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)

REPLY 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) 972-0200
ecreizman@piercebainbridge.com
jalexander@piercebainbridge.com

Attorneys for Defendant David Ottensoser

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

PRELIMINARY STATEMENT

The leeway afforded to plaintiffs who may utilize the group pleading doctrine in certain circumstances does not countenance the "shoot first and ask questions later" approach employed by Plaintiffs here in their First Amended Complaint, and most particularly, with respect to David Ottensoser. The absence of any factual allegations of wrongdoing specific to Ottensoser not only portends that discovery will expose that Plaintiffs' legal claims against him wholly lack merit, but it will also flatly contradict certain of the few (misinformed) allegations they specifically make about Ottensoser, such as that he served as "General Counsel" to Beechwood—an entirely false contention which Plaintiffs, regardless of their "outsider" status, have absolutely no excuse for getting wrong.

But more to the point of this motion to dismiss, Plaintiffs' opposition fails to address any of the arguments in Ottensoser's opening brief, most prominently that the FAC is devoid of any factual allegations giving rise to an inference of *scienter* on Ottensoser's part, a necessary element of each and every one of Plaintiffs' claims against him. Even crediting Plaintiffs' misplaced reliance on the group pleading theory here, that doctrine cannot substitute for specific facts relevant to Ottensoser's state of mind. As set forth in Ottensoser's opening brief, the mere allegation that Ottensoser received a salary and a discretionary bonus (not even an incentive bonus)—a motive possessed by virtually all corporate insiders—fails to give rise to an inference of scienter. Plaintiffs studiously ignore this simple principle of black letter law in their opposition brief because they have no answer for it.

Although the alleged transactions in this case are indeed complex and the many different entities here may be confusing, the nature of the alleged wrongdoing is not. Here, a group of equity owners who controlled Platinum Management (the so-called "Platinum Defendants") allegedly engaged in fraudulent schemes to benefit themselves, their families, and their friends at the expense of PPVA's investors by: (i) falsely inflating the value of PPVA's assets, thus deceitfully generating management fees for themselves; and (ii) creating an investment entity, Beechwood, which they also owned and controlled through nominees, and fraudulently transferred valuable PPVA assets to Beechwood and Beechwood's investors.

To establish *scienter* for virtually each of the Platinum Defendants other than Ottensoser, the FAC identifies: (i) "*controlling owners* and *co-lead managers* of Platinum and Beechwood," (ii) "owners and controlling minds of Beechwood," (iii) an "owner of Beechwood," (iv) a "portfolio manager" of Platinum Management and PPVA, (v) the head of marketing or PPVA, who had "direct knowledge of PPVA's lack of liquidity" and who "drew a salary and distributions after his resignation," and (vi) an individual who "held a significant *ownership* interest with Platinum Management, and exerted *control* over PPVA and its affairs." (Opp. Br. at 9-12). In stark contrast to most of the Platinum Defendants, Ottensoser is alleged to be nothing more than a salaried executive of Platinum. And there are no allegations even suggesting that he was aware of any wrongdoing, that he was a decision-maker at Platinum, or that he was involved in any way in the dissemination of false statements to investors.

On the other side of the alleged fraud are the Beechwood entity defendants, which were owned and controlled by the owners and controllers of Platinum Management, which did not include Ottensoser. There is no allegation whatsoever that Ottensoser, his family members, or his friends were nominee equity owners of Beechwood. Nor is there any allegation that Ottensoser or any nominee were investors in the BEOF Funds, "a standalone mechanism by

which Platinum Management personnel, their family and friends, and certain preferred investors" were able to invest in Black Elk, "outside of the regular funds," to the detriment of PPVA's investors. (Opp. Br. at 19). Likewise, neither Ottensoser nor anyone affiliated with him are alleged to have financially benefitted in any way from the Agera Energy transaction, in which Mark Nordlicht allegedly inserted his nephew as an executive at Agera, and gave a job to Kevin Cassidy as "a *quid pro quo*" concerning a fund with which Cassidy and Nordlicht were allegedly involved.

Plaintiffs do not even try to explain in their opposition brief how their claims against Ottensoser survive this conspicuous gap in the FAC's allegations. Nor, in their opposition papers, do Plaintiffs address their failure in their FAC—which they boast contains "1,012 paragraphs and 100 exhibits"—to allege facts or attach exhibits supporting their conclusory allegations that Ottensoser's role as general counsel or as a member of the Platinum risk committee somehow made him aware of, or knowingly complicit in any aspect of the alleged wrongdoing.

Plaintiffs' attempt to sweep Ottensoser into this action by relying solely on vague and amorphous allegations, conclusory assertions, and improper group pleading should be rejected by this Court. The discovery process is designed to enable a plaintiff to prove its well-pled allegations, not to allow a fishing expedition—at great personal cost and expense to an innocent person—to determine if there really are claims to be made.

For these reasons, and for the reasons set forth in his opening brief, the First Amended Complaint fails to adequately plead facts supporting any of its claims against Ottensoser, and therefore should be dismissed as against him in its entirety.

ARGUMENT

I. Plaintiffs ignore and do not address the arguments in Ottensoser's opening brief.

Plaintiffs do not address any of Ottensoser's arguments in his opening brief. Most conspicuously, Plaintiffs fail to address the argument that the FAC's allegations with respect to Ottensoser fail to raise an inference of *scienter*, which is necessary for each and every single one of their claims against him. Plaintiffs' arguments are as conclusory as the allegations concerning Ottensoser in their deficient pleading. Instead of even trying to explain how their allegations satisfy Rule 9(b) with respect to Ottensoser, Plaintiffs simply repeat those deficient allegations.

For example, in a feeble effort to demonstrate that the FAC adequately states a civil RICO claim against Ottensoser, Plaintiffs merely point to allegations in the FAC that:

- Ottensoser sent "two emails circulating a copy of the executed Nordlicht Side Letter to Manela and another Platinum Management executive."
- Ottensoser "was *involved* in drafting and negotiating the *various documents* by which the transactions comprising the First and Second Schemes were effectuated, including the Agera Transactions."

(Opp. Br. at 28). With respect to the two emails, Plaintiffs cannot identify anything in the FAC that explains how Ottensoser's mere emailing of a legal document to other executives furthered the alleged fraud. Nor do they point to any allegation in the FAC that suggests that Ottensoser understood the allegedly fraudulent purpose of the Side Letter. And since Plaintiffs fail to include any factual allegations in the FAC supporting an inference of *scienter*, that allegation without more—and there isn't more—does not support its claim.

Likewise, not only does the vague allegation that Ottensoser was "involved in drafting and negotiating various documents" fail to demonstrate *scienter*, it also fails to identify in any meaningful way what Ottensoser actually did. Plaintiffs might have just as well simply alleged that "Ottensoser was involved in the fraudulent scheme that victimized" PPVA's investors.

Adding the words "various documents" and "transactions comprising the First and Second schemes" does not and cannot possibly satisfy their pleading obligation under Rule 9(b).[1]

Thus, because Plaintiffs choose not to address the arguments in Ottensoser's opening brief, there is no point repeating them here, and, instead, we respectfully refer the Court to the detailed analysis set forth in that brief (DE 210).

II. Plaintiffs' reliance on the group pleading doctrine does not serve to adequately allege false statements or omissions with respect to Ottensoser.

Even if the group pleading doctrine were available to Plaintiffs here,[2] their reliance on it with respect to Ottensoser is unavailing. As an initial matter, the claims of fraud lodged against Ottensoser (Fourth and Fifth Counts) cannot be saved by the group pleading doctrine. Group pleading is "extremely limited in scope . . . to group-published documents, such as SEC filings and press releases," and "does not apply to oral statements." *Camofi Master LDC v. Riptide Worldwide, Inc.*, 2011 WL 1197659, at *6 (S.D.N.Y. Mar. 25, 2011).

With respect to Ottensoser, the only group-published statements alleged to be at issue are the periodic net asset value ("NAV") statements. *See, e.g.*, FAC ¶¶ 784 (the "material representations included statements concerning the nature and characteristics of the investments of PPVA, the method of valuation of PPVA assets, including NAV, and the management and other fees earned by Platinum Defendants and subsequently paid by or charged to PPVA"); 807 (same); 830 (referencing same); 853 (referencing same). The only other written statements—the

[1] Plaintiffs cannot benefit from relaxed pleading standards where they have admittedly had access to over 13 million documents from Platinum Management's servers for almost nine months. *See, e.g., Devaney v. Chester*, 709 F. Supp. 1255, 1261 (S.D.N.Y. 1989) (dismissing complaint where "the trustee has had the benefit of wide-ranging discovery before filing his Fourth Amended Complaint"); *In re Old CarCo LLC*, 435 B.R. 169, 192 (Bankr. S.D.N.Y. 2010) (rejecting application of relaxed standards where "there was ample opportunity to investigate any potential claims prior to filing the Complaint").

[2] Ottensoser joins in the arguments of his co-defendants that the limited circumstances in which Plaintiffs can rely on group pleading are not present here.

agreements and contracts relating to the transactions that are at the center of the alleged schemes—are not group-published statements for purposes of group pleading. *See, e.g., In re Optimal U.S. Litig.*, 837 F. Supp. 2d 244, 263 (S.D.N.Y. 2011); *Watson v. Riptide Worldwide, Inc.*, 2012 WL 383946, at *4–5 (S.D.N.Y. Feb. 7, 2012) (finding that a merger agreement does not qualify as "group-published information"). [3]

The FAC contains no allegation that Ottensoser authored or otherwise exercised ultimate authority over the periodic NAV statements. Plaintiffs allege only that Ottensoser "was involved" in the alleged schemes by way of his position as Platinum Management's general counsel and chief compliance officer, his position on PPVA's risk committee, and his alleged role as Beechwood's general counsel. FAC ¶ 110. This is insufficient, as "[t]he Second Circuit has suggested that a corporate officer defendant must have active involvement in the transaction at issue for the group pleading doctrine to apply." *Watson*, 2012 WL 383946, at *4.

Here, Plaintiffs "do not allege any facts that show what level of involvement [Ottensoser] had in the" NAV statements. *Id.* at *5 (dismissing fraud claims that plaintiffs claimed were "attributable to [individual defendant] due to his status as Riptide's CFO"). *See also City of Roseville Emps.' Ret. Sys. v. EnergySolutions, Inc.*, 814 F. Supp. 2d 395, 417 (S.D.N.Y. 2011) (denying use of group pleading as to directors where "[t]here is no indication . . . that [defendants] had any authority over" the contents of a report); *Levy v. Maggiore*, 48 F. Supp. 3d 428, 451 (E.D.N.Y. 2014) ("Absent any factual allegations with respect to Santiago, other than his title, the group pleading doctrine does not encompass Santiago.").

Nor have Plaintiffs credibly alleged that Ottensoser exercised day-to-day control over Platinum Management or the group-published documents. Judge Marrero's opinion in *Anwar v.*

[3] In any event, Plaintiffs do not allege that the contracts and agreements underlying the alleged schemes contained misleading statements or omissions, only that they were used in furtherance of the alleged schemes.

Fairfield Greenwich Ltd., 728 F. Supp. 2d 372 (S.D.N.Y. 2010) is instructive. In *Anwar*, the defendants were a CFO, a COO, two founding partners who were alleged to have "over[seen]" the company, and two presidents of a wholly-owned subsidiary. 728 F. Supp. 2d at 406. Those defendants were in "positions that required daily oversight and steering over operations," such as "conducting due diligence over all the entities." *Id.* Here, by contrast, all Plaintiffs have alleged are broad, sweeping allegations that Ottensoser "was involved in every aspect of the First and Second Schemes" by "his position as a member of the risk committee," with no explanation of what that role entailed, and "help[ed] to orchestrate" and "assist[ed] in the consummation of" other schemes and transactions. FAC ¶ 110.

The group pleading allegations also do not substitute for allegations sufficient to raise an inference of scienter, which is a necessary element of every claim pled against Ottensoser. "Scienter must be separately pled and individually supportable as to each defendant; scienter is not amenable to group pleading." *Kinra v. Chi. Bridge & Iron Co.*, 2018 WL 2371030, at *6 (S.D.N.Y. May 24, 2018) (internal quotations and citations omitted). This principle easily defeats the purported claims against Ottensoser relating to breaches of his fiduciary duties to PPVA (First and Second Counts) at the pleading stage since the FAC does no more than "vaguely attribut[e] misconduct" to him. *Steinberg v. Sherman*, 2008 WL 2156726, at *5 (S.D.N.Y. May 8, 2008).

Likewise, the aiding and abetting claims against Ottensoser (Third, Sixth, Seventh, and Eighth Counts) are not adequately pled because the FAC fails to allege any facts supporting "actual knowledge" by Ottensoser of any breach of fiduciary duties or fraud on his part or on those of his co-defendants. *See Bullmore v. Ernst & Young Cayman Island*, 45 A.D.3d 461, 464 (1st Dep't 2007). Moreover, the hopelessly vague allegation that Ottensoser "was *involved* in drafting and negotiating the *various documents* by which the transactions comprising the First

and Second Schemes were effectuated" fails to satisfy the element of "substantial assistance," which requires allegations sufficient to establish that Ottensoser "in some sort associated himself with the [illicit] venture, that [he] participated in it as something that he wished to bring about, and that he sought by his actions to make it succeed." *SEC v. DiBella*, 587 F.3d 553, 566 (2d Cir. 2009); *Anwar*, 728 F. Supp. 2d at 406 (noting that group pleading "does not also transitively convey scienter"). Plainly, the factual allegations relating to Ottensoser do not come close to satisfying that standard.

The civil conspiracy claim against Ottensoser (Sixteenth Count) fails because Plaintiffs do not identify a single factual allegation to support their conclusory assertion that he agreed with anyone to commit any of the underlying wrongdoing alleged in the FAC.

With respect to the civil RICO claim (Seventeenth Count), as discussed above in Section I, the allegations fall woefully short of establishing that he engaged in the requisite predicate acts of fraud. Nor does the FAC allege any facts supporting that Ottensoser played "*some* part in directing the [alleged] enterprise's affairs." *Reves v. Ernst & Young*, 507 U.S. 170, 179 (1993) (emphasis and original).

CONCLUSION

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

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/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
jalexander@piercebainbridge.com

Attorneys for Defendant David Ottensoser