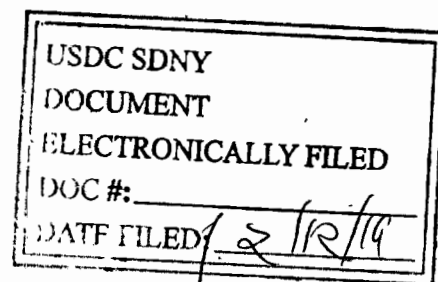


ALSTON & BIRD

90 Park Avenue
New York, NY 10016
212-210-9400 | Fax: 212-210-9444



December 11, 2019

Hon. Jed S. Rakoff
United States Courthouse
500 Pearl Street
New York, NY 10007

Re: *Trott v. Platinum Management (NY) LLC, et al*, 1:18-cv-10936 (JSR)

Dear Judge Rakoff:

Pursuant to Rule 45 of the Federal Rules of Civil Procedure, non-parties Timothy Bischof and Eric Johnson respectfully request that this Court quash the non-party subpoena served by the Joint Official Liquidators of Platinum Partners Value Arbitrage Fund L.P. (“PPVA” or the “Liquidators”) on Bischof on December 9, 2019 and the non-party subpoena that PPVA has yet to serve (but has been attempting to serve) on Johnson (the “Subpoenas”) on the eve of major holidays and just three weeks before the close of all discovery in the above-captioned action as well as all actions consolidated therewith (the “Consolidated Actions”).

Bischof and Johnson, residents of Indiana, are senior executive officers of various CNO Parties. Johnson is the President and Chief Investment Officer of 40|86 Advisors and the Executive Vice President and Chief Investment Officer of CNO, and Bischof is the Senior Vice President of WNIC and BCLIC and the Senior Vice President and Chief Risk Officer of CNO. For the reasons set forth below, they should not be deposed in this case.

By way of background, as the Court knows, on November 21, 2018, PPVA filed a complaint in *Trott v. Platinum Management (NY) LLC, et al.*, No. 18 Civ. 10936 (the “*Trott* Action”). While this initial complaint alleged 17 counts against a staggering 89 parties, *not one* of the CNO Parties was named. PPVA has since filed two amended complaints, adding substantive details, additional claims, and even more parties. Yet, PPVA *never* added a single claim or allegation against any of the CNO Parties. ***Indeed, in the more than 1,000 paragraphs in the 180-page Second Amended Complaint (the “SAC”), there is not a single reference to any of the CNO Parties—not WNIC, not BCLIC, not 40|86 Advisors, and not CNO. See Trott Action, Dkt. No. 285.***

What the Court is probably *not* aware of, however, is that on June 7, 2019—nearly a month *after* this Court’s May 15, 2019 deadline for the addition of parties had elapsed, and almost nine months after the *Trott* Action was first commenced—PPVA, together with an entity called Principal Growth Strategies, LLC (which is owned by PPVA and PPCO), commenced an action against the CNO Parties (and SHIP, and others in the Consolidated Actions) by filing a verified complaint in the Delaware Court of Chancery (Delaware District Court, No. 10 Civ.

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01319, the “Chancery Action”).¹ Ex. 1. The Chancery Action represents a brazen exercise in claim-splitting and forum shopping on the part of PPVA, and was brought in Delaware solely to avoid this Court’s deadline to amend pleadings.

The Chancery Action, like the *Trott* Action, arises out of the “Ponzi-esque” scheme orchestrated by the Platinum funds and their principals and primarily concerns the transactions related to the convertible promissory note jointly held by PPVA and PPCO that would control 95% of the equity of Agera Energy’s parent. In fact, the *Trott* SAC and the Chancery Action complaint share many of the same allegations, oftentimes verbatim, with respect to the Agera Transactions and assert some of the same claims against the same defendants. Currently, only two equitable claims, one for “unjust enrichment” and one for constructive trust (a remedy, not a cause of action), are asserted against the CNO Parties in the Chancery Action.

The CNO Parties removed the Chancery Action to federal district court, with the ultimate goal of transferring that case to its rightful place before this Court. Chancery Action, Dkt. No. 1. PPVA, however, seeks to avoid this Court and has thus moved purely for strategic reasons to remand the case back to the Delaware Chancery Court. Chancery Action, Dkt. No. 9.

Respectfully, having chosen to split its Agera claims and not assert such claims against the CNO Defendants in this case, PPVA should take any discovery of the CNO Parties in the action it instituted against them in Delaware. Otherwise, these deponents will be deposed by PPVA multiple times.

Moreover, during the depositions in the Consolidated Action, PPVA—even though its complaint in the *Trott* Action does not mention any of the CNO Parties—has been asking questions of witnesses concerning CNO’s involvement in the Agera transaction. While every witness has testified that there was none, it is obvious that PPVA is engaged in a fishing expedition in this case in an effort to discover facts for another case. *See Night Hawk v. Briarpatch Ltd., L.P.*, 2003 U.S. Dist. LEXIS 23179, at *24-25 (S.D.N.Y. Dec. 30, 2003) (quashing Rule 45 subpoena for testimony where defendants sought “to obtain information for use in state court proceedings”); *Nicholas v. Poughkeepsie Sav. Bank/FSB*, 1991 U.S. Dist. LEXIS 8083, at *3 (S.D.N.Y. June 14, 1991) (modifying non-party subpoena to allow only materials not otherwise available from the defendant or public sources where minimal probative value of material sought did not outweigh the “risk of its misuse in framing a claim against the non-party”; stating that “when the purpose of a discovery request is to gather information for use in proceedings other than the pending suit, discovery is properly denied”).

And, no other party in the Consolidated Actions is seeking to depose any CNO witness. CNO, as the Court has aware, has diligently settled the claims the Receiver brought against it, as well as its affirmative claims against Lincoln, all the Beechwood Parties, and most of the individuals. CNO will soon be out of the case, and every other party except PPVA realizes that

¹ The Chancery Action was first filed in the Chancery Court as Case No. 2019-0431. Following removal, it became Delaware District Court Case No. 1:19-cv-01319-CFC. Citations to the Chancery Action docket herein refer to the District Court docket.

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CNO was just a victim here and has no relevant knowledge about the fraud scheme. Again, PPVA is not even mentioned on the *Trott* complaint.

The Receiver's and all other parties lack of interest in deposing any CNO witness is unsurprising, given that absolutely no facts have been discovered—in over three years of litigation concerning the Platinum/Beechwood fraud—that suggest that any of the CNO Parties were involved in the fraud. In fact, in the over 12 million documents that make up the discovery record in the Consolidated Actions, there are precisely *zero* documents that suggest, even remotely, that any of the CNO Parties was a knowing participant in any part of the Platinum/Beechwood fraud. And Platinum concedes that. Not only has the Receiver for Platinum Partners Credit Opportunities Master Fund L.P. (“PPCO” or “Receiver”) agreed to dismiss all its claims against the CNO Parties in *Cyganowski v. Beechwood Re Ltd., et al.*, No. 18 Civ. 12018 (the “*Cyganowski* Action”) (the only action to which they were parties), but it has also acknowledged as part of its settlement agreement that “the CNO Defendants[] [made] credible arguments based on an expansive documentary record developed during pre-trial discovery that they were not knowing participants in any fraud perpetrated by certain of the Platinum funds or the Beechwood entities, but were instead purely victims of such fraud schemes.” And, in each instance, witnesses have confirmed that CNO played no role whatsoever. Exs. 3, 4. There are *no other parties* seeking to depose the CNO Parties, or any individuals associated with CNO, in any of the Consolidated Actions. Only PPVA seeks such testimony—and that's for use in another case.

Moreover, while the CNO Parties and their employees—including Bischof and Johnson—were noticed for depositions in the *Cyganowski* Action, in early November 2019, the noticing parties (for Bischof and Johnson, those were PPCO, Lincoln, and Beechwood) agreed to defer CNO-related depositions in the *Cyganowski* Action given the substantial progress that had been made in settling the claims in that action. At that time, PPVA had indicated its intent to depose only a corporate designee for the CNO Parties, *not* any individual CNO employees.² Yet PPVA, too, agreed to defer its intended deposition of CNO in the Consolidated Actions pending mediation with the CNO Parties of its claims *in the Chancery Action*. By mid-November, the CNO Parties had reached a settlement with each of PPCO, Lincoln, and the Beechwood parties, and nearly all of the individual defendants sued by WNIC and BCLIC in the *Cyganowski* Action. Consequently, *none* of the parties to the *Cyganowski* Action (or the *SHIP* Action) continued to seek testimony from any of the CNO Parties or employees. All of the parties to those cases have recognized that the CNO Parties are just victims of the fraud scheme, and for that reason, the CNO Parties are practically out of the case. But, following an unsuccessful mediation in the Chancery Action on November 19, 2019 (before Judge Pittman), PPVA informed the undersigned—for the first time—that PPVA now intended to depose Bischof and Johnson in the *Trott* Action. It is clear, however, that PPVA is not seeking to depose Bischof and Johnson to learn facts relevant to the *Trott* Action. They are instead seeking to depose those individuals to obtain facts in furtherance of the improperly-filed Chancery Action.

² PPVA unsuccessfully attempted to serve a Rule 45 subpoena to depose a corporate designee of the CNO Parties, which included a list of topics for examination. *See* Ex. 2. PPVA appears to have now abandoned this subpoena.

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Put simply, PPVA is trying to get two bites at the apple by using the *Trott* Action to depose the CNO Parties and related individuals on claims relevant only to its entirely separate Chancery Action, *not* PPVA's claims against unrelated parties in the *Trott* Action. Having sued the CNO Parties in Delaware—improper as that was—PPVA should now take depositions of CNO witnesses in *that* case, not this one.

Indeed, it is clear that PPVA is seeking to use discovery in this case to shore up its “unjust enrichment” claim in the Chancery Action and to gather facts to add new claims against the CNO Parties in the Chancery Action—as PPVA has expressly advised the CNO Parties that it plans to do—which is improper. PPVA seeks to continue on that track by deposing CNO's witnesses now. PPVA showed its true colors when it sought to serve a deposition notice on a corporate designee of the CNO Parties. The topics for examination identified by PPVA in that deposition notice made clear that PPVA desired to misuse discovery in the *Trott* Action to obtain information for the Chancery Action. Indeed, 13 of the 37 topics concerned the Agera Transactions; not coincidentally, this is the very subject of the Chancery Action claim against the CNO Parties. Ex. 2. Moreover, PPVA's topics were specific to *the CNO Parties'* knowledge and information about the Agera Transactions, belying any argument that the Agera-related topics were intended to elicit general information about Agera to support PPVA's claims against parties in the *Trott* Action. In short, PPVA is improperly using discovery here to gather facts for the Chancery Action. Having not even mentioned the CNO Parties in the *Trott* Action SAC, and with no other party in the Consolidated Actions seeking to depose these witnesses, that is clearly the case.

The Subpoenas impose an undue burden because none of the many other parties in the Consolidated Actions seek to depose Bischof or Johnson. Rather, *every other party* recognizes that these depositions are unnecessary because any information the CNO Parties may offer is not related to the claims or defenses of any party in the Consolidated Actions. Given all of the discovery obligations that must be met before the fast-approaching December 31, 2019 deadline (and the deadline is really a week earlier, as depositions have not been scheduled during the holidays for obvious reasons), preparing and producing non-party witnesses to testify on irrelevant topics, for the sole purpose of assisting an adversary in a separate proceeding, no less—is unduly burdensome, and wholly inappropriate. PPVA's egregious abuse of the discovery process—which, if successful, would significantly burden non-parties—cannot stand.

Finally, the Subpoenas deny a reasonable amount of time for compliance, and, for that reason, too, impose an undue burden under Rule 45. The subpoena served on Bischof set a return date of December 10, 2019—*one day after service*. This is unreasonable on its face. In addition, as this Court is well aware, discovery in the Consolidated Actions will close on December 31, 2019 and the parties understand that absolutely no further extensions will be granted. In light of this schedule, the discovery that remains to be completed (which includes 19 scheduled fact and expert witness depositions and dozens more that are noticed but not yet scheduled), and the complexity of the Consolidated Actions pending before this Court, there is simply no time for endless fishing expeditions, or allowing expensive and irrelevant depositions to proceed. Moreover, the Court specifically warned the parties not to wait until the last minute to take depositions, but that is precisely what PPVA has done. Bischof was not served until December 9, 2019, and Johnson *still* has not been served. With the holidays less than two weeks

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away and these senior executive officers preparing for year-end reporting (CNO is a public company, and Bischof and Johnson are integrally involved in these time-intensive preparations), it is now simply too late to notice these depositions. *See Cole v. City of New York*, 2012 U.S. Dist. LEXIS 48542, at *12-13 (S.D.N.Y. Apr. 5, 2012) (quashing subpoenas for unreasonable time to comply “[i]n light of [sic] the plaintiff’s unjustified delay in serving the subpoenas at issue”). Combined with the scheduling difficulties surrounding the holidays—Bischof has pre-existing holiday plans that have him traveling from December 20 to January 6, and Johnson will be traveling on December 17, 20, and 24-27—it will be nearly impossible to coordinate preparation and deposition dates during this time, particularly where counsel will need to prepare the witnesses for inevitable questioning about an entirely different case. Nor will PPVA be significantly disadvantaged if it is unable to take these two depositions in the *Trott* Action, as there will be plenty of time to conduct this very same discovery in the Chancery Action, should it proceed, after December 31, 2019.

Bischof and Johnson respectfully request that the Court quash the Subpoenas and order such other and further relief as this Court deems just and fair. In the alternative, if the depositions must proceed, Bischof and Johnson request that this Court order the deposition to take place in Indiana (and the subpoena to Bischof contains an Indiana location), as required by Rule 45(c)(1), and that the questioning be limited to information relevant only to the *Trott* Action and not the Chancery Action, including prohibiting any questions concerning Agera. Finally, given the eleventh-hour nature of the subpoena, the upcoming holidays and the witnesses’ travel schedules and corporate responsibilities (year-end reporting), if any deposition is ordered it should be upon a mutually agreed date.

Respectfully submitted

/s/ Adam J. Kaiser

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