Avraham C. Moskowitz (AM 8913)
MOSKOWITZ & BOOK, LLP
345 7th Avenue, 21st Floor
New York, New York 10001
Tel: (212) 221-7999
Fax: (212) 39808835
amoskowitz@mb-llp.com

Attorneys for Defendant Platinum F.I. Group, LLC

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), *et al.*, Plaintiff(s), -v- Platinum Management (NY) LLC, *et al.*, Defendant(s).	18-cv-10936 (JSR)

DEFENDANT PLATINUM F.I. GROUP, LLC'S
REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

Defendant Platinum FI Group, LLC ("PFIG") respectfully submits this reply memorandum of law in support of its motion to dismiss all claims against it for failure to state a claim under Federal Rules of Civil Procedure 9(b) and 12(b)(6). In their opposition to the motions filed by PFIG and numerous other defendants, plaintiffs the Joint Official Liquidators (the "JOLs") of Platinum Partners Value Arbitrage Fund LP ("PPVA") assert that the Amended Complaint "includes facts demonstrating that [PFIG and the other Preferred Investor defendants] knew about Black Elk's financial difficulties and that the proposed 'opportunity,' the 'O' in

BEOF, was directly at the expense of PPVA, but was being promoted by Platinum Management who was obligated to act in the interests of PPVA." (ECF No. 223 ("Opp. Mem.") at 3.) They further argue that the Amended Complaint alleges facts showing how PFIG, among others, "knew about and substantially assisted the Platinum Defendants' various tortious actions during the First and Second Scheme." (Opp. Mem. at 5.) These assertions in opposition to PFIG's motion to dismiss are false, and no such factual allegations appear on the face of the Amended Complaint.

Notwithstanding the JOLs' misleading description of their pleading, the Amended Complaint alleges just four specific facts about PFIG. First, PFIG is "is a longtime client" of defendant Murray Huberfeld. (Amended Complaint ¶ 162.) Second, PFIG's principal, Mark (Moshe) Leben "is a close friend of Huberfeld." (*Id.*) Third, PFIG is among some 130 identified and unidentified entities who "directly or indirectly" invested in the BEOF Funds. (Amended Complaint ¶¶ 145-46.) Fourth, PFIG earned a return as a result of its investment in the BEOF Funds (Amended Complaint ¶ 493). These extraordinarily spare factual allegations, even if true, are entirely consistent with a theory that PFIG was an innocent arms-length investor and relied in good faith on the representations made to it in connection with the BEOF Fund offering.[1] Accordingly, these four mundane facts are insufficient to state a plausible claim under Fed. R. Civ. P. 8, and the Amended Complaint must be dismissed. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007) (explaining that notice pleading under Rule 8 requires that a plaintiff allege

[1] The JOLs assert that the Platinum and Beechwood defendants "purposefully 'papered' the acts and transactions at issue in order to make them seem legitimate to outside parties. The transactions also were made purposely complex, to hide the fact that they were permeated by fraud, deceit and a breach of trust." (Opp. Mem. at 36.) The JOLs have made no attempt, in the Amended Complaint or in their opposition papers, factually to substantiate their conclusion that PFIG—an outside investor—somehow saw through this "papering" by other defendants, understood the true nature of the purposely complex transactions those other defendants designed, in a deliberately obfuscatory manner, in order that the First and Second Schemes remain undetected, and invested in the BEOF Funds with the specific intent to defraud PPVA or to aid and abet breaches of fiduciary duty.

"facts adequate to show illegality," disregarding legal conclusions couched as factual allegations, and approving dismissal of claims where facts alleged as evidence of conspiracy were equally compatible with lawful, unchoreographed free-market behavior).

The Amended Complaint must also be dismissed as against PFIG because it fails to allege fraud with the specificity required by Fed. R. Civ. P. 9(b) even under the relaxed "totality of the circumstances" pleading standard sought by the JOLs. Even under that standard, as the JOLs admit, a trustee or liquidator is required to show that its pleading is more than speculation or conclusory allegations. *See In re ICP Strategic Credit Income Fund Ltd.*, No. 13-12116 (REG), 2015 WL 5404880, at *9 (Bankr. S.D.N.Y. Sept. 15, 2015). To meet its burden, a liquidator or trustee must plead the specific facts upon which its belief that fraud has occurred is founded. *Id.* "Even where a relaxed standard is appropriately employed, each defendant is entitled to be apprised of the nature of his alleged participation in the fraud." *In re Ahead by a Length, Inc.*, 100 B.R. 157, 167 (Bankr. S.D.N.Y. 1989).

Even that relaxed pleading standard has not been met. The four mundane facts alleged about PFIG fail to establish even the broad outlines of its participation in a fraudulent scheme. In their opposition memorandum, the JOLs broadly assert that all of the 130 known and unknown Preferred Investors (including PFIG) "were acutely aware" of the fraudulent actions of other defendants; "entered into a series of transactions" at PPVA's expense; and "materially and knowingly aided and abetted" other defendants' breach of fiduciary duties. (Opp Mem. at 32.) These conclusory allegations—which do not appear on the face of the Amended Complaint itself—must be rejected as without adequate factual predicate. The Amended Complaint stands on its own and does not conform to the JOLs' description of its contents or support the conclusions they urge in their opposition memorandum. The Amended Complaint does not

support a reasonable inference that PFIG had actual knowledge of the alleged fraud could be drawn. There are no allegations that PFIG was told, or otherwise knew, that making an investment in the BEOF Funds would somehow be to the detriment of PPVA, and there are certainly no facts suggesting that PFIG, when investing, intended to help the Platinum Defendants breach fiduciary duties or perpetuate a fraud upon PPVA. No deceptive statements or acts of omission are attributed to PFIG, directly or indirectly. Put simply, the Amended Complaint merely alleges that PFIG was a long-term client of Platinum Management and that PFIG, in keeping with that long-term relationship, invested profitably in the BEOF Funds. Those facts, even if assumed true, do not apprise PFIG of the nature of its alleged participation in the fraud purportedly carried out by other defendants. Accordingly, the Amended Complaint must be dismissed as against PFIG.

Finally, the JOLs' use of group pleading should be rejected, at least in the case of PFIG and the other Preferred Investor defendants. The JOLs allege no facts suggesting that any of the 130 Preferred Investors were corporate insiders with direct involvement in the everyday business of Beechwood, Platinum Management, or the BEOF Funds—and there is certainly no specific factual allegation to support the JOLs' conclusion that PFIG was such an insider. To the contrary, the Amended Complaint explicitly defines the Preferred Investors as "direct or indirect investors in the BEOF Funds," not as fund managers or other control persons. (Amended Complaint ¶ 145.) PFIG's sole connection to anyone who might reasonably be considered a corporate insider is that PFIG is "is a longtime client" of defendant Murray Huberfeld, and its principal, Mark (Moshe) Leben "is a close friend of Huberfeld." (Amended Complaint ¶ 162.) Accordingly, the group pleading doctrine cannot cure the Amended Complaint's deficiencies where the allegations against PFIG are concerned. *See Anwar v. Fairfield Greenwich Ltd.*, 728 F.

Supp. 2d 372, 405-06 (S.D.N.Y. 2010) ("In order to invoke the group pleading doctrine against a particular defendant the complaint must allege facts indicating that the defendant was a corporate insider, with direct involvement in day-to-day affairs, at the entity" that engaged in fraudulent conduct.)

Because the complaint fails to state a claim against PFIG, much less with the particularity required by Rule 9(b), it must be dismissed.

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MOSKOWITZ & BOOK, LLP

By:/s/Avraham C. Moskowitz
Avraham C. Moskowitz (AM 8913)
Attorneys for Defendant
Platinum F.I. Group, LLC
345 7th Avenue, 21st Floor
New York, NY 10001
(212) 221-7999
amoskowitz@mb-llp.com