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Via ECF

December 11, 2022

Honorable Jed S. Rakoff
United States District Court, Southern District of New York
500 Pearl Street, Room 1340
New York, New York 10007

Re: *In re Platinum-Beechwood Litigation,* 18-cv-6658 (JSR) (Master Docket)
Trott et al. v. Platinum Management (NY) LLC et al., 1:18-cv-10936 (JSR)

Dear Judge Rakoff:

During trial on December 8, 2022, Your Honor asked the parties to address the following issue: "If I had no knowledge that NAVs had been inflated previously, but I become aware of that knowledge on day X, but it is part of a scheme to defraud investors or whatever, once I join the scheme, why am I not liable subject to aiding and abetting or whatever for every wrong committed pursuant to the scheme?" *See* Tr. 1232, l. 8-13.

Pursuant to Your Honor's instructions, Plaintiffs submit this letter memorandum to demonstrate that Defendant David Bodner ("*Bodner*"), as a co-conspirator and joint tortfeasor, is jointly and severally liable on Plaintiffs' aiding and abetting claims against Bodner for <u>all damages</u> resulting from Platinum Management's underlying breach of fiduciary duty or fraud.

This letter memorandum also summarizes the proof at trial that establishes that Bodner, by reason of his control of and authority over Platinum Management,[1] was aware or should have been aware of the overvaluation since the day of the November 16, 2012 Black Elk explosion. Given the proportion of PPVA's assets under management that Black Elk represented, the NAV of PPVA did not *increase* in the year 2012 or any year thereafter, such that all incentive fees from that point forward were unearned.

[1] Admittedly, Platinum Management, as PPVA's General Partner, Investment Manager and the party that was responsible for calculating PPVA's NAV, owed fiduciary duties to PPVA. *See* Summary Judgment Opinion [ECF No. 624] at 4.

Platinum Management had the duty to accurately report PPVA's NAV to PPVA. Platinum Management engaged in fraud and breached its duties to PPVA by providing false NAV statements to PPVA beginning in December 2012 and each month thereafter.

Bodner became aware that the PPVA NAV was falsely inflated via his special knowledge as a Platinum Partner and the role he assumed at Platinum Management and (i) failed to disclose or stop the same, concealing the fraud; (ii) founded or capitalized the "affiliate entities" Beechwood and Black Elk Opportunities Fund ("*BEOF*") that were instrumental in perpetrating and concealing the overvaluation (the "*Debt Stability Scheme*"); and (iii) both aided and abetted Platinum Management's torts and breached his own fiduciary duties.

There is substantial evidence that Bodner had actual knowledge of the overvaluation prior to the payment of 2012 "incentive fees" in 2013/2014. A significant portion of those incentive fees went directly to an entity Bodner owned. Thus, Bodner's receipt of such fees despite knowledge of the overvaluation is a clear breach of the duty of loyalty. Even if, *counterfactually*, Bodner did not have actual knowledge that the PPVA NAV could not have increased for year 2012, Bodner breached his duties of care and loyalty by not investigating whether PPVA's NAV could have possibly increased given the calamitous year. Bodner is not permitted to take advantage of Platinum Management's purported contractual limitations of duty set forth in an Investment Management Agreement. Even if such a higher standard was applicable to Bodner, the failure to investigate the payment of tens of millions of dollars of fees from PPVA's bank account, a portion of which he had a direct interest in and received, both given his position as Platinum Partner and Founder, and given his actual roles and knowledge – constituted gross negligence and recklessness at the very least.

I. Bodner, As An Aider and Abettor and Co-Conspirator, Is Jointly and Severally Liable For All Damages Arising From The Defendants' Breach Of Fiduciary Duty Or Fraud

New York law holds that a co-conspirator or joint tortfeasor, who is held liable for aiding and abetting a breach of fiduciary duty or a fraud, is jointly and severally liable for all damages arising from such breach of fiduciary duty or fraud committed by the principal defendants. *See Merrill Lynch, Pierce, Fenner & Smith Inc. v. Arcturus Builders Inc.*, 159 A.D.2d 283, 284-285 (1st Dep't 1990); *Visual Arts Found., Inc. v. Egnasko,* 91 A.D.3d 578, 579 (1st Dep't 2012) ("Having been found liable on the aiding and abetting claims, Egnasko's co-defendants are jointly and severally liable for the damages resulting from Egnasko's fraud and breaches of fiduciary duty (citations omitted)").[2]

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[2] *Cf. In re Refco Securities Litig.*, No. 1:08cv03086, 2012 WL8283039, at *8 (S.D.N.Y. 2009) (acknowledging the collective liability and damages standard for aiding and abetting, but distinguishing on the grounds that PwC was not retained at the time of the primary actor's fraud, and any damages by the time of its retention were irreversible and uncollectable). Here, Bodner was a Platinum Partner from the time Platinum Management and PPVA were founded in 2003, and any fee payments could have been returned to PPVA by the partners if the NAV was corrected in the ensuing years.

Courts have consistently rejected an aider and abettor's assertion that his liability extends only to his actions as an aider and abettor. As the Second Circuit recognized in *New York v. United Parcel Service, Inc.*, 942 F.3d 554, 598, n. 34 (2d Cir 2019):

> *PS in effect argues that it should not be held liable for the unpaid taxes it helped the shippers evade because it is only an aider and abetter, rather than the principal offender. But those who aid and abet or conspire in wrongful conduct are generally jointly and severally liable for the harm caused by that conduct,* regardless of the degree of their participation or culpability in the overall scheme. (Citation omitted). (Emphasis added).

In *Lumbard v. Maglia, Inc*., 621 F. Supp. 1529, 1536 (S.D.N.Y. 1985), the two aiders and abettors (Brancorp and Rubinroit) argued that their liability on the conspiring and aiding and abetting the fraud claims "can issue only to the extent of their participation in the fraud." The District Court rejected this attempt to limit their liability to their own actions, stating (*id*).:

> *These contentions ignore a fundamental principle of tort law: those who aid and abet or conspire in tortious conduct are jointly and severally liable with other participants in the tortious conduct, regardless of the degree of their participation or culpability in the overall scheme*. W. Prosser, Handbook of the Law and Torts 292–93 (4th ed. 1971). *See* also *Valdan Sportswear v. Montgomery Ward & Co.*, 591 F.Supp. 1188, 1191 (S.D.N.Y.1984) (Weinfeld, J.) ("Allegations of a civil conspiracy ... are proper ... for the purpose of establishing joint liability by co-participants in tortious conduct.") The liability remains joint and several, notwithstanding the amount of any direct benefit conferred upon them through the fraudulent transaction. (citations omitted)… *They may be found liable to the full extent of that fraud, regardless of the nature or extent of their participation therein*. (Emphasis added).

See also Banco de Desarrollo Agropecuario, S.A. v. Gibbs, 709 F.Supp. 1302, 1307 (S.D.N.Y. 1989) ("One who knowingly participates in another's breach of fiduciary duty is jointly and severally liable for all damages caused by the breach."); *Amusement Indus., Inc. v. Midland Ave. Assocs, LLC*, 820 F. Supp. 2d 510, 526 (S.D.N.Y 2011) (finding that if plaintiff proved its aiding and abetting claim for conversion of plaintiff's fund, "the Malik Defendants would potentially be liable to the full extent of the conversion"); *Bank of China v. Sub-Zero, Inc*, No. 02 Civ. 4457 (RMB) (AJP), 2005 WL 1149780, at *2 (S.D.N.Y. May 16, 2005) (Peck, M.J.) (Report and Recommendation) (finding that "defendants Sub-Zero, Crossroad, TRB, Sino and Huaken are jointly and severally liable to the Bank of China for $5,051,844.74" based on the settled doctrine that "[u]nder New York law, joint tortfeasors are jointly and severally liable for the damages resulting from their concerted conduct"), *adopted*, 2005 WL 1388855 (S.D.N.Y. June 9, 2005); *DLJ Mortg. Cap., Inc. v. Kontogiannis,* 110 A.D.3d 522, 523 (1st Dep't 2013); *Superintendent of Ins. of State of N.Y. v. Freedman,* 443 F. Supp. 628, 638-639 (S.D.N.Y. 1977), *aff'd*, 594 F.2d 852 (2d Cir. 1978) ("Although Freedman may not have been the primary force in devising this conspiracy, as a knowing participant, he nonetheless is as culpable as each of the others who

knowingly took part in the misappropriation. Like any co-conspirator, he is jointly and severally liable for the loss to the corporation resulting from the fraudulent scheme."); *Wimbledon Fin. Master Fund, Ltd. v. Weston Cap. Mgmt. LLC*, No. 653468/2015, 2019 WL 6716377, at *11 (Sup. Ct. New York Cnty Dec. 10, 2019) ("WCAM, Wimbledon and Partners II's investment advisor, and Galanis, who aided and abetted WCAM's breaches of fiduciary duties, are jointly and severally liable for those breaches.")

The Second Circuit's decision in *Uddo v. DeLuca*, 837 F. App'x 39 (2d Cir. 2020) is particularly instructive. There, the District Court held that Defendant Robert DeLuca was liable for breach of fiduciary duty, fraud, breach of contract and fraudulent inducement and that Kimberly Deluca (Robert DeLuca's wife) was liable for aiding and abetting Robert DeLuca's breach of fiduciary duty.

In connection with the finding of liability against Kimberly DeLuca, the District Court noted that "[a]t the outset, one who aids and abets a breach of fiduciary duty may be liable even if she has no independent fiduciary duty to the allegedly injured party. *Sanford/Kissena Owners Corp. v. Daral Properties, LLC*, 84 A.D.3d 1210, 923 N.Y.S.2d 692 (2d Dep't 2011)." *Uddo v. DeLuca*, 425 F. Supp. 3d 138, 156 (E.D.N.Y. 2019). The District Court found that "Ms. DeLuca was aware of Mr. DeLuca's fiduciary duty to Mr. Uddo" and that the "evidence at trial established that Ms. DeLuca substantially assisted Mr. DeLuca in his breach of fiduciary duty to Mr. Uddo by concealing their insolvency from Mr. Uddo and knowingly using the Schwab funds to pay for personal expenses and to pay off prior debts that she and her husband incurred." *Id.* at 157.

Significantly, the Second Circuit affirmed the judgment holding Robert DeLuca and Kimberly DeLuca <u>jointly and severally liable</u> in the amount of $5,802,193.06 to plaintiff Peter Uddo, Ms. DeLuca's uncle. Thus, *Uddo* confirms the settled doctrine that an aider and abettor of a breach of fiduciary duty will be jointly and severally liable for <u>all damages</u> arising from the breach of fiduciary duty.[3]

Further, although this Court dismissed the "conspiracy claim for administrative purposes" (*see* ECF No. 624 at 33-34), the Court recognized that "[a]ll that an allegation of conspiracy can accomplish is to connect nonactors, who otherwise might escape liability, with the acts of their co-conspirators." *Burns Jackson Miller Summit & Spitzer v. Lindner*, 452 N.Y.S.2d 80, 93-94 (2nd Dep't 1982), *aff'd*, 451 N.E.2d 459 (N.Y. 1983)." While under New York Law conspiracy is not an independent tort, it may be asserted in connection with independent, underlying torts, such as fraud and breach of duty, which are present here. A dismissal for administrative purposes only toward the purpose of judicial efficiency is not intended to limit the substantive rights of the parties. *Loreley Fin. (Jersey) No. 3 Ltd. v. Wells Fargo Sec., LLC,* 2016 WL 5719749 (S.D.N.Y. 2016). Here, where all of the disputed 2012-2013 incentive fees went <u>*directly into the pockets of Bodner*</u> and the other Platinum Partners, the increased propriety of such liability is obvious.

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[3] This disposes of Bodner's counsel's argument that an aider and abettor is "liable for what you cause, not for what happened before you." *See* Tr. 1232, l. 22-23.

"One who enters a conspiracy late, with knowledge of what has gone before, and with the intent to pursue the same objective, may be charged with preceding acts in furtherance of the conspiracy." *Kottler v. Deutsche Bank G*, 607 F. Supp. 2d 447, 469 (S.D.N.Y. 2009) (quoting *Indus. Bldg. Materials, Inc. v. Interchemical Corp.*, 437 F.2d 1336, 1343 (9th Cir. 1970)); *see Norex Petro. Ltd. v. Blavatnik*, 2015 WL 5057693, at *12 (N.Y. Sup. Ct. N.Y. Cnty. Aug. 25, 2015) (same))

The Southern District has expressly cited the treatise on liability of co-conspirators, which states that: "A conspirator may be liable even though he [or she] did not take an active part of every branch of the conspiracy … And the liability that one can incur by subsequently joining a conspiracy may include acts previously done by coconspirators in pursuance of the conspiracy." *Epstein v. Hass Secs. Corp.*, 731 F. Supp. 1166, 1187-1188 n. 19 (S.D.N.Y. 1990) (quoting 20 N.Y. Jur. 2d, *Conspiracy -- Civil Aspects* § 10, at 12-13 (1982)) (emphasis added); *see also Boucher v. Sears*, No. 89-CV-1353, 1997 WL 599316, at *6 ("[T]he Bank would be liable for all damages incurred by County Developers resulting from the conspiracy to defraud County Developers even if the Bank did not [participate in the] part of the scheme which caused the damages to County Developers.").

The foregoing cases conclusively demonstrate that, if Plaintiffs prove their claims against Bodner, Bodner will be jointly and severally liable for all damages resulting from the breach of fiduciary duty or fraud committed by the principal defendants.[4]

II. The Proof At Trial Established That Bodner, By Reason Of *Either* (a) His Control and Authority Of Platinum Management as a Fiduciary *Or* (b) His Special Knowledge as a Platinum Partner, Was Aware Of The Overvaluation Of PPVA's Net Asset Value Since the Black Elk Explosion or Breached His Duties in Failing to Investigate Reasons How PPVA's NAV Could *Increase* Such that Incentive Fees Could Still be Paid to Bodner and the other Platinum Partners.

[4] At the trial held on December 8, Bodner's counsel asserted that "the management agreement between Platinum Management and PPVA expressly eliminates negligence for this kind of duty" (referring to the duty of care). *See* Tr. 1232, l. 4-6. Bodner cannot rely on any exculpation language in the Management Agreement. *See In re Rural Metro Corp. S'holder Litig*., 88 A.3d 54, 86 (Del. Ch.2014) (rejecting the argument of the defendant's financial advisor that the defendant company's exculpatory provision should apply equally to a party charged with aiding and abetting a breach of fiduciary duty, finding: "That is not what [DGCL] Section 102(b)(7) authorizes. The literal language of Section 102(b)(7) only covers directors; it does not extend to aiders and abettors."). So too here, as an aider and abettor, Bodner cannot receive the benefit of contractual exculpation to which he is not a party. What is more, Bodner, who was not a named director of Platinum Management, cannot fall within the exculpation provision even if it applied (which it does not) and the exculpation provision does not apply as a matter of law to Bodner as an aider and abettor.

Even in the absence of the law cited above holding that joint tortfeasors and co-conspirators are joint and severally liable for all the damages of a scheme, the proof at trial has firmly established that Bodner is a fiduciary and held special knowledge of the overvaluation of PPVA's net asset value, such that he should be liable for all 2012/2013 incentive fees paid with funds originating from PPVA's bank account. A monthly breakdown of the cash payments for 2012/2013 incentive fees paid to the Platinum Partners is as follows:

Date	**Payment of Incentive Fees with PPVA Cash**
February 2013	$597,110
April 2013	$500,000
July 2013	$4,826,470
August 2013	$3,500,000
September 2013	$1,000,000
February 2014	$13,399,999
March 2014	$4,450,000
June 2014	$2,500,000

In this case, all 2012/2013 incentive fees were paid to the Platinum Partners after the November 16, 2012 Black Elk explosion, which led to employee deaths, litigation, civil and criminal investigations into Black Elk's safety procedures as well as well shut ins. PPVA's holdings in Black Elk's equity and debt comprised approximately 35% of PPVA's assets under management prior to the Black Elk explosion.

Any notion that Bodner would not have known immediately that the Black Elk explosion would have a negative impact on PPVA's NAV is overwhelmingly rebutted by the proof submitted at trial. For example, the same night as the Black Elk Explosion, Bodner was "anxious" for data from Joseph SanFilippo and Platinum Management's COO concerning what remained owing to Black Elk's investors. *See* **PX 417**. Indeed, in his testimony at trial, Bernard Fuchs described the Black Elk explosion as an "all hands on deck" situation. *See* Tr. 271, ln 20 to 271, ln 1. On December 11, 2012, Landesman had to get special permission from Bodner to notify Fuchs, at that time a prominent investor in PPVA, of the situation with Black Elk. *See* **PX 479**.

On November 19, 2012, three days after the Black Elk explosion, Bodner and Huberfeld held a meeting with prominent Platinum investor Richard Stadtmauer, and then followed that with a closed door partners meeting with Mark Nordlicht and Uri Landesman. *See* **PX 951** (CTRL3348339) (to be entered via Bodner) and **PX 952** (CTRL3584521) (to be entered via Bodner).[5] The valuation of PPVA's assets and investments were regularly discussed at the partner meetings and other meetings held by David Bodner with PPVA investors. *See* **PX 426** (May 2010 email whereby Angela Albanese is receiving updated presentations for Bodner meetings) (to be entered via Bodner). If Bodner had made the same proclamations at the November 2012 partners meeting that he made at the January 2015 partners meeting – that PPVA was overvalued and

[5] As per this Court's Rules, witnesses at this trial are only to be called once.

mandating that no partners receive further cash payment of incentive fees – PPVA would not have suffered damages in connection with the payment of approximately $31 million in incentive fees paid in cash in 2013-2014.

Fuchs further testified that he was asked by Bodner to assist him in soliciting investors for the BEOF Funds, a "one off" fund established in January 2013 meant to prop up Black Elk's inflated value and for which investors would receive a guarantee of payment from PPVA. *See* Tr. 272, ln. 2-24. Bodner worked with Fuchs over the coming months to solicit investors for the BEOF Funds. *See* **PX 521** (Fuchs relaying to Bodner the August 2013 BEOF investor solicitation emails with Shlomo Rechnitz) (to be entered via Bodner) and **PX 434** (Bodner reviewing Shlomo Rechnitz pitch for BEOF on the same day).

On January 9, 2014, Bodner received from David Steinberg a copy of a report from The Seaport Group recommending sale of Black Elk's secured bonds because the bonds were "overvalued in the 80's" and further states: "[h]owever, we believe that the PDP PV-10 in the NSAI report significantly overstates asset value given the report's assumption of $2.87/Mcfe for cash operating expenses, compared to actual cash operating expenses of $6.22-$8.60/Mcfe over the past six quarters. We thus believe recovery could be significantly lower." Bodner received this report in January 2014: in the subsequent two months, approximately $18 million in incentive fees were paid to the Platinum Partners. *See* **PX 554.**

Bodner's pre-2013 knowledge of overvaluation is not limited to Black Elk. As the testimony of Jed Latkin provided, Golden Gate Oil was a bad investment from the start, and experienced significant production issues by July/August of 2012, just a few months after PPVA made the investment, where the wells were pumping water and any oil was not suitable for sale. *See* Tr. 321, ln. 22 to 322, ln. 17. Latkin further testified that he made regular reports of the Golden Gate Oil operational problems to Uri Landesman, who told him that he relayed this information to Bodner and Huberfeld at the partners meeting. *See* Tr. 320, ln. 9 to 321, ln. 21.

Rather than use his authority over Platinum Management and PPVA to adjust the inflated values for Golden Gate Oil, Bodner, along with Huberfeld and Nordlicht, capitalized and founded Beechwood, and engaged in the Debt Stability Scheme to transfer debt issued by non-operating companies such as Golden Gate Oil, and cause PPVA to pay interest on such loans to Beechwood, in order to provide justification for the inflated values of these assets. Bodner at all times had knowledge of the debt transfers and PPVA's payment of interest on these transferred debt interests. *See* **PX 384** (Bodner reviewing Beechwood debt limits) and **PX 459** (Huberfeld sending Bodner summary of interest payments to be made to Beechwood).

The foregoing demonstrates that even if joint and several liability did not apply to this case (which it does), Bodner is liable for all incentive fees due to his role as a fiduciary and/or due to the actual, special knowledge he received as one of the Platinum Partners concerning the overvaluation of PPVA's assets. *SNS Bank, N.V. v. Citibank, N.A.*, 777 N.Y.S. 2d 62, 66 (1st Dep't 2004); *Aetna Cas. & Sur. Co. v. Aniero Concrete Co.,* 404 F. 3d 566, 582 (2d Cir. 2005) (per curiam).

Respectfully submitted,

HOLLAND & KNIGHT LLP

s/ Warren E. Gluck

To: All Counsel By ECF

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