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Via ECF

December 14, 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:

The following addresses the various matters for which you requested briefing at trial during the evening of December 13, 2022.

I. Quintero's Testimony and Proving Damages Through Lay Witnesses

The first question raised by the Court is whether the Plaintiffs may introduce evidence of damages due to overvaluation via lay witnesses or admissible documentary evidence when proof of such damages via Plaintiffs' valuation expert witness was not included in the expert's report or testimony or deviates from the damages figures calculated by the damages expert Ronald Quintero ("*Quintero*") in his report ("*Quintero Report*").

A. Quintero's Report and Testimony Offers the Opinion that PPVA's NAV Did Not Increase During 2012, and Thus All Incentive Fees Paid in 2013/2014 For All 2012 Incentive Fees Were Damages to PPVA

It is undisputed by all parties that Incentive Fees are only payable based upon an *increase* in PPVA's NAV, at the end of each calendar year (December), relative to PPVA's NAV in the prior year. Quintero was expressly tasked to evaluate the question of whether PPVA's NAV *increased* from December 2012 onwards. He unequivocally stated both in his report and in his testimony that the answer was "no." *See* Tr. 1667, ln. 22 to 1670, ln. 5. Despite the protestations of Defendant, similar statements are found throughout the Quintero Report. *See* Quintero Report at p. 1 (defining "Damages Period" as beginning in December 2012); Quintero Report at paragraph 32 ("Incentive fees during the damages period were unearned, and constitute damages sustained

by the Fund"); and Quintero Report at paragraph 32 ("Accordingly, all of the Incentive Fees charged to Platinum during the Damages Period constitute damages sustained by Platinum.).

Further, the opinion from Quintero above that 2012 Incentive Fees were unearned is no way conclusory. The specific reason that Quintero opined that PPVA's NAV could not have increased during 2012 is that PPVA's Black Elk Common Equity was being valued at approximately $200 million in 2012, and the events of 2012, culminating with the November 16, 2012 Black Elk explosion, rendered the equity worthless or nearly worthless. Because PPVA's Black Elk common equity represented nearly 30% of PPVA's NAV in 2012, Mr. Quintero opined that it would be impossible for PPVA's NAV to have increased in that year, but rather that the value necessarily decreased. Mr. Quintero specifically confirmed that the other PPVA assets could not and did not increase sufficiently to offset the PPVA Black Elk Common Equity Decrease. *See* Footnote 1 for evidence.[1]

There is significant evidence in both Quintero's trial testimony and the Quintero Report underlying his opinion that all incentive fees for year 2012, which crystalized on December 31, 2012, were unearned (the "*No 2012 Incentive Fees Opinion*"). Present the No 2012 Incentive Fees Opinion. For example, Quintero testified regarding the following:

- PPVA's NAV did not increase from December 2012 and onward. Tr. 956 ln 21-25

- Quintero's opinion is that zero incentive fees should have been paid for year 2012. Tr. 957 ln. 9-16

- The underlying basis for his No 2012 Incentive Fees Opinion was the financial condition of Black Elk, which represented one-third of PPVA's assets, and the November 2012 Black Elk explosion, which Quintero stated as the "worst disaster in the Gulf since the British Petroleum explosion in 2010," and was the consequence of 300 serious violations of procedures. Quintero testified that Black Elk was insolvent even before the November 2012 explosion. Tr. at 957-958.

- If Black Elk's debt cannot be paid, then PPVA's large common equity position cannot be worth anything. It was evident by the end of 2012 that there was no value in the Black Elk common equity. Tr. 959, ln. 2-12.

- "If you were to mark that down to zero, which [Platinum Management] did not, it would have taken away any ability to recognize any appreciation for 2012." Tr. 959, ln. 9-11.

- Quintero reviewed the other assets of PPVA and made sure they did not increase in proportion more than Black Elk Common Equity Decreased, opinion that nothing could offset such a catastrophic loss. Tr. 959-960.

As set forth in Footnote 1, Quintero specifically evaluated the impact of the events of 2012 and the Black Elk explosion *both* in relation to preparing his Black Elk valuation analysis for purposes of Management Fee damages *and* for the purposes of his express conclusion that the PPVA NAV did not increase in 2012.

Accordingly, Mr. Quintero specifically opined that **zero** incentive fees should have been paid on account PPVA performance in 2012 or any time thereafter. *See also* Daubert Opinion D.E. 646 at 40 ("*Daubert Opinion*") (affirming Quintero opinion that no Incentive Fees should have been paid during Damages Period [December 2012-2016]; further ruling that Quintero may testify as to $55.083 million incentive fees that were illegitimately gained.

B. XYZ

The Quintero Report did not distinguish between those Incentive Fees that were paid to Platinum Management through the "GP" account in the form of *Cash* versus Incentive Fees that were paid to Platinum Management's partners in the form of Limited Partner ("*LP*") interests in PPVA. The Quintero Report *did* specifically describe the process by which Incentive Fees were *either* paid in Cash or paid via LP Interests, which LP Interests were then "redeemed" for cash. *See* Quintero Report at Exhibit 21 (sources relied upon included bank statements); Quintero Report at Appendix A (attaching SS&C investor detail statements setting forth the payment of incentive fees in the form of LP interests and the subsequent redemption of a portion of the same). Quintero testified as the two-step process by which a certain portion of the 2012 and 2013 incentive fees

None of the above testimony is outside the scope of Quintero's Report. To wit, the Quintero Report states the following:

- Quintero's Fair Value Opinions expressly states the following regarding PPVA's common equity holdings in Black Elk: "Series A and B likely were worthless in its entirety." Quintero Report at Exhibit 23.

- The Reported Value of [Black Elk] securities exceeded adjusted fair values by as much as $191MM between 12/12 and 3/16. Quintero Report at Ex. 23, p. 1.

- Quintero relied on the S&P ratings for the Black Elk secured bonds: "9/17/12: S&P 9/17/12: S&P lowered its corporate credit rating on Black Elk to CCC+, with a negative outlook, for reasons including: (1) vulnerable business risk; (2) highly-levered financial risk; (3) small reserve and production base; (4) high operating costs; (5) weak sources of liquidity; and (6) insufficient cash flow to cover anticipated capital expenditures." Quintero Report at Ex. 23, page 2.

- Quintero expressly cites the Black Elk explosion: 11/16/12: Oil platform on Gulf of Mexico explodes, resulting in 2 deaths, and several injuries ("West Delta 32 Explosion"). Quintero Report at Ex. 23, page 2.

were paid in the form of LP interests, and later redeemed through the accounts of Bodner, Huberfeld, Nordlicht and Landesman. Tr. 966, ln. 25 to 967, ln. 11.

The Quintero Report specified a number of $55.083 million as the amount of Incentive Fees, paid in cash *or* paid in LP Interests. At no point in the case, until Bodner's *Daubert* motion, did Plaintiffs feel it necessary to distinguish between Incentive Fees paid in cash as opposed to via LP interests. In connection with Bodner's challenge of Quintero's testimony on *Daubert* grounds, Defendants challenged the notion that *any* management or incentive fees were damages of PPVA (the Master Fund) and sought to preclude Quintero from testifying as to such damages on that basis. In the Daubert Opinion, and in response to Bodner's arguments, the Court also ruled that to the extent it could be demonstrated that PPVA (Master Fund) actually paid the fees in question from its bank accounts, such payments would be deemed damages to PPVA (Master Fund). *Daubert Opinion* at pp. 34-38.

By virtue of this ruling, the Court immediately altered the amount of Incentive Fees that Mr. Quintero could testify were damages of the Master Fund; *there is and was no dispute that a portion of the Incentive Fees were paid in LP Interests and never redeemed.*

Bodner then filed a Motion In Limine seeking to preclude Quintero from testifying as to 2012 Incentive Fees and any Incentive Fees that were not paid directly in cash or which were not redeemed. ECF No. 667 ("*Incentive Fees MIL*"). The Incentive Fees MIL, as well as various oral motions to the Court prior to December 14, 2022, incorrectly contended that Quintero had: (a) restricted his analysis of the value of the PPVA Assets to 2013 onward; (b) restricted his analysis of Incentive Fees and whether any such fees were payable on account of PPVA NAV increase to 2013 onward; (c) did not opine that PPVA's NAV failed to increase in 2012; and (d) did not explicitly and clearly state that all Incentive Fees accrued from the Damages Period (defined as December 2012-2016), should not have been paid and were not earned.

For the reasons stated above, each and every one of the foregoing contentions was demonstrably false and this Court denied Defendant's Incentive Fees MIL and repeated raising of the issue within the trial. Tr. 4, ln. 16 to 5, ln. 2; Tr. 944, ln. 19-21 ("I totally disagree with defense counsel and I agree with plaintiffs' counsel. That's a final ruling. I will hear no further argument on it.").

Quintero's trial testimony, set forth above, confirms that Bodner's positions on 2012 Incentive Fees remains untrue and without merit.

However, it also became clear during Quintero's trial testimony yesterday, that Quintero did not specifically incorporate $13,997,109 of Incentive Fees paid directly to the "GP" Account in the form of cash, rather than payment of LP Interests (some of which were later redeemed for cash). In particular, the sum of $13,997,109 of cash incentive fees paid by the PPVA Master Fund to the Platinum Management "GP Account"(and then distributed to the members of the general partner), are at issue. Two PPVA bank statements, pre-marked and noticed by Plaintiffs as PX 610 (GP Bank Account statements) and PX 597 (PPVA Master Fund Bank Statements), contains and clearly evidences the relevant transfers from the PPVA Master Fund to the PPVA feeder fund accounts, and then directly to the GP Account used to receive direct cash incentive fees.

Defendant derived this conclusion by examining (a) the LP Fees paid to Platinum Management (and the Platinum Partners) in 2013 (on account of 2012 NAV increase), (b) Plaintiff's letter to the Court dated December 11, 2022 to the Court detailing the cash Incentive Fee payments and Redeemed Cash incentive fee damages claims by Plaintiffs, and (c) the amount of total Incentive Fees (cash and LP) noted by Mr. Quintero in his report ($55.083 million) ("*Defendant Cash Fees Analysis*").

Upon a detailed review of the Quintero report minutia (to which Plaintiffs made a continuing objection), it appears that Bodner is contending the two following points:

- Bodner appears to acknowledge or at least not dispute that Mr. Quintero *did* include $16,776,470 dollars of redeemed LP interests as Incentive Fee payments evidenced by reference to bank statements and the SS&C LP statements attached to his Report. *See* Tr. 1693-1695 that comprise JX 42 and JX 45 (received into evidence) as well as the SS&C tabs appended to Quintero's Report that Bodner had admitted into evidence (DX 679).

- Plaintiffs also understand that Bodner contends Quintero *did not* include the $13,997,109 of cash payments directly to the GP Account (this sum consists of two payments of $597,000 and $13,400,000 in January 2013 and February 2014, respectively).

Within the limited time-frame allotted for this letter, Plaintiffs are not able to confirm that the Defendant Cash Fees Analysis is correct. However, Plaintiff's position, which was articulated to the Court this evening, is that even if the Defendant Cash Fees Analysis is correct, it can be easily cured via the introduction of just two short bank statements via a lay witness, and the admissibility of those bank statements cannot seriously be called into question (indeed it appears the Defendant Cash Fees Analysis is based on the same statements).

If the Defendant Cash Fees Analysis is correct, then Plaintiffs not only realized this issue for the first time today, Plaintiffs respectfully submits that its analysis of the issue was obfuscated by the clearly untrue arguments set forth in Defendant's Incentive Fees MIL concerning Quintero's opinion on 2012 Incentive Fees (which arguments remain untrue). *See* Tr. at 1599-1600 (sidebar where Plaintiffs' counsel explains Plaintiffs' understanding of cross for first time to Court and Defendant counsel reverts to "real issue" of the 2012 Fees issue).

Moreover, Plaintiffs *believed* that the issue of precise cash fee payments allocable as damages were (a) not being challenged anymore based upon Defendants' "Bench Memo" attached to the Pre-Trial Consent Order (D.E. 760-4) (noting that "If a member of the General Partner redeems unearned (inflated) incentive fees for a cash payment, Bodner acknowledges that it is properly characterized as a damage to PPVA) and (b) were actually included within Mr. Quintero's analysis.

Plaintiffs acknowledge that Defendant's "Bench Memo" proposal was not accepted. However, Plaintiff also believed that this specific issue was no longer disputed, and that the "Bench Memo" concept had been adopted, and this belief was specifically formed during a side-bar during

the Huberfeld testimony, memorialized at page 808-810 of the transcript as well as an additional, confirmatory "we're past that" stated by Defendant's counsel, upon pressing by Plaintiffs' counsel, which did not make the transcript.

Setting aside the question of whether the $13,997,109 was included in Mr. Quintero's Incentive Damages calculations, Plaintiff - from the outset of this trial -- proceeded to introduce an Incentive Fees Damages calculation from Mr. Quintero that *specifically incorporated this Court's ruling that only "Cash" or "Cash Redeemed" Incentive fees were payable.*

In particular, Plaintiffs' opening, and the testimony adduced from Mr. Quintero on the amount of Incentive Fees was damages was that they amounted to $30,773,579. Clearly and obviously, this is a different number $55.083 million Incentive Fee number stated in Mr. Quintero's report and both Quintero and Plaintiffs' counsel clearly explained that this difference was designed to account (downward) for the Court's "Cash From PPVA" Ruling in the Daubert Opinion. It was the express understanding of Plaintiffs that (assuming that Quintero in fact calculated the cash fees paid correctly), such downward revision, and clear alteration to the $55.083 million figure was both permissible and the natural result of the Daubert Opinion.

Moreover, it was the express understanding of Plaintiffs that even if Quintero was *not* permitted to testify as to a particular topic - for example, China Horizon and Over Everything -- that testimony from other witnesses regarding the facts relating to such overvaluation and the damage sustained thereby was permissible. For example, Mr. Post testified regarding China Horizon. Mr. Gerszberg was ordered to appear in this trial after evading subpoena to testify on two issues - that Over Everything was defunct by 2015, and that he delivered the powerpoint presentation to Mr. Huberfeld and Mr. Bodner at Mr. Huberfeld's house in January 2016. Not only was there no objection to such testimony based upon relevance, Plaintiff understood the Court to have found it probative.

Indeed, Federal Rule of Civil Procedure 701 explicitly allows for lay witnesses to testify on basic damages or liability matters that are directly within their scope of knowledge. This has been interpreted by this Court and others to allow for testimony such as that of Mr. Gerszberg in highly analogous situations. *Securitron Magnalock Corp. v. Schnabolk*, 65 F.3d 256 (2d Cir. 1995) *In re Refco Inc. Securities Litigation*, 2011 WL 13243784 (S.D.N.Y March 28, 2011) (permitting testimony of lay witness as to damages to plaintiff).

The case of *United Realty Advisors, LP v. Verschleiser*, 14-cv-5903(JGK), 14-cv-8084(JGK), 2019 WL 4889420, at *4 (S.D.N.Y. Oct. 3, 2019) is particularly instructive:

> The defendants move to preclude any testimony about the subjects covered by the expert reports that were stricken. The motion has no merit and is denied. The Court struck expert reports and testimony from experts where the reports were not timely produced. *However, the Court made it clear that the plaintiffs could attempt to prove their case through fact witnesses in the usual course, subject, as always, to the applicable Federal Rules of Evidence, for example, Rules 401, 403, 602, and 701. See Frydman v. Verschleiser*, No. 14-cv-5903, 2017 WL 1155919, at *3 (S.D.N.Y. Mar 27, 2017) ("[T]he plaintiffs' case is

> not foreclosed by the preclusion of the two experts. The plaintiffs can still, through fact evidence, attempt to prove their claims and establish damages."). *Plainly, that would include testimony from witnesses who work for or are associated with telecommunications companies responsible for producing the records at issue. Similarly, lay witnesses could testify about the subject of damages and traditionally do so.* The motion to preclude is therefore denied. (Emphasis added).

Here, in addition to Mr. Post and Mr. Quintero, Mr. Jed Latkin testified as to the immediate impact of the Black Elk explosion in November 2012 on both Black Elk and PPVA's Black Elk Common Equity at length. Mr. Latkin testified that the explosion fundamentally altered Black Elk's business, and that the NAV increase was impossible due to the explosion and the increased costs and problems of extracting oil thereafter. Tr. at 340-343.

If Plaintiff counsel had known about this specific Defendant Cash Fee Analysis (or indeed, that the Court would question whether Mr. Quintero could and should depart from his $55 million Incentive Fee Damages number) beforehand, Plaintiff would have done one of two things:

- Simply present the Quintero Opinions that (a) No Incentive Fees were Payable on Account of 2012 PPVA NAV increases, (b) that PPVA's NAV did not increase in 2012 due to the impact of the 2012 liquidity and 2012 Black Elk Explosion on PPVA's Black Elk Common Equity and its proportion of PPVA's NAV (as well as the Latkin factual testimony supporting the conclusion), and (c) that the Platinum Management and Platinum Partners' LP Interests were redeemed in 2013/2014 ("*General Partner Redemption Opinion*") (see trial Transcript p. 1550-1553); *and*

  - Introduce proof, via Mr. Trott, that PPVA's bank statements clearly show that PPVA in fact paid the amount of $30,773,579 in cash incentive fees and cash redemptions; or

  - Present the No 2012 Incentive Fees Opinion, the General Partner Redemption opinion, Trott testimony as to the $13,997,109 in direct GP payments and Mr. Quintero's (apparently undisputed) incorporation of $16,776,470 in cash redemption payments.

Under the circumstances, Plaintiff respectfully submits that the introduction of the two bank statements evidencing the $13,997,109 of cash payments directly to the GP Account on account of Incentive Fees, does not even rise to the level of FRE 701. The documents and payments are clear on their face. And even if it did rise to the level of FRE 701, Mr. Trott is clearly qualified as a Joint Official Liquidator of PPVA to present this evidence. *In re Refco Inc. Securities Litigation*, 2011 WL 13243784 (S.D.N.Y March 28, 2011)

In sum, the questions for the Court are as follows:

1. Did the Court's Daubert opinion authorize Mr. Quintero to present an Incentive Fees Damages figure *lower* than $55.083 million - for example, the actual amount of "cash and

cash-redeemed" incentive fees Plaintiffs submit there is proof were paid by PPVA - $30,773,579?

2. If the Defendant Cash Fees Analysis is correct and Mr. Quintero did not originally include the $13,997,109 cash redemption within his $55.083 million Incentive Fees Damages Calculation, are Mr. Quintero's "No 2012 Incentive Fees Opinion" and his "General Partner Redemption Opinion" nevertheless admissible"?

3. Assuming the No 2012 Incentive Fees Opinion and his General Partner Redemption Opinion are admissible, may the $13,997,109 in PPVA bank account payments to Platinum Management GP account, clearly evidenced via bank statements, be presented to the jury through admission of PX 597 and PX 610 and/or the testimony of Mr. Trott?

Plaintiff submits that based on the above, the answer to each of these questions is yes. Plaintiff further submits that it is clearly the "No 2012 Incentive Fees Opinion" and "General Partner Redemption Opinion" which require expert testimony. Indeed, this Court noted clarity of those opinions (Trial Transcript 1602-1604) (further noting that the final calculation amount "…didn't require any extended hypothesis, it was a simple question of arithmetic"). And Courts regularly permits lay witnesses or the Court's own speculation to supplement the portions of an expert's testimony that the Court deems admissible. *Securitron Magnalock Corp. v. Schnabolk*, 65 F.3d 256 (2d Cir. 1995) *In re Refco Inc. Securities Litigation*, 2011 WL 13243784 (S.D.N.Y March 28, 2011) (permitting testimony of lay witness as to damages to plaintiff); *United Realty Advisors, LP v. Verschleiser*, 14-cv-5903(JGK), 14-cv-8084(JGK), 2019 WL 4889420, at *4 (S.D.N.Y. Oct. 3, 2019).

II. The Second Amended Complaint Pleads Claims for Breach Of Fiduciary Duty And Fraud By Bodner Based On His "Superior Knowledge"

Plaintiffs submit that the Second Amended Complaint ("*SAC*") pleads a claim for breach of fiduciary duty and fraud against Bodner based on his "superior knowledge" arising from his control and authority at Platinum Management. *See* SAC, ECF No. 285, at ¶¶ 9-12, 74-78, 82-86, 269-270, 782-791, 792-813.

Indeed, in denying Bodner's motion for summary judgment, this Court held (ECF No. 624, at 26-31):

> *Assuming Bodner owed a fiduciary duty to PPVA, the Court finds that there is a genuine dispute of whether Bodner breached that fiduciary duty by failing to disclose the overvaluations of PPVA's NAVs when he admittedly had knowledge of the overvaluations*. In addition to raising his concerns about the overvaluations to other Platinum partners as discussed above, Bodner also admitted that, during the relevant time, he received reports involving PPVA's NAVs. See Plaintiffs 56.1 CS ¶ 193.17 And, despite such knowledge, he allegedly took unearned fees and distributions – amounting to $100 million between him and Huberfeld according to Nordlicht's email to Fuchs dated January 15, 2016 – based on such overvaluations. See ECF No. 577, Ex.

> 31.18 *All this evidence supports that Bodner had the knowledge of the overvaluation but may have withdrawn fees in breach of his duty, sufficient to deny Bodner's motion for summary judgment on the claim for breach of fiduciary duty with respect to the overvaluations of PPVA's NAVs.* (Emphasis added).
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> * * *
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> *In addition, pure omissions are actionable when defendant had an affirmative duty to disclose that information to plaintiff, such as when defendant owes a fiduciary duty to plaintiff or under the "special facts" doctrine where defendant has superior knowledge to plaintiff.* 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). And, a "constructive fraud claim modifies the claim for actual fraud by replacing the scienter requirement with the requirement that Defendants maintained either a fiduciary or confidential relationship with Plaintiff." LBBW Luxemburg S.A. v. Wells Fargo Sec. LLC, 10 F. Supp. 3d 504, 524 (S.D.N.Y. 2014)…. On the other hand, however, *pure omission may here be actionable, because Bodner might have had the obligation, as a fiduciary, to disclose the fraudulent nature of such valuations to PPVA, from which he was receiving excessive management fees and distributions*. See SNS Bank, N.V. v. Citibank, N.A., 777 N.Y.S. 2d 62, 66 (1st Dep't 2004). (Emphasis added).

The Court's holding also was based on Plaintiffs' Rule 56.1 Statement at ¶¶ 175-218.

The Court's denial of Bodner's summary judgment motion constitutes law of the case. *See Wright v. Cayan*, 817 F.2d 999, 1002 n.3 (2d Cir. 1987) (law of the case can be established by a denial of summary judgment); *Cary Oil Co., Inc. v. MG Refining & Marketing, Inc.*, 257 F.Supp.2d 751, 765 (S.D.N.Y. 2003). "The law of the case doctrine forecloses reconsideration of issues that were decided—or that could have been decided—during prior proceedings" and "applies both to that which is expressly decided as well as to everything decided by necessary implication." *Choi v. Tower Rsch. Cap. LLC*, 2 F.4th 10, 21 (2d Cir. 2021). Accordingly, the Court's Summary Judgment Decision necessarily decided that the SAC pled claims for breach of fiduciary duty and fraud based on Bodner's "superior knowledge."

Even if the SAC did not plead claims for breach of fiduciary duty and fraud based on Bodner's "superior knowledge" and the Court's Summary Judgment Decision does not constitute "law of the case," Plaintiffs, under Fed. R. Civ. P. 15(b), can move to amend the SAC to add such claims to conform to the evidence. Judicial authority uniformly holds that Rule 15(b) permits amendment of pleadings at any time to conform to evidence presented at trial provided that the opposing party is not prejudiced. *See Brandon v. Holt*, 469 U.S. 464, 471, n. 19 (1985) (noting that "amendment to conform to evidence may be made at any time'" and "Rule 15(b) amendment allowed 'so long as the opposing party has not been prejudiced in presenting his case"); *Pashaian v. Eccelston Properties, Ltd.*, 88 F.3d 77, 87, n. 7 (2d Cir. 1996); *Millenium Expressions, Inc. v.*

Chauss Marketing, Ltd, No. 02 Civ. 7545(JCF), 2007 WL 950070, at *5 and n. 6 (S.D.N.Y. Mar. 30, 2007).

Given that the Summary Judgment Decision specifically referred to Bodner's "superior knowledge" as a basis for Bodner's potential liability, Bodner cannot claim any prejudice whatsoever if the Court permits the plaintiffs to amend the Complaint to add specific paragraphs and claims arising from Bodner's "superior knowledge."

III. The Applicable Statute of Limitations On The Fraud And Breach of Fiduciary Duty Claims Against Bodner

The statute of limitations for a New York "action based upon fraud" is the longer of either "six years from the date the cause of action accrued or two years from the time the plaintiff ... discovered the fraud, or could with reasonable diligence have discovered it." CPLR 213(8). See *Sabourin v. Chodos*, 194 A.D.3d 660, 661 (1st Dep't 2021). Bodner has the burden of proof to show that any part of Plaintiffs' claims are barred by the statute of limitations. *See Sargiss v. Magarelli,* 12 N.Y.3d 527, 532 (2009); *Sabourin,* 194 A.D.3d at 661.

New York law holds that claim for breach of fiduciary duty that are based on fraud have a six year statute of limitations. *See Sabourin,* 194 A.D.3d at 662 ("Nor are plaintiff's unjust enrichment or aiding and abetting breach of fiduciary duty claims time-barred. Both claims are subject to the six-year statute of limitations because they are based on allegations of actual fraud."); *Cusimano v. Schnurr*, 137 A.D.3d 527, 530 (1st Dep't 2016) ("These allegations, which sound in fraud, are not merely incidental to the breach of fiduciary duty claims, and thus, the applicable limitations period for plaintiffs' breach of fiduciary claims is six years" (citations omitted). *See* also *AQ Asset Mgt., LLC v. Levine*, 119 A.D.3d 457 (1st Dep't 2014) (claims that defendant deceived sellers into signing the stock and sales proceeds distribution, and failing to disclose and misrepresenting full benefits accruing to defendant, including defendant's personal interest in the sale proceeds, were sufficient to allege fraudulent conduct that defendant breached his fiduciary duty as to warrant a six-year limitations period);.

Moreover, where, as here, an action is brought on behalf of an entity which has been defrauded by persons who completely dominated and controlled it, the statute of limitations is tolled until the appointment of the independent trustee, liquidator or receiver. *See Armstrong v. McAlpin*, 699 F.2d 79, 87 (2d Cir.1983); *IIT, An International Investment Trust v. Cornfield*, 619 F.2d 909, 929–30 (2d Cir.1980); *In re Firestar Diamond, Inc*., 634 B.R. 265, 297 (Bankr. S.D.N.Y. 2021); *Banco De Desarrollo Agropecuario, S.A. v. Gibbs*, 709 F.Supp. 1302, 1310 (S.D.N.Y.1989). Thus, the statute of limitations on the breach of fiduciary duty and fraud claims should be tolled until the Joint Official Liquidators of PPVA were put into place in or about August 2016.

Finally, given that Bodner and the other Platinum Defendants continued to overvalue PPVA's NAV through 2016, plaintiffs' claims are subject to the "continuing wrong" doctrine which, in essence, tolls the statute of limitations. *See Selkirk v. State*, 249 A.D.2d 818, 819 (3d Dep't 1998); 16 N.Y.Prac., *New York Law of Torts* § 19:34 ("The doctrine is usually employed

when there is a series of continuing wrongs, and it serves to toll the limitations period to the date of the commission of the last wrongful act.”).

Respectfully submitted,

HOLLAND & KNIGHT LLP

s/ Warren E. Gluck

To: All Counsel By ECF

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