UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE PLATINUM-BEECHWOOD LITIGATION,	Index No. 18-CV-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), Plaintiffs, v. PLATINUM MANAGEMENT (NY) LLC, *et al.*, Defendants.	Index No. 18-CV-10936 (JSR)

MEMORANDUM OF LAW IN SUPPORT OF DAVID OTTENSOSER'S

MOTION TO DISMISS THE FIRST AMENDED COMPLAINT

Eric M. Creizman
Jeffrey R. Alexander
Pierce Bainbridge Beck Price & Hecht LLP
747 3rd Ave, Suite #2000
New York, NY 10017
(212) 484-9866
ecriezman@piercebainbridge.com
jalexander@piercebainbridge.com

Attorneys for Defendant David Ottensoser

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

We respectfully submit this memorandum of law in support of David Ottensoser's motion to dismiss the First Amended Complaint ("FAC") as against him under Rule 12(b)(6) of the Federal Rules of Civil Procedure.

PRELIMINARY STATEMENT

In response to the Defendants' various motions to dismiss, Plaintiffs promised to file an amended complaint "with additional allegations and exhibits that amplify and clarify the claims against each defendant named in the Amended Complaint." (DE 155). With respect to Ottensoser, however, all Plaintiffs have done in their First Amended Complaint is add conclusory allegations based on Ottensoser's alleged job titles as well as baseless claims.

Contrary to their promises, Plaintiffs have failed in their amended pleading to attach any exhibits relating to Ottensoser from the 13 million plus documents under Plaintiffs' control that Plaintiffs boast "may be relevant to this action" (DE 21 ¶ 13). This is problematic for Plaintiffs because, as discussed in Ottensoser's brief in support of his motion to dismiss the original complaint (DE 84), the exhibits relating to Ottensoser consist of emails on which he is copied that merely reflect that his roles as an in-house attorney and a compliance officer for Platinum management. And instead of amplifying and clarifying their claims against Ottensoser, all Plaintiffs have done in their amended complaint is baldly allege that Ottensoser "helped to orchestrate" and "was involved in" the various alleged schemes—apparently based solely on the allegation that Ottensoser held positions as in-house counsel and compliance officer for certain entities, and served on Platinum's "risk committee."

What is missing from the FAC, as with the original complaint, are alleged facts to support the conclusory assertions underlying Plaintiffs' purported claims against Ottensoser. Accordingly, as with the initial complaint, the paltry allegations in the FAC concerning Ottensoser do not satisfy the liberal pleading standards of Rule 8, let alone the heightened

standards of Rule 9(b), which are applicable to the claims asserted against Ottensoser because they sound in fraud.

For all these reasons, and the reasons set forth below, each and every claim asserted against Ottensoser in the FAC should be dismissed with prejudice.

FACTUAL BACKGROUND

I. The alleged schemes

The FAC alleges that from 2013 until 2015, "interrelated and overlapping" groups of entities and persons, including the "Platinum Defendants" and the "Beechwood Defendants"—each of which Ottensoser is alleged to be a member—engaged in two broad schemes. In the "First Scheme," the Platinum Defendants and the Beechwood Defendants caused PPVA to engage in a series of non-commercial transactions with the Beechwood Entities designed to: (i) falsely inflate the net value ascribed to PPVA's assets, thus enabling Platinum Management to collect unearned partnership shares and fees; (ii) priorities the interests of the Beechwood Entities over the interests of PPVA and its investors; and (iii) enable Platinum Management insiders, friends, and designated investors and creditors to take the proceeds from the sale of PPVA's largest investment, Black Elk, to the detriment of the prior rights of PPVA and Black Elk's other creditors. (FAC ¶ 9).[1]

In the "Second Scheme," with PPVA's collapse imminent, and facing an investigation of the Black Elk scheme, the Platinum Defendants allegedly breached their fiduciary duties to PPVA by conspiring to transfer or encumber most or all of PPVA's assets for the benefit of the Beechwood Defendants, select insiders, and the Platinum Partners Credit Opportunities Master Fund L.P. ("PPCO"). (¶ 10). In furtherance of the Second Scheme, among other things,

[1] All further citations in this memorandum to paragraphs of the FAC shall be in the following format: (¶__).

Defendant Nordlicht allegedly executed a "Side Letter" requiring PPVA and its subsidiaries to use the proceeds of the sale of Implant Sciences Corporation to pay $37 million of uncollectable debt owed to Beechwood, for no benefit to PPVA. (¶ 11(a)). In addition, the Platinum Defendants transferred one of PPVA's last valuable assets, a majority interest in Agera Energy, to Beechwood for little or no consideration. (¶ 11(f)).

II. The vague, conclusory, and speculative allegations concerning Ottensoser's involvement in the alleged schemes

A. Supposition derived from Ottensoser's alleged job titles

According to the FAC, Ottensoser served as Platinum Management's general counsel, compliance officer, and a member of its risk committee. (¶ 12 (ix)). In those capacities, Ottensoser allegedly "participated in drafting, reviewing and/or commenting on the contracts and other documents that bound PPVA to the improper transactions comprising the First and Second Schemes and without which the First and Second Scheme could not have occurred." (*Id.*). Of course, even assuming that such activities may be attributed to Ottensoser (based apparently only on the positions he held), there are no facts alleged to support that Ottensoser knowingly and intentionally participated in the wrongdoing alleged in the Complaint.

Likewise, the FAC alleges that as a member of the risk committee, Ottensoser was "responsible for assessing the risk associated with PPVA's investments, a significant issue in determining value." (¶ 12(ix)). The FAC contains no factual allegations, however, providing a nexus between Ottensoser's alleged responsibilities and the alleged wrongdoing in the FAC. Similarly, the FAC vaguely alleges that Ottensoser provided "legal services to BAM/the Beechwood Entities, even when those parties ostensibly were on opposite sides of a transaction from PPVA." (*Id.*). The FAC, however, fails to identify what legal services Ottensoser provided to BAM/the Beechwood Entities when the parties were on the opposite side of a transaction from PPVA. Nor does it identify for which transactions Ottensoser provided conflicted legal services.

And the FAC fails to connect this allege legal advice, however conflicted, with the wrongdoing underlying Plaintiffs' purported claims.

The FAC also alleges in conclusory fashion that Ottensoser "was one of the in house counsel responsible for documenting the transactions that comprised the First and Second Schemes and was actively involved in closing those transactions." (¶ 106). Of course, the FAC fails to identify which transactions he documented or assisted in "closing." Likewise, the FAC vaguely alleges that Ottensoser also "was involved in creating Beechwood and worked as general counsel for Beechwood during its initial stages, providing legal services to Beechwood and PPVA even when both parties ostensibly were on opposite sides of a transaction." (¶¶ 107). Again, nowhere does the FAC describe the alleged "legal services" that Ottensoser provided, and nowhere does the FAC identify the "transactions" in which Ottensoser provided legal services to Beechwood when Beechwood and PPVA were "ostensibly . . . on opposite sides of a transaction."

The FAC also relies on Ottensoser's alleged "capacity as general counsel of Platinum Management, PPVA, and Beechwood" for the speculative assertion that he therefore "was aware of the conflicts between those entities and arising out of the transactions comprising the First and Second Schemes, and that PPVA's interests were being subordinated to those of Beechwood, the Preferred Investors of the BEOF Funds, PPCO and/or the counterparts in connection with the Security Lock Up." (¶ 108). Likewise, relying on Ottensoser's alleged membership on the risk committee, the FAC alleges that "Ottensoser was responsible for assessing the risk associate[d] with PPVA's assets and investments, a significant issue in determining the value thereof." (¶ 109). The FAC, however: (i) fails to identify anything Ottensoser actually did or participated in to "assess the risk" associated with PPVA's assets and investments; (ii) fails to allege, let alone explain how Ottensoser's assessment of risk in these circumstances was in any way related to the

overvaluing of PPVA's assets; and (iii) fails to identify any nexus whatsoever between his "responsibilities" on the risk committee and the wrongdoing alleged in the FAC.

Furthermore, in lieu of specific factual allegations, the FAC vaguely and sweepingly asserts that Ottensoser "was involved in every aspect of the First and Second Schemes," by "inter alia," (i) "*using his position* as a member of the risk committee *to participate* in the false inflation of the value of PPVA's assets, *particularly* during the period from *2012 through 2016* . . . ."; (ii) "*helping to orchestrate* the Black Elk Scheme"; (iii) " *helping to orchestrate* the series of transactions among PPVA and the Beechwood Entities . . ."; and (iv) "*assisting in* the *consummation* of the [Security Lock-Up transactions.]" (¶ 110) (emphasis added).

These are amorphous and conclusory assertions masquerading as factual allegations. For example, the FAC provides no answers to the following questions: How did Ottensoser "use his position" to "participate" in falsely inflating the value of PPVA's assets? When did he allegedly do this during the four year period between 2012 and 2016? How did Ottensoser "help to orchestrate" the Black Elk Scheme, or the series of transactions at issue? What does it even mean to "help to orchestrate" the scheme or the series of transactions? What did Ottensoser do to "assist in the consummation" of the Security Lock-Up transactions?

B. The infirm allegations concerning Ottensoser's involvement in the creation of Beechwood

According to the FAC, Defendants Nordlicht, Huberfeld, Levy, Bodner, Feuer, and Taylor—but *not* Ottensoser—"developed a scheme to create Beechwood as a way to generate capital in a new business venture that they could use for their personal benefit to, among other things, allocate to themselves an ever increasing share of PPVA assets." (¶ 333). By contrast, relying on brief email exchanges annexed to the FAC as Exhibits 41 and 43, the FAC merely alleges that Ottensoser dealt with outside counsel, Bryan Cave, which Platinum Management engaged to assist in the creation of the Beechwood Entities. (¶¶ 356, 358).

The FAC, therefore, does not contain factual allegations that Ottensoser was ever aware of any scheme that others allegedly devised. Rather, as one would expect of an in-house counsel, Ottensoser was tasked with dealing with outside counsel who was engaged to create the Beechwood Entities. The FAC alleges no facts from which an inference may be drawn that either Ottensoser or Bryan Cave had any reason to believe that the Beechwood Entities were created for the purpose of some illicit scheme or to further any wrongdoing.

C. The infirm allegations concerning Ottensoser's involvement in the Black Elk Scheme

The FAC does not contain any factual allegations suggesting that Ottensoser knew of, let alone knowingly participated in the Black Elk scheme. All the FAC alleges with respect to Ottensoser is that he received an email, annexed to the FAC as Exhibit 54, "confirming that Steinberg's wife purchased certain of the 13.75% Senior Secured Notes." (¶ 473). This purports to support the allegation that Levy and the other Beechwood Defendants caused certain Beechwood Entities to purchase the Senior Secured Notes on the "open market," through allegedly independent noteholders, like Steinberg's wife. As an initial matter, nowhere in the FAC are there any factual allegations or any exhibits—including Exhibit 54—that suggest that Ottensoser understood that the purpose of the transaction was to ensure that there were sufficient votes to amend the Indenture. (¶ 93). In addition, nowhere in the FAC is there an allegation that Ottensoser stood to benefit from such an amendment. Indeed, he did not since he was not a Preferred Investor of the BEOF Funds.

D. The infirm allegations concerning Ottensoser's involvement in the Second Scheme

As discussed above, the Nordlicht Side Letter was created for the benefit of investors in Beechwood and to the detriment of PPVA, by requiring PPVA to use $37 million in proceeds from the sale of Implant Sciences Corporation to pay uncollectable debt owed to Beechwood. (¶ 11(a)). The FAC alleges that the Nordlicht Side Letter was circulated to a group of

"executives and lawyers," including Ottensoser. (¶ 569). But the FAC fails to allege that Ottensoser was aware that the Nordlicht Side Letter: (i) improperly took valuable assets from PPVA to pay Beechwood funds it was not entitled to and would never recover; (ii) for the benefit of Beechwood's owners, namely, Nordlicht, Huberfeld, Bodner, Levy, Feuer, and Taylor—but *not* Ottensoser—at the expense of PPVA. (¶¶ 567-568).

The FAC also alleges that as part of the Second Scheme, the Platinum Defendants and Beechwood Defendants orchestrated a March 2016 restructuring of certain notes for the benefit of "prop[ping] up Beechwood and PPCO to PPVA's substantial detriment." (¶¶ 572, 592). Yet of the 22 paragraphs discussing the March 2016 restructuring, only one mentions Ottensoser, and is effectively group pled. According to the FAC, "[t]he terms of and specific steps by which the various transactions comprising the March 2016 restructuring were accomplished were developed, coordinated, and accomplished by Nordlicht, Huberfeld, Bodner, Levy, Bernard Fuchs, Steinberg, SanFilippo, and *Ottensoser*, *working together with* Narain, Taylor, and Feuer." (¶ 594). This allegation wholly fails to identify what Ottensoser supposedly did to effect the March 2016 restructuring or point to a single fact suggesting that Ottensoser knowingly participated in the restructuring for the illicit purposes described in the FAC.

Finally with respect to the Agera Sale, designed to transfer one of PPVA's last valuable assets to Beechwood for little or no consideration, all the FAC alleges is that Ottensoser, along with others, worked together to "prepare the documents by which the various parts of the Agera transaction were accomplished." (¶¶ 619, 623). Again, the FAC wholly fails to identify any specific act Ottensoser engaged in, any specific fact that would cause Ottensoser to be aware of the wrongful nature of the transaction, or any motive that Ottensoser would have to participate in effecting the Agera Sale.

As for motive, all the FAC can muster is that "Ottensoser received a salary as well as bonus compensation," and thereby "personally benefited from the inflated asset values assigned to PPVA's assets . . . and from the inflated distributions, fees and other payments made to Platinum Management. (¶ 12(ix)).

The FAC purports to assert ten claims against Ottensoser for: (i) breaching the fiduciary duties of care and good faith owed to the PPVA Fund and its investors (1st Count); (ii) breaching the fiduciary duty of loyalty owed to the PPVA Fund and its investors (2nd Count); (iii) aiding and abetting the Platinum Defendants' breaches of fiduciary duties (3rd Count); (iv) fraud (4th Count); (v) constructive fraud 5th Count); (vi) aiding and abetting fraud of the Platinum Defendants (6th Count); (vii) aiding and abetting the Beechwood Defendants' breaches of fiduciary duties (7th Count); (viii) aiding and abetting fraud of the Beechwood Defendants (8th Count); and (ix) civil conspiracy (16th Count); and (x) violating the Civil RICO statute (17th Count).

ARGUMENT

To avoid unnecessary duplication, Ottensoser adopts the legal analysis set forth in David Bodner's memorandum of law in support of his motion to dismiss the First Amended Complaint (the "Bodner Mem.") concerning the standards relevant to a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure, and the pleading standards under Rules 8(a) and 9(b), as well as the insufficiency of group pleading in lieu of allegations of fact specific to each defendant. Suffice it to say, even the minimal pleading requirements of Rule 8(a)(2) are violated, where, as here, the Complaint relies on group pleading, and thus "fails to give each defendant fair notice of the claims against it." *Holmes v. Allstate Corp.*, 2012 WL 627238, at *22 (S.D.N.Y. Jan. 27, 2012), *adopted by* 2012 WL 626262 (S.D.N.Y. Feb. 27, 2012). It follows that Plaintiffs' extravagant reliance on group pleading cannot possibly satisfy the heightened

standards of Rule 9(b), which are applicable to the claims against Ottensoser, "by making vague allegations about the defendants as a unit." *S.E.C. v. U.S. Envtl., Inc.*, 82 F. Supp. 2d 237, 241 (S.D.N.Y. 2000).

The FAC provides no factual allegations—as opposed to supposition and conclusory assertions—that would enable Plaintiffs to satisfy any of the necessary elements of any of the claims averred against Ottensoser. The FAC alleges no facts whatsoever that remotely suggest that Ottensoser sought to enrich the founders, owners, or managers of Platinum Management at the expense of PPVA, or that he was aware of any such misconduct by others. Plaintiffs' rank speculation resulting from Ottensoser's alleged roles as "one of the in house counsel" (¶ 106), "general counsel for Beechwood during its initial stages" (¶ 107), a general counsel (¶ 108), and member of the risk committee (¶ 109)), without more (and there isn't more alleged in the FAC), are insufficient to cure these pleading defects.

The allegations that Ottensoser received the Nordlicht Side Letter (¶ 569), played some vague role in "develop[ing], coordinat[ing] and accomplish[ing]" of the "March 2016 restructuring" (¶ 594), and that he was part of a group that prepared the Agera Sale documents (¶ 623), fail to allege facts identifying any involvement in wrongdoing and thus fail to satisfy Rule 9(b). *See Mills v. Polar Molecular Corp.*, 12 F.3d 1170, 1175 (2d Cir. 1993) (requiring that the complaint describe *each* defendant's participation with particularity). That standard is plainly not satisfied here.

Plaintiffs also fail to allege any specific facts supporting a strong inference of Ottensoser's knowledgeable participation in the alleged fraudulent schemes, which requires dismissal of the FAC against him. *See Wexner v. First Manhattan Co.*, 902 F.2d 169, 172 (2d Cir. 1990). Unlike some of the other of the Platinum Defendants, Ottensoser is not alleged to have been an owner of the Beechwood Entities. Nor is he alleged to have received the inflated

management fees paid to certain Platinum Management executives or incentive compensation based on the inflated valuation of the assets at issue. The only motive the FAC ascribes to Ottensoser is that he would indirectly benefit from the alleged fraudulent transactions because "he received a salary," and purportedly "bonus compensation." (*See, e.g.*, ¶ 12(ix)). However, it is insufficient to base the pleading of scienter on allegations of "motives possessed by virtually all corporate insiders, including . . . the desire to maintain a high stock price in order to increase executive compensation . . . or prolong the benefits of holding corporate office." *Novak v. Kasaks*, 216 F.3d 300, 307 (2d Cir. 2000). Even alleging that a corporate officer's compensation is tied to stock value—which Plaintiffs do not allege here with respect to Ottensoser—is, without more, insufficient to give rise to a strong inference of scienter. *See Patel v. L-3 Commc'ns Holdings, Inc.*, 2016 WL 1629325, at *12 (S.D.N.Y. Apr. 21, 2016) ("[T]he existence, without more, of executive compensation dependent upon stock value does not give rise to a strong inference of scienter.").

In these circumstances, Plaintiffs fail to allege sufficient facts to support even the most basic elements of their common law claims against Ottensoser, let alone their RICO claim.

CONCLUSION

For all the foregoing reasons, David Ottensoser respectfully requests the Court enter an order dismissing the First Amended Complaint as against him, with prejudice.

Dated: February 4, 2019

/s/ Eric M. Creizman
Eric M. Creizman
Jeffrey R. Alexander
Pierce Bainbridge Beck Price & Hecht LLP
747 3rd Ave, Suite #2000
New York, NY 10017
(212) 972-0200
ecreizman@piercebainbridge.com

Attorneys for Defendant David Ottensoser