Ct. Ex. 1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re PLATINUM-BEECHWOOD LITIGATION
MARTIN TROTT and CHRISTOPHER SMITH, as Joint Official Liquidators and Foreign Representatives of PLATINUM PARTNERS VALUE ARBITRAGE FUND L.P., and PLATINUM PARTNERS VALUE ARBITRAGE FUND L.P, Plaintiffs, -v- DAVID BODNER, Defendant.

18-cv-6658 (JSR)
18-cv-10936 (JSR)

THE COURT'S INSTRUCTIONS OF LAW TO THE JURY

I. GENERAL INSTRUCTIONS

INSTRUCTION NO. 1

Duty of the Court

We are now approaching the most important part of this case, your deliberations. You have heard all the evidence in the case, as well as the final arguments of the lawyers for the parties. Before you retire to deliberate, it is my duty to instruct you as to the law that will govern your deliberations. These are the final and binding instructions, which entirely replace the preliminary instruction I gave you at the start of the case, which you should now discard.

Regardless of any opinion that you may have as to what the law may be or ought to be, it is your sworn duty to follow the law as I give it to you. Also, if any attorney or other person has stated a legal principle different from any that I state to you in my instructions, it is my instructions that you must follow.

Because my instructions cover many points, I have provided each of you with a copy of them, not only so that you can follow them as I read them to you now, but also so that you can have them with you for reference throughout your deliberations. In listening to them now and reviewing them later, you should not single out any particular instruction as alone stating the law, but you should instead consider my instructions as a whole.

INSTRUCTION NO. 2

Duty of the Jury

Your duty is to decide the fact issues in the case and arrive, if you can, at a verdict. You, the members of the jury, are the sole and exclusive judges of the facts. You pass upon the weight of the evidence; you determine the credibility of the witnesses; you resolve such conflicts as there may be in the testimony; and you draw whatever reasonable inferences you decide to draw from the facts as you determine them.

In determining the facts, you must rely upon your own recollection of the evidence. To aid your recollection, we will send you all the exhibits at the start of your deliberations, together with an index to help you find what you want. If you need to review particular items of testimony, we can also arrange to provide them to you in transcript or read-back form.

Please remember that none of what the lawyers have said in their opening statements, in their closing arguments, in their objections, or in their questions, is evidence. Nor is anything I may have said evidence. The evidence before you consists of just three things: the testimony given by witnesses that was received in evidence, the exhibits that were received in evidence, and any stipulations of the parties as to matters in evidence.

Testimony consists of the answers that were given by the witnesses to the questions that were permitted to be asked here in court. Please remember that questions, although they may provide the context for answers, are not themselves evidence; only answers are evidence, and you should therefore disregard any question to which I sustained an objection. Also, you may not consider any answer that I directed you to disregard or that I directed be stricken from the record. Likewise, you may not consider anything you heard about the contents of any exhibit that was not received in evidence.

More generally, you should be careful not to speculate about matters not in evidence. Your focus should be solely on the evidence that was presented here in court.

It is the duty of the attorney for each side of a case to object when the other side offers testimony or other evidence that 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 out of the hearing of the jury. All such questions of law must be decided by me. You should not show any prejudice against any attorney or party because the attorney objected to the admissibility of evidence, asked for a conference out of the hearing of the jury, or asked me for a ruling on the law.

I also ask you to draw no inference from my rulings or from the fact that on occasion I asked questions of certain witnesses. My rulings were no more than applications of the law and my questions were only intended for clarification or to expedite matters. You should understand that I have no opinion as to the verdict you should render in this case.

INSTRUCTION NO. 3

Duty of Impartiality

You are to perform your duty of finding the facts without bias or prejudice or sympathy or hostility as to any party, for all parties are equal under the law. You are to perform your final duty in an attitude of complete fairness and impartiality. You are not to be swayed by rhetoric or emotional appeals. It must be clear to you that if you were to let extraneous considerations interfere with your thinking, there would be a risk that you would not arrive at a true and just verdict. So do not be guided by anything except clear thinking and calm analysis of the evidence.

INSTRUCTION NO. 4

Burden of Proof: Preponderance of the Evidence

As you know, this is a civil case. In a civil case, a party who is making a claim against another party has what we call the "burden of proof," which is the burden of establishing each of the essential elements of that claim. Here, it is the plaintiffs who have the burden of proof.

As it turns out, there is now only one claim against Mr. Bodner that you are called upon to consider: a claim for breach of fiduciary duty. I will describe the essential elements of this claim shortly, but for now, keep in mind that plaintiffs must prove each of the essential elements of that claim by a preponderance of the credible evidence. The "credible evidence" means such evidence that you find worthy of belief. To establish an element of a claim by a "preponderance" of the credible evidence means to prove that that element is more likely true than not true.

When assessing whether the party bringing a claim has met its burden of proof as to that claim, the question is not which party called the greater number of witnesses as to that claim or how much time one party or another spent on it during the trial. The focus must always be on the quality of the evidence: its persuasiveness in convincing you of its truth.

INSTRUCTION NO. 5

Direct and Circumstantial Evidence

In deciding whether a party meets its burden of proof, you may consider both direct evidence and circumstantial evidence.

Direct evidence is evidence that proves a fact directly. For example, where a witness testifies to what he or she saw, heard, or observed, that is called direct evidence.

Circumstantial evidence is evidence that tends to prove a fact by proof of other facts. To give a simple example, suppose that when you came into the courthouse today the sun was shining and it was a nice day, but the courtroom blinds were drawn and you could not look outside. Later, as you were sitting here, someone walked in with a dripping wet umbrella, and, soon after, somebody else walked in with a dripping wet raincoat. Now, on our assumed facts, you cannot look outside of the courtroom and you cannot see whether it is raining. So you have no direct evidence of that fact. But on the combination of the facts about the umbrella and the raincoat, it would be reasonable for you to infer that it had begun raining.

That is all there is to circumstantial evidence. Using your reason and experience, you infer from established facts the existence or the nonexistence of some other fact. Please note, however, it is not a matter of speculation or guess; it is a matter of logical inference.

The law makes no distinction between direct and circumstantial evidence. Circumstantial evidence is of no less value than direct evidence, and you may consider either or both, and may give them such weight as you conclude is warranted.

INSTRUCTION NO. 6

Witness Credibility

It must be clear to you by now that counsel for the opposing parties are asking you to draw very different conclusions about various factual issues in the case. An important part of that decision will involve making judgments about the testimony of the witnesses you have listened to and observed. 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 that may help you to decide the truth and the importance of each witness's testimony.

Your decision to believe or to not believe a witness may depend on how that witness impressed you. How did the witness appear to you? Was the witness candid, frank, and forthright, or did the witness seem to be evasive or suspect in some way? How did the way the witness testified on direct examination compare with how the witness testified on cross-examination? Was the witness consistent, or contradictory? Did the witness appear to know what he or she was talking about? Did the witness strike you as someone who was trying to report his or her knowledge accurately? These are examples of the kinds of common-sense questions you should ask yourselves in deciding whether a witness is or is not truthful.

How much you choose to believe a witness may also be influenced by the witness's bias. Does the witness have a relationship with any of the parties that may affect how he or she testified? Does the witness have some interest, incentive, loyalty, or motive that might cause him or her to shade the truth? Does the witness have some bias, prejudice, or hostility that may cause the witness to give you something other than a completely accurate account of the facts he or she testified to?

You should also consider whether the witness had an opportunity to observe the facts he or she testified about, and whether the witness's recollection of the facts stands up in light of the other evidence in the case.

In other words, what you must try to do in deciding credibility is to size up a person just as you would in any important matter where you are trying to decide if a person is truthful, straightforward, and accurate in his or her recollection.

INSTRUCTION NO. 7

Deposition Testimony

Some of the testimony before you is in the form of excerpts from depositions that were received in evidence and read during the trial. A deposition is simply a procedure whereby, prior to trial, the attorneys may question a witness or a party under oath before a court stenographer. You should consider the deposition testimony received at trial according to the same standards you would use to evaluate the testimony of a witness given live in court.

INSTRUCTION NO. 8

Specialized Testimony

The law permits parties to offer testimony from witnesses who were not involved in the underlying events of the case but who by education or experience profess to expertise in a specialized area of knowledge. In this case, the only such witnesses who testified were William Post and Ronald Quintero, both of whom were called by the plaintiffs. Specialized testimony is presented to you on the theory that someone who is learned in the field may be able to assist you in understanding specialized aspects of the evidence.

However, your role in judging credibility and assessing weight applies just as much to these witnesses as to other witnesses. When you consider the specialized opinions that were received in evidence in this case, you may give them as much or as little weight as you think they deserve. For example, a specialized witness necessarily bases his or her opinions, in part or in whole, on what that witness learned from others, and you may conclude that the weight given the witness's opinions may be affected by how accurate or inaccurate that underlying information is. More generally, if you find that the opinions of a specialized witness were not based on sufficient data, education, or experience, or if you should conclude that the trustworthiness or credibility of such a witness is questionable, or if the opinion of the witness is outweighed, in your judgment, by other evidence in the case, then you may, if you wish, disregard the opinions of that witness, entirely or in part. On the other hand, if you find that a specialized witness is credible, and that the witness's opinions are based on sufficient data, education, and experience, and that the other evidence does not give you reason to doubt the witness's conclusions, you may, if you wish, rely on that witness's opinions and give them whatever weight you deem appropriate.

II. LIABILITY

INSTRUCTION NO. 9

Liability in General

With these general instructions in mind, let me now turn to the claim in this case, a claim for fiduciary breach. Plaintiffs Martin Trott and Christopher Smith are court-appointed liquidators suing on behalf of Platinum Partners Value Arbitrage Fund, L.P. ("PPVA" or the "Fund"). They assert that the defendant, David Bodner, breached a fiduciary duty he had to PPVA and its investors by failing to disclose to PPVA and its investors his alleged knowledge that PPVA's assets were overvalued and/or by failing to object to the payment by PPVA of incentive and management fees to which he allegedly knew he and other persons or entities were not entitled.

In assessing this claim, you must first determine, according to my instructions, whether the plaintiffs have proved each essential element of this claim. This is known as establishing "liability." If you determine that the defendant is liable on plaintiffs' claim, you must then decide whether the Release Agreement nevertheless relieves Mr. Bodner of liability. Finally, if you find that the defendant is liable on plaintiffs' claim and that the Release Agreement does not bar the claim, you will have to determine what are called "damages," that is, the amount of money to be paid by Mr. Bodner on the claim.

Against this background, let us now discuss the essential elements of the plaintiffs' claim of breach of fiduciary duty.

INSTRUCTION NO. 10

Breach of Fiduciary Duty

Specifically, plaintiffs' claim is that Mr. Bodner breached a fiduciary duty to PPVA and its investors by failing to disclose to PPVA and its investors his knowledge of the alleged overvaluation of PPVA's assets and/or by failing to object to payment of incentive and management fees to which he allegedly knew he and other persons or entities were not entitled.

To prove their breach of fiduciary duty claim, plaintiffs must prove by a preponderance of evidence each of the three essential elements. The first is that Mr. Bodner owed a fiduciary duty to PPVA and its investors. What is a fiduciary duty? It is a special duty of care that is created when one party, with the other party's knowledge and consent, reasonably puts its trust and confidence in the other party to carry out a particular role or undertake a particular duty on behalf of the first party. In particular, those who manage the investments of an investment fund owe a fiduciary duty to the fund and its investors. Although Mr. Bodner was not an officer of PPVA, plaintiffs argue that, through Platinum Management and otherwise, Mr. Bodner exercised significant control over PPVA's management of its investments and thereby assumed a fiduciary duty to PPVA and its investors. Mr. Bodner denies that he exercised any such control. So, this is the first issue you will need to resolve.

Second, if you find that Mr. Bodner owed a fiduciary duty to PPVA and its investors, you must then determine whether Mr. Bodner breached that fiduciary duty by failing to disclose to PPVA and its investors the alleged overvaluation of the Fund's assets that he allegedly knew about and/or by failing to object to payment of incentive and management fees to which he allegedly knew he and other persons or entities were not entitled. One who owes a fiduciary duty to a fund and its investors is required to act in good faith to advance the interests of the persons and entities to whom he owes the duty. This includes a continuing duty to truthfully and fully disclose to the

persons and entities to whom he owes the duty all material facts, meaning any facts that would be material to these persons and entities in making an investment or financial decision. He also owes these persons and entities his undivided loyalty and may not obtain an improper advantage for himself or otherwise act in any manner contrary to their interests. In short, if Mr. Bodner had a fiduciary duty to PPVA and its investors, which he denies, and if the Fund's assets were overvalued and he knew about this, which he also denies, then he would have had a duty to disclose this knowledge to the investors, as well as a duty to object to the payment of incentive and management fees to which he knew he and other persons or entities were not entitled.

Third, and finally, if you find that Mr. Bodner owed a fiduciary duty to PPVA and its investors and that he knowingly breached that fiduciary duty by failing to disclose his alleged knowledge of the alleged overvaluation of the Fund's assets and/or by failing to object to payment of incentive and management fees to which he knew he was not entitled, you must then determine whether the Fund and its investors were financially damaged as a result of Mr. Bodner's failure to disclose this knowledge. Here, again, the parties are in dispute. For example, they differ considerably as to the amounts of incentive and management fees that were allegedly wrongfully paid as a result of Mr. Bodner's alleged fiduciary breach. Again, this is a dispute you must resolve, remembering at all times that it is the plaintiffs' burden to prove each of the essential elements of their fiduciary breach claim by a preponderance of the evidence.

INSTRUCTION NO. 11

Release Agreement Defense

If, but only if, you find that plaintiffs have proved the essential elements of their claim that Mr. Bodner breached a fiduciary duty to PPVA and its investors, you must then determine whether Mr. Bodner must still be found not-liable on that claim because he was released from liability by the Release Agreement dated March 20, 2016, which was signed by Mr. Bodner in his personal capacity and by Mr. Mark Nordlicht on behalf of Platinum Management.

Specifically, the Release Agreement, if it is valid, absolves Mr. Bodner from any liability for plaintiffs' fiduciary breach claim. However, there is an important exception. If you find by a preponderance of the evidence that Mr. Nordlicht or Platinum Management also engaged in the same fiduciary breach that you have found Mr. Bodner liable for, then the release is unenforceable as to that claim. This is because two persons or entities liable for the same misconduct cannot lawfully agree to release each other from liability for that misconduct.

III. DAMAGES

INSTRUCTION NO. 12

Compensatory Damages

If you have found Mr. Bodner liable on plaintiffs' fiduciary breach claim and have also found that the Release is unenforceable as to that claim, then you must determine the sum of money that must be paid by Mr. Bodner to the plaintiffs as a result of his fiduciary breach. These sums of money are called "damages," and the plaintiffs bear the burden of proving the amount of these damages by a preponderance of the credible evidence.

Generally speaking, an injured party is entitled to recover from a liable party the sum of money that will justly and fairly compensate the injured party for the injuries that were proximately caused by the misconduct of the liable party. An injury is "proximately caused" by the misconduct of the liable party if that misconduct was a substantial factor in causing the injury. With respect to the breach of fiduciary duty, then, the measure of damages is how much money the Fund and its investors lost as a proximate result of Mr. Bodner's fiduciary breach.

Please note that Mr. Bodner is liable only for the damages proximately caused by his own acts that constituted the breach of fiduciary duty unless plaintiffs also prove by a preponderance of the credible evidence that he intentionally entered into an agreement, explicitly or implicitly, with Mr. Nordlicht and/or Mr. Huberfeld, to defraud the investors by hiding the fact that the Fund's assets were overvalued, in which case he is also liable for the damages caused by Mr. Nordlicht and/or Mr. Huberfeld. This might include, for example, the allegedly inflated amount of any management fees paid in cash during the relevant period, as well as the allegedly inflated amount of any incentive fees paid in cash or redeemed as cash during the relevant period.

In calculating damages, do not concern yourself with the possibility that other persons may have already paid or been ordered to pay some of the damages. Such "set-offs" will be determined by the Court and duly deducted from any sum of damages that you calculate.

IV. CONCLUDING INSTRUCTIONS

INSTRUCTION NO. 13

Selection of Foreperson; Right to See Exhibits and Hear Testimony; Communications with the Court

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 to serve as your spokesperson if you need 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. In addition, we will send into the jury room all the exhibits that were admitted into evidence, along with an index so you can locate what you want. If you want any of the testimony, that can also be provided, in either transcript or read-back form. But please remember that it is not always easy to locate what you might want, so 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 to me 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 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.

INSTRUCTION NO. 14

Verdict; Need for Unanimity; Duty to Consult

You should not, however, tell me or anyone else how the jury stands on any issue until you have reached your verdict and recorded 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, you should exchange views with your 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 view that, after discussion with your fellow jurors, now appears to you erroneous.

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

This completes my instructions of law.