UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE PLATINUM-BEECHWOOD LITIGATION	Master Docket No. 1:18-cv-06658-JSR
MARTIN TROTT and CHRISTOPER SMITH, as Joint Official Liquidators and Foreign Representatives of PLATINUM PARTNERS VALUE ARBITRAGE FUND L.P. (in Official Liquidation) and PLATINUM PARTNERS VALUE ARBITRAGE FUND L.P. (in Official Liquidation), Plaintiffs, -v- PLATINUM MANAGEMENT (NY) LLC, et al., Defendants.	Case No. 1:18-cv-10936-JSR

REPLY MEMORANDUM OF LAW OF DEFENDANT HUBERFELD FAMILY FOUNDATION, INC. IN FURTHER SUPPORT OF ITS MOTION TO DISMISS THE FIRST AMENDED COMPLAINT

MORRISON COHEN LLP
909 Third Avenue
New York, New York 10022
(212) 735-8600

Attorneys for Defendant Huberfeld Family Foundation, Inc.

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PRELIMINARY STATEMENT

Plaintiffs' Opposition[1] further underscores their inability to set forth a viable claim against the defendant Huberfeld Family Foundation, Inc. ("the Foundation"), despite their access to virtually all the relevant documentation and an Amended Complaint that weighs in at "1,012 paragraphs and 101 exhibits" (Opp. at 1). Plaintiffs' claims against the Foundation are part of a hodgepodge of conclusory assertions that when broken down lack any logical underpinnings, much less particularized facts sufficient to support a legal claim that would pass muster under Fed. R. Civ. P. 8 and 9(b). In the end, Plaintiffs' claim against the Foundation is based on little more than its name and any effort to suggest anything sinister in the Foundation's actions has been fully exposed.

Thus, for example, Plaintiffs now offer no response to the fact that they asserted loans were made by the Foundation to the Aaron Elbogen Irrevocable Trust at 700% interest when in fact it was at 7% interest. (See AC ¶ 161). Likewise, Plaintiffs do not – because they cannot – dispute any of the following:

- The Foundation is a not-for-profit corporation that was established in 1998, long before the events in this case were alleged to have taken place. (*See* Declaration of Donald H. Chase, dated February 4, 2019 (the "Chase Dec."), Exhibit 1.)

- During the period of 2012-2016 alone, the Foundation made over $11 million in charitable donations to a variety of charitable, religious, and education organizations and needy individuals. (*See* Chase Dec., Exhibit 2.)

- As of 2014, the Foundation maintained a significant investment in Plaintiff PPVA, ascribed with a fair market value of $13,291,940. (*See* Chase Dec. ¶ 11.)

- During the same time, the Foundation maintained only a $1 million investment in the BEOF Funds, and only received a single distribution from the BEOF Funds (the "Black Elk Proceeds Payment") in an amount roughly commensurate with its principal investment. (*See* AC ¶ 493.)

[1] Plaintiffs' Opposition to Moving Defendants' Motions to Dismiss, dated February 11, 2019 (18-cv-10936-JSR ECF Doc. No. 222) (the "Opposition" or "Opp.").

- The Black Elk Trustee commenced litigation against PPVA seeking to avoid and recover all transfers by Black Elk to PPVA, and to equitably subordinate PPVA's claims in connection with its secured debt. (*See* AC ¶ 497.)

- The Black Elk Trustee also asserted a claim against the Foundation for repayment of the Black Elk Proceeds Payment. (*See* Chase Dec., Exhibit 3.) The Foundation resolved its dispute with the Black Elk Trustee, and the Black Elk Trustee dismissed with prejudice all of its claims against the Foundation, and broadly released the Foundation from any claims related to the Black Elk Proceeds Payment. (*See* Chase Dec. ¶ 9.)

Contriving participation in an alleged fraudulent scheme from passive investments whereby the Foundation actually lost significant sums of money is a tall order for sure. Here, Plaintiffs also essentially concede that the Foundation's initial investment in the Black Elk Opportunities Fund was without knowledge of any scheme. (*See* AC ¶ 444.) And while Plaintiffs allege, upon information and belief, that certain investors in the BEOF Funds raised concerns in 2014, there is no allegation that the Foundation raised concerns. (AC ¶ 460.) Plaintiffs also do not assert that the Foundation had any control over Black Elk or the BEOF Funds, the parties to the key transaction at issue. Given these facts, one simply cannot possibly conclude that the Foundation substantially assisted in any allegedly fraudulent scheme simply by essentially accepting the return of their principal investment in a BEOF Fund.

Critically, to the extent Plaintiffs allege any damage arising from the Foundation's actions, or any unjust enrichment by the Foundation, Plaintiffs simply cannot meet their burden to establish standing. In its opening brief, the Foundation showed that the injury for which Plaintiffs seek redress as against the Foundation actually belongs to Black Elk. Because the Foundation has settled all claims with Black Elk, and obtained a broad release covering the subject matter of the Amended Complaint, Plaintiffs' claims against the Foundation must likewise be dismissed pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction. Faced with these true facts, Plaintiffs elected to punt by failing to meaningfully address in any form or

fashion the Foundation's lack of standing argument. The facts and legal argument set forth by the Foundation in its opening brief establishing that Plaintiffs' alleged injury belongs to Black Elk, and not to Plaintiffs, are therefore essentially uncontroverted. Since the initial filing, an order of dismissal was entered, and the Foundation has also obtained a copy of Plaintiffs' relevant filings in the Black Elk Bankruptcy Adversary Proceeding against Plaintiffs. (*See* Reply Declaration of Donald H. Chase, dated February 15, 2019 ("Reply Chase Dec."), Exhibits 1-2.) PPVA's own settlement with Black Elk confirms that any money that PPVA now claims it was due from the Black Elk Renaissance Sale from the Foundation actually belongs to Black Elk, not PPVA. Because Plaintiffs fail to meet their burden to establish standing, their claims against the Foundation must be dismissed.

The Foundation also previously demonstrated that the Amended Complaint's conclusory allegations and improper group pleadings cannot skirt the court rulings in this Circuit that have dismissed similarly deficient fraud-based claims pursuant to Rule 12(b)(6). Nor did the Opposition cure the Amended Complaint's failure to state a plausible claim against the Foundation with particularity. To avoid dismissal, Plaintiffs 'raise the white flag' and argue for a relaxed standard for pleading fraud-based claims that is inconsistent with established law. (Opp. at 33.) Even under a "relaxed" standard, however, Plaintiffs' theory of the case against the Foundation is irreconcilable with the true facts that the Foundation was, if anything, a victim, not an aider-and-abettor, of the Platinum Defendants' alleged scheme. In any event, Plaintiffs' conclusory allegations of aiding-and-abetting breach of fiduciary duty and fraud, and unjust enrichment, should also be dismissed because the Amended Complaint fails to plead the requisite elements, and improperly lumps the Foundation together with other differently situated defendants through imprecise group pleading.

For these reasons, as well as those set forth below and in the reply memoranda of the Moving Defendants, the Foundation respectfully requests that the Court dismiss the Amended Complaint with prejudice.

ARGUMENT

I.

PLAINTIFFS DID NOT SUFFER A COGNIZABLE INJURY CAUSED BY THE FOUNDATION, SO THEIR CLAIMS AGAINST THE FOUNDATION MUST BE DISMISSED FOR LACK OF STANDING

The Amended Complaint must be dismissed for lack of subject matter jurisdiction because Plaintiffs lack standing to assert their claims against the Foundation. In the Opposition, Plaintiffs elect not to reckon with the Foundation's argument. Instead, they devote only one sentence in a footnote to rebut the Foundation's argument, asserting that it is "wholly without merit as the Amended Complaint specifically alleges facts and causes of action in connection with damages incurred by PPVA." (Opp. at 20 n.5.)

The Opposition, however, misses the point entirely. It is precisely those "specifically allege[d] facts" in the Amended Complaint that vitiate Plaintiffs' standing. As against the Foundation, the only damages that Plaintiffs effectively allege from the Foundation's actions are the Foundation's receipt of the Black Elk Proceeds Payment, which was allegedly comprised of funds that flowed from the Black Elk Renaissance Sale through the BEOF Funds. There is certainly no allegation that any other alleged harm that befell PPVA would not have occurred in the absence of the Foundation's action or inaction. Plaintiffs assert that PPVA, and not Black Elk, was injured by these events because "[i]f the Platinum and Beechwood Defendants had not engaged in the Black Elk Scheme, the proceeds of the Renaissance Sale likely would have been used to pay off" PPVA's secured debt. (AC ¶ 501.) There is no allegation that any other alleged harm that befell PPVA would not have occurred in the absence of the Foundation's action or

inaction. And, any claim for unjust enrichment is likewise limited solely to the Foundation's receipt of the Black Elk Proceeds Payment.

And yet Black Elk, now in bankruptcy, interposed an adversary proceeding against PPVA to avoid and recover *all* transfers from Black Elk to PPVA, and to equitably subordinate PPVA's claims in connection with its secured debt. (AC ¶ 497.) In that adversary proceeding, PPVA reached a settlement with Black Elk, pursuant to which the parties crystallized the sum of money that was fraudulently transferred from Black Elk to PPVA (~$15 million), and PPVA agreed not to oppose Black Elk's motion for default judgment against PPVA in the adversary proceeding for that amount. (Reply Chase Dec., ¶¶ 6-7, Exhibit 2 at Exhibit A, Recital ¶ 10; ¶¶ 1.1-1.2.[2]) Under the terms of PPVA's settlement with Black Elk, therefore, PPVA effectively conceded that any and all funds that PPVA received from Black Elk from the Black Elk Renaissance Sale were avoided, and the court entered default judgment awarding that full sum to Black Elk. (Reply Chase Dec. ¶ 7.) PPVA's own settlement with Black Elk confirms that any money that PPVA claims it was due from the Black Elk Renaissance Sale from the Foundation actually belongs to Black Elk, not PPVA. Put differently, any injury caused by the Foundation's receipt of Black Elk's funds may only be asserted by Black Elk, who suffered the injury caused by the flow of the Black Elk Proceeds Payment to the Foundation.

In turn, the Black Elk Trustee also interposed claims against the Foundation for that very payment. (*Compare* Chase Dec., Exhibit 3 at ¶ 158 *with* AC ¶ 493.) The Foundation has since settled Black Elk's claims against the Foundation, and obtained a broad release of liability from Black Elk concerning the Black Elk Proceeds Payment. Thus, even if PPVA had, at one time, a

[2] The Foundation respectfully requests that the Court take judicial notice of the two publicly-filed court documents appended as Exhibit 1 and Exhibit 2 to the Reply Chase Dec. *See, e.g., Kavowras v. N.Y. Times Co.*, 328 F.3d 50, 57 (2d Cir. 2003) (noting that courts may take judicial notice of public filings).

cognizable injury caused by the Foundation's receipt of the Black Elk Proceeds Payment, PPVA's injury has been rendered moot.[3] Indeed, the Foundation's settlement with Black Elk also eliminated any possible unjust enrichment claim (which also properly belonged to Black Elk).

Plaintiffs only stand in the shoes of PPVA, and not Black Elk. Thus, they lack standing to assert a claim against the Foundation for any damage suffered in connection with the Black Elk Proceeds Payment because that injury was ultimately passed on to Black Elk, with whom the Foundation settled and obtained a dismissal with prejudice from the Black Elk-Foundation Lawsuit. Plaintiffs' attempt to disguise Black Elk's claim against the Foundation as their own must accordingly be rejected; any other result would cause the Foundation to face the danger of duplicative recoveries for the same alleged conduct and deviate from the well-settled principle barring third-party standing to which this Circuit hews. *See, e.g.*, *In re Bernard L. Madoff Inv. Sec. LLC*., 721 F.3d 54, 66 (2d Cir. 2013). The Amended Complaint must accordingly be dismissed with prejudice as a matter of law for lack of subject matter jurisdiction.

II.

THE AMENDED COMPLAINT IS ALSO LEGALLY DEFICIENT[4]

The Opposition confirms that the only relevant allegations contained in the Amended Complaint directed specifically toward the Foundation assert that the Foundation was an investor in one or both of the BEOF Funds, and received a single ~$1 million distribution in 2014 as a

[3] On February 6, 2019, the United States Bankruptcy Court, Southern District of Texas, Houston Division, entered an Order of Dismissal with Prejudice of Huberfeld Family Foundation, Inc., dismissing with prejudice all claims against the Foundation in the Black Elk-Foundation Lawsuit. (Reply Chase Dec., Exhibit 1.)

[4] The Foundation also joins in the replies of the other Moving Defendants based on Plaintiffs' failure to allege their aiding and abetting fraud and breach of fiduciary duty, and unjust enrichment claims.

result of the Black Elk Renaissance Sale, an amount roughly commensurate with its principal investment in the BEOF Funds. (AC ¶¶ 145-146, 493.) Despite Plaintiffs' attempts to cast aspersions on the Foundation, receiving a distribution on one's investment, standing alone, is not aiding-and-abetting fraud or breach of fiduciary duty. *See, e.g.*, *MLSMK Invs. Co. v. JP Morgan Chase & Co.*, 737 F. Supp. 2d 137, 145 (S.D.N.Y. 2010) ("While it may be true that Defendants could have connected the dots to determine that Madoff was committing fraud, Plaintiff offers no facts to support the claim that they actually reached such a conclusion."), *aff'd in part*, 431 Fed. Appx. 17 (2d Cir. 2011).

Lacking any specific facts connecting the Foundation to the Platinum Defendants' purported scheme, Plaintiffs resort to imprecise group pleading and conclusory allegations to raise the specter that, by virtue of being merely "related to Murray Huberfeld" (Opp. at 19), the Foundation's conduct can only be explained as substantial assistance in the Platinum Defendants' alleged scheme. (Opp. at 19.) Plaintiffs' theory is implausible, however, when the true facts are placed on the table concerning the Foundation's involvement in PPVA. Namely, Plaintiffs do not address why, if the Foundation was a "friend[] and insider[] of certain of the Platinum Defendants" with knowledge of the Platinum Defendants' scheme (Opp. at 18), the Foundation would have maintained a ~$13 million investment in PPVA through at least 2014, with no allegation of any withdrawal during that period, and yet only a $1 million investment in the BEOF Funds during the same period. It is equally implausible that the Foundation, even had it known about the Platinum Defendants' scheme, would substantially assist the Platinum Defendants to redirect the proceeds from the Black Elk Renaissance Sale from PPVA (in which the Foundation maintained a ~$13 million investment) to the BEOF Funds (in which it maintained a ~$1 million investment).

The conduct alleged against the Foundation – that it invested in a BEOF Fund and later accepted the return of its investment – is not actionable because it is also entirely consistent with the behavior of an arms-length outside investor, not an insider. The Amended Complaint establishes only that the Foundation is a victim, not a perpetrator, of PPVA's collapse and does not belong in this lawsuit. *See, e.g.*, *Lemon v. Jerrietta R. Hollinger & Ganz & Hollinger, P.C.*, No. 17-CV-4725 (RA), 2018 U.S. Dist. LEXIS 81182, at *14 (S.D.N.Y. May 14, 2018) ("Dismissal is appropriate when, accepting all factual allegations as true and drawing all reasonable inferences in the plaintiff's favor, a complaint fails to plead enough facts to state a claim that is plausible on its face.") (citation and internal quotations omitted); *Sonterra Capital Master Fund Ltd. v. Credit Suisse Grp. AG,* 277 F. Supp. 3d 521, 555 (S.D.N.Y. 2017) (dismissing claims because, *inter alia*, "it is not plausible that defendants shared a motive to conspire"); *Lefkowitz v. Bank of N.Y.*, No. 01 Civ. 6252 (VM) (MHD), 2009 U.S. Dist. LEXIS 120223, at *72 (S.D.N.Y. Nov. 25, 2009) (dismissing fiduciary-breach claim and finding conclusory allegations contradicted by other events to be "simply not plausible").

Lacking any specific facts or a plausible theory of wrongdoing against the Foundation, Plaintiffs resort to improper and imprecise group pleading to lump the Foundation together with other Preferred Investors from whom the Foundation is differently situated. The Amended Complaint utterly fails to state a legally viable claim against the Foundation, let alone one that satisfies Rule 9(b). For this reason as well, the claims against the Foundation should be dismissed with prejudice.

CONCLUSION

For all the reasons set forth herein, as well as in the reply memoranda submitted by the other Moving Defendants, all of Plaintiffs' claims against the Foundation should be dismissed with prejudice.

Date: February 15, 2019

Respectfully submitted,

MORRISON COHEN LLP

/s/ Donald H. Chase
Donald H. Chase
Y. David Scharf
Daniel C. Isaacs
909 Third Avenue
New York, NY 10022
Tel: (212) 735-8600
dchase@morrisoncohen.com
dscharf@morrisoncohen.com
disaacs@morrisoncohen.com

Attorneys for Defendant Huberfeld Family Foundation, Inc.