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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), Plaintiffs, v. PLATINUM MANAGEMENT (NY) LLC, *et al.*, Defendants.	No. 18 Civ. 10936 (JSR)

REPLY MEMORANDUM OF LAW OF DEFENDANT DAVID BODNER IN FURTHER SUPPORT OF HIS MOTION TO DISMISS THE FIRST AMENDED COMPLAINT

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Defendant David Bodner respectfully submits this reply memorandum of law in further support of his Motion to Dismiss the FAC (the "Bodner Motion") [ECF No. 182].[1]

PRELIMINARY REPLY STATEMENT

In the opening sentences of their Memorandum in Opposition to Defendants' Motions to Dismiss the First Amended Complaint (the "Opp.") [ECF No. 222], the JOLs brashly proclaim that their FAC "contains 1,012 paragraphs and 101 exhibits," and "describes in exhaustive detail" various allegedly tortious and fraudulent schemes. (Opp. at 1). That proclamation merely underscores what Bodner has been saying to this Court all along, starting with the initial conference held nearly two months ago, on December 19, 2018: notwithstanding the JOLs' access to a mountain of emails and other information, ***there are no facts that show that Bodner engaged in any wrongful act.***

The Court can comb through those "1,012 paragraphs and 101 exhibits," as well as through the "exhaustive detail" with which the alleged schemes are described in the FAC. The Court will find no inculpatory facts as to Bodner. Indeed, the Court will find virtually no facts of any kind as to Bodner, and certainly no facts that show any wrongdoing by Bodner.

Almost 20 years ago, Bodner was a co-founder of Platinum Management and PPVA, and raised initial investment funds for those entities. (FAC ¶¶ 75-76). Bodner was an initial investor in Beechwood and owned Beechwood stock through various investment trusts. (FAC ¶¶ 77, 205). There are no facts in the FAC indicating that at any relevant time Bodner directed activities or made investment decisions at any of these entities, that he was involved in their day-to-day management, or that he participated in any way in the tortious or fraudulent

[1] Capitalized terms not defined herein shall have the meanings ascribed to them in Bodner's Memorandum of Law in Support of his Motion to Dismiss ("Bodner Mem.") [ECF No. 183]. Citations to the docket refer to Case No. 18 Civ. 10936 (JSR). Emphasis is supplied unless otherwise indicated.

conduct that is alleged to have occurred. Nor are there any facts indicating that Bodner knew that false representations were being made to PPVA.

The JOLs have had ample time and multiple opportunities to identify specific facts that show that Bodner engaged in any wrongful act. The JOLs have repeatedly failed to make any such showing. In their Opposition, the JOLs continue their stratagem of invoking labels and conclusions, as if those somehow substitute for facts. They do not. Lacking any facts that show that Bodner engaged in any wrongful act, the FAC must be dismissed as to him.

Implicitly acknowledging that they have no facts against Bodner, the JOLs urge the Court to allow them to use "group pleading" allegations to serve as a substitute for facts against Bodner. But the case law ordinarily prohibits group pleading (*see* Bodner Mem. at 4-11), and has only permitted it under the limited circumstances of the "group pleading doctrine" not present here: where a written misrepresentation can be attributed for pleading purposes to a group of individuals with day-to-day operational responsibility. *See Anwar v. Fairfield Greenwich, Ltd.,* 728 F. Supp. 2d 372, 405-406 (S.D.N.Y. 2010). There are no facts alleged against Bodner that show that he had any role, position, title, function, or day-to-day responsibility at Platinum Management such that he could potentially be held in the case for a fraudulent misstatement made by others.

The JOLs also implore the Court to indulge their request for a "relaxed" pleading standard. That too should be denied. First, by their own admission, the JOLs are in the uniquely advantaged position of having full access to the 13 million documents of their primary adversary, Platinum Management, at the pleading phase. (ECF No. 21 at ¶¶ 11, 13). They have had such access since April 2018. (Opp. at 36). As a result, the entire corpus of Platinum communications is at their disposal and fully word-searchable. If the record contained any

documents inculpatory to Bodner, the JOLs would have included them in the FAC. But, despite having combed those servers for evidence, which they have submitted in connection with various pleadings, motions, and oppositions in this case,[2] the JOLs have come up empty. More importantly, a "relaxed" pleading standard, when applicable, is no substitute for the absence of any facts at all as to Bodner.

In sum, there are no facts alleged in the FAC that support any claim against Bodner. And in light of the JOLs' access to the 13 million documents on the Platinum Management server, along with the fact that the JOLs have already amended their pleading, the dismissal should be granted with prejudice.

REPLY POINTS

THE JOLS HAVE NOT REBUTTED BODNER'S SHOWING THAT THE FAC SHOULD BE DISMISSED AS TO HIM

The Bodner Motion demonstrated that the FAC contains no facts that show that he engaged in any wrongful act. In their Opposition, the JOLs do not even attempt to show that the FAC contains such facts. Instead, the JOLs double down on their position that conclusions may substitute for facts, and that they are entitled to use group pleading as well as a "relaxed" pleading standard, to circumvent their obligation under Fed. R. Civ. P. 8 and 9(b) to plead facts, and not just conclusions and characterizations.

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[2] On January 23, 2019, the JOLs admitted to this Court that "the JOLs currently have access to documents stored on Platinum Management's servers." [ECF No. 155 at 29]. The JOLs now try to downplay their access, stating that they only have access "to the PPVA-specific documents previously stored on Platinum Management's servers." (Opp. at 36-37) (emphasis in original). This is a demonstrably false statement. The JOLs have accessed far more than what is "PPVA-specific" on the Platinum Management servers. (*See, e.g.,* ECF No. 46-5 (email to counsel from Platinum Credit Management LP, an entity that had no relationship to PPVA); ECF No. 46-10 (personal legal invoice directed to David Levy); *see also* Bodner Mem. n.5).

Thus, in a section titled "David Bodner and Murray Huberfeld," the JOLs provide a laundry list of general all-purpose terms, unsupported by any facts: "controlling owners"; "co-lead managers"; "power and control"; "appointing and controlling"; "significant decisions"; "hiring of key personnel"; and so on. (Opp. at 9-10). These are conclusory terms and characterizations, not facts.

Bodner and Huberfeld are distinct individuals. Each is entitled to a pleading that contains facts that show his own participation in wrongdoing. By inappropriately lumping Bodner with Huberfeld, the JOLs seek to tarnish Bodner with reference to Huberfeld's guilty plea in connection with an investment by the Correction Officers' Benevolent Association, which is not only unrelated to Bodner, but also unrelated to the claims in this lawsuit.

The JOLs also cite to FAC ¶ 12, which, apart from non-inculpatory factual allegations regarding Bodner's ownership interests in Platinum Management and the Beechwood Entities, consists of conclusory allegations, unsupported by facts. (FAC ¶ 12(iv)).

Finally, the JOLs cite to FAC ¶¶ 330-386, which set out the creation, structure and ownership of Beechwood, and to FAC ¶¶ 427-502, which set out the Black Elk Scheme. Not one of these 133 paragraphs contains a single inculpatory fact about Bodner. (Opp. at 9-10).

In sum, the JOLs' Opposition does nothing more than cite to, and repackage, conclusions and characterizations in the FAC. The JOLs have failed to rebut Bodner's showing that the FAC should be dismissed as to him.

A. The JOLs Stretch the Group Pleading Doctrine Far Beyond What Precedent Allows

The JOLs press their argument that they are entitled to a free pass against Bodner under the group pleading doctrine. But the group pleading doctrine applies only where: (i) a fraudulent misstatement is made in writing (typically in a securities offering document); and (ii)

there are specific factual allegations that each member of the group was a "high-level" insider with "day-to-day" responsibility at the company that issued such statements. *Anwar*, 728 F. Supp. 2d at 406; *see also Loreley Fin. (Jersey) No. 3 Ltd. v. Wells Fargo Sec., LLC*, 797 F.3d 160, 172 (2d Cir. 2015) (permitting group pleading only with respect to "statements made in an offering document" but not "oral and written statements made outside the offering documents themselves"); *In re Optimal U.S. Litig.*, 837 F. Supp. 2d 244, 263 (S.D.N.Y. 2011) ("[T]he group pleading doctrine applies only to written statements.").

Every case the JOLs rely upon in their effort to justify their group-pleading tactic (Opp. at 29-33) underscores these two bedrock principles, neither of which is present here. For example, in *SEC v. Landberg* (cited at Opp. at 29), Judge Castel held that under the group pleading doctrine, "a plaintiff may circumvent the general pleading rule that fraudulent statements must be linked directly to the party accused of the fraudulent intent but only as to individuals with direct involvement in the everyday business of the company." 836 F. Supp. 2d 148, 156 (S.D.N.Y. 2011) (internal quotation marks omitted). Likewise, in *In re Refco, Inc. Securities Litigation* (cited at Opp. at 29), Judge Lynch held that "direct involvement in the company's everyday business is critical to support the presumption" that "group-published information [is] the collective work of those individuals with direct involvement in the everyday business of the company." 503 F. Supp. 2d 611, 641 (S.D.N.Y. 2007).

Courts routinely reject group pleading based on ownership coupled with conclusory assertions of control. For example, in *Polar International Brokerage Corp. v. Reeve* (cited at Opp. at 31), Judge Scheindlin dismissed a group pleading claim against certain defendants because the plaintiffs had "assert[ed] only that the . . . [d]efendants [we]re 'investor(s) and partner(s)'" in a company and had "fail[ed] to otherwise connect the[m] . . . to

the Offer or the Offer Documents." 108 F. Supp. 2d 225, 238 (S.D.N.Y. 2000). On this basis, the Court held that it was "impossible to characterize the . . . [d]efendants as corporate insiders with direct involvement in the daily activities of the relevant companies or intimate knowledge of the challenged transaction." *Id.; see also DiVittorio v. Equidyne Extractive Indus.*, 822 F.2d 1242, 1249 (2d Cir. 1987) (dismissing claims against individual defendants where none was "tied to the Offering Memorandum in any specific way, or even alleged to have been an officer or director of any non-individual" defendant); *City of Pontiac Gen. Emps. Ret. Sys. v. Lockheed Martin Corp.*, 875 F. Supp. 2d 359, 374 (S.D.N.Y. 2012) (Rakoff, J.) ("Plaintiff's conclusory pleading that each defendant had 'ultimate authority' over the statements is clearly insufficient to adequately plead [that the defendant] made these statements."); *Camofi Master LDC v. Riptide Worldwide, Inc.*, 10 Civ. 4040 (CM), 2011 U.S. Dist. LEXIS 31237, at *20 (S.D.N.Y. Mar. 23, 2011) (permitting group pleading where defendants were "high-level executives and, by virtue of their positions, played a daily role in the activities" of the company); *Elliott Assocs., L.P. v. Hayes,* 141 F. Supp. 2d 344, 354 (S.D.N.Y. 2000) (brackets omitted) (group pleading doctrine can only apply where "the defendants are a narrowly defined group of highly ranked officers or directors who participated in the preparation and dissemination of a published company document").

The JOLs attempt to use group pleading for two purposes: (i) to link Bodner (via the Platinum Defendants group) to Platinum's alleged misstatements to PPVA regarding PPVA's net asset value; and (ii) more broadly, to link Bodner to the various schemes and transactions allegedly carried out by the Platinum Defendants and the Beechwood Defendants. (Opp. at 29). With respect to the latter, their effort to allege a "series of tortious acts" through group pleading is defective as a matter of law. Group pleading can only potentially apply to written statements,

not to the planning or execution of transactions. *See In re Optimal U.S. Litig.*, 837 F. Supp. 2d at 263. With respect to alleged misstatements, the FAC fails to allege any facts indicating day-to-day involvement by Bodner. The conclusory assertions that Bodner controlled Platinum Management are insufficient. *Id.* at 264 ("[M]ere allegations of a corporate [insider] relationship are insufficient to render a [defendant] liable as an insider or affiliate under the group pleading doctrine. Rather, plaintiffs must allege interaction between the [defendant] relating to the subject matter of the alleged fraudulent misstatement or omission that is more than conclusory.").

In sum, the FAC's group pleading allegations are defective as to Bodner and cannot withstand his Motion to Dismiss.

B. The JOLs Have Not Identified Any Non-Group Pleaded Facts That Support Any of Their Claims Against Bodner

Each of the claims against Bodner rests on nothing more than conclusory assertions and characterizations. This is inadequate under both Rule 8 and Rule 9(b).

The First and Second Counts of the FAC base their claims of breach of fiduciary duty on alleged schemes to defraud PPVA. (FAC ¶¶ 758, 766). These Counts must therefore satisfy the requirements of Rule 9(b). They do not. There are no facts that show that Bodner owed or breached a fiduciary duty to PPVA. The FAC contains no facts that state when, where, or how Bodner supposedly made misrepresentations, or what those misrepresentations were. Conclusory assertions are inadequate to plead either the existence or the breach of a fiduciary duty. *See PetEdge, Inc. v. Garg*, 234 F. Supp. 3d 477, 499 (S.D.N.Y. 2017) ("conclusory assertions of direction, knowledge, and approval" are inadequate to support claim for breach of fiduciary duty); *Welch v. TD Ameritrade Holding Corp.*, No. 07 Civ. 6904 (RJS), 2009 U.S. Dist. LEXIS 65584, at *120 (S.D.N.Y. July 27, 2009) ("Plaintiffs cannot maintain a claim for breach of fiduciary duty against these Defendants simply by levying a series of general allegations.").

The Fourth and Fifth Counts, for fraud and constructive fraud, are similarly defective. Implicitly conceding that Bodner made no affirmative misrepresentation, the JOLs rely on alleged omissions. They argue that "the obligation to plead a material misrepresentation is replaced with a duty to disclose," either because Bodner owed a fiduciary duty to PPVA, or because the "special facts" doctrine applies. (Opp. at 15-17). As discussed above, the FAC does not set forth facts that establish that Bodner owed PPVA a fiduciary duty.

As for the "special facts doctrine," the JOLs claim that the Platinum Defendants – a group the FAC defines to include Bodner – had a duty to disclose "the accurate NAV to PPVA" because the Platinum Defendants had "superior knowledge of PPVA's true NAV." (Opp. at 16-17) (citing *Senior Health Insurance Co. v. Beechwood Re Ltd.*, No. 18-cv-6658 (JSR), 2018 U.S. Dist. LEXIS 206536, at *19 (S.D.N.Y. Dec. 6, 2018) (Rakoff, J.) (internal citation omitted)). The FAC does not contain any facts that demonstrate that Bodner possessed any knowledge regarding PPVA's true NAV. The Fourth and Fifth Counts of the FAC should therefore be dismissed as to Bodner.

The JOLs' Opposition also fails to identify facts in the FAC sufficient to state a claim against Bodner for civil conspiracy. A pleading must include "specific allegations, including the times, facts, and circumstances of the alleged conspiracy." *Am. Bldg. Maint. Co. v. ACME Prop. Servs.*, 515 F. Supp. 2d 298, 318 (N.D.N.Y. 2007) (citing *Brownstone Inv. Grp., LLC v. Levey*, 468 F. Supp. 2d 654, 661 (S.D.N.Y. 2007)). There are none in the FAC as to Bodner. Resorting once again to conclusory group pleading allegations, the JOLs assert that the FAC details the "ways in which the moving Platinum and Beechwood Defendants engaged in a corrupt agreement to carry out the First and Second Schemes and the overt acts taken by each of them in furtherance of these schemes." (Opp. at 17). But nowhere in the FAC's 1,000+

paragraphs (nor in its 101 exhibits) are there facts that show that Bodner agreed to participate in any conspiracy, committed an overt act in furtherance of any conspiracy, or intentionally participated in furtherance of a plan or purpose, each of which is a necessary element of a claim for civil conspiracy. *See Ritchie Capital Mgmt., L.L.C. v. Gen. Elec. Capital Corp.*, 121 F. Supp. 3d 321, 339-40 (S.D.N.Y. 2015)*, aff'd on other grounds*, 821 F.3d 349 (2d Cir. 2016); *see also Perez v. Lopez*, 97 A.D.3d 558, 560 (N.Y. App. Div. 2012). For these reasons, the FAC fails to state a claim against Bodner for civil conspiracy.

With respect to the Seventeenth Count of the FAC, for civil RICO violations, the JOLs identify no facts in the FAC that show with the requisite particularity that Bodner engaged in predicate mail fraud and wire fraud sufficient to constitute a pattern of racketeering activity. The JOLs point to allegations in the FAC that fall far short of meeting the Rule 9(b) pleading standard. They cite FAC ¶ 12(iv), which consists entirely of unsupported conclusions and characterizations, not facts. (Opp. at 25-26). The FAC does not specify any involvement by Bodner in predicate fraudulent conduct, or facts that show that Bodner had any fraudulent intent. It does not plead a claim for violation of civil RICO.

The Court also should dismiss the claims against Bodner for allegedly aiding and abetting wrongdoing by others: the Third and Seventh Counts for allegedly aiding and abetting breaches of fiduciary duties, and the Sixth and Eighth Counts for allegedly aiding and abetting fraud. The FAC lacks any factual allegations that show that Bodner had actual knowledge of any of the wrongful acts he is alleged to have aided and abetted, or that he provided substantial assistance to the commission of any of those wrongful acts. The JOLs simply assert, in conclusory fashion, that the FAC "includes extensive detail" on the Platinum Defendants' "direct involvement in the transactions and aiding abetting of the breaches of fiduciary duties." (Opp. at

2-3, citing FAC ¶ 12). FAC ¶ 12 contains twelve sub-paragraphs, each one allocated to a different defendant. Sub-paragraph (iv) is allocated to Bodner. It contains no detail at all showing Bodner's "direct involvement" in any transactions or in aiding and abetting any breaches of fiduciary duty.

The Sixth and Eighth Counts, for aiding and abetting fraud, fare no better. The JOLs assert that they "have also alleged with particularity how the Beechwood Defendants, via their direct and indirect ownership, via the myriad Beechwood vehicles, and via the revolving-door Beechwood-Platinum managerial employees, aided and abetted this fraud and breach of fiduciary duty." (Opp. at 5). In support, the JOLs cite to FAC ¶¶ 330-99. (Opp. at 14-15). But nowhere in these 70 paragraphs are there any facts that show Bodner had knowledge of, or provided substantial assistance to, any fraud or other wrongdoing.

Finally, the JOLs assert that "[t]he Platinum Defendants' actions and misrepresentations and omissions enabled them to loot PPVA by charging unearned and fraudulent fees and bonuses, or in any case materially aided and abetted other Platinum Defendants in respect of same." (Opp. at 5). In support, the JOLs cite to FAC ¶¶ 173-77, 324, 336, 374, 383. (Opp. at 13-14). Those paragraphs, and the JOLs' summary thereof in their Opposition (at 13-14), set forth allegations against Daniel Saks, not against Bodner. Once again, there are no facts that support the Sixth and Eighth Counts as against Bodner.

In sum, all four aiding and abetting claims against Bodner should be dismissed.[3]

CONCLUSION

The FAC's counts against Bodner should be dismissed in their entirety, and with prejudice.

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[3] In their Opposition, the JOLs do not dispute, or even address, Bodner's arguments that the FAC does not set forth a claim for unjust enrichment. (Bodner Mem. at 13).

Dated: February 15, 2019
New York, New York

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