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

MEMORANDUM OF LAW OF DEFENDANT HUBERFELD
FAMILY FOUNDATION, INC. IN SUPPORT OF SUMMARY JUDGMENT

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Defendant Huberfeld Family Foundation, Inc. ("HFF") respectfully submits this memorandum of law in support of its motion (the "Motion") for summary judgment, pursuant to Federal Rule of Civil Procedure 56, dismissing the Second Amended Complaint (the "SAC") of plaintiffs Martin Trott and Christopher Smith, as Joint Official Liquidators and Foreign Representatives of Platinum Partners Value Arbitrage Fund L.P. (in Official Liquidation) (the "JOLs") and Platinum Partners Value Arbitrage Fund L.P. (in Official Liquidation ("PPVA," together with the JOLs, "Plaintiffs") in its entirety.

PRELIMINARY STATEMENT

The Court is undoubtedly all too familiar with this case. In a sprawling 1,000+ paragraph complaint, Plaintiffs allege that from 2013 to 2016, ten or so primary actors (the "Platinum Defendants" and the "Beechwood Defendants") engaged in a series of non-commercial transactions designed to, among other things, falsely inflate the value of PPVA's assets to generate unearned management fees, and prioritize the interests of other people or entities over PPVA's interests (including relating to a purported fraud referred to as the Black Elk Scheme). Over the past year, the parties (including HFF) participated in a grueling and substantive discovery process involving tens of millions of documents, more than 50 depositions, and additional discovery devices.

As it pertains to HFF, that discovery did not unearth any secrets. HFF – being a not-for-profit charitable organization – had already publicly disclosed all of its material charitable work and principal-generating activity in public tax returns and other documents. Hence, following a year of disclosure, the only material facts connecting HFF to the events laid out in the SAC remain as undisputed now as they were when the SAC was filed: that HFF invested millions of dollars in PPVA, which it lost (just like PPVA's other investors); and HFF invested $1 million in one of the "BEOF Funds" (a third-party fund that invested in Black Elk preferred equity and, according to

PPVA, received funds to which it was not entitled); and, finally, that HFF received back little more than a return of its principal from the BEOF Fund a year-and-a-half later.

Notwithstanding these undisputed facts, Plaintiffs still pursue three claims against HFF. The first two claims are for aiding-and-abetting the allegedly fraudulent Black Elk Scheme and aiding-and-abetting the alleged breaches of fiduciary duty in connection with that scheme, based essentially on HFF's investment in the BEOF Fund. The third claim is for unjust enrichment based essentially on HFF's receipt of the return of its principal from the BEOF Fund following the Renaissance Sale. As discussed below, the undisputed evidence and controlling law establish HFF's right to summary judgment on all three remaining claims.

First, Plaintiffs' aiding-and-abetting claims should be dismissed because HFF did not substantially assist the purported Black Elk Scheme or proximately cause Plaintiff's alleged damages. The undisputed facts are that HFF's only affirmative conduct even remotely connected to Black Elk was (i) making a $1 million investment in one of the BEOF Funds in February 2013, and (ii) receiving an approximately $1 million distribution from that same investment in August 2014. The record evidence further confirms that HFF did not – because it could not – participate in the particular wrongful event (known as the "Consent Solicitation") that PPVA contends was the predicate for its fraud and breach of fiduciary duty claims. Rather, the Consent Solicitation was undertaken only by certain Black Elk bondholders, which HFF undisputedly was not. Nothing that HFF did could be rationally inferred to have proximately caused PPVA's damages relating to the Black Elk Scheme. Since Plaintiffs lack proof to support HFF's substantial assistance or a

causal nexus to the purported fraud and breach of fiduciary duty alleged in the SAC, the aiding-and-abetting claims against HFF should be summarily dismissed.[1]

Second, Plaintiffs' unjust enrichment claim should likewise be dismissed because, to the extent HFF received back its principal investment in the BEOF Fund, it was not at PPVA's expense, but rather at Black Elk's expense. More specifically, PPVA entered into a binding settlement agreement wherein it agreed that the funds subject to Plaintiff's unjust enrichment claim are due and owing to Black Elk, not PPVA. Black Elk, in fact, separately sued HFF and HFF settled all claims with Black Elk in their entirety. Under these circumstances, equity and good conscience simply do not favor permitting PPVA to recover funds to which another party is entitled, nor do they countenance a windfall to PPVA or a double recovery against HFF.

Finally, Plaintiffs' claims against HFF are in any event barred by a valid release. In March 2016, Platinum-related entities (including PPVA) and Murray Huberfeld entered into a release agreement that unequivocally released Huberfeld from all manner of claims related to PPVA. HFF was expressly named as a third-party beneficiary of that agreement and is equally entitled to the benefit of that release granted by PPVA. That broad and unambiguous agreement hence bars this action because Plaintiffs are simply seeking to litigate claims that they previously expressly released. For this independent reason as well, summary judgment dismissing all the remaining claims set forth against HFF in the SAC is squarely warranted.

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[1] This Court previously dismissed at the pleading stage Plaintiffs' other claims against HFF in the SAC.

RELEVANT FACTS[2]

A. Background About HFF

HFF is a New York State not-for-profit charitable corporation that was established in August 1998. (56.1 ¶ 30.) As its tax returns disclose, HFF has made many millions of dollars in donations to a variety of charitable, religious, and education organizations and needy individuals. (56.1 ¶ 31.) From time to time, HFF has also made interest-free loans to needy individuals or entities for charitable purposes. (56.1 ¶ 32.)

In order to sustain and grow its corpus for the long-term, HFF – like many charitable organizations – makes for-profit investments. The proceeds of those investments are, in turn, used to support HFF's charitable donations. (56.1 ¶ 33.) All of HFF's investments and charitable donations are disclosed in its federal tax returns on Form 990, which are publicly available. (56.1 ¶ 34.) HFF's investments include, among others, a multi-million dollar investment in PPVA, and interest-bearing loans to various individuals and entities. HFF's investment in PPVA was valued at over $13 million at the end of 2015. (56.1 ¶¶ 35-36.)

Murray Huberfeld was the director and president of HFF throughout 2013 and 2014. (56.1 ¶ 38.) Murray Huberfeld shared decision-making authority for HFF with, among others, the other directors of HFF. (56.1 ¶ 39.)

B. HFF's Investment In Black Elk Opportunities Fund International, LLC

On February 8, 2013, HFF invested $1 million in Black Elk Opportunities Fund International, Ltd (the "BEOF Fund"). (56.1 ¶ 40.) On or about August 21, 2014, following Black Elk's sale of certain of its assets to Renaissance Offshore, LLC (the "Renaissance Sale"), HFF received a $1,026,677 distribution from the BEOF Fund. (56.1 ¶ 41.)

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2 All the relevant facts are set forth in HFF's accompanying Rule 56.1 Statement ("56.1"), which is incorporated by reference herein.

HFF was at all times a passive investor in the BEOF Fund; it had no management authority or ownership stake in the BEOF Fund. (56.1 ¶ 42.)

C. HFF Had Nothing To Do With The "Consent Solicitation", Which Is The Sole Focus Of Plaintiffs' Aiding-And-Abetting Claims Related To The Black Elk Scheme

Plaintiffs contend that HFF aided-and-abetted the Platinum Defendants and the Beechwood Defendants in carrying out the so-called Black Elk Scheme.[3] According to Plaintiffs, the Black Elk Scheme was a plan orchestrated by the Platinum Defendants and the Beechwood Defendants to "divert 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 and to hide Platinum Management's false valuations of Black Elk equity." (Chase Dec., Ex. 1 (SAC) at ¶¶ 475, 440-515.) Plaintiffs allege that the Black Elk Scheme was perpetrated through a fraudulent "Consent Solicitation," which was a vote put to certain Black Elk bondholders to secure an amendment to their indenture that would allow Black Elk to use the Renaissance Sale proceeds to redeem the preferred equity ahead of their notes. (*Id.*) HFF, however, had nothing to do with the Consent Solicitation. It did not participate in or have any role whatsoever in the Consent Solicitation. (56.1 ¶¶ 50-52.)

As background, Black Elk had previously issued certain notes, known as the "13.75% Senior Secured Notes" (or "Notes"), which were governed by an indenture dated November 23, 2010 (the "Notes Indenture"). (56.1 ¶ 43.) The Notes Indenture permitted Black Elk to use the proceeds from an asset sale for only one or more of the following purposes: (1) to repay indebtedness, including to the holders of the Notes; (2) to acquire assets of an oil and gas business; (3) to acquire the majority of the voting stock of an oil and gas business; or (4) to make capital expenditures or acquire long term assets for purposes of its oil and gas businesses. (56.1 ¶ 44.)

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[3] Unless defined herein, capitalized terms refer to the definitions set forth in the SAC.

The Notes Indenture also included a mechanism by which this provision of the Notes Indenture could be modified. Namely, Section 9.02(a) permitted any provision of the Notes Indenture to be amended "with the consent of the Holders of a majority in aggregate principal amount of the Notes affected thereby then outstanding (including, without limitation, consents obtained in connection with a purchase of, or tender offer or exchange offer for, Notes) . . . ." (56.1 ¶ 45.)

In July 2014, Black Elk circulated an "Offer to Purchase and Consent Solicitation" (the "Consent Solicitation") to holders of the Notes (the "Noteholders"). (56.1 ¶ 46.) The purpose of the Consent Solicitation was to solicit the Noteholders' votes concerning the use of the proceeds of the Renaissance Sale. (56.1 ¶ 47.) Specifically, the Consent Solicitation offered to buy back the Notes at par and sought consents from the Noteholders to authorize certain proposed amendments to the Notes Indenture. (56.1 ¶ 48.) The proposed amendments included the addition of a fifth use of asset sale proceeds to the list of four uses already permitted by Section 4.10 of the Indenture. (56.1 ¶ 49.) This proposed amendment, Section 4.10(b)(5), permitted Black Elk to use the proceeds of an asset sale to purchase at par any Notes that Noteholders elected to tender and then to use any remaining asset sale proceeds to "repurchase or redeem preferred equity of [Black Elk]." (*Id.*) On August 21, 2014, Black Elk issued a Form 8-K announcing that it had received the requisite consents of Noteholders to, among other things, apply the proceeds from the Renaissance Sale to, among other things, repurchase preferred equity issued by Black Elk. (56.1 ¶ 53.)

Only the Noteholders participated in the Consent Solicitation. (56.1 ¶ 50.) HFF was not a Noteholder. (56.1 ¶ 51.) Nor did HFF otherwise participate, or have any role, in the Consent Solicitation. (56.1 ¶ 52.)

D. HFF's 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. (56.1 ¶ 54.) 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. (56.1 ¶ 55.)

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 in connection with the Renaissance Sale. The Bankruptcy Court thereafter granted Black Elk's motion for Default Judgment on September 20, 2018. (56.1 ¶ 56.) In connection with the Black Elk Bankruptcy Case, the Black Elk Trustee also commenced an adversary proceeding against HFF (the "Black Elk-HFF Lawsuit"). (56.1 ¶ 57.) In the Black Elk-HFF Lawsuit, the Black Elk Trustee asserted a claim against HFF for repayment of the $1,026,676.83 that was transmitted from Black Elk to the BEOF Fund, which in turn transmitted the same amount to HFF. (*Id.*)

This payment is one and the same as the Black Elk Proceeds Payment alleged in the SAC as the basis for the remaining claims against HFF. (56.1 ¶ 58.) On January 31, 2019, HFF resolved its dispute with the Black Elk Trustee. (56.1 ¶ 59.) As part of that resolution, the Black Elk Trustee dismissed with prejudice all of its claims against HFF, and broadly released HFF from any claims relating to the $1,026,676.83 Black Elk Proceeds Payment. (56.1 ¶ 59.) On February 6, 2019, the Court entered a formal Order of Dismissal with Prejudice of Huberfeld Family Foundation, Inc.

(56.1 ¶ 60.) As a result, any outstanding or potential liability of HFF to Black Elk has been released, including any liability related to the Black Elk Proceeds Payment. (*Id.*)

E. PPVA Released HFF From The Very Claims It Now Asserts

PPVA's remaining claims against HFF in the SAC are also barred because it is a named third-party beneficiary of a release agreement effective as of March 20, 2016 between the Platinum Management Entities and Platinum Funds (including PPVA) and Huberfeld, among others (the "Release Agreement").[4] (56.1 ¶ 13 and Chase Dec., Ex. 9.) PPVA expressly released HFF in that Release Agreement from all of PPVA's now stated claims against HFF. (*Id.*)

As it pertains to HFF, in March 2016, Huberfeld and certain affiliated persons and entities (including HFF), were beneficial owners of limited partnership interests in PPVA and other Platinum Funds (a "Funds Interest"). (56.1 ¶ 15.) HFF was a long-time investor in PPVA, having made its initial investment in PPVA in 2008 (or earlier). (56.1 ¶ 21.) As of December 31, 2015, the value of HFF's investment in PPVA was over $13 million. (56.1 ¶ 22.) HFF was listed in Exhibit A to the Release Agreement as one of the entities covered by, and a third party beneficiary of, the Release Agreement. (56.1 ¶¶ 19-20.)

Pursuant to the Release Agreement, Huberfeld gave certain good and valuable consideration to Platinum, which included (among other consideration), his agreement not to redeem his and the affiliated entities' substantial Funds Interest (including HFF's interest in PPVA), or to withdraw any of his or the affiliated entities' funds from the Platinum Management Entities (including any and all fees earned in 2015), for a period of two (2) years from the effective date of the Release Agreement. (56.1 ¶ 23.) Huberfeld also relinquished his indirect beneficiary

[4] For brevity, HFF respectfully joins the motion for summary judgment filed by Murray Huberfeld, which sets forth the undisputed material facts and applicable law establishing the validity of the Release Agreement between Platinum (including PPVA) and Huberfeld, and the General Release granted by PPVA to Huberfeld in that agreement.

interest in the Platinum Management Entities. (*Id.*) Huberfeld, on behalf of himself and the affiliated entities (including HFF), also gave to the Platinum Management Entities (including PMNY) and the Platinum Funds (including PPVA) an unconditional release of, *inter alia*, all known and unknown claims. (*Id.*) In exchange, "Platinum" (including PPVA) gave an unconditional release of, *inter alia*, their known and unknown claims to Huberfeld and the affiliated entities (including HFF). (56.1 ¶ 24.)

F. Procedural Background And The Remaining Claims Against HFF

On January 25, 2019, Plaintiffs filed their First Amended Complaint ("FAC") alleging aiding-and-abetting fraud and breach of fiduciary duty, and unjust enrichment claims against HFF relating to its investment in the BEOF Fund. *See* FAC ¶ 867 (alleging that HFF "substantially assisted and participated in the Platinum Defendants' breaches of their fiduciary obligations in connection with the Black Elk Scheme"); ¶ 881 (same regarding aiding-and-abetting fraud); ¶ 939 (same regarding unjust enrichment).

In response, HFF 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, HFF and Plaintiffs reached an agreement-in-principle to settle all of Plaintiffs' claims against HFF. 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. (*See* Chase Dec., Ex. 34.) 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 reneged on the agreement-in-principle and refused to settle with the Foundation as agreed.

On March 29, 2019, shortly after Plaintiffs abruptly withdrew from their agreement-in-principle to settle with HFF, Plaintiffs amended their complaint in only two respects as against HFF: (i) first, by adding a claim for relief against HFF as an alter ego of Murray Huberfeld (SAC ¶¶ 1029-1041; Count 22), and (ii) second, by adding two conclusory charging paragraphs to its aiding-and-abetting breach of fiduciary duty claim against HFF, alleging that it, as "the alter ego of Platinum Management and Murray Huberfeld, provided substantial assistance to the Platinum Defendants in implementing the First and Second Scheme" and "[i]n addition to its role in the Black Elk Scheme, HFF acted as a repository for assets illicitly gained by the Platinum Defendants by way of the First and Second Schemes" (Chase Dec., Ex. 1 (SAC) at ¶¶ 882-883).

HFF subsequently moved to dismiss the SAC. Following full briefing, the Court dismissed the alter ego claim against HFF, preserving only Plaintiffs' "aiding and abetting and unjust enrichment [claims] in connection with HFF's role as a Preferred Investor [in the BEOF Fund]," and concluded that HFF could only be "held liable for the proceeds that it received" from the Renaissance Sale. *See Trott v. Platinum Mgmt. (NY) LLC*, Nos. 18-cv-06658 & 18-cv-10936 (JSR), 2019 U.S. Dist. LEXIS 104562, at *61-63 (S.D.N.Y. June 21, 2019). In reaching its decision, the Court concluded that the "SAC does not plausibly allege that HFF was 'used by [Huberfeld] to accomplish his own and not [HFF's] business,'" or that the "Platinum Defendants were 'in reality carrying on [HFF's] business in their personal capacities for purely personal…ends.'" *Id.* at 61 (citation omitted). The Court further determined that the SAC did not allege that HFF failed to observe corporate formalities, was undercapitalized, or engaged in any

ultra vires activity. *Id.* Finally, the Court concluded that the "SAC's allegations that HFF engaged in suspicious financial transactions with Platinum-related individuals at a time when the First and Second Schemes were ongoing" were not actionable because they were conclusory and causally unconnected to the First and Second Schemes. *Id.* at 61-62.

During discovery, HFF deposed Martin Trott, the JOLs' Rule 30(b)(6) corporate designee, who confirmed that Plaintiffs' claims against HFF are essentially limited to HFF's investment in the BEOF Fund. (56.1 ¶ 61.) Namely, Mr. Trott testified that no "other activity by [HFF] in connection with Platinum [] forms the basis for [PPVA's] damage allegations" other than its direct or indirect participation in the BEOF Funds (Tr. 788:11-789:8). (56.1 ¶ 61.)

The only remaining operative claims brought by Plaintiffs against HFF in the SAC are Counts 9-10 (aiding-and-abetting fraud and breach of fiduciary duty) and Count 15 (unjust enrichment), all three of which are substantively limited to HFF's investment in the BEOF Fund and receipt of proceeds from the Renaissance Sale. HFF now moves for summary judgment dismissing all of the remaining counts alleged in the SAC on the basis that (i) HFF did not substantially assist the purported "Black Elk Scheme" or proximately cause Plaintiffs' alleged damages; (ii) Plaintiffs' unjust enrichment claim fails because HFF was not enriched at PPVA's expense, but if at all, at Black Elk's expense, and equity does not in these circumstances warrant any award to Plaintiffs; and, in any event, (iii) Plaintiffs' claims are barred by a valid release.

STANDARD OF REVIEW

"[S]ummary judgment is appropriate where there exists no genuine issue of material fact and, based on the undisputed facts, the moving party is entitled to judgment as a matter of law." *D'Amico v. City of New York*, 132 F.3d 145, 149 (2d Cir. 1998). Facts are "material" only where those facts could "affect the outcome of the suit under the governing law." *See Mortg. Resolution Servicing, LLC v. JPMorgan Chase Bank, N.A.*, No. 15-cv-293 (LTS-RWL), 2019 U.S. Dist.

LEXIS 167845, at *17 (S.D.N.Y. Sep. 27, 2019) (*quoting Holtz v. Rockefeller & Co. Inc*., 258 F.3d 62, 69 (2d Cir. 2001)). A dispute is only "genuine" when there is enough evidence in favor of the non-moving party to support a jury verdict for that party. *Id.* (*quoting Holtz*, 258 F.3d at 69). "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Arneberg v. Georges Berges Galleries, LLC*, Nos. 16-cv-8955 & 17-cv-4973 (AJN), 2018 U.S. Dist. LEXIS 47876, at *7-8 (S.D.N.Y. Mar. 22, 2018) (citation omitted).

ARGUMENT

I.

THE AIDING-AND-ABETTING CLAIMS SHOULD BE DISMISSED BECAUSE HFF DID NOT SUBSTANTIALLY ASSIST THE BLACK ELK SCHEME OR PROXIMATELY CAUSE PPVA'S ALLEGED DAMAGES

A. Overview of Applicable Law

In order to prevail on a claim for aiding-and-abetting fraud or breach of fiduciary duty, plaintiffs must prove: (1) the existence of a predicate fraud or breach of fiduciary duty; (2) HFF's actual knowledge of those wrongful acts; and (3) that HFF provided substantial assistance to the perpetrators, which proximately damaged 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), *aff'd*, 882 F.3d 333, 345 (2d Cir. 2018) ("Substantial 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).

This motion focuses solely on the third element. "'[S]ubstantial assistance' generally exists where: (1) a defendant 'affirmatively assists, helps conceal, or by virtue of failing to act when required to do so enables the fraud to proceed'; and (2) 'the actions of the aider/abettor proximately caused the harm on which the primary liability is predicated.'" *Rosner v. Bank of China*, No. 06

cv 13562, 2008 U.S. Dist. LEXIS 105984, at *13 (S.D.N.Y. Dec. 18, 2008), *aff'd*, 349 Fed. Appx. 637 (2d Cir. 2009) (citation omitted). "Allegations of 'but for' causation are insufficient; an alleged aider and abettor will be liable only where the plaintiff's injury is a direct or reasonably foreseeable result of the defendant's conduct. Inaction on the part of the alleged aider and abettor 'ordinarily should not be treated as substantial assistance, except when it was designed intentionally to aid the primary fraud or it was in conscious and reckless violation of a duty to act.'" *Id.* at *13-14 (citations omitted); *see also Sharp Int'l Corp. v. State Street Bank & Trust Co.*, 302 B.R. 760, 774-75 (E.D.N.Y. 2003) ("mere inaction does not amount to substantial assistance for purposes of determining aider and abettor liability"), *aff'd*, 403 F.3d 43 (2d Cir. 2005) (citation omitted); *Renner v. Chase Manhattan Bank*, No. 98 Civ. 296 (CSH), 2000 U.S. Dist. LEXIS 8552, at *37 (S.D.N.Y. June 14, 2000) ("Even if actual knowledge could be attributed to Chase, it did not substantially assist in the fraud."), *aff'd*, 85 Fed. Appx. 782 (2d Cir. 2004).

B. HFF Did Not Substantially Assist The Purported Black Elk Scheme

Plaintiffs' aiding-and-abetting claims should be dismissed because HFF did not provide the requisite substantial assistance for the purported Black Elk Scheme. The record evidence establishes that HFF's only affirmative conduct even remotely connected to Black Elk was: (i) making a $1 million investment in one of the BEOF Funds on February 8, 2013, and (ii) receiving an approximately $1 million distribution from that same investment in August 2014. HFF was at all relevant times a mere passive investor in the BEOF Fund. It had no management authority or ownership stake in the BEOF Fund, and certainly had no authority or discretion to control the BEOF Fund's actions. Critically, HFF's February 8, 2013 investment in the BEOF Fund was made *prior to the time* that Black Elk had allegedly suffered any financial or economic difficulties, and more than 17 months before the Consent Solicitation was distributed to Noteholders.

Evidence adduced in discovery further confirmed that HFF did not – because it could not – participate in the Consent Solicitation. (56.1 ¶¶ 50-52.) Black Elk did not circulate the Consent Solicitation until July of 2014, a year-and-a-half after HFF invested in the BEOF Fund. Furthermore, the Consent Solicitation was only directed to Noteholders. Because HFF was not a Noteholder, it did not (and it could not) tender any consent to Black Elk to amend the Notes Indenture, direct how the proceeds of the Renaissance Sale would be distributed, or otherwise play any role in the Consent Solicitation. (56.1 ¶ 52.) The undisputed facts thus demonstrate that HFF's only affirmative action was to invest in the BEOF Fund long before the Black Elk Scheme was even alleged to have been hatched.[5]

Additionally, nothing that HFF did could be rationally inferred to have proximately caused PPVA's alleged damages relating to the Black Elk Scheme. "There 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 fraud's commission." *In re Platinum-Beechwood Litig.*, No. 18-cv-06658 (JSR), 2019 U.S. Dist. LEXIS 62745, at *38-39 (S.D.N.Y. Apr. 11, 2019) (*quoting Krys*, 749 F.3d at 127). The undisputed facts here confirm that Plaintiffs cannot meet this standard. HFF's investment in the BEOF Fund – made long before any of the purportedly fraudulent acts alleged in the SAC – does not causally connect to or advance the Black Elk Scheme, which is only alleged to have been carried out by the Platinum Defendants and the Beechwood Defendants through the Consent Solicitation. That HFF's investment in the BEOF Fund (along with the myriad other investments by myriad other investors) could be a "but-for"

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[5] Plaintiffs have never even alleged that the primary actors in the Black Elk Scheme had concocted their alleged scheme before HFF's investment on February 8, 2013, such that HFF's investment itself could somehow be connected as any type of assistance (even temporally) to the alleged scheme. To the contrary, Plaintiffs allege that the scheme was not even conceived until "early 2014." (SAC ¶ 468.)

cause of the Black Elk Scheme is insufficient. *See, e.g.*, *Balanced Return Fund v. Royal Bank of Can.*, No. 600949/09, 2014 N.Y. Misc. LEXIS 6380, at *30 (Sup. Ct. N.Y. Cty. Oct. 30, 2014) (granting summary judgment dismissing aiding-and-abetting claims because plaintiff adduced no evidence that defendants had "control over plaintiffs' investments . . . and there is no evidence in the record raising an issue of fact as to whether defendants assisted any Norshield entity in mismanaging or misstating assets"), *aff'd in part*, 138 A.D.3d 542 (1st Dep't 2016).

The concept that HFF would aid-and-abet the Black Elk Scheme is also as preposterous now (after comprehensive discovery) as it was over a year ago when Plaintiffs first alleged it. It begs the question of why HFF, with its roughly $13 million stake in PPVA, would have or could have aided-and-abetted anyone to carry out the Black Elk Scheme, and in turn harm HFF's significantly more valuable pecuniary interest in PPVA. "[N]o rational jury" could find in favor of Plaintiffs. *See Monachino v. Bair*, 481 Fed. Appx. 20, 21 (2d Cir. 2012). The aiding-and-abetting claims should accordingly be dismissed with prejudice. *See Chemtex, LLC v. St. Anthony Enters.*, 490 F. Supp. 2d 536, 547-48 (S.D.N.Y. 2007) (granting summary judgment dismissing aiding-and-abetting claim because plaintiff "has not adduced any evidence, despite discovery, that [defendant] either affirmatively assisted SAE in an effort to defraud [plaintiff] through an alleged conveyance of SAE's assets to ASAGI or in any way helped to conceal such alleged conveyance"); *Briarpatch Ltd., L.P. v. Geisler Roberdau, Inc.*, No. 99 Civ. 9623 (RWS), 2007 U.S. Dist. LEXIS 27001, at *72-73 (S.D.N.Y. Apr. 2, 2007) (granting summary judgment dismissing aiding-and-abetting claim because "there is no evidence in the record that Phoenix provided any substantial assistance to further Geisler and Roberdeau's breach of fiduciary duty"); *SEC v. Cedric Kushner Promotions, Inc.*, 417 F. Supp. 2d 326, 336 (S.D.N.Y. 2006) (granting summary judgment

dismissing aiding-and-abetting claim because no facts "support any allegation that Angel's conduct was a substantial causal factor in the perpetuation of the underlying fraud").

II.

THE UNJUST ENRICHMENT CLAIM SHOULD SIMILARLY BE DISMISSED

Plaintiffs' unjust enrichment claim against HFF sounds in the same alleged Black Elk Scheme as their claims for aiding-and-abetting fraud and breach of fiduciary duty. "The basic elements of an unjust enrichment claim in New York require proof that (1) defendant was enriched, (2) at plaintiff's expense, and (3) equity and good conscience militate against permitting defendant to retain what plaintiff is seeking to recover." *Briarpatch Ltd., L.P. v. Phoenix Pictures, Inc.*, 373 F.3d 296, 306 (2d Cir. 2004). An unjust enrichment claim may be dismissed on summary judgment where defendant is not enriched at *plaintiff's* expense. *See Bazak Int'l Corp. v. Tarrant Apparel Group*, 347 F. Supp. 2d 1, 4 (S.D.N.Y. 2004). An unjust enrichment claim may also be dismissed on summary judgment where defendants returned the subject funds and "therefore did not retain any benefit unjustly," *Apollon Waterproofing & Restoration Corp. v. Bergassi*, 241 A.D.2d 347, 348 (1st Dep't 1997), and "courts may reduce the amount of a claim for unjust enrichment based on repayment." *See Silverman v. United Talmudical Acad. Torah Vyirah, Inc. (In re Allou Distribs.)*, 446 B.R. 32, 76 (Bankr. E.D.N.Y. 2011).

Here, summary judgment is warranted on Plaintiffs' unjust enrichment claim for multiple reasons. First, to the extent HFF received back its principal investment in the BEOF Fund, it was not *at PPVA's expense*, but rather *at Black Elk's expense*. Plaintiffs have already separately conceded that Black Elk was the true party harmed in the aftermath of the Renaissance Sale by agreeing to the judgment in favor of Black Elk with respect to the transfer to PPVA of the proceeds from that transaction, and executing a settlement agreement with Black Elk. (56.1 ¶¶ 54-56). Indeed, pursuant to Plaintiffs' settlement with the Black Elk Trustee in the action filed against

PPVA in Texas, any funds originating from the Renaissance Sale – such as those that are the subject of Plaintiffs' unjust enrichment claim against HFF here – are effectively acknowledged by PPVA to be due and owing to Black Elk, and not PPVA. (56.1 ¶¶ 54-56.) Accordingly, to the extent HFF was enriched by virtue of the return of its principal investment in the BEOF Fund, it was concededly at the expense of Black Elk, not PPVA. Black Elk's Trustee also commenced a separate action against HFF in Texas and HFF settled with the Black Elk Trustee and resolved all of Black Elk's claims based on, *inter alia,* the very same payments received by HFF in the aftermath of the Renaissance Sale. (56.1 ¶¶ 57-60.) That action was then dismissed with prejudice. (56.1¶ 59)

Second, to the extent Black Elk received and continues to have a judgment against PPVA, such judgment would necessarily be reduced by virtue of Black Elk's settlement with HFF and its dismissal of the claims against HFF. Plaintiffs have thus already received the benefit of HFF's settlement and resolution and HFF is no longer "enriched."

Finally, equity and good conscience simply do not ratiocinate in favor of permitting PPVA to recover funds to which it was not, in the first place, concededly entitled as a matter of undisputed fact and law, and for which it has in any event already received the benefit. Indeed, to allow PPVA to recover for unjust enrichment under these circumstances would countenance a windfall to PPVA and a double recovery against HFF.

III.

ALL OF PPVA'S CLAIMS AGAINST HFF ARE IN ANY EVENT BARRED BY A VALID RELEASE

The Release Agreement is a valid and binding agreement, enforceable against PPVA, which unequivocally released Huberfeld from all manner of PPVA's claims in this case. (*See* Memorandum of Law of Defendant Murray Huberfeld In Support Of Summary Judgment.)

Because HFF is a named third-party beneficiary of the same Release Agreement, Plaintiffs' claims against HFF are similarly barred by the General Release contained within it. (56.1 ¶¶ 19-20, 23.)

As set forth in the Release Agreement, PPVA unambiguously waived and released HFF from "any and all manner of actions, causes of action, suits, . . . claims and demands . . . whether in law or in equity, whether known, unknown, or hereafter becoming known, foreseen or unforeseen . . . representative or other capacity, existing or hereafter arising, in law or in equity . . . that are based in whole or in part on any act or omission, transaction, or event in connection in any manner whatsoever with Platinum, from the beginning of the world to the Effective Date." (56.1 ¶ 24) The Effective Date was March 20, 2016. PPVA was represented by counsel and the Release Agreement was entered into knowingly and voluntarily. (56.1 ¶ 26.) HFF also abided by the terms of the Release Agreement. Among other things, it has not asserted any counterclaims, cross-claims or third party claims against parties to the Release Agreement.

HFF is entitled to rely on the preclusive effect of the General Release in the Release Agreement because it was expressly included as a third-party beneficiary in the Release Agreement. Any doubt as to whether PPVA intended to grant the General Release to HFF is removed by virtue of the fact that HFF is expressly named in Exhibit A to the Release Agreement.

Moreover, in addition to the ample consideration provided by Huberfeld in the Release Agreement, HFF also provided its own ample consideration for the broad general release that it obtained. First, HFF agreed to, and did, "lock-up" its assets in PPVA for two years following the effective date of the Release Agreement. *See S.E.C. v. Cavanagh*, 445 F.3d 105, 113 (2d Cir. 2006) (quoting the District Court calling an option and lock-up provisions "material parts of the consideration" in an acquisition). Second, HFF granted Platinum (including PPVA) a concomitant general release, which alone provides sufficient consideration to effectuate the Release Agreement.

Lambertson v. Kerry Ingredients, Inc., 50 F. Supp. 2d 163, 169 (E.D.N.Y. 1999) ("This mutual release provides sufficient consideration to effectuate the General Release.").

CONCLUSION

For all the foregoing reasons, HFF's motion for summary judgment should be granted and all the claims in the SAC against HFF should be dismissed with prejudice.

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Respectfully submitted,

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