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), Plaintiffs, v. PLATINUM MANAGEMENT (NY) LLC, *et al.*, Defendants.	No. 18 Civ. 10936 (JSR)

MEMORANDUM OF LAW OF DEFENDANT DAVID BODNER IN SUPPORT OF HIS MOTION *IN LIMINE* TO EXCLUDE FROM JURY INSTRUCTIONS AND TO CONSOLIDATE DUPLICATIVE CLAIMS

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Defendant David Bodner respectfully submits this memorandum of law in support of his motion *in limine* to exclude from the Court's instructions to the jury seven of the eight claims asserted by the Joint Official Liquidators ("JOLs") of Platinum Partners Value Arbitrage Fund, L.P. ("PPVA"), as they are entirely duplicative. Specifically, the JOLs' claims for fraud (Count IV), constructive fraud (Count V), aiding and abetting breach of fiduciary duty (Counts III and VII), and aiding and abetting fraud (Counts VI and VIII) are entirely duplicative of their claims for breach of fiduciary duty (Counts I and II), which are themselves duplicative of each other. Thus, the JOLs' claims should be consolidated so that the jury will be charged only on one claim of breach of fiduciary duty.

PRELIMINARY STATEMENT

This motion arises from the Court's April 21, 2020 Opinion and Order (ECF No. 624)[1] (the "April 21 Decision") on Bodner's motion for summary judgment. In the April 21 Decision, the Court granted summary judgment on all claims asserted against Bodner, except to the extent that such claims are premised on the theory that Bodner was a fiduciary of PPVA and that he breached his fiduciary duty by failing to address his knowledge that PPVA's net asset value ("NAV") was fraudulently inflated, and, as a result, PPVA sustained damage. As a consequence of this narrowed focus, the eight remaining counts asserted against Bodner in the JOLs' Second Amended Complaint (ECF No. 285) ("SAC") are all predicated upon the same omission and all seek the same relief. Namely, the claims for breach of fiduciary duty, aiding and abetting breach of fiduciary duty, fraud and constructive fraud, and aiding and abetting fraud all require the JOLs to establish at trial that Bodner: (i) owed a fiduciary duty to PPVA; (ii) had actual knowledge of the allegedly fraudulent NAV overvaluation; (iii) intentionally failed to

[1] ECF citations refer to the *Trott* docket, 18 Civ. 10936. Capitalized terms not defined herein shall have the meanings ascribed to them in the SAC.

address the overvaluation; and (iv) caused damaged to PPVA. *See* April 21 Decision at 22-33. Moreover, the JOLs seek identical relief – "judgment awarding them compensatory damages in an amount to be determined at the trial of this action, together with interest at the statutory rate" and "punitive damages" – in connection with each of the eight claims. SAC ¶¶ 772-73, 780-81, 790-91, 812-13, 836-37, 844-45, 856-57, 867-68.

Thus, the eight remaining counts against Bodner are duplicative, and charging the jury on each of them will serve no purpose other than to create confusion, risk a conflicting and illogical compromise verdict, create inefficiencies at trial, and unduly prejudice Bodner. Because the JOLs' claims can be consolidated into one non-duplicative claim for breach of fiduciary duty without any adverse effect on the JOLs' potential recovery, evidence, or argument at trial, elimination of the duplicative claims will streamline the Court's management of the trial, minimize confusion for the jury, and eliminate unfair prejudice. As set forth below, courts within this district recognize that it is within the province of the Court to exclude from the jury's consideration merely cumulative claims. For these reasons, as explained in more detail below, Bodner respectfully requests an Order that: (i) the jury will not be charged on the JOLs' claims for fraud, constructive fraud, aiding and abetting breach of fiduciary duty, and aiding and abetting fraud; and (ii) the JOLs' two breach of fiduciary duty claims will be consolidated into a single claim, and the jury will be charged on one count of breach of fiduciary duty.

THE APRIL 21 DECISION

In the April 21 Decision, the Court granted summary judgment in favor of Bodner on "(a) the Sixteenth Count (civil conspiracy) in its entirety and (b) parts of the First and Second Counts (breach of fiduciary duty), parts of the Fourth and Fifth Counts (fraud and constructive fraud), parts of the Third, Sixth, Seventh, and Eighth Counts (aiding and abetting breach of fiduciary duty and fraud), to the extent that these eight Counts are not premised on the

overvaluation of PPVA's net asset value ('NAV')." April 21 Decision at 2 (emphasis added).[2]

With respect to the JOLs' claims for breach of fiduciary duty, the Court concluded that there was a genuine dispute of material fact as to whether Bodner: (1) owed a fiduciary duty to PPVA; and (2) "breached that fiduciary duty by failing to disclose the overvaluations of PPVA's NAV when he admittedly had knowledge of the overvaluations" and/or "despite such knowledge, [] allegedly took unearned fees and distributions . . . based on such overvaluations." April 21 Decision at 25-27.

With respect to the claims for fraud and constructive fraud, the Court noted that "pure omissions are actionable when defendant had an affirmative duty to disclose that information to plaintiff, such as when defendant owes a fiduciary duty to plaintiff or under the special facts doctrine where defendant has superior knowledge to plaintiff[,]" and that a "constructive fraud claim modifies the claim for actual fraud by replacing the scienter requirement with the requirement that Defendants maintained either a fiduciary or confidential relationship with Plaintiff." *Id.* at 30 (citations and quotation marks omitted). The Court then reasoned that "[o]n the one hand, no evidence here shows that Bodner himself authored the misrepresentations regarding PPVA's NAVs, or that he was on the valuation committee, or that he interacted with outside auditors or valuation service providers for PPVA." *Id.* However, "on the other hand . . . pure omission may here be actionable, because Bodner might have had the obligation, as a fiduciary, to disclose the fraudulent nature of such valuations to PPVA, from which he was receiving excessive management fees and distributions." *Id.* Thus, the Court concluded that "for substantially the same reason as in the context of the claim for breach of

[2] The Court also found that "no evidence connects Bodner to any of the more specific self-dealing transactions at issue in this action," including the "Black Elk scheme," the "Montsant transactions," and the "Agera sale" and, therefore, concluded that plaintiffs' claims could not be premised on those transactions. *Id.* at 27, 31, 33.

fiduciary duty, the Court grants summary judgment in favor of Bodner on portions of the claims for fraud and constructive fraud that are not premised on the overvaluations of PPVA's NAVs, but denies the motion in all other respects." *Id.* at 31 (emphasis added).

With respect to the claims for aiding and abetting fraud, the Court recognized that "[b]ecause the same activity is alleged to constitute the primary violation underlying both claims," the claims "overlap[] substantially[.]" *Id.* at 32 (citations and quotation marks omitted) (emphasis added). The Court further recognized that the analysis of the aiding and abetting claims "largely follows from the [] analysis of Bodner's motion on the claims for breach of fiduciary duty, fraud, and constructive fraud." *Id.* The Court concluded that "the inaction of an aider and abettor is actionable [as substantial assistance] when the aider and abettor has an affirmative duty to act or has a fiduciary duty to plaintiff, as possibly applicable here." *Id.* at 32

Finally, the Court dismissed the civil conspiracy claim in its entirety. The Court explained that "plaintiffs' conspiracy claim is, on any scenario, entirely duplicative of their aiding and abetting claims, and thus the Court grants summary judgment in favor of Bodner on the conspiracy claim for administrative purposes." *Id.* at 33-34.

ARGUMENT

I. THIS COURT MAY EXERCISE ITS DISCRETION TO CONSOLIDATE DUPLICATIVE CLAIMS AND STREAMLINE ITS INSTRUCTIONS TO THE JURY

Courts within the Second Circuit have recognized that it is well within the province of the trial court to consolidate duplicative claims so that the jury is charged only on non-duplicative claims. For example, in *Scott v. The Dime Savings Bank of New York*, 886 F. Supp 1073, 1077 (S.D.N.Y. 1995), the case entered trial with plaintiffs having asserted 13 claims against the defendant. Judge Chin determined at the outset of trial that the 13 claims "were duplicative and could be organized into three claims: fraud, breach of fiduciary duty and

negligence." *Id.* Thus, Judge Chin "advised the parties that [he] would only charge the jury on those three claims." *Id.* Similarly, in *Zamora v. North Salem Cent. Sch. Dist.*, 414 F. Supp. 2d 418, 427 (S.D.N.Y. 2006), the court held that it would exercise supplemental jurisdiction over state claims arising from the same nucleus of operative facts as the federal claims. Recognizing the potential for duplication, however, the court stated that "[t]o the extent [the state law] claims are duplicative of the federal claims, the Court may conclude at the end of trial not to submit them to the jury." *Id.*

That duplicative claims should be consolidated and not submitted to the jury is consistent with the well-established principle that claims that "arise[] from the same conduct and involve[] no distinct damages" may be dismissed as duplicative. *Seippel v. Jenkens & Gilchrist, P.C.*, 341 F. Supp. 2d 363, 376 (S.D.N.Y. 2004) (holding that plaintiffs' breach of fiduciary duty claim, breach of contract claim and negligent misrepresentation claim were each duplicative of their legal malpractice claim and should be dismissed); *see also NetJets Aviation, Inc. v. LHC Commc'ns, LLC*, 537 F.3d 168, 175 (2d Cir. 2008) (noting that "[t]wo claims are duplicative of one another if they 'arise from the same facts . . . and do not allege distinct damages,'" but declining to dismiss account stated claim as duplicative of breach of contract claim where plaintiff's potential recovery was greater with breach of contract than with account stated); *Interventure 77 Hudson LLC v. Halengren*, Index No.: 653913/2013, 2018 N.Y. Misc. LEXIS 1851, at *30-*31 (Sup. Ct. N.Y. Cnty. May 14, 2018) (dismissing claims for fraud, negligence and unjust enrichment as duplicative of a breach of fiduciary duty claim where the claims "each allege the same acts or omissions, and claim the same injuries and damages as plaintiffs' fiduciary duty claims."), *aff'd*, 172 A.D.3d 481, 481-82 (1st Dep't 2019) (the motion court "correctly dismissed plaintiffs' fraud claim as duplicative of the breach of fiduciary duty claim,

as plaintiffs' fraud allegations are subsumed in the allegations of wrongdoing that constitute the alleged breach of fiduciary duty." (citing *Pai v Blue Man Group Publ., LLC*, 151 A.D.3d 456 (1st Dep't 2017) ("inasmuch as plaintiff's fraud claim was duplicative of the breach of fiduciary duty claim, it was properly dismissed"))). Indeed, in its April 21 Decision, this Court dismissed the JOLs' civil conspiracy claim against Bodner "for administrative purposes" on the basis that it was "entirely duplicative" of the JOLs' aiding and abetting claims. April 21 Decision at 34.

In the criminal context, courts have recognized that the submission of multiple, duplicative counts to a jury may cause prejudice by suggesting that the defendant has engaged in more misconduct than is, in fact, alleged. *See United States v. Clarridge*, 811 F. Supp. 697, 702 (D.D.C. 1992) ("when an indictment charges numerous offenses arising from the same conduct it may falsely suggest to a jury that a defendant has committed not one but several crimes. Once such a message is conveyed to the jury, the risk increases that the jury will be diverted from a careful analysis of the conduct at issue. Compromise verdicts or assumptions that, with so many charges pending the defendant must be guilty on at least some of them, pose significant threats to the proper functioning of the jury system.") (internal citations and quotation marks omitted); *see also United States v. Reed*, 639 F.2d 896, 904 (2d Cir. 1981) ("The vice in multiplicity of charges is that it may lead to multiple sentences for the same offense and may improperly prejudice a jury by suggesting that a defendant has committed not one but several crimes.").

The same reasoning applies here. If the jury is instructed that there are eight claims against Bodner, it may falsely suggest to the jury that Bodner has engaged in multiple, different acts of misconduct. The reality is that, as a result of the April 21 Decision, the exact same alleged misconduct underlies all of the JOLs' remaining claims. In addition, allowing the jury to be charged on eight counts that are all predicated on the same conduct will be a waste of

time and could cause confusion or lead to an inconsistent verdict if the jury finds Bodner liable on some but not all claims. *See* Fed. R. Evid. 403 ("The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.").

II. MULTIPLE COUNTS AGAINST BODNER ARE ENTIRELY DUPLICATIVE OF THE REMAINING FIDUCIARY DUTY CLAIM

As set forth above, in the April 21 Decision, this Court held that the JOLs' breach of fiduciary duty, fraud, constructive fraud, and aiding and abetting claims could proceed to trial only to the extent that such claims are premised on Bodner's alleged intentional failure to disclose what he knew to be a fraudulent overvaluation of PPVA's NAV. *See* April 21 Decision at 2, 18, 26, 29, 31, 33. Because the Court limited the JOLs' claims in this manner, "the same activity is alleged to constitute the primary violation underlying both claims" for breach of fiduciary duty (Counts I and II) and fraud (Count IV). *Id.* at 32 (citations and quotation marks omitted). Likewise, the claims for aiding and abetting breach of fiduciary duty and aiding and abetting fraud (Counts III, VI, VII, and VIII) "overlap[] substantially" and the analysis of the aiding and abetting claims "largely follows from the [] analysis of . . . the claims for breach of fiduciary duty, fraud, and constructive fraud." *Id*. In fact, as a result of the April 21 Decision, there is no scenario in which a jury could conclude that Bodner is liable on one claim but not another. Indeed, the questions to the jury for a single breach of fiduciary duty claim will be identical to the questions to the jury on each of the duplicative seven claims, *i.e.*, was Bodner a fiduciary, did he acquire actual knowledge that PPVA's NAVs were fraudulently inflated, did he breach his fiduciary duty by failing to address the fraudulent NAVs, and did his breach cause damage to PPVA.

The four aiding and abetting claims—two for aiding and abetting fraud, and two for aiding and abetting breach of fiduciary duty—are also duplicative of each other. There is no purpose in having two counts for each aiding and abetting claim, where the sole distinction is that one is against Bodner in his capacity as a "Platinum Defendant" and one is against Bodner in his capacity as a "Beechwood Defendant." There is no distinction between the two, and both turn on the same alleged fiduciary relationship between Bodner and PPVA. Further, in light of the April 21 Decision, there is no longer a distinction between Bodner's alleged conduct that forms the basis of the primary and secondary liability claims. Both are based on his alleged failure to act when he allegedly owed a fiduciary duty to PPVA. *See* April 21 Decision at 32. Thus, there is no scenario in which the elements of a claim for breach of fiduciary duty or fraud would be satisfied and where the elements of a claim for aiding and abetting breach of fiduciary duty or aiding and abetting fraud would not also be satisfied.[3]

[3] In this regard, this case is distinguishable from *Loreley Fin. (Jersey) No. 3 Ltd. v. Wells Fargo Secs., LLC*, No. 12-cv-3723 (RJS), 2016 U.S. Dist. LEXIS 135909, at *23 (S.D.N.Y. Sept. 29, 2016), cited in the April 21 Decision in support of the dismissal of the JOLs' civil conspiracy claim as duplicative of the aiding and abetting claims. In *Loreley*, Judge Sullivan declined to dismiss plaintiffs' aiding and abetting fraud claim, which defendants argued "impermissibly duplicate[d] the[] fraud claim." *Id.* at *20. The court noted that "Plaintiffs may plead aiding and abetting fraud in the alternative to their underlying fraud claim," and "New York courts have been particularly reluctant to dismiss aiding and abetting claims at the pleading stage, so long as plaintiffs do not merely allege that defendants aided and abetted [their] own fraud but rather, premise the aiding and abetting claims on different conduct." *Id.* at *20-21 (internal citations and quotation marks omitted). Analyzing the allegations in the complaint, the court concluded that "notwithstanding the overlap between the fraud and aiding and abetting claims, Plaintiffs also allege acts of substantial assistance that are distinct from the alleged misrepresentations and omissions that are actionable under Plaintiffs' claim for fraud." *Id.* at *21; *see also Neogenix Oncology, Inc. v. Gordon*, 133 F. Supp. 3d 539, 553 (E.D.N.Y. 2015) (declining to dismiss aiding and abetting breach of fiduciary duty claim as duplicative of breach of fiduciary duty claim "[b]ecause the aiding and abetting claim is premised on different conduct than the breach of fiduciary duty claim" and "[u]nder New York law, courts will dismiss claims that are entirely duplicative when they are premised on the same conduct and seek the same relief."). Here, not only is the case no longer at the pleading stage, but unlike *Loreley*, the JOLs' aiding and abetting claims are not premised on conduct different from the fraud or breach of fiduciary duty claims.

There is also complete overlap between the JOLs' two breach of fiduciary duty claims (Counts I and II) and the JOLs' fraud claim (Count V). *See* April 21 Decision at 32 ("the same activity is alleged to constitute the primary violation underlying both claims" for breach of fiduciary duty and fraud). Where, as here, "plaintiffs' fraud allegations are subsumed in the allegations of wrongdoing that constitute the alleged breach of fiduciary duty," the fraud claim is duplicative of the breach of fiduciary duty claim. *Interventure*, 172 A.D.3d at 481-82.

Finally, with respect to the JOLs' constructive fraud claim (Count IV), as the Court noted in the April 21 Decision, the elements of constructive fraud are the same as the elements of fraud, except that "a constructive fraud claim modifies the claim for actual fraud by replacing the scienter requirement with the requirement that Defendants maintained either a fiduciary or confidential relationship with Plaintiff." April 21 Decision at 30. Because the fraud claim (Count V) against Bodner is based on a theory of intentional omission of material information when he had an alleged duty to speak due to his alleged fiduciary relationship with PPVA, the fraud claim and constructive fraud claim are based on the same failure to act, and the jury will need to make the exact same determinations in connection with both claims.

Eliminating the duplicative fraud, constructive fraud, aiding and abetting fraud and aiding and abetting breach of fiduciary duty claims leaves two counts of breach of fiduciary duty (Counts I and II). These two counts are identical, except that one alleges a breach of the duty of care and good faith (Count I) and the other alleges a breach of the duty of loyalty/self-dealing (Count II). Both claims will require the jury to find that Bodner engaged in the same alleged misconduct—the intentional failure to address what he knew to be a fraudulently overvalued PPVA NAV when his fiduciary relationship with PPVA obligated him to address the

overvaluation—and both seek the same relief. Thus, the two counts should be consolidated and the jury should be charged on one count of breach of fiduciary duty.

In sum, as a result of the Court's April 21 Decision, the JOLs' fraud, constructive fraud, aiding and abetting fraud, and aiding and abetting breach of fiduciary claims are entirely duplicative of their breach of fiduciary duty claims, in that all claims are premised on the same conduct and seek the same relief. *See Seippel*, 341 F. Supp. 2d at 376. So too are the JOLs' two breach of fiduciary duty claims duplicative of each other. Accordingly, charging the jury on each of the eight counts would serve no practical purpose and would unnecessarily prolong the trial, waste judicial and party resources, and potentially confuse the jury and prejudice Bodner.

CONCLUSION

For the foregoing reasons, Bodner respectfully requests that this motion be granted and the Court enter an Order that: (i) the jury will not be charged on the JOLs' claims for fraud, constructive fraud, aiding and abetting breach of fiduciary duty, and aiding and abetting fraud; and (ii) the JOLs' two breach of fiduciary duty claims will be consolidated into a single claim, and the jury will be charged on one count of breach of fiduciary duty.

Dated: September 25, 2020
New York, New York

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