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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE PLATINUM-BEECHWOOD LITIGATION	:	18-cv-06658 (JSR)
TROTT, et al., Plaintiffs, -v- PLATINUM MANAGEMENT (NY) LLC, et al., Defendants.	:	18-cv-10936 (JSR)

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF THE BEECHWOOD PARTIES' MOTION TO DISMISS THE SECOND AMENDED COMPLAINT

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The Beechwood Parties, by and through their undersigned counsel, respectfully submit this reply brief in further support of their motion to dismiss the Second Amended Complaint.[1]

ARGUMENT

I. THE RICO, COMMON LAW, AND DECLARATORY JUDGMENT CLAIMS ARE BARRED BY THE *WAGONER* AND *IN PARI DELICTO* DOCTRINES

The Bankruptcy Insider Exception Does Not Apply. The SAC does not allege that the Beechwood Parties were insiders of PPVA. They had absolutely no role at PPVA; they were not its fiduciaries, and they had no control over its activities. In fact, the SAC excludes all of them from its broad definition of the "Platinum Defendants." (SAC ¶ 34.) As a result, the bankruptcy exception that the JOLs have invoked is on its face inapplicable to the Beechwood Parties. Their arguments in opposition do not change that conclusion.

First, the Second Circuit has read the insider exception "narrowly to allow only for suits by a bankruptcy trustee against a fiduciary of the debtor corporation, not against third parties who are alleged to have aided and abetted the debtor's fraud, short of control by the third party over the debtor." *Sec. Inv'r Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC (In re Madoff Sec.)*, 987 F. Supp. 2d 311, 321 (S.D.N.Y. 2013) (Rakoff, J.). The law presumes that third parties who are not fiduciaries are not insiders.[2] To overcome that presumption, the JOLs must show that the third party exercised total dominion and control over the debtor. *See Hirsch v. Arthur Andersen & Co.*, 72 F.3d 1085, 1095 (2d Cir. 1995). They fail to do that here.

The JOLs do not argue that any of the Beechwood Parties were on the board of PPVA, were a manager at PPVA, or owed fiduciary duties to PPVA. Therefore, to overcome the

[1] All defined terms set forth herein have the same meanings as set forth in the Beechwood Parties' Memorandum of Law in Support of Their Motion to Dismiss.

[2] The JOLs have not brought a claim against any Beechwood Party for breach of fiduciary duty.

presumption that they are not insiders, the JOLs must establish that each Beechwood Party has "at least a controlling interest in the debtor or … exercise sufficient authority over the debtor so as to unqualifiably dictate corporate policy and the disposition of corporate assets." *See In re Borders Grp., Inc.*, 453 B.R. 459, 469 (Bankr. S.D.N.Y. 2011). But the SAC does not include a single well-pled allegation that any of the Beechwood Individuals had a controlling interest in PPVA or exercised control over PPVA. Nor does it allege that they were involved in PPVA's day-to-day operations. Indeed, the JOL's do not even allege that the Beechwood Individuals proffered advice to PPVA's management. *See In re PHS Grp., Inc.*, 581 B.R. 16, 32 (E.D.N.Y. 2018). The JOLs cite no case in which similarly situated individuals were found to be insiders.

Similarly, with regard to the Beechwood Entities, the SAC also does not allege that they had a controlling interest in PPVA or exercised *any* authority or control over PPVA. To the contrary, the SAC alleges that the Beechwood Entities were "dominated and controlled" by Platinum Management and its executives. (SAC ¶ 985.) This is the opposite of what is required for the bankruptcy-insider exception to apply to the Beechwood Entities.[3]

Recognizing the limits of the insider exception, the JOLs seek to expand it by relying on cases holding that bankruptcy trustees and liquidators have standing, in certain circumstances, to bring alter ego claims. From this, they extrapolate that they have standing to sue third-parties whom they allege are alter egos of bankruptcy insiders for all sorts of additional torts. That is an exception that no court has ever recognized.[4] *See In re Madoff Sec.*, 987 F. Supp. 2d at 321

[3] The JOLs cite to several opinions for their helpful-sounding recitations of law (Opp. 5-7), but in almost every instance the cases concern classic insiders such as owners, directors, and senior managers. The JOLs only cite one case that even comes close to supporting their aggressive interpretation of this exception, a recent bankruptcy court opinion. *In re PHS Grp. Inc.,* 581 B.R. at 20. But that case is easily distinguishable—there, unlike here, the trustee alleged that each of the defendants exercised control over the debtor, not vice versa. *Id.*

[4] Putting aside the fact that the JOLs' allegations concerning control run in the wrong direction, what they are requesting is extreme: The alter ego allegations they invoke seek to pierce the veil

(declining to apply insider exception to third party based on close relationship to insider); *New Greenwich Litig. Tr., LLC v. Citco Fund Servs. (Europe) B.V.*, 145 A.D.3d 16, 27, 41 (1st Dep't 2016) (same). This expansion has little to recommend it. It does not comport with equity, and it would dramatically weaken the imputation doctrines in contravention of the New York Court of Appeals' admonition that "the principle that a wrongdoer should not profit from his own misconduct is so strong in New York that … the defense applies even in difficult cases and should not be weakened by exceptions." *Kirschner v. KPMG LLP*, 15 N.Y.3d 446, 464 (2010).

Second, even if the JOLs could argue that the Beechwood Parties were insiders for the purposes of the *Wagoner* doctrine, courts have questioned whether New York State law even contains an insider exception to the *in pari delicto* doctrine. *See In re Lehr Constr. Corp.*, 551 B.R. 732, 743 (S.D.N.Y. 2016), *aff'd*, 666 F. App'x 66 (2d Cir. 2016) (suggesting the insider exception is a creature of federal bankruptcy law and does not apply to the state law defense of *in pari delicto*). The bankruptcy-insider exception has never been applied in a New York state court case and, for that reason, should not be applied in connection with the *in pari delicto* doctrine here, especially since the JOLs have other avenues of recovery. For example, the JOLs may maintain alter ego allegations against the Beechwood Entities, as they have already done.

The Adverse-Interest Exception Does Not Apply. The JOLs also argue that the adverse-interest exception to the imputation doctrines applies to the allegations in the SAC. But the adverse interest exception is the "most narrow of exceptions," and an agent's conduct is imputed to the principal unless the agent "[1] totally abandoned his principal's interests *and* [2] [acted] entirely for his own or another's purposes." *Kirschner*, 15 N.Y.3d at 458. To escape dismissal,

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of PPVA to reach Platinum Management; to pierce the veil of Platinum Management to reach certain owners; to somehow bypass those owners to reach their children's trusts; to pierce the veil of those trusts to reach various holding companies; and to pierce the veil of those holding companies to reach their affiliates. They offer no authority to support such a process.

the JOLs must allege that their agent's conduct satisfies this two-part test, which they cannot.

First, the JOLs do not allege that PPVA's agents "totally abandoned" the funds' interests. To the contrary, the JOLs affirmatively allege that the conduct of PPVA's officers sustained the funds for years, allowing PPVA to survive and attract new investors when it should have been liquidated in 2013. (SAC ¶¶ 15, 20, 24, 26, 307, 319, 321-22, 344.) In addition, the SEC complaint, which is attached to the SAC as an exhibit, makes clear that PPVA was the intended beneficiary of its agents' misconduct. (*See, e.g.*, *id.* Ex. 25 ¶¶ 6, 77-80, 132, 174.)

Second, the JOLs do not allege that PPVA's agents acted entirely for their own or another's interests. One of the central allegations in the SAC is that PPVA's agents overvalued assets to artificially inflate PPVA's net asset value and, in turn, increase their compensation. New York courts have held that allegations such as these are insufficient to establish that an agent acted *entirely* for his own benefit. *See Walker, Truesdell, Roth & Assocs., Inc., v. Globeop Fin. Servs. LLC*, 2013 WL 8597474, at *7 (Sup. Ct. N.Y. Cty. May 27, 2013). Accordingly, the JOLs fail to satisfy either prong of the two-part *Kirschner* test.

II. THE CIVIL RICO CLAIMS SHOULD BE DISMISSED

The JOLs argue that their RICO claims should not be dismissed because (a) they are not grounded in securities fraud and thus not subject to dismissal under the RICO Amendment to the PLSRA, and (b) they are broad enough in terms of the number of victims, time, and purpose to constitute a continuous pattern of racketeering activity. The JOLs are wrong on both counts.

As a preliminary matter, this Court has already held that identical claims advanced by SHIP were barred by the RICO Amendment. *See In re Platinum-Beechwood Litig.*, 2019 WL 1759925, at *8 (S.D.N.Y. Apr. 22, 2019) ("SHIP's allegations are barred … insofar as the gravamen of [its] claims is that Beechwood funneled SHIP's assets to Platinum.") Here, as in the SHIP Action, the SAC alleges that Beechwood used reinsurance funds to enter into "non-

commercial transactions" with PPVA. (SAC ¶¶ 9, 28, 30, 400, 811, 835.) That fell within the RICO Amendment in SHIP, and it does so again here.[5]

Seeking to draw a distinction, the JOLs walk away from the majority of the predicate acts of racketeering identified in the SAC. (*See* SAC ¶¶ 978 (ii)-(vii).) Instead, the JOLs now maintain that their RICO claims "are based on (1) the Platinum Defendants misrepresenting the value of PPVA's assets, so as to inflate PPVA's [net asset value] and take excessive fees during the First Scheme; and (2) after the First Scheme started to collapse, the Platinum *and Beechwood Defendants* engaging in the Second Scheme, stripping PPVA of its assets for their personal gain." (Opp. 23 (emphasis added).) Recasting the RICO claims in this way does not save them.

Regarding the First Scheme, the JOLs indicate that the RICO-related allegations are limited to the Platinum Defendants. (*Id.*) Even were it otherwise, the allegations relating to the Beechwood Parties would still not satisfy the two-year minimum duration necessary to find closed-ended continuity.[6] That is because where the "alleged predicate acts attributed to [a particular defendant] . . . do not extend over a sufficiently long period of time," a district court should dismiss the substantive RICO claims as well as any related claims. *First Capital Asset Mgmt., Inc. v. Satinwood, Inc.*, 385 F.3d 159, 181–82 (2d Cir. 2004) (affirming dismissal).

Here, though the SAC references the payment of "performance fees" and "unearned management fees," any withdrawals involving Beechwood occurred over a 22-month period. Beechwood launched in February 2014 (SAC ¶ 373), and the purported misrepresentations concerning PPVA's net asset value continued only through 2015. (Opp. 23). This Court has

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[5] Additionally, as alleged here, conduct undertaken to keep a Ponzi scheme alive is conduct undertaken "in connection with the purchase and sale of securities." *See Picard v. Kohn*, 907 F. Supp. 2d 392, 398 (S.D.N.Y. 2012) (Rakoff, J.).

[6] The JOLs claim that the Beechwood Parties only challenge the RICO claims on the basis of the RICO Amendment. (Opp. 15.) This is false. (*See*, *e.g.*, Mov. 14.)

already held that withdrawals over a 22-month period are insufficient to constitute a "pattern" for RICO purposes. *In re Platinum*, 2019 WL 1759925, at *8.

Regarding the Second Scheme, the JOLs argue that the various (securities) transactions were not, in fact, "transactions 'in connection with securities'" for the purposes of the RICO Amendment. (Opp. 19.) They are wrong. "[F]raud in the purchase or sale of securities," 18 U.S.C. § 1964(c), covers a broad swath of deceptive conduct relating to transactions involving securities. The Supreme Court has made clear that the nearly identical language of § 10(b) is to be "construed not technically and restrictively, but flexibly to effectuate [the statute's] remedial purposes." *S.E.C. v. Zandford*, 535 U.S. 813, 819 (2002) (internal marks omitted). The Supreme Court has found fraud in connection with the purchase or sale of securities where purported victims maintained an ownership position in fraudulently overvalued securities, *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 77, 88 (2006), and where transactions "enabled [a respondent] to convert the proceeds of the sales of securities to his own use." *Zandford*, 535 U.S. at 819-20.[7] That is exactly what the JOLs allege here.

As to continuity, the fact remains that the conspiracy as alleged is limited to a single victim, PPVA, and a singular purpose: "to first overvalue, and then strip PPVA of its assets." Such allegations are insufficient to allege a continuous pattern of racketeering activity.

III. THE AIDING AND ABETTING CLAIMS SHOULD BE DISMISSED

As a preliminary matter, the JOLs' aiding and abetting claims should be dismissed on the basis of either the *Wagoner* Rule or the *in pari delicto* doctrine. However, even if the Beechwood Parties were PPVA insiders and those doctrines were deemed to be inapplicable, the aiding and abetting claims would need to be dismissed for an alternate reason: "[A]

[7] *See Chadbourne & Parke LLP v. Troice*, 571 U.S. 377, 387 (2014) (not disturbing precedent addressing the "in connection with" requirement, including *Dabit* and *Zandford*).

corporate insider cannot aid and abet another corporate insider." *In re Grumman Olson Indus., Inc.*, 329 B.R. 411, 425 (Bankr. S.D.N.Y. 2005) (citations omitted). "[A] third-party relationship between the aider and abettor and the corporation is a necessary element in any such action." *Solow v. Stone,* 994 F. Supp. 173, 181 (S.D.N.Y.), *aff'd,* 163 F.3d 151 (2d Cir. 1998). Thus, if the Beechwood Parties were PPVA insiders, the aiding and abetting claims fail.

Beyond that, the JOLs do not respond to several arguments advanced by the Beechwood Parties in their moving brief.[8] First, under New York law, "[s]ubstantial assistance requires the plaintiff to allege that the actions of the aider/abettor proximately caused the harm on which the primary liability is predicated." *Cromer Fin. Ltd. v. Berge*r, 137 F. Supp. 2d 452, 470 (S.D.N.Y. 2001). Here, for example, the purported basis for the JOLs' aiding and abetting claims is that certain Beechwood Parties participated in transactions comprising the First and Second Schemes. But the SAC does not allege that BRILLC, BRE Holdings, BRE, BBIL, or Illumin had any involvement, let alone proximate involvement, with the transactions comprising the First and Second Schemes. Thus, at most, the JOLs allege "but for" causation as to these entities.

Second, the SAC fails to set forth a viable theory of reliance. The only PPVA officers identified in the SAC are Nordlicht (CIO); Landesman (CIO); Levy (CIO); Steinberg (CRO; and Sanfilippo (CFO). (*Id.* ¶ 12.) The JOLs have accused each of these individuals of fraud. Thus, the JOLs do not identify anybody at PPVA who they maintain was not a part of the fraud scheme or who was in a position to be misled. To the extent reliance is predicated on PPVA's limited partners being misled, such claims accrue to PPVA's creditors, not the JOLs.

IV. THE CIVIL CONSPIRACY CLAIM SHOULD BE DISMISSED

The JOLs do not even attempt to dispute that their civil conspiracy claims arise out of the

[8] The Beechwood Parties hereby incorporate the statements of law concerning the abandonment of claims set forth in Daniel Saks' Reply Memorandum of Law. (ECF No. 411 at 5.)

same misconduct as a plaintiff's aiding and abetting claims. (*Compare* SAC ¶ 964 *with id.* ¶¶ 852, 863.) That mandates dismissal. *See*, *e.g.*, *Briarpatch Ltd. LP v. Phoenix Pictures, Inc.*, 312 F. App'x 433, 434 (2d Cir. 2009) (civil conspiracy count dismissed as duplicative of aiding and abetting count); *Tatintsian v. Vorotyntsev*, 2019 WL 1746004, at *11 (S.D.N.Y. Apr. 18, 2019).

In their opposition brief, the JOLs concede that the claims are duplicative. (*See* Opp. 36 n.9.) Instead, in a footnote, they argue that they are allowed to plead alternative theories of liability, though they do not specify how their duplicative claim for civil conspiracy is a pleading "in the alternative." (*Id.*) Because the underlying acts are in fact identical, there is no alternative theory of liability, and the conspiracy claim should be dismissed.

V. THE UNJUST ENRICHMENT CLAIM SHOULD BE DISMISSED

As the Beechwood Parties set forth in their moving brief, the JOLs' unjust enrichment claims fail for two independent reasons: (1) an unjust enrichment claim cannot stand where an express agreement governs the rights at issue; and (2) merely alleging a general, non-specific benefit is insufficient to plead an unjust enrichment claim. (Mot. 20-21.)

Here, the JOLs do not dispute that a series of express agreements govern the rights at issue or attempt to add any specificity to their general, and completely insufficient, allegation that the Beechwood Parties got the "benefit of" the purported schemes. (*See* Opp. 36 n.9.) Instead, they appear to argue that if two of those agreements (the Nordlicht Side Letter and the Master Guaranty Agreement) are ultimately found to be invalid, then the two Beechwood Entities who stand to benefit from those agreements, BAM I and BAM Admin, could potentially be enriched. (*Id.*) That position, which the JOLs spell out for the first time in their opposition brief, makes clear that their unjust enrichment claim should be dismissed for a third reason—it is premature. *See Chevron Corp. v. Donziger*, 871 F. Supp. 2d 229, 259 (S.D.N.Y. 2012).

The JOLs do not allege that any Beechwood Entity has received the benefit of the

Nordlicht Side Letter or the Master Guaranty Agreement. If the JOLs are correct and these agreements are invalid, then BAM I and BAM Admin will never receive any benefit from them; if they are wrong and those agreements are valid, then the subject matter issue will be governed by "valid and binding contract[s]" and there can be no claim for unjust enrichment. *See In re Platinum*, 2019 WL 1759925, at *9. Thus, because the claim is both premature and unlikely to ever ripen, it should be dismissed.[9]

VI. THE DECLARATORY JUDGMENT CLAIMS SHOULD BE DISMISSED

Counts 20 and 21 purport to be causes of action seeking a declaratory judgment that the Nordlicht Side Letter and the Master Guaranty are void and unenforceable as against public policy because these transactions were "permeated with fraud." (Opp. 1018-20, 1026-28.)

As shown in the opening brief, the JOLs do not meet the Rule 9(b) standard here. *See In re Chowaiki & Co. Fine Art Ltd.*, 593 B.R. 699, 715 (Bankr. S.D.N.Y. 2018) (applying standard to declaratory judgment action sounding in fraud). They fail to identify a material misrepresentation or omission made in connection with the Nordlicht Side Letter or the Master Guaranty. Additionally, they fail to allege that PPVA's management justifiably relied on any misrepresentation or omission by the Beechwood Parties. To the contrary, they maintain that PPVA's agents were "involved in every aspect of the First and Second Schemes." (*See, e.g.*, SAC ¶¶ 48, 54, 73.) For these reasons alone, Counts 20 and 21 should be dismissed.

Even if the JOLs could satisfy Rule 9(b), the Court should decline to proceed on the declaratory judgment counts because the JOLs have at their disposal other available remedies, including an affirmative action for fraud. *In re Chowaiki*, 593 B.R. at 717 (dismissing

[9] The JOLs have failed to allege how any Beechwood Party other than BAM I and BAM Admin could be enriched. And it is insufficient to merely allege a general, non-specific benefit. *Senior Health Ins. Co. of Pa. v. Beechwood Re Ltd.*, 345 F. Supp. 3d 515, 533 (S.D.N.Y. 2018).

declaratory judgment claim) (citing cases). The cases cited by the JOLs are all distinguishable on this basis. None of them involved a declaratory judgment action. Instead, they all involved efforts by wrongdoers to enforce illegal agreements or agreements that were procured by fraud.

VII. THE ALTER EGO ALLEGATIONS AGAINST ILLUMIN AND THE CLAIMS AGAINST BCG AND THE PEDCO ENTITIES, WHICH THE JOLS HAVE ABANDONED, SHOULD BE DISMISSED

As discussed in the moving brief, the alter ego allegations against Illumin are entirely group-pled and do not support the JOLs' conclusory allegation that Illumin was an alter ego of Platinum.[10] (Mov. 24.) The JOL's failure to address this point in their opposition brief supports dismissal. *See In re Platinum-Beechwood Litig.,* 2019 WL 1570808, at *19 (S.D.N.Y. Apr. 11, 2019) (court may deem a claim abandoned when a plaintiff fails to respond to an argument).

Similarly, this Court previously dismissed all claims against BCG and the PEDCO Entities. *In re Platinum,* 2019 WL 1570808, at *11-12. The JOLs then reasserted claims against these entities in the SAC without materially altering the allegations. (*See* Mot. 24-25.) In the moving brief, the Beechwood Parties argued that because the allegations against BCG and the PEDCO Entities remain effectively unchanged, they should be dismissed again. The JOLs did not respond to these arguments. Thus, as above, the claims against these entities should be deemed abandoned and denied again. *See, e.g.*, *In re Platinum,* 2019 WL 1570808, at *19.

CONCLUSION

For the foregoing reasons, and those stated in the moving brief, all of the claims asserted against Illumin and the Beechwood Individuals, and all of the non-alter-ego claims against each of the Beechwood Entities should be dismissed with prejudice.

[10] The allegations are also factually impossible since Illumin was not formed until December 2016, after the Platinum entities were placed into liquidation and receivership.

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