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 *IN LIMINE* TO EXCLUDE EVIDENCE: (1) OF UNRELATED MATTERS THAT OCCURRED 17 TO 30 YEARS AGO; AND (2) REGARDING CLAIMS DISMISSED AT SUMMARY JUDGMENT

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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 "**JOLs**"), and Platinum Partners Value Arbitrage Fund L.P. (in Official Liquidation) ("**PPVA**") (collectively, "**Plaintiffs**") submit this memorandum of law in opposition to the Motion *in Limine* of Defendant David Bodner ("**Bodner**") to exclude: (i) "evidence of a misdemeanor conviction and civil settlements that occurred between 1992 and 2005"; and (ii) "evidence concerning claims that did not survive the Court's summary judgment ruling" (the "**Motion**"). ECF Nos. 753 and 754.[1]

PRELIMINARY STATEMENT

Bodner's Motion is a last-ditch attempt to deprive the jury of relevant evidence on two of the key factual disputes of this case: (i) whether or not Bodner was a fiduciary to PPVA and Platinum Management (defined below); and (ii) whether PPVA's net asset value was overvalued and the manner in which Platinum Management and Bodner accomplished the overvaluation.

First, Bodner's Motion makes the incorrect assumption that Plaintiffs intend to elicit testimony concerning his criminal conviction and settlements with government agencies solely for impeachment purposes. Rather, Plaintiffs intend to use evidence of Bodner's prior bad acts in their case-in-chief, to demonstrate the only justifiable reason why Bodner would mask his ownership in PPVA, Beechwood and the BEOF Funds through a labyrinth of "passive" beneficial interests in trusts and limited liability companies owned by him or his immediate family members: to mask his involvement in these entities from the SEC, and avoid the scrutiny which would befall a registered investment advisor such as Platinum Management. Bodner will argue at trial that his

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

"passive" ownership in these entities is evidence that he was simply a mere investor. Plaintiffs should be permitted to provide the real story.

Second, the final page of Bodner's motion seeks the exclusion of *all evidence* relating whatsoever to Beechwood and the BEOF Funds and the insider transactions among these funds and PPVA. But there is nothing at all in this Court's prior opinions that somehow limits the relevant evidence that the Plaintiffs may introduce to demonstrate that PPVA was overvalued by Platinum Management and that Bodner had knowledge and provided substantial assistance regarding the same. One of the primary methods in which the overvaluation scheme was accomplished was through the transfer of defaulted debt interests in underlying investment companies from PPVA to Beechwood in order to provide the illusion of stability in the investment companies. Platinum Management caused PPVA to consistently guarantee these debt interests transferred to Beechwood and never accounted for these liabilities on PPVA's balance sheet, even though Platinum Management had full knowledge that non-performing companies such as Golden Gate Oil and Northstar had no ability to pay these debts. These facts are directly relevant to the overvaluation fraud perpetrated by Bodner and Platinum Management, and Bodner's Motion should be denied in its entirety.

FACTUAL BACKGROUND

The Motion details three of Bodner's bad acts, in which he: (i) pled guilty in 1992 to one count of illegal possession of false identification document in connection with taking a government-administered exam (the "**Criminal Conviction**"); (ii) settled with the SEC in or about 1998 for failure to file a disclosure required by Regulation 13D and the Exchange Act ("**SEC Settlement**"); and (iii) entered into a consent agreement in 2005 with the FDIC after it alleged that Bodner failed to comply with Section 19 of the Federal Deposit Insurance Act (12 U.S.C. § 1829)

("**FDIC Settlement**" and collectively with the Criminal Conviction and the SEC Settlement, the "**Prior Bad Acts**"). Motion at 2-3.

On August 22, 2001, within the period of Bodner's bad acts described in the Motion, Platinum Management (NY) LLC ("**Platinum Management**") was formed as a Delaware limited liability company. The Mark Nordlicht Grantor Trust (the "**MNGT**") owns 65% of Platinum Management. Grosser Lane Management LLC, which is owned jointly between Bodner and his wife and controlled by Bodner, owns the economic equivalent of 24.99 percent in the MNGT.

Platinum Management served as the general partner and investment manager of PPVA. Platinum Management was also an SEC-registered investment adviser and subject to, among other securities laws, the Investment Advisers Act of 1940. Consequently, Platinum Management was required to make various filings with the SEC, including an annual Form ADV, Uniform Application for Investment Adviser Registration (collectively, the "**Form ADVs**"). The Form ADVs did ***not*** disclose Platinum Management's beneficial owners, including Bodner.

On April 21, 2020, the Court issued an Opinion and Order granting in part and denying in part Bodner's Motion 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 Motion for Summary Judgment on the aspects of Counts 1-8 of Plaintiffs' Second Amended Complaint (ECF No. 285) that are premised on Bodner's breach of fiduciary ad fraudulent conduct with respect to the overvaluation of the net asset value of PPVA.

ARGUMENT

I. There Is No Basis to Exclude Evidence of Bodner's Prior Bad Acts from Any Facet of this Trial

A. Bodner's Bad Acts are Relevant to this Trial and the Plaintiffs' Case-in-Chief

Bodner's Motion is based entirely on a strawman, arguing that the only reason that Plaintiffs would seek to introduce testimony of the Prior Bad Acts would be to impeach Bodner's credibility. This is not the case. Bodner's Prior Bad Acts is the only plausible justification for why Bodner's interests in Platinum Management were concealed from the SEC through a complicated trust and LLC structure, and rebuts any argument that the MNGT structure is evidence that Bodner was merely a passive investor in Platinum Management and PPVA, rather than a senior partner with negative veto power over all of PPVA's operations.

As a general matter, "all relevant evidence is admissible under the Federal Rules of Evidence unless specifically excluded." *United States v. Perez*, 387 F.3d 201, 209 (2d Cir. 2004) (citation omitted). Evidence is "relevant" if "(a) it has any tendency to make any fact more or less probable than it would be without the evidence" and (b) "the fact is of consequence in determining the action." Fed. R. Evid. 401. A material fact is "one that would affect the outcome of the suit under the governing law." *Beth Israel Med. Ctr. v. Horizon Blue Cross & Blue Shield of N.J., Inc.*, 448 F.3d 573, 579 (2d Cir. 2006). Evidence "need not be conclusive in order to be relevant. An incremental effect is sufficient." *United States v. Certified Envtl. Servs., Inc.*, 753 F.3d 72, 90 (2d Cir. 2014) (citation omitted).

The Rule 401 standard "should be interpreted liberally." *Perez*, 387 F.3d at 209. As courts have repeatedly observed, "[t]he standard of relevance established by the Federal Rules of Evidence is not high." *United States v. Southland Corp.*, 760 F.2d 1366, 1375 (2d Cir. 1985) (citation omitted); *see also United States v. Al-Moayad*, 545 F.3d 139, 176 (2d Cir. 2008) (calling the relevance threshold "very low"). Under Rule 402, "all [r]elevant evidence is admissible … unless an exception applies." *United States v. White*, 692 F.3d 235, 246 (2d Cir. 2012) (quoting Fed. R. Evid. 402).

Evidence of prior convictions are routinely considered relevant under Rule 401, including when presented during a party's case-in-chief and when the prior convictions would be obviously relevant to rebutting stated defenses. *See, e.g., Old Chief v. United States*, 519 U.S. 172, 178-79 (1997) (prior conviction deemed relevant under Rule 401 in part because it "was a step on one evidentiary route to the ultimate fact"); *Malick v. JP Morgan Chase Bank, N.A.*, 79 Fed. Appx. 563, 568 (2d Cir. 2019) (admitting testimony as to party's prior conviction for embezzlement because it was "relevant" to the party's "veracity"); *United States v. Jackson*¸ 792 Fed. Appx. 849, 853 (2d Cir. 2019) (prior conviction for "inflating appraisal values to fraudulently secure bank loans" was relevant to show that defendant was "familiar with loan structuring and other transactions"); *United States v. Brown*, 345 F. Supp. 2d 358, 359 (S.D.N.Y. 2004) (permitting introduction of prior conviction in case-in-chief); *c.f. United States v. Zedner*¸ 401 F.3d 36, 49-50 (2d Cir. 2015) (holding that evidence of previously fraudulently transferring of deeds was relevant to the charge of counterfeiting bonds to the extent that it proved the "defendant's financial sophistication, his ability to execute complex schemes, and his ability to form intent to defraud"), *rev'd on other grounds by Zedner v. United States*¸ 547 U.S. 489 (2006).

Here, Bodner intends to argue that he was not a fiduciary to Platinum Management or PPVA, and he will point to his "passive" ownership interest in Platinum Management as proof that he was merely an investor in PPVA, not a senior partner with ultimate control over PPVA and its investment manager (as other witnesses will testify). The Plaintiffs should be able to respond to this argument with the Prior Bad Acts, which are clearly relevant as to why Bodner held his ownership interests in Platinum Management through the MNGT.

As part of his testimony, William Post, Plaintiffs' expert, will testify as to the needlessly complicated ownership structure of Platinum Management, how he has never seen ownership in a

SEC-registered investment advisor structured in such a way, and how the only plausible reason to structure Platinum Management's through the MNGT would be to conceal Bodner's ownership from the SEC due to the increased scrutiny the Prior Bad Acts would bring upon Platinum Management. Bodner's Motion fails to account for the relevancy of the Prior Bad Acts to the key factual dispute of whether Bodner is a fiduciary of PPVA and Platinum Management, and for that reason alone Bodner's Motion should be denied.

B. Rule 609(b) Does Not Preclude Introduction of Bodner's Conviction as Impeachment Evidence

Even if Plaintiffs were seeking to raise the Prior Bad Acts for impeachment purposes only, it would still be permitted under the Federal Rules of Evidence. Bodner devotes the bulk of the Motion to his fallacious argument that the Criminal Conviction cannot be used as impeachment under Fed. R. Evid. 609(b)(1). On the contrary, Plaintiffs may impeach Bodner with the Criminal Conviction because it involved his dishonesty and because his credibility is likely crucial to the resolution of this matter.

Under Rule 609(a)(2), a witness can be impeached with evidence of a prior conviction that involves a "dishonest act or false statement." Fed. R. Evid. 609(a)(2). "[E]vdence of convictions for crimes involving dishonesty or false statement, whether felonies or misdemeanors, must be admitted under Rule 609(a)(2) as being *per se* probative of credibility." *United States v. Estrada*, 430 F.3d 606, 615 (2d Cir. 2005) (internal quotation marks omitted) (emphasis in original). The Rule 403 balancing inquiry does not apply to Rule 609(a)(2). *See Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 525-26 (1989).

Rule 609(b)(1) provides that evidence of a conviction older than ten years, as is the case here, is admissible if the "probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect[.]" Fed. R. Evid. 609(b)(1). A conviction of older

than ten years should be admitted "very rarely and only in exceptional circumstances." *Zinman v. Black & Decker (U.S.), Inc.*, 983 F.2d 431, 434 (2d Cir. 1993). However, "courts have consistently admitted convictions over ten years of age when the prior crimes involved falsification and the credibility of the testifying witness was crucial to the outcome of the current case." *United States v. Chervin*, No. 10-cr-918, 2013 WL 124270, at *5 (S.D.N.Y. Jan. 10, 2013) (citing, *e.g.*, *Zinman*, 983 F.2d at 434) (emphasis added).

"[M]aking a false statement to a government agency is a crime akin to perjury," and, consequently, a conviction of this nature bears "heavily" on the credibility of the witness. *See Zinman*, 983 F.2d at 434; *see also, e.g., United States v. Payton*, 159 F.3d 49, 58 (2d Cir. 1998) (conviction for false statement to a government official rendered the "credibility issue" central to the case); *Casmento v. Volmar Constr., Inc.*, No. 20-cv-0944 (LJL), 2022 WL 1094529, at *3 (S.D.N.Y. Apr. 12, 2022) (noting that the "crime of falsifying business records … bears directly" on a party's "character for truthfulness"); *Montanez v. City of Syracuse*, No. 6:16-cv-00550 (BKS/TWD), 2019 WL 4257134, at *3 (N.D.N.Y. Sept. 9, 2019) (holding that prior convictions for filing a false instrument held "critical importance" to plaintiff's credibility); *Sanders v. Ritz-Carlton Hotel Co., LLC*, No. 05 Civ. 6385(PKL), 2008 WL 4155635 at *5 (S.D.N.Y. Sept. 9, 2008) (noting that a conviction for "making false and fraudulent statements to the government" implicates credibility).

Here, despite the multitude of witnesses which will testify to the contrary, Bodner will ask the jury to believe his testimony that: (i) he had no active role in the management of Platinum Management and PPVA; and (ii) he had no knowledge that PPVA's net asset value was overvalued. Resolution of these factual disputes will largely hinge on the credibility of Bodner's testimony. Bodner's Criminal Conviction, which involved the type of false statement to a

government official referenced in the cases above, is the exact type of impeachment evidence that goes directly towards the "character for truthfulness" that is admissible under FRE 609(b)(1).

C. Rule 608(b) Does Not Apply to the Criminal Conviction

Bodner argues that Rule 608(b) precludes the introduction of the Criminal Conviction. In so doing, Bodner omits the critical clause in the Rule:

> Except for a criminal conviction under Rule 609, extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attach or support the witness's character for truthfulness.

Fed. R. Evid. 608(b) (emphasis added); *see, e.g., Alvarez v. United States*, 808 F. Supp. 1066, 1095 (S.D.N.Y. 1992) ("Rule 608(b) prohibits credibility attacks from being proved by extrinsic evidence unless the witness has been convicted of a crime.") (emphasis added).

As set forth above, the Criminal Conviction is admissible under Rule 609. Consequently, Rule 608(b) does not apply. Moreover, Plaintiffs should be permitted under Rule 608(b)(1) to cross-examine Bodner concerning the Criminal Conviction because it is "probative of [Bodner's] character for truthfulness or untruthfulness[.]"[2] In particular, the Criminal Conviction is evidence of Bodner's character for untruthfulness, which in turn supports Plaintiffs' argument that the structure of the Mark Nordlicht Grantor Trust and Platinum Management is evidence of an intentional effort to obscure the true owners of Platinum Management, and thus evade potential scrutiny arising from its ownership by a convicted criminal. *See United States v. Myerson*, No. 1988 WL 108442, at *1-2 (S.D.N.Y. Sept. 29, 1988) (permitting questioning under Rule 608(b)(1) concerning a past conviction for submitting a false answer on a New York City Department of Investigation sworn questionnaire).

[2] The Motion cites *United States v. Calderon-Urbina*, 756 F. Supp. 2d 566, 569 (S.D.N.Y. 2010), which is entirely inapposite. The court precluded cross-examination under Rule 608(b) of a defendant's arrest, which is wholly distinct from a conviction for purposes of Rule 608. *Id.* at 568.

D. The SEC and FDIC Bad Acts Should not be Excluded from This Trial

Finally, Bodner erroneously argues that the SEC Settlement and the FDIC Settlement are not relevant to this case, and thus should be excluded under Fed. R. Evid. 401. Again, as explained in detail above, the Prior Bad Acts, including the SEC Settlement and the FDIC Settlement, are highly relevant to this case – particularly with respect to whether Bodner should be considered a fiduciary of Platinum Management (as opposed to, as he falsely contends, a "mere investor"). Specifically, the SEC Settlement and the FDIC Settlement provide critical context for the decision to implement the unorthodox organizational structure of Platinum Management. Indeed, the largest beneficial owners of Platinum Management were effectively concealed from the SEC, despite the obvious competitive advantages, as will be detailed by Mr. Post, in advertising that a hedge fund's largest investors had taken a stake in the management company.[3]

II. There Is No Basis to Exclude Evidence Concerning Transaction-Related Evidence Which Is Directly Related to the Overvaluation of PPVA

On the final page of his motion, Bodner makes the absurd argument that the Plaintiffs should be precluded from introducing any evidence *at all* concerning the creation and capitalization of Beechwood and the BEOF Funds, the Black Elk Scheme, the Montsant Transactions, the Agera Sale, or the overvaluation of Over Everything and China Horizon.

[3] The cases cited by Bodner are easily distinguishable. In *United States v. Ahmed*, the defendant sought to question an expert witness about actions in which he was only a named defendant and which pertained to unrelated issues. *See* 14-cr-277 (DLI), 2016 WL 3647686, at *2-3 (E.D.N.Y July 1, 2016). This Court's decision in *Barron Partners, LP v. LAB123, Inc.*, 593 F. Supp. 2d 667, 672-73 (S.D.N.Y 2009), dealt with the issue of whether a failure to disclose a consent decree with the SEC constituted a material omission, as required to impose liability for fraudulent concealment. Finally, the Second Circuit's decision in *Lipsky v. Commonwealth United Corp.,* 551 F.2d 887, 893 (2d Cir. 1976), concerned a consent decree between a government agency and a corporate defendant.

Plaintiffs fully agree that their remaining fraud and breach of fiduciary claims against Bodner are limited to overvaluation of PPVA's net asset value. But there is nothing in this Court's prior opinions that somehow limits the relevant evidence that the Plaintiffs may introduce to demonstrate that PPVA was overvalued by Platinum Management and that Bodner had knowledge and provided substantial assistance regarding the same. The creation of the BEOF Funds and Beechwood by Bodner is a primary reason for Bodner's liability.

The creation of the BEOF Funds shortly after the November 2012 Black Elk Explosion, and the willing subordination of PPVA's interests to those of the BEOF Funds, was an effort to mask the problems with Black Elk in an effort to maintain a high value for PPVA's investment in Black Elk. The creation of Beechwood, the collateralization of the same with Bodner's investor interests in PPVA, and use of Beechwood to transfer defaulted debt interests to a "third-party" to provide the illusion of debt stability, was the manner in which Platinum Management and Bodner were able to mask the non-performance of PPVA's largest investments, including Golden Gate Oil and Northstar. As summarized to this Court by Plaintiffs' counsel during the *Daubert* hearing in this case:

> And if you say, well, anyone should have realized, part of it is that the failure to make these realizations was based on concealed information, for example, the Platinum-Beechwood relationship and the fact that these debts were in default. These are entities that were valuing equity in the hundreds of millions, and there was no comment about the debt. Everyone believed that the debt was good. But in fact, Beechwood was holding it, and Platinum Management was paying interest. I'm not even sure how you model that on a cash flow analysis. So the point is that he adopted what is right for a case, which I recognize we have to prove it, but for a case which is absolutely tainted with fraud and for which a traditional asset valuation is simply inappropriate.

Transcript of June 18, 2020 hearing (ECF No. 644) at p. 37, ln 17 to p. 38, ln. 6.

In response, this Court stated: [b]ut the inadequacies of the data and the somewhat unusual nature of the methodology are partly colored by the fact that here we had, according to the plaintiffs, a very clever fraud, a sophisticated fraud. *Id*. at p. 40, ln 22-25.

Given this, to argue that the related-party transactions among PPVA, the BEOF Funds and Beechwood are irrelevant is beyond preposterous. These transactions are the manner in which Platinum Management was able to justify its inflated valuations, and are clearly relevant under FRE 401. And while the Plaintiffs concede that their expert Ronald Quintero is precluded from testifying about his opinion of the overvaluation of China Horizon and Over Everything, there is nothing in this Court's Daubert Opinion (ECF No. 646) precluding the introduction of evidence through fact witnesses concerning the overvaluation of these investments and Bodner's knowledge of the same. Bodner's Motion is a last-ditch effort to improperly limit the introduction of relevant evidence, and should be denied in its entirety.

CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that the Court issue an Order denying Bodner's Motion in its entirety.

Dated: New York, New York
November 23, 2022

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