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.

Case No. 1:18-cv-10936-JSR

MEMORANDUM OF LAW IN SUPPORT OF DAVID OTTENSOSER'S MOTION TO DISMISS THE COMPLAINT

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We respectfully submit this memorandum of law in support of David Ottensoser's motion to dismiss the Complaint against him under Rules 8, 9, and 12(b)(6) of the Federal Rules of Civil Procedure.

PRELIMINARY STATEMENT

The gravamen of the massive complaint filed in this action is that key principals of Platinum Management (NY) LLC participated in fraudulent schemes to enrich themselves, their families, and their close friends at the expense of the PPVA Fund and its investors. Towards that goal, Platinum Management's founders, owners, and managers created Beechwood, and then allegedly caused Beechwood to enter into transactions with Platinum Management to: (i) falsely inflate the PPVA Fund's net asset value, (ii) acquire interests in the PPVA Fund's most valuable assets; and (iii) otherwise enrich themselves at the expense of the PPVA Fund and its investors. Although the Complaint specifically identifies certain founders, owners, and managers of Platinum Management as owning, controlling, and ultimately benefitting from Beechwood, David Ottensoser is not among those so identified.

Despite controlling over 13 million documents from Platinum Management's servers "that may be relevant to this action," (DE 21¶ 13), Plaintiffs fail in their 765-paragraph Complaint to allege a single fact even suggesting that Ottensoser was aware of any of the alleged schemes at issue or that he benefitted from them in any way. Ottensoser is barely even mentioned in the hundreds of pages of documents relating to the legal proceedings involving Platinum Management that are referenced in the Complaint or attached to it as exhibits. All Plaintiffs allege in the eight paragraphs that Ottensoser's name appears in the Complaint is that Ottensoser, at various times, served as General Counsel or Chief Compliance Officer of Platinum Management, and that he served as General Counsel of Beechwood in Beechwood's formative stages. Plaintiffs baldly assert that Ottensoser "was actively involved" in the fraudulent schemes

at issue and "was instrumental" in the creation of Beechwood. But there are no facts whatsoever alleged to support those conclusory allegations.

All Plaintiffs can muster in support of their case against Ottensoser are a few unremarkable emails that reflect Ottensoser's role as an attorney and compliance officer for Platinum Management. Nothing in those emails comes close to raising even the slightest inference that Ottensoser had knowledge of any wrongdoing or did anything to further it. None of those allegations describe any activity by Ottensoser that satisfies any element of any of the claims Plaintiffs assert against him. Nor is there any allegation anywhere in the entire Complaint that Ottensoser was one of Platinum Management's principals, family members, or friends who were enriched by the alleged wrongdoing.

To compensate for these fatal shortcomings with regard to Ottensoser, Plaintiffs resort to lumping him in with the "Platinum Defendants" and the "Beechwood Defendants," and then allege that those defendants knowingly breached fiduciary duties, committed fraud, and aided and abetted fraud. But it is well established that in these circumstances, such group pleading is an inadequate substitute for specific factual allegations about Ottensoser which are necessary to state a claim against him. The paltry allegations concerning Ottensoser do not satisfy even the liberal pleading standards of Rule 8, let alone the heightened standards of Rule 9(b), which are applicable to the claims asserted against Ottensoser because they sound in fraud.

For all these reasons, and the reasons set forth below, each and every claim asserted against Ottensoser in the Complaint should be dismissed with prejudice.

FACTUAL BACKGROUND

To avoid unnecessary duplication, Ottensoser identifies here only those allegations in the Complaint that specifically refer to him.

Plaintiffs allege that Ottensoser was an attorney who, at certain relevant times, "served as general counsel or Chief Compliance Officer of Platinum Management." Compl. ¶ 48.[1] In those capacities, since Platinum Management was PPVA's general manager, Ottensoser was "obligated to manage and operate PPVA in good faith." (¶ 33). Instead, Ottensoser, along with the other Platinum Defendants, Beechwood Defendants, and other individuals and entities, allegedly "breached this duty, and . . . materially assisted in this breach." (¶ 34). According to the Complaint, Ottensoser "was actively involved in the First and Second Schemes," "was instrumental in the creation of Beechwood," and "worked as general counsel for Beechwood during its initial stages." (¶¶ 48). *See also* ¶¶ 237, 727 (alleging that Platinum Management and Beechwood shared overlapping management, including Ottensoser).

The Complaint also references three unremarkable email exchanges involving Ottensoser. *First*, an email exchange relating to Platinum Management's engagement of Bryan Cave as outside counsel "to assist in the creation of the Beechwood Entities." (¶ 212). That email exchange consists of a Bryan Cave attorney informing Ottensoser that he needs the "name of the Newco" in order to "open the new matter," followed by an email from Ottensoser to David Levy asking, "Beechwood Re Investment LLC (or something like that)." (Compl. Ex. 38).[2]

Second, an email from a Bryan Cave attorney to Levy and Ottensoser attaching a draft of Beechwood's LLC Operating Agreement and subscription documents (Compl. Ex. 40), which documents were allegedly used by the Platinum and Beechwood Defendants "to grant Nordlicht, Bodner, Huberfeld, and Levy majority ownership and control over Beechwood." (¶217).[3]

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[1] All further citations in this memorandum to paragraphs of the Complaint shall be in the following format: (¶__).

[2] For the Court's convenience, Exhibit 38 to the Complaint is annexed to the Declaration of Eric M. Creizman, dated January 9, 2019 ("Creizman Declaration"), as Exhibit A.

[3] Exhibit 40 to the Complaint is annexed to the Creizman Declaration as Exhibit B.

Third, an email exchange in which Ottensoser, in his capacity as Platinum's Chief Compliance Officer, purportedly "confirms" to an outside brokerage firm that David Steinberg's wife purchased senior secured bonds of Black Elk. (Compl. Ex. 49).[4] The referenced email exchange involving Ottensoser, however, does not suggest in the slightest bit that he was in any way involved in effecting the trade, that he was aware of any scheme or wrongdoing in connection with that transaction, or that this isolated transaction would even put Ottensoser on notice of any scheme, let alone the complex "Black Elk" and other schemes alleged in the Complaint.[5]

Beyond the above references to Ottensoser, there are no other allegations in the Complaint that mention him, let alone discuss any facts relating to any conduct on his part. Nevertheless, without any specific factual allegations relating to Ottensoser, Plaintiffs assert claims against him for: (i) breaching the fiduciary duties of care and good faith owed to the PPVA Fund and its investors (First Count); (ii) breaching the fiduciary duty of loyalty owed to the PPVA Fund and its investors (Second Count); (iii) fraud (Third Count); (iv) aiding and abetting the Platinum Defendants' breaches of fiduciary duties (Fourth Count); (v) aiding and abetting fraud (Fifth Count); and (vi) violating the Civil RICO statute (Thirteenth Count).

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[4] Exhibit 49 to the Complaint is annexed to the Creizman Declaration as Exhibit C.

[5] Incidentally, Plaintiffs blatantly mischaracterize the email exchange in Exhibit 49. The referenced email exchange shows that Ottensoser *did not* "confirm" that Steinberg's wife purchased the Black Elk bonds. Rather, the plain language of Ottensoser's email to the outside brokerage represents that David Steinberg had control over his wife's trading account. Moreover, the bonds were not sold to a *Beechwood* entity, but to a *Platinum Management* entity, PPLO (¶ 93), which appears to be contrary to Plaintiffs' theory of the case, i.e., that "[t]he Beechwood Defendants also caused certain Beechwood entities to purchase the 13.75% Senior Secured Notes. . . ." (¶ 318).

ARGUMENT

To avoid unnecessary duplication, Ottensoser adopts the legal analysis set forth in David Bodner's memorandum of law in support of his motion to dismiss the Complaint (the "Bodner Memorandum") concerning the pleading standards relevant to a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure, and the pleading standards under Rules 8(a) and 9(b), as they relate to the claims made against the "Platinum Defendants" and the "Beechwood Defendants." Suffice it to say, even the minimal pleading requirements of Rule 8(a)(2) are violated, where, as here, the Complaint relies on group pleading, and thus "fails to give each defendant fair notice of the claims against it." *Holmes v. Allstate Corp.*, 2012 WL 627238, at *22 (S.D.N.Y. Jan. 27, 2012), *adopted by* 2012 WL 626262 (S.D.N.Y. Feb. 27, 2012).[6] It follows that Plaintiffs' extravagant reliance on group pleading here cannot possibly satisfy the heightened standards of Rule 9(b), which are applicable to the claims against Ottensoser, "by making vague allegations about the defendants as a unit." *S.E.C. v. U.S. Envtl., Inc.*, 82 F. Supp. 2d 237, 241 (S.D.N.Y. 2000).

Absent the group pleading allegations concerning the "Platinum Defendants" group and the "Beechwood Defendants" group, the Complaint provides no factual allegations—as opposed to conclusory assertions—that would enable Plaintiffs to satisfy any of the necessary elements of any of the claims averred against Ottensoser.[7]

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[6] *See also, e.g., United States v. Private Sanitation Indus. Ass'n of Nassau/Suffolk, Inc.*, 793 F. Supp. 1114, 1130 (E.D.N.Y. 1992) (holding that "the lack of clarity" created by the government's failure to clearly allege which of the 39 defendants was responsible for each of the 195 alleged acts of racketeering "plagues almost every page of the complaint . . [and would] have certainly required dismissal of many of the alleged racketeering acts under Rule 8(a) simply for failure to put each defendant on notice as to the claims against him.")

[7] As explained in the Bodner Memorandum, Plaintiffs cannot rely here on the "group pleading doctrine," which allows a plaintiff in a securities fraud action to rely on a presumption that written statements that are group-published are statements made by all individuals "with direct involvement in the everyday business of the company." *City of Pontiac Gen. Emps.' Ret.*

Here, the Complaint merely alleges that Ottensoser served at various times as General Counsel and Chief Compliance Officer of Platinum Management and General Counsel of Beechwood in its initial stages. The Complaint references emails that show nothing more than the fact that Ottensoser, as would be expected in his then-role as Platinum Management's General Counsel, dealt with outside counsel in the formation of the Beechwood entities, and, as would be expected in his later role as Platinum Management's Chief Compliance Officer, responded to questions from a brokerage about a particular trade. Yet the Complaint alleges no facts whatsoever that even remotely suggest that Ottensoser sought to enrich the founders, owners, or managers of Platinum Management at the expense of PPVA, or that he was aware of any such misconduct by others. Nor are there any facts alleged that would suggest he had any motive to do so, since he was not one of the individuals or entities that the Complaint specifically identifies as having devised or benefitted from the schemes at issue. (*See, e.g.* ¶¶ 57, 194, 196, 228).

Sys. V. Lockheed Martin Corp., 875 F. Supp. 2d 359, 373 (S.D.N.Y. 2012). As an initial matter, the doctrine is limited to "group-published documents, such as SEC filings and press releases." *Elliot Assoc., L.P. v. Covance, Inc.*, 2000 WL 1752848, at *12 (S.D.N.Y. Nov. 28, 2000). The claims here relate more broadly to schemes to defraud investors in the PPVA Fund beyond statements in written documents. *See, e.g., Blank v. Tripoint Global Equities, LLC*, 338 F. Supp. 3d 194, 211 (S.D.N.Y. 2018) ("[T]he group pleading doctrine applies only to collectively-authored written documents, not to oral statements.").

Furthermore, there are no particularized allegations whatsoever that Ottensoser had any involvement in the creation, formulation, or dissemination of any public filings containing misrepresentations relevant to the scheme. *See, e.g., In re Braskem S.A. Secs. Litig.*, 246 F. Supp. 3d 731, 762 (S.D.N.Y. 2017). Moreover, to invoke the group pleading doctrine, the plaintiff "must allege facts sufficient to show that the defendants had knowledge that the statements were false at the time they were made," which Plaintiffs do not do here. *In re Citigroup, Inc. Secs. Litig.*, 330 F. Supp. 2d 367, 381 (S.DN.Y. 2004). Finally, the group pleading doctrine "can only be invoked to attribute fraudulent statements to defendants, remaining wholly insufficient to plead scienter." *S.E.C. v. Espuelas*, 579 F. Supp. 2d 461, 482 n.10 (S.D.N.Y. 2008). Plainly, the Complaint is devoid of any factual allegations supporting scienter on the part of Ottensoser with respect to any of the alleged wrongdoing.

Ottensoser also is not identified as one of the individuals who owned or controlled any of the Beechwood entities. (*See, e.g.* ¶¶ 68, 75, 76, 217, 220, 229). Furthermore, Ottensoser is not alleged to have had any involvement in valuation of the PPVA Fund's assets or in making statements to the PPVA Fund's investors about the Fund's net asset value. (*See, e.g.,* ¶¶ 153-190). He also is not alleged to have had any part in effectuating any aspect of the allegedly illicit transactions between Platinum Management and Beechwood.

In these circumstances, Plaintiffs woefully fail to allege sufficient facts to support even the most basic elements of their common law claims against Ottensoser, and consequently, cannot even come close to adequately alleging facts to support their RICO claim against him. Accordingly, the Complaint should be dismissed in its entirety with respect to Ottensoser.

CONCLUSION

"An amendment to a pleading is futile if the proposed claim could not withstand a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6)." *Lucente v. Int'l Bus. Machs. Corp.*, 310 F.3d 243, 258 (2d Cir. 2002)); *Ruffolo v. Oppenheimer & Co*., 987 F.2d 129, 131 (2d Cir. 1993) ("Where it appears that granting leave to amend is unlikely to be productive, however, it is not an abuse of discretion to deny leave to amend.").

The Plaintiffs have had control of the Platinum Management computer servers and access to millions of documents relevant to this action long before misguidedly bringing this case against Ottensoser. Despite their prolix complaint and identification of documents and emails that they purport substantiate their claims of wrongdoing against others, Plaintiffs are unable to muster a single specific factual allegation, email, or document that even remotely supports an inference that Ottensoser was in any way involved in the alleged wrongdoing. Consequently, the Complaint's claims against Ottensoser should be dismissed with prejudice.

For all the foregoing reasons, David Ottensoser respectfully requests the Court enter an order dismissing the Complaint as against him, with prejudice.

Dated: January 9, 2019

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