

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE PLATINUM-BEECHWOOD LITIGATION

MARTIN TROTT and CHRISTOPER 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.

Master Docket No. 18-cv-06658-JSR

Case No. 1:18-cv-10936-JSR

MEMORANDUM OF LAW IN SUPPORT OF JOSEPH SANFILIPPO'S
MOTION FOR SUMMARY JUDGMENT

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Defendant Mr. Joseph SanFilippo, by and through his undersigned attorneys, respectfully moves pursuant to Federal Rules of Civil Procedure 56(c) for summary judgment on all of Plaintiff's claims against him (the First through Sixth Counts of the Second Amended Complaint ("SAC")).¹

PRELIMINARY STATEMENT

The SAC, charging Mr. SanFilippo with belonging to a group called the "Platinum Defendants," was filed in this case on April 11, 2019. Less than two months later, on July 9, 2019, Mr. SanFilippo was acquitted of all charges in the *Platinum* criminal case, which tracked the *same* allegations made here regarding Platinum Partners Value Arbitrage Fund, L.P. ("PPVA"), including alleged fraudulent inflation of the value of PPVA oil and gas investments and alleged misappropriation of the assets of one such investment, Black Elk Energy Offshore Operations, LLC ("Black Elk").

By rights, Mr. SanFilippo should not be in this case at all. There is no evidence that he participated in any fraud or breach of fiduciary duty and, as a salaried employee, he had no motive to do so. All the relevant evidence, indeed, supports that he is not liable. Plaintiffs had hoped for a very different outcome in the criminal case; having failed to obtain it, they persist in pursuing Mr. SanFilippo in an attempt to draw blood from a stone. That effort cannot succeed. The Court should grant Mr. SanFilippo summary judgment.

¹ The Sixteenth and Seventeenth Counts of the SAC, which also appear to have been brought against Mr. SanFilippo, were dismissed pursuant to a motion to dismiss by Defendant Beren for being defective as a matter of law. *See* Dkt. No. 479 (1/02/20 Mem. Order) at 13-14. The Court's determination should be binding here as well.

STATEMENT OF UNDISPUTED FACTS

The following facts, based on materials in the record (Fed.R.Civ. P. 56(C)(1)(A)), cannot be genuinely disputed.

Mr. SanFilippo

From 2007 to 2016, Mr. SanFilippo was Chief Financial Officer (“CFO”) of Platinum Management (NY) LLC (“PMNY”). PMNY was the Investment Manager and General Partner of PPVA. *See* Ex. 1 (“SanFilippo Aff.”), ¶ 1; 56.1 ¶ 1². Mr. SanFilippo also served on PPVA’s Valuation Committee. Ex. 1 (SanFilippo Aff.) ¶ 2; 56.1 ¶ 2. From January 2015 to October 2015, he stepped down as CFO because of medical issues affecting his family; during this period he served instead as Director of Finance of PMNY under a new CFO. Ex. 1 (SanFilippo Aff.) ¶ 3; 56.1 ¶ 3. Mr. SanFilippo had no ownership or equity interest in any Platinum fund. Ex. 1 (SanFilippo Aff.) ¶ 4; 56.1 ¶ 4. He was a salaried employee of PMNY who in addition was eligible to receive (and in most years did receive) an annual bonus. Ex. 1 (SanFilippo Aff.) ¶ 5; 56.1 ¶ 5.

Mr. San Filippo had no ownership or equity interest in any Beechwood entity or Beechwood-related entity. He also was never employed by any such entity. Ex. 1 (SanFilippo Aff.) ¶ 6; 56.1 ¶ 6.

Disclosures in PPVA’S Financial Statements

One of Mr. SanFilippo’s principal responsibilities was to supervise the preparation of PPVA’s annual audited financial statements. Ex. 1 (SanFilippo Aff.) ¶ 7; 56.1 ¶ 7. He also worked directly with the outside auditors – either BDO or CohnReznick – who audited these statements. In every relevant year, PPVA’s financial statements received an unqualified opinion

² All numbered exhibits cited are attached to the accompanying declaration by Kevin J. O’Brien, dated February 14, 2020. 56.1 refers to Mr. SanFilippo’s 56.1 statement, dated February 14, 2020.

from the auditors. Ex. 1 (SanFilippo Aff.) ¶ 7; 56.1 ¶ 8. An unqualified opinion is the highest mark an audited financial statement may receive. It means that, in an independent auditor's judgment, the company's financial statements are fairly and appropriately presented, in compliance with generally accepting accounting principles.

PPVA's financial statements typically described the fund's major investments, including oil and gas investments such as equity holdings in Black Elk and Golden Gate Oil, LLC ("Golden Gate"). 56.1 ¶ 9. PPVA's Black Elk and Golden Gate investments were considered "Level 3" assets, which are not publicly traded and for which there exist no readily available market prices. Level 3 assets can only be valued by means of sophisticated valuation techniques. SAC ¶ 319; Ex. 2 (2013 PPVA Financial Statement) at 27, 29, 36ff.; Ex. 1 (SanFilippo Aff.) ¶ 8; 56.1 ¶ 10.

The Consolidated Financial Statements for Platinum Partners Arbitrage Fund L.P. and Subsidiaries ("2013 PPVA Financial Statement"), audited by BDO and issued in February 2015, disclosed in detail the valuation process at PPVA. It set forth (1) how Mark Nordlicht, the Chief Investment Officer ("CIO") and President of PMNY, PPVA's Investment Manager and General Partner, determined PPVA's Level 3 valuations and presented them to the Valuation Committee; (2) how those valuations were required to be supported by various data, pricing sources, pricing models, counterparty prices or other methods; (3) how PPVA "has engaged a third-party independent valuation specialist to review and report on all material Level 2 and Level 3 investment valuations on a quarterly basis;" and (4) that the Valuation Committee's responsibility was to review PPVA's written valuation processes and procedures and to evaluate the fairness and consistent application of the valuation policies as set by the General Partner. Ex. 2 (2013 Financial Statement) at 3, 25, 36; Ex. 1 (SanFilippo Aff.) ¶ 9; 56.1 ¶ 11.

The 2013 Financial Statement also disclosed the enterprise value and the financial condition of the fund’s major Level 3 assets, including Black Elk and Golden Gate. It described the valuation method used by Mr. Nordlicht and outside valuation specialists to arrive at the enterprise value for each of these companies – a market approach, specifically a guideline public company method – and disclosed the multiples and discounts used to arrive at enterprise value in each case. Ex. 2 (2013 Financial Statement) at 37-38, 40-4; Ex. 1 (SanFilippo Aff.) ¶ 10; 56.1 ¶ 12.

The 2013 PPVA Financial Statement received an unqualified opinion from the BDO auditors. Their opinion states that the Financial Statement (including its disclosures of the enterprise value and financial condition of PPVA’s Level 3 assets) “*present[s] fairly, in all material respects, the consolidated financial position of [PPVA] and Subsidiaries as of December 31, 2013.*” Ex. 2, (2013 Financial Statement) at 3 (emphasis added); Ex. 1 (SanFilippo Aff.) ¶ 11; 56.1 ¶ 13.

Mr. SanFilippo’s Indictment and Acquittal at Trial

In 2016 Mr. SanFilippo was indicted on six counts of fraud and conspiracy to defraud with respect to PPVA investors. *See United States v. Nordlicht, et al.*, 1: 1-16-cr-00640-BMC, Eastern District of New York (“*Platinum* criminal case”), Dkt. No. 1 (Indictment dated 12/14/16). The principal allegation in the Indictment was that Mr. SanFilippo and four other defendants schemed to fraudulently inflate the value of PPVA’s assets, in particular its oil and gas investments such as Black Elk. Ex. 3 (Indictment) ¶ 42ff; 56.1 ¶ 14.

On July 9, 2019, Mr. SanFilippo was found not guilty of all six counts by the jury in the *Platinum* criminal case. The following day, the Court ordered that he be acquitted, discharged and his bond exonerated. Ex. 4, Dkt. No. 776 (Judgment of Acquittal); 56.1 ¶ 15.

LEGAL STANDARD

Under F.R.Civ.P. 56(a), a court shall grant summary judgment where “there is no genuine dispute as to any material fact and the movant is entitled to judgement as a matter of law.” *See also Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Shenk v. Karmazin*, 868 F. Supp. 2d 299, 305 (S.D.N.Y. 2012). “One of the purposes of summary judgment is ‘to isolate and dispose of factually insupportable claims.’” *CL-Alexanders Laing & Cruikshank v. Goldfeld*, 739 F. Supp. 158, 161 (S.D.N.Y. 1990) (quoting *Celotex*, 477 U.S. at 323-24). Accordingly, as is the case here, where there are no genuine issues of material fact as to the claims alleged and where summary judgment can help to narrow the issues for trial, courts have not hesitated to grant summary judgment. *See Smith v. Menifee*, No. 00 Civ. 2521, 2002 WL 461514, at 3 (S.D.N.Y. Mar. 26, 2002). (“Summary judgment is appropriate to streamline the process for terminating frivolous claims and to concentrate [the court’s] resources on meritorious litigation.”) (quoting *Knight v. U.S. Fire Ins. Co.*, 804 F.2d 9, 12 (2d Cir. 1986)).

To defeat summary judgment, the nonmoving party “must offer some hard evidence showing that its version of the events is not wholly fanciful.” *Jefferys v. The City of N.Y.*, 426 F.3d 549, 554 (2d Cir. 2005) (quoting *D’Amico v. City of N.Y.*, 132 F.3d, 145, 149 (2d Cir. 1998)). “The mere existence of a scintilla of evidence in support of the [non-moving party’s] position will be insufficient; there must be evidence on which the jury could reasonably find for the [non-moving party].” *Jeffreys*, 426 F.3d at 554 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986)). Likewise, the non-moving party “must do more than simply show that there is some metaphysical doubt as to the material facts,” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986), and “may not rely on conclusory allegations or

unsubstantiated speculation.” *Fujitsu Ltd. V. Fed. Express Corp.*, 247 F.3d 423, 428 (2d Cir. 2001).

In particular, where, as here, Plaintiffs’ claims sound in fraud and “can do serious damages to the goodwill of a...professional person,” *In re Initial Pub. Offering Sec. Litig.*, 241 F. Supp. 2d 291, 325 (S.D.N.Y. 2003), summary judgment is particularly appropriate. Furthermore, dismissal of the claims against Mr. SanFilippo would serve “[o]ne of the principal purposes of the summary judgment rule”: “to isolate and dispose of factually insupportable claims, ...thereby permitting courts to avoid ‘protracted, expensive and harassing trials.’” *Allstate Ins. Co. v. Administratia Asigurarilor De Stat*, 948 F. Supp. 285, 298 (S.D.N.Y. 1996) (citation omitted) (quoting *Meiri v. Dacon*, 759 F.2d 989, 998 (2d Cir. 1985)).

There is no “hard evidence” in this case that Mr. SanFilippo engaged in fraud or breached any fiduciary duties as alleged in the First through Sixth Counts of the SAC. In fact, the available evidence shows exactly the opposite. Mr. SanFilippo stands unnecessarily exposed to a trial that would be “protracted, expensive, and harassing,” as well as extremely harmful to his newly revived professional prospects. He is therefore entitled to summary judgment on all counts.

ARGUMENT

The Evidence Belies Any Claim that Mr. SanFilippo Participated in Either the “First Scheme” or the “Second Scheme” Alleged in the SAC

The SAC alleges that Mr. SanFilippo, as one of the “Platinum Defendants,” entered into two schemes to defraud and breach various fiduciary duties.

In the “First Scheme,” the Platinum Defendants are alleged to have fraudulently schemed between 2012 and 2015 (1) to inflate the publicly stated values of PPVA assets,

including oil and gas holdings such as Black Elk and Golden Gate, (2) to misappropriate valuable assets from Black Elk itself, and (3) to improperly “prioritize” the interests of the Beechwood entities over those of PPVA. SAC ¶¶ 3, 9, 19-30. The closest Plaintiffs come to alleging what Mr. SanFilippo *himself* actually *did* to further these supposed schemes is in SAC ¶ 96. Plaintiffs claim, with respect to the first object of the supposed scheme, that Mr. SanFilippo “us[ed] his position as a member of the valuation and risk committees to participate in the false inflation of the values of PPVA’s assets, particularly during the period from 2012 through 2016.” With respect to the second object, Plaintiffs allege without any factual detail that Mr. SanFilippo “help[ed] to orchestrate the Black Elk scheme.” As to the third object of this “First Scheme,” Plaintiffs similarly allege that he “helped to orchestrate” or “consummate” transactions between PPVA and Beechwood entities.

Even more sketchily asserted is Mr. SanFilippo’s involvement in the alleged “Second Scheme,” in which the Platinum Defendants are said to have schemed in late 2015 to transfer or encumber PPVA’s remaining assets for the benefit of Beechwood and various “insiders.” Nowhere is Mr. SanFilippo alleged to have taken any specific steps in furtherance of this supposed scheme. SAC ¶¶ 10-11, 30-33, 96.

Thus, of the four criminal objects asserted in the two schemes, Plaintiffs do not even allege what Mr. SanFilippo supposedly did to pursue three of them (Black Elk, PPVA/Beechwood, PPVA asset transfer/encumbrance). This is not a mere oversight, but rather reflects the absence of any incriminating evidence against Mr. SanFilippo. The SAC’s Black Elk assets allegations, for instance, closely mirror the government’s claims in the Indictment in the *Platinum* criminal case. However, the government chose *not* to indict Mr. SanFilippo for any conduct relating to Black Elk assets. Ex. 3, Dkt. No. 1 (Indictment) Counts Six through Eight.

Trigger-happy as the government was in bringing the Indictment against Mr. SanFilippo, even it could not avoid the reality that he simply had nothing to do with the Black Elk transactions at issue.

Similarly, Mr. SanFilippo had no affiliations or ties to Beechwood or any other person or entity that would explain why he would work against the interests of PPVA, the fund managed by his long-time employer. Conveniently enough, Plaintiffs are quick to cite Mr. SanFilippo's salary and bonus as reasons why he would be incentivized to inflate PPVA's asset values, SAC ¶ 12(ix),³ but then turn around and argue that he also worked to *betray* PPVA's interests. Both cannot be true – in fact, neither is.

Finally, there is no evidence to support Plaintiffs' assertion that Mr. SanFilippo used his position on the Valuation Committee to falsely inflate the value of PPVA's Level 3 assets. Rather, the evidence establishes Mr. SanFilippo's lack of culpability, for these reasons.

First, the PPVA financial statements, which were audited by outside auditors at major accounting firms, make clear that the members of the Valuation Committee (such as Mr. SanFilippo) did *not* determine valuations of PPVA Level 3 assets and that the Committee merely oversaw and reviewed a valuation process based upon multiple inputs, including reviews and

³ It is well-established that, to properly allege fraudulent conduct, “[m]otives that are generally possessed by most corporate directors and officers do not suffice; instead, plaintiffs must assert a concrete and personal benefit to the individual defendants resulting from the fraud.” *Shields v. Citytrust Bancorp, Inc.*, 25 F. 3d 1124, 1130 (2d Cir. 1994). Plaintiffs fail that test here.

reports from “a third-party independent valuation specialist.” The relevant disclosure is as follows:

“Level 3 Valuation Processes

The General Partner [PMNY] establishes valuation processes and procedures to ensure that the valuation techniques for investments that are categorized within Level 3 of the fair value hierarchy are fair, consistent and verifiable. The General Partner designates a Valuation Committee (the “Committee”) to *oversee the valuation process* of the Master Fund’s [PPVA’s] Level 3 investments. The Committee is comprised of Senior Investment Manager personnel and presided over by the Chief Investment Officer (“CIO”) and President of the General Partner. The Committee is responsible for *reviewing the Master Fund’s written valuation processes and procedures, conducting periodic reviews of the valuation policies, and evaluating the fairness and consistent application of the valuation policies as established by the General Partner.*

The Committee meets on a quarterly basis or as needed to review the valuation of the Master Fund’s Level 3 investments. Valuations determined by the CIO, and presented to the Committee *are required to be supported by market data, third-party pricing sources; industry accepted pricing models, counterparty prices, or other methods the Committee deems to be appropriate, including the use of proprietary pricing models.*

Additionally, as part of the review process the Master Fund has engaged a *third-party independent valuation specialist to review and report on all material Level 2 and Level 3 investment valuations on a quarterly basis.*” Ex. 2, (2013 Financial Statement) at 36; emphases added.

Second, the fair values PPVA assigned to its assets through the aforementioned valuation process were *themselves* audited by BDO, which opined that the Financial Statement fairly presented the financial position of PPVA for 2013. Thus, the valuations for investments such as Black Elk and Golden Gate were reviewed for fairness and vouched for not only by an “independent valuation specialist” each quarter, but by BDO auditors at the end of the year.

Third, Mr. SanFilippo’s membership on the Valuation Committee, which functioned within a process benefitting from numerous checks and balances, multiple inputs, and even review and approval from outside auditors, gave him reasonable assurances that

PPVA's Level 3 valuations were being made fairly and in good faith. Mr. SanFilippo himself was not a valuations expert or specialist. (In much the same way, members of corporate audit committees are usually not themselves auditors). But, given the nature of the process established for PPVA, Mr. SanFilippo could rely on the assumption that the fund's valuations were proper. In other words, he acted at all times without fraudulent or otherwise culpable intent.

Given PPVA's careful process for reviewing and determining its Level 3 assets, it is not surprising that, in the *Platinum* criminal case, the government failed to prove any fraud in the fund's valuation of these assets. In fact, the prosecution suffered a complete failure of proof on valuation, which was the centerpiece of the Indictment. Accordingly, in its jury instructions the trial court told the jury it *could not consider* valuations as a basis for convicting any defendant, including Mr. SanFilippo:

“Ladies and Gentlemen of the Jury, you have heard testimony and seen exhibits about Platinum's valuation of its assets. Judge Cogan has found that the valuation of Platinum's assets was proper and you must accept that as a fact. Therefore, fraudulent valuations cannot serve as a basis to convict any defendant.” Ex. 5, Trial Tr. at 7101 (excerpt attached).

For all these reasons, Plaintiffs' valuation case against Mr. SanFilippo also fails.

CONCLUSION

For the foregoing reasons, Mr. SanFilippo respectfully requests that Court grant his motion for summary judgement in its entirety.

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Dated: New York, New York
February 14, 2020