United States District Court
Southern District of New York

In Re Platinum-Beechwood Litigation,	No. 18 Civ. 6658 (JSR)
Martin Trott and Christopher Smith, as JOL, Plaintiffs, vs. Platinum Management (NY), LLC, et al., Defendants.	No. 18 Civ. 10936 (JSR)

Memorandum of Law of Defendants Morris Fuchs, Estate of Jules Nordlicht, Barbara Nordlicht, FCBA Trust, Aaron Parnes, Sarah Parnes, Shmuel Fuchs Foundation And Solomon Werdiger In Support of Their Motion Pursuant To Fed. R. Civ. P. Rules 9(b) And 12(b)(6) To Dismiss The Claims Asserted Against Them In The First Amended Complaint

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Table of Contents

Table of Authorities ii

Preliminary Statement 1

The Motion In Brief 1

The Allegations of the FAC 3

Argument 9

Point 1 9

The First Amended Complaint ("FAC") Fails To State A Claim Against Any Defendant 9

A. The FAC Employs Only Impermissible Group Pleading Against The Defendants 9

B. The FAC Does Not Plead The Aiding And Abetting Claims Against The Defendants With Required Particularity 10

C. The FAC Does Not Allege Facts To Establish That Any Defendant Aided Or Abetted Any Breach Of Fiduciary Duties Or Fraud By The Platinum Defendants 11

a. The FAC Does Not Allege Facts To Establish That Defendants Had Actual Knowledge Of Any Wrongful Conduct By The Platinum Defendants 12

b. The FAC Does Not Allege Facts To Establish That Defendants Provided Substantial Assistance To Any Wrongful Conduct By The Platinum Defendants 14

c. The FAC Does Not Allege Facts To Establish That Defendants Proximately Caused Any Harm To PPVA 18

D. The FAC Fails To Plead A Viable Claim For Unjust Enrichment 19

Conclusion 20

Table of Authorities

Decker v. Massey-Ferguson, Ltd., 681 F.2d 111 (2d Cir. 1982) 10

Fraternity Fund Ltd. v. Beacon Hill Asset Mgmt., LLC,
479 F. Supp. 2d 349 (S.D.N.Y. 2007) 11, 14, 18

Kolbeck v. LIT Am., 939 F. Supp. 240 (S.D.N.Y. 1996) 10

Krys v. Pigott, 749 F.3d 117 (2d. Cir. 2014) 11

Lerner v. Fleet Bank, N.A., 459 F.3d 273 (2d Cir. 2006) 11

Nathel v. Siegal, 592 F. Supp. 2d 452 (S.D.N.Y. 2008) 14, 18

Rosner v. Bank of China, 528 F. Supp. 2d 419 (S.D.N.Y. 2007) 18

Silverman Partners, L.P. v. First Bank,
687 F. Supp. 2d 269 (E.D.N.Y. 2010) 19

SPV OSUS Ltd. v. AIA LLC, 2016 U.S. Dist. LEXIS 69349
(S.D.N.Y. May 24, 2016)(Rakoff, J.), *aff'd*, 882 F.3d 333 (2d Cir. 2018) 11

Welch v. TD Ameritrade Holding Corp.,
2009 U.S. Dist. LEXIS 65584, 2009 WL 2356131,
(S.D.N.Y. July 27, 2009) 19

Federal Rules of Civil Procedure:

9(b) 1, 10

12(b)(6) 1

Preliminary Statement

This Memorandum of Law is submitted by Defendants Morris Fuchs ("Fuchs"), Estate of Jules Nordlicht ("Nordlicht Estate"), Barbara Nordlicht ("Barbara Nordlicht"), FCBA Trust ("FCBA"), Aaron Parnes ("Parnes"), Sarah Parnes ("Sarah Parnes"), Shmuel Fuchs Foundation ("Fuchs Foundation") and Solomon Werdiger ("Werdiger") (each, individually, a "Defendant", and, collectively, "Defendants") in support of their motion pursuant to Fed. R. Civ. P. Rules 9(b) and 12(b)(6) to dismiss the claims asserted against them in the First Amended Complaint (the "FAC"). For the reasons hereafter set forth, the Court should grant the motion.

The Motion In Brief

The FAC alleges that each Defendant is, along with at least thirty other individuals and entities, part of a group denominated by the FAC as "Preferred Investors of the BEOF Funds" (the "Investor Group")(¶146).[1] The FAC alleges three claims against the Investor Group, as a group: i) aiding and abetting breach of fiduciary duties by the Platinum Defendants (Ninth Count); ii) aiding and abetting fraud by the Platinum Defendants (Tenth Count); and iii) unjust enrichment (Fifteenth Count). Plaintiff seeks recovery against the Investor Group of both compensatory and punitive damages on each of the three claims.[2]

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[1]The "¶" symbol, followed by a number, refers to a paragraph in the FAC which is annexed to the Zitter Affirmation as Exhibit A.

[2]See *ad damnum* allegations of the FAC beginning on p. 176.

The FAC contains no allegations against any individual Defendant, supported by alleged facts, which would indicate that: i) any individual Defendant had actual knowledge of any alleged breach of fiduciary duty or fraud on the part of any other defendant; or ii) any individual Defendant substantially assisted any such alleged breach of fiduciary duty or fraud by any other defendant; or iii) any action taken by any Defendant caused any harm to Platinum Partners Value Arbitrage Fund, L.P. ("PPVA").[3] Even under liberal pleading rules, therefore, the FAC fails to plead viable claims for aiding and abetting breach of fiduciary duty or fraud or a viable claim for unjust enrichment against any Defendant. The Court, therefore, should dismiss the claims against the Defendants.

Simply stated, the FAC engages in impermissible group pleading and does not, as required with respect to each Defendant, allege any facts which would permit any inference of any improper conduct by any of them which would support a finding of liability against any of them. Such generalized and conclusory pleading, unsupported by alleged facts to support any claim of wrongdoing by any Defendant, is insufficient to state a claim for relief.

[3]Plaintiffs represent PPVA as Joint Official Liquidators.

The Allegations of the FAC

The claims against the Investor Group arise out of an alleged scheme allegedly perpetrated by the Platinum Defendants[4] to defraud PPVA. The Platinum Defendants allegedly used Defendants Black Elk Opportunities Fund LLC ("BEOF I") and Black Elk Opportunities Fund International Ltd. ("BEOF II", and together with BEOF I, the "BEOF Funds")[5] to provide themselves and select insiders with proceeds from the sale of PPVA's prime assets (the "Renaissance Sale"), to the detriment of PPVA (the "Black Elk Scheme" (¶9)).[6] The Investor Group is alleged to be comprised of direct or indirect investors in the BEOF Funds who received proceeds of the Renaissance Sale (¶145-146).

Although the FAC describes various alleged relationships (*i.e.*, family, friend or investor) between individual Defendants and other defendants in the case, none of those descriptions contains or adverts to any facts which give rise to any reasonable inference that any individual Defendant, by virtue of such relationship, learned of, participated in, or aided or abetted the

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[4]The Platinum Defendants and the Beechwood Defendants are defined in ¶3 and ¶34 of the FAC. None of the Defendants is a Platinum Defendant.

[5] BEOF I is alleged to be a Delaware limited liability company with its principal place of business in New York (¶143). BEOF II is alleged to be a limited liability company domiciled in the Cayman Islands with its principal place of business in New York (¶144). The BEOF Funds are not alleged to be either Platinum Defendants or Beechwood Defendants. The Platinum Defendants set up the BEOF Funds (¶438). The key persons managing the BEOF Funds were defendants Mark Nordlicht, Landesman, Manela, Levy and Small, all of whom are Platinum Defendants (¶440). None of the Defendants is alleged to have any management role in the BEOF Funds.

[6]See ¶143 and ¶144 of the FAC.

Black Elk Scheme. Those "relationship" allegations are set forth in the footnote.[7] Those allegations, therefore, do not add substance to Plaintiffs' claims.

The FAC alleges that the Investor Group's participation, as a group, in a March 2014 offering (the "Offering") by the BEOF Funds of Class C Limited Liability Company Interests in the BEOF Funds ("Class C Interests"), constituted the Investor Group's knowing assistance in the breach of fiduciary duties and fraud by the Platinum Defendants (¶865, ¶879). The Investor Group's participation in that Offering allegedly made it possible for other defendants to engage in their wrongful conduct (¶865, ¶879).[8]

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[7]Thus the FAC alleges that: i) Morris Fuchs is the brother of defendant Bernard Fuchs and was a long term investor in various (unspecified) funds managed by the Platinum Defendants (¶151); ii) Barbara Nordlicht and Jules Nordlicht are the parents of defendant Mark Nordlicht and the grandparents of defendant Michael Nordlicht (¶148), were clients and friends to whom Murray Huberfeld pitched an investment in Black Elk via the BEOF Funds in the first quarter of 2013 and were investors in the BEOF Funds (¶441); iii) FCBA was set up by Aaron and Chaya Elbogen who are longtime friends of defendants Bodner, Huberfeld and Manela, and who are long term investors in various (unspecified) funds managed by Platinum (¶159). Aaron Elbogen is alleged to have aided and abetted another unrelated allegedly fraudulent scheme more than eighteen years ago (¶160) and was allegedly involved in 2014 in an apparently unrelated loan relationship between the Huberfeld Family Foundation and a trust related to Aaron Elbogen (¶161); iv) Aaron Parnes and his wife Sarah Parnes are clients of Murray Huberfeld, were referred to by Huberfeld as "among his people" and were long term investors in various (unspecified) funds managed by the Platinum Defendants (¶170); v) the Fuchs Foundation was set up for the benefit of the family of Defendant Morris Fuchs and defendant Bernard Fuchs (although as a charitable foundation it was presumably set up for the benefit of charitable entities, not anyone's family) (¶152); and vi) Solomon Werdiger is a close friend of Huberfeld, is an active and significant contributor to one or more charities in which Huberfeld serves as a vice president and was a long term investor in various (unspecified) funds managed by the Platinum Defendants (¶156).

[8]The original complaint, as opposed to the FAC, made no such claim.

The Platinum Defendants, therefore, according to the FAC, developed the Black Elk Scheme to divert the proceeds of the Renaissance Sale to redeem the Series E preferred shares in Black Elk, allegedly for the benefit of the Investor Group (¶462). In order to enable Black Elk to redeem its preferred equity with the Renaissance Sale proceeds, rather than repay the Notes, the Platinum Defendants needed to have a majority of the Notes held by nominally unaffiliated persons or entities so that such unaffiliated Note holders could amend the terms of the Indenture governing the Notes to allow the proceeds of the Renaissance Sale to be used to redeem the preferred equity rather than pay the Notes (¶463-66).

In furtherance of the alleged scheme, the Platinum Defendants allegedly arranged for a swap of the Notes held by PPVA to the BEOF Funds in exchange for the transfer to PPVA of the series E preferred equity held by the BEOF Funds (¶467-68).[12] This swap was allegedly made "subsequent" to the Offering by the BEOF Funds (¶468).[13] Each member of the Investor Group participated in the Offering either by "rolling over their existing investments in the BEOF Funds (and thus in Black Elk) and/or by investing additional capital" (¶469). The FAC does not specify which members of the Investor Group elected which course of action.

The Investor Group agreed to participate in the Offering "in order to aid [Mark] Nordlicht, Levy, Small, Landesman, Manela and the other Platinum Defendants and the

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[12]The swap was presumably made so that the BEOF Funds, as apparently independent entities, could vote their acquired Notes in favor of the amendment allowing the Renaissance Sales proceeds to be used to redeem the series E preferred equity (¶470-71).

[13]The FAC does not allege how much after the March 2014 offering the swap was made.

Beechwood Defendants in their scheme to insure that those Preferred Investors [Mark Nordlicht, Levy, Small, Landesman, Manella and the other Platinum and Beechwood Defendants] would not lose their investment in Black Elk" (¶470). None of the Defendants are included in that group of persons allegedly aided by the Investor Group's participation in the Offering.

The FAC does not allege any facts which indicate that any Defendant had actual knowledge of the alleged scheme either before or after the Offering. The FAC does not allege how participation in the Offering in any way assisted the Platinum and Beechwood Defendants in accomplishing the Black Elk Scheme. The FAC does not allege how any Defendant's alleged participation in the Offering in any way caused damage to PPVA.

Other than the allegations relating to the Defendants' alleged participation in the Offering, the FAC contains only bald conclusory allegations against the Investor Group as a group without any alleged factual support for those allegations and without particularization of the allegedly improper actions by any individual Defendant. Thus the FAC alleges that the Investor Group, as a group:

i) "materially assisted" and "materially and knowingly aided and abetted" the Platinum Defendants in their breach of fiduciary duties (¶35, ¶257);

ii) was "aware" of the actions of the Platinum Defendants in furtherance of the Black Elk Scheme (¶145)[14];

iii) "substantially assisted and participated in the Platinum Defendants' breaches of their fiduciary obligations in connection with the Black Elk Scheme"[15] (¶867, ¶881);

iv) "had actual knowledge that the Platinum Defendants were breaching their fiduciary obligations to PPVA by engaging in the acts and transactions comprising the Black Elk Scheme" (¶868);

v) "substantially assisted and participated in the Platinum Defendants' material misrepresentations, omissions and actions to defraud PPVA in connection with the Black Elk Scheme" (¶881);[16] and

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[14]The allegations of ¶145 are made against the Investor Group, not against the BEOF Funds themselves.

[15]The alleged assistance and participation allegedly consisted of "participating in the Black Elk Scheme," with no allegations as to what actions, if any, by any Defendant constituted such participation, and "engaging in [unspecified] transactions to benefit the Platinum Defendants, the BEOF Funds and the Preferred Investors of the BEOF Funds" without any details as to the nature of any Defendant's alleged engagement in any allegedly wrongful transactions (¶867). Thus the FAC's attempt to allege the details of the Investor Group's alleged participation in alleged wrongful activity contains only more generalities and conclusory allegations, not facts.

[16]The alleged manner in which the Investor Group allegedly so assisted and participated was by: i) engaging in [unspecified] transactions with PPVA designed to support an inflated NAV ascribed to PPVA's investment in Black Elk; ii) engaging in [unspecified] transactions to benefit the Platinum Defendants, the BEOF Funds and the Investor Group to the detriment of PPVA; and iii) participating in the Black Elk Scheme (¶881). Once again, the FAC simply sets forth additional conclusory allegations rather than factual details to support the claims.

vi) "had actual knowledge that the Platinum Defendants were defrauding PPVA by engaging in the acts and transactions and making the material misrepresentations and omissions comprising the Black Elk Scheme" (¶882).

The FAC alleges generally that as a direct and proximate result of the alleged actions of the Investor Group, among others, PPVA was damaged (¶869-70, ¶883-84). The FAC never alleges how the alleged actions of the Investor Group caused such alleged damage to PPVA.

Argument

Point 1

The FAC Fails To State A Claim Against Any Defendant

A. The FAC Employs Only Impermissible Group Pleading Against The Defendants

The law regarding the insufficiency of "group pleading" to satisfy applicable pleading standards and to state a viable claim for relief is set forth in Point 1 in the Memorandum of Law submitted by defendant David Bodner ("Bodner") in support of his motion to dismiss and will not be repeated herein. As set forth above, other than being included in the FAC as part of the Investor Group there are no allegations against any of the individual Defendants in his, hers or its individual capacity.[17] Thus the FAC does not give any Defendant fair notice of the facts asserted

[17]The allegations that each Defendant's alleged participation in the Offering constituted aiding and abetting the Black Elk Scheme are insufficient to state a claim, as set forth hereafter in Section C.

against him, her or it and for which he, she or it is allegedly liable. For this reason alone, the claims against the Defendants should be dismissed.

B. The FAC Does Not Plead The Aiding And Abetting Claims Against The Defendants With Required Particularity

The FAC does not allege any facts with sufficient particularity to sustain a claim of aiding and abetting either fraud or breach of fiduciary duty. The particularity requirements of Rule 9(b) apply to claims for aiding and abetting fraud and aiding and abetting breach of fiduciary duty sounding in fraud. *Decker v. Massey-Ferguson, Ltd.*, 681 F.2d 111, 119 (2d Cir. 1982) ("[C]onclusory allegations that defendants aided and abetted or conspired are not enough."); *Kolbeck v. LIT Am.*, 939 F. Supp. 240, 245 (S.D.N.Y. 1996) ("To the extent the underlying primary violations are based on fraud, the allegations of aiding and abetting liability must meet the particularity requirements of Fed. R. Civ. P. 9(b).")

There is no basis to relax the otherwise applicable pleading standards because Plaintiffs are Liquidators of PPVA, as Plaintiffs argued in their submission in response to Defendants' motion to dismiss the original complaint. The law on this point is, similarly, set forth in Point IV in the Bodner Memorandum of Law. It is clear from the amended pleading that the Plaintiffs have had access to all relevant documents relating to the Offering and Defendants' alleged participation therein (see, *e.g.* ¶493). Plaintiffs are in a position, therefore, to plead all relevant facts in connection with the Offering. Aside from said participation, no other alleged actions by any Defendant underlies the claims asserted against them herein.

C. The FAC Does Not Allege Facts To Establish That Any Defendant Aided Or Abetted Any Breach Of Fiduciary Duties Or Fraud By The Platinum Defendants

In order to allege a claim for aiding and abetting the FAC must set forth facts demonstrating that: i) each Defendant had actual knowledge of the wrongful scheme allegedly aided and abetted; ii) each Defendant provided "substantial assistance" to the perpetration of the wrongful scheme; and iii) each Defendant's "substantial assistance" caused damage to PPVA.[18] *Krys v. Pigott*, 749 F.3d 117, 127 (2d. Cir. 2014), citing *Lerner v. Fleet Bank, N.A.,* 459 F.3d 273, 292 (2d Cir. 2006); *SPV OSUS Ltd. v. AIA LLC,* 2016 U.S. Dist. LEXIS 69349 at *18, *19 (S.D.N.Y. May 24, 2016)(Rakoff, J.), *aff'd*, 882 F.3d 333 (2d Cir. 2018) ("Substantial assistance requires the plaintiff to allege that the actions of the aider/abettor proximately caused the harm on which the primary liability is predicated."); *Fraternity Fund Ltd. v. Beacon Hill Asset Management, LLC,* 479 F. Supp. 2d 349, 370-71 (S.D.N.Y. 2007) (In the aiding and abetting context, a plaintiff must allege that the defendant's substantial assistance in the primary violation proximately caused the harm on which the primary liability is predicated.)[19] Plaintiffs have failed to meet these pleading requirements.

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[18]Plaintiffs must also set forth facts establishing the existence of a primary breach of duty or fraud on the part of the Platinum Defendants. To the extent those defendants successfully argue that the FAC fails to plead any primary breach of fiduciary duty or fraud, the aiding and abetting claims against the Defendants must also fail. For purposes of this motion only, Defendants assume that the FAC alleges a primary breach of fiduciary duty or fraud against the Platinum Defendants.

[19]See also Bodner Memorandum of Law, Point III.

a. The FAC Does Not Allege Facts To Establish That Defendants Had Actual Knowledge Of Any Wrongful Conduct By The Platinum Defendants

There is no allegation in the FAC that anyone with knowledge of the alleged Black Elk Scheme ever communicated such knowledge, directly or indirectly, to any individual Defendant or that any individual Defendant, in connection with the Offering or at any time, otherwise actually learned of the alleged scheme.

The FAC does allege (¶470) that, "Given Black Elk's precarious financial condition, the Preferred Investors of the BEOF Funds were clearly aware of and agreed to participate in the March 2014 offering in order to aid" the Preferred Investors listed in ¶470[20] to insure that they would not lose their investment in Black Elk "with actual knowledge that Beechwood was affiliated with the Platinum Defendants." To the extent Plaintiffs rely upon this vaguely drafted paragraph to establish that the Defendants had actual knowledge of the Black Elk Scheme because they knew about Black Elk's precarious financial condition, such reliance is misplaced. The mere fact that a company may be in precarious financial condition (as are thousands of companies throughout the economy at all times) does not inform investors - and certainly does not provide the investors with actual knowledge - that the company's managers are about to engage in a fraudulent scheme.

[20]The listed investors do not include any Defendants.

To the contrary, the Private Placement Memorandum utilized to sell Class C Interests (the "PPM")[21] in the BEOF Funds in March 2014 indicates that any funds realized from the offering would be used to purchase additional Notes from Black Elk which needed funds for its ongoing business activities. There is absolutely no indication in the PPM that the Platinum Defendants (or anyone else) were about to embark upon a nefarious scheme. Thus the PPM (p. 13) provides in relevant part:

> **The Issuer's [Black Elk's] Need for Capital**
>
> The Issuer [Black Elk] needs capital for acquisitions, exploitation and development in order to pursue the most attractive opportunities as market conditions evolve.
>
> The Issuer has issued $150 million face value of the Notes at a 13.75% interest rate, discounted at 99.109%. The Issuer currently pays interest on the Notes semi-annually in arrears, on June 1 and December 1 of each year (though the Issuer has solicited the consent of the holders of the Notes to make distributions at the end of each calendar quarter), and the Notes will mature on December 1, 2015, on which date all principal then outstanding will be due. The Company, together with the Offshore Fund, intends to purchase up to $100 million of the Notes from the Issuer, PPVA Black Elk (Equity) LLC and/or other third party holders. Upon the completion of this offering of Notes, the Company will have approximately $250 million of senior debt.

The primary use of any funds raised in the Offering, therefore, according to the PPM, was to provide further funding to Black Elk.

Although the PPM does state that the BEOF Funds may purchase Notes from PPVA and other third-party holders, the fair reading of the PPM is that Black Elk needed money for its

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[21]The PPM is annexed to the Zitter Affirmation as Exhibit B. Although the FAC attaches over 100 exhibits, the PPM is not included.

business purposes and the funds raised by the Offering would be used to further those purposes. Even if any funds raised in the Offering were used to acquire any Notes from third-parties or PPVA, putting those Notes in the hands of the BEOF Funds, which was interested in Black Elk's long term success, is certainly a reasonable objective and does not indicate that any fraudulent scheme was afoot. The PPM certainly does not disclose (or even hint at the fact) that the BEOF Funds were intending to acquire any Notes to participate in any scheme to amend the terms of the Indenture governing the Notes. There is no allegation that any Defendant participated in the preparation of the PPM. Thus the FAC does not allege any facts from which one can reasonably conclude that any individual Defendant had actual knowledge of the Black Elk scheme.

b. The FAC Does Not Allege Facts To Establish That Defendants Provided Substantial Assistance To Any Wrongful Conduct By The Platinum Defendants

In order to plead a viable claim for aiding and abetting Plaintiffs must allege facts establishing that the Defendants provided substantial assistance to the Black Elk Scheme. Substantial assistance occurs "when a defendant affirmatively assists, or helps conceal, or fails to act when required to do so, thereby enabling the fraud . . . to occur." *Nathel v. Siegal,* 592 F. Supp. 2d 452, 470 (S.D.N.Y. 2008) (quoting *Fraternity Fund Ltd. v. Beacon Hill Asset Mgmt., LLC*, 479 F. Supp. 2d 349 at 370. The FAC simply does not meet this requirement.

Defendants' only alleged concrete participation in the Black Elk Scheme is their alleged participation in the Offering. The FAC does not explain how such participation aided the Black Elk Scheme. Under the terms of the PPM, any cash raised in the Offering could be used to purchase Notes. Plaintiffs' contention is, presumably, that Defendants' participation in the Offering assisted the Platinum Defendants in assembling the majority of those Notes in friendly (*i.e.*, the BEOF Funds) hands so that the Indenture could be amended to allow redemption of the preferred equity. Otherwise there is no pleaded connection between the Offering and the perpetration of the Black Elk Scheme. But the pleaded facts, and the terms of the PPM, do not establish that participation in the Offering provided any assistance, let alone substantial assistance, to the consummation of the Black Elk Scheme.

Under the terms of the PPM, the Offering allowed investors to acquire Class C Interests in the BEOF Funds **either** by rolling over existing interests in Class A and B Limited Liability Company interests in the BEOF Funds (the "Class A and Class B Interests") (which required no further cash investment) **or** by purchasing such Class C Interest for cash.[22] To the extent any individual Defendant "rolled over" his, hers or its prior ownership of Class A and B Interests into Class C Interests in the BEOF Funds, no new cash was provided to assist with purchasing Notes for the alleged scheme. Any "roll over" participation in the offering was simply an internal adjustment of the investor's ownership in the BEOF Funds from Class A and B to Class C.[23]

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[22]See the PPM annexed as Exhibit B to the Zitter Affirmation, at p. 4.

[23]The FAC does not allege how owning Class C Interests, as opposed to owning Class A and Class B Interests, in the BEOF Funds in any way assisted the perpetration of the Black Elk Scheme.

The FAC does not specify which Defendants, if any, simply rolled over their ownership interests in the BEOF Funds and which Defendants, if any, provided additional cash. Thus the FAC states that, "The Preferred Investors of the Preferred Funds each agreed to participate in the March 2014 offering **either** by rolling over their existing investment in the BEOF Funds (and thus in Black Elk) **and/or** by investing additional capital" (¶469) (emphasis added). The FAC does not allege that any of the Defendants purchased Class C Interests with cash.[24] Thus even if a cash purchase of Class C Interests somehow aided and abetted the Black Elk Scheme (which it did not) the FAC does specify which Defendant, if any, purchased a Class C Interest for cash.[25]

But even if any Defendant had purchased Class C Interests in the BEOF Funds with cash, there is no allegation either that the BEOF Funds in fact used such cash to purchase Notes, that the BEOF Funds in fact purchased any Notes in furtherance of the alleged scheme, or that any such Notes allegedly purchased were necessary to acquire a majority of the Notes to accomplish the purpose of the scheme. Thus the FAC does not allege facts which demonstrate that any Defendant provided substantial assistance to the Black Elk Scheme.

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[24]Plaintiffs apparently have access to all of the BEOF Fund's documents and could have pleaded the exact facts had they chosen to do so. In ¶493, Plaintiffs provide a precise chart of Defendants' investments in the BEOF Funds and their receipt of distributions. We are informed that Plaintiffs received the BEOF Fund's documents in connection with another litigation pending between and among the parties. Thus Plaintiffs are in a position to plead which Defendants selected which option in connection with the Offering.

[25]Although the FAC does allege that "the BEOF Funds supported the amendment to the Black Elk Notes Indenture" (¶478), the FAC does not allege that the BEOF Funds voted any Notes which it held in favor of the amendment (¶493) and it certainly does not allege that the BEOF Funds voted any Notes which it acquired with cash from the Offering in favor of the amendment.

The FAC alleges that the Platinum Defendants caused PPVA, which Platinum controlled, to sell Notes which PPVA owned to certain Beechwood entities (not the BEOF Funds) at prices designated solely by Mark Nordlicht (¶472). The FAC further alleges that certain Beechwood entities (not the BEOF Funds) purchased Notes on the open market (¶473). There is no allegation that the BEOF Funds purchased any Notes. Any cash, therefore, obtained by the BEOF Funds from any Defendant in the Offering was not alleged to be used in furtherance of the Black Elk Scheme. Thus any participation by any Defendant in the Offering could not possibly have rendered substantial assistance to the Black Elk Scheme.

The FAC does allege (¶467) that the BEOF Funds swapped preferred equity which it held in Black Elk for Notes held by PPVA. No cash, presumably is involved in a swap and the FAC does not allege that any cash was involved in the swap. The swap was made "subsequent" to the Offering. There is no allegation that the swap was in any way related to the Offering. The individual Defendants had no control over the BEOF Funds and, therefore, could not have had any role in facilitating the swap.[26] The Platinum Defendants simply did not need the Offering to accomplish the swap so any participation by the Defendants in the Offering could not possibly have rendered substantial assistance to the Black Elk Scheme.

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[26]The FAC does not allege that any of the Defendants had the ability to control, or in fact controlled, either the BEOF Funds, the Platinum Defendants or any other defendant herein. To the contrary, the FAC alleges that the BEOF Funds were controlled by defendants Mark Nordlicht, Murray Huberfeld, Daniel Small, David Levy and David Bodner, all of whom are Platinum Defendants (¶34).

Further, it does not appear to be in the financial interest of the individual Defendants to aid and abet an alleged scheme to allow the BEOF Funds to swap the Black Elk preferred equity which it owned for the Notes owned by PPVA, as Plaintiffs allege that the BEOF Funds did. If the alleged purpose of the Black Elk Scheme was to allow the preferred equity to be paid prior to payment on the Notes, then by swapping its preferred equity in Black Elk for Notes owned by PPVA, the BEOF Funds acquired a security (the Notes) which was to become subordinate in payment to the preferred equity. There would be no economic reason for the Defendants to participate in a scheme whereby the BEOF Funds, in which the Defendants had an interest, transferred Black Elk preferred equity to PPVA, which as a result of the alleged scheme would be paid prior to the Notes.

c. The FAC Does Not Allege Facts To Establish
That Defendants Proximately Caused Any Harm To PPVA

The FAC must allege that the aider/abettor's actions "proximately cause[] the harm on which the primary liability is predicated." *Nathel,* 592 F. Supp. 2d. at 470, citing *Rosner v. Bank of China*, 528 F. Supp. 2d 419, 426 (S.D.N.Y. 2007). "The Plaintiffs must allege more than but-for causation. They must allege also that their injury was a direct or reasonably foreseeable result of the conduct." *Fraternity Fund Ltd., supra,* 479 F. Supp. 2d at 370-71. The FAC does not meet this requirement.

As set forth in the previous section, any participation by any Defendant in the Offering did not assist the Platinum Defendants in assembling the nominal unaffiliated majority of the

Notes necessary to amend the Indenture. Other than their alleged participation in the Offering, no other facts are alleged to establish that any Defendant aided and abetted the Black Elk Scheme. Thus none of any alleged actions by any Defendant caused any damage to PPVA.

D. The FAC Fails To Plead A Viable Claim For Unjust Enrichment

Rule 9(b) also applies to claims of unjust enrichment sounding, as here, in fraud. In addition to the case law cited in the Bodner Memorandum of Law, Point I, see also *Silverman Partners, L.P. v. First Ba*nk, 687 F. Supp. 2d 269, 288 (E.D.N.Y. 2010) (citing *Welch v. TD Ameritrade Holding Corp.*, 2009 U.S. Dist. LEXIS 65584, 2009 WL 2356131, *21 (S.D.N.Y. July 27, 2009)) (Unjust enrichment claims "must be pled with specificity when the underlying acts are allegedly fraudulent."). For the same reason that the aiding and abetting claims against the Defendants fail for lack of properly particularized pleading and for failure to plead the necessary element of the claim, so, too, the unjust enrichment claim fails to state a claim against Defendants for which relief may be granted.

Conclusion

For the reasons set forth herein, the Court should dismiss the claims against Defendants Morris Fuchs, Estate of Jules Nordlicht, Barbara Nordlicht, FCBA Trust, Aaron Parnes, Sarah Parnes, Shmuel Fuchs Foundation and Solomon Werdiger.

Respectfully submitted,
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