

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK**

IN RE PLATINUM-BEECHWOOD LITIGATION

Docket No: 1:18-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,

Docket No.: 1:18-cv-10936 (JSR)

v.

PLATINUM MANAGEMENT (NY) LLC, MARK  
NORDLICHT, DAVID LEVY, ESTATE of URI  
LANDESMAN, MURRAY HUBERFELD, DAVID  
BODNER, DAVID STEINBERG, DANIEL SMALL,  
et al.

Defendants.

**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT ESTATE OF URI  
LANDESMAN'S MOTION TO DISMISS COUNT SEVENTEEN OF THE SECOND  
AMENDED COMPLAINT**

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Pursuant to Federal Rules of Civil Procedure 12(b)(6) and 9(b), Defendant Estate of Uri Landesman (the “Estate”) submits this memorandum of law in support of its motion to dismiss Count Seventeen of the Second Amended Complaint (the “SAC”), alleging civil RICO, filed by Plaintiffs Martin Trott, Christopher Smith, and Platinum Partners Value Arbitrage Fund L.P (collectively, “Plaintiffs”) on March 29, 2019.<sup>1</sup>

In the SAC, Plaintiffs assert a multitude of claims against an ever-growing number of defendants. Incorporating the Estate with the “Platinum Defendants,” Plaintiffs rely almost entirely on group pleading to assert a variety of allegations against the Estate. But, the group pleading doctrine has its limits, and it does not absolve the Plaintiffs from infusing particularity as concerns Mr. Landesman when pleading the RICO predicate acts that he is alleged to have committed. Plaintiffs fail to identify any false or fraudulent statement by Mr. Landesman, much less one that qualifies as mail or wire fraud. It is not even clear from the face of the complaint that Plaintiffs have alleged any RICO predicates at all. Plaintiffs’ failure to attribute any predicate act to Mr. Landesman is a failure of basic pleading standards. Count Seventeen, alleging violation of civil RICO against the Estate, should be dismissed for failure to state a claim.

### **FACTS AND PROCEDURAL BACKGROUND**

Plaintiffs allege that the various defendants perpetrated a massive fraud via Platinum Management’s management of Platinum Partners Value Arbitrage Fund L.P (“PPVA”) and the calculation of PPVA’s net asset value (“NAV”). (SAC ¶¶ 1, 7.) Mr. Landesman, who is now deceased, held the title of President of Platinum Management until April 2015. (*Id.* ¶ 255.) He served as “co-chief investment officer of PPVA” alongside Mark Nordlicht, and served on the

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<sup>1</sup> All Terms not defined here are accorded the meaning set forth in the SAC. All relevant arguments raised by the other defendants are incorporated by reference.

valuation and risk committees until his resignation in the spring of 2015. (SAC ¶ 12(ii).)

Plaintiffs allege that Mr. Landesman, “remained involved in developing strategy for managing PPVA’s liquidity issues and seeking out new investors even after his resignation in 2015,” but he is not alleged to have held a management or operational position. (*See id.*) Plaintiffs’ allegations against the Estate are based almost entirely on Mr. Landesman’s former management role at Platinum Management.<sup>2</sup> (*Id.* ¶ 3.)

Plaintiffs assert eight claims against the Estate:

- Counts One and Two: Breach of Fiduciary Duty;
- Count Three: Aiding and Abetting Breach of Fiduciary Duty;
- Count Four: Fraud;
- Count Five: Constructive Fraud;
- Count Six: Aiding and Abetting Fraud;
- Count Sixteen: Civil Conspiracy; and
- Count Seventeen: Civil RICO (18 U.S.C. § 1962(c))

The Estate joined the previous round of motions, moving to dismiss the SAC on the basis that it improperly relied on group pleading. On March 15, 2019, the Court denied that motion. (ECF No. 276.) In an April 11, 2019 opinion, the Court held, *inter alia*, that the group pleading doctrine could properly be employed in these circumstances for at least some of the allegations, but invited defendants to file additional motions to dismiss if such motions were warranted. (*See* ECF No. 290, pp. 45-51, 62.) We respectfully submit that this is one such instance.

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<sup>2</sup> The Estate is not included as a Beechwood Defendant in the SAC.

The SAC itself is 185 pages long, comprising over 1041 paragraphs of allegations. It contains almost no allegations directed specifically to Mr. Landesman. In support of its civil RICO claims, Plaintiffs assert that the “Platinum Defendants” engaged in 10 acts of mail or wire fraud as follows:

	Description	Exhibit from SAC (if available)	Explanation in SAC
1.	Wire fraud for a bribery scheme by Murray Huberfeld	1	SAC ¶ 280
2.	Wire fraud for a July 30, 2015 email describing how the Beechwood scheme was used to disguise the relationship between Beechwood and Platinum	33	
3.	Wire fraud for a March 11, 2014 email allegedly sent to secure votes to amend the Indenture through the fraudulent use of Beechwood as an unauthorized proxy		SAC ¶¶ 440, <i>et seq.</i>
4.	Wire fraud for three emails dated May 13, 2014, June 23, 2014, and July 1, 2015 allegedly furthering a plan to have PPVA sell loan interests to Beechwood at artificial and inflated prices	56	SAC ¶¶ 487, 488, 489
5.	Wire fraud for an unidentified email communication that allegedly contained false representations related to the final “Consent Solicitation,” published prior to the amendment of the Indenture		SAC ¶¶ 478-483
6.	Wire fraud for an unidentified email communication to the Indenture Trustee consenting to the Indenture amendment		SAC ¶¶ 476-478
7.	Wire fraud for an August 18, 2014, email directing the wiring of funds from the proceeds of the Renaissance Sale	55	SAC ¶ 502
8.	Wire fraud for an unidentified email communication “concerning Platinum Defendants and Beechwood Defendants’ causing Monstant” to purchase remaining 13.75% Senior Secured Notes		SAC ¶ 522
9.	Wire fraud for a series of communications between April and June 2016 concerning the allegedly insider sale of PGS		SAC ¶ 643, <i>et seq.</i>

10.	Wire fraud for the execution of the January 14, 2016 Nordlicht Side Letter	75	SAC ¶ 568, <i>et seq.</i>
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See SAC ¶ 978.

Of these ten alleged predicate acts, Mr. Landesman appears to have taken part in none of them. Because none of these ten example predicate acts are pled with particularity as to Mr. Landesman, and because the SAC contains insufficient allegations demonstrating with particularity that Mr. Landesman engaged in two predicate acts, the Estate moves to dismiss Count Seventeen alleging civil RICO.

### ARGUMENT

A Civil RICO allegation is the “litigation equivalent of a thermonuclear device,” with its access to extreme sanctions. *Katzman v. Victoria’s Secret Catalogue*, 167 F.R.D. 649, 655 (S.D.N.Y. 1996) (Sweet, J.) (quoting *Miranda v. Ponce Fed. Bank*, 948 F.2d 41, 44 (1st Cir. 1991)). Consequently, courts should review civil RICO claims with particular scrutiny, and ensure that “actions traditionally brought in state courts do not gain access to treble damages and attorney’s fees in federal courts simply because they are cast in terms of RICO violations.” *Mathon v. Marine Midland Bank, N.A.*, 875 F. Supp. 986, 1001 (E.D.N.Y. 1995); *see also Katzman*, 167 F.R.D. at 655 (observing that “courts should strive to flush out frivolous RICO allegations at an early stage of the litigation”).

Section 1962(c) of the RICO Act prohibits “any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise’s affairs through a pattern of racketeering activity.” 18 U.S.C. § 1962(c). To establish a RICO violation under 18 U.S.C. § 1962(c), Plaintiffs must allege: “(1) conduct (2) of an enterprise (3) through a pattern



(4) of racketeering activity.” *Kim v. Kimm*, 884 F.3d 98, 103 (2d Cir. 2018); *see also Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 (1985). Failure to allege each of these elements sufficiently is fatal to a plaintiff’s RICO claim, warranting dismissal of that claim. *DeFalco v. Bernas*, 244 F.3d 286, 306 (2d Cir. 2001).

**I. Plaintiffs Cannot Rely on Group Pleading to Establish the Existence of Predicate Acts Conducted By Mr. Landesman.**

To establish a pattern of racketeering activity, Plaintiffs “must plead at least two predicate acts, and must show that the predicate acts are related and that they amount to, or pose a threat of, continuing criminal activity.” *GICC Capital Corp. v. Tech. Fin. Grp.*, 67 F.3d 463, 465 (2d Cir. 1995) (internal citation omitted). RICO predicates sounding in fraud must be pleaded with particularity, as required by Rule 9(b). *Nasik Breeding & Research Farm Ltd. v. Merck & Co., Inc.*, 165 F. Supp. 2d 514, 537 (S.D.N.Y. 2001) (Schwartz, J.) (holding that Rule 9(b) applies with particular force to RICO claims and that plaintiffs must plead with particularity as to each defendant); *see also Plount v. Am. Home Assur. Co., Inc.*, 668 F. Supp 204, 207 (S.D.N.Y. 1987) (Sweet, J.).

“Importantly, RICO allegations must be evaluated ‘with respect to each defendant individually.’” *Franzone v. City of New York*, No. 13-CV-5282 NG, 2015 WL 2139121, at \*8 (E.D.N.Y. May 4, 2015) (quoting *First Capital Asset Mgmt., Inc. v. Satinwood, Inc.*, 385 F.3d 159, 181 (2d Cir. 2004)). RICO requires that “[a] plaintiff must allege, at a minimum, that ‘a defendant personally committed or aided and abetted the commission of two predicate acts.’” *4 K & D Corp. v. Concierge Auctions, LLC*, 2 F. Supp. 3d 525, 537 (S.D.N.Y. 2014) (Koeltl, J.) (quoting *McLaughlin v. Anderson*, 962 F.2d 187, 192 (2d Cir. 1992)). It is insufficient to allege a fraudulent scheme generally, “since ‘not every use of the mails or wires in furtherance of an unlawful scheme to deprive another of property constitutes mail or wire fraud.’” *McLaughlin*,

962 at 192 (quoting *McEvoy Travel Bureau, Inc. v. Heritage Travel, Inc.*, 904 F.2d 786, 791 (1st Cir. 1990)). Rather, the Plaintiffs must make some attempt to connect the alleged predicates to Mr. Landesman.

Nor does the group pleading doctrine permit the Plaintiffs to attribute the alleged predicates to Mr. Landesman using the group pleading doctrine. “The group pleading doctrine is extremely limited in scope.” *Elliott Assocs., L.P. v. Hayes*, 141 F. Supp. 2d 344, 354 (S.D.N.Y. 2000) (Scheidlin, J.). It applies only “to group-published documents, such as SEC filings and press releases.” *Id.*; see also *In re Alstrom SA*, 406 F. Supp. 2d 433, 449 (S.D.N.Y. 2005) (Marrero, J.) (explaining that the group pleading doctrine allows plaintiffs “for pleading purposes only, to ‘rely on a presumption that statements in prospectuses, registration statements, annual reports, press releases and other group published information, are the collective works of those individuals with direct involvement in the everyday business of the company’” (quoting *In re BISYS Sec. Litig.*, 397 F. Supp. 2d 430, 438 (S.D.N.Y. 2005) (Kaplan, J.))). It does not apply to informal correspondence such as email traffic. This rule makes sense, because such correspondence is easily attributable to a specific individual at a specific time, and resort to the group pleading doctrine is not required.

Mr. Landesman is implicated in none of the ten alleged RICO predicates identified by the Plaintiffs. (See SAC ¶ 978.) The first alleged predicate act, a bribery allegation against Murray Huberfeld appears to have no real connection to any fraud alleged in the SAC, much less one connected to Mr. Landesman. Alleged predicate acts numbers 2, 9, and 10 all took place after Mr. Landesman resigned, and was no longer in a management position.<sup>3</sup> (SAC ¶ 254 (noting

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<sup>3</sup> Additionally, predicate act number 2 appears to be an internal communication discussing a concern that prior statements made to an investor were not entirely honest. There was no false

that Mr. Landesman resigned from Platinum Management in April 2015); *see also* SAC Ex. 33 (relating to predicate act 2)). Plaintiffs make no attempt to connect predicate acts 3, 4, or 7 to Mr. Landesman, nor does it appear that these were the types of published materials falling under the group pleading doctrine.<sup>4</sup> (*See* SAC Ex. 56 (relating to predicate act 4, and making no mention of Mr. Landesman); SAC Ex. 55 (relating to predicate act 7 and making no mention of Mr. Landesman).) Predicate acts 9 and 10 occurred long after Mr. Landesman had left his management position.

Finally, predicate acts 5, 6, and 8, are pleaded with no particularity at all, failing to identify even the date of the relevant communication, making it impossible to analyze. As a result, these allegations fail to satisfy their burden of “stat[ing] the contents of the communications, who was involved, [and] where and when they took place, and [should] explain why they were fraudulent.” *Spool v. World Children Int’l Adoption Agency*, 520 F.3d 178, 185 (2d Cir. 2008) (quoting *Mills v. Polar Molecular Corp.*, 12 F.3d 1170, 1176 (2d Cir. 1993)); *see also 4 K & D Corp.*, 2 F. Supp. 3d at 538 (requiring plaintiffs to “specify the statements it claims were false or misleading, give particulars as to the respect in which plaintiffs contend the statements were fraudulent, state when and where the statements were made, and identify those responsible for the statements” for predicate acts of wire fraud (quoting *Moore v. PaineWebber, Inc.*, 189 F.3d 165, 173 (2d Cir. 1999))).

In sum, Mr. Landesman is not alleged to have sent any emails, responded to any email, ordered the transfer of funds, personally made any false or fraudulent statements, or taken any

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statement made to any individual and it seems nothing was sent in furtherance of a fraudulent scheme. Therefore, it cannot serve as a predicate act.

<sup>4</sup> Only two of the three emails identified in predicate act 4 were even sent while Mr. Landesman was still in his management position at Platinum Management.

other action that could be considered a RICO predicate. Nor do the alleged RICO predicates qualify for application of the group pleading doctrine. Plaintiffs have thus failed to allege that Mr. Landesman violated the RICO statute, and Count Seventeen should be dismissed.

## **II. Plaintiffs Fail to Plead Any Predicate Acts Supporting a RICO Claim against the Estate**

More generally, it is not clear that Plaintiffs have pleaded any RICO predicate acts at all. RICO claims relying only on mail and wire fraud as predicate acts “merit particular scrutiny, lest the courts allow the RICO statute to federalize garden-variety state common law claims.” *Bigsby v. Barclays Capital Real Estate, Inc.*, 170 F. Supp. 3d 568, 576 (S.D.N.Y. 2016) (Koeltl, J.) (internal quotations omitted). Added scrutiny is required because “virtually every ordinary fraud is carried out in some form by means of mail or wire communication.” *Gross v. Waywell*, 628 F. Supp. 2d 475, 493 (S.D.N.Y. 2009) (Marrero, J.) (citation omitted). Furthermore, “unlike the other criminal offenses the statute enumerates as racketeering, use of the mail or wires is not inherently criminal.” *Id.* In other words, the alleged wire fraud must be, at a minimum, integral to the scheme to defraud to serve as a predicate act. *See id.* at 493 (noting that finding the necessary criminality in a wire communication requires analysis beyond the mere fact of the communication). The SAC contains no allegations that support any allegation of mail fraud at all. As to wire fraud, Plaintiffs allege only an incidental use of the email and the wires, but fail to offer allegations supporting an inference that the use was anything other than incidental. It is telling that, in a complaint as long and complex as this one, Plaintiffs can identify only ten vague communications that are connected to the wires.

Plaintiffs fail to plead anything more than an incidental use of the wires. They fail to allege that the use of the wires was somehow integral to the scheme to defraud. As a result,

Plaintiffs cannot allege that any predicate act of wire fraud was committed by any defendant.

Count Seventeen should be dismissed.

**CONCLUSION**

Because Plaintiffs have failed to allege sufficient facts with the required particularity that, if true, demonstrate that Mr. Landesman committed two predicate acts of wire or mail fraud, Plaintiff's RICO claim against the Estate cannot stand. The RICO claim should be dismissed as to the Estate.

Dated: April 22, 2019  
Newark, New Jersey

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