UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re: PLATINUM-BEECHWOOD LITIGATION.	Civil Action No. 18-cv-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), Plaintiffs, - against - PLATINUM MANAGEMENT (NY) LLC, *et al.,* Defendants.	Civil Action No. 18-cv-10936 (JSR)

MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT DAVID BODNER'S MOTION PURSUANT TO NEW YORK GENERAL OBLIGATIONS LAW § 15-108

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Plaintiffs[1] submit this memorandum of law in opposition to the Motion of Defendant David Bodner ("**Bodner**"), pursuant to New York General Obligations Law § 15-108 ("**Section 15-108**"). Bodner seeks to offset the damages awarded by the jury on December 20, 2022 in the amount of $8,150,601.80 (the "**Damages Verdict**") (ECF No. 789)[2] on account of settlements entered into by and among the PPVA Parties and the Settling Defendants.[3] In support of their Opposition, the Plaintiffs respectfully state:

PRELIMINARY STATEMENT

After 15 days of trial and deliberations, the jury awarded a jury verdict against David Bodner in the amount of $8.15 million, due to Bodner's breach of his fiduciary duty in connection with his receipt of certain fees which were unearned. The Court's final words on the record are particularly appropriate here: "…justice was done." (Tr. 2165: l-13).

Bodner now seeks to eliminate any personal liability for the breach of his fiduciary duties by misapplying GOL Section 15-108. That statute is intended to promote settlements, while protecting non-settling defendants to the extent the injury caused by the non-settling defendant is the same as the injury that is shown to have been caused by a settling joint tortfeasor. In short, the statute provides a means for a victim to reach settlements while limiting the risk of a double recovery by that victim.

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[1] 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**") (collectively, "**Plaintiffs**" or "**PPVA Parties**)

[2] All docket citations refer to the case captioned *Trott v. Platinum Management (NY) LLC*, No. 18-cv-10936-JSR.

[3] The Settling Defendants are defined as: [redacted]

Bodner's misleading offset motion ignores two important, if inconvenient, facts: there is no risk of double recovery by the PPVA Parties in this case, and none, or virtually none, of the Bodner damages have been recovered. The PPVA Parties sought *separate and significantly greater* damages from the Settling Defendants, on account of other injuries that resulted from various other schemes and transactions connected to the Platinum fraud, such as the June 2016 Agera Sale and the Black Elk Scheme. Moreover, after days of deliberation, the jury found Bodner proximately caused $8.15 million out of the total $50 million of management and incentive fees damages. Bodner's assertion that the PPVA parties have already collected *the same* $8.1 million from other parties is wrong on its face.

The PPVA Parties have sought **$597.2 million** in separate and distinct damages from the Settling Defendants in the aggregate, and $494.4 million in this case alone. *See* the February 2, 2023 Declaration of Martin Trott ("**Trott Decl.**") at ¶¶ 27. Prior to trial, the Court **reduced** the damages the PPVA Parties could seek from Bodner via summary judgment and motion *in limine* decisions to those directly attributable to the overvaluation claim. The following provides the full scope of damages sought against the Settling Defendants, which damages claims, by definition, the Settling Defendants settled:

Damages Category	Damages Alleged by PPVA Plaintiffs (Without Interest)
Damages Alleged in SDNY Litigation	
Management Fees	$15 million
Incentive Fees	$31 million
Black Elk Bond Subordination	$18 million (not permitted in Bodner Trial)
Black Elk Bond Buyback	$35.5 million (not permitted in Bodner Trial)
Montsant Encumbrances	$35 million (not permitted in Bodner Trial)
Nordlicht Side Letter	$37 million (not permitted in Bodner Trial)
March 2016 Restructuring	$97.9 million (not permitted in Bodner Trial): • 3.1 million (Navidea) • $20 million (Master Guaranty) • $4.8 million (Carbon Credits) • $70 million (PPCO transfers)

Security Lockup (PPNE, Kismetia, Twosons, Gerszberg, West Loop/Epocs)	$127 million (not permitted in Bodner Trial): • $80 million (PPNE) • $450,000 (Kismetia) • $14 million (Twosons) • $7.5 million (West Loop/Epocs) • $15 million (Gerszberg)
Agera	$93.8 million (not permitted in Bodner Trial)
JOLs' Attorney Fees in Connection with non-SDNY Litigation	$4.2 million (not sought other than in Bodner trial)
Sub-Total:	**$494.4 million**
Additional Damages only alleged in Non-SDNY Litigation Against Settling Defendants	
Redemption Damages	$18 million
Additional Black Elk Scheme Damages	$25 million
Additional Fees Damages	$47.2 million
Fees Paid to [redacted]	$2 million
Enven Settlement	$4.6 million
[redacted] Fees	$6 million
Sub-Total:	**$102.8 million**
Total Damages Sought:	**$597.2 million**
Total Amount Collected From Settling Defendants	**$34,736,500**

On account of these claims for damages in the amount of $597.2 million, the PPVA Parties have collected only $35 million in cash settlement payments from the Settling Defendants (the "**Settlement Payments**").

Accordingly, there is absolutely no risk of double recovery. Bodner is attempting a sleight of hand, seeking to apply the entirety of the Settlement Payments as an offset against his personal $8.15 million Damages Verdict, a small subset of the total damages, or even of the improperly collected management and incentive fees. Bodner is well aware that the Settlement Payments were made to the PPVA Parties not simply on account of the overpaid fees at issue at trial, but also on

account of the significantly larger asset dissipation claims and even broader universe of overvaluation damages.

The PPVA Parties not only sought separate damages from Bodner and the Settling Defendants, but Bodner also was held liable by the jury for an entirely separate injury than the injuries alleged against the Settling Defendants. The bulk of the Settlement Payments were made by [redacted] This is far different from the injury caused by Bodner: the failure to utilize his unique position as a senior partner at Platinum Management, armed with insider knowledge of the underperformance of PPVA's investments, to prevent the overpayment of fees.

Even if this Court deems an offset appropriate, an offset of approximately $1.4 million is the *maximum* amount appropriate under this Court's analysis in *Koch v Greenberg*, 14 F. Supp. 3d 247, 270 (S.D.N.Y. 2014), *aff'd*, 626 F. App'x 335 (2d Cir. 2015), a case approvingly cited by Bodner in his opening brief ("**Koch**"). *See also Barkley v. United Homes, LLC*, 848 F. Supp. 2d 248, 267 (E.D.N.Y. 2012), *aff'd sub nom,* 557 F. App'x 22 (2d Cir. 2014) (trial defendants were only entitled to set-off to the extent that the economic harms covered in prior settlements were "identical" to those proven at trial). In *Koch* and *Barkley*, the District Courts refused to apply a "dollar-for-dollar" offset on account of settlements where the plaintiff had sought significantly more damages from the settling defendants as compared to the trial defendant. As explained below, it is clear that, at most, a very small portion of the payments by Settling Defendants Fuchs and Huberfeld, and those settling defendants only, constitute the "same injury" for which the jury awarded damages against Bodner.

Accordingly, Bodner's motion should be denied in its entirety, and judgment should be entered in favor of the PPVA Parties for the full Damages Verdict plus prejudgment interest, as calculated below in the amount of $14,871,163.90, or at most a reduction of $1,374,234 is appropriate.

FACTUAL BACKGROUND

A. The Full Scope of the PPVA Parties' Claims in this Case

On March 29, 2019, the PPVA Parties filed their Second Amended Complaint in this case (the "**SAC**") [ECF No. 285], asserting claims including breach of fiduciary duty, fraud, and aiding and abetting against approximately ninety (90) defendants in connection with the numerous schemes and transactions that resulted in the implosion of PPVA in 2016. The 185 page SAC chronicles the various schemes and transactions orchestrated by the defendants following the November 2012 explosion on the oil rig operated by Black Elk Offshore Operations, LLC ("**Black Elk**"). The SAC categorizes these schemes as follows:

- The First Scheme: The fraudulent inflation of the net asset value ("**NAV**") of PPVA, which enabled the payment of unearned management and incentive fees as well as other damages suffered by PPVA as a result of the overvaluation (SAC at ¶ 9).

- The Second Scheme: The transfer or encumbrance of nearly all of PPVA's valuable assets for the benefit of Beechwood, select insiders, as well as Platinum Partners Credit Opportunities Master Fund L.P. ("**PPCO**") (SAC at ¶ 10)

In addition to the First Scheme overvaluation damages that were raised at trial against Bodner, the SAC seeks damages in connection with the following Second Scheme transactions, all of which were live and active claims against various Settling Defendants at the time of settlement:

- The Agera Sale: On the day following the arrest of Murray Huberfeld, the June 9, 2016 transfer of one of PPVA's last valuable assets, a majority interest in Agera Energy LLC, worth between $200-$300 million, to Beechwood and its insurance clients for little to no consideration. (SAC at ¶¶ 607-672). The PPVA Parties sought damages of $93.8 million

in connection with the Agera Sale. *See* November 14, 2019 Expert Report of Ronald G. Quintero [ECF No. 639 at Ex. 1] ("**Quintero Report**") at ¶ 40.

- The Black Elk Bond Subordination: The use of Beechwood to rig a proposed amendment to the indenture governing secured bonds issued by Black Elk, in order to use proceeds of the sale of Black Elk to pay insiders holding Black Elk preferred equity, rather than secured bondholders such as PPVA. (SAC at ¶¶ 440-515). The PPVA Parties sought $18 million in damages in connection with the Black Elk scheme. *See* Quintero Report at ¶ 52.

- The Black Elk Bond Buyback: Following the sale of substantially all of Black Elk's assets, PPVA's January 30, 2015 repurchase of worthless Black Elk secured bonds temporarily held by Beechwood to effectuate the Black Elk scheme. (SAC at ¶¶ 516-528). The PPVA Parties sought $35.5 million in damages in connection with the Black Elk Bond Buyback. *See* Quintero Report at ¶ 61.

- The Montsant Collateral Account: The use of PPVA subsidiary Montsant Partners, LLC ("**Montsant**") to provide Beechwood with security interests in various liquid and collectable assets, such as a promissory note issued by Implant Sciences Corporation ("**Implant**") and public securities issued by Navidea, Urigen and Vistagen. (SAC at ¶¶ 556-567).

- The Nordlicht Side Letter: The January 2016 side letter requiring PPVA and any of its subsidiaries and affiliates holding the valuable proceeds from the sale of Implant to use such proceeds to pay approximately $37 million of uncollectable debt owed to Beechwood by Golden Gate Oil, LLC ("**GGO**"), for no benefit to PPVA. (SAC at ¶¶ 568-583).

- The March 2016 Restructuring: A series of March 2016 transactions among PPVA, Beechwood and PPCO, by which tens of millions of assets were stripped from PPVA and assets were encumbered by Platinum Management for the benefit of PPCO and Beechwood. (SAC at ¶¶ 584-606)

- The Security Lock-Up: The series of transactions, documents and promissory notes that PPVA entered into with select redeeming investors and certain creditors of PPVA, by which those investors and creditors preferentially were granted cash or security interests on all assets of PPVA (and in some cases subsidiary assets) to collateralize tens of millions of dollars of equity redemption claims or otherwise unsecured debt for no additional consideration (SAC at ¶¶ 673-762).

Trott Declaration at ¶ 5.

The following summarizes **the $494.4 million** in damages sought by the PPVA Parties in connection with the various schemes and transactions set forth in the SAC (Trott Decl. at ¶ 5):

Damages Category	Damages Alleged
Management Fees	$15 million
Incentive Fees	$31 million
Black Elk Bond Subordination	$18 million
Black Elk Bond Buyback	$35.5 million
Montsant Encumbrances	$35 million
Nordlicht Side Letter	$37 million
March 2016 Restructuring	$97.9 million: • 3.1 million (Navidea) • $20 million (Master Guaranty) • $4.8 million (Carbon Credits) • $70 million (PPCO transfers)
Security Lockup (PPNE, Kismetia, Twosons, Gerszberg, West Loop/Epocs)	$127 million: • $80 million (PPNE) • $450,000 (Kismetia) • $14 million (Twosons) • $7.5 million (West Loop/Epocs) • $15 million (Gerszberg)
Agera	$93.8 million
JOLs' Attorney Fees in Connection with non-SDNY Litigation	$4.2 million
Total Damages Sought in the SAC:	**$494.4 million**

On April 21, 2020, this Court issued an Opinion and Order granting in part and denying in part Bodner's and Fuchs' Motions for Summary Judgment (ECF No. 523). *See* ECF No. 624 at 2-3 (the "**Summary Judgment Order**"). Specifically, the Summary Judgment Order denied Bodner's and Fuchs' Motions for Summary Judgment on the aspects of the SAC that are premised on Bodner's breach of fiduciary duty and fraudulent conduct with respect to the overvaluation of the net asset value of PPVA, but granted the motions in connection with the Second Scheme transactions outlined above.

B. The Trial and the Damages Verdict Against Bodner

Due to the Summary Judgment Opinion as well as the Court's first-day rulings on the motions *in limine* and rulings during trial, the PPVA Parties were limited at trial to seeking a verdict against Bodner on a single count of breach of fiduciary duty in connection with the overvaluation of PPVA's NAV by its investment manager, Platinum Management (NY) LLC ("**Platinum Management**"). The sole triable issue at trial against Bodner was whether he had knowledge of the overvaluation of PPVA's NAV and failed to disclose or correct the misstated NAV in his position of authority over PPVA and Platinum Management.

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

The evidence and testimony at trial proved that Bodner was a fiduciary of PPVA and that in his position as senior partner, Bodner was well aware of the massive overvaluation of PPVA's NAV. The jury heard testimony from Jed Latkin and Fuchs that the failure of PPVA's investments such as GGO and the overvaluation inflation of PPVA's NAV was commonly discussed at the monthly partner meetings of Platinum Management's owners. A presentation was given to David Bodner in January 2016 by Seth Gerszberg, which showed zero net value for PPVA's oil and gas investments and reported that PPVA only held $40 million in unencumbered assets, and even this presentation wildly overstated the gross value of PPVA's oil & gas investments, incorrectly utilizing the same gross asset values as Platinum Management when in fact the relevant underlying investments were actually or near-valueless.

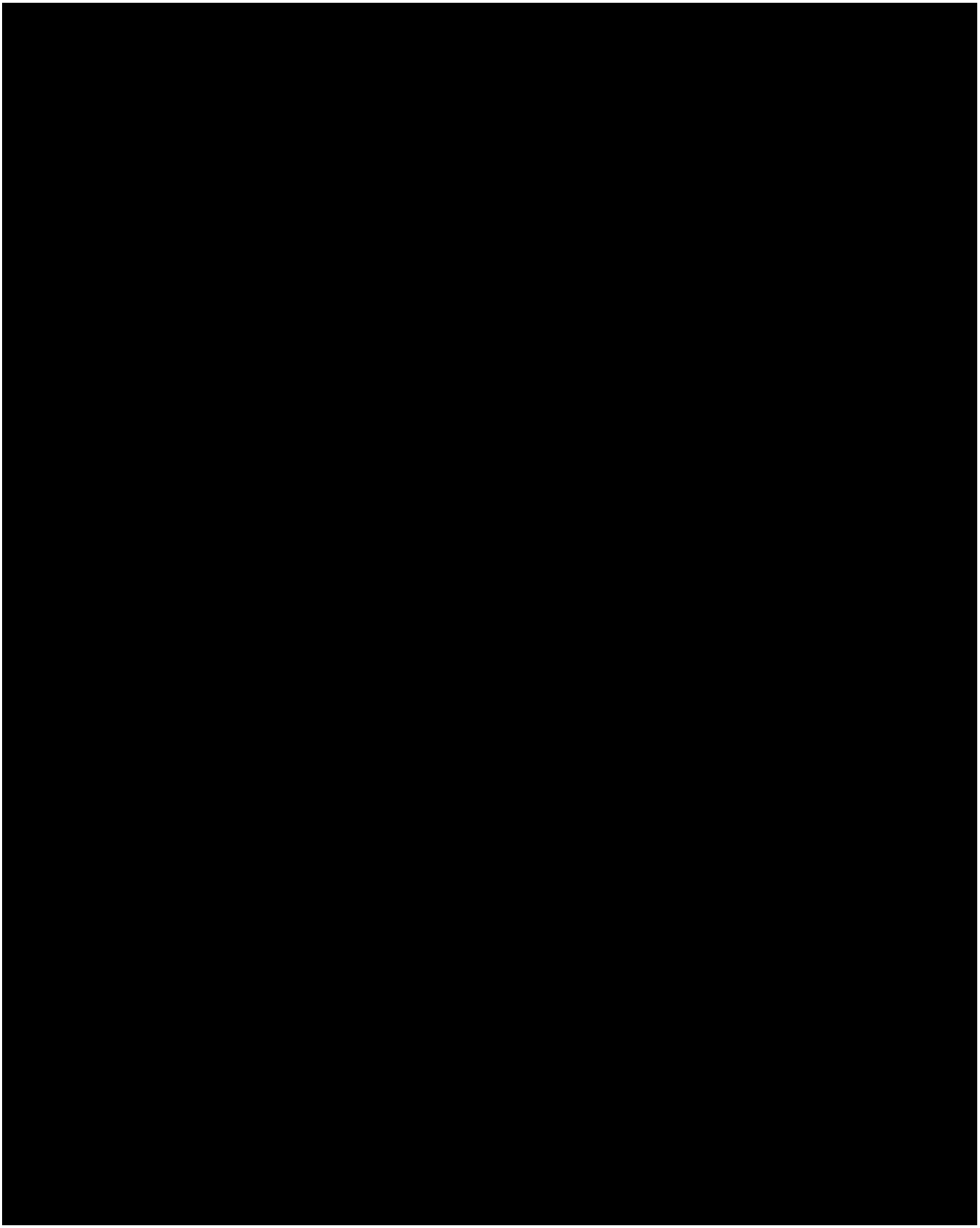
In connection with Bodner's breach of his fiduciary duty in connection with the inflation of PPVA's NAV, the PPVA Parties sought the following damages from Bodner in this particular trial: (i) $30.7 million in unearned incentive fees paid to Platinum Management's owners on or

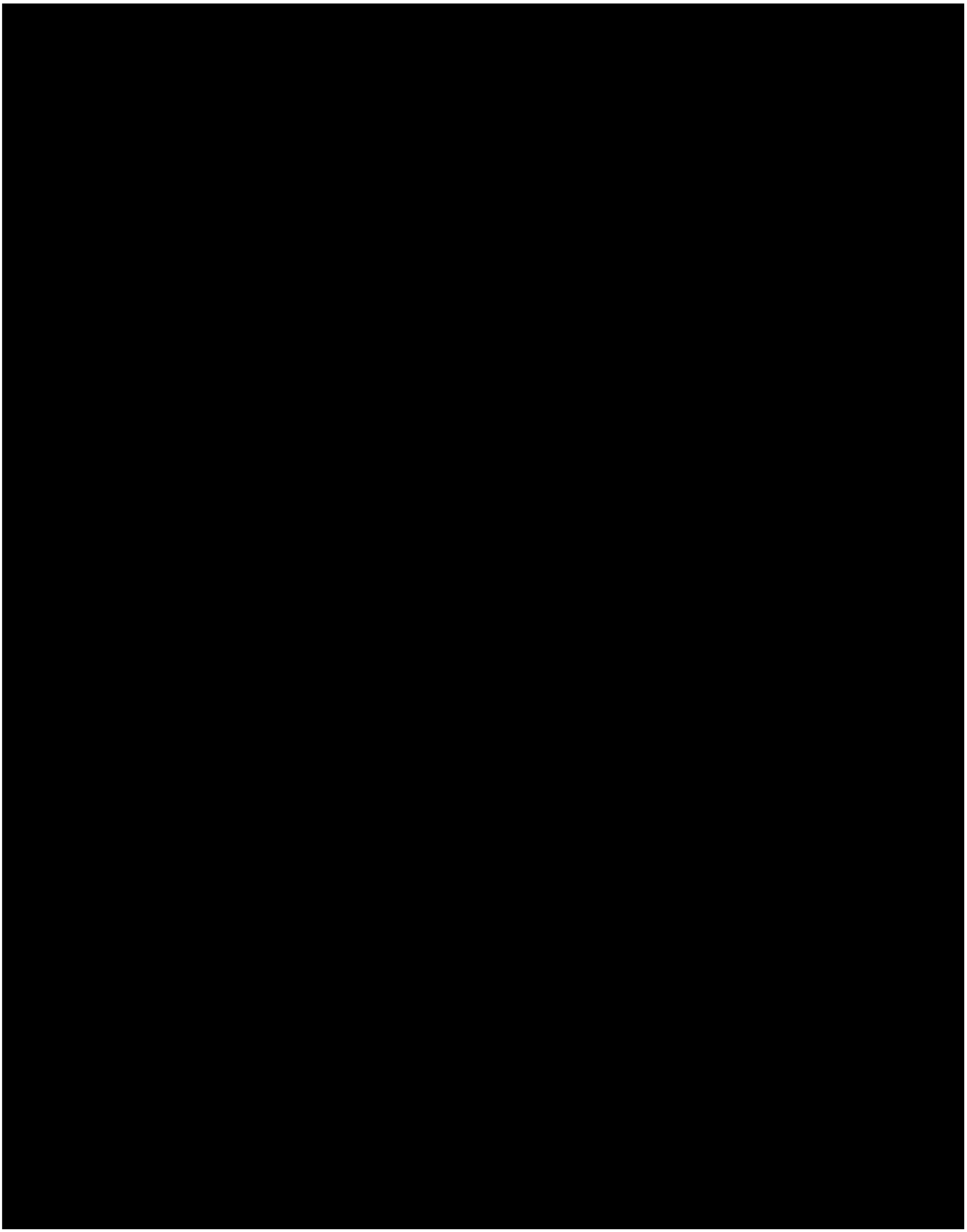
after January 1, 2013 through July 2014; (ii) $15.5 in overpaid management fees paid to Platinum Management from January 1, 2013 through June 1, 2016; and (iii) $4.2 million in legal fees incurred by the PPVA Parties in connection with proceedings against third parties. Tr. 2026-2027, 2031. Bodner strenuously argued via counsel presentation to the jury and court, trial testimony and in closing, that Bodner could not be liable for damages incurred prior to his breach of fiduciary duty. The Bodner Damages Verdict *excluded* the hundreds of millions of dollars of damages incurred by PPVA in connection with the myriad frauds, breaches of fiduciary duties and dissipation schemes by Platinum Management and others in the Second Scheme transactions.

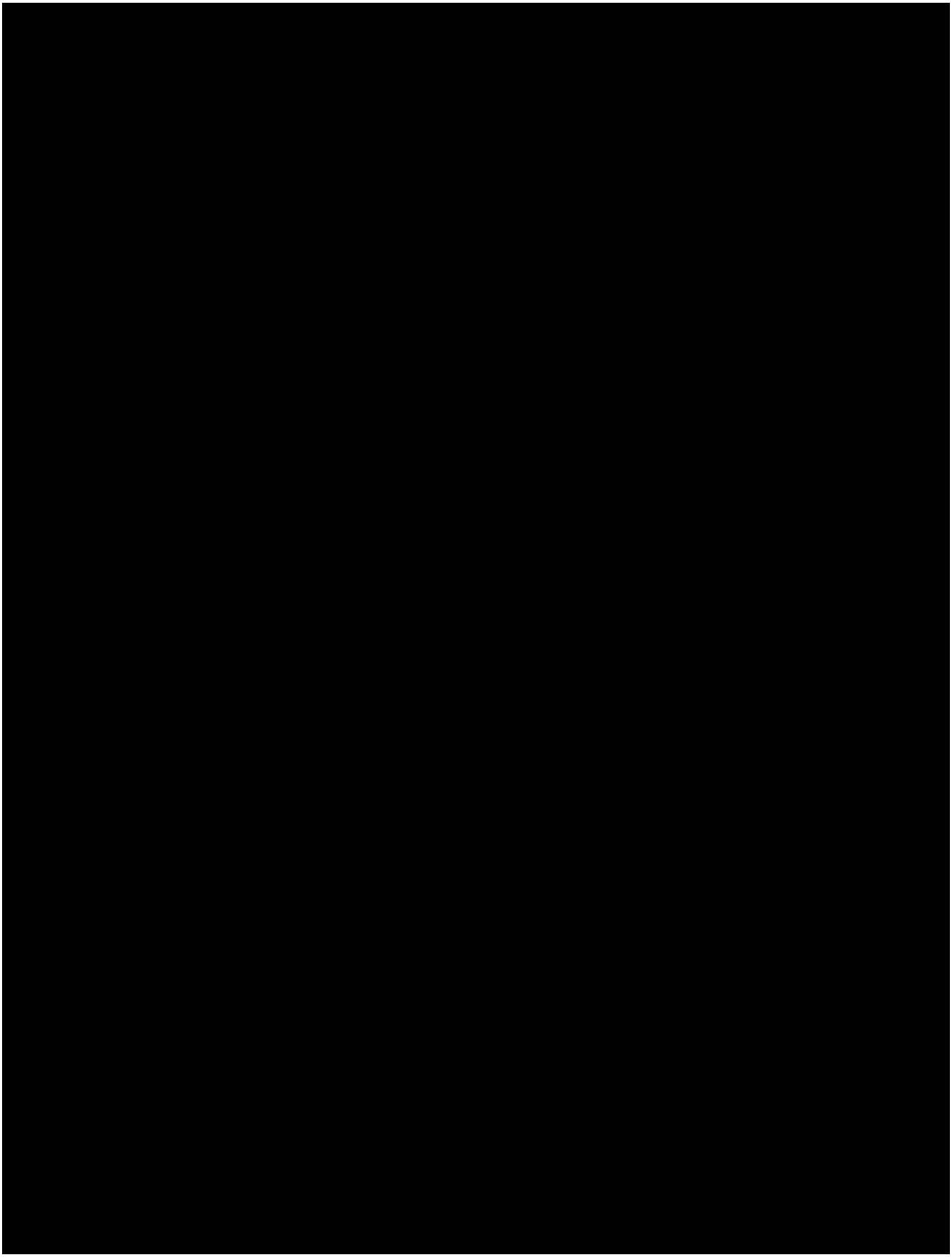
The jury returned the Damages Verdict in the amount of $8,150,601.80, which represented the compensatory damages arising from Bodner's breach of fiduciary duty. ECF No. 789.

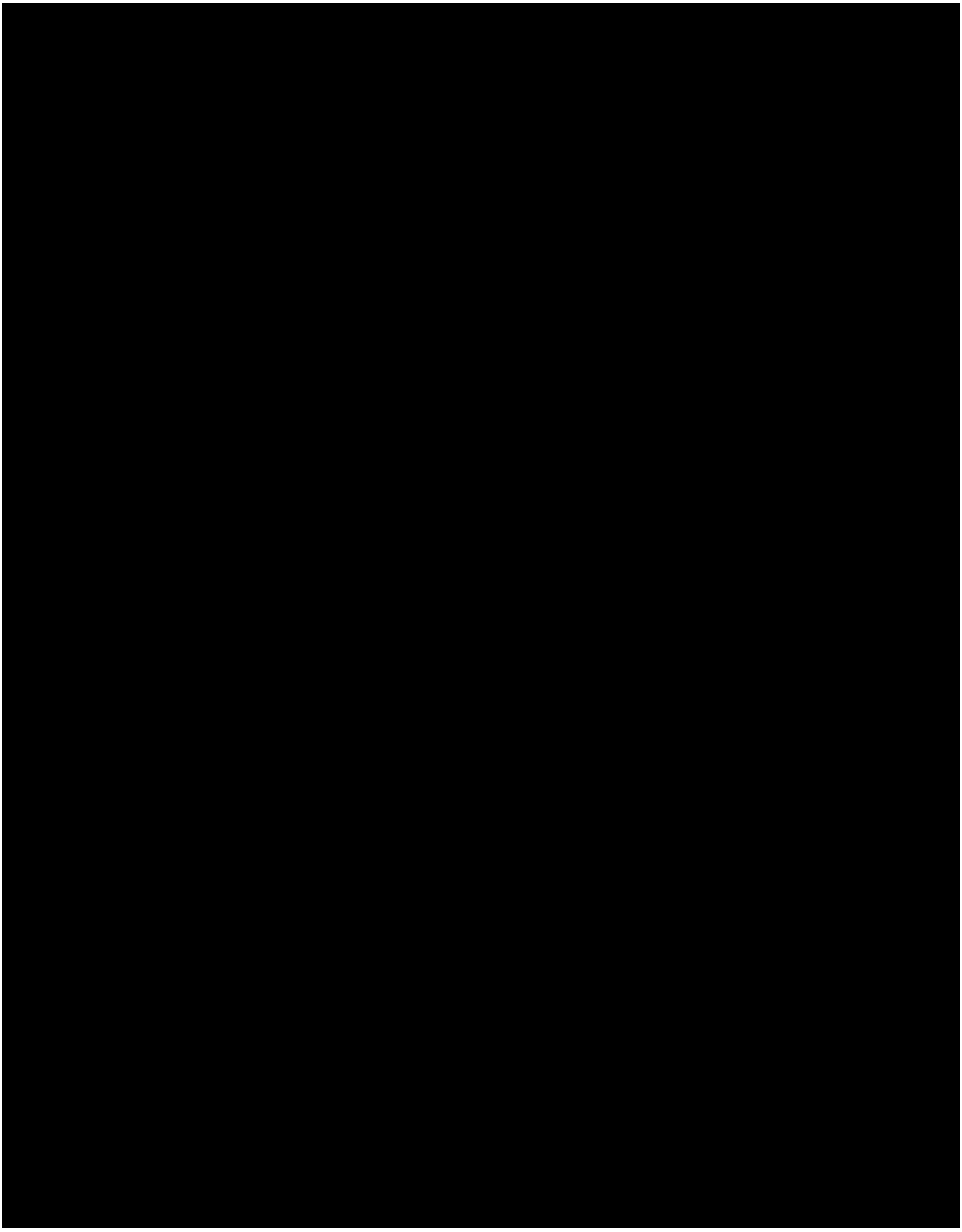
C. The PPVA Parties' Claims Against and Settlements with the Settling Defendants

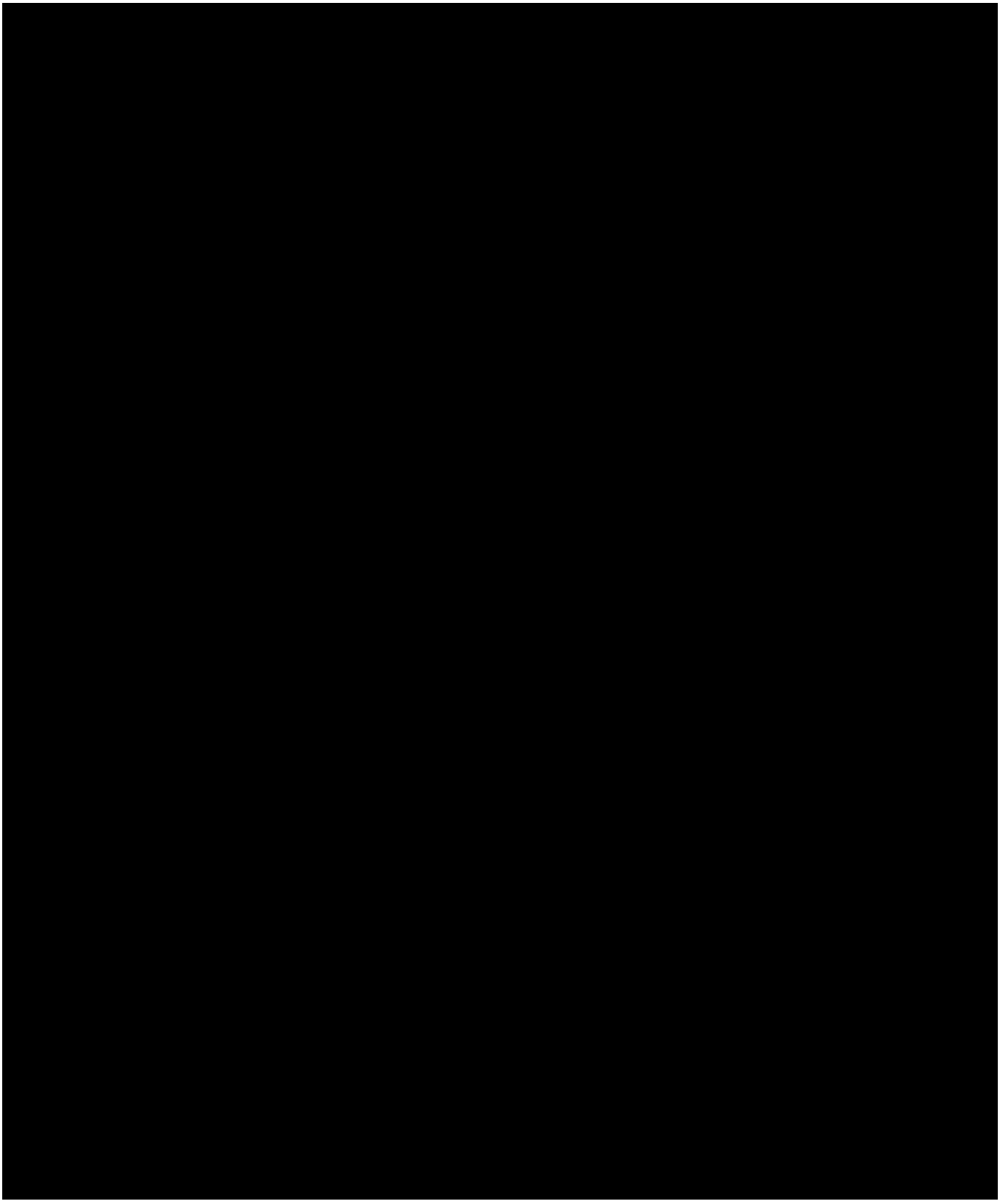
Prior to trial, the PPVA Parties entered into settlements with various defendants in this broad action as well as other actual or contemplated defendants in other matters. Trott Decl. at ¶¶ 6-26. The following is a summary of PPVA's claims against the Settling Defendants as well as the settlements entered into among the parties.











5. The Settling Defendants From This Case

[redacted]

[redacted]

DISCUSSION

I. Section 15-108

General Obligations Law § 15-108(a) provides:

> (a) Effect of release of or covenant not to sue tortfeasors. When a release or a covenant not to sue or not to enforce a judgment is given to one of two or more persons *liable or claimed to be liable in tort for the same injury,* or the same wrongful death, it does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms expressly so provide, but 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.

N.Y. Gen. Oblig. Law § 15-108(a) (McKinney 2007) (emphasis added).

The policy behind Section 15-108 is to encourage settlement and ensure equity. Plaintiffs should be fairly compensated, but the possibility of double recovery should be avoided. *Whalen v. Kawasaki Motors Corp.*, 92 N.Y.2d 288, 292 (1988).

If the factfinder determines that the settling party and non-settling defendants are responsible for the "same injury," the factfinder must then determine an allocation of fault and resulting allocation of damages. *Schipani v. McLeod*, 541 F.3d 158, 163 (2d Cir. 2008) ("When a joint tortfeasor asserts the affirmative defense of General Obligations Law § 15–108 to reduce its

[redacted]

liability, liability is apportioned by 'assessing the damage inflicted by each joint tortfeasor.'" (quoting *Graphic Arts Mut. Ins. Co. v. Bakers Mut. Ins. Co. of N.Y.*, 45 N.Y.2d 551, 557 (1978)).

A. Bodner Has Waived His Right to Seek An Equitable Apportionment Under Section 15-108

Bodner's Motion seeks an offset of the Damages Verdict based upon his own calculation as to his "equitable share" of responsibility for the Damages Verdict. Bodner Mem. at pp. 21-24. Bodner has waived his right to seek an offset on account of an equitable apportionment, due to his Motion's complete absence of proof as to the overvaluation of PPVA's NAV and the Settling Defendants' responsibility for the same.

Section 15-108 is an affirmative defense and the defendant bears the burden of establishing his right to a set-off. *Whalen*, 92 N.Y.2d at 293 (confirming Section 15-108 is an affirmative defense); *Hamilton v. Garlock, Inc.*, 96 F. Supp. 2d 352, 356-57 (S.D.N.Y. 2000) ("the defendant must bear the burden of establishing the equitable share of culpability attributable to each of the settling defendants."). Courts will bar non-settling defendants from seeking an "equitable apportionment" reduction if the Defendant fails to present evidence of the settling defendant's fault, and in such circumstances will only permit reduction due to settlement amounts actually paid. *See Hamilton*, 96 F. Supp. 2d at 357; *see also Gerdik v. Van Ess*, 5 A.D.3d 726, 727 (2d Dep't 2004); *Hyosung Am., Inc. v. Sumagh Textile Co., Ltd.*, 25 F. Supp. 2d 376, 387 (S.D.N.Y. 1998), *aff'd*, 189 F.3d 461 (2d Cir. 1999) (holding that because the defendant "has not proven that [the settling defendant] was also involved [in the fraud] ... [plaintiff's] settlement with [the settling defendant] does not reduce plaintiff's recovery against [the defendant] in this action.").

In support of his argument that the Settling Defendants are responsible for 92% of the Damages Verdict, Bodner relies almost entirely on the allegations made by the PPVA Parties in the SAC and the pre-litigation draft complaints exchanged with [redacted] (the

latter of which are inadmissible under FRE 408), none of which were alleged to have received management/incentive fees. *See* Bodner Mem. at p. 3 ("Indeed, in stark contrast to Bodner, the JOLs claimed that many of the Released Tortfeasors were highly active wrongdoers[.]") (emphasis added). Bodner's Motion contains no submission of proof as to the wrongdoing of the Settling Defendants. In fact, there is no statement in Bodner's Motion that the Settling Defendants committed any wrongdoing at all. The pre-discovery allegations made by the PPVA Plaintiffs in various complaints and mediation statements against the Settling Defendants does not amount to Bodner satisfying his burden under Section 15-108. Bodner had the opportunity in his Motion to prove the contributory fault of the Settling Defendants, and he failed to do so. Accordingly, Bodner has waived any right to seek an offset on an "equitable apportionment" theory, and any attempt by Bodner to cure this deficiency with his reply brief should be barred.

II. No Offset Is Required Due to the Unique Injury Caused by Bodner

As a threshold matter, Section 15-108 will ***not*** apply to the Settling Defendants to the extent they did not cause the "same injury" or are not joint tortfeasors. The unique injury caused by Bodner on the limited claim against him at trial was Bodner's failure to provide PPVA with the honest services required of him as a senior partner of Platinum Management, with the unique ability to wield his authority to correct PPVA's overstated NAV. This is a significantly different injury than the ones [redacted] This is also a separate injury from the SDNY Settling Defendants, all of which did not have Bodner's unique aspect of ultimate decision making authority over PPVA.

In order to obtain a Section 15-108(a) set-off, the two defendants must be subject to liability for damages for the same exact injury. *Koch,* 14 F. Supp. 3d at 270; *Hyosung,* 25 F. Supp. 2d at 387. In determining whether settled claims are for the "same injury" for which the as the non-

settling defendants are liable, the Court may look to the scope of the settlement agreements themselves, as well as the claims alleged against the settling defendants. *See Barkley*, 848 F. Supp. 2d at 266.

For example, a settlement in a federal action brought by investors in limited partnerships against the partnerships' sponsor and accounting firm was not required to be set off against the investors' subsequent recovery in a state action against the same accounting firm, where the federal action alleged an injury related to the initial investment into the partnership, while the state action related solely to the accounting firm's post-investment actions in using a repudiated accounting method. *Ackerman v. Price Waterhouse*, 252 A.D.2d 179, 203-04 (1st Dep't 1998).

Getty Petroleum Corp. v. Island Transp. Corp., 862 F.2d 10 (2d Cir. 1988) is particularly instructive. In that case, a compensatory damage award which was intended to remedy trademark owner's injury stemming solely from defendants' contributory infringement did not take into account the trademark owner's injuries attributable to settling codefendants (downstream distributions of petroleum), and thus defendants could not invoke Section 15-108 to reduce their liability for compensatory damages by virtue of the settlement by the downstream distributors. As the Second Circuit held:

> As noted, the special verdict form asked the first jury to calculate Getty Petroleum's lost profits at the Middle Village and Garden City Park stations "as a result of the activities of Salem and/or Cahill." The compensatory damages assessed against appellants were intended to remedy Getty Petroleum's injury stemming solely from appellants' contributory infringement. *Because the jury's compensatory award did not take into account plaintiff's injuries attributable to the settling codefendants, Salem and Cahill may not invoke § 15–108 to decrease their liability for compensatory damages by virtue of these settlements. See Whitney v. Citibank, N.A.*, 782 F.2d 1106, 1118 (2d Cir. 1986) (where distinct injuries caused by different defendants, § 15–108(a) does not apply, and no grounds for offset exist).

Id. at 15-16 (emphasis added).

Courts also will make a distinction between injury and damages. In *Fox Paine & Co., LLC v. Equity Risk Partners, Inc.*, 2019 WL 5872535, at *8-9 (N.Y. August 23, 2019), *aff'd*, 189 A.D.3d 1365 (2d Dep't 2020), the New York Supreme Court denied a non-settling defendant's motion to compel production of settlement agreements for Section 15-108 purposes because even though there was an overlap in damages sought by Plaintiff (attorney fees) against the settling and non-settling defendants, the plaintiff's claims involved separate acts by the defendants and separate theories of recovery.

Here, it is clear that the injury caused by Bodner is *not identical* to the injury caused by the Settling Defendants. The PPVA Parties' claims against [redacted] an entirely separate injury from Bodner's failure to correct PPVA's fraudulent overvalued NAV from the inside of Platinum Management. *See Ackerman,* 252 A.D.2d at 204 (injuries were not identical when conducted by same accounting firm at different points in time).

Similarly, it cannot be argued that the injuries caused by [redacted] are remotely similar to the injury caused by Bodner. There is absolutely nothing in the [redacted] had any hand in the overvaluation of PPVA's assets or were in any way associated with the valuation side of PPVA. [redacted]

Further, the injury caused by Bodner is separate from the injury caused by the Settling SDNY Defendants. [redacted], the scope of injuries alleged and damages sought against the Settling SDNY Defendants was *substantially* greater as compared to Bodner, and included schemes alleged both in the SAC – such as the numerous Second Scheme transactions meant to dissipate PPVA of its remaining valuable assets – as well as the injuries caused to PPVA due to [redacted].

Second, the Settling SDNY Defendants had different positions of authority in the Platinum/Beechwood structure, and thus the injuries caused by them are different from the injuries caused by Bodner. The primary reason for the comparatively low settlement payments from [redacted] is because it was learned through discovery that while these individuals had purported positions of authority, the ultimate decision making authority for PPVA was held by the three Platinum Partners: David Bodner, Murray Huberfeld and Mark Nordlicht. Trott Decl. at ¶ 26.

As for [redacted], while he held a similar position as Bodner within Platinum Management, it was made clear at trial that Bodner had independent authority to make unilateral decisions on behalf of PPVA and Platinum Management, such as Bodner's mandate at the January 2015 partners meeting that no partners would take money out of PPVA from that date forward. The specific injury caused by Bodner – depriving PPVA of his honest services to accurately report the NAV that Bodner personally believed was misstated – is an entirely separate injury from the injuries alleged against [redacted]. Accordingly, Section 15-108 does not apply to the Settling Defendants because they did not cause the same injury as David Bodner.

III. In the Event that the Court Deems an Offset Appropriate, the Court Should Apply the Analysis Set Forth in *Koch* and *Barkley*

In the event that this Court deems Bodner caused the "same injury" as the Settling Defendants, well-settled case law dictates that any offset should be minimal, given that there is no prospect of double recovery and given the significant damages alleged and uncollected against the Settling Defendants.

This case involves, at most, a partial overlap in damages claimed against the trial defendant and certain Settling Defendants. The PPVA Parties' claims against the Settling Defendants sought management/incentive fee damages, but also sought damages/claims never brought against Bodner or dismissed against him prior to trial. In such situations, this Court and other courts apportion the settlements to be sure that only those portions of the settlements attributable to the same injuries are used to offset the damages awarded in the Court. The goal is to be sure that the victim is justly compensated, and not short changed to the benefit of the tortfeasor.

In *Barkley*, the Eastern District of New York was faced with a similar situation in a case where Section 15-108 applied. The Eastern District held that where settlement with settling defendants was for injuries much larger in scope than against non-settling defendants, set-off on a dollar-for-dollar basis based on the amount of settlements was inappropriate. 848 F. Supp. 2d at 266-67. *Barkley* involved various defendants involve in a broad house-flipping fraudulent scheme. *Id*. at 251. The Court further held that the non-settling defendants were only entitled to set-off to the extent that the economic harms covered by the settlement were "identical" to those proven at trial. *Id*. at 267. As stated by the Eastern District:

> Here, the scope of the settlements with some of the defendants is broader than the damages for which the jury found the non-settling defendants liable. In particular, some settlements covered release of federal and state discrimination claims, for which plaintiffs claimed substantial non-economic damages, in addition to economic harms. (*See* Tr. XV at 78 (asking the jury to award $200,000 to each plaintiff for emotional damages).) The fraud, conspiracy-to-defraud, and deceptive practices claims, for which the defendants were found liable at trial, allowed plaintiffs to recover damages only for economic harms. Some of the settlements,

> therefore, were not entirely for the "same injury," as required for application of Section 15-108.

Id. at 266.

Koch is a key case on this issue. In *Koch*, the plaintiff alleged injuries due to his purchase of counterfeit bottles of wine in connection with a scheme perpetrated by various defendants. The critical issue was that one of the settling defendants had settled on a claim much larger in scope – the sale of more bottles of counterfeit wine – than the case alleged against the non-settling defendant. The Southern District in *Koch* provided an analysis that is instructive in these type of situations and should be applied here:

> It does not automatically follow, however, that a 100–percent reduction of the Zachys settlement amount is required by § 15–108. Under New York law, the trial court must "make an independent determination of what the proper apportionment of settlement proceeds should be, based on the monetary value of each cause of action." *Andrulonis,* 924 F.2d at 1225 (citing *Casey*, 119 A.D.2d at 367, 507 N.Y.S.2d at 163)…
>
> Faced with analogous circumstances — *i.e.,* where a prior settlement covered overlapping but broader injuries — Judge Kiyo Matsumoto of the Eastern District of New York has applied a proportional reduction to the setoff amount under § 15–108. *See Barkley v. United Homes, LLC,* 848 F. Supp. 2d 248, 267 (E.D.N.Y. 2012), *aff'd,* 557 F. App'x 22, 2014 WL 305480 (2d Cir. 2014). This approach is appropriate here in light of the text and purposes of the statute. . .
>
> The purchase price of the 36 bottles of wine at issue at the time of the Zachys settlement was $621,559. The purchase price of the 24 bottles at issue in the trial was $355,811. The latter is 57.245% of the former. When that same percentage is applied to the $250,000 paid by Zachys in the settlement, the result is $143,112. That number provides the best measure under § 15–108 of "the amount of the consideration paid for" the release of Zachys for the "same injury" as the claims that went to trial.

14 F. Supp. 3d at 271-72:

As set forth above, an offset under *Koch* and *Barkley* is calculated by (i) calculating the percentage of the damages verdict against the amount alleged against a Settling Defendant; and (ii) applying that percentage to the settlement amount paid by the Settling Defendant to calculate

the amount of the Section 15-108 offset. The following provides the offset amount for each Settling Defendant (excluding Baker Botts, due to there being no overlap in the damages sought whatsoever):

Settling Defendant	Damages Sought by JOLs	Verdict % of Claim Amount	Settlement Amount	Offset Amount[5]
[redacted]	$494.4 million	1.6%	[redacted]	$160,000
[redacted]	$494.4 million	1.6%	[redacted]	$5,400
[redacted]	$494.4 million	1.6%	[redacted]	$3,184
[redacted]	$494.4 million	1.6%	[redacted]	$5,600
[redacted]	$50.2 million	16.2%	[redacted]	$324,000
[redacted]	$153.2 million	5.3%	[redacted]	$124,550
[redacted]	$123.5 million	6.6%	[redacted]	$478,500
[redacted]	$314.2 million	2.6%	[redacted]	$273,000
			Total Offset Amount	$1,374,234

IV. Calculation of Judgment

The PPVA Parties are entitled to prejudgment interest as a matter of substantive law (9% per annum simple interest), calculated from the date of Bodner's breach. Any Section 15-108 offsets are to be applied only after the addition of pre-judgment interest. N.Y. C.P.L.R. 5001-5004; *Conway v. Icahn & Co., Inc.*, 16 F.3d 504, 512 (2d Cir. 1994); *see also In re Joint E. Dist. & S. Dist. Asbestos Litig.*, 18 F.3d 126, 131-33 (2d Cir. 1994) (calculating pre-judgment interest prior to application of offsets due to settlements); *Huang v. Sy*, 62 A.D.3d 660, 661-62 (2d Dep't 2009) (plaintiff is entitled to pre-judgment interest as a matter of law on breach of fiduciary duty claim).

The PPVA Parties submit that prejudgment interest should begin accruing as of January 1, 2014. The Damages Verdict (ECF No. 789) makes clear that the damages awarded against Bodner were not on account of the 2012 NAV. The date of January 1, 2014 is a reasonable date given that

[5] Calculated by Applying the Verdict % to the Settlement Amount for each Settling Defendant

it would fall after an entire year of monthly NAV statements through 2013 that the PPVA Parties alleged were misstated (and the jury did not dispute), and immediately prior to the payment of incentive fees to Bodner and other Platinum Management owners at the beginning of 2014. The following provides the calculation of prejudgment interest:

Year	**Interest Amount**
2014	$733,554.16
2015	$733,554.16
2016	$733,554.16
2017	$733,554.16
2018	$733,554.16
2019	$733,554.16
2020	$733,554.16
2021	$733,554.16
2022	$733,554.16
2023	$118,574.66 through February 28, 2023 ($2,009.74 per diem)
Total Interest Amount:	$6,720,562.10
Total Damages Amount:	**$14,871,163.90**
Total Judgment Amount If Offset is Applied:	**$13,496,929.90**

CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that the Court enter Judgment against David Bodner in the amount of $14,871,163.90, and grant any additional relief that this Court deems just and proper.

Dated: New York, New York
February 2, 2023

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