UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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| IN RE PLATINUM-BEECHWOOD LITIGATION | Civil Action No. 1:18-cv-00658 |
| MELANIE L. CYGANOWSKI, AS RECEIVER, BY AND FOR PLATINUM PARTNERS CREDIT OPPORTUNITIES MASTER FUND LP, PLATINUM PARTNERS CREDIT OPPORTUNITIES FUND (TE) LLC, PLATINUM PARTNERS CREDIT OPPORTUNITIES FUND LLC, PLATINUM PARTNERS CREDIT OPPORTUNITIES FUND INTERNATIONAL LTD., PLATINUM PARTNERS CREDIT OPPORTUNITIES FUND INTERNATIONAL (A) LTD., and PLATINUM PARTNERS CREDIT OPPORTUNITIES FUND (BL) LLC,<br><br>*Plaintiffs*,<br><br>v.<br><br>BEECHWOOD RE LTD., *et al.*,<br><br>*Defendants*. | Civil Action No. 1:18-cv-12018 |

**MEMORANDUM OF LAW OF DEFENDANT PB INVESTMENT HOLDINGS, LTD. IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT**

## TABLE OF CONTENTS

# TABLE OF AUTHORITIES

## Cases



## Rules

PB Investment Holdings, Ltd. ("PBIHL"), asks the Court to grant summary judgment dismissal of the remaining claims against PBIHL in the First Amended Complaint ("FAC") filed by Melanie L. Cyganowski, as Receiver, by and for certain entities forming the fund commonly known as "PPCO"[1] (the "Receiver").

## I. SUMMARY

The Receiver has only two claims against PBIHL: (1) aiding and abetting fraud and (2) aiding and abetting breaches of fiduciary duties allegedly committed by Mark Nordlicht ("Nordlicht") and Platinum Credit Management, L.P. ("Portfolio Manager") in connection with a transaction involving PPCO that occurred on March 21, 2016.[2] First Am. Compl., Doc. 83 ["FAC"], ¶¶ 334-89. There are four reasons why the Court should dismiss these claims. First, PBIHL did not have actual knowledge that Nordlicht and/or the Portfolio Manager were committing a fraud against, or breaching fiduciary duties owed to, PPCO in negotiating and consummating this transaction. Second, PBIHL did not substantially assist Nordlicht and/or the Portfolio Manager with the allegedly wrongful acts. Such assistance, if any, did not proximately cause the injuries the Receiver alleges PPCO sustained. Third, the Receiver cannot prove that Nordlicht or the Portfolio Manager, in negotiating and consummating the March 2016 Transaction, committed a fraud against, or breached fiduciary duties owed to, PPCO. Finally, the Receiver's

[1] Various terms are defined throughout this pleading. Capitalized terms that this pleading does not define rely upon the definitions supplied by the Receiver's First Amended Complaint ("FAC").

"PPCO" is the collective fund comprised of Platinum Partners Credit Opportunities Master Fund LP ("Master Fund"), Platinum Partners Credit Opportunities Fund (TE) LLC, Platinum Partners Credit Opportunities Funds LLC, Platinum Partners Credit Opportunities Fund International Ltd., Platinum Partners Credit Opportunities Fund International (A) Ltd., and Platinum Partners Credit Opportunities Fund (BL) LLC.

[2] In fact, these are the only claims remaining against PBIHL in the Platinum-Beechwood litigation.

claims are barred by operation of the *Wagoner* rule and *in pari delicto* doctrine because PPCO benefitted from the transaction. That benefit precludes application of the "adverse interest" exception.

## II. INTRODUCTION

The Receiver alleges that certain PPCO insiders—specifically, Nordlicht—engaged in a massive fraudulent scheme over the course of several years. The alleged scheme took several forms, beginning with Nordlicht's overvaluation of PPCO's assets in 2012, and continuing with his alleged theft of PPCO's assets in 2015-16. Strikingly, the Receiver does not lodge any claim against the alleged Platinum "insiders", including Nordlicht or the Portfolio Manager,[3] for the alleged primary violation. Instead, the Receiver essentially sues any other person or entity whose name appears on any of the voluminous production in this case. PBIHL is one such party.

Despite the breadth of the Receiver's allegations against the defendants, her allegations against PBIHL *solely* relate to one transaction—a March 21, 2016 Note Purchase Agreement and subsequent assignments of a Northstar Note (the "March 2016 Transaction"). The Receiver claims PBIHL aided and abetted Nordlicht's and the Portfolio Manager's alleged fraud and breaches of fiduciary duties in consummating the March 2016 Transaction. FAC, ¶¶ 334-89.

The parties have produced over 10 million documents deposed over 50 witnesses. Yet the Receiver still cannot show that PBIHL substantially assisted any breach of fiduciary duty or fraud related to the March 2016 Transaction. Indeed, the Receiver cannot establish that the March 2016 Transaction was fraudulent or somehow breached a fiduciary duty. Rather, the facts developed and testimony—*including the opinion of the Receiver's own expert*—conclusively demonstrate

[3] The "Portfolio Manager" is PPCO's investment manager, Platinum Credit Management, LP. SUMF, ¶ ##. Notably, although absent from the case heading, the Receiver is also the receiver of the Portfolio Manager. Id., ¶ ##.

that the March 2016 Transaction actually benefited PPCO. Accordingly, the Court should dismiss the Receiver's claims against PBIHL.

## III. RELEVANT FACTS

### A. STRUCTURE AND GOVERNANCE OF PPCO

PPCO was structured as a master-feeder hedge fund, comprised of three offshore feeder funds and one onshore feeder fund[4] (collectively, the "Feeder Funds"). FAC, ¶ 67. Investors placed their investments in the Feeder Funds. SUMF[5], ¶ 3. The Feeder Funds then invested substantially all of their assets via purchases of limited partnership interests in the Master Fund. Id., ¶¶ 4-9.

The Master Fund was the primary investment vehicle of PPCO and held the PPCO portfolio. The Master Fund had no employees, directors, or officers. Id., ¶ 12. [redacted]

[4] The three offshore feeder funds are Platinum Partners Credit Opportunities Fund (TE) LLC; Platinum Partners Credit Opportunities Fund International Ltd; and, Platinum Partners Credit Opportunities Fund International (A) Ltd (the "Offshore Funds"). The onshore feeder fund is Platinum Partners Credit Opportunities Fund LLC (the "Onshore Fund"). The Offshore Funds invested substantially all of their assets in the PPCO Blocker LLC (the "Blocker Fund"). The Blocker Fund then invested the assets into the Master Fund.

[5] "SUMF" refers to PBIHL's Rule 56.1 Statement of Undisputed Material Facts, filed concurrently with the Motion.

### *1. PPCO's Investment Strategy*

PPCO marketed itself as an "asset-based investment fund" that invested through "originating loans and/or making equity investment in markets that are underserved by traditional sources of financing." FAC, ¶ 66. [redacted]

[redacted]

*2. Valuation of Investments*

[redacted]

**B. PPCO RESTRUCTURING**

The Receiver's claims against PBIHL arise against the backdrop of certain transactions involving the Master Fund, BAM Administrative, SHIP, and the CNO Trusts in December 2015 and March 2016. Towards the end of 2015, Nordlicht asked Beechwood to restructure certain loans between Platinum and Beechwood. Id., ¶ 38. According to Beechwood's CEO, Mark Feuer, Nordlicht expressed two "significant issues" concerning the loans between Platinum and Beechwood. Id., ¶ 43. First, the collateral that Beechwood had on certain loans with Platinum "was placing a stranglehold" on Nordlicht's ability to raise capital, as the collateral was against

the entire fund. Id., ¶ 44. Second, Nordlicht wished to lower the interest rates that were on some of the loans, as it was very difficult for Platinum to sustain. Id., ¶ 45.

PPCO entered into certain transactions with Beechwood, SHIP, and the CNO trusts in December 2015 and March 2016 as a result (the "PPCO Restructuring"). *See* id., ¶¶ 59-77. Feuer acknowledged that he "tried to effectuate transactions with the Platinum organization to try to help them with some of their challenges." Id., ¶ 51. However, Feuer would not do the PPCO Restructuring unless it made sense for Beechwood's clients—namely, SHIP and the CNO Trusts. Id., ¶ 52. Accordingly, Feuer needed to "continue making sure that the loans that [Beechwood] had given the Platinum funds were as securitized as possible." Id..

***1. December 2015 Transactions***

The first round of transactions were executed on or around December 23, 2015. *See* Id., ¶ 59. That was when the Master Fund executed a Delayed Draw Demand Note for $15.5 million to SHIP. Id. That demand note was secured pursuant to a Master Security Agreement in which BAM Administrative, as SHIP's agent, was granted security interests in substantially all of the assets of the Master Fund and the Master Fund's direct and indirect subsidiaries (the "December 2015 Security Agreement"). Id., ¶ 60. The Master Fund's subsidiaries entered into a Subsidiary Guarantee in which each entity guaranteed the amounts due to SHIP under the demand note. Id., ¶ 62. The funds loaned in the demand note were disbursed back to certain of SHIP's investment accounts and the CNO Trusts as PPCO purchased debt owed by Desert Hawk and LC Energy. Id., ¶ 63.

**2. *March 2016 Transaction***

On March 21, 2016, the Master Fund entered the March NPA with BAM Administrative as agent for, and on behalf of, SHIP and the CNO Trusts. Id., ¶ 64. The March NPA restated the

demand note and authorized the sale of additional promissory notes to SHIP and the CNO Trusts, as follows:

| Noteholder | Note |
|---|---|
| SHIP | $42,963,949.04 ($123,190.55 consisting of accrued interest) |
| BRe BCLIC Primary | $10,000,000.00 |
| BRe BCLIC Sub | $500,000.00 |
| BRe WNIC 2013 LTC Primary | $14,989,677.78 |
| BRe WNIC 2013 Sub | $700,000.00 |
| **TOTALS** | **$69,153,626.82** |

Id., ¶ 65.

In conjunction with the March NPA, the Master Fund entered into an Amended and Restated Master Security Agreement on March 21, 2016 (the "Amended Security Agreement"). Id. ¶ 66. The Amended Security Agreement granted security interests to BAM Administrative, as agent for SHIP and the CNO Trusts, in substantially all of the Master Fund's assets. Id., ¶ 67. Importantly, the Amended Security Agreement expressly provided that it did not amend or restate the December 2015 Security Agreement. Id., ¶ 68. In connection with the March NPA, certain Master Fund subsidiaries and affiliates entered a March 21, 2016 Subsidiary Guaranty. Id. ¶ 69. This guaranty guaranteed all payment obligations the Master Fund had under the March NPA. Id., ¶ 70.

The Master Fund directed SHIP and the CNO Trusts to distribute the funds flowing from the March NPA to "BAM Administrative Services LLC, as Agent for each of the [March NPA] Lender, BRe WNIC 2013 LTC Primary, Beechwood Bermuda International Limited and Beechwood Bermuda Investment Holdings, Ltd., for its segregated accounts." Id., ¶ 246. The Master Fund utilized the funds to purchase assignments of all right, title, and interest in the entirety

of a $50 million Second Priority Senior Secured Note (the "Northstar Note"). Id., ¶ 72. The Northstar Note was issued by Northstar GOM Holdings Group and due September 18, 2019. Id. ¶ 74. It also carried a 12% interest rate from the lenders, SHIP and BRe WNIC 2013 LTC Primary, as follows:

- $20,056,611.11 ($19,000,000.00 principal) of BRe WNIC 2013 LTC Primary's interest in the Northstar Note to the Master Fund;
- $11,400,600.00 ($10,800,000.00 principal) of SHIP's interest in the Northstar Note to the Master Fund; and,
- $21,323,344.44 ($20,200,000.00 principal) of SHIP's interest in the Northstar Note to PPVA Oil & Gas, LLC.

*See* Id., ¶ 75.

[redacted]

**C. PBIHL**

PBIHL is the successor to Beechwood Bermuda Investment Holdings Limited ("BBIHL"). BBIHL was formed under Bermuda law on November 28, 2014. Id., ¶ 78. Unlike the other entities associated with the Beechwood brand, BBIHL did not sell insurance products. Id., ¶ 85. Rather, BBIHL was formed to provide certain investment products to high net-worth non-U.S. residents. Id., ¶ 86. Specifically, BBIHL offered two types of savings vehicles. These vehicles were similar to an annuity product in the United States. Id., ¶ 87. BBIHL had its own board of directors. The board was comprised of Scott Taylor, Mark Feuer, and David Lessing. *See* Id., ¶ 80. Feuer and

Taylor were not involved in BBIHL, as Lessing oversaw BBIHL's day-to-day operations. *See* Id., ¶¶ 81, 83. Lessing was the senior executive, based in Bermuda, and headed the investments business. Id., ¶ 82.

BBIHL was organized under Bermuda's Segregated Accounts Companies (SAC) Act. As such, BBIHL formed a segregated account for its clients, the purpose was to separate the assets and liabilities of the company and from those of each client. Id., ¶ 88. The segregated account functioned like a new company and held a client's investment products. Id., ¶ 90. BBIHL's clients' invested assets were pooled into a segregated custody account, held by Wilmington Trust as custodian, pursuant to a Custody Account Trust Agreement. Id., ¶ 91.

## IV. ARGUMENT

To establish her claims of aiding and abetting against PBIHL, the Receiver must prove: (1) a violation by a primary wrongdoer, (2) the defendant's actual knowledge of the violation, and (3) proof that the defendant substantially assisted in the primary wrongdoing. *Armstrong v. McAlpin*, 699 F.2d 79, 91 (2d Cir. 1983); *see also Broad-Bussel Family LP v. Bayou Group LLC*, 472 F. Supp.2d 528, 532 (S.D.N.Y. 2007). Moreover, as the Receiver bases her claims on alleged wrongdoing committed by PPCO's agents, she must overcome the *Wagoner* rule and *in pari delicto* doctrine. *See, e.g. Trott v. Platinum Mgmt. (NY) LLC*, 2019 U.S. Dist. LEXIS 104562, *19 (S.D.N.Y. June 21, 2019) (Rakoff, J.).

A "court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Where the nonmoving party bears the burden of proof at trial, a movant may establish that it is entitled to summary judgment by "point[ing] to a lack of evidence to go to the trier of fact on an essential element of the nonmovant's claim." *Jaramillo v. Weyerhaeuser Co.*,

536 F.3d 140, 145 (2d Cir. 2008) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986)). "In that event, the nonmoving party must come forward with admissible evidence sufficient to raise a genuine issue of fact for trial in order to avoid summary judgment." *Id.* (citing *Celotex*, 477 U.S. at 322-23). Importantly, "the determination of whether a given factual dispute requires submission to a jury must be guided by the substantive evidentiary standards that apply to the case." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Thus, to survive summary judgment where, as here, the plaintiff must prove his case by clear and convincing evidence, the plaintiff "must have adduced sufficient evidence to meet this standard at trial." *Mazzaro De Abreu v. Bank of Am. Corp*, 812 F.Supp. 2d 316, 322 (S.D.N.Y. 2011); *see Anderson*, 477 U.S. at 255-56 (ruling clear and convincing standard must be applied in determining summary judgment).

PBIHL is entitled to summary judgment because PBIHL did not have actual knowledge of any wrongdoing, nor did it substantially assist in any fraud or breach of fiduciary duty. Indeed, the Receiver cannot prove that Nordlicht or the Portfolio Manager committed fraud or breached a fiduciary duty while negotiating and consummating the March 2016 Transaction and the evidence even establishes that PPCO benefitted from that deal. Thus, the *Wagoner* rule and *in pari delicto* doctrine bar the Receiver's claims.

**A. PBIHL DID NOT HAVE ACTUAL KNOWLEDGE**

The Receiver's claims against PBIHL fail because PBIHL had no actual knowledge of the alleged fraud or breaches of fiduciary duties associated with the March 2016 Transaction. The Receiver must provide clear and convincing evidence that PBIHL had actual knowledge of the primary violations to satisfy her heavy burden here. *See Beck v. Manufacturers Hanover Trust Co.*, 820 F.2d 46, 50 (2d Cir. 1987); *Fraternity Fund Ltd. v. Beacon Hill Asset Mgmt., LLC*, 479 F.Supp. 2d 349, 367 (S.D.N.Y. 2007).

Unlike the scienter requirement in a claim for fraud, "aiding and abetting requires a reasonable inference of actual knowledge." *Abu Dhabi Commer. Bank v. Morgan Stanley & Co.*, 888 F. Supp. 2d 431, 445 (S.D.N.Y. 2012). "Plaintiffs may raise such an inference in one of two ways: (1) by alleging facts showing a motive for participating in a fraudulent scheme and a clear opportunity to do so; or (2) by identifying circumstances indicative of conscious behavior." *AHT Corp. v. BioShield Techs., Inc. (In re AHT Corp.)*, 292 B.R. 734, 746 (S.D.N.Y. 2003). The Receiver cannot do either.

"Allegations of constructive knowledge or recklessness are insufficient." *Fraternity Fund Ltd.*, 479 F. Supp. 2d at 367; *see also Abu Dhabi Commer. Bank*, 888 F. Supp. 2d at 445. Where, as here, the defendant owes no independent duty to the plaintiff, "even 'ignorance of red flags or obvious warning signs of fraudulent activity cannot establish a defendant's actual knowledge sufficient to support a claim of aiding and abetting fraud." *Abu Dhabi Commer. Bank*, 888 F. Supp. 2d at 477; *see In re Agape Litig.*, 681 F. Supp. 2d 352, 364 (E.D.N.Y. 2010) (holding knowledge of primary actor's prior fraud conviction merely showed constructive knowledge).

Summary judgment is warranted on this element for several reasons. First, the Receiver's corporate representative, Marc Kirschner ("Kirschner"), could not point to any evidence that PBIHL had actual knowledge of Nordlicht's or the Portfolio Manager's alleged breach of fiduciary duty or fraud. *See* SUMF, ¶ 96. Rather, the Receiver infers PBIHL's knowledge by virtue of improperly grouping it into the "amorphous" Beechwood structure. Id., ¶ 96. However, "it is a well-settled principle of corporate law that '[p]arent and subsidiary or affiliated corporations are, as a rule, treated separately and independently.'" *Akhtar v. JPMorgan Chase & Co.*, 2019 N.Y. Misc. LEXIS 4835, at *5 (N.Y. Sup. Ct. Sept. 5, 2019) (quoting *Sheridan Broadcasting Corp. v. Small*, 19 A.D.3d 331, 332 (N.Y. App. Div. 2005)). Thus, as the Receiver does not allege an alter

ego or other veil piercing theory in order to impute all of Beechwood's knowledge onto PBIHL, the Receiver's argument is unavailing.

Moreover, while Feuer and Taylor both served nominally as directors of BBIHL at the time of the March 2016 Transaction, their knowledge is not automatically attributed to BBIHL or PBIHL. *See U.S. v. Bestfoods*, 524 U.S. 51, 70 (1998). The knowledge possessed by an individual director only imputes to a corporation when it is acquired within the scope of the director's agency with the corporation. *Cromer Fin. Ltd. v. Berger*, 245 F. Supp. 2d 552, 559 (S.D.N.Y. 2003). The evidence shows that neither Feuer nor Taylor acquired knowledge about the March 2016 Transaction within the scope of their agency with BBIHL—especially as Feuer admitted that he did not even know what BBIHL was or how BBIHL fit into the Beechwood structure, if at all. SUMF, ¶ 83. Indeed, Feuer and Taylor had no substantive role within BBIHL; both testified that Lessing, who was in charge of Beechwood retail business, oversaw BBIHL's day-to-day operations. *See* id., ¶¶ 81-82. There is no allegation, much less evidence, that Lessing had any actual knowledge of the alleged primary violations. And, even if the Receiver could raise an issue as to Taylor's and Feuer's knowledge while acting for "Beechwood",[6] she cannot meet her burden to show they had actual knowledge that should be imputed upon PBIHL. Accordingly, the Court should dismiss the Receiver's claims against PBIHL.

Alternatively, even if Feuer's and Taylor's knowledge is imputed to BBIHL, they did not have actual knowledge of Nordlicht's or the Portfolio Manager's underlying violations. Without specifically referring to PBIHL, the Receiver alleges all of the defendants knew of the underlying

[6] Notably, the Court dismissed the Receiver's claims for aiding and abetting against Feuer and Taylor, individually, because "the FAC does not make a single particularized allegation against Feuer or Taylor in connection with any of the problematic transactions." Oct. 7, 2019, Op. & Order [Doc. 429], p. 94.

fraud and breach of fiduciary duties because: (1) Nordlicht was "hopelessly conflicted" in each and every transaction he negotiated and consummated with the defendants because he was CIO of the Platinum funds, on one hand, and a "majority stakeholder and decision-maker" at Beechwood, on the other; and, (2) the Portfolio Manager directed PPCO to enter into the PPCO Loan Transactions and Securities Purchases, which were "not intended to be in their best interests, but rather structured solely to benefit the Defendants." FAC, ¶¶ 328, 337. However, the Receiver has no evidence to support her allegations as it pertains to PBIHL.

At the time of the PPCO Restructuring, PBIHL did not have actual knowledge that Nordlicht had a conflict of interest in consummating the March 2016 Transaction. Feuer and Taylor had substantially divested Beechwood of its investments in Platinum-related entities, effectively distancing themselves from Nordlicht. *See* SUMF, ¶ 40. Nordlicht was not a principal or shareholder of BBIHL and did not have any control over Beechwood. *See* id., ¶¶ 41, 84. Moreover, Feuer and Taylor did not know what powers and duties Nordlicht possessed over Platinum, apart from knowing that those powers were very broad. *See* id., ¶ 42.

Further, Feuer and Taylor did not have actual knowledge that Nordlicht or the Portfolio Manager desired to consummate the March 2016 Transaction for a fraudulent purpose. Feuer testified that he was involved in the PPCO restructuring "on the periphery." Id., ¶ 39. Feuer recalled Nordlicht approaching him about Platinum restructuring its Beechwood loans because it needed to lower existing interest rates and alleviate a "stranglehold" on its ability to raise capital caused by Beechwood's lien on all of Platinum's assets. *See* id., ¶ 44. Taylor, who was not directly involved in the negotiation of the PPCO Restructuring, agreed:

> I think I had a general sense in early 2016 that there was a desire from Platinum and certain portfolio companies to change the terms of interest associated with various loans; and that, right, dealt with liquidity among potentially other things.

Id., ¶ 46.

Further, Feuer and Taylor did not know whether the Restructuring benefitted one Platinum entity over the other, as they did not even know the organizational-level differences between PPVA and PPCO. From their perspective, PPVA and PPCO were one in the same: Platinum. *See* id., ¶¶ 47-50 They considered their dealings to be with Platinum and the restructuring to be for the benefit of Platinum. *See* id., ¶ 47. They did not know how Platinum structured the deals behind the scenes or whether a particular transaction benefitted PPVA or PPCO. *See* id., ¶ 48. Feuer and Taylor did not know that Nordlicht or the Portfolio Manager overvalued the Northstar Note—much less *intentionally* overvalued the Northstar Note, as alleged by the Receiver. *See* id., ¶ 50. PPCO did not purchase the Northstar Note at a significant discount; rather, the Northstar Note was assigned at face-value. *See* id., ¶ 73. Likewise, Beechwood did not know how Platinum performed its own internal valuation of the underlying collateral (which was independent of Beechwood's own internal valuation). *See* id., ¶ 50. Therefore, the Receiver cannot meet her high burden on an essential element of her claims against PBIHL.

**B. PBIHL DID NOT SUBSTANTIALLY ASSIST**

The Receiver must also establish that PBIHL substantially assisted in the alleged fraud or breach of fiduciary duties. Substantial assistance requires "a substantial contribution to the perpetration" of the underlying violation. *JP Morgan Chase Bank v. Winnick*, 406 F. Supp. 2d 247, 257 (S.D.N.Y. 2005). "One provides substantial assistance if he 'affirmatively assists, helps conceal, or by virtue of failing to act when required to do so enables it to proceed.'" *Kolbeck v. LIT Am.*, 939 F. Supp. 240, 247 (S.D.N.Y. 1996) (quoting *Diduck v. Kaszycki & Sons Contractors, Inc.*, 974 F.2d 270, 284 (2d Cir. 1992)). Moreover, "[t]he substantial assistance must be the proximate cause of the harm on which the primary liability is predicated." *Mazzaro de Abreu*, 525

F. Supp. 2d at 388 (citations omitted); *see Winnick*, 406 F. Supp. 2d at 256 ("Whether the assistance is substantial or not is measured, in turn, by whether the action of the aider and abettor proximately caused the harm."). Summary judgment is proper for the following reasons.

***1. No substantial assistance.***

As already shown, BBIHL was a wholly separate entity operating independently from the rest of Beechwood. Not only was BBIHL based in Bermuda, but it was in a wholly different industry (retail investment products) than the rest of Beechwood (institutional reinsurance). *See* SUMF, ¶¶ 85-86. Demonstrating BBIHL's attenuation from Beechwood, Feuer testified that he did not even know what BBIHL was or how BBIHL fit into the Beechwood structure, if at all. Id., ¶ 83.

Further, it is undisputed that BBIHL was not involved in the December 2015 Transaction. *See* FAC, ¶¶ 225-39. BBIHL did not play any role in the negotiation, structure, or execution of the March 2016 Transaction—much less affirmatively assist in any fraudulent conduct involving the March 2016 Transaction. SUMF, ¶¶ 97-101. BBIHL was not a party to the first part of the March 2016 Transaction—the March NPA. Id., ¶ 97. BBIHL was not a signatory or party to any document memorializing the March 2016 Transaction. Id., ¶ 98. BBIHL did not lend any money to PPCO, take a security interest against any of PPCO's assets, or assign any portion of the Northstar Note to PPCO. *See* id., ¶¶ 99-100. In fact, not one witness involved in the PPCO Restructuring could testify as to what role, if any, BBIHL played in the transactions.

The Receiver's only evidence—out of over 10 million documents produced—that supports her claims consists of: (1) BBIHL's identification as a principal of BAM Administrative on direction letters, and; [redacted].

[redacted] This purported evidence does not prove, however, that BBIHL even participated in the March 2016 Transaction—much less substantially assisted in Nordlicht's or the Portfolio Manager's fraud or breach of fiduciary duties.

The direction letters do not help the Receiver's claims. The letters merely identify BBIHL as the principal of BAM Administrative; they are silent as to whether BBIHL was involved in the March 2016 Transaction in any way. *See* id., ¶ 71. [redacted] as the Receiver speculates through these documents, such passive role is analogous to a bank. *See In re Agape Litig.*, 681 F. Supp. 2d at 366; *Renner v. Chase Manhattan Bank*, 2000 U.S. Dist. LEXIS 8552, *37 (S.D.N.Y. June 14, 2000). Evidence merely showing an account established by the defendant was used to perpetrate the underlying fraud or breach of fiduciary duty, alone, is not substantial assistance. *See In re Agape*, 681 F. Supp. 2d at 366. Thus, PBIHL is entitled to summary judgment.

***2. BBIHL's participation did not proximately cause the Receiver's alleged damages***

Alternatively, there was no substantial assistance because any affirmative action undertaken by BBIHL was not a proximate cause of the Receiver's damages. "Also embedded into the substantial assistance element is a proximate cause analysis, which requires a showing that 'a defendant's participation [was] the proximate cause of plaintiff's injury.'" *Silvercreek Mgmt. v. Citigroup, Inc.*, 346 F. Supp. 3d 473, 487-88 (S.D.N.Y. 2018) (quoting *Dubai Islamic Bank v. Citibank, N.A.*, 256 F. Supp. 2d 158, 167 (S.D.N.Y. 2003)). Substantial assistance "can be considered a proximate cause where a plaintiff's injury was a direct or reasonably foreseeable

result of the defendant's conduct." *Id.*, at 488. The gravamen of the Receiver's injury, as alleged in the FAC and confirmed by Kirschner's testimony, is that the Receiver is prohibited from making certain distributions or redemptions because the PPCO Restructuring caused BAM Administrative, on behalf of SHIP and the CNO Trusts, to gain a security interest in all of the assets of PPCO and its subsidiaries. *See* FAC, ¶ 258. The Receiver's action is one to void the liens.

The Receiver's damages, if any, were caused by the December 2015 Transaction. That is where PPCO granted a security interest on its and its subsidiaries' assets as collateral for its demand note with SHIP. Id., ¶¶ 60, 62. The March 2016 Transaction simply reaffirmed this security interest, but, notably, *did not amend or restate* the December 2015 Security Agreement. Id., ¶¶ 67, 68. The security interest resulting from the December 2015 Transaction was perfected by filing a UCC-1 financing statement. *See* id., ¶ 61; *see also* U.C.C. § 9-310. Thus, as the security interest from the December transaction was perfected first in time, it has priority over the security interest created by the March 2016 Transaction. *See* U.C.C. § 9-312(5)(a). Therefore, had the March 2016 Transaction had not occurred, the blanket lien of which the Receiver complains would still encumber the assets of PPCO and its subsidiaries in equal force.[7] Accordingly, the March 2016 Transaction could not be a proximate cause of the Receiver's damages. Therefore, PBIHL is entitled to summary judgment.

## C. THE RECEIVER CANNOT ESTABLISH THE PRIMARY VIOLATIONS OF HER AIDING AND ABETTING CLAIMS AS A MATTER OF LAW

To pursue her aiding and abetting claims, the Receiver must establish the underlying fraud or breach of fiduciary duty. *See Armstrong*, 699 F.2d at 91. The Receiver glosses over this element

[7] The Receiver also takes the position that the security interests associated with the March 2016 Transaction are invalid. *See* Id., ¶ ##. To the extent the security interests from the March 2016 Transaction are invalid, that further demonstrates that PBIHL's alleged substantial assistance did not proximately cause the damages at issue here.

in her FAC by simply assuming a fraud or breach of fiduciary duty occurred in connection with the March 2016 Transaction. Even if she had not glossed over this element, the evidence shows she cannot establish it.

"Under New York law, '[t]o state a cause of action for fraud, a plaintiff must allege a representation of material fact, the falsity of the representation, knowledge by the party making the representation that it was false when made, justifiable reliance by the plaintiff and resulting injury." *Lerner v. Fleet Bank, N.A.*, 459 F.3d 273, 291 (2d Cir. 2006) (quoting *Kaufman v. Cohen*, 307 A.D.2d 113, 119, 760 N.Y.S.2d 157, 165 (1st Dep't 2003)). By contrast, a breach of fiduciary duty requires establishing: "(1) that a fiduciary duty existed between plaintiff and defendant, (2) that defendant breached that duty, and (3) damages as a result of the breach." *Meisel v. Grunberg*, 651 F. Supp. 2d 98, 114 (S.D.N.Y. 2009). Further, under the business judgment rule, business decisions are presumed legitimate. *See Lippe v. Bairnco Corp.*, 230 B.R. 906, 916-17 (S.D.N.Y. 2016). Thus, the Receiver must overcome this presumption of legitimacy by showing that "the fiduciary acted in bad faith or with fraudulent intent." *In re Eugenia Vi Venture Holdings, Ltd.*, 649 F. Supp. 2d 105, 126 (S.D.N.Y. 2008).

The Receiver alleges the fraudulent scheme began back in 2012 and consisted of an overvaluation of assets. SUMF, ¶ 92. However, the Receiver concedes that the March 2016 Transaction was not the product of any fraud committed by Nordlicht or the Portfolio Manager, but rather was orchestrated by SHIP. Id., ¶ 93. In fact, Kirschner testified that SHIP was the "mastermind" of the March 2016 Transaction and directed BAM Administrative to do it. *See* id., ¶¶ 94-95. ("No. I believe my characterization is that this March transaction was the culmination of three loans that SHIP engineered through [its investment management agreements with] Beechwood, working with Beechwood and Platinum, to put [the loans] back to Platinum.").

Further, Kirschner testified that David Steinberg, the main individual representing Platinum in the March 2016 Transaction, worked with the Receiver to understand that transaction. Id., ¶ 53. Steinberg's testimony reveals that the March 2016 Transaction was not done in bad faith or out of fraud but was rather done in furtherance of a legitimate business purpose. Steinberg testified that the purpose of the transaction was to make the Platinum portfolio more sustainable. Id., ¶ 55. Steinberg testified that "Mark [Nordlicht] very much wanted to put the fund back into – what he called balance, which was having a significant liquid portfolio." Id., ¶ 56. In fact, Steinberg explained how the PPCO Restructuring was intended to put PPCO back in balance and correct Platinum's liquidity issue. Id., ¶ 57. Notably, at the time of the March 2016 Transaction, Steinberg believed he was acting in Platinum's best interests. Id., ¶ 58.

Not only was the March 2016 Transaction consummated in good faith and without fraudulent intent, but Nordlicht and the Portfolio Manager's alleged wrongful acts were not fraudulent when, in fact, they were disclosed to PPCO, the Limited Partners, and the investors. *See Wexler v. KPMG LLP*, 2014 N.Y. Misc. LEXIS 1488, **36-40 (N.Y. Sup. Ct., April 1, 2014) (holding sophisticated investor failed to properly allege fraud where limited partnership agreement disclosed acts and risks and investor did not allege how disclosures were false). [redacted]

Therefore, because the evidence demonstrates that the March 2016 Transaction was in furtherance of legitimate business interests, the risks of which were expressly disclosed, the Receiver cannot prove—much less through clear and convincing evidence—that Nordlicht or the Portfolio Manager committed fraud against, or breached a fiduciary duty owed to, PPCO in consummating the March 2016 Transaction. Accordingly, the Receiver cannot prove another essential element of her aiding and abetting claims against PBIHL and, thus, PBIHL is entitled to summary judgment.

## D. THE RECEIVER'S CLAIMS ARE BARRED BY THE *IN PARI DELICTO* DOCTRINE AND THE *WAGONER* RULE

Bottom line: PPCO benefitted from the March 2016 Transaction. This means the Receiver's claims are barred by operation of the *in pari delicto* doctrine and the *Wagoner* rule.

The Court stated the general legal standards underlying the *Wagoner* rule and the *in pari delicto* doctrine in its Omnibus Opinion:

> The *Wagoner* rule stands for the "well-settled proposition that a bankrupt corporation, and by extension, an entity that stands in the corporation's shoes, lacks standing to assert claims against third parties for defrauding the corporation where the third parties assisted corporate managers in committing the alleged fraud." *Cobalt Multifamily Inv'rs I, LLC Shapiro*, 857 F. Supp. 2d 419, 425 (S.D.N.Y. 2012). The *Wagoner* rule applies not only to bankruptcy trustees, but also to liquidators and court-appointed receivers. *See Bullmore v. Ernst & Young Cayman Islands*, 20 Misc. 3d 667, 861 N.Y.S.2d 578, 586-87 (N.Y. Sup. Ct. 2008); *Cobalt*, 857 F.Supp. 2d at 425.
>
> The doctrine of *in pari delicto* is similar to the *Wagoner* rule. Instead of functioning as a prudential rule of standing, however, the doctrine of *in pari delicto* is an affirmative defense under New York law that "generally precludes a wrongdoer . . . from recovering from another wrongdoer." *Picard v. HSBC Bank PLC*, 454 B.R. 25, 29 (S.D.N.Y. 2011) [subsequent appellate history omitted]; *see Kirschner v. KPMG LLP*, 15 N.Y.3d 446, 938 N.E.2d 941, 950, 912 N.Y.S.2d 512 (N.Y. 2010) ("The doctrine of in pari delicto mandates that the courts will not intercede to resolve a dispute between two wrongdoers.").

Doc. 429, pp. 73-74.

There are two relevant exceptions, though: the "insider exception" and "adverse interest exception". *See, e.g. Trott*, 2019 U.S. Dist. LEXIS 104562, at *19. The Court previously ruled that "[n]one of the FAC Beechwood Defendants [including PBIHL] – even Taylor and Feuer – are alleged to control or owe fiduciary duties to the PPCO entities, and do not fit within the definition of 'insiders' for the purpose of the insider exception." Doc. 429, pp. 78-79. Thus, the Receiver only avoids dismissal under *Wagoner* or *in pari delicto* if the adverse exception applies. However, as a matter of law, the adverse interest exception is inapplicable here.

***1. Nordlicht and/or the Portfolio Manager's conduct is imputed upon PPCO.***

It is undisputed that Nordlicht and the PPCO Portfolio Manager were agents of the PPCO Funds such that their actions are imputed to PPCO. First, the Receiver alleges an agency relationship between PPCO and Nordlicht and the Portfolio Manager. *See* FAC, ¶¶ 77, 80. Second, this agency with PPCO is evidenced by the relevant agreements. The Portfolio Manager's agency was expressed through the LPA. Id., ¶ 14.[8] Nordlicht was CIO of the Portfolio Manager. Id., ¶ 15. Indeed, Kirschner testified that Nordlicht was acting on behalf of PPCO. Id., ¶ 105.

***2. The PPCO Funds Benefitted from the March 2016 Transaction***

The adverse interest exception applies only when the agent "*totally abandoned* his principal's interests and [was] acting *entirely* for his own or another's purpose." *Kirschner*, 15 N.Y.3d at 466 (emphasis in original). The exception "avoids ambiguity" in that it *only* applies in "this most narrow of exceptions for those cases—outright theft or looting or embezzlement—where the insider's misconduct benefits only himself or a third party; i.e. where the fraud is committed against a corporation rather than on its behalf." *Id.* at 465-66 (emphasis added).

[8] Indeed, the relationship between the Portfolio Manager and the PPCO Funds is so close that the Portfolio Manager is, in fact, an entity under the Receiver's receivership.

Regardless of the agent's motivation or even the ultimate, long-term damage to the company, the adverse interest exception does not apply if the company realizes *any* benefit from the agent's actions. *See Kirschner*, 15 N.Y. 3d at 466-68. Thus, the exception is not triggered where the agent has a conflict of interest, is not acting primarily for his principal, or is "actually motivated by the agent's desire for personal gain." *See id.* at 466-67.

"Even where the insiders' fraud can be said to have caused the company's ultimate bankruptcy, it does not follow that the insiders 'totally abandoned' the company . . . [I]t is immaterial that it turned out that it would have been better for the agent to have acted differently." *Id.*, at 468. "So long as the corporate wrongdoer's fraudulent conduct enables the business to survive—to attract investors and customers and raise funds for corporate purposes—this test is not met." *Id.* Importantly, there "is no meaningful difference between enabling a business to survive and preserving an investment vehicle." *In re ICP Strategic Income Fund, Ltd.*, 568 B.R. 596, 612, (S.D.N.Y. 2017), *aff'd* 730 Fed. Appx. 78 (2d Cir. 2018).

The Reciever cannot meet her burden to show that Nordlicht and the Portfolio Manager totally abandoned their principal's interests and were acting entirely for their own purpose. Here, David Prager, the Receiver's own valuation expert admits that PPCO benefitted from the March 2016 Transaction. Prager finds that PPCO received between $47 million to $50.5 million in gross value as a result of the March 2016 Transaction. *See* SUMF, ¶ 106. [redacted]

Further, Prager opines that, [redacted]

[redacted]

[redacted]

Prager opined [redacted]

According to Prager, [redacted]

It is undisputed that the March 2016 Transaction benefited PPCO in several ways, [redacted] That PPCO benefited, even temporarily, is enough to overcome the adverse interest exception. *See Kirschner*, 15 N.Y.3d at 470-71 (refusing to expand application of adverse interest exception to apply where benefits are short-term or illusory). Therefore, the Court should dismiss the Receiver's claims against PBIHL in their entirety.

## V. CONCLUSION

The Receiver's entire case against PBIHL is founded upon evidence that is circumstantial (at best). The Receiver cannot meet her burden to establish by clear and convincing evidence that PBIHL aided and abetted any fraud or breaches of fiduciary duties that Nordlicht or the Portfolio Manager may have committed in the March 2016 Transaction. Further, the *Wagoner* rule and *in pari delicto* doctrine bar the Receiver's claims because PPCO benefitted from the March 2016 Transaction. Accordingly, PBIHL asks the Court to grant this Motion for Summary Judgment in its entirety.

Dated: February 14, 2020

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

It is hereby certified that on this 14th day of February 2020, a copy of the foregoing was served through the Court's electronic filing system as to all parties who have entered an appearance in this proceeding.

*/s/ Kendal B. Reed*
Kendal B. Reed