UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE PLATINUM-BEECHWOOD LITIGATION	Docket No: 1:18-cv-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, MARK NORDLICHT, DAVID LEVY, ESTATE of URI LANDESMAN, MURRAY HUBERFELD, DAVID BODNER, DAVID STEINBERG, DANIEL SMALL, et al. Defendants.	Docket No.: 1:18-cv-10936 (JSR)

REPLY IN SUPPORT OF DEFENDANT ESTATE OF URI LANDESMAN'S MOTION TO DISMISS COUNT SEVENTEEN OF THE SECOND AMENDED COMPLAINT

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Pursuant to Federal Rules of Civil Procedure 12(b)(6) and 9(b), Defendant Estate of Uri Landesman (the "Estate") submits this reply in support of its motion to dismiss Count Seventeen of the Second Amended Complaint (the "SAC"), alleging civil RICO, filed by Plaintiffs Martin Trott, Christopher Smith, and Platinum Partners Value Arbitrage Fund L.P (collectively, "Plaintiffs") on March 29, 2019.[1]

In opposing the Estate's motion to dismiss the RICO claim, Plaintiffs either misunderstand or ignore the Estate's central argument. Plaintiffs argue that the RICO claim against the Estate is sufficiently pled because Mr. Landesman was part of the association-in-fact enterprise that committed two predicate acts. Plaintiffs misunderstand the predicate act requirement of the RICO statute and fail to plead that Mr. Landesman committed two predicate acts. Plaintiffs alternatively contend that this Court's April 11, 2019 opinion forecloses the Estate's motion. This is incorrect, as the Court expressly invited defendants to file more particularized motions to dismiss, which is precisely what the Estate did here. Plaintiffs' arguments therefore lack merit, and Count Seventeen of the SAC should be dismissed.

ARGUMENT

I. Plaintiffs Misunderstand the RICO Predicate Act Requirement.

Plaintiffs argue that the RICO allegations survive because they have pled that the Platinum Defendants, "*through the association-in-fact enterprise*, engaged in two or more acts constituting indictable offenses under 18 U.S.C. Sections 1341 and 1343 in that they devised or intended to devise a scheme or artifice to defraud PPVA, and to obtain money and property from PPVA through false pretenses, representations, and promises." (Pls.' Opp. to Mots. to Dismiss, 18-cv-6658, Dkt. No. 319 ("Opp.") at 28 (emphasis in Opp.) (quoting SAC ¶ 977).) This

[1] All Terms not defined here are accorded the meaning set forth in the SAC. All relevant arguments raised by the other defendants are incorporated by reference.

argument conflates the "enterprise" element of civil RICO with the "predicate act" requirement. Not only must Plaintiffs allege the existence of an enterprise, but they must also allege that *each defendant* committed two predicate acts. *DeFalco v. Bernas*, 244 F.3d 286, 306 (2d Cir. 2001). This requires that Plaintiffs plead, with particularity, the specific predicate acts alleged against Mr. Landesman.

Section 1962(c) is not "a second RICO conspiracy statute." *United States v. Persico*, 832 F.2d 705, 714 (2d Cir. 1987). Instead, the "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)." *Id.* Here, Plaintiffs have not pled a RICO conspiracy under section 1962(d). This Court should reject Plaintiffs' belated attempt to turn their claim from a substantive RICO violation to a RICO conspiracy claim.

Plaintiffs fail to allege any specific acts of wire or mail fraud attributable to Mr. Landesman. Plaintiffs cite to sections of the SAC "detail[ing] the part each Defendant played in operating the enterprise." (Opp. at 30.) But this is no more than clumsy sleight of hand. None of these sections concern acts specific to Mr. Landesman, nor do the specific acts of wire fraud alleged in the paragraph 978 of the SAC indicate any involvement by Mr. Landesman. (Estate of Uri Landesman's Mem. of Law in support of Mot. to Dismiss Count 17 of SAC, 18-cv-6658, Dkt. No. 258 ("Estate Mot."), at 3-4, 6-7.) Plaintiffs have failed to point to any allegation in their SAC that, if true, would show that Mr. Landesman committed two predicate acts of wire fraud or mail fraud. Because of this deficiency, the RICO claim against his Estate should be dismissed.

Furthermore, even if one of the enumerated acts were attributable to Mr. Landesman, Plaintiffs have failed to demonstrate anything more than incidental use of the wires. (*See* Estate

Mot. at 8-9.) Allegations demonstrating an integral use of the wires are required in order to prevent the RICO statute from "federaliz[ing] garden-variety state common law claims" of fraud. *Bigsby v. Barclays Capital Real Estate, Inc.*, 170 F. Supp. 3d 568, 575 (S.D.N.Y. 2016) (Koeltl, J.) (internal quotations omitted). Such an inquiry is especially required because "virtually every ordinary fraud is carried out in some form by means of mail or wire communication." *Gross v. Waywell*, 628 F. Supp. 2d 475, 493 (S.D.N.Y. 2009) (Marrero, J.).

Notably, the ten instances of wire fraud that Plaintiffs pointed to in their SAC (which, again, do not demonstrate any involvement by Mr. Landesman), fail to demonstrate that wire fraud was necessary or integral to the scheme to defraud PPVA. For this reason, too, the RICO Claim against the Estate should be dismissed.

II. The Estate's Argument Is Not Barred By the Law of the Case.

Perhaps recognizing the deficiency of their pleading, Plaintiffs chose instead to argue that the Estate's motion is a belated attempt to move for reconsideration of this Court's previous order denying the motion to dismiss on group pleading grounds. (Opp. at 24.) Indeed, of the six and a half pages in Plaintiffs' Opposition directed at the Estate's motion, almost five of them are devoted to the "law of the case" argument. This argument, too, fails.

First, even though the Court denied the Estate's joinder in the motion to dismiss based on group pleading grounds, the Court expressly permitted defendants to file a second round of motions to dismiss on more particularized grounds. That is precisely what the Estate did. Thus, the Estate's current motion is not a late motion for reconsideration, but rather follows the procedure implemented by the Court.

In opposing the Estate's current motion, Plaintiffs fail to address the fundamental problem that the group pleading doctrine, on which Plaintiffs entirely rely, does not apply to the individual acts of wire fraud Plaintiffs identified in the SAC, and therefore cannot satisfy the

requirement that they plead two predicate acts specific to Mr. Landesman. (Estate Mot. at 6.) Group pleading applies to group published documents only, and the emails relied upon by Plaintiffs are manifestly not published by a group. *Elliott Assocs., L.P. v. Hayes*, 141 F. Supp. 2d 344, 354 (S.D.N.Y. 2000) (Scheindlin, J.); *In re Alstom SA*, 406 F. Supp. 2d 433, 449 (S.D.N.Y. 2005) (Marrero, J.). Accordingly, the group pleading doctrine cannot save Plaintiffs' deficient RICO claim.

CONCLUSION

Because Plaintiffs have failed to allege sufficient facts with the required particularity that, if true, demonstrate that Mr. Landesman committed two predicate acts of wire or mail fraud, Plaintiffs' RICO claim against the Estate cannot stand. The RICO claim should be dismissed as to the Estate.

Dated: May 23, 2019
Newark, New Jersey

By: /s/ Eric R. Breslin .

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