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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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)

MEMORANDUM OF LAW OF DEFENDANT DAVID BODNER IN SUPPORT OF HIS MOTION TO DISMISS THE COMPLAINT FOR FAILURE TO STATE A CLAIM

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Defendant David Bodner respectfully submits this memorandum of law in support of his motion to dismiss all claims against him for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6).

PRELIMINARY STATEMENT

The Complaint filed by the Joint Official Liquidators (the "JOLs") of Platinum Partners Value Arbitrage Fund LP ("PPVA") fails to state a claim against David Bodner. The Complaint relies entirely on deficient group pleading, and does not contain a single factual allegation that Bodner himself engaged in any wrongful act or omission. The Complaint alleges that Bodner is a member of two groups — the "Platinum Defendants" and the "Beechwood Defendants" — and, without identifying any specific conduct by Bodner, asserts that he is legally responsible for the alleged "schemes" carried about by those groups. The only facts alleged against Bodner are that he was a founding owner of certain Platinum and Beechwood entities. Those facts are not actionable. Nowhere in the 765-paragraph Complaint is there a factual allegation of specific wrongdoing by Bodner. The Complaint is bereft of a single relevant statement, act, or omission by him.

In addition to the Complaint's group pleading deficiency, each of the seven causes of action alleged against Bodner — for fraud, civil racketeering, aiding and abetting fraud, breach of fiduciary duty, aiding and abetting breach of fiduciary duty, and unjust enrichment — all require heightened pleading pursuant to Federal Rule of Civil Procedure 9(b). The Complaint fails to plead even generally — much less with particularity — Bodner's involvement in or his assistance with any unlawful conduct.

The Complaint does not state a claim as to Bodner and should be dismissed.

FACTS ALLEGED AGAINST DAVID BODNER

Bodner is alleged to have co-founded Platinum Management and PPVA in 2001, and to have raised initial investment funds for those entities. (Compl. ¶¶ 27, 38, 42, 92). He is also alleged to have co-founded and co-owned Beechwood entities. (Compl. ¶¶ 67, 70, 75-76). In conclusory fashion, the Complaint alleges that Bodner was one of Platinum Management's "principals/managers/advisors/owners" (Compl. ¶ 33), and that Bodner was an "ultimate decision mak[er]" for both Platinum Management and the Beechwood Entities (Compl. ¶ 733). The Complaint does not identify a single fact that supports the conclusory assertion that Bodner was a decision maker for either Platinum Management or any Beechwood entity.

ARGUMENT

I. The Complaint's Group Pleading Fails to Satisfy Rule 8 and Rule 9(b)

To survive a motion to dismiss under Rule 12(b)(6), each of Plaintiffs' claims against Bodner must allege enough facts to state a claim for relief that is plausible on its face under Federal Rule of Civil Procedure 8. For a pleading to state a claim for relief under Rule 8(a)(2), it must include "a short and plain statement of the claim showing that the pleader is entitled to relief." The complaint must "give *each defendant* fair notice of what the plaintiff's claim is and the ground upon which it rests." *Atuahene v. City of Hartford*, 10 Fed. Appx. 33, 34 (2d Cir. 2001) (emphasis added); *see also Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Conclusory or "naked assertions devoid of further factual enhancement will not satisfy Rule 8's requirements." *Vantone Grp. LLC v. Yangpu NGT Indus. Co.*, No. 13 Civ. 7639 (LTS), 2015 U.S. Dist. LEXIS 86653, at *11 (S.D.N.Y. July 2, 2015) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

Where allegations are made against a group of defendants, generalizations as to the group are insufficient to satisfy the pleading standards. *See Twombly*, 550 U.S. at 565 n.10

("[T]he complaint here furnishes no clue as to which of the four [defendants] (much less which of their employees) supposedly agreed."). Second Circuit courts have consistently held that group pleading, without specific facts as to each defendant, does not sufficiently state a claim for relief. *See Atuahene*, 10 Fed. Appx. 33, 34 (2d Cir. 2001) (dismissing complaint under Rule 8 because plaintiff "lump[ed] all the defendants together in each claim and provid[ed] no factual basis to distinguish their conduct"); *Ochre LLC v. Rockwell Architecture Planning & Design, P.C.*, No. 12 Civ. 2837 (KBF), 2012 U.S. Dist. LEXIS (S.D.N.Y. Dec. 3, 2012) (dismissing causes of action where the "key facts pled in the SAC are 'lumped' together and thus do not afford each defendant adequate notice of the factual allegations it faces. This failure to isolate the key allegations against each defendant supports dismissal under the standards set forth in *Twombly* and *Iqbal*."); *In re Digital Music Antitrust Litig.*, 812 F. Supp. 2d 390, 417 (S.D.N.Y. 2011) ("The complaint alleges direct involvement of the [Defendants] by way of generic references to 'defendants.' This approach is insufficient."); *Medina v. Bauer*, No. 02 Civ. 8837 (DC), 2004 U.S. Dist. LEXIS 910, at *18 (S.D.N.Y. Jan. 26, 2004) (dismissing complaint because "[b]y lumping all the defendants together and failing to distinguish their conduct, plaintiff's amended complaint fails to satisfy the requirements of Rule 8. Specifically, the allegations fail to give adequate notice to these defendants as to what they did wrong.").

The prohibition on group pleading applies at least with equal force where a group of defendants is subject to allegations of fraud; Rule 9(b) requires that the complaint describe *each* defendant's participation with particularity. *See Mills v. Polar Molecular Corp.*, 12 F.3d 1170, 1175 (2d Cir. 1993). Because each defendant is entitled to know the nature of his alleged participation, the plaintiff must separately establish each defendant's acts or omissions as part of the fraud. *Id.* (citing *Odyssey Re (London) Ltd. v. Stirling Cooke Brown Holdings Ltd.*, 85 F.

Supp. 2d 282, 293 (S.D.N.Y. 2000)); *see also ING Global v. UPS Oasis Comp Supply Corp.*, No. 11 Civ. 5697 (JSR), 2012 U.S. Dist. LEXIS 37049, at *12-13 (S.D.N.Y. Jan. 3, 2012) ("[T]he Complaint must specify the statements it claims were false or misleading, give particulars as to the respect in which plaintiff contends the statements were fraudulent, state when and where the statements were made, and identify those responsible for the statements. . . . The complaint here largely fails to provide any of these particulars, instead simply lumping the defendants together in largely conclusory statements . . . . This will not suffice.").

The JOLs' deficient group pleading permeates every element of their claims against Bodner. Bodner is alleged to be a member of both the "Platinum Defendants" group and the "Beechwood Defendants" group,[1] (Compl. ¶ 42), but there is no specific factual allegation that Bodner himself engaged in any wrongful act. The Complaint includes no specific factual allegations that, if true, would establish that he himself provided assistance to any fraudulent scheme or breach of fiduciary duty.

The essential elements of scienter for fraud and knowledge for the aiding and abetting claims are likewise only alleged through impermissible group pleading. The Complaint alleges that "the Platinum Defendants knew" that their alleged misrepresentations to PPVA were material and false. (Compl. ¶¶ 578-89). The Third Count (for fraud) contends that the Platinum Defendants "intentionally did not include liabilities" in the PPVA NAV calculations (*id.* ¶ 583), and "knowingly and intentionally defrauded PPVA by causing it to engage in transactions with and involving the Beechwood Entities that were designed to benefit the Beechwood Entities to the detriment of PPVA" (*id.* ¶ 589). These group pleading allegations do not meet the pleading

[1] The Complaint alleges fraudulent conduct by other defendant groups – the "BEOF Funds" and the "Preferred Investors of the BEOF Funds." (Compl. ¶¶ 54-57, 306-337). Bodner is not alleged to be a member of either of those groups.

standards required under Rule 8 or Rule 9(b) and should be disregarded. They cannot serve as a basis for imposing liability.[2]

II. The Complaint Fails to Allege Under Rule 9(b) Any Conduct for Which Bodner Could Have Primary Actor Liability

In addition to their impermissible group pleading, the JOLs' allegations against Bodner as to fraud, civil racketeering, breach of fiduciary duty, and unjust enrichment are not pled with particularity as required by Fed. R. Civ. P. 9(b). *See Alliance Shippers, Inc. v. Garcia*, 669 Fed. Appx. 11, 12-13 (2d Cir. 2016) ("Under Federal Rule of Civil Procedure 9(b), all claims of fraud are subject to a heightened pleading standard and must be pleaded with particularity."). To allege fraud with particularity, the complaint must "detail the statements or omissions that the plaintiff contends are fraudulent, identify the speaker, state where and when the statements were made, and explain why the statements are fraudulent." *Id.* And while the scienter required for fraud may be pleaded generally, the plaintiff must still establish a "strong inference of fraudulent intent," which it can do by alleging facts that provide strong circumstantial evidence of conscious misbehavior or recklessness. *Mills v. Polar Molecular Corp.*, 12 F.3d 1170, 1176 (2d Cir. 1993). The JOLs fail in this regard by a wide margin.

The Third Count, for fraud, must include, *inter alia*, a material false representation made with the intent to defraud the plaintiff. *See Newman v. Family Mgmt. Corp.*, 530 Fed. Appx. 21, 24 (2d Cir. 2013). The Complaint utterly fails to allege any of these elements with particularity because it does not identify any specific conduct attributable to

[2] The JOLs are unaided by the "group pleading doctrine," which permits a plaintiff to attribute a misstatement or omission in a securities offering document to the group of authors responsible for it. *See e.g. In re Alstom SA,* 406 F. Supp. 2d 433, 450 (S.D.N.Y. 2005). Even in that inapposite context, the group pleading doctrine allows plaintiffs to connect individual defendants to a group's *statements* — it does not allow for imputation of scienter from one member of the group to another. *Id.*

Bodner. It describes no fraudulent statements or omissions made by Bodner to anyone. And it likewise does not include a single allegation addressing Bodner's knowledge, and does not include any facts that could explain how Bodner knew such alleged statements were false.

For the First and Second Counts, alleging breaches of fiduciary duty, the JOLs must allege facts that show, at a minimum, the existence of a duty, and a knowing breach of that duty by Bodner. *See Leighton v. Poltorak*, No. 17 Civ. 3120 (LAK), 2018 U.S. Dist. LEXIS 87007, at *16 (S.D.N.Y. May 23, 2018) (citing *Johnson v. Nextel Commc'ns, Inc.*, 660 F.3d 131, 138 (2d Cir. 2011)). The JOLs do not identify any facts establishing a duty owed by Bodner to PPVA, and, as above, do not allege a single act, statement, or omission by Bodner that could constitute a breach of any duty.

Likewise, the Thirteenth Count, for civil racketeering, fails to allege with requisite particularity that Bodner engaged in predicate acts of mail fraud and wire fraud sufficient to constitute a pattern of racketeering activity. *See Lundy v. Catholic Health Sys. of Long Island, Inc.*, 711 F.3d 106, 119 (2d Cir. 2013) (explaining that, in a RICO claim "alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake"). The Complaint refers to various emails in an effort to support predicate RICO acts, but Bodner is not the author or recipient of a single one of these emails. The JOLs fail to allege facts that show that Bodner directed these communications. The conclusory declaration that "[e]ach of these communications [was] by or on behalf of the Platinum Defendants and Beechwood Defendants" (Compl. ¶ 715), fails to identify with particularity Bodner's involvement in any fraudulent conduct, and the JOLs allege no facts to indicate Bodner had any fraudulent intent in connection with these acts. The RICO count must be dismissed as to Bodner.

The Eleventh Count asserts that the Beechwood Defendants were unjustly enriched at PPVA's expense through the Second Scheme transactions. (Compl. ¶¶ 687-93). As above, this requires, *inter alia*, that Bodner participated in some wrongful conduct such that any benefit he received was detrimental to PPVA. *See Cohen v. BMW Invs. L.P.*, 668 Fed. App'x 373, 374 (2d Cir. 2016) (quoting *Georgia Malone & Co. v. Rieder*, 19 N.Y.3d 511, 516 (2012)). The Complaint does not allege a single action or statement by Bodner that was part of or in furtherance of any of the Second Scheme transactions, and certainly does not describe any wrongful conduct by Bodner with the specificity required by Rule 9(b). *See Goldemberg v. Johnson & Johnson Consumer Cos.*, 8 F. Supp. 3d 467, 483 (S.D.N.Y. 2014). The claim for unjust enrichment must fail.

III. The Complaint Fails to Allege Under Rule 9(b) Any Conduct or Knowledge for Which Bodner Could Have Secondary Actor Liability

The Fourth and Fifth Counts of the Complaint, for aiding and abetting breach of fiduciary duties and aiding and abetting fraud, respectively, both require, *inter alia*, that the defendant had actual knowledge of the primary alleged wrong, and provided substantial assistance in committing that wrongful act. *See Krys v. Pigott*, 749 F.3d 117, 127 (2d Cir. 2014). In pleading knowledge, allegations that give rise to an inference of actual knowledge by the aider and abettor are required; constructive knowledge is not sufficient. *See id.* Claims for aiding and abetting fraud and breach of fiduciary duty are subject to the same heightened pleading standard as fraud claims under Rule 9(b). *See id.* at 129 ("In asserting claims of fraud – including claims for aiding and abetting fraud or a breach of fiduciary duty that involves fraud – a complaint is required to plead the circumstances that allegedly constitute fraud 'with particularity.'").

The JOLs fail to allege Bodner's role in the alleged aiding and abetting of the fraudulent scheme or fiduciary duty breach with the specificity required under Rule 9(b). The

JOLs do not allege that Bodner took part in a single conversation, or sent or received a single communication, in connection with either of the alleged fraudulent schemes. The JOLs thus have not identified any conduct by Bodner that could plausibly be described as providing substantial assistance in the commission of a fraud.

Further, the JOLs' allegations of actual knowledge on Bodner's part are limited to the conclusory claim that "the Beechwood Defendants had actual knowledge that the Platinum Defendants were defrauding PPVA by engaging in the acts and transactions and making the material misrepresentations and omissions comprising the First and Second Schemes." (Compl. ¶ 614). This conclusory assertion lacks any factual support from which a factfinder could reasonably infer that Bodner specifically had actual knowledge of the alleged fraud. The Complaint contains no allegations that Bodner was told, or otherwise knew, that by making an investment in Beechwood he was engaging in conduct designed to help Platinum Management or others breach fiduciary duties or perpetrate a fraud upon PPVA.

Finally, the JOLs include a count for relief for alter ego liability against certain Beechwood entities alleged to be owned by Bodner. (Compl. ¶¶ 75, 723-37). Because the Complaint fails to state a claim for liability, the relief counts against entities allegedly owned by Bodner should be dismissed accordingly. *See Antartica Star I, LP v. Gibbs Int'l, Inc.*, No. 15-cv-2630 (KBF), 2017 U.S. Dist. LEXIS 20723, at *27-28 (S.D.N.Y. Feb. 14, 2017).

CONCLUSION

For the foregoing reasons, the Complaint should be dismissed against Bodner in its entirety.

Dated: January 9, 2019
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