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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

SENIOR HEALTH INSURANCE COMPANY OF PENNSYLVANIA, Plaintiff, v. BEECHWOOD RE LTD., *et al*., Defendants.	Civ. Action No. 18-cv-6658 (JSR)
MARTIN TROTT and CHRISTOPHER SMITH, as Joint Official Liquidators and Foreign Representatives of PLATINUM PARTNERS VALUE ARBITRAGE FUND L.P. (in Official Liquidation) and PLATINUM PARTNERS VALUE ARBITRAGE FUND L.P., (in Official Liquidation), Plaintiffs, v. PLATINUM MANAGEMENT NY LLC, *et al*., Defendants.	Civ. Action No. 18-cv-10936 (JSR)

REPLY MEMORANDUM OF LAW OF DEFENDANT
GRD ESTATES LTD. IN SUPPORT OF MOTION TO DISMISS

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Defendant GRD Estates Ltd. ("**GRD**") respectfully submits this Reply Memorandum of Law in support of its motion to dismiss all claims against it for failure to state a claim under Fed. R. Civ. P. 12(b)(6) (the "**Reply Brief**").[1]

I. INTRODUCTION

The Plaintiffs' Opposition to Moving Defendants' Motions to Dismiss (the "**Opposition**") implicitly acknowledges the weakness of its case against GRD and the other so-called "Preferred Investors of the BEOF Funds." The Opposition devotes far more attention and specificity to assertions against Defendants who are not "Preferred Investors of the BEOF Funds." The Opposition never overcomes the First Amended Complaint's failure to make any specific and factual allegation that GRD was a knowing or willing participant in the "schemes" alleged in the First Amended Complaint. The Plaintiffs continue to rely solely on unsupported inferences and speculation with respect to their claims for "unjust enrichment" and those for aiding and abetting fraud and breaches of fiduciary duties. Many of the cases cited herein to support dismissal were cited in inapposite ways in the Opposition.

Plaintiffs improperly rely on the "relaxed" pleading standard that is sometimes available to trustees. They obfuscate the fact that one Plaintiff is Platinum Partners Value Arbitrage Fund, L.P. ("**PPVA**"), purportedly as the actual aggrieved party. The Joint Official Liquidators of PPVA (the "**JOLs**"), in their representative capacities, are additional parties (and are represented

[1] In its Motion to Dismiss [Doc. No. 184] (the "**MTD**") and supporting Memorandum of Law [Doc. No. 185] (the "**GRD Memorandum**" and, collectively with the MTD, the "**GRD Motion**"), GRD included among its arguments a request for dismissal of Plaintiffs' Complaint pursuant to Fed. R. Civ. P. 12(b)(5) based on insufficient service of process. Following the filing of GRD's Motion to Dismiss, the undersigned counsel agreed to accept service of the First Amended Complaint on behalf of GRD. Accordingly, in this Reply Brief, GRD shall only address arguments related to its request for dismissal pursuant to Fed. R. Civ. P. 12(b)(6).

by the same counsel who represents PPVA). PPVA, as the purported aggrieved party, is not entitled to the "relaxed" pleading standard.

Finally, Plaintiffs failed to address several arguments presented in the GRD Motion, including that a claim for unjust enrichment requires that the plaintiff have bestowed a benefit upon the defendant. No such allegations were (or could be) made in the First Amended Complaint.

II. PLAINTIFFS' AIDING AND ABETTING CLAIMS FAIL ON MULTIPLE LEVELS

A. Plaintiffs Have Not Alleged Actual Knowledge By Defendant GRD

Claims for aiding and abetting the breach of fiduciary duty[2] require: (1) a breach by a fiduciary of obligations to another; (2) ***that the defendant knowingly induced or participated in the breach***; and (3) that plaintiff suffered damage as a result of the breach. See S & K Sales Co. v. Nike, Inc., 816 F.2d 843, 847-848 (2d Cir 1987) (emphasis added); Whitney v. Citibank, N.A., 782 F.2d 1106, 1115 (2d Cir 1986) (citing Wechsler v. Bowman, 285 NY 284, 291 (1941)). Certain obvious facts cannot be overstated — **"aiding and abetting" requires the alleged aider and abettor to know of the wrongful acts**. The First Amended Complaint alleges an extensive and pervasive fraud by PPVA insiders that, by the nature of what is asserted, would not have been readily ascertainable. Yet, Plaintiffs' theory is that GRD must have known about that which, by its very nature, was hidden from parties like GRD. Importantly, the First Amended Complaint contains no allegations of GRD's **actual** knowledge of any alleged wrongdoing. Instead, Plaintiffs have weaved together a story relying on **constructive** knowledge based on

[2] The elements for aiding and abetting fraud are similar: (1) the existence of an underlying fraud; (2) knowledge of this fraud on the part of the aiding and abetting party; and (3) substantial assistance by the aiding and abetting party in achieving this fraud. Oster v. Kirschner, 77 A.D.3d 51, 55 (1st Dept 2010).

public filings of a company in which the Preferred Investors of the BEOF Funds were not investors.[3]

Specifically, Plaintiffs refer to Black Elk's second quarter 2013 10-Q (the "**Black Elk 10-Q**"), issued on August 14, 2013, which discussed the legal effects of the Black Elk explosion and growing financial difficulties. See First Amended Complaint ¶ 450. GRD's investment in the BEOF Funds was made in February 2013, six months **before** the public issuance of the Black Elk 10-Q. Moreover, Plaintiffs admit in the First Amended Complaint that "[t]he first round of BEOF Fund investment in Black Elk occurred during the first quarter of 2013, **before the full extent of Black Elk's financial difficulties arising out of the Black Elk Explosion was fully known**." See First Amended Complaint ¶ 444 (emphasis added). Based on their own allegations, Plaintiffs have not — and cannot — allege that GRD had actual knowledge of (or actively participated in) any alleged breach of fiduciary duty or fraud by the Platinum Defendants at the time of its investment.

The aiding and abetting allegations regarding the 2014 transactions also rely on constructive knowledge and must fail. Any assertion that GRD provided additional funds to support the "schemes" in 2014 is overridden by the chart on p. 93 of the First Amended Complaint showing that GRD's investment was lower on August 1, 2014 than it was on December 31, 2013.

B. GRD Does Not Have A "Close Personal Relationship" With Huberfeld To Warrant Inference of Actual Knowledge

Moreover, Plaintiffs claim that "… the Preferred Investors of the BEOF Funds were friends and insiders of certain of the Platinum Defendants, who benefitted from those

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[3] As set forth in the GRD Motion, **actual** knowledge by the aider and abettor is required and **constructive** knowledge is not sufficient. Krys v. Pigott, 749 F.3d 117, 127 (2d Cir. 2014) (emphasis added).

relationships and were able to avoid significant losses notwithstanding having invested in Black Elk equity at a time when Black Elk's financial condition was on the brink of insolvency." See Opposition at p. 19. As to GRD specifically, Plaintiffs make the conclusory allegation, **on information and belief**, that "GRD Estates Ltd. is a longtime client of [Murray] Huberfeld, and its principal, Gordon Diamond, is Huberfeld's close personal friend" without providing any factual support for that conclusion. See First Amended Complaint ¶ 163. Importantly, and as pointed out by Plaintiffs' in the Opposition, allegations made "upon information and belief," even under the so-called "relaxed pleading standard" (discussed *infra*), require Plaintiffs to "plead the basis of [their] belief" or, if the information would be "peculiarly within the adverse parties' knowledge," the allegation must be "… accompanied by a state of facts upon which the belief is based." See Opposition at pp. 35-36; see also Elliott Associates, L.P. v. Hayes, 141 F.Supp.2d 344 (S.D.N.Y. 2000) ("A complaint like plaintiff's, which fails to adduce any specific facts supporting an inference of knowledgeable participation in the alleged fraud, will not satisfy even a relaxed standard.") (internal citation omitted). With no factual basis to support their conclusion, Plaintiffs' allegation of GRD's "close personal friendship" with Huberfeld is simply not credible and fails.

Additionally, this unsupported allegation is made by Plaintiffs in an apparent attempt to capitalize on an argument advanced in Bernard L. Madoff Inv. Securities LLC that, "by virtue of, *inter alia*, his **close and personal relationship** with Madoff and expertise as an investment advisor, Stanley Chais knew or should have known that BLMIS was predicated on fraud." 445 B.R. 206, 216 (Bankr. S.D.N.Y. 2011) (emphasis added). The allegations in Madoff noted that the "close and personal relationship" conclusion was based on an "… unusually close relationship with Madoff on both a business and social level that spanned over thirty years…"

and that "Stanley Chais's telephone number was the first speed dial entry on a BLMIS telephone." Id. at 222, 233. In this case, we have a naked allegation of a "close personal friendship" with Mr. Huberfeld[4], hardly giving rise to the type of relationship required to impute actual or constructive knowledge.

Based on the foregoing, Count Nine (Aiding and Abetting Breach of Fiduciary Duty) and Count Ten (Aiding and Abetting Fraud) of the First Amended Complaint should be dismissed as to GRD.

III. PLAINTIFFS' UNJUST ENRICHMENT CAUSE FAILS AS A MATTER OF LAW

As an initial matter, the Opposition fails to address the fatal flaws in the First Amended Complaint that are identified in the GRD Motion. Specifically, a well-pled claim for unjust enrichment requires, *inter alia*, that GRD have **participated** in some wrongful conduct such that any benefit it received was to the detriment of PPVA and cannot be justly retained. See GRD Memorandum at p. 14 (citations omitted). A cause of action for unjust enrichment also requires that the **plaintiff** must have bestowed the benefit on the defendant." Id. The First Amended Complaint does not allege a single action by GRD that connects it to participation in either the First Scheme Transactions or the Second Scheme Transactions. Moreover, there are no allegations in the First Amended Complaint that the **Plaintiffs** bestowed a benefit on GRD.

Additionally, to maintain a cause of action for unjust enrichment, "equity and good conscience [must] militate against permitting defendant to keep what plaintiff is seeking." See Senior Health Ins. Co. of Penn. v. Beechwood RE Ltd., et al., 345 F. Supp. 515, 532 (S.D.N.Y 2018). Implicit in that requirement is that Plaintiffs must be entitled to the funds they are seeking to recover from GRD and similarly-situated defendants in this action. Mandarin

[4] Though GRD has not filed an Answer to the First Amended Complaint, GRD denies the allegation that Mr. Diamond and Mr. Huberfeld are "close personal friends."

Trading Ltd. v. Wildenstein, 16 N.Y.3d 173, 182 (2011), quoting Paramount Film Distrib. Corp. v. State of New York, 30 N.Y.2d 415, 421 (1972). Unfortunately for Plaintiffs, the lawsuit attached to the First Amended Complaint as Exhibit 61 (Adv. Pro. No. 16-3237, Bankr. S.D. Tex., Doc. No. 1) (the "**Black Elk Litigation**") was reduced to judgment (Adv. Pro. No. 16-3237, Bankr. S.D. Tex., Doc. Nos. 117 and 121), effectively adjudicating that Plaintiffs voluntarily forfeited any entitlement to the funds they now seek to recover from GRD.

Moreover, "… unjust enrichment is not a catchall cause of action to be used when others fail." Corsello v. Verizon NY, Inc., 18 N.Y.3d 777, 790 (2012). "An unjust enrichment claim is not available where it simply duplicates, or replaces, a conventional contract or tort claim." Id. at 790-91 (internal citations omitted). In the First Amended Complaint, Plaintiffs seek relief in the form of various tort claims and, in addition, have asserted claims for unjust enrichment based on the same unsubstantiated allegations. Unjust enrichment is only available in "unusual circumstances" where an equitable obligation is created running from the defendant to the plaintiff. Id. at 790. No such obligation has been created in law or in equity.

Finally, Plaintiffs fail to address GRD's argument that punitive damages, which are specifically requested in paragraph 943 of the First Amended Complaint, are not available under New York law in connection with unjust enrichment claims. See GRD Memorandum at p. 14. The Opposition cited neither argument nor authority to the contrary.

For all of the foregoing reasons, Count Fifteen (Unjust Enrichment) of the First Amended Complaint should be dismissed as to GRD.

IV. GROUP PLEADING IS NOT PERMISSIBLE AS TO THE PREFERRED INVESTORS OF THE BEOF FUNDS

For a pleading to state a claim for relief, it must, among other things, "give ***each defendant*** fair notice of what the plaintiff's claim is and the ground upon which it rests."

Fed. R. Civ. P. 8(a)(2); Atuahene v. City of Hartford, 10 Fed. Appx. 33, 34 (2d Cir. 2001) (emphasis added); see also Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007). Generalized allegations made against a group of defendants are insufficient to satisfy the pleading standards. See Twombly, 550 U.S. at 565 n.10.

As correctly stated in the Opposition, the group pleading doctrine applies to "corporate insiders" with direct involvement in the everyday business of the company. City of Pontiac Gen. Emps.' Ret. Sys. v. Lockheed Martin Corp., 875 F. Supp. 2d 359, 373 (S.D.N.Y. 2012) (Rakoff, J.) (citing Camofi Master LDC v. Riptide Worldwide, Inc., No. 10 Civ. 4020 (CM), 2011 WL 1197659, at *6 (S.D.N.Y. Mar. 25, 2011)); Anwar v. Fairfield Greenwich Ltd., 728 F. Supp. 2d 372, 405-06 (S.D.N.Y. 2010) ("In order to invoke the group pleading doctrine against a particular defendant the complaint must allege facts indicating that the defendant was a corporate insider, with direct involvement in day-to-day affairs, at the entity issuing the statement.") (citing In re Alstom SA, 406 F. Supp. 2d 433, 449 (S.D.N.Y. 2005)).

GRD was not an insider of PPVA or of any Platinum Defendant nor did GRD have direct involvement in the day-to-day business of PPVA or of any of the Platinum Defendants. Plaintiffs' make the conclusory and unsupported assertion that "[t]he Preferred Investors of the BEOF Funds also consist of a group of insiders, including family members, friends and select investors, each of whom either is a Platinum Defendant or is personally connected to Mark Nordlicht, Murray Huberfeld, Bernard Fuchs, David Bodner or one of the other Platinum Defendants." See Opposition at p. 32. Plaintiffs further attempt to group the Preferred Investors of the BEOF Funds together based on "common characteristics" including, *inter alia*, their alleged knowledge of the Black Elk Scheme, their participation in "a series of transactions in order to intentionally place their preferred investments outside of the corporate

structure of PPVA", and their knowingly aiding and abetting the Platinum Defendants' breach of their fiduciary duties to PPVA. Id. at pp. 32-33. Instead of basing their argument for group pleading on a sound factual basis, Plaintiffs use the circular logic that the unsubstantiated commonality of the "Preferred Investors of the BEOF Funds," when asserted on a group basis, supports their ability to rely on group pleading. Once this unsubstantiated commonality fails (i.e., GRD is not a "close personal friend" of any Platinum Defendant), Plaintiffs' circular logic supporting the argument for group pleading completely falls apart.

For the foregoing reasons, the First Amended Complaint should be dismissed for failure to meet the pleadings requirements set forth in Fed. R. Civ. P. 8(a).

V. PLAINTIFFS ARE NOT ENTITLED TO A RELAXED PLEADING STANDARD

Plaintiffs assert that they are entitled to a "relaxed pleading standard" that has been found to be applicable, under certain circumstances, to bankruptcy trustees and liquidators. See Opposition at pp. 33-37. The cases cited by Plaintiffs in the Opposition hold that trustees and liquidators are, under certain circumstances, entitled to a relaxed pleading standard because they are third party outsiders who must plead based on secondhand knowledge for the benefit of an estate and its creditors. Id. In response to arguments made by GRD (and other defendants), Plaintiffs continue that "the present matter is in its infancy … [and] while the JOLs currently have access to the PPVA-specific documents previously stored on Platinum Management's servers, they only gained access to those documents recently and have not by any means completed a review of the same…" Id. at 36-37. Finally, Plaintiffs compel this Court to look at the "totality of the circumstances" and consider whether Plaintiffs already had access to discovery. Id. at 34 (citations omitted).

Plaintiffs' arguments in support of a relaxed pleading standard fail for several reasons. First, the "relaxed pleading standard" would not apply to PPVA, the purportedly aggrieved party,

which is a separate plaintiff in this action. With the JOLs and PPVA using the same counsel, the knowledge they obtained and while representing PPVA would be imputed to the JOLs as well.

Second, though the JOLs state that they only "recently" gained access to the PPVA documents, PPVA — a named Plaintiff in this action — has had control of and unlimited access to its own documents from their origin and has had adequate time to identify specific factual or documentary support for the allegations in the First Amended Complaint. Moreover, the Plaintiffs previously acknowledged that the JOLs had possession of over 13 million documents from the Platinum servers for roughly nine (9) months before the filing of the First Amended Complaint.[5] See GRD Memorandum at p. 2.

Finally, with respect to the "totality of the circumstances," the JOLs had access to pre-filing discovery in PPVA's chapter 15 proceeding[6] to develop evidence and compel testimony, along with the ability to conduct discovery in the Black Elk Litigation where PPVA was a named Defendant. The "totality of the circumstances" in this case means that Plaintiffs cannot stand on unsubstantiated, conclusory allegations while one Plaintiff had possession of the relevant information and documents from their inception and the other Plaintiffs have had access to those documents and information for longer than the Defendants will. See Devaney v. A.P. Chester, 813 F.2d 566, 569 (2d Cir. 1987) (the relaxed standard does not eliminate the particularity requirement, but the degree of particularity required should be determined in light of such circumstances as whether the plaintiff has had an opportunity to take discovery of those who may possess knowledge of the pertinent facts).

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[5] As this Court has required Defendants to be ready for trial in September 2019, Defendants would have access to those same documents for no more than seven (7) months.

[6] This includes the availability of Fed. R. Bankr. P. 2004.

Based on the foregoing, GRD submits that Plaintiffs had more than ample access to documents and information that would allow them to meet the pleading requirements set forth in Fed. R. Civ. P. 8(a) and 9(b) and their failure to do so is cause for this Court to dismiss the First Amended Complaint.

VI. JOINDER

GRD respectfully joins in the responsive legal arguments advanced by other Defendants to dismiss the First Amended Complaint including, but not limited to, other Preferred Investors of the BEOF Funds, to the extent such arguments are applicable to GRD and are not inconsistent with the arguments contained herein and in the GRD Motion.

VII. CONCLUSION

For all of the reasons set forth herein, the First Amended Complaint falls well short of the pleading requirements necessary to sustain causes of action against GRD. Accordingly, GRD respectfully requests that this Court enter an Order dismissing all claims and causes of action against it, with prejudice, pursuant to Fed. R. Civ. P. 12(b)(6).

Dated: February 15, 2019
New York, New York

Respectfully submitted,

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