UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re: PLATINUM-BEECHWOOD LITIGATION	No. 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) and PLATINUM PARTNERS VALUE ARBITRAGE FUND L.P. (in OFFICIAL LIQUIDATION),	No. 18 Civ. 10936 (JSR)
Plaintiffs,	**MEMORANDUM OF LAW OF DEFENDANT TWOSONS CORPORATION IN SUPPORT OF ITS MOTION TO DISMISS**
v.	
PLATINUM MANAGEMENT (NY) LLC, et al., Defendants.	**ORAL ARGUMENT REQUESTED**

MEMORANDUM OF LAW OF DEFENDANT TWOSONS CORPORATION IN SUPPORT OF ITS MOTION TO DISMISS THE FIRST AMENDED COMPLAINT FOR FAILURE TO STATE A CLAIM

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Defendant Twosons Corporation ("Twosons") respectfully submits this memorandum of law in support of its motion (the "Motion") of even date herewith to dismiss all claims against it in the First Amended Complaint ("FAC") for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6).[1] Twosons incorporates herein and joins with the motions filed substantially contemporaneously herewith of the other defendants on the same or similar grounds.

I. PRELIMINARY STATEMENT

In a bid to cure the patent pleading deficiencies that plagued their original complaint, Plaintiffs have filed the FAC that is a triumph of stuffing over substance. With respect to defendant Twosons, this means throwing a series of unremarkable, unsupported and in most cases irrelevant allegations against the wall in an ultimately futile attempt to link Twosons' redemption of its investment in a Platinum-controlled fund into a knowing and active participation in a fraud. Put simply, the FAC fails to present a coherent narrative to support Plaintiffs' insistence on promoting a one-size-fits-all and guilt-by-association approach to this litigation and continues to allege the defendants' collective knowledge and participation in various schemes designed to defraud the investors in, and creditors of, two funds in a related family of funds, known as "Platinum Partners." In so doing, Plaintiffs have obliterated the distinctions between, among other things, actual knowledge, imputed knowledge or no knowledge at all, to paint a picture of a sinister plot concocted by all the defendants, without resort to such niceties as making particularized allegations of fact against specific defendants to support this convenient narrative of collective culpability.

[1] Twosons is hereby renewing its Motion (ECF No. 87) on group pleading grounds. In the event all causes of action against Twosons are not fully dismissed, Twosons reserves its rights to file a subsequent motion to dismiss on all other available grounds including, by way of example and not limitation, standing, lack of personal jurisdiction, improper venue, and failure to state a claim upon which relief can be granted. Additionally, by filing this Motion, Twosons is respectfully not consenting to the personal jurisdiction of this Court.

To mask the dearth of meaningful allegations made as to defendant Twosons, Plaintiffs have grouped it along with 23 other defendants into a collective defined as the "Preferred Investors of the BEOF Funds," for the purpose of asserting three of the 21 counts set out in FAC: Count Nine (Aiding and Abetting Breach of Fiduciary Duties); Count Ten (Aiding and Abetting Fraud); and Count Fifteen (Unjust Enrichment). But nowhere in its hundreds of pages and voluminous exhibits is there to be found the requisite "who," "what," "where," "when," or "why" of Twosons' allegedly culpable conduct, let alone in a manner sufficient to meet the heightened pleading requirements to allege fraud and related causes of action under Federal Rule of Civil Procedure 9. Plaintiffs' vague allegations against Twosons boil down to three propositions: (i) Twosons received a redemption of its investments in a fund that was invested in a company allegedly defrauded by other defendants not part of the "Preferred Investor" grouping; (ii) Twosons loaned a portion of its redemption proceeds to the Black Elk Opportunity Fund on a secured basis; and (iii) Twosons' principals were personally acquainted with some of the other defendants. None of these propositions, independently or in combination, support the causes of action asserted against Twosons. Accordingly, all of the counts asserted against Twosons should be dismissed with prejudice.

II. ALLEGATIONS DIRECTED TO TWOSONS AND THE PREFERRED INVESTORS OF THE BEOF FUNDS

Plaintiffs' repetitive but substantively sparse allegations in the FAC can be summarized as follows:

- Twosons invested in the BEOF Funds and received returns on those investments. FAC ¶¶ 172; 459-469; 493; 685; 696-712; 865; 865-866 (repeated verbatim at ¶¶ 879-880);
- Due to an alleged personal and business relationship between Twosons' principals, the Hararis, – themselves not defendants in this action – and Huberfeld (another defendant against

whom many more allegations of "bad conduct" are made), Twosons is implicated in a conspiracy to commit breach of fiduciary duty and fraud. FAC ¶¶ 145; 172; 257; 470; 691-693; and

- A series of gratuitous and wholly speculative allegations that because the Harais had other businesses and that doing business requires capital, they were motivated through Twosons to aid and abet the Platinum Defendants' alleged fraud. FAC ¶¶ 694-695.

Addressed in light of the applicable legal standards below, these allegations – no more substantial than were present in the initial Complaint – compel dismissal of all counts against Twosons with prejudice.

III. LEGAL ARGUMENT

A. Standard of Review

"On a motion to dismiss under Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief may be granted, the court must accept the well-pleaded factual allegations in the complaint as true…to determine whether the complaint itself is legally sufficient." *In re Livent Inc. Noteholders Sec. Litig.*, 151 F. Supp. 2d 371, 404 (S.D.N.Y. 2001) (*citing Grandon v. Merrill Lynch & Co.*, 147 F.3d 184, 188 (2d Cir. 1998)). However, "Rule 12(b)(6) motion practice does not demand that every allegation in the complaint must be deemed true, but only 'factual' assertions. This test would exclude pleadings expressing legal conclusions, speculation and unsubstantiated allegations 'so broad and conclusory as to be meaningless.'" *Id.* at 405 (*citing Decker v. Massey-Ferguson, Ltd.*, 681 F.2d 111, 120 (2d Cir. 1982) and *O'Brien v. National Prop. Analysts Partners*, 936 F.2d 674, 676 (2d Cir. 1991)). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim of relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) (setting forth pleading requirements under Rule 8).

"In sum, the standard to govern the sufficiency of the complaint presumes 'well-pleaded' allegations and it is only those pleadings the courts are charged to deem true." *Id.* That is, "bald contentions, unsupported characterizations, and legal conclusions are not well-pleaded allegations, and will not suffice to defeat a motion to dismiss." *Kelly v. Classic Restaurants Corp.*, No.01 CV 09345, 2003 WL 22052845 at *2 (S.D.N.Y. Sept. 2, 2003) (*citing Leeds v. Meltz*, 85 F.3d 51, 53 (2d Cir. 1996)). Similarly, "conclusory statements [cannot] substitute for minimally sufficient factual allegations." *G-I Holdings, Inc. v. Baron & Budd*, 179 F. Supp. 2d 233, 265 (S.D.N.Y. 2001) (quoting *Furlong v. Long Island College Hosp.*, 710 F.2d 922, 927 (2d Cir. 1983)). "It is not…proper to assume that the [plaintiff] can prove facts that it has not alleged ..." *Associated Gen. Contractors v. Cal. State Council of Carpenters*, 459 U.S. 519, 526 (1983).

Claims based in fraud are subject to the heightened pleading requirements of Federal Rule of Civil Procedure Rule 9(b), which provides that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." Fed.R. Civ.P. 9(b)). The Rule "is designed to further three goals: (1) providing a defendant fair notice of plaintiff's claim, to enable preparation of defense; (2) protecting a defendant from harm to his reputation or goodwill; and (3) reducing the number of strike suits." *DiVittorio v. Equidyne Extractive Indus., Inc.*, 822 F.2d 1242, 1247 (2d Cir. 1987) (citation omitted).[2]

"Rule 9(b) is rigorously enforced in this circuit." *Henneberry v. Sumitomo Corp. of Am.*, 415 F. Supp. 2d 423, 455 (S.D.N.Y. 2006). A plaintiff alleging fraud is required to plead " 'the who, what, when, where, and how [of the fraud]: the first paragraph of any newspaper story.'" *Id.* (citations and internal quotation omitted). "To pass muster under Rule 9(b) in this Circuit, a

[2] Co-defendants' arguments regarding the inapplicability of a "relaxed" pleading standard to Plaintiffs' allegations are incorporated herein by reference. Moreover, even a relaxed pleading standard "does not eliminate the particularity requirement." *Devaney v. Chester*, 813 F.2d 566, 569 (2d Cir. 1987); *see also First Capital Asset Mgmt. v. Satinwood, Inc.*, 385 F.3d 159, 179 (2d Cir. 2004)

complaint must allege with some specificity the acts constituting fraud; conclusory allegations that defendant's conduct was fraudulent or deceptive are not enough." *Odyssey Re (London) Ltd. v. Stirling Cooke Brown*, 85 F. Supp. 2d 282, 293 (S.D.N.Y. 2000), *aff'd* 2 Fed. Appx. 109 (2d Cir. 2001). Moreover, Rule 9(b) does not give the pleader license to evade the strictures of Rule 8, which requires sufficient factual matter, accepted as true, to state a claim that is plausible on its face. *Iqbal*, 556 U.S. at 687. "And Rule 8 does not empower respondent to plead the bare elements of his cause of action, affix the label "general allegation," and expect his complaint to survive a motion to dismiss." *Id.*

B. Plaintiffs' FAC Still Contains Impermissible Group Pleading That Fails to Satisfy the Requirements of Federal Rules of Civil Procedure 8 and 9, and Plaintiffs' Aiding and Abetting Breach of Fiduciary Duty (Count Nine) and Fraud (Count Ten) Claims Against Twosons Are Comprised of Nothing More Than Conclusory Statements.

Under Federal Rule of Civil Procedure 8, Plaintiffs' claims against Twosons must allege enough facts to state a claim for relief that is plausible on its face. For a pleading to state a claim for relief, it must include "a short and plain statement of the claim showing that the pleader is entitled to relief" and must "give ***each defendant*** fair notice of what the plaintiff's claim is and the ground upon which it rests." Fed. R. Civ. P. 8(a)(2); *Atuahene v. City of Hartford*, 10 Fed. Appx. 33, 34 (2d Cir. 2001) (emphasis added); *see also Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Conclusory or "naked assertions devoid of further factual enhancement will not satisfy Rule 8's requirements." *Vantone Grp. LLC v. Yangpu NGT Indus. Co.*, 2015 WL 4040882 at *3 (S.D.N.Y. July 2, 2015) (*quoting Iqbal*, 556 U.S. at 678).

Where allegations are made against a group of defendants, generalizations as to the group are insufficient to satisfy the pleading standards. *See Twombly*, 550 U.S. at 565 n.10 ("[T]he complaint here furnishes no clue as to which of the four [defendants] (much less which of their employees) supposedly agreed."). Second Circuit courts have consistently held that group

pleading, without more specific facts as to each defendant, does not sufficiently state a claim for relief. *See Atuahene*, 10 Fed. Appx. 33, 34 (2d Cir. 2001) (dismissing complaint under Rule 8 because plaintiff "lump[ed] all the defendants together in each claim and provid[ed] no factual basis to distinguish their conduct"); *Ochre LLC v. Rockwell Architecture Planning & Design*, P.C., 2012 WL 6082387 at *6 (S.D.N.Y. Dec. 3, 2012) (dismissing causes of action where the "key facts pled in the SAC are 'lumped' together and thus do not afford each defendant adequate notice of the factual allegations it faces. This failure to isolate the key allegations against each defendant supports dismissal under the standards set forth in *Twombly* and *Iqbal*.").

Moreover, in their now-mooted Opposition, Plaintiffs recite the "group pleading doctrine," as allowing "particular statements or omissions to be attributed to individual defendants even when the exact source of those statements is unknown" where the complaint "allege[s] facts indicating that the defendant was a corporate insider, with direct involvement in day-to-day affairs" in order to connect defendants to statements. *Anwar v. Fairfield Greenwich Ltd.*, 728 F. Supp. 2d 372 at 405-06 (S.D.N.Y. 2010). However, the FAC does not allege (nor could it) that Twosons or any of its agents were "corporate insiders" of any of the Platinum Defendants, or had "direct involvement in day-to-day affairs" of any of the Platinum entities or Black Elk. Accordingly, Plaintiffs tacitly admit that the group pleading doctrine (to the extent even permissible in this case) is wholly inapplicable with respect to Twosons.

Assuming *arguendo* that "group pleading" could be proper as to Twosons, the FAC is still deficient on its face where, as here, Twosons' purported conduct and/or knowledge is lumped into a defined grouping of defendants in lieu of particularized allegations. In such instances, the prohibition on group pleading applies with greater force and Rule 9(b) requires that the complaint describe each defendant's participation with particularity. *See Mills v. Polar Molecular Corp.*, 12

F.3d 1170, 1175 (2d Cir. 1993). Because each defendant is entitled to know the nature of its alleged participation, the plaintiff must separately establish each defendant's acts or omissions as part of the fraud. *Id.* (citing *Odyssey* 85 F. Supp. 2d at 293); *see also ING Global v. UPS Oasis Comp Supply Corp.*, 2012 WL 28259 at *4 (S.D.N.Y. Jan. 4, 2012) (JSR) ("[T]he Complaint must specify the statements it claims were false or misleading, give particulars as to the respect in which plaintiff contends the statements were fraudulent, state when and where the statements were made, and identify those responsible for the statements. . . . The complaint here largely fails to provide any of these particulars, instead simply lumping the defendants together in largely conclusory statements . . . . This will not suffice."). The allegations contained in the FAC fall well short of these standards and accordingly, as to Twosons, the FAC must be dismissed in its entirety, with prejudice.

i. The Allegations Against the Preferred Investors of the BEOF Funds and/or Twosons Are Still Insufficiently Pleaded.

The allegations against the Preferred Investors of the BEOF Funds essentially start with Plaintiffs alleging that they "were aware of the actions of the Platinum and Beechwood Defendants in furtherance of the Black Elk Scheme, as well as Beechwood's representations that it was unaffiliated with Platinum Management." FAC ¶ 145. As such, the allegations rest on the alleged collective knowledge of all of the Preferred Investors of the BEOF Funds, without identifying what, if anything, Twosons specifically knew (*i.e.*, any facts showing that Twosons had knowledge that any aspects of the Platinum Defendants' conduct were fraudulent), or how Twosons would have come by such knowledge. Plaintiffs then conveniently use this alleged monolithic collective knowledge to plead a series of group allegations that purport to substitute this artificial collective knowledge for specific allegations as to specific facts or acts known by specific defendants. In so doing, Plaintiffs fail to specify what conduct, perpetrated by what entity under the umbrella term

"Platinum Defendants" or "Beechwood Defendants" is at issue here. *Id.* Which actions did Twosons allegedly have knowledge of? What is the basis for stating that Twosons, specifically, had such knowledge, and why does it matter? The FAC makes no effort to provide any such detail.

Later, Plaintiffs define "First Scheme Transactions," (FAC ¶ 391) but there is no mention of the Preferred Investors of the BEOF Funds generally, let alone Twosons specifically, in the allegations describing the individual "transactions" that collectively encompass the "First Scheme." Indeed, the FAC tellingly eliminated the allegation that "Twosons had knowledge of certain First Scheme Transactions and Second Scheme Transactions." *Cf.* Complaint ¶ 58 with FAC ¶ 172. In other words, Plaintiffs allege that Twosons was complicit in a fraud notwithstanding that it had no knowledge of the individual elements comprising the allegedly fraudulent schemes.

In a similarly bald assertion, Plaintiffs allege that the Preferred Investors of the BEOF Funds "materially and knowingly aided and abetted the Platinum Defendants' breach of their fiduciary duties to PPVA." FAC ¶ 257. Plaintiffs utterly fail, however, to allege which of the Platinum Defendants Twosons (or any of the other Preferred Investors of the BEOF Funds) purportedly aided and abetted, or what Twosons might have done or how or when any such conduct might have occurred. The FAC further does not muster a single identifiable fact to (i) tie any knowledge on the part of Twosons individually to the knowledge of the Preferred Investors of the BEOF Funds, collectively (and vice-versa); or (ii) tie the actual knowledge of the Preferred Investors of the BEOF Funds (as if such a collective knowledge could even exist) to the alleged fraud and breaches of fiduciary duty of some of the Platinum Defendants.

Plaintiffs' allegations regarding the so-called First Scheme Transactions solely involve the Beechwood Entities and Platinum Defendants. FAC ¶ 387-426. Additionally, Plaintiffs concede that the sale of the Black Elk asset occurred at the direction of the Platinum Defendants. FAC ¶

455. And, Plaintiffs specifically exclude the Preferred Investors of the BEOF funds from "developing the Black Elk Scheme," implicating only the Platinum Defendants and the Beechwood Defendants. FAC ¶ 462. Plaintiffs also conspicuously exclude the Preferred Investors of the BEOF Funds from the allegation that the "Platinum Defendants and Beechwood Defendants were aware that the Consent Solicitation [pertaining to Black Elk] contained [a] falsehood, that the vote was rigged, and the result would be a massive loss to PPVA to the benefit of the BEOF Funds and their equity interests." FAC ¶ 485. Even viewing the allegations in the light most favorable to Plaintiffs, to the extent Twosons (as part of the defined category, Preferred Investors of the BEOF Funds) obtained some favorable priority in terms of recouping its investment, the FAC alleges that this was "as a result of the actions of ***the Platinum and Beechwood Defendants***," FAC ¶ 502 (emphasis supplied), and not Twosons. In fact, there are no allegations whatsoever that Twosons was complicit in any fraud giving rise to these alleged advantages.[3]

Plaintiffs' allegations regarding the so-called Second Scheme Transactions concern an allegedly "intentional scheme to transfer or encumber nearly all of the Remaining PPVA Assets to or for the benefit of the Platinum Defendants, the Beechwood Defendants, PPCO and select insiders of the Platinum Defendants, and to the detriment of PPVA." FAC ¶ 539. Simply put, Plaintiffs' allegations do not imbue Twosons with any specific "knowledge" or identify any "assistance" it may have given with regard to these Second Scheme Transactions. Rather, Plaintiffs' allegations regarding the Second Scheme Transactions collapse into the circular argument that "Defendants" conspired to commence the Second Scheme Transactions for their own benefit. Significantly, however, Twosons and the other Preferred Investors of the BEOF

[3] Taking the allegations in the FAC at face value, Plaintiffs essentially ask this Court to equate the redemption of an indirect investment in a non-debtor that would violate the Bankruptcy Code's priority scheme to aiding and abetting a fraud or breach of fiduciary duty.

Funds are expressly excluded from these allegations. Finally, there are no well pleaded allegations anywhere in the FAC alleging that Twosons or, indeed, any the Preferred Investors of the BEOF Funds, participated in any respect in the Second Scheme Transactions.

ii. The New Allegations in the FAC Still Do Nothing To Cure Plaintiffs' Pleading Deficiencies.

In a vain attempt to cure the patent infirmities in the original Complaint, the FAC resorts to guilt by association in lieu of well-pleaded allegations. Plaintiffs add allegations around the assertion that "[t]here are significant business and personal connections between the Harari family and certain of the Platinum Defendants," and that certain of the Platinum Defendants solicited the Hararis for investments. FAC ¶¶ 691-693. In essence, Plaintiffs' new allegations compel the unremarkable inference that people in the business of raising capital contact people they know to be investors. Plaintiffs bootstrap these communications between Murray Huberfeld and principals at Twosons into active collusion between the two in furtherance of fraud and/or breaches of fiduciary duty, in flagrant disregard of the well-settled pleading standards for those causes of action. Additionally, none of the correspondence attached to the FAC comes close to the level of collusion that Plaintiffs attempt to characterize in the FAC. What is more, the Hararis are not even Defendants in this litigation and even if they were, Plaintiffs have not and cannot allege any conduct that would implicate Twosons, a corporate entity, in any alleged conspiracy. These superficial allegations regarding a purported relationship between the Hararis and Murray Huberfeld do nothing to conceal Plaintiffs' chief pleading deficiency: that in over 1000 paragraphs they have alleged nothing more as to Twosons than that it received redemption payments from the BEOF Funds.

Indeed, the balance of Plaintiffs' new allegations in the FAC do nothing more than recite the terms of Twosons and other investors' investments with the BEOF Fund. FAC ¶ 696-712. In

Plaintiffs' Ninth Count, for aiding and abetting breach of fiduciary duty against the Preferred Investors of the BEOF Funds, they add group allegations that "the Preferred Investors of the BEOF Funds made a conscious choice to participate in the Platinum Defendants' actions with respect to Black Elk and eventually the Black Elk Scheme" by agreeing "to exchange their existing investments in the BEOF Funds for new investments and in some cases to invest in additional funds which agreements substantially assisted the Platinum Defendants in making it possible to effect the Black Elk Scheme." FAC ¶ 865. Plaintiffs further allege that these "spring 2014 agreements by the Preferred Investors of the BEOF Funds to exchange their existing investments in the BEOF Funds for new investments and/or to invest additional funds were made notwithstanding the fact that by Spring 2014, Black Elk's public filings indicated that it likely was insolvent." FAC ¶ 880. Plaintiffs repeat these allegations verbatim in the FAC's revised Tenth Count, Aiding and Abetting Fraud Against the Preferred Investors of the BEOF Funds. FAC ¶¶ 879-880. There are no allegations, however, as to how receipt of these funds by Twosons and/or "creditor priorities" in and of themselves generate the actionable claims at issue here. Plaintiffs allege absolutely nothing about what specifically Twosons knew, who knew it, and how such knowledge could induce Twosons to collude with the Platinum Defendants or anyone else in a conspiracy to commit fraud or a breach of fiduciary duty. Plaintiffs also fail to assert how the disregard of "corporate formalities" by the Platinum Defendants implicates Twosons in any way. Simply put, a redemption payment from an investment in a fund that was invested in an insolvent company does not state a claim for fraud or breach of fiduciary duty.

C. Plaintiffs' Aiding and Abetting Breach of Fiduciary Duty (Count Nine) and Aiding and Abetting Fraud (Count Ten) Claims Against Twosons Are Still Nothing More Than Conclusory Statements.

The Ninth and Tenth Counts of the FAC, for aiding and abetting breach of fiduciary duties and aiding and abetting fraud, respectively, both require, *inter alia*, that the defendant had actual knowledge of the primary alleged wrong, and provided substantial assistance in committing that wrongful act. *See Krys v. Pigott*, 749 F.3d 117, 127 (2d Cir. 2014). In pleading knowledge, allegations which give rise to an inference of actual knowledge by the aider and abettor are required; constructive knowledge is not sufficient. *See id.* Claims for aiding and abetting fraud and breach of fiduciary duty are subject to the same heightened pleading standard as fraud claims under Rule 9(b). *See id.* at 129 ("In asserting claims of fraud – including claims for aiding and abetting fraud or a breach of fiduciary duty that involves fraud – a complaint is required to plead the circumstances that allegedly constitute fraud 'with particularity.'"). Here, Plaintiffs' allegations fall well short of these well-settled pleading requirements – Plaintiffs utterly fail to plead that Twosons had ***any*** specific actual knowledge to support their aiding and abetting claims. Accordingly, these counts must be dismissed.

i. Aiding and Abetting Breach of Fiduciary Duty (Count Nine)

Notwithstanding that Count Nine (Aiding And Abetting Breach of Fiduciary Duty) is styled "as against the BEOF Funds and Preferred Investors of the BEOF Funds," the bulk of the allegations ostensibly supporting this count concern the actions of the Platinum Defendants. In fact, all Plaintiffs can muster in support of their claims that the Preferred Investors of the BEOF Funds aided and abetted breach of fiduciary duty is the inadequate and rote invocation that the Preferred Investors of the BEOF Funds "substantially assisted and participated in the Platinum Defendants' breaches of their fiduciary obligations in connection with the Black Elk Scheme by,

inter alia, (i) participating in the Black Elk Scheme; and (ii) engaging in transactions to benefit the Platinum Defendants, the BEOF Funds and the Preferred Investors of the BEOF Funds to the detriment of PPVA," and that the Preferred Investors of the BEOF Funds had "actual knowledge that the Platinum Defendants were breaching their fiduciary obligations to PPVA...." FAC ¶¶ 867-868.

As if deliberately reinforcing the point that Plaintiffs can point to nothing more that Twosons' investments as their sole proof of conspiracy, they add allegations in the FAC that "the Preferred Investors of the BEOF Funds made a conscious choice to participate in the Platinum Defendants' actions with respect to Black Elk and eventually the Black Elk Scheme" by agreeing "to exchange their existing investments in the BEOF Funds for new investments and in some cases to invest in additional funds which agreements substantially assisted the Platinum Defendants in making it possible to effect the Black Elk Scheme." FAC ¶ 865. As an initial matter, Twosons's alleged specific investments are not pleaded with particularity here. Moreover, Plaintiffs fail to allege how Twosons' actions were or could be "conscious," or when and how such "consciousness" arose, let alone how it could be a deliberate attempt to conspire with the Platinum Defendants.

Plaintiffs further allege that these "spring 2014 agreements by the Preferred Investors of the BEOF Funds to exchange their existing investments in the BEOF Funds for new investments and/or to invest additional funds were made notwithstanding the fact that by Spring 2014, Black Elk's public filings indicated that it likely was insolvent." FAC ¶ 880. Plaintiffs make no effort to impute Twosons with knowledge of such alleged "likely" insolvency, let alone to articulate how that would be material to Twosons. Plaintiffs still fail, as they did in the Initial Complaint, to allege how or why Twosons would re-invest in the BEOF Funds if they knew of fraudulent conduct.

Just as in their initial Complaint, Plaintiffs allege no facts regarding Twosons specifically, or even what kinds of "transactions" executed by Twosons could possibly amount to self-dealing to the detriment of PPVA. Nor do Plaintiffs describe ***what*** actual knowledge of ***what*** improper conduct amounting to breach of the Platinum Defendants' fiduciary duties (***which*** Platinum Defendants?) Twosons might have known, let alone ***when***. Finally, Plaintiffs allege that the Preferred Investors of the BEOF Funds "acted willingly, grossly, recklessly and wantonly negligent, and without regard for PPVA's rights and interests." FAC ¶ 872. Other than this string of nasty-sounding adverbs, there are no allegations anywhere in the FAC that any of the Preferred Investors of the BEOF Funds, let alone Twosons, owed any independent duty to PPVA. Put simply, a mere statement alleging gross negligence does not state a claim for relief. Accordingly, Count Nine of the FAC must be dismissed.

ii. Aiding and Abetting Fraud (Count Ten)

Plaintiffs' count against Twosons for aiding and abetting fraud in Count Ten fairs no better than Count Nine. The Platinum Defendants and their alleged misdeeds feature prominently, followed by a desultory recitation of additional facts that have nothing to do with Twosons or the Preferred Investors of the BEOF Funds. *See, e.g.*, FAC ¶ 874-878. And Plaintiffs copy and paste the same deficient language that appears in Count Nine (aiding and abetting breach of fiduciary duty) attempting to impute "consciousness" to Twosons in making its investments (without explaining, at least, the when and why of such allegations) into Count Ten. From these thinnest of reeds, Plaintiffs baldly assert the Preferred Investors of the BEOF Funds (without any specific allegations against Twosons) have secondary liability for the Platinum Defendants' alleged fraud. FAC ¶ 884. Needless to say, these allegations fall woefully short of the particularity requirements of Fed. R. Civ. P. 9. Accordingly, Count Seven of the FAC must be dismissed.

D. Plaintiffs Still Do Not Adequately Plead Unjust Enrichment (Count Fifteen).

The FAC does not add any new allegations against Twosons. The Fifteenth Count of the FAC asserts that the Preferred Investors of the BEOF Funds were unjustly enriched at PPVA's expense. (FAC ¶¶ 935-943). A well pleaded claim for unjust enrichment requires, *inter alia*, that Twosons participated in some wrongful conduct such that any benefit it received was to the detriment of PPVA and cannot be justly retained. *See Cohen v. BMW Invs. L.P.*, 668 Fed. App'x 373, 374 (2d Cir. 2016) (quoting *Georgia Malone & Co. v. Rieder*, 19 N.Y.3d 511, 516, 973 N.E.2d 743 (2012)). The FAC does not adequately plead a single action by Twosons that connects it to actual involvement in either the First Scheme Transactions or the Second Scheme Transactions. Rather, the sum of the allegations involving Twosons amounts to the allegation that Twosons received a distribution of funds from a fraud. However, as explained at length above, there are no well pleaded allegations that Twosons had any involvement in the underlying alleged fraud perpetrated by the Platinum Defendants. As such, claims for unjust enrichment against Twosons must also fail.

E. Allowing Further Amendment of the FAC Would Be Futile Because Plaintiffs Have Not and Cannot Allege Anything More Than That Twosons Received Proceeds From Investments.

Courts will find amendment futile and dismissal with prejudice appropriate where a Plaintiff has failed to meet Rule 9(b)'s requirements despite previous opportunities for amendment. *U.S. ex rel. Grubea v. Rosicki, Rosicki & Associates, P.C.*, 319 F. Supp. 3d 747, 751 (S.D.N.Y. 2018) (Rakoff, J.) (dismissing relator's fraud claims with prejudice) (*citing U.S. ex rel. Pervez v. Beth Isr. Med. Ctr.*, 736 F. Supp. 2d 804, 816 (S.D.N.Y. 2010) (Dismissing relator's claims under Rule 9(b) with prejudice for failure to plead scienter where relator had "previous opportunities to amend the pleadings."). A district court's denial of a request for leave to amend a pleading is

reviewed for abuse of discretion. *Krys v. Pigott*, 749 F.3d 117, 134 (2d Cir. 2014) (citing *Foman v. Davis*, 371 U.S. 178, 182 (1962); *Starr v. Sony BMG Music Entertainment*, 592 F.3d 314, 321 (2d Cir.2010), *cert. denied*, 131 S.Ct. 901 (2011)).

In both the Complaint and the Amended Complaint, Plaintiffs have demonstrated that they cannot allege anything more as to Twosons than that Twosons received redemption proceeds from indirect investments in Black Elk. Plaintiffs add detail in the FAC regarding the nature and terms of the investments, *see, e.g.*, FAC ¶¶ 696-704 and summarize an alleged "personal relationship" between the Hararis and Murray Huberfield (which, as described above, is so woefully short of establishing any sort of conspiracy that it borders on irrelevant for purposes of evaluating Plaintiffs' conspiracy claims). If permitted to amend claims against Twosons again, Plaintiffs will do nothing more than reinforce that Twosons made indirect investments in Black Elk and received proceeds from them. Plaintiffs will not and cannot allege the who, what, where or, especially, why of any actual conspiracy between Twosons and the Platinum Defendants or any other individual or entity. As stated above, the mere facts of Twosons' investments and the terms of those investments do not a conspiracy make. Nor are there any allegations that can salvage Plaintiffs' associated unjust enrichment claim. As such, further amendment of the FAC as to Twosons would be futile, and dismissal of any and all claims against it in the FAC should be with prejudice.

IV. CONCLUSION

For all the foregoing reasons, as did the original Complaint, Plaintiffs' FAC falls well short of the pleading requirements necessary to sustain causes of action against Twosons. Accordingly, Twosons respectfully requests that this Court enter the accompanying Order dismissing all claims and causes of action against Twosons, with prejudice.

Respectfully Submitted:

/s/ Marc Hirschfield

Dated: February 4, 2019

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MARTIN TROTT and CHRISTOPHER SMITH, as Joint Official Liquidators and Foreign Representatives of PLATINUM PARTNERS VALUE ARBITRAGE FUND L.P. (in OFFICIAL LIQUIDATION) and PLATINUM PARTNERS VALUE ARBITRAGE FUND L.P. (in OFFICIAL LIQUIDATION),	No. 18 Civ. 10936 (JSR)
Plaintiffs,	**CERTIFICATE OF SERVICE**
v.	
PLATINUM MANAGEMENT (NY) LLC, *et al.*,	
Defendants.	

I hereby certify that a true and correct copy of the foregoing Notice of Motion and Motion to Dismiss, and Memorandum in Support thereof, have been filed electronically and are available to all counsel of record for viewing and downloading from the ECF system.

Dated: February 4, 2019

/s/ Marc Hirschfield
Marc Hirschfield