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

TABLE OF CONTENTS

PRELIMINARY STATEMENT 1

ARGUMENT 4

I. Plaintiffs Have Abandoned Their Claims Against Saks by Failing to Address, and Thus Conceding, at Least One Independent Ground for Dismissal of Each Claim 5

II. Plaintiffs Cannot Amend Their Pleadings in an Opposition to a Motion to Dismiss 6

III. The Documents Attached to Plaintiffs' Opposition Brief Are Inapposite, and Plaintiffs Continue to Rely on Admittedly Incorrect or Baseless Allegations 7

IV. The Few Arguments Plaintiffs Do Make as to Saks Are Without Merit 8

A. The RICO allegations against Saks do not identify a single predicate act, let alone satisfy the Second Circuit's two-year continuity requirement 8

B. Plaintiffs mischaracterize the case law interpreting the PSLRA bar on securities-related civil RICO claims 9

C. Plaintiffs' arguments on pages 35 and 36 of their Opposition fail to address the elements of any claim 9

D. Plaintiffs are barred from asserting their claims by the doctrine of *in pari delicto* and the *Wagoner* rule 10

CONCLUSION 10

TABLE OF AUTHORITIES

Page(s)

CASES

Bonilla v. Smithfield Assocs. LLC,
No. 09 Civ. 1549, 2009 WL 4457304 (S.D.N.Y. Dec. 4, 2009) 5

Div. 1181 Amalgamated Transit Union – N.Y. Emps. Pension Fund v. R&C Transit, Inc.,
No. 16 Civ. 2481, 2018 WL 794572 (E.D.N.Y. Feb. 7, 2018) 5

Elliot Assocs., LP v. Hayes,
141 F. Supp. 2d 344 (S.D.N.Y. 2000) 10

Gross v. Waywell,
628 F. Supp. 2d 475 (S.D.N.Y. 2009) 9

In re Platinum-Beechwood Litig.,
No. 18 Civ. 10936, 2019 WL 1570808 (S.D.N.Y. Apr. 11, 2019) 5

Jacobson v. Peat, Marwick, Mitchell & Co.,
445 F. Supp. 518 (S.D.N.Y. 1977) 7

Jennings v. Hunt Cos.,
367 F. Supp. 3d 66 (S.D.N.Y. 2019) 7

Lipton v. Cnty. of Orange, N.Y.,
315 F. Supp. 2d 434 (S.D.N.Y. 2004) 5

O'Brien v. Nat'l Prop. Analysts Partners,
719 F. Supp. 222 (S.D.N.Y. 1989) 2, 7

Robinson v. Fischer,
No. 09 Civ. 8882, 2010 WL 5376204 (S.D.N.Y. Dec. 29, 2010) 5

Spool v. World Child Int'l Adoption Agency,
520 F.3d 178 (2d Cir. 2008) 9

United States v. Persico,
832 F.2d 705 (2d Cir. 1987) 9

Wright v. Ernst & Young LLP,
152 F.3d 169 (2d Cir. 1998) 6

Defendant Daniel Saks ("Saks") respectfully submits this reply memorandum of law ("Reply") in support of his Motion to Dismiss ("Motion") the Second Amended Complaint (Dkt. No. 285 ("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

Plaintiffs have addressed almost none of the arguments that Saks advanced in his moving brief. Consistent with the Court's direction following the first round of motions to dismiss based on impermissible group pleading, Saks filed a detailed Motion "to dismiss the remaining claims in the FAC on more particularized grounds," (Dkt. No. 290 at 57 ("April Opinion")). Because Plaintiffs added Saks as a Platinum Defendant after the April Opinion, albeit with no new facts, Saks' Motion also addresses several claims that had never before been asserted against him. Rather than respond to Saks' particularized arguments, Plaintiffs simply re-list the few allegations asserted against Saks in their now-Second-Amended Complaint and then purport to supplement them with brand new allegations that are not in the SAC. Each of Plaintiffs' approaches is improper, leaving the Court with numerous grounds to dismiss the SAC as to Saks.

First, courts routinely consider claims to be abandoned where a plaintiff fails to address specific arguments made by the defendant on a motion to dismiss. Plaintiffs' failure to respond to nearly all of the arguments included `in Saks' moving brief—specifically that (1) the unjust enrichment claim has already been dismissed as to Saks; (2) Saks did not owe a personal fiduciary duty to PPVA; (3) Plaintiffs have alleged no act by Saks that could be considered a breach of fiduciary duty; (4) Plaintiffs have not alleged a misrepresentation by Saks; (5) Saks cannot be liable for constructive fraud or fraud by omission because he owes no personal

fiduciary duties to PPVA; (6) Plaintiffs have failed to meet the heightened standard for civil RICO claims predicated purely on mail and wire frauds; (7) Plaintiffs fail to allege a RICO enterprise separate and apart from component predicate acts; (8) Plaintiffs fail to plead Saks' actual, as opposed to constructive, knowledge necessary to sustain aiding and abetting claims; (9) Plaintiffs allege no facts that could be considered substantial assistance of the primary violation; and (10) Plaintiffs fail to identify an agreement involving Saks necessary to support a claim for civil conspiracy—constitutes abandonment of Plaintiffs' claims against Saks.

Second, "it is axiomatic that the Complaint cannot be amended by the briefs in opposition to a motion to dismiss." *O'Brien v. Nat'l Prop. Analysts Partners*, 719 F. Supp. 222, 229 (S.D.N.Y. 1989). Plaintiffs cannot cure their flawed allegations as to Saks by attaching documents outside the SAC to an opposition brief.

Third, even Plaintiffs' characterizations of the documents attached to their Opposition are rebutted by the four corners of the underlying documents. For example, Plaintiffs paint Saks as a member of the "Platinum Management's valuation committee," but attach only documents relating to valuation meetings for PPCO, a fund that Plaintiffs do not represent. Likewise, Plaintiffs say that Saks was "marketed" as Co-CIO of Platinum Management, but attach only an admitted draft document with several inaccuracies and no indicia that it was ever actually used in a substantially similar form. Even if these documents were properly incorporated into Plaintiffs' third-try SAC—and they are not—they do not plug the many pleading deficiencies that require dismissal of the claims against Saks.

Relatedly, Plaintiffs continue to make factual allegations as to Saks that they either admit have no basis in the facts known to Plaintiffs or, worse, are explicitly contradicted by facts known to Plaintiffs. Plaintiffs ignore Saks' Declaration correcting the record as to his dates of

employment, and adopt his start date at Platinum as March 2014 by pretending it is asserted in the SAC (*compare* SAC ¶ 12(xii), *with* Dkt. No. 351 ("Opposition") at 11, 35-36). However, Plaintiffs nonetheless continue to invoke their allegation in the SAC that Saks "*previously* [*i.e*, in 2013] was involved in overseeing the investment in Golden Gate Oil." (*see* SAC ¶ 12(xii) and Dkt. No. 351 ("Opposition") at 35-36 (emphasis added)). This allegation can no longer be credited. Plaintiffs also purport to rely in their brief on the SAC allegation that Saks was "Chief Investment Officer and then President of B Asset Manager LP during *and after* 2015," (*Id*. (emphasis added)), despite their failure to respond to Saks' corrective Declaration.

Fourth, Plaintiffs' few arguments that do address Saks' moving brief are without merit. For example, Plaintiffs argue that they have sufficiently pleaded predicate RICO acts by Saks despite declining to identify a single one, and continue to make conclusory allegations of Saks' two-year involvement despite conceding that Saks was only employed by Platinum and Beechwood for 21 months. Plaintiffs argue that the PSLRA does not bar their civil RICO claims, even though they have based their claims largely on the allegations made in a criminal securities fraud proceeding, and have benefitted from the imputation of PPVA's organizational publication of allegedly inaccurate securities valuation reports to individual defendants through group pleading. Plaintiffs further argue that Saks should be considered within the ambit of their ever-broadening group pleading, despite relying on admittedly false allegations of fact and improper amendment to their pleading that still do not establish that Saks was within the narrow group of officers and directors responsible for the PPVA net asset value reports. Finally, Plaintiffs argue that their claims are not barred by the *Wagoner* rule and the doctrine of *in pari delicto*, even though the previous cases that address such a bar are on point.

ARGUMENT

At this Court's December 19, 2018 status conference, counsel for defendant David Bodner ("Bodner") represented to the Court his belief, "in light of the group pleading, that [Plaintiffs'] complaint [was] subject to an efficient motion to dismiss process." (Dec. 19, 2018 Conference Tr. at 10:7-9.) On that ground, the Court allowed a preliminary round of motions to dismiss to be filed on an expedited schedule, and stated:

> "So just so everyone's clear, the motion to dismiss that is being filed on a group pleading basis, you can join in, you can not join in. If you have a motion to dismiss on some totally different basis, like they failed to plead with particularity or something like that, that doesn't have to be filed by January 9th . . . . We will set a date for the filing of that in due course."

(*Id.* at 16:4-12.) The Court also specifically stated that it would not "preclud[e] other motions to dismiss on other more particularized grounds." (*Id.* at 15:23-24.) Following that instruction, Saks filed a motion to dismiss that joined the group pleading argument advanced by Bodner, highlighting the scarcity of non-group-pleaded facts that were alleged as to Saks in the then-First-Amended Complaint. (Dkt. No. 192.) In its order largely denying Saks' motion to dismiss at the group pleading stage, the Court rejected Saks' "broad-brush argument that no wrongdoing or knowledge of wrongdoing has been attributed to him," but specifically noted that Saks would not be "prejudiced from hereafter moving to dismiss the remaining claims in the FAC on more particularized grounds." (Dkt. No. 290 at 57.) Saks accordingly filed this more particularized motion to dismiss, which for the first time made arguments regarding the sufficiency of the allegations as to the elements of each specific cause of action brought against him—including numerous causes of action asserted against Saks for the first time in the SAC (Dkt. Nos. 357-59), after the Court's initial decision.

Plaintiffs' Opposition either misunderstands or deliberately mischaracterizes the procedural history of this case. Plaintiffs argue that Saks "largely seeks to re-litigate arguments

already decided by this Court," (Opp. at 35), despite the fact that Saks never before argued the specific grounds presented in the Motion. In wrongly relying on stare decisis, Plaintiffs declined to address the substance of nearly all of the arguments Saks advanced in his motion, including as to at least one element of every cause of action asserted against Saks. Plaintiffs also improperly purport to rely on allegations that are not in the SAC, in an apparent attempt to have a *fourth* bite at the apple, while continuing to rely on allegations against Saks that have no basis in fact. Plaintiffs have not cured the deficiencies of their first three pleadings, and should not be given any more latitude at this late juncture.

I. Plaintiffs Have Abandoned Their Claims Against Saks by Failing to Address, and Thus Conceding, at Least One Independent Ground for Dismissal of Each Claim

A court "may, and generally will, deem a claim abandoned when a plaintiff fails to respond to a defendant's arguments that the claim should be dismissed." *Lipton v. Cnty. of Orange, N.Y.*, 315 F. Supp. 2d 434, 446 (S.D.N.Y. 2004); *see also, e.g.*, *In re Platinum-Beechwood Litig.*, No. 18 Civ. 10936, 2019 WL 1570808, at *19 (S.D.N.Y. Apr. 11, 2019); *Robinson v. Fischer*, No. 09 Civ. 8882, 2010 WL 5376204, at *10 (S.D.N.Y. Dec. 29, 2010); *Bonilla v. Smithfield Assocs. LLC*, No. 09 Civ. 1549, 2009 WL 4457304, at *4 (S.D.N.Y. Dec. 4, 2009); *Div. 1181 Amalgamated Transit Union – N.Y. Emps. Pension Fund v. R&C Transit, Inc.*, No. 16 Civ. 2481, 2018 WL 794572, at *4 (E.D.N.Y. Feb. 7, 2018). Plaintiffs' Opposition fails to address, or even acknowledge, any of the following arguments in Saks' moving brief:

- Breach of Fiduciary Duties as a Platinum Defendant (Counts I and II). Saks argues on pages 6-10 of his moving brief that Plaintiffs did not sufficiently allege either that Saks owed PPVA personal fiduciary duties of loyalty and care, or actions constituting a breach of his fiduciary duty with particularity;

- Common Law Fraud and Constructive Fraud as a Platinum Defendant (Counts IV and V). Saks argues on page 11 of his moving brief that Plaintiffs failed to identify an affirmative

misrepresentation by Saks, nor have they alleged that Saks owed a personal fiduciary duty to PPVA as required to support a claim for constructive fraud or fraud by omission[1];

- Aiding and Abetting (Counts III, VI, VII, and VIII). Saks argues on pages 18-21 of his moving brief that Plaintiffs have alleged neither actual, as opposed to constructive, knowledge of the fraudulent scheme nor that Saks substantially assisted the fraudulent scheme, each of which is a necessary element for an aiding and abetting claim;

- Unjust Enrichment (Count XIV). Saks argues on page 5 of his moving brief that Plaintiffs' unjust enrichment claim was dismissed as to Saks, without leave to replead;

- Civil Conspiracy (Count XVI). Saks argues on pages 21-22 of his moving brief that Plaintiffs failed to identify an agreement by Saks to join the alleged conspiracy, which cannot be established merely by the fact of one's employment; and

- Civil RICO (Count XVII). Saks argues on pages 15-17 of his moving brief that Plaintiffs failed to identify a single predicate act involving Saks, failed to meet the heightened standard for civil RICO claims predicated purely on mail and wire fraud and did not allege a RICO enterprise separate and apart from component predicate acts.

No other causes of action are alleged as to Saks. Accordingly, as Plaintiffs have failed to address at least one independent ground for dismissal of each cause of action asserted against Saks in his Motion, the claims against Saks should be deemed abandoned and dismissed.

II. Plaintiffs Cannot Amend Their Pleadings in an Opposition to a Motion to Dismiss

Instead of addressing the elements of the claims against Saks, Plaintiffs attempt to prop up their deficient SAC through a declaration and several exhibits filed alongside their Opposition, (Dkt. No. 350 ("Bixter Declaration")). This is not allowed. The Second Circuit has long held that a plaintiff may not amend pleadings to avoid dismissal by alleging new facts in an opposition brief, *see Wright v. Ernst & Young LLP*, 152 F.3d 169, 178 (2d Cir. 1998), and countless district courts have held similarly, *see, e.g.*, *Jennings v. Hunt Cos.*, 367 F. Supp. 3d 66,

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[1] Saks acknowledges that Plaintiffs' Opposition addresses whether Saks may have a misrepresentation imputed to him through group pleading. (Opp. at 35-36.) However, as discussed elsewhere in this Reply and in the moving brief, many of the claims in the SAC had not been previously asserted against Saks, and thus this Court could not have decided whether the elements of those claims were met as to Saks. Moreover, the Court made clear in the April Opinion that Saks could make his particularized arguments now.

70-71 (S.D.N.Y. 2019); *O'Brien*, 719 F. Supp. at 229; *Jacobson v. Peat, Marwick, Mitchell & Co.*, 445 F. Supp. 518, 526 (S.D.N.Y. 1977). That general legal principle rings especially true here, given that Plaintiffs have already amended their pleadings twice and were in possession of millions of relevant documents before this case began. Plaintiffs' inclusion of new documents from PPVA's own files—which have long been in their possession—along with their characterization of those documents in the Opposition as adding to the factual picture, should be rejected.

III. The Documents Attached to Plaintiffs' Opposition Brief Are Inapposite, and Plaintiffs Continue to Rely on Admittedly Incorrect or Baseless Allegations

Even if Plaintiffs were allowed to amend the SAC via additional new documents attached to an opposition brief, the documents they attach as to Saks do not support the characterizations in their Opposition. Two of the documents—Exhibits 8 and 9 to the Bixter Declaration—concern a "PPCO Valuation Comittee [sic] Meeting," and do not address valuations or valuation committee meetings for PPVA. PPCO is an entirely separate fund that has brought its own litigation through its receiver, Melanie Cyganowski, in a related case. Plaintiffs ignore the specific reference to PPCO, and mischaracterize this document as establishing more generally that Saks was part of "Platinum Management's valuation committee." (Opp. at 31.) Likewise, Plaintiffs admit that Exhibit 7 to the Bixter Declaration is a "draft" document, which contains notes and blanks without any indication that it was ever used. The fact that Plaintiffs would have access to, but have not used, a final version—if it even exists—renders implausible the conclusion that Saks was actually "marketed as the co-CIO of Platinum Partners." (*Id.*) Finally, Saks cannot discern the relevance of Exhibit 10, which says nothing about Saks' actions or knowledge relevant to the elements of each cause of action asserted against him.

Plaintiffs also continue to press facts that are either contradicted by their own records or are lacking support, and thus cannot be credited. As Saks wrote in his Declaration attached to the Motion, he worked for Platinum Management between March 2014 and September 2014. In response to Saks' request to Plaintiffs to correct their pleading regarding Saks' employment dates, Plaintiffs admitted that Platinum's human resources records indicate that Saks began his employment at Platinum in March 2014. (Schwartz Decl. ¶ 2 & Ex. A.) Having failed to address those dates in their opposition brief, Plaintiffs have tacitly admitted them. Nonetheless, they continue to refer in their brief to the SAC's allegation that Saks "previously," *i.e., before the end of 2013 according to the SAC*, "was involved in overseeing the investment in Golden Gate Oil," (*compare* SAC ¶ 12(xii), *with* Opp. at 11, 36.) This allegation cannot be credited given his March 2014 start date.

Plaintiffs' brief also continues to rely on the allegation that Saks was "Chief Investment Officer and then President of B Asset Manager LP ["BAM"] during *and after* 2015." (Opp. at 11 (emphasis added).) But Saks resigned from BAM on December 31, 2015 (*see* Saks Decl. ¶ 6). Plaintiffs' brief does not address this, and Plaintiffs have no basis to argue otherwise (*see* Schwartz Decl. ¶ 2 & Ex. A). Plaintiffs' allegation that Saks was employed by BAM "after 2015" cannot be credited.

IV. The Few Arguments Plaintiffs Do Make as to Saks Are Without Merit

A. The RICO allegations against Saks do not identify a single predicate act, let alone satisfy the Second Circuit's two-year continuity requirement

Plaintiffs argue that they have adequately pled a civil RICO claim against Saks simply because he allegedly "served a critical role at both Platinum and Beechwood, and consistent with the Court's April 2019 Decision, is liable for all foreseeable acts of the [RICO] conspiracy." (Opp. at 31.) That is not the standard. The Second Circuit has made clear that civil RICO

focuses "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). In other words, simply tying Saks to a RICO conspiracy (an entirely separate cause of action) is insufficient to allege a civil RICO claim against him individually under 18 U.S.C. § 1962(c). Plaintiffs have not identified a single predicate act of racketeering involving Saks, as the law requires, particularly for civil RICO claims predicated purely on wire fraud, as here. *See Gross v. Waywell*, 628 F. Supp. 2d 475, 493-95 (S.D.N.Y. 2009). And Plaintiffs cannot establish a two-year participation in the enterprise by Saks, as required in the Second Circuit. *See Spool v. World Child Int'l Adoption Agency*, 520 F.3d 178, 184 (2d Cir. 2008).

B. Plaintiffs mischaracterize the case law interpreting the PSLRA bar on securities-related civil RICO claims

Saks joins the arguments made by the Beechwood Parties and others regarding the sufficiency of Plaintiffs' allegations under the PSLRA.

C. Plaintiffs' arguments on pages 35 and 36 of their Opposition fail to address the elements of any claim

On pages 35 and 36 of their Opposition, Plaintiffs reiterate the few allegations in the SAC concerning Saks and conclude, without any reference to the elements of the claims, Saks' arguments in his moving brief, legal arguments of their own, or case law, that their allegations against Saks "clearly are sufficient." Plaintiffs' brief also makes a contention that is not alleged in the SAC, the Bixter Declaration, or the exhibits thereto—that Saks was involved in "various refinancings of Golden Gate Oil," (Opp. at 36)—which the Court has no basis to credit.

As explained in Saks' moving brief (at 8-10), the arguments made against Saks are insufficient to place him within the ambit of a group pleading. Even if the Bixter Declaration were proper as part of an opposition to a motion to dismiss (and it is not), the documents therein do not move the needle. None of the new, un-pleaded documents show that Saks was involved

at all in determining the net asset value of investments in the PPVA fund—the only relevant fund in this case—as opposed to PPCO, PPLO, or any other fund managed by Platinum Management. Plaintiffs present no pleaded allegation or un-pleaded evidence that Saks is among the "narrowly defined group of highly ranked officers or directors" that were involved in producing the net asset value reports for PPVA, which the Court has identified as the relevant group-published written statements. *Elliot Assocs., LP v. Hayes*, 141 F. Supp. 2d 344, 354 (S.D.N.Y. 2000).

D. Plaintiffs are barred from asserting their claims by the doctrine of *in pari delicto* and the *Wagoner* rule

Saks joins the arguments made by the Beechwood Parties and others regarding the bar placed on Plaintiffs' claims by the doctrine of *in pari delicto* and the *Wagoner* rule.

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 replead, and any further relief that the Court deems just and proper.

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New York, New York

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