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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 NON-NAV CLAIMS IN THE SECOND AMENDED COMPLAINT

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Defendant David Bodner respectfully submits this memorandum of law in support of his motion to dismiss the Second Amended Complaint (ECF No. 285)[1] (the "SAC") of the Joint Official Liquidators (the "JOLs") of Platinum Partners Value Arbitrage Fund LP ("PPVA") insofar as it charges Bodner with conduct other than the alleged group-pleaded misstatements of PPVA's net asset value ("NAV"), in accordance with this Court's Opinion dated April 11, 2019 (ECF No. 290) (the "April 11 Opinion" or "Op.") and pursuant to Federal Rule of Civil Procedure 12(b)(6).

PRELIMINARY STATEMENT

The Court held in the April 11 Opinion that the First Amended Complaint (the "FAC") contained sufficient factual allegations against the so-called "Platinum Defendants" for application of the group pleading doctrine, such that the FAC satisfied Rule 9(b) with respect to written statements published by Platinum Management. (Op. at 44-45). The relevant published statements are the allegedly "inflated reports of PPVA's NAV" at various points in time from in or about January 1, 2013 through in or about August 23, 2016. (*Id.*; SAC ¶ 250).

This motion does not address and does not seek to reargue the Court's decision that, for pleading purposes, it is "appropriate to charge [Bodner] with the misstatements of PPVA's NAV." (Op. at 45). The JOLs will have the opportunity through discovery to try to connect one or more defendants with those NAV statements. Rather, this motion addresses only the separate allegations that Bodner engaged in fraudulent transactional conduct — the non-NAV based allegations — which must be pleaded with specificity under Rule 9(b).

[1] ECF citations refer to the *Trott* docket, 18 Civ. 10936.

Although the SAC is crafted in terms of the First Scheme and the Second Scheme,[2] the relevant dichotomy for this motion is between, on the one hand, allegations that NAV statements were fraudulently inflated, largely due to the valuation of two oil-producing assets (Black Elk and Golden Gate), and on the other hand, allegations that a dozen or more transactions were executed with the fraudulent intent to loot or encumber the assets of PPVA. Allegations falling into this second category are set forth with some detail in the SAC, including the actors who are said to have implemented the transactions knowing that they were designed to and allegedly had the effect of depriving PPVA of assets that should have remained in the fund.

The SAC does not, however, set forth any facts demonstrating that Bodner had any role in the dozen or more transactions that are alleged to have defrauded PPVA out of tens or hundreds of millions of dollars. Yet every count against Bodner seeks to hold him liable for the alleged transactional conduct, with which he is not connected by any facts, as well as the alleged misstatements of PPVA's NAV by the Platinum Defendants group.

The valuations at the heart of the NAV claims are complicated enough. The JOLs cannot require Bodner to also defend a dozen or more transactions — with their own factual, legal, and expert issues — to which they have failed to connect him. Accordingly, the JOLs should proceed to discovery against Bodner only with respect to his alleged involvement in the creation or dissemination of fraudulent NAV statements. The allegations concerning the transactional conduct should be dismissed as to Bodner because the SAC fails to satisfy the heightened pleading requirements of Rule 9(b) for those claims.

In addition to the absence of facts connecting Bodner to the individual transactions that the SAC asserts were designed to divert assets from PPVA to Beechwood or

[2] Capitalized terms not defined herein shall have the meanings ascribed to them in the SAC.

third parties, there are no facts in the SAC to support scienter. Here, we draw the contrast between the scienter facts with respect to the NAV claims (alleged on a group basis only) and the total absence of individualized scienter facts with respect to the transactional conduct claims.

With respect to the NAV claims, the SAC asserts that Bodner had a direct or indirect interest in receiving management distributions on the basis of PPVA's NAV. According to the SAC, PPVA paid $95 million between January 1, 2013 and August 23, 2016 on the basis of its stated NAV. (SAC ¶ 250). The Court held in the April 11 Opinion that the motivation to receive such distributions is sufficient to establish scienter for pleading purposes. (Op. at 50). With respect to the individual transactions, however, the SAC sets forth only the barest conclusory allegation that Bodner and others had an equity interest in Beechwood. There are no facts that Bodner or affiliated entities received any distributions directly or indirectly from Beechwood, or from any of the alleged transactions. Therefore, the SAC fails to establish any facts from which to infer that Bodner had any motive to defraud PPVA in favor of Beechwood.

For these reasons, the SAC should be limited to "charg[ing] [Bodner] with the misstatements of PPVA's NAV." (Op. at 45). Insofar as the remainder of the SAC purports to assert claims of transactional conduct against Bodner, either as a primary or secondary actor, those portions of the SAC should be dismissed for failing to satisfy Rule 9(b).

FACTS ALLEGING TRANSACTIONAL CONDUCT

The SAC alleges that Bodner was a member of two groups, the "Platinum Defendants" and the "Beechwood Defendants." (SAC ¶ 3). The allegations of transactional conduct rest largely on these two defined terms, but do not allege a single fact demonstrating Bodner's specific role in the transactions. Because the JOLs do not allege that the following transactions were accomplished through misstatements of PPVA's NAV, they are not excused from pleading these claims with particularity and in an individualized manner.

I. First Scheme Transactions

The SAC's First Scheme is purportedly comprised of the following transactions.

A. Golden Gate Oil Transaction (SAC ¶¶ 413-23)

The JOLs allege that "the Platinum Defendants and Beechwood Defendants caused BAM I, acting as agent for certain Beechwood reinsurance trusts, to purchase the Golden Gate Oil Loan from [PPVA's wholly-owned subsidiary] Precious Capital" at par value. (SAC ¶¶ 416, 418). The Note Purchase Agreement for this transaction "specifically provided that BAM I could put the Golden Gate Oil Loan it had purchased to PPVA and that PPVA would guarantee payment of that debt in full." (SAC ¶ 421). This "left PPVA liable to pay the Beechwood Entities in the event that the underlying operating company failed to repay the Golden Gate Loan" and "protected Beechwood's investment in Golden Gate Oil at the expense of PPVA." (SAC ¶¶ 422-23).

The SAC does not allege a single fact connecting Bodner to the Golden Gate Oil transaction.

B. PEDEVCO Transaction (SAC ¶¶ 424-35)

As part of the PEDEVCO transaction, the Platinum Defendants and Beechwood Defendants allegedly "caused" PPVA's subsidiary RJ Credit and certain Beechwood Entities to purchase the senior secured PEDEVCO Notes. (SAC ¶ 428). RJ Credit "was the only lender obligated to make continuing loans to PEDEVCO, such that the Platinum Defendants and Beechwood Defendants favored the interests of the Beechwood Entities and its clients over PPVA with this transaction." (SAC ¶ 429). RJ Credit's PEDEVCO Notes "were also subordinated in priority to those held by the Beechwood Entities and its clients such that no interest could be paid on the PEDEVCO Notes held by RJ Credit unless and until all interest due to Beechwood's clients was paid in full." (SAC ¶ 430).

The SAC does not allege a single fact connecting Bodner to the PEDEVCO transaction.

C. Implant Sciences Transaction (SAC ¶¶ 436-39)

For the Implant Sciences transaction, the Platinum Defendants and Beechwood Defendants allegedly "caused BAM Administrative . . . to refinance $20 million of the revolving loan issued by" PPVA's subsidiary DMRJ to the portfolio company IMSC. (SAC ¶ 436). This transaction "caused DMRJ to subordinate all of its liens on IMSC's assets, including the lien securing DMRJ's revolving loan to IMSC . . . to the liens securing repayment of BAM Administrative's term loan" and "ceded to BAM I significant rights in the event of an IMSC bankruptcy, even though DMRJ held much larger loans to that company." (SAC ¶ 439).

The SAC does not allege a single fact connecting Bodner to the Implant Sciences transaction.

D. Black Elk Scheme (SAC ¶¶ 440-515)

In the alleged Black Elk Scheme, the Platinum Defendants "caused PPVA to transfer a portion of the 13.75% Senior Secured Notes it held [in Black Elk] to the BEOF Funds, partly in exchange for series E preferred equity held by the BEOF Funds." (SAC ¶ 480). Platinum Management – not the Platinum Defendants, and not Bodner – "thereafter caused PPVA to sell approximately $24.5 million worth of the 13.75% Senior Secured Notes to Beechwood Entities managed by BAM at prices solely designated by Nordlicht." (SAC ¶ 485). The "purpose" of selling and swapping these notes "was to create the appearance that independent entities . . . were the owners of the" notes, (SAC ¶ 484), so that an independent majority of noteholders could vote to amend the Indenture, (SAC ¶¶ 477-78). The amended Indenture would permit Black Elk to "divert the proceeds from the Renaissance Sale to redeem the series E preferred shares in Black Elk," (SAC ¶ 475), instead of using those proceeds to

"repay the holders of the 13.75% Senior Secured Notes, a significant portion of which were held by PPVA or its subsidiaries," as called for in the original Indenture, (SAC ¶ 469).

The SAC includes Bodner in a list of individuals who allegedly were "heavily involved in marketing the investment [in the BEOF Funds] to potential investors and were aware of and involved in the planning of all aspects of the transactions between and among the BEOF Funds and PPVA," (SAC ¶ 453); "aware of and participated in the actions and transactions with respect to Black Elk and the Black Elk Scheme," (SAC ¶ 466); and "managing both PPVA and the BEOF Funds," (SAC ¶ 484). But this is just impermissible group pleading in the most conclusory fashion, used in a context with no published written statement. The SAC does not allege a single specific fact as to Bodner's role in the underlying transactions. There is not a single statement or document in the 76 paragraphs of the SAC's Black Elk-related allegations (or the 12 exhibits referenced therein) connecting Bodner to the Black Elk Scheme. There are no facts describing what Bodner supposedly did to knowingly advance this scheme.

E. First Scheme Montsant Transaction (SAC ¶¶ 516-28)

In the Montsant transaction from the First Scheme, the Platinum Defendants and Beechwood Defendants allegedly "caused a wholly-owned subsidiary of PPVA, Montsant . . . to purchase all of the 13.75% Senior Secured Notes held by the Beechwood Entities at 93.5% of par, and to pay interest on the Golden Gate Oil Loan." (SAC ¶ 522). "To finance these transactions, Platinum Defendants and Beechwood Defendants caused Montsant to 'borrow' $35.5 million at 12% interest from SHIP, a Beechwood client, via a loan administered by Beechwood." (SAC ¶ 523). To secure that loan, Platinum Management allegedly "transferred equity securities and notes belonging to PPVA and DMRJ to an account pledged as collateral" for the loan. (SAC ¶ 526).

The SAC does not allege a single fact connecting Bodner to the Montsant transaction from the First Scheme.

F. Northstar Transaction (SAC ¶¶ 529-50)

In the Northstar transaction, the Platinum Defendants and Beechwood Defendants allegedly "grant[ed] certain Beechwood Entities a lien on PPVA's interests in Agera Energy, one of PPVA's most significant assets, as additional collateral to secure repayment of the Northstar Notes." (SAC ¶ 532). The Platinum Defendants and Beechwood Defendants also "caused PPVA to engage in a series of transactions with the Beechwood Entities and PPCO that resulted in PPVA holding $22 million worth of the Northstar Notes," (SAC ¶ 538), which allowed Northstar to "draw on unsecured credit lines from PPVA," (SAC ¶ 545).

The SAC does not allege a single fact connecting Bodner to the Northstar transaction.

II. Second Scheme Transactions

The SAC describes the Second Scheme as a "set of acts and transactions" by which the Platinum Defendants "further breached their duties to PPVA by conspiring to transfer or encumber all or nearly all of PPVA's remaining assets for the benefit of the Beechwood Defendants, select insiders," and PPCO. (SAC ¶ 10). The Second Scheme is purportedly comprised of the following transactions.

A. Second Scheme Montsant Transaction (SAC ¶¶ 556-67)

For the Montsant transaction from the Second Scheme, the Platinum Defendants allegedly "caused PPVA and its subsidiaries to transfer . . . equity securities in Navidea Biopharmaceuticals . . . and equity securities and debt instruments issued by Vistagen Therapeutics" to the account pledged as collateral for Montsant's $35.5 million loan from SHIP. (SAC ¶ 564). DMRJ also "assigned to Montsant its rights, title, and interest in" a note issued by

IMSC, which "the Platinum Defendants and Beechwood Defendants . . . caused Montsant to deposit" into the same collateral account. (SAC ¶¶ 566-67).

The SAC does not allege a single fact connecting Bodner to the Montsant transaction from the Second Scheme.

B. Nordlicht Side Letter Transaction (SAC ¶¶ 568-83)

For the Nordlicht Side Letter transaction, the JOLs allege that "Nordlicht purported to grant the Beechwood Entities an interest in the proceeds of a separate investment held by another PPVA subsidiary, that otherwise would not have been available to them to pay off the Golden Gate Oil Loan, to the detriment of PPVA." (SAC ¶ 578).

The SAC does not allege, even by way of references to the Platinum Defendants or Beechwood Defendants, that Bodner had any role in the Nordlicht Side Letter transaction. The SAC only asserts in conclusory fashion that the Nordlicht Side Letter "benefits the Beechwood Entities," and then lists Bodner as among six alleged owners of the Beechwood Entities. (SAC ¶ 580).

C. March 2016 Restructuring Transactions (SAC ¶¶ 584-606)

In the March 2016 restructuring transactions, certain Platinum Defendants and Beechwood Defendants allegedly "orchestrated a series of transactions in connection with a 'restructuring' of all of the transactions previously entered into between and among PPVA, PPCO and the Beechwood Entities." (SAC ¶ 584). The "net effect" of these transactions "was to prop up Beechwood and PPCO to PPVA's substantial detriment, under circumstances where Beechwood and PPCO were chosen as the 'good funds' to continue onward, while PPVA was left heading towards liquidating with the Platinum Defendants' insiders largely paid out for their actual investments." (SAC ¶ 604).

The SAC alleges that the "terms and specific steps by which the various transactions comprising the March 2016 restructuring were accomplished were developed, coordinated and accomplished by . . . Bodner," among others. (SAC ¶ 606). But the SAC does not set forth a single fact to support these conclusory allegations, nor does it allege any facts connecting Bodner to the March 2016 restructuring transactions. Such group pleading is impermissible where, as here, it is not used to connect an individual to a group-published document.

D. Agera Transaction (SAC ¶¶ 607-72)

For the Agera Transaction, the SAC alleges that "the Platinum Defendants, working in concert with the Beechwood Defendants and SHIP, caused PGS to transfer its interest in the Agera Note to AGH Parent LLC – an entity not affiliated with PPVA, but at that time controlled directly by the Platinum Defendants and Beechwood Defendants, and for the benefit of SHIP." (SAC ¶ 643). Prior to this sale, "PPVA held 55% of the membership interests in PGS," (SAC ¶ 614), which in turn held the Agera Note, a "promissory note convertible into approximately 95% of the equity in Agera Energy," (SAC ¶ 615). The JOLs allege that this sale was an "insider transaction . . . intended to be substantially below fair value," (SAC ¶ 637), which "resulted in the dissipation of as much as $150 million of value to the Beechwood Entities" to PPVA's detriment, (SAC ¶ 671).

The SAC alleges that Bodner along with a list of others "began planning an insider sale of Agera." (SAC ¶ 630). But the SAC points to no group-published statement to justify this group pleading. There is not a single statement or document in the SAC's 66 paragraphs of Agera-related allegations (or the 13 exhibits referenced therein) connecting Bodner to the Agera Transaction.

E. Security Lockup Transactions (SAC ¶¶ 673-762)

In the Security Lockup transactions, the Platinum Defendants allegedly "orchestrated increasingly brazen transactions between PPVA and its subsidiaries and insiders in order to maintain control of such assets in the eventual liquidation of PPVA." (SAC ¶ 673). The Security Lockup aspect of the Second Scheme is purportedly comprised of the following transactions.

(i) PPNE Notes Transactions (SAC ¶¶ 677-87)

For the PPNE Notes transactions, the Platinum Defendants allegedly "caused PPVA to issue a promissory note with a maximum principal amount of $36 million and an interest rate of 1.333% per month," (SAC ¶ 677), and a second promissory note "with a maximum principal amount of $150 million and an interest rate of 1% per month," (SAC ¶ 680). PPVA pledged all of its assets as collateral for these notes. (SAC ¶ 682).

The SAC does not allege a single fact connecting Bodner to the PPNE Notes transactions.

(ii) Kismetia Transaction (SAC ¶¶ 688-95)

In the Kismetia transaction, the Platinum Defendants allegedly "caused PPVA to issue a promissory note" to Kismetia for which PPVA pledged all of its assets as collateral. (SAC ¶¶ 691-92).

The SAC does not allege a single fact connecting Bodner to the Kismetia transaction.

(iii) Twosons Transactions (SAC ¶¶ 696-725)

For the Twosons transactions, the JOLs allege that Nordlicht – not Bodner – caused PPVA to issue a promissory note "in the original maximum principal amount of $14 million dollars for the benefit of Twosons that accrued interest at a rate of 1.333% per

month." (SAC ¶ 696). "Between October 2014 and June 2016, the Platinum Defendants caused PPVA to pay Twosons monthly interest totaling $2.15 million" and to repay "$8 million in principal to Twosons during that period." (SAC ¶¶ 721-22).

The SAC does not allege a single fact connecting Bodner to the Twosons transactions.

(iv) Seth Gerszberg and West Loop/Epocs Transactions (SAC ¶¶ 726-62)

For the Seth Gerszberg and West Loop/Epocs transactions, the Platinum Defendants allegedly "failed to take steps to protect PPVA's interests by declaring a default on the loans owed to PPVA by Seth Gerszberg and his companies and seeking to foreclose on the collateral securing such loans." (SAC ¶ 736). West Loop/Epocs was also "provide[d] . . . with a security interest in DMRJ's rights to certain proceeds from the sale of IMSC, specifically from one of the IMSC Notes owned by DMRJ." (SAC ¶ 748). Finally, "the Platinum Defendants caused PPVA subsidiary Huron Capital LLC . . . to transfer $15 million from the Agera proceeds to or on behalf of Gerszberg and Spectrum30." (SAC ¶ 756).

The SAC does not allege a single fact connecting Bodner to the Seth Gerszberg and West Loop/Epocs transactions.

ARGUMENT

THE NON-NAV CLAIMS SHOULD BE DISMISSED FOR FAILURE TO MEET THE HEIGHTENED PLEADING STANDARD

Each and every count against Bodner in the SAC seeks to hold him liable for alleged damages to PPVA resulting from the transactional conduct comprising the First and Second Schemes. To the extent the JOLs' causes of action are based on these allegations of transactional conduct, rather than for Bodner's alleged participation in the publication of PPVA's

NAV, they should be dismissed for failure to meet the heightened pleading standards required by Rule 9(b).

As explained in the April 11 Opinion, the JOLs' "claims are grounded in fraud and must therefore surmount not only the less onerous obstacles presented by Rule 8, but also the more significant barriers imposed by Rule 9(b)." (Op. at 43). For all claims sounding in fraud, including actual fraud, constructive fraud, breach of fiduciary duty, and any related aiding and abetting claim, "a complaint is required to plead the circumstances that allegedly constitute fraud 'with particularity.'" *Krys v. Pigott*, 749 F.3d 117, 129 (2d Cir. 2014) (quoting Rule 9(b)). Moreover, "[b]ecause Rule 9(b) requires that a defendant receive fair notice of the fraud claim, a plaintiff alleging a claim sounding in fraud against multiple defendants under Rule 9(b) must plead with particularity by setting forth separately the acts complained of by each defendant." *United States ex rel Aryai v. Skanska*, No. 09 Civ. 5456 (LGS), 2019 U.S. Dist. LEXIS 45083, at *23 (S.D.N.Y. Mar. 19, 2019) (emphasis in original) (internal quotation marks omitted). In this case, since the import of the allegations is that Bodner participated in or aided and abetted transactions implemented by others, the SAC must, at a minimum, set forth facts that show Bodner knew about each of the dozen or so transactions and that he knew the transactions were designed to defraud PPVA. *Pigott*, 749 F.3d at 127. The SAC does neither.

The JOLs assert ten counts against Bodner – the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Sixteenth, and Seventeenth Counts of the SAC[3] – alleging that he breached fiduciary duties, committed actual and constructive fraud, aided and abetted fraud and

[3] The JOLs also reassert a claim the Court already dismissed – for unjust enrichment against Bodner – in the Fourteenth Count of the SAC. (SAC ¶¶ 938-47). The Court dismissed this claim in its "bottom-line" Order dated March 15, 2019 (ECF No. 276), and later explained that the JOLs "abandoned" the claim by failing to "address Bodner's argument . . . that the FAC failed to state a claim for unjust enrichment against [him]." (Op. at 55).

fiduciary breaches by others, entered a civil conspiracy, and violated RICO, all of which resulted in damages to PPVA.

Each and every one of these Counts seeks to hold Bodner liable for allegedly fraudulent transactional conduct, such as "caus[ing] PPVA and its subsidiaries to engage with the Beechwood Entities and the Beechwood Defendants in insider investments, loans and other transactions including, among others, Golden Gate Oil, PEDEVCO, Black Elk, Northstar, Montsant/Navidea and Implant Sciences," (SAC ¶¶ 800, 823; *see also* ¶¶ 840, 863, 984); and "engaging in . . . the Black Elk Scheme, Black Elk bond devaluation, and the significant creditor claims that resulted therefrom (First Scheme)" and "the transfer or encumbrance of nearly all of PPVA's Remaining Assets for the sole benefit of Beechwood, PPCO and other select insiders and to the detriment of PPVA (Second Scheme)," (SAC ¶ 769; *see also* ¶¶ 777, 786, 852, 964).

The SAC does not set forth a single fact demonstrating Bodner's role in these transactions, or in any transaction alleged to have been part of the First and Second Schemes. Nor does it set forth facts to demonstrate that Bodner did or could have benefited from these transactions in any way, such that an inference of scienter could be justified. *See Vaughn v. Air Line Pilots Ass'n, Int'l*, 377 F. App'x 88, 90-91 (2d Cir. 2010).

Insofar as the SAC seeks to hold Bodner liable for the alleged acts of transactional conduct, it fails to state a claim for which relief can be granted and should be dismissed.

CONCLUSION

For the foregoing reasons, to the extent the SAC charges Bodner with conduct other than the alleged misstatements of PPVA's net asset value, it should be dismissed.

Dated: April 22, 2019
New York, New York

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