

United States District Court
Southern District of New York

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Martin Trott and Christopher Smith, as JOL,

Plaintiffs,

18 Civ. 10936 (JSR)

vs.

Platinum Management (NY), LLC, et al.,

Defendants.

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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

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Federal Rules of Civil Procedure:

9(b) 1, 7

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 Complaint. For the reasons hereafter set forth, the Court should grant the motion.

The Motion In Brief

The Complaint alleges that each Defendant is, along with at least twenty three other individuals and entities, part of a group denominated by the Complaint as “Preferred Investors of the BEOF Funds” (the “Investor Group”)(¶57).¹ The Complaint alleges three claims against the Investor Group: i) aiding and abetting breach of fiduciary duties by the Platinum Defendants (Sixth Count); ii) aiding and abetting fraud by the Platinum Defendants (Seventh Count); and iii) unjust enrichment (Twelfth Count). Plaintiff seeks recovery against the Investor Group of both compensatory and punitive damages on each of the three claims.² Other than alleging that each Defendant is part of the Investor Group, the Complaint contains no allegations against any individual Defendant. Even under liberal pleading rules, the Complaint fails to plead viable

¹The “¶” symbol, followed by a number, refers to a paragraph in the Complaint.

²See *ad damnum* allegations of the Complaint beginning on p. 128.

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 Complaint 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.

The Allegations of the Complaint

This Complaint arises out of various alleged schemes alleged to have been perpetrated primarily by the Platinum Defendants and the Beechwood Defendants³ to defraud Platinum Partners Value Arbitrage Fund (“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”)⁴ to provide themselves and select insiders with proceeds from the sale of PPVA’s prime assets (the “Renaissance Sale”), to

³The Platinum Defendants and the Beechwood Defendants are defined in ¶¶33-34 of the Complaint. None of the Defendants is either a Platinum or a Beechwood Defendant.

⁴ BEOF I is alleged to be a Delaware limited liability company with its principal place of business in New York (¶54). BEOF II is alleged to be a limited liability company domiciled in the Cayman Islands with its principal place of business in New York (¶55). The BEOF Funds are not alleged to be either Platinum Defendants or Beechwood Defendants.

the detriment of PPVA.⁵ The Investor Group is alleged to be comprised of various individuals and entities that were direct or indirect investors in the BEOF Funds who received proceeds of the Renaissance Sale (¶56). Other than allegedly being included in the Investor Group in ¶57 of the Complaint, none of the Defendants is ever referred to individually in the Complaint.⁶

The Complaint alleges no details of any Defendant's alleged direct or indirect investment in either BEOF Fund. The Complaint does not allege the time when any Defendant allegedly made any such alleged investment or the amount of any such alleged investment. The Complaint does not allege the nature of any Defendant's interest in either BEOF Fund - *i.e.*, was the alleged investment a loan to the BEOF Funds, did the alleged investor acquire a membership interest in the BEOF Funds and, if so, the nature of any such membership interest, or did the alleged investor acquire some other interest in the BEOF Funds. The Complaint does not allege whether any Defendant invested in both BEOF Funds or only one. The Complaint does not allege the circumstances under which any Defendant became part of the Investor Group. The Complaint does not allege the amount of any distributions or other consideration which any Defendant allegedly received from the BEOF Funds.

⁵See ¶54 and ¶55 of the Complaint.

⁶The Complaint alleges (¶¶623, 637) that the "BEOF Funds were formed by Platinum Management for the corrupt and wrongful purpose of siphoning nearly \$100 million in funds out of Black Elk in connection with the Renaissance Sale and letting PPVA and its subsidiaries face the consequences in the form of certain creditor claims." The Complaint does not allege, however, that any individual Defendant had knowledge of such purpose or in any way participated in the formation of the BEOF Funds.

The Complaint contains only bald conclusory allegations against the Investor Group as a group without any alleged factual support for those allegations. Other than as an alleged part of the alleged Investor Group, the Complaint contains no allegations against any individual Defendant. Thus the Complaint 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 (¶34, ¶118);
- ii) was “aware” of the actions of the Platinum Defendants in furtherance of the Black Elk Scheme (¶56)⁷;
- iii) “substantially assisted and participated in the Platinum Defendants’ breaches of their fiduciary obligations in connection with the Black Elk Scheme”⁸ (¶628);
- 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” (¶629);

⁷The allegations of ¶56 are made against the Investor Group, not against the BEOF Funds themselves.

⁸The 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 (¶628). Thus the Complaint’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.

- v) “substantially assisted and participated in the Platinum Defendants’ material misrepresentations, omissions and actions to defraud PPVA in connection with the Black Elk Scheme” (¶642);⁹
- vi) as a result of the allegations of ¶642, the Investor Group “had actual knowledge that the Platinum Defendants were defrauding PPVA . . .” (¶643).

The Complaint, however, does not allege any facts to support any of those allegations against any individual Defendant. The Complaint does not allege what actions any individual Defendant allegedly took in furtherance of, or otherwise to participate in, the schemes allegedly perpetrated by the Platinum Defendants. Nor does the Complaint allege any facts from which one could reasonably infer that any individual Defendant had actual knowledge about the alleged Black Elk Scheme or any aspect of it.

The Complaint does not allege that any of the Defendants had the ability to control, or in fact controlled, either BEOF Fund, the Platinum Defendants or any other defendant herein in their alleged perpetration of the Black Elk Scheme. To the contrary, the Complaint alleges that the BEOF Funds were controlled by defendants Mark Nordlicht, Murray Huberfeld, Daniel Small, David Levy and David Bodner (¶¶627, 641). Thus to the extent the Complaint alleges any

⁹The 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 (¶642). Once again, the Complaint simply sets forth additional conclusory allegations rather than factual details to support the claims.

wrongful actions by the BEOF Funds, Defendants had no ability to control or direct those actions and the Complaint does not allege that any Defendant, as an alleged part of the Investor Group, did so. The Investor Group is alleged to be investors in the BEOF Funds (§57). Their alleged status as mere investors, however, does not render the Defendants responsible for any actions of the BEOF Funds, its managers or the Platinum Defendants.

Argument

Point 1

The Complaint Fails To State A Claim Against Any Defendant

A. The Complaint 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 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 Complaint as part of the Investor Group, there are no allegations against any of the individual Defendants in his, hers or its individual capacity. Thus the Complaint does not give any Defendant fair notice of the facts asserted 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 Complaint Does Not Plead The Aiding And Abetting Claims Against The Defendants With Required Particularity

The Complaint 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).”). The only “fact” alleged in the Complaint is that each Defendant was allegedly an investor in one or both of the BEOF Funds. The fact of an investment in a fund, over which the Defendants are not alleged to have had control, and which was allegedly involved in wrongful conduct, is insufficient to state an aiding and abetting claim against an investor in the fund based solely upon the fact of such investment. The Complaint is utterly lacking alleged facts to support any claim that any Defendant engaged in any wrongful conduct.

In order to allege a claim for aiding and abetting, the Complaint must set forth facts that each Defendant provided “substantial assistance” in committing the wrongful act, as set forth in the Bodner Memorandum of Law, Point III. 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, 370 (S.D.N.Y. 2007). Further, the Complaint 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, v. Beacon Hill Asset Management*, LLC, 479 F. Supp. 2d 349, 370-71 (S.D.N.Y. 2007). The Complaint herein meets neither of these requirements.

Nor does the Complaint contain any factual allegations which would give rise to a reasonable inference that: i) any Defendant had actual knowledge of the underlying alleged breach of fiduciary duty or alleged fraud; or ii) that any Defendant substantially participated in any alleged breach of fiduciary duty or alleged fraud. Pleading such factual details is required to state a claim for aiding and abetting, as set forth in Point III of the Bodner Memorandum of Law. The Complaint only pleads the conclusory allegations relating to the Investor Group in that regard (¶¶628, 629, 642 and 643). Such allegations are insufficient to plead viable claims for aiding and abetting fraud or breach of fiduciary duty.

C. The Complaint 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 II, see also

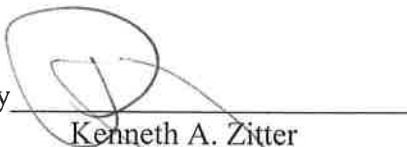
Silverman Partners, L.P. v. First Bank, 687 F. Supp. 2d 269, 288 (E.D.N.Y. 2010) (citing *Welch v. TD Ameritrade Holding Corp.*, 2009 U.S. Dist. LEXIS 65584, 2009 WL 2356131, *21 (S.D.N.Y. July 27, 2009)) (Unjust enrichment claims “must be pled with specificity when the underlying acts are allegedly fraudulent.”). For the same reason that the aiding and abetting claims against the Defendants fail for lack of properly particularized pleading, 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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