UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE PLATINUM-BEECHWOOD LITIGATION,	:	No. 18 Civ. 6658 (JSR)
MARTIN TROTT and CHRISTOPHER SMITH, as 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),	:	No. 18 Civ. 10936 (JSR)
Plaintiffs,	:	
v.	:	
PLATINUM MANAGEMENT (NY) LLC, *et al.*,	:	
Defendants.	:	

MEMORANDUM OF LAW OF DEFENDANT DAVID BODNER IN SUPPORT OF HIS MOTION PURSUANT TO NEW YORK GENERAL OBLIGATIONS LAW § 15-108

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Defendant David Bodner respectfully submits this memorandum of law in support of his motion (the "Motion") pursuant to New York General Obligations Law § 15-108 ("Section 15-108") to offset the damages awarded by the jury on December 20, 2022 from $8,150,601.80 (the "Damages Verdict") (ECF No. 789)[1] to zero. The offset is required to account for the nearly $40.1 million in consideration already paid to the Joint Official Liquidators ("JOLs") by persons and entities claimed to be liable in tort for the same injury caused by Bodner.[2]

PRELIMINARY STATEMENT

Bodner timely asserted an affirmative defense in this action seeking an offset of damages pursuant to Section 15-108. ECF No. 654. Section 15-108(a) provides, in relevant part:

> When a release or a covenant not to sue … is given to one of two or more persons liable or claimed to be liable in tort for the same injury … *it reduces the claim* of the releasor against the other tortfeasors to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, or in the amount of the released tortfeasor's equitable share of the damages under article fourteen of the civil practice law and rules, *whichever is the greatest.*

As this Court recently observed in another case, this statute "require[s] that non-settling defendants receive credit for the greater of an earlier settling defendant's cash payment and share of responsibility." *Gruber v. Gilbertson*, 16-cv-9727 (JSR), 2022 WL 17828609, at *5 (S.D.N.Y. Dec. 21, 2022) (emphasis added). Accordingly, under the plain language of Section 15-108(a), Bodner—the only non-settling defendant in this action—must receive credit for, and the Damages Verdict must be reduced by, the greater of: (i) the amount of consideration paid to the JOLs by those released persons and entities who were claimed to be liable in tort for the same injury as Bodner; or (ii) the amount of the released tortfeasors' equitable share of damages.

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[1] ECF citations refer to the *Trott* docket, 18 Civ. 10936.

[2] The parties agreed that the Court would determine the Section 15-108 offset. Trial Transcript ("Tr.") 1007.

As set forth in more detail below, the JOLs settled with and released the following persons and entities (the "Released Tortfeasors"), each of whom the JOLs claimed were liable in tort for the same injury caused by Bodner[3]—losses sustained by PPVA as a result of fraudulent inflation of the net asset value (NAV) of the fund through overvaluation of its assets:

Date of Settlement	Released Tortfeasor	Amount (USD) paid to PPVA
[redacted]	[redacted]	10,000,000.00
		2,000,000.00
		337,500.00
		199,000.00
		350,000.00 (cash)
		4,109,825.13 (secured notes)
[redacted]		2,350,000.00
		8,500,000.00
		1,750,000.00
		10,500,000.00
	Total	**40,096,325.13**

The JOLs have already recovered nearly five times the amount of the Damages Verdict, which is the only adjudication of the true value of the JOLs' claims for NAV inflation and resulting damages. Reduction of the Damages Verdict is mandated by statute and is necessary to prevent a

[3] In addition to the Released Tortfeasors, the JOLs settled with numerous other persons and entities. Certain of those settling parties were not claimed to be liable in tort for the same injury as Bodner, and, therefore, their settlements are not relevant for purposes of this Motion under Section 15-108. Other settling parties, such as, [redacted] were claimed to liable in tort for the same injury caused by Bodner, but because they paid no monetary consideration in exchange for their releases, their settlements do not fall within the scope of Section 15-108. *See* Section 15-108(d)(1) ("A release or a covenant not to sue between a plaintiff or claimant and a person who is liable or claimed to be liable in tort shall be deemed a release or covenant for the purposes of this section only if: (1) the plaintiff or claimant receives, as part of the agreement, monetary consideration greater than one dollar").

multiple recovery, given that the JOLs have been made more than whole on their inflated NAV claims as a result of the consideration paid to them by the Released Tortfeasors.

Because the consideration already paid to the JOLs far exceeds the Damages Verdict—including interest however computed—an analysis of the Released Tortfeasors' equitable share of damages is unnecessary. But even undertaking such an analysis, the result would not be materially different. Bodner submits that the Released Tortfeasors' aggregate equitable share of damages is at least 92%, leaving Bodner's share at no more than 8%. Indeed, in stark contrast to Bodner, the JOLs claimed that many of the Released Tortfeasors were highly active wrongdoers without whose affirmative misconduct the fraudulent overvaluation scheme would have been unsuccessful, saving PPVA the unearned fees adjudicated in the Damages Verdict to be $8.15 million.

Thus, the Motion should be granted, and the Damages Verdict reduced by the greater of the consideration paid by the Released Tortfeasors ($40.1 million), or the Released Tortfeasors' equitable share of the Damages Verdict (at least 92%). On these facts, the consideration is greater, and the Damages Verdict should be offset to zero.

BACKGROUND

A. The JOLs' Claims against Bodner, and the Damages Verdict

The JOLs' operative pleading, the Second Amended Complaint ("SAC") (ECF No. 285), charged Bodner with liability for both the "First Scheme" and the "Second Scheme." SAC ¶¶ 9-11. In the First Scheme, the JOLs alleged that Bodner, who was included among the group called the "Platinum Defendants" and "Individual Platinum Defendants," was responsible for fraudulently inflating the value of PPVA's assets, which caused PPVA to pay inflated management and incentive fees to Platinum Management (NY) LLC ("Platinum Management") and the other Platinum Defendants. SAC ¶¶ 769, 777, 786, 805. Bodner was also accused as a member of the "Beechwood Defendant" group of assisting in the First Scheme by engaging in transactions

designed to support the inflated values of the PPVA assets in order to take unearned fees. *See, e.g.,* SAC ¶ 852. In the Second Scheme, Bodner was accused, with the Platinum Defendants and the Beechwood Defendants, of engaging in various transactions involving Beechwood that favored Beechwood to PPVA's detriment. SAC ¶ 11.

The Court, in its summary judgment decision (ECF No. 624), dismissed the entirety of the Second Scheme counts against Bodner for failure of proof, and left as the sole triable issue against Bodner the First Scheme claim that he came to learn that the fund's assets were overvalued and failed to disclose that fact to the investors, which he was obligated to do if deemed a fiduciary to PPVA and its investors. That claim was deemed to be contained in the First and Second Counts of the SAC where the JOLs alleged that Bodner and the other Platinum Defendants breached their fiduciary duties by "intentionally…artificially inflating PPVA's NAV, in order to generate unearned fees…at the expense of PPVA." SAC ¶ 777; *see also* ¶ 769 (alleging the Platinum Defendants engaged in "systematic misrepresentation and overvaluation of PPVA's NAV for the purpose of paying the Platinum Defendants unearned fees."); ¶ 805 (claiming "[t]he Platinum Defendants falsely inflated the NAV of PPVA's assets, in order to generate for themselves tens of millions of dollars in fraudulent fees and payments – to which they were not entitled – all to the detriment of PPVA.").

At trial, the jury was charged with a single count of fiduciary breach based upon Bodner's failure to disclose his actual knowledge of overvaluation. *See* Court's Instruction of Law to the Jury (ECF No. 787) ("Jury Instructions"), Nos. 9 & 10.

The JOLs put on a case that Bodner was in control of PPVA and Platinum Management at all relevant times, and both caused and had knowledge of the overvaluation. The JOLs argued to the jury that Bodner and his longtime business partner, Murray Huberfeld, were the "senior

partners" at Platinum Management and that Mark Nordlicht, the chief investment officer, was the junior partner who took direction from them. *See, e.g.*, Tr. 14 (JOLs' opening: "This case is about…one of the two senior partners at the management company that managed the hedge fund, PPVA"); Tr. 118 (Post: "Mr. Bodner and Mr. Huberfeld were the senior partners, made the major decisions. Mr. Nordlicht ran the business on a day-to-day basis."); Tr. 1991 (JOLs' summation: "basically everyone who encountered Mr. Bodner and Mr. Huberfeld and Mr. Nordlicht in the room arrived at the conclusion that Huberfeld and Bodner were senior partners."). The JOLs also sought an instruction, which the Court gave the jury over Bodner's objection, that Bodner and Huberfeld could be deemed co-conspirators who formed an agreement to conceal the overvaluation from investors. *See* Jury Instruction No. 12.

The JOLs relied heavily on Bodner's participation as an investor in Beechwood as evidence of his participation in and knowledge of the overvaluation scheme. They claimed that Bodner was in control of Beechwood, and therefore knowledgeable about a "debt stability plan" in which Beechwood was used in related party transactions to prop up the value of various PPVA assets, including securities issued by Golden Gate Oil and Black Elk Energy. Tr. 84-85, 102, 107, 237 (Post); 1568 (Quintero); 558 (Gluck: "Since the beginning, the thesis of the plaintiffs was this debt stability scheme, that the debt of Golden Gate, Northstar, what have you, was sent over to Beechwood…That is the essence of the overvaluation scheme."); 2017-2018 (summation: "if you are Beechwood and you are actually owned by Platinum and you sit on the deck. That's the debt stability scheme."). They made the same claim with respect to Bodner's alleged knowledge of "BEOF," a fund managed by an affiliate of Platinum Management to purchase Black Elk preferred shares, which was allegedly used to inflate the value of the other Black Elk securities in PPVA's portfolio. Tr. 84-85, 102 (Post).

As a result of Bodner's alleged failure to disclose his knowledge of overvaluation, the JOLs claimed he was responsible for the entirety of the unearned management and incentive fees paid by PPVA to Platinum Management and its related entities after January 1, 2013 and through June 30, 2016. The JOLs told the jury in summation that these amounts were $30.7 million in unearned incentive fees, and $15.5 million in unearned management fees. Tr. 2026-27, 2031. The JOLs also asked the jury to award $4 million in legal fees incurred in connection with proceedings against third parties. Tr. 2031.

The trial concluded on December 15, 2022. The jury deliberated for more than three full days. On December 19, 2022, the jury foreperson advised the Court that the jury was deadlocked on the question of liability. The Court gave the jury a "soft" *Allen* charge. Tr. 2155. The following day, the jury returned the Damages Verdict, awarding the JOLs just 16% of the damages they sought. ECF No. 789. The JOLs did not seek to poll the jury in any respect.

B. The JOLs' Claims Against, and Settlements with, the Released Tortfeasors

Prior to the Damages Verdict, the JOLs collected nearly $40.1 million from persons and entities they claimed to be responsible for PPVA's payment of unearned management and incentive fees—the same injury allegedly caused by Bodner's failure to disclose his knowledge of overvaluation.

1. [redacted]

[redacted]

[4] This Motion is supported by the Declaration of Julia B. Mosse, dated January 12, 2023 ("Mosse Decl."). The settlement agreements and certain other materials referenced here are annexed to the Mosse Decl. At the request of the JOLs, they are filed under seal pursuant to the Court's Protective Order, ECF No. 284. Bodner takes no position as to whether the settlement documents should be afforded confidential treatment.

[5] The JOLs papered the [redacted] settlement in an effort to circumvent Section 15-108. [redacted] These contrived "Admitted Claims" serve no legitimate purpose, and should be ignored. "Settling parties may not structure the apportionment to avoid a later setoff by a nonsettling defendant [because] to hold otherwise would permit them to circumvent the policy underlying section 15–108." *Koch v. Greenberg*, 14 F. Supp. 3d 247, 271 (S.D.N.Y. 2014) (quotations and citations omitted).

2. [redacted]

[redacted]

3. [redacted]

[redacted]

4. [redacted]

[redacted]

[redacted]

5. [redacted]

[redacted]

[redacted]

6. [redacted]

[redacted]

[redacted]

[redacted]

7. [redacted]

[redacted]

[redacted]

8. [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

9. [redacted]

[redacted]

[redacted]

ARGUMENT

I. The Damages Verdict Must Be Reduced By The Greater Of: (1) The Consideration Actually Received By The JOLs From The Released Tortfeasors; And (2) The Released Tortfeasors' Equitable Share Of Damages

Where, as here, the plaintiffs have settled with one or more persons or entities who were claimed to be liable in tort for the same injury caused by the non-settling defendant, Section 15-108 requires that the Damages Verdict be reduced by the greater of the amount of consideration paid by the Released Tortfeasors or their equitable share of damages. N.Y. Gen. Oblig. L. § 15-108(a); *see also Gruber*, 2022 WL 17828609, at *5. Section 15-108 applies whether or not the claims against the settling and non-settling parties are identical, because "[n]othing in section 15–108 ... requires that the two defendants be liable upon the same theory. All that is required is that they be subject to liability for damages for the same injury." *Koch*, 14 F. Supp. 3d at 269-70 (quoting *Roma v. Buffalo Gen. Hosp.*, 103 A.D.2d 606, 481 N.Y.S.2d 811, 813 (3d Dep't 1984)). As this Court explained in *Gruber* when analyzing a "similar statute[]" (the settlement offset provision of the PSLRA), although "affording non-settling defendants the greater of the cash value of earlier partial settlements or the settling defendants' share of responsibility" may be "particularly friendly to non-settling defendants," it serves to "protect[] non-settling defendants

[6] [redacted]

whose contribution rights are eliminated by earlier settlements they had no role in negotiating" and "falls well within the mainstream of common American judicial practice." *Gruber*, 2022 WL 17828609, at *5; *see also* N.Y. Gen. Oblig. L. § 15-108(b) ("A release given in good faith by the injured person to one tortfeasor as provided in subdivision (a) relieves him from liability to any other person for contribution as provided in article fourteen of the civil practice law and rules.").

The New York Court of Appeals has held that, in cases involving multiple settling parties, the appropriate method of computing the offset is by aggregating the settlements of all settling alleged tortfeasors and reducing the verdict by the greater of that amount or their collective equitable shares of the verdict. *See Didner v. Keene (In re Matter of New York City Asbestos Litigation)*, 82 N.Y.2d 342, 352 (1993).

II. The Aggregate Consideration Received By The JOLs Exceeds, And Therefore Eliminates, The Damages Verdict

Either in this case or in parallel proceedings, the JOLs have claimed that each of the Released Tortfeasors damaged PPVA by causing the payment of unearned management and incentive fees, either through their affirmative role in the inflation of PPVA's NAV or through their failure to detect and disclose the inflated NAV. *See* Background, Section B, *supra*. As such, each of them was "claimed to be liable in tort for the same injury" that was calculated by the jury here to be $8.15 million. N.Y. Gen. Oblig. L. § 15-108(a).

The consideration received to date by the JOLs from the Released Tortfeasors ($40.1 million) far exceeds the Damages Verdict and wipes it out entirely. This is true even with the accrual of prejudgment interest. *See Conway v. Icahn & Co., Inc.*, 16 F.3d 504, 512 (2d Cir. 1994) (applying prejudgment interest in accordance with N.Y. C.P.L.R. § 5001 from a "reasonable intermediate date" before applying Section 15-108); *Bauman v. Keene* (*In re Joint E. Dist. & S.*

Dist. Asbestos Litig.), 18 F.3d 126, 131 (2d Cir. 1994) (imputing interest to settling tortfeasors before computing offset).

Accordingly, the JOLs have already received just compensation as a result of the settlements and will suffer no prejudice through the proper application of Section 15-108 to reduce the Damages Verdict to zero. As this Court observed in *Gruber*, while Bodner may benefit from the reduction in the Damages Verdict, he had no role in the negotiation of the settlements, which eliminated his right to contribution from the Released Tortfeasors.

III. Even On An "Equitable Share" Basis, Bodner's Proportionate Responsibility For Unearned Fees Should Be No Greater Than 8 Percent

Because the consideration already paid to the JOLs by the Released Tortfeasors far exceeds the amount of the Damages Verdict, an "equitable share" analysis is not necessary. However, even engaging in such an analysis, the Damages Verdict should be reduced by at least 92% to account for the Released Tortfeasors' equitable share of damages, leaving Bodner's equitable share of the Damages Verdict at no greater than 8%.

As demonstrated in Background, Section B, *supra*, each of the Released Tortfeasors was alleged to have played a significant role in causing the losses sustained by PPVA as a result of the fraudulent inflation of its NAV. In many instances, the Released Tortfeasor's alleged misconduct was far more severe than Bodner's failure to act.

[redacted]

[redacted]

[redacted]

[redacted]

Accordingly, Bodner submits that the Damages Verdict should be allocated such that the [redacted] The individual allocations should be as follows:

Released Tortfeasor	Equitable Share of Damages
[redacted]	20%
[redacted]	8%
[redacted]	8%
[redacted]	4%
[redacted]	4% each, 12% collectively
[redacted]	14%
[redacted]	12%
[redacted]	12%
[redacted]	2%
TOTAL	**92%**

This apportionment would leave Bodner with responsibility for the remaining 8% of the Damages Verdict, [redacted], which is entirely consistent with the JOLs' theory of the case.

CONCLUSION

Bodner respectfully requests that the Motion be granted and the Damages Verdict be reduced to zero.

Dated: January 12, 2023
New York, New York

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By: */s/ Eliot Lauer*

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