UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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)

DEFENDANTS' REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

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ARGUMENT

The Beechwood Parties made a series of arguments why they should be granted summary judgment, only some of which the Liquidators respond to. The Court should hold that those arguments have been conceded, while the remainder of Liquidators' positions are meritless. Thus, summary judgment should be granted for the Beechwood Parties on multiple grounds.

I. The Aiding And Abetting Claims Are Barred By The *Wagoner* And *In Pari Delicto* Doctrines.

The Liquidators argue that their aiding and abetting claims fall within either the "insider" exception or the "adverse-interest" exception to the *Wagoner* and *in pari delicto* doctrines. Neither of those exceptions applies, however. And even if they did, there are further exclusions that would still bar those claims.

A. The "Insider" Exception Does Not Apply to the Beechwood Parties.

The Liquidators do not contest that Narain is not an insider. (*See* Opp. at 40-41.) But they ask the Court to change its prior ruling denying insider status to Feuer and Taylor, *see In re Platinum-Beechwood Litig.*, 2019 WL 2569653, at *7 (S.D.N.Y. June 21, 2019), because of "new evidence obtained through discovery"—namely, a confusing narrative about how Platinum supposedly hired Feuer and Taylor to vet a potential investment in a company called Alpha Re, the idea for which Platinum then "stole," and which then somehow supposedly led to the creation of Beechwood. (Opp. at 40.) That request should be swiftly rejected.

To begin with, the claim that the Liquidators' argument is based on "new evidence" is specious. The Liquidators raised Alpha Re in their Complaint (ECF No. 1 ¶ 201), First Amended Complaint (ECF No. 156 ¶ 345), Amended First Amended Complaint (ECF No. 159 ¶ 345), and the SAC (ECF No. 285 ¶ 359). They included the NDA that Beechwood Capital entered into with Alpha Re as an exhibit to each. (ECF Nos. 1-3 at Ex. 29; 157-3 at Ex. 32; 159-3 at Ex. 32; 285-2 at Ex. 34.) And virtually every document that the Liquidators cite in support of this argument either came from their own productions in this case (Bixter Decl. Exs. 281-82, 284, 286-89, 293-97) or were available to them via Platinum's email servers prior to the initiation of this action (*See* Bixter Decl. Exs. 283, 290-92). This "new evidence" is hardly new.

Moreover, it isn't even "evidence." There is no proof that PPVA ever "hired" Feuer or Taylor. The only document the Liquidators cite in support is an email from the sell-side adviser pitching the Alpha Re deal, indicating that Platinum should "engage [its] insurance expert team for business diligence on Alpha Re." (*See* Bixter Decl. Ex. 288.) Feuer and Taylor were not even copied on the email. (*Id.*) Rather, the actual record tells a far more limited story: Feuer (a career insurance professional) was referred by a neighbor, Huberfeld, to evaluate—informally and for no compensation—a potential investment opportunity. (See Bixter Decl. Ex. 280, Feuer Tr. 27:14-25, 29:4-30:11.) Then, all Feuer and Taylor did was attend one meeting with Alpha Re (Liquid. 56.1 ¶ 390, ECF No. 565) and collectively exchange approximately five emails over the course of three months (*see* Bixter Decl. Exs. 283, 285, 287). That was the end of their involvement in Alpha Re. Similarly, the suggestion that Feuer and Taylor "stole" the idea for Beechwood is invented out of thin air, without a shred of support, and indeed contradicted by every witness possessing knowledge about Beechwood's formation.

Even if that "evidence" were proved to be true, it would not change the legal analysis. As this Court held: "The Second Circuit has read the insider exception . . . narrowly to allow only for suits . . . 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." *In re Platinum*, 2019 WL 2569653, at *7 (emphasis added, internal marks and citations omitted). None of the evidence cited by the Liquidators suggests that Feuer or Taylor owed fiduciary duties to PPVA, held a position at PPVA, or exerted any control over PPVA—let alone the requisite control to be considered insiders. *See id.* at *7, 17, 20 (holding that PPVA portfolio manager (Saks) and informal adviser (Katz) were not insiders). Indeed, nowhere in their brief do the Liquidators even attempt to argue that Feuer or Taylor exerted control over PPVA at any time. To the contrary, the Liquidators argue (also unconvincingly) the exact opposite, that the Beechwood Entities were "dominat[ed] and controll[ed] by Platinum." (Opp. at 36.)

Thus, the Court should rule (again) that Feuer and Taylor are not corporate insiders of PPVA. Additionally, as shown in Point V below, none of the Beechwood Entities was an alter ego of Platinum Management. Therefore, they are not corporate insiders of PPVA either.

B. The Adverse-Interest Exception Is Inapplicable.

The Liquidators do not dispute that the adverse-interest exception does not apply to the allegations related to the Golden Gate Oil transaction, the PEDEVCO transaction, the Implant Sciences transaction, the Northstar transaction, the Second Scheme Montsant transaction, or the March 2016 restructuring. (*See* Opp. at 42-49.) Accordingly, all the Beechwood Parties are entitled to summary judgment on the aiding and abetting fraud and breach of fiduciary duty claims brought in connection with each of those transactions.

The Liquidators do, however, maintain that the exception applies to four transactions listed in the SAC, which they term the "Black Elk Bond Subordination," the "Black Elk Bond Buyback," the "Nordlicht Side Letter," and the "Agera Sale." (Opp. at 39.) They are wrong.

In New York, the standard for establishing adverse interest is exceedingly high: "To come within the exception, the agent must have *totally abandoned* his principal's interests and be acting *entirely* for his own or another's purposes," not the corporation's. *Kirschner v. KPMG LLP*, 15 N.Y.3d 446, 466 (2010) (emphasis added, internal marks and citations omitted). "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.* at 468. Indeed, as this Court has emphasized, "New York law 'reserves 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.'" *In re Platinum*, 2019 WL 2569653, at *3 (quoting *Kirschner*, 15 N.Y.3d at 466-67).

Contrary to the Liquidators, *Conway v. Marcum & Kliegman LLP*, 176 A.D.3d 477 (1st Dep't 2019), does not help them. In *Conway*, the liquidators of several hedge funds brought an accounting-malpractice action against the funds' former auditor, alleging that the latter failed to uncover fraudulent activity at the funds. Holding that the adverse-interest exception applied, the court reasoned that the "mere continuation of a corporate entity does not *per se* constitute a benefit that precludes application" of the exception. *Id.* at 477-8. The court also concluded that merely "speculat[ing] about the benefits to be derived from the continued existence of the defrauded entity is inconsistent with the analysis of the adverse interest exception in *Kirschner*." *Id.* But here, no one is taking the position that the adverse-interest exception does not apply merely because PPVA was able to stay in business. Nor is anyone speculating about the potential benefits that PPVA could receive from its own continued existence. To the contrary, the Beechwood Parties' position—supported by contemporaneous emails and unrebutted witness testimony—is that each of the transactions at issue was designed to enable PPVA "to attract investors … and raise funds for corporate purposes." *Kirschner*, 15 N.Y.3d at 468. Those kinds of purposes preclude application of the exception.

On these principles, none of the four transactions identified by the Liquidators was a situation where the Platinum agent "totally abandoned" his principal's interests and acted "entirely" for his own purposes.

1. ***The Black Elk Bond Substitution***

The Liquidators focus on several aspects of the Black Elk transaction. They do not assert that the adverse-interest exception applies to allegations concerning the purported overvaluation of assets, nor do they contest that the vast majority of the damages they seek in connection with Black Elk concern its purported overvaluation. Accordingly, that aspect of the Liquidators' aiding and abetting claims is barred.

The allegations concerning the use of proceeds from the Renaissance Sale also do not warrant the adverse-interest exception. The Liquidators do not seriously dispute that according to contemporaneous emails, Nordlicht subjectively believed that the failure to pay back the Black Elk preferred shareholders would "be the end of the fund." (Liquid. 56.1 ¶ 147 (indiscriminately citing 121 non-responsive paragraphs of their 56.1 statement).[1] And they do not proffer anything beyond speculation to show that the consent solicitation was actually designed to subordinate PPVA's bond holdings to the equity interests of Platinum Management's friends and family. Instead, they nitpick around the edges of the Beechwood Parties' argument that PPVA benefited from the Renaissance Sale, while still conceding the salient points—namely, that (1) the value of the private equity subject to the put option ($20 million) exceeded the value of the debt held by PPVA ($18 million); and (2) the interest rate on the private equity shares accrued at a rate of 20%, which was higher than the 13.75% rate on the debt. (Opp. at 44; Liquid. Resp. 56.1 ¶ 142, ECF No. 546.) These facts, coupled with the fact that the residual debt would be at or near the top of the capital stack in the event of a bankruptcy, demonstrate that PPVA benefited from the transaction.

The Liquidators also do not dispute that the transaction was disclosed as a related-party transaction, nor do they offer any response to the argument that PPVA did not suffer any loss

[1] *Costello v. N.Y. State Nurses Ass'n*, 783 F. Supp. 2d 656, 661 n.5 (S.D.N.Y. 2011) (disregarding responses where plaintiff did not "specifically dispute" defendant's statements or supplied only "conclusory allegations, speculation or conjecture").

attributable to the Beechwood Parties in connection with the transaction—particularly in light of the fact that the fund engineered a short sale where it borrowed Black Elk bonds from PPBE, sold them short to BAM at prices close to par, and then covered the short at $93, profiting at the expense of Beechwood. Thus, the Liquidators have effectively conceded these points.

2. ***The Black Elk Bond Buyback***

The Liquidators' allegations related to the Montsant transaction and the Black Elk Bond Buyback also do not fall within the adverse-interest exception. The Liquidators do not dispute that a significant portion of the damages they claim in connection with Black Elk allegedly resulted from "inflated values reported by Platinum." (Mov. Br. at 20.) To the contrary, they double down on this allegation, arguing that Platinum and Beechwood worked to "boost" the market price for Black Elk bonds. (Opp. at 45.) But that is the very type of allegation relating to "overvaluations" and an "effort to maintain the façade of financial viability" that falls outside the adverse-interest exception.

The Liquidators also do not seriously dispute that, as shown by emails, Nordlicht wanted to purchase the bonds so he could satisfy the bond Indenture in connection with his effort to consolidate PPVA's offshore oil and gas assets. Instead, they rely on the bald assertion that "PPVA could have purchased any additional bonds they required on the open market for a substantially lower price, raising a disputed issue of fact as to whether the repurchase of Black Elk Bonds from Beechwood was truly necessary to effectuate the Northstar transaction." (Opp. at 40.) The Liquidators cite no documentary evidence for this proposition, which is belied by the fact that a liquid market for the Black Elk bonds did not exist, and PPVA needed roughly *half* of the $150 million Black Elk bonds outstanding to consummate the transaction.

The Liquidators do not respond to the Beechwood Parties' argument that the Black Elk notes were retired as part of the Northstar transaction, which benefited PPVA as a substantial equity holder of Black Elk. (Mov. Br. at 20.) Accordingly, the Liquidators have effectively conceded that point.

Finally, the Liquidators assert *ipse dixit* that "the Nordlicht Side Letter is the type of 'embezzlement and looting' to which the adverse interest exception applies." (Opp. at 46.) But they offer no evidence to support this point.

3. ***The Nordlicht Side Letter***

The Beechwood Parties proffered unrebutted witness testimony that the Nordlicht Side Letter was executed as part of an effort by Nordlicht to save PPVA. (*See* Mov. Br. at 23-24.) Nordlicht needed to be able to sell Implant Sciences, and needed BAM's assurance that it would not default the company. This uncontroverted testimony is corroborated by contemporaneous emails and documents, including those relied upon by the Liquidators, which all show that Nordlicht was actively trying to save PPVA by preventing any potential interference with the Implant sales process. (*Id.*, Bixter Decl. Ex. 49, at 17 of 18)[2] (showing "Use of Proceeds" from sale of Implant central to Nordlicht's survival plan for PPVA).) The Liquidators offer nothing but conclusory denial and innuendo in response. *See Geo-Grp. Commc'ns, Inc. v. Chopra*, 2018 WL 3632498, at *10 (S.D.N.Y. July 30, 2018) (plaintiff's conclusory denials of sworn testimony establishing consideration for disputed payments insufficient on summary judgment).

The Liquidators readily acknowledge that the Golden Gate Note Purchase Agreement provided BAM Admin with a put option and a Master Fund guarantee. The significance of these contractual provisions is that—Nordlicht Side Letter or no Nordlicht Side Letter—the Master Fund was obligated to pay off the Golden Gate loan. In their opening brief, the Beechwood Parties argued that, given the fact that PPVA was already on the hook for the Golden Gate loan,

[2] Because the pages of Ex. 49 are not numbered, citations are in reference to the total number of exhibit pages. Thus, the above citation refers to the 17th page of the 18-page exhibit.

the Nordlicht Side Letter could not be considered akin to "embezzlement" or "looting." Nordlicht was essentially promising BAM and BAM Admin something to which it was already entitled. The Liquidators offer no response to this argument. Accordingly, the Court should treat the claim as abandoned. *See In re Platinum-Beechwood Litig.*, 2019 WL 2569653, at *7 (Liquidators abandoned their unjust enrichment claim by failing to respond to Beechwood's arguments); *see also Lipton v. Cty. of Orange, NY*, 315 F. Supp. 2d 434, 446 (S.D.N.Y. 2004).

4. *The Agera Transaction*

Finally, the allegations related to Agera are also not subject to the adverse-interest exception for a host of reasons.

The Liquidators do not seriously dispute that the Agera Sale was motivated by PPVA's liquidity concerns. This fact is supported by the testimony of every relevant witness, including David Steinberg and Michael Katz, who are no longer parties to the action. (Liquid. Resp. 56.1 ¶¶ 234-39, 247-54, 263-71, 276-77.) Moreover, the testimony is corroborated by a number of contemporaneous emails. (*Id.* ¶¶ 240-47.) This record is simply devastating to the Liquidators' invocation of the exception, which is *their burden* on summary judgment. And their various attempts to cast dispersions on this undisputed record are not remotely sufficient to satisfy this "most narrow exception." *In re Platinum*, 2019 WL 2569653, at *3. Indeed, many of the Liquidators' arguments are simply irrelevant or baseless.

For example, the Liquidators' claim that Agera was "worth" more than $200 million, but only sold for $170 million, is unfounded and misleading. (Opp. at 47.) The formula for the purchase price of the Agera transaction was set forth in the Assignment of Notes and Liens on April 1, 2016 (not June, as the Liquidators would have it). (Liquid. Resp. 56.1 ¶ 258.) It provides:

> A purchase price equal to the product of (i) (a) the enterprise value of Agera Holdings LLC of US$208,400,000 less (b) all indebtedness of Agera Holdings LLC and each of its direct and indirect subsidiaries (collectively, the "Agera Group") plus (c) all cash on the consolidated balance sheet of the Agera Group multiplied by (ii) 0.95 (the "Purchase Price").

(*Id.*) The Liquidators have plainly conflated enterprise value ("worth") with equity value and failed to subtract Agera's net debt of $30 million. They cannot survive summary judgment by flubbing the math.

In addition to the $65 million *in cash* paid in connection with the transaction (Lipsius Decl. Ex. GGGG ¶ 38 & Ex. 33 (page 2 of 2)), the Liquidators' suggestion that the debt that PPVA and PPCO received was worthless is not borne out by discovery and is contrary to logic. To start, David Steinberg, who negotiated the deal on behalf of PPVA, testified that he believed each of these loans had value. (Liquid. Resp. 56.1 ¶¶ 248-51, 279-81.) Even if that were not the case, it is a fact that PPVA and PPCO benefited from receiving each of these loans. For example, PPCO owned roughly half of PGS. A portion of the debt exchanged in the Agera sale was the PPCO Note. Likewise, PPVA owned equity in each of the other portfolio companies and those companies had an obligation to repay the face value of debt prior to the equity having any value. This is a classic example of debt forgiveness. If any of these portfolio companies defaulted on these loans, it could potentially wipe out PPVA's equity interests. Thus, PPVA benefited as the primary equity holder in each of these companies. Moreover, the debt was contemporaneously determined to have significant value by Duff & Phelps, an undisputedly well-respected independent valuation firm. (*See* Lipsius Reply Dec. Exs. B & C; Ex. GGGG ¶ 36.)

Though the Liquidators speculate that PPVA could have sold the convertible note for cash to another buyer, they offer zero evidence that it could have done so in a time frame to provide the immediate liquidity that PPVA needed, or at all given the complexity of Agera's business as well as Cassidy's involvement. (*See* Liquid. Resp. 56.1 ¶ 231.)

Moreover, PPVA does not dispute that a significant portion of the cash consideration was paid pre-closing (Liquid. 56.1 ¶ 772) or that through pure inaction, the defendants could have let Beechwood keep Agera for a price of only $20 million. (Liquid. Resp. 56.1 ¶¶ 224, 227; Mov. Br. at 28.) The pre-closing liquidity Beechwood repeatedly provided to PPVA in connection with the Agera transaction allowed it to survive from April until the close of the Agera Sale in June.

The Liquidators' argument that Nordlicht was attempting to "persuade Marcos Katz, Michael Katz's father, to invest additional funds in PPVA," is nothing more than speculation. (Opp. at 47.) But if true, it would *help* the Beechwood Parties' position. It is hornbook law that "[s]o 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." *Kirschner*, 15 N.Y.3d at 468 (emphasis added).

And there is absolutely no evidence that anyone at Beechwood had any idea that Huberfeld was being investigated prior to his arrest in June 2016. Any suggestion by the Liquidators to the contrary—for which they have provided no support—is purely speculative and frivolous. Every witness with knowledge testified that the deal was motivated by PPVA's liquidity position and the pressure to close came from Platinum, not Beechwood. (Liquid. Resp. 56.1 ¶ 263.)

The fact that PPVA ultimately filed for bankruptcy is also irrelevant. "[T]he mere fact that a corporation is forced to file for bankruptcy does not determine whether its agents' conduct was, at the time it was committed, adverse to the company." *Kirschner*, 15 N.Y.3d at 468. Indeed, "[e]ven 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." *Id.* When considering whether an agent's acts were a fraud on the principal prompted by "selfish" motives, it "is immaterial that it has turned out that it would have been better" for the agent to have acted differently. *Id.*

C. The Sole-Actor Rule Applies to Platinum Management.

Even if the adverse-interest exception were applicable, however, the Beechwood Parties would still be entitled to summary judgment, because the sole-actor rule also applies in this case, and the "innocent insider" corollary to the rule does not.

The Liquidators do not seriously dispute that the sole-actor rule applies here. Indeed, the authority they themselves rely upon perfectly illustrates why it does. As the court explained in *Breeden v. Kirkpatrick & Lockhart, LLP*, 268 B.R. 704, 710 (S.D.N.Y. 2001) (cited in Opp. at 49), the *Wagoner* rule imputes the misconduct of corrupt management to the corporation whenever management dominates the company—such as in the sole-shareholder context—or when the corporation *delegates all authority over a portion of its business to a particular manager or managers. Id.* (emphasis added). Moreover, not all members of management are relevant for the purposes of applying the rule. *Id.* Instead, "[o]nly management that exercises total control over the corporation—or that exercises total control *over the type of transactions involved in the particular fraudulent activity at issue*—are relevant." *Id.* (emphasis added).

Here, it is undisputed that Platinum Management served as PPVA's general partner and investment manager and was vested with sole decision-making authority and responsibility for managing it. (Liquid. Resp. 56.1 ¶¶ 2, 7, 10.) Nordlicht, Levy, and Saks served at various times as Platinum Management's Chief Investment Officer or Co-Chief. (*Id.* ¶ 18.) All investment and trading decisions made by Platinum Management were ultimately based on the judgment of these individuals (even if, according to the Liquidators, they were subject to the "full veto power" of Landesman (*id.*)). The Liquidators brought claims against each of these individuals in the SAC. And they do not identify by name or implication any non-defendant employees or officers of Platinum Management that exercised any sort of control over Platinum's investments.

The Liquidators argue half-heartedly that "[t]his case bears no resemblance to the types of cases where the sole actor rule applies" because PPVA was not a "closely held corporation with unity between a small group of managers and owners." (Opp. at 49-50.) But they cite no authority that the sole-actor rule applies only to closely held corporations or that there must be unity between ownership and management for the rule to apply. Indeed, the sole-actor exception has been applied to limited partnerships. *See Grassmueck v. Am. Shorthorn Ass'n*, 402 F.3d 833, 838–42 (8th Cir. 2005) (invoking sole-actor doctrine and imputing knowledge of fund's general partner to the fund). And it has been invoked in connection with hedge funds far larger than PPVA. *See In re Bernard L. Madoff Inv. Sec. LLC.*, 721 F.3d 54, 64-65 & n.14 (2d Cir. 2013) (invoking the sole-actor exception in connection with fraud at the world's largest hedge fund and concluding that "[i]t is not possible … to separate Madoff himself and his scheme"). Moreover, the unity between managers and owners is incontrovertible: Nordlicht and Landesman collectively owned 35% of the general partner, and the Mark Nordlicht Grantor Trust, for which Nordlicht was trustee, owned the balance. (*See* Liquid. 56.1 ¶¶ 34, 40.) And the owners of the general partner and their families were some of the biggest investors in PPVA's limited partnership interests. (*See*, *e.g.*, Bixter Decl. Exs. 41, 70.)

Finally, the other authorities cited by the Liquidators offer no support for the vague proposition that "[t]his case bears no resemblance to the types of cases where the sole actor rule applies." (Opp. at 49.) Both cases represent fairly obvious applications of the "innocent-insider" exception, a corollary to the sole-actor rule, which is discussed in Point I.D below.[3]

[3] *In re CBI Holding Co., Inc.*, 529 F.3d 432 (2d Cir. 2008), for example, involved a fraud perpetrated by management on the company's lenders. *Id.* at 439-40. One of those lenders was an insider that had substantial ability to control the corporation. *See id.* at 439. Among other

D. The Innocent-Insider Exception Does Not Apply.

The Liquidators argue that that sole-actor rule is inapplicable here because the Feeder Funds, which held limited-partnership interests in PPVA, had representatives that "could take action on their behalf to stop fraudulent conduct from occurring." (Opp. at 51.) In support, the Liquidators identify two representatives—David Bree and Don Seymour (the "DMS Directors")—who they claim (1) had oversight authority over the Offshore Feeder Funds, (2) may have had the ability to terminate Platinum Management as investment manager for the Offshore Feeder Funds, and (3) demonstrated the type of control they could wield over Platinum Management, resigning following Huberfeld's arrest in June 2016.[4] These contentions are supported by a single affidavit from Seymour.

The very same cases that the Liquidators cite establish the insufficiency of this proof. *See, e.g.*, *In re 1031 Tax Grp., LLC*, 420 B.R. 178, 206 (Bankr. S.D.N.Y. 2009) (holding that allegations regarding the ability of CEO and another officer to stop alleged fraud were insufficient to nudge the innocent-insider exception "across the line from conceivable to plausible"); *In re Lehr Constr. Corp.*, 528 B.R. 598, 613 (Bankr. S.D.N.Y. 2015), *aff'd*, 551 B.R. 732 (S.D.N.Y. 2016), *aff'd*, 666 F. App'x 66 (2d Cir. 2016) (after-the-fact assertions that

things, it owned 48% of the company; had the right to select 2/5 of the company's board; had the right to select 1/3 of the audit committee; and had the right to take control of the company in the event of a "control triggering event," including breach of the loan covenants at issue. *Id.* Similarly, *Cobalt Multifamily Inv'rs I, LLC v. Shapiro*, 2009 WL 2058530, at *2, 10 (S.D.N.Y. July 15, 2009), involved a determination at the *pleading stage* that the plaintiff had adequately alleged that more than 300 innocent shareholders had express authority under the shareholder agreement to stop the alleged fraud. For the reasons discussed below, the Liquidators have failed to satisfy their burden of establishing that the innocent-insider exception applies here.

[4] The Liquidators assert that the DMS Directors had the authority to terminate Nordlicht, but there is no such indication in the document they cite. (*See* Bixter Decl. Ex. 4.) Moreover, Seymour stated that he would need to consult counsel to confirm his authority to terminate the IMA on behalf of the Offshore Fund. And the Liquidators have not submitted an affirmation from counsel agreeing with that position. *Breeden*, 268 B.R. at 713.

controlling shareholder and de facto CEO would have objected to criminal scheme if he had known about it were insufficient to invoke innocent-insider exception).[5]

As relevant to the allegations against Beechwood, Seymour asserted that if the DMS Directors were "aware of the interconnected nature of Platinum and Beechwood" they "would have made an inquiry regarding these transactions, and to the extent that we believed wrong doing had occurred, would have taken those actions, within our powers, which we believed to be in the best interests of the Feeder Funds as investors … of the Master Fund." (Seymour Decl. ¶ 7.) Not only is that statement equivocal (at best) regarding the steps Seymour could have taken potentially to stop the fraud, but the steps he did identify are exactly the types that New York courts have previously found insufficient to invoke the innocent-insider exception. *See Bullmore v. Ernst & Young Cayman Islands*, 20 Misc. 3d 667, 673 (Sup. Ct. N.Y. Co. 2008) (ruling that Seymour and his co-director were not innocent insiders in virtually identical circumstances); *Breeden*, 268 B.R. at 713-14 (holding that "the stated intentions of these innocent insiders that they would have informed a third-party, such as the SEC, amount to nothing more than mere speculation and conjecture" and "those who resigned did so because of their belief that they were powerless to effect the changes necessary to stop the fraud").

Indeed, Seymour's contention that, if informed of the interconnected nature of Platinum and Beechwood, he may have taken some action to stop it, is not only speculative, but inconsistent with his own behavior. When Nordlicht disclosed his indirect ownership interest in

[5] The Liquidators also cite *In re CBI Holding Co., Inc.*, 311 B.R. 350 (S.D.N.Y. 2004), arguing that the rationale behind the innocent-insider exception is that, where only some members of management are guilty of misconduct, it would be unfair to punish non-culpable shareholders. But the court expressly rejected that rationale in the next paragraph of the opinion, concluding that "misconduct by those given authority to make decisions on behalf of a company should be imputed to the company even if innocent members of management could and would have prevented the fraud had they been aware of it." *Id.* at 372.

Beechwood on multiple investor calls in 2014 (Liquid. Resp. 56.1 ¶¶ 47-52, 56-62), the DMS Directors did nothing. When Nordlicht disclosed that Platinum's principals owned approximately 50% of the Beechwood entities in 2014 (*id.*), the DMS Directors did nothing. When Nordlicht disclosed that Beechwood and Platinum had transacted and were likely going to transact in the future (*id.*), the DMS Directors did nothing. Indeed, even after Huberfeld's arrest, the DMS Directors did not go to Cayman Islands Monetary Authority (which supervised Beechwood Re), nor tell investors, nor terminate the IMA. Instead, they resigned. Put simply, the DMS Directors, to the extent that they can even be considered insiders, were both "impotent and irrelevant for the purposes of applying the *Wagoner* rule." *Breeden*, 268 B.R. at 714.

II. The Liquidators Abandoned Their Claims For Aiding And Abetting Fraud Against All Of The Beechwood Parties.

In addition to the grounds for holding that the *Wagoner* and *in pari delicto* doctrines apply to all the aiding and abetting claims, there is a reason to reject the aiding and abetting fraud claims on the merits: The Liquidators have abandoned them.

In their opening brief, the Beechwood Parties argued for nineteen pages, transaction by transaction, that the record does not support the Liquidators' claims for aiding and abetting fraud. (Mov. Br. at 9-28.) In particular, the Beechwood Parties proffered evidence of investor calls (belatedly produced by PPVA) in which Nordlicht disclosed that (1) he had "partial ownership" in Beechwood (Liquid. Resp. 56.1 ¶ 49); (2) Platinum's principals owned 50% of Beechwood (*id.* ¶ 56); (3) he was involved with Beechwood "as an advisor" (*id.* ¶ 48); (4) Platinum had helped Beechwood on things like "financial reporting" (*id.* ¶ 60); (5) Levy had served as CIO at Beechwood (*id.* ¶ 58); and (6) given the respective mandates of the two businesses, he hoped Beechwood would be able to co-invest or purchase certain positions from PPVA to help the fund "from a liquidity standpoint" and make the fund "more liquid throughout the portfolio." (*Id.* ¶¶ 51-52, Ex. L Tr. 34:9-12, 35:14-18.) Likewise, the Beechwood Parties proffered PPVA's audited financials, showing that Beechwood was repeatedly disclosed to Platinum's investors as a related party of Platinum Management—including in connection with the very transactions that form the core of the Liquidators' complaint. (*Id.* ¶ 70.)

The Liquidators fail to respond to any of this evidence, even though it is devastating to their fraud case. (*See* Opp. at 34-62.) Indeed, the Liquidators dedicate only two sentences of their 74-page brief to those claims, arguing that "the Beechwood Movants [are] liable for aiding and abetting fraud" because they "regularly entered into transactions with PPVA, orchestrated by Platinum Management/Beechwood employees, with actual knowledge that such transactions would permit Platinum Management and its owners to perpetuate its overvaluation scheme and later divert PPVA's remaining valuable assets to Beechwood as the criminal investigations threatened to take down the Platinum enterprise." (Opp. at 58.) These conclusory assertions are not enough to keep those claims alive. *See Lipton*, 315 F. Supp. 2d at 446.

Indeed, the Liquidators' failure to engage with Beechwood's arguments, while troubling, is not surprising. The foundation of their aiding and abetting argument against Feuer, Taylor, and Narain has always been their purported knowledge of the "true ownership" of Beechwood. (Lipsius Reply Decl. Ex. A, June 4, 2019 Hr'g Tr. at 14:13-14 ("This is critical. [Feuer and Taylor] have actual knowledge of the true ownership of Beechwood"); 15:5-6 ("[Narain] understood and knew, as we've alleged, the true ownership of Beechwood on that side of Platinum.").) But the premise underlying this position—the Platinum Defendants' purported failure to disclose their relationship with Beechwood to gatekeepers and investors—has been thoroughly disproven. Accordingly, the Beechwood Parties should be granted summary judgment on the claims for aiding and abetting fraud.

III. The Beechwood Parties Are Entitled to Summary Judgment On The Liquidators' Claim For Aiding And Abetting Breach Of Fiduciary Duty.

The claim for aiding and abetting breach of fiduciary duty should also be rejected on the merits. The Liquidators fail to respond to any of the Beechwood Parties' arguments with respect to the Golden Gate Oil, PEDEVCO, Implant Sciences, Northstar, Second Scheme Montsant, and March 2016 restructuring transactions (Mov. Br. at 10-15, 18-21), contending only that they were examples of "feigned liquidity" (Opp. at 57-58). The Court should therefore treat that portion of the Liquidators' claim as abandoned, s*ee Lipton*, 315 F. Supp. 2d at 446, or alternatively rule that the Liquidators have failed to carry their burden of proof on each element of their claim in connection with each of those transactions. As for the Black Elk Bond Subordination, the Black Elk Bond Buyback, the Nordlicht Side Letter, and the Agera Sale, the Liquidators also cannot carry their burden of proof.

The Black Elk Bond Subordination. The Liquidators do not respond to the argument that Feuer or Taylor lacked the requisite knowledge and failed to assist in the Black Elk Bond Subordination. Indeed, they offer no actual evidence to establish that, at the time of the subordination, they (1) were even aware that BAM clients had purchased Black Elk bonds from the Master Fund; (2) knew anything about Black Elk's operations, including the Renaissance Sale; (3) knew about the consent solicitation; (4) knew how BAM's clients voted or intended to vote on the consent solicitation; (5) knew how Black Elk planned to use the proceeds of the Renaissance Sale; or (6) knew how the Master Fund distributed the proceeds of the Renaissance Sale. (Liquid. Resp. 56.1 ¶¶ 148-49 (offering no point-by-point rebuttal but merely listing dozens of non-responsive paragraphs of their own 56.1 statement).) Similarly, the Liquidators do not dispute that BAM II had not been formed at the time of the alleged subordination.

The Black Elk Bond Buyback. The Liquidators fail to respond to the Beechwood Parties' arguments regarding loss causation and damages, conceding that (1) they cannot satisfy their burden of establishing evidence of a loss, given that Montsant has not paid back a penny of the $35.5 million that it borrowed and still holds all of the underlying collateral; and (2) PPVA profited at Beechwood's expense in connection with the Buyback, borrowing Black Elk bonds from PPBE, selling them short to BAM at prices close to par, and then covering the short at $93. In doing so, PPVA profited at the expense of Beechwood.

The Nordlicht Side Letter. The Liquidators have fundamentally failed to prove *any damages* with respect to the Side Letter, an essential element of their claim. They do not dispute that the Nordlicht Side Letter has never been enforced—indeed, the purpose of their declaratory judgment claims is to keep it from being enforced—or that their expert was unable to identify any damages. And they do not seriously contend that Beechwood's clients ever received anything pursuant to the terms of the Nordlicht Side Letter. In their response and counterstatement to the Beechwood Parties' 56.1 statement, the only "payment" they can cite is the assignment of "interests in the Golden Gate loan to PGS in connection with the January 2017 redemption of PGS' interests in AGH Parent LLC." (Liquid. Resp. 56.1 ¶ 191.) This bears no apparent relationship to the Nordlicht Side Letter and none is identified in the Liquidators' brief.[6] Moreover, the Liquidators do not dispute that there are no allegations connecting Taylor to the Nordlicht Side Letter, or that the agreement predates Narain's arrival at BAM.

The Agera Sale. As a preliminary matter, the Liquidators' arguments that "[i]t was clear that a decision needed to be made concerning which part of the Platinum/Beechwood enterprise would survive," and that "[t]he investigation into the COBA Scheme and Platinum Management provided the answer: Beechwood would survive and would be granted Platinum Management's valuable assets and relieved of Platinum Management's bad debts" (Opp. at 55) are wholly

[6] The only theory of damages that they sought to advance during discovery related to the purported overvaluation of Golden Gate. And, as discussed above, the adverse-interest exception does not apply to allegations concerning the purported overvaluation of assets (*see* Opp. at 42-49). Accordingly, the *Wagoner* and *in pari delicto* doctrines apply and summary judgment should be granted on the aiding and abetting claims related to the Nordlicht Side Letter.

unsupported. Again, the record is clear that the Agera transaction, including the two repurchase agreements, was central to Nordlicht's efforts to save the fund. As Steinberg testified, "getting cash from the Agera sale ... would have fulfilled one of the objectives," and "getting debt reduction would have [fulfilled] the other objective." (Liquid. Resp. 56.1 ¶ 248.) The Liquidators' own documents show that these two objectives were central to Nordlicht's plan for the fund (Bixter Decl. Ex. 49), and the Agera transaction fulfilled both objectives.

Acknowledging that the Agera transaction was not in fact a "looting," the JOLs have effectively retreated to the position that the transaction was not fair. But even if the fairness test preferred by the Liquidators was the standard, that test was not met here. First, as noted above, the Liquidators' argument regarding the purchase price is wrong because they conflate enterprise value with equity value and fail to subtract net debt. Second, PPVA benefited from debt reduction. Third, PPVA had every opportunity to hire outside counsel and seek a fairness opinion, but, according to Steinberg, could not afford one without first receiving additional liquidity. Fourth, the terms of any payments to Cassidy or Gerzberg following the Agera Sale were between PPVA and those individuals. Beechwood had nothing to do with them. Even if the Liquidators could raise a triable issue as to fairness, they have proffered simply no evidence that any of the Beechwood Parties had actual knowledge that Nordlicht was breaching his fiduciary duties in the transaction that offered so many ostensible benefits for the fund.

IV. Summary Judgment Is Appropriate On The Alter Ego Allegations.

Although issues of fact may preclude summary judgment for BAM and BAM Admin, the other Beechwood Entities are all entitled to summary judgment on the alter ego claims. The time for group pleading is over, and the Liquidators do not proffer evidence that the insurance and reinsurance entities were involved in the transactions at issue (as opposed to trusts established for the benefit of CNO, SHIP, and ULICO). (*See* Liquid. 56.1 ¶ 359.)

V. BAM Admin Is Entitled To Summary Judgment On The Declaratory Judgment Claims.

The Liquidators argue that the Nordlicht Side Letter and the Master Security Guaranty are void and unenforceable because performance of these contracts would practice fraud or deception on a third party. But those allegations have not been borne out by discovery. One not need look any further than the Liquidators' own exhibits to see that both transactions arose out of Nordlicht's desperate attempt to save PPVA in 2016. (*See* Bixter Decl. Ex. 49, at 8, 13-17 of 18) (restructuring of Beechwood debt and use of proceeds from sale of Implant would provide "enough capital" to fund present commitments "plus retain enough cash to fund future investments"); Ex. 68 ("It all starts with just making sure our flagship ppva is healthy again . . . .").) There is simply no evidence that either of those transactions was motivated by fraud. And the Liquidators do not seriously dispute the relevant facts—namely, that at the time the Nordlicht Side Letter was executed, PPVA was already obligated to pay the Golden Gate loan pursuant to the put option and the guarantee (Liquid. Resp. 56.1 ¶ 105), and that PPVA achieved many of the goals set forth in Exhibit 49 when it entered into the Master Security Guaranty, including lower interest rates, deferred interest payments, extended maturities, and the elimination of various encumbrances. (*Id.* ¶¶ 195-216.) Accordingly, summary judgment should be entered against the Liquidators on those claims.

CONCLUSION

For the reasons set forth above and all prior submissions, the Beechwood Parties respectfully request that the Court enter summary judgment in their favor and dismiss with prejudice the Liquidators' remaining claims.

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