Platinum Partners Value Arbitrage Fund LP v Kroll Assoc., Inc.

2011 NY Slip Op 32599(U)

September 30, 2011

Supreme Court, New York County

Docket Number: 105508/2010

Judge: Paul Wooten

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SCANNED ON 10/5/2011

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL WOOTEN
Justice

PART 7

PLATINUM PARTNERS VALUE ARBITRAGE FUND LP,

Plaintiff,

- against-

KROLL ASSOCIATES, INC., and KROLL, INC.,

Defendants.

INDEX NO. 105508/2010

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to 5, were read on this motion by defendants to dismiss the complaint, pursuant to CPLR 3211(a)(1) and (7), and CPLR 3016.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1,2
Answering Affidavits — Exhibits (Memo)	3,4
Replying Affidavits (Reply Memo)	5

FILED
OCT 05 2011
NEW YORK
COUNTY CLERK'S OFFICE

Cross-Motion: ☐ Yes ■ No

This is an action by plaintiff Platinum Partners Value Arbitrage Fund LP ("Platinum"), a hedge fund, against Kroll Associates, Inc. and Kroll, Inc. (collectively "Kroll"), a provider of due diligence services, alleging fraud, gross negligence, and breach of contract in connection with Kroll's performance of due diligence services. Platinum alleges that it relied upon Kroll's due diligence services when it decided to fund a $20,000,000 loan that later turned out to be part of a Ponzi scheme. Platinum now seeks to hold Kroll liable for its losses on the basis that Kroll failed to discover and disclose certain information regarding the criminal histories of the parties involved that could have been found had Kroll conducted a proper search of online media sources. Discovery has not commenced and the Note of Issue has not been filed. Before the Court is Kroll's pre-answer motion to dismiss, pursuant to CPLR 3211(a)(1) and (7), and CPLR 3016, seeking to dismiss the complaint in its entirety. Platinum has responded in opposition to

the motion, and Kroll has filed a reply.

BACKGROUND

A. The Facts

According to the complaint, Platinum is a hedge fund and Kroll is an entity that provides investigative due diligence services. In 2008, Platinum contemplated making a substantial loan to an entity known as Banyon Investments LLC ("Banyon") in order to facilitate the purchase of "structured litigation settlements" -- an investment vehicle involving litigation settlements that are purchased at a discount and paid out over time -- from a Florida attorney, Scott Rothstein ("Rothstein"). In order to ascertain the business risks associated with the potential loan and to assess the integrity of those involved, Platinum, through its attorneys, Troutman Sanders LLP ("Troutman"), retained Kroll to conduct a due diligence investigation into Rothstein's law firm, Rothstein Rosenfeld Adler PA ("RRA"), as well as other related individuals and companies, including George Levin ("Levin") and Frank J. Preve ("Preve"). Rothstein and RRA were the attorneys for the plaintiffs in the cases underlying the structured litigation settlements, and Levin and Preve were involved in raising capital to finance the settlements.

Kroll was retained pursuant to a retainer letter dated May 14, 2008 ("the Retainer Agreement"), which provided for a retainer payment of $12,500, hourly rates ranging from $230 to $475, and an estimated budget for the overall engagement of $40,000 to $50,000. The Retainer Agreement expressly limited Kroll's liability for damages as follows:

> "[Troutman] and Platinum Partners agrees that neither we, our affiliates, our representatives nor our employees will be liable for any claims, liabilities or expenses relating to this engagement for an aggregate amount in excess of the fees paid by you to us pursuant to this engagement, *except to the extent finally judicially determined to have resulted from our gross negligence, fraud, willful or unlawful conduct.* In no event will we or our affiliates, our representatives or our employees be liable for consequential, special, indirect, punitive or exemplary losses, damages or expenses relating to this engagement" (Not. of Mot., Ex. 1-A at § 2 [emphasis supplied]).

Platinum alleges that in deciding to retain Kroll, it relied upon representations made in Kroll's website describing the quality of its work as:

> "A Kroll investigation is the standard by which due diligence investigations are measured. Kroll provides clients with the information they need to assess the background, reputation, and integrity of any business before entering into a substantial financial relationship.
>
> How We Investigate
>
> When organizations are exploring underwritings, investments, acquisitions, mergers or other commercial partnerships, among the principal's questions to be answered are:
>
> *Are the representations and warranties that form the basis for the deal accurate and complete?
>
> *What is the background and reputation of the parties with whom we will be doing business?" (*id.*, Ex. 1 at ¶ 24).

Platinum also purportedly relied upon the following representation from Kroll's website: "We maintain the world's most comprehensive database library of public and proprietary investigative information. Our due diligence investigative strategy is designed to trawl every available electronic and public record source." (*id.* at ¶ 25).

In addition, Platinum claims that it relied upon Kroll's representations in the Retainer Agreement that it had "online subscriptions to thousands of local and global news sources and [would] provide comprehensive research drawing upon these numerous and diverse information sources." (*id.* at ¶ 21).

On June 23, 2008, Kroll submitted a 76-page report to Platinum containing the final results of its due diligence investigation ("the Report"). The Report noted, *inter alia*, that the chief objectives of the assignment were to determine: (1) whether RRA was legal counsel in lawsuits that could result in potential settlement awards in the tens of millions of dollars; (2) whether any of the principal subjects, mainly Rothstein and Levin, were actually wealthy or in financial difficulty; and (3) the reputation of the subjects. Kroll described the methodology that it

[* 4]

utilized in connection with its investigation as follows:

> "Kroll's methodology included onsite and database research mainly in Broward County, Florida. When possible, Kroll expanded its searches nationally to identify corporate affiliations and property ownership related to the subjects. The database research consisted of a review of electronically available public records in relevant jurisdictions and encompassed corporate affiliations and filings, property ownership records, limited partnership filings, fictitious business name filings, federal and state litigation records, lien and judgment filings, local and national media archives, consumer databases and appropriate state and federal regulatory agency records. Kroll conducted a focused, onsite search of civil litigation indices in Broward County, Florida.
>
> Kroll also conducted source enquiries in Broward and Miami-Dade Counties, Florida for information regarding the reputation of the subjects" (*id.* at ¶ 32).

The Report devoted an entire chapter to Levin. It noted that Kroll conducted a state-wide criminal history check with the Florida Department of Law Enforcement ("FDLE") and that no matching records were found. Platinum alleges that this falsely implied that Levin had no prior criminal history. The Report also referenced a Levin-affiliated corporation, Classic Motor Carriages, Inc. ("CMC"), but purportedly did not disclose that in 1985 and 1992, CMC signed consent agreements with the Florida Attorney General ("Florida AG") promising not to violate state consumer protection laws; that in 1994, the Florida AG filed a civil complaint against CMC and Levin charging deceptive trade practices and civil theft based on complaints of consumer fraud; or that in 1999, CMC pled guilty in federal court to wire fraud based upon fraudulent sales practices. Platinum claims that the Report disclosed no criminal, fraudulent, or other unlawful conduct by Levin or CMC.

The Report also devoted a full chapter to Preve. It similarly noted that Kroll conducted a state-wide criminal history check for Preve with the FDLE and that no matching records were found. Platinum claims that this falsely implied that Preve had no prior criminal involvement in Florida. Further, the Report listed only two civil cases against Preve in the Clark County,

[* 5]

Washington, Superior Court, and no criminal cases. Platinum alleges that the Report failed to disclose that in 1985, Preve pled guilty in federal court to falsifying loan documents in connection with a criminal scheme that resulted in substantial loses by the International Bank of Miami, of which Preve had been President.

On June 27, 2008, purportedly in reliance upon Kroll's findings, Platinum funded loans to Banyon in excess of $20,000,000 in connection with the RRA structured litigation settlements. Thereafter, on December 1, 2009, Rothstein was indicted in the United States District Court for the Southern District of Florida on charges that included racketeering and wire fraud for running a Ponzi scheme. The Ponzi scheme that was the subject of the indictment included the RRA structured litigation settlements for which Platinum had provided capital. Rothstein pled guilty on January 25, 2010, and Platinum alleges that it has sustained substantial losses as a result.

B. The Present Lawsuit

Platinum commenced the present action against Kroll in April 2010, bringing causes of action for fraud, gross negligence, and breach of contract. The complaint alleges that Platinum loaned substantial sums in connection with the RRA structured litigation settlements in reliance upon Kroll's representations in the Report, the Retainer Agreement, and Kroll's website, and that it would not have loaned the funds had Kroll uncovered and disclosed certain information regarding the criminal histories of Preve, Levin, and CMC that was readily available from the online media source LexisNexis. Specifically, Platinum claims that Kroll missed the following media reports: (1) a May 23, 1985 article by the "Miami Herald" reporting that Preve pled guilty in federal court to falsifying loan documents; (2) a July 12, 1994 article in the "Fort Lauderdale Sun-Sentinel" reporting that the Florida AG had filed a civil complaint against CMC and Levin that included charges of deceptive trade practices and civil theft, and that referenced the consent agreements that CMC signed in 1985 and 1992; and (3) an April 30, 1999 article in the

"Vero Beach Press Journal" reporting that CMC pled guilty in federal court to criminal charges based upon fraudulent sales practices to consumers. Platinum claims that had Kroll conducted a relevant LexisNexis search, it would have uncovered these articles and discovered the criminal histories of Preve, Levin, and CMC.

The complaint further alleges that Kroll knowingly made false representations in the Report, the Retainer Agreement, and Kroll's website regarding the methodology it used to perform the due diligence investigation and as to the breath of the electronic searches it conducted. Platinum claims that Kroll's investigation bore no resemblance to the detailed, thorough and comprehensive investigation promised in Kroll's various representations, and that Kroll intended for Platinum to rely on its representations and delivered the Report with knowledge or reckless disregard for the fact that it had not conducted a thorough electronic search of media and public records. Platinum also claims that it suffered substantial lost loan funds as a proximate result of Kroll's "knowing, willful and/or reckless misrepresentations" (*id.* at ¶ 82), and it seeks to recover compensatory and punitive damages exceeding $20,000,000.

Kroll has not yet answered the complaint. In this pre-answer motion to dismiss all three causes of action, Kroll takes the position that the present lawsuit is merely an attempt to hold it responsible for Platinum's own poor decision to invest in a Ponzi scheme, and to circumvent the parties' contractual damages limitation clause based upon unsubstantiated allegations of fraud and gross negligence. Kroll claims that it explicitly warned Platinum that the contemplated loan transaction bore the hallmarks of a Ponzi scheme, and it references specific sections of the Report indicating that the RRA lawsuits could not support settlements anywhere close to the levels contemplated by the transaction; that Rothstein and Levin were financially stretched; and that the reputations of Rothstein and his associates were suspect in the Florida legal community. Kroll notes, in particular, that it examined all relevant cases in which RRA had been counsel in 2007 and 2008 and reported that the lawsuits were too small to sustain the

transaction.[1] Kroll further notes that the Report identified some 65 newspaper or online reports that Kroll reviewed, and specified that the media searches encompassed only *recent* articles within the previous 10 years (*i.e.*, back to 1998), which would have excluded the 1994 and 1985 articles. The Report also revealed that the due diligence search encompassed only *active* companies affiliated with Levin, which would have excluded the 1999 newspaper article about CMC since it concerned an *inactive* company. Additionally, Kroll maintains that it disclosed that its criminal history checks into Levin and Preve were limited to state-wide criminal background checks with the FDLE and did not expressly concern federal criminal background checks. In any event, Kroll submits that the Retainer Agreement contains a damages limitation clause limiting any potential damages in this action to less than $75,000.

DISCUSSION

A. Motion to Dismiss Standards

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction" (*Leon v Martinez*, 84 NY2d 83, 87 [1994]). The Court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*id.* at 87-88). Under CPLR 3211(a)(1), dismissal is warranted "only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*id.* at 88; *see also Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *Kram Knarf, LLC v Djonovic*, 74 AD3d 628, 628 [1st Dept 2010]). Under CPLR 3211(a)(7), the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law, dismissal will be denied (*see Guggenheimer v Ginzburg,* 43 NY2d 268, 275 [1977]; *Harris v IG*

[1] Kroll also claims that, in addition to the Report, it gave supplemental warnings about the proposed loan. Kroll submits, *inter alia*, a copy of an email sent on June 24, 2008, advising "appropriate safeguards" and verification of "the existence of the underlying lawsuits and settlements" should the transaction proceed (Not. of Mot., Ex. 5). The email also recommended an opinion from Florida legal counsel.

Greenpoint Corp., 72 AD3d 608, 609 [1st Dept 2010]).

A heightened pleading requirement applies where a cause of action for fraud is pled. CPLR 3016(b) requires that the "circumstances constituting the wrong be stated in detail" (*see E1 Entertainment U.S. LP v Real Talk Entertainment, Inc.*, 85 AD3d 561, 562 [1st Dept 2011]), and a complaint that does not allege fraud with sufficient particularity is dismissible as a matter of law (*see Accurate Copy Serv. of Am., Inc. v Fisk Bldg. Assoc. L.L.C.*, 72 AD3d 456, 456 [1st Dept 2010]; *Ambassador Factors v Kandel & Co.*, 215 AD2d 305, 307 [1st Dept 1995]).

B. Fraud

Kroll moves to dismiss Platinum's fraud claim on two grounds. First, Kroll argues that Platinum has failed to plead all of the essential elements of its fraud claim with particularity. Second, Kroll argues that the fraud claim should be dismissed because it is duplicative of Platinum's breach of contract claim.

In order to state a cause of action for fraud, a plaintiff must allege "misrepresentation or concealment of a material fact, falsity, scienter by the wrongdoer, justifiable reliance on the deception, and resulting injury" (*Zanett Lombardier, Ltd. v Maslow*, 29 AD3d 495, 495 [1st Dept 2006]). Each of the essential elements must be pled with the requisite particularity under CPLR 3016(b) (*see New York City Health & Hosps. Corp. v St. Barnabus Community Health Plan*, 22 AD3d 391, 391 [1st Dept 2005]; *Ramos v Ramirez*, 31 AD3d 294, 295 [1st Dept 2006]). Though CPLR 3016(b) requires a plaintiff to detail the allegedly fraudulent conduct, unassailable proof of fraud is not required at the pleading stage, and the heightened pleading requirements of CPLR 3016(b) are satisfied "when the facts suffice to permit a 'reasonable inference' of the alleged misconduct" (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]; *see also Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d 486, 492 [2008]; *Stewart Tit. Ins. Co. v Liberty Tit. Agency, LLC*, 83 AD3d 532, 533 [1st Dept 2011]).

Here, Kroll alleges that Platinum has failed to plead particularized facts supporting its

fraud claim with respect to the issues of scienter, justifiable reliance, and proximate cause.[2] As to the issue of scienter, Kroll argues that Platinum proffers only conclusory and unsubstantiated allegations that the representations made by Kroll were "knowingly" or "recklessly" false, and that Platinum merely attempts to infer fraudulent intent based on Kroll's failure to discover the three media articles on LexisNexis. Kroll argues that such a theory inferring fraudulent conduct from assertions of negligence cannot sustain a fraud claim.

Platinum argues that it has sufficiently pled facts from which scienter may be reasonably inferred. Platinum claims that it has set forth numerous misrepresentations and omissions that "could only have been made with clear intent and knowledge of their falsity," and that there "must have been either knowing misrepresentations made -- constituting fraud -- or gross negligence" for a company of Kroll's caliber and expertise to miss these criminal convictions (Memo. in Opp. at 23-24).

The Court finds that Platinum has failed to adequately plead a cause of action for fraud. It is well established that a fraud claim is not stated where a plaintiff makes only a conclusory allegation of the element scienter, and fails to set forth factual allegations from which it may be reasonably inferred that the purported misrepresentations were known to be false at the time they were made (*see Giant Group v Arthur Andersen LLP*, 2 AD3d 189, 190 [1st Dept 2003] [fraud claim properly dismissed on the ground that allegations of scienter were not pled with the requisite particularity and were conclusory where plaintiff alleged "only that defendants knew or recklessly failed to discover certain improprieties in the financial statements of the corporate entity which defendants were purportedly to review on plaintiff's behalf"]; *Zanett*, 29 AD3d at 495-96; *Dominick v Green*, 2004 WL 5109719 [Sup Ct NY County 2004]).

Here, the allegations of scienter are conclusory and the complaint fails to allege sufficient facts from which Kroll's knowledge of the purported falsity of its representations may

[2]Because the Court finds the scienter element dispositive, the Court will not address Kroll's arguments with respect to the remaining elements of fraud.

be reasonably inferred (*see Giant*, 2 AD3d at 190). There are inadequate allegations that the representations in the Report, the Retainer Agreement, or Kroll's website were made to intentionally deceive Platinum, or that Kroll should have known that the representations were false. Indeed, Platinum merely alleges that Kroll's representations must have been made with the requisite intent since Kroll failed to discover the three news articles on LexisNexis. This mere allegation that Kroll "negligently" or "recklessly" failed to discover the three articles is insufficient to establish the requisite fraudulent intent (*see LaSalle Natl. Bank v Ernst & Young LLP*, 285 AD2d 101, 109 [1st Dept 2001] ["Notably, most of the allegations set forth in the complaint . . . sounding in fraud actually allege conduct amounting to negligence rather than the intent to mislead the complaining party, to its detriment, that is the hallmark of a fraud claim. Negligence in [defendant's] purported departure from professional standards, no matter how well particularized, does not make out fraud. . . ."]; *Giant*, 2 AD3d at 190). Platinum, therefore, has failed to adequately plead a viable fraud claim and dismissal is warranted.

As to Kroll's second argument, Kroll asserts that the fraud claim should be dismissed on the additional basis that it is duplicative of the breach of contract claim. It argues that the fraud cause of action is essentially a claim that Kroll did not intend to perform its obligations under the Retainer Agreement, and is an improper attempt to convert a breach of contract claim into a fraud claim in order to escape the parties' contractual damages limitation clause.

Platinum argues that the fraud claim is not duplicative because the complaint contains allegations of fraudulent representations that were made in the Report, which were made after execution of the Retainer Agreement. It thus argues that the representations were outside of the express terms of the Retainer Agreement which permits the assertion of an independent fraud claim.

The Court agrees that the fraud claim should be dismissed as duplicative of the breach of contact claim (*see Havell Capital Enhanced Mun. Income Fund, L.P. v Citibank, N.A.*, 84 AD3d 588, 589 [1st Dept 2011] ["fraud claim, which arose from the same facts, sought identical

damages and did not allege a breach of any duty collateral to or independent of the parties' agreements, was redundant of the contract claim"]; *Hedge Fund Capital Partners, LLC v Thor Asset Mgt., Inc.*, 84 AD3d 703, 704 [1st Dept 2011]; *Financial Structures Ltd. v UBS AG*, 77 AD3d 417, 419 [1st Dept 2010]).

The Court is unpersuaded that the allegedly post-contract representations made in the Report are outside of the express terms of the Retainer Agreement so as to provide a non-duplicative basis for Platinum's fraud claim (*see Sebastian Holdings, Inc. v Deutsche Bank AG*, 78 AD3d 446, 447 [1st Dept 2010] [fraud claim could not be sustained as it was duplicative of breach of contract claim were the "claim for fraud essentially allege[d] that defendant failed to monitor and report to plaintiff the extent of its trading exposure, which were duties required under their agreement"]; *Canstar v Jones Constr. Co.*, 212 AD2d 452, 453 [1st Dept 1995]). Platinum's fraud claim is thus dismissed on this ground as well (*see Empire 33rd LLC v Forward Assn. Inc.*, 87 AD3d 447, 448-49 [1st Dept 2011] [fraud claims were properly dismissed both for lack of the necessary particularity and as duplicative since they did not allege the breach of a duty independent of the contract]).[3]

C. <u>Gross Negligence</u>

Kroll next argues that Platinum's gross negligence claim should be dismissed because Platinum has not pled any conduct demonstrating intentional wrongdoing or that Kroll recklessly failed to report the information from the three media articles. Kroll submits that Platinum's allegations of gross negligence ignores Kroll's extensive warnings to Platinum about the RRA settlements and the parties involved, and the fact that the Report expressly set forth the parameters of the due diligence investigation limiting it to recent news articles, active companies, and state criminal background checks. Kroll further argues that the gross negligence claim should be dismissed as duplicative of the breach of contract claim because it

[3]To the extent that Platinum seeks to amend its complaint so as to comply with CPLR 3016(b), the request is denied as "there is no reason to believe that [Platinum] could correct the deficiencies of the pleading" (*Ceres v Shearson Lehman Bros.*, 227 AD2d 222, 223 [1st Dept 1996]).

does not allege a duty independent of the contract.

Platinum argues that it has pled sufficient facts to establish that Kroll knowingly or recklessly made misrepresentations about the criminal backgrounds of Preve, Levin and CMC, because the failure of a company with Kroll's expertise to find the three articles creates an "inference that either a proper search was not done or any search that was completed was 'grossly negligent'" (Memo. in Opp. at 13). Platinum further argues that the claim is not duplicative because there was a special relationship between the parties premised on Kroll's expertise which gave rise to liability sounding in tort, not mere breach of contract.

Gross negligence is "conduct that evinces a reckless disregard for the rights of others or 'smacks' of intentional wrongdoing" (*Colnaghi, U.S.A., Ltd. v Jewelers Protection Servs., Ltd.*, 81 NY2d 821, 823-24 [1993]; *see also Sommer v Federal Signal Corp.*, 79 NY2d 540, 554 [1992]; *Abacus Federal Sav. Bank v ADT Sec. Servs., Inc.*, 77 AD3d 431, 433 [1st Dept 2010]). Platinum's conclusory assertions that Kroll "knowingly" or "recklessly" misrepresented the backgrounds of Preve, Levin and CMC, as inferred by their alleged failure to discover the three media articles on LexisNexis, fails to meet this standard. The Court finds that the gross negligence claim is "unsupported by any factual allegations of conduct evincing a reckless disregard for the rights of others or smacking of intentional wrongdoing" (*Mancuso v Rubin*, 52 AD3d 580, 583 [2d Dept 2008] [holding that plaintiff's conclusory assertion that engineering company performed inspection "recklessly" was insufficient to state a cause of action for gross negligence]). Further, the claim cannot be reconciled with the warnings and parameters that are clearly set forth in the Report (*see Finsel v Wachala*, 79 AD3d 1402, 1404 [3d Dept 2010]). Accordingly, the gross negligence claim is dismissed for failure to state a claim (*see Apple Bank for Savings v PricewaterhouseCoopers LLP*, 70 AD3d 438, 438 [1st Dept 2010]).

Dismissal of the gross negligence claim is also warranted on the additional ground that it is duplicative of the breach of contract claim. Notwithstanding Platinum's arguments to the contrary, the Court finds that Platinum has failed to allege a breach of a duty independent of the

Retainer Agreement (*see Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 390 [1987]; *Pacnet Network Ltd. v KDDI Corp.*, 78 AD3d 478, 479 [1st Dept 2010]).

D. Breach of Contract

Lastly, Kroll seeks to dismiss Platinum's breach of contract claim. Kroll argues that the claim is based solely on Kroll's alleged failure to find the three articles about Preve, Levin and CMC, which is information that fell outside of the express parameters of the due diligence investigation. Kroll also asserts that Platinum's claim fails to plead damages permitted under the contract since the Retainer Agreement contains an enforceable damages limitation clause that limits damages to the fees paid under the contract.

Platinum argues that the complaint properly pleads all of the elements of a cause of action for breach of contract even if its damages are capped. It argues that the claim should therefore not be dismissed and that the issue of damages should be presented to the trier of fact.

The Court finds that Platinum has failed to allege a viable cause of action for breach of contract (*see Gordon v Curtis*, 68 AD3d 549, 550 [1st Dept 2009]). The gravamen of the breach of contract claim is that Kroll breached its contractual duties under the Retainer Agreement by failing to discover and reveal the three media article pertaining to Prevent, Levin, and CMC. The Retainer Agreement itself, however, undisputedly indicates that these three articles were outside of the investigative parameters disclosed in the Report, which expressly limited the investigation to recent news articles, active companies, and state criminal background checks (*see id.* [affirming dismissal of breach of contract cause of action that did not identify the express provision that defendants allegedly breached]; Gordon & *Breach Science Publs. v New York Sys. Exch.*, 267 AD2d 52, 52 [1st Dept 1999]; *Gordon v Dino De Laurentiis Corp.*, 141 AD2d 435, 436 [1st Dept 1988]; *Giant*, 2 AD3d at 190). Further, even were the complaint to state a viable cause of action for breach of contract, damages would be limited as set forth in the damages limitation clause (*see Pacnet*, 78 AD3d at 480; *Mancuso*,

522 AD3d at 583). Platinum's cause of action for breach of contract is, accordingly, dismissed.

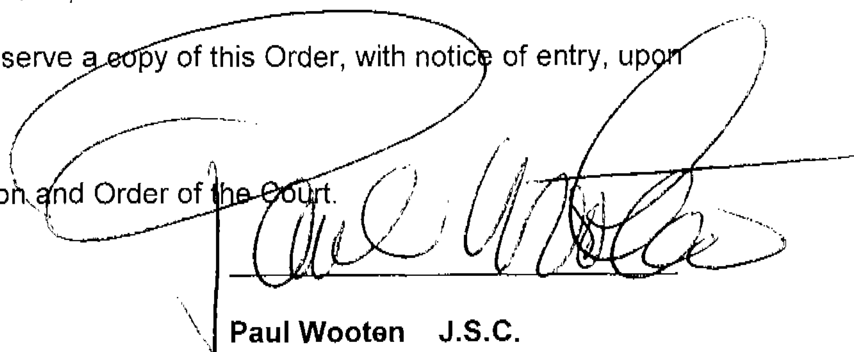
For these reasons and upon the foregoing papers, it is,

ORDERED that Kroll's motion to dismiss the complaint in its entirety is granted; and it is further,

ORDERED that the Clerk is directed to enter judgment in favor of Kroll dismissing all claims in the complaint; and it is further,

ORDERED that Kroll shall serve a copy of this Order, with notice of entry, upon Platinum.

This constitutes the Decision and Order of the Court.



Dated: September 30, 2011

Paul Wooten J.S.C.

Check one: ■ **FINAL DISPOSITION** ☐ **NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST**

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