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 MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO DISMISS THE SECOND AMENDED COMPLAINT

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

Attorneys for Defendant Huberfeld Family Foundation, Inc.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

PRELIMINARY STATEMENT 1

FACTS RELEVANT TO THE INSTANT MOTION 4

A. The Foundation 4

B. The Alleged Facts In The SAC Directed At The Foundation 5

C. The Group Pleading Allegations Indirectly Referencing The Foundation 7

D. The Foundation's Recent Settlement With Black Elk 9

ARGUMENT 10

I. Plaintiffs Lack Standing To Bring Their Black Elk Claims Against The Foundation 10

II. Plaintiffs' Claims Are Barred By The *In Pari Delicto* Doctrine 14

III. The Second Amended Complaint Fails To State A Claim Against The Foundation 15

A. The SAC Fails To Plead Adequately Its Claims For Aiding-And-Abetting 15

B. The SAC Fails To Plead Adequately Its Claim for Unjust Enrichment 197

C. The SAC Also Fails To State An Alter Ego Claim Against The Foundation........ 19

CONCLUSION 24

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

American Fuel Corp. v. Utah Energy Dev. Co.,
122 F.3d 130 (2d Cir. 1997)....................20, 21

Ashcroft v. Iqbal,
556 U.S. 662 (2009)....................15

In re Bernard L. Madoff Inv. Sec. LLC,
721 F.3d 54 (2d Cir. 2013)....................11, 14

Briarpatch Ltd. v. Phoenix Pictures, Inc.,
373 F.3d 296 (2d Cir. 2004)....................18

In re Brown,
Nos. 18-10617 & 18-01553-JLG, 2018 Bankr. LEXIS 2911
(Bankr. S.D.N.Y. Sept. 25, 2018)....................13

Capmark Fin. Group. Inc. v. Goldman Sachs Credit L.P.,
491 B.R. 335 (S.D.N.Y. 2013)....................20

Cohen v. BMW lnvs. L.P.,
668 Fed. App'x 373 (2d Cir. 2016)....................18

In re Currency Conversion Fee Antitrust Litig.,
265 F. Supp. 2d 385 (S.D.N.Y. 2003)....................24

EED Holdings v. Palmer Johnson Acquisition Corp.,
228 F.R.D. 508 (S.D.N.Y. 2005)....................19

Hirsch v. Arthur Andersen & Co.,
72 F.3d 1085 (2d Cir. 1995)....................13

Jiaxing Hongyu Knitting Co. v. Allison Morgan LLC,
No. 11 Civ. 09342 (AJN), 2013 U.S. Dist. LEXIS 2852 (S.D.N.Y. Jan. 8, 2013)............22, 23

Kalin v. Xanboo, Inc.,
No. 04 Civ. 5931 (RJS), 2009 U.S. Dist. LEXIS 34954 (S.D.N.Y. Mar. 30, 2009) ...20, 21, 24

Kasper Global Collection & Brokers, Inc. v. Global Cabinets & Furniture Mfrs. Inc.,
952 F. Supp. 2d 542 (S.D.N.Y. 2013)....................21

Kavowras v. N.Y. Times Co.,
328 F.3d 50 (2d Cir. 2003)....................5

Krys v. Pigott,
749 F.3d 117 (2d Cir. 2014)....................15, 16

In re Lehr Constr. Corp.,
551 B.R. 732 (S.D.N.Y. 2016)....................15

M'Baye v. World Boxing Ass'n,
No. 05 Civ. 9581 (DC), 2007 U.S. Dist. LEXIS 23173 (S.D.N.Y. Mar. 21, 2007)....................18

M+J Savitt, Inc. v. Savitt,
No. 08 Civ. 8535 (DLC), 2009 U.S. Dist. LEXIS 21321 (S.D.N.Y. Mar. 17, 2009)....................18

In re Mediators, Inc.,
105 F.3d 822 (2d Cir. 1997)....................12, 13

MFS/Sun Life Trust-High Yield Series v. Van Dusen Airport Servs. Co.,
910 F. Supp. 913 (S.D.N.Y. 1995)....................13

Papasan v. Allain,
478 U.S. 265 (1986)....................24

Pereira v. Farace,
413 F.3d 330 (2d Cir. 2005)....................11

S.W. v. New York City Dep't of Educ.,
646 F. Supp. 2d 346 (S.D.N.Y. 2009)....................13

Shearson Lehman Hutton, Inc. v. Wagoner,
944 F.2d 114 (2d Cir. 1991)....................11

Sonterra Capital Master Fund, Ltd. v. Barclays Bank PLC,
No. 15-CV-3538 (VSB), 2018 U.S. Dist. LEXIS 215143 (S.D.N.Y. Dec. 21, 2018)....................19

Spokeo, Inc. v. Robins,
136 S. Ct. 1540 (2016)....................11

SPV OSUS Ltd. v. AIA LLC,
No. 15-cv-619 (JSR), 2016 U.S. Dist. LEXIS 69349 (S.D.N.Y. May 24, 2016)
(Rakoff, J.), *aff'd*, 882 F.3d 333 (2d Cir. 2018)....................15

Taberna Capital Mgmt., LLC v. Dunmore,
No. 08 Civ. 1817 (JSR), 2009 U.S. Dist. LEXIS 79811 (S.D.N.Y. Sep. 1, 2009)....................24

Transition Invs., Inc. v. Allen O. Dragge, Jr. Family Trust,
No. 11 Civ. 4775 (PAC), 2011 U.S. Dist. LEXIS 134532 (S.D.N.Y. Nov. 21, 2011)....................20

Warth v. Seldin,
422 U.S. 490 (1975)....................11

Welch v. TD Ameritrade Holding Corp.,
No. 07 Civ. 6904 (RJS), 2009 U.S. Dist. LEXIS 65584 (S.D.N.Y. July 27, 2009) 17

STATE CASES

Georgia Malone & Co. v. Rieder,
19 N.Y.3d 511 (2012) 18

Kirschner v. KPMG LLP,
15 N.Y.3d 446 (2010) 14

Mandarin Trading Ltd. v. Wildenstein,
16 N.Y.3d 173 (2011) 18, 19

Rosenbach v. Diversified Group, Inc.,
85 A.D.3d 569 (1st Dep't 2011) 14

Other Authorities

Federal Rules of Civil Procedure 12 ....1, 11

Defendant Huberfeld Family Foundation, Inc. (the "Foundation") respectfully submits this memorandum of law in support of its motion (the "Motion") to dismiss the Second Amended Complaint (the "SAC") pursuant to Federal Rules of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction, and Rule 12(b)(6) for failure to state a claim upon which relief may be granted.[1]

PRELIMINARY STATEMENT

The Foundation does not belong in this lawsuit. It is a not-for-profit charitable organization that happens to bear the Huberfeld family name, hence its inclusion. Contrary to its portrayal in the SAC, however, the Foundation has (as a matter of public record) donated many millions of dollars to charitable causes and lost millions of dollars in its investment in PPVA.[2] Indeed, aside from its substantial loss on investments in PPVA, its only other direct connection to the events laid out in the SAC is its receipt of the return of its separate approximately $1 million principal investment in one of the BEOF Funds, not PPVA. Yet, Plaintiffs still seek to pursue a host of claims against the Foundation for aiding and abetting the breach of fiduciary

[1] On February 4, 2019, the Foundation filed a motion to dismiss the First Amended Complaint. (ECF Dkt. No. 203.) After filing the motion, but before oral argument on March 7, 2019, the Foundation and Plaintiffs reached an agreement-in-principle to settle all of Plaintiffs' claims against the Foundation. Plaintiffs' counsel, Barbra Parlin, notified the Court of the parties' prospective settlement in open court during oral argument. *See, e.g.*, March 7, 2019 Oral Argument Transcript at 37-38 (Ms. Parlin: "Your Honor, can I raise one housekeeping matter before we adjourn? We have a settlement that's sort of in principle right now. We have to document it and get approval, but we have one with Mr. Chase's client, the Huberfeld Family Foundation. They have a motion pending, but I assume they're not going to pursue it because we have the settlement pending." The Court: "Is that right?". Mr. Chase: "That's accurate."). Plaintiffs, through Ms. Parlin, again confirmed that agreement-in-principle in an email with the Court on March 14, 2019. Yet, after the Court entered its bottom-line opinion deciding the first round of motions to dismiss the First Amended Complaint on March 15, 2019, Plaintiffs essentially reneged on the agreement-in-principle, refused to settle with the Foundation as agreed, and asserted additional allegations against the Foundation in the Second Amended Complaint.

[2] All capitalized terms not otherwise defined herein have the meanings set forth in the SAC.

duties, aiding and abetting fraud, and unjust enrichment (SAC Counts 9, 10 and 15), as well as for the first time now in the third iteration of their Complaint, a claim that the Foundation is the alter ego of defendants Murray Huberfeld and Platinum Management (SAC Count 22). All of these claims must be dismissed as a matter of law.

Initially, Plaintiffs cannot meet their threshold burden to establish standing to bring certain of their claims against the Foundation. Plaintiffs assert that they were injured in substantial part by the Foundation's receipt of funds flowing from the proceeds of the Black Elk Renaissance Sale to the BEOF Funds, and then in turn to the Preferred Investors of the BEOF Funds (including the Foundation), 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." (SAC ¶ 514.) The SAC, however, elsewhere vitiates this claim of injury. As Plaintiffs themselves allege, 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. (SAC ¶ 510.) PPVA in fact agreed to allow judgment to be entered against it on those claims and judgment was thereafter entered against PPVA on those claims. (See Declaration of Donald H. Chase dated April 22, 2019 [the "Chase Dec."] at ¶¶ 15-16, Ex. 7.) Thus, any injury caused by the Foundation's receipt of Black Elk's funds belongs in the first instance to Black Elk, the party who concededly suffered the actual injury. In any event, any claim of injury (and any basis for standing), whether by Black Elk or PPVA, has been rendered moot because the Foundation recently settled and obtained a dismissal with prejudice of all Black Elk claims against the Foundation in a separate proceeding as well as a broad release of liability from Black Elk concerning the Foundation's receipt of Black Elk Renaissance Sale

proceeds. Accordingly, Plaintiffs now have no basis to assert any claim against the Foundation based upon its receipt of Black Elk funds, even if they ever arguably had one.

In addition to Plaintiffs' lack of standing, the SAC is also still insufficient otherwise to sustain Plaintiffs' claims against the Foundation for aiding and abetting the Platinum Defendants' alleged fraud and breach of fiduciary duty. Given the Court's prior dismissal of such claims against other Preferred Investors, dismissal of the Foundation is likewise appropriate. Plaintiffs seek to group the Foundation with Huberfeld and other individuals who allegedly caused PPVA's demise, yet they have not alleged a viable connection between a single allegedly actionable or improper act or omission on the Foundation's part, and the alleged fraud or breach of fiduciary duty in this action. Certainly there is nothing that shows (or even gives rise to a reasonable inference) that the Foundation substantially aided and abetted the wrongdoers who allegedly defrauded PPVA in any allegedly fraudulent scheme. Given the Foundation's financial investment in PPVA, Plaintiffs' allegations against the Foundation simply make no logical sense and fail to satisfy the liberal pleading standards of Rule 8, much less the particularized pleading requirements of Rule 9(b), which govern all of Plaintiffs' claims sounding in fraud. As for Plaintiffs' claim for unjust enrichment, it also fails on its face, particularly in light of the Foundation's settlement with Black Elk and the dismissal with prejudice of all of the Black Elk claims and Plaintiffs' failure to show any unjust enrichment in these circumstances where the Foundation lost millions of dollars in its PPVA investment.

Finally, no doubt recognizing the infirmity of its other claims against the Foundation, Plaintiffs' latest ploy is to assert that the Foundation is an alter ego of both Platinum Management and Murray Huberfeld with respect to Plaintiffs' claims for breach of fiduciary duty and fraud against the Platinum Defendants. Plaintiffs' unusual reverse veil piercing styled

claim, however, fails to meet the "heavy burden" set upon a party who seeks to pierce the corporate veil. To be sure, the SAC musters allegations that Mr. Huberfeld was the "president, director and official signatory" for the Foundation, that a single "invoice for third party payroll services" was directed to Platinum Management's offices, and that other defendants occasionally transacted business with the Foundation. Still, Plaintiffs fail to allege anything sinister about these alleged transactions, fail to connect the Foundation's activity to the purported fraud or wrongdoing alleged to have caused Plaintiffs injury, fail to support a reasonable inference of complete domination and control, and ultimately fail to assert specific facts that would overcome "the presumption of separateness afforded to related corporations."

This is now Plaintiffs' third pleading, and the only allegations that they can proffer against the Foundation in an exhaustive 1,700+ page SAC (inclusive of exhibits) are a scattershot of irrelevant and/or conclusory averments insufficient to state their claims. To make matters worse, Plaintiffs' irresponsible pleading is now painfully obvious: they have misstated obvious facts about the Foundation's financial activity (*see infra* n.5); misstated when the Foundation was formed, despite publicly available information on that topic (*see* Facts at Section B); contradict themselves regarding the Foundation's address and place of business (*see* Point II(B)); and self-servingly exclude critical facts simply because they undercut their narrative (*see* Facts at Section A concerning PPVA's $13 million investment in PPVA). The Foundation has been named without any legitimate basis simply because of its name and the claims against it should now be dismissed with prejudice.

<u>FACTS RELEVANT TO THE INSTANT MOTION</u>

A. The Foundation

The Foundation is a New York State not-for-profit corporation that was established in August 1998. (*See* Chase Dec., Ex. 1 (print-out of the Foundation's registration with the New

York State Department of State, Division of Corporations).) According to the Foundation's publically available Returns of Private Foundation Form 990-PF, during the period of 2012-2016, the Foundation made over $11 million in charitable donations to a variety of charitable, religious, and educational organizations and needy individuals. (*See* Chase Dec., Exhibit 2 (relevant excerpts of the Foundation's 2012-2016 IRS Forms 990).)[3] As the complete 2014 Form 990-PF attached as Exhibit 3 to the SAC discloses, the Foundation also had a significant investment in PPVA with a fair market value of $13,291,940.[4] (SAC Ex. 3 at p. 28, or Sch. B at p. 8; s*ee* Chase Dec. ¶ 6.)

B. The Alleged Facts In The SAC Directed At The Foundation

Despite its prolixity, when distilled to its essence, the SAC boils down to the following non-conclusory allegations against the Foundation. During the period of 2013-2014, the Foundation maintained a $1 million investment in the BEOF Funds. (SAC ¶ 506.) On or about August 21, 2014, the Foundation received a $1,026,677 distribution from Platinum Partners Black Elk Opportunities Fund International LLC, one of the BEOF Funds (the "Black Elk Proceeds Payment"). (*Id.*) The funds comprising the Black Elk Proceeds Payment flowed from the proceeds of the Black Elk Renaissance Sale to the BEOF Funds, and then in turn to the Foundation. (*Id.* at ¶¶ 503-506.) The amount of the Black Elk Proceeds Payment was commensurate with the Foundation's principal investment in the BEOF Funds. (*Id.* at ¶ 506.)

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[3] The Foundation respectfully requests that the Court take judicial notice of these facts, which are based on publicly-filed documents of the New York Department of State and U.S. Internal Revenue Service. *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).

[4] Not surprisingly, the SAC makes no mention of the Foundation's substantial investment in PPVA, which clearly undermines its claims against the Foundation.

Plaintiffs assert that the Foundation was "set up for the benefit of the family of defendant Murray Huberfeld, but in fact was used as a repository for assets of the Platinum Defendants and their friends and family during the course of the First and Second Schemes, and as such is the alter ego of Platinum Management and Murray Huberfeld." (SAC ¶ 144.) Plaintiffs further allege that the Foundation was "formed and conceived by Platinum Management and Murray Huberfeld to execute a fraud that harmed PPVA . . . to wit – the diversion of the Renaissance Sale proceeds and the creation of a repository for the illicit gains derived from the First and Second Schemes" (SAC ¶ 1040), was "formed by the same persons and counsel that formed Platinum Management" (SAC ¶ 1034), and had overlapping management with Platinum Management (SAC ¶ 1035). Publicly available information clearly establishes, however, that the Foundation was founded in 1998 – years before PPVA or Platinum Management were founded and at least 14 years before the purported First and Second Schemes. (Chase Dec. ¶¶ 3 and Ex. 1.) The Foundation's tax returns for 2012-2016 alone further establish over $11 million in charitable contributions over that relevant time period. (*Id*. ¶¶ 4-5 and Ex. 2.)

Additionally, Plaintiffs allege that during the time period of the SAC, the Foundation, among other activity, "entered into transactions and agreements with Platinum insiders and certain of the Defendants in this case," "provid[ed] a range of 'loans' to affiliated investors and friends in the Platinum circle," and that other defendants, from time to time, "invested" money with the Foundation. (SAC ¶¶ 148-149, 150-163.) The Foundation took "donations" not "investments", however, and the loan transactions identified by Plaintiffs represent only a small fraction of the Foundation's financial activity, and their value pales in comparison to the Foundation's $13 million investment in PPVA. (*Compare id. with* SAC Ex. 3 (Foundation's 2014 Form 990-PF reporting a fair market value of $48,384,938 in assets and a $13,291,940

investment in PPVA).) Plaintiffs also seek to inflame the Court by making reference to an alleged $3 million loan "to a company involved in a student loan scam whereby indebted students were defrauded." (SAC ¶ 151.) The company in question is identified as Hutton Ventures, LLC. (*Id.*) Yet, as disclosed in the Chase Dec. (¶¶ 7-8 and Exs. 3 and 4), Plaintiffs have apparently confused a California business of the same name (Hutton Ventures) with a separate Delaware entity that the Foundation dealt with which had no dealings whatsoever in student loans.[5] The SAC does not otherwise specify any connection between these alleged transactions and the schemes at issue, except to infer something nefarious from the mere fact that a small number of the individuals or entities with whom the Foundation transacted are also defendants named by Plaintiffs in this action. Significantly, Plaintiffs do not allege that the Foundation had any business dealings with PPVA or Platinum Management, other than the Foundation's own loss of a multi-million dollar investment in PPVA. (*See generally id.*)

C. The Group Pleading Allegations Indirectly Referencing The Foundation

Black Elk was an oil and gas company based in Houston, Texas. (SAC ¶ 441.) PPVA owned a majority of the common equity, as well as a significant portion of Black Elk's secured debt. (SAC ¶¶ 441-444.) The BEOF Funds were also investors in Black Elk. (SAC ¶ 506.) According to Plaintiffs, the Platinum Defendants and the Beechwood Defendants, as part of a larger Black Elk Scheme, conspired to help the Platinum Defendants and other unidentified insiders, including the Preferred Investors of the BEOF Funds, to cash out of their investment in

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[5] In the First Amended Complaint, Plaintiffs made similarly baseless allegations, including that two of the Foundation's loans to the Aaron Elbogen Irrevocable Trust bore interest "at the astounding rate of 700%." (First Amended Complaint ¶ 161.) Of course, that allegation was false (as we noted such in our moving papers to dismiss the prior version of the Complaint), as any fair reading of the Foundation's 2014 Form 990-PT disclosed that the interest rate on the loan transactions at issue was 7%, not 700%. (*See* SAC Ex. 3 at p. 34, Sch. B at p. 14.) Indeed, Plaintiffs retracted this allegation in the SAC (*see* SAC ¶ 174). Yet, it serves as another example of Plaintiffs' careless and irresponsible pleading in this action.

Black Elk ahead of the interests of PPVA. (SAC ¶¶ 514-515.) The Platinum Defendants and the Beechwood Defendants purportedly accomplished this scheme by "divert[ing] the proceeds from the Renaissance Sale to redeem the series E preferred shares in Black Elk for the benefit of the Preferred Investors of the BEOF Funds . . . ." (SAC ¶ 475.)

Plaintiffs generally allege that the Foundation was one of a multitude of individuals or entities (including 100 "John Does") that were "direct or indirect investors in the BEOF Funds and received proceeds from the [Black Elk] Renaissance Sale[]," a group denominated in the SAC as the "Preferred Investors of the BEOF Funds." (SAC ¶ 137.) According to Plaintiffs, the Preferred Investors of the BEOF Funds "were aware of the actions of the Platinum and Beechwood Defendants in furtherance of the Black Elk Scheme, as well as Beechwood's representations that it was unaffiliated with Platinum Management." (SAC ¶ 137.)

Plaintiffs assert that the Preferred Investors of the BEOF Funds "made a conscious choice to participate in the Platinum Defendants' actions with respect to Black Elk and eventually the Black Elk Scheme," "substantially assisted and participated" in the Platinum Defendants' purported misconduct, and had "actual knowledge" of the schemes allegedly perpetrated by the Platinum Defendants. (SAC ¶¶ 870-885, 887-889.) On the basis of these allegations, Plaintiffs assert claims against the Foundation (together with all of the Preferred Investors of the BEOF Funds) for aiding and abetting the Platinum Defendants' purported breach of fiduciary duties (Count 9) and fraud (Count 10), and, in the alternative, for unjust enrichment (Count 15). (SAC ¶¶ 870-889, 949-959.)

The SAC does not, however, allege a single fact against the Foundation that directly supports any of the generalized allegations about the Preferred Investors of the BEOF Funds. More specifically, Plaintiffs do not allege any actions by the Foundation that were undertaken in

order to "substantially assist and participate" in the Platinum Defendants' schemes. Nor does the SAC contain any allegations from which one could reasonably infer that the Foundation substantially assisted in the Platinum Defendants' fraud or breaches of fiduciary duty, or why and how it would benefit from the Black Elk Scheme given its significant investment in PPVA. (*See* Chase Dec. ¶ 6, SAC Ex. 3 at p. 28.) To the contrary, since the Foundation had a significant stake in PPVA, the Plaintiffs' entire theory makes no logical sense vis-a-vis the Foundation. Moreover, since the Foundation was admittedly a mere "direct or indirect investor" in the BEOF Funds (SAC ¶ 137), it clearly lacked any ability to control or direct the alleged actions of the BEOF Funds or the Platinum Defendants.

D. The Foundation's Recent Settlement With Black Elk

In August 2015, an involuntary bankruptcy petition was filed against Black Elk, styled as *In re Black Elk Energy Offshore Operations, LLC*, Case No. 15-34287 (the "Black Elk Bankruptcy Case"), in the United States Bankruptcy Court for the Southern District of Texas, which subsequently was converted to a voluntary chapter 11 case in September 2015. (SAC ¶ 507.) As part of the Black Elk Bankruptcy Case, the post-confirmation litigation trustee (the "Black Elk Trustee") commenced litigation against PPVA seeking, among other things, to avoid and recover all transfers by Black Elk to PPVA, and to equitably subordinate PPVA's claims in connection with its secured debt. (SAC ¶ 510.) Black Elk and PPVA thereafter entered into a Settlement Agreement wherein PPVA agreed not to oppose Black Elk's motion for default judgment based on the funds that were allegedly transferred fraudulently to PPVA and the Bankruptcy Court thereafter granted Black Elk's motion for Default Judgment on September 20, 2018. (*See* Chase Dec. ¶¶ 15-16 and Ex. 7.)

In connection with the Black Elk Bankruptcy Case, the Black Elk Trustee also commenced an adversary proceeding against the Foundation (the "Black Elk-Foundation

Lawsuit"). In the Black Elk-Foundation Lawsuit, the Black Elk Trustee asserted a claim against the Foundation for repayment of the $1,026,676.83 that was transmitted from Black Elk to the Platinum Partners Black Elk Opportunities Fund International LLC (one of the BEOF Funds, *see* SAC ¶¶ 136, 506), which was in turn transmitted in the same amount to the Foundation. (*See* Chase Dec., Exhibit 5 (Black Elk-Foundation Lawsuit Complaint) at ¶ 158.) This payment is one and the same as the Black Elk Proceeds Payment alleged as the fundamental basis for the claims against the Foundation set forth in the SAC. (*Compare* Chase Dec., Exhibit 5 (Black Elk-Foundation Lawsuit Complaint) at ¶ 158 *with* SAC ¶ 506.)

On January 31, 2019, the Foundation resolved its dispute with the Black Elk Trustee. As part of that resolution, the Black Elk Trustee dismissed with prejudice all of its claims against the Foundation, and broadly released the Foundation from any claims relating to the $1,026,676.83 Black Elk Proceeds Payment. (*See* Chase Dec. ¶ 12 and Ex. 6.) As a result, any outstanding or potential liability of the Foundation to Black Elk has been released, including any liability related to the Black Elk Proceeds Payment. On February 6, 2019, the Court entered a formal Order of Dismissal with Prejudice of Huberfeld Family Foundation, Inc. (*Id.*)

ARGUMENT

I.

Plaintiffs Lack Standing To Bring Their Black Elk Claims Against The Foundation

The SAC asserts claims against the Foundation for aiding-and-abetting fraud (ninth count), aiding-and-abetting breach of fiduciary duty (tenth count), and unjust enrichment (fifteenth count) (together, the "Black Elk Claims"). These claims rest in large part on the Foundation's alleged role as a Preferred Investor of the BEOF Funds and its receipt of funds

from Black Elk.[6] These claims must be dismissed pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure for lack of subject matter jurisdiction to the extent that Plaintiffs lack standing to assert them against the Foundation.

Standing is a "threshold question in every federal case" and determines "the power of the court to entertain the suit." *In re Bernard L. Madoff Inv. Sec. LLC*, 721 F.3d 54, 66 (2d Cir. 2013) (*quoting Warth v. Seldin*, 422 U.S. 490, 498 (1975)). The "irreducible constitutional minimum" of standing consists of three conjunctive elements: (1) injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (noting that the plaintiff, as the party invoking federal jurisdiction, bears the burden of establishing standing). A corollary of the standing principal is the general bar on "third-party standing." That is, a party "must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *See Warth*, 422 U.S. at 499; *Madoff*, 721 F.3d at 66. Courts in the Second Circuit have "hewed to this principle." *Madoff*, 721 F.3d at 67.

Plaintiffs, like the trustees of an ordinary bankruptcy estate, stand in the shoes of the defunct corporation – here, PPVA. Consequently, Plaintiffs only have standing to assert claims belonging to PPVA, and do not have standing to assert claims belonging to PPVA's creditors, such as Black Elk. *See Shearson Lehman Hutton, Inc. v. Wagoner*, 944 F.2d 114, 118 (2d Cir. 1991) ("[A] bankruptcy trustee has no standing generally to sue third parties on behalf of the estate's creditors, but may only assert claims held by the bankrupt corporation itself."); *Pereira*

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[6] *See* SAC ¶¶ 879 ("The BEOF Funds and the Preferred Investors of the BEOF Funds 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."); 895 (same, but alleging actual knowledge "that the Platinum Defendants were defrauding PPVA" related to the Black Elk Scheme); 949 (alleging unjust enrichment in connection with amounts received from Black Elk only).

v. Farace, 413 F.3d 330, 342 (2d Cir. 2005) ("Although corporate officers and directors owe fiduciary duties to creditors when a corporation is insolvent in fact, these duties do not expand the circumscribed rights of the trustee, who may only assert claims of the bankrupt corporation, not its creditors.") (internal citation omitted); *In re Mediators, Inc.*, 105 F.3d 822, 825-26 (2d Cir. 1997) (treating creditors committee as if it were a bankruptcy trustee for purposes of standing analysis).

In the instant action, Plaintiffs' Black Elk Claims against the Foundation are exclusively premised on the allegation that the Foundation, as a Preferred Investor of the BEOF Funds, received the Black Elk Proceeds Payment with funds that flowed from the Black Elk Renaissance Sale through the BEOF Funds. Plaintiffs assert that they were 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." (SAC ¶¶ 514-515.) The SAC, however, vitiates this claim of injury on its face. As Plaintiffs themselves allege, 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. (SAC ¶ 510.) In fact, Black Elk's motion for judgment on the transferred funds was granted. (Chase Dec. ¶¶ 15-16, Ex. 7) Thus, any injury caused by the Foundation's receipt of Black Elk's funds belongs in the first instance to Black Elk, the party who suffered the injury caused by the flow of the Black Elk Proceeds Payment to the Foundation.

Plaintiffs – who only have standing to assert claims by PPVA, and not Black Elk – 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 not suffered by PPVA, but ultimately passed on to Black Elk. Any other result would cause the Foundation to face the danger of

duplicative recoveries for the same alleged conduct. *See Wagoner*, 944 F.2d at 118 (holding trustee lacked standing to bring claim alleging money damages to creditors); *Hirsch v. Arthur Andersen & Co*., 72 F.3d 1085, 1094 (2d Cir. 1995) (holding that trustee had no standing to bring creditor claims against accountants and law firms that had provided services to the debtor, a real estate partnership operated as a Ponzi scheme); *In re Mediators, Inc*., 105 F.3d at 826 (affirming dismissal of breach of fiduciary duty claim brought by creditors' committee functioning as bankruptcy trustee, against bank and law firm for allegedly aiding and abetting debtor's fraud).

In any event, the Foundation also recently settled Black Elk's claims against the Foundation, and obtained a broad release of liability from Black Elk concerning the Black Elk Proceeds Payment. Hence, even if PPVA had a cognizable injury caused by the Foundation's receipt of the Black Elk Proceeds Payment, such as by the specter of civil liability to Black Elk or otherwise, PPVA's injury has been rendered moot. *See In re Brown*, Nos. 18-10617 & 18-01553-JLG, 2018 Bankr. LEXIS 2911, at *9-10 (Bankr. S.D.N.Y. Sept. 25, 2018) (dismissing claim for lack of subject matter jurisdiction where, after filing of complaint, the claim for relief was rendered moot because indebtedness was satisfied; noting, "[a] controversy ceases to exist, and the claim in question becomes moot, if 'events outrun the controversy' so that the court 'can grant no meaningful relief.'") (citations omitted); *MFS/Sun Life Trust-High Yield Series v. Van Dusen Airport Servs. Co*., 910 F. Supp. 913, 931 (S.D.N.Y. 1995) (noting that if debt underlying fraudulent conveyance claim had been extinguished by settlement and rendered moot, court would not have subject matter jurisdiction over action); *see also S.W. v. New York City Dep't of Educ.*, 646 F. Supp. 2d 346, 358 (S.D.N.Y. 2009) (observing that potential civil liability can

constitute an injury in fact, but finding no standing where plaintiff could not establish any basis to incur liability).

Simply stated, since the Foundation has resolved the underlying dispute with Black Elk, PPVA has no legal standing under any circumstances to pursue its Black Elk Claims in this action, which claims belong to Black Elk. The SAC's Black Elk Claims must accordingly be dismissed with prejudice as a matter of law for lack of subject matter jurisdiction.

II.

Plaintiffs' Claims Are Barred By The *In Pari Delicto* Doctrine

Plaintiffs' claims are also barred by the *in pari delicto* doctrine, which prohibits "a party that has been injured as a result of its own intentional wrongdoing from recovering for those injuries from another party whose equal or lesser fault contributed to the loss . . . ." *See Rosenbach v. Diversified Group, Inc.*, 85 A.D.3d 569, 570 (1st Dep't 2011). The doctrine applies even where it is alleged that both parties acted willfully; "[i]ndeed, the principle that a wrongdoer should not profit from his own misconduct is so strong in New York that we have said the defense applies even in difficult cases and should not be 'weakened by exceptions.'" *Kirschner v. KPMG LLP*, 15 N.Y.3d 446, 464 (2010) (citation omitted). Dismissal at the pleading stage on the basis of *in pari delicto* is appropriate where, as here, the outcome is plain on the face of the pleadings. *See Madoff*, 721 F.3d at 65 (granting motion to dismiss based on *in pari delicto*).

Here, Plaintiffs, who stand in PPVA's shoes, allege that Platinum Management and the Platinum Defendants at all times acted as PPVA's general partner, and therefore its agent. (SAC ¶ 28). Platinum Management's acts and the knowledge it acquired while acting within the scope of its authority (even if such acts were unauthorized) are therefore imputed to PPVA. *Kirschner*, 15 N.Y.3d at 465. The alleged wrongful conduct by Platinum Management, as agent for PPVA,

thus squarely bars Plaintiffs' claims against the Foundation. *See, e.g.*, *Madoff*, 721 F.3d at 65 n. 13 ("The pleadings here leave us with no doubt that BLMIS – in whose shoes the Trustee stands – bore at least 'substantially equal responsibility' for the injuries the Trustee now seeks to redress."); *In re Lehr Constr. Corp*., 551 B.R. 732, 744 (S.D.N.Y. 2016) (dismissing debtor's claims on grounds of *in pari delicto*).

III.

The Second Amended Complaint Fails To State A Claim Against The Foundation

As an alternative and independent basis for dismissal, Plaintiffs' Black Elk Claims against the Foundation fail because they do not allege facts sufficient to state a claim that is plausible on its face and complies with Rule 9(b)'s heightened pleading requirement.[7] As this Court recognizes, conclusory or "naked assertions 'devoid of further factual enhancement'" will not satisfy even Rule 8's requirements. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted).

A. The SAC Fails To Plead Adequately Its Claims For Aiding-And-Abetting

In order to allege a claim for aiding-and-abetting, the SAC must set forth facts with particularity demonstrating that: (a) the Foundation had actual knowledge of the wrongful acts that it purportedly aided-and-abetted; (b) the Foundation provided the Platinum Defendants with "substantial assistance" to the perpetration of the wrongful acts; and (c) the Foundation's "substantial assistance" caused damage to PPVA. *See Krys v. Pigott*, 749 F.3d 117, 127 (2d Cir. 2014); *SPV OSUS Ltd. v. AIA LLC*, No. 15-cv-619 (JSR), 2016 U.S. Dist. LEXIS 69349, at *18-19 (S.D.N.Y. May 24, 2016) (Rakoff, J.), *aff'd*, 882 F.3d 333 (2d Cir. 2018) ("Substantial

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[7] In order to avoid needless repetition, Defendant HFF references the Standard of Review and Legal Standards set forth in the Court's prior Opinion dated April 11, 2019, addressing the motions to dismiss previously filed in this action.

assistance requires the plaintiff to allege that the actions of the aider/abettor proximately caused the harm on which the primary liability is predicated.") (citation omitted). Plaintiffs have failed to meet these pleading requirements.

The only relevant allegations contained in the SAC directed specifically toward the Foundation assert that the Foundation was an investor in one or both of the BEOF Funds; received an approximately $1 million distribution in 2014 as a result of the Black Elk Renaissance Sale, an amount commensurate with its principal investment in the BEOF Funds; and conducted limited financial activity with certain of the Platinum Defendants. (*See, e.g.*, SAC ¶ 148, 506.) Initially, the mere fact that the Foundation invested in a BEOF Fund over which it had no control, however, is insufficient to state a claim for aiding and abetting the Platinum Defendants' alleged fraud or breach of fiduciary duty directed toward PPVA, let alone to sustain those claims in view of Rule 9(b)'s heightened pleading requirements. The SAC alleges that certain of the named defendants – but not PPVA, Platinum Management, or the BEOF Funds – had infrequent financial dealings with the Foundation. (SAC ¶¶ 148-149, 150-163.) Yet, the Foundation's limited transactions with those defendants connotes nothing in terms of the alleged fraudulent schemes and certainly does not warrant a reasonable inference that it "provided substantial assistance to advance the fraud's commission." *Krys*, 749 F.3d at 127. *See* April 11, 2019 Decision and Order, ECF Dkt. No. 225 ("Rakoff Decision") (dismissing aiding-and-abetting claims against Preferred Investors; the "allegations in the FAC establish no more than guilt by association with respect to the Preferred Investors").

As this Court also recognized, "[t]here must also be a nexus between the primary fraud, the alleged aider and abettor's knowledge of the fraud, and what the alleged aider and abettor did with the intention of advancing the fruad's commission." Rakoff Decision at 26, *quoting Krys*,

749 F.3d at 127. The SAC fails to meet this standard. Similar to those Preferred Investors for whom the Court dismissed the same aiding-and-abetting claims that are asserted against the Foundation, the Foundation's unrelated transactions with certain of the defendants or investment in the BEOF Funds does not permit the reasonable inference that the Foundation substantially assisted the Black Elk Scheme or any other scheme. Among other things, the SAC fails to adequately plead how the Foundation substantially assisted the Platinum Defendants, which of the Platinum Defendants it assisted, or when such conduct occurred. There is no allegation that the Foundation had any control over the BEOF Funds, Platinum Management, or PPVA. Indeed, the SAC does not set forth a single identifiable fact or document (out of the millions of documents in Plaintiffs' possession) that is legally sufficient to connect any actual conduct by the Foundation to the Platinum Defendants alleged Black Elk Scheme, much less substantial assistance to same. To the contrary, Plaintiffs theory as laid out in the SAC is implausible because it begs the question of why the Foundation, with its $13 million stake in PPVA, in PPVA, would have knowingly aided-and-abetted anyone to carry out the Black Elk Scheme and harm PPVA, and in turn harm the Foundation's own pecuniary interest. The aiding-and-abetting claims should be dismissed with prejudice.

B. The SAC Fails To Plead Adequately Its Claim For Unjust Enrichment

Plaintiffs' unjust enrichment claim against the Foundation, sounding in the same alleged Black Elk Scheme as the claims for aiding-and-abetting fraud and breach of fiduciary duty, also fails for lack of a properly particularized pleading. *See, e.g.*, *Welch v. TD Ameritrade Holding Corp.,* No. 07 Civ. 6904 (RJS), 2009 U.S. Dist. LEXIS 65584, at *32-33, *70-71 (S.D.N.Y. July 27, 2009) (holding that Rule 9(b) applied to unjust enrichment claim premised on alleged fraudulent actions). As this court has articulated, in order to set forth a claim for unjust

enrichment, a plaintiff must allege: " '(1) defendant was enriched, (2) at plaintiff's expense, (3) equity and good conscience militate against permitting defendant to retain what plaintiff is seeking to recover.'" (Rakoff Decision at 26-27, *quoting Briarpatch Ltd. v. Phoenix Pictures, Inc.,* 373 F.3d 296, 306 (2d Cir. 2004). Here, the SAC fails on all of these elements. First, the SAC does not demonstrate that the Foundation was enriched, particularly considering its substantial lost investment in PPVA. Second, to the extent the Foundation received back its principal in one of the BEOF Funds, it was concededly not at Plaintiff's expense, but rather at Black Elk's expense, and as previously noted, the Foundation has settled with Black Elk on its claims in this regard. Third, equity and good conscience do not permit multiple recoveries in these circumstances.

A well-pled claim for unjust enrichment also requires, *inter alia*, that the Foundation has participated in some wrongful conduct such that any benefit it received therefrom was to the detriment of PPVA and cannot be justly retained. *See Cohen v. BMW lnvs. L.P.*, 668 Fed. App'x 373, 374 (2d Cir. 2016) (citing *Georgia Malone & Co. v. Rieder*, 19 N.Y.3d 511, 516 (2012)). It also requires that "[t]o bring such a claim, the plaintiff must have bestowed the benefit on the defendant." *M+J Savitt, Inc. v. Savitt*, No. 08 Civ. 8535 (DLC), 2009 U.S. Dist. LEXIS 21321, at *30 (S.D.N.Y. Mar. 17, 2009). "Although privity is not required for an unjust enrichment claim, a claim will not be supported if the connection between the parties is too attenuated." *Mandarin Trading Ltd. v. Wildenstein*, 16 N.Y.3d 173, 182 (2011).[8]

Here, the SAC clearly does not adequately plead a single action by the Foundation that connects it to actual involvement in the Black Elk Scheme, that the Foundation had any

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[8] Plaintiffs' demand for punitive damages in relation to their unjust enrichment claims should also be dismissed, as New York law does not allow punitive damages on unjust enrichment claims. *M'Baye v. World Boxing Ass'n*, No. 05 Civ. 9581 (DC), 2007 U.S. Dist. LEXIS 23173, at *13 (S.D.N.Y. Mar. 21, 2007).

involvement in the underlying alleged fraud perpetrated by the Platinum Defendants, or that Plaintiffs bestowed a benefit on the Foundation. Moreover, there is no "indicia of an enrichment that was unjust," because the SAC does not demonstrate a contractual relationship between Plaintiffs and the Foundation, or any other relationship that could have caused reliance or inducement. *Mandarin Trading Ltd.*, 16 N.Y.3d at 182. Absent any allegations of dealings between the parties, their relationship is simply too attenuated to state a claim for unjust enrichment. *See id.*, *Sonterra Capital Master Fund, Ltd. v. Barclays Bank PLC*, No. 15-CV-3538 (VSB), 2018 U.S. Dist. LEXIS 215143, at *74 (S.D.N.Y. Dec. 21, 2018) (dismissing unjust enrichment claim; "[a]lthough the nature of the relationship required to establish an unjust enrichment claim has not been clearly defined, the relationship is 'too attenuated' if the parties [are] not connected in a manner that 'could have caused reliance or inducement,' or if they 'simply had no dealings with each other.'") (citations omitted).

C. The SAC Also Fails To State An Alter Ego Claim Against The Foundation

In the SAC, Plaintiffs have added a claim for relief against the Foundation asserting that it is "an alter ego of both Platinum Management and Murray Huberfeld in respect of Counts One, Two, Three, Four, Five, and Six" (*i.e.* Plaintiffs' claims for breach of fiduciary duty and fraud against the Platinum Defendants). (SAC ¶¶ 1030-1041.) At the outset, Plaintiffs' claim is apparently premised on a reverse veil piercing theory that seeks to hold the Foundation liable based on the actions of parties who allegedly dominate and control the Foundation. Even if Plaintiffs could somehow proceed on such a reverse veil piercing theory in these circumstances, however, their claim is still legally deficient due to its failure to plead non-conclusory facts with particularity establishing the required elements to pierce the corporate veil. *See EED Holdings v. Palmer Johnson Acquisition Corp.*, 228 F.R.D. 508, 512 (S.D.N.Y. 2005) ("[W]here a veil-

piercing claim is based on allegations of fraud, 'the heightened pleading standard of Rule 9(b) is the lens through which those allegations must be examined.'") (citation omitted).

New York imposes a "heavy burden" on a party who seeks to pierce the corporate veil. *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). "[D]isregard of the corporate form is warranted only in extraordinarily 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) (citation omitted). To state a claim for alter ego liability, Plaintiffs must allege with particularity that (i) parties exercised complete domination over an entity with respect to the transaction attacked, such that it had no separate will of its own, and (ii) that this domination was used to force the entity to commit the fraud or wrong against Plaintiffs that caused them injury. *See, e.g.*, *American Fuel Corp. v. Utah Energy Dev. Co.*, 122 F.3d 130, 134 (2d Cir. 1997) (reversing finding of alter ego liability); *Transition Invs., Inc. v. Allen O. Dragge, Jr. Family Trust*, No. 11 Civ. 4775 (PAC), 2011 U.S. Dist. LEXIS 134532, at *14-15 (S.D.N.Y. Nov. 21, 2011) (dismissing alter ego claim where, *inter alia*, plaintiff failed to specify "who, when, where and how any of these individuals [exercised dominion and control], or how they used such domination to mislead Plaintiff"). Here, Plaintiffs fail on both counts.

On the first issue of domination, Courts in the Second Circuit analyzing a claim to pierce the corporate veil balance the following factors "that tend to identify a dominated corporation":

> (1) whether corporate formalities are observed, (2) whether the capitalization is adequate, (3) whether funds are put in and taken out of the corporation for personal rather than corporate purposes, (4) whether there is overlap in ownership, officers, directors, and personnel, (5) whether the corporate entities share common office space, address and telephone numbers, (6) the amount of business discretion displayed by the allegedly dominated corporation, (7) whether the alleged dominator deals with the dominated

> corporation at arms length, (8) whether the corporation is treated as an independent profit center, (9) whether others pay or guarantee debts of the dominated corporation, and (10) whether the corporation in question had property that was used by the alleged dominator as if it were the dominator's own.

American Fuel Corp., 122 F.3d at 134; *see also Kalin*, 2009 U.S. Dist. LEXIS 34954, at *30. Critically, the mere fact that a corporation may have been "created to engage in certain business" or that an individual "is the sole member, shareholder, or a controlling person in an entity does not, by itself, justify piercing the corporate veil." *Kasper Global Collection & Brokers, Inc. v. Global Cabinets & Furniture Mfrs. Inc.*, 952 F. Supp. 2d 542, 578 (S.D.N.Y. 2013).

Plaintiffs do not allege with particularity facts establishing complete domination and control by anyone over anyone, or an injury-producing fraud by the Foundation, sufficient to state a claim for alter ego liability. Initially, the SAC fails to plead that the Foundation dominated and controlled Huberfeld and Platinum Management or even that they dominated and controlled the Foundation. Rather, the only non-conclusory facts that Plaintiffs assert are that Huberfeld was the "president, director and official signatory" for the Foundation (SAC ¶ 145) and that a single "invoice for third party payroll services" was directed to Platinum Management's offices (SAC ¶¶ 146-147). Even those facts, however, are contradicted in the SAC – namely, Exhibit 3 to the SAC, the Foundation's 2014 Form 990-PF, identifies at least one additional manager, Rachel Jacobs, and a differing mailing address for the Foundation. (SAC Ex. 3 at pp. 18, 1.)

Conversely, the SAC does not – because it cannot – allege that the Foundation's corporate formalities were not observed, that it was undercapitalized, engaged in any *ultra vires* activity, or that the dealings between Huberfeld or Platinum Management with the Foundation were anything other than arms-length. Indeed, the Foundation was undeniably established and

doing business more than 14 years before the fraud alleged in the SAC even began. (Chase Dec., Ex. 1.) Plaintiffs' attempt to disregard the Foundation's corporate form based on Huberfeld's mere service as an officer and director of the Foundation and the location to which the Foundation's mail was directed on isolated occasions should be rejected as it does not come even close to raising the specter of total control and domination required by New York law or justifying alter ego liability. *See Jiaxing Hongyu Knitting Co. v. Allison Morgan LLC*, No. 11 Civ. 09342 (AJN), 2013 U.S. Dist. LEXIS 2852, at *24 (S.D.N.Y. Jan. 8, 2013) ("mere fact that Eig acted as the controlling shareholder . . . is insufficient to pierce the corporate veil").

Furthermore, the SAC does not sufficiently allege with particularity any non-conclusory facts to support a reasonable inference that the Foundation's corporate form was used to achieve the fraud or breaches of fiduciary duty alleged in Counts 1-6 of the SAC. To pierce the corporate veil, Plaintiffs must allege that the purported domination and control was "used to commit a fraud or other wrong that cause[d]" Plaintiffs' loss. *See Jiaxing Hongyu Knitting Co.*, 2013 U.S. Dist. LEXIS 2852, at *24. In the SAC, however, Plaintiffs only assert that during the time period of the SAC, the Foundation, among other activity, "entered into transactions and agreements with Platinum insiders and certain of the Defendants in this case," "provid[ed] a range of 'loans' to affiliated investors and friends in the Platinum circle," and that other defendants, from time to time, provided money to the Foundation. (SAC ¶¶ 148-149, 150-163.) The SAC does not and cannot point to anything sinister in these transactions, even as it attempts to infer as much from the mere fact that a small number of the individuals or entities with whom the Foundation had transactions are also defendants named by Plaintiffs in this action. Thus, Plaintiffs do not even allege that the Foundation had any business dealings with PPVA or Platinum Management, other than the Foundation's own loss of a multi-million dollar investment

in PPVA. (*See generally id*.) Plaintiffs also make no effort to connect any of the alleged Foundation transactions even remotely to the Black Elk Scheme or any other fraud alleged by Plaintiffs against Huberfeld and Platinum Management. *See Jiaxing Hongyu Knitting Co*., 2013 U.S. Dist. LEXIS 2852, at *24 (finding that plaintiff alleged insufficient facts to support the conclusion that the "corporate form was in any way used to achieve the fraud – there are no allegations that, for example, that Allison Morgan is undercapitalized and Eig used the corporate form to avoid payment of money owed to Jiaxing").

The remainder of Plaintiffs' allegations are conclusory at best and/or dispelled by the incontrovertible facts. For example, Plaintiffs allege without support that the Foundation was "formed for the corrupt purpose of the Black Elk Scheme as well as providing a clearing house for assets illicitly seized through the First and Second Schemes" (SAC ¶ 1035); "to execute a fraud that harmed PPVA and benefited the [Foundation]" (SAC ¶ 1040); and that Platinum Management and the Foundation shared "overlapping investors". (SAC ¶ 1037) These allegations are patently false on their face. Initially, as previously noted, the Foundation was formed a decade and a half before any of the events at issue and operated during those years as a charitable foundation donating millions of dollars to charitable causes. (Chase Dec. ¶ 3 and Ex. 1.) Next, the allegations do not support any finding that the Foundation served as a clearing house for illicit assets. Plaintiffs fail to point to a single charitable distribution that was improper. Third, Plaintiff identifies no benefit to the Foundation and the Foundation in fact lost millions on its investment with PPVA. How did the Foundation benefit? Finally, the Foundation had no "investors" and was not an investment fund. It obviously only had donors, including principally the Huberfeld family. In short, Plaintiffs' allegations lack the requisite factual support are simply too sparse and conclusory to overcome "the presumption of separateness afforded to

related corporations." *Kalin*, 2009 U.S. Dist. LEXIS 34954, at *32 (citation omitted); *see also Taberna Capital Mgmt., LLC v. Dunmore*, No. 08 Civ. 1817 (JSR), 2009 U.S. Dist. LEXIS 79811, at *12 (S.D.N.Y. Sep. 1, 2009) (Rakoff, J.) (dismissing claim for alter ego liability because, *inter alia*, the alter ego allegations of the complaint were "conclusory, formulaic, and insufficient to sustain any claim for alter ego liability"); *In re Currency Conversion Fee Antitrust Litig*., 265 F. Supp. 2d 385, 426 (S.D.N.Y. 2003) ("These purely conclusory allegations cannot suffice to state a claim based on veil-piercing or alter-ego liability, even under the liberal notice pleading standard."); *cf. Papasan v. Allain*, 478 U.S. 265, 286 (1986) (noting that courts "are not bound to accept as true a legal conclusion couched as a factual allegation").

CONCLUSION

For the reasons set forth herein, all of Plaintiffs' claims against the Foundation should be dismissed with prejudice.

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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.