

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

-----X
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,

-against-

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

Defendants.
-----X

Case No. 1:18-cv-10936-JSR

**DEFENDANT DANIEL SAKS’ MEMORANDUM OF LAW IN SUPPORT OF THE
MOTION TO DISMISS THE COMPLAINT FILED BY DEFENDANT DAVID BODNER**

Defendant Daniel Saks (“Saks”) respectfully submits this memorandum of law in support of the motion, filed by co-defendant David Bodner (“Bodner”), to dismiss the Complaint (D.E. No. 1).¹ While Saks preserves his right to move to dismiss at a later date, if it becomes necessary, Saks agrees with Bodner that the Complaint of Plaintiffs Martin Trott and Christopher Smith as Joint Official Liquidators (“Plaintiffs”) is so facially defective that the Court should dismiss it. Saks thus joins in Bodner’s arguments that Plaintiffs’ reliance on “group pleadings” and failure to satisfy Fed. R. Civ. P. 9(b)’s pleading standards warrants dismissal of the Complaint. This submission is filed in accordance with the Court’s Order at the December 19, 2018 Court conference.²

¹ The Notice of Motion filed by Bodner seeks to have the Complaint dismissed in its entirety and invites other defendants to join by January 9, 2019. (D.E. No. 71.)

² Saks was not served before the conference and did not appear. We note that although the Court stated at the December 19, 2018 conference that all parties were to be served by the end of December, Saks did not receive a summons and Complaint from Plaintiffs until January 2, 2019.

Saks joins Bodner's position that Plaintiffs' group pleadings are insufficient and lack the requisite specificity.³ The crux of Bodner's motion is that Plaintiffs' strategy to collectively plead their claims against groups of defendants, rather than each defendant individually, has resulted in a Complaint that does not sufficiently satisfy the pleading standards set forth in Fed. R. Civ. P. 8 and 9(b). We agree that the Court should dismiss the Complaint on that basis.

The argument made by Bodner is particularly compelling when the references to Saks in the Complaint are considered. While Bodner is identified as a "Platinum Defendant" and a "Beechwood Defendant," Saks is only identified in the Complaint as a "Beechwood Defendant." Plaintiffs assert that each Beechwood Defendant should be held liable for "aiding and abetting breach of fiduciary duties" (Count 4), for "aiding and abetting fraud" (Count 5), for "unjust enrichment" (Count 11), and for a "violation of civil RICO" (Count 13). As Bodner contends, this is not an appropriate way to plead liability.

The sparse individual allegations against Saks are insufficient as a matter of law to state viable claims against him. The only times Saks is individually referenced in the Complaint are:

- The conclusory allegation that the Platinum Defendants breached their duties to PPVA, and that Saks, along with several other defendants, "materially assisted in this breach."
(Compl. ¶ 34.)

³ While Saks is joining in Bodner's group pleading argument, he is preserving all of his rights and defenses, including his right to file his own motion to dismiss. While we did not attend the December 19, 2018 conference, it is our understanding from the transcript that the Court only required defendants to opt into the group pleadings argument at this time, and that any defendant who may wish to file a motion addressing additional or individualized grounds for dismissal will be permitted to do so at a later date. (*See also* Steinberg Brief, D.E. No. 82 at 1 n.1.) Therefore, Saks submits this statement only to join Bodner's argument that Plaintiffs' group pleadings are insufficient to state claims for relief. To the extent the Court does not dismiss the Complaint based on Plaintiffs' improper use of group pleadings, Saks reserves the right to move to dismiss.

- The allegation that Mark Nordlicht, one the defendants, “operated Beechwood via intermediaries” including, among other defendants, Saks. (Compl. ¶ 38.)
- The allegation that, beginning in late 2014, Saks was chief financial officer (“CFO”) and chief investment officer (“CIO”) for BAM, which is defined as a “Beechwood Entity.”⁴ Plaintiffs assert, again in a conclusory fashion, that “Saks was instrumental to Beechwood’s involvement in the First Scheme and Second Scheme,” that Saks had knowledge of the First Scheme and Second Scheme Transactions, that he “exerted control over PPVA and its subsidiaries,” and that he was the “signatory on behalf of various Beechwood Entities in connection with several of the transactions among Beechwood Entities and PPVA.” (Compl. ¶ 61.)
- The allegation that Saks, along with several other defendants, was either a recipient or copied on an email by a Platinum Management portfolio manager explaining that a Black Elk SEC filing valued Golden Gate Oil at \$60 million. (Compl. ¶ 185.) This email is alleged to have been sent before Saks is alleged to have become involved with any of the “Beechwood Entities.” (*Compare Id.* (date of email May 23, 2014) *with* Compl. ¶ 61 (Saks replaced Levy as the CIO of BAM “in late 2014.”)).
- The allegation that Saks replaced David Levy as BAM’s CFO and CIO in late 2014. (Compl. ¶¶ 233, 242.)
- The allegation that the Beechwood Entities and Platinum Management have overlapping management, including, among other defendants, Saks. (Compl. ¶ 727.)

Collectively, these individual allegations against Saks, if taken as true, establish only that he was employed by BAM, that he was formerly a “Platinum Management executive,” and that he

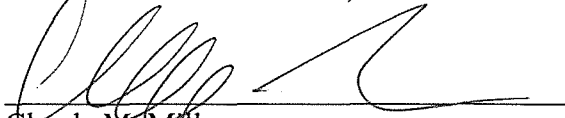
⁴ Saks was never BAM’s CFO.

was a recipient of an email from a Platinum Management portfolio manager. There are no allegations, other than those proffering mere conclusions, that Saks engaged in any wrongdoing that would give rise to liability for aiding and abetting breaches of fiduciary duty, aiding and abetting fraud, unjust enrichment, or racketeering. This is especially true given that allegations of fraud, which underlie each of the claims asserted against Saks (as a “Beechwood Defendant”), are subject to Fed. R. Civ. P. 9(b)’s heightened pleading standards that require a party to “state with particularity the circumstances constituting fraud or mistake.” Here, Plaintiffs offer only a general accusation that Saks was “instrumental” to the various schemes described in the Complaint; Plaintiffs do not allege, with any particularity, what his supposed roles in the schemes were. As discussed in Bodner’s brief, Plaintiffs fail to plead the elements of fraud as required by the Second Circuit. (*See* Bodner Brief, D.E. No. 72, p. 5.) Saks cannot be expected to defend against a Complaint where he is not on notice of the facts giving rise to his alleged liability.

Accordingly, based upon the arguments contained in this memorandum and the motion to dismiss filed by Bodner, Saks agrees that the Court should dismiss the Complaint in light of Plaintiffs’ reliance on group pleadings and failure to comply with Rule 9(b).

Dated: New York, New York
January 9, 2019

KOSTELANETZ & FINK, LLP



Claude M. Millman
Stephen A. Josey
Seven World Trade Center, 34th Floor
New York, NY 10007
212-808-8100
cmillman@kflaw.com
Attorneys for Defendant Daniel Saks