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*Via ECF*

December 7, 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:

Pursuant to Your Honor's instructions at the trial today, Plaintiffs submit this letter to demonstrate that the Release Agreement, dated March 20, 2016, (the "*Release Agreement*") executed by, among others, Platinum Management (NY) LLC ("*Platinum Management*"), Mark Nordlicht ("*Nordlicht*"), on behalf of Platinum Management and other entities, Murray Huberfeld ("*Huberfeld*"), and David Bodner ("*Bodner*"), is invalid and unenforceable as a matter of law and therefore cannot constitute a defense to Bodner's liability to the Plaintiffs' claims for, *inter alia*, breach of fiduciary duty and fraud.

The Release Agreement was collusively entered into by and among Bodner, Huberfeld, and Nordlicht (on behalf of Platinum Management), long after they knew they were under criminal and SEC investigation, and faced significant personal liability for their breaches of duty and the fraud concerning PPVA, including but not limited to COBA and SEC infractions as well as the overvaluation, Black Elk subordination, and the use of Beechwood as a mechanism to conceal both. It purports to cause PPVA to release its claims against its own fiduciaries solely for their benefit without anything approaching the "punctilio of honor" required of a fiduciary (*Meinhardt v. Salmon*, 249 N.Y. 458 (1928)). Indeed, in denying summary judgment, this Court recognized the critical "timing" of the Release Agreement, noting that:

> The Release Agreement was entered into after Platinum received grand jury subpoenas for records related to the COBA bribery scheme, less than three weeks after learning that federal prosecutors had expanded their criminal investigation to Platinum-Beechwood transactions, and just before Platinum sunk. Also … evidence demonstrates that Bodner and Huberfeld were likely aware of various troubles PPVA faced, such as overvaluations of PPVA's assets. See, e.g., Fuchs Dep. 26:17-30:20 (testifying that, at a January 2015

> meeting among him, Nordlicht, Huberfeld, and Bodner, Bodner criticized Nordlicht that "the valuations were not right" and "Nordlicht wasn't properly marking the fund").

In the Release Agreement, Bodner and other Defendants, having already determined and been told via a detailed PowerPoint presentation that the net asset value ("*NAV*") of PPVA was mismarked and overvalued by hundreds of millions of dollars and that further distributions and redemptions should cease – caused co-conspirator and joint tortfeasor Platinum Management, via Nordlicht (now a convicted felon), to provide them a Release from liability related to "Platinum," including but not limited to "specific liabilit[ies]" that Mr. Nordlicht discussed with Michael Katz.

## I. There Are Numerous Bases On Which To Challenge A Release

PPVA'S purported release of Bodner and Huberfeld is simply not enforceable, and New York law recognizes that releases are not a universal "get out of jail free" card. In this regard:

(a) "Courts will not enforce a release that is the product of fraud." *Becher v. Tyco Intern. Ltd.*, 27 F. App'x. 48, 51 (2d Cir. 2001) (citing *Allen v. WestPoint–Pepperell, Inc.*, 945 F.2d 40, 44 (2d Cir. 1991). *See also Joint Venture Asset Acquisition v. Zellner,* 808 F. Supp. 289, 302 (S.D.N.Y. 1992) ("Under New York law, a release or waiver clause may be attacked and set aside ... for substantive flaws in its execution, such as fraud in the inducement, illegality, duress, or mutual mistake.").

(b) A Release Agreement will be unenforceable if it "was entered into for a fraudulent purpose of permitting one co-conspirator … to release its other co-conspirators," … from liability and was permeated by self-dealing. *See Trott v. Platinum Mgmt*, Summary Judgment Decision at 24. The same principle would apply to a joint tortfeasor who entered into a release for the fraudulent purpose of releasing another joint tortfeasor from liability.

(c) A Release can be invalidated if it is against public policy. *See Kyff v Kyff*, 286 N.Y. 71 (N.Y. 1941). It is a "familiar equitable principle that a wrongdoer, whether willful or negligent, should not benefit from his own wrongdoing." *JPMorgan Chase Bank v. Liberty Mut. Ins. Co.*, 189 F. Supp. 2d 24, 28 (S.D.N.Y. 2002) (Rakoff, J.).

(d) A Release will be held unenforceable if it was the result of fraudulent inducement or fraudulent concealment. *See Becher v. Tyco Int'l Ltd.*, 27 Fed. Appx. 48, 51 (2d Cir. 2001) (citation omitted); *see also CMG Holdings,* 2016 WL 468865, at *8 (refusing to enforce release on fraudulent inducement grounds); *Sillam v. Labaton Sucharow LLP*, No. 21 cv 6675 (CM), 2022 WL 1448673, at *4 (S.D.N.Y. May 9, 2022)

(e) A Release will be held unenforceable where the Releasor gave no consideration and the Release is therefore fundamentally unfair. 19A N.Y. Jur. 2d Compromise, Accord, and Release § 92.

(f) A Release will be held invalid if it was obtained through duress. *See Fourth Ocean Putnam Corp. v. Suburbia Fed. Sav. & Loan Ass'n*, 124 A.D.2d 550 (2d Dep't 1986).

It is Bodner's burden to show – as to PPVA – *both:* (i) the actual validity of the release including, *inter alia,* all elements from authority, to consideration, *and* (ii) that the release by a co-conspirator to another co-conspirator in a fraudulent overvaluation context does not violate public policy. *See Kalisch-Jarcho, Inc. v. City of N.Y.*, 58 N.Y.2d 377, 385, 448 N.E.2d 413, 417 (N.Y. 1983); *see also Fleming v. Ponziani*, 24 N.Y.2d 105, 110-111, 247 N.E.2d 114, 118-119 (N.Y. 1969) (describing the "well established view in New York that the party seeking to prove the validity of a release has the burden of proof on the issue. This burden extends to proving lack of duress, illegality and fraud."); *Boxberger v. New York, New Haven & Hartford R.R. Co.*, 237 N.Y. 75, 78, 142 N.E. 357 (N.Y. 1923); *Hill v. St. Clare's Hosp.*, 67 N.Y.2d 72, 84, 499 N.Y.S.2d 904, 911 (N.Y. 1986) ("the burden of proof as to the *validity* of a release is on the defendant who pleads it."); *see also Mangini v. McClurg*, 24 N.Y.2d 556, 563, 301 N.Y.S.2d 508, 514 (N.Y. 1969) (distinguishing the burden of proof for mutual mistake and fraud, holding "Where, however, the release is challenged on the grounds of duress, illegality, or fraud, the burden of persuasion remains with the releasee"); c*f. Gerber Finance v. Volume Snacks Inc.,* No. 21-cv-507, 2021 WL 3038780, at *1, 4 (S.D.N.Y. July 19, 2021) (Rakoff, J.) (quoting *Flemming* but holding the "voidable" as opposed to "void" standard applicable to a release challenge based on lack of consideration and economic duress). Indeed, where as here PMNY caused PPVA to give up valuable claims against Bodner and Huberfeld, the men who controlled PMNY, the release is voidable at the election of PPVA and the Court cannot enquirer into the fairness or reasonableness of the self-dealing act. *Matter of Rothko*, 43 NY.2d 305 (N.Y. 1977) (self-dealing by fiduciaries subject to "no further inquiry" rule).

## II. The Release Agreement Should Be Held Void Because, Irrespective of any Other, Purported Justifications, It Is Was In Fact Entered Into Between Co-Conspirators and Had the Effect of Permitting One Co-Conspirator Or Joint Tortfeasor From Releasing Another Co-Conspirator Or Joint Tortfeasor From Liability And Is The Subject Of Self-Dealing By and Between Fiduciaries of PPVA That Purported to Grant a Release on PPVA's Behalf

It is well settled that releases executed by co-conspirators are invalid. This precise issue was considered in *Aviles v. S&P Global, Inc.*, 380 F. Supp. 3d 221, 301-302 (S.D.N.Y. 2019), a closely analogous case. There, the court declined to apply a purported release to bar claims against non-officer defendants for aiding and abetting breaches of fiduciary duty, in circumstances where there was a plausible basis to conclude that those issuing the purported release were themselves breaching fiduciary duties to the company. The court articulated rationale for rejecting the release is equally applicable here. *Id.*

> The Court has determined that Plaintiffs have plausibly alleged that [officer defendants'] conduct around the Settlement Agreement [containing the release] constituted a fiduciary breach. . . . And [the non-officer defendants invoking the release] are plausibly alleged to have aided and abetted that breach. So, the question remains: May a corporation's release of claims against a third party be rescinded, in the absence of fraud, where the release

> arises out of a fiduciary breach that was committed by the corporate officers and knowingly facilitated by the third party?
>
> The parties have cited no New York law on this question, and the Court has found no authority that directly controls. But the Court takes the view that New York courts would likely answer in the affirmative. After all, "where a fiduciary relationship exists between" parties to a contract, there must be clear proof of the integrity and fairness of a transaction between them, or any instrument thus obtained will be set aside or held as invalid, even in the face of a release of claims. . . . New York courts will sometimes set aside a third-party transaction executed by a fiduciary in breach of its obligations. *And considerations of equity militate against allowing an unscrupulous fiduciary to double down on a breach by taking the additional step of validly insulating its third-party co-conspirator from any liability for the breach*.
>
> *The Court concludes that the Settlement Agreement's release of claims does not bar Plaintiffs' derivative common-law claims against the [defendants invoking the release] to the extent that the release arose from a fiduciary breach that [such defendants] knowingly abetted*. *Id*. (emphasis added; quotations and citations omitted).

Thus, *Aviles* stands for the essential (though unremarkable) proposition that co-conspirators cannot release themselves from liability. *See also CMG Holdings Group v. Wagner*, 15-CV-5814 (JPO), 2016 WL 4688865, at *7-8 (S.D.N.Y. Sept. 7, 2016).

This principle, by itself, should invalidate and void the Release Agreement as a matter of law. Given the "timing" of the Release Agreement noted above, it is both undeniable that the effect of the Release Agreement is to permit one co-conspirator (Platinum Management) to release another co-conspirator from numerous claims that PPVA could assert against Huberfeld and Bodner (including those sounding in indemnity). Moreover, given the paucity of consideration given by Bodner and Huberfeld (the Platinum Management Company had no value and PPVA already could not pay $110 million of redemptions that had been previously accumulated), and the highly attenuated and speculative notion that PPVA would benefit because having a Katz "entity" as a "beneficiary" of a (private) trust that held membership interests in Platinum Management would enable the enhanced possibility of further investment in PPVA, the evidence clearly and convincingly demonstrates that the purpose of the transaction was predominantly to provide Messers. Huberfeld and Bodner with an illicit release. The conclusion is merely strengthened by the fact that the Katz transaction was summarily aborted amid substantial discord and dispute.

Notably, it is undisputed that self-dealing was involved -- a factor which further warrants a finding that the Release Agreement is invalid. Simply put, Platinum Management and Bodner were on both sides of the Release Agreement. Indeed, in the Summary Judgment Decision, this Court expressly rejected Bodner's reliance on the New York Court of Appeals' Decision in *Centro Empresarial Cempresa S.A. v. America Movil, S.A.B. de C.V.*, 17 N.Y.3d 269, 278 (2011), stating that "[t]he instant case is distinguishable from *Centro* in that, here, *the releasing party was*

*allegedly controlled by the same set of individuals that were being released from liability*." *Trott v. Platinum Mgmt*, Summary Judgment Decision at 21 n. 11 (emphasis added). Centro and its progeny stand for the unremarkable proposition that when a fiduciary has demonstrated adversity toward a beneficiary and the beneficiary has thus lost trust in it, it cannot continue to rely on the fiduciary's duty of loyalty, particularly where the relationship has become adversarial. Not so here. At the time of the release, Bodner's lawyers continued to represent and advise PPVA, PMNY, Bodner and Huberfeld. And, unlike here, the fiduciary in Centro was not seeking to release concealed joint tortfeasors or co-conspirators. A Release should be held void where, as here, one co-conspirator attempts to release another co-conspirator from liability, self-dealing permeates the entire transaction, Platinum Management, as the General Partners and Investment Manager of PPVA admittedly was a fiduciary to PPVA and the proof at trial demonstrates that Bodner, as a result of his authority and control over Platinum Management, also was a fiduciary to PPVA.

This principle that co-conspirators cannot release the other from liability is particularly applicable as a result of the key events following the Summary Judgment Decision.

> 1. Platinum Management has since defaulted in this consolidated litigation (after participating fully through discovery and summary judgment), thereby admitting the claims against it (including the claims for which it purported to release Bodner and Huberfeld).
>
> 2. Nordlicht's conviction in the criminal proceeding was reinstated by the Second Circuit. See *United States v. Landesman*, 17 F.4th 298, 332-342 (2d Cir. 2021) (the "Second Circuit Order"). In turn, the Second Circuit order found that Black Elk Bondholders had been harmed by the subordination beyond a reasonable doubt. Not only was PPVA a Black Elk Bondholder, but this conclusion *necessarily entails* the conclusion that PPVA's nearly $200 million valuation of its Black Elk Common equity was materially misstated and was rather at or near zero.
>
> 3. Nordlicht filed for personal bankruptcy in the Bankruptcy Court for the Southern District of New York. *See In re Mark Nordlicht*, No. 21-CV-5990, 2022 WL 1591788 (Bankr. S.D.N.Y. May 19, 2022) (the "Nordlicht Bankruptcy") & Gluck Decl. Ex. 3.[1] The Nordlicht Proof of Claim is an *allowed and undisputed claim* in the full amount, to which no objection has been filed. Within the Nordlicht Bankruptcy, the same claims asserted by Plaintiffs against Bodner are allowed and admitted claims against Nordlicht by virtue of PPVA's Proof of Claim.

In short, as a result of the foregoing events, PPVA fiduciaries Platinum Management and Nordlicht (the entity that purportedly had the power to cause PPVA to execute a Release and the person who signed on behalf of that entity) (a) have admitted the claims in the SAC; and (b) are jointly liable as joint tortfeasors or co-conspirators against PPVA under circumstances where the

[1] This is an exhibit to the Plaintiffs' Motion *In Limine* on the Release.

proof at trial has shown that Bodner should be found liable as a co-conspirator, joint tortfeasor, and aider and abettor of those very same claims.

It is important to note here that the relevant "third party" in this transaction is not Katz, as counsel for Mr. Bodner claims, but rather PPVA. Just as insiders are not shielded from liability in the context of *in pari delicto*, it cannot be permitted that fiduciaries can involuntarily "join" the third party to whom they owe a duty -- PPVA -- to a Release that purports to exculpate them from claims by PPVA (and particularly breach of the very fiduciary duties in question).

Moreover, this principle should apply with equal force in the case of joint tortfeasors. Here, Platinum Management, Bodner and Nordlicht were joint tortfeasors. As with the case of co-conspirators, it would be against public policy to permit a joint tortfeasor to release another joint tortfeasor from liability where, as here, the Release Agreement was entered into for a fraudulent purpose. *See CMG Holdings Group v. Wagner*, 15-CV-5814 (JPO), 2016 WL 4688865, at *7-8 (S.D.N.Y. Sept. 7, 2016).

## III. The Release Agreement Should Be Held Unenforceable As A Matter Of Law Because It Was The Result Of Fraudulent Inducement Or Fraudulent Concealment.

Judicial authority uniformly holds that a Release Agreement will be unenforceable if it was the result of fraudulent inducement or fraudulent concealment. Directly on point is *CMG Holdings Group v. Wagner*, 15-CV-5814 (JPO), 2016 WL 4688865, at *7-8 (S.D.N.Y. Sept. 7, 2016), where the District Court denied the defendants' motion to dismiss based on a Release Agreement. In language which equally applies to this case, the District Court held that "[b]ecause CMG has adequately alleged that the releases in the Release Agreements were the products of fraudulent inducement, those releases do not bar claims against Wagner at this stage," (*id.* at *8) concluding:

> CMG pleads pervasive and particularized allegations of fraudulent behavior by Wagner (namely that, unknown to CMG, Wagner engaged in a pattern of fraud over a period of five years designed to siphon clients and profits away from XA and to other businesses owned or controlled by him and his associates). *The scope and magnitude of those actions strongly support an inference that if CMG knew about Wagner's actions it would not have entered into the two Release Agreements.* (Emphasis added).

Thus, Judge Oetken found that the broad release did not bar plaintiff's claims against the defendant CEO, because it was the CEO's own "calculated nondisclosures [that] induced [plaintiff] to enter into the Release Agreements" in the first place. *Id.* at *8.

The identical result was reached in the recent case of *Sillam v. Labaton Sucharow LLP*, No. 21 cv 6675 (CM), 2022 WL 1448673, at *4-5 (S.D.N.Y. May 9, 2022), where the District Court held that "Plaintiffs have sufficiently plead fraudulent inducement and for that reason the release may be avoided as fraudulently induced." Following the rational articulated in *Wagner*, the District Court concluded that "the release may be avoided as fraudulently induced," stating:

> *Plaintiffs have plausibly alleged they were unaware of Defendants' fraud at the time of executing the release and maintain that they would not have entered into the Universal Settlement Agreement and released their fraud claims against the Defendants had they known the Kellner Declarations were false. The facts that would have allowed Plaintiffs to learn of the falsity* of *those Declarations were and are peculiarly within Labaton's knowledge.* (Emphasis added).

*See also Bollinger Indus. Inc. v. Walter R. Tucker Enter., Ltd.*, 3:20-CV-95 (FJS/ML), 2021 WL 5585795, at * 7 (S.D.N.Y. Nov. 29, 2021) (Release in the Plaintiff Settlement Agreement should be null and void because plaintiff "plausibly stated a claim alleging that it was fraudulently induced into signing the Settlement Agreement").

Platinum Management (through Nordlicht) executed a Release Agreement which Bodner asserts released any and all of PPVA's claims against him. Clearly, at the time of the execution of the Release Agreement, PPVA had no knowledge of the massive overvaluation of PPVA's NAV committed by Bodner, Platinum Management and the other defendants. Indeed, the holdings of *Aviles*, *Wagner*, *Sillam* and *Bollinger* apply with even greater force here because PPVA had no knowledge and was not involved in the execution of the Release Agreement. As a result, PPVA did not give its assent to the Release Agreement.[2] Indeed, Bodner cannot complain that the Release Agreement is void because it was Platinum Management's and his own fraudulent conduct and non-disclosure of key facts concerning, *inter alia,* the massive overvaluation of PPVA's NAV that resulted in the execution of the Settlement Agreement.

PPVA was the victim of Platinum Management's and Bodner's fraud, but was being told at the time that its net value (although negative at the time) was worth more than $700 million. Under these circumstances, there was fraud in the inducement or fraudulent concealment because Platinum Management misrepresented to PPVA or omitted the true facts in connection with the released conduct. As in *Aviles*, *Wagner*, *Sillam* and *Bollinger*, a neutrally managed PPVA (a) would not have agreed to the Release Agreement had it known of Platinum Management's and Bodner's fraud and massive overvaluation of PPVA's NAV and (b) certainly would not have released such multi-million claims against Platinum Management, Nordlicht and Bodner.

Significantly, prior to the execution of the Release Agreement, the Releasors requested an opinion of counsel that Platinum Management had the authority to execute the Release Agreement on behalf of PPVA. Incredibly, though it had actual knowledge of the SEC investigation,

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[2] The enforceability of an agreement under New York law also requires the presence of mutual assent or a "meeting of the minds." As this Court has noted, "[m]utual assent is a question of fact to be found by the jury." *Bazak Intern. Corp. v. Tarrant Apparel Grp.*, 378 F. Supp. 2d 377, 389 (S.D.N.Y. 2005) (citing *U.S. Titan, Inc. v. Guangzhou Zhen Hua Shipping Co., Ltd.*, 241 F.3d 135, 145 (2d Cir. 2001)). Fraud can prevent the mutual assent required for an agreement. *See TufAmerica, Inc. v. Codigo Music LLC*, 162 F. Supp. 3d 295, 324 (S.D.N.Y. 2016); see also *Hetchkop v. Woodlawn at Grassmere, Inc.*, 116 F.3d 28, 34 (2d Cir. 1997).

broadening COBA and Beechwood investigations, valuation problems and other matters, Curtis Mallet (counsel to Bodner, PMNY and PPVA) delivered an opinion that stated that Platinum Management had the authority to sign a Release under which PPVA would release multi-million dollar claims against Bodner, Platinum Management and other releases ***without:***

> (a) Bodner, Nordlicht and Platinum Management were co-conspirators and the effect of co-conspirators releasing each other for a fraudulent purpose;
>
> (b) the irreconcilable conflicts and self-dealing issue by which Platinum Management, Nordlicht and Bodner were on both sides of the Release Agreement;
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> (c) the potential multi-million claims that PPVA would be releasing against, *inter alia*, Nordlicht, Bodner and Platinum Management and the context of the ongoing investigations; and
>
> (d) the purported "consideration" that Bodner was giving in exchange for the Release Agreement was a nullity given the prohibition on partner redemptions, the inability of PPVA to meet any redemptions, and the worthlessness of Platinum Management, and whether such consideration was adequate in light of the multi-million claims PPVA was releasing against Bodner.

The failure of the opinion letter to disclose or consider the obvious infirmities and concealed facts demonstrates the collusive and improper nature of the release and renders it void as a matter of law.

## IV. The Release Agreement Should Be Held Unenforceable Because Bodner Gave No Consideration And The Release Agreement Is Therefore Fundamentally Unfair

Under New York law, to be valid, a contract must be supported by consideration. *See, e.g.*, *Murray v. Northrop Grumman Info. Tech., Inc.*, 444 F.3d 169, 178 (2d Cir. 2006). "Consideration to support an agreement exists where there is 'either a benefit to the promisor or a detriment to the promisee.'" *Hollander v. Lipman*, 885 N.Y.S.2d 354, 355 (N.Y. App. Div. 2009) (quoting *Weiner v. McGraw–Hill, Inc.*, 443 N.E.2d 441, 445 (N.Y. 1982)). Bodner contended in his summary judgment motion that the value provided in exchange for his release was as follows:

> The Release Agreement caused Bodner, and also Huberfeld, to forfeit their interests in the [Mark Nordlicht Grantor] Trust and to subject their families' limited partnership interest in the Platinum feeder fund to a two-year lockup period, as opposed to the 90-day redemption terms provided in the funds' subscription agreement. (56.1 ¶ 52). At the time, the Bodner and Huberfeld families held approximately $80 million in limited partnership interest in the

> funds. (56.1 ¶ 53). Bodner and Huberfeld also gave general releases to the Platinum entities (56.1 ¶ 54); and waived certain rights with respect to distribution of 2015 accrued management fees (56.1 ¶ 55).

(Memorandum of Law of Defendant David Bodner in Support of His Motion for Summary Judgment at 9 (No. 524).

However, Bodner's waiver of rights to management fees is not consideration for PPVA under any circumstances because that claim belongs to Platinum Management, not to Bodner directly.[3] Moreover, no fees were even possibly forthcoming and Mr. Nordlicht himself opined that the Management Company was worthless. Similarly, an agreement to forbear from redeeming limited partnership interests in the Platinum Feeder Funds potentially could be consideration to the feeder funds, but not to PPVA, because neither Bodner (or any of his family members or affiliates) were limited partners *in PPVA*. Moreover, there was already more than $110 million of redemptions that could not be paid, Katz himself had requested a redemption of his $50 million investment, and the prohibition against Platinum Partners withdrawing fees still stood. In short, no actual consideration was provided.

The January 2016 presentation made to Bodner and others put them on notice that PPVA itself had, at most, $40 million in unencumbered assets, more than that in debt, and their interests in Platinum Management and the PPVA feeder fund were worth nothing. By March 2016, it was clear that both PPVA and Platinum Management were in even worse financial condition. As Mark Nordlicht himself explained in an email to Uri Landesman on March 10, 2016:

> Uri –
>
> I know you are frustrated by needing to have things simple for the divorce. Unfortunately, we are anything but simple now. ***we are in the midst of a complete relaunch of our business***. In terms of 2015, all fees are being used to take care of issues ( PPlo unwind, side pocket coverage, various investor accommodation). If things turn around significantly, I guess there cd be some value there but realistically, I wdnt count on it. ***In terms of 2016, going forward mgmt percentages are being determined by either people coming up with New cash or putting existing holdings at risk as first loss to bring in new capital. There is no value to management company otherwise and it is why david and Murray are gone. It's almost like a complete new startup.***

Thereafter, on March 17, 2016, just three days prior to execution of the Settlement Agreement, Nordlicht explained to David Levy, Huberfeld's nephew, there is nothing of value and "no

[3] By the same token, an agreement to forbear from receiving compensation from the Mark Nordlicht Grantor Trust provides no consideration to PPVA.

consideration" for the March 2016 Release: "***There is no value right now to mgmt. co anyhow as evidenced by fact shares are being given away for just investment, no consideration***."

These admissions as to the complete lack of value and the proof at trial demonstrates that Bodner's agreement to forbear from redeeming limited partnership interests in the PPVA feeder funds and from collecting management fees had no value at all and thus could not be "consideration" for the "broad, unconditional general release" provided to Bodner and others in the March 2016 Release Agreement.

## V. The Release Agreement Is Void under Applicable Cayman Liquidation Law

On August 23, 2016, in the wake of Huberfeld's arrest in connection with the COBA Scheme and the sale of the Agera Note, Platinum Management caused PPVA to commence provisional liquidation proceedings in the Grand Court of the Cayman Islands. The March 2016 Release, which was entered into within six months before the commencement of the Cayman Liquidation, thus is void as a matter of Cayman law, because it was a transfer of an interest in PPVA's property to related parties – Bodner, Huberfeld, and others.

The Declaration of Marc Kish at 2-3 (ECF No. 575) explained that Section 145 of the Cayman Companies Law provides:

> (1) Every conveyance or transfer of property, or charge thereon, and every payment obligation and judicial proceeding, made, incurred, taken or suffered by any company in favour of any creditor at a time when the company is unable to pay its debts within the meaning of section 93 with a view to giving such creditor a preference over the other creditors *shall be invalid if made, incurred, taken or suffered within six months immediately preceding the commencement of a liquidation.*
>
> (2) A payment made as aforesaid to a related party of the company shall be deemed to have been made with a view to giving such creditor a preference.
>
> (3) For the purposes of this section a creditor shall be treated as a "related party" if it has the ability to control the company or exercise significant influence over the company in making financial and operating decisions. (Emphasis added).

The Release provided to Bodner and others was a transfer of PPVA's property interests, namely the ability of PPVA to bring a claim against those Defendants and seek damages, as the JOLs are doing through this case. The indemnification provided to Bodner and others in connection with the March 2016 Release Agreement likewise is a "payment obligation" incurred by PPVA.

For the same reason that Bodner is a fiduciary to PPVA, he also is a "related party" under the Cayman Companies Law Sec. 145, as he has the ability to "control the company or exercise

significant influence over the company in making financial and operating decisions." *Id.* at 3. As such, the March 2016 Release Agreement is deemed to be a void preferential transfer by PPVA in preference to PPVA's other creditors. Accordingly, the March 2016 Release is invalid under applicable Cayman law.

Respectfully submitted,

HOLLAND & KNIGHT LLP

s/ Warren E. Gluck

To: All Counsel By ECF

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