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)**

DEFENDANT DAVID BODNER'S PROPOSED JURY INSTRUCTIONS

INTRODUCTION

Pursuant to Paragraph 7 of the Individual Rules of Practice of the Honorable Jed S. Rakoff, Defendant David Bodner, through his undersigned counsel, respectfully submits these Proposed Jury Instructions.

Dated: November 23, 2022
New York, New York

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PROPOSED GENERAL INSTRUCTIONS (PRE-TRIAL)

Instruction No. 1.
Contact with Others

Before we start the trial, let me give you a few "rules of the road."

First, please do not discuss the case with anyone. Do not Google the defendant or the companies that are mentioned in the case. Keep in mind that from time to time I may ask each of you if you accessed information from any source, including the internet, and if you have, that may require your dismissal as a juror. This includes discussing the case in person, in writing, by phone or electronic means, via text messaging, e-mail, Facebook, Twitter, blogging or any Internet chat room, website, or other feature. If you have to tell someone such as your spouse or your employer that you are serving on a jury and that the trial may last as late as [date], that's okay. But when they inevitably ask you what the case is about, please tell them that you are under strict instructions from the judge not to discuss the case. The reason for this, obviously, is that we want you to decide this case solely on the evidence presented in this courtroom, and not on the basis of anything anyone who hasn't heard the evidence may think about the case. If you are asked or approached in any way about your jury service or anything about this case, you should respond that you have been ordered by the judge not to discuss the matter, and you should report the contact to the court as soon as possible.

Along the same lines, you should not try to access any information about the case or do research on any issue that arises in the case from any outside source, including dictionaries, reference books, or anything on the Internet. And in the unlikely event you see anything in the media about this case, please turn away and pay it no heed. Your sworn duty is to decide this case solely and wholly on the evidence presented in this courtroom.

Finally, please do not discuss the case even among yourselves until all the evidence has been presented and the case has been given to you for your deliberations. The reason for this is that the evidence will be presented one witness and one exhibit at a time, and it is important that you keep an open mind until you have heard all the evidence.

Authority:

4 Modern Federal Jury Instructions-Civil P 71.02 (71-75) (adapted from Rakoff instruction).

Instruction No. 2.
Preliminary Instruction

Pursuant to Paragraph 7 of the Individual Rules of Practice of the Honorable Jed S. Rakoff, Defendant David Bodner respectfully submits the following preliminary instruction.

Before we begin to hear the evidence, I want to give you a brief overview of the claims in this case. After you have heard all the evidence and the parties have made their closing arguments, I will give you detailed instructions of law that will displace this preliminary instruction and will govern your deliberations. This is a civil lawsuit brought by the plaintiffs, Martin Trott and Christopher Smith, who manage the affairs and assets of a company called Platinum Partners Value Arbitrage Fund L.P., or "PPVA." Messrs. Trott and Smith are also referred to as the "Joint Official Liquidators" or "JOLs." The defendant in this case is David Bodner. Plaintiffs allege that Mr. Bodner controlled PPVA and intentionally failed to disclose what he came to learn was the fraudulent overvaluation of PPVA's net asset value or "NAV" with respect to the following six assets: (1) Black Elk; (2) Golden Gate; (3) Northstar; (4) Pedevco; (5) Desert Hawk; and (6) the Michael Goldberg Note Receivable. Plaintiffs claim that Mr. Bodner's failure to disclose the overvaluation caused PPVA to pay inflated management and incentive fees, which are calculated as a percentage of the NAV. Mr. Bodner denies all of Plaintiffs' claims and argues that they are barred by a Release Agreement. You will hear there were a number of other persons and entities that plaintiffs claimed were responsible for the same damage allegedly caused by Mr. Bodner and that this lawsuit was originally brought against various additional defendants. In the event that you find Mr. Bodner liable, you will be asked to apportion liability for plaintiffs' damages among certain of those persons. Please remember that this preliminary instruction is simply a brief overview of the claims in this case.

Instruction No. 3.
After the Jury Is Impaneled and Sworn

Ladies and gentlemen, you are about to hear opening statements of counsel. I want to caution you that nothing that counsel says in their opening statement is evidence. The evidence will come to you from the testimony of the witnesses, exhibits received into evidence, and occasionally, we will have a stipulation wherein the two sides agree to a particular fact. Those are the only sources of evidence—testimony, exhibits, and if there are any stipulations. So you may ask: Why do we even have an opening statement? The answer is that the evidence will come in one witness at a time, one exhibit at a time, and it may be helpful for you to have an overview of what each side believes the evidence will show; obviously, they will disagree as to what they think the evidence will show, but by hearing what their predictions are you will have a sort of road map, a kind of context in which you can evaluate the witnesses as each of them testifies. Plaintiffs have what we call the burden of proof. Essentially, they have the obligation of proving their claim and, therefore, Plaintiffs go first. So we will hear first from Plaintiffs' counsel.

PROPOSED GENERAL INSTRUCTIONS (POST-TRIAL)

Instruction No. 4.
Juror Attentiveness

Ladies and gentlemen, before you begin your deliberations, I am now going to instruct you on the law. You must pay close attention and I will be as clear as possible.

It has been obvious to me and counsel that until now you have faithfully discharged your duty to listen carefully and observe each witness who testified. Your interest never flagged, and you have followed the testimony with close attention.

I ask you to give me that same careful attention as I instruct you on the law.

Authority:

4-71 Modern Federal Jury Instructions-Civil, P 71.01 (Matthew Bender)

Instruction No. 5.
Duty of the Court

You have now heard all of the evidence in the case as well as the final arguments of the lawyers for the parties.

My duty at this point is to instruct you as to the law. It is your duty to accept these instructions of law and apply them to the facts as you determine them, just as it has been my duty to preside over the trial and decide what testimony and evidence is relevant under the law for your consideration.

On these legal matters, you must take the law as I give it to you. If any attorney has stated a legal principle different from any that I state to you in my instructions, it is my instructions that you must follow.

You should not single out any instruction as alone stating the law, but you should consider my instructions as a whole when you retire to deliberate in the jury room.

You should not, any of you, be concerned about the wisdom of any rule that I state. Regardless of any opinion that you may have as to what the law may be—or ought to be—it would violate your sworn duty to base a verdict upon any other view of the law than that which I give you.

Authority:

4-71 Modern Federal Jury Instructions-Civil, P 71.02 (Matthew Bender)

Instruction No. 6.
Duty of the Jury

As members of the jury, you are the sole and exclusive judges of the facts. You pass upon the evidence. You determine the credibility of the witnesses. You resolve such conflicts as there may be in the testimony. You draw whatever reasonable inferences you decide to draw from the facts as you have determined them, and you determine the weight of the evidence.

In determining these issues, no one may invade your province or functions as jurors. In order for you to determine the facts, you must rely upon your own recollection of the evidence. What the lawyers have said in their opening statements, in their closing arguments, in their objections, or in their questions is not evidence. Nor is what I may have said—or what I may say in these instructions—about a fact issue evidence. In this connection, you should bear in mind that a question put to a witness is never evidence, it is only the answer which is evidence. However, you are not to consider any answer that I directed you to disregard or that I directed struck from the record.

Since you are the sole and exclusive judges of the facts, I do not mean to indicate any opinion as to the facts or what your verdict should be. The rulings I have made during the trial are not any indication of my views of what your decision should be as to whether or not a plaintiff has proven his or its case.

If applicable: **[**I also ask you to draw no inference from the fact that upon occasion I asked questions of certain witnesses. These questions were only intended for clarification or to expedite matters and certainly were not intended to suggest any opinions on my part as to the verdict you should render, or whether any of the witnesses may have been more or less credible than any other witnesses. You are expressly to understand that the court has no opinion as to the verdict you should render in this case.**]**

As to the facts, ladies and gentlemen, you are the exclusive judges. You are to perform the duty of finding the facts without bias or prejudice to any party.

Authority:

4-71 Modern Federal Jury Instructions-Civil, P 71.03 (Matthew Bender)

Instruction No. 7.
Duty of Impartiality

In determining the facts you are reminded that you took an oath to render judgment impartially and fairly, without prejudice or sympathy and without fear, solely upon the evidence in the case and the applicable law. I know that you will do this and reach a just and true verdict.

Authority:

4-71 Modern Federal Jury Instructions-Civil, P 71.04 (Matthew Bender)

Instruction No. 8.
Jury to Disregard Court's View

I have not expressed nor have I intended to intimate any opinion as to which witnesses are or are not worthy of belief, what facts are or are not established, or what inference or inferences should be drawn from the evidence. If any expression of mine has seemed to indicate an opinion relating to any of these matters, I instruct you to disregard it. You are, I repeat, the exclusive, sole judges of all of the questions of fact submitted to you and of the credibility of the witnesses. Your authority, however, is not to be exercised arbitrarily; it must be exercised with sincere judgment, sound discretion, and in accordance with the rules of law which I give you. In making your determination of the facts in this case, your judgment must be applied only to that which is properly in evidence. Arguments of counsel are not in evidence, although you may give consideration to those arguments in making up your mind as to what inferences to draw from the facts which are in evidence.

From time to time the court has been called upon to pass upon the admissibility of certain evidence, although I have tried to do so, in so far as it was practicable, out of your hearing. You have no concern with the reasons for any such rulings and you are not to draw any inferences from them. Whether offered evidence is admissible is purely a question of law in the province of the court and outside the province of the jury. In admitting evidence to which objection has been made, the court does not determine what weight should be given to such evidence, nor does it pass on the credibility of the evidence. Of course, you will dismiss from your mind, completely and entirely, any evidence which has been ruled out of the case by the court, and you will refrain from speculation or conjecture or any guesswork about the nature or effect of any colloquy between court and counsel held out of your hearing or sight.

Authority:

4-71 Modern Federal Jury Instructions-Civil, P 71.05 (Matthew Bender)

Instruction No. 9.
Conduct of Counsel

It is the duty of the attorney on each side of a case to object when the other side offers testimony or other evidence which the attorney believes is not properly admissible. Counsel also have the right and duty to ask the court to make rulings of law and to request conferences at the side bar out of the hearing of the jury. All those questions of law must be decided by me, the court. You should not show any prejudice against an attorney or his or her client because the attorney objected to the admissibility of evidence, or asked for a conference out of the hearing of the jury or asked the court for a ruling on the law.

As I already indicated, my rulings on the admissibility of evidence do not, unless expressly stated by me, indicate any opinion as to the weight or effect of such evidence. You are solely responsible for determining the credibility of all witnesses and the weight and effect of all evidence.

Authority:

4-71 Modern Federal Jury Instructions-Civil, P 71.06 (Matthew Bender)

Instruction No. 10.
Reprimand of Counsel for Misconduct

During the course of the trial, I may have had to admonish or reprimand an attorney because I did not believe what he was doing was proper. You should draw no inference against him or her, or his or her client. It is the duty of the attorneys to offer evidence and press objections on behalf of their side. It is my function to cut off counsel from an improper line of argument or questioning, to strike offending remarks and to reprimand counsel when I think it is necessary. But you should draw no inference from that. It is irrelevant to your verdict whether you like a lawyer or whether you believe I like a lawyer.

In fact, in this case, I would like to express my gratitude to each of the attorneys for their conscientious efforts on behalf of their clients and for work well done.

Your verdict should be based on the facts as found by you from the evidence and the law as instructed by the court.

Authority:

4-71 Modern Federal Jury Instructions-Civil, P 71.07 (Matthew Bender)

Instruction No. 11.
<u>Sympathy</u>

Under your oath as jurors you are not to be swayed by sympathy. You should be guided solely by the evidence presented during the trial, without regard to the consequences of your decision.

You have been chosen to try the issues of fact and reach a verdict on the basis of the evidence or lack of evidence. If you let sympathy interfere with your clear thinking there is a risk that you will not arrive at a just verdict.

It would be improper for you to consider any personal feelings you may have about one of the parties' respective races, religions, national origins, genders, or ages.

All parties to a civil lawsuit are entitled to a fair trial, free from prejudice. You must make a fair and impartial decision so that you will arrive at a just verdict.

Authority:

4-71 Modern Federal Jury Instructions-Civil, P 71.10 (Matthew Bender)

Instruction No. 12.
Burden of Proof

This is a civil case and as such the plaintiffs have the burden of proving the essential allegations of their complaint.

If after considering all of the testimony you are satisfied that the plaintiffs have carried their burden on each essential point as to which they have the burden of proof, then you must find for the plaintiffs on their claims.

If upon a consideration of all the facts on each issue you find that the plaintiffs have failed to sustain the burden cast upon them, then you should proceed no further and your verdict must be for Mr. Bodner.

Authority:

4-73 Modern Federal Jury Instructions-Civil, P 73.01 (Matthew Bender)

Instruction No. 13.
Burden of Proof – Preponderance of the Evidence and "Clear and Convincing" Standards

In civil cases, there are generally two standards of proof: the preponderance of the evidence standard and the "clear and convincing" evidence standard. Under the preponderance of the evidence standard, the burden of proof is met when the party with the burden convinces the factfinder that it is more likely than not that a fact is true, even if that fact is only slightly more probable than not to be true. In contrast, clear and convincing evidence is a more exacting standard. The standard of proof for all claims at issue in this case is clear and convincing evidence. Clear and convincing proof leaves no substantial doubt in your mind. It is proof that establishes in your mind that the proposition at issue is not only probable, but that it is highly probable or reasonably certain. This means that with respect to each of the JOLs' claims against Mr. Bodner, the JOLs must prove that the evidence shows it is highly probable or reasonably certain that their claim is true. If your assessment of the evidence leads you to conclude that there remains some substantial doubt regarding any required element of any one of the JOLs' claims, you must find for Mr. Bodner on that claim. In this case, the standard of proof Plaintiffs must meet is clear and convincing evidence.

Authorities:

4 Modern Federal Jury Instructions-Civil, P 73.03 (LexisNexis) (modified)

Trott, et al. v. Platinum Management (NY) LLC, et al., Opinion at 23, 43 (Doc. 290) (S.D.N.Y. Apr. 11, 2019) (recognizing fraud-based nature of breach of fiduciary duty claims); *Trott, et al. v. Platinum Management (NY) LLC, et al.*, Opinion and Order at 32 (Doc. 624) (S.D.N.Y. Apr. 21, 2020) (recognizing that the "same activity is alleged to constitute the primary violation underlying both claims" for breach of fiduciary duty and fraud); *Allen v. Westpoint-Pepperell, Inc.*, 11 F. Supp. 2d 277, 284-85 (S.D.N.Y. 1997) (claims that are a "species of fraud" require proof by clear and convincing evidence).

Matter of Duane II. (Andrew II.), 151 A.D.3d 1129, 1130-31 (3d Dep't 2017); *see Fresh Meadow Food Servs., LLC v. RB 175 Corp.*, 549 F. App'x 34, 35-36 (2d Cir. 2014) (concerning a

fraud claim under New York law, "[C]lear and convincing evidence must demonstrate that the thing to be proved is highly probable or reasonably certain.").

Colorado v. New Mexico, 467 U.S. 310 (1984)

Instruction No. 14.
What Is and Is Not Evidence

The evidence in this case is the sworn testimony of the witnesses, the exhibits received in evidence, stipulations, and judicially noticed facts.

By contrast, the questions of a lawyer are not to be considered by you as evidence. It is the witnesses' answers that are evidence, not the questions. At times, a lawyer on cross-examination may have incorporated into a question a statement which assumed certain facts to be true, and asked the witness if the statement was true. If the witness denied the truth of a statement, and if there is no direct evidence in the record proving that assumed fact to be true, then you may not consider it to be true simply because it was contained in the lawyer's question.

Testimony that has been stricken or excluded is not evidence and may not be considered by you in rendering your verdict. Also, if certain testimony was received for a limited purpose—such as for the purpose of assessing a witness's credibility—you must follow the limiting instructions I have given.

Arguments by lawyers are not evidence, because the lawyers are not witnesses. What they have said to you in their opening statements and in their summations is intended to help you understand the evidence to reach your verdict. However, if your recollection of the facts differs from the lawyers' statements, it is your recollection which controls.

Exhibits which have been marked for identification may not be considered by you as evidence until and unless they have been received in evidence by the court.

To constitute evidence, exhibits must be received in evidence. Exhibits marked for identification but not admitted are not evidence, nor are materials brought forth only to refresh a witness's recollection.

Finally, statements which I may have made concerning the quality of the evidence do not constitute evidence.

It is for you alone to decide the weight, if any, to be given to the testimony you have heard and the exhibits you have seen.

Authority:

4-74 Modern Federal Jury Instructions-Civil, P 74.01 (Matthew Bender)

Instruction No. 15.
Direct and Circumstantial Evidence

There are two types of evidence which you may properly use in reaching your verdict.

One type of evidence is direct evidence. Direct evidence is when a witness testifies about something he or she knows by virtue of her own senses—something she has seen, felt, touched, or heard. Direct evidence may also be in the form of an exhibit where the fact to be proved is its present existence or condition.

Circumstantial evidence is evidence which tends to prove a fact by proof of other facts. There is a simple example of circumstantial evidence which is often used in this courthouse.

Assume that when you came into the courthouse this morning the sun was shining and it was a nice day. Assume that the courtroom blinds were drawn and you could not look outside. As you were sitting here, someone walked in with an umbrella which was dripping wet. Then a few minutes later another person also entered with a wet umbrella. Now, you cannot look outside of the courtroom and you cannot see whether or not it is raining. So you have no direct evidence of that fact. But on the combination of facts which I have asked you to assume, it would be reasonable and logical for you to conclude that it had been raining.

That is all there is to circumstantial evidence. You infer on the basis of reason and experience and common sense from one established fact the existence or non-existence of some other fact.

Circumstantial evidence is of no less value than direct evidence. It is a general rule that the law makes no distinction between direct evidence and circumstantial evidence but simply requires that your verdict must be based on a consideration of all the evidence presented.

Authority:

4-74 Modern Federal Jury Instructions-Civil, P 74.02 (Matthew Bender)

Instruction No. 16.
Judicial Notice

I have taken judicial notice of certain facts which are not subject to reasonable dispute. I have accepted these facts to be true, even though no direct evidence has been introduced proving them to be true. You are required to accept these facts as true in reaching your verdict.

Authority:

4-74 Modern Federal Jury Instructions-Civil, P 74.03 (Matthew Bender)

Instruction No. 17.
Stipulation of Facts

A stipulation of facts is an agreement among the parties that a certain fact is true. You must regard such agreed facts as true.

Authority:

4-74 Modern Federal Jury Instructions-Civil, P 74.04 (Matthew Bender)

Instruction No. 18.
Stipulation of Testimony

A stipulation of testimony is an agreement among the parties that, if called, a witness would have given certain testimony. You must accept as true the fact that the witness would have given that testimony. However, it is for you to determine the effect, if any, to be given that testimony.

Authority:

4-74 Modern Federal Jury Instructions-Civil, P 74.05 (Matthew Bender)

Instruction No. 19.
Summaries and Charts as Evidence

During the trial, you saw certain charts that were not admitted as evidence for your consideration during deliberations—for example, lawyers for both sides showed portions of the evidence, including visual aids and quotes from the testimony, at times in the trial. I remind you that these charts and graphics just as counsel's questions and arguments are not evidence.

However, you also saw certain summary charts that *were* admitted as evidence, and these summarized information contained in voluminous original documents, such as account statements and other financial records. These summary charts were admitted so as to aid you in considering the evidence.

You may, of course, ask for the actual records on which the summaries are based, but you can rely entirely on the summary charts for the information taken from the original records.

Authority:

4-74 Modern Federal Jury Instructions-Civil, P 74.12 (Matthew Bender)

Instruction No. 20.
Depositions and Remote Testimony

Some of the testimony before you is in the form of depositions which have been received in evidence. A deposition is simply a procedure where the attorneys for one side may question a witness or an adversary party under oath before a court stenographer prior to trial. This is part of the pretrial discovery, and each side is entitled to take depositions. You may consider the testimony of a witness given at a deposition according to the same standards you would use to evaluate the testimony of a witness given at trial.

[If applicable: In addition, one witness testified remotely by video conference. You should consider this testimony according to the same standards you use to evaluate the testimony of the witnesses who testified here in the courtroom.]

Authority:

4-74 Modern Federal Jury Instructions-Civil, P 74.14 (Matthew Bender)

Adapted from Instruction No. 7 in *Gruber v. Reger*, Case No. 1:16-cv-09727-JSR (S.D.N.Y.) (Rakoff, D.J.), ECF No. 478 (June 14, 2022).

Instruction No. 21.
Inferences

During the trial you have heard the attorneys use the term "inference," and in their arguments they have asked you to infer, on the basis of your reason, experience, and common sense, from one or more established facts, the existence of some other fact.

An inference is not a suspicion or a guess. It is a reasoned, logical conclusion that a disputed fact exists on the basis of another fact which has been shown to exist.

There are times when different inferences may be drawn from facts, whether proved by direct or circumstantial evidence. The plaintiffs ask you to draw one set of inferences, while the defense asks you to draw another. It is for you, and you alone, to decide what inferences you will draw.

The process of drawing inferences from facts in evidence is not a matter of guesswork or speculation. An inference is a deduction or conclusion which you, the jury, are permitted to draw—but not required to draw—from the facts which have been established by either direct or circumstantial evidence. In drawing inferences, you should exercise your common sense.

So, while you are considering the evidence presented to you, you are permitted to draw, from the facts which you find to be proven, such reasonable inferences as would be justified in light of your experience.

Authority:

4-75 Modern Federal Jury Instructions-Civil, P 75.01 (Matthew Bender)

Instruction No. 22.
Effect of Inference on Burden of Proof –
<u>Inference Against Defendant Does Not Shift Burden of Proof</u>

The mere existence of an inference against Mr. Bodner does not relieve the plaintiffs of the burden of establishing their case by clear and convincing evidence. If the plaintiffs are to obtain a verdict, you must still believe from the credible evidence that they have sustained the burden cast upon them. If plaintiffs have failed to sustain their burden, then your verdict must be for Mr. Bodner. If you should find that the evidence raises a substantial doubt about plaintiffs' claims, then the plaintiffs have failed to sustain their burden of proof and your verdict should be for Mr. Bodner. If and only if you determine, after carefully weighing all the evidence, that the facts favor the plaintiffs by the clear and convincing evidence standard I have articulated, then they have met their burden of proof.

Authority:

4-75 Modern Federal Jury Instructions-Civil, P 75.02 (Matthew Bender)

Instruction No. 23.
Inference From Party's Assertion of
Privilege Against Self-Incrimination

You have heard (identify witnesses) decline to answer questions on the grounds of his or her Fifth Amendment privilege against self-incrimination.

The Fifth Amendment of the United States Constitution affords every person the right to decline to answer any questions if he or she believes that the answers may tend to incriminate them. In civil cases, you are permitted, but not required, to draw an inference that the withheld information would have been unfavorable to that person, and only that person. In other words, you may not infer based on one witness's invocation of his Fifth Amendment right against self-incrimination that the withheld information would have been unfavorable to another person who is not invoking the Fifth Amendment.

Any inference you may draw should be based upon all of the facts and circumstances in this case as you may find them.

Authority:

4-75 Modern Federal Jury Instructions-Civil, P 75.05 (Matthew Bender)

Instruction No. 24.
Witness Credibility

You have had the opportunity to observe all the witnesses. It is now your job to decide how believable each witness was in his or her testimony. You are the sole judges of the credibility of each witness and of the importance of her testimony.

It must be clear to you by now that you are being called upon to resolve various factual issues raised by the parties in the face of very different pictures painted by both sides. In making these judgments, you should carefully scrutinize all of the testimony of each witness, the circumstances under which each witness testified and any other matter in evidence which may help you decide the truth and the importance of each witness's testimony.

How do you determine where the truth lies? You watched each witness testify. Everything a witness said or did on the witness stand counts in your determination. How did the witness impress you? Did he appear to be frank, forthright, and candid, or evasive and edgy as if hiding something? How did the witness appear; what was her demeanor—that is, her carriage, behavior, bearing, manner and appearance while testifying? Often it is not what a person says but how he says it that moves us.

You should use all the tests for truthfulness that you would use in determining matters of importance to you in your everyday life. You should consider any bias or hostility the witness may have shown for or against any party as well as any interest the witness has in the outcome of the case. You should consider the opportunity the witness had to see, hear, and know the things about which he testified, the accuracy of her memory, her candor or lack of candor, her intelligence, the reasonableness and probability of her testimony and its consistency or lack of consistency and its corroboration or lack of corroboration with other credible testimony.

In other words, what you must try to do in deciding credibility is to size a witness up in light of his or her demeanor, the explanations given and all of the other evidence in the case. Always remember that you should use your common sense, your good judgment and your own life experience.

Authority:

4-76 Modern Federal Jury Instructions-Civil, P 76.01 (Matthew Bender)

Instruction No. 25.
Bias

In deciding whether to believe a witness, you should specifically note any evidence of hostility or affection which the witness may have towards one of the parties. Likewise, you should consider evidence of any other interest or motive that the witness may have in cooperating with a particular party.

It is your duty to consider whether the witness has permitted any such bias or interest to color his testimony. In short, if you find that a witness is biased, you should view his testimony with caution, weigh it with care and subject it to close and searching scrutiny.

Authority:

4-76 Modern Federal Jury Instructions-Civil, P 76.02 (Matthew Bender)

Instruction No. 26.
Interest in Outcome

In evaluating the credibility of the witnesses, you should take into account any evidence that a witness may benefit in some way from the outcome of the case. Such interest in the outcome creates a motive to testify falsely and may sway a witness to testify in a way that advances his own interests. Therefore, if you find that any witness whose testimony you are considering may have an interest in the outcome of this trial, then you should bear that factor in mind when evaluating the credibility of his testimony, and accept it with great care.

Keep in mind, though, that it does not automatically follow that testimony given by an interested witness is to be disbelieved. There are many people who, no matter what their interest in the outcome of the case may be, would not testify falsely. It is for you to decide, based on your own perceptions and common sense, to what extent, if at all, the witness's interest has affected his testimony.

Authority:

4-76 Modern Federal Jury Instructions-Civil, P 76.03 (Matthew Bender)

Instruction No. 27.
Discrepancies in Testimony

You have heard evidence of discrepancies in the testimony of certain witnesses, and counsel have argued that such discrepancies are a reason for you to reject the testimony of those witnesses.

You are instructed that evidence of discrepancies may be a basis to disbelieve a witness's testimony. On the other hand, discrepancies in a witness's testimony or between his or her testimony and that of others do not necessarily mean that the witness's entire testimony should be discredited.

People sometimes forget things and even a truthful witness may be nervous and contradict himself. It is also a fact that two people witnessing an event will see or hear it differently. Whether a discrepancy pertains to a fact of importance or only to a trivial detail should be considered in weighing its significance; but a willful falsehood always is a matter of importance and should be considered seriously.

It is for you to decide, based on your total impression of the witness, how to weigh the discrepancies in her testimony. You should, as always, use common sense and your own good judgment.

Authority:

4-76 Modern Federal Jury Instructions-Civil, P 76.04 (Matthew Bender)

Instruction No. 28.
Impeachment by Prior Inconsistent Statements

You have heard evidence that at some earlier time the witness has said or done something which counsel argues is inconsistent with the witness's trial testimony.

Evidence of a prior inconsistent statement was placed before you for the limited purpose of helping you decide whether to believe the trial testimony of the witness who contradicted himself. If you find that the witness made an earlier statement that conflicts with his trial testimony, you may consider that fact in deciding how much of his trial testimony, if any, to believe.

In making this determination, you may consider whether the witness purposely made a false statement or whether it was an innocent mistake; whether the inconsistency concerns an important fact, or whether it had to do with a small detail; whether the witness had an explanation for the inconsistency; and whether that explanation appealed to your common sense.

It is exclusively your duty, based upon all the evidence and your own good judgment, to determine whether the prior statement was inconsistent, and if so how much, if any, weight to give to the inconsistent statement in determining whether to believe all or part of the witness's testimony.

Authority:

4-76 Modern Federal Jury Instructions-Civil, P 76.05 (Matthew Bender)

Instruction No. 29.
Expert Witnesses

In this case, I have permitted certain witnesses to express their opinions or conclusions about matters that are at issue in this case. While the rules of evidence ordinarily do not permit witnesses to testify as to opinions or conclusions, an exception to this rule exists for "expert witnesses." An expert witness is a person who, by education and experience has become expert is some art, science, profession, or calling. An expert witness may be permitted to testify to an opinion on those matters about which he or she has special knowledge, skill, experience and training. Such testimony is presented to you on the theory that someone who is experienced and knowledgeable in the field can assist you in understanding the evidence or in reaching an independent decision on the facts.

When you determine what weight to give to each expert's opinion, you should consider the witness's qualifications and credibility, the facts or materials upon which each opinion is based, and the reasons given for each opinion.

A witness's opinion is based on knowledge, beliefs, or impressions. An opinion is only as good as the facts and reasons that it is based upon. When determining the value of the expert's opinion, you should consider whether such facts have actually been proved. Likewise, you may consider the strengths and weaknesses of the reasons that the opinion is based on. You may give the opinion testimony whatever weight, if any, you find it deserves in light of all the evidence in this case. You should not, however, accept a witness's testimony merely because he is an expert. Nor should you substitute it for your own reason, judgment, and common sense. The determination of the facts in this case rests solely with you.

Expert witnesses are often asked to assume that certain facts are true. They then render their expert opinions based upon the assumption, or they answer hypothetical questions. If any assumed fact has not been established by the evidence, you should take that into consideration when evaluating the expert's answer. You are not bound by an opinion, but you may not disregard

one arbitrarily. You should give each opinions the weight you think it deserves. If you feel that it is outweighed by the evidence, you may disregard the opinion entirely.

Authority:

Adapted from 2d Modern Federal Jury Instructions-Civil 2.13

3 K. O'Malley, J. Grenig & W. Lee, Federal Jury Practice and Instructions (5th ed. 2001) § 104.40

Instruction No. 30.
Proposed Release Instruction

You heard testimony about an agreement entered into on March 20, 2016 in which Mr. Bodner and PPVA mutually released one another from "[a]ny and all [claims] . . . based in whole or in part on any act or omissions, transaction, or event in connection in any manner whatsoever with Platinum . . ."

The release agreement is enforceable against PPVA, and you must find for Mr. Bodner, unless you find (as Plaintiffs claim) that Plaintiffs have proven by clear and convincing evidence that the agreement was not entered into for a genuine business purpose. If Plaintiffs fail to establish by clear and convincing evidence that freeing up partnership interests for new investors such as the Katz Family was not at least one of the purposes of the release agreement, then you must find for Mr. Bodner.

Authority:

Centro Empresarial Cempresa S.A. v. América Móvil, S.A.B. de C.V., 17 N.Y.3d 269 (2011); Trott, et al. v. Platinum Management (NY) LLC, et al., Opinion and Order (Doc. 624) (S.D.N.Y. Apr. 21, 2020).

PROPOSED LIABILITY INSTRUCTIONS

[Note for the Court: Mr. Bodner has filed a motion *in limine*, ECF No. 669, seeking an order from the Court consolidating the counts into a single claim for breach of fiduciary duty, charging the jury only on that single count. The JOLs have agreed that their eight counts may be consolidated into four claims: breach of the fiduciary duty of care, breach of the fiduciary duty of loyalty, fraud, and aiding and abetting breach of fiduciary duty. Regardless of whether the Court consolidates the remaining claims against Mr. Bodner into one or four claims, all of the plaintiffs' remaining claims are premised on Bodner's alleged failure to disclose overvaluations of PPVA's NAV after he allegedly acquired knowledge of the overvaluations. Despite the different elements and ramifications of the JOLs' four suggested claims, each of the four claims involves an identical factual inquiry for the jury. As such, counsel for Mr. Bodner suggests that only the breach of fiduciary duty instruction be read to the jury, as the inquiry that instruction presents would be identical for any of the other remining claims against Bodner that survive the motion *in limine* stage. Counsel for Mr. Bodner believes that any other approach to the jury instructions regarding the remaining claims against him increases the risks of an inconsistent jury verdict and a potential mistrial.

Although counsel for Mr. Bodner believes that the interests of justice and judicial economy support consolidating the JOLs' claims into a single count for breach of fiduciary duty, in the event the Court does not agree, counsel sets forth the below proposed instructions for each of the JOLs' duplicative claims.]

Authorities:

April 21 Opinion (Doc. 624).

Kosmynka v. Polaris Indus., 462 F.3d 74, 86 (2d Cir. 2006) (citing *Barry v. Manglass*, 55 N.Y.2d 803, 432 N.E.2d 125, 447 N.Y.S.2d 423, 424 (1981) ("Under New York law, a verdict is inconsistent if a jury's finding on one claim necessarily negates an element of another cause of action."); *id.* (appellate court concluding "that [defendant] preserved its objection to the

inconsistent verdict by bringing the anomaly to the court's attention at a time when it could be cured.”).

Anderson Grp., LLC v. City of Saratoga Springs, 805 F.3d 34, 44 (2d Cir. 2016) (“[A] district court, properly alerted to a potential verdict inconsistency, may attempt to correct that error by resubmitting the matter to the jury after providing ‘some further instruction.’”).
Seippel v. Jenkins & Gilchrist, P.C., 341 F. Supp. 2d 363, 376 (S.D.N.Y. 2004) (claims that “arise[] from the same conduct and involve[] no distinct damages” may be dismissed as duplicative).

Interventure 77 Hudson LLC v. Halengren, Index No. 653913/2013, 2018 N.Y. Misc. LEXIS 1851, at *30-31 (Sup. Ct. N.Y. Cty. May 14, 2018) (dismissing claims including fraud as duplicative of breach-of-fiduciary-duty claim where 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); *see also Pai v. Blue Man Grp. 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”).

Joyce v. Thompson Wigdor & Gilly LLP, No. 06 Civ. 15315(RLC)(GWG), 2008 WL 2329227, at *14 (S.D.N.Y. June 3, 2008) (dismissing plaintiff’s negligence, breach of contract, breach of fiduciary duties, negligent misrepresentation, and fraudulent misrepresentation claims as duplicative of legal malpractice claim because plaintiff “identifies no other factual basis for these claims . . . nor does she allege any ‘distinct damages’ arising from these claims”); *see also Iannazzo v. Day Pitney LLP*, No. 04 Civ. 7413 (DC), 2007 WL 2020052, at *10 (S.D.N.Y. July 10, 2007) (holding that breach of fiduciary duty claim was duplicative of legal malpractice claim because breach of fiduciary duty claim was “based on the same set of facts” and plaintiff “does not allege distinct damages”); *Serova v. Teplen*, No. 05 CIV. 6748 (HB), 2006 WL 349624, at *4 (S.D.N.Y. Feb. 16, 2006); *Mecca v. Shang*, 258 A.D.2d 569, 570, 685 N.Y.S.2d 458, 459-60 (2d Dep’t 1999).

Instruction No. 31.
Liability in General

Let us now turn to the specific claim(s) brought by Plaintiffs against Mr. Bodner. In assessing any given claim, you must determine, according to my instructions, whether Plaintiffs have proved each essential element of that claim by clear and convincing evidence. This is known as establishing "liability." If you find that Mr. Bodner is liable on a given claim, then, and only then, will you proceed to consider the issue of damages, that is, how much money Mr. Bodner must pay on that claim. In determining whether Plaintiffs have established Mr. Bodner's legal liability on any given claim, you must consider only the proof related to that claim.

Authority:

Adapted from Instruction No. 11 in *Gruber v. Reger*, Case No. 1:16-cv-09727-JSR (S.D.N.Y.) (Rakoff, D.J.), ECF No. 478 (June 14, 2022).

Instruction No. 32.
Claim for Breach of Fiduciary Duty

Plaintiffs claim that Mr. Bodner breached his fiduciary duty by intentionally failing to disclose what he came to learn was the fraudulent overvaluation of PPVA's net asset value ("NAV"). To support a claim for breach of fiduciary duty, plaintiffs must prove by clear and convincing evidence each of the following elements: (1) that Mr. Bodner owed a fiduciary duty to PPVA, (2) that Mr. Bodner breached that fiduciary duty, (3) that PPVA suffered damages as a result of Mr. Bodner's breach, and (4) that Mr. Bodner's breach of fiduciary duty caused PPVA's damages. If you conclude that Plaintiffs did not prove each and all of these facts by clear and convincing evidence, you must find for Mr. Bodner.

Authority:

Trott, et al. v. Platinum Management (NY) LLC, et al., Opinion and Order at 22 (Doc. 624) (S.D.N.Y. Apr. 21, 2020) (setting forth three elements of breach of fiduciary duty claim); *Spinelli v. NFL*, 903 F.3d 185, 207 (2d Cir. 2018) ("To state a breach of fiduciary duty claim under New York law, a plaintiff must plead: (i) the existence of a fiduciary duty; (ii) a knowing breach of that duty; and (iii) damages resulting therefrom.") (citations and quotation marks omitted).

Instruction No. 33.
First Element: Existence of a Fiduciary Relationship

The first element or requirement that plaintiffs must prove to prevail on a claim for breach of fiduciary duty is the existence of a fiduciary relationship between Mr. Bodner and PPVA. In this case, the parties agree that PPVA appointed Platinum Management as its investment adviser and general partner, and Platinum Management is, as a result, in a fiduciary relationship with PPVA. In the case of Mr. Bodner, the parties also agree that he was not a managing member, officer, or employee of Platinum Management, that he had no role in setting NAV or valuing assets, and that he had no contractual power over the affairs of Platinum Management. Notwithstanding this, Plaintiffs claim Bodner owed a fiduciary duty to PPVA because the plaintiffs claim Bodner in practice had control over Platinum Management and Mark Nordlicht, who was in fact the legal head of Platinum Management and majority owner, as relating to the affairs of PPVA. Bodner denies that he exercised control over Platinum Management with respect to the affairs of PPVA and thus Bodner denies he was a fiduciary.

In order to find that Mr. Bodner was a fiduciary of PPVA, you must find that, by clear and convincing evidence, Mr. Bodner had actual control over Platinum Management with respect to the business and affairs of PPVA. If you find that plaintiffs have not established that Bodner had actual control over the affairs of Platinum Management relating to PPVA, you must find for Mr. Bodner on the breach of fiduciary duty claim and your inquiry ends right there.

I instruct you that, in order to determine whether Mr. Bodner had actual control over Platinum Management with respect to the affairs of PPVA, you must conclude that in fact he had the ability to control Platinum Management. Someone who has a vote, or an opinion—even a respected opinion—is not in control. A person with an opinion that can be overruled and who cannot compel another to act in accordance with his instruction does not have control over the second person. Influence is not control. Control is the power and authority to direct.

Authority:

Trott, et al. v. Platinum Management (NY) LLC, et al., Opinion and Order at 25-26 (Doc. 624) (S.D.N.Y. Apr. 21, 2020) (genuine issue of material fact exists as to whether Mr. Bodner "exercised significant 'superiority or influence over' PPVA's affairs" and therefore owed a fiduciary duty to PPVA); *id.* at 22 (quoting *Indep. Asset Mgmt. v. Zanger*, 538 F. Supp. 2d 704, 709 (S.D.N.Y. 2008)); *United States v. Chestman*, 947 F.2d 551 (2d Cir. 1991) ("'At the heart of the fiduciary relationship' lies 'reliance, and de facto control and dominance.'" (quoting *United States v. Margiotta*, 688 F.2d 108, 125 (2d Cir. 1982))); *Argent Elec., Inc. v. Cooper Lighting, Inc.*, 03 Civ. 9794 (RMB), 2005 U.S. Dist. LEXIS 18689, at *28 (S.D.N.Y. Aug. 31, 2005) (citing *Better Benefits v. Protective Life Ins.*, No. 03 Civ. 2820, 2004 U.S. Dist. LEXIS 5076, at *8-9 (S.D.N.Y. Mar. 30, 2004) ("The essence of a fiduciary relationship is that one party was dominated by the other. Indeed, in the absence of dominance and influence there is no fiduciary relationship regardless of the level of trust between the parties.")); *Thermal Imaging, Inc. v. Sandgrain Sec., Inc.*, 158 F. Supp. 2d 335, 343 (S.D.N.Y. 2001) ("Mere reposal of one's trust or confidence in a party, however, does not create a fiduciary relationship; the trust or confidence must be accepted as well."); *Reuben H. Donnelly Corp. v. Mark I. Mktg. Corp.*, 893 F. Supp. 285, 289 (S.D.N.Y. 1995) ("Under New York law, a fiduciary relationship arises when one has reposed trust or confidence in the integrity or fidelity of another who thereby gains a resulting superiority of influence over the first, or when one assumes control and responsibility over another."); *Marmelstein v. Kehillat*, 11 N.Y.3d 15, 21 (N.Y. 2008) ("[T]wo essential elements of a fiduciary relation are . . . de facto control and dominance") (citations and quotation marks omitted); *RNK Capital LLC v. Natsource LLC*, 76 A.D.3d 840, 842 (1st Dep't 2010) ("[O]n this record it could not reasonably be concluded that [plaintiffs] repose[d] a high level of confidence and reliance in [defendants], who thereby exercise[d] control and dominance over [plaintiffs]") (citations an quotation marks omitted).

In re Eugenia VI Venture Holdings, Ltd., 649 F. Supp. 2d 105, 124-25 (S.D.N.Y. 2008) (rejecting argument that defendants owed fiduciary duties and noting that actual control may

"depend on such variables as voting rights, veto rights, or requirements for a super-majority vote on issues pertinent to company management" rather than simply share ownership).

In re Motel 6 Secs. Litig., 161 F. Supp. 2d 227, 238 (S.D.N.Y. 2001) ("Control is not the same as influence," defining "control person" in securities context).

In re Blech Sec. Lit., 961 F. Supp. 569, 587 (S.D.N.Y. 1997) (distinguishing an "exercise of influence" from control-person status under securities law).

Instruction No. 34.
Second Element: Knowing Breach of a Fiduciary Duty

If plaintiffs prove that Mr. Bodner was a fiduciary of PPVA by virtue of his ability to control the business and affairs of Platinum Management with respect to PPVA, the next element plaintiffs must prove by clear and convincing evidence is that Mr. Bodner knowingly breached a fiduciary duty. To do so, in the case of Mr. Bodner, plaintiffs must prove that Mr. Bodner came to learn PPVA's NAV was fraudulently inflated, and that he willfully failed to disclose this to PPVA. This requires plaintiffs to prove that at some point during the damages period, (1) PPVA's NAV was intentionally overvalued; (2) as the product of Platinum Management's intentional fraud (and not merely by poor judgment or undue optimism); (3) that Mr. Bodner had actual knowledge of the fraudulent overvaluation, and understood the overvaluation was arbitrary and not based on a good-faith view of asset values; and (4) that Mr. Bodner intentionally failed to disclose to PPVA what he learned was the fraudulent overvaluation. If you find that one or more of these elements has not been proved against Mr. Bodner, you must find for Mr. Bodner on this claim.

You must first consider whether PPVA's NAV was overvalued as the product of Platinum Management's fraud and/or arbitrariness. The plaintiffs' claims in this case rely on six assets that they allege were fraudulently overvalued at one or more points in time between January 1, 2013 and March 31, 2016: Black Elk, Golden Gate, Northstar, Pedevco, Desert Hawk, and the Michael Goldberg Receivable. To find that PPVA's NAV at any point in time was overvalued, your inquiry is limited to PPVA's stated valuations of these six assets.

If you find that one or more of PPVA's NAVs for the six assets at issue was overvalued at a particular point in time, then you must decide whether the overvaluation amount was the product of Platinum Management's fraud. To find fraud, it is not enough to find that a third-party valuator disagreed with PPVA's NAV issued by Platinum Management and issued a different valuation. Nor is it enough to find that Platinum Management used poor judgment in issuing one or more of PPVA's NAVs. Nor is it enough to find that Platinum Management made a mistake in the course

of exercising good faith judgment. To qualify as the product of fraud, you must find that Platinum Management issued an overvaluation with the intent to defraud.

In order to establish intent to defraud, plaintiffs must establish by clear and convincing evidence that Platinum Management intentionally inflated PPVA's NAVs with actual knowledge that they were inflated.

Because an essential element of plaintiffs' case is intent to defraud, it follows that good faith on the part of Platinum Management is a complete defense to a finding that it acted with fraudulent intent. Mr. Bodner, however, has no burden to establish Platinum Management's good faith. Rather, the burden is on the plaintiffs to prove fraudulent intent and consequent lack of good faith by clear and convincing evidence.

Platinum Management's honest belief in the reasonableness of the NAV statements—at the time those statements were issued—is a complete defense to a finding that it acted with fraudulent intent in issuing an overvaluation of one or more of PPVA's NAVs.

Furthermore, you have heard testimony about industry standards for hedge fund managers. A finding that Platinum Management did not conduct its work in accordance with industry standards does not establish proof of an intent to commit knowing fraud, or of recklessness. To find that Platinum Management acted fraudulently in issuing an overvalued NAV statement for PPVA, you must find that it acted with an intent to defraud.

In the case of Mr. Bodner, if you find that Platinum Management acted fraudulently in overvaluing PPVA's NAV, you must next consider whether Mr. Bodner had actual knowledge at some point that PPVA's NAV as prepared by Platinum Management was fraudulently overvalued for the six assets referenced by plaintiffs. Actual knowledge cannot be proved merely by showing that Mr. Bodner disagreed with how Platinum Management was valuing the assets.

If you find that Platinum Management intentionally overvalued PPVA's NAV as a result of fraud, and that Mr. Bodner had actual knowledge that PPVA's NAV as prepared by Platinum Management was fraudulently overvalued for one or more of the six assets at issue, then you must

consider whether Mr. Bodner intentionally failed to disclose to PPVA what he learned was the fraudulent overvaluation of PPVA's NAV.

Because the plaintiffs claim that Mr. Bodner acted willfully, in order to find Mr. Bodner liable, you must find that he had actual knowledge that PPVA's NAV was fraudulently overvalued and that he acted in bad faith by making the deliberate decision not to disclose that fraudulent overvaluation to PPVA. If you find that one or more of these elements have not been proved against Mr. Bodner, you must find for Mr. Bodner on this claim.

Because an essential element of plaintiffs' case is that Mr. Bodner made a deliberate decision not to disclose a fraudulent overvaluation to PPVA, it follows that good faith on the part of Mr. Bodner is a complete defense to a charge of fraud against him. A defendant, however, has no burden to establish a defense of good faith. Rather, the burden is on the plaintiffs to prove fraudulent intent and consequent lack of good faith by clear and convincing evidence.

Mr. Bodner's honest belief that he did not need to disclose anything about PPVA's NAV to PPVA is a complete defense to a finding that he intentionally failed to disclose an overvaluation of PPVA's NAV.

Authority:

Trott, et al. v. Platinum Management (NY) LLC, et al., Opinion and Order at 26-27 (Doc. 624) (S.D.N.Y. Apr. 21, 2020).

Second Amended Complaint, ¶¶ 763-781

Anwar v. Fairfield Greenwich, Ltd., 728 F. Supp. 2d 372, 414 (S.D.N.Y. 2010) (discussing common law elements of fraud).

Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC, 592 F. Supp. 2d 608, 623 (S.D.N.Y. 2009); *Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC*, 446 F. Supp. 2d 163, 195 & n.233 (S.D.N.Y. 2006).

Wright v. Ernst & Young LLP, 152 F.3d 169, 175 (2d Cir. 1998).

Black v. Finantra Capital, Inc., 418 F.3d 203, 209 (2d Cir. 2005*); Brown v. E.F. Hutton Group, Inc.*, 991 F.2d 1020, 1032 (2d Cir. 1993); *I. Meyer Pincus & Ass., P.C. v. Oppenheimer*,

936 F.2d 759, 761-63 (2d Cir. 1991); *Schlick v. Penn-Dixie Cement Corp.*, 507 F.2d 374, 380 (2d Cir. 1974); *Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC*, 592 F. Supp. 2d 608, 622 (S.D.N.Y. 2009).

P. Chimento Co., Inc. v. Banco Popular de Puerto Rico, 208 A.D.2d 385, 617 N.Y.S.2d 157, 158-59 (N.Y. Sup. Ct. 1994); *First Nat'l State Bank of New Jersey v. Irving Trust Co.*, 91 A.D.2d 543, 457 N.Y.S.2d 17, 19 (N.Y. Sup. Ct. 1982); *Lanzi v. Brooks*, 54 A.D.2d 1057, 388 N.Y.S.2d 946, 948 (N.Y. Sup. Ct. 1976).

Basic Inc. v. Levinson, 485 U.S. 224, 108 S. Ct. 978, 99 L. Ed. 2d 194 (1988); *Fed. Hous. Fin. Agency v. Nomura Holding Am., Inc.*, 104 F. Supp. 3d 441, 557 (S.D.N.Y. 2015).

Griffin v. McNiff, 744 F. Supp. 1237, 1251 (S.D.N.Y. 2010) ("In and of itself, however, a failure to investigate does not rise above the level of negligence unless there are factual allegations which tend to establish knowledge of the alleged fraudulent acts.").

In re Omnicom Grp., Inc. Sec. Litig., No. 02 Civ. 4483 (WHP)(MHD), 2007 U.S. Dist. LEXIS 60298, at *48-51 (S.D.N.Y. Aug. 10, 2007) (reviewing ambiguous evidence about value of securities and concluding, "[a]t the very least, where reasonable minds could differ" about proper accounting treatment, allegedly improper treatment could not be viewed as fraudulent).

In re WebMD Health Corp. Sec. Litig., No. 11 Civ. 5382 (JFK), 2013 U.S. Dist. LEXIS 1512, at *18-20 (S.D.N.Y. Jan. 2, 2013) (dismissing fraud claims; scienter requires proof that defendants actually knew their statements were false); *see also Frankfurt-Tr. Inv. Luxemburg AG v. United Techs. Corp.*, 336 F. Supp. 3d 196, 229 (S.D.N.Y. 2018) (dismissing fraud claim and citing cases regarding scienter).

Steinberg v. Carey, 439 F. Supp. 1233, 1239-41 (S.D.N.Y. 1977) (granting summary judgment to defendants who "had no hand in the preparation or verification of the prospectus" and so "were entitled to rely on the efforts of management and counsel and had no duty to go any further than they did"; "the required scienter is not present where a defendant entertains a reasonable belief that all the facts have been disclosed").

Instruction No. 35.
Third Element: Proximate Cause

If you find that Mr. Bodner did breach his fiduciary duties to PPVA by intentionally failing to disclose what he came to learn to be a fraudulent overvaluation of PPVA's NAV, the third element that plaintiffs must establish by clear and convincing evidence is that Mr. Bodner's omission was the proximate cause of the alleged injury, if any, to PPVA.

In order for an alleged omission to be considered the proximate cause of the injury, it must be a substantial factor in causing the damage, and the injury must have been either a direct result or a reasonably probable and foreseeable consequence of the omission. Here, Plaintiffs claim that as a result of Platinum Management's overvaluation of PPVA's NAV, PPVA paid inflated management fees and inflated incentive fees. Accordingly, in the case of Mr. Bodner, in order for plaintiffs to establish Mr. Bodner's liability for PPVA's alleged losses, plaintiffs must also show that the alleged failure of Mr. Bodner to disclose his alleged knowledge of the fraudulent overvaluation was in a reasonably direct and foreseeable way responsible for PPVA continuing to pay the inflated fees. Plaintiffs have the burden of establishing this direct causal connection between Mr. Bodner's failure to disclose the overvaluation of PPVA's NAV and PPVA's subsequent continued payment of inflated management or incentive fees.

Authority:

4-82 Modern Federal Jury Instructions-Civil, P 82.02 (Matthew Bender)

Meisel v. Grunberg, No. 11-4394-cv, 521 Fed. Appx. 3, 8 (2d Cir. Mar. 26, 2013) ("We have previously explained that, where damages are sought for breach of fiduciary duty under New York law, the plaintiff must demonstrate that the defendant's conduct proximately caused [the] injury." (quoting *LNC Invs., Inc. v. First Fidelity Bank, N.A.*, 173 F.3d 454, 465 (2d Cir. 1999)); *Bernshtein v. City of N.Y.*, No. 11-0545-cv, 496 Fed. Appx. 140 (2d Cir. Sept. 14, 2012) (summary order) (upholding jury instructions that defined "proximate cause" as "a cause that naturally and probably led to and might have been expected to produce plaintiff's injury, or that a reasonable person would regard as the cause of the injury"); *Northbay Constr. Co., Inc. v. Bauco Constr.*

Corp., 38 A.D.3d 737, 738 (2d Dep't 2007) ("[I]t was for the jury, as the trier of fact, to determine whether [defendant] proximately caused the losses claimed through his alleged breach of fiduciary duty . . . . Thus, there must be a new trial because [b]y . . . refusing to charge the jury on proximate cause, the Supreme Court removed causation from the jury's consideration and decided the issue as a matter of law.") (internal citations and quotation marks omitted).

Instruction No. 36.
Fourth Element: Compensatory Damages

The purpose of the law of damages is to award, as far as possible, just and fair compensation for the loss, if any, which resulted from the defendant's allegedly wrongful conduct.

These are known as "compensatory damages." Compensatory damages seek to make the plaintiff whole—that is, to compensate the plaintiff for the damage suffered. I remind you that you may award compensatory damages only for injuries that the plaintiffs prove were proximately caused by Mr. Bodner's allegedly wrongful conduct. This means that, if you conclude that Mr. Bodner is liable and that PPVA is entitled to compensatory damages, those damages will be based on the amount of overvaluation (if any) that you find from the time that Bodner's breach of fiduciary duty began. I will do the actual damages calculations based on the amount of overvaluation (if any) that you find.

Authority:

4 Modern Federal Jury Instructions – Civil 77-3

Instruction No. 37.
Claim for Fraud

[If Bodner's motion *in limine*, ECF No. 669, is not granted]

Plaintiffs also bring a claim for fraud against Mr. Bodner. They claim that Bodner is liable for fraud because he is a fiduciary and he allegedly came to learn that PPVA's NAV was fraudulently inflated and then he willfully failed to disclose this to PPVA. Therefore, Plaintiffs claim that Mr. Bodner is liable for fraud based on the same alleged conduct that they claim makes him liable for breach of fiduciary duty. Mr. Bodner denies that he is liable for fraud and denies that he caused PPVA to suffer damages.

To support their fraud claim, Plaintiffs must prove by clear and convincing evidence exactly the same facts as they must prove for breach of fiduciary duty: (1) that Mr. Bodner exercised control over Platinum Management with respect to the affairs of PPVA, and therefore he was a fiduciary to PPVA; (2) that Mr. Bodner came to learn PPVA's NAV was fraudulently inflated; (3) that Mr. Bodner willfully failed to disclose this fraudulent overvaluation to PPVA; and (4) that PPVA suffered damages as a proximate result, meaning that Mr. Bodner was obligated to disclose fraudulent overvaluations to PPVA and PPVA was injured as a direct result of his failure to do so. If you conclude that Plaintiffs did not prove each and all of these facts by clear and convincing evidence, you must find for Mr. Bodner.

Authority:

Trott, et al. v. Platinum Management (NY) LLC, et al., Opinion and Order (Doc. 624), at 30-31 (S.D.N.Y. Apr. 21, 2020) ("[P]ure omission may here be actionable, because Bodner might have had the obligation, as a fiduciary, to disclose . . ."; "Therefore, for substantially the same reason as in the context of the claim for breach of fiduciary duty, the Court grants summary judgment in favor of Bodner on portions of the claims for fraud and constructive fraud . . .").
Second Amended Complaint, ¶¶ 792-813

New York Pattern Jury Instructions -- Civil, PJI 3:20

Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC, 592 F. Supp. 2d 608, 623 (S.D.N.Y. 2009); Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC, 446 F. Supp. 2d 163, 195 & n.233 (S.D.N.Y. 2006).

Instruction No. 38.
Claim for Aiding and Abetting a Breach of Fiduciary Duty

[If Bodner's motion *in limine*, ECF No. 669, is not granted]

Plaintiffs also bring a claim against Mr. Bodner for aiding and abetting a breach of fiduciary duty by Platinum Management. They claim that Bodner is liable for aiding and abetting because he allegedly came to learn that PPVA's NAV was fraudulently inflated and then he willfully failed to disclose this to PPVA. Therefore, Plaintiffs claim that Mr. Bodner is liable for aiding and abetting a breach of fiduciary duty based on the same alleged conduct that they claim makes him liable for breach of fiduciary duty and fraud. Mr. Bodner denies that he is liable for aiding and abetting a breach of fiduciary duty, and denies that he caused PPVA to suffer damages.

To support their aiding-and-abetting claim, Plaintiffs must prove by clear and convincing evidence exactly the same facts as they must prove for breach of fiduciary duty and fraud: (1) that Mr. Bodner exercised control over Platinum Management with respect to the affairs of PPVA, and therefore he was a fiduciary to PPVA; (2) that Mr. Bodner came to learn PPVA's NAV was fraudulently inflated; (3) that Mr. Bodner willfully failed to disclose this fraudulent overvaluation to PPVA; and (4) that PPVA suffered damages as a proximate result, meaning that Mr. Bodner was obligated to disclose fraudulent overvaluations to PPVA and PPVA was injured as a direct result of his failure to do so. If you conclude that Plaintiffs did not prove each and all of these facts by clear and convincing evidence, you must find for Mr. Bodner.

Authority:

Trott, et al. v. Platinum Management (NY) LLC, et al., Opinion and Order (Doc. 624), at 32 (S.D.N.Y. Apr. 21, 2020) ("The analysis here also largely follows from the above analysis of Bodner's motion on the claims for breach of fiduciary duty, fraud, and constructive fraud. . . .")

Second Amended Complaint, ¶¶ 846-857

Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC, 446 F. Supp. 2d 163, 201 & n.279 (S.D.N.Y. 2006); Fraternity Fund Ltd. v. Beacon Hill Asset Mgmt. LLC, 376 F. Supp. 2d 385, 412 (S.D.N.Y. 2005).

PROPOSED DAMAGES INSTRUCTIONS

Instruction No. 39.
Consider Damages Only If Necessary

If the plaintiffs have proven by clear and convincing evidence that Mr. Bodner is liable on plaintiffs' claims, then you must determine the damages to which the plaintiffs are entitled. However, you should not infer that the plaintiffs are entitled to recover damages merely because I am instructing you on the elements of damages. It is exclusively your function to decide upon liability, and I am instructing you on damages only so that you will have guidance should you decide that the plaintiff is entitled to recovery.

You will be provided with a special verdict form which asks for your findings on each element of liability and on the appropriate measure of damages, if you find Mr. Bodner liable.

Instruction No. 40.
Damages – Comment by Counsel During Opening or Closing Remarks

During his/her opening/closing remarks, counsel for Plaintiffs suggested a specific dollar amount s/he believes to appropriate compensation for specific element of Plaintiffs' damages. An attorney is permitted to make suggestions as to the amount that should be awarded, but those suggestions are argument only and not evidence and should not be considered by you as evidence of any plaintiff's damages. The determination of damages is solely for you, the jury, to decide.

Authority:

Adapted from New York Pattern Jury Instructions -- Civil, PJI 2:77A

Instruction No. 41.
Proportionate Liability (General Obligations Law 15-108)

Before the commencement of this trial, there were a number of persons and entities that plaintiffs claimed were responsible for the same damage allegedly caused by Mr. Bodner.

A list of such persons and entities is as follows:[1]

- Ezra Beren
- CohnReznick LLP
- Bernard Fuchs
- Seth Gerszberg
- Murray Huberfeld
- Estate of Uri Landesman
- David Ottensoser
- Joseph SanFilippo
- David Steinberg

You have heard testimony from and about some of those released persons and entities, and you may have seen evidence about them. Among others, they are various officers, managers, and employees of Platinum Management. Your verdict form includes the names of these persons and you will be responsible for apportioning the plaintiffs' damages among them. You must determine whether any released persons or entities are responsible for any of the plaintiffs' damages, and the extent to which those parties are responsible. In other words, you must apportion the liability for the plaintiffs' alleged damages among any released parties that you find contributed to those damages, even though those parties are not defendants in this trial.

[1] [Note for the Court: Bodner would seek to add the following released persons and entities that should be included in a GOL 15-108 instruction if this Court permits the JOLs' request for previously dismissed Second Scheme damages, which is the subject of a motion *in limine* by Bodner, ECF No. 746: Kevin Cassidy; Moshe Feuer; Illumin Capital Management LP; Dhruv Narain; Michael Nordlicht; Daniel Saks; Scott Taylor.
Bodner is not aware presently of all parties that have been released by Plaintiffs. Bodner will conform this list to the evidence at the conclusion of Plaintiffs' case-in-chief.]

Authority:

New York General Obligations Law Section 15-108 ("When a release or a covenant not to sue or not to enforce a judgment is given to one of two or more persons liable or claimed to be liable in tort for the same injury . . . it reduces the claim of the releasor against the other tortfeasors to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, or in the amount of the released tortfeasor's equitable share of the damages under [NY CPLR § 1402 (2012)] whichever is the greatest.").

Instruction No. 42.
Compensatory Damages

The first type of damages is compensatory damages, on which I already instructed you when I described it as an essential element of a cause of action for breach of fiduciary duty.

Instruction No. 43.
Punitive Damages

[Note for the Court: As explained in Mr. Bodner's motion *in limine* centered on the JOLs' punitive damages claims, ECF No. 671, Mr. Bodner does not believe the JOLs have a legal basis for a punitive damages claim. However, should the Court disagree, he submits the following proposed instruction.]

The relationship between Platinum Management and PPVA was defined by various contracts, including an Investment Management Agreement and a Limited Partnership Agreement. In the case of Mr. Bodner, he submits that he was not a party to either of those contracts, and thus had no right to control or manage PPVA or its relationship with Platinum Management, and assumed no fiduciary duty to PPVA. Plaintiffs argue that Mr. Bodner controlled PPVA by controlling Platinum Management, but Mr. Bodner disputes that he controlled either entity. Under New York law, tort claims based in contract, as they are here, must be "part of a pattern of similar conduct directed at the public generally" to be eligible for the extraordinary remedy of punitive damages. Bodner submits that none of the claims still at issue in this case—that he failed to disclose alleged NAV overvaluations to PPVA—involve "conduct directed at the public generally." If you find that Bodner's conduct was not directed at the public generally, then you may not enter a verdict for punitive damages against Bodner.

The purpose of punitive damages is to punish and deter, not to compensate. Punitive damages serve to punish a defendant for malicious or reckless conduct and, by doing so, to deter others from engaging in similar conduct in the future. You are not required to award punitive damages. If you do decide to award punitive damages, you must use sound reason in setting the amount. Your award of punitive damages must not reflect bias, prejudice, or sympathy toward any party. It should be presumed that plaintiffs have been made whole by compensatory damages, so punitive damages should be awarded only if you find that Mr. Bodner's conduct involved such wanton dishonesty as to imply a criminal indifference to his legal obligations. I remind you that

there were no criminal charges filed against Mr. Bodner as there were against certain other Platinum Management partners.

If you find that Plaintiffs have not proven by a preponderance of the evidence that Mr. Bodner engaged in gross, wanton, or willful misconduct of a highly immoral nature, you may not award punitive damages against Mr. Bodner.

Authority:

Adapted from Diamond Modern Federal Jury Instructions-Civil 15.7

Icebox-Scoops, Inc. v. Finanz St. Honore, B.V., 715 Fed. Appx. 54, 56 (2d Cir. 2017).

Evans v. Ottimo, 469 F.3d 278, 283 (2d Cir. 2006)

Instruction No. 44.
Consequential Damages: Breach of Fiduciary Duty

[Note for the Court: As explained in Mr. Bodner's motion *in limine* centered on the JOLs' consequential damages claims, ECF No. 746, Mr. Bodner does not believe the JOLs have a legal basis for their un-pleaded and never-litigated consequential damages claim. However, should the Court disagree, he submits the following proposed instruction.]

A plaintiff may recover consequential damages where the breach of fiduciary duty was a "substantial factor" in causing the injury. If you determine Mr. Bodner breached a fiduciary duty, you must consider whether that act was a "substantial factor" in causing plaintiffs to incur their alleged harms. Plaintiffs claim that Mr. Bodner failed to disclose that the assets were allegedly inflated, and that this failure to disclose proximately caused parties other than Mr. Bodner (namely, Platinum Management and Beechwood) to cause economic harm to PPVA through transactions in which Mr. Bodner played no role. You can find that Plaintiffs are entitled to recover these consequential damages only if you find that these transactions were the foreseeable outcome of any breach of fiduciary duty, fraud, or aiding and abetting of a breach of fiduciary duty by Mr. Bodner. If conduct by Platinum Management and Beechwood in the other transactions in which Mr. Bodner played no role was an intervening cause of the alleged economic harm resulting from those transactions, then you must not award consequential damages as against Mr. Bodner.

Plaintiffs claim that at some point in time between January 1, 2013 and March 31, 2016, Bodner came to learn that PPVA's NAV was fraudulently inflated. Plaintiffs further claim that at the time Bodner failed to disclose to PPVA that the NAV was inflated, it was reasonably foreseeable that, in 2016, Platinum Management and Beechwood would agree to a sale from PPVA to Beechwood of Agera at a price well below its value; and that the Agera sale was a deliberate decision to steal funds from PPVA and give them to Beechwood. Mr. Bodner had nothing to do with the Agera sale and is not accused of knowing it was done below true value or to harm PPVA.

If you find that it was not reasonably foreseeable that, in 2016, Platinum Management would steal funds from PPVA through the Agera sale, you must find for Bodner and may not

award consequential damages. The Agera sale was an independent unlawful or injurious transaction not connected to Bodner or the inflation of PPVA's NAV. If you find that the theft of PPVA funds through the Agera transaction was an intervening cause, then you should also find the Agera transaction was not reasonably foreseeable. It is Plaintiffs' burden to prove that the Agera transaction was a reasonably foreseeable outcome of Bodner's alleged failure to disclose the inflated NAV.

Authority:

Trott, et al. v. Platinum Management (NY) LLC, et al., Opinion and Order (Doc. 624) (S.D.N.Y. Apr. 21, 2020).

Aramony v. United Way, 28 F. Supp. 2d 147, 177 (S.D.N.Y. 1998).

Instruction No. 45.
Disgorgement and the Faithless Servant Doctrine

[Note for the Court: As explained in Mr. Bodner's motion *in limine* centered on the JOLs' disgorgement claims, ECF No. 746, Mr. Bodner does not believe that the JOLs have a legal basis for their un-pleaded and never-litigated disgorgement claim regarding his 2012 incentive fees and the cash equivalent of his unredeemed Feeder Fund interests. However, should the Court disagree, Bodner notes that disgorgement is an equitable remedy and is an issue for the Court, not the jury, to decide. If the Court disagrees with this, Bodner submits the following proposed instruction.]

In addition to actual damages, plaintiffs also seek an award of disgorgement. Disgorgement is a remedy that requires a party who profits from a wrongful act to give up any profits he or she made as a result of that act.

Such damages may be awarded only to the extent they are not already considered in calculating plaintiff's actual damages. In order to avoid double recovery, an award of disgorgement may not include any amounts that were accounted for in calculating plaintiff's actual damages.

Plaintiffs' disgorgement claim as against Mr. Bodner has two parts. First, Plaintiffs claim that Mr. Bodner's incentive fees that he earned for calendar year 2012 and which were paid to Grosser Lane, not to Mr. Bodner personally, should be disgorged. Plaintiffs make this claim even they do not allege that PPVA's NAV was fraudulently inflated in 2012. In order to award disgorgement of Mr. Bodner's 2012 fees paid to Grosser Lane, you must find that Plaintiffs have proven all of the following facts by clear and convincing evidence: (1) that Mr. Bodner was a servant of PPVA, meaning he was equivalent to an employee even though he was not an officer, director, or employee of PPVA and had no title at PPVA; (2) that when Grosser Lane received the 2012 fees, which Plaintiffs do not allege were inflated, Mr. Bodner was already breaching a fiduciary duty to PPVA; and (3) that Mr. Bodner's uninflated 2012 fees cannot be separated from other fees or distributions paid to Grosser Lane during 2013 and 2014.

Second, Plaintiffs claim that Feeder Fund interests allocated to Mr. Bodner and his family members (who are not defendants) should be disgorged, even though these interests were never redeemed for cash value. In order to award disgorgement of the Feeder Fund interests that were never distributed as cash, you must find that Plaintiffs proved by clear and convincing evidence: (1) that when the Feeder Fund interests were allocated to Mr. Bodner and his family members, Mr. Bodner was already breaching a fiduciary duty to PPVA; and (2) the fair cash value of these unredeemed Feeder Fund interests at the time they were allocated.

Authority:

Adapted from 2diam Modern Federal Jury Instructions-Civil 9.33.

SEC v. Commonwealth Chem. Sec., Inc., 574 F.2d 90, 95-96 (2d Cir. 1978) (disgorgement is historical equity remedy whose "availability is entrusted to the discretion of the court").

SEC v. Wyly, 56 F. Supp. 3d 394 (S.D.N.Y. 2014) (disgorgement is equitable remedy, so "district court has broad discretion not only in determining whether or not to order disgorgement but also in calculating the amount to be discharged").

Diamond v. Oreamuno, 24 N.Y.2d 494, 498-99 (1969) (officers and directors found in breach of fiduciary duty may be disgorged of profits "derived solely from exploiting information gained by virtue of their inside position as corporate officials").

Sec. Investor Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC, 12 MC 115 (JSR), 2013 U.S. Dist. LEXIS 172638, at *125 (S.D.N.Y. Dec. 5, 2013) (Rakoff, D.J.) (rejecting claims against "spouses solely by virtue of their marriage to, and their receiving of joint transfers with, corporate insiders").

Mosionzhnik v. Chowaiki, 41 Misc. 3d 822, 832, 972 N.Y.S.2d 841, 849 (N.Y. Sup. Ct. N.Y. Cty. 2013) (holding that fair market value of faithless servant's equity shares was "not impaired by her bad acts because her equity is not compensation for her services and not dependent on her job performance").

PROPOSED DELIBERATIONS INSTRUCTIONS

Instruction No. 46.
Deliberations

You will shortly retire to the jury room to begin your deliberations. As soon as you get to the jury room, please select one of your number as the foreperson to preside over your deliberations and serve as your spokesperson to communicate with the Court.

You will be bringing with you into the jury room a copy of my instructions of law and a verdict form on which to record your verdict.

Let me pause there, ladies and gentlemen, and just show you the verdict form. It's a very simple form. [Walk through verdict form].

When you have finished reaching your verdict, your foreperson will record it on that form and then sign it and date it, and seal it in this envelope marked "verdict." That will be brought to me, but I will not open it until you are all back here in the courtroom. Then we will open it, we will read it to you and ask each of you individually whether that's your verdict. The reason we go through that is to be absolutely sure we have your verdict just as you decide it.

In addition, we will send into the jury room all of the exhibits that were admitted into evidence. If you want any of the testimony, that also could be provided either in transcript or read-back form. But, please remember, that it is not always easy to locate what you might want to be as specific as you possibly can be in requesting portions of testimony.

Any of your requests, in fact any communication with the Court, should be made in writing signed by your foreperson, and given to the marshal who will be available outside the jury room throughout your deliberations. After consulting with counsel, I will respond to any question or request that you have as promptly as possible, either in writing or by having you return to the courtroom so that I can speak with you in person.

You should not, however, tell me or anyone else how the jury stands on any issue until you reach your verdict and record it on your verdict form.

Each of you must decide the case for yourself after consideration with your fellow jurors of the evidence in the case, and your verdict must be unanimous. In deliberating, bear in mind that while each juror is entitled to his or her opinion, each should exchange views with his or her fellow jurors. That is the very purpose of jury deliberation -- to discuss and consider the evidence; to listen to the arguments of fellow jurors; to present your individual views; to consult with one another; and to reach a verdict based solely and wholly on the evidence.

If, after carefully considering all the evidence and the arguments of your fellow jurors, you entertain a conscientious view that differs from the others, you are not to yield your view simply because you are outnumbered. On the other hand, you should not hesitate to change or modify an earlier opinion which, after discussion with your fellow jurors, now appears to be to be erroneous.

In short, your verdict must reflect your individual views and it must also be unanimous.

This completes my instruction of law.

Now, counsel, all objections and requests regarding the instructions of law that were previously made are deemed to be made again at this time, and the Court adheres to its prior rulings.

Authority:

Adapted from closing instruction in Samms v. Abrams et al., Case. No. 15-cv-2741 (S.D.N.Y.) (J. Rakoff) (ECF No. 121).

Instruction No. 47.
Right to See Exhibits and Hear Testimony;
Communications with Court

You are about to go into a jury room and begin your deliberations. If during those deliberations you want to see any of the exhibits, you may request that they be brought into the jury room. If you want any of the testimony read back to you, may also request that. Please remember that it is not always easy to locate what you might want, so be as specific as you possibly can in requesting exhibits or portions of the testimony.

Your requests for exhibits or testimony—in fact any communication with the court—should be made to me in writing, signed by your foreperson, and given to one of the marshals. In any event, do not tell me or anyone else how the jury stands on any issue until after a unanimous verdict is reached.

Authority:

4-78 Modern Federal Jury Instructions-Civil, P 78.01 (Matthew Bender)

Instruction No. 48.
Duty to Deliberate/Unanimous Verdict

You will now return to decide the case. In order to prevail, a plaintiff must sustain his or its burden of proof as I have explained to you with respect to each element of the complaint. If you find that a plaintiff has succeeded you should return a verdict in his or its favor on that claim. If you find that that plaintiff failed to sustain the burden on any element of the claim, you should return a verdict against the plaintiff. (Similarly, if you find that Mr. Bodner has failed to sustain his or its burden with respect to any element of the defendant's affirmative defense, you must return a verdict against that defense.)

It is your duty as jurors to consult with one another and to deliberate with a view to reaching an agreement. Each of you must decide the case for himself or herself, but you should do so only after a consideration of the case with your fellow jurors, and you should not hesitate to change an opinion when convinced that it is erroneous. Your verdict must be unanimous, but you are not bound to surrender your honest convictions concerning the effect or weight of the evidence for the mere purpose of returning a verdict or solely because of the opinion of other jurors. Discuss and weigh your respective opinions dispassionately, without regard to sympathy, without regard to prejudice or favor for either party, and adopt that conclusion which in your good conscience appears to be in accordance with the truth.

Again, each of you must make your own decision about the proper outcome of this case based on your consideration of the evidence and your discussions with your fellow jurors. No juror should surrender his or her conscientious beliefs solely for the purpose of returning a unanimous verdict.

Authority:

4-78 Modern Federal Jury Instructions-Civil, P 78.03 (Matthew Bender)

Instruction No. 49.
Deadlock Charge: Reaching Agreement

This case is important for the plaintiffs and for Mr. Bodner. Both parties, as well as the court, have expended a great deal of time, effort and resources in seeking a resolution of this dispute.

It is desirable if a verdict can be reached, but your verdict must represent the conscientious judgment of each juror.

While you may have honest differences of opinion with your fellow jurors during the deliberations, each of you should seriously consider the arguments and opinions of the other jurors. Do not hesitate to change your opinion if, after discussion of the issues and consideration of the facts and evidence in this case, you are persuaded that your initial position is incorrect. However, I emphasize that no juror should vote for a verdict unless it represents his or her conscientious judgment.

Authority:

4-78 Modern Federal Jury Instructions-Civil, P 78.04 (Matthew Bender)

Instruction No. 50.
Selection of Foreperson

When you retire, you should elect one member of the jury as your foreperson. That person will preside over the deliberations and speak for you here in open court.

Authority:

4-78 Modern Federal Jury Instructions-Civil, P 78.05 (Matthew Bender)

Instruction No. 51.
Return of Verdict

After you have reached a verdict, your foreperson will fill in the form that has been given to you, sign and date it and advise the marshal outside your door that you are ready to return to the courtroom.

I will stress that each of you should be in agreement with the verdict which is announced in court. Once your verdict is announced by your foreperson in open court and officially recorded, it cannot ordinarily be revoked.

Authority:

4-78 Modern Federal Jury Instructions-Civil, P 78.06 (Matthew Bender)

Instruction No. 52.
Special Verdict

I have prepared a special verdict form for you to use in recording your decision. The special verdict form is made up of questions concerning the important issues in this case. Your answers must be unanimous and must reflect the conscientious judgment of each juror. You should answer every question (except where the verdict form indicates otherwise).

Authority:

4-78 Modern Federal Jury Instructions-Civil, P 78.09 (Matthew Bender)

Instruction No. 53.
Partial Verdict

It is the desire of the court and of all the parties that you return a verdict on each of the plaintiffs' claims against Mr. Bodner, if you can do so without violating your individual consciences. However, if, after conscientious deliberations, you are only able to agree on a verdict concerning some of the claims, you may return a verdict concerning only those claims.

Authority:

4-78 Modern Federal Jury Instructions-Civil, P 78.12 (Matthew Bender)

Instruction No. 54.
Return to Deliberations After Polling

It appears from the answers given during the polling of the jury that your verdict is not unanimous. As I previously instructed, the court cannot accept a verdict unless it is unanimous. I must therefore ask that you return to the jury room and continue your deliberations. The instructions which I previously gave you will apply. Specifically, I remind you that you should discuss and consider the evidence; listen to the arguments of your fellow jurors; present your individual views and consult with one another. You should not hesitate to change your views if you are convinced they are erroneous; however, you should not surrender a conscientiously held conviction simply because you may be outnumbered or merely in order to reach a verdict.

Authority:

4-78 Modern Federal Jury Instructions-Civil, P 78.13 (Matthew Bender)