

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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: IN RE PLATINUM-BEECHWOOD LITIGATION, : No. 18 Civ. 6658 (JSR)  
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: 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 : No. 18 Civ. 10936 (JSR)  
: PARTNERS VALUE ARBITRAGE FUND L.P. (in :  
: OFFICIAL LIQUIDATION), :  
:

Plaintiffs,

v.

PLATINUM MANAGEMENT (NY) LLC, *et al.*,

Defendants.

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**MEMORANDUM OF LAW OF DEFENDANTS  
MICHAEL NORDLICHT AND KEVIN CASSIDY IN SUPPORT OF  
THEIR MOTION TO DISMISS THE SECOND AMENDED COMPLAINT**

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**PRELIMINARY STATEMENT**

Defendants Michael Nordlicht and Kevin Cassidy respectfully submit this memorandum in support of their motion, pursuant to Fed. R. Civ. P. 12(b)(6), to dismiss the Second Amended Complaint (“SAC”) filed by the Joint Official Liquidators (“JOLs”) of Platinum Partners Value Arbitrage Fund LP (“PPVA”) and PPVA because the SAC is barred under the *in pari delicto* doctrine and the *Wagoner* Rule. Michael Nordlicht and Kevin Cassidy join in each of the motions to dismiss the SAC filed by defendant Michael Katz and other defendants on these grounds. Michael Nordlicht and Kevin Cassidy incorporate herein and join in the memoranda of law filed by these other defendants. *See* Dkt. Nos. 301, 303-04, 307-09, 311, 313, 315-16, and 319-20.

The SAC alleges claims of (1) aiding and abetting breach of fiduciary duty against Michael Nordlicht and Kevin Cassidy (Twelfth Count), and (2) unjust enrichment against Kevin Cassidy (Fourteenth Count). However, The JOLs and PPVA lack standing to assert these claims because, under the *in pari delicto* doctrine and the *Wagoner* Rule, the Platinum Defendants’ alleged bad acts and knowledge are imputed to PPVA and the JOLs. The SAC should be dismissed with prejudice as against Michael Nordlicht and Kevin Cassidy.

**RELEVANT ALLEGATIONS IN THE SAC**

Defendant Platinum Management (NY) LLC is the general partner of PPVA. SAC ¶¶ 7, 39, 228. The “Platinum Defendants” is a group comprising Platinum Management and the individuals who allegedly owned, operated and managed Platinum Management. SAC ¶¶ 3, 7. The Platinum Defendants are alleged to have operated, managed and controlled PPVA. SAC ¶¶ 12, 269. The gravamen of the SAC is the allegation that PPVA suffered claimed damages as a result of two alleged fraudulent schemes: one “scheme” engaged in by the “Platinum

Defendants” and the “Beechwood Defendants” from 2012 through 2015; and a second “scheme” engaged in by the “Platinum Defendants” beginning in late 2015, with the alleged “material and knowing assistance” by the “Beechwood Defendants.” SAC ¶¶ 3, 9-11.

Michael Nordlicht and Kevin Cassidy are *not* alleged to be members of the Platinum Defendants or Beechwood Defendants. Plaintiffs allege that Michael Nordlicht and Kevin Cassidy aided and abetted the Platinum Defendants’ alleged breach of fiduciary duty owed to PPVA. The aiding and abetting claim is based on a single transaction in the alleged second scheme in which the “Platinum Defendants” effected the sale by Principal Growth Strategies, LLC (“PGS”) (in which PPVA held an interest) of a convertible note issued by Agera Holdings LLC to a Beechwood entity (“Agera Transaction”). At that time, Michael Nordlicht was in-house counsel and Kevin Cassidy was a managing director or senior executive of Agera Energy Inc., the underlying operating company. The SAC also asserts a claim of unjust enrichment against Kevin Cassidy based upon the receipt by non-party Starfish Capital Inc. of a payment of cash and membership interests in the purchasing entity in exchange for Starfish’s sale of its membership interest in PGS in connection with the Agera Transaction.<sup>1</sup>

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<sup>1</sup> In an effort to bolster the unjust enrichment claim against Kevin Cassidy, the SAC alleges that the purchase price was paid to Starfish “an entity set up by Cassidy to avoid having taxes withheld from such payment. SAC ¶ 632. The SAC however does not, and cannot, allege that withholdings of taxes was legally required (it was not) or that taxes were not paid in connection with the sale of the 8% membership interest in PGS (they were). Similarly, the SAC seeks to establish that Michael Nordlicht and Kevin Cassidy had actual knowledge of the Platinum Defendants’ alleged breach of fiduciary duty based upon the allegations that they were “installed” as “in-house counsel” and the “managing director” of Agera Energy, respectively, “despite” their alleged lack of experience in the energy sector.” SAC ¶¶ 121, 131, 618, 624-25. Yet, these allegations are rebutted by other allegations in the SAC. For example, the SAC alleges that Kevin Cassidy previously worked for Optionable Inc., an energy derivatives brokerage firm (and not a fund as alleged in the SAC). SAC ¶¶ 130, 617. The SAC alleges that Agera Energy was launched following the June 2014 purchase of the assets of an energy company from a bankruptcy proceeding and turned into a “leading energy reseller to the consumer and business markets” that “achieved FYE 2015 revenues of \$301.4 million and EBITDA of \$20.2 million.” SAC ¶¶ 611, 613-14, 627. The SAC’s allegations thus establish that Agera was being successfully operated, and not by inexperienced and unqualified individuals.

**ARGUMENT**

**PLAINTIFFS LACK STANDING TO SUE  
MICHAEL NORDLICHT AND LEVIN CASSIDY**

The authorities set forth in the incorporated memoranda of law demonstrate that the aiding and abetting fiduciary duty claim against Michael Nordlicht and Kevin Cassidy and the unjust enrichment claim against Kevin Cassidy should be dismissed as a matter of law under the doctrine of *in pari delicto* and the related *Wagoner* Rule as set forth in *Shearson Lehman Hutton, Inc. v. Wagoner*, 944 F.2d 114, 118 (2d Cir. 1991).

**CONCLUSION**

For all of the foregoing reasons, as well as the reasons set forth in the incorporated memoranda of law submitted by other defendants, it is respectfully requested that the Court enter an order (a) dismissing the Twelfth and Fourteenth Counts as against 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  
April 22, 2019

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

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