UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE PLATINUM-BEECHWOOD LITIGATION	Master Docket No. 1:18-cv-06658-JSR
SENIOR HEALTH INSURANCE COMPANY OF PENNSYLVANIA, Plaintiff, v. BEECHWOOD RE LTD., et al., Defendants.	Case No. 1:18-cv-06658 (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.	Case No. 1:18-cv-10936-JSR
MELANIE L. CYGANOWSKI, AS RECEIVER, BY AND FOR PLATINUM PARTNERS CREDIT OPPORTUNITIES	Case No. 1:18-cv-12018 (JSR)

MASTER FUND LP, PLATINUM PARTNERS CREDIT OPPORTUNITIES FUND (TE) LLC, PLATINUM PARTNERS CREDIT OPPORTUNITIES FUND LLC, PLATINUM PARTNERS CREDIT OPPORTUNITIES FUND INTERNATIONAL LTD., PLATINUM PARTNERS CREDIT OPPORTUNITIES FUND INTERNATIONAL (A) LTD., and PLATINUM PARTNERS CREDIT OPPORTUNITIES FUND (BL) LLC,

Plaintiffs,

v.

BEECHWOOD RE LTD., et al.,

Defendants.

SENIOR HEALTH INSURANCE COMPANY OF PENNSYLVANIA,

Crossclaimant,

v.

BEECHWOOD RE LTD., B ASSET MANAGER LP, B ASSET MANAGER II LP, BEECHWOOD RE HOLDINGS, INC., BEECHWOOD BERMUDA LTD., BEECHWOOD BERMUDA INTERNATIONAL LTD., BEECHWOOD BERMUDA INVESTMENT HOLDINGS, LTD., BAM ADMINISTRATIVE SERVICES LLC, FEUER FAMILY TRUST, and TAYLOR-LAU FAMILY TRUST,

Crossclaim Defendants.

SENIOR HEALTH INSURANCE COMPANY OF PENNSYLVANIA,

Third-Party Plaintiff,

v.

PB INVESTMENT HOLDINGS LTD., BEECHWOOD CAPITAL GROUP, LLC, B ASSET MANAGER GP LLC, B ASSET MANAGER II GP LLC, MSD ADMINISTRATIVE SERVICES LLC, PLATINUM MANAGEMENT (NY) LLC, N MANAGEMENT LLC, MARK NORDLICHT, MURRAY HUBERFELD, DAVID BODNER, ESTATE OF URI LANDESMAN, NAFTALI MANELA, JOSEPH SANFILIPPO, DANIEL SMALL, ELLIOT FEIT, DAVID STEINBERG, EZRA BEREN, DAVID OTTENSOSER, WILL SLOTA, BERNARD FUCHS a/k/a BERISH FUCHS, DANIEL SAKS, HOKYONG KIM a/k/a STEWART KIM, BEECHWOOD TRUST NO. 1, BEECHWOOD TRUST NO. 2, BEECHWOOD TRUST NO. 3, BEECHWOOD TRUST NO. 4, BEECHWOOD TRUST NO. 5, BEECHWOOD TRUST NO. 6, BEECHWOOD TRUST NO. 7, BEECHWOOD TRUST NO. 8, BEECHWOOD TRUST NO. 9, BEECHWOOD TRUST NO. 10, BEECHWOOD TRUST NO. 11, BEECHWOOD TRUST NO. 12, BEECHWOOD TRUST NO. 13, BEECHWOOD TRUST NO. 14, BEECHWOOD TRUST NO. 15, BEECHWOOD TRUST NO. 16, BEECHWOOD TRUST NO. 17, BEECHWOOD TRUST NO. 18, BEECHWOOD TRUST NO. 19, BEECHWOOD TRUST NO. 20 a/k/a THE DAVID I LEVY BEECHWOOD TRUST,

BEECHWOOD ASSET MANAGEMENT TRUST I, BEECHWOOD ASSET MANAGEMENT TRUST II, BEECHWOOD RE INVESTMENTS, LLC SERIES A, BEECHWOOD RE INVESTMENTS, LLC SERIES B, BEECHWOOD RE INVESTMENTS, LLC SERIES C, BEECHWOOD RE INVESTMENTS, LLC SERIES D, BEECHWOOD RE INVESTMENTS, LLC SERIES E, BEECHWOOD RE INVESTMENTS, LLC SERIES F, BEECHWOOD RE INVESTMENTS, LLC SERIES G, BEECHWOOD RE INVESTMENTS, LLC SERIES H, BEECHWOOD RE INVESTMENTS, LLC SERIES I, ROAD HOLDINGS, LLC, LAWRENCE PARTNERS, LLC, MONSEY EQUITIES, LLC, WHITESTAR LLC, WHITESTAR LLC II, WHITESTAR LLC III, PLATINUM CREDIT HOLDINGS, LLC, MARK NORDLICHT GRANTOR TRUST, DAHLIA KALTER, MICHAEL JOSEPH NORDLICHT, KEVIN CASSIDY, MARK FEUER AND SAMUEL ADLER AS TRUSTEES FOR BEECHWOOD GLOBAL DISTRIBUTION TRUST, BRAD SHALIT AS TRUSTEE FOR FEUER FAMILY 2016 ACQ TRUST, and BRAD SHALIT AS TRUSTEE FOR TAYLOR-LAU FAMILY 2016 ACQ TRUST,

Third-Party Defendants.

MEMORANDUM OF LAW IN SUPPORT OF EZRA BEREN'S MOTION TO DISMISS

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STATUTES

Fed. R. Civ. P. 12(b)(6) 1

Defendant Ezra Beren respectfully moves pursuant to Fed. R. Civ. P. 12(b)(6), to dismiss the claims against him in 1:18-cv-10936-JSR (the "**Liquidators' Case**"). For convenience, unless otherwise noted we use the defined terms as used in the operative complaints in these two actions.

With respect to 1:18-cv-06658-JSR (the "**SHIP Case**"), the claims amount to essentially a subset of those in the Liquidators' Case. Accordingly, in the interest of efficiency, Mr. Beren will not extensively address the claims in the SHIP Case and will not use the additional pages the Court originally allowed for this originally consolidated brief.

PRELIMINARY STATEMENT

The reason Mr. Beren is a defendant in these actions is that he is Mr. Huberfeld's son-in-law. He was an employee with a family connection that seemed fortunate at first but has now become exceedingly expensive.

The allegations against Mr. Beren reduce to the fact that he was an employee with a vaguely senior sounding but ill-defined title and must therefore have been "involved" in Platinum Management's alleged malfeasance. "Involvement" is simply not enough to successfully allege anything. With exhibits, the Second Amended Complaint ("**SAC**") runs to over 1,750 pages. A text search finds that Mr. Beren is specifically mentioned all of 17 times; otherwise, he is lumped into the general group of "Platinum Defendants" or "Beechwood Defendants."

Comparing the specific factual allegations against the other members of these groups with those against Mr. Beren it becomes clear that there are no meaningful factual allegations against Mr. Beren at all. Other members of these groups of defendants are alleged to be founders, or partners, or directly involved in specific transactions, or other things that suggest the exercise of discretion on behalf of a corporate defendant; they can plausibly be said to be insiders, or to have had involvement in their day to day affairs.

There are, however, no such allegations relating to Mr. Beren particularly, and none suggesting that he had "direct involvement in day to day affairs" of the company as a whole, much less the functions relevant to this action. The "group pleading doctrine" can only carry the plaintiffs so far, and it falls far short of reaching Mr. Beren.

Similarly, the JOLs' claims of breach of fiduciary duty not only lack the requisite specificity, but fail to show the kind of duties or relationship that would create a fiduciary duty in the first place.

Finally, specific allegations that would plausibly create an inference of *scienter* are entirely absent.

In sum, "while legal conclusions can provide the framework of a complaint, they must be supported by factual allegations." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). It is in this respect that the SAC falls short. An examination of the allegations specific to Mr. Beren in light of the April 11 Order shows that he has been bundled into this action not on the basis of meaningful allegations, but simply because of a family relationship.

PROCEDURAL POSTURE

In a motion under Rule 12(b)(6), the Court normally "accept[s] all factual allegations in the complaint and draw[s] all reasonable inferences in the plaintiff's favor." *ATSI Commc'ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 98 (2d Cir. 2007). However, Mr. Beren joins this case after substantial discovery has already been completed. The plaintiffs have had access to more than 12 million documents and several key depositions have been taken. Experts have been retained and reports drafted (though Mr. Beren has not had time even to consider this aspect of his defense). In the Liquidators' Case, Mr. Beren is responding to the *third* complaint filed in this action. The plaintiffs have had ample time to investigate their allegations and conform their pleadings to the

evidence as it is known to them. Mr. Beren, however, awaits responses to his interrogatories so that he can know where among the 12 million documents he should look.

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).

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.

Although our review of the documents is only now beginning, we are not aware of any evidence to controvert these facts. Interrogatories have been served to attempt to discover the basis for these allegations and notices to admit are being served contemporaneously.

Further, there have already been motions to dismiss in these consolidated actions. Although they may not be law of the case as to him (as he was not yet a party) Mr. Beren has no desire to relitigate matters the Court has already decided. Mr. Beren therefore joins for purposes of appeal certain arguments regarding the application of law (*e.g.*, the group pleading doctrine and the sufficiency of the allegations connecting him to any allegedly fraudulent statements) but will not reargue the law. In particular, we look to this Court's order of April 11, 2019, (the "**April 11 Order**") for guidance.

I.
THE CLAIMS AGAINST MR. BEREN

For clarity, we summarize which of the many claims pertain to Mr. Beren and how they are alleged to apply to him. In each claim, Mr. Beren is lumped in with either the "Platinum Defendants" or the "Beechwood Defendants"; there are very few allegations against him in particular, and the few that there are rely entirely on assumptions unsupported by factual allegations.

First Count: Breach of Fiduciary Duty (Care and Good Faith)
Second Count: Breach of Fiduciary Duty (Duty of Loyalty/Self-Dealing)

In these claims, Mr. Beren is lumped in as a generic "Platinum Defendant," and it is alleged that he owed fiduciary duties to PPVA. The allegations as to Mr. Beren specifically cannot support a finding of a fiduciary duty. The April 11 Order takes great pains to identify the allegations against the defendants as to whom this claim was sustained that give rise to an inference of a fiduciary

obligation. Those allegations are absent as to Mr. Beren. The JOLs therefore fail adequately to allege even that he was a fiduciary, much less that he acted in derogation of that status.

Third Count: Aiding and Abetting Breach of Fiduciary Duties against the Individual Platinum Defendants

This is the first count in which Mr. Beren's name actually appears. However, the allegations specific to him are still nonexistent. Every relevant allegation lumps him in with the "Platinum Defendants." There are no allegations to suggest that Mr. Beren had actual knowledge of, or actively participated in, the breaches alleged against other Platinum Defendants. The specific factual allegations against Mr. Beren are no stronger than those against the many parties as to whom this Court dismissed these claims in its April 11 Order. *See* April 11 Order 3 (noting dismissal of this claim as to numerous defendants).

Fourth Count: Fraud against the Platinum Defendants

Here too, Mr. Beren is simply lumped in as a "Platinum Defendant." A fraud claim is more demanding than the fiduciary duty claims in Counts One through Three. The JOLs rely on group pleading to associate Mr. Beren with the allegedly fraudulent statements and omissions but have provided nothing to support this contention other than his title. Nor do the allegations specific to Mr. Beren give rise to a plausible inference of *scienter*. The April 11 Order, in its discussion of other Platinum Defendants, again highlights the difference in the allegations between them and Mr. Beren.

Fifth Count: Constructive Fraud against the Platinum Defendants

Mr. Beren is again just a "Platinum Defendant." As the Court explained in its April 11 Order, a constructive fraud claim simply replaces the ordinary *scienter* requirement with a requirement that the tortfeasor be a fiduciary of the victim—essentially imposing strict liability for

false statements on fiduciaries. April 11 Order 25 – 26. As the JOLs have failed to allege a fiduciary duty on the part of Mr. Beren (or the more basic elements of fraud) this claim must fail.

Sixth Count: Aiding and Abetting Fraud against the Individual Platinum Defendants

Again including Mr. Beren merely as a "Platinum Defendant," the SAC completely fails to allege any basis for *scienter* as to Mr. Beren specifically, much less material assistance to actual tortfeasors. Here too, the JOLs rely on Mr. Beren's title and relationship to do all the work for them.

Seventh Count: Aiding and Abetting Breach of Fiduciary Duties against the Beechwood Defendants

Mr. Beren is also a "Beechwood Defendant" and is being accused of aiding and abetting himself as a Platinum Defendant. Here too, the specific allegations against other Beechwood Defendants highlight the absence of specific, factual allegations against Mr. Beren.

Eighth Count: Aiding and Abetting Fraud against the Beechwood Defendants

This claim suffers from the same defects as the Sixth Count—the JOLs simply have nothing to support their claims other than their assumptions about Mr. Beren's role based on his title—which by this time had been downgraded to "credit analyst." SAC ¶ 113.

Sixteenth Count: Civil Conspiracy against the Platinum Defendants and the Beechwood Defendants

As the Court observed in its April 11 Order, there is no independent tort of civil conspiracy in New York. All the claim does is join non-actors with tortfeasors under circumstances where there is a "corrupt agreement" between them and "intentional participation" in the tortious conduct. April 11 Order 27. The allegations against Mr. Beren fail to plausibly suggest either.

Seventeenth Count: Violation of Civil RICO against the Platinum Defendants and the Beechwood Defendants

The predicate acts upon which the JOLs rely are mail and wire fraud based on the allegations described above. This RICO claim fails for the same reasons the fraud claims described above fail.

II.
THE SAC FAILS TO ALLEGE MR. BEREN'S RESPONSIBILITY FOR ANY FALSE OR MISLEADING STATEMENT OR OMISSION AND FAILS TO ALLEGE *SCIENTER*

A.
The JOLs' Claims for Relief Must Be Plausible and Particularized

The plaintiffs are required to "state a claim to relief that is plausible on its face." *Ashcroft*, 556 U.S. at 676 (citation, quotation omitted). "A claim has facial plausibility when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Id.* As this Court held in its April 11 Order, in addition to their fraud claims, the JOLs' claims relating to breach of fiduciary duty

> 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). As a general matter, where a plaintiff brings claims sounding in fraud, she must "(1) specify the statements that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent." *Lerner* [*v. Fleet Bank, N.A.*, 459 F.3d 273 (2d Cir. 2006)] at 290. This is true regardless of whether a plaintiff's claim is for actual fraud, constructive fraud, or breach of fiduciary duty. *See Krys* [*v. Pigott*, 749 F.3d 117 (2d Cir. 2014)] at 129.

April 11 Order 43. All of the claims against Mr. Beren must therefore satisfy the more particularized pleading requirements of Rule 9.

Below, we examine the specific allegations as to Mr. Beren in light of this burden and this Court's prior holdings as to other individual Platinum and Beechwood Defendants. When the specific allegations themselves are scrutinized, it is clear that the JOLs attempt to meet their burden by simply bundling Mr. Beren in with other defendants as to whom they are able to make much more robust allegations. Allegation by association cannot meet the burden of Rule 9, or Rule 8 for that matter.

B.
The Group Pleading Doctrine Is Inapplicable to Mr. Beren

Before turning to the specific allegations against Mr. Beren, we must dispense with the "group pleading" issue. The allegations against Mr. Beren simply are not sufficient to bundle him in with the other defendants.

Mr. Beren's titles alone cannot suffice, and yet that is all that the JOLs really have. The SAC does not try to explain what a "Portfolio Manager" really did at Platinum Management or at Beechwood, but instead leaves it to the Court to draw the unsupported inference that Mr. Beren was "involved" in a substantial way with the challenged deals. Here is an example of the JOLs' pleading technique as to Mr. Beren:

> 255. Nordlicht and Ottensoser were members of the risk committee. Landesman was a member of the risk committee until he resigned as President of Platinum Management in April 2015. Steinberg was a member of the risk committee and later became co-chief risk officer.
>
> 256. The portfolio managers, such as Small, Beren, Levy and Steinberg also contributed to valuation and risk determinations.
>
> 257. Huberfeld, Bodner and Fuchs also had input into determinations as to the value of and risk associated with PPVA's investments.

SAC ¶¶ 255 – 57.

Other individual defendants are alleged to have specific roles relevant to the JOLs' theory of liability: Nordlicht, Ottensoser and Landesman were on the risk committee, and Landesman was President besides. *Id.* ¶ 255. Steinberg was on the risk committee and was also co-chief risk officer. *Id*. Huberfeld, Bodner and Fuchs are alleged to have had input into the "value of and risk *associated with PPVA's investments,*" *id.* ¶ 257, and elsewhere each is repeatedly alleged to have had substantial and specific management roles. Huberfeld and Bodner were founders and owners, *id.* ¶ 12(iii), and Fuchs was a principal. *Id.* ¶ 12(v). Small was a "managing director" as well as a "portfolio manager charged with originating, managing and overseeing many of PPVA's investments, including its investments in Black Elk, Implant Sciences, China Cablecomm, Desert Hawk and Northstar." *Id.* ¶ 12(viii). Levy was a "co-chief investment officer of PPVA." *Id.* ¶ 42.

Compared with the other Platinum Defendants, Mr. Beren is alleged to have "contributed to valuation and risk determinations," though the nature of this contribution is unspecified. *Id.* ¶ 256.[1] This is insufficient to permit a plausible inference of participation in a fraudulent scheme.

A number of cases have addressed complaints such as this one, where a minor defendant subject to a small number of conclusory allegations is lumped in with much more senior corporate officials against whom there are much more robust allegations. Particularly apt is *Levy v. Maggiore*, 48 F. Supp. 3d 428, 449 (E.D.N.Y. 2014).

[1] In fact, we believe the evidence available to the JOLs shows that Mr. Beren had responsibility only for a single relevant transaction—PEDEVCO—and that his duties were limited to taking information provided by PEDEVCO and passing it along to the valuation and risk committees; others had actual responsibility for the investment. The SAC also describes him as "a required member of the valuation committee," SAC ¶ 12(xiii), but does not explain what "required member" means. In fact, this formulation appears designed to allow the JOLs to omit explaining that he did not in fact play any meaningful role in assigning values to PPVA assets—a way of saying he was "involved" without having to actually admit Mr. Beren didn't actually *do* anything.

In *Levy*, the court held that the group pleading doctrine could be applied to Maggiore, who was alleged to have been "a member of the Board of Directors, . . . [a] founder, and . . . Chief Executive Officer for the relevant times . . . ." In contrast, the Court dismissed claims against other defendants, including a "Chief Branding Officer and board member." *Id.* at 451. The plaintiff failed to "allege or provide facts supporting the finding that [the] 'Chief Branding Officer' [was] a 'high level' executive position within [the defendant], or that he was involved with the development of the" allegedly fraudulent statement. *Id*. Consequently, the Court concluded that the group pleading doctrine could not reach a C-suite executive and non-independent member of the board.

Similarly, each of several other board members was alleged: (1) "by virtue of his responsibilities and activities as a senior officer and/or director of the Company" to have been "privy to and participated in the creation, development and distribution [of fraudulent materials]"; (2) to have "enjoyed significant personal contact and familiarity with the other . . . Defendants and was advised of and had access to other members of the Company's management team, internal reports and other data and information about the Company's finances, operations, and sales"; and (3) to have been "aware of the Company's dissemination of information to investors which they knew or recklessly disregarded was materially false and misleading." *Id*.

The court correctly concluded that these allegations, which purported to "suggest[ ] a greater-than-typical involvement of the board members in the day-to-day operations of [the corporate defendant] are conclusory" and that "the remaining allegations [did] not suggest that these Defendants were acting as 'corporate insiders.'" *Id*. at 451 – 52.

If the allegations in *Levy* were insufficient as to the Chief Branding Officer and several directors, the allegations here surely are inadequate as to Mr. Beren, who is alleged to have been a "Portfolio Manager" whose duties are alleged only in the most conclusory fashion.

The fraud claims and claims that sound in fraud—including the fiduciary duty claims, *see* April 11 Order 43, therefore cannot benefit from the group pleading doctrine. The JOLs must therefore tie Mr. Beren to *specific* fraudulent or misleading statements or omissions. The SAC fails to do this, and does not even attempt to do so.

C.
The JOLs Fail to Allege *Scienter* as to Mr. Beren

Even if the JOLs could avail themselves of the group pleading doctrine, "[i]n a case involving multiple defendants, plaintiffs must plead circumstances providing a factual basis for scienter for each defendant; guilt by association is impermissible." *In re DDAVP Direct Purchaser Antitrust Litig.*, 585 F.3d 677, 695 (2d Cir. 2009).

This Court found that the SAC sufficiently alleged *scienter* as to the other Platinum Defendants. As with the group pleading doctrine, the allegations against the other Platinum Defendants are markedly different from those against Mr. Beren. As the Court summarized in its April 11 Order:

> Here, plaintiffs have alleged myriad facts that give rise to a strong inference of fraudulent intent for each of the moving Platinum Defendants. Bodner and Huberfeld, for example, are alleged to be founders and owners of Platinum Management who stood to benefit from the inflation of PPVA's NAV. They are also alleged to be founders and owners of the Beechwood Entities, which were created for the express purpose of "provid[ing] Platinum Management with transaction partners that could be used to justify PPVA's inflated NAV." FAC ¶ 337. Levy is likewise alleged to have received a percentage of Platinum Management's profits and to have been "instrumental in the creation of Beechwood." *Id.* ¶ 53.
>
> Landesman is alleged to have been an owner of Platinum Management, co-CIO of PPVA, a member of the risk and valuation committees, and one of the people responsible "for all trading, asset allocation and risk management on behalf of PPVA." *Id.* ¶¶ 56 – 61. And Ottensoser—while not alleged to be an owner of Platinum Management—is alleged to have received a compensation package

> through which he benefitted from PPVA's inflated NAV. *Id*. ¶ 12(ix). He is also alleged to have been general counsel, chief compliance officer, and a member of the risk committee, as well as one of the people "involved in creating Beechwood" and one of the people "responsible for documenting the transactions that comprised the First and Second Schemes." *Id*. ¶¶ 105 – 109.

April 11 Order 50 – 51.

These allegations are vastly more robust than anything alleged as to Mr. Beren. The closest—and it is not very close—is that Mr. Beren stood to benefit financially from the overvaluing of PPVA's investments. The SAC alleges Mr. Beren

> was paid a salary plus incentive compensation based on the increased value of the investments he managed, whether realized or unrealized. In 2014, Beren also entered into an investment management agreement with BAM, for which he was paid based on the performance of the investments he managed, so he personally benefitted from the inflated asset values assigned to PPVA's assets by the Platinum Defendants and from the inflated distributions, fees and other payments made to Platinum Management by PPVA.

SAC ¶ 12(xiii). On this basis, the most similar of the other Platinum Defendants is perhaps Steinberg, who (unlike Mr. Beren) is also alleged to have been a member of the risk committee and co-chief risk officer, *id.* ¶ 255, as well as to have been an "authorized signatory" and to have "negotiated the terms of the 2015 Montsant Loan in his capacity as a fiduciary of this wholly owned PPVA subsidiary." *Id.* ¶ 525. Or compare Ottensoser, who is also alleged to have "been general counsel, chief compliance officer, and a member of the risk committee, as well as one of the people involved in creating Beechwood and one of the people responsible for documenting the transactions that comprised the First and Second Schemes." April 11 Order 51 (quotations, citations omitted).

But all there is for Mr. Beren is the allegation that he made more money because of inflated net asset values and that he therefore had the requisite *scienter*.[2] It has, however, long been the rule that the simple desire to make more money is insufficient to establish *scienter*. *See, e.g.*, *Kalnit v. Eichler*, 264 F.3d 131, 139 (2d Cir. 2001) ("Motives 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) ("[A] plaintiff must do more than merely charge that executives aim to prolong the benefits of the positions they hold"); *Ferber v. Travelers Corp.*, 785 F. Supp. 1101, 1107 (D. Conn. 1991) ("[I]ncentive compensation can hardly be the basis on which an allegation of fraud is predicated. On a practical level, were the opposite true, the executives of virtually every corporation in the United States could be subject to fraud allegations.").[3]

But that is all the JOLs have with respect to Mr. Beren. The SAC fails to allege *scienter* sufficiently.

[2] In fact, Mr. Beren was never paid more than his regular W-2 wages in respect of any of the deals alleged to have been fraudulent. His employment may have allowed for that possibility but he never in fact received any such incentive compensation, and we believe that nowhere in the 12 million documents is there any evidence that Mr. Beren did. If the JOLs are aware of this and persist in this allegation nonetheless it is intentionally misleading.

[3] These securities cases discuss the pre-PSLRA standard and are therefore applicable in this action.

III.
THE CLAIMS AGAINST MR. BEREN ARE INSUFFICIENTLY ALLEGED

A.
The Claims Grounded in Fiduciary Duties Fail

Counts One and Two are predicated on a breach of fiduciary duty by Mr. Beren. Count Three alleges aiding and abetting breaches of fiduciary duties by others.

For Counts One and Two, the JOLs must therefore show that Mr. Beren owed PPVA a fiduciary duty either by virtue of his position at Platinum Management or arising from specific conduct. The SAC does not attempt to allege any specific acts by Mr. Beren that would create a fiduciary duty on his part, so any such duty must arise from his position at Platinum Management.

As the Court explained in its April 11 Order:

> "In determining whether a fiduciary duty exists, the focus is on whether one person has reposed trust or confidence in another and whether the second person accepts the trust and confidence and thereby gains a resulting superiority or influence over the first." *Indep. Asset Mgmt. LLC*, 538 F. Supp. 2d at 709. Accordingly, a plaintiff cannot allege that a corporate official owed a fiduciary duty without "indicat[ing] that there was anything about [the defendant's] role as a corporate official that created a personal relationship of trust and confidence." *Krys*, 486 F. App'x at 156.

April 11 Order 52. And the Court explained in detail why the allegations against other Platinum Defendants were sufficient—demonstrating a sharp contrast with the skimpy and conclusory allegations as to Mr. Beren:

> Bodner and Huberfeld are alleged to be founders of PPVA, and to have been "involved in the management and operation of PPVA" to such an extent that their "approval was required for all significant business, investment and personnel decisions." Landesman and Levy are each alleged to have been co-CIOs of PPVA; Landesman is also alleged to have been "responsible for all trading, asset allocation and risk management on behalf of PPVA," while Levy is alleged to have "had direct responsibility for overseeing and managing many of PPVA's most significant investments."

Id. 52 – 53. Mr. Beren is alleged to have been a Portfolio Manager with no explanation of what that title means or what responsibilities it carried. Unlike Levy, Mr. Beren is not alleged to have exercised discretion in trading anything on behalf of PPVA or anyone else. *C.f. Assured Guar. (UK) Ltd. v. J.P. Morgan Inv. Mgmt. Inc.*, 80 A.D.3d 293, 306 (1st Dep't 2010), *aff'd*, 18 N.Y.3d 341 (2011) (exercising discretion on behalf of investor gives rise to fiduciary relationship). Unlike Bodner and Huberfeld, Mr. Beren is not alleged to have had the power to approve or withhold approval of anything. Indeed, the allegation that Bodner's and Huberfeld's "approval was required for all significant business, investment and personnel decisions" seriously undermines any inference that Mr. Beren had the kind of authority that could plausibly give rise to a fiduciary obligation. SAC ¶ 996 ("The ultimate decision making for both Platinum Management and the Beechwood Entities rested with the same controlling minds: Nordlicht, Huberfeld, Levy and Bodner.").

The allegations of the SAC are simply insufficient to allege that Mr. Beren owed fiduciary duties to anyone, and Counts One and Two must therefore fail. They would fail independently because of the lack of a showing of *scienter*, as discussed above in Section II.D.

Count Three, alleging aiding and abetting a breach of fiduciary duty by other defendants, similarly fails. In the April 11 Order, the Court dismissed numerous aiding and abetting claims on the ground that the JOLs failed to "plausibly allege that the defendant had actual knowledge of the underlying tort." April 11 Order 31 – 33 (citing *Krys v. Butt*, 486 F. App'x 156, 157 (2d Cir. 2012); *Krys v. Pigott*, 749 F.3d 117, 127 (2d Cir. 2014)). Although Mr. Beren may not be as remote with respect to the relevant transactions as some of those defendants, the allegations of the SAC still fail to allege actual knowledge of any underlying tort by Mr. Beren.

Further, "a claim for aiding and abetting a breach of fiduciary duty requires, *inter alia*, that the defendant knowingly induced or participated in the breach." *Krys*, 486 F. App'x at 157 (citation, quotation omitted). As shown above, the allegations in this respect are insufficient.

Counts One, Two and Three all fail.

B.
The Claims Grounded in Fraud Fail

The Fourth, Fifth and Sixth Counts allege fraud, constructive fraud and aiding and abetting fraud. As discussed above in Section II.B, the JOLs cannot make use of the group pleading doctrine. They must therefore satisfy the pleading requirements applicable to a claim of fraud. As the Court explained in its April 11 Order,

> Under Rule 9(b), a plaintiff must: "(l) specify the statements that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent." *Lerner v. Fleet Bank, N.A.*, 459 F.3d 273, 290 (2d Cir. 2006). "In cases where the alleged fraud consists of an omission and the plaintiff is unable to specify the time and place because no act occurred, the complaint must still allege: (1) what the omissions were; (2) the person responsible for the failure to disclose; (3) the context of the omissions and the manner in which they misled the plaintiff, and (4) what defendant obtained through the fraud." *Odyssey Re (London) Ltd.v. Stirling Cooke Brown Holdings Ltd.*, 85 F. Supp. 2d 282, 293 (S.D.N.Y. 2000).

April 11 Order 24 – 25.

Without the benefit of the group pleading doctrine, the SAC cannot satisfy these requirements; indeed, it does not even try. Unlike the other Platinum Defendants, Mr. Beren is not linked to any specific statements or omissions. Further, as discussed in Section II.D, allegations as to *scienter* are patently lacking. The fraud claim must fail.

As the Court has explained, a constructive fraud claim simply replaces the ordinary *scienter* requirement with a requirement that the tortfeasor be a fiduciary of the victim—essentially

imposing strict liability for false statements on fiduciaries. *Id.* 25 – 26. As discussed in Section III.A, the JOLs have failed to allege a fiduciary duty as to Mr. Beren, so this claim must fail as well.

With respect to the aiding and abetting claim in the Sixth Count, the SAC fails to allege any basis for *scienter* as to Mr. Beren. *See supra* Section II.D. Here too, the JOLs rely on unsupported conclusions and Mr. Beren's relationship with Huberfeld to do all the work for them. Counts Four, Five and Six all fail.

C.
The Beechwood-Related Claims Fail

The Seventh and Eighth Counts pertain to Mr. Beren's time as an employee of Beechwood, on the strength of which he is named a "Beechwood Defendant." *See* SAC ¶¶ 35, 12(xiii).[4] Both Counts are claims for aiding and abetting the Platinum Defendants—the Seventh as to breaches of fiduciary duty, and the Eighth as to fraud. These claims fail for essentially the same reasons as the claims discussed above. Once again, the JOLs must allege that Mr. Beren had actual knowledge of the underlying tort and that the defendant knowingly induced or participated materially in the breach. *Krys*, 486 F. App'x at 157; *Krys*, 749 F.3d at 127; Once again, the specific allegations against other Beechwood Defendants highlight the paucity of the allegations against Mr. Beren. *See* April 11 Order 38 – 40.

The individual Beechwood Defendants are Nordlicht, Huberfeld, Bodner, Saks, Levy, Beren, Manela, Ottensoser, Taylor, Feuer and Narain. SAC ¶ 35. Every one of the other Beechwood Defendants is the subject of factual allegations putting them in positions of

[4] While at Platinum Management, Mr. Beren had been at least called a "Portfolio Manager" and "Vice President" even if his duties as alleged included neither authority nor discretion; when he was hired at BAM he was "demoted" to "credit analyst." SAC ¶ 113.

responsibility and authority at some relevant Beechwood entity. *See, e.g.*, SAC ¶ 46 (Nordlicht was owner and controlling person acting through Levy, Naftali Manela, Saks, Narain, Taylor and Feuer); ¶ 77 (Bodner was creator and owner of Beechwood); ¶ 85 (Nordlicht, Levy, Bodner and Huberfeld were "concealed owners and co-lead managers of the Beechwood Entities"); ¶¶ 190 – 92 (Saks chief investment office and President); ¶ 193 ("Feuer, Levy and Taylor were the original public face of Beechwood and, together with Nordlicht, Bodner and Huberfeld, founded the company"); ¶¶ 205 – 08 (Narain was involved with numerous specific transactions with Nordlicht, Levy, Steinberg, Ottensoser, Fuchs, Bodner, Huberfeld, Katz, Cassidy, Michael Nordlicht and others.)

Mr. Beren was a credit analyst. *Id.* ¶ 113. The JOLs do not allege any facts that suggest that while occupying this mighty position he had the power or discretion to control or even meaningfully to affect anything. Instead, the JOLs allege in conclusory fashion that he was "involved." *Id.* ¶ 114. This is not enough to plausibly allege that Mr. Beren had actual knowledge of any underlying tort or that he knowingly induced or participated materially in any breach. The Seventh and Eighth Counts must be dismissed.

D.
The Civil Conspiracy Claim Fails

As the Court has explained, there is no independent tort of civil conspiracy in New York. All the claim does is join non-actors with tortfeasors under circumstances where there is a "corrupt agreement" between them and "intentional participation" in the tortious conduct. April 11 Order 27. For all of the above reasons, the allegations against Mr. Beren fail to plausibly suggest either.

E.
The Civil RICO Claim Fails

The predicate acts upon which the JOLs rely are mail and wire fraud based on the allegations described above. *See* SAC ¶¶ 978 – 79. As explained above, the JOLs fail to sufficiently allege any fraudulent conduct on the part of Mr. Beren. The RICO claim therefore fails for the same reasons the fraud claims described above fail.

Further, the specific RICO allegations serve to show just how removed Mr. Beren was from the relevant conduct and how weak the specific allegations against him are. The JOLs list a host of specific acts alleged to be sufficient predicates, and Mr. Beren is not tied to any of them.

IV.
THE CLAIMS AGAINST MR. BEREN IN THE SHIP CASE SIMILARLY FAIL

The Amended Third Party Complaint in the SHIP Case ("**TPC**") uses the same pleading strategy as the SAC. The TPC bundles Mr. Beren into the "Co-Conspirators," TPC ¶ 1 n.4, the "Beechwood Insiders," *id.* ¶ 4 n.8, the "Platinum Insiders," *id.* ¶ 29 n.17. The allegations about his position and responsibilities are similarly conclusory and unsupported by facts. *Id.* ¶ 49. Apart from that, the allegations specific to Mr. Beren are: that he was employed simultaneously by Platinum Management and Beechwood, *id.* ¶¶ 119, 122; that he "contributed to the valuation committees valuation assessments," *id.* ¶ 327, without describing his "contribution" and implicitly acknowledging he was not *on* the valuation committees; and that he "contributed to risk determinations," *id.* ¶ 328, without describing his "contribution" and implicitly acknowledging he was not *on* the risk committees.

As discussed above, this isn't even close to sufficient.

The claims asserted against him, for aiding and abetting fraud, Count One, *id.* ¶¶ 410 – 18, aiding and abetting breach of fiduciary duty, Count Two, *id.* ¶¶ 419 – 28, and for civil conspiracy, Count Five, *id.* ¶¶ 445 – 53, all fail for the reasons discussed above. An additional claim for unjust enrichment, Count Seven, *id.* ¶¶ 461 – 66, appears to name Mr. Beren incorrectly, as it refers to "Co-Conspirator Defendants" but does not name him among the recipients of property by which they were allegedly unjustly enriched. *See id.* ¶ 462. He is not alleged to have received any such property.

CONCLUSION

For the reasons discussed above, the SAC should be dismissed as to Mr. Beren. Because this is the third operative complaint, and because the JOLs have long been in possession of an extraordinarily voluminous record, there is no reason to believe that there are more robust allegations that they have hiding in reserve. The dismissal should therefore be with prejudice.

Dated: December 2, 2019
New York, NY

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