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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 SUPPORT OF HIS MOTION TO DISMISS THE NON-NAV CLAIMS IN THE SECOND AMENDED COMPLAINT

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RULES

Defendant David Bodner respectfully submits this reply memorandum of law in further support of his Motion to Dismiss the Non-NAV Claims in the SAC (ECF No. 321).[1] The SAC does not set forth any facts demonstrating that Bodner had any role whatsoever in the dozen or more fraudulent transactions that are alleged to have looted or encumbered PPVA's assets or otherwise defrauded PPVA out of tens or hundreds of millions of dollars.

PRELIMINARY REPLY STATEMENT

In their Memorandum of Law in Opposition to Moving Defendants' Second Round of Motions to Dismiss (ECF No. 351) (the "Opp."), the JOLs do not even attempt to identify facts in the SAC that connect Bodner to implementing or substantially assisting in implementing the transactions comprising the non-NAV claims. Although they conclusorily assert that "[i]t is clear that the SAC sufficiently alleges facts tying . . . Bodner to the transactions challenged in the current motion[]" (Opp. at 34), the JOLs do not cite a single fact in the SAC that identifies transactional conduct by Bodner. The JOLs' failure to point to any facts connecting Bodner to fraudulent transactional conduct is not at all surprising. There are no such facts. The JOLs—who have had full access to the Platinum server for more than a year—have known all along that there are no facts. Whether the SAC sets forth sufficient facts with respect to other individuals is of no moment because the SAC sets forth no facts connecting Bodner to the non-NAV claims.

The JOLs also argue without basis that their claims of inflated NAV that the Court sustained in its April 11 Opinion are indistinguishable from their claims of fraudulent transactional conduct. But the two sets of claims are indeed distinguishable in several critical

[1] ECF citations refer to the *Trott* docket, 18 Civ. 10936. Capitalized terms not defined herein shall have the meanings ascribed to them in the Memorandum of Law of Defendant David Bodner in Support of His Motion to Dismiss the Non-NAV Claims in the SAC (ECF No. 322) (the "Bodner Motion").

respects, including the relevant pleading rules. The NAV claims were sustained for pleading purposes based on the group pleading doctrine. The claims of fraudulent transactional conduct, on the other hand, require individualized facts in accordance with Federal Rule of Civil Procedure 9(b). The JOLs do nothing to make up for the lack of factual allegations in the SAC to support the non-NAV claims against Bodner. The non-NAV claims should be dismissed.

REPLY POINTS

I. Bodner Is Not Seeking Reargument on the NAV Claims

Bodner's Motion now before the Court seeks dismissal of only the non-NAV claims, which are subject to Rule 9(b) but are not saved by the group pleading doctrine. Bodner has explicitly stated that he "does not seek to reargue" the April 11 Opinion. (Bodner Motion at 1). Bodner moves expressly with respect to the non-NAV claims in accordance with the Court's statement that "no defendant will be prevented from bringing a motion as part of the second round." (April 11 Opinion at 62).

To support their "reargument" theory, the JOLs completely mischaracterize the April 11 Opinion. As to Bodner, the Court held only that "at the pleading stage," the JOLs could rely on group pleading to "charge Bodner . . . with Platinum Management's misstatements" of PPVA's NAV. (April 11 Opinion at 49). The Court explained, as quoted in the JOLs' Opposition, that Bodner "is alleged to have been a high-level corporate insider, and it is therefore appropriate to charge [him] with the misstatements of PPVA's NAV." (April 11 Opinion at 45) (emphasis added) (quoted in Opp. at 33). Bodner disagrees with the Court's conclusion that, for pleading purposes, Bodner was an insider sufficiently alleged to be associated with the NAV process so as to come under the group pleading doctrine. But the Court's decision has nothing to do with whether Bodner was aware that others were implementing the alleged fraudulent

transactions designed to loot or encumber PPVA's assets, nor does it speak to whether Bodner provided substantial assistance to carry out any such transactions.

The Court did not hold that the group pleading doctrine applies to all of the allegations in the 1,041-paragraph SAC. The group pleading doctrine applies to corporate insiders responsible for statements in a group-published document. (April 11 Opinion at 22-23). It does not apply to claims that individual fraudulent transactions were implemented to loot or encumber PPVA's assets. For their non-NAV claims, the JOLs rely on the supposedly fraudulent terms of individual transactions, rather than on group statements. As such, the non-NAV claims must be pleaded with the typical specificity required by Rule 9(b). Here, the SAC has attempted to set down facts as to the individuals at Platinum who are alleged to have implemented the transactions, but in stark contrast the SAC sets forth no facts whatsoever to connect Bodner to implementing the transactions or providing substantial assistance to someone who was implementing them. (*See* Bodner Motion at 4-11). There are simply no facts. In short, these claims do not meet even the minimum pleading requirements of Rule 8 and certainly do not meet the heightened requirements of Rule 9(b).

The JOLs also incorrectly state that Bodner "acknowledge[s]" that the SAC's group allegations of inflated NAV are "sufficiently pled." (Opp. at 32). The Bodner Motion acknowledged only that Bodner is not seeking to reargue this issue in light of the April 11 Opinion, but Bodner in no way agrees that claims of misstated NAV are sufficiently pleaded as to him or that he is properly viewed as part of the group that prepared the NAV statements.

The JOLs' argument that the Bodner Motion is an attempt at reargument is nothing more than a distraction from the absence of any facts connecting Bodner to the non-NAV claims in the SAC.

II. The Inflated NAV Claims Are Distinct from the Transactional Misconduct Claims

In their one attempt to salvage the non-NAV claims against Bodner, the JOLs argue that it would be illogical for the Court to sustain the claims of alleged NAV misstatements against Bodner while at the same time dismissing the claims of transactional conduct because the latter claims "relat[e] to [the] very transactions that g[a]ve rise to such inflated NAV." (Op. at 32-33). The JOLs' argument that the transactional conduct gave rise to the alleged misstatements of PPVA's NAV is at odds with the allegations in the SAC.

The SAC alleges that PPVA's NAV was inflated by the group of individuals that valued its assets, in particular by overvaluing PPVA's investments in Black Elk (SAC ¶¶ 315-16) and Golden Gate (SAC ¶ 329). In contrast, the non-NAV claims have nothing to do with inflating the value of PPVA's investments. Rather, these claims rest on the theory that the Platinum managers intentionally looted the fund and encumbered its assets through individual transactions. (*See* Bodner Motion at 3-11). Whether the NAV statements overvalued PPVA's assets has nothing to do with whether one or more transactions were individually fraudulent and designed to loot assets from the fund. The claims of inflated NAV are thus distinct from the claims of transactional conduct.

The fact that the Court sustained the JOLs' claims that Bodner misstated PPVA's NAV on the basis of group pleading is of no assistance to the JOLs' effort to sustain its non-NAV claims against Bodner. Pursuant to Rule 9(b), the JOLs must demonstrate with specificity Bodner's connection to the non-NAV claims, all of which sound in fraud. There are no facts demonstrating Bodner's awareness that any of the transactions were structured as fraudulent transactions or that the purpose of the transactions was to steal money from the PPVA fund. Nor are there any facts demonstrating that Bodner provided any assistance—much less substantial assistance—to enable these transactions to occur. The JOLs have failed to meet the

heightened pleading standard of Rule 9(b) with respect to the non-NAV claims, so those claims should be dismissed.

CONCLUSION

For the foregoing reasons and the reasons set forth in the Bodner Motion, the non-NAV claims in the SAC against Bodner should be dismissed.

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Respectfully submitted,

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