UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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, *Plaintiffs*, v. BEECHWOOD RE LTD., *et al.*, *Defendants*.	Civil Action No. 1:18-cv-12018

DEFENDANT PB INVESTMENT HOLDINGS LTD.'S REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

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PB Investment Holdings, Ltd. ("PBIHL"), files this Reply in Support of Its Motion for Summary Judgment [Dkt. 492], seeking dismissal of the Receiver's only remaining claims for aiding and abetting fraud and breach of fiduciary duty against PBIHL.

SUMMARY OF REPLY

The Receiver has strung along PBIHL throughout this litigation based solely on its identification on one document and an unsupported and unpled argument that PBIHL should somehow be responsible for the actions of the entire Beechwood enterprise. To be clear, the Receiver has no claim of alter ego or veil piercing against PBIHL. Therefore, PBIHL's liability must be assessed solely through the context of PBIHL's own knowledge and actions, alone, not through "the context of Beechwood's overall role," as the Receiver argues.

After abandoning her claims of aiding and abetting fraud, the Receiver's Response to PBIHL's Motion for Summary Judgment [Dkt. 508] (the "Response") addresses the sole issue of whether PBIHL somehow aided and abetted Mark Nordlicht's breach of fiduciary duty. PBIHL did not. The Receiver's underlying claim of Nordlicht's breach of fiduciary duty remains speculative and unsupported. Notwithstanding, the Receiver is unable to raise a fact issue that PBIHL, itself, had actual knowledge of and provided substantial assistance to Nordlicht's alleged breach. Finally, PPCO benefitted from the March 2016 Transaction, so as to bar the Receiver's claims under *in pari delicto* and the *Wagoner* rule. Accordingly, the Court should grant PBIHL summary judgment on all of the Receiver's remaining claims against PBIHL.

ARGUMENT

The Receiver argues throughout her Response that she does not have to prove her case in the face of summary judgment. True, but the Receiver must provide at least *some* credible proof

sufficient to raise a genuine issue of material fact. *See Jaramillo v. Weyerhaeuser Co.*, 536 F.3d 140, 145 (2d Cir. 2008). On all elements, the Receiver has failed to do so.

First, the Receiver has failed to articulate—much less raise a genuine issue of material fact concerning—the underlying violations upon which she predicates her aiding and abetting claims against PBIHL. As an initial matter, the Receiver completely abandons her aiding and abetting fraud claim in her Response. Yet, her breach of fiduciary duty claim fails, too, as a matter of law.

Second, the Receiver failed to raise a genuine issue of material fact regarding PBIHL's aiding and abetting alleged liability: that is, whether PBIHL somehow knew that Nordlicht was allegedly breaching a fiduciary duty owed to PPCO in entering into the March 2016 Transaction and, with such knowledge, affirmatively and substantially assisted Nordlicht in his breach. The Receiver presents no evidence that PBIHL, itself, had any knowledge. That failure notwithstanding, she fails to present any credible evidence creating a reasonable inference of Mark Feuer's alleged actual knowledge sufficient to overcome summary judgment. Moreover, the Receiver cannot raise a fact issue that PBIHL substantially assisted Nordlicht's breach of fiduciary duties. At best, her evidence shows PBIHL provided passive assistance to SHIP.

Finally, at a minimum, the Receiver cannot escape the unassailable fact that the evidence and her own expert confirm that PPCO benefitted from the March 2016 Transaction. Therefore, the Receiver's claims are barred by the *in pari delicto* doctrine and the *Wagoner* rule.

Therefore, for all the foregoing reasons, the Court should grant PBIHL summary judgment.

A. The Receiver Abandoned her Aiding and Abetting Fraud Claim against PBIHL

At the outset, the Receiver abandoned her claim against PBIHL for aiding and abetting fraud. Despite it being an essential element of her aiding and abetting fraud claim against PBIHL, the Receiver presents no evidence of fraud. *See Armstrong v. McAlpin*, 699 F.2d 79, 91 (2d Cir.

1983). The Receiver asks the Court to assume Nordlicht and the Portfolio Manager committed fraud in connection with the March 2016 Transaction in her Response. The Receiver relies solely on the conclusory and unsubstantiated statement: "Compelling evidence of fraud includes, [sic] in addition to saddling PPCO with the liens, overvaluations, and entry into the PPCO Loan Transaction." Response, p. 73-74. Reliance on such conclusory allegations and unsubstantiated speculation is insufficient to overcome summary judgment. *Jeffreys v. City of New York*, 426 F.3d 549, 554 (2d Cir. 2005).

The Receiver presents no evidence of an underlying fraud committed by Nordlicht in connection with the March 2016 Transaction. Rather, her entire argument regarding the alleged underlying violation relates only to Nordlicht's conflict of interest, so as to support her breach of fiduciary duty claim. Even her footnote at the end of her one sentence relating to the underlying fraud refers to the breach of fiduciary duty claim. *See* Response, p. 74 n. 34.

Additionally, her abandonment is made clear throughout the remainder of her Response, as she argues that Feuer had actual knowledge of Nordlicht's breach of fiduciary duty. *See* Response, IV.C. However, she does attempt to raise a genuine issue of material fact concerning whether Feuer had actual knowledge of any alleged fraud committed by Nordlicht and the Portfolio Manager[1] in connection with the March 2016 Transaction. Accordingly, the Court should grant PBIHL summary judgment on the Receiver's now-abandoned aiding and abetting fraud claim.

B. The Receiver Fails to Raise a Genuine Issue of Material Fact Concerning Her Aiding and Abetting Breach of Fiduciary Duty Claim

Notwithstanding the Receiver's forfeiture of her fraud claim and claims concerning the Portfolio Manager, her attempt to manufacture a claim that PBIHL somehow aided and abetted

[1] In fact, the Receiver apparently abandons her claims relating to the Portfolio Manager, altogether.

Nordlicht's breach of fiduciary duty likewise fails. The Receiver is required to prove that (1) Nordlicht committed a breach of fiduciary duty, (2) PBIHL had actual knowledge of Nordlicht's breach, and (3) PBIHL substantially assisted Nordlicht's breach. *See Armstrong*, 699 F.2d at 91. The Receiver failed to raise a fact issue on all elements, entitling PBIHL to summary judgment.

1. The Receiver failed to raise a genuine issue of material fact of the primary breach.

Despite her decision not to bring suit against Nordlicht, she must nonetheless prove that Nordlicht breached a fiduciary duty in order to prove that PBIHL aided and abetted such breach. *See id.*, at 91. That is, she must prove that (1) a fiduciary duty existed between Nordlicht and PPCO; (2) Nordlicht breached that fiduciary duty; and, (3) PPCO's damages were caused by such breach. *See Meisel v. Grunberg*, 651 F. Supp. 2d 98, 114 (S.D.N.Y. 2009). Yet, the Receiver continues to gloss over these elements, simply assuming the breach occurred and caused the alleged injury without providing any evidence beyond mere speculation.

The Receiver focuses solely on an apparent conflict of interest Nordlicht had in entering into the March 2016 Transaction, based on alleged ownership interests his family members had in Beechwood. Response, pp. 72-73.[2] Even if the Receiver could prove that Nordlicht had a conflict of interest, she fails to adduce any admissible evidence of causation—that is, PPCO's alleged damages were caused by Nordlicht's alleged conflict of interest. Rather, based on the Receiver's belief that the March 2016 Transaction was a bad deal for PPCO, she simply assumes the bad deal

[2] Notably, the Receiver's implication contained within these two paragraphs directly conflicts with her argument proffered over the course of 66 pages to her Response, indicating that SHIP was the mastermind of the PPCO Restructuring and that SHIP was the ultimate beneficiary of the transactions.

Additionally, the Receiver apparently abandons any claim she had that the Portfolio Manager committed a breach of fiduciary duty, as she only focuses on Nordlicht himself.

was a result of Nordlicht's conflict. Proving breach of fiduciary duty requires more than such speculation. The Receiver fails to acknowledge, much less address, the undisputed fact that the March 2016 Transaction was the product of negotiation, which her corporate representative acknowledges was ultimately engineered by SHIP, *see* SUMF 94, 95; and, indeed, SHIP and CNO required that any loans given to Platinum "were as securitized as possible." SUMF 52.

Notwithstanding, the Receiver does not dispute that the LPA and the PPMs disclosed conflicts of interest to the Limited Partners and investors, alike. The Receiver does not dispute that the LPA provides that certain actions taken by the Portfolio Manager or General Partner and, as such Nordlicht, via his employment with the Portfolio Manager and General Partner, "do not constitute a breach of any duty owed by any Person to the Limited Partners or Master Fund." Indeed, such actions include certain "conflicts of interests" disclosed in the PPMs. LPA 2.2(c).

The LPA and PPM do disclose that the General Partner, Portfolio Manager, and their respective principals and affiliates (including Nordlicht) "may from time to time have an interest in financial instruments in which the Company has an interest such as, but not limited to, [l]oans, . . . equity or equity-linked securities in companies, and *may have business interests that are different from or opposite to the Company's business interests*." PPM, p. 54 (emphasis added). Here, the Receiver's allegation that Nordlicht's breach results from having an indirect interest in loans and equity in companies that are opposite of PPCO's is precisely the type of interest that is expressly disclosed in the PPM and disclaimed in the LPA.

Therefore, even if the Receiver's allegations regarding Nordlicht's conflict of interest are true, Nordlicht cannot be liable or breach of fiduciary duty, as a matter of law, pursuant to the

LPA. *See* 6 Del. C. § 17-1101 (f) (providing that a partnership agreement may limit or eliminate any and all liabilities for breach of fiduciary duties).[3]

2. The Receiver failed to raise a genuine issue of material fact concerning PBIHL's alleged actual knowledge of the breach of fiduciary duty.

In her Response, the Receiver claims that she may create a reasonable inference of knowledge *in order to* identify circumstances indicative of conscious behavior. Response, p. 77-78. In fact, the opposite is true: she may create a reasonable inference of knowledge *by* identifying circumstances indicative of conscious behavior. *See AHT Corp. v. BioShield Techs. Inc.*, 292 B.R. 734, 746 (S.D.N.Y. 2003); *Primavera Familienstiftung v. Askin*, 173 F.R.D. 115, 128 (S.D.N.Y. 1997). Indeed, the Receiver fails to overcome her heavy burden of establishing PBIHL's actual knowledge by only presenting evidence of constructive knowledge or recklessness. *Kolbeck v. LIT Am.,* 939 F. Supp. 240, 246 (S.D.N.Y. 1996).

The Receiver continues to gloss over, without presenting any credible evidence to the contrary, that Feuer was not acting on behalf of BBIHL/ PBIHL when he acquired any alleged knowledge about the PPCO Restructuring. It is undisputed that Feuer was not involved in the day-to-day operations of BBIHL and, in fact, he had no idea what BBIHL or PBIHL was. Likewise, it is undisputed that Feuer did not know whether BBIHL was even involved in the March 2016 Transaction—much less whether BBIHL's alleged involvement substantially assisted Nordlicht's breach of fiduciary duty. Indeed, the entire basis for the Receiver's argument that Feuer's knowledge should be imputed to PBIHL is based on documents, which the Receiver has failed to show relate in any way to the March 2016 Transaction. Accordingly, there is no evidence

[3] As the Master Fund is a Delaware limited partnership, Delaware law determines what fiduciary duties are owed to the Master Fund and Limited Partners, pursuant to New York's internal affairs doctrine. *See Krys v. Sugrue*, 2010 U.S. Dist. LEXIS 33642, **112-13 (S.D.N.Y. Mar. 1, 2010).

that Feuer obtained any knowledge regarding the PPCO Restructuring in connection with his disinterested, nominal role with BBIHL.

Assuming, *arguendo*, that Feuer's knowledge can be imputed upon PBIHL, the Receiver fails to identify any evidence demonstrating conscious behavior or, rather, "conscious misbehavior." *See Askin*, 173 F.R.D. at 128. Feuer did not know what powers and duties Nordlicht possessed over Platinum. SUMF, 42. Specifically, he did not know that Nordlicht valued the Platinum assets. *See* SUMF 50. Indeed, Feuer did not know the difference between PPVA and PPCO, to him, it was all "Platinum". *See* SUMF, 44-45. Thus, Feuer did not know whether the March 2016 Transaction benefitted PPVA over PPCO. SUMF, 48.

Feuer believed that Nordlicht desired to do the PPCO Restructuring to lower interest rates and alleviate a stranglehold on certain loans issued by Platinum. SUMF, 44-45. Contrary to the Receiver's claim, the evidence demonstrates that SHIP desired the lien on PPCO and it is undisputed that Feuer testified that he needed to ensure that SHIP loans to the Platinum funds "were as securitized as possible." SUMF 52. Accordingly, even if Feuer's knowledge is somehow imputed to BBIHL, there is no evidence sufficient to raise a fact issue by clear and convincing evidence that Feuer had any actual knowledge that Nordlicht breached a fiduciary duty owed to PPCO in consummating the March 2016 Transaction.

3. There is no genuine issue of material fact that PBIHL substantially assisted Nordlicht's breach of fiduciary duty.

The Receiver's sole argument that PBIHL substantially assisted Nordlicht's breach of fiduciary duty in causing PPCO to enter in this alleged multi-tranche, elaborate scheme is that BBIHL allegedly received $2.1 million from SHIP pursuant to an alleged participation agreement. Even if true, this is insufficient to raise a genuine issue of material fact on the element of substantial assistance. Rather, at best, the Receiver's argument is that PBIHL passively assisted SHIP.

The Receiver sets forth no allegation or evidence of any other actions by PBIHL. Rather, the undisputed evidence demonstrates that BBIHL:

(1) was not a signatory or party to any document involved in the March 2016 Transaction;

(2) was not involved in any negotiations underlying the March 2016 Transaction;

(3) was not a lender to PPCO under the March NPA;

(4) was not a lender to Northstar under the Northstar Note;

(5) did not assign any interest in the Northstar Note to PPCO or PPVA Oil & Gas; and,

(6) did not receive any security interest in PPCO's assets.

In light of these facts, the Receiver claims that she "need only adduce evidence that PBIH[L] contributed to the perpetration of the underlying violations, not that PBIH[L] deal directly with Nordlicht." Response, p. 74. However, the Receiver is required to adduce evidence that PBIHL contributed to the perpetration of Nordlicht's alleged breach of fiduciary duty—that is, that Nordlicht "caused PPCO to transfer $18.2 million of value to PPCO [sic]." Response, p. 74; *see JP Morgan Chase Bank v. Winnick*, 406 F. Supp. 2d 247, 256 (S.D.N.Y. 2005). She cannot.

In her Response, the Receiver seeks to introduce a participation agreement between BBIHL and SHIP in the Northstar Note held by SHIP. Not only is there no evidence that this alleged agreement is related to the March 2016 Transaction at all, but the agreement itself refutes the Receiver's allegations. Under the purported participation agreement, BBIHL's segregated accounts do not hold a $2.1 million interest in the note, as the Receiver's implies. As such, BBIHL could not have been directly involved in transferring a portion of the Northstar Note to PPCO or PPVA Oil & Gas or, importantly, receive $2.1 million from PPCO for the assigned interest in the Northstar Note. Rather, BBIHL simply paid $2.1 million for the right to receive a like-kind proportion of the interest and principal proceeds received by SHIP arising from the Northstar Note.

Thus, even if the Receiver is correct, BBIHL received $2.1 million from SHIP, based on SHIP's contractual obligation to pay BBIHL its proportion of proceeds received from any disposition of the Northstar Note. At best, this raises a fact issue as to whether BBIHL provided passive assistance to SHIP. It certainly does not give rise to any fact issue that PBIHL provided substantial (affirmative) assistance to Nordlicht's breach of fiduciary duty.

Moreover, it does not follow that BBIHL "proximately caused the harm upon which the primary liability is predicated." *JP Morgan Chase Bank v. Winnick*, 406 F.Supp. 2d 247, 256 (S.D.N.Y. 2005). The Receiver's evidence, if true, suggests that, by the time BBIHL was entitled to recover funds, the March 2016 Transaction was already completed and closed. Put differently, the Receiver's alleged injury was incurred before any involvement by BBIHL. Thus, BBIHL could not have been a proximate cause of the alleged injury.

Regardless, the evidence set forth by the Receiver only shows that BBIHL passively held funds on behalf of its clients. BBIHL did not "affirmatively assist[]" Nordlicht to cause PPCO to enter into the March 2016 Transaction, and the Receiver does not seriously refute such fact. Rather, Receiver claims that it is sufficient to impute the actions of the entire Beechwood enterprise onto PBIHL. *See* Response, p. 76. Her failure to allege any alter ego or veil piercing theory of liability against PBIHL notwithstanding, she simply assumes, without any allegation or evidence, that PBIHL is responsible for the actions of every Beechwood entity. It is not. Therefore, PBIHL is entitled to summary judgment.

C. PPCO Benefitted from the March 2016 Transaction

The Receiver's argument that PPCO did not receive any benefit from the March 2016 Transaction is unavailing in light of the undisputed facts and her own expert's testimony. The Receiver alleges that PPCO lacked liquidity and could not make redemptions to shareholders. *See*

FAC 4. The Receiver's witness, David Steinberg, confirmed that the March 2016 Transaction was intended to put PPCO back into balance and correct Platinum's liquidity issue. SUMF 57. The March 2016 Transaction provided PPCO liquidity by unencumbering the lien on PPCO's most valuable asset, Agera, which "projected aggressive revenue and earnings growth" at the time of the transaction. *See* SUMF 110-12. As the March 2016 Transaction "enable[d] the business to survive" and "preserv[ed] an investment vehicle," PPCO clearly benefitted. *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).

Moreover, the Receiver cannot distance herself from her expert's conclusion that the March 2016 Transaction decreased the bottom-line deficit of PPCO and, in fact, may have created a surplus. *See* SUMF 109. Specifically, her expert opines that the March 2016 Transaction *reduced* PPCO's deficit by between $21.3 to $24.6 million. *See* Id. The Receiver's expert further concludes that the value of PPCO's investments dramatically *increased* by more than $40 million as a result of the March 2016 Transaction. *See* SUMF 108. Therefore, the Receiver's claims are barred by *in pari delicto* doctrine and the *Wagoner* rule.

CONCLUSION

The Receiver can no longer string PBIHL along simply because its predecessor's name contained the word "Beechwood". Nor can the Receiver continue to predicate her aiding and abetting claims on the bare assumption that Nordlicht committed a fraud or breach of fiduciary duty. The undisputed facts are that PBIHL is a wholly separate entity that had absolutely no active involvement in the March 2016 Transaction—or any transaction underlying the Receiver's claims. The Receiver cannot raise a genuine issue of material fact demonstrating otherwise. Accordingly, the Court should grant PBIHL's motion for summary judgment on the Receiver's remaining claims against it.

Dated: March 17, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

It is hereby certified that on this 17th day of March 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