UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re: PLATINUM-BEECHWOOD LITIGATION.	Civil Action No. 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, - against - PLATINUM MANAGEMENT (NY) LLC, *et al.*, Defendants.	Civil Action No. 18-cv-10936 (JSR)

PLAINTIFFS' COUNSEL STATEMENT TO COURT REGARDING POSSIBLE MONETARY SANCTION RELATED TO OPPOSITION TO EZRA BEREN'S MOTIONS TO DISMISS

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Counsel for Plaintiffs did not intentionally disregard or ignore any rule of this Court or of the Federal Rules of Civil Procedure and acted in good faith at all times. The Opposition to Ezra Beren's Motion to Dismiss [Dkt. No. 497] ("Beren Opposition") complied with counsels' understanding of the rules and prior practices of the Court in this litigation. Importantly, the Court, in this litigation, accepted supplemental information submitted by Plaintiffs to support its arguments concerning the appropriateness of a particular defendant's inclusion in group pleading in analogous circumstances. The Beren supplemental information is no different than the supplemental information submitted previously in similar filings and was offered in this instance to demonstrate the appropriateness of Mr. Beren being properly defined as a Platinum Defendant and a Beechwood Defendant. Also, Mr. Beren's motion to dismiss included factual denials, expressly referenced the late stage of discovery, and invoked Rule 11 – contending that based upon the late stage of discovery, Plaintiffs' counsel had an obligation to evaluate and inform the Court as to evidentiary material learned in the proceedings (*i.e.,* with the very factual material included in the Beren Opposition). *See* Dkt. No. 491 at p. 3. Accordingly, Plaintiffs' counsel believed that Beren had both opened the door to the inclusion of supplemental information and that a heightened factual, or even summary judgment, standard could be applied. *Carter v. Stanton,* 405 U.S. 669, 671, (1972) (per curiam) (Where "matters outside the pleadings were presented and not excluded by the court[, t]he court were therefore required by Rule 12(b) of the Federal Rules of Civil Procedure to treat the motion to dismiss as one for summary judgment and to dispose of it as provided in Rule 56.")

Under these circumstances – and where counsel for Plaintiffs did their best to file a substantive opposition in the last three weeks, and perhaps the busiest time, of the discovery period – Plaintiffs' counsel did not act in bad faith. At worst, the decision constituted a technical error, and Plaintiffs' counsel respectfully requests that the Court find no bad faith and decline to issue sanctions.

ARGUMENT

Ezra Beren was properly identified under the group pleading standards as a Platinum Defendant and a Beechwood Defendant in the Plaintiffs' Second Amended Complaint [Dkt. No. 285] (the "SAC").

The theme of Beren's motion to dismiss [Dkt. No. 491] (the "Beren Motion") was that the sole reason Beren was a named defendant in the case was because he is the son-in-law of Murray Huberfeld. Beren Motion at p. 1. In this regard, Beren: (i) made a number of factual assertions and denials, (ii) specifically invoked the discovery exchanged to date in the case, and (iii) implied that no evidence as to Beren existed while invoking Rule 11 concerning Plaintiffs' continuing obligation to analyze evidence and report to the Court on the outcome of the same.[1] As such, Plaintiffs' counsel believed that they had an obligation to respond to Beren's false assertions and present their supplemental evidence supporting the allegations set forth in the SAC – which had been accepted by

[1] Beren's Motion expressly disputes factual allegations while invoking Rule 11 (p. 3):

> The Second Circuit has observed that Rule 11 obligations "are not measured solely as of the time they are filed with or submitted to the court, but include reaffirming to the court and advocating positions contained in those pleadings and motions after learning that they cease to have any merit." *O'Brien v. Alexander*, 101 F.3d 1479, 1489 (2d Cir. 1996) (quoting the Advisory Committee's notes).
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> A number of the allegations made in the complaints to which Mr. Beren now responds are not true based on Mr. Beren's personal knowledge. This observation is not intended to turn this motion into one for summary judgment, which would be premature, nor do we have any reason to believe the allegations were initially made in bad faith. However, the plaintiffs may be required to disaffirm certain allegations in light of the facts now known. For example: (1) he was not on any "valuation committee"; (2) he never had a "management role" or managerial responsibilities; (3) he was never a corporate "officer"; (4) as "Portfolio Manager" he had little or no discretion as to his "portfolio" and had direct responsibilities only with respect to the PEDEVCO investment; (5) he originated no deals during his employment at Platinum Management (including PEDEVCO, a relationship he inherited from Steinberg); (6) he never received any bonus or other special compensation (other than his regular W-2 wages) in respect of any of the deals alleged to be fraudulent; (7) he never made any communication to PPVA or anyone else regarding the value of any investment; and (8) he was a Beechwood employee but received a diminished (but more accurate) title in light of his continued limited and non-managerial duties.

the Court in prior pleadings in this case. *Cf. Cortec Indus., Inc. v. Sum Holding L.P.*, 949 F.2d 42, 48 (2d Cir. 1991) (A finding of notice is significant).

Moreover, Plaintiffs' understanding was that under circumstances of group pleading in this particular case, it was appropriate to include supplemental information that lent support to the appropriateness of a particular defendant's inclusion in a group (*i.e.,* the Preferred Investors of the BEOF Funds, the Platinum Defendants and the Beechwood Defendants). The use of supplemental, connective information supporting the appropriateness of group pleading as to particular defendants was used by Plaintiffs in its oppositions to prior motions to dismiss. Plaintiffs' counsel also believed that the supplemental information was specifically put at issue by Beren.

The factual support included in the Beren Opposition was not intended to go to issues such as whether there was an overvaluation connected to the Seabrook bribe[2], or that the Black Elk and Agera transactions were tortious, asset dissipating transactions. Rather, the facts went to supplement Beren's role and participation in Agera, Black Elk and the bribe – *i.e.,* that Beren was an appropriate Platinum and Beechwood Defendant.

On pages 6-9 of the Beren Opposition, Plaintiffs' counsel listed the relevant allegations directly from the SAC, including as to Agera, Black Elk and the Seabrook bribe (including public and judicial records as to the same), and did their best to ensure that the supporting factual matter supported the plausibility of these allegations.

Plaintiffs' Opposition Brief included supplemental information nearly identical to the supplemental information that Plaintiffs submitted in response to the prior motions to dismiss – particularly as to the Huberfeld Family Foundation. While it is clear now that this Court did not want

[2] The SAC alleged that the Seabrook bribe was evidence of knowing and perpetuating the overvaluation scheme. The factual material simply explains Beren's role in that bribe as a Platinum Defendant and Beechwood Defendant, and the papering of the same with false invoices. Plaintiffs incorporated the facts and circumstances surrounding the Seabrook bribe in their complaint and these are central and important facts that are public record. SAC at Ex. 1.

the supplemental material in the Beren Opposition, there is no evidence of bad faith by counsel. *See Oliveri v. Thompson*, 803 F.2d 1265, 1275 (2d Cir. 1986) (The court should resolve all doubts in favor of the signer and avoid using hindsight). Counsel for Plaintiffs have attempted to follow this Court's rules and orders meticulously while at the same time providing all relevant information to the Court in a timely manner.

On March 6, 2019, the Court heard oral argument on Defendants' first round of motions to dismiss. During the hearing, there was discussion regarding certain emails not specifically referenced in the complaint, and the Court requested that counsel supplement the SAC with new records that had been collected as whether defendant GRD Estates was "friends and family" within the context of the Black Elk scheme and was properly named as a Preferred Investor of the BEOF Funds as alleged in the SAC. On March 11, 2019, Plaintiffs filed the supplement and attached 3 new emails that Plaintiffs contended supported the group pleading allegations in the SAC [Dkt. No. 271].

On May 13, 2019, Plaintiffs filed their opposition to the second round motion to dismiss filed by the Huberfeld Family Foundation ("HFF"), the most recent motion to dismiss filed in this matter. In its opposition brief, Plaintiffs included supplemental factual material concerning the appropriateness of HFF as a BEOF Defendant and its relationship to Platinum Management (NY) LLC. [Dkt. Nos. 351 and 352] (which material was further supported by the Declaration of Richard A. Bixter, Jr. annexing records).

By the late-afternoon of December 16, 2019, the due date[3] of the Beren Opposition, Plaintiffs' Counsel had prepared the Beren motion to dismiss in a format much like the HFF opposition. A few hours prior to filing, Counsels' associate contacted the Court for what was believed would be a routine motion to file documents subject to the protective order under seal. Counsel, in response to what it

[3] Plaintiffs' counsel had requested an extension of this date from Beren's counsel, which request was denied.

believed was the Court's directive during that call, removed the documents from the opposition papers, and generally attempted to pivot towards greater legal analysis – filing the opposition just prior to midnight.

While the exhibited documents that were planned were removed, Counsel left the supplemental factual assertions, *inter alia,* for all of the reasons stated above: (i) Beren's own factual assertions and express invocation of the discovery to date and Plaintiffs' continuing obligations to analyze that discovery under Rule 11; (ii) Plaintiffs' understanding regarding the role of connective material to support the use of group pleading for Mr. Beren; (iii) Counsels' understanding of prior treatment of the same in this case; and (iv) the possibility of heightened factual or even summary judgment treatment under the circumstances. Plaintiffs' counsel believed that the supplemental information included in the Beren Opposition supported the SAC's factual allegations as explicated in the Opposition Brief at pp. 6-9, and was accurate to the best of Plaintiffs' knowledge. Importantly, Plaintiffs are unaware of any authenticity or relevancy disputes in relation to the underlying documents. *See Chambers v. Time Warner, Inc.*, 282 F.3d 147, 152–53 (2d Cir. 2002).

WHEREFORE, Plaintiffs respectfully request that this Court decline to impose sanctions on Plaintiffs' counsel and find that Plaintiffs' counsel did not act in bad faith or intentionally engage in misconduct.

Dated: New York, New York
January 3, 2020

HOLLAND & KNIGHT LLP

By: /s/ Warren E. Gluck, Esq.
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