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 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)

PLAINTIFFS' OMNIBUS SUR-REPLY MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT DAVID BODNER'S THREE MOTIONS *IN LIMINE*

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Plaintiffs Martin Trott and Christopher Smith, as Joint Official Liquidators and Foreign Representatives of Platinum Partners Value Arbitrage Fund L.P. (in Official Liquidation) (the "**Joint Official Liquidators**") and Platinum Partners Value Arbitrage Fund L.P. (in Official Liquidation) ("**PPVA**" and collectively with the Joint Official Liquidators, the "**JOLs**") submit this omnibus sur-reply in opposition to the Three Motions *in Limine* ("**Motions *in Limine***") filed by Defendant David Bodner ("**Bodner**"). *See* (ECF No. 667, 669 and 671).[1]

ARGUMENT

A. Bodner's First Motion *in Limine* (Incentive Fees)

1. Incentive Fees Paid by PPVA in 2013

Bodner once again misconstrues Quintero's practical use of year-end 2012 net asset value ("**NAV**") as the starting point for his "straight line" damages calculation on Management Fees as a "concession" that PPVA's Black Elk investment and PPVA's overall NAV was properly valued as of December 2012. To be clear: that will not be Quintero's testimony, and his report (and that of the JOLs' other expert, Bill Post) makes that abundantly clear. Rather, the JOLs' experts and fact witnesses will testify that PPVA's NAV did not increase in 2012 but actually decreased, that Bodner had actual knowledge of the facts and circumstances concerning that decrease, and that no Incentive Fees should therefore have been paid on 2012 performance.

Bodner's attempt to recast Quintero's opinion into something more favorable is belied by the plainly stated conclusion of Quintero's Report: "all of the Incentive Fees charged to Platinum during the Damages Period constitute damages sustained by Platinum." (Quintero Report at ¶ 32) (emphasis added). Quintero calculates this amount to be $55.083 million during the damages period, which begins in December 2012. *Id*. Quintero's opinion above is supported, *inter alia,* by his valuation opinion of Black Elk. (Quintero Report at Exhibit 23). Quintero's Report discusses Black Elk's clear insolvency by the end of 2012 (with a negative shareholder value of more than $88 million), and the immediate negative effect that the Black Elk Explosion and the creation of the BEOF Funds had on

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[1] The ECF citations herein refer to the Court's docket in the *Trott* litigation. *See Trott, et al. v. Platinum Management (NY) LLC, et al.*, No. 1:18-cv-10936 (S.D.N.Y.).

the value of PPVA's investment. (Quintero Report at Exhibit 23.4). Based on this evidence, Quintero opines that PPVA's Series A and Series B common equity position in Black Elk (which comprised the vast majority of PPVA's Black Elk investment) **"likely were worthless in their entirety."** *Id*. Bodner cannot credibly argue that Quintero believes that PPVA's Black Elk investment was properly valued as of December 2012 in the face of these plain statements of Quintero's actual opinions.

For his part, Bill Post will testify to his opinion that: (i) Black Elk was a financially distressed company throughout 2012; (ii) the Black Elk Explosion had an immediate adverse impact on Black Elk's financial condition and the health and financial condition of PPVA's investment portfolio; and (iii) this is precisely the problem that the corrupt BEOF funds, seeded and owned by Bodner, Nordlicht and Huberfeld, was designed to "solve." Moreover, PPVA will call fact witnesses and introduce evidence regarding the Black Elk Explosion aftermath and the creation of the BEOF Funds, which will demonstrate that Platinum Management's consistent valuation of PPVA's Black Elk stake as of the end of 2012 was grossly overstated.[2]

Bodner attempts to sidestep all of this by arguing that all of these facts indicating that PPVA's Black Elk investment was valueless as of late 2012 were "public knowledge." But the public's knowledge is irrelevant. The Platinum Defendants, including Bodner, knew of the explosion, the precise nature of PPVA's holdings, both at the debt level and the various classes of equity, and resulting litigation's impact on the value of PPVA's subordinated equity interests in Black Elk. They

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[2] Bodner's Reply discounts these facts by claiming that they do not form the basis of "professional opinions of fair value." But that argument is a rehash of Bodner's previously denied *Daubert* motion. Bodner fundamentally misapprehends the distinction between the Management Fee analysis on the one hand, and Incentive Fees Analysis on the other. As Plaintiffs have consistently reminded Bodner, the calculation of appropriate management fees as a percentage of NAV bears a relation to fair value. By contrast, because the sole determinant of Incentive fees is whether NAV *did not increase* over the damages period, the question is not definitive valuation but rather an absence of increase. The testimony from PPVA expert and fact witnesses is that due to Black Elk's proportion of the PPVA portfolio, there was no increase in NAV throughout the damages period – 2012-2016. Hence, the amount of Incentive fees payable is always zero – as this Court recognized in the Daubert argument. *See* ECF No. 681 at Ex. 1.

knew, therefore, of the resulting write-down at PPVA that should have occurred.[3] Instead, in an attempt to "fix" the problem, Bodner and other Defendants formed the BEOF Funds with the express purpose of covertly avoiding the write-down, scrambled by contacting and falsely reassuring investors, and discussed the Black Elk disaster at hastily scheduled partner meetings attended by Bodner, all in an effort to create the illusion of false value in Black Elk and to buoy PPVA's false NAV. *See* (ECF No. 678 at 5-6). They did this while at the same time offering covert "guarantees" of the BEOF investment by PPVA, which was also unaccounted for in PPVA's NAV. All of this is more than enough to put PPVA's purportedly increased 2012 NAV squarely in play in this case, notwithstanding Bodner's suggestions otherwise. Further, Bodner's attempt to rely on the December 2012 third-party valuation report of Sterling Valuation is simply not credible given that Bodner admitted at his deposition that he never reviewed such reports. *See* November 5, 2019 Declaration of Richard A. Bixter, Jr. ("**Bixter Decl.**") Ex. 1. Rather, and as the JOLs will prove at trial, Bodner obtained insider information from his fellow Platinum Management partners and wielded his ultimate decision making authority concerning the strategic decisions for PPVA. Moreover, and at the macro level, PPVA will demonstrate that Bodner had actual knowledge by 2014 – which he conveyed to the partners at a dinner meeting in 2015 – that PPVA was mismarked, such that the Sterling and subsequent valuations were wrong. That Bodner "relied upon" PPVA's valuation process and the valuation reports that he knew were wrong is wholly invalid.

Bodner next argues that the remedy of disgorgement, which he seems to acknowledge is available in breach of fiduciary duty cases, is not the subject of his motion. But Bodner is seeking to exclude all evidence of incentive fees paid in 2013, at a time when the JOLs have alleged Bodner was continuing to breach his fiduciary duties due to the overvaluation of PPVA's assets. New York courts have consistently held that disgorgement damage is a remedy for breach of a fiduciary duty, including

[3] Even on Defendants' version of the facts, the BEOF capital injection was viewed as necessary from PPVA's perspective, while the $100 million BEOF raise was uncertain to occur and one of the largest capital raises ever engaged by Defendants. It is inconceivable that the Black Elk problem, which required extraordinary corrective action, did not negatively impact PPVA's NAV in 2012, before the BEOF capital raise occurred.

profits obtained, and compensation and expenses paid to a fiduciary <u>during the period of his disloyalty</u>. *See, e.g., Stanley v. Skowron*, 989 F. Supp. 2d 356, 363 (S.D.N.Y. 2013) (concluding that defendant who was not paid on a task-by-task basis must forfeit one hundred percent of the compensation he received during period of disloyalty). Bodner fails to answer, and cannot answer, how the JOLs' disgorgement damages are proved other than by introducing evidence of the amounts Bodner actually received during the period of his disloyalty.

2. <u>Damages Suffered by PPVA Subsequent to September 2014</u>

Despite Bodner's argument to the contrary, the damages available to the JOLs are not limited to the incentive fees paid by PPVA <u>***in cash***</u>, and the JOLs should be permitted to offer any evidence regarding incentive fees paid to Bodner after September 2014. This includes incentive fees paid in the form of "stock" (or more accurately, limited partnership interests). Quintero will testify that, due to the overvaluation of PPVA, approximately $55 million in unearned incentive fees were paid to Defendants either in cash payments <u>***or non-cash transfers of PPVA Limited Partnership Interests to their investor accounts***</u> with PPVA's onshore feeder fund.

While <u>*cash*</u> payments for incentive fees appear to have ended by the end of 2014, Bodner and the other Platinum Management owners continued to be paid incentive fees in the form of limited partner interests in PPVA's onshore feeder fund throughout the damages period, and, of course, Platinum Management was paid unearned management fees through August 2016, which fees are recoverable as direct damages. There is no basis to preclude Plaintiff from submitting such evidence at trial. Indeed, Bodner's reply concedes as much, by recasting this aspect of his motion as a "narrow" motion only addressing evidence of "cash withdrawals" made by Bodner after September 2014.

B. <u>Bodner's Third Motion *in Limine* (Punitive Damages)</u>

Bodner's Reply repeats his argument that, under *Icebox-Scoops, Inc. v. Finanz St. Honore, B.V.*, 715 F. App'x 54, 56 (2d Cir. 2017), the JOLs cannot seek punitive damages against Bodner because the JOLs' claims have their genesis in contract, namely the IMA and the LPA. *See* (Bodner Reply at pp. 10-11). Bodner is not a party to the IMA or the LPA, and the JOLs have not asserted a breach of contract claim against Bodner in connection with these agreements. As set forth at length

in the JOLs' Opposition to Bodner's Third Motion *in Limine*, this Court has previously held that the fraud and breach of fiduciary duty claims against Bodner are based on his *actual misconduct* in connection with the overvaluation scheme, not any contractual duty of Platinum Management. *See* (ECF No. 680 at 4-6).

The JOLs possess tort claims against Bodner independent of any contract claim and this alone should end the question of whether punitive damages are properly considered by the jury here. *Don Buchwald & Assoc. v. Rich*, 281 A.D.2d 329, 330 (1st Dep't 2001) ("The limitation of an award for punitive damages to conduct directed at the general public applies only in breach of contract cases, not in tort cases for breach of fiduciary duty."); *see also Vandashield Ltd v. Isaacson*, 146 A.D.3d 552, 555 (1st Dep't 2017) (diversion of assets to a secretly created competitive organization constitutes a breach of fiduciary duty and, thus, does not require an allegation of public harm to properly claim punitive damages); *Cf. Deng v. 278 Gramercy Park Grp., LLC*, No. 12 Civ. 7803(DLC)(JLC), 2014 WL 1016853, at *16 (S.D.N.Y. Mar. 14, 2014) (noting that under New York law, fraud claims trigger imposition of punitive damages).

Bodner next argues that, if the JOLs' claims do have their genesis in contract (they do not), then punitive damages are not appropriate because his misconduct did not target the public. First, Bodner misstates the law as to what constitutes a "public harm," inventing a standard that in order to target the public, the defendant's conduct must involve circumstances such as trading securities on public exchanges, a lack of sophisticated victims, and "socially significant institutions." (Bodner Reply Brief at p. 11). There is no such standard under New York law, where it is well-settled that a fraudulent business practice designed to harm multiple third parties is all that is required to satisfy the "public harm" requirement.[4]

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[4] *Huang v. iTV Media, Inc.*, 79 F. Supp. 3d 458 (E.D.N.Y. 2015) and *Stichting Pensioenfonds ABP v. Credit Suisse Grp. AG*, 2012 N.Y. Misc. LEXIS 5996 (N.Y. Sup. Ct. Nov. 30, 2012) are both unavailing with respect to Bodner's "public harm" argument. In *Huang*, an individual employee (plaintiff) brought civil claims against his former employer iTV Media, including breach of contract and fraud, based upon promises allegedly made to him before he was hired. As summarized by the Court: "In short, plaintiff alleges that defendants—various iTV entities and their President and Chief Executive Officer, Song Lin—promised him certain responsibilities and compensation in his new

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In *Walker v. Sheldon*, the New York Court of Appeals held that in an action to recover damages for fraudulently inducing plaintiff to enter into a publishing contract, the trial court correctly concluded that if a plaintiff was able to prove that the defendant company and its officers were engaged in carrying on a larcenous scheme to trap "generally the unwary," a jury would be justified in granting punitive damages due to a fraud aimed at the public. *Walker v. Sheldon*, 10 N.Y.2d 401, 405 (1961) (holding that punitive damages may be awarded where fraud is aimed at the public). A fraudulent business practice that is imposed on multiple customers may be considered to be a harm to the public. *See Pludeman v. N. Leasing Sys., Inc.*, 837 N.Y.S.2d 10 (1st Dep't 2007), *aff'd*, 10 N.Y.3d 486 (2008). In *Pludeman*, the New York court held that purposely concealing three pages of a four-page equipment leasing contract for more than one customer is a sufficient harm to the public to warrant a claim for punitive damages. *Id*. at 13. These cases demonstrate that all that is necessary to satisfy the "public harm" requirement is a fraudulent business practice imposed on multiple customers in order to trap "generally the unwary." *Walker,* 10 N.Y.2d at 405.

The argument that the overvaluation scheme perpetrated by Bodner and the other Defendants did not target the public is absurd. Here, Bodner and the other Defendants engaged in a multi-year fraudulent scheme by overvaluing PPVA's NAV and enriching themselves through unearned fees, which caused foreseeable harm to PPVA's investors and creditors. Platinum Management marketed an investment in PPVA to the public at large based primarily on the fictitious rate of returns that

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position, but did not keep those promises once plaintiff began working for iTV." *Id.* at 460. Given this factual background, the Court found that the failure of iTV Media to uphold their employment promises was not a fraud "directed at the public." Thus, the Court's decision was rendered within the context of a dispute between an individual employee and his employer; an "isolated transaction" that involved alleged fraudulent inducement in connection with an individual employment contract. *Stichting* involved fraud claims that arose after a Dutch pension fund purchased shares of Residential Mortgage-Back Securities from Credit Suisse. As the trial court in *Stichting* noted: "The transactions at issue . . . were arm's length interactions between two sophisticated entities." *Id.* at *39. The trial court's holding with respect to the "public generally" standard was based, in part, on its earlier finding that "[i]n general, a special relationship does not arise out of an ordinary arm's length business transaction between two parties." In short, the trial court viewed the purchasing of shares by the Dutch pension fund as a series of deliberate transactions between two companies rather than a series of actions aimed at the public.

resulted from the overvaluation scheme. *See* (Bixter Decl. Ex. 2). At the same time, Bodner and the other Defendants failed to disclose liquidity issues and the overvaluation of PPVA's assets, all while continuing to promise lucrative returns. This is exactly the type of fraudulent scheme meant to trap the unwary where punitive damages are appropriate under New York law.

The public harm caused by the overvaluation scheme on which the JOLs' claims against Bodner are premised was far-reaching in scope, leading directly to PPVA's collapse, at the expense of PPVA's investors and creditors around the world. Many of PPVA's feeder fund investors were individuals and far from the sophisticated investors that, under Bodner's mistaken theory, would make punitive damages inappropriate. *See* Bixter Decl. Ex. 3.

Under these circumstances, even if the JOLs' independent tort claims against Bodner are viewed as having their "genesis" in contract—and they do not—the fraudulent overvaluation scheme perpetrated by Bodner and the other Defendants was part of a pattern of behavior aimed at the public generally, and a jury should be permitted to consider whether an award of punitive damages is appropriate.

C. Bodner's Second Motion *in Limine* (Consolidation of Claims)

The JOLs have agreed to consolidate the eight remaining counts against Bodner into four counts: (i) breach of the fiduciary duty of care; (ii) breach of the fiduciary duty of loyalty; (iii) fraud; and (iv) aiding and abetting breach of fiduciary duty. *See* ECF No. 679. Bodner incredibly seeks to consolidate the claims further, and his attempts to explain away the important distinctions in the elements of each cause of action, the factual predicates required to prove each cause of action and the different remedies available under each cause of action, are unpersuasive.

1. The Fraud and Breach of Fiduciary Duty Claims

Bodner argues that the JOLs' fraud claim should be consolidated with the JOLs' breach of fiduciary duty claims because the "special facts" doctrine does not apply to Bodner's failure to disclose the overvaluation of PPVA's net asset value. Bodner misstates the law as to the "special facts" doctrine and the duty to disclose generally.

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Under New York law, application of the "special facts" doctrine is not dependent on whether the fraud is perpetrated by the actual party engaged in a transaction. Courts applying New York law hold that "the doctrine requires satisfaction of a two-prong test: that the material fact was information 'peculiarly within the knowledge' of [the defendant], and that the information was not such that could have been discovered . . . through the 'exercise of ordinary intelligence.'" *Jana L. v. West 129th Street Realty Corp.*, 22 A.D.3d 274, 278 (1st Dep't 2005); *see also Southwestern Payroll Serv., Inc. v. Pioneer Bankcorp, Inc.*, No. 1:19-CV-1349 (FJS/CFH), 2020 WL 4353219, at *4 (N.D.N.Y. July 7, 2020) ("The special facts doctrine applies when 'one party has superior knowledge that is not readily available/accessible to the other party and that party knows the other party is acting on the basis of mistaken knowledge.'").

While the duty to disclose under the "special facts" doctrine" often arises in a transactional context, there is no requirement that the defendant be in privity of contract with the plaintiff for the special facts doctrine to apply. *See Swersky v. Dreyer & Traub,* 219 A.D.2d 321, 326-327 (1st Dep't 1996) (plaintiff had successfully pled a fraud claim under the special facts doctrine in connection with defendant failing to disclose the true value of securities, even though defendant was not a party to any of the transactions at issue); *see also, e.g., Barrett v. Freifeld*, 64 A.D.3d 736, 738 (2d Dep't 2009) (defendant had duty to disclose financial condition of company plaintiff intended to purchase from third party); *John Blair Comms. v. Reliance Cap. Grp.*, 157 A.D.2d 490, 492 (1st Dep't 1990) (holding that a duty to disclose is not limited to parties in privity of contract); *Caracci v. State of N.Y.*, 203 A.D.2d 842, 844 (3d Dep't 1994) (determining factor is when nondisclosure would "le[a]d the person to whom it was or should have been made to forego action that might otherwise have been taken for the protection of that person").

Here, the fraud alleged by the JOLs involved hundreds of transactions: (i) the overvaluation of PPVA's NAV on a monthly basis; (ii) the accrual and payment of incentive and management fees with funds derived from PPVA; and (iii) the transactions by which the overvaluation was accomplished, including but not limited to the creation of the BEOF Funds and Beechwood to create the false impression of stability in PPVA's investments. Under New York law, Bodner's absence as

a signatory to certain of these transactions is immaterial to application of the special facts doctrine. Further, Bodner seeks to have it both ways by arguing in his Third Motion *in Limine* that the JOLs' claims are based in contract while also arguing for purposes of the "special facts" doctrine that there are no transactions at issue in this case.

Bodner clearly had superior knowledge of the facts at issue due to his insider role at Platinum Management, and his failure to disclose the overvaluation scheme while personally benefitting from the fraud makes him liable.

2. The Claims for Breach of Duty of Care and Breach of Duty of Loyalty

Bodner seeks to collapse the JOLs' breach of fiduciary duty (duty of care) and breach of fiduciary (duty of loyalty) claims into a single breach of fiduciary duty claim, arguing that he had no duty as a fiduciary to stay reasonably informed of PPVA's financial condition and the valuation of PPVA's assets. Nothing could be further from reality.

The duty of care requires the fiduciary to stay reasonably informed of the performance of the subject company, and conduct reasonable diligence in considering material information. *Hanson Trust PLC v. ML SCM Acquisition, Inc.*, 781 F.2d 264, 274-275 (2d Cir. 1986). A fiduciary is also required to ensure that a company to which it owes a duty is managed by competent personnel. *See, e.g.*, *Kimmel v. Schaefer*, 89 N.Y.2d 257, 265 (1996)

To be sure, the JOLs' Second Amended Complaint asserted a claim for breach of the fiduciary duty of care against Bodner and alleges a breach thereof for, among other things, not acting "in a responsible and lawful manner, in good faith, so as not to cause injury to PPVA" and for failing to "ensure that they did not engage in any fraudulent, unsafe, unlawful or unsound investment, operational, administrative or management practices. *See* (ECF No. 285 at ¶¶ 765, 768-769). Bodner's contention that these allegations are no longer in the case due to the April 21 Order is completely without basis to the extent that Bodner failed to properly manage and oversee the valuation of PPVA's assets in his role as a fiduciary.

3. The Aiding and Abetting Claims and the Primary Liability Claims

Bodner next argues that the JOLs' aiding and abetting fraud and aiding and abetting breach of fiduciary duty claims should be consolidated with the JOLs' breach of fiduciary duty claims, arguing that the Court's April 21 Decision somehow reached this conclusion when, in fact, it expressly stated the contrary.

The April 21 Decision recognized that the aiding and abetting claims against Bodner are premised on "*Platinum Management and other Platinum defendants*" committing the primary violations of fraud and breaching fiduciary duties. *See* (ECF No. 624 at 32). The distinction between primary and secondary liability is precisely the type of distinction that precludes the conclusion here that the aiding and abetting claims are duplicative. *See Loreley Fin. (Jersey) No. 3 Ltd. v. Wells Fargo Sec., LLC*, No. 12-cv-3723 (RJS), 2016 WL 5719749, at *6 (S.D.N.Y. Sept. 29, 2016).

Further, despite Bodner's argument to the contrary, the jury may find distinct damages in connection with the JOLs' aiding and abetting claims as contrasted with the primary liability claims. It is well-settled law that those who knowingly participated in a fiduciary's breach of duty to cause a single, indivisible harm, are jointly and severally liable for any damages caused. *See, e.g.*, *Banco de Desarrollo Agropecuario, S.A. v. Gibbs*, 709 F. Supp. 1302, 1307 (S.D.N.Y. 1989); *First 1953 Fund. Ltd. v. Kung,* 250 F. Supp. 744, 749 (S.D.N.Y. 1966).[5] The jury may hold Bodner jointly and severally liable for all damages arising from Platinum Management's primary violations if it determines that Bodner persistently and substantially assisted Platinum Management's primary violations, causing a single, indivisible injury. These damages include, but are not limited to, damages in connection with Platinum Management's corporate waste of PPVA's assets as the reasonable and foreseeable consequence of the overvaluation scheme and management and incentive fees paid to Platinum Management and the other Defendants. *See* ECF No. 679 at pp. 10-11.

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[5] Bodner's attempts to discount the holding in *In re Libor-Based Fin. Instruments Antitrust Litig.*, No. 11 MDL 2262 NRB, 2015 WL 4634541, at *100 (S.D.N.Y. Aug. 4, 2015) is unpersuasive. While the Court cites to Illinois and federal law in discussing the expanded nature of recovery available for secondary liability claims, it also cites to the Restatement (Second) of Torts § 876(b), and the case is expressly decided in part under New York law.

Because the factual predicates *and* the available remedies differ as between the primary violation claims asserted directly against Bodner and the secondary violation claims related to Platinum Management's fraud and breach of fiduciary duties, the secondary violation claims asserted against Bodner should not be consolidated with the primary violation claims.

CONCLUSION

For the reasons set forth above, Plaintiffs request this Court issue an Order denying Bodner's Motions *in Limine* in their entirety.

Dated: November 5, 2020
New York, New York

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