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December 11, 2022

VIA EMAIL

The Hon. Jed S. Rakoff
United States District Court for the Southern
District of New York
Daniel Patrick Moynihan United States
Courthouse
500 Pearl Street
New York, New York 10007-1312

Re: *Trott v. Platinum Mgmt. (NY) LLC et al.*, No. 18-cv-10936-JSR – Defendant's Motion for Judgment as a Matter of Law That Bodner Is Not Liable for Fees Paid Prior to December 2014

Dear Judge Rakoff:

We respectfully submit this letter on behalf of defendant David Bodner in further support of his motion pursuant to Federal Rule of Civil Procedure 50(a) seeking a ruling that Bodner is not liable in damages for any fees paid before the so-called "Fuchs dinner," which occurred no earlier than December 2014.[1] The Court invited the parties (Tr. 1233:11-20) to brief the merits of the contention by plaintiffs' counsel at argument (Tr. 1228:17-18) that "one who decides to aid and abet should be liable for what's come before." Plaintiffs were arguing that Bodner can be held liable for fees paid by PPVA prior to the date upon which Bodner is found to have acquired actual knowledge that PPVA's assets were fraudulently overvalued. Plaintiffs are flat wrong. Under clear New York law, Bodner can only be responsible for damages that were proximately caused by his failure to act upon his alleged knowledge. This precludes any possibility of holding him responsible for "retroactive" damages caused by others before he acquired actual knowledge.

[1] Tr. 279:10-15, 280:10-21 (Bernard Fuchs). Fuchs testified at his deposition that the dinner was in January, February, or March 2015, not December 2014; this testimony was played for the jury during cross-examination of Fuchs. (Tr. 482:14-25, 485:2-9; Fuchs Dep. 515:13-23.)

A claim for aiding and abetting a fiduciary breach or fraud requires proof of the defendant's actual knowledge of, and substantial assistance or knowing participation in, the breach or fraud. A defendant's "assistance" is only "substantial"—and therefore actionable—if it proximately caused the injury at issue. *See SPV Osus Ltd. v. UBS AG*, 882 F.3d 333, 345 (2d Cir. 2018) ("'Substantial assistance requires the plaintiff to allege that the actions of the aider/abettor proximately caused the harm on which the primary liability is predicated, such that the 'injury [is] a directly or reasonably foreseeable result of the conduct.'") (citation omitted) (emphasis added); *Fraternity Fund Ltd. v. Beacon Hill Asset Mgmt., LLC*, 479 F. Supp. 2d 349, 360 (S.D.N.Y. 2007) (cited in Summary Judgment Order, ECF No. 624, at 32); *N.Y. City Emples. Ret. Sys. v. Ebbers (In re WorldCom, Inc. Sec. Litig.)*, 382 F. Supp. 2d 549, 560-61 (S.D.N.Y. 2005) (substantial assistance requires proof of proximate cause); *see also Lerner v. Fleet Bank, N.A.*, 459 F.3d 273, 294-95 (2d Cir. 2006) (discussing elements of fiduciary breach claim and requirement that damages be caused by defendant's breach). The court in *Fraternity Fund* wrote:

> [S]ubstantial assistance is intimately related to the concept of proximate cause. Whether the assistance is substantial or not is measured by whether the action of the aider and abettor proximately caused the harm on which the primary liability is predicated. . . . [Plaintiffs] must allege [ ] that their injury was a direct or reasonably foreseeable result of the conduct.

479 F. Supp. 2d at 370-71 (internal modifications and citations omitted).

Fraternity Fund is on point. In that case, just as here, the district court was examining allegations that a hedge fund overstated its net asset values ("NAVs"). The court concluded that there were insufficient allegations of aiding and abetting the alleged breach of fiduciary duty and fraud until May 2002, and dismissed claims concerning the earlier period. *See* 479 F. Supp. 2d at 367, 375. Other cases involving alleged breach of fiduciary duty and fraud in the financial sector also make clear that the required element of substantial assistance turns on a proximate-cause analysis. *See Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC*, 446 F. Supp. 2d 163, 201-02 (S.D.N.Y. 2006) (discussing these elements in an alleged NAV overvaluation case, and holding that defendant can only be liable for damages that are "direct or reasonably foreseeable result of the conduct" at issue); *see also Silvercreek Mgmt. v. Citigroup, Inc.*, 346 F. Supp. 3d 473, 487-88 (S.D.N.Y. 2018) (in Enron litigation, holding that "a proximate cause analysis" is "embedded" in New York aiding-and-abetting law).

Since proximate cause is an essential element of aiding and abetting, Bodner could be liable only for harm that was the reasonably foreseeable consequence of his alleged failure to act after having allegedly acquired actual knowledge of fraudulent overvaluation. If a defendant could be liable for damages incurred before his participation, such as fees based upon a fraudulent NAV that pre-dated his conduct, that would eviscerate the required element of proximate cause, since harm that has already occurred cannot be foreseeable. The special master appointed by this Court in *Krys v. Sugrue (In re Refco Sec. Litig.)* ("*Refco*"), No. 07-md-1902 (JSR), 2012 U.S. Dist. LEXIS 188344 (S.D.N.Y. Oct. 17, 2012), *report and recommendation adopted in relevant part*, ECF No. 1760 (Rakoff, D.J.), recognized this exact point:

> The Plaintiffs' dramatic theory of retroactive liability is flatly inconsistent with the law on aiding and abetting in New York and the basic premise of proximate causation—that a wrongdoer can be liable only for the injury that it had a part in causing.

Id. at *59-60 (citing *Fraternity Fund*, 479 F. Supp. 2d at 370-71, and *Pension Committee*, 446 F. Supp. 2d at 201) (emphasis added).

In an earlier decision in the same litigation, this Court adopted, and rejected a motion for reconsideration of, the special master's decision that plaintiffs could not recover damages from PwC for assets deposited before PwC's alleged substantial assistance to the fraud began. *Refco*, 2012 U.S. Dist. LEXIS 25661, at *40-43 (S.D.N.Y. Feb. 16, 2012) ("By the time PwC substantially assisted the Refco fraud, assets that had previously been deposited at Refco were already unrecoverable . . ."); *see also Refco*, 2011 U.S. Dist. LEXIS 161534, at *88 (S.D.N.Y. Aug. 10, 2011), *report and recommendation adopted*, 2011 U.S. Dist. LEXIS 161529 (Oct. 24, 2011) (order that this Court declined to reconsider in February 2012 decision); *CABS Nursing Home Co., Inc. v. NNRC LLC*, Index No. 522335/2016, 2017 N.Y. Misc. LEXIS 3814, at *17-18 (N.Y. Sup. Ct. Kings Cty. Oct. 3, 2017) ("Here, CABS [plaintiff] cannot meet the 'substantial-assistance' prong of its aiding-and-abetting fraud claim as the alleged fraud occurred two years prior to 270 Nostrand's involvement and, therefore, 270 Nostrand could not have aided and abetted the alleged fraud.").

In short, there is no support in New York law for plaintiffs' contention (Tr. 1228:17-18) that "one who decides to aid and abet should be liable for what's come before."

Plaintiffs also suggested at argument that the Court could reach a different conclusion applying the law of conspiracy. But New York does not recognize an independent tort of civil conspiracy, as this Court noted in its Summary Judgment Order when it dismissed plaintiffs' civil conspiracy claims on that basis. ECF No. 624 at 33; *see also Kovkov v. Law Firm of Dayrel Sewell, PLLC*, 182 A.D.3d 418, 418 (1st Dep't 2020). Plaintiffs' civil RICO claim was dismissed on the merits pursuant to the Private Securities Litigation Reform Act. ECF No. 624 at 44.

Accordingly, there is no actionable claim in this case that could make Bodner liable for fees paid by PPVA before the date upon which he could reasonably be deemed by the jury to have acquired knowledge of overvaluation.

* * *

On the element of actual knowledge, Bodner submitted at argument that no reasonable juror could conclude that Bodner had knowledge of fraudulent overvaluation prior to the Fuchs dinner. In response, plaintiffs cited PX 434 and PX 554, but PX 434, dated August 29, 2013, has nothing to do with valuation; and PX 554 is a routine, third-party analyst report dated January 9, 2014, and offers nothing regarding Platinum Management's own valuation. *See Silvercreek Management*, 346 F. Supp. 3d at 487 (New York law of aiding and abetting requires

actual knowledge, and "evidence that a defendant could or should have been able to deduce the fact of an underlying fraud on the basis of red flags or warning signs is not a substitute for actual knowledge").[2]

Respectfully submitted,

Nathaniel Ament-Stone

[2] In opposing Bodner's Rule 50(a) motion, plaintiffs argued that Bodner breached his fiduciary duty of care by failing to "investigate" alleged suspicions of overvaluation. (Tr. 1230:19-24.) No such negligence-based claim of a duty to "investigate" was alleged in the Second Amended Complaint (ECF No. 285), and even if such a claim could be inferred, it did not survive summary judgment—where the Court held that the sole remaining factual claim to be tried was whether Bodner came to have actual knowledge of the overvaluation and failed to disclose that knowledge. ECF No. 624 at 32 (recognizing that the "same activity is alleged to constitute the primary violation underlying both claims" for breach of fiduciary duty and fraud).

Because the fiduciary duty claim was based on allegations of fraud—*i.e.*, because Bodner's omission that allegedly created fiduciary liability would also be a fraudulent omission on the same facts—Bodner accepted that the six-year statute of limitations for fraud claims would apply to both the fiduciary- and fraud-based claims. *See Kaufman v. Cohen*, 307 A.D.2d 113, 120 (1st Dep't 2003) (applying six-year statute in CPLR § 213(8) to fiduciary duty claims based on willful misconduct). But, if plaintiffs are deemed to have preserved a negligence-based claim for breach of fiduciary duty of care, that means the statute of limitations applicable to that claim is three years, not six. *Wimbledon Fin. Master Fund, Ltd. v. Hallac*, 192 A.D.3d 617, 618 (1st Dep't 2021) (three-year statute of limitations applies to fiduciary duty claims based upon "negligence or a failure to utilize reasonable care"). If the fiduciary duty claim sounds in negligence and the shorter statute applies, plaintiffs are time-barred from pursuing a recovery based on any management or incentive fees paid prior to October 16, 2013, which date is three years before plaintiffs commenced a Chapter 15 proceeding in this district. *See* 11 U.S.C. § 108(a)(2).