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 in Reply to the Memorandum of Law Submitted by Plaintiffs in Opposition to Defendants' 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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Preliminary Statement

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") submit this Memorandum of Law in reply to the Memorandum of Law ("Plaintiffs' MOL") submitted by Plaintiffs in opposition to Defendants' 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") and in further support of said motion. For the reasons hereafter set forth, and in Defendants' moving Memorandum of Law ("Defendants' MOL"), the Court should grant the motion.[1]

Plaintiffs have simply not demonstrated that the FAC pleads with required particularity that any Defendant aided or abetted any breach of fiduciary duty or fraud by the Platinum Defendants or was unjustly enriched.

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[1]Capitalized terms herein have the same definition as set forth in Defendants' MOL.

Argument

Point 1

Plaintiffs Have Not Pleaded Viable Claims For Aiding and Abetting

Plaintiffs do not dispute, as set forth in Defendants' MOL, pp. 10-11, that in order to establish a claim for aiding and abetting tortious misconduct, Plaintiffs must plead sufficient factual particulars to establish that each Defendant, with actual knowledge of the Platinum Defendants' alleged tortious misconduct, substantially assisted that misconduct, which substantial assistance caused damage to PPVA. Plaintiffs' MOL does not identify the allegations in the FAC which meet that standard.

Plaintiffs assert (Plaintiffs' MOL, p. 3) that FAC ¶145-172 set forth the "substantial assistance and financing they (the Investor Group) provided to the Black Elk Scheme [and] the specifics of their investments in the BEOF Funds." Other than alleging generally that the Defendants were investors in the BEOF Funds, and the relationships between certain Defendants and other defendants, those paragraphs contain no such details. Plaintiffs again state generally (Plaintiffs' MOL, p. 5) that the Investor Group "knew about and substantially assisted the Platinum Defendants' various tortious actions." No details are provided about that alleged assistance, or how the Investor Group acquired actual knowledge of any alleged tortious actions by the Platinum Defendants.

The purported details regarding the Investor Group's alleged substantial assistance in the Black Elk Scheme are set forth in the bullet points on pp. 18-19 of Plaintiffs' MOL. None of those bullet points provide any factual support to any claim against any Defendant. The first bullet point implies that somehow an investment in the BEOF Funds was an "opportunity" to engage in improper conduct "outside of the regular funds."[2] Plaintiffs cite FAC ¶439 which relies upon a February 3, 2013 email (FAC, Exhibit 50) from Murray Huberfeld, a Platinum Defendant, to one member of the Investor Group, who is not a Defendant, soliciting an investment in the BEOF Funds. That email, together with the February 4, 2013 email from Huberfeld which is part of that Exhibit, make clear that Huberfeld is soliciting a one time investment in the BEOF Funds for money to be invested by those funds in Black Elk for its use in pursuing its drilling program.[3] The fact that the investment was presented by Huberfeld as "outside of the regular funds" does not connote anything sinister. The simple reading of the Huberfeld emails is that it offers another

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[2]To the extent Plaintiffs imply (or state) that the use of the word "Opportunities" in the name "Black Elk Opportunities Fund" somehow implies something sinister about making any investment therein, such implication (or statement) is baseless. Although we have not done an actual survey, there is no doubt that there are thousands of investment funds in the United States which use the word "Opportunities" in their names.

[3]Plaintiffs take the "outside of the regular funds" excerpt from the email out of context. The relevant excerpts from those emails are as follows:
February 3, 2013 email: As you know once in a while we raise money for a deal specific company outside of the regular funds. We are working on a "one off deal" for black elk oil and gas company.
Terms - $95 million raise, 16% interest net to investor Interest paid quarterly, Plus 40k shares per million invested (valued at $3- $6 per share)120k - 240k equity kicker. Money being used to fund additional drilling program. 14 month term, interest goes to 36 percent if not payed on time. Rolling Closings beginning Feb 1 - March 1
February 4, 2013 email: Check out the black elk deal I sent u. Great interest rate plus shares as upside. We are moving ahead on the deal. If u want to speak to david levy he can take you thru the deal. 14 months. Let me know how much I should hold for you as it is going to move quickly.

way of investing in Black Elk. There is certainly no problem with more than one fund investing in Black Elk, or the BEOF Funds making or increasing their investment in Black Elk. Such proposal by Huberfeld implies nothing sinister or improper.

But more significantly, the investment was solicited in February 2013, apparently in connection with BEOF Funds raising $40 million in the first quarter of 2013, as alleged in FAC ¶442. At that time, according to the FAC, the full extent of Black Elk's financial difficulties were not yet known (¶444).[4] The Black Elk Scheme itself, however, according to the FAC, was not allegedly hatched until 2014. The FAC alleges that negotiations for the Renaissance Sale, which was at the core of the Black Elk Scheme, did not commence until 2014 (¶455). Any investment in the BEOF Funds in the first quarter of 2013, therefore, could not possibly have been made with knowledge of the Black Elk Scheme, or substantially assist it, because that alleged scheme did not yet exist.[5] The second and third bullet points, which refer to investments in the BEOF Funds by the Investor Group in the first quarter of 2013, similarly, cannot establish any substantial assistance by the Investor Group in, or any actual knowledge of, the 2014 Black Elk Scheme.[6]

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[4]Because the full extent of Black Elk's financial difficulties were not yet known when a $40 million investment was made in the first quarter of 2013, it is illogical to assume that any investor was making a new investment in the BEOF Funds with the knowledge and intention of assisting any scheme to defraud PPVA. No rational investor would throw good money after bad and hope to recover a new investment by engaging thereafter in improper conduct.

[5]Plaintiffs' MOL, p. 18, also states that the Investor Group knew (time unspecified) that Black Elk was overvalued by PPVA. The FAC contains no such allegation.

[6]In any event, there is no claim that any actions by any Defendant in 2013 substantially assisted the Black Elk Scheme or caused PPVA any damages.

The fourth bullet point contends that because some unidentified members of the Investor Group raised concerns about their investment by early 2014 (¶460), that somehow gave the Investor Group actual knowledge that the Platinum Defendants were about to embark upon a tortious scheme. The fact that a company is somehow experiencing financial difficulties simply does not provide an investor therein with actual knowledge that the company's management is about to act improperly.[7]

The fifth bullet point asserts as follows:

> The Preferred Investors of the BEOF Funds provided substantial assistance to the Black Elk Scheme, by swapping its Black Elk equity for bonds, in order to rig the consent solicitation vote for the Black Elk Indenture. Am. Compl. ¶ 465-471.

That paragraph is equivocally drafted. It appears to state that the Investor Group swapped Black Elk equity which the Investor Group owned, for bonds, in furtherance of the Black Elk Scheme. But Plaintiffs' MOL says "by swapping its Black Elk equity for bonds," not "their Black Elk equity for bonds." The FAC, and Plaintiffs' MOL, never state that any Defendant ever owned Black Elk securities directly, as opposed to indirectly through their interests in the BEOF Funds (any such allegation of direct ownership, we are informed, would be untrue). It was the BEOF Funds which allegedly made the swap with Black Elk (¶467). But Defendants undisputedly had no control over the BEOF Funds which were controlled by the Platinum Defendants (¶34,

[7]Plaintiffs' assertion (Plaintiffs' MOL, p. 20) that Black Elk's financial difficulties were publicly known throughout 2013 appears somewhat at odds with the allegation in FAC ¶444 that the full extent of Black Elk's financial issues were not yet known in the first quarter of 2013.

Defendants' MOL, p. 17 and note 26).[8] Thus the Defendants could not participate in, or assist, any alleged swap between the BEOF Funds and Black Elk which Plaintiffs contend lies at the heart of the Black Elk Scheme.

To the extent Plaintiffs contend that the Defendants' participation in the Offering somehow assisted the BEOF Funds in accomplishing the swap, Plaintiffs never refute the points raised at pp. 15-18 of Defendants' MOL. Defendants there demonstrate that the FAC contains no allegations that: i) any individual Defendant invested cash in the Offering (investing cash would at least allow for the possibility that the BEOF Funds could use such cash to purchase bonds) as opposed to trading his, her or its Class A or B Interests in the BEOF Funds for Class C Interests therein (which would provide no cash for such purposes); ii) that the BEOF Funds in fact used any such cash from the Offering to purchase bonds in furtherance of the Black Elk Scheme; or iii) that any such bonds purchased by the BEOF Funds with the proceeds of the Offering were necessary to place a majority of the outstanding Notes in friendly, but nominally independent, hands to enable the Indenture to be modified, thereby carrying out the Black Elk Scheme.

Thus the FAC simply does not allege sufficient factual particulars to establish any claim for aiding and abetting against the Defendants.

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[8]Plaintiffs, at p. 21, refer to a chart (FAC ¶493) listing the Investor Group's indirect equity investment in Black Elk and the distributions received by each of them from the BEOF Funds as a result of the Renaissance Sale. No member of the Investor Group, and certainly no Defendant, is alleged to have received, as a direct owner of any Black Elk equity, a direct payment of any proceeds from the Renaissance Sale.

Point 2

Plaintiffs Have Not Pleaded A Viable Claim For Unjust Enrichment

Plaintiffs do not dispute, as set forth in Defendants' MOL, that where, as here, the underlying unjust enrichment claim is based upon tortious misconduct, Plaintiffs must plead the tortious conduct with particularity. Indeed, Plaintiffs argue (Plaintiffs' MOL, p. 20), in support of their unjust enrichment claim, that they have set forth in exhaustive detail how the Investor Group aided and abetted the Black Elk Scheme. As set forth above, the FAC does not properly plead any claim for aiding and abetting breach of fiduciary duty or fraud. The unjust enrichment claim, therefore, must also be dismissed.

Conclusion

For the foregoing reasons and for the reasons set forth in Defendants' moving papers, the Court should dismiss all of 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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