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' MEMORANDUM OF LAW
IN SUPPORT OF MOTION TO DISMISS THE SECOND AMENDED COMPLAINT

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Defendant Daniel Saks ("Saks") respectfully submits this memorandum of law in support of his Motion to Dismiss the Second Amended Complaint (Dkt. No. 226) ("SAC") filed by Plaintiffs Martin Trott and Christopher Smith, in their capacity as Joint Official Liquidators of Platinum Partners Value Arbitrage Fund L.P. ("PPVA" and collectively, "Plaintiffs").

PRELIMINARY STATEMENT

Defendant Saks worked at Platinum Management (NY) LLC ("Platinum Management") for six months in 2014, and then worked at B Asset Manager, LP ("BAM") until the end of 2015. In the initial Complaint and the First Amended Complaint (the "FAC"), Plaintiffs identified Saks only as a Beechwood Defendant. This Court did not dismiss Saks from the FAC on the group pleading motion, but explained that, as the single group pleading movant named only as a Beechwood Defendant, Saks would not be prejudiced from moving to dismiss on more particularized grounds. (*Id.*)

Thereafter, Plaintiffs filed their Second Amended Complaint ("SAC"), which adds ***no new factual allegations*** but nonetheless now categorizes Saks as a Platinum Defendant as well. With this, Plaintiffs increase their claims against Saks to ***eleven*** causes of action, adding breach of fiduciary duty, fraud and constructive fraud to their previous claims of secondary liability, conspiracy and civil RICO. None of the new or old counts state a cause of action against Saks. He should be dismissed as a matter of law, with prejudice and without leave to replead.

STATEMENT OF FACTS

Saks began working at Platinum Management (NY) LLC ("Platinum Management") in March 2014. (Ex. A, Decl. of Daniel Saks ("Saks Decl."), ¶ 2.) Saks resigned from Platinum

Management six months later, effective September 14, 2014.[1] (*Id.* ¶ 4.) The SAC does not allege that Saks ever held an ownership interest in any Platinum entity or invested any of his own money in Platinum.

The SAC alleges that Saks was "until about 2014, a portfolio/investment manager with oversight and control over numerous PPVA investments." (SAC ¶ 12(xii); *see also id.* ¶ 188 ("Until 2014, Saks worked as a portfolio manager at Platinum Management.").) The SAC further alleges that "by the end of 2013, Saks became responsible for overseeing and managing PPVA's bio/pharma investments" in certain companies, and also states that Saks "previously [i.e., before the end of 2013] was involved with overseeing the investment in Golden Gate Oil." (*Id.* ¶ 12(xii).) Because these allegations pre-date his now-conceded start date at Platinum in March 2014, they cannot be credited.

Looking at the SAC allegations concerning Saks' actual tenure at Platinum between March 2014 and Sept 2014, the SAC alleges only that he was copied on one email, dated May 23, 2014, two months after he arrived, regarding an option held by Black Elk to purchase the membership interests of Golden Gate Oil. (*Id.* ¶ 338 and Ex. 30.) According to Black Elk's Form 10-Q for the period ending September 30, 2013, which Plaintiffs attached to the SAC as Exhibit 29, this option was acquired on November 14, 2013—before Saks joined Platinum. (Ex. 29 at 17; *see also* SAC ¶ 336.) The option allowed Black Elk "to purchase 100% of the equity of Golden Gate for an aggregate purchase price equal to $60 million plus the amount of any

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[1] Saks submits a declaration regarding his dates of employment because the SAC (and the FAC and the initial Complaint) are incorrect and material to this motion. Counsel for Plaintiffs have notified us they now agree Saks' start date was March 2014 but have to date been unable to respond as to his end date. Counsel for Plaintiffs have also notified us that as of yesterday, they don't think they have any information as to when Saks started and stopped at BAM. By addressing this specific information now, Saks does not concede the correctness of any other allegations in the SAC and reserves all rights, including the right to challenge all of the incorrectly pleaded information at an appropriate time.

advances made to Golden Gate by its members after October 29, 2013 plus the principal, interest and fees outstanding under certain debt of Golden Gate." (Ex. 29 at 17.) The May 23, 2014 email identified a potential issue with this publicly reported option: other outside investors might have questions about purchasing Golden Gate Oil at a valuation over $60 million when Black Elk held an option to buy those same shares at $60 million valuation. (*See* ¶ 338 ("the issue is that it publicly discloses the value of the option and therefore pegs GGO [Golden Gate Oil]'s value to $60M. This is ultimately a marketing issue that could be dealt with but something we should all be aware of.").) Four months later, Saks left Platinum. (Saks Decl. ¶ 4.)

The SAC then alleges that "[d]uring 2014, Saks began working for the Beechwood Entities, eventually serving as Chief Investment Officer and then President of B Asset Manager LP . . . . " (SAC ¶ 12(xii)) and that Saks left Platinum to replace David Levy as co-chief investment officer of B Asset Manager, LP ("BAM"). (SAC ¶¶ 190, 387, 396.) Saks began his employment at BAM after he left his employment at Platinum, and remained at BAM until his resignation on December 31, 2015. (Saks Decl. ¶¶ 5, 6.) As of January 1, 2016, Saks was not employed by any Platinum or Beechwood entity. (*Id.* ¶ 7.) The SAC allegation regarding Saks supposed overlapping employment at Platinum and Beechwood (SAC ¶ 189) and the suggestion that he continued at BAM after 2015 (SAC ¶¶ 12(xii)) cannot be credited in view of Plaintiffs' counsel's concession that they have no information on those dates.

During Saks' employment at BAM, he executed an agreement dated May 13, 2015 as "Authorized Signatory" of "BAM Administrative Services LLC." (SAC Ex. 65.) In this agreement, PPVA's wholly owned subsidiary, Montsant, through its authorized signer, David

Steinberg,[2] pledged collateral to secure a loan that had been previously made to Montsant. (*See id.*) Notably, Saks is not alleged to be a signatory on the primary Montsant transaction that the SAC focuses on, which occurred in January of 2015. (*See* SAC Ex. 64.) Based solely on the May 13, 2015 pledge agreement, in which Saks acted as a counterparty to PPVA for an ancillary agreement providing collateral for an earlier transaction, Plaintiffs make the conclusory allegation that Saks "was involved in orchestrating the January 2015 Montsant transaction and executed the transaction documents on behalf of BAM." (SAC ¶ 192.)

With these sparse allegations, Plaintiffs assert that "Saks was instrumental to Beechwood's involvement in the First Scheme and Second Scheme . . . , and acted as signatory on behalf of various Beechwood Entities in connection with several of the transactions among Beechwood Entities and PPVA." (*Id.*) The SAC does not identify facts showing Saks' role in any other of the "several . . . transactions" in which Saks was allegedly involved, nor does it allege the role those transactions played in the First Scheme and Second Scheme, if any. Moreover, with respect to the Second Scheme, the alleged "significant wrongful acts and transactions" (*id.* ¶11) all occurred in 2016, when Saks was no longer employed by any Beechwood Entity.

ARGUMENT

By Order dated March 15, 2019 (the "March 15 Order"), this Court dismissed Count XIV (alleging unjust enrichment) of the FAC as to Saks, and otherwise denied Saks' first motion to dismiss (Dkt. No. 192). In the April 11, 2019 opinion (the "April 2019 Opinion") explaining the rationale for that Order, this Court addressed only Saks' "broad-brush argument that no

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[2] Steinberg was initially named as a Platinum Defendant in this action, but was voluntarily dismissed from the case in an order dated March 19, 2019. (Dkt. No. 277.)

wrongdoing or knowledge of wrongdoing has been attributed to him." (Dkt. No. 290 at 57.) The Court explained, however, that, as the single first-round movant named in the FAC only as a Beechwood Defendant, Saks would not be "prejudiced from hereafter moving to dismiss the remaining claims in the FAC on more particularized grounds." (*Id.*)

Plaintiffs thereafter filed the SAC, which alleges no new facts regarding Saks and makes one new conclusory allegation: that "Bodner, Huberfeld, Landesman, ***Saks,*** Manela, SanFilippo, Ottensoser, Beren and Fuchs were aware of and participated in the actions and transactions with respect to Black Elk and the Black Elk Scheme . . . ," (SAC ¶ 466) (emphasis added). The SAC uses this conclusory addition to add Saks—for the first time—as a Platinum Defendant, thus exposing Saks to a new laundry list of causes of action, including breach of fiduciary duty (Counts I and II), common law fraud (Count IV), and constructive fraud (Count V). The SAC now also accuses Saks of aiding and abetting as both a Platinum (Counts III and VI) and Beechwood Defendant (Counts VII and VIII), reasserts the dismissed claim for unjust enrichment (Count XIV), and continues to assert claims of Civil Conspiracy (Count XVI) and Civil RICO (Count XVII), now as a Platinum and a Beechwood Defendant. For the reasons stated below, the SAC does not state a claim against Saks under any of these causes of action. Saks should be dismissed from this case with prejudice and without leave to replead.

I. The SAC Alleges No New Facts Against Saks Regarding Unjust Enrichment, Which the Court Previously Dismissed as to Saks

The March 15 Order dismissed the FAC's claim of unjust enrichment as to Saks. (Dkt. No. 276 at 3.) Plaintiffs allege no new facts in the SAC to demonstrate that Saks was, in fact, enriched, nor do they specify why the unjust enrichment claim against him is not duplicative of the various tort claims also alleged in the FAC and SAC. The SAC's claim for unjust enrichment should be dismissed as to Saks.

II. The Breach of Fiduciary Duty Claims Should Be Dismissed

The SAC newly alleges that Saks, in his capacity as an alleged Platinum Defendant, personally owed fiduciary duties of loyalty and care to PPVA and breached those duties. (SAC ¶¶ 763-781.) The SAC's cursory allegation that Saks was among "the individuals who oversaw the management, operation, valuation and administration of PPVA and its subsidiaries," is legally insufficient to establish a personal fiduciary duty, and in any event, there are no overt acts alleged to have been made by Saks that would constitute a breach of any such duties.

A. The SAC does not sufficiently allege that Saks owed PPVA fiduciary duties

A fiduciary duty arises where "confidence is reposed on one side and there is resulting superiority and influence on the other." *In re Refco Inc. Sec. Litig.*, 826 F. Supp. 2d 478, 503 (S.D.N.Y. 2011) (Rakoff, J.) (quoting *United States v. Chestman*, 947 F.2d 551, 568 (2d Cir. 1991)). The SAC does not allege any direct contractual, ownership, or other relationship through which Saks could be found to have "superiority and influence" over PPVA. The SAC alleges only that "Platinum Management, in its capacity as PPVA's general manager, and its principals / managers / advisors / owners, Nordlicht, Huberfeld, Bodner, Landesman, Bernard Fuchs, Levy, Beren, Saks, Manela, Ottensoser, SanFilippo, and Small . . . were obligated to manage and operate PPVA in good faith, in accordance with the terms of the partnership agreement, other operating documents, marketing materials, and the representations, statements and promises made to PPVA." (SAC ¶ 34.) In other words, the SAC asserts that Saks personally owed PPVA a fiduciary duty by virtue of his six-month tenure as a non-owner employee at Platinum Management, PPVA's general partner. This is incorrect as a matter of law.

An individual's employment at a corporate general partner does not, in general, suffice to impute liability for the general partner's breach of fiduciary duty to the individual employee. This Court has specifically rejected the argument that "any high-ranking corporate official is

subject to personal liability for breach of fiduciary duty whenever the corporation breached a fiduciary duty." *In re Refco*, 826 F. Supp. 2d at 512 (citing *Am. Fin. Int'l Grp.-Asia, LLC v. Bennett*, No. 05 Civ. 8988, 2007 WL 1732427, at *5 (S.D.N.Y. June 14, 2007) and *A.I.A. Holdings, SA v. Lehman Bros., Inc.*, No. 97 Civ. 4978, 1999 WL 47223, at *6 (S.D.N.Y. Feb. 3, 1999)); *see also Sergeants Benevolent Ass'n Annuity Fund v. Renck*, 19 A.D.3d 107, 116 (1st Dep't 2005). For instance, even where an individual who was "president, Chief Operating Officer and member of the board of directors" of a corporation that owed fiduciary duties to the plaintiff, and who "was an authorized signatory on [plaintiff's] bank and broker accounts; . . . authorized wire transfers to and from [plaintiff's] bank accounts; . . . directly oversaw many of the services provided by [the corporate fiduciary] to [plaintiff]; and . . . understood the [plaintiff's] business model," that was legally insufficient to find that the individual employee personally owed a direct fiduciary duty to the plaintiff. *In re Refco*, 826 F. Supp. 2d at 511. *See also Gelfman v. Weeden Inv'rs, LP*, 792 A.2d 977, 992 n.24 (Del. Ch. 2001) (officers and directors of a corporate general partner owe only a "duty of loyalty derivatively" to the partnership, and only where the officers and directors who themselves owned a stake in the partnership "have acted in a way that is potentially advantageous to their personal interests and at the expense of the limited partners.").

The Complaint does not allege any facts that would support an assertion that Saks had any independent financial interest in either PPVA, its investments, or Platinum Management. These allegations do not approach even those made against the president, COO and director in *In re Refco*, which this Court rejected. The allegations also are less extensive than those originally made in a related case brought by SHIP against Dhruv Narain (who replaced Saks in the position of chief investment officer at BAM), where this Court held: "Although SHIP does allege that

Narain managed SHIP's assets as CIO of BAM, it does not 'indicate that there was anything about [Narain's] role as a corporate official that created a personal relationship of trust and confidence.'" *Senior Health Ins. Co. of Pa. v. Beechwood Re Ltd.*, 345 F. Supp. 3d 515, 525 (S.D.N.Y. 2018). The claims for breach of fiduciary duties against Saks (Counts I and II) should be dismissed for failure to sufficiently allege a fiduciary duty to PPVA.

B. The SAC does not sufficiently allege that Saks breached any duty to PPVA

Even more fundamentally, the SAC does not allege that Saks performed a single affirmative act in his role as a Platinum employee, and thus he could not have breached any fiduciary duty even if he had owed one. While this Court recognized in its April 11, 2019 opinion that "the group pleading doctrine applies to breach of fiduciary duty claims that are rooted in fraud," (Dkt. No. 290 at 23), the Court has not previously had the opportunity to decide whether those group pleadings should be imputed to Saks in his capacity as a Platinum Defendant. Unlike the other Platinum Defendants, Saks is not alleged to be one of the "narrowly defined group of highly ranked officers or directors who participated in the preparation and dissemination of" net asset value ("NAV") reports for PPVA's investments, nor is Saks alleged to have had any financial incentive to misstate the valuations.

Under the group pleading doctrine, a group-published written statement may be imputed only to a "narrowly defined group of highly ranked officers or directors who participated in the preparation and dissemination of a published company document." *Elliott Assocs., LP v. Hayes*, 141 F. Supp. 2d 344, 354 (S.D.N.Y. 2000). This Court identified the relevant group-published statements as "the Platinum Defendants' persistently inflated reports of PPVA's NAV." (Dkt. No. 290 at 44-45.) The Court then recited the following allegations made against each of the Platinum Defendants within the "narrowly defined group of highly ranked officers or directors who participated in the preparation and dissemination" of the PPVA NAV reports:

- Bodner and Huberfeld were "founders and owners of Platinum Management," were "involved with sourcing investment opportunities, meeting with and marketing to important investors, dealing with issues concerning liquidity and redemptions, and developing business and investment strategy for PPVA," were "involved in the management and operation of PPVA and of Platinum Management," their "approval was required for all significant business, investment and personnel decisions," and they "participated in improperly inflating the values of PPVA's assets in order to improperly increase PPVA's NAV." (*Id.* at 46.)

- Ottensoser was "general counsel and Chief Compliance Officer for Platinum Management and PPVA," he was "responsible for documenting the transactions that comprised the First and Second Schemes and was actively involved in closing those transactions," he was "a member of the risk committee, [and] was responsible for assessing the risk associated with PPVA's assets and investments, a significant issue in determining the value thereof," and as part of the risk committee he "participate[d] in the false inflation of the value of PPVA's assets . . . in order to report information that resulted in PPVA's NAV being inflated and overstated." (*Id.* at 46-47.)

- Levy was "co-CIO of PPVA," was "a member of the valuation committee and 'was responsible for assessing the actual value of PPVA's investments and reporting such values so that PPVA's NAV could be accurately determined and any fees and other charges accurately calculated," and "us[ed] his position as a member of the valuation committee to falsely inflate the value of PPVA's assets . . . in order to report information that resulted in PPVA's NAV being inflated and overstated." (*Id.* at 47.)

- Landesman was "President of Platinum Management and co-CIO of PPVA," he shared responsibility "for all trading, asset allocation and risk management on behalf of PPVA," he was a "member of the risk committee, and in that capacity was responsible for assessing the risks associated with PPVA's investments, which was a significant factor in determining value," he was a "member of the valuation committee," he was "involved with sourcing investment opportunities, meeting with and marketing to important investors and developing investment and business strategy for PPVA and its investments," and he "was responsible for marketing PPVA on behalf of Platinum Management, and making representations concerning PPVA's NAV and the status of its various investments." (*Id.* at 47-48.)

The allegations against Saks in his capacity as a Platinum Defendant do not even come close to those levied against the other Platinum Defendants. The SAC does not allege that Saks was a founder or owner. The SAC does not allege that Saks was a member of the valuation committee, or of the risk committee, and makes no creditable allegations regarding specific

involvement in net asset value calculation. In short, the inclusion of Saks within the ambit of a group pleading would require significant widening of the "narrowly defined group of highly ranked officers or directors" the Court identified in its April 11 Opinion. *Elliott Assocs.*, 141 F. Supp. 2d at 354. Accordingly, the claim for breach of fiduciary duty should also be dismissed as to Saks on the independent ground that Saks committed no breach of any such duty.

III. The SAC Fails to State a Claim for Fraud or Constructive Fraud Against Saks

The SAC also asserts primary liability claims against Saks, for the first time in his alleged role as a Platinum Defendant, for fraud and constructive fraud. (SAC ¶¶ 792-837.) The fraud claims fail for the same reasons as Plaintiffs' breach of fiduciary duty claims. Separately and independently, the common-law fraud claim against Saks also fails because the SAC does not adequately allege scienter as to Saks.

A claim of common-law fraud requires "a representation of material fact, the falsity of the representation, knowledge by the party making the representation that it was false when made, justifiable reliance by the plaintiff and resulting injury." *Kaufman v. Cohen*, 760 N.Y.S.2d 157, 165 (1st Dep't 2003). Where a claim of common-law fraud is based on omissions, a plaintiff must specify "(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 plaintiff; and (4) what defendant obtained through the fraud." *Odyssey Re (London) Ltd. v. Stirling Cooke Brown Holdings Ltd.*, 85 F. Supp. 2d 282, 293 (S.D.N.Y. 2000). Furthermore, a common-law fraud claim premised on an omission must generally be accompanied by "the existence of a fiduciary relationship requiring disclosure of the unknown facts." *Connaughton v. Chipotle Mexican Grill, Inc.*, 23 N.Y.S.3d 216, 220 (1st Dep't 2016); *see also United States v. Szur*, 289 F.3d 200, 211 (2d Cir. 2002); *In re Refco, Inc. Sec. Litig.*, 759 F. Supp. 2d 301, 316

(S.D.N.Y. 2010) (Rakoff, J.). A claim for constructive fraud replaces the scienter requirement for common-law fraud "with the requirement that Defendants maintained either a fiduciary or confidential relationship with Plaintiff." *LBBW Lux. SA v. Wells Fargo Sec. LLC*, 10 F. Supp. 3d 504, 524 (S.D.N.Y. 2014).

A. Plaintiffs do not allege any false or misleading representation by Saks

The SAC does not attribute any false or misleading disclosure or responsibility for any omission to Saks. Thus, again, the only way Saks could be found liable for fraud or constructive fraud is through the group pleading doctrine. For the reasons set forth above, Saks does not fall within the "narrowly defined group of highly ranked officers or directors who participated in the preparation and dissemination of a published company document," *Elliott Assocs.*, 141 F. Supp. 2d at 354, and thus both claims should be dismissed.

B. Claims of constructive fraud and common-law fraud by omission fail because Saks owed no fiduciary duty to PPVA

As also set forth above, Saks cannot be subjected to a claim for common-law fraud based on omission, or for constructive fraud, because he held no fiduciary duty to PPVA. The facts alleged against Saks suggest a far more attenuated relationship to PPVA than those possessed by defendants in other fraud claims this Court has previously rejected. Additionally, the SAC does not allege any pecuniary incentive for Saks to prioritize his own interests, or Platinum Management's interests, ahead of PPVA's. Accordingly, there is no factual basis for the Court to find that Saks owed any direct or derivative fiduciary duties to PPVA during his six-month tenure as an employee of PPVA's general partner, Platinum Management.

C. Plaintiffs fail to plead scienter as to Saks to support a common-law fraud claim

Finally, even if the group-pled written valuation statements could be attributed to Saks, there are insufficient facts to establish scienter as to Saks during his short tenure at Platinum. As

the Court recognized in the April 11 Opinion, while the group pleading doctrine can impute a false statement to a defendant, it "does not also transitively convey scienter." (Dkt. No. 290 at 23 (citing *Anwar v. Fairfield Greenwich Ltd.*, 728 F. Supp. 2d 372, 406 (S.D.N.Y. 2010).) Thus, Plaintiffs must individually establish that Saks understood that the group-published valuations of PPVA's assets were false during the six-month period that he was employed by Platinum.

The SAC alleges that Saks was copied on one email regarding an option held by Black Elk to purchase a complete ownership interest in Golden Gate Oil at a valuation of $60 million. (SAC ¶ 338 & Ex. 30.) As a result of this email and the existence of the option itself, the SAC concludes that the "value the Platinum Defendants placed on Golden Gate Oil was inflated." (SAC ¶ 337.)

Even resolving all ambiguities in favor of Plaintiffs, the SAC's conclusion does not reasonably flow from the email or the option itself, particularly as to Saks. In November 2013, before Saks' employment at Platinum began, Black Elk acquired an option "to purchase 100% of the equity of Golden Gate for an aggregate purchase price equal to $60 million plus the amount of any advances made to Golden Gate by its members after October 29, 2013 plus the principal, interest and fees outstanding under certain debt of Golden Gate." (SAC Ex. 29 at 17.) After Black Elk obtained this option, any outside investor considering acquiring a stake in Golden Gate Oil would have understood that Black Elk could acquire their stake at an enterprise valuation of $60 million. Thus, regardless of the objective value of Golden Gate Oil's assets, prospective outside investors could be hesitant to acquire a stake in Golden Gate Oil at an enterprise valuation higher than $60 million, because Black Elk could acquire that same stake at a lower valuation than an outside investor. A reasonable investment professional, such as Saks, would have understood this to be the "marketing issue" referenced in Exhibit 30. No reasonable

investment professional would have understood the "marketing issue" to be that Golden Gate Oil was not objectively worth more than $60 million absent other specific information regarding value – which Saks is not alleged to have had.

The email does not address what PPVA's net asset valuation reports of Golden Gate Oil reflected in late 2013—prior to Saks arriving at Platinum Management—nor what they reflected as of the May 23, 2014 date of the email, two months after Saks arrived. Even if the email cited in the SAC could be read to establish that Golden Gate Oil's value was objectively $60 million, which it does not, the SAC alleges no facts allowing a reasonable inference that Saks would have known during that period that Platinum's actual valuations of Golden Gate Oil were fraudulently inconsistent with that value.

Plaintiffs have thus not adequately alleged that Saks knew the group-published valuations of PPVA assets were false. The SAC contains no additional facts that would impute any knowledge to Saks during his tenure at Platinum Management. The only reasonable inference that can be drawn from the single email that Saks did receive is that the option to purchase Golden Gate Oil stock might require additional explanation to prospective third-party investors. Accordingly, the common-law fraud claim against Saks in his capacity as a Platinum Defendant should be dismissed for failure to plead scienter.

IV. Plaintiffs' Civil RICO Claims Fail for Several Reasons

The SAC asserts a claim against Saks as a participant in a RICO enterprise in his capacity as both a Platinum employee and a Beechwood employee. 18 U.S.C. § 1962(c) makes it "unlawful for 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."

A civil RICO claim requires the plaintiff to plead that each defendant involved in the RICO enterprise engaged in at least two "predicate acts" of "racketeering activity," which is defined by statute to include various criminal conduct. 18 U.S.C. § 1961. Because the predicate acts must demonstrate a "pattern" of conduct by the RICO defendants, courts require the plaintiff to plead the elements of a scheme with either "closed-ended continuity" or "open-ended continuity." Because Platinum no longer exists, the relevant concept here is "closed-ended continuity," which requires that the predicate acts be related and extend over a "substantial period of time." *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 241-242 (1989). The Second Circuit has "never held a period of less than two years to constitute a 'substantial period of time.'" *Spool v. World Child Int'l Adoption Agency*, 520 F.3d 178, 184 (2d Cir. 2008). Second, RICO claims predicated solely on wire fraud or mail fraud, as here, are subject to a heightened pleading standard that disallows group pleading. *Gross v. Waywell*, 628 F. Supp. 2d 475, 493, 495 (S.D.N.Y. 2009). Third, in order to plead a RICO enterprise, it is a "requirement in this Circuit" that the enterprise cannot simply perform the specific predicate acts; instead, the enterprise must engage in a "*course* of fraudulent or illegal conduct separate and distinct from the alleged predicate racketeering acts themselves." *First Capital Asset Mgmt., Inc. v. Satinwood, Inc.*, 385 F.3d 159, 174 (2d Cir. 2004). Finally, following the enactment of the PSLRA, there is a bar against RICO claims premised on facts that could give rise to a violation of the securities laws. 18 U.S.C. § 1964(c).

A. Saks' tenure with Platinum and Beechwood lasted less than two years

The RICO claims against Saks may be properly dismissed solely on the basis that Saks' individual involvement was not long enough to establish closed-ended continuity. Saks' employment at Platinum and Beechwood combined lasted only from March 2014 through December 2015—one year and nine months, or less than the shortest two-year closed-ended continuous scheme recognized as legally sufficient. *See Spool*, 520 F.3d at 184.

B. The SAC does not meet the heightened standard for RICO claims predicated solely on wire fraud, both as to individual predicate acts and continuity

Within the Second Circuit, RICO claims under Section 1962(c), like those here, focus "on the individual patterns of racketeering engaged in by a defendant, rather than the collective activities of the members of the enterprise." *United States v. Persico*, 832 F.2d 705, 714 (2d Cir. 1987). Where the only predicate RICO acts alleged are instances of mail fraud or wire fraud, courts hold that such claims must be "particularly scrutinized because of the relative ease with which a plaintiff may mold a RICO pattern from allegations that, upon closer scrutiny, do not support it," *Gross*, 628 F. Supp. 2d at 493 (quoting *Efron v. Embassy Suites (P.R.), Inc.*, 223 F.3d 12, 20 (1st Cir. 2000)), and have thus rejected the availability of group pleading because of the increased scrutiny such claims require, *see, e.g.*, *Gross*, 628 F. Supp. 2d at 495. Because "use of the mail or wires is not inherently criminal," and "virtually every ordinary fraud is carried out in some form by means of mail or wire communication," *Gross* held that increased scrutiny of such claims was necessary to prevent "transforming garden-variety common law actions into federal cases." *Id.* at 493 (citing *Al-Abood ex rel. Al-Abood v. El-Shamari*, 217 F.3d 225, 238 (4th Cir. 2000)); *see also Cont'l Petroleum Corp. v. Corp. Funding Partners, LLC*, No. 11 Civ. 7801, 2012 WL 1231775, at *4 (S.D.N.Y. Apr. 12, 2012); *In re General Motors LLC Ignition Switch Litig.*, Nos. 14-MD-2543 and 14-MC-2543, 2016 WL 3920353, at *11 (S.D.N.Y. July 15, 2016). Due to the ubiquity of wire communications, "courts hold that a multiplicity of mailings 'may be no indication of the requisite continuity of the underlying fraudulent activity'" and thus do "not necessarily translate into a 'pattern' of racketeering activity." *Gross*, 628 F. Supp. 2d at 493-94 (quoting *U.S. Textiles, Inc. v. Anheuser-Busch Cos., Inc.*, 911 F.2d 1261, 1266 (7th Cir. 1990) and collecting cases). Thus, a plaintiff predicating a RICO claim purely on wire fraud must plead "details regarding the alleged predicate acts in which each particular defendant was

directly or indirectly involved or had responsibility, as well as information concerning where, when and by which defendant any representations involved in the alleged fraudulent scheme constituting deception of Plaintiffs were communicated by use of the mail and/or wires, and how such statements actually deceived Plaintiffs." *Gross*, 628 F. Supp. 2d at 494-95.

1. The SAC fails to plead any predicate acts as to Saks individually

The SAC's RICO claim is predicated purely on instances of wire fraud, but provides none of the particularity that such claims require. Paragraph 978 of the SAC lists ten instances of email communications, but ***none*** refers to Saks. Indeed, the first such instance of wire fraud, the emails that formed the basis of Murray Huberfeld's conviction for bribery of a union official, does not even implicate the enterprise. Moreover, several of them are outside the period in which Saks was employed at Platinum or Beechwood. This is the exact approach that the *Gross* court rejected, *see id.* at 495, and thus the RICO claim should be dismissed as to Saks.[3]

2. The SAC fails to establish closed-ended continuity as to Saks under the heightened standard, and cannot do so through group pleading

Because the SAC fails to plead a single predicate act as to Saks, it cannot establish the broader concept of continuity through "individual patterns of racketeering engaged in by [Saks]." *Persico*, 832 F.2d at 714. And, as *Gross* reiterated, Plaintiffs cannot group plead closed-ended continuity. *Gross*, 628 F. Supp. 2d at 494-95.

C. Plaintiffs do not sufficiently plead a RICO enterprise

The SAC fails to plead a criminal enterprise because it fails to establish a course of conduct by the enterprise separate and apart from the component predicate acts. The Second

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[3] Because the SAC describes most of the categories of email in broad swaths, it is difficult to determine which, if any of the component emails were sent by Saks. To the extent Plaintiffs refer to the email communications attached as exhibits to the SAC, however, none were sent by Saks. Because the RICO predicate acts conduct must be pled with particularity, Saks should not be required to prove a negative, even at the motion to dismiss stage.

Circuit has held that it is a "requirement in this Circuit" for a RICO plaintiff to allege a "*course* of fraudulent or illegal conduct separate and distinct from the alleged predicate racketeering acts themselves." *First Capital* 385 F.3d at 174. Here, the alleged predicate racketeering acts are simply the component parts of the alleged common-law fraud—the SAC does not identify any greater or separate course of fraudulent or illegal conduct.

D. Plaintiffs' RICO claims are barred by the PSLRA

As advanced by the Beechwood Parties in their memorandum of law in support of their motion to dismiss the SAC (*see* Dkt. No. 328-4 at 13-15), civil RICO claims may not be based on the purchase or sale of securities. Saks adopts these arguments in full, which apply in equal force to Saks in his capacity as both a Platinum Defendant and a Beechwood Defendant.

V. The Aiding and Abetting Claims Against Saks Should Be Dismissed, as the SAC Does Not Plead Actual Knowledge of the Underlying Schemes or Substantial Assistance

The SAC pleads against Saks four alleged counts of aiding and abetting: aiding and abetting breach of fiduciary duty in his capacity as a Platinum Defendant (Count III, SAC ¶¶ 782-91); aiding and abetting fraud in his capacity as a Platinum Defendant (Count VI, SAC ¶¶ 838-45); aiding and abetting breach of fiduciary duty in his capacity as a Beechwood Defendant (Count VII, SAC ¶¶ 846-57); and aiding and abetting fraud in his capacity as a Beechwood Defendant (Count VIII, SAC ¶¶ 858-68). To establish liability for aiding and abetting fraud, the Plaintiffs must show "(1) the existence of a fraud; (2) the defendant's knowledge of the fraud; and (3) that the defendant provided substantial assistance to advance the fraud's commission." *Krys v. Pigott*, 749 F.3d 117, 127 (2d Cir. 2014). For the purposes of an aiding and abetting claim, knowledge is subjective and requires that the defendant actually knew of the fraudulent scheme, "not mere notice or unreasonable awareness." *Samuel M. Feinberg Testamentary Tr. v. Carter*, 652 F. Supp. 1066, 1082 (S.D.N.Y. 1987). Aiding and abetting

breach of fiduciary duty likewise requires that the defendant had "actual knowledge of the breach of duty" and "knowingly induced or participated in the breach." *Krys v. Butt*, 486 F. App'x 153, 157 (2d Cir. 2012). Courts have rejected attempts to draw a distinction between culpable conduct for aiding and abetting fiduciary duty liability, and aiding and abetting fraud. *See, e.g.*, *Hongying Zhao v. JPMorgan Chase & Co.*, No. 17 Civ. 8570, 2019 WL 1173010, at *5 n.6 (S.D.N.Y. Mar. 13, 2019); *Kirschner v. Bennett*, 648 F. Supp. 2d 525, 533 (S.D.N.Y. 2009). Although the Court found in its April 11 Opinion that Plaintiffs had stated primary claims for fraud and breach of duty against at least some defendants, the SAC fails to plead either of the other two elements of secondary liability against Saks—actual knowledge and substantial assistance.

A. Plaintiffs do not sufficiently allege that Saks had actual knowledge of the fraudulent scheme

The SAC, at most, alleges that Saks could have had reason to suspect that some type of wrongdoing was occurring. This is not sufficient to plead the actual knowledge that an aiding and abetting claim requires. While employed at Platinum, the SAC alleges that Saks received an email about an option that Black Elk had to purchase Golden Gate Oil for $60 million. (SAC ¶ 337.) While employed at Beechwood, Saks executed the documents for a May 2015 pledge of assets that provided security for a January 2015 transaction with Montsant that the SAC does not otherwise connect him to. Neither of these facts, without more, allows a reasonable inference of actual knowledge of a greater fraud. Indeed, as discussed above, both the email regarding the option in Golden Gate Oil and the Montsant Pledge Agreement were ordinary actions for an investment professional; without more non-conclusory information regarding Saks' alleged participation, there is no basis to conclude that these events raised red flags for Saks.

But even if the aforementioned transactions could be said to potentially raise red flags, red flags alone are insufficient to plead actual knowledge. *See, e.g.*, *Rosner v. Bank of China*, 349 F. App'x 637, 638-39 (2d Cir. 2009); *Chemtex, LLC v. St. Anthony Enters., Inc.*, 490 F. Supp. 2d 536, 547 (S.D.N.Y. 2007) ("even alleged ignorance of obvious warning signs of fraud will not suffice to adequately allege actual knowledge" in the absence of a fiduciary duty); *In re Agape Litig.*, 773 F. Supp. 2d 298, 310 (E.D.N.Y. 2011) (no actual knowledge where plaintiff pled facts demonstrating that "the fraud was obvious"); *Zamora v. JPMorgan Chase Bank, N.A.*, No. 14 Civ. 5344, 2015 WL 4653234, at *3 (S.D.N.Y. July 31, 2015); *Berman v. Morgan Keegan & Co.*, No. 10 Civ. 5866, 2011 WL 1002683, at *10 (S.D.N.Y. Mar. 14, 2011). Unlike for other defendants, there are no allegations that Saks or his family stood to benefit personally from any alleged fraud. Unlike for other defendants, there are no allegations that Saks had any role in the founding of Beechwood or understood the circumstances surrounding its creation. Unlike for other defendants, the concentration of Platinum's investments in risky oil and gas companies occurred years before Saks' employment at Platinum. There are no factual indicia that Saks appreciated the alleged facts that this Court concluded would be sufficient with respect to other defendants at the pleading stage. The aiding and abetting claims against Saks should be dismissed.

B. Plaintiffs do not sufficiently allege that Saks provided substantial assistance to the execution of the fraud or breach of duty by others, which arise from the same alleged conduct

Because no action of Saks proximately caused any harm to PPVA, there can be no aiding and abetting claim against him. A defendant substantially assists a breach of fiduciary duty or fraud "when the defendant affirmatively assists, helps conceal or fails to act when required to do so, thereby enabling the breach to occur." *SPV OSUS Ltd. v. AIA LLC*, No. 15 Civ. 0619, 2016 WL 3039192, at *6 (S.D.N.Y. May 24, 2016) (Rakoff, J.) (quoting *Lerner v. Fleet Bank, N.A.*,

459 F.3d 273, 295 (2d Cir. 2006)). The substantial assistance provided by the defendant must also be both an actual, but-for cause and a proximate cause of injury to the plaintiff. *See SPV OSUS*, 2016 WL 3039192, at *6. As Judge Kaplan wrote in *Fraternity Fund Limited v. Beacon Hill Asset Management LLC*, 479 F. Supp. 2d 349, 370 (S.D.N.Y. 2007), "substantial assistance is intimately related to the concept of proximate cause," and "[w]hether the assistance is substantial or not is measured by whether the action of the aider and abettor proximately caused the harm on which the primary liability is predicated." Where, as here, the defendant owes no direct fiduciary duties to the plaintiff, substantial assistance cannot be established by inaction. *Lerner*, 459 F.3d at 295; *SPV OSUS*, 2016 WL 3039192, at *8.

As a Platinum Defendant, the SAC alleges almost no conduct at all by Saks, let alone conduct that could be considered substantial assistance in a fraud or breach of duty. The only creditable "conduct" attributed to Saks is his receipt, in copy, of the May 24, 2014 email already explained above. The receipt of an email is neither the but-for nor the proximate cause of any harm to PPVA, and courts have dismissed aiding and abetting claims brought on that basis. *See Meeker v. McLaughlin*, No. 17 Civ. 5673, 2018 WL 3410014, at *9 (S.D.N.Y. July 13, 2018).

As a Beechwood Defendant, the SAC alleges that Saks signed the Montsant Pledge Agreement on May 13, 2015 on behalf of Beechwood—not on behalf of Montsant, which the SAC alleges to be the "wholly-owned subsidiary of PPVA" created after Saks left Platinum in September 2014. (SAC ¶¶ 522, 526 & Exs. 64-65.) The SAC details that this pledge agreement secured a previous loan, made four months earlier, that enabled Montsant to purchase Black Elk 13.75% Senior Secured Notes at 93.5% of par. (*Id.* ¶ 522.) Plaintiffs do not allege facts showing that Saks was involved in any of those previous transactions that the Montsant Pledge Agreement secured, and that the SAC alleges was fraudulent. Plaintiffs also do not allege facts attributing

any responsibility to Saks for the PPVA valuation reports produced after his departure from Platinum Management that included the assets encumbered by the Montsant Pledge Agreement.

The May 13, 2015 Montsant Pledge Agreement was not a proximate cause of injury to PPVA and, thus, Saks did not substantially assist any fraud or breach of fiduciary. The pledge of collateral merely establishes a security for a separate transaction. Any alleged harm incurred by PPVA came as a result of the allegedly flawed underlying transaction in January 2015 through which Montsant purchased Black Elk Senior Secured Notes, financed by a loan made at 12% interest. Nor is Saks' involvement in the May 13, 2015 Montsant Pledge Agreement a proximate cause of the alleged subsequent misrepresentation of encumbered assets at Platinum, which Saks had departed from eight months earlier.

Moreover, Saks did not pledge the valuable collateral for the loan on behalf of Montsant; he merely accepted it. BAM owed a fiduciary duty to its investors to obtain the best collateral possible in the deal. Saks cannot be held personally liable to PPVA for allegedly aiding and abetting a fraud and breach of fiduciary duty merely because he was employed by a different entity that had a separate fiduciary duty to its own clients to support loans with collateral. To the extent the SAC alleges that Saks failed to stop the fraud or breach of duty to PPVA, that claim fails because Saks did not owe any fiduciary duty to PPVA. *See Lerner*, 459 F.3d at 295; *SPV OSUS*, 2016 WL 3039192, at *8.

VI. There Is No Independent Cause Of Action For Civil Conspiracy

The SAC pleads a claim of civil conspiracy against Saks, as well as each of the other Platinum and Beechwood Defendants. (SAC ¶¶ 960-67.) However, civil conspiracy does not exist as an independent cause of action. *See, e.g.*, *Powell v. Kopman*, 511 F. Supp. 700, 704 (S.D.N.Y. 1981). Rather, civil conspiracy is a concept that may link a defendant to the torts of

other defendants under certain circumstances. *Rutkin v. Reinfeld*, 229 F.2d 248, 252 (2d Cir. 1956); *Brownstone Inv. Grp., LLC v. Levey*, 468 F. Supp. 2d 654, 661 (S.D.N.Y. 2007). Under a theory of civil conspiracy, a third-party may be liable for the conduct of a tortfeasor only in the presence of the following elements: "(1) an agreement between two or more parties; (2) an overt act in furtherance of the agreement; (3) the parties' intentional participation in the furtherance of a plan or purpose; and (4) resulting damage or injury." *Treppel v. Biovail Corp.*, No. 03 Civ. 3002, 2005 WL 2086339, at *5 (S.D.N.Y. Aug. 30, 2005). As to the third element, the SAC's failure to plead specific knowledge by Saks that led to specific intentional wrongdoing by him is already addressed above. As also set forth above, Saks' conduct was not the cause of any injury to PPVA, and therefore the fourth element is not present.

While the absence of each of these elements is alone sufficient to dismiss the claim for civil conspiracy as to Saks, the SAC most critically fails to plead an agreement involving Saks in even a conclusory fashion, let alone set forth specific facts that would support such an allegation. To the extent Plaintiffs argue that the Saks' common employment with other defendants at Platinum and/or Beechwood entities establishes a basis for a civil conspiracy claim, courts have rejected conspiracy agreements based solely on the defendants' common employment. *See, e.g.*, *Schwartz v. Soc'y of N.Y. Hosp.*, 605 N.Y.S.2d 72, 73 (1st Dep't 1993); *Brownstone Inv. Grp.*, 468 F. Supp. 2d at 661; *cf. Donini Int'l, S.p.A. v. Satec (USA) LLC*, No. 03 Civ. 9471, 2004 WL 1574645, at *3-4 (S.D.N.Y. July 13, 2004) (common ownership of company not sufficient to establish agreement).

VII. The Doctrine of *In Pari Delicto* and the *Wagoner* Rule Provide an Independent Basis for Dismissal of the Claims Against Saks

As an independent ground for dismissal of each of the claims made against Saks, the Second Circuit's *Wagoner* rule and the doctrine of *in pari delicto* each bar claims by a party

engaged in equally wrongful or more wrongful conduct than another. These arguments were made by the Beechwood Parties in their memorandum, (*see* Dkt. No. 328-4 at 8-13), and Saks adopts and incorporates these same arguments by reference as though fully set forth herein. The SAC alleges that PPVA, through its principals, orchestrated an alleged fraud, yet pleads facts regarding Saks that suggest only limited participation in discrete component transactions during limited periods of time, for six months while Saks was at Platinum and then for a little over a year while Saks was at BAM, a separate company. PPVA should not be permitted to pursue Saks for the alleged wrongful conduct of its own control group, of which Saks was not a member.

CONCLUSION

For each of the foregoing reasons, Saks respectfully requests an order dismissing all of the claims asserted against him with prejudice and without leave to renew, and any further relief that the Court deems just and proper.

Dated: May 10, 2019
New York, New York

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