UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re PLATINUM-BEECHWOOD LITIGATION	Case 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), Plaintiffs, v. PLATINUM MANAGEMENT (NY) LLC, et al., Defendants.	Case No. 18 Civ. 10936 (JSR)

DEFENDANT DANIEL SAKS' REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

Defendant Daniel Saks ("Saks") respectfully submits this Reply memorandum of law in support of his Motion to Dismiss (Dkt. No. 117/192) (the "Motion") the First Amended Complaint (Dkt. No. 159) ("FAC") filed by Plaintiffs Martin Trott and Christopher Smith, in their capacity as Joint Official Liquidators ("Plaintiffs").

PRELIMINARY STATEMENT

Neither the FAC nor Plaintiffs' Response refers to even one affirmative act by Saks in furtherance of the fraudulent schemes it alleges. Similarly, there is no reference to any specific instance of knowledge by Saks of any fraudulent or otherwise improper conduct. Yet the FAC and the Response repeat again and again the conclusory assertions that Saks was "involved" and even "instrumental" to these same schemes. These bald conclusions are wholly unsupported by statements of positive fact specific to Saks and are insufficient to state a claim against Saks.

Sensing the weakness of their factual allegations, Plaintiffs tacitly admit and attempt to justify their group pleading as against Saks by misapplying doctrine specific to written statements in securities publications to the claims here. The "group pleading" doctrine in the context of securities litigation "allows a plaintiff to rely on a presumption that *written* statements that are 'group-published,' *e.g.*, SEC filings and press releases, are statements made by all individuals 'with direct involvement in the everyday business of the company,'" *City of Pontiac Gen. Emps. Ret. Sys. v. Lockheed Martin Corp.*, 875 F. Supp. 2d 359, 373 (S.D.N.Y. 2012) (Rakoff, J.) (emphasis court's). But this has no bearing here. Plaintiffs have not pled a claim based on "group-published" written securities statements.

Additionally, although the FAC's claims against Saks fail under any standard, Plaintiffs do not enjoy a relaxed pleading standard. This was not a complaint written based on vague, "secondhand" knowledge. As evident by the 101 exhibits attached to the FAC, Plaintiffs have

unrestricted access to millions of documents relevant to this litigation. The fact that the review of these millions of documents has not uncovered a single factual allegation worth making against Saks, after two tries, underscores why the claims against him should be dismissed in their entirety, with prejudice, and without leave to replead.

ARGUMENT

Saks' Memorandum of Law filed in support of his Motion (Dkt. No. 119/193) (the "MOL") established that the 13 of 1,012 paragraphs of the FAC that mention him do the following: establish his employment at Platinum and then Beechwood (¶ 7, 12, 46, 173-75, 336, 374, 383, 974); make naked conclusory assertions regarding his "involve[ment]," "instrumental[ity]," or "orchestrat[ion]" of allegedly fraudulent schemes (¶ 176-77); and show that he was copied on a single email (¶ 324), with no response from him. As set forth in the MOL and other individual defendants' memoranda joined by Saks, *see* MOL at 2, these allegations amount to at most an impermissible group pleading that should be dismissed for failure to state a claim. Nothing in the Response alters that conclusion.

Plaintiffs do not dispute Saks' recitation of the FAC's allegations against him. *See* Resp. at 13-14, 28. The Response simply reiterates the same types of unsupported conclusory allegations made in the FAC—specifically that Saks:

- "was involved in the significant overvaluation of Golden Gate Oil as well as transactions related thereto," Resp. at 13;
- "was involved with various transactions related to Black Elk," *id.* at 14;
- "was involved in transactions among PPVA and the Beechwood Entities that are part of the First Scheme," *id.*;
- "provided substantial assistance with the First and Second Schemes," *id.*; and
- "was an instrumental part of Beechwood's involvement in the First and Second Schemes," *id.* at 28.

The legal conclusions of Saks' "involvement" do not flow from any facts asserted in the FAC. Indeed, the only facts cited in the Response are that Saks was "chief investment officer and President of BAM," and that Saks on some occasions "acted as a signatory on behalf of various Beechwood Entities in connection with several of the transactions among Beechwood and PPVA." *Id.* at 28. These facts in no way connect Saks to any of the allegations of fraud and breach of duty; they at most establish that he was at times an officer of one of the Beechwood entities and performed normal job functions associated with that role.

Plaintiffs' legal argument regarding the group pleading doctrine gets no further. The Response relies on the exception to the prohibition on group pleading that may sometimes be applied in securities litigation "that *written* statements that are 'group-published,' *e.g.*, SEC filings and press releases, are statements made by all individuals 'with direct involvement in the everyday business of the company,'" *City of Pontiac*, 875 F. Supp. 2d at 373. Resp. at 29-33. This doctrine, "however, as is clear from its requirements, is 'extremely limited in scope,'" *id.*, and is inapposite here.

First, Plaintiffs' cited exception applies to group-published, written statements, made in the context of securities filings and publications. *See, e.g.*, *City of Pontiac*, 875 F. Supp. 2d at 373 (emphasizing, in allowing only Section 10(b) and Rule 10b-5 claims to proceed, that the group pleading doctrine applies to "*written* statements" in group-published securities filings and releases); *In re BISYS Sec. Litig.*, 397 F. Supp. 2d 430, 438 (S.D.N.Y. 2005) (doctrine applies to "prospectuses, registration statements, annual reports, press releases, or group-published information" in litigation brought under Section 10(b) and Rule 10b-5); *Watson v. Riptide Worldwide, Inc.*, No. 11 Civ. 0874, 2012 WL 383946, at *4 (S.D.N.Y. Feb. 7, 2012) ("[l]astly, the group pleading doctrine 'applies only to written statements'"); *Camofi Master LDC v. Riptide*

Worldwide, Inc., No. 10 Civ. 4020, 2011 WL 1197659, at *6 (S.D.N.Y. Mar. 25, 2011) (stating in context of Section 10(b) and Rule 10b-5 claims that "the [group pleading] doctrine is limited to group-published documents, such as SEC filings and press releases."). This is not a case involving group-published written statements in the context of a securities filing or release. Rather, the FAC asserts that the fact that certain allegedly self-interested transactions occurred creates a basis for common-law and civil RICO claims.

Second, group pleading requires individualized allegations of scienter not present here. *See, e.g.*, *In re Citigroup, Inc. Sec. Litig.*, 330 F. Supp. 2d 367, 381 (S.D.N.Y. 2004) ("Although the group pleading doctrine may be sufficient to link the individual defendants to the allegedly false statements, Plaintiff must also allege facts sufficient to show that the Defendants had knowledge that the statements were false at the time they were made."); *In re Refco, Inc. Sec. Litig.*, 503 F. Supp. 2d 611, 645 (S.D.N.Y. 2007) ("[t]he group pleading doctrine . . . does not permit plaintiffs to presume the state of mind of those defendants at the time the alleged misstatements were made"); *In re BISYS Sec. Litig.*, 397 F. Supp. 2d at 440 (quoting *In re Citigroup, Inc. Sec. Litig.*, 330 F. Supp. 2d at 381). None of the allegations in the FAC concerning Saks allow any reasonable inference that Saks appreciated the allegedly fraudulent nature of the described transactions.

Finally, the application of a relaxed pleading standard is particularly inappropriate in this case. *See* Resp. at 33-37. As the cases cited by Plaintiffs explain, "the degree of particularity required should be determined in light of such circumstances as whether the plaintiff has had an opportunity to take discovery of those who may possess knowledge of pertinent facts." *In re Hellas Telecomm. (Luxembourg) II S.C.A.*, 535 B.R. 543, 562 (Bankr. S.D.N.Y. 2015) (quoting *Devaney v. Chester*, 813 F.2d 566, 569 (2d Cir. 1987)). Here, Plaintiffs already have access to a

voluminous record of documents and electronic communications. The FAC cites 101 exhibits, the vast majority of which are non-public. Despite this substantial document review, the FAC refers to only one email on which Saks is copied and to which he does not reply.

Furthermore, unlike in *In re Ahead by a Length, Inc.*, 100 B.R. 157, 166-67 (Bankr. S.D.N.Y. 1989), and other cases on which Plaintiffs rely, Plaintiffs here do not even attempt to make specific allegations against Saks by "[p]leading on information and belief." Even if this were a case "that concern[ed] matters peculiarly within [Saks'] knowledge," *id.*, Plaintiffs have made no attempt to inform Saks of what they believe his role in any of the alleged fraudulent schemes was, what he knew about those schemes, or any specific actions he took in furtherance of those schemes. The FAC merely alleges that Saks was employed by a Platinum entity, and then by a Beechwood entity, and oversaw some investments in that capacity. That pleading is insufficient to state a claim against Saks under either Rules 8(a) or 9(b) of the Federal Rules of Civil Procedure, or any other standard.

CONCLUSION

For the reasons stated above and in our moving papers and the moving and reply papers of the other movants whose arguments Saks has joined, Saks respectfully submits that the First Amended Complaint should be dismissed as to him with prejudice, and without leave to replead.

Dated: February 15, 2019
New York, NY

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