Eliot Lauer
Jacques Semmelman
Gabriel Hertzberg
CURTIS, MALLET-PREVOST,
COLT & MOSLE LLP
101 Park Avenue
New York, New York 10178-0061
Telephone: 212-696-6000
Facsimile: 212-697-1559
Email: elauer@curtis.com
jsemmelman@curtis.com
ghertzberg@curtis.com

Attorneys for Defendant David Bodner

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE PLATINUM-BEECHWOOD LITIGATION,	No. 18 Civ. 6658 (JSR)
MARTIN TROTT and CHRISTOPHER SMITH, as Joint Official Liquidators and Foreign Representatives of PLATINUM PARTNERS VALUE ARBITRAGE FUND L.P. (in OFFICIAL LIQUIDATION) and PLATINUM PARTNERS VALUE ARBITRAGE FUND L.P. (in OFFICIAL LIQUIDATION), Plaintiffs, v. PLATINUM MANAGEMENT (NY) LLC, *et al.*, Defendants.	No. 18 Civ. 10936 (JSR)

MEMORANDUM OF LAW OF DEFENDANT DAVID BODNER IN SUPPORT OF HIS MOTION TO DISMISS THE FIRST AMENDED COMPLAINT

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Defendant David Bodner respectfully submits this memorandum of law in support of his motion to dismiss the First Amended Complaint (the "FAC") of the Joint Official Liquidators (the "JOLs") of Platinum Partners Value Arbitrage Fund LP ("PPVA") pursuant to Federal Rule of Civil Procedure 12(b)(6).

PRELIMINARY STATEMENT

The FAC fails to state a claim against David Bodner. The JOLs have done nothing to cure the deficient group pleading of the original complaint. Bodner is again alleged generally to be a member of two groups — the "Platinum Defendants" and the "Beechwood Defendants" — based entirely on his ownership interests, not on his conduct. Nowhere in the FAC is there a factual allegation of specific wrongdoing by Bodner that could render him legally responsible for the alleged conduct of those groups.

The FAC is, to be sure, heavier than its predecessor on conclusory assertions. The FAC claims that Bodner was "involved in every aspect of the First and Second Schemes" — the alleged schemes to inflate the net asset value of PPVA, and to transfer assets from PPVA to Beechwood — but not one factual allegation demonstrates any actionable participation in either scheme. (FAC ¶ 78).[1] Similarly, the FAC accuses him of "orchestrating the Black Elk Scheme" and "orchestrating the series of transactions among PPVA, Beechwood and/or affiliated entities in or to encumber or strip PPVA's remaining valuable assets," but the FAC is bereft of facts that support these conclusory assertions. (FAC ¶ 78). The FAC alleges no fact that identifies a specific act, statement, omission, transaction, or decision by him that injured PPVA or assisted others in doing so.

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[1] Emphasis is supplied throughout this memorandum unless otherwise noted.

The JOLs' failure to allege a single hard fact is not coincidental. There are no such facts. Bodner was a minority founder of Platinum almost 20 years ago, but was not a fund manager. Bodner was never an officer, director, or employee of Platinum. He made personal and family investments in 2013 as a co-founder of Beechwood, but was not a reinsurance professional, and was not an officer, director, or employee of Beechwood. It is telling that for almost a year, the JOLs have had access to the entire corpus of internal and external Platinum communications — 13 million documents, they admit — and describe in careful detail each of the transactions they claim defrauded PPVA. (ECF No. 21 at ¶ 13; ECF No. 155 at 29). Yet not a single document reflects any input from Bodner on any of those transactions. Not a single document reflects that Bodner instructed one of the fund managers (or anyone else) at Platinum Management to execute a transaction, to make a representation to an investor or potential investor, or to place a valuation on a PPVA asset. Not one document demonstrates Bodner's participation in the day-to-day running of Platinum or Beechwood.

Whether examined under the heightened pleading rules of Rule 9(b) or the notice pleading rules of Rule 8, the FAC does not hold up. It does not state a claim as to Bodner.

FACTS ALLEGED AGAINST BODNER

The FAC alleges, as did the original complaint, that Bodner co-founded Platinum Management and PPVA in 2001, and raised initial investment funds for those entities from his religious community. (FAC ¶¶ 75, 76). The FAC also alleges, as did the original complaint, that he co-founded Beechwood and owned Beechwood stock through various Beechwood trusts. (FAC ¶¶ 77, 205).

New to the FAC are vague, general allegations that Bodner: met with (unnamed) investors and attorneys; interviewed (unnamed) personnel; and met with (unidentified) investment partners. (FAC ¶ 12(iv)). None of these meetings is described by date or location or

even circumstance. Also new to the FAC is the allegation that Bodner used a shared secretary, who sometimes printed or forwarded emails for him to read. (FAC ¶ 82 & Exs. 2, 31).

There are no allegations against Bodner that could be regarded fairly as factual. The remaining references to him are conclusory accusations of "orchestrating" or "planning" or being "involved in" or "participating in" the various schemes alleged in the FAC — always in an entirely undescribed and unidentified way. (FAC ¶ 12(iv) (Bodner was "involved in sourcing investment opportunities" and "also was involved in the management and operation of PPVA and of Platinum Management"); ¶ 78 ("orchestrating" various schemes); ¶ 83 ("involved in sourcing investment opportunities"); ¶ 84 ("involved in management and operation of PPVA"), ¶ 86 ("participated in improperly inflating values of PPVA's assets"); ¶ 453 ("participated in the actions and transactions with respect to Black Elk and the Black Elk Scheme"); ¶ 594 ("developed, coordinated and accomplished" Second Scheme transactions with Beechwood); ¶ 618 ("began planning" to sell Agera to Beechwood)). In each case, following an introductory paragraph where Bodner is introduced as one member of a group "involved in" or "participating in" or "planning" some scheme, he is not mentioned again. His actual involvement — his conduct — is never alleged.

In a similar fashion, Bodner is characterized as a "concealed owner" and "co-lead manager" of Beechwood, wielding "power and control via intermediaries," whose "approval was required for all significant decisions including all investment decisions." (FAC ¶ 85). No specific decision or investment decision is identified, nor are any particulars provided as to Bodner's alleged "approval."

These are not facts. These are labels and conclusions. The FAC does not identify a single investment or managerial decision at Platinum or Beechwood that Bodner made, directed, or authorized. Absent any such facts, the FAC does not state a claim against Bodner.

ARGUMENT

I. The FAC's Group Pleading Is Deficient

To survive a motion to dismiss under Rule 12(b)(6), the FAC 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 F. App'x 33, 34 (2d Cir. 2001); *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 state a claim for relief. *See Atuahene*, 10 F. App'x at 34 (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 172208, at *16 (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 complaint must plead facts that separately establish each defendant's acts or omissions as part of the fraud. *See Odyssey Re (London) Ltd. v. Stirling Cooke Brown Holdings Ltd.*, 85 F. Supp. 2d 282, 293-94 (S.D.N.Y. 2000)), *aff'd*, 2 F. App'x 109 (2d Cir. 2001); *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,[2] (FAC ¶¶ 74), but there is no specific factual allegation that Bodner himself engaged in any wrongful act. The FAC includes no specific factual allegations that, if true, would establish that he himself participated in, or provided assistance to, any fraudulent scheme or breach of fiduciary duty implemented by either of these groups.

The FAC's attempts to cure the group pleading deficiencies of the original complaint only highlight the lack of any facts. The JOLs have merely added a sentence: "Unless otherwise noted, all references herein to the Platinum Defendants means that each of the persons named as such were involved in the act, omission, misstatement, or breach at issue." (FAC ¶ 34). A similar sentence has been inserted following the definition of the Beechwood Defendants: "Unless otherwise noted, all references herein to the Beechwood Defendants means that each of the persons named as such were involved in the act, omission, misstatement, or breach at issue." (FAC ¶ 36). This is nothing more than group pleading, using more words. It is not a remedy for the FAC's failure to specify what conduct by Bodner — not by others, but by Bodner — is alleged to have caused damage to PPVA.

The group pleading failure with respect to Bodner is illustrated in the Third Count of the FAC, for aiding and abetting a breach of fiduciary duty. It charges that the group labeled "Individual Platinum Defendants" participated in Platinum Management's breaches of its fiduciary obligations to PPVA by: (i) "orchestrating transactions . . . designed to support the inflated NAV [net asset value] ascribed to PPVA's assets;" (ii) "causing PPVA and its subsidiaries to engage in transactions to benefit the Platinum Defendants, BEOF Funds and the Beechwood Defendants;" (iii) "participating in the Black Elk Scheme;" and (iv) "engaging in

[2] The FAC alleges fraudulent conduct by other defendant groups – the "BEOF Funds" and the "Preferred Investors of the BEOF Funds." (FAC ¶¶ 144-46). Bodner is not alleged to be a member of either of those groups.

transactions . . . designed to benefit the Beechwood Defendants and other insiders to the detriment of PPVA. (FAC ¶ 775). But there are no facts in the FAC that demonstrate Bodner's participation in any of these transactions. There are no facts alleged in support of the conclusory assertions that Bodner "orchestrated," "caused," "participated in," or "engaged in" any transaction alleged in the FAC to have injured PPVA.

Nor does the FAC allege facts that demonstrate that Bodner occupied the kind of senior, day-to-day operational role at Platinum Management that might have rendered him legally responsible for Platinum Management's alleged misstatements to PPVA under the "group pleading doctrine." This Court's decision in *Anwar v. Fairfield Greenwich Ltd.*, 728 F. Supp. 2d 372 (S.D.N.Y. 2010) — relied on by the JOLs as "right on point here" (*Opposition to Moving Defendants' Motions to Dismiss* (ECF No. 155) (the "Opp. Mem.") at 24) — actually underscores the FAC's deficiencies with respect to Bodner. In *Anwar*, a Madoff-related case against the Fairfield Greenwich funds, the Court denied a motion to dismiss securities fraud claims by a group of persons and entities called the "Fraud Defendants." *Anwar*, 728 F. Supp. 2d at 406. Importantly, the "individuals named as Fraud Defendants all had high-level positions" within the Fairfield Greenwich funds, and the complaint alleged specific facts demonstrating each defendant's role in the "day-to-day operations" of the funds. *Id.* The individual members of the Fraud Defendants group were the chief financial officer, chief operating officer, chief risk officer, a director and president, and two founding partners who were also "current senior officers." *Id.* at 388, 405. There were facts alleged as to each individual member of the Fraud Defendants group demonstrating both day-to-day operational activity and relevant interaction on Madoff-related matters.

What was present in *Anwar* to justify group pleading, but is missing entirely here, are non-conclusory factual allegations that Bodner had a day-to-day role at Platinum (or Beechwood). The FAC alleges facts that show that certain others had day-to-day roles, but no such facts as to Bodner. For example, Mark Nordlicht is alleged to have been co-chief investment officer of Platinum Management, chairman of the valuation and risk committees, and managing member of the Platinum investment entities. (FAC ¶ 12(i)). Uri Landesman was alleged to have been president of Platinum Management, co-chief investment officer of PPVA, and a member of both the valuation and risk committees. (FAC ¶ 12(ii)). Joseph SanFilippo is alleged to have been chief financial officer of PPVA, and a member of the valuation and risk committees. (FAC ¶ 12(viii)). Daniel Small was alleged to have been a managing director and portfolio manager at Platinum Management. (FAC ¶ 12(vii)). David Levy, David Steinberg, and David Ottensoser all had c-suite titles and positions at Platinum Management. (FAC ¶ 12(vi) & (ix)). That is not to say that merely alleging someone's title or position justifies group pleading in lieu of specific individual facts. But with respect to Bodner, the FAC not only cannot identify any title or position, but does not even attempt to provide a job description, as Bodner had no day-to-day role in PPVA, Platinum Management, or Beechwood.

For purposes of the JOLs' contention that *Anwar* is "right on point here" (Opp. Mem. at 24), the official roles, titles, positions, and responsibilities of the other members of the Platinum Defendants group contrast starkly with the lack of facts alleged against Bodner, who had no role, position, title, or function at Platinum Management, and the FAC does not allege facts that show otherwise. He is nothing like the Fraud Defendants in *Anwar* who had titles, positions, and fact-based showings of day-to-day responsibility for the Fairfield Greenwich funds, and who therefore could be held in the case through group pleaded allegations.

Further proof of Bodner's non-insider status is found in the JOLs' detailed description of the various transactions that allegedly damaged PPVA. For example, the key transaction alleged in the First Scheme is a multi-step, complex set of transactions to loot the assets of a Texas-based PPVA portfolio company called Black Elk, and to transfer the proceeds from a sale of those assets to "Platinum Management insiders, friends and designated investors/creditors," but not Bodner. (FAC ¶ 9(iii)). The FAC's factual description of the Black Elk Scheme occupies 89 paragraphs of detailed text and 16 exhibits, and sets forth detailed allegations of conduct by Nordlicht, Levy, Small, and the CFO of Black Elk, Jeffrey Shulse. (FAC ¶¶ 427-515 and Exs. 49-64). No factual allegation or document reflects any involvement or knowledge by Bodner. And yet, in the section of the FAC describing the Black Elk Scheme, the JOLs allege without basis and in an entirely conclusory manner that Bodner was "heavily involved in marketing the investment" and was "involved in planning all aspects of the transactions." (FAC ¶ 440).

Another example is found in the complex "Agera Transactions," which the JOLs describe as the "culmination of the Second Scheme." (FAC ¶ 11(v)). The JOLs use 63 paragraphs to describe the Agera Transactions, through which the Agera business was transferred from PPVA to Beechwood for $170 million, some of which was paid through non-cash consideration, which was allegedly at a below-market price. (FAC ¶¶ 599-661). The FAC identifies at least some conduct by a dozen defendants and entities, who allegedly ran the Agera business (FAC ¶¶ 604-13), prepared documentation for the transfers at issue (FAC ¶ 623), and received a portion of the consideration (FAC ¶¶ 644-48). But no conduct or role is attributed to Bodner. Yet, once again, Bodner is alleged, solely through group pleading, to be liable for the alleged Second Scheme. (FAC ¶ 595).

In contrast to the detailed facts alleged against certain defendants, the JOLs have selected — from the millions of Platinum Management emails available to them — just two emails directed to Bodner. (FAC Exs. 2 and 31). Neither of these emails was written by Bodner, and neither demonstrates any wrongdoing by him, or involvement in the day-to-day running of Platinum Management.

Exhibit 2, an email authored by Bernard Fuchs in February 2016, reflects that an investor, Mr. Fruchthandler, who was upset with Platinum about a holdback of a portion of his redemption from the fund, reported to Fuchs that he had vented to Bodner the day before. That a disgruntled or concerned Mr. Fruchthandler would contact Bodner — a person he knows personally and socially, and whom he knows to be a founder of and substantial investor in Platinum — does not render Bodner a day-to-day manager of Platinum, much less a wrongdoer.

Exhibit 31, an email that was not written by Bodner but that was sent to Bodner, states the author's opinion that he or she had been not "exactly honest" with a Beechwood investor (CNO) in directing Beechwood funds into Platinum's portfolio of illiquid assets. The email reflects that Bodner, in a one-line reply sent hours after the email was sent to him, referred the author to Harvey Werblowsky, a senior lawyer within Platinum Management (*see* ECF No. 53). Not only does the email fail to inculpate Bodner in any way, it bears no relation to the JOLs' claim that the Platinum and Beechwood Defendants schemed to divert funds out of PPVA and into Beechwood. The email describes a situation where the opposite occurred: Beechwood's assets were invested into Platinum, not the other way around.

Finally, setting aside whether group pleading may be used by the JOLs to inculpate Bodner for statements made by others, group pleading may not be used to support the requisite element of scienter for fraud or the knowledge element for the aiding and abetting and

conspiracy claims. Group pleading does not allow for imputation of scienter from one member of the group to another, which is exactly what the JOLs attempt to do here. *See In re Alstom SA,* 406 F. Supp. 2d 433, 450 (S.D.N.Y. 2005). Thus, the FAC allegations that "the Platinum Defendants knew" that their alleged misrepresentations of net asset value to PPVA were material and false (FAC ¶ 785), and the allegations in the Fourth Count (for fraud against the Platinum Defendants group) that the Platinum Defendants "intentionally did not include liabilities" in the PPVA net asset value calculations (FAC ¶ 790), 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" (FAC ¶ 796), are fatally deficient.[3]

II. The FAC Contains No Factual Allegation By 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); nor do they satisfy the lesser Rule 8 standard. *See Alliance Shippers, Inc. v. Garcia*, 669 F. App'x 11, 12-13 (2d Cir. 2016). 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.* at 12. 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

[3] Likewise, because the group pleading doctrine could only conceivably aid the JOLs by attributing statements to persons legally responsible for those statements, *In re Alstom SA,* 406 F. Supp. 2d at 450, it cannot support the JOLs' claims for unjust enrichment or breach of fiduciary duty by attributing conduct across members of a group.

of conscious misbehavior or recklessness. *Mills v. Polar Molecular Corp.*, 12 F.3d 1170, 1176 (2d Cir. 1993). The FAC fails in this regard.

For the First and Second Counts, which allege breaches of fiduciary duty, the FAC must allege facts that show, at a minimum, the existence of such 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 FAC does not set forth any facts establishing a fiduciary duty owed by Bodner to PPVA, and, as above, does not allege a single act, statement, or omission by Bodner that could constitute a breach of any such duty.[4]

The Fourth 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 F. App'x 21, 24 (2d Cir. 2013). The FAC fails to allege any of these elements with particularity because it does not identify any specific conduct attributable to Bodner. It describes no fraudulent statements or omissions made by Bodner to anyone. The Fifth Count, for constructive fraud, fails for the same reason. *See Saltz v. First Frontier, LP*, 782 F. Supp. 2d 61, 82-83 (S.D.N.Y. 2010) (emphasis added), *aff'd*, 485 F. App'x 461 (2d Cir. 2012).

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[4] The JOLs argue that a claim of breach of fiduciary duty is "not properly undertaken on a motion to dismiss." (Opp. Mem. at 7). But courts within the Second Circuit "routinely have held that conclusory allegations of a 'special relationship,' and 'complete trust and confidence' are insufficient to state a claim of fiduciary duty" and must be dismissed on a motion pursuant to Rule 12(b)(6). *Abercrombie v. Andrew College*, 438 F. Supp. 2d 243, 275 (S.D.N.Y. 2006); *see also PetEdge, Inc. v. Garg*, 234 F. Supp. 3d 477, 499 (S.D.N.Y. 2017) (dismissing breach of fiduciary duty claim where plaintiff failed to "plausibly allege[] the existence of a special relationship of confidence and trust . . . that gives rise to a fiduciary duty"); *Faktor v. Yahoo! Inc.*, No. 12 Civ. 5220 (RA), 2013 U.S. Dist. LEXIS 55719, at *10-11 (S.D.N.Y. Apr. 16, 2013) (same); *Welch v. TD Ameritrade Holding Corp.*, No. 07 Civ. 6904 (RJS), 2009 U.S. Dist. LEXIS 65584, at *120-21 (S.D.N.Y. July 27, 2009) (same).

Likewise, the Seventeenth 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). The FAC 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. (FAC ¶ 962). The FAC fails to allege any facts that show that Bodner directed any of these communications. The conclusory declaration that "[e]ach of these communications [was] by or on behalf of the Platinum Defendants and Beechwood Defendants" (FAC ¶ 962) fails to identify Bodner's involvement in any predicate fraudulent conduct, and the FAC alleges no facts that show that Bodner had any fraudulent intent in connection with these alleged acts. The RICO count must be dismissed as to Bodner.

The Fourteenth Count asserts that the Beechwood Defendants were unjustly enriched at PPVA's expense through the Second Scheme transactions. (FAC ¶¶ 926). As above, this requires, *inter alia*, pleading facts that demonstrate 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 F. App'x 373, 374 (2d Cir. 2016) (quoting *Georgia Malone & Co. v. Rieder*, 19 N.Y.3d 511, 516 (2012)). The FAC 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 FAC Fails to Allege Any Conduct or Knowledge For Which Bodner Could Have Secondary Actor Liability

The Third and Seventh Counts of the FAC, for aiding and abetting breach of fiduciary duties, and the Sixth and Eighth Counts, for aiding and abetting fraud, all 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, factual 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 FAC fails to allege facts that demonstrate any participation by Bodner in the alleged aiding and abetting of any fraudulent scheme or in any breach of fiduciary duty. The FAC does not allege that Bodner took part in a single conversation, or sent a single communication, in connection with either of the alleged fraudulent schemes. The FAC thus does not identify any conduct by Bodner that could plausibly be described as providing substantial assistance in the commission of a fraud. The Sixteenth Count, for civil conspiracy, must likewise fail, since there is no factual allegation of an overt act by Bodner in furtherance of any agreement with others to harm PPVA. *See Ritchie Capital Mgmt., L.L.C. v. Gen. Elec. Capital Corp.*, 121 F. Supp. 3d 321, 339-40 (S.D.N.Y. 2015), *aff'd on other grounds*, 821 F.3d 349 (2d Cir. 2016).

Further, the FAC's 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." (FAC ¶ 853). 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 FAC contains no plausible factual 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 FAC contains a count for relief for alter ego liability against certain Beechwood entities alleged to be owned by Bodner. (FAC ¶¶ 205, 970-84). Because the FAC 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).

IV. The Pleading Standards Should Not Be Relaxed for the JOLs, Who Have All The Relevant Documentation and Evidence In Their Possession

The JOLs urge the Court to relax the Rule 9(b) pleading standards because their knowledge of the "complex and intertwined" fraudulent transactions identified in the FAC is "secondhand," and because they have not yet had discovery. (Opp. Mem. at 29). But unlike any of the trustees or liquidators in the cases the JOLs rely upon for relaxed pleading, the JOLs freely admit that they are in control of the servers of their adversary, defendant Platinum Management, and are "in possession of more than 13 million documents" including "all or nearly all of the

relevant documentation."[5] (ECF No. 21 at ¶¶ 11, 13). Whereas relaxing the pleading standard is intended to prevent disadvantage to a court-appointed fiduciary who often lacks information about its adversary, the JOLs are at a tremendous advantage here because, unlike any other party to this lawsuit, they are sitting on the entire library of Platinum-related documents. *See Hosking v. TPG Capital Mgmt., L.P. (In re Hellas Telecomms. (Lux.) II SCA)*, 535 B.R. 543, 562 (Bankr. S.D.N.Y. 2015); *Liquidation Trust v. Daimler AG (In re Old CarCo LLC)*, 435 B.R. 169, 192 (Bankr. S.D.N.Y. 2010); *see also In re Rollaguard Sec., LLC*, 570 B.R. 859, 871 (Bankr. S.D. Fla. 2017) ("[W]hen a trustee does not suffer from this lack of knowledge, the need to relax Fed. R. Civ. P. 9(b)'s heightened pleading requirements does not exist."), *rev'd on other grounds*, *Furr v. TD Bank, N.A.*, 587 B.R. 743 (Bankr. S.D. Fla. 2018).

This access has enabled the JOLs to draft a 184-page, 1,012-paragraph FAC that details a dozen complex allegedly fraudulent schemes. They have no facts that inculpate Bodner, notwithstanding the allegation that Bodner "generally conducted business at Platinum Management via a shared secretary," whose emails are also on the Platinum server. (FAC ¶ 82 & Exs. 2, 31). Under these circumstances, the JOLs cannot reasonably be termed "outsider[s]" working off of "secondhand knowledge," *Sec. Inv'r Prot. Corp. v. Stratton Oakmont, Inc.*, 234 B.R. 293, 310 (Bankr. S.D.N.Y. 1999), and therefore are not entitled to the benefit of the relaxed pleading standard for their fraud claims.

The JOLs have known since the initial conference on December 19, 2018 that Bodner intended to move on group pleading grounds; the JOLs have had nearly two months since that conference to scour Platinum Management's servers to find some evidence to support

[5] Bodner does not concede that the JOLs have legitimately gained access to the server, and reserves all rights in that regard, but the reality is that, however obtained, the JOLs have had such access by their own admission.

their claims against him. They have come up empty-handed. Their failure to present facts is not a function of their disadvantage as purported newcomers to Platinum, but rather an accurate reflection of the complete documentary record and the absence of any facts that could inculpate Bodner in the complex schemes alleged in the FAC.

Regardless of the pleading standard, the FAC does not plead facts sufficient to withstand this Motion.

CONCLUSION

For the foregoing reasons, the FAC's counts against Bodner should be dismissed in their entirety.

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CURTIS, MALLET-PREVOST,
COLT & MOSLE LLP

By: */s/ Eliot Lauer*

Eliot Lauer
Jacques Semmelman
Gabriel Hertzberg
101 Park Avenue
New York, New York 10178
Tel.: (212) 696-6000
Fax: (212) 697-1559
Email: elauer@curtis.com
jsemmelman@curtis.com
ghertzberg@curtis.com

Attorneys for Defendant David Bodner

34044128