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)

DEFENDANT DAVID STEINBERG'S REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF HIS MOTION TO DISMISS THE COMPLAINT

LANKLER SIFFERT & WOHL LLP

David E. Hodges (dhodges@lswlaw.com)
Matthew G. Coogan (mcoogan@lswlaw.com)

500 Fifth Avenue
New York, NY 10110
(212) 921-8399

Attorneys for Defendant David Steinberg

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PRELIMINARY STATEMENT

Plaintiffs' Opposition to David Steinberg's motion to dismiss does not meaningfully address the fatal errors in their Amended Complaint. Instead, Plaintiffs mostly make the same collective arguments in their Opposition that doom the collectively-alleged group pleading in their Amended Complaint. Other than listing Steinberg along with other defendants to describe group conduct, in a mere two paragraphs do Plaintiffs bother to address arguments in their Opposition to allegations about David Steinberg individually. See Opp. at 11, 28. But even in these mentions, Plaintiffs fail to identify specific, particular allegations in their Amended Complaint about what David Steinberg said or did that suffice to state a claim against him.

Plaintiffs also fail to address many of Steinberg's arguments as to why the Amended Complaint must be dismissed against him and have therefore conceded those arguments. *First*, Plaintiffs ignore that any purchase of Black Elk bonds attributable to Steinberg occurred too late to have been part of the consent solicitation, so Steinberg could not possibly have been part of the alleged "Black Elk Scheme."[1] *Second*, Plaintiffs do not contest that Steinberg never made any statements to PPVA, let alone any material false statement. *Third*, Plaintiffs never mention their constructive-fraud or aiding-and-abetting-fraud claims and have apparently abandoned them.

[1] We have requested that Plaintiffs withdraw their allegation against Steinberg in connection with the alleged "Black Elk Scheme" on the ground that account statements and Plaintiffs' own allegations show that no Black Elk bonds were purchased until well after the consent solicitation. If Plaintiffs do not withdraw this allegation, Steinberg will move for sanctions under Rule 11 of the Federal Rules of Civil Procedure.

ARGUMENT

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 allege facts demonstrating that Steinberg personally owed PPVA a fiduciary duty or that any of his alleged conduct amounted to a breach.

Plaintiffs assert, without citing any law in support, that it is "beyond cavil" that "senior management" at "this level of responsibility" owe fiduciary duties, but they do not say to whom the duties of such "senior management" are owed. See Opp. at 9. Even if that were the standard (it is not), other than alleging Steinberg's titles at Platinum Management and various transactions that he was "involved with," Plaintiffs point to no facts demonstrating a "level of responsibility" from which a fiduciary relationship could be presumed. For Plaintiffs to establish that Steinberg personally owed an independent fiduciary duty to PPVA, the governing standard requires them to allege specific facts showing that PPVA reposed confidence in Steinberg personally, such that Steinberg held a position of "superiority and influence" over PPVA, not simply that Steinberg held a certain title at Platinum Management (which was separate from PPVA). See AG Capital Funding Partners, L.P. v. State Street Bank & Trust Co., 11 N.Y.3d 146, 158 (2008).

Plaintiffs have alleged no such facts. Instead, they attempt to extend the fiduciary duty that Platinum Management might have owed PPVA to Steinberg personally.[2] But courts have

[2] Because the fiduciary duty here allegedly arises out of the contracts between PPVA and Platinum Management, see AC ¶ 255, AC Exhs. 4 & 5 (alleging that the duty arose out of the partnership agreement and "in accordance with its operating documents"), it cannot apply as a matter of law to David Steinberg, who was a non-signatory to the contracts at issue. See Schwartzco Enterprises LLC v. TMH Management, LLC, 60 F.Supp.3d 331, 353 (E.D.N.Y. 2014); Triaxx Prime CDO 2006-1, Ltd. v. Bank of New York Mellon, 2018 WL 1417850, at *6 (S.D.N.Y. March 8, 2018) ("A fiduciary duty that arises out of contract . . . does not create a duty other than that established by the contract.").

repeatedly rejected the notion that a corporation's fiduciary duty automatically gives rise to an individual fiduciary duty on the part of corporate executives or employees. See, e.g., Sergeants Benevolent Ass'n Annuity Fund v. Renck, 19 A.D.3d 107, 116 (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."); Steinberg Br. at n.12 (collecting cases).

In their Opposition, Plaintiffs make the same insufficient arguments that they make in their Amended Complaint—*i.e.*, that Steinberg was "involved with" numerous transactions, that he was an "authorized signatory" for certain PPVA subsidiaries, and that therefore he was a "fiduciary for those entities in such capacity." See Opp. at 11. However, Plaintiffs allege no fact about what Steinberg was "authorized" to do on behalf of any PPVA subsidiary, such as whether he had authority to make decisions or exercise discretion on behalf of any subsidiary, or whether he could personally decide how to dispose of any subsidiary's assets. See, e.g., AC ¶ 555. Nor do Plaintiffs allege any instance in which they reposed special confidence in Steinberg personally, as opposed to Platinum Management.

Plaintiffs also have not alleged any conduct that would amount to a breach by David Steinberg of any fiduciary duty. See Steinberg Br. at 13. Group pleading is a fraud doctrine that does not apply to claims for breach of fiduciary duty, so Plaintiffs must do more than "vaguely attribute[e] misconduct" to Steinberg through collective allegations. See Steinberg v. Sherman, 2008 WL 2156726, at *5 (S.D.N.Y. May 8, 2008). Plaintiffs' claims for breach of fiduciary duty against Steinberg must be dismissed.

B. Plaintiffs fail to allege substantial assistance or actual knowledge and thus fail to state a claim for aiding and abetting a breach of fiduciary duty.

Plaintiffs' claim against Steinberg for aiding and abetting a breach of fiduciary duty should be dismissed because Plaintiffs fail to allege that David Steinberg personally "substantially assisted" an alleged breach of a fiduciary duty by another defendant, and instead only point to group allegations in their Opposition. See, e.g., Opp. at 13 (". . . it is clear they provided substantial assistance to Platinum Management and the other individual Platinum Defendants, in connection with the First and Second Schemes."). Plaintiffs' failure to make such allegations against Steinberg individually dooms their claim against him. See Marino v. Grupo Mundial Tenedora, S.A., 810 F. Supp. 2d 601, 613–14 (S.D.N.Y. 2011). Similarly, Plaintiffs do not point to any "actual knowledge" by David Steinberg of any other defendants' breach. See Bullmore v. Ernst & Young Cayman Is., 45 A.D.3d 461, 464 (1st Dep't 2007).

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

A. Plaintiffs concede that there was no actionable misstatement by David Steinberg.

Because Plaintiffs fail to identify any statement personally made by Steinberg to PPVA, they have conceded that Steinberg did not make an actionable misstatement[3] and that he lacked

[3] Plaintiffs argue that they need not plead a material misrepresentation under the "special facts" doctrine. Opp. at 15-16. However, the special facts doctrine only applies where one party possess information not readily available to the other, and if PPVA had "the means available to [it] of knowing . . . [it] must make use of those means" and is under a "duty to inquire." Jana L. v. W. 129th St. Realty Corp., 22 A.D.3d 274, 278 (2005). As the general partner of Platinum Management, PPVA had the means to learn any fact it wanted to know from Platinum Management and was under a duty to inquire about any facts or circumstances PPVA thought it lacked, and Plaintiffs have alleged no facts to show that it ever discharged this duty. In any event, even under a theory of nondisclosure under the "special facts" doctrine, Plaintiffs have failed to identify with particularity what material information was allegedly "peculiarly within the knowledge" of Steinberg or how any failure to disclose by Steinberg harmed PPVA. See Odyssey Re (London) Ltd. v. Stirling Cooke Brown Holdings Ltd., 85 F. Supp. 2d 282

personal involvement in any of the alleged "schemes" in the Amended Complaint.[4]

In their Opposition, Plaintiffs use the same collective group tactics that also make the Amended Complaint insufficient to state a claim. See, e.g., Opp. at 16. But the group pleading doctrine does not save Plaintiffs from their obligation to inform Steinberg "of his alleged participation in the fraud." DiVittorio v. Equidyne Extractive Indus., Inc., 822 F.2d 1242, 1247 (2d Cir. 1987); see also Steinberg Br. at n.17 (collecting cases).

Group pleading is "extremely limited in scope" and applies only to written statements (not oral statements) that are "group-published" such as, for example, SEC filings and press releases. City of Pontiac General Employees' Retirement System v. Lockheed Martin Corp., 875 F. Supp. 2d 359, 373 (S.D.N.Y. 2012); see also Steinberg, 2008 WL 2156726 at *4 (describing categories of written statements that group pleading applies to as "prospectuses, registration statements, annual reports, press releases, or other group-published information"). It permits a plaintiff to treat the "collective work" in a written statement where authorship is unclear as a statement made by "all individuals with direct involvement in the everyday business of the company." Id. Plaintiffs have identified no such "group published" written statements where the authorship is collective or unclear to which group pleading could be applied.[5]

(S.D.N.Y. 2000) (explaining that even under a fraud-by-omission theory, a plaintiff still must 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.").

[4] Plaintiffs do not address (and have conceded) that Steinberg was ***not*** a "direct participant" in the Black Elk Scheme, see Steinberg Br. at 17-18, and similarly do not challenge his arguments that Plaintiffs have failed to connect him personally to their allegations in either the "First Scheme," see id. at 16-17, or the "Second Scheme," id. at 18.

[5] Plaintiffs allege the existence of various valuation reports, see, e.g., AC ¶ 321, but they do not allege whether these documents were public or somehow "published" within the meaning of the group pleading doctrine. Plaintiffs also do not allege that Steinberg personally participated in the creation of any such valuation report, contra AC ¶ 12(viii) ("SanFilippo also was responsible for

Additionally, to include Steinberg as part of the "group," Plaintiffs are not entitled to "rely solely on [Steinberg's] title" – they must "directly allege or provide facts supporting the finding that [Steinberg holds] a 'high level' executive position within [Platinum Management], or that he was involved with the development of" the specific written statements at issue. See Levy v. Maggiore, 48 F.Supp.3d 428, 451 (E.D.N.Y. 2014). Plaintiffs have not alleged sufficient facts about any of Steinberg's titles or his role at Platinum Management to support a finding that any written statements should be attributed to him personally.

B. Plaintiffs cannot rely on group pleading to establish scienter, which they also fail to allege.

While the group pleading doctrine might permit a plaintiff in an appropriate case to connect multiple defendants to a single written statement, "it does not also transitively convey scienter." See Anwar v. Fairfield Greenwich Ltd., 728 F. Supp. 2d 372, 406 (S.D.N.Y. 2010). Plaintiffs do not even attempt to argue how their collective allegations show the scienter of each separate defendant, and they have alleged no facts from which it could be strongly inferred that Steinberg individually had the intent to deceive necessary to sustain their fraud claim. See Stephenson v. Citco Grp. Ltd., 700 F. Supp. 2d 599, 619–20 (S.D.N.Y. 2010).

C. The constructive fraud and aiding-and-abetting fraud claims against David Steinberg should be dismissed because Plaintiffs have abandoned them.

In his moving papers, Steinberg argued that Plaintiffs failed to state a constructive fraud claim or an aiding-and-abetting fraud claim against him. See Steinberg Br. at 20-21. Because Plaintiffs do not address, or even mention, either of these claims in their Opposition, they should be dismissed against Steinberg. Cf. Johnson v. Williams, 699 F. Supp. 2d 159, 169–70 (D.D.C.

. . . providing valuation reports each quarter"), and Plaintiffs never identify any specific misrepresentation or omission in any such report.

2010) ("[W]hen a plaintiff files a response to a motion to dismiss but fails to address certain arguments made by the defendant, the court may treat those arguments as conceded, even when the result is dismissal of the entire case.") (internal quotations omitted).

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

A. Plaintiffs fail to allege an agreement or state a claim for the underlying torts necessary to state a claim for civil conspiracy.

Plaintiffs recite the elements for civil conspiracy and point to "1000 well-pled allegations" in support thereof, see Opp. at 17-18, but they fail to identify a single allegation about Steinberg to support their contention that he personally joined an agreement with any other defendant or that he personally acted in furtherance of any alleged agreement, see Steinberg Br. at 21. Because Plaintiffs also fail to state a claim against Steinberg for any of the underlying torts, see Steinberg Br. at 10-21, the claim against him for civil conspiracy must be dismissed. See Abacus Fed. Sav. Bank v. Lim, 75 A.D.3d 472, 474 (1st Dep't 2010).

B. Plaintiffs fail to state a claim against David Steinberg for civil RICO.

In support of their RICO claim against Steinberg, Plaintiffs list his titles at Platinum Management, note their allegation that he was a member of the valuation and risk committees, and then make a giant leap, without alleging any factual support, that he was therefore "responsible for assessing the value of, and risk associated with, PPVA's assets and investments." See Opp. at 28. However, nothing is alleged about the relevant committees—such as how they functioned, how often they met, what their authority was, if they made any statements, etc.—that would support an inference that Steinberg wielded responsibility over value and risk assessments by virtue of his membership alone. See also Steinberg Br. at 16.

Aside from impermissible inferential leaps, Plaintiffs' RICO claim fails for several additional reasons. *First*, the RICO allegations fail to detail a course of fraudulent conduct, and

Plaintiffs fail to allege that Steinberg intended to join a RICO enterprise. See Steinberg Br. at 22. *Second*, Plaintiffs fail to allege facts demonstrating that Steinberg had "***some*** part in directing the enterprise's affairs." See Reves v. Ernst & Young, 507 U.S. 170, 179 (1993) (emphasis in original). *Third*, Plaintiffs point to wire and mail fraud as the required predicate acts, but, as discussed above in connection with the fraud-based claims, Plaintiffs have not adequately alleged any fraud by Steinberg, whether by wire, by mail, or otherwise. Because Plaintiffs have not alleged any fraud they have failed to meet the requirement that they must plead a predicate act by David Steinberg. See 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."). Accordingly, Plaintiffs' RICO claim against Steinberg must be dismissed.

IV. David Steinberg is not an "insider," so there is no exception to *in pari delicto*, which bars all of Plaintiffs' claims against Steinberg.

Plaintiffs argue in a footnote that it is "black letter law" that "insiders" such as Steinberg cannot rely upon *in pari delicto*. See Opp. at n.4. Even if the "insider" exception applied generally in this context, which it does not,[6] it would only apply to "[g]eneral partners, sole shareholders, . . . sole decision makers," and "those who controlled the corporation in some way," see In re Lehr Constr. Corp., 528 B.R. 598, 609 (Bankr. S.D.N.Y. 2015) (internal quotation marks omitted)—not to Steinberg who falls into none of those categories. Plaintiffs have not alleged and cannot allege that Steinberg "controlled" Platinum Management or PPVA

[6] The "insider" exception is a creature of federal bankruptcy law and does not apply to the New York state law defense of *in pari delicto*. See In re Lehr Constr. Corp., 551 B.R. 732, 743 (S.D.N.Y.), aff'd, 666 F. App'x 66 (2d Cir. 2016); Kirschner v. KPMG LLP, 15 N.Y.3d 446, 464 (2010) (explaining that the *in pari delicto* doctrine is "so strong" that "the defense applies even in difficult cases and should not be weakened by exceptions" (quotations and citations omitted)).

in any meaningful sense, and therefore they cannot show that an "insider" exception would cover Steinberg. All of Plaintiffs' claims against Steinberg are barred by *in pari delicto* and should be dismissed.

V. Plaintiffs must meet the requirements of Rule 9(b) and are not entitled to a relaxed pleading standard.

Plaintiffs argue that the heightened particularity requirement of Rule 9(b) should be "relaxed" because Plaintiffs are trustees making "secondhand" allegations and because the facts are "uniquely in the knowledge of the defendants." See Opp. at 33-37. Plaintiffs' argument misstates the relevant law and is frivolous in any event, as Plaintiffs have already told this Court that they are currently in possession of Platinum Management's servers and have had access for many months[7] to ***13 million documents*** that constitute "***all or nearly all*** of the relevant documentation" in this case. See Pls.' Pre-Conf. Stmnt., at ¶¶ 11-13 (filed on Dec. 12, 2018) [Dkt. No. 21] (emphasis added). Plaintiffs make no effort to explain how, in light of their possession of all of the relevant documents in this case, knowledge of alleged fraudulent statements could possibly only be "peculiarly within" the knowledge of defendants. In any event, the liquidators have had two and a half years to investigate their claims against David Steinberg, see AC ¶ 16, and still they cannot state a claim against him. The relaxed standard for which Plaintiffs advocate does not apply here, where Plaintiffs have had abundant access to "numerous documents" and an "ample opportunity to investigate any potential claims prior to filing the Complaint." See In re Old CarCo LLC, 435 B.R. 169, 192 (Bankr. S.D.N.Y. 2010).

[7] Despite vaguely characterizing their access to these documents as having been obtained "recently," see Opp. at 37, the Amended Complaint alleges that they have had "full access" to the documents since at least "Spring of 2018," see AC ¶ 278, which is ample time to have performed a thorough review.

CONCLUSION

For the reasons stated above and in David Steinberg's opening memorandum of law (Dkt. No. 198), all of Plaintiffs' claims against David Steinberg should be dismissed with prejudice.

Dated: February 15, 2019
New York, NY

Respectfully submitted,

LANKLER SIFFERT & WOHL LLP

By: */s/ David E. Hodges*

David E. Hodges
(dhodges@lswlaw.com)
Matthew G. Coogan
(mcoogan@lswlaw.com)

500 Fifth Avenue
New York, NY 10110
(212) 921-8399

Attorneys for Defendant David Steinberg