UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE PLATINUM-BEECHWOOD LITIGATION _____	Master Docket 1:18-cv-06658-JSR
MARTIN TROTT and CHRISTOPHER SMITH, as Joint Official Liquidators and Foreign Representatives of PLATINUM PARTNERS VALUE ARBITRAGE FUND L.P. (in OFFICIAL LIQUIDATION) and PLATINUM PARTNERS VALUE ARBITRAGE FUND L.P. (in OFFICIAL LIQUIDATION), Plaintiffs, v. PLATINUM MANAGEMENT (NY) LLC, et al., Defendants.	Case 1:18-cv-10936-JSR **DECLARATION OF IRA S. LIPSIUS IN FURHTER SUPPORT OF THE BEECHWOOD PARTIES' MOTION FOR SUMMARY JUDGMENT**

Ira S. Lipsius declares the following under the penalty of perjury:

1. I am a partner at the law firm of Lipsius-Benhaim Law, LLP, and counsel for B Asset Manager LP, B Asset Manager II LP, BAM Administrative Services, LLC, Beechwood Re Investments LLC, Beechwood Re Holdings, Inc., Beechwood Bermuda International Ltd., Mark Feuer, Scott Taylor, and Dhruv Narain (the "Beechwood Parties").

2. I submit this declaration in further support of the Beechwood Parties' motion for summary judgment in this action.

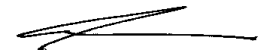
3. Attached hereto as Exhibit A is a true and accurate transcript of a hearing held before this Court on June 4, 2019.

4. Attached hereto as Exhibit B is the expert report by Dhruv Narain dated December 16, 2019 pursuant to Fed. R. Civ. P. 26(a)(2)(C).

5. Attached hereto as Exhibit C is a Duff & Phelps report dated April 14, 2016, titled "B Asset Manager, LP Estimation of a Fair Value Range for Certain Debt Investments as of March 31, 2016."

Dated: Kew Gardens, New York
March 17, 2020

LIPSIUS-BENHAIM LAW, LLP



Ira S. Lipsius

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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In re:

PLATINUM-BEECHWOOD LITIGATION 18-CV-6658 (JSR)

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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. 19-CV-10936 (JSR)

PLATINUM MANAGEMENT (NY) LLC, et al.,
Defendants.

Argument
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New York, N.Y.
June 4, 2019
10:47 a.m.

Before:

HON. JED S. RAKOFF

District Judge

APPEARANCES

HOLLAND & KNIGHT LLP
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Attorney for Defendant Estate of Uri Landesman
BY: ERIC R. BRESLIN

(Case called)

THE DEPUTY CLERK: Will the parties please identify themselves for the record.

MR. BROWNLEE: Good morning, your Honor. John Brownlee, Barbara Parlin, Elliot Magruder and Warren Gluck on behalf of plaintiffs.

THE COURT: Good morning.

MR. LAUER: Good morning, your Honor. Eliot Lauer and Gabriel Hertzberg, Curtis, Mallet-Prevost, Colt & Mosle LLP for David Bodner.

MR. GLICK: Good morning, your Honor. Stuart Glick, Thompson & Knight on behalf of defendant Michael Katz.

THE COURT: Good morning.

MR. LIPSIUS: Good morning, your Honor. Ira Lipsius of Lipsius-Benhaim Law on behalf of Beechwood defendants.

MR. CHASE: Good morning, your Honor. Don Chase with Morrison Cohen for the Huberfeld Family Foundation with Dan Isaacs.

THE COURT: Good morning.

MS. DOHERTY: Therese Doherty and Lisa Marie Collins of Mintz Levin on behalf of defendants Kevin Cassidy and Michael Nordlicht.

MR. GELBER: Good morning, your Honor. Lawrence R. Gelber, attorney at law, on behalf of Kevin Cassidy and Michael Nordlicht.

MR. REED: Good morning, your Honor. Kendal Reed and Michael Korik on behalf of PB Investment Holdings, Limited.

MR. OSTROVE: Good morning, your Honor. Elliot Ostrove of Epstein Ostrove on behalf of Seth Gerszberg.

THE COURT: Good morning.

All right. So I know that the question that is foremost on your minds right now is can you properly bill for the fire drill we just encountered.

Because of the drill, I think I'm going to ask everyone to narrow their oral remarks to things that are not in their papers that they felt they wanted to say and either for one reason or another had not made it to their papers but they felt needed to be brought to my attention. I'm sorry to limit you in that way but we are now almost an hour late.

So, I guess there is no clear order but I think that probably the best way to proceed is first with the arguments that everyone joined in, or virtually everyone, on the *in pari delicto Wagoner* rule issue. So who from the moving party wants to address that?

MR. GLICK: Your Honor, Stuart Glick, Thompson & Knight. I can start with that, your Honor.

THE COURT: Why don't you go to the rostrum, please.

MR. GLICK: Yes, your Honor.

In keeping in mind your Honor's directive, I believe we've covered most of our issues in the papers we've submitted.

Just very summarily what I would remark is that we represent the grandson of two significant investors. He was sued for allegedly aiding and abetting a breach of a fiduciary duty from Agera Energy. When you separate the wheat from the chaff, what you're left with here is that he was the grandson of investors. He sent an e-mail on March 13, 2016, which is Exhibit 82, paragraph 608 of the second amended complaint, in which he made a suggestion that Agera Energy be sold to an insider from one the oil and gas sector. That was his reference to insiders. Nothing nefarious as the plaintiffs try to make it out to be in the complaint. And he said the purpose was to free up cash to invest in the oil and gas sector with a much higher multiple upside than the energy retail sector that Agera was in. That was it. And he said the price should be at an above-industry average for -- with a forward looking multiple.

So there's nothing wrong with what he was suggesting. He made a suggestion representing significant investors. And as we know from the second amended the complaint, the plaintiff -- the Platinum defendants, PPVA, promptly ignored his suggestion. And in June they sold Agera not to an insider in the oil and gas sector but to an entity controlled by the Platinum defendants and by certain Beechwood plaintiffs. But they sold it at a price that netted $170 million with cash of roughly $55 million. So there was some benefit.

What's equally important, your Honor, what I just want

to stress is what's not alleged in the complaint against my client. It's not alleged that he's a board member, a general partner, a shareholder, a decision maker, an officer, a director, an employee or a person with sufficient authority to dictate corporate policy and the disposition of assets, nor were his grandparents. There is no allegation to that.

It's not alleged that my client ever received any compensation, salary, fee, bonus, distributions, profits, payments, or any remuneration of any type whatsoever. It's not alleged that he participated in any theft, looting or embezzlement. It's not alleged that he had any actual knowledge of any wrongdoing by the Platinum defendants or anyone else who was actually sued for fiduciary duty breaches. And it's also not alleged with any specificity that any harm from his, what I would call, harmless suggestion was the direct and proximate cause of the Platinum defendants PPVA ignoring his advice and selling it to an insider.

So that's where we get to the *in pari delicto* and *Wagoner* rule. I don't think there's any argument from the plaintiffs that the rule is applicable but they're saying there's exceptions to the rule. First, they're saying they argue an insider exception and they try to argue it in a rather unique way saying not only should we look at the person but also the person as an alter ego. In my situation, as I said, he had absolutely no role and he had no authority to dictate

corporate policy or the disposition of assets. So he wasn't an insider.

It's unclear from the papers but to the extent they're trying to argue that his elderly grandparents were insiders, there are allegations that they had the ability to dictate corporate policy or the disposition of assets.

So, again, he's not an insider. And that's assuming the insider exception applies in New York. The law is a little unclear but I don't think we have to waste time arguing it because he clearly wasn't an insider.

They also argue the adverse interest exception, essentially arguing that this activity led to the ultimate downfall of PPVA and it's bankruptcy. But that's not the test. The test has to be that the principals totally abandoned PPVA's interests. And the facts show that didn't happen here. We know that there was a purchase price of 170 million and 55 million in cash. So it wasn't totally abandoned. We know that that there wasn't and outright theft, looting, or embezzlement. And we know that even if the company ultimately went into bankruptcy due to the Agera situation and others, there was benefit from the cash received and liquidity obtained to survive.

So, again, the adverse interest exception simply doesn't apply on the facts here, which gets to the sole actor rule which is an exception to the adverse interest exception.

And where you have, as you have here from their allegations that the Platinum defendants and PPVA was essentially one entity, that they totally dominated the business and management, the adverse interest exception doesn't even apply.

So for someone like my client who was simply the grandson of investors who was trying to help out his grandparents was dragged into this, they should not be permitted to sue him as a third party.

THE COURT: All right. So before we hear from other defense counsel on this specific aspect of the *Wagoner* rule let me her from plaintiffs' counsel.

MR. BROWNLEE: Thank you, your Honor. Good morning.

With regard to Mr. Katz, I think a couple of principles. I think this Court has made clear that the *in pari delicto* and *Wagoner* rules do not apply to insiders.

THE COURT: He's not an insider says your adversary.

MR. BROWNLEE: Here's our understanding and here's what's been alleged in the complaint.

That Mr. Marco Katz, grandfather of Michael Katz, was a significant investor in PPVA. He came to them for redemption. He wanted his money back. They couldn't do it. So in exchange for that they gave him an opportunity to exercise his power, his control that he had over them by placing either himself or someone else as an insider into the company. And he picked his grandson. And so at that moment,

as the *Refco* cases talk about, they say a controlling shareholder forced the company to act in his interest, that that is an insider for the *in pari delicto* analysis. So he stood in his grandfather's shoes at that moment with all the power and the ability to control what happened inside that company.

So then he sends this e-mail, no. 82, and it's not a suggestion from him. I think it's important to look at the context of how he's sending it. He is the grandson of the guy that they owe a bunch of money to.

And what is he saying in that e-mail? We should sell this and we should do it to an insider. That's specifically what he says. And in the e-mail he says strategic buyers are wiser than in times past. Unlike the potential insider, major sophisticated buyers have stopped trading books on RCEs and the like.

So he's now putting it out there. It's not a suggestion from a third party as in the traditional *in pari delicto* where it's an auditor or a lawyer or something. This is an insider with the power and the ability to control. He says let's do this inside deal.

The e-mail traffic then continues. Eventually that insider becomes defined as the Beechwood consortium which, as the Court is well aware, Beechwood is the entity that was set up by the Platinum defendants to help mask or disguise the

fraud that they were committing. And the Bodner e-mail that we talked about in March certainly lays out the purpose behind Beechwood.

So now you've got the insider transaction that's been defined as the Beechwood consortium. And ultimately that's what occurs. And to the tune of upward bounds of three hundred, somewhere between there, around there, was directly taken from PPVA.

So as far as Michael Katz being an insider, we think we've pled sufficient and the evidence supports that clearly from the e-mail traffic as well.

With regard to adverse interest, I think it's important for the Court to remember that it is true that this 50 million came in, but it was quickly looted out. And at the end of the day, from all the activity in the criminal -- not criminal but the fraud that went on inside this entity, you have a deficit of upwards of $300 million where at one point it was valued at 800.

So from an adverse interest we think we've satisfied that as well. Again, we don't think we get there with Mr. Katz. We think he was a classic insider, certainly not a third party as defined in the traditional ways. And we satisfied that.

THE COURT: Let me go back to counsel for Mr. Katz.

MR. GLICK: I think what's important here, your Honor,

is language. The language that's actually in the second amended complaint, not the language we just heard from counsel. The language in the second amended complaint, paragraph 125 says, "Marco Katz was offered the opportunity to appoint a representative to oversee his interests." That's 125.

Nothing about appointing an insider in the company. That's never alleged. And they double down on that in paragraph 182. Where it says at the end, "In March 2016 Marco Katz was permitted to appoint Michael Katz at Platinum Management to directly oversee his investment."

Again, not an insiders. This was an elderly grandfather who was sick and a grandmother and they agreed that he could oversee the interests. Nothing about him being appointed as an insider. That's conclusionary which should be ignored. And if we go through the rest of the complaint there's actually nothing said that he actually did other than really sending this e-mail. And the e-mail is important too. Because the way it begins is: "Mark, after thinking about this for a few days I would like to share some thoughts on Agera and a potential sale to an insider." But then he goes on to state, "Having insider knowledge, expertise in the oil and gas sector increases the handicap for success."

This wasn't a demand and we know it wasn't a demand showing control because they promptly ignored it. They didn't sell it to somebody who was an insider and had expertise in the

oil and gas sector. They sold it to Platinum defendants and some Beechwood defendants.

My client never said that. So to say he had authority or his grandfather had authority, obviously, the authority was not sufficient to get what he had suggested. They went a completely different route. And in the 40 paragraphs from 630 to 672 where they describe the Agera sale, there is nothing specific that my client had anything to do with it as they allege.

So the idea that he was appointed as an insider is belied by the plain language of the complaint we have before us.

THE COURT: All right.

Let's turn to other defense counsel who want to be heard on the *Wagoner* rule.

MR. LIPSIUS: Keeping in mind the Court's directive, I believe we fairly stated it well in our briefing but I want to raise a few issues and I'll keep it very succinct, at least I'll attempt to do that as well as an attorney can.

I would like to break this into -- I'm not going to go into *in pari delicto*, whether he complies to it, an insider. The Court is aware of all the briefing on that, the cases on that. I'm going to leave that to the Court to decide based on the case law, and what's been presented. And the application of the PHS case, I'm not going to address that at all. I'll

leave that to the Court.

I just want to focus on one aspect and that is three individuals Mark Feuer, Scott Taylor and Dhruv Narain. If one goes through the pleadings, one does not see any direct allegation and there is nothing there that they were directly involved as insiders. There are claims of Beechwood and those that we've refuted and listed in the briefing.

But what did these three individuals actually do in controlling PPVA. And there is no control that they had in PPVA. And that is really what it comes down to is these three individuals, all the reasons everyone should be dismissed. I just wanted the Court to take careful note on these three individuals.

As I said, I'm going to keep it very succinct.

Can I go into any of the other issues at this time even though the Court asked for us first to address the *Wagoner* and *in pari delicto* matters?

THE COURT: I'm sorry. Go ahead.

MR. LIPSIUS: Can I address some of the other issues other than the *Wagoner* and *in pari delicto* at this time or I should hold off?

THE COURT: No I wanted to limit it to *Wagoner* at this time. We'll come back to other issues later.

MR. LIPSIUS: So that is merely what I wanted to say.

THE COURT: OK. Very good.

MR. BROWNLEE: Very briefly, your Honor, for -- with regard to Beechwood defendants Feuer, Taylor and Narain. Taylor and Feuer helped found Beechwood. And the evidence that we presented in our pleadings was clear that the purpose behind Beechwood, of course, was to help disguise the fraud in Platinum. And so the pleadings make clear that Mr. Feuer and Mr. Taylor founded it. They were the public face of Beechwood. They owned common stock in Beechwood, had managerial authority over Platinum's -- over Beechwood. They were directly involved in the day-to-day conduct that comprised the first and second schemes as alleged in the complaint. They had actual knowledge.

This is critical. They have actual knowledge of the true ownership of Beechwood, which Mr. Bodner in his e-mail makes clear that had that come to light the whole thing could have been exposed at that time.

Mr. Feuer, in fact, signed the Nordlicht side letter, which I think this Court has already addressed in its prior decision. And so I think with Mr. Feuer and Mr. Taylor, classic insiders.

With Mr. Narain, he came in a little bit later. I believe the evidence is he came in in January of 2016 after the Nordlicht side letter. So his, if you tend to look at *in pari delicto* as a series of circles, who is in it as it broadens, Mr. Narain certainly is on one of the outer ones due to the

fact that he just came in a little bit later.

That being said, he was an active participant in the Monsant transaction, the master guarantee that the Court has referenced. He certainly worked with insiders, as we believe. And, again, understood and knew, as we've alleged, the true ownership of Beechwood on that side of Platinum.

So we think that -- again, we concede Taylor and Feuer, from our perspective, is a little bit easier than Narain, but we think that he comes inside one of these circles; perhaps narrowly but inside. Thank you, Judge.

THE COURT: Thank you.

Response.

MR. LIPSIUS: With everything said there may have been shown signs of control of Beechwood. There are no signs of these individuals and no indication whatsoever that they had any control over PPVA. And these are separate entities. We have corporate entities. We have individuals.

So though the Beechwood defendants, they may assert, had certain control, and we challenge that and that's in our papers, the individuals did not have any control and only their control was through the Beechwood entity. Thank you.

THE COURT: All right. Anyone else want to be heard on the *Wagoner*?

MS. DOHERTY: Good morning, your Honor. On behalf of defendants Kevin Cassidy and Michael Nordlicht.

Similar to Mr. Katz, both Mr. Cassidy and Michael Nordlicht, their roles are limited to being executives of Agera Energy, which is an underlying operating company. They are alleged to have -- their role in the alleged scheme is limited to aiding and abetting the Platinum defendants' alleged breach of fiduciary duty in connection with the Agera transaction where an entity of which PPVA was a member sold a convertible note issued by Agera Holdings to AGH parent.

So the question is whether Kevin Cassidy or Michael Nordlicht is an insider of PPVA. And the amended complaint resoundingly answers that question no. There are no facts whatsoever to establish that either Kevin Cassidy or Michael Nordlicht was an officer, a director, a manager, a member, an agent or an employee of PPVA, a partner or a shareholder. They're expressly excluded from the group of Platinum defendants and Platinum Management who are the people and entity who actually operated and controlled PPVA. There is not a single fact that is alleged in the complaint to substantiate the conclusionary allegation that the plaintiffs make that, "Michael Nordlicht and Kevin Cassidy used their positions of authority, influence, and control to cause PPVA to engage in noncommercial transactions to inflate NAV and eventually loot PPVA." Not a single allegation. In fact, there's not even an allegation which establishes that either of these gentlemen had any knowledge whatsoever of the value that was attributed to

PPVA's indirect interests in that convertible note; none whatsoever. So there are no facts alleged that puts either Michael Nordlicht or Kevin Cassidy in a position of control, that they actually executed control, had control, executed management of anything to do with PPVA.

One of the things that they set forth in their opposition papers is to seem to allege that Agera Energy is a subsidiary.

THE COURT: I wanted to ask your adversary about that when he stands up because you make the argument that that's nowhere in the complaint and, moreover, that it's really raised for the first time in their opposition to your motion, if I understand your argument.

MS. DOHERTY: That is our argument, but we go a step further and we -- the second amended complaint actually defeats their argument that Agera somehow is a subsidiary of PPVA. The corporate structure is very clearly set forth in the amended complaint. And Agera Energy is alleged to be a wholly-owned subsidiary of Agera Holdings. And Agera Holdings is allegedly owned by Michael Nordlicht and MF Energy; 95 and 5 percent each. PPVA separately was a member of Principal Growth Strategies, PGS. And Agera Holdings is the entity that issued the note. Agera owns Agera Energy. Agera Holdings issued a note of $600,000.

THE COURT: What about -- forgive me for interrupting.

What about the adverse interest exception, because although you argue that this was intended to create some liquidity for PPVA, as I understand the overall arching allegations are that all these transactions that were alleged to be fraudulent or improper one way or another, either in the short run were designed to maximize the management fees that insiders could obtain or were simply temporizing until the insiders could loot the company of all its real assets leaving it bankrupt. So the argument, as I understand it from your adversary, is that the adverse interest exception would be applicable.

MS. DOHERTY: The adverse interest exception is not applicable under the controlling case law beginning with *Kirschner*. And that is because in order for that to apply it's a very, very narrow exception, as your Honor very well knows. It applies when the actors, the agents totally abandoned the corporation's interest. There are two e-mails that are set forth and attached to the second amended complaint, Exhibit 82 and Exhibit 87. And those very clearly set forth a primary purpose of the transaction was to monetize the interests that PGS held in that $600,000 convertible note. They took a $600,000 convertible note and sold it for $170 million, of which 55,000 was put into cash. And the e-mails very clearly describe it as an opportunity to solve a liquidity problem, that the resulting liquidity is just too transformative, it says, to ignore.

Those factors are key. And those factors show that the interest, at least some of which, the interest in doing the transaction would result in liquidity and a benefit to PPVA. The fact that later -- I don't know who is alleged to have done what that made it collapse, but it's irrelevant because the transaction itself actually resulted in a benefit and had an intent to result in a benefit. And my clients, the only transaction that they are alleged to have been involved in here, that they are alleged -- allegedly aided and abetted is this transaction. And so the adverse interest does not apply whatsoever.

One of the -- what's not in our papers, as your Honor wanted us to mention, what I find interesting is that on the one hand the seller of the convertible note is suing on behalf -- suing my clients and alleging that the sales price was too low. In the related case, SHIP brought a third party complaint. SHIP is the buyer. And SHIP is alleging we paid too much for it. They're alleging every time that it was valued in the books it took a $600,000 note and overinflated it. So which is it?

At the end of the day the allegations in this amended complaint resoundingly show that the adverse interest exception does not apply.

THE COURT: All right. Let me hear from plaintiffs' counsel.

MS. DOHERTY: Thank you.

THE COURT: Thank you.

MR. BROWNLEE: So with regard to the ownership, your Honor, it's our understanding and it's been pled the PPVA held a 55 percent controlling interest in a company PGS. PGS was part of -- was a composite. I think PPCO had part of it with Agera Holdings which was, in fact, Agera. So I think our description of it as a subsidiary is accurate. And I think looking at the control of it --

THE COURT: So point me to where in the complaint you're relying on in that regard.

(Counsel confer)

THE COURT: I understand the complaint is a modest 185 pages. Let's see if you can find where.

MR. BROWNLEE: Your Honor, thank you very much. I believe in paragraph 614 it reads, "PPVA and PPCO owned a controlling interest in Agera Energy through a jointly-owned subsidiary."

THE COURT: I'm sorry. Hang on one second.

(Pause)

THE COURT: "PPVA and PPCO owned a controlling interest in Agera Energy through a jointly-owned subsidiary, Principal Growth Strategy LLC," and then there's PGS. "Before June 8, 2016 PPVA held 55 percent of the membership interests in PGS and PPCO held 45 percent of the PGS membership

interests."

So I'm not quite sure that that is the same as saying they were a subsidiary of PPVA but I understand at least now the allegations as to effective control or whatever.

MR. BROWNLEE: Yes, your Honor.

So with that control, gave them the power essentially to appoint Mr. Cassidy and Mr. Nordlicht to go in and run this on a day-to-day. They became insiders certainly of Agera. In fact, I think the Court has pointed out in its opinion that one of them was appointed -- Mr. Nordlicht, Michael Nordlicht received 95 percent in direct equity in Agera Energy for nothing. And I as you well know, the Agera transaction was effective June 9. That's why June 8 is an important date in those paragraphs. That was the day after Mr. Huberfeld's arrest. Mr. Nordlicht, with the help of these two insiders, was able to effect Agera transactions and looted PPVA of upwards of $300 million.

And we certainly think from an insider perspective they were placed in there by Mr. Nordlicht. Their role was to control it and run it, do as he said. Classic insiders. And they did it all to the benefit of themselves and Mr. Nordlicht and the Platinum and Beechwood defendants, all to the detriment of PPVA. Ultimately PPVA lost it all. It is true that through Agera it was about 50 or so million that went in at one moment. But that was ultimately looted as well.

And so we think that, again, if you look at the circles, these guys I think clearly inside that. They were placed in there. If you look at these two gentlemen and their role relative to some of the more traditional *in pari delicto* type cases of accountants, lawyers, consultants, that's not them. They were placed in there on the inside for a purpose and they effected that purpose all to the detriment of PPVA.

THE COURT: All right. Let me hear again from defense counsel.

MS. DOHERTY: Your Honor, I just want to address two quick points with respect to Kevin Cassidy and Michael Nordlicht being, quote, installed in Agera Energy. They were both employees of Agera Energy and ran Agera Energy as a managing director and as a lawyer. You need much more than having a relationship with an alleged insider to grant you insider status.

Your Honor very well knows from the Madoff case the wives of Mark and Andrew Madoff, their relationships with their husbands was not enough to make them insiders. Certainly being a nephew of Mark Nordlicht and being a person who is put in a position in a separate entity is not enough. You need much more. And this second amended complaint does not provide it.

With respect to the subsidiary, let's just parse a couple more of the paragraphs in the complaint to make it very clear that Agera Energy is not by any definition a subsidiary

of PPVA. You started with the paragraph at 614 which is accurate that PPVA is a member of PGS. And what PGS held was a convertible note issued by Agera Holdings. So Agera Holdings borrowed $600,000 and promised to pay it back. PGS held debt of Agera Holdings. That is in paragraph 615. And that promissory note is Exhibit 84.

THE COURT: OK.

MS. DOHERTY: That promissory note was convertible into an equity interest in Agera Holdings if steps were taken to actually convert the note. It is not alleged that that note was ever converted. Therefore, PGS never held any equity interest or control over Agera Holdings. That's very clear from Exhibit 84.

What they are alleged to have done, not convert it into control of Agera Holdings but to have sold it and got rid of it altogether. So PGS is alleged to have sold it.

THE COURT: I think I'm inclined to agree with you that they haven't adequately alleged a subsidiary relationship in the textbook sense but what your adversary was saying that they have alleged effective control which doesn't require a subsidiary relationship.

What about that?

MS. DOHERTY: I will agree that Kevin Cassidy was a managing director -- was alleged to be a managing director of Agera Energy and that Michael Nordlicht is alleged to be a

lawyer for Agera Energy. Agera Energy is an entity, an operating company, totally separate and distinct from PPVA. There is no connection. There is no act or authority or ability for either Kevin Cassidy or Michael Nordlicht to take any action that affected PPVA ever. There's none alleged there. They had no inside information. They couldn't tell them what to do. They didn't tell them what to do. They weren't board members. They weren't directors. They weren't officers. They didn't take direction from any of those. They are separate and apart from all of the Platinum defendants and Platinum Management. PPVA is a fund that is distinct from Agera Energy. There is no connection there whatsoever to make the case that either Kevin Cassidy or Michael Nordlicht is an effective insider of PPVA.

THE COURT: All right. Anyone else want to be heard on the *Wagoner* issue?

Yes.

MR. CHASE: Donald Chase with Morrison Cohen. I represent the Huberfeld Family Foundation, your Honor.

I just wanted to add one thing from our perspective. The *in pari delicto* events and particularly insider exception falls away if we are not considered an alter ego of Murray Huberfeld and Platinum Management. I'm perfectly willing to go into that, why we're not an alter ego; or if you want to wait, I'll wait.

THE COURT: No. Why don't we hold on for that. Thank you.

MR. OSTROVE: Good morning, your Honor. Elliot Ostrove on behalf of Seth Gerszberg. As we point out in our papers, your Honor, that Seth Gerszberg is not alleged to be an insider of any kind. He's not alleged to be an officer, director, employee, shareholder, member, board member or have any connection whatsoever with respect to PPVA. In fact, if we look at the complaint itself, we see at paragraph 134 plaintiff alleges that Mr. Gerszberg served as a, quote, adviser to Platinum Management. They clarify what they mean by adviser in paragraph 929 of the complaint where they characterize Mr. Gerszberg as a quote/unquote informal adviser to Platinum Management. The closest else they come to Mr. Gerszberg touching Platinum in any way is in paragraph 728 of the second amended complaint where they allege that Mr. Gerszberg was Nordlicht's close friend, quote/unquote. Being a friend and taking advice from your friend, even if we assume all of the allegations in the complaint to be true, does not rise to the level of an insider or somebody who had control over this fund or had any ability to control the fund.

Moreover, your Honor, as we look at the rest of the allegations with respect to Mr. Gerszberg within the second amended complaint, essentially arise out of the descriptions of transactions at paragraphs 729 through 756, we see that

ultimately the wrongful conduct that's alleged against him is that he borrowed money from the fund. He borrowed money from the fund at one time and then he renegotiated and borrowed money again. And in connection with our motion we had submitted the secured promissory note executed by Mr. Gerszberg on behalf of Spectrum 30, which is an entity that it's wholly, completely and separate and distinct from any of the plaintiffs' entities of any kind. Essentially Mr. Gerszberg's here because he did business with the fund and because of that and both the *Wagoner* rule and *in pari delicto* require that he be dismissed.

THE COURT: Let me hear from the plaintiffs.

MR. BROWNLEE: Thank you, your Honor. So to my circle analogy we recognize right upfront this is probably our toughest one.

I think, though, when the Court makes its judgment on Mr. Gerszberg, I would ask that the Court would consider just a couple of facts that we've alleged in the complaint that I think are really important when you're trying to assess: Is this person an insider; does he have that ability to exercise that power and control; or is it that traditional third party.

Take us back to the summer of '16. This thing is collapsing. People are looking for life vests. And these are some pretty hardened folks who have been doing this fraud, as we allege, for quite a while. And yet at that moment

Mr. Gerszberg was able to extract $15 million for himself and $10 million for his cousin. And so this is --

THE COURT: I don't understand how you believe that shows that he was an insider. What it shows, perhaps, is what you alleged in your complaint which was he was a buddy of Nordlicht and Nordlicht wanted to cut him in; while the whole thing was being looted, why not give some loot to his good friend. But that doesn't make Gerszberg an insider.

MR. BROWNLEE: We recognize that the Court may very well review it in that light.

Our view is that at this moment in the context of this complete scheme, that for someone to be able to walk away with that type of money you had to be on the inside. And so I guess Mr. Nordlicht may have done that out of the good of his heart.

THE COURT: Good of the heart is a little strong, but why do you think it's not plausible that if he saw an opportunity to continue to loot the company before it went down that he might for whatever reason cut in some of his friends. It reminds -- this is a pretty bad analogy but that won't stop me. Many times in insider trading cases the insider will tip not just people with whom he has a financial arrangement but people who are close friends. And there's a debate in the Second Circuit about how close a friend they have to be. But no one claims that that makes the tipees controlling the insider. So it's hard for me to see, absent a more specific

allegation than the ones you make, what makes Mr. Gerszberg an insider.

MR. BROWNLEE: Again, we understand that is a potential theory here. Our view is just different than the analogy and I think it's a good one that the Court uses. Here it's a little bit different.

THE COURT: I agree the analogy is just, you know, what came to the top of my head in an otherwise dull moment.

MR. BROWNLEE: This tends to be a little more sealed off. I think there's the one e-mail where the person inquires about buying one of these assets and Mr. Nordlicht says no, it's out. So this was saved for those who tended to know. This is a lot of money. It's not just a general tip. And he got the $50 million for nothing. He provided no consideration to it. And so we think that as we sit here in the pleadings in this stage that it survives. Thank you.

THE COURT: Very good. Anyone else on the *Wagoner*?

Then I'd like to turn next to the RICO claims. So who from the defense wants to address those.

MR. BRESLIN: Good morning, your Honor. Eric Breslin, Duane Morris, for the Estate of Uri Landesman. We made a motion, I think a relatively discrete, precise motion, hopefully. So we have -- I have nothing more to add than what is already in the papers.

THE COURT: OK. Anyone else want to be heard on the

RICO issues?

With respect to arguments specific to individual defendants among, in addition to those we've already heard, I think there are several counsel indicated they wanted to be heard on other aspects of the individual defendants. So I'm happy to hear that now.

MR. GLICK: Again, your Honor, Stuart Glick, Thompson & Knight on behalf of Michael Katz.

The other aspect of our motion was failure to state a claim. I know your Honor is more familiar than I am with Rule 8 and Rule 9(b), to speed this up, facial plausibility; and for 9(b) you have to answer the three Ws: where, when, and why.

Again, they're suing my client for aiding and abetting a breach of fiduciary duty. And when you look at it from the 25,000-foot level, what they're essentially saying is that my client, who was permitted to represent his grandparents' interests, decided to throw them under the bus since they were significant investors and participate or aided and abetted a breach of fiduciary duty that harmed his grandparents, and he did so even though he never received a cent from the entire transaction. He's not being sued for unjust enrichment. So he's just a really evil guy is basically their theory.

But when we look at the actual allegations that they raise, they simply have not made a case. First, we take -- we don't look at the conclusionary allegations for which there is

no factual context. And what you have there is they haven't shown that he knowingly induced or participated in a breach of fiduciary duty. There's simply no facts showing that. And, in fact, as I said earlier the facts show that the Platinum defendants actually moved in a direction opposite of what he had suggested. There's nothing to show that what he did was substantially to assist in a sale when what he suggested was a sale to an insider in the oil and gas sector, as they allege, and they went a different direction and they sold it to a Platinum defendant Beechwood entity. So he didn't -- there's actually no facts showing what he did in the 40 paragraphs from 630 to 672 that what he actually did, the when, the where, and the why of how he assisted in the breach of fiduciary duty.

But, as importantly, they also don't show that there's any causation with respect to anything that Michael Katz did and the losses suffered. And, again, I say it's hard to say this causation, when he suggested A and they ignored him and did B, to show that somehow his suggestion but for that they would not have sold Agera Energy to the Platinum defendant Beechwood entity or that somehow that the ultimate sale to the Platinum defendant Beechwood entity and the harm resulting was proximately caused by anything Michael Katz did. There's simply no nonconclusionary allegations in the complaint that show that.

So just limiting to that issue, your Honor. We also

raise the issue that there's certainly no basis for punitive damages. We rely on the brief. But they simply haven't met the requirements of pleading particularity with respect to Mr. Katz and their claim of aiding and abetting and breach of fiduciary duty.

THE COURT: All right. Let me hear from plaintiffs' counsel.

MR. BROWNLEE: Yes, your Honor. Just very briefly. We refer to the e-mail no. 87. This is communications between Mr. Nordlicht and Mr. Katz. This is after Mr. Katz has already sent his e-mail suggesting to -- proposing to Mr. Nordlicht that this be an inside sale. And Mr. Nordlicht writes, "I was reluctant on Agera but I have -- I did -- I replaced that upside fund and liquidity. It's just too transformative for us to ignore. I also recognize a point on the right time in cycle to exit and appear we might get satisfactory type of bid from a Beechwood led consortium."

So that's Mr. Mark Nordlicht telling Mr. Katz at that time he's going to follow his advice on the inside deal and they're going to do with Beechwood which, of course, is their alter ego set up by the same folks at Platinum Management.

THE COURT: What about the argument that it's implausible that he would harm his grandfather's interests?

MR. BROWNLEE: I think that what they were looking to do was to get the money out. I think Mr. Katz explains that in

his original e-mail, the benefits of doing an inside deal. Because, as he explains, that an outsider, someone at an arm's length transaction is going to look at this very skeptically but an insider won't. They ultimately come to the perfect insider, Beechwood, which they set up. And, of course, eventually that's what occurs and Agera gets looted.

And so what his motivation was, his interaction with his grandfather, I don't know. But as far as at this stage in the pleadings, it's clear that these two, Mr. Nordlicht and Mr. Katz, have a meeting of the minds as to what it's going to do. And if you look at the follow-up to that, Mr. Katz writes, he talks about cleaning up the balance sheet. And he says, "I'm excited to lead the effort on organization. There is much to do." And so this is -- he's all in at this point, moving forward with this transaction that ends up only benefiting the Platinum and Beechwood defendants, all to the detriment of PPVA.

So we think that that e-mail alone at the pleading stage puts him in. I don't think that even if he were to come in at this point and try to give some -- I don't know how you could say that doing an insider transaction with Beechwood to the detriment of PPVA has some sort of benign impact on his grandfather. He does talk about getting his grandfather to do the paperwork. I don't know what status he was. But sometimes families are more complicated. But I certainly don't think

based on this evidence we can assume that he was looking out for his grandfather's interests.

THE COURT: Let me hear finally on this issue from Mr. Katz.

MR. GLICK: Yes, your Honor. I think the language is important. And what we have here for the plaintiffs is they cherrypicked words and they try to put nefarious purpose behind them.

We've already seen in Exhibit 82 that when he says an insider, he's talking about an insider in the oil and gas sector. Again, having insider knowledge and expertise in the oil and gas sector. That's what he's talking about. And there is no evidence contrary to that.

But also if we look at 82 what his idea was, "to free up cash to reinvest in the oil and gas sector which is a much higher multiple potential upside opportunity today than the energy retail sector."

So he's not looking to get cash to raid it, to loot it. He's looking to reinvest to make more money. There's nothing wrong with making more money. The problem is when they took it out and they gave it to an insider with Beechwood and the Platinum defendants, which there is no evidence, nonconclusionary evidence my client had anything to do with.

And then again you look at -- you look at Exhibit 87 and what is being said there. And, again, you have to read the

entire exhibit and not just cherrypick. The language what he says here is that what Mr. Nordlicht says in March -- and again the transaction didn't happen until June, and there is no evidence my client had anything to do with it -- is he says that they might get a satisfactory type of bid from a Beechwood led consortium. But you can't ignore the other e-mails that were sent at the same time, which is 82. And what they're saying there is, quote, Nordlicht says that they should get a -- they should get an acceptable price. And my client says, "We should be in line with an above-industry average with a forward-looking multiple."

So my client is on a whole different -- the facts we have, not these insinuations that are not based on fact or the conclusions when you cherrypick words and reach a conclusion without the where, the why, and the when -- the facts we have is that Mr. Katz was looking for a sale to an insider in the oil and gas industry at an above-market average price to free up money to reinvest in the oil and gas because he thought it would make a better return.

That's not what happened here at all. We know what happened. We know the end of the story. So even though you pick words out, we know from the facts alleged that what happened is that it had nothing to do with what my client said and everything about him being an insider, being all in, joining them. There is no facts alleged that say any of that.

Thank you, your Honor.

THE COURT: Thank you.

MR. BROWNLEE: Your Honor, 30 seconds.

THE COURT: Yes.

MR. BROWNLEE: I trust the Court will read no. 82. Let me -- on this oil and gas thing. Here's what he actually wrote. He says -- and he's writing this to Nordlicht, "Having insider knowledge and expertise in the oil and gas sector increases the handicap for success." And so they don't want someone -- they're don't want to sell this to an insider in the oil and gas industry. It's just the opposite of what counsel says. What he says in his conclusion, "capitalize on an insider willing to purchase now." And then ultimately we learn from Mr. Nordlicht that means a Beechwood consortium and that's what happened.

It can be read confusing and so I'm -- I know I've confused these myself, but that's clear. He's saying, trying to sell this to an insider with knowledge in the oil and gas industry is bad, not good. Thank you, Judge.

THE COURT: Thank you very much.

All right. Other individuals.

MR. LIPSIUS: Ira Lipsius for the Beechwood entities.

On the aiding and abetting, I think there is a bit of a paradox here. If *Wagoner* applies, then of course the aiding and abetting falls by the wayside. If *Wagoner* does not apply,

then what we have is -- then we have -- as insiders they would not have a right to bring -- there has to be a third party relationship. If they were part of the insider group, you would have to fall aside under the *Solo* case. I just wanted to bring that attention, a paradox here. Either it has to drop one way or the other way, your Honor.

THE COURT: Do you want to say anything on that?

MR. BROWNLEE: Very briefly, your Honor. We disagree with that analysis. Clearly, the Beechwood entities are insiders. The allegations -- of course, these were set up as part of the Beechwood defendants. And we've been through they were all connected with the Platinum defendants. They have ultimate decision making with Nordlicht, Huberfeld, Mr. Levy, Mr. Bodner for these Beechwood entities. You have overlapping ownership, overlapping management; use the same offices, same capitalization, same financing. So we believe they are insiders for *in pari delicto* analysis. Therefore, it would fall outside. That being said, I think that you can be an insider and still not be a fiduciary. It's just a different analysis. We don't think that the Court is required to pick one.

THE COURT: Other counsel.

MR. LAUER: Good morning Eliot Lauer for David Bodner. This is a motion to dismiss.

THE COURT: I saw you looked at the clock to see

whether it was still this morning.

MR. LAUER: Correct, your Honor.

This is a motion to dismiss the non-NAV claims. The court sustained the NAV claims against Bodner on the basis of the group pleading rule. As we said in our moving papers, while we disagree with the Court, we respect the Court's decision. We respect the judicial process. We're not seeking reargument. We're very comfortable resolving this at the appropriate junction, probably summary judgment.

Today's motion addresses the claims that in a dozen or so, perhaps 14, individual transactions portfolio managers, traders, executives, and others within the Platinum organization stole assets from the Platinum fund. The second amended complaint claims that Bodner is responsible for each of those alleged thefts. These claims, obviously, are serious fraud claims. They involve hundreds and hundreds and millions of dollars. And under the federal rules there is no group pleading here; Rule 9(b) applies. They were required to plead detailed facts setting forth individual activity of David Bodner. There are no facts, absolutely no facts in the SAC that Bodner implemented any of these transactions. Accordingly, his potential liability is only as an accessory. There are no facts that Bodner knew that any of these transactions was designed to defraud the fund or designed to steal assets from the fund. Most significantly, there are no

facts that Bodner did anything to substantially assist these transactions. The SAC, which is plaintiffs' third pleading here, identifies a number of individuals with respect to each of these 14 transactions who are said to have implemented them. There are no facts that Bodner implemented. There are no facts that connect Bodner to knowing that one or more of these transactions was constructed to steal assets from the fund. Group pleading, conclusionary allegations are of no help today to the plaintiffs on this motion. There are simply no facts that David Bodner provided substantial assistance to effect these fraudulent transactions.

In response, and they point to no facts in their response, they give an interesting argument at page 32 of their brief. They argue -- and it's almost a throwaway argument when they should be conceding that they'll drop these -- this portion of the case. They argue the transactional looting claims inflate the value of the fund and, therefore, if Bodner can be held under group pleading to answer for the inflation claims, the NAV claims, logically, according to plaintiff, he should be required to answer the individual looting claims. But, there is no logic here. This is pure sophistry.

First, the SAC alleges theft transactions which obviously deflated the fund, looting it.

Second, the valuation process, as this Court is well aware, is quite different than doing the transactions

themselves. Put another way, signing off on an inflated net asset value statement, for example, in 2015 says nothing and does not in any way indicate that an individual was also responsible for let's say the Agera transaction in 2016 where, according to plaintiffs, SAC, a $230 million asset was knowingly disposed of for a worthless note.

Paragraph 671 of the SAC alleges that this was $150 million looting transaction. If so, in order to hold Bodner to answer that claim, as well as the others, the SAC was required to set forth facts showing that Bodner knew this transaction was designed to loot the fund and facts showing that Bodner provided substantial assistance to the transaction. The SAC has no facts.

To conclude, the Court has held under the group pleading doctrine that Bodner should answer for the inflation, the NAV inflation claims. We will deal with that in discovery. I can assure your Honor based on the documents in their server, at the end of this process plaintiffs will fail to prove that Bodner had any culpable role in the valuation process or the preparation of false NAV statements. That is for another day.

For today there are absolutely no facts that culpably connect Bodner to these 14 or so non-NAV transactions. They have had the server. They have had millions of documents for more -- for more than a year. They have nothing.

In the interests of justice, this is an expensive case

to litigate. In the interests of justice, pursuant to federal Rule 9(b), federal rules require that the non-NAV claims with respect to David Bodner should be dismissed.

THE COURT: All right. Thank you very much. Let me hear from plaintiffs' counsel.

MR. BROWNLEE: The Court has addressed this in its opinion. We went back and looked at this. I read, "The Court concludes based on the foregoing that the complaint alleges facts indicating that each defendant was a corporate insider, with direct involvement in day-to-day affairs, at Platinum Management. Even Bodner's memorandum -- which the other moving defendants join or incorporate -- explicitly concedes that Landesman, Levy, and Ottensoser had day-to-day roles at Platinum. And Bodner and Huberfeld cannot distinguish themselves from their fellow Platinum defendants simply because the complaint failed to identify a title or position that they held. Plaintiffs concede that Bodner and Huberfeld did not have official titles but they contend these Platinum cofounders covertly conducted Platinum's day-to-day business by way of a secretary who would relay their directives to other defendants, and they argue. And the Court has looked at this under the group pleading standard.

THE COURT: That was in the context of the group pleading issue. What your adversary is saying is that assuming for the sake of argument that Bodner was an insider, etc.,

etc., that doesn't mean you can tie him to specific looting transactions without 9(b) type of allegations directed at him vis-a-vis those transactions. That is, I take it, the gist of his current argument.

So what about that?

MR. BROWNLEE: Well, I think that this complaint alleges a myriad of facts that put Mr. Bodner and the other Platinum defendants and Beechwood defendants right in the middle of all of the increase in net asset value or looting. The Court has held that they were created for -- the Beechwood entities were created for the express purpose of providing Platinum Management with transaction partners that could be used to justify PPVA's inflated net asset value. So they were in charge of, they owned it, they benefited from it, they controlled the day-to-day operations of this. Even Mr. Bodner's e-mail that we talked about last time talks about how setting that up allowed them to do this.

And so we think that at this stage this complaint is sufficient not only for the broader group pleading but to put him as controller, owner, manager, and beneficiary of these specific transactions that he would have overseen in that role. And so we think at this stage we've satisfied that.

THE COURT: So I'm mulling another hypo which will probably be no better than the last one. So in a pump and dump type scheme you -- the defendants typically take over a shell

corporation. Through false representations they make it appear to investors to be a worthy investment and then they dump the stock on the unsuspecting investors, turns out that it's a worthless company, and they disappear to parts unknown.

So I take it what you're saying is that if someone could be -- who is adequately alleged to be someone who engaged in the first part of that scheme, it's a reasonable plausible inference that they did it to enable the end result of looting.

MR. BROWNLEE: I do. But I also believe that in our case we've actually alleged that; that the very transactions that are now challenged here make up first and second schemes for which Mr. Bodner and his cohorts at both Platinum and Beechwood controlled, benefited from, managed and owned the entities that effected those transactions.

We've put in a lot of evidence in this and we continue to review it. But this is an e-mail from 2014 that I confess it's not in the record but we have continued to go through. It's between a gentleman, Brian Jedwab, and Mark Nordlicht. And it talks about where he says, consumer lending line is an offshoot of Bellicose and was cut from 50 million to 10 million by DB, David Bodner, after term sheet was completed. Both were negotiated at length based on input from DB, David Bodner, and MH and they approved both.

So there are tons of evidence in this record. We believe we've sufficiently pled where we'll be able to draw

them in to these specific transactions. But they controlled it. They owned it. They benefited from it. They managed it. They set it up. So Mr. Bodner, and then with his other e-mails, we think that there's plenty at this stage and with more to come.

THE COURT: All right.

MR. BROWNLEE: Thank you, Judge.

THE COURT: Let me hear from Mr. Bodner's counsel.

MR. LAUER: Your Honor, I'd like to set this stage a little bit. Because my adversary, in the absence of facts required by 9(b) -- when you're accusing an individual of stealing or participating in individual theft, in the absence of facts, the other side has come in and they've created this fascinating multiple-web of schemes. And I'd just like to point a couple of very fundamental points that are not sustained in the complaint but seem to be the underpinning of these arguments.

My adversary said earlier, not in response to my argument, that the purpose of Beechwood was to help to disguise the fraud at Platinum. There is absolutely no evidence anywhere in any of the pleadings by any of the plaintiffs that that was the purpose of Beechwood. And this nonsense about whether or not there was full disclosure to the insurance companies with respect to the connection between Platinum and Beechwood, that's one thing. But it's quite clear that the

purpose of Beechwood was to obtain access to the insurance company funds so they could be invested to help Platinum. And whether or not the managers at Beechwood stepped over the line or did not step over the line in terms of disclosure of who owned Beechwood, it is an absolute falsehood. And there is absolutely no basis in any of the pleadings to say that the purpose of Beechwood was to defraud Platinum. And this idea that all of these transactions -- the $300 million that was supposed looted in Agera, and all the other hundreds of millions of dollars that were looted, there is no evidence that any of this so-called fictitious looting went anywhere. There is no evidence that Mark Nordlicht who is running this fund actually took money out. So I'm saying this -- I apologize for being a bit emotional about it -- but at the end of the day you can't justify suing David Bodner for a $300 million Agera claim without facts. And you can't make it up by saying well we've also been able to get by under group pleading. And we've also been able to conjure up and creatively connect this scheme and that. There may very well be sustainable individual transactions that arguably breach some fiduciary duty here and there. There is no overarching fraud. And whether there is or there isn't, in order to sue David Bodner for stealing $300 million in Agera and a hundred million dollars in Golden and a hundred million dollars in Black Elk, you've got to connect David Bodner with facts. The non-NAV claims should be

dismissed.

THE COURT: If nothing else, a bit of emotion has provoked a surreply.

MR. BROWNLEE: Just remind the Court of Mr. Bodner's own words in his e-mail of July 29 of 2015. "I'm really concerned that if Ed Bonek from CNA Financial Group finds out we've invested Beechwood money into Platinum with its illiquid investments, since it didn't exactly fit the investment objectives, he won't trust us and he will take out all of the approximately 500 million he has invested in Beechwood."

He goes on, "We weren't exactly honest with Ed about the original investment or that Beechwood and Platinum really are in the grid. I'm concerned. What should we do."

Explains exactly what he thought, what we thought, what he thought about Beechwood and its role in this overall scheme. Thank you, Judge.

THE COURT: All right. Other counsel.

MR. CHASE: Your Honor, again, Don Chase, for Huberfeld Family Foundation.

This is our first go-round with your Honor. Huberfeld Family Foundation is a charitable organization that was formed in 1998. Now I want to, just in terms of what I want to cover it's just the alter ego theory primarily right now. It's a claim that was raised for the first time in this last iteration of the complaint. And here's what is alleged. They allege

that the foundation was formed and conceived by Platinum Management and Murray Huberfeld to execute a fraud that harmed PPVA, to wit, the diversion of Renaissance sales proceeds and the creation of a repository for the illicit gains derived from the first and second schemes. That's from the second amended complaint, paragraph 1040. They make similar allegations throughout the complaint. You can look at paragraph 144 which is almost identical. They allege, again, in paragraph 1035 that the foundation was "formed for the corrupt purpose of the Black Elk scheme as well as providing a clearinghouse for assets illicitly seized through the first and second schemes."

And then they go through a series of allegations where they claim that various people made investments into the Huberfeld Family Foundation and regularly transferred cash and assets fraudulently acquired in the course of the first and second scheme. In fact, that's from paragraph 158. And 159 to 163 articulates all these investors in the Huberfeld Family Foundation.

Now there's a fundamental disconnect because this is a nonprofit corporation. There are no owners. There are no investors. There is no return of funds. It's not an investment fund. And contrary to what the complaint continually alleged in terms of how it was formed and conceived, it existed a decade-and-a-half continually before the events at issue, before any of these schemes.

THE COURT: Well, doesn't the complaint allege that Mr. Huberfeld was the foundation's president, director, official signatory and daily administer?

MR. CHASE: It does allege that, your Honor.

THE COURT: So I'm not sure that I catch your point about that because it's not for profit it -- that doesn't matter.

MR. CHASE: My point is this. There is no allegation and if you look -- we've attached -- they've attached Form 990s. Every year the foundation filed a Form 990 fully disclosing its activity. We have pointed out that from 2008 to 2017 $24 million in charitable contribution, charitable donations from the foundation to charitable causes occurred. No dispute over that. There is no dispute. 24 million distributed. There was also 24 million -- roughly 24 million in net income and investment income during that period. And roughly 21 million in further charitable contributions to the Family Foundation.

Now what you don't see here is any funds going to Mr. Huberfeld personally, nor under the nonprofit law and everything would he be entitled -- does he have any right to the funds, nor does anyone else who contributes gifts to the Family Foundation have any right to those funds, or any return on those funds, nor is there evidence that they received any return on the funds, or anybody received anything improperly.

The only beneficiaries of this Family Foundation are charities, religious organizations, or primarily Jewish charitable organizations that he donates to, the foundation donates to.

So what we're looking at here is, what they focus on is these loans. And the key here is you're talking about a reverse-veil-piercing theory against a not-for-profit corporation. There's precious little law on this. It's a unique kind of argument.

And I think where you start is you start with Judge Winter in *American Fuel Corp.* which is an excellent case to guide on the factors you're supposed to consider. That's 122 F.3d 130 (2d Cir. 1997). And Judge Winter in that case found that even though a corporation had no independent office, no independent address, no separate bank account, he still rejected piercing. And the point is that his focus was on lack of evidence, use of the funds for personal matters, intermingling of the funds, commingling of funds. And if you look at the cases, that's one of the key points.

And you don't find that here. There is no money that you find going to Mr. Huberfeld or going to anything other than charities. I'm going to get to loans in a second. But if you look at the factors that were articulated by Judge Winter in the Second Circuit you'll find that they are not satisfied in this case. Clearly not satisfied.

In fact, the plaintiff doesn't want you to look at

that. In their brief they ask you not -- they said we don't think these factors apply. They don't point to any other law that says what the standard should be if not the Second Circuit factors.

But just to go through them really quickly. Were corporate formalities observed? Of course they were here. 990s were filed every year fully disclosing all the activity publicly.

THE COURT: But maybe you should get to the loans because, as I understand the plaintiffs' position, it is that, first, Mr. Huberfeld controlled the foundation; and second, that using that control he had the foundation make millions of dollars in loans each year that had nothing to do with the charitable purposes of the foundation but which aided and abetted the scheme -- complained of schemes.

MR. CHASE: On the first point, on control, cases are clear that control is not enough. You could look at -- Bill and Melinda Gates may have control of their foundation.

THE COURT: It has to be control plus fraud.

MR. CHASE: So the second element, the loans. First of all, if you take organizations like a university, obviously has an endowment. They invest. Now it doesn't have anything to do with their educational purposes per se but they invest to keep their endowment. Similarly charitable foundations have the right to invest their corpus to try to grow it. That's

precisely what was done here by the Family Foundation. They invested the initial corpus of contributions in what was the historical business.

And, by the way, from 1998 all the way through -- it's not like the investments differed in nature or changed or altered. It was consistent in terms of their pattern. They invested in secured loans, mortgages, personal loans. That's what they did largely with the money. And through that investment they made -- I think we calculated roughly six to ten percent return a year; 24 million over that period from 2008 to 2017.

So, yes, they did loans. And, yes, what the evidence clearly shows through their public filings is they made money on that investment. Those weren't sham investments. Those were investments to increase the amount of money that they had to donate to charity.

So what do you have here? You don't have allegations here that the business and personal loans were shams, were not paid back, were -- other than market or greater than market rates. The only time they allege any loan was at a below market rate was when it was given to another charitable foundation. So Mr. Fuchs had a foundation and actually Huberfeld and Bodner at one time had a foundation together. And there are -- there was one or two loans I think that was at zero percent interest because it was a charitable donation

going to another charitable organization giving money. Other than that, the loans that they tried to make a big deal out of throughout their allegations only relate to perfect -- what you could only assume, because there is no evidence in the complaint to suggest otherwise, that these loans are other than at market rate or above market rate and there's nothing nefarious about them. The fact that some insiders may have gotten the loans means absolutely nothing unless they're saying that the loans were shams somehow, and they are not saying that. So what you have is a perfectly legitimate business transaction by the foundation. And there is also no connection between these loans and the schemes themselves.

So, at the end of the day we don't think that there's any basis under these facts as alleged to find that there is -- that the foundation is an alter ego of either Platinum Management or Murray Huberfeld.

THE COURT: All right. Thank you very much. Let me hear from plaintiffs' counsel.

MR. BROWNLEE: Thank you, your Honor.

A couple of points on the foundation. I don't think there's any doubt that Mr. Huberfeld controlled this foundation completely. He was president, director and official signatory for all that it did.

Point two is that it is also uncontested that Mr. Huberfeld has been convicted of fraud, wire fraud within

the confines of this case. He allegedly took $60,000 from PPVA and used it to pay off some official to provide investment dollars into Platinum. So he's pled guilty to that. I believe he's been sentenced already.

THE COURT: By the way, speaking of things like that, what -- do you know or does someone here know what the status is of the ongoing trial of some of the defendants?

MS. PARLIN: Ongoing.

THE COURT: Pardon?

MS. PARLIN: It's pending. The government is still presenting its case from what I understand.

THE COURT: The government is still presenting its case. Sounds pretty boring. Go ahead.

MR. BROWNLEE: If you believe Law 360, your Honor. Apparently the Court described after a long examination that it was painful, is what the Court would call it; so it continues on.

So, Mr. Huberfeld controlled it. He's been convicted of fraud within the confines of his case. I look at this, for kind of lack of my own analogy that's probably not very good, it's money laundering. It's got money coming in and it's got money going out. Money coming in, in our view is bad money or tainted money. First of all, they got a million dollars from the Black Elk scheme. The chart on page 96 of the second amended complaint has the Huberfeld Family Foundation getting a

little over a million dollars in August of 2014 from the Black Elk scheme. You've got almost a million dollars, I think 933,000, coming in from Mark Nordlicht, paragraph 159. Paragraph 160 Mr. Landesman put about 400,000 into. Paragraph 61 is Huberfeld-Bodner, quote/unquote, charitable organization put another almost two hundred thousand. So you've got the bad, in our view, tainted money coming in and then in some instances it's going out. Some of it went to this Aaron Elbogen fund. This is a gent who apparently had been found by the SEC in past to do some aiding and abetting from some fraud scheme and this was apparently funds to help in some relation to some criminal matter; certainly not charitable as described by counsel.

So, I think at the pleading stage we have satisfied that the alter ego of this entity by Mr. Huberfeld is appropriate.

I'm not saying that every penny that came in was used for illicit purposes. We don't have to prove that. We don't have to show that. But I think, as we sit here today, we've certainly shown that he controlled it; that he certainly has been convicted of fraud within the confines of this case; that, in our view, inappropriate funds have gone in, inappropriate funds have gone out. That's how they used that. Not all the time, but certainly some of the time. And we think that that is satisfied under alter ego. Thank you, Judge.

THE COURT: Thank you.

MR. CHASE: So now it's money laundering. With money laundering usually somebody is laundering money to get it back on the other end. The only people getting the money out at the other end are charities. So when whoever gives a gift to this foundation, they're not getting their money back. They have no right to their money back. There's nothing being laundered. The money is coming in and it's being donated to charity.

The second thing is in terms of the standard, I call your attention to *United States v. Funds Held Ex Rel. Wetterer,* 210 F.3d 96 (2d Cir). The Court said -- and this is a case, by the way, that also addressed reverse veil piercing in the context of a nonprofit, I believe. Anyhow, the Court said courts must be extremely reluctant to disregard corporate forum. That's at page 106. And only when the corporation primarily transacts the business of the dominating interest rather than its own.

So if you look here, in terms of this corporation, this charitable foundation, its clear purpose, as disclosed in the 990, $24 million was donated between 2008 and 2017. And in terms of the loans that counsel keeps referring to, he's saying that they're not charitable loans. But like I said, there is a distinction. They're still ultimately going to charitable organizations. But there's a distinction between how you invest your endowment.

THE COURT: Again, I'm not totally sure I understand the argument. Supposing you enter into a fraudulent scheme to extract money from Platinum and now you decide I want to make a name for myself, I want to be well regarded in philanthropic circles. I have this foundation that, under my hypo, I totally control and so I'm going to take some or all of this ill-gotten funds and run it through the company that I control and I'll get the benefit because everyone will say what a great foundation and what -- and I will be some organization's citizen of the year.

What does it matter under that hypo that the funds didn't go back to the person who fraudulently obtained them? He or she, in my hypo, is still making use of a company that, in my hypo, he or she controls to convert to his benefit and seeming legitimacy, funds that were actually obtained by fraud. Why does it matter where the funds go?

MR. CHASE: I think the point here is number one, let me just say this. In this case this foundation -- Family Foundation, this charitable organization was operating for a decade-and-a-half before any of the events at issue and operating in the same way.

THE COURT: A lot of the arguments that I've heard this morning, of course, are highly relevant to summary judgment and things like that. But we're just talking about the pleadings now.

In my hypothetical I control this foundation. I set it up for legitimate philanthropic purposes and then I decide I'm going to take some of that money that I looted, that I in effect stole, and put it into the corporation; and of course the corporation will know about it because I control the corporation -- or I shouldn't say corporation, into the foundation.

Why does it matter that the foundation is otherwise legit?

MR. CHASE: I think before reaching that and sustaining a pleading along those lines, I think an analysis has to be done of the reverse veil piercing. It's a high standard. If you're going to pierce through -- you know, it's one thing to hold liable if you have a direct claim that -- against the foundation saying you were engaged in a fraud by doing this. But that's not what I'm talking about. We're talking about a veil piercing. We're talking about basically saying the foundation is liable for what Mr. Huberfeld did. And we're going to use him to get at your corpus of charitable money.

And it's a particularly important issue for the foundation here because, as you know, this is a very expensive litigation. So what's going to happen, obviously, is the funds that would otherwise go to charity, these are going to be going to litigation fees.

And so the standard that the Second Circuit has set up is a very strict one. And it says that you have to be extremely reluctant to pierce the veil unless you have real pleadings that can satisfy a very high standard. I don't think that the facts here do. I think the only thing that they're really pointing to that says we're an alter ego is they're trying to focus on these loans. But the loans -- there is no allegation that they're sham loans or they weren't at market rates or the money was never repaid or anything like that. They're just business loans.

THE COURT: OK. Thank you very much.

Before I hear from anyone else I'm a little mindful of the time. Again, of course, we were all sandbagged by that fire drill this morning. But we've gone now well over an hour-and-a-half and I have other matters that -- a conference call that supposedly is going to occur at 12:30, maybe I can join it late, but I'll ask anyone else who wants to be heard on any subject to keep it fairly tight. So who else wants to be heard?

(No response)

THE COURT: I should have given that speech earlier.

All right. Well this is a very interesting set of motions and, as was true previously, and I am very grateful, there are nothing but great lawyers in this case on both sides so that is very helpful to the Court. So I will take the

matter sub judice but I will try to get you a decision in fairly short order. This matter is adjourned. Thanks.

(Adjourned)

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