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,

-against-

PLATINUM MANAGEMENT (NY) LLC et al.,

Defendants.

Case No. 18-cv-10936 (JSR)

DEFENDANT GREGG DONNENFELD'S MEMORANDUM OF LAW IN SUPPORT OF HIS MOTION UNDER FED. R. CIV. P. 12(b)(6) TO DISMISS THE COMPLAINT AS AGAINST HIM FOR FAILURE TO STATE A CLAIM FOR RELIEF

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Defendant Gregg Donnenfeld ("Donnenfeld") submits this memorandum of law in support of his motion under Fed. R. Civ. P. 12(b)(6) to dismiss as against him, for failure to state a claim for relief, the Complaint of plaintiffs Martin Trott and Christopher Smith, as Joint Official Liquidators and Foreign Representatives of Platinum Partners Value Arbitrage Fund L.P. ("PPVA") (collectively, "Plaintiffs").[1]

PRELIMINARY STATEMENT

That Donnenfeld has been named a defendant in this case reflects just how irresponsibly Plaintiffs have thrown anyone they could think of into the mix. Unlike other named defendants who were involved in PPVA's management or operations, Donnenfeld had no role in the events underlying the Complaint other than to serve as an attorney on a limited number of transactions – all of which he believed were bona fide – during a brief eight-month period, beginning in March 2016, in which he was on Platinum's payroll. He was not, and is not alleged to have been, involved in any of the events that preceded March 2016, the period during which almost all of the wrongs alleged in the Complaint took place. And he not only committed no wrong during the brief time he worked at Platinum in 2016, but given the absence of even one specific allegation against him in the Complaint, he has no idea what wrong he is even being accused of.

To survive a motion to dismiss, Plaintiffs' claims against Donnenfeld – for fraud, breach of fiduciary duty, and violations of the federal Racketeer Influenced and Corrupt Organizations Act ("RICO"), all of which are predicated on alleged fraudulent conduct – must be pled with particularity. Yet the Complaint contains no specific allegation of such conduct by Donnenfeld,

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[1] Capitalized terms not otherwise defined herein have the meanings ascribed to them in the Complaint. References herein to "Platinum" are collectively to PPVA, defendant Platinum Management (NY) LLC ("Platinum Management"), and any other Platinum-affiliated companies. References to "Ex. __" are to the exhibits to Donnenfeld's accompanying declaration dated January 9, 2019 ("Donnenfeld Decl.").

making his inclusion as a defendant in this case all but sanctionable. Indeed, across 765 paragraphs in a 135-page Complaint, Donnenfeld is mentioned by name only twice:

(1) In ¶33, which simply defines the "Platinum Defendants"; and

(2) In ¶46, which simply identifies Donnenfeld as a party to the litigation, grouping him among the Platinum Defendants by cursorily, and falsely, alleging that he was "instrumental in implementing the final stages of the Second Scheme, including the Security Lockup and the Platinum Defendants' misrepresentation of PPVA's net asset value in the months leading up to commencement of the Cayman Liquidation."

Nowhere in the Complaint is Donnenfeld ever referred to again, and nowhere, it follows, does the Complaint identify a single act evidencing how Donnenfeld was in any way involved, much less "instrumental," in implementing the "Second Scheme" or any other alleged wrong.

As shown in Points I through IV below, all of which are based solely on the allegations in the Complaint, Plaintiffs' claims against Donnenfeld fail to state a valid cause of action and should be dismissed under Rule 12(b)(6). In Point I, applicable to all of the four claims against him, Donnenfeld adopts, and incorporates therein, the group pleading arguments advanced by defendant David Bodner ("Bodner") in Bodner's brief in support of his motion to dismiss the Complaint as against him. Point I of Bodner's brief establishes that the Complaint's group pleading falls far short of meeting the pleading requirements of Rules 9(b) and 8.

As shown in Point II, Plaintiffs' fraud claim fails as against Donnenfeld because it does not plead the requisite elements of a fraud claim, and because it in all events fails to meet the particularity requirements of Rule 9(b). Point III shows that Plaintiffs' RICO claim, as against Donnenfeld, fails to meet not only RICO's particularity requirements, but also every other element of a civil RICO claim. Point IV shows that Plaintiffs' two claims for breach of fiduciary duty fail because they do not plead the elements of a fiduciary duty claim, do not meet the particularity requirements under Rule 9(b) (made applicable here because the claims are

grounded in allegations of fraud), and do not allege that Donnenfeld, a lawyer, ever placed his own interests above PPVA's.

Finally, as shown in Point V, Plaintiffs' claims are also all subject to dismissal, with prejudice, on the additional ground that Platinum, in a severance agreement with Donnenfeld reached in late 2016, released Donnenfeld from any claims relating to his work there. That release applies to all of Plaintiffs' four claims against Donnenfeld, and while it is outside the Complaint, it may permissibly be introduced on this motion because it bears directly on the claims against Donnenfeld and is within Plaintiffs' possession and knowledge. Indeed, Donnenfeld made Plaintiffs' lead counsel aware of the release at the time it went into effect, and counsel confirmed that the release did not require the approval of PPVA's liquidators.[2]

* * *

Plaintiffs' claims against Donnenfeld exemplify why the law rightly subjects RICO and other claims predicated on fraud to heightened scrutiny and particularity requirements. By grouping Donnenfeld with the individuals who appear to have caused PPVA's demise, Plaintiffs have risked tarnishing his otherwise unblemished professional reputation. Yet they have not alleged a single wrongful act on Donnenfeld's part, much less one that shows he conspired with other wrongdoers to defraud PPVA or engage in predicate acts of racketeering activity. That is not responsible advocacy.

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[2] Additional evidence outside though related to the complaint offers further reasons why Plaintiffs' claims against Donnenfeld are invalid as a matter of law. But because the Complaint does not specify anything that Donnenfeld is alleged to have done wrong, Donnenfeld does not rely on that evidence on this motion. He reserves the right to rely on it in the event amended claims are brought against him.

THE RELEVANT FACTS

This fact section is divided into two parts: (i) the two allegations against Donnenfeld in the Complaint – which, even if accepted as true, are far too insufficient to support any of the claims against Donnenfeld; and (ii) Platinum's release of Donnenfeld – evidence that may permissibly be introduced on this motion, and that supports an independent ground, beyond those based solely on the Complaint's allegations, for dismissing the claims against Donnenfeld.

A. The Complaint's Lack of Specific Allegations Against Donnenfeld

As noted, of the 765 paragraphs in the Complaint, only two refer to Donnenfeld by name: ¶33, which defines the "Platinum Defendants," and ¶46, which identifies Donnenfeld as a party to the litigation, notes that Platinum Management hired him "as an employee" in or about March 2016, and vaguely alleges with no particularity whatsoever that he was "instrumental in implementing the final stages of the Second Scheme," as defined in ¶10 of the Complaint. From then on, the Complaint never refers to Donnenfeld again, never identifies a single act, wrongful or otherwise, in which he engaged, and otherwise never specifies what the "final stages of the Second Scheme" refers to or how Donnenfeld was "instrumental" in "implementing" them.

B. Platinum's Release of Donnenfeld

As set forth in his accompanying declaration, Donnenfeld is a practicing lawyer in New York who was on defendant Platinum Management's payroll for only about eight months, from March 2016 to October 2016 – a period that post-dated nearly all of the alleged acts of wrongdoing by the defendants with whom Donnenfeld is improperly grouped. On or about September 21, 2016, Platinum told Donnenfeld that it would soon have to cease paying his salary due to a lack of available funds. (Donnenfeld Decl. ¶2)

Later that day, as part of his cessation of employment, Donnenfeld and Platinum (through one of its executives, defendant David Steinberg) negotiated a severance agreement that included comprehensive mutual releases. Donnenfeld memorialized that agreement by an email dated September 22, 2016 (Ex. 1) that he sent to Platinum's executives, including Steinberg and defendants Mark Nordlicht and David Levy. (Donnenfeld Decl. ¶4) Paragraph 5 of that email confirms the mutual releases to which Platinum and Donnenfeld had agreed, stating:

> 5. Mutual releases: Platinum and its affiliates release me from all possible liabilities and claims of any sort and I release Platinum and its affiliates from all possible claims of any sort (but I'm obviously still entitled to any unpaid salary for any past work since last payroll period). [Ex. 1 at ¶5]

Shortly after memorializing the severance agreement, Donnenfeld discussed the agreement with Plaintiffs' lead counsel in this action, Warren E. Gluck, as evidenced by their exchange of emails on October 4, 2016. (Ex. 2) In response to Donnenfeld's specific question of whether the agreement required the approval of PPVA's liquidators, Mr. Gluck told Donnenfeld that it did not. Relying on that representation, Donnenfeld did not undertake to seek the liquidators' approval at that time, as he otherwise would have, and he performed further work pursuant to the severance agreement, as he otherwise would not have. (Donnenfeld Decl. ¶5)

ARGUMENT

To survive a motion to dismiss under Rule 12(b)(6), a claim must set forth factual allegations, accepted as true, sufficient "to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation and citation omitted). A sufficiently pled complaint "must provide 'more than an unadorned, the-defendant-unlawfully-harmed-me accusation.'" *Pension Benefit Guar. Corp. v. Morgan Stanley Inv. Mgmt. Inc.*, 712 F.3d 705, 717 (2d Cir. 2013) (quoting *Iqbal,* 556 U.S. at 678). "Mere conclusory statements in a complaint and formulaic recitation of the elements of a cause of action are insufficient." *Gordon*

v. Sonar Capital Mgmt. LLC, 962 F. Supp. 2d 525, 527-28 (S.D.N.Y. 2013) (Rakoff, J.) (internal quotation omitted) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). So, too, are allegations that make little more than "'naked assertion[s]' devoid of 'further factual enhancement.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 557). Although all factual allegations in the complaint are accepted as true, and all reasonable inferences are drawn in a plaintiff's favor, a court need not credit "legal conclusions" in a claim or "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements." *Harris v. Mills*, 572 F.3d 66, 72 (2d Cir. 2009) (quoting *Iqbal*, 556 U.S. at 678). Nor is a court "bound to accept as true a legal conclusion couched as factual allegation." *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 555) (internal quotation omitted). Legal conclusions must instead be supported by factual allegations. *Id.*; *Pension Benefit Guar. Corp,* 712 F.3d at 717-18.

Judged by those standards, Plaintiffs' claims against Donnenfeld cannot stand. The Complaint fails to meet the pleading requirements for fraud, RICO, and breach of fiduciary duty claims, as shown in Points I through IV. And as shown in Point V, all of Plaintiffs' claims against Donnenfeld are barred in all events by Platinum's release of Donnenfeld, which also underscores why any amendment of those claims would be futile.

I

THE GROUP PLEADING ARGUMENTS MADE BY DEFENDANT BODNER ON HIS DISMISSAL MOTION, AND INCORPORATED HEREIN, COMPEL THAT THE CLAIMS AGAINST DONNENFELD BE DISMISSED FOR IMPERMISSIBLE GROUP PLEADING

Donnenfeld adopts, and incorporates herein, the group pleading arguments advanced by Bodner in Point I of Bodner's brief in support of his dismissal motion. Those arguments apply with equal force to Donnenfeld and other similarly situated defendants and compel that all four of the claims against Donnenfeld be dismissed for failure to comply with Rule 9(b) and Rule 8.

Put succinctly, where allegations are made against a group of defendants, generalizations as to the group are insufficient to satisfy applicable pleading standards. *Twombly*, 550 U.S. at 565 n.10 ("the complaint here furnishes no clue as to which of the four [defendants] (much less which of their employees) supposedly agreed"). Such generalized group pleading, also discussed below, is precisely what the Complaint impermissibly resorts to here.

II

PLAINTIFFS' FRAUD CLAIM (THIRD COUNT)
SHOULD BE DISMISSED AS AGAINST DONNENFELD FOR
FAILURE TO PLEAD THE ELEMENTS OF A FRAUD CLAIM AT ALL,
MUCH LESS WITH THE PARTICULARITY REQUIRED UNDER RULE 9(b)

Plaintiffs' fraud claim, asserted against the Platinum Defendants as a group, fails as a matter of law as against Donnenfeld because it fails to allege the elements of a fraud claim under New York law, and because it in all events comes nowhere close to meeting the particularity requirements embodied in Rule 9(b).

"'To state a cause of action for fraud, a plaintiff must allege 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.'" *Senior Health Ins. Co. of Pennsylvania v. Beechwood Re Ltd.*, No. 18-CV-6658, 2018 WL 6378158, at *7 (S.D.N.Y. Dec. 6, 2018) (Rakoff, J.) (quoting *Kaufman v. Cohen*, 307 A.D.2d 113, 119 (1st Dep't 2003)). Here, the Complaint fails to allege, as against Donnenfeld, any one of those five elements. Nowhere does it allege any material misrepresentation of fact made by Donnenfeld, why any such representation was false, how Donnenfeld knew any such representation was false when made, how Plaintiffs relied on any such representation, or how they were injured by it. That the Complaint fails to state a valid fraud claim against Donnenfeld is apparent.

Given the absence of any allegations at all against Donnenfeld, Plaintiffs' fraud claim fails to meet the requirements of Rule 9(b), which states that, "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b). As is well established, "[t]o satisfy the particularity requirement of Rule 9(b), a complaint must adequately 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." *Cosmas v. Hassett*, 886 F.2d 8, 11 (2d Cir. 1989) (citing *Goldman v. Belden*, 754 F.2d 1059, 1069-70 (2d Cir. 1989)). When, as here, multiple defendants are alleged to have committed a fraud, a complaint must specify the fraud perpetrated by each defendant. *E.g.*, *Naughright v. Weiss*, 826 F. Supp. 2d 676, 689 (S.D.N.Y. 2011) (dismissing fraud claim for lack of particularity and stating that "[w]hen a claim is brought against multiple defendants, Rule 9(b) requires that a plaintiff differentiate his allegations as to each defendant and inform each defendant separately of the specific allegations"); *LaRoe v. Elms Sec. Corp.*, 700 F. Supp. 688, 694 (S.D.N.Y. 1988) ("Rule 9(b) requires that each defendant receive particularized notice of his alleged participation in the alleged fraud"; dismissing fraud claim because, in part, "a number of the paragraphs describing the alleged fraud do not distinguish between defendants"). A plaintiff "may not lump separate defendants together in vague and collective fraud allegations but must inform each defendant of the nature of his alleged participation in the fraud." *Alki Partners, L.P. v. Vatas Holding GmbH*, 769 F. Supp. 2d 478, 493 (S.D.N.Y. 2011), *aff'd sub nom. Alki Partners, L.P. v. Windhorst*, 472 F. App'x 7 (2d Cir. 2012); *see also Eaves v. Designs for Fin., Inc.*, 785 F. Supp. 2d 229, 247 (S.D.N.Y. 2011) (same).

Here, Plaintiffs' fraud claim, as against Donnenfeld, falls so far short of the particularity requirements of Rule 9(b) as to call into question whether the claim – and all of the other claims against Donnenfeld, which too are predicated on fraud – comport with Rule 11(b).[3] The Complaint alleges (at ¶576) that the Platinum Defendants made "material representations" that "occurred by way of the Platinum Defendants making, and causing to be made, written and oral representations concerning the financial condition of PPVA and the acts in furtherance of the Platinum Defendants' administration and management of PPVA's assets." Yet it does not allege a single such representation made by Donnenfeld – who, again, is referred to by name only twice in the entire Complaint, and not once in the entire "Factual Background" section spanning pages 21 to 97 of the Complaint. Moreover, the allegations against the "Platinum Defendants" as a group – in a Complaint alleging wrongdoing by various Platinum executives over the course of several years – plead nothing with particularity as against Donnenfeld, who was employed by Platinum as an attorney for only eight months in 2016. There is, in short, not a single allegation placing Donnenfeld on the requisite notice of the "who, what, when, where, and how of the fraud" alleged against him, thereby putting him in a situation in which he cannot mount an informed legal or factual defense. *Telenor East Invest AS v. Altimo Holdings & Invs. Ltd.*, 567 F. Supp. 2d 432, 441-42 (S.D.N.Y. 2008) (to state a fraud claim, "a plaintiff must set forth the who, what, when, where and how of the alleged fraud") (internal quotations and citations omitted).

Plaintiffs' fraud claim as against Donnenfeld should accordingly be dismissed for failure to meet the pleading and particularity requirements of a fraud claim under New York law.

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[3] Donnenfeld reserves the right to seek sanctions at an appropriate future time.

III

PLAINTIFFS' RICO CLAIM (THIRTEENTH COUNT)
SHOULD BE DISMISSED AS AGAINST DONNENFELD
FOR FAILURE TO MEET RICO'S PLEADING REQUIREMENTS

As against Donnenfeld, Plaintiffs' RICO claim, which is asserted against both the Platinum Defendants and the Beechwood Defendants, is as woefully deficient as their fraud claim. To state a valid RICO claim under 18 U.S.C. § 1962(c), a plaintiff must allege that the defendant (a) through the commission of two or more predicate acts (b) constituting a "pattern" of "racketeering activity" (c) participated in an "enterprise" (d) the activities of which affect interstate or foreign commerce and (e) caused injury to the plaintiff. *City of New York v. Chavez*, 944 F. Supp. 2d 260, 268 (S.D.N.Y. 2013); *see also*, *e.g.*, *U1IT4Less, Inc. v. Fedex Corp.*, 871 F.3d 199, 205 (2d Cir. 2017), *cert. denied*, 138 S. Ct. 1559 (2018). These elements must be established as to each individual defendant. *Santana v. Adler*, No. 117 CIV 06147 ATSDA, 2018 WL 2172699, at *6 (S.D.N.Y. Mar. 26, 2018), *report and recommendation adopted*, No. 17 CIV 6147 ATSDA, 2018 WL 2170299 (S.D.N.Y. May 10, 2018); *see also United States v. Persico*, 832 F.2d 705, 714 (2d Cir. 1987), *cert. denied*, 486 U.S. 1022 (1988) (reversing in part convictions under 18 U.S.C. § 1962(c) and stating that "[t]he focus of section 1962(c) is on the individual patterns of racketeering engaged in by a defendant, rather than the collective activities of the members of the enterprise, which are proscribed by section 1962(d)"). Courts scrutinize allegations of racketeering particularly closely because the "mere assertion of a RICO claim has an almost inevitable stigmatizing effect on those named as defendants. As a result, courts are charged with flushing out frivolous RICO allegations at the earliest possible stage of litigation." *Elsevier Inc. v. W.H.P.R., Inc.*, 692 F. Supp. 2d 297, 300 (S.D.N.Y. 2010); *see also*, *e.g.*, *Sanchez v. Hoosac Bank*, No. 12 CIV. 8455 (ALC), 2014 WL 1326031, at *4 (S.D.N.Y. Mar. 31, 2014)

(dismissing RICO claim and stating that "[a] plaintiff's burden is high when pleading RICO allegations 'as [c]ourts look with particular scrutiny at claims for a civil RICO given RICO's damaging effects on the reputations of individuals alleged to engaged in RICO enterprises and conspiracies.'") (citation omitted).

The failure to meet the "high burden" on any one of RICO's pleading requirements dooms a RICO claim as a matter of law. *E.g.*, *In re Integrated Res. Real Estate Ltd. Partnerships Sec. Litig.*, 850 F. Supp. 1105, 1144 (S.D.N.Y. 1993) ("The failure of any one element is fatal to a RICO claim."); *see also Turner v. New York Rosbruch/Harnik, Inc.*, 84 F. Supp. 3d 161, 170 (E.D.N.Y. 2015) (same). As against Donnenfeld, the Complaint fails to meet all of them.

A. The Complaint Fails to Allege Any Predicate Acts Committed by Donnenfeld

Allegations of predicate mail and wire fraud must be pled with particularity to satisfy the requirements of Rule 9(b). *Mills v. Polar Molecular Corp.*, 12 F.3d 1170, 1176 (2d Cir. 1993); *Kalimantano GmbH v. Motion in Time, Inc.*, 939 F. Supp. 2d 392, 412-13 (S.D.N.Y. 2013). The allegations "should state the contents of the communications, who was involved, where and when they took place, and explain why they were fraudulent." *Mills*, 12 F.3d at 1176; *see also Azkour v. Haouzi*, No. 11 CIV. 5780 (RJS) (KNF), 2012 WL 3667439, at *4 (S.D.N.Y. Aug. 27, 2012); *Odyssey Re (London) Ltd. v. Stirling Cooke Brown Holdings Ltd.*, 85 F. Supp. 2d 282, 301 (S.D.N.Y. 2000), *aff'd*, 2 F. App'x 109 (2d Cir. 2001). When, as here, predicate acts are based on mail and wire communications, a court must scrutinize such allegations given "the relative ease with which a plaintiff may mold a RICO pattern from allegations that, upon closer scrutiny, do not support it." *Crawford v. Franklin Credit Mgmt. Corp.*, 758 F.3d 473, 489 (2d Cir. 2014) (internal quotation and citation omitted); *Gross v. Waywell*, 628 F. Supp. 2d 475, 493

(S.D.N.Y. 2009) ("Unlike the other criminal offenses the statute enumerates as racketeering, use of the mail or wires is not inherently criminal. . . . Thus, to find the necessary criminality in those activities requires substantive inquiry beyond the mere fact of the communication . . . ."); *see also Helios Int'l S.A.R.L. v. Cantamessa USA, Inc.*, No. 12 Civ. 8205, 2013 WL 3943267, at *5 (S.D.N.Y. July 31, 2013).

Here, the Complaint does not allege a single mail or wire communication, by or from Donnenfeld, that constitutes a predicate act under RICO. Paragraph 715 of the Complaint identifies the emails constituting the alleged predicate acts on which Plaintiffs rely, and none of them have anything to do with Donnenfeld. And even if they did, the Complaint fails to plead why any of the emails were incidental to an essential part of the transactions, to the extent they can be deciphered, in which Donnenfeld was involved. *Odyssey Re (London) Ltd.*, 85 F. Supp. 2d at 301 ("while the use of the mail or wire need not be an essential element of the alleged fraud, it must at least be incidental to an essential part of the underlying fraudulent scheme") (internal quotation and citations omitted). Plaintiffs' failure to meet RICO's predicate act requirement compels, by itself, that their RICO claim be dismissed as against Donnenfeld.

B. The Complaint Fails to Allege that Donnenfeld Engaged in a Pattern of Racketeering Activity

"To plead a pattern of racketeering activity, a plaintiff must allege (1) at least two predicate acts of racketeering occurring within a ten-year period; (2) that these predicate acts are related to each other; and (3) that these predicate acts amount to or pose a threat of continuing criminal activity." *D.R.S. Trading Co., Inc. v. Fisher*, No. 01 CIV. 8028 (WHP), 2002 WL 1482764, at *3 (S.D.N.Y. July 10, 2002) (citing *GICC Capital Corp. v. Technology Fin. Group, Inc.*, 67 F.3d 463, 465 (2d Cir. 1995)). As to the second requirement, Plaintiffs fail to meet it as against Donnenfeld because the Complaint never alleges how any act or omission by Donnenfeld

related to the predicate acts allegedly committed by the Beechwood Defendants, with whom the Platinum Defendants are grouped in the RICO claim.

Nor does the Complaint meet the third requirement of a pattern of racketeering, commonly known as the "continuity" requirement. To meet it, a plaintiff may allege "either a closed-ended or an open-ended pattern of racketeering activity." *Id.* (citing *GICC Capital Corp.*, 67 F.3d at 465). Here, Plaintiffs do not state whether they are alleging a closed-ended or open-ended pattern of continuity, but they fail to meet the continuity requirement either way.

1. Plaintiffs Do Not Sufficiently Allege Close-Ended Continuity

To satisfy the closed-ended continuity requirement for a RICO pattern, the Second Circuit requires that the predicate acts extend over at least two years and has held that even a two-year duration, without more, is insufficient. *First Capital Asset Mgmt., Inc. v. Satinwood, Inc.*, 385 F.3d 159, 181 (2d Cir. 2004) (stating that although two years "may be the *minimum* duration necessary to find closed-ended continuity, the mere fact that predicate acts span two years is insufficient, without more, to support a finding of a closed-ended pattern"; affirming dismissal and finding closed-ended continuity was lacking on creditor's claim against debtor under RICO) (emphasis in original); *see also*, *e.g.*, *Reich v. Lopez*, 858 F.3d 55, 60 (2d Cir. 2017) (citing *H.J. Inc. v. Nw. Bell Tell. Co.*, 492 U.S. 229, 239 (1989)); *Senior Health Ins. Co.*, *supra*, 2018 WL 6378158, at *10 (where pattern is close-ended, "'predicate acts occurring over less than a two-year period may not be deemed a pattern'") (citing *First Capital Asset Mgmt.*, 385 F.3d at 168 and dismissing RICO claim whose predicate acts occurred over a period shorter than two years).

Here, the Complaint fails to meet the close-ended continuity requirement as to Donnenfeld because Donnenfeld's employment by Platinum – the only period during which any possible (though not alleged) predicate acts could have occurred – spanned a mere eight months,

from March 2016 through October 2016. The Complaint, moreover, alleges (at ¶713) that the "acts of racketeering have been continuous" by stating that "[t]here was repeated conduct during a period of time beginning in approximately February 2014 and continuing through June 2016." Yet Donnenfeld was employed by Platinum for only the last three months of that period and had nothing to do with the alleged wrongful acts that occurred before then. The Complaint accordingly fails, as against Donnenfeld, to meet the close-ended continuity requirement.

2. Plaintiffs Do Not Sufficiently Allege Open-Ended Continuity

Nor does the Complaint meet the open-ended continuity requirement, which involves "criminal activity 'that by its nature projects into the future with a threat of repetition.'" *Reich*, 858 F.3d at 60 (citing *H.J. Inc.*, 492 U.S. at 241). Indeed, there can be no open-ended continuity as to Donnenfeld because there is "no likelihood that the [alleged] fraud against [plaintiffs] will continue" when plaintiffs have "terminated [their] relationship with defendants." *D.R.S. Trading Co.*, 2002 WL 1482764, at *5; *see also Schlaifer Nance & Co. v. Estate of Warhol*, 119 F.3d 91, 97 (2d Cir. 1997).

That termination came in October 2016, when Donnenfeld ceased being on Platinum's payroll. (Donnenfeld Decl. ¶2-3) As to Donnenfeld, then, there neither is nor ever was a "threat of repetition " of "criminal activity" beyond October 2016 – though, in fact, Donnenfeld never engaged in any criminal activity to begin with, so there was never any such activity to repeat. The Complaint therefore fails to meet the open-ended continuity requirement.

C. The Complaint Fails to Allege that Donnenfeld Participated in a RICO Enterprise

To state a valid RICO claim as against Donnenfeld, the Complaint must allege that he "conduct[ed] the affairs of the RICO 'enterprise' through a pattern of racketeering activity." *Riverwoods Chappaqua Corp. v. Marine Midland Bank, N.A.*, 30 F.3d 339, 344 (2d Cir. 1994).

An "enterprise" is "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4). The enterprise allegation must be more than a "'naked assertion' devoid of 'further factual enhancement.'" *D. Penguin Bros. v. City Nat. Bank*, 587 F. App'x 663, 668 (2d Cir. 2014) (quoting *Iqbal*, 556 U.S at 678) (dismissing RICO claim for failure to plead a RICO enterprise); *see also Beter v. Murdoch*, No. 17 CIV. 10247 (GBD), 2018 WL 3323162, at *6 (S.D.N.Y. June 22, 2018).

Here, the enterprise alleged in ¶710 of the Complaint is, as to Donnenfeld, just the kind of "naked assertion" that cannot withstand a motion to dismiss. Paragraph 710 defines the "enterprise" as an "association-in-fact" among the Platinum Defendants, the Beechwood Defendants, and the Beechwood Entities, formed "for the common and continuing purpose described herein . . . ." Nowhere, however, does the Complaint allege how Donnenfeld was "associated with" or "conducted the affairs of each of the Beechwood Entities . . . ." (Complaint ¶709) Nor does it allege how Donnenfeld shared a common purpose with the Beechwood Entities – whom he is not alleged to have even known – or any of the other Defendants with which he is conclusory grouped. *See First Capital Asset Mgmt.,* 385 F.3d at 174 (for "an association of individuals to constitute an enterprise, the individuals must share a common purpose to engage in a particular fraudulent course of conduct and work together to achieve such purpose") (internal quotation and citations omitted); *D. Penguin Bros.*, 587 F. App'x at 668 (2d Cir. 2014) (there must be a "plausible inference" that defendants' actions are to advance the agenda of the enterprise "or for any shared purpose"). The Complaint also alleges nothing suggesting that Donnenfeld benefited from the alleged enterprise. *Id.* ("Notably absent from the

complaints' narrative are any allegations that [defendant] benefited in any way from the alleged enterprise").

Further, for an individual defendant to be liable under § 1962(c), he or she must have "participated in the operation or management of the enterprise itself" and "have some part in *directing* [the enterprise's] affairs." *Palatkevich v. Choupak*, No. 12 CIV. 1681 CM, 2014 WL 1509236, at *16 (S.D.N.Y. Jan. 24, 2014) (quoting *Reves v. Ernst & Young*, 507 U.S. 170, 179, 183 (1993) (minority shareholder and officer of one corporation that sent false information but was not alleged to have "any degree of control over the enterprise" did not "conduct" the enterprise)). Donnenfeld is never even referred to in the fact section of the Complaint, much less said to have "participated in the operation or management" of the alleged enterprise. The reality, as discovery would show if the claims against Donnenfeld were ever to get to that point, is that Donnenfeld was simply a lawyer who was instructed to perform certain legal work that he believed was bona fide. But as the Second Circuit has held, taking directions and performing tasks that are "'necessary or helpful' to the enterprise, without more, is insufficient to bring a defendant within the scope of § 1962(c)." *United States v. Viola*, 35 F.3d 37, 41 (2d Cir. 1994), *abrogated on other grounds by Salinas v. United States*, 522 U.S. 52 (1997); *see also LaSalle Nat'l Bank v. Duff & Phelps Credit Rating Co.*, 951 F. Supp. 1071, 1090 (S.D.N.Y. 1996) ("[s]imply because one provides goods or services that ultimately benefit the enterprise does not mean that one becomes liable [for a RICO violation] as a result") (citation omitted), *abrogated on other grounds by Anschutz Corp. v. Merrill Lynch & Co.*, 690 F.3d 98 (2d Cir. 2012).

In short, the Complaint makes no allegations whatsoever that Donnenfeld had any part in operating, directing, or benefiting from an association-in-fact among the Beechwood Defendants,

the Beechwood Entities, and the Platinum Defendants. On that ground, too, the Complaint fails to state a valid RICO claim against Donnenfeld.

D. Failing to Allege that Donnenfeld Committed Any Predicate Acts, the Complaint Fails to Allege that Any Such Acts Affected Interstate Commerce

In ¶714 and ¶719 of the Complaint, Plaintiffs make a vague and conclusory allegation that all defendants' actions affected interstate or foreign commerce, without explaining how the emails they list as predicate acts in ¶715 actually did so. That allegation, absent detailed factual support, is not enough to meet the requirement that predicate acts affect interstate commerce. *E.g.*, *Azkour*, *supra*, 2012 WL 3667439 at *5 (conclusion "that the communications occurred in 'interstate commerce'" is insufficient without "factual allegations to support that conclusion").

But even if the Complaint's conclusory allegation that the alleged predicate acts cited in ¶715 affected interstate commerce is deemed sufficient as to some defendants, it is not as to Donnenfeld. As already shown, Donnenfeld himself is not even alleged to have committed a predicate act, much less one that affected interstate commerce. On yet another ground, Plaintiffs' RICO claim fails as against Donnenfeld as a matter of law.

E. The Complaint Fails to Allege that Any Acts or Omissions by Donnenfeld Actually or Proximately Caused Plaintiffs' Alleged Injuries

Under 18 U.S.C. § 1962(c), Plaintiffs are required to show that the alleged pattern of predicate mail and wire fraud acts, and not some other acts, actually and proximately caused the injuries sought on their RICO claim. *E.g.*, *Hemi Grp., LLC v. City of N.Y.*, 559 U.S. 1, 11 (2010); *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 461 (2006) (the law requires that "the alleged violation led directly to the plaintiff's injury"). "A predicate act does not proximately cause an injury if it merely furthers, facilitates, permits or conceals an injury that happened or could have happened independently of the act." *Vicon Fiber Optics Corp. v. Scrivo*, 201 F.

Supp. 2d 216, 219 (S.D.N.Y. 2002); *see also Leung v. Law*, 387 F. Supp. 2d 105, 122 (E.D.N.Y 2005) (no proximate causation where the mail and wire fraud alleged "may have concealed, but did not cause, [Plaintiff's] losses"); *Moeller v. Zaccaria*, 831 F.Supp. 1046, 1054 (S.D.N.Y. 1993) (fraudulent representations did not proximately cause plaintiffs' injury when the injury may have happened without the acts of mail and wire fraud).

Here, the Complaint never alleges that Donnenfeld committed a predicate act, so there is no act or omission on his part that could have actually or proximately caused Plaintiffs any harm. On that ground, too, Plaintiffs' RICO claim fails as against Donnenfeld as a matter of law.

IV

PLAINTIFFS' CLAIMS FOR BREACH OF FIDUCIARY DUTY (FIRST AND SECOND COUNTS) SHOULD BE DISMISSED AS AGAINST DONNENFELD FOR FAILURE TO PLEAD THE ELEMENTS OF A FIDUCIARY DUTY CLAIM, FOR LACK OF PARTICULARITY, AND FOR FAILURE TO ALLEGE THAT DONNENFELD, AN ATTORNEY, EVER PLACED HIS OWN INTERESTS ABOVE PPVA'S

Plaintiffs' claims against Donnenfeld for breach of fiduciary duty are just as defective as their fraud and RICO claims. Under New York law, "[t]o state a claim for breach of fiduciary duty, plaintiffs must allege that (1) defendant owed them a fiduciary duty, (2) defendant committed misconduct, and (3) they suffered damages caused by that misconduct." *Burry v. Madison Park Owner LLC*, 84 A.D.3d 699, 699-700 (1st Dep't 2011).[4] Although Rule 9(b)

[4] Although the "internal affairs doctrine creates a presumption in favor of applying the law of the state of incorporation" – here, Platinum Management is alleged to be a Delaware LLC (Complaint ¶37) – "the presumption is not irrebuttable; if there is a state with a more significant relationship with the parties and the dispute at issue, the court should apply that state's law." *In re MF Glob. Holdings Ltd. Inv. Litig.*, 998 F. Supp. 2d 157, 179 (S.D.N.Y. 2014), *aff'd sub nom. In re MF Glob. Holdings Ltd. Inv. Litig. (DeAngelis v. Corzine)*, 611 F. App'x 34 (2d Cir. 2015) (internal quotations and citations omitted). Here, all of the alleged acts relevant to Donnenfeld, to the extent decipherable, occurred in New York, which was Platinum Management's principal place of business (Complaint ¶37). New York accordingly has a far more significant relationship with this dispute than does Delaware, which has no known relationship at all.

typically applies only to fraud claims, it "does apply to a claim for breach fiduciary duty when the claimed breach rests upon the same allegations as a fraud claim." *Breslin Realty Assocs. v. Park Invs., Ltd.*, No. 91 CV 1614 (TCP), 1991 WL 340576, at *5 (E.D.N.Y. Dec. 23, 1991); *see also Frota v. Prudential-Bache Secs, Inc.*, 639 F. Supp. 1186, 1193 (S.D.N.Y. 1986); *Burry*, 84 A.D.3d at 700 (fiduciary duty claim whose alleged misconduct is grounded in fraud must be pleaded with particularity); *Palmetto Partners, L.P. v. AJW Qualified Partners, LLC*, 83 A.D.3d 804, 808 (2d Dep't 2011). Because the allegations underlying Plaintiffs' fiduciary duty claims are the same as those underlying their fraud claim, those allegations must similarly meet the particularity requirements embodied in Rule 9(b). As against Donnenfeld, the Complaint comes nowhere close to doing so as to each element of a breach of fiduciary duty claim.

First, the Complaint fails to allege how Donnenfeld even owed a fiduciary duty to PPVA in the first place. The Complaint alleges (at ¶46) simply that Donnenfeld, in March 2016, "was hired as an employee of Platinum Management," without ever saying what acts Donnenfeld is alleged to have done in that capacity. But as a general rule, "under New York law, an employer-employee relationship is not fiduciary in nature." *Lind v. Vanguard Offset Printers, Inc.*, 857 F. Supp. 1060, 1067 (S.D.N.Y. 1994) (dismissing breach of fiduciary duty claim where the purported fiduciary relationship was based on the plaintiff's status as an employee). It follows that breach of fiduciary duty claims against employees, as opposed to corporate officers and directors, are "available only where the employee has acted directly against the employer's interests – as in embezzlement, improperly competing with the current employer, or usurping business opportunities." *Grika v. McGraw*, 55 Misc. 3d 1207(A), 2016 WL 8716417, at *15 (N.Y. Sup. 2016), *aff'd sub nom. L.A. Grika on behalf of McGraw*, 161 A.D.3d 450 (1st Dep't 2018) (quoting *Veritas Capital Mgmt., L.L.C. v. Campbell*, 82 A.D.3d 529, 530 (1st Dep't

2011)); *see also Delville v. Firmenich Inc.*, 920 F. Supp. 2d 446, 469 (S.D.N.Y. 2013). The "mere failure of an employee to perform assigned tasks does not give rise to a cause of action alleging breach of [the duty of loyalty and good faith]." *Grika*, 2016 WL 8716417, at *15 (alteration in *Grika*) (quoting *Cerciello v. Admiral Ins. Brokerage Corp.*, 90 A.D.3d 967, 968 (2d Dep't 2011). Because the Complaint fails to plead what Donnenfeld is alleged to have done in his capacity as a Platinum Management employee, the fiduciary duty claims against him are invalid for failure to plead that he owed a fiduciary duty to PPVA.

Second, even if Donnenfeld were properly alleged to have had a fiduciary duty to PPVA, Plaintiffs' breach of fiduciary duty claims would still fail as against him because the Complaint never alleges at all, much less with particularity, any "misconduct" in which he supposedly engaged. *E.g.*, *RSSM CPA LLP v. Bell*, 162 A.D.3d 554, 555 (1st Dep't 2018) (allegations that former employee used confidential information to solicit business away from employer were insufficiently particularized since they did not identify any clients or personnel). Nor can the Complaint meet the misconduct requirement by grouping Donnenfeld with the other Platinum Defendants, since group pleading does not meet the particularity requirements of Rule 9(b). *See Grika*, 2016 WL 8716417, at *15 (dismissing fiduciary duty claim where the complaint made no "specific allegations of wrongdoing by these individuals . . . and instead impermissibly use[d] 'group pleading,' which does not comply with the heightened pleading requirement of CPLR 3016(b)").

Third, the Complaint fails to allege that Donnenfeld, as an attorney, placed his own interests above those of PPVA in carrying out his allegedly wrongful acts – acts that cannot be deciphered in any event. *E.g.*, *Chateau Hip v. Gilhuly*, No. 95 CIV. 10320 (JGK), 1996 WL 437929, at *5 (S.D.N.Y. Aug. 2, 1996) ("Even assuming that the Court could entertain the

breach of fiduciary duty claim against the Law Firm defendants, however, the Second Amended Complaint lacks sufficient allegations to sustain such a claim. A claim for breach of fiduciary duty against an attorney must allege that the attorney took advantage of or placed his interests above those of his client.") (citing *Greene v. Greene*, 56 N.Y.2d 86 (1982)). Moreover, Plaintiffs must "plead facts showing deceitful intent." *Id.* (citing *Flickinger v. Harold C. Brown & Co., Inc.*, 947 F.2d 595, 599 (2d Cir. 1991), *in turn citing Horn v. 440 East 57th Co.*, 151 A.D.2d 112, 120 (1st Dep't 1989)) (dismissing fiduciary duty claim for failure to include "indispensable allegations" of deceitful intent and attorney's placement of own interests above client's interests). Since the Complaint alleges no acts by Donnenfeld at all, it obviously does not allege that he deceitfully ever intended to place his own interests above those of PPVA. On that separate ground, too, the fiduciary duty claims against Donnenfeld fail as a matter of law and should be dismissed.

V

PLAINTIFFS' CLAIMS AGAINST DONNENFELD ARE ALL BARRED BY PLATINUM'S RELEASE OF DONNENFELD

Although the allegations in the Complaint are, by themselves, insufficient to state a valid claim against Donnenfeld, Platinum's release of Donnenfeld, discussed in sub-part B of the fact section, provides an additional independent ground on which Plaintiffs' claims should be dismissed. The release also underscores why any amended claims against Donnenfeld would be futile, and why a dismissal based on the release should be with prejudice.

Although the release is not referred to in the Complaint, it may nonetheless be taken into account on this motion because it bears directly on the validity of the claims against Donnenfeld and has long been within Plaintiffs' possession and knowledge. As the Second Circuit has stated, "[p]laintiffs' failure to include matters of which as pleaders they had notice and which

were integral to their claim – and that they apparently most wanted to avoid – may not serve as a means of forestalling the district court's decision on the motion [to dismiss]." *Cortec Indus., Inc. v. Sum Holding L.P.*, 949 F.2d 42, 44 (2d Cir. 1991); *see also In re Lyondell Chem. Co.*, 491 B.R. 41, 50 (Bankr. S.D.N.Y. 2013), *aff'd*, 505 B.R. 409 (S.D.N.Y. 2014) (granting motion to dismiss; "plaintiffs cannot willfully close their eyes to documents in their possession that are integral to their claims."); *Ginx, Inc. v. Soho All.*, 720 F. Supp. 2d 342, 352 (S.D.N.Y. 2010), *as corrected* (Aug. 19, 2010) ("When plaintiffs fail to include any reference to documents that they knew of that are integral to their claim, there is no need for the court to convert the motion to a summary judgment motion in order to take them into account.").

Platinum's release of Donnenfeld (*see* Ex. 1) bars Plaintiffs from asserting any claims against him, including the fraud, breach of fiduciary duty, and RICO claims asserted in the Complaint. *E.g.*, *Frydman v. Akerman*, 280 F. Supp. 3d 418 (S.D.N.Y. 2017) (granting summary judgment dismissing all claims, including RICO and breach of duty of loyalty claims, on the basis of a release); *Consorcio Prodipe, S.A. de C.V. v. Vinci, S.A.*, 544 F. Supp. 2d 178, 189, 192 (S.D.N.Y. 2008) (granting defendant summary judgment, on the basis of "broad releasing language," dismissing RICO, fraudulent inducement, and other claims); *Patterson v. Calogero*, 150 A.D.3d 1131, 1132 (2d Dep't 2017) (claims for fraud and breach of fiduciary duty, among others, were barred by a general release in stock purchase and severance agreement).

Nor is there any question that the release, embodied in Donnenfeld's September 22, 2016 email memorializing his verbal agreement with Platinum's principals (Ex. 1), is valid and enforceable. Under New York law, "any release of claims [is] analyzed . . . as a contract whose interpretation is governed by principles of contract law." *Johnson v. Lebanese Am. Univ.*, 84 A.D.3d 427, 429 (1st Dep't 2011) (internal quotation and citation omitted). In accordance with

those principles, "[i]t is well settled at common law that a letter of confirmation sent to the other party to an oral agreement is deemed to be a total integration of the terms of the agreement where the other party makes no response to it *and* the other party subsequently performs under the terms." *Araslmowicz v. Bestfoods, Inc.*, 81 F. Supp. 2d 526, 530 (S.D.N.Y. 2000) (alterations in original); *see also Petereit v. S.B. Thomas, Inc.*, 63 F.3d 1169, 1178 (2d Cir. 1995) (certain plaintiffs held to have accepted terms of letters confirming agreements by their performance under the agreements); Restatement (Second) of Contracts § 209 (1981) ("The intention of the parties may also be manifested without explicit statement and without signature. A letter, telegram or other informal document written by one party may be orally assented to by the other as a final expression of some or all of the terms of their agreement.").

Platinum's release of Donnenfeld therefore need not have come in a more formal agreement signed by both sides. Platinum's assent to Donnenfeld's September 22, 2016 email (Ex. 1) suffices to bind Platinum, including PPVA, to the release. That is all the more so inasmuch as Plaintiffs' own lead counsel represented to Donnenfeld that the release did not require liquidator approval – a representation on which Donnenfeld relied in not seeking such approval at that time, as he would otherwise have done, and in performing further work pursuant to the severance agreement, as he otherwise would not have done.[5] (Donnenfeld Decl. ¶5) To the extent, then, Plaintiffs argue that the release is somehow invalid, they are estopped from doing so. *E.g.*, *Richter v. Zabinsky*, 257 A.D.2d 397, 398 (1st Dep't 1999) (validating payee's

[5] By email sent by Mr. Gluck to Donnenfeld's counsel on the afternoon of January 8, 2019, the day before this motion was filed, Mr. Gluck expressed the position that Platinum's release of Donnenfeld had to have been approved by PPVA's liquidators and the Cayman Islands Court to be valid. That is the exact opposite of what Mr. Gluck told Donnenfeld in October 2016, and Plaintiffs are now estopped from taking a contrary position. If Plaintiffs continue to take that position, Mr. Gluck will become a material fact witness in the case.

oral agreement to release maker from obligations under note, and stating that "under standard tenets of promissory estoppel, it would be unconscionable not to enforce this agreement").

CONCLUSION

For the foregoing reasons, Plaintiffs' claims against Donnenfeld should all be dismissed under Rule 12(b)(6) for failure to state a claim for relief. In the event the Court dismisses the claims on the basis of Platinum's release of Donnenfeld, that dismissal should be with prejudice.

Dated: New York, New York
January 9, 2019

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