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)

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

MINTZ LEVIN COHN FERRIS GLOVSKY AND POPEO PC
The Chrysler Center
666 Third Avenue
New York, New York 10017
Telephone: (212) 935-3000
Facsimile: (212) 983-3115

Lawrence R. Gelber
The Vanderbilt Plaza
34 Plaza Street East, Suite 1107
Brooklyn, New York 11238
Telephone: (718) 638-2383
Facsimile: (718) 857-9339

Attorneys for Defendants
Michael Nordlicht and Kevin Cassidy

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PRELIMINARY STATEMENT

The Agera Executives' motion to dismiss the SAC showed that the claims asserted against them are barred under the *Wagoner* Rule and the *in pari delicto* doctrine. In opposition, Plaintiffs do not contest that these doctrines apply. Plaintiffs argue however that the purported "insider" and "adverse interest" exceptions apply here to preclude application of the *Wagoner* Rule and *in pari delicto* doctrine. As shown below, Plaintiffs are dead wrong as a matter of fact and law.[1]

First, the SAC does not allege a *single* well-pleaded fact to support its conclusory assertion that either of the Agera Executives was an "insider" of PPVA. There are no facts alleged to establish any direct connection between the Agera Executives and PPVA. Kevin Cassidy and Michael Nordlicht are not alleged to be officers, directors, managers, members, agents, or employees of PPVA. The SAC does not allege that the Agera Executives had access to any insider information relating to PPVA. No facts are pleaded to establish that either of the Agera Executives exercised any level of control over PPVA or its affairs or executed actual management of PPVA. Indeed, the SAC expressly *excludes* the Agera Executives from the groups of defendants who did allegedly lead, operate, manage and control PPVA. *See, e.g.*, SAC ¶ 12. Rather, the Agera Executives allegedly *aided and abetted* others identified as the "insiders" of PPVA. The *Wagoner* Rule and *in pari delicto* doctrine squarely apply to bar both claims against the Agera Executives.

Second, Plaintiffs attempt to shoehorn the claims against the Agera Executives into the very narrow adverse interest exception to the *in pari delicto* doctrine. This attempt fails because the facts alleged in the SAC and its annexed exhibits establish that the Platinum Defendants did not "totally abandon" PPVA's interests in connection with the Agera Transaction (the sale by PGS

[1] All defined terms set forth herein shall have the same meanings as defined in the Agera Executives' Memorandum of Law in Support of Their Motion to Dismiss the Second Amended Complaint ("Mem."). Dkt. No. 324.

of the promissory note issued by Agera Holdings). To the contrary, the SAC alleges that PGS received significant cash from the Agera Transaction, thus resulting in increased liquidity to PPVA, which Plaintiffs concede is a benefit.

Accordingly, the claims against the Agera Executives are barred under the *Wagoner* Rule and *in pari delicto* doctrine and the Twelfth Count as against both Michael Nordlicht and Kevin Cassidy and the Fourteenth Count as against Kevin Cassidy should be dismissed with prejudice.

ARGUMENT

I. THE AGERA EXECUTIVES WERE NOT INSIDERS OF PPVA

Plaintiffs argue that the *Wagoner* Rule and *in pari delicto* doctrine do not apply to bar their claims because the Agera Executives were "insiders" of PPVA. Dkt. No. 351 at 1, 5-11. However, Plaintiffs do not and cannot point to any facts in the SAC that establish that the Agera Executives were insiders of PPVA. This is not surprising because there are no such facts.

In the context of *Wagoner/in pari delicto*, an "insider" is someone who is "on the board or in management, or in some other way controls the corporation." *Krys v. Sugrue* (*In re Refco Inc. Secs. Litig.*), No. 07-md-1902(JSR), 2010 U.S. Dist. LEXIS 132778, at *789-81 (S.D.N.Y. Dec. 6, 2010), *rev'd in part on other grounds*, 779 F. Supp. 2d 372 (S.D.N.Y. 2011) (collecting cases). New York courts have held that *in pari delicto* "does not apply to the actions of fiduciaries who are insiders *in the sense that they either are on the board or in management, or in some other way control the corporation*." *Teras Int'l Corp. v. Gimbel*, No. 13-CV-6788 (VEC), 2014 U.S. Dist. LEXIS 174328, at *25 (S.D.N.Y. Dec. 17, 2014), quoting *In re Optimal U.S. Litig*., 813 F. Supp. 2d 383, 400 (S.D.N.Y. 2011) (emphasis added). "Insider status" should be determined "'based on the totality of the circumstances, including the degree of an individual's involvement in a debtor's affairs.'" *Pergament v. Amton Inc.* (*In re PHS Grp. Inc.*), 581 B.R 16, 37 (Bankr. E.D.N.Y. 2018), quoting *In re Borders Group Inc.*, 453 B.R. 459, 469 (Bankr. S.D.N.Y. 2011).

Consistent with New York case law, Plaintiffs concede that, to fit within the exception, a corporate insider must have "some level of control over the company's affairs." Dkt. No. 351 at 5 (citations omitted). Plaintiffs concede also that, to be deemed an insider, a third party must "*execute[] 'actual management of the Debtor's affairs*' to afford him 'an opportunity to self-deal.'" *Id.* at 6 (citations omitted; emphasis added). However, Plaintiffs fall woefully short of satisfying even their own definition of "insider" because neither of the Agera Executives is alleged to have had any level of control, or executed management, of PPVA's affairs.

There is not a single fact alleged in the SAC that *connects* the Agera Executives to PPVA, let alone establishes that the Agera Executives were corporate insiders. The SAC does *not* allege that the Agera Executives were officers, directors, managers, member, agents or employees of PPVA. Indeed, Plaintiffs concede that "Cassidy was *not* an employee of Platinum Management, PPVA or PGS." SAC ¶ 655 (emphasis added). The SAC does not allege facts establishing that the Agera Executives were fiduciaries of PPVA. By contrast, the SAC alleges that the Platinum Defendants operated, managed and controlled PPVA and its affairs. SAC ¶¶ 12, 34, 269, 912. Platinum Management was the general partner and managing member of PPVA and the "Platinum Defendants" was a group consisting of Platinum Management and those who owned, operated and managed Platinum Management. SAC ¶¶ 3, 7, 34, 39, 228, 243, Ex. 6. The SAC thus expressly *excludes* the Agera Executives from the alleged group of Platinum Defendants. SAC ¶ 3.

The facts alleged in the SAC (and the clear lack of facts) establish that the Agera Executives were PPVA ***outsiders*** who did ***not*** execute actual management or control over PPVA.

Plaintiffs argue that Michael Nordlicht and Kevin Cassidy "used their positions of authority, influence and control to cause PPVA to engage in non-commercial transactions to inflate NAV and eventually loot PPVA." Dkt. No. 351 at 7. Incredibly, Plaintiffs fail to point to a single

allegation of fact in the SAC to support this bald conclusion. Instead, Plaintiffs repeat the conclusory allegations of the SAC in two "summary" paragraphs. *Id.* at 9-10. Plaintiffs do not (and cannot) point to any alleged facts to support their vacant conclusions about the Agera Executives' purported control over PPVA, involvement in PPVA's affairs, or exercise of decision-making authority over PPVA. The SAC does not even plead facts to show that either of the Agera Executives had the requisite actual knowledge of the purported value that the Platinum Defendants or Beechwood Defendants attributed to the Agera Note sold by PGS.[2]

Plaintiffs imply that being "installed" as the managing director of Agera Energy by Mark Nordlicht, Bodner and Huberfeld establishes that Cassidy was a PPVA insider. Dkt. No. 351 at 9. Plaintiffs likewise imply that Michael Nordlicht's familial relationship with Mark Nordlicht and "installation" as the general counsel for Agera shortly after graduation from law school establishes that he was a PPVA insider. *Id*. at 10. Plaintiffs conspicuously fail to cite any legal authority, controlling or otherwise, to support these arguments.

In tacit recognition that the SAC does not establish that the Agera Executives exercised any control over PPVA, Plaintiffs concoct an "alternative fact" not alleged in the SAC. Plaintiffs argue that Agera is a "subsidiary" of PPVA and Kevin Cassidy "exerted control over" Agera "in connection with the Agera Transaction." Dkt. No. 351 at 9.[3] This concocted fact does not supply

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[2] The sole allegations in the SAC of the purported valuations of PGS or PPVA's interest in Agera Energy are that: (a) a June 2016 valuation report issued by Alvarez and Marsal to Platinum Partners LP estimated the value of Agera Energy to be between $225,533.000 and $283,553,000 (SAC ¶ 628, Ex. 71); and (b) a July 2016 memorandum by B Asset Manager LP concluded that "we believe that marking the value of the B1 Preferred Stock held in Agera at the high end of the Duff & Phelps Valuation Report as of June 30, 2016." SAC ¶ 629, Ex. 86. There is no allegation or exhibit showing that any such valuation information was ever conveyed to the Agera Executives, let alone prior to the Agera Transaction.

[3] Plaintiffs contend, for the very first time, that Cassidy "exerted control over PPVA's *Agera subsidiary* in connection with the Agera Transaction." Dkt. No. 351 at 9 (emphasis added). This new "alternative fact" should not be considered by the Court. *See Zappin v. Cooper,* No.

the missing link between the Agera Executives and PPVA. The SAC does not (because it cannot) allege that Agera is a "subsidiary" of PPVA. Flatly contradicting Plaintiffs' argument, the SAC itself alleges that (a) "Agera Energy is a *wholly owned subsidiary of Agera Holdings, LLC*, a Delaware Corporation" (SAC ¶ 620) (emphasis added), and (b) Agera Holdings was owned by Michael Nordlicht and MF Energy Holdings, LLC. SAC ¶ 622. PPVA was a member of PGS, which held a promissory note issued by Agera Holdings, which was convertible into an equity interest in Agera Holdings. SAC ¶¶ 614-15, Ex. 84. There is no allegation that PGS ever converted the debt interest (promissory note) into equity. Rather, PGS is alleged to have sold this debt instrument to AGH Parent LLC. SAC ¶¶ 643, 647, Ex. 90. There simply are no well-pleaded facts to support any inference of control by Kevin Cassidy over PPVA or its affairs.[4]

In sum, the Agera Executives' purported "relationship" with or connection to PPVA is far too attenuated to support any finding that they were "insiders" of PPVA.

II. THE ADVERSE INTEREST EXCEPTION IS NOT APPLICABLE HERE

Plaintiffs argue that the adverse interest exception applies to preclude application of the *in pari delicto* defense. Dkt. No. 351 at 11-13. The law is well settled in New York that the adverse interest exception is the '"most narrow of exceptions' [and] is reserved for cases of 'outright theft or looting or embezzlement . . . where the fraud is committed against a corporation rather than on its behalf."' *Picard v. JPMorgan Chase Bank & Co. (In re Bernard L. Madoff Inv. Secs. LLC)*,

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16-civ-5985(KPF), 2018 U.S. Dist. LEXIS 17520, at *19-20 (S.D.N.Y. Feb. 2, 2018) (reiterating the court may only consider facts alleged in the complaint, exhibits to the complaint, documents incorporated by reference, and matters of which judicial notice may be taken).

[4] Plaintiffs' reliance on the decision in *Flake v. Alper Holdings USA, Inc.* (*In re Apler Holdings USA, Inc.*), 398 B.R. 736 (S.D.N.Y. 2008) (Dkt. No. 351 at 10), is grossly misplaced in the absence of a parent/subsidiary relationship between PPVA and Agera Energy or a showing that Agera Energy was the alter ego of PPVA or dominated and controlled PPVA. No such facts are alleged in the SAC.

721 F.3d 54, 64 (2d Cir. 2013), quoting *Kirschner v. KPMG LLP*, 15 N.Y.3d 446, 467 (N.Y. 2010). Plaintiffs concede that the exception applies only where the agent's acts are "'entirely opposed (*i.e.*, 'adverse') to the corporation's own interests.'" Dkt. No. 351 at 11-12, citing *Kirschner*, 15 N.Y.3d at 467. The SAC limits the Agera Executives' alleged involvement to a single transaction: the Agera Transaction. SAC ¶¶ 121-22, 131, 133, 912-21. Plaintiffs' opposition however does not specifically mention the Agera Transaction in its adverse interest argument, let alone how the Agera Transaction could be shoe-horned into this narrow exception. It cannot.

Plaintiffs argue -- without any specific reference to the SAC, the Agera Executives or the Agera Transaction -- that "this case represents one of the rare 'looting and embezzlement' circumstances where the adverse interest exception to *in pari delicto* applies." Dkt. No. 351 at 12. Again without any specific reference to the Agera Transaction, Plaintiffs argue that "these transactions enabled Defendants to loot PPVA's assets, *and provided no benefit to PPVA in the form of increased liquidity*...." *Id*. at 13 (emphasis added). However, the allegations in the SAC relating to the Agera Transaction rebut this argument and establish that the adverse interest exception does not apply.

The SAC does not (and cannot truthfully) allege that the Agera Transaction constituted theft or looting or embezzlement of PPVA. Rather, the SAC and its annexed exhibits establish that the Agera Transaction was intended to and did create at least a short-term benefit for PPVA.

PGS was the holder of the Agera Note that was convertible into 95.01% of the equity of Agera Holdings. SAC ¶ 615. The principal amount of the Agera Note was $600,071.23. SAC Ex. 90. PPVA held a 55% interest in PGS. SAC ¶ 614. In a March 2016 email, defendant Michael Katz describes the Agera Transaction as an opportunity to "solve … our liquidity problem." SAC Ex. 82. Another March 2016 email from defendant Mark Nordlicht describes the resulting

liquidity to PPVA from the sale of Agera Note as "just too transformative." SAC Ex. 87. The SAC alleges that, when the Agera Note was sold in June 2016, *at least $45 million of the purchase price was paid to PGS (and therefore PPVA) in cash*. SAC ¶ 653. It cannot rationally be disputed that these facts establish a benefit to PPVA as defined by Plaintiffs themselves – "in the form of increased liquidity" to PPVA. Dkt. No. 351 at 13. In other words, the Agera Transaction was not an "abandonment" or "looting" of PPVA by Platinum Management, but rather an infusion of cash *into* PPVA at a time when it allegedly faced liquidity issues.

ICP Strategic Income Fund, Ltd. v. DLA Piper L.L.P. (U.S.) (In re ICP Strategic Income Fund, Ltd.), No. 17-1669-BK, 2018 U.S. App. LEXIS 10429 (2d Cir. 2018), is instructive. There, plaintiffs were the joint official liquidators of a "feeder fund" and alleged that the law firm of DLA Piper aided and abetted breaches of fiduciary committed by the feeder fund's investment manager. *Id*. at *80. The plaintiffs alleged that DLA Piper helped the investment manager transfer millions of dollars of the fund's assets to Barclays Bank to meet obligations of an investment vehicle called Triaxx, in which the fund had invested approximately half of its net asset value. *Id*. The plaintiffs argued that the *in pari delicto* defense did not apply because the investment manager "totally abandoned" the fund's interest when it transferred money from the feeder fund to Barclays. *Id*. Rejecting the application of the adverse interest exception, the court explained that DLA Piper helped the feeder fund's investment manager to sustain the investment vehicle and therefore "preserved the Fund's large investment in it, which constituted a benefit at the time." *Id*. at *82.

Likewise here, the Platinum Defendants did not "totally abandon" PPVA's interest when it sold the $600,000 Agera Note because at least $45 million of the purchase price was paid *in cash* to PGS, which benefitted PPVA in the form of increased liquidity. SAC ¶ 653. *See also Concord Capital Mgmt., LLC v. Bank of Am., N.A.*, 102 A.D.3d 406, 406, 958 N.Y.S.2d 93, 94 (1st Dep't

2012) (adverse interest exception inapplicable where alleged scheme "brought millions of dollars in plaintiffs' coffers and allowed plaintiffs to survive for a few years").

Accordingly, the adverse interest exception to the *in pari delicto* doctrine does not apply.

CONCLUSION

For all of the foregoing reasons, it is respectfully requested that the Court enter an order (a) dismissing the Twelfth Count as against both Michael Nordlicht and Kevin Cassidy and the Fourteenth Count as against 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
May 23, 2019

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

By: /s/ Therese M. Doherty
Therese M. Doherty
LisaMarie F. Collins
The Chrysler Center
666 Third Avenue
New York, New York 10017
Telephone: (212) 935-3000
Facsimile: (212) 983-3115
Email: tdoherty@mintz.com
lfcollins@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 Defendants
Michael Nordlicht and Kevin Cassidy