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September 22, 2023

VIA ECF

The Hon. Jed S. Rakoff
 United States District Court, Southern District of New York
 500 Pearl Street, Room 1340
 New York, New York 10007

Re: *Trott v. Platinum Mgmt. (NY) LLC et al.*, Nos. 18-cv-6658 (JSR), 18-cv-10936 (JSR)

Dear Judge Rakoff:

As counsel for defendant David Bodner, I write to notify this Court of five numeric errors in the Court’s Opinion and Order entered on Wednesday in the above-captioned litigation (ECF No. 840)¹ (the “Order”), and to provide the correct numbers as listed in the JOLs’ Memorandum of Law in Opposition to Defendant’s Motion Pursuant to GOL 15-108 (ECF No. 825) (Ex. A).

After stating its intention to use a \$50.2 million numerator to determine its “percentage of the total damages sought by the plaintiffs against each of the co-defendants” (ECF No. 840 at 11), the Court incorrectly derived an across-the-board percentage of 10.15 percent, comparing \$50.2 million to “defendants’ total damages exposure of \$494 million.” (*Id.* at 12.)² This statement is incorrect with respect to five settling defendants—Baker Botts LLP, BDO LLP, Blank Rome LLP, CohnReznick LLP, and Bernard Fuchs—who did not face claimed damages exposure of \$494 million.

The exclusive sources of plaintiffs’ “damages exposure claims” for all settling defendants are the JOLs’ memorandum (ECF No. 825) and the accompanying Declaration of Martin Trott (ECF No. 827). In their memorandum, the JOLs state the following claimed damages exposure for each of these five settling defendants (*see* ECF No. 825 at 24):

- Baker Botts: \$80 million (*id.* at 14);
- BDO: \$153.2 million (*id.* at 10);
- Blank Rome: \$314.2 million (*id.* at 12);
- CohnReznick: \$123.5 million (*id.* at 11);

¹ All ECF citations are to the docket for No. 18-cv-10936 (JSR).

² The Court further wrote: “The 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.’” *Id.* at 9-10 (quoting *Andrulonis v. United States*, 924 F.2d 1210, 1226 (2d Cir. 1991)).

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- Fuchs: \$50.2 million (*id.* at 24).³

Based on the JOLs' claimed damages exposure for each of these five settling defendants, the correct derived percentages, respectively, are:

- Baker Botts: **62.75 percent** (\$50,200,000 / \$80,000,000) (settlement date: Dec. 23, 2019);
- BDO: **32.77 percent** (\$50,200,000 / \$153,200,000) (settlement date: Oct. 31, 2022);
- Blank Rome: **15.98 percent** (\$50,200,000 / \$314,200,000) (settlement date: Oct. 26, 2022);
- CohnReznick: **40.65 percent** (\$50,200,000 / \$123,500,000) (settlement date: Oct. 22, 2020);
- Fuchs: **100 percent** (\$50,200,000 / \$50,200,000) (settlement date: Nov. 16, 2022).

Applying the corrected percentages to the Court's list (ECF No. 840 at 11-13 & n.7) results in a corrected chart as follows (Ex. B):

Settling Party	Claim Amount	Offset Percentage	Settlement	Principal Offset	Days Since	9% Annual	Total Offset
		Against \$50,200,000	Amount		Settlement	Interest Offset	
Baker Botts	\$80,000,000	62.75%	\$1,750,000	\$1,098,125.00	1367	\$370,143.34	\$1,468,268.34
BDO	\$153,200,000	32.77%	\$2,350,000	\$770,039.16	324	\$61,518.75	\$831,557.91
Beechwood	\$494,400,000	10.15%	\$4,459,825.13	\$452,838.23	1213	\$135,442.05	\$588,280.29
Blank Rome	\$314,200,000	15.98%	\$10,500,000	\$1,677,593.89	329	\$136,091.93	\$1,813,685.82
CohnReznick	\$123,500,000	40.65%	\$8,500,000	\$3,455,060.73	1063	\$905,604.55	\$4,360,665.28
Fuchs	\$50,200,000	100.00%	\$2,000,000	\$2,000,000.00	308	\$151,890.41	\$2,151,890.41
Huberfeld	\$494,400,000	10.15%	\$10,000,000	\$1,015,372.17	509	\$127,436.16	\$1,142,808.33
Landesman	\$494,400,000	10.15%	\$337,500	\$34,268.81	1322	\$11,170.69	\$45,439.50
Saks	\$494,400,000	10.15%	\$199,000	\$20,205.91	1297	\$6,462.01	\$26,667.92
				Verdict Amount	Days of Pre-Judgment Interest	9% Annual Interest	Totals
Bodner Verdict Liability				\$8,150,601.80	3518	\$7,070,256.28	\$15,220,858.08
Total Settling-Party Offsets							\$12,429,263.80
Net Liability After Offsets							\$2,791,594.28

Thus, using this Court's methodology and list, but the corrected interest and actual damages-exposure claims asserted by the JOLs, the amount of GOL 15-108 credit to Bodner, including interest, would be \$12,429,263.80 as of September 20, 2023. Subtracting this from

³ Notably, the Court granted an identical partial summary judgment in favor of Fuchs as Bodner, dismissing all claims (including Agera) "to the extent they [we]re not predicated on the NAV overvaluations" (ECF No. 624 at 42), leaving only the JOLs' same \$50.2 million overvaluation claim against Fuchs and Bodner, which Bodner faced at trial and which Fuchs settled two weeks before trial on November 16, 2022.

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\$15,220,858.08 as of September 20, 2023, the resulting judgment against Bodner would be **\$2,791,594.28**—not \$10,463,736.27. The Excel spreadsheet from which this image is derived, including the underlying formulas, is enclosed with this letter for the Court's convenience.

Accordingly, we submit respectfully that, correcting the Court's list for interest and the JOLs' actual claimed damages exposure for each settling defendant, the net result is **\$2,791,594.28** for the reasons set forth above.

Sincerely,

A handwritten signature in black ink that reads "Eliot Lauer". The signature is written in a cursive style with a long horizontal flourish extending to the right.

Eliot Lauer

EXHIBIT A

**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),

Civil Action No. 18-cv-10936 (JSR)

Plaintiffs,

- against -

PLATINUM MANAGEMENT (NY) LLC, *et al.*,

Defendants.

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

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after January 1, 2013 through July 2014; (ii) \$15.5 million 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.

1. BDO

BDO served as auditor for PPVA for, among other years, fiscal years 2012 and 2013. Trott Decl. at ¶ 7. On December 4, 2020, the PPVA Parties filed a Demand for Arbitration against BDO (the "**BDO Claim**"), alleging that BDO negligently breached its engagement agreements with PPVA in connection with BDO's audit of PPVA's financial statements for fiscal years 2012 and 2013. Declaration of Julia B. Mosse, dated January 12, 2023 ("**Mosse Decl.**"), Ex. 8 at ¶¶ 36-39. Specifically, the PPVA Parties alleged that BDO negligently breached the terms of its engagement letters with PPVA by failing to identify the obvious flaws in valuation materials prepared by

Platinum Management and Sterling Valuation Group (PPVA's third-party valuation agent) in connection with the valuation of GGO, Black Elk and China Horizon. BDO Claim at ¶ 36.

The PPVA Parties sought at least **\$153.2 million** in damages from BDO in connection with its negligent breach of contract and failure to adhere to GAAP requirements, including but not limited to (i) \$93.2 million in management and incentive fees; (ii) the payment of redemptions to investors; (iii) \$7 million in damages in connection with the Black Elk Scheme; and (iv) \$35 million in damages in connection with the Black Elk Bond Buyback. BDO Claim at ¶ 44. The BDO claim statement was never revised, no aspect of even the prima facie validity of PPVA's claims against BDO or the relevant damages were addressed or adjudicated by the arbitral panel or otherwise, and PPVA and BDO never had discovery in the arbitration. Trott Decl. at ¶ 9.

On October 31, 2022, the PPVA Parties and BDO entered into a Settlement (the "**BDO Settlement**") pursuant to which BDO agreed to pay the PPVA Parties \$2.35 million in exchange for a release of any and all claims asserted by the PPVA Parties in the arbitration. Mosse Decl. Ex. 9, BDO Settlement ¶¶ 3.1, 5.1; Trott Decl. at ¶ 10.

2. CohnReznick

CohnReznick was PPVA's independent auditor for the year ended December 31, 2014. Trott Decl. at ¶ 11. In anticipation of mediation, the PPVA Parties provided CohnReznick with an exemplar draft complaint (the "**CohnReznick Draft Complaint**") in which the PPVA Parties asserted claims for breach of contract, professional negligence/malpractice, negligent misrepresentation, and unjust enrichment in connection with the CohnReznick audit of PPVA's 2014 financial statements. Mosse Decl. at Ex. 10. No arbitration or litigation was ever commenced against Cohn Reznick and no aspect of the Cohn Reznick claims were ever adjudicated by a Court or arbitral panel. No revisions were ever made to the unfiled CohnReznick Complaint and no

analysis of breach of timing causation was ever performed. No discovery was had against CohnReznick. The complaint was in fact and intended to be an exemplar only of the scope of the Platinum frauds and CohnReznick's potential proximate role. Similar to BDO, the injury alleged to be caused by CohnReznick is the failure of the auditing firm to comply with the requirements of GAAP due to its approval of PPVA's 2014 financial statements "in the face of substantial and material accounting issues, fraud risks, and overvalued asset balances critical to the determination of whether PPVA's financial statements fairly conveyed information in accordance with GAAP." CohnReznick Draft Complaint at ¶ 128; Trott Decl. at ¶ 12-13.

The PPVA Parties sought \$123.5 million in proposed damages from CohnReznick in connection with its negligent breach of contract and failure to adhere to GAAP requirements, including (i) \$2 million in fees paid to CohnReznick on an unjust enrichment theory; (ii) \$6.7 million in management fees paid after CohnReznick issued the audit in September 2015; (iii) \$18 million in redemptions paid in or after September 2015 to PPVA investors; (iv) \$93.8 million in damages in connection with the Agera Sale; and (v) \$3.1 million in damages in connection with the March 2016 Restructuring. CohnReznick Complaint at p. 51; Trott Decl. at ¶ 14.

On October 22, 2020, the PPVA Parties and CohnReznick entered into a Settlement Agreement (the "**CohnReznick Settlement**") pursuant to which CohnReznick agreed to pay the PPVA Parties a total settlement amount of \$7.25 million in consideration for the JOLs' *pre-suit/pre-arbitral* release of CohnReznick from any and all claims (which amount was lowered due to CohnReznick's settlement with PPVA's feeder funds). Mosse Decl. Ex. 11, CohnReznick Settlement ¶¶ 1.A, 2; Trott Decl. at ¶ 15.

3. **Blank Rome**

Blank Rome was PPVA's and Beechwood's primary transaction counsel from 2008 and onwards, often involved in papering the various transactions outlined in the SAC. Trott Decl. at ¶ 16. On March 29, 2021, the PPVA Parties filed an action against Blank Rome in the Pennsylvania Court of Common Pleas, which was later stayed in favor of arbitration among the parties. In their complaint, the PPVA Parties' asserted claims against Blank Rome for breach of contract, legal malpractice, breach of fiduciary duty and aiding and abetting breach of fiduciary duty (the "**Blank Rome Complaint**"). Mosse Decl. at Ex. 12. Specifically, the PPVA Parties alleged that Blank Rome repeatedly failed to "comply with its professional responsibilities by acting against the interests of its longstanding client, PPVA and instead acted in the interest of other and adverse clients such as Beechwood. Blank Rome Complaint ¶ 1. Among other things, the Blank Rome Complaint alleges that Blank Rome (i) improperly acted as counsel for both PPVA and Beechwood on the various insider transactions among the parties relating to GGO, Implant and PEDEVCO; (ii) facilitated various transactions in connection with the Black Elk Scheme and certain Second Scheme transactions such as the granting of Beechwood with security through the Montsant collateral account. Trott Decl. at ¶ 16.

In sum, the injury to PPVA caused by Blank Rome was the deprivation of the "reasonable skill and knowledge commonly possessed by an attorney" in connection with various insider transactions where Blank Rome failed to put the interests of its clients first. Blank Rome Complaint at ¶ 46. There is no allegation whatsoever in the Blank Rome Complaint that Blank Rome was involved with the overvaluation of PPVA's assets.

The PPVA Parties sought **\$314.2 million** in damages from Blank Rome in connection with its claims, including (i) \$6 million in fees paid to Blank Rome; (ii) \$93.2 million in management

and incentive fees paid to Platinum Management and its owners; (iii) \$43 million in connection with the Black Elk Scheme; (iv) \$35.5 million in connection with the Black Elk Bond Buyback; (v) \$4.6 million in connection with the Enven Settlement associated with the Black Elk Scheme; (vi) \$35 million in connection with the granting of security to Beechwood through the Montsant Collateral Account; (vii) \$3.1 million in connection with the March 2016 repurchase of Navidea shares; and (viii) \$93.8 million in connection with the Agera Sale. Blank Rome Complaint at ¶¶ 293-300; Trott Decl. at ¶ 17.

Blank Rome removed the matter to a JAMS arbitration per the Blank Rome engagement letter. Following the removal, no substantive rulings were ever issued by the arbitral panel, the parties never engaged in discovery and the Blank Rome Complaint was never adjudicated in any respect. Trott Decl. at ¶ 18.

On October 26, 2022, the PPVA Parties and Blank Rome entered into a Settlement Agreement (the “**Blank Rome Settlement**”) pursuant to which Blank Rome agreed to pay the PPVA Parties \$10.5 million in consideration for a general release. Mosse Decl., Ex. 13 at ¶¶ 1.A, 3; Trott Decl. at ¶ 19.

4. Baker Botts

Baker Botts served as PPVA’s litigation counsel in connection with various matters arising out of the Black Elk Scheme from roughly August 2015 through August of 2016. Trott Decl. at ¶ 20. In November 2019, the PPVA Parties and Baker Botts engaged in mediation, during which the PPVA Parties submitted a draft exemplar complaint (the “**Baker Botts Draft Complaint**”) asserting claims against Baker Botts for professional negligence and breach of fiduciary duty. The JOLs alleged that Baker Botts represented PPVA in various litigation matters in the wake of the November 2012 Black Elk explosion as well as the Black Elk bankruptcy and had knowledge of

the fraudulent actions taken by Platinum Management in connection with the Black Elk Scheme. Baker Botts Draft Complaint at ¶¶ 2, 21, 42. The PPVA Parties further alleged that “Baker Botts was aware of the Black Elk Scheme, the relationship between PPVA and the Beechwood Entities, and other potentially nefarious PMNY behavior, but did nothing to stop it” and “Baker Botts’ silence and inaction, by failing to advise the Managers and innocent stakeholders and fiduciaries that what PPVA, PMNY and the Managers were doing or had done was fraudulent or unlawful, and by failing to withdraw as counsel, facilitated the subsequent conduct that resulted in millions of dollars in damages to PPVA.” *Id.* ¶¶ 43, 62.

Notably, the only compensatory damages sought by the PPVA Parties against Baker Botts were \$80 million in damages in connection with the Agera Sale. Trott Decl. at ¶ 21. There is no allegation in the Baker Botts complaint that Baker Botts was somehow involved in the overvaluation of PPVA’s assets, and the PPVA Parties did not seek fee damages from Baker Botts. The Baker Botts Draft Complaint was never filed and no arbitration or legal proceedings were ever commenced against Baker Botts. No discovery in relation to the Baker Botts claims was ever exchanged and no matter concerning Baker Botts was ever addressed or litigated in any court. *Id.* at ¶¶ 21-22.

On December 23, 2019, the PPVA Parties and Baker Botts entered into a Settlement Agreement (the “**Baker Botts Settlement Agreement**”) pursuant to which Baker Botts agreed to pay the JOLs \$1.75 million as consideration for the JOLs’ general release of Baker Botts from any and all claims relating to the legal services provided by Baker Botts. Mosse Decl. Ex. 15 at ¶¶ 1-2.6; Trott Decl. at ¶ 23.

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):

<u>Settling Defendant</u>	<u>Damages Sought by JOLs</u>	<u>Verdict % of Claim Amount</u>	<u>Settlement Amount</u>	<u>Offset Amount⁵</u>
Murray Huberfeld	\$494.4 million	1.6%	\$10 million	\$160,000
Uri Landesman	\$494.4 million	1.6%	\$337,500	\$5,400
Daniel Saks	\$494.4 million	1.6%	\$199,000	\$3,184
Beechwood	\$494.4 million	1.6%	\$350,000	\$5,600
Bernard Fuchs	\$50.2 million	16.2%	\$2 million	\$324,000
BDO	\$153.2 million	5.3%	\$2.35 million	\$124,550
CohnReznick	\$123.5 million	6.6%	\$7.25 million	\$478,500
Blank Rome	\$314.2 million	2.6%	\$10.5 million	\$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

EXHIBIT B

<u>Settling Party</u>	<u>Claim Amount</u>	<u>Offset Percentage Against \$50,200,000</u>	<u>Settlement Amount</u>	<u>Principal Offset</u>	<u>Days Since Settlement</u>	<u>9% Annual Interest Offset</u>	<u>Total Offset</u>
Baker Botts	\$80,000,000	62.75%	\$1,750,000	\$1,098,125.00	1367	\$370,143.34	\$1,468,268.34
BDO	\$153,200,000	32.77%	\$2,350,000	\$770,039.16	324	\$61,518.75	\$831,557.91
Beechwood	\$494,400,000	10.15%	\$4,459,825.13	\$452,838.23	1213	\$135,442.05	\$588,280.29
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Huberfeld	\$494,400,000	10.15%	\$10,000,000	\$1,015,372.17	509	\$127,436.16	\$1,142,808.33
Landesman	\$494,400,000	10.15%	\$337,500	\$34,268.81	1322	\$11,170.69	\$45,439.50
Saks	\$494,400,000	10.15%	\$199,000	\$20,205.91	1297	\$6,462.01	\$26,667.92

	<u>Verdict Amount</u>	<u>Days of Pre- Judgment Interest</u>	<u>9% Annual Interest</u>	<u>Totals</u>
<u>Bodner Verdict Liability</u>	\$8,150,601.80	3518	\$7,070,256.28	\$15,220,858.08
<u>Total Settling-Party Offsets</u>				\$12,429,263.80
<u>Net Liability After Offsets</u>				\$2,791,594.28