UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE PLATINUM-BEECHWOOD LITIGATION	18 Civ. 6658 (JSR)
MARTIN TROTT and CHRISTOPHER SMITH, as Joint Official Liquidators and Foreign Representatives of PLATINUM PARTNERS VALUE ARBITRAGE FUND L.P. (in Official Liquidation), *et ano.*, Plaintiffs, - against - PLATINUM MANAGEMENT (NY) LLC, *et al.*, Defendants.	18 Civ. 10936 (JSR)

MEMORANDUM OF LAW IN SUPPORT OF DAVID STEINBERG'S MOTION TO DISMISS THE COMPLAINT

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Defendant David Steinberg respectfully submits this memorandum of law in support of his motion pursuant to Federal Rule of Civil Procedure (the "Rules") 12(b)(6) to dismiss the Amended Complaint of Plaintiffs Martin Trott and Christopher Smith, as Joint Official Liquidators (the "Liquidators") and Foreign Representatives of Platinum Partners Value Arbitrage Fund L.P. ("PPVA") (in Official Liquidation), and Plaintiff PPVA (collectively, "Plaintiffs"). Steinberg also joins the motion filed by Defendant David Bodner (Dkt. No. 182).

PRELIMINARY STATEMENT

David Steinberg has been swept up in Plaintiffs' dragnet Amended Complaint (Dkt. No. 156) ("AC" or "Complaint"), which now spans 1,012 paragraphs, totals more than 1,700 pages (including exhibits), and makes allegations against 199 defendants, including 100 pseudonymous "John Does." Despite its length, the Complaint does not allege any misconduct, misstatement, misrepresentation, or any other wrongdoing by Steinberg. For the most part, the Complaint fails to attribute any actions or statements to him at all. Instead, Plaintiffs make collective allegations against entire groups, one of which is the so-called "Platinum Defendants" — the label given to Steinberg, 11 other individuals, and the entity that formerly employed him. Plaintiffs new Amended Complaint does little more besides break out the "Platinum Defendants" group and list Steinberg individually, adding scarcely any new substance or facts as to him but simply characterizing him as being "involved" in various transactions. Plaintiffs' "group pleading" fails to identify with particularity who did or said what, when, or how. What little the Complaint says about Mr. Steinberg fails to satisfy even the basic pleading standard under Rule 12(b)(6), let alone the heightened pleading standard for fraud and fraud-based claims under Rule 9(b).

Plaintiffs allege eight causes of action against David Steinberg—breach of the fiduciary duty of care and good faith (First Count), breach of the fiduciary duty of loyalty/self-dealing (Second Count), aiding and abetting breach of fiduciary duty (Third Count), fraud (Fourth Count),

constructive fraud (Fifth Count), aiding and abetting fraud (Sixth Count), civil conspiracy (Sixteenth Count), and civil RICO (Seventeenth Count). Plaintiffs' claims fail for multiple reasons. *First*, Plaintiffs fail to show that Steinberg owed any duty to PPVA, and even assuming a duty, they fail to allege any breach. *Second*, Plaintiffs fail to plead any element of fraud; they fail to allege a false statement, an actionable nondisclosure, materiality, scienter, reliance, or damages. *Third*, Plaintiffs fail to plead the elements of civil RICO, namely, that Steinberg was employed by or associated with a RICO enterprise, that he conducted or participated in the conduct of any alleged RICO enterprise's affairs, or that he committed any predicate acts of racketeering or engaged in a pattern of racketeering activity. *Fourth*, Plaintiffs fail to plead the necessary elements of their secondary theories of liability, aiding and abetting and civil conspiracy. *Lastly*, Plaintiffs are barred by the *in pari delicto* doctrine from pursuing these claims.

Because the Complaint fails to allege a single fact as to what David Steinberg supposedly did or said or knew regarding the fraudulent schemes alleged in the Complaint, this Court should promptly dismiss him from this action. Such dismissal is necessary to prevent the injustice against which Rule 12(b)(6)'s notice pleading requirements—and Rule 9(b)'s heightened particularity requirement for fraud and fraud-based claims—were intended to guard, namely, the danger that an individual could be required to defend against serious allegations of fraud and misconduct absent adequate notice of his supposed wrongdoing. Because of these pleading deficiencies, Plaintiffs' eight claims against David Steinberg must be dismissed.

Additionally, for all of the reasons set forth in the Memorandum of Law filed by defendant David Bodner, dated February 4, 2019 (Dkt No. 183), the claims against David Steinberg must be dismissed.

STATEMENT OF FACTS ALLEGED IN THE AMENDED COMPLAINT

A. Allegations as to David Steinberg.[1]

David Steinberg resides in New Jersey and began to work for Platinum Management[2] in May 2009. AC ¶ 87. The Complaint alleges that Steinberg held two titles at Platinum Management.[3] First, he was a "portfolio manager" for "various PPVA investment positions." Id. Second, he was the "co-chief risk officer" at Platinum Management.[4] Id. at ¶ 88. The Complaint does not allege what Steinberg actually did as an employee of Platinum Management, such as what his responsibilities were, what authority or discretion he had (if any) to act on behalf of Platinum Management or its investors (such as PPVA), or what kinds of tasks he performed.[5] David Steinberg is nowhere in any of the marketing materials or offering documents that

[1] The Complaint's factual allegations are presumed to be true solely for purposes of this motion to dismiss. David Steinberg disputes them.

[2] For ease of reference and unless otherwise specified, this brief uses the same defined terms as used by Plaintiffs in their Amended Complaint; however, Steinberg does not concede any of the factual assertions or characterizations as stated in those defined terms.

[3] As just one example of Plaintiffs' sloppy pleading, Steinberg is identified in a group of defendants as someone who "owned, operated and managed Platinum Management," AC ¶ 7; however, the idea that Steinberg somehow "owned" Platinum Management is not only false, it has no basis in any of the Complaint's numerous exhibits and allegations that describe the actual ownership of Platinum Management, see, e.g., AC at Ex. 5.

[4] Plaintiffs allege that Steinberg also worked for or held titles at PPVA, see, e.g., AC ¶ 88, but this is categorically false — he was only ever employed by Platinum Management. Plaintiffs' allegations to this Court are contradicted by representations that PPVA has made to other courts, including to the Grand Court of the Cayman Islands in its Abridged Report, Cause No. FSD 131 of 2016 (AJJ) (issued on October 13, 2016), a true and correct copy of which is attached to the Declaration of David Hodges as Exhibit A, at ¶¶ 3.30-3.42 (describing need of PPVA to retain employees of Platinum Management, including Steinberg, with consulting agreements). Judicial notice may be taken of admissions in pleadings and public filings in other judicial proceedings that contradict the party's factual assertions in a subsequent action. See Carruthers v. Flaum, 388 F. Supp. 2d 360, 370 (S.D.N.Y. 2005).

[5] By contrast, the Complaint alleges in multiple places that "ultimate decision making" for Platinum Management rested in some combination of defendants Nordlicht, Huberfeld, Small, Levy, and Bodner. See AC ¶¶ 84, 980, 994. The Complaint also identifies others at Platinum Management as "founders," id. ¶¶ 12(i), 12(iii), 12(iv), "owners," id. ¶ 12(iii), 12(iv), "President," id. ¶¶ 12(ii), 56, "managing member," id. ¶ 42, and "Chief Investment Officers," id. ¶¶ 12(i), 12(ii), 12(vi).

Plaintiffs attach to their Complaint, including the sections containing biographies of key Platinum Management personnel. See AC Exhs. 6, 7, 8, 9.

The Complaint makes scarce mention of David Steinberg individually — only 36 of the Complaint's 1,012 paragraphs mention him by name — and, where the Complaint mentions him, it is mostly as part of a list of the other so-called "Platinum Defendants", without any specific fact pleaded as to Steinberg. Plaintiffs make individual allegations about Steinberg's particular conduct in only a handful of instances. And the references to him make no more than broad, conclusory statements about Steinberg and others, make virtually no concrete factual allegations about what Steinberg allegedly did, and fail to identify a single misrepresentation, false statement, or wrongful act by Steinberg. Specifically:

- Plaintiffs allege that Steinberg was a member of the valuation and risk committees, and that solely by virtue of those memberships he must have had "direct knowledge" of the false inflation of the value of PPVA's assets. See AC ¶¶ 12(vi), 89, 91, 240-42. But Plaintiffs do not allege any basis for this inference, such as what the alleged committees did or the information that they received.

- Plaintiffs allege that Steinberg managed PPVA's investments in five companies (without identifying any wrongful conduct by him in relation to those companies), that he reviewed and negotiated unidentified agreements and other unidentified documents relating to the March 2016 restructuring and Agera Transactions, that he was an "officer/manager/authorized signatory" (without alleging what any of these terms means) of certain PPVA subsidiaries, that he was paid a base salary and incentive compensation, that he was a co-investment advisor for BAM, and that he was the Beechwood Entities' investment advisor. AC ¶¶ 12(vi), 512.

- Plaintiffs allege that Steinberg was "involved with and responsible for negotiating and executing numerous transactions involving PPVA" while only identifying three actual transactions — the 2015 Montsant loan, the PEDEVCO transaction, and the Agera Transactions. AC ¶ 90. Nothing is alleged about what Steinberg specifically did as part of any of these transactions, and nothing he personally did is identified as wrongful or fraudulent.

- Plaintiffs allege that Steinberg was "involved in the creation of Beechwood and even worked for Beechwood" without identifying any particular conduct by Steinberg that was wrongful or fraudulent. AC ¶ 92.

- Plaintiffs allege that Steinberg was a "direct participant" in the Black Elk scheme, using an account in his wife's name to conceal control to vote in favor of a consent solicitation. AC ¶¶ 93, 473. However, Plaintiffs fail to plead that Steinberg or his wife actually owned the bonds at the time of the vote.

- Plaintiffs allege that Steinberg was a "responsible person" or "officer" or "fiduciary" for PPVA subsidiaries, without identifying any particular conduct, wrongful or otherwise, with regard to any of those subsidiaries that would form a basis for a fiduciary relationship with them. AC ¶ 94.

- Plaintiffs allege that Steinberg received an email written by someone else raising an "issue" about the valuation of Golden Gate Oil in an SEC filing. AC ¶ 324. Plaintiffs allege nothing fraudulent or wrongful about Steinberg's mere receipt of the email.

- Plaintiffs allege that an email from Steinberg to Murray Huberfeld regarding wire transfers are evidence that the Platinum Defendants were funding Beechwood. AC ¶ 348. Plaintiffs allege nothing fraudulent or wrongful about the wire transfers described in the email.

- Plaintiffs allege that Steinberg was involved in in executing the Agera Sale, but the only particular allegation is that Steinberg "worked directly with [Kevin Cassidy] and his counsel to create the mechanism by which 8% of the Agera purchase price" would be received by Kevin Cassidy, who was at the time the managing director of Agera. See AC ¶¶ 619-645.

The above are the only allegations that refer to David Steinberg individually. In the rest of the Complaint, Plaintiffs simply lump Steinberg and 12 other corporate and individual defendants—Platinum Management, Mark Nordlicht, Murray Huberfeld, David Bodner, Uri Landesman, Bernard Fuchs, David Levy, Ezra Beren, Naftali Manela, David Ottensoser, Joseph SanFilippo, and Daniel Small—together in the group identified as the "Platinum Defendants," AC ¶ 34, and proceed to level allegations against them collectively. In the overwhelming majority of references to the "Platinum Defendants" in the Complaint, David Steinberg is not mentioned at all.[6]

[6] AC ¶¶ 3, 9, 10, 11, 19-22, 25-27, 29-30, 35, 48, 54, 63, 65-66, 73, 78, 86, 100, 104, 110, 123, 128, 136, 143-44, 147, 149, 151, 153, 156, 159, 170, 180, 223, 229, 237, 245, 247-49, 251-57, 264, 278, 292-98, 302-05, 307-09, 312-15, 321, 323, 325, 328-32, 335, 337, 358-59, 364, 387-391, 394-95, 399, 403-06, 409, 411-16, 421, 423, 425-29, 434, 437-38, 455, 459, 462, 466-67, 470, 474, 484-87, 492, 497, 499, 502-510, 515-16, 519-530, 533-34, 539-540, 543-45, 548-551, 554-58, 572, 578, 590-96, 601, 626-631, 637-38, 642, 648, 662, 664, 666, 669, 673, 677, 680, 691, 695, 697-98, 702,

B. The Alleged Schemes.

The Complaint alleges that PPVA's assets were misappropriated and diminished through various "schemes" — the "First Scheme," the "Black Elk Scheme," and the "Second Scheme." Each scheme involved numerous separate transactions and agreements, but the Complaint fails to identify any conduct by Steinberg in furtherance of any of these alleged "schemes."

1. The "First Scheme."

The Complaint defines the "First Scheme" as a "set of acts and transactions" from 2013 to 2015 in which the Platinum Defendants and the Beechwood Defendants caused PPVA to engage in a series of "non-commercial transactions" designed to (i) "falsely inflate the net value ascribed to PPVA's assets"; (ii) prioritize the interests of "Beechwood Entities" over the interests of PPVA; and (iii) enable Platinum insiders to take proceeds from the sale of PPVA's largest investment, Black Elk, in contravention of "prior rights of PPVA." See AC ¶ 9.

The Complaint does not identify any conduct attributable to Steinberg as part of the First Scheme, except for vague and conclusory allegations that he was "involved in" the creation of Beechwood, apparently because he sent an email regarding wires about Beechwood's funding. See AC ¶¶ 92, 346. Steinberg is not alleged to have been responsible for calculating the net asset value ("NAV") or communicating the NAV to PPVA (or to any other investor or entity). Other Platinum Defendants, however, are alleged to have been involved in calculating NAV[7] or

705-06, 710, 712, 714-15, 717, 725-736, 739-740, 745, 747-49, 752-762 (First Count), 763-770 (Second Count), 771-780 (Third Count), 781-802 (Fourth Count), 803-826 (Fifth Count), 827-834 (Sixth Count), 944-951 (Sixteenth Count), 952-969 (Seventeenth Count).

[7] See AC ¶ 63 ("In connection with the First Scheme, ***Landesman*** was responsible for marketing PPVA on behalf of Platinum Management, and making representations concerning PPVA's NAV.") (emphasis added); ¶ 12(viii) ("***SanFilippo*** also was responsible for communicating with the third parties who routinely performed valuation, accounting and administrative services on behalf of PPVA, including calculating and reporting PPVA's NAV on a monthly basis and providing valuation reports each quarter.") (emphasis added); AC ¶ 86 ("[B]oth ***Bodner*** and ***Huberfeld*** also participated in improperly inflating the values of PPVA's assets in order to

communicating it to PPVA.[8] Nor is Steinberg alleged to have controlled, coordinated, or otherwise directed the affairs of Beechwood or any "Beechwood Entity."[9]

2. The "Black Elk Scheme."

The Complaint alleges a separate "Black Elk Scheme" as a sub-part of the "First Scheme," in which Plaintiffs allege that the Platinum Defendants and the Beechwood Defendants conspired to help the Platinum Defendants and other unidentified "insiders" to be able to "cash out" their investment in Black Elk ahead of the interests of PPVA. See AC ¶¶ 427-537. Black Elk was an oil and gas company in which PPVA owned a majority of the common equity, as well as a "significant portion" of the Black Elk bonds. See AC ¶¶ 428-431. Plaintiffs allege that the "Platinum Defendants" failed to disclose an interest in $72 million in bonds that they controlled ahead of a consent solicitation; that consent solicitation included a proposed amendment whereby the bondholders could vote to amend the Indenture to permit certain equity holders to be paid ahead of the bondholders from the sale of certain of Black Elk's assets. See AC ¶¶ 483-486.

The Complaint does not identify any conduct attributable to David Steinberg that furthered the "Black Elk Scheme," except for an allegation that David Steinberg "was a direct participant in the Black Elk Scheme, using an account maintained in the name of his wife to

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improperly increase PPVA's NAV, thereby causing PPVA to pay excessive distributions, fees and other payments to the Platinum Defendants.") (emphasis added).

[8] "***SanFilippo***, ***Nordlicht*** and ***other Platinum Management staff*** routinely communicated valuation information to PPVA's external fund administrator, SS&C Technologies, Inc., which, in turn would use that information to perform the calculations necessary to prepare PPVA's monthly NAV statements." AC ¶ 244 (emphasis added).

[9] Other defendants, however, are alleged to have established, controlled, or managed Beechwood. See AC ¶ 335 ("The effort [to establish Beechwood] was coordinated by Nordlicht, Levy, Huberfeld, Taylor, Feuer and Bodner."); AC ¶ 334 ("The majority ownership in and ultimate control of Beechwood was in fact held by Nordlicht, Huberfeld, Bodner and Levy, while Taylor and Feuer maintained ostensible and nominal management authority, with Levy."). Indeed, Steinberg appears in none of the numerous exhibits attached to the Complaint concerning the formation of Beechwood, including many emails. See AC at Exhs. 32, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43.

purchase Black Elk bonds for the purpose of voting in favor of the consent required to amend the Indenture . . . ." See AC ¶ 93. The exhibits attached by Plaintiffs to their Complaint make clear that only ten Black Elk bonds were involved, and that these ten bonds were ***sold*** by Steinberg's wife in December 2014, four months ***after*** the consent solicitation at issue.[10] The Complaint never alleges when Steinberg's wife ***purchased*** the bonds, which would be necessary to establish if they were purchased prior to the consent solicitation that took place four months prior in August 2014 that is central to the alleged "Black Elk Scheme." See AC ¶ 488. Nor does the Complaint allege whether Steinberg's wife (or anyone else) voted in any particular way in the consent solicitation. Nor does the Complaint allege any basis to infer that Steinberg's wife's ownership of ten Black Elk bonds was material to the consent solicitation.

3. The "Second Scheme."

The Complaint defines the "Second Scheme" as a "set of acts and transactions" in late 2015 where the Platinum Defendants "with material assistance" from other, unidentified defendants, transferred or encumbered "all or nearly all" of PPVA's remaining assets for the benefit of the Beechwood Defendants, unidentified "insiders," and PPCO. AC ¶ 10. The Complaint identifies five "significant wrongful acts" as part of the Second Scheme, including (i) the use of "Montsant" to hide Beechwood's encumbrance of PPVA assets, see AC ¶¶ 543-555; (ii) a side letter by defendant Mark Nordlicht agreeing to use the proceeds of the sale of an asset to pay unrecoverable debt owed to Beechwood, see AC ¶¶ 556-571; (iii) a March 2016 restructuring of PPVA, see AC ¶¶ 572-594; (iv) a "Security Lockup" where "select redeeming investors and creditors of PPVA" were preferentially granted security interests and liens on all assets of PPVA, see AC ¶¶ 11(iv), 662-714; and (v) a sale of Agera Energy to Beechwood and SHIP, see AC ¶¶ 595-661.

[10] See AC Ex. 54 (explaining that a December 15, 2014 sale of Black Elk bonds was made from an account belonging to David Steinberg's wife and describing the amount as 10 bonds).

The Complaint does not identify any conduct by David Steinberg as part of the alleged Second Scheme, which involved multiple transactions and restructurings spanning several years, except (1) to call him the "notice party" for unidentified documents related to the March 2016 restructuring, see AC ¶¶ 593-94, and (2) to make vague and conclusory allegations regarding the sale of Agera. The Complaint alleges that "the specific terms by which the Agera Sale was effected were put in place by Steinberg, Ottensoser, Taylor and Narain." See AC ¶ 619. However, the only conduct alleged by Steinberg during the sale of Agera was involvement in executing documents that permitted Agera's then-managing director to receive 8% of the sale price. AC ¶¶ 644-45. Nothing further is alleged about Steinberg's conduct during the negotiations.

C. The Present Action.

In August 2016, PPVA entered liquidation proceedings in the Cayman Islands and Joint Official Liquidators were appointed to represent PPVA. AC ¶ 16. In November 2018, the Joint Official Liquidators commenced the present action, and in January 2019 they filed an Amended Complaint alleging 21 causes of action against 199 defendants. The Amended Complaint asserts eight claims against the "Platinum Defendants," of which David Steinberg is defined to be among.

ARGUMENT

All claims against David Steinberg must be dismissed. Plaintiffs allege no facts against Steinberg individually sufficient to state any claims against him. The Complaint fails to meet even the basic notice pleading requirements of Rule 12(b)(6), and falls far short of Rule 9(b)'s heightened particularity requirement for fraud, fraud-based breach of fiduciary duty, and fraud-based RICO claims.

I. Plaintiffs fail to state a claim for breach of fiduciary duty (First and Second Counts) or aiding-and-abetting breach of fiduciary duty (Third Count) against David Steinberg.

A. Plaintiffs fail to state a claim against David Steinberg for breach of fiduciary duty (First and Second Counts)

The claims against David Steinberg for breach of fiduciary duty—which are based in fraud and subject to Rule 9(b)'s heightened particularity standard, Fernandez v. UBS AG, 222 F. Supp. 3d 358, 387 (S.D.N.Y. 2016)—must be dismissed for failure to adequately plead the three elements of that claim, namely, that (1) Steinberg owed Plaintiffs a fiduciary duty, (2) he breached that duty, and (3) Plaintiffs suffered damages as a result. Burry v. Madison Park Owner LLC, 84 A.D.3d 699, 699–700 (N.Y. 1st Dep't 2011).[11]

The breach of fiduciary duty claims fail for at least two independent reasons. *First*, to the extent that Plaintiffs allege that Steinberg breached a fiduciary duty owed to PPVA as a result of his employment by Platinum Management, the claims must be dismissed for failure to allege facts showing that such a duty existed. *Second*, the Complaint alleges no conduct by Steinberg that indicates a breach of any fiduciary duty.

1. Plaintiffs fail to allege facts demonstrating that Steinberg's employment with Platinum Management gave rise to any fiduciary duty to PPVA.

Insofar as Plaintiffs' fiduciary duty claims are based on Steinberg's alleged employment by "Platinum Management," the claim must be dismissed because the Complaint alleges no facts

[11] The Complaint does not indicate whether the fiduciary-duty based claims are brought under the law of New York (where Platinum Management had its principal place of business and where Steinberg was employed) or Delaware (where Platinum Management was incorporated). The Court need not undertake a choice-of-law analysis, however, because the substance of the law is the same in both jurisdictions. See Tronlone v. Lac d'Amiante Du Quebec, 297 A.D.2d 528, 528 (N.Y. 1st Dep't 2002). Although PPVA is a Cayman Islands entity, the Complaint makes no statement under Federal Rule of Civil Procedure 44.1 that any claims are being asserted on the basis of Cayman Islands law. For these reasons, we cite below to both New York and Delaware law in support of David Steinberg's motion to dismiss the fiduciary duty claims.

from which it could be inferred that such a relationship gave rise to a fiduciary duty to PPVA.

To survive a motion to dismiss, the Complaint "must set forth specific facts constituting the alleged relationship with sufficient particularity to enable the Court to determine whether, if true, such facts could give rise to a fiduciary relationship." Naughright v. Weiss, 826 F. Supp. 2d 676, 695 (S.D.N.Y. 2011) (quoting World Wrestling Entm't, Inc. v. Jakks Pac., Inc., 530 F. Supp. 2d 486, 504 (S.D.N.Y. 2007)). Here, as against David Steinberg, the only allegation suggesting a "Platinum"-based fiduciary duty is that as "the general partner and/or the persons or entities who exercised day-to-day management over PPVA, its subsidiaries and its assets, the Platinum Defendants had fiduciary duties of due care and loyalty to PPVA." AC ¶ 255. But the Complaint alleges only that Platinum Management—not Steinberg individually—acted as a general partner of PPVA. See AC ¶ 39. With respect to Steinberg, the Complaint alleges only that he served as "co-chief risk officer" and "portfolio manager" of Platinum Management, and identifies a mere five investments of PPVA for which Steinberg allegedly had any responsibility as a Platinum Management employee. See AC ¶ 12(vi).

Plaintiffs' allegations are insufficient to allege a fiduciary duty on Steinberg's part. Even if ***Platinum Management*** owed a fiduciary duty to PPVA as its general partner, it does not follow that Steinberg individually owed any such duty simply because he was employed by Platinum Management. Courts have repeatedly rejected the notion that a corporation's fiduciary duty automatically gives rise to individual fiduciary duties on the part of corporate executives or employees.[12]

[12] See, e.g., Sergeants Benev. Ass'n Annuity Fund v. Renck, 19 A.D.3d 107, 116 (N.Y. 1st Dep't 2005) ("Even where this Court has upheld a breach of fiduciary duty claim against a corporate defendant, we have not imposed personal liability upon the responsible executive."); Krasner v. Rahfco Funds LP, No. 11-CV-4092(VB), 2012 WL 4069294, at *9-10 (S.D.N.Y. Aug. 9, 2012) (dismissing fiduciary duty claim against officer of hedge funds' general partner, noting that "[t]he fact that an individual is a corporate officer of a corporation [that] has breached a fiduciary duty

For Plaintiffs to establish that Steinberg personally owed an independent fiduciary duty to PPVA, they would have to allege specific facts showing that PPVA reposed confidence in Steinberg personally, such that Steinberg held a position of "superiority and influence" over PPVA. See AG Capital Funding Partners, L.P. v. State Street Bank and Trust Co., 11 N.Y.3d 146, 158 (2008). Plaintiffs allege no such facts. To the contrary, most of the allegations describing the transactions that the "Platinum Defendants" allegedly entered into on PPVA's behalf attribute those actions to Mark Nordlicht or others, see, e.g., AC ¶ 697, or do not identify an individual defendant at all, see, e.g., id. ¶ 666. The only allegations concerning Steinberg's involvement in transactions related to PPVA were the March 2016 restructuring and the sale of Agera. The March 2016 restructuring was allegedly signed by Mark Nordlicht on behalf of PPVA, Montsant and Golden Gate Oil, see id. ¶ 593, and the terms were allegedly "developed, coordinated and accomplished" by Nordlicht, Huberfeld, Bodner, Levy, Bernard Fuchs, Steinberg, SanFilippo, and Ottensoser, "working together" with Narain, Taylor, and Feuer, see id. 594. Plaintiffs allege that the Agera sale was "initiated by" Michael Katz and Mark Nordlicht, see id. ¶ 596, and that the specific terms were put in place by Steinberg, Ottensoser, Taloyr and Narrain, "all operating with the knowledge of and in conjunction with" the other Platinum Defendants, Katz, the Beechwood Defendants, SHIP, Cassidy, and Michael Nordlicht, see id. ¶ 619. Given the involvement of so many others in these transactions, it is impossible to infer from the alleged facts that PPVA reposed confidence in

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does not necessarily mean the individual may be held liable"); In re Refco Inc. Secs. Litig., 826 F. Supp. 2d 478, 511-12 (S.D.N.Y. 2011) (dismissing fiduciary duty claim against Chief Operating Officer, owner, and director of hedge funds' third-party administrator, holding that "[i]t does not follow that just because . . . [funds' administrator] had a relationship of trust and confidence with [funds], that [Chief Operating Officer, owner, and director of funds' administrator] did as well"); Am. Fin. Int'l Grp.-Asia, L.L.C. v. Bennett, No. 05-CV-8988 (GEL), 2007 WL 1732427, at *5 (S.D.N.Y. June 14, 2007) ("Even if such a relationship had existed between plaintiffs and [defendant company], nothing in the complaint suggests that any relationship existed between plaintiffs and [defendant company's] individual officers.").

Steinberg personally, and Plaintiffs do not allege that confidence was reposed in Steinberg individually. These allegations are insufficient to create a fiduciary relationship.

The Complaint does not allege that Steinberg possessed any discretionary trading authority or any other decision-making authority with respect to PPVA's assets, and Plaintiffs' conclusory assertion that Steinberg was a "fiduciary" for various PPVA subsidiaries, without alleging specific facts to support that conclusion, see AC ¶ 94, is insufficient to state a claim.

2. Plaintiffs fail to allege conduct by Steinberg constituting a breach of any fiduciary duty.

Plaintiffs also fail to allege any conduct by Steinberg that would constitute a breach of fidcuciary duty. Plaintiffs' allegations in this regard are only collective allegations, see AC ¶ 256 ("[T]he Platinum Defendants reneged on their obligations and breached their duties of due care and loyalty to PPVA . . . ."). The Complaint does not identify any misconduct or misrepresentation made by Steinberg individually.[13] Nor does the Complaint allege any specific acts by Steinberg in furtherance of the various "Schemes" identified in the Complaint. The Complaint does not allege that Steinberg benefited personally from any particular transaction, except to allege generally that he received a salary and bonus compensation.

As discussed below, see infra Section II(A), such collective allegations are insufficient to state a claim. Where, as here, the Complaint has "failed to plead any specific acts which constitute any alleged fraud or breach of trust," dismissal of the fiduciary duty claim is required. Cf. Rasmussen v. A.C.T. Envt'l Servs., 292 A.D.2d 710, 712 (N.Y. 3d Dep't 2002).

B. Plaintiffs fail to state a claim against David Steinberg for aiding and abetting breach of fiduciary duty (Third Count).

The claim against David Steinberg for aiding and abetting others' alleged breaches of

[13] Plaintiffs base their breach of fiduciary duty claims on the fraudulent conduct alleged in the "First and Second Schemes." See AC ¶ 758 (count one), ¶ 766 (count two).

fiduciary duty also must be dismissed. The Complaint fails to allege facts showing that Steinberg had "actual knowledge" of others' breaches or provided "substantial assistance to the primary violator." Bullmore v. Ernst & Young Cayman Is., 45 A.D.3d 461, 464 (N.Y. 1st Dep't 2007) (internal quotation marks omitted); accord In re Rural Metro Corp., 88 A.3d 54, 80 (Del. Ch. 2014); Marino v. Grupo Mundial Tenedora, S.A., 810 F. Supp. 2d 601, 614 (S.D.N.Y. 2011) (dismissing complaint that alleged "no specific evidence" in support of aiding and abetting).

II. Plaintiffs fail to state a claim against David Steinberg for any fraud-based claims (Fourth, Fifth, and Sixth Counts).

A. Plaintiffs fail to state a claim for fraud against David Steinberg (Fourth Count).

The Complaint fails to plead the essential elements of fraud against David Steinberg, *i.e.*, "a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages." Eurycleia Partners, LP v. Seward & Kissel, LLP, 12 N.Y.3d 553, 559 (2009). Nor does the Complaint meet the heightened pleading standard of Rule 9(b),[14] which requires that allegations be pleaded with particularity and that a complaint must "(1) specify the statements that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent." Lerner v. Fleet Bank, N.A., 459 F.3d 273, 290 (2d Cir. 2006).

[14] Plaintiffs' allegations are not the sort for which courts sometimes relax Rule 9(b)'s particularity requirement because "the facts comprising the alleged fraud are 'peculiarly within the opposing party's knowledge.'" See Brooke v. Schlesinger, 898 F. Supp. 1076, 1086 (S.D.N.Y. 1995). In fact, Plaintiffs have made clear that they are the custodians of Platinum Management's servers and are thus "currently in possession of more than 13 million documents" including "***all or nearly all*** of the relevant documentation." See Pls.' Pre-Conf. Stmnt., at ¶¶ 11-13 (filed on Dec. 12, 2018) [Dkt. No. 21] (emphasis added). Here, Plaintiffs have access to the facts, and should plead them if they can. The narrow exception for peculiar-knowledge facts does not alter the basic principle that a defendant who has not "made any representations [him]self with the intent to deceive" cannot be liable for fraud. See Silver Oak Capital L.L.C. v. UBS AG, 82 A.D.3d 666, 668 (N.Y. 1st Dep't 2011).

1. Plaintiffs allege no false statement by David Steinberg.

The Complaint nowhere alleges that David Steinberg ***ever*** communicated with PPVA, let alone misrepresented any material fact to PPVA. The Complaint attributes only one alleged communication to David Steinberg individually. See AC ¶ 346 (email from Steinberg to Huberfeld concerning wire transfers). That statement, which is not alleged to have been false or even made to PPVA, cannot support a fraud claim. See Robinson v. Crawford, 46 A.D.3d 252, 253 (N.Y. 1st Dep't 2007). To the extent that any misrepresentations are alleged, they were allegedly made by other defendants,[15] or the speaker is not identified at all.[16]

Plaintiffs' fraud theory against Steinberg relies on collective allegations that blatantly violate Rule 9(b)'s particularity requirement. When applying Rule 9(b), courts dismiss fraud claims that fail to identify the particular representation made ***by each defendant*** against whom fraud is alleged, and when and to whom the alleged representation was made.[17]

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[15] See, e.g., AC ¶ 59 ("***[Landesman]*** was responsible for assessing the actual value of PPVA's investments and reporting such values so that PPVA's NAV could be accurately determined and any fees and other charges accurately calculated.") (emphasis added); AC ¶ 277 (". . . ***Nordlicht's*** assertions as to the value of PPVA's assets were false . . .") (emphasis added); AC ¶ 244 ("***SanFilippo***, ***Nordlicht*** and other Platinum Management staff routinely communicated valuation information to PPVA's external fund administrator, SS&C Technologies, Inc., which, in turn would use that information to perform the calculations necessary to prepare PPVA's monthly NAV statements.") (emphasis added); AC ¶ 788 ("Such initial valuations, however, were arbitrarily adjusted by ***Nordlicht***, with the consent of the other Platinum Defendants, in order to increase NAV and increase management fees paid to the Platinum Defendants.") (emphasis added).

[16] See, e.g., AC ¶ 309 ("An example of the Platinum Defendants misrepresenting the value of PPVA's assets concerns PPVA's debt and equity position in Golden Gate Oil"), ¶ 733 (". . . the misrepresentation of its NAV by the Platinum Defendants"), ¶ 789 (". . .the Platinum Defendants misrepresented the risk of loss to PPVA . . ."), ¶ 1009 (". . . the Platinum Defendants and Beechwood Defendants were able to continue their misrepresentation . . .").

[17] See DiVittorio v. Equidyne Extractive Indus., Inc., 822 F.2d 1242, 1247 (2d Cir. 1987) ("Where multiple defendants are asked to respond to allegations of fraud, the complaint should inform each defendant of the nature of his alleged participation in the fraud."); Yellow Cab SLS Jet Mgmt. v. Schwartz, No. 13-CV-7575 JSR, 2014 WL 2111688, at *1 (S.D.N.Y. May 12, 2014) (dismissing fraud claims under Rule 9(b) where allegations were "silent as to the identity of the speaker as well as to when and where the statements were made"); Odyssey Re (London) Ltd. v. Stirling Cooke

Aside from improper collective allegations against so-called "Platinum Defendants," there are only scant direct references to Steinberg in the Complaint. Such fleeting references fall far short of adequately alleging that Steinberg either participated in or furthered any of the alleged "Schemes."

First Scheme — the First Scheme alleges that PPVA's NAV was misrepresented and that Beechwood's interests were prioritized over PPVA's. The only connections Plaintiffs attempt to make between Steinberg and the First Scheme are to allege in a conclusory fashion that he "us[ed] his position as a member of the valuation committee to participate in the false inflation of the value of PPVA's assets." See AC ¶ 89. Plaintiffs fail to identify, with particularity, how he used his position,[18] or even which assets he was involved in inflating the value of; and Plaintiffs fail to identify any false statements, to whom they were made, when, or where.[19] Regarding the First Scheme, Plaintiffs also allege that Steinberg was "involved in" in the creation of Beechwood. See id. ¶ 92. To support that conclusory allegation, Plaintiffs allege that an email from Steinberg to Huberfeld in March 2013 concerning wire transfers are evidence that the Platinum Defendants (without specifying which defendants) were funding Beechwood. See id. ¶ 346. Even assuming

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Brown Holdings Ltd., 85 F. Supp. 2d 282, 293 (S.D.N.Y. 2000) ("When fraud is alleged against multiple defendants, a plaintiff must plead with particularity by setting forth separately the acts or omissions complained of by each defendant."). Rule 9(b) prevents individuals from being swept into serious fraud allegations absent detailed allegations of their individual participation. See Mills v. Polar Molecular Corp., 12 F.3d 1170, 1175 (2d Cir. 1993) ("Rule 9(b) is not satisfied where the complaint vaguely attributes the alleged fraudulent statements to 'defendants.' . . . [T]he plaintiffs also had to allege that the [defendants] ***personally*** knew of, or participated in, the fraud." (emphasis in original)).

[18] In the only allegation where valuation committee conduct is attributed to any individuals, other defendants including Mark Nordlicht are involved, but not Steinberg. See AC ¶ 298 (". . . email exchange among Platinum Management employees discussing Nordlicht's readjustment of NAV subsequent to a valuation committee meeting.").

[19] See In re Alstom SA, 406 F. Supp. 2d 433, 467 (S.D.N.Y. 2005) ("That these defendants held positions as Senior Vice President and Vice President of Finance at [defendant company] may be a starting point for a claim of liability, but these titles do not, without additional facts, support a logical inference that those defendants were responsible for the drafting, production, reviewing, or dissemination of the information communicated by [defendant company] to [plaintiff].")

the truth of Plaintiffs' allegation that these were "funding" wires for Beechwood,[20] nothing is alleged to be false about the email and nothing is alleged to have been misrepresented. In short, there is no misconduct attributed to Steinberg regarding the creation of Beechwood.

Black Elk Scheme — the Black Elk Scheme alleges that the Platinum Defendants hid their control of Black Elk bonds in order to rig the vote in the consent solicitation, which amended the Indenture governing the bonds to allow the proceeds from the sale of Black Elk assets to be used to pay certain equity holders ahead of others, including PPVA. Although Plaintiffs conclusorily allege Steinberg's "direct participation" in the Black Elk Scheme, the only fact they allege in support is that his wife ***sold*** ten Black Elk bonds in ***December 2014***. See AC ¶ 473; AC Ex. 54. But nowhere do Plaintiffs allege that Steinberg's wife purchased the bonds in time for the vote, which was ***four months earlier, in August 2014***. See AC ¶ 488.[21] Nor do they allege that she (or anyone else) voted the ten bonds in the consent solicitation. Nor would such an

[20] The exhibit attached to the Complaint and cited as support for this allegation is dubious at best. See Compl. Ex. 33. The cited email from Steinberg was not sent from his Platinum Management address, but rather from an "@grid4x.com" email address. Nothing is alleged about who or what "grid4x" might refer to, and nothing is alleged about whether it has anything to do with the establishment of Beechwood. The email from Steinberg to Huberfeld includes a chart with 19 separate entries, but eight unlabeled columns. Two of the columns are numbers that might be dollar amounts (no currency is noted), and one of the number columns appears to be a cumulative accounting of the amounts listed in the other number column. Only one of the 19 entries has "Beechwood Cap" listed as the entity, and because the columns are not labeled, it is equally likely that the entries are transfers ***from*** the entities listed into a separate account, rather than a table showing 19 separate transfers ***to*** Beechwood, as Plaintiffs claim in their Complaint.

[21] Because neither Steinberg nor his wife owned any Black Elk bonds in August 2014, Plaintiffs should not be permitted to re-plead the purchase date of Black Elk bonds as to Steinberg or his wife because it would be futile, see Abu Dhabi Commercial Bank v. Morgan Stanley & Co. Inc., 651 F. Supp. 2d 155, 187 (S.D.N.Y. 2009), and Plaintiffs cannot show that they are "in possession of facts that could cure the pleading deficiencies," see Malgieri v. Ehrenberg, No. 12-CV-2517 (CS), 2012 WL 6647515, at *9 (S.D.N.Y. Dec. 21, 2012); see also Gallop v. Cheney, 642 F.3d 364, 369 (2d Cir. 2011) ("[I]n the absence of any indication that [plaintiff] could—or would—provide additional allegations that might lead to a different result, the District Court did not err in dismissing her claim with prejudice.").

allegation be "plausible on its face." Ashcroft v. Iqbal, 556 U.S. 662, 678-79 (2009). To put these ***ten*** bonds allegedly owned by Mrs. Steinberg in context, the total number of outstanding Black Elk bonds under the Indenture was 150,000, AC ¶ 483, and the number of bonds that Plaintiffs allege the "Platinum Defendants" and "Beechwood Defendants" concealed control over is at least 72,000, id. ¶ 484. Without more specific factual allegations about how these ten bonds were used to conceal control, Plaintiffs have not pleaded enough facts to permit this Court to "draw [a] reasonable inference" that Steinberg is liable for fraud based on a scheme to conceal control. See Iqbal, 556 U.S. at 678; ATSI Commc'ns, Inc. v. Shaar Fund, Ltd., 493 F.3d 87, 104 (2d Cir. 2007) ("The inference [plaintiff] asks us to draw is too speculative even on a motion to dismiss.").

Second Scheme — the Second Scheme alleges that, starting in 2015, the Platinum Defendants and others breached their duties to PPVA by transferring all or nearly all of PPVA's remaining assets for the benefit of Beechwood and others through a series of multiple transactions. As to Steinberg, Plaintiffs allege only (1) that he was the "notice party" for the March 2016 restructuring, which was signed by Mark Nordlicht on behalf of PPVA, see AC ¶ 593, and (2) that he helped execute part of the Agera Sale that permitted Agera's then-managing director—Kevin Cassidy—to be compensated as part of that sale, see AC ¶ 645. Steinberg is not alleged to have made any misrepresentations to PPVA (or anyone else) during any of these negotiations or transactions. Steinberg is not alleged to have determined the price of these sales or dictated the terms of these deals. Nor is there alleged to have been anything nefarious or wrong about the managing director of the entity being sold being compensated as part of the terms of the sale.

2. Plaintiffs allege no actionable nondisclosure by David Steinberg.

The Complaint also alleges fraud by omission, see AC ¶¶ 786, 799, 800, 809, which must be dismissed as against Steinberg because no fiduciary relationship is alleged, see Connaughton v. Chipotle Mexican Grill, Inc., 135 A.D.3d 535, 540 (N.Y. 1st Dep't 2016) ("[W]hen one alleges fraud based on an omission, the complaint must also allege the existence of a fiduciary relationship requiring disclosure of the unknown facts."); Rivietz v. Wolohojian, 38 A.D.3d 301, 301 (N.Y. 1st Dep't 2007). As previously discussed in connection with the breach of fiduciary duty claims, Plaintiffs have not alleged facts demonstrating that Steinberg's employment with Platinum Management gave rise to any personal fiduciary duty to PPVA. See supra Section I(A)(1).

Further, where the alleged fraud consists of an omission and the plaintiff is unable to specify the time and place because no act occurred, the complaint must still allege: "(1) what the omissions were; (2) the person responsible for the failure to disclose; (3) the context of the omissions and the manner in which they misled the plaintiff, and (4) what defendant obtained through the fraud." See Odyssey, 85 F. Supp. 2d at 293. Plaintiffs have pleaded none of these required elements with respect to Steinberg. Accordingly, Plaintiffs' fraud claims based on non-disclosure must be dismissed as to him.

3. As to David Steinberg, Plaintiffs also fail to plead the required fraud elements of materiality, scienter, reliance, and damages.

The fraud claim must also be dismissed as to David Steinberg because none of the other elements of fraud—materiality, scienter, reliance, and damages—are pleaded. As the Complaint identifies no misrepresentation or actionable omission by Steinberg, it necessarily follows that materiality, scienter, reliance, and damages are lacking. See Zutty v. Rye Select Broad Market Prime Fund, L.P., No. 113209/09, 2011 WL 5962804 at *9-10 (N.Y. Sup. Ct. 2011). Not only is scienter not pleaded with respect to any ***statement*** by Steinberg, but the ***only*** mention of

Steinberg's state of mind in the entire Complaint is the unsupported, conclusory assertion that "Steinberg had direct knowledge of the Platinum Defendants' inflation of the value of PPVA's assets and the misrepresentation of PPVA's NAV." See AC ¶ 91. Because Plaintiffs allege no facts supporting this legal conclusion, it is insufficient to support a fraud claim. See Stephenson v. Citco Grp. Ltd., 700 F. Supp. 2d 599, 619–20 (S.D.N.Y. 2010) (explaining that plaintiffs must "plead the factual basis which gives rise to a 'strong inference' of fraudulent intent" to survive a motion to dismiss). Additionally, Plaintiffs' allegations that Steinberg was "paid a base salary" and that he received "incentive compensation", AC ¶ 12(vi), are not sufficient to permit an inference of scienter. See Schwab v. E*TRADE Fin. Corp., 258 F. Supp. 3d 418, 435 (S.D.N.Y. 2017) (holding that "generic profit motive" is "insufficient to establish scienter").

B. Plaintiffs fail to state a claim against David Steinberg for constructive fraud (Fifth Count).

The elements of constructive fraud are the same as fraud, except that the requirement of scienter is dropped and replaced by a requirement that Plaintiffs must "prove the existence of a fiduciary or confidential relationship warranting the trusting party to repose his or her confidence in the defendant and therefore to relax the care and vigilance he or she would ordinarily exercise in the circumstances." Levin v. Kitsis, 82 A.D.3d 1051, 1054 (N.Y. 2d Dep't 2011) (alterations and internal quotation marks omitted). Plaintiffs have not only failed to allege the non-scienter elements of fraud, see supra Section II(A), they have also failed to allege that PPVA personally reposed confidence in Steinberg sufficient to show the existence of such a fiduciary or confidential relationship, see supra Section I(A)(1). Accordingly, the constructive fraud claim against Steinberg must be dismissed.

C. Plaintiffs fail to state a claim against David Steinberg for aiding and abetting fraud (Sixth Count).

The Complaint also fails to plead aiding-and-abetting fraud, which requires particularized factual allegations showing the underlying fraud, actual knowledge, and substantial assistance. Stanfield Offshore Leveraged Assets, Ltd. v. Metro. Life Ins. Co., 64 A.D.3d 472, 476 (N.Y. 1st Dep't 2009). The Complaint alleges no facts suggesting—let alone describing with particularity—that Steinberg knew about any fraud or substantially assisted it. See Owens v. Textron Fin. Corp., No. 13 CV 5948 VB, 2014 WL 3887181, at *4 (S.D.N.Y. July 14, 2014); In re Agape Litig., 773 F. Supp. 2d 298, 318 (E.D.N.Y. 2011).

III. Plaintiffs fail to state a civil conspiracy claim against David Steinberg (Sixteenth Count).

To state a claim for civil conspiracy, Plaintiffs must adequately allege the underlying primary torts (which, as explained above, they have not),[22] in addition to alleging "(1) an agreement between two or more parties; (2) an overt act in furtherance of the agreement; (3) the parties' intentional participation in the furtherance of a plan or purpose; and (4) resulting damage or injury." Abacus Fed. Sav. Bank v. Lim, 75 A.D.3d 472, 474 (N.Y. 1st Dep't 2010). Plaintiffs have pleaded no agreement, overt act, intentional participation, or resulting damage/injury. Accordingly, the civil conspiracy claim must be dismissed.

IV. Plaintiffs fail to state a claim against David Steinberg for civil RICO (Seventeenth Count).

Plaintiffs fail to allege facts establishing the requisite elements of a substantive RICO claim under § 1962(c), namely that: (i) a "person"; (ii) who is "employed by or associated with"; (iii) an "enterprise"; (iv) that is "engaged in, or the activities of which affect, interstate or foreign

[22] Plaintiffs identify the underlying primary torts for their civil conspiracy claim as "breach of fiduciary duties, fraud, constructive fraud and/or aiding and abetting of the same." AC ¶ 945.

commerce"; (v) "conduct[ed] or participat[ed] . . . in the conduct of such enterprise's affairs"; (vi) through a "pattern"; (vii) of "racketeering activity"; and (viii) that plaintiff was "injured in his business or property by reason of" the defendant's racketeering activity. 18 U.S.C. §§ 1962(c), 1964(c); see also Cruz v. FXDirectDealer, LLC, 720 F.3d 115, 120 (2d Cir. 2013); Moss v. Morgan Stanley Inc., 719 F.2d 5, 17 (2d Cir. 1983). RICO claims that allege predicate acts of fraud, see AC ¶¶ 961-63, are subject to the heightened pleading standard in Rule 9(b). See Lundy v. Catholic Health Sys. of Long Island Inc., 711 F.3d 106, 119 (2d Cir. 2013).

A. Plaintiffs fail to allege that David Steinberg was employed by or associated with a RICO enterprise.

Plaintiffs allege the relevant RICO enterprise to be an associated-in-fact enterprise consisting of the "Platinum Defendants," "Beechwood Defendants," and "Beechwood Entities." But the Complaint fails to allege facts showing the required elements of "a purpose, relationships among the [RICO Defendants], and longevity." Boyle v. United States, 556 U.S. 938, 946 (2009). Equally absent are facts "detail[ing] any ***course*** of fraudulent or illegal conduct separate and distinct from the alleged predicate racketeering acts themselves." First Capital Asset Mgmt., Inc. v. Satinwood, Inc., 385 F.3d 159, 174 (2d Cir. 2004) (emphasis in original); see also United States v. Turkette, 452 U.S. at 583. The Complaint also fails to allege that David Steinberg joined or intended to join such an enterprise. Cruz, 720 F.3d at 121 (finding that defendants as to whom "the amended complaint contain[ed] no specific factual allegation about . . . intent" were "properly excluded from the alleged RICO enterprise").

B. Plaintiffs fail to allege that David Steinberg conducted or participated in the conduct of any alleged RICO enterprise's affairs.

To establish that David Steinberg "conduct[ed] or participat[ed] . . . in the conduct of" a RICO enterprise's affairs, as § 1962(c) requires, Plaintiffs must allege facts demonstrating that he had "***some*** part in directing the enterprise's affairs." Reves v. Ernst & Young, 507 U.S. 170, 179

(1993) (emphasis in original). Here, Steinberg is not alleged to have had any "discretionary authority" to manage the affairs of Platinum Management or Beechwood. See U.S. v. Viola, 35 F.3d 37, 41, 43 (2d Cir. 1994), abrogated on other grounds by Salinas v. U.S., 522 U.S. 52 (1997). He appears nowhere in Plaintiffs' description of Beechwood's activities or management. See AC ¶ 334 ("The majority ownership in and ultimate control of Beechwood was in fact held by [Mark] Nordlicht, Huberfeld, Bodner and Levy, while Taylor and Feuer maintained ostensible and nominal management authority, with Levy."). Nor do Plaintiffs allege with particularity any involvement by Steinberg in "directing [Platinum Management's] affairs." See AC ¶¶ 213-751. Mark Nordlicht and Moshe Feuer, respectively, are alleged to have directed the affairs of Platinum Management and Beechwood. AC ¶¶ 42-43, 179.

C. Plaintiffs fail to allege that David Steinberg committed any predicate act of racketeering or engaged in a pattern of racketeering activity.

Plaintiffs also fail adequately to plead any predicate racketeering act by David Steinberg. Plaintiffs' collective allegations that the "Platinum Defendants," "Beechwood Defendants," and "Beechwood Entities" committed various predicate acts, AC ¶¶ 961-64, do not allege any particularized conduct by David Steinberg and thus are insufficient as a matter of law. Lundy, 711 F.3d at 119; Gross v. Waywell, 628 F. Supp. 2d 475, 495 (S.D.N.Y. 2009). ("[L]umping the defendants into collective allegations results in a failure to demonstrate the elements of § 1962(c) with respect to each defendant individually, as required."). Among other things, the Complaint alleges no fact indicating that David Steinberg individually: (i) "transmit[ted] or cause[d] to be transmitted" any wire communication for purposes of executing a scheme to defraud or to obtain money by false pretenses, 18 U.S.C. § 1343 (wire fraud); (ii) took any action to conceal the source of unlawful proceeds, 18 U.S.C. § 1956 (money laundering); (iii) received any monetary benefit without the agreement of his employer or principal, N.Y. Penal Law § 180.08

(commercial bribery); or (iv) accepted any bribe or kickback in connection with any fraud under 18 U.S.C. §§ 1343, 1346, Skilling v. U.S., 561 U.S. 358, 408 (2010) (honest services fraud).[23]

Nor have Plaintiffs satisfied the "pattern" element of § 1962(c), which requires allegations that David Steinberg personally committed a minimum of two predicate racketeering acts that were "related" and "amount to or pose a threat of continued criminal activity." H.J. Inc. v. N.W. Bell Tel. Co., 492 U.S. 229, 239 (1989); McLaughlin v. Anderson, 962 F.2d 187, 192 (2d Cir. 1992). Here, Plaintiffs rely only on a theory of closed-ended continuity, which requires allegations of, among other things, "a series of related predicates extending over a substantial period of time." Cofacredit, S.A. v. Windsor Plumbing Supply Co., 187 F.3d 229, 242 (2d Cir. 1999). Closed-ended continuity is "primarily a temporal concept," Gross v. Waywell, 628 F. Supp. 2d 475, 486 (S.D.N.Y. 2009), and time periods of less than two years are held not to be sufficient, Cofacredit, 187 F.3d at 242; GICC Capital Corp. v. Tech. Fin. Grp., Inc., 67 F.3d 463, 467 (2d Cir. 1995). Where only mail or wire fraud is alleged, "the potential for transforming garden-variety common law actions into federal cases is greater . . . . RICO claims premised on mail or wire fraud must be particularly scrutinized because of the relative ease with which a plaintiff may mold a RICO pattern from allegations that, upon closer scrutiny, do not support it." Gross, 628 F. Supp. 2d at 493; see also Airlines Reporting Corp. v. Aero Voyagers, Inc., 721 F. Supp. 579, 584 (S.D.N.Y. 1989) ("[T]he raw number of predicate acts has never been determinative, especially when only mail and wire fraud are alleged.").

Although Plaintiffs have barely crossed the two-year minimum requirement by alleging that predicate acts were continuous for two years and five months, see AC ¶ 960, the predicate

[23] Plaintiff also has wholly failed to allege any facts demonstrating that it suffered any RICO injury proximately caused by any alleged predicate act of David Steinberg. Anza v. Ideal Steel Supply Corp., 547 U.S. 451, 461 (2006); Hecht v. Commerce Clearing House, Inc., 897 F.2d 21, 23 (2d Cir. 1990).

acts identified in the Complaint are all mail or wire frauds under 18 U.S.C. §§ 1341, 1343, and almost all of them are identified as emails, see AC ¶ 962. Because the period of time is barely two years and only wire frauds by use of emails are alleged, the period of time is not "substantial," and Plaintiffs fail the continuity requirement.

V. Plaintiffs' Claims Are Barred by the In Pari Delicto Doctrine.

Plaintiffs' claims also are barred by the *in pari delicto* doctrine, which prohibits a party that has been injured as a result of its own intentional wrongdoing from recovering for those injuries from another party whose equal or lesser fault contributed to the loss. Rosenbach v. Diversified Group, Inc., 85 A.D.3d 569, 570 (N.Y. 1st Dep't 2011).[24] "The defense requires intentional conduct on the part of the plaintiff or its agents." Sacher v. Beacon Assocs. Mgmt. Corp., 114 A.D.3d 655, 657 (2014).

Plaintiffs, who stand in PPVA's shoes, allege that Platinum Management at all times acted as PPVA's general partner and therefore its agent. See AC ¶ 215; Friedson v. Lesnick, No. 91 Civ. 2133 (JSM), 1992 WL 51543, at *2 (S.D.N.Y. Mar. 9, 1992) ("Under New York law, each general partner acts as the agent of every other general partner and of the partnership."). The alleged wrongful conduct by Platinum Management, as agent for PPVA, bars Plaintiffs' claims against Steinberg. See In re Lehr Constr. Corp., 551 B.R. 732, 744 (S.D.N.Y. 2016) (dismissing debtor's claims against former employee on grounds of *in pari delicto*).

CONCLUSION

For the reasons stated above, all of Plaintiffs' claims against David Steinberg should be dismissed with prejudice.

[24] Although *in pari delicto* is an affirmative defense under New York law, it is appropriate on a motion to dismiss where, as here, the outcome is "plain on the face of the pleadings." In re Bernard L. Madoff Inv. Sec. LLC, 721 F.3d 54, 65 (2d Cir. 2013).

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Respectfully submitted,

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