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 CHRISTOPHER SMITH, as Joint Official Liquidators and Foreign Representatives of PLATINUM PARTNERS VALUE ARBITRAGE FUND L.P. (in Official Liquidation) and PLATINUM PARTNERS VALUE ARBITRAGE FUND L.P. (in Official Liquidation), Plaintiffs, -v- PLATINUM MANAGEMENT (NY) LLC, et al., Defendants.	Case No. 1:18-cv-10936-JSR

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

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Distilled to their essence, Plaintiffs' claims against the Foundation rest on the faulty premise that the Foundation's innocuous charitable activity is actionable because it bears Murray Huberfeld's last name. Although you would never know it from reading Plaintiffs' rhetoric:

(1) As a non-profit entity, the Foundation has *no* owners or investors, it provides *no* financial returns or dividends, it simply receives gifts and distributes monies *only* to charities. Formed and operating at least 14 years before the events at issue, it distributed nearly $24 million to charities between 2008 and 2017 alone (Chase Reply Dec. ¶5). Contrary to Plaintiffs' portrayal, it is not an investment fund. *No one* invests in the Foundation. They donate to it for charity.

(2) The Foundation disbursed *no* funds to Murray Huberfeld, who has *no* right to receive any funds *ever* from the Foundation.

(3) In order to preserve and expand its corpus of charitable funds, the Foundation invests its capital to achieve a positive rate of return (much like any University), quite often with secured loans to businesses and individuals and at market or even premium interest rates, such that during that same time period (2008-17), it earned roughly $24 million in net investment income, which translates into somewhere between a 6% to 10% annual rate of return, a more than respectable return. (*Id.*) All of its financial activities are fully disclosed in annual public filings. (*Id.* at Ex. 2).

(4) There is nothing in the Complaint to suggest that any of the personal and business loans made by the Foundation were on less than market terms, not repaid, or otherwise illusory or improper. Indeed, nothing about the loans identified is inherently improper. Plaintiffs do nothing more than point to the names of a few of the borrowers in an effort to suggest something nefarious but there is no substance offered to support any such inference. Nor is there anything in the Complaint connecting any of the loans made by the Foundation to any fraudulent scheme articulated in the SAC.

(5) The Foundation had at all relevant times roughly $13 million invested in PPVA and there is no allegation that it ever sought or received any redemptions. (*see, e.g.*, SAC, Ex. 3, stock schedule). So it has lost roughly $13 million in connection with the very events from which Plaintiffs now allege it benefitted.

(6) There are no allegations to suggest any disregard of the corporate formalities or the intermingling of funds. While Mr. Huberfeld was indeed the President of the Foundation, which had no offices as such, there is certainly nothing surprising about receiving Foundation mail at his office at the time or tending to the Foundation business on occasion at the office.

Despite all of the above unassailable facts, Plaintiffs nonetheless ask the Court to uphold a

baseless "reverse veil piercing" theory premised on hysterical speculation that somehow transforms a nonprofit charity's routine attempts to leverage its capital for charitable purposes into something more sinister. Plaintiffs also ask the Court to find credible a theory that the Foundation put a roughly $13 million investment in PPVA at risk to knowingly and substantially assist a sprawling scheme by which it could recover its separate $1 million principal investment in Black Elk. Plaintiffs' allegations wither under the scrutiny required by Rule 8 and 9(b).

I. PLAINTIFFS DID NOT SUFFER A COGNIZABLE INJURY CAUSED BY THE FOUNDATION

The SAC must be dismissed for lack of subject matter jurisdiction because Plaintiffs do not have standing to assert their claims for aiding-and-abetting fraud and breach of fiduciary duty, and unjust enrichment (the "Black Elk Claims") against the Foundation. In their Opposition,[1] Plaintiffs concede that the Black Elk Claims are exclusively premised on a "single tortious act"; namely, the Foundation's receipt of the Black Elk Proceeds Payment. (*See* Opp. at 52-53 (referencing the Foundation's "single tortious act" being its "participation in the Black Elk Scheme").) Yet, neither the SAC nor the Opposition point to any alleged injury that Plaintiffs suffered that can reasonably be inferred to have been caused by the Foundation's actions.

Instead, Plaintiffs summarily argue that "PPVA was damaged by the Black Elk Scheme, not only in the diversion of the Renaissance Sale Proceeds to the Foundation, but also in the subordination of PPVA's rights, and the significant creditor claims against PPVA that resulted from the Black Elk Scheme." (Opp. at 52-53.) This argument misses the point. Those three purported injuries are not cognizable because they either do not belong to PPVA, or are causally unrelated to the Foundation's alleged misconduct.

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[1] Plaintiffs' Memorandum of Law in Opposition to Moving Defendants' Second Round of Motions to Dismiss, ECF Doc. No. 351 (the "Opposition" or "Opp.").

Plaintiffs do not dispute that any damage caused by the "diversion of the Renaissance Sale Proceeds to the Foundation," belongs in the first instance to Black Elk, the party who suffered the injury caused by the transmission to the Foundation of a portion of the proceeds of its Renaissance Sale. Plaintiffs also admit that Black Elk, now in bankruptcy, has sought to avoid and recover all transfers to PPVA and to equitably subordinate PPVA's claims in connection with its secured debt, all based on *PPVA's conduct*, not the Foundation's. (SAC ¶ 510.) PPVA even 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 Black Elk was awarded default judgment against PPVA for its claims related to those Renaissance Sale Proceeds. (Chase Dec.[2] ¶¶ 15-16, Ex. 7 at Exhibit A, Recital ¶ 10: ¶¶ 1.1-1.2.) PPVA's settlement with Black Elk confirms that any money PPVA claims was due from the Renaissance Sale belongs – as a matter of law – 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 Black Elk Proceeds Payment to the Foundation.

The Foundation's settlement of Black Elk's claims, and its broad release of liability from Black Elk concerning the Black Elk Proceeds Payment, further vitiates Plaintiffs' standing. Even if PPVA had, at one time, a cognizable injury caused by the Foundation's receipt of the Black Elk Proceeds Payment, PPVA's injury has been rendered moot. The Foundation's settlement with Black Elk also eliminated any possible unjust enrichment claim, which also properly belonged to Black Elk. Plaintiffs' stipulation with the other Preferred Investors of the BEOF Funds, conditionally dismissing PPVA's claims in favor of claims by Black Elk, only further confirms that any injury caused by a Preferred Investors' receipt of proceeds from the

[2] Declaration of Donald H. Chase in Support of the Huberfeld Family Foundation, Inc.'s Motion to Dismiss the Second Amended Complaint, dated April 22, 2019 ("Chase Dec.").

Renaissance Sale belongs to Black Elk, and not PPVA. (Chase Reply Dec.[3] ¶ 3, Exhibit 1.)

The remaining purported injuries to which PPVA points – the subordination of PPVA's rights and purported "creditor claims" against PPVA – are not cognizable because the SAC does not causally connect them to the Foundation's alleged misconduct. Plaintiffs do not plead any facts supportive of a causal connection between the sole tortious alleged conduct alleged by Plaintiffs in the SAC – the Foundation's receipt of the Black Elk Proceeds Payment – and the subordination of PPVA's rights or creditor claims against PPVA. (*See* SAC.) Nor do Plaintiffs cite to any allegations in the SAC that could even be read to support such an inference. To the contrary, those injuries that PPVA suffered were caused by PPVA's own conduct, and not, somehow, the Foundation's receipt of the Black Elk Proceeds Payment. (SAC ¶ 510.) Because Plaintiffs do not meet their burden of alleging any injury that belongs to PPVA, rather than to Black Elk, or an injury that is fairly traceable to the alleged misconduct of the Foundation, the Black Elk Claims must be dismissed with prejudice for lack of subject matter jurisdiction. *See Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016).

II. THE SAC FAILS TO PLEAD A VIABLE CLAIM AGAINST THE FOUNDATION

A. Plaintiffs' Alter Ego Claim Is Specious And Unsupported By True Facts

Plaintiffs fail to meet their "heavy burden" of showing that disregard of the Foundation's corporate form is warranted. *See Kalin v. Xanboo, Inc.*, No. 04 Civ. 5931 (RJS), 2009 U.S. Dist. LEXIS 34954, at *31 (S.D.N.Y. Mar. 30, 2009). Tellingly, Plaintiffs ask this Court to sustain their alter ego claim despite their failure to plead the requisite elements. (Opp. at 45 (arguing that "traditional factors used to pierce the corporate veil do not apply because of the unique facts of this action and because the Foundation is a nonprofit corporation").) This admission speaks

[3] Reply Declaration of Donald H. Chase in Further Support of the Huberfeld Family Foundation, Inc.'s Motion to Dismiss the Second Amended Complaint, dated May 23, 2019 ("Chase Reply Dec.").

volumes about the dearth of actionable facts alleged in the SAC. Under controlling law, in order to state an alter ego claim, Plaintiffs must allege, with particularly, that (i) Huberfeld or Platinum Management exercised wrongful domination over the Foundation, and (ii) that this domination was used to force the Foundation to commit the fraud alleged in Counts 1-6 of the SAC. *See American Fuel Corp. v. Utah Energy Dev. Co.*, 122 F.3d 130, 134 (2d Cir. 1997). Neither the fact that the Foundation is a nonprofit corporation, nor any other "unique fact[] of this action," warrants an exception to the Second Circuit's well-settled rule that "disregard of the corporate form is warranted only in extraordinary circumstances, and conclusory allegations of dominance and control will not suffice to defeat a motion to dismiss." *Capmark Fin. Group. Inc. v. Goldman Sachs Credit L.P.*, 491 B.R. 335, 347 (S.D.N.Y. 2013); *see also CH v. RH*, 18 Misc. 3d 268, 276-77 (Sup. Ct. Nassau Cty. 2007) (applying same rules of law for nonprofit corporations as apply to for-profit corporations with respect to claim for reverse veil piercing).

(i) Plaintiffs Do Not Allege Any Wrongful Domination Of The Foundation

Plaintiffs argue that the first element of a reverse veil piercing claim – domination and control – is satisfied merely because Huberfeld controlled the Foundation. (Opp. at 45-46.) But that fact alone does not as a matter of law suffice to show the type of *wrongful* domination necessary to pierce the corporate veil. *See American Fuel Corp.*, 122 F.3d at 134.

Rather, to support an inference of wrongful domination, courts in the Second Circuit consider whether a pleading alleges a variety of potential factors "that tend to identify a dominated corporation," such as, *inter alia*, the observance of corporate formalities, whether the company is capitalized, and whether the assets of the corporation are used to pay the debts of the manager. *Id.* Neither the SAC nor the Opposition points to any such facts. Plaintiffs concede, as they must, that the Foundation's corporate formalities were observed, that it was capitalized,

that it did not engage in any *ultra vires* activity, and that the assets of the Foundation were never to satisfy a debt of Huberfeld or any other Platinum Defendant. (Opp. at 45-46.) Furthermore, the Foundation was undisputedly established and doing business more than 14 years before the fraud alleged in the SAC even began, and has conducted itself in a demonstrably identical manner since at least 2008.[4] (Chase Reply Dec. ¶5, Exhibit 2 (reflecting donations, investment/loan activity, and charitable contributions from 2008-2017).) The mere fact that Huberfeld was responsible for operating the Foundation that bears his family name does not even come close to establishing the type of domination necessary to sustain Plaintiffs' alter ego claim.

(ii) The Foundation's Corporate Form Was Not Used To Further Any Wrongdoing, Let Alone The Wrongdoing Alleged In The SAC

Plaintiffs also fail to allege facts sufficient to show that the purported domination of the Foundation was used to commit the same fraud that caused Plaintiffs' loss. *Jiaxing Hongyu Knitting Co. v. Allison Morgan LLC*, No. 11 Civ. 09342 (AJN), 2013 U.S. Dist. LEXIS 2852, at *21-22 (S.D.N.Y. Jan. 8, 2013). The Opposition confirms that the SAC alleges no facts connecting the purported domination of the Foundation, on the one hand, to the fraud of the Platinum Defendants alleged in Counts 1-6 of the SAC, on the other hand. Indeed, the Opposition does not even identify any wrongdoing at all; the financial activity to which they point is perfectly appropriate.

Initially, Plaintiffs' assert that the Foundation's receipt of the Black Elk Proceeds Payment is a proper predicate to pierce the corporate veil. (Opp. at 46-47.) This assertion fails,

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[4] Both Plaintiffs and the Foundation respectfully request that the Court take judicial notice of the Foundation's historical tax returns appended as Exhibit 3 to the SAC, and to the Declarations of Donald Chase submitted in connection with the Foundation's instant motion. (Huberfeld Family Foundation, Inc.'s Memorandum of Law in Support of Its Motion to Dismiss the Second Amended Complaint, ECF Doc. No. 307 (the "Moving Br.") at 5 n.3; Opp. at 48 n.15.)

for the same reasons set forth *infra* at Point II(B)-(C): the SAC's allegations that the Foundation knowingly, substantially assisted in the Black Elk Scheme are implausible and non-actionable.

Plaintiffs also accuse the Foundation of serving as an "investment" fund or a "repository for assets of the Platinum Defendants," asserting that the Foundation's lending activity is sinister. Plaintiffs' conclusory allegations are not just plainly wrong and silly are on their face – they actually have it in reverse. The Foundation never acted as an "investment" fund or a "repository" for anyone's assets, but in fact made interest-bearing loans to third-parties for the purpose of supplementing the Foundation's donations in order to raise additional capital to support its substantial charitable activity. (Chase Reply Dec. ¶5, Ex. 2.)

Critically, the Foundation's loan activity is no secret. All of the activity to which Plaintiffs point was openly reported on the Foundation's tax returns. (*Id.*) The Foundation's lending was made at market or above-market interest rates, and there is no allegation that any of its loans were not fully paid back with interest. (*See, e.g.*, SAC, Exhibit 3.) Contrary to Plaintiffs' condemnation, these loans were not "red flags" (Opp. at 48), but rather openly reported investment activity that permitted the Foundation to supplement its donated income and generate additional revenue to give to charity. To be sure, it is precisely the additional revenue raised by these loans that permitted the Foundation to contribute almost $24 million to charity from 2008-2017, while in the same period only receiving about $20.7 million in donated income. (Chase Reply Dec. ¶ 5, Ex. 2)

Setting Plaintiffs' baseless aspersions aside, the SAC does not point to anything intrinsically nefarious about the Foundation's loans. Plaintiffs spill substantial ink noting that certain of the loans were made to individuals that they also named in this action. But that fact, also openly reported on the Foundation's tax returns, is innocuous given those individuals'

professional and personal connections to the Huberfeld family. Plaintiffs' attempt to transmogrify the Foundation from a charitable institution with openly reported financial activity, into a 'slush fund for fraudsters' is specious and belied by the unassailable facts.[5]

In any event, Plaintiffs' failure to causally connect the Foundation's financial activity to the alleged wrongdoing in Counts 1-6 of the SAC is independently fatal to their claims. The fact that the Foundation made loans – even loans to parties in this action – does not support an inference that the Foundation served as a repository or clearinghouse for the particular illicit assets supposedly pilfered from PPVA, or that the Foundation's lending activity furthered the First or Second Schemes. Absent any such particularized allegations demonstrating that the Foundation's conduct was causally connected to the fraud alleged by Plaintiffs against Huberfeld and Platinum Management, Plaintiffs' alter ego claim cannot be sustained. *See Jiaxing Hongyu Knitting Co.*, 2013 U.S. Dist. LEXIS 2852, at *24.

B. The Aiding-And-Abetting Claims Are Not Plausible

Plaintiffs concede that the Foundation engaged in a "single tortious act" – its receipt of the Black Elk Proceeds Payment. (Opp. at 52-53.) The mere fact that the Foundation received a distribution on its investment – without legally sufficient allegations of the Foundation's actual knowledge and substantial assistance in others' wrongdoing – is not enough to sustain aiding-and-abetting fraud or breach of fiduciary duty claims. *See, e.g.*, *MLSMK Invs. Co. v. JP Morgan Chase & Co.*, 737 F. Supp. 2d 137, 145 (S.D.N.Y. 2010).

Lacking any specific facts connecting the Foundation's affirmative conduct to the

[5] To make matters worse, Plaintiffs do not dispute that they actually misstated in the SAC critical details about the Foundation's activity. For instance, in its Moving Br., the Foundation established that Plaintiffs' allegations confused a Foundation loan to an entity named Hutton Ventures, LLC with a completely different company "involved in a student loan scam." (Moving Br. at 6-7.)

Platinum Defendants' purported scheme, Plaintiffs resort to group pleading and conclusory allegations (*see* Opp. at 51) to raise the specter that, "by way of Huberfeld" (Opp. at 50) the Foundation knew of the Platinum Defendants' wrongful conduct. But even if the facts alleged against the Foundation were stated with particularity, which they are not, the Opposition does not cure the SAC's contradictory and implausible theory of the case against the Foundation.

Plaintiffs do not challenge that the Foundation maintained a ~$13 million investment in PPVA through at least 2014. Plaintiffs also admit that the Foundation maintained only a $1 million investment in the BEOF Funds during the same period. The Opposition does not even attempt to address why, if the Foundation was indeed something more than a mere passive investor in the BEOF Funds, the Foundation would have knowingly and substantially participated in any scheme to damage PPVA, where it had a $13 million investment, in favor of the Black Elk Scheme, to potentially recover at most its $1 million principal 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 entirely consistent with the behavior of an arms-length outside investor, not an insider. The aiding-and-abetting claims are implausible and should be dismissed with prejudice. *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); *Sonterra Capital Master Fund Ltd. v. Credit Suisse Grp. AG,* 277 F. Supp. 3d 521, 555 (S.D.N.Y. 2017).

C. The Unjust Enrichment Claim Also Fails

Plaintiffs summarily argue that the SAC's allegations "are sufficient to plead a claim for unjust enrichment" because the Foundation "unjustly enrich[ed itself] by way of the Renaissance Sale Proceeds." (Opp. at 52.) Contrary to Plaintiffs' assertion, the SAC does not plead any facts

demonstrating that the Foundation was actually enriched at PPVA's expense, particularly because (i) the Foundation itself was a victim, in view of its substantial lost investment in PPVA; (ii) the Foundation's receipt of the Black Elk Proceeds Payment was at Black Elk's, and not PPVA's expense, as PPVA has admitted in court filings (*see* Chase Dec. ¶¶ 15-16); and (iii) the Foundation settled with Black Elk in this regard. In any event, Plaintiffs do not even address the Foundation's argument that equity and good conscience do not permit multiple recoveries in these circumstances (as confirmed by Plaintiffs' voluntary dismissal of the other Preferred Investors in favor of Black Elk's claim (*see* Chase Reply Dec., Exhibit 1), and that the Foundation's relationship with PPVA was too attenuated to legally support a claim for unjust enrichment. (Moving Br. at 17.) For these reasons, Plaintiffs' unjust enrichment claim also fails.

III. PLAINTIFFS' CLAIMS ARE BARRED BYTHE *IN PARI DELICTO* DOCTRINE

Plaintiffs' claims against the Foundation are barred by the *in pari delicto* doctrine because the Platinum Defendants' intentional misconduct is imputed to PPVA. (Moving Br. at 14.) In response, Plaintiffs argue that they may bring their claims against the Foundation because the Foundation is an imputed insider of PPVA, and because of the adverse interest exception. In order to avoid repetition, the Foundation joins in the arguments set forth in the Reply Memorandum of Law in Further Support of Defendant Michael Katz's Motion to Dismiss (ECF Dkt. No. 410 at 1-4), confirming that neither the insider nor the adverse-interest exceptions apply to save Plaintiffs' claims.

CONCLUSION

All of Plaintiffs' claims against the Foundation should be dismissed with prejudice.

Date: May 23, 2019

Respectfully submitted,

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