UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE PLATINUM BEECHWOOD LITIGATION	Master Docket No. 1:18-cv-06658-JSR
MARTIN TROTT *et al.*, plaintiffs *against* PLATINUM MANAGEMENT (NY) LLC, *et al.,* defendants.	No. 1:18-cv-10936-JSR

MEMORANDUM OF LAW IN SUPPORT OF EZRA BEREN'S MOTION FOR SUMMARY JUDGMENT

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Defendant Ezra Beren moves pursuant to Rule 56 for summary judgment dismissing the claims against him in 1:18-cv-10936-JSR in their entirety. For convenience, unless otherwise noted, we use the defined terms as used by the plaintiffs (the "**JOLs**") in the Second Amended Complaint (the "**SAC**"). "**Beren Aff.**" refers to the Affirmation of Ezra David Beren, executed Feb. 14, 2020. "**SanFilippo Aff.**" refers to the Affirmation of Joseph SanFilippo, executed Feb. 5, 2020. "**Nordlicht Aff.**" refers to the Affirmation of Mark Nordlicht, executed February 4, 2020. "**Fact Statement**" refers to the Statement of Material Facts submitted pursuant to Local Rule 56.1.

PRELIMINARY STATEMENT

The JOLs' case against Mr. Beren is based on conjecture and surmise, not evidence. They make virtually no allegations as to him individually (and those that they do are often wrong). Instead, they lump him in with broad general allegations about "Defendants," "Platinum Defendants" or "Beechwood Defendants." Presumably, they assumed that somewhere in the millions of documents in their possession would be something—*anything*—linking Mr. Beren to the "schemes" they allege.

The ridiculousness of the JOLs' assumptions was such that Mr. Beren pointed out, in his motion to dismiss, that the extensive evidence available to the JOLs showed the allegations' falsehood and suggested that the JOLs should reconsider their reliance thereon. They declined to do so. However, discovery is over and the JOLs must prove their case with actual facts.

This they cannot do.

The undismissed claims against Mr. Beren principally allege fraud and breach of fiduciary duty, as well as aiding and abetting others in respect of those torts.[1] There is an almost throwaway allegation of unjust enrichment as well. As noted, Mr. Beren has been lumped in with other "Platinum Defendants" and "Beechwood Defendants with very few allegations specific to him personally. Whether this was the product of speculation and wishful thinking, or simply lazy drafting on the part of the JOLs, nothing in the factual record supports Mr. Beren's involvement in the allegedly tortious actions of these groups of defendants, either as a primary tortfeasor or by aiding and abetting others.

1. *Mr. Beren was not a fiduciary*. The Court found, largely on the strength of the allegations regarding Mr. Beren's title of "portfolio manager," his compensation, and his supposedly "discretionary authority," that the JOLs had sufficiently alleged that he was a fiduciary as to PPVA. *See* Dec. 24 Order at 11. The facts do not support this assertion. His "portfolio" consisted of a single investment over which he had no discretion at all, and his salary was unconnected to PPVAs' NAV. Mr. Beren had no authority to take any action on behalf of anyone else. He was never, as the SAC suggests, on both sides of any transaction. The JOLs have a complete failure of proof in showing the existence of any fiduciary duties. Nor can they show actual material involvement in any tortious conduct that could satisfy their burden.

2. *Mr. Beren is not liable for fraud*. The SAC does not allege any false statements to have been made by Mr. Beren directly. Instead, it relies on Mr. Beren's "involvement" in the preparation of such statements. In fact, he had no such involvement, and the JOLs cannot point to facts showing otherwise. Further, there is no evidence that would permit an inference of *scienter*. The JOLs were able to get over their pleading hurdle with the help of the group

[1] The Court decided Mr. Beren's motion to dismiss in an order dated December 24, 2019 (the "**Dec. 24 Order**").

pleading doctrine, but now they cannot provide factual support for any of the allegations on which they relied. Mr. Beren simply did not have the authority, the involvement or the access to information to permit him to be considered the maker of any false statement, or to permit a reasonable inference of *scienter*. Moreover, the JOLs have no support for their allegation that Mr. Beren knowingly participated in any underlying tort by anyone else. In fact, there is no evidence that he knew about much of anything beyond the single item in his portfolio for which he had nominal responsibility.

3. *Mr. Beren never received money or property by which he could have been unjustly enriched*. Mr. Beren was paid a draw against realized profits in his "portfolio." His portfolio—consisting of a single investment—never realized a profit. Hence, Mr. Beren was never paid anything beyond his draw with respect to any of the allegedly fraudulent transactions. There is nothing he could be required to return to a more deserving party.

Because the Liquidators have no evidence from which a reasonable trier of fact could find in their favor on any of their claims against Mr. Beren, summary judgment in Mr. Beren's favor is required.

LEGAL STANDARD

As this Court has observed:

> "Summary judgment is proper when, after drawing all reasonable inferences in favor of a non-movant, no reasonable trier of fact could find in favor of that party." *Heublein, Inc. v. United States*, 996 F.2d 1455, 1461 (2d Cir. 1993); *see also* Fed. R. Civ. P. 56(a) ("The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."). "A fact is 'material' for these purposes if it 'might affect the outcome of the suit under the governing law.'" *Holtz v. Rockefeller & Co., Inc.*, 258 F.3d 62, 69 (2d Cir. 2001) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). "An issue of fact is

> 'genuine' if 'the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" *Id*. "Genuine issues of fact are not created by conclusory allegations." *Heublein*, 996 F.2d at 1461.

Great Am. Ins. Co. v Zelik, 19-CV-1805 (JSR), 2020 WL 85102, at *2 (S.D.N.Y. Jan. 6, 2020). "If the undisputed facts reveal that there is an absence of sufficient proof as to any essential element on which the opponent of summary judgment has the burden of proof, any factual dispute with respect to other elements becomes immaterial and cannot defeat the motion." *Gottlieb v. Cty. of Orange*, 84 F.3d 511, 519 (2d Cir. 1996) (citing, inter alia, *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986)).

Not only is there a complete failure of proof with respect to many elements of the JOLs' claims, but the affirmations and evidence supplied by Mr. Beren show that (among other things): (1) he was not on any "valuation committee" and played no role in establishing the NAV of PPVA; (2) he never had a "management role" or managerial responsibilities at Platinum Management, Beechwood, or any related entity; (3) as "Portfolio Manager," he "managed" a single investment—PEDEVCO—and had no discretion as to that investment; (4) he originated no deals during his employment at Platinum Management (including PEDEVCO, which he had inherited from Mr. Steinberg); (5) his pay was unrelated to PPVA's NAV and he never received any bonus or other special compensation in respect of his portfolio; (6) he never made any communication to PPVA or anyone else regarding the value of PPVA or any investment; (7) he was never simultaneously an employee of Platinum and Beechwood; and (8) while a Beechwood employee, he received a diminished (but more accurate) title in light of his continued limited and non-managerial duties.

Faced with their lack of evidence and Mr. Beren's evidence, the JOLs "cannot defeat the motion by relying on the allegations in [their] pleading . . . or on conclusory statements, or on

mere assertions that affidavits supporting [Mr. Beren's] motion are not credible." *Id.* at 518. They also may not defeat the motion for summary judgment "merely upon a 'metaphysical doubt' concerning the facts, or on the basis of conjecture or surmise." *Bryant v. Maffucci*, 923 F.2d 979, 982 (2d Cir. 1991) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). The motion must be granted because, in the end, conjecture and surmise are all the JOLs have.

ARGUMENT

I.
THE ELEMENTS OF THE REMAINING CLAIMS

The claims against Mr. Beren that survived the motion to dismiss are: as a Platinum Defendant, breach of fiduciary duty (First and Second Counts); aiding and abetting breach of fiduciary duty (Third Count); fraud (Fourth Count); constructive fraud (Fifth Count); aiding and abetting fraud (Sixth Count); and, as a Beechwood Defendant, aiding and abetting breach of fiduciary duty (Seventh Count), aiding and abetting fraud (Eighth Count) and unjust enrichment (Fourteenth Count).[2]

A. Elements of the Fiduciary Duty Claims

To show that Mr. Beren is liable on the claims for breach of fiduciary duty, the JOLs must have evidence from which a reasonable jury could conclude that Mr. Beren *had* a fiduciary duty towards PPVA, and knowingly induced or participated in a breach of those duties.

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[2] The Sixteenth Count (civil conspiracy) and the Seventeenth Count (civil RICO) in the SAC were dismissed in the Dec. 24 Order.

In its Dec. 24 Order, the Court explained that "[i]n determining whether a fiduciary duty exists, the focus is on whether one person has reposed trust or confidence in another and whether the second person accepts the trust and confidence and thereby gains a resulting superiority or influence over the first." Dec. 24 Order at 11 (quoting *Indep. Asset Mgmt. LLC v. Zanger*, 538 F. Supp. 2d 704, 709 (S.D.N.Y. 2008)). In particular, the Court noted the significance of the allegation that Mr. Beren had discretionary authority with respect to the property of PPVA:

> In particular, where a "defendant had discretionary authority to manage [a plaintiff's] investment accounts, it owed [the plaintiff] a fiduciary duty of the highest good faith and fair dealing." *Assured Guar. (UK) Ltd. v. J.P. Morgan Inv. Mgmt. Inc.*, 915 N.Y.S.2d 7, 16 (1st Dep't 2010), aff'd, 962 N.E.2d 765 (N.Y. 2011).

Dec. 24 Order at 11.

But the JOLs can no longer rely on their allegations of discretionary authority; they must find evidence that supports those allegations. They cannot do so because there is no basis to find that Mr. Beren was a fiduciary, much less that he participated in any of the allegedly tortious acts.

To show aiding and abetting liability, the JOLs must also show that Mr. Beren had "knowingly induced or participated in the breach." *Trott v. Platinum Mgmt. (NY) LLC (In re Platinum-Beechwood Litig.)*, 2019 WL 4934967, 400 F. Supp. 3d 2, at *5 (S.D.N.Y. 2019) (citations, quotation omitted). "As to the second element, '[a] person knowingly participates in a breach of fiduciary duty only when he or she provides substantial assistance to the primary violator.'" *Id.* (quoting *Lerner v. Fleet Bank, N.A.*, 459 F.3d 273, 294 (2d Cir. 2006)). But the JOLs have no evidence of any of this.

B. Elements of the Fraud Claims

The elements of a fraud claim are: "'a representation of material fact, the falsity of the representation, knowledge by the party making the representation that it was false when made, justifiable reliance by the plaintiff and resulting injury.'" Dec. 24 Order at 11 (quoting *Kaufman v. Cohen*, 307 A.D.2d 113 (App. Div. 1st Dep't 2003)). "To establish liability for aiding and abetting fraud under New York law, the plaintiffs must show (1) the existence of a fraud; (2) the defendant's knowledge of the fraud; and (3) that the defendant provided substantial assistance to advance the fraud's commission." *In re Platinum-Beechwood Litig.*, 2019 WL 4934967, at *22 (quoting *Krys v. Pigott*, 749 F.3d 117, 127 (2d Cir. 2014)).

As to constructive fraud, as this Court has explained, the elements are the same as for ordinary fraud except that the *scienter* requirement is replaced by the existence of a fiduciary relationship between the alleged tortfeasor and the victim. *See* Dec. 24 Order at 12 (citing *Brown v. Lockwood*, 432 N.Y.S.2d 186, 193-94 (App. Div. 2d Dep't 1980)).

Here, too, the JOLs cannot show the most basic element of all. They cannot show that Mr. Beren made any statements at all on which anyone relied, much less that he had knowledge of their falsity. Nor can they show knowledge of the other alleged tortfeasors' actions or that he provided any assistance at all. The absence of a fiduciary relationship dooms the constructive fraud claim as well.

C. Elements of Unjust Enrichment

"To state a claim for unjust enrichment under New York law, a plaintiff must allege that: '(1) defendant was enriched, (2) at plaintiff's expense, and (3) equity and good conscience militate against permitting defendant to retain what plaintiff is seeking to recover.'" *In re*

Platinum-Beechwood Litig., 2019 WL 4934967, at *25 (quoting *Briarpatch Ltd. v. Phoenix Pictures, Inc.*, 373 F.3d 296, 306 (2d Cir. 2004)).

"Relief for unjust enrichment is 'available only in unusual situations when, though the defendant has not breached a contract nor committed a recognized tort, circumstances create an equitable obligation running from the defendant to the plaintiff.' Accordingly, '[a]n unjust enrichment claim is not available where it simply duplicates, or replaces, a conventional contract or tort claim.'" *Id*. (quoting *Corsello v. Verizon N.Y., Inc.*, 18 N.Y.3d 777, 944 (2012)).

To the extent that this is simply duplicative of other tort claims against Mr. Beren, it is untenable as a matter of law and should be dismissed. This claim also fails for a basic factual reason: Mr. Beren was not "enriched." He received his draw while an employee at Platinum and at Beechwood; he did not receive anything at all in respect of any of the alleged schemes. There is therefore nothing for the JOLs to recover that should, in equity, go to PPVA or its investors.

II.
NO REASONABLE FACT-FINDER COULD FIND MR. BEREN LIABLE

The JOLs' theory is that Mr. Beren was a major player who, through his relationship with his father-in-law, was an integral part in the workings of the frauds and other torts on which this action is based. They have, however, no evidence to support their assertions and, therefore, Mr. Beren is entitled to summary judgment on all of their claims against him.

A. The Fiduciary Duty-Related Claims All Fail

The SAC portrays Mr. Beren as a senior management member with manifold responsibilities and powers: "an investment manager with responsibility for overseeing and managing PPVA's subsidiary RJ Credit and its various investments (e.g., PEDEVCO), among

other investments." SAC ¶ 12(xiii). This is egregiously wrong, as the JOLs would know if they had reviewed their own records and examined their deposition witnesses thoroughly.

1. Mr. Beren Was Not a Fiduciary of PPVA

Mr. Beren was never a fiduciary of PPVA, either at Platinum or at Beechwood. His "portfolio" only ever consisted of a single item: PEDEVCO. *See* Fact Statement ¶ 8; Beren Aff. ¶ 13; Nordlicht Aff. ¶ 3; San Filippo Aff. ¶ 3. He did not originate that investment, but "inherited" it from his superior at Platinum, David Steinberg, who was a member of PEDEVCO's board. *See* Fact Statement ¶ 9; Beren Aff. ¶ 13. Mr. Beren had no investment or management discretion as to PEDEVCO or any other PPVA asset. *See* Fact Statement ¶¶ 20 – 23; Beren Aff. ¶¶ 8, 19 – 22; Nordlicht Aff. ¶ 6; San Filippo Aff. ¶ 6. All of his actions were subject to the approval of his superiors, who made the ultimate decisions as to all investment matters, even with respect to PEDEVCO. *See id.*; Beren Aff. ¶¶ 19 – 21.

Nor is Mr. Beren's title of "Vice President" relevant. Whatever his title, besides lacking investment discretion, Mr. Beren also lacked any managerial responsibility. *See* Fact Statement ¶¶ 8, 19 – 23; Beren Aff. ¶¶ 19 – 22; Nordlicht Aff. ¶ 3; San Filippo Aff. ¶ 3. The title of "Vice President" was an accommodation to him to help him in his efforts to develop deals, and was eventually withdrawn. *See* Fact Statement ¶¶ 2 – 3; Beren Aff. ¶ 7. As will be discussed more fully below, Mr. Beren also had nothing to do with valuing PPVA's investments (*see* Fact Statement ¶¶ 33 – 34, 38; Beren Aff. ¶¶ 36 – 37, 42; Nordlicht Aff. ¶¶ 4 – 5; San Filippo Aff. ¶¶ 4 – 5) or with communicating those values to PPVA. *See* Fact Statement ¶ 33 – 34; Beren Aff. ¶¶ 39 – 40. The entirety of Mr. Beren's responsibilities with respect to his "portfolio" consisted of gathering data from others and passing it along to the personnel who actually had authority in the organization. *See* Fact Statement ¶¶ 36 – 39; Beren Aff. ¶¶ 39 – 42.

The JOLs have no support for their contention that Mr. Beren ever owed conflicting duties as a result of his association with both Platinum and Beechwood. First, as explained above, he never had any discretionary authority to exercise that could have been compromised by a conflict of interest. Second, he never simultaneously owed duties to both Platinum and Beechwood—his employment at the former ended, and then a few weeks later his employment at the latter began. *See* Fact Statement ¶ 45; Beren Aff. ¶ 56. Third, Mr. Beren's duties at Beechwood were largely identical to those at Platinum—get data on PEDEVCO and pass it along. *See* Fact Statement ¶ 46; Beren Aff. ¶ 57. He still had no discretionary authority. *See* Fact Statement ¶¶ 46, 52 – 55; Beren Aff. ¶¶ 57 – 64.

There is therefore nothing to support an inference that PPVA "reposed trust or confidence in" Mr. Beren, or that he "accept[ed] the trust and confidence and thereby gain[ed] a resulting superiority or influence over PPVA." *Indep. Asset Mgmt. LLC*, 538 F. Supp. 2d at 709. Because Mr. Beren owed no fiduciary duty to PPVA, and the JOLs can point to no evidence supporting a contrary conclusion, Mr. Beren is entitled to summary judgment on the First and Second Counts.

2. Mr. Beren Did Not Aid and Abet Any Breaches of Fiduciary Duty

To find Mr. Beren liable for aiding and abetting, the JOLs must show that Mr. Beren knowingly provided substantial assistance to a primary tortfeasor. The JOLs have a long list of allegations concerning the "Platinum Defendants" or the "Beechwood Defendants" and their various "schemes." They have no evidence that Mr. Beren had any involvement in or knowledge of any of them. It appears that the JOLs simply assumed—without any actual evidence—that he had some meaningful role in these alleged acts on the basis of his title and relationship to Mr. Huberfeld.

The substantive allegations relating to the alleged schemes begin at paragraph 313 with the Black Elk Explosion that supposedly led to the First and Second Schemes. Over the next 728 paragraphs—more than 100 pages—Mr. Beren's name hardly appears; instead he is grouped with the "Defendants," "Platinum Defendants," or "Beechwood Defendants" in the allegations of wrongdoing. But the lack of specific allegations regarding Mr. Beren is telling; in fact, he had nothing to do with any of them.

He had nothing to do with Black Elk or the Black Elk Scheme. *See* Fact Statement ¶¶ 59 – 60, 65; Beren Aff. ¶¶ 68 – 69. He had nothing to do with the Renaissance Sale. *See* Fact Statement ¶ 61; Beren Aff. ¶ 70. He had nothing to do with the Consent Solicitation. *See* Fact Statement ¶ 62; Beren Aff. ¶ 71. He had nothing to do with the Senior Secured Notes, or with their sale, or with Monstant or with Northstar or with the Agera Security Agreement. *See* Fact Statement ¶¶ 63 – 75; Beren Aff. ¶¶ 72 – 86. It would take far more than 25 pages simply to recite all the things Mr. Beren was *not* involved in that the Platinum and Beechwood Defendants are alleged to have done.

Mr. Beren's job responsibilities are simple and laid out in his affirmation: he kept an eye on certain data reported by PEDEVCO and reported it up the chain, and unsuccessfully tried to source new deals for Platinum. He had no other duties and did not participate in the management of the business or the decisions of his superiors.

We respectfully refer the Court to paragraphs 58 through 100 of the Fact Statement and 67 through 109 of the Beren Aff. for the specific facts refuting the allegations of the SAC. The JOLs have no evidence to controvert these facts and should never have made allegations based on unsupportable assumptions. Mr. Beren is entitled to judgment on the Third and Seventh Counts.

B. The Fraud-Related Claims Fail

The SAC's fraud claims fail because they cannot satisfy their burden to show a misstatement or *scienter*. And their constructive fraud claim fails for the additional reason that, as demonstrated above, Mr. Beren owed no fiduciary duty.

1. Mr. Beren Was Not Responsible for Any Misstatements

The SAC does not tie Mr. Beren personally to any allegedly false statements. To overcome this failure, the JOLs invoked the group pleading doctrine in an effort to impose responsibility on Mr. Beren for "communicating material representations to PPVA in various forms and by omitting to state material facts." SAC ¶ 793. The Court found, in the Dec. 24 Order, that the JOLs had met their pleading burden because

> Beren is alleged to have been a Vice President of the Platinum Management, portfolio manager for various PPVA investments, and "required member of the valuation committee," which had "responsibility for valuing all of PPVA's assets and investments." SAC ¶ 12(xiii). A deep involvement in the valuation committee is far from tangential to the SAC's key allegations. Furthermore, Beren's involvement in the valuation process, which lies at the core of the First Scheme and the Second Scheme, is repeatedly emphasized in the SAC. *See, e.g.*, SAC ¶¶ 12(xiii), 115, 256.

Dec. 24 Order at 8.

Having alleged these things, the JOLs must now find factual support for them—they must show facts that would permit the inference that Mr. Beren bore responsibility for the allegedly false statements on which the fraud claims are predicated. The JOLs are utterly unable to do so, because no such facts exist.

Mr. Beren never had any day-to-day management responsibilities with respect to Platinum Management or any other Platinum entity, including RJ Credit LLC, the holding company of the PEDEVCO investment. *See* Fact Statement ¶ 23; Beren Aff. ¶ 22. He was not a

signatory to any "partnership agreement" or "operating documents" of Platinum Management, as the SAC suggests. *See* SAC ¶ 34; Fact Statement ¶ 25; Beren Aff. ¶¶ 24 – 25. He had not seen the PPVA Partnership Agreement and had no knowledge of how it may have required PPVA to calculate its NAV, recouped its expenses or compensated its partners. *See* Fact Statement ¶ 26; Beren Aff. ¶ 25.

Mr. Beren was never a member of any valuation committee. Fact Statement ¶ 33; Beren Aff. ¶ 36; Nordlicht Aff. ¶ 4; San Filippo Aff. ¶ 4. He played no role in determining the NAV of PPVA, or of valuing any of PPVA's assets. Fact Statement ¶¶ 18, 33; Beren Aff. ¶¶ 36 – 37; Nordlicht Aff. ¶ 5; San Filippo Aff. ¶ 5. He never had responsibility for determining any of the allegedly false information communicated to PPVA. Fact Statement ¶¶ 27, 33 – 39; Beren Aff. ¶¶ 39 – 43. He was certainly not a "required member" of the valuation committee, whatever that means. *See* Fact Statement ¶¶ 33 – 34; Beren Aff. ¶ 37. He was not even *aware* on any kind of regular or systematic basis of the NAV of PPVA. *See* Fact Statement ¶ 18; Beren Aff. ¶ 37.

Far from being a "required member" of the valuation committee, Mr. Beren once participated in part of one meeting, by telephone, to replace an absent David Steinberg. *See* Fact Statement ¶ 40; Beren Aff. ¶¶ 44 – 46. He provided accurate information to the committee and dropped off the call. *Id*. There is a single document that ambiguously suggests he may have been on the valuation committee for two quarters, but this interpretation is inaccurate based not only on the testimony of Mr. Beren (*see* Beren Aff. ¶ 48) but on the testimony of its apparent author. *See* SanFilippo Aff. ¶ 4. There are no minutes or other records showing him to have been present at any other meetings.

Mr. Beren's sole responsibility that even arguably related to the value of PPVA was to gather certain information about PEDEVCO's bank accounts and operations and pass them along

to the personnel who would make the actual decisions. *See* Fact Statement ¶¶ 36 – 38; Beren Aff. ¶¶ 36 – 42. The information he passed along was 100% accurate, and the JOLs have nothing to suggest otherwise. *See* Fact Statement ¶ 39; Beren Aff. ¶ 43.

The JOLs have no evidence to support their allegations as to Mr. Beren's role and, therefore, no basis upon which to hold him liable for any alleged misstatements or omissions. He is entitled to summary judgment on the Fourth Count.

2. The JOLs Have No Evidence of Scienter

To plead *scienter*, the JOLs relied principally on an alleged financial interest in exaggerating the NAV of PPVA. Specifically, in denying Mr. Beren's motion to dismiss, the Court relied on the JOLs allegations that Mr. Beren received "a salary plus incentive compensation based on the increased value of the investments he managed, whether realized or unrealized" and "participated in the fraudulent valuation of PPVA's NAV and worked for certain Beechwood entities, even when these Beechwood entities were on opposite sides of a transaction from PPVA." Dec. 24 Order at 9 – 10. These allegations, the Court concluded, were sufficient to show that he had "both motive and opportunity to commit fraud." *Id*. (citation, quotation omitted.)

The JOLs cannot support either of these allegations because they are just false. And the problem with relying on Mr. Beren's alleged financial interest in an inflated NAV to show *scienter* is that he never had one.

Mr. Beren's compensation at Platinum consisted of a $100,000 draw, against which he would receive a percentage of the *realized* profits on the investments in is portfolio. *See* Fact Statement ¶ 7; Beren Aff. ¶¶ 12 – 13. No part of his pay depended on the NAV of PPVA as a

whole. *See* Fact Statement ¶ 13; Beren Aff. ¶ 14. As noted above, Mr. Beren was not even aware of PPVA's NAV; it simply was not his job.

To infer *scienter* given Mr. Beren's position and the relationship between his role and compensation, you would have to believe that (1) Mr. Beren knowingly gave false information to his superiors on the valuation committee (for which there is no evidence) (2) in the hope that they would incorrectly credit PEDEVCO with realized profits so that (3) they would then pay him more. This theory is nonsense. PEDEVCO never realized any profits and Mr. Beren never received anything beyond his draw with respect to his "portfolio"—which, again, only contained PEDEVCO. *See* Fact Statement ¶¶ 8, 11 – 12; Beren Aff. ¶¶ 12 – 13. And all of this is surely known to the JOLs from Platinum Management's pay and banking records.

The complete absence of any evidence of *scienter* is another reason to dismiss the Fourth Count.

3. The Absence of a Fiduciary Duty Further Dooms the Constructive Fraud Claim

As noted above, the elements of this are the same as for ordinary fraud except that the *scienter* requirement is replaced by the existence of a fiduciary relationship between the alleged tortfeasor and the victim. *See* Dec. 24 Order at 12. Because, as shown above, Mr. Beren has no responsibility for any of the allegedly false statements, and because he was not a fiduciary of PPVA, he is entitled to judgment on the Fifth Count.

4. Mr. Beren Did Not Aid and Abet Fraud

To establish liability for aiding and abetting fraud, the JOLs must come forward with evidence showing Mr. Beren (1) had knowledge of a primary tortfeasor's fraud, and (2) provided substantial assistance to advance the fraud's commission. *See Krys v. Pigott*, 749 F.3d at 127. The JOLs can do neither.

As discussed above in Section II.A.2, the JOLs list a litany of alleged acts they generally ascribe to the Platinum Defendants or the Beechwood Defendants over more than 100 pages in the SAC. Mr. Beren did not participate in any of them, did not provide substantial assistance to anyone else, and for the most part was entirely unaware of them. *See* Fact Statement ¶¶ 58 – 100; Beren Aff. ¶¶ 67 - 109. The JOLs have nothing to show otherwise but conjecture and surmise. Mr. Beren should have judgment in his favor on the Sixth and Eighth Counts.

C. Mr. Beren Was Not Unjustly Enriched

As the Court has previously observed, to the extent that this is simply duplicative of other tort claims against Mr. Beren, it is untenable as a matter of law and should be dismissed. However, this claim fails for a simple factual reason: Mr. Beren was not "enriched."

"The essential inquiry in any action for unjust enrichment . . . is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered." *Mandarin Trading Ltd. v Wildenstein*, 16 N.Y.3d 173, 182 (2011) (citation, quotation omitted). The only thing Mr. Beren received was his draw from Platinum Management, and later from Beechwood. *See* Fact Statement ¶¶ 7, 47; Beren Aff. ¶¶ 12, 57. He never received any bonuses, distributions, or anything else of value as a result of any of the alleges schemes, nor did he receive anything as a result of PPVA's allegedly inflated NAV. There is therefore nothing to return to the JOLs.

CONCLUSION

Because the JOLs are unable to come forward with evidence from which any reasonable fact-finder can conclude that Mr. Beren is liable, the Court should enter judgment for Mr. Beren on all counts of the SAC.

Dated: February 14, 2020
New York, NY

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