UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE PLATINUM-BEECHWOOD LITIGATION	:	No. 18 Civ. 6658 (JSR)
MARTIN TROTT and CHRISTOPHER SMITH, as Joint Official Liquidators and Foreign Representatives of PLATINUM PARTNERS VALUE ARBITRAGE FUND L.P. (in OFFICIAL LIQUIDATION) and PLATINUM PARTNERS VALUE ARBITRAGE FUND L.P. (in OFFICIAL LIQUIDATION),	:	No. 18 Civ. 10936 (JSR)
Plaintiffs,	:	
v.	:	
PLATINUM MANAGEMENT (NY) LLC, *et al.*,	:	
Defendants.	:	

REPLY MEMORANDUM OF LAW OF DEFENDANT DAVID BODNER IN SUPPORT OF HIS MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

David Bodner respectfully submits this Reply Memorandum of Law in further support of his Motion for Summary Judgment (ECF No. 523)[1] pursuant to Federal Rule of Civil Procedure 56.

PRELIMINARY REPLY STATEMENT

Based upon the absence of testimonial and documentary evidence the JOLs have implicitly abandoned the SAC's allegations that Bodner was "involved in every aspect of" the alleged fraudulent transactions described in the SAC, and that he had a direct role in the alleged inflation of net asset value (NAV) calculations between 2012 and 2016. (SAC ¶ 78). Of the various allegedly fraudulent transactions between PPVA and Beechwood, the JOLs mention only the sale of Agera in June 2016. (Opp. at 20).[2] The evidence offered against Bodner, however, has nothing to do with the transaction. The JOLs offer no evidence (because there is no evidence) that Bodner had any role in the allegedly fraudulent Agera sale.

Similarly, the JOLs fail to offer facts or legal basis to connect Bodner with the alleged Black Elk Scheme. (Opp. at 16–20). This claim is also implicitly abandoned.

The JOLs now try to substitute the SAC claims that Bodner "orchestrat[ed]" ten fraudulent transactions (SAC ¶ 78) with an ill-defined assertion that Bodner breached a fiduciary duty to PPVA when he "helped establish and manage Beechwood." (Opp. at 16). But the JOLs offer no basis to contend that capitalizing a business that would provide new investments and

---

[1] ECF citations refer to the *Trott* docket, 18 Civ. 10936. Capitalized terms not defined herein shall have the meanings ascribed to them in Bodner's opening memorandum ("Bodner Mem.") (ECF No. 524). Citations to the JOLs' opposition memorandum ("Opposition" or "Opp.") refer to the unredacted version provided to the parties and Court by email.

[2] As Bodner predicted (Bodner Mem. n.9), the JOLs make no effort to defend their allegations that he could be responsible for transactions involving: Golden Gate Oil (SAC ¶¶ 413–23); Implant Sciences (SAC ¶¶ 436–39); PEDEVCO (SAC ¶¶ 424–35); Montsant (SAC ¶¶ 516–28; 556–67); Northstar (SAC ¶¶ 529–50); Nordlicht Side Letter (SAC ¶¶ 568–83); March 2016 restructuring (SAC ¶¶ 584–606); and the Security Lockup (SAC ¶¶ 673–762).

liquidity for PPVA somehow is a breach of duty to PPVA (even assuming Bodner was a PPVA fiduciary). And while the JOLs assert that Bodner "managed" Beechwood, none of the examples they reference in support of that false claim have anything to do with the allegedly fraudulent transactions at issue.

Next, the JOLs manufacture a new claim—located nowhere in the SAC—that Bodner knew that the investment into PPVA by the COBA union in 2013/2014 was a product of illicit activity, and he should therefore return to PPVA a $1.8 million distribution that is traceable to COBA's investment. But there is no evidence that Bodner had any inkling that the investment was tainted, including no evidence from the SDNY criminal trial or the testimony of the government's cooperating witness.

Most tellingly, the JOLs have abandoned the very claim that allowed them to proceed against Bodner following the Group Pleading motion (Apr. 11 Op. at 44–45) (ECF No. 290), where they asserted that Bodner was part of the insider group responsible for producing the allegedly fraudulent NAV statements from 2012 through 2016. Now, they argue that, as of a January 2015 dinner meeting, Bodner "knew PPVA was overvalued," and liable for his inaction thereafter. (Opp. at 16). But the JOLs offer no evidence that Bodner had any knowledge different from what every investor had available to him. They claim that Bodner "took steps to hide the overvaluation" (*id.*), but provide no record citation for that invention. They assert that Bodner "continued to accept millions in fees and distributions" (*id.*) but that claim is demonstrably false, as Bodner received no distributions of fees after March 2014. (56.1 ¶ 9).[3]

There is likewise no triable issue on the JOLs' assertion that Bodner could be deemed a fiduciary to PPVA. There is no suggestion that Platinum Management—PPVA's

[3] The JOLs purport to dispute this fact but—despite having the complete history of PPVA financial records—have no evidence of a distribution after March 2014.

general partner and investment advisor—delegated to Bodner any area of fiduciary responsibility. Neither Bodner, nor his family entity, Grosser Lane Management, had any ability *as a matter of law* to direct or restrain the business activities of Nordlicht, the MNG Trust, or Platinum Management. (56.1 ¶¶ 10, 12). The JOLs argue that Bodner nevertheless exercised *de facto* control by involving himself in the business, but the *evidence* shows only that Bodner was a significant stakeholder in the Platinum organization, heavily interested in its success and in providing his input and opinions. This does not create a triable issue as to the existence of a fiduciary duty under New York law, which requires evidence that PPVA "reposed trust or confidence" in Bodner, and that Bodner "accept[ed] the trust and confidence" in turn. (Opp. at 11).

Finally, merits aside, the JOLs struggle unsuccessfully to escape the March 2016 Release Agreement (ECF No. 543 Ex. 12), where PPVA and Bodner exchanged general releases. The JOLs argue that the Release Agreement is inequitable and unenforceable, but have no support for that assertion, where two senior in-house lawyers for Platinum Management—who have never been accused by the JOLs (or anyone else) of violating their loyalty to PPVA—signed off on the Release Agreement after specifically considering it from PPVA's perspective. (ECF No. 543 Ex. 16). The JOLs' other arguments against the release are unavailing.

There are no triable issues here. Bodner is entitled to summary judgment.

REPLY POINTS

I. THE JOLs DO NOT RAISE A JURY ISSUE AS TO WHETHER BODNER OWED PPVA A FIDUCIARY DUTY

New York courts will locate a fiduciary relationship "when one [person] is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation." *Thermal Imaging, Inc. v. Sandgrain Sec., Inc.*, 158 F. Supp. 2d 335, 343 (S.D.N.Y.

2001). Critically here: "[m]ere reposal of one's trust or confidence in a party…does not automatically create a fiduciary relationship; the trust or confidence must be accepted as well." *Id.*; *accord* Opp. at 11; April 11 Op. at 23.

The JOLs fail to meet this standard. They adduce *no* facts that PPVA reposed trust or confidence in Bodner. PPVA's fiduciary and investment advisor was its general partner, Platinum Management. Platinum Management, through its managing member Uri Landesman, delegated fiduciary duties to, for example, Nordlicht, its chief investment officer; Joseph San Filippo, its chief financial officer; and Suzanne Horowitz, its chief legal officer. These professionals were "under a duty to act for or to give advice for the benefit of [PPVA] upon matters within the scope" of their areas of expertise. *Thermal Imaging*, 158 F. Supp. 2d at 343. And by accepting their positions, they accepted the "trust or confidence" reposed in them. *Id.*

Platinum Management delegated no duty to Bodner. As the Platinum Management witnesses testified, Bodner had "no role" at Platinum Management. (Bodner Mem. at 5–6). Likewise, the JOLs adduce no facts (because there are no facts) indicating that Bodner *accepted* any fiduciary responsibility for PPVA, in any context or scope.

Unable to deal with New York law, the JOLs turn to Delaware cases like *Wallace v. Wood*, 752 A.2d 1175, 1178 (Del. Ch. 1999), where the Chancery court held that "[o]fficers, affiliates and parents of a general partner, may owe fiduciary duties to limited partners if those entities control the partnership's property." (Opp. at 10).[4] But Bodner was never an officer,

[4] The JOLs write in a footnote (Opp. n.6) that the Court could apply Delaware law, but misread cases that merely defer a New York/Delaware choice of law analysis at the motion to dismiss stage. *Tatintsian v. Vorotyntsev*, No. 16 Civ. 7203 (GHW), 2019 U.S. Dist. LEXIS 66379, at *19 (S.D.N.Y. Apr. 18, 2019); *Marino v. Grupo Mundial Tenedora, S.A.*, 810 F. Supp. 2d 601, 610 (S.D.N.Y. 2011). There is no New York/Delaware choice of law analysis here. New York law applies because the JOLs have already acceded to the application of New York law. (Bodner Mem. n.12).

affiliate or parent of Platinum Management, and he never controlled PPVA's property. Bodner was not even a *member* of Platinum Management. His entity, Grosser Lane, was a beneficiary of the MNG Trust. While the MNG Trust held membership interests in Platinum Management, the trust instrument stated explicitly that Grosser Lane had "*no control* over the underlying assets of the trust and shall have *no interest in or control over the Company* [Platinum Management]." (ECF No. 543 Ex. 2) (emphasis supplied). This is dispositive of the fiduciary duty question.

The JOLs contend that "fiduciary liability is not dependent solely upon an agreement or contractual relation…but results from the relation." (Opp. at 13) (quoting *EBC I, Inc.v. Goldman, Sachs & Co.*, 5 N.Y.3d 11, 20 (2005)). Here, however, unlike Goldman Sachs' relationship to its advisory client in *EBC I*, Bodner had *no* contractual relationship with PPVA, never "occupied a relationship of higher trust" with PPVA, and was not its underwriter or advisor.[5]

Unable to adduce any facts that Bodner had control over *specific* PPVA property, the JOLs focus instead on his purported ability to assert influence within Platinum Management *generally*. In response to Bodner's Local Rule 56.1 statement that Grosser Lane "could not direct or restrain any business activity" of Platinum Management (*id.* ¶ 10), the JOLs deflect with a citation to a 41-paragraph range of their own Statement of Material Facts ("JOL-SOMF") (¶¶ 178–218). They cite that same 41 paragraphs repeatedly in an attempt to refute, for example, that Grosser Lane lacked the ability to direct Nordlicht's control over the MNG Trust (56.1 ¶ 12) and that Bodner had "no role at Platinum Management or PPVA." (56.1 ¶ 17). The JOLs

[5] The JOLs cite *Int'l Equity Invs., Inc. v. Opportunity Equity Partners, Ltd*., 472 F. Supp. 2d 544, 550 (S.D.N.Y. 2007) for the proposition that "limited partners who assume managerial control over a limited partnership will have fiduciary obligations" (Opp. at 13–14), but what the Court *actually* held was that a limited partner may be deemed for pleading purposes to have assumed the general partner's fiduciary role by executing an agreement on behalf of the partnership. There are no analogous facts here.

purport to establish through those 41 paragraphs that "Bodner was involved in decision-making with Huberfeld and Nordlicht regarding Platinum Management and its funds" (JOL-SOMF ¶ 195), and that Bodner "was involved in and had input into investment positions, strategic decisions, and redemption issues." (*Id*. ¶ 196).

But whether Bodner was "involved," or had "input," or was consulted for his opinion on sundry business matters is not disputed—Bodner was an investor with $40 million in family money invested in the PPVA/PPCO funds (56.1 ¶ 53) and held through Grosser Lane a 19% profit share in the management company (*id.* ¶ 8). None of these supposed facts creates a triable issue as to whether he was delegated or accepted *a fiduciary role* with respect to PPVA. And while the JOLs assert in their opposition memorandum that Bodner "was an ultimate decision maker with final authority for Platinum Management" (Opp. at 14), neither the testimony nor documents cited in support of these assertions provides evidence that Bodner had any decision-making authority with respect to any specific PPVA asset or transaction.[6] It is irrelevant if Bodner participated in "employee matters" (JOL-SOMF ¶¶ 199–203), "solicit[ed] investors," or "provided input into investor relations" (*id.* ¶¶ 204–215) (although the source documents do not demonstrate that Bodner did those things). None of those alleged facts creates a genuine issue as to whether Bodner was delegated or accepted a fiduciary role. Despite 50 depositions and millions of documents, the JOLs point to no specific matter at issue for which Bodner was a "decision maker." (Opp. at 14).

[6] The JOLs cite Michael Katz "describing Bodner and Huberfeld as 'co-equal partners and Nordlicht was treated as a more junior partner,'" (JOL-SOMF ¶ 195) but Katz's impressions were based solely upon "interactions" where Nordlicht appeared to defer to the elder Bodner and Huberfeld. (Katz 259:9–22) (Feuerstein Reply Decl. Ex. C). The JOLs also cite to Fuchs (JOL-SOMF ¶ 195) (Fuchs 63:2–10) stating that *in 2011* Huberfeld, after abdicating his role at PPCO, "was still making decisions with Mark and Bodner." Neither Fuchs nor Katz offered testimony that Bodner made any specific decision regarding any of the transactions at issue here.

Where the allegations of fiduciary duty are unsupported by factual proof that PPVA reposed trust or confidence in Bodner, and there are no facts demonstrating that Bodner accepted trust or confidence in turn, summary judgment is warranted.[7]

II. THERE ARE NO FACTS SUPPORTING A BREACH OF FIDUCIARY DUTY (OR FRAUD) BY BODNER

The JOLs identify five facts that they contend raise a triable issue as to whether Bodner breached a fiduciary duty to PPVA. None does.

1. Overvaluation. While the SAC alleged that Bodner "participate[d] in the false inflation of the value of PPVA's assets…during the period from 2012 through 2016" (*id*. ¶ 78), the JOLs now aver only that Bodner "knew PPVA was overvalued" as of January 2015 (Opp. at 16), but not that he had any role in the valuation. The JOLs new position is based upon on a January 2015 dinner meeting where Bodner allegedly said to Nordlicht "the valuations were not right, that Mark Nordlicht wasn't properly marking the fund." (Fuchs 28:8–10) (Feuerstein Reply Decl. Ex. B). Nordlicht rejected Bodner's input as uninformed:

> You have no right to tell me what I should mark down, what I should not mark down. I know the -- I know the valuations. I know the positions. You don't know it. So don't butt in, and don't tell me how to run the fund. And don't mix into valuations.

(Fuchs 447:5–10).[8] The JOLs argue that this exchange raises a jury question. It does not. First, no reasonable fact finder could conclude from Fuchs' testimony that Bodner "knew PPVA was

[7] The JOLs argue that the Court should leave fiduciary issues for trial (Opp. at 9–10) but none of the cases they cite actually hold this. In *Faulkner v. Arista Records LLC*, 602 F. Supp. 2d 470, 482 (S.D.N.Y. 2009), the Court dismissed the plaintiff's fiduciary duty claims *on the pleadings*, finding them "conclusory" and "insufficient to plead a fiduciary relationship." *Id. United Feature Syndicate, Inc. v. Miller Features Syndicate, Inc.*, 216 F. Supp. 2d 198, 218 (S.D.N.Y. 2002) was also decided on motion to dismiss. In *Liss v. Smith*, 991 F. Supp. 278, 311 (S.D.N.Y. 1998) the Court determined on summary judgment that a union president *did* owe a fiduciary duty to the union, and in *Schmidt v. Bishop*, 779 F. Supp. 321, 325 (S.D.N.Y. 1991), a church abuse case, the Court entered summary judgment for the defendant pastor on the penitent's fiduciary duty claims.

overvalued," where the testimony is that Bodner was *unknowledgeable*: "I know the valuations….*You don't know it*. So don't butt in." (Fuchs 447:5–8) (emphasis supplied).

Furthermore, the JOLs have no plausible proof as to *how* Bodner could have known the valuations were overstated. They aver that Bodner "admitted that beginning in 2012 he received 'the marks' every month about PPVA" (Opp. at 16), but *every* investor in PPVA received monthly NAV reports (Johnston Decl. Ex. 50), and there is no evidence that Bodner had access to some separate set of books that contained different numbers. If the JOLs had that evidence, they would have offered it; they did not. (*See* JOL-SOMF ¶ 193). The JOLs rely instead upon a January 2014 analyst report by the "Seaport Group" which recommended a "sell" rating on Black Elk's distressed publicly-traded bonds, and questioned the productivity of certain Black Elk drilling sites (Bixter Decl. Ex. 133). But there is no evidence of who Seaport Group is or what information it is based upon.[9] And the JOLs fail to connect the analyst's opinions regarding Black Elk's business as of January *2014* to PPVA's valuation of its Black Elk position in January *2015*—which at that time had been reduced to just $8 million, or 1% of PPVA's assets. (Johnston Decl. Ex. 110).[10]

---

[8] Bodner recalled that he voiced his opinion that assets should be marked up when the fund has a realized gain, not an unrealized gain, to which Nordlicht responded: "you have no right to tell me what to do." (Bodner 167:18–169:5) (Feuerstein Reply Decl. Ex. A).

[9] The JOLs offer the analyst's report for its truth but took no discovery from the author to establish the document as a business record (it is not) or that it fits within another hearsay exception. The Court should not consider it. *See City of New York v. FedEx Ground Package Sys.*, 351 F. Supp. 3d 456, 490 (S.D.N.Y. 2018) ("As Plaintiffs rely upon inadmissible hearsay… it cannot be considered on this motion for summary judgment").

[10] Sterling Valuation Group, the independent third party valuator, marked PPVA's Black Elk position as of December 31, 2014 at $1.7 million *higher* than PPVA had it marked. (Johnston Decl. Exs. 121–123). Moreover, even if PPVA's $8 million position was overvalued in some respect (the JOLs do not offer a different figure), such amount is immaterial as a matter of law. *ECA & Local 134 IBEW Joint Pension Trust of Chi. v. JP Morgan Chase Co.*, 553 F.3d 187 (2d Cir. 2009) (under 5% impact on bottom line deemed immaterial and nonactionable).

The JOLs offer no evidence that Bodner had knowledge in January 2015 (or any other time) that PPVA was overvalued.[11] And while the JOLs write that Bodner "took steps to hide the overvaluation" (Opp. at 16), they have no citation or support for this false assertion.

2. Investing in Beechwood. The JOLs argue that Bodner breached his duty to PPVA when he "helped establish and manage Beechwood." (Opp. at 16). While it is undisputed that Bodner helped capitalize Beechwood in early 2014 (JOL-SOMF ¶ 371), the JOLs fail to explain how this violated a duty to PPVA. Moreover, the evidence fails to match the assertion that Bodner "manage[d]" Beechwood. Every Beechwood witness testified that Bodner had nothing whatsoever to do with running their business (56.1 ¶¶ 46–47), and the JOLs point to *no evidence* connecting Bodner to any of the challenged PPVA-Beechwood transactions because there is no such evidence. To take just one example (JOL-SOMF ¶ 455) the JOLs aver that Bodner "sourced and evaluated potential investment allocations of Beechwood managed assets," and refer the Court to the testimony of Daniel Saks. Saks' testimony is that Bodner brought him deals to look at, and Saks declined them. (Saks 182:19–22) (Feuerstein Reply Decl. Ex. E).[12] This, like all the other "evidence" offered, has nothing to do with any transaction or occurrence that injured PPVA.

3. March 2014 Distribution. The JOLs assert that COBA's investment in PPVA in March 2014 provided liquidity for a $1.8 million distribution to Bodner's entity Grosser Lane,

[11] The JOLs reference a January 2016 slide deck and claim with no support that "Bodner was a recipient" of it (Opp. at 18; JOL-SOMF ¶ 634; Bixter Decl. Ex. 49), but the email was not sent to Bodner or his assistant, and the only testimony on the topic is that it was never discussed with Bodner (Steinberg 112:8–121:6) (Feuerstein Reply Decl. Ex. F).

[12] In a section of the Opposition defending their claims against Ezra Beren, the JOLs slip in an assertion that Bodner "used Beren to relay [his] directives." (Opp. at 33). None of the evidence cited supports this invention, and none of the conduct attributed to Bodner connects him to any SAC claim. (*See e.g.* JOL-SOMF ¶ 134) (Bodner assisting Beren in structuring a "potential Platinum deal").

and that Bodner's receipt of the funds was a breach of his duty to PPVA. (Opp. at 18). This claim is absent from the SAC and the Court should not consider it. But, in any case, it lacks support. The fact that Huberfeld declined to answer questions about the COBA matter by invoking his Fifth Amendment privilege (Opp. at 18) is not competent evidence against Bodner. The fact that Jona Rechnitz left a telephone message for Bodner on December 15, 2014, "the same day the COBA bribe was effectuated" (*id.*) is unremarkable in light of record evidence showing that the purpose of the call was a charitable dinner that Rechnitz was hosting. (Bodner 399:18–400:14) (Feuerstein Reply Decl. Exs. A, 1). Finally, the JOLs reference Nordlicht's statement in March 2016 to Bodner's counsel that he did not want to personally guaranty "misconduct" claims against Bodner or Huberfeld. (Bixter Decl. Ex. 42). The JOLs make no effort to connect this statement to COBA, nor to show that this was anything more than a conceptual positon in negotiating the scope of the Release Agreement.[13]

4. The Albanese Email. The JOLs cite SAC Ex. 33 as a "perfect example" of "Bodner's knowledge of the Platinum/Beechwood relationship and his efforts to conceal fraud." (Opp. at 18–19). Bodner's former assistant Albanese, however, testified under oath that *she* was the author of Exhibit 33, and that she wrote it on her last day at Platinum with the intent to pressure Platinum Management to improve her severance pay. (56.1 ¶ 61). She admitted that she had no information as to whether or if Bodner knew about the matters in her email, and that she fabricated its contents based on conversations she overheard in the office—conversations *not*

[13] Nordlicht was commenting on a draft of the Release Agreement that contained a provision by which he would personally guaranty indemnity rights that Bodner and Huberfeld would retain against PPVA after the release was executed. (Feuerstein Reply Decl. Ex. 2). As Bodner's counsel explained in response to Nordlicht, "[i]t's not really a question of misconduct. They may face a frivolous claim at a time when the fund lacks liquidity to fund their defense." (Feuerstein Reply Decl. Ex. 3). In the final Release Agreement, Bodner and Huberfeld's right to indemnification was placed upon Platinum Management (not PPVA), and they dropped their request that Nordlicht guaranty the obligation. (Release Agreement ¶ 3(c)).

involving Bodner—and on press releases she found on the internet regarding CNO Group's earlier investment with Beechwood. (56.1 ¶ 62). The JOLs may not like Albanese's testimony but there is no evidence contradicting it.[14]

Moreover, nothing about Albanese's email supports the JOLs' claims that Bodner directed or assisted in valuation or transactional misconduct, or has any connection to any claim of loss by PPVA. Nor does the email demonstrate an effort by Bodner "to conceal" anything from PPVA. (Opp. at 19). To the contrary, immediately upon receipt of Albanese's email, Bodner forwarded it to an in-house lawyer at Platinum Management, an experienced professional the JOLs have never accused of disloyalty to PPVA, and from whom the JOLs never sought discovery. (Feuerstein Reply Decl. Ex. 4; *see also* ECF No. 53). Exhibit 33 does not raise a triable issue.

5. Agera. The JOLs' last resort is an assertion that Bodner's "approval, and consent to restructuring, was necessary to transfer Agera to Beechwood" in a below-value sale. (Opp. at 20–21). Yet the JOLs provide no citation for this allegation, and there is no evidence whatsoever that Bodner approved or consented to any aspect of the transaction. (*See* Opp. at 20–21). As all the business people involved testified, from both the Platinum and Beechwood sides, Bodner had nothing to do with it. (Steinberg 147:17–148:7, Narain 579:16–580:2, Thomas 234:13–235:4, 458:15–24) (Feuerstein Reply Decl. Exs. F, D, & G).

The JOLs distract with reference to Bainbridge Partners, a fund organized by Bodner's son and a business partner in November 2015, which made an $18 million loan to Agera. (JOL-SOMF ¶ 690). Bodner does not dispute that he helped his son structure the loan

[14] The JOLs complain that at oral argument on Bodner's motion to dismiss his counsel "never alleged [to the Court] that this email was actually drafted by Bodner's secretary." (Opp. at 19). It was not counsel's role, however, to "allege" facts outside the complaint at that argument.

and participated in the group that funded it (Bodner 56.1 ¶ 92), for which he earned some interest. (JOL-SOMF ¶ 694). But nothing about the loan prejudiced PPVA. To the contrary, Bainbridge provided liquidity to a PPVA portfolio company at a time when (according to the JOLs) PPVA was unable to provide it.

Otherwise, the JOLs allege that Bodner "often worked at Agera's offices" and gave his partners and potential investors tours there. (Opp. at 20–21). Bodner never "worked at" Agera (Bodner 354:23–355:11) (Feuerstein Reply Decl. Ex. A) but he did visit and take meetings there. The JOLs note that in December 2015, Bodner asked Nordlicht if PPVA could borrow from Agera "on a short term basis." (JOL-SOMF ¶¶ 686 & 689). The idea went nowhere. None of these facts connect Bodner to the Agera sale and therefore do not create a triable issue as to whether Bodner can be liable for losses arising from that sale.

III. THE JOLS HAVE NO FACTS SHOWING SUBSTANTIAL ASSISTANCE OF ANY FIDUCIARY BREACH OR FRAUDULENT CONDUCT

The JOLs make no effort to identify separate facts upon which a jury could find that Bodner provided substantial assistance of a fraud or fiduciary breach by another person. For the same reason those facts discussed in Section II do not state an issue of fact as to fiduciary breach or fraud, they do not state a triable issue with respect to secondary liability.

Additionally, none of the conduct attributed to Bodner as addressed in Section II can be deemed "substantial" assistance because it was not the proximate cause of any injury to PPVA. *See SPV OSUS, Ltd. v. UBS AG*, 882 F.3d 333, 345 (2d Cir. 2018). No reasonable juror could conclude that the Bodner family investment in Beechwood in early 2014, for example, proximately caused any particular trade or transaction that allegedly favored Beechwood over PPVA months or years later, or that Bodner had actual knowledge that Beechwood would

allegedly engage in fraudulent or one-sided transactions with PPVA. There are simply no facts upon which a jury could make that determination.

IV. THERE IS NO TRIABLE ISSUE AS TO THE BINDING EFFECT OF THE MARCH 2016 RELEASE

The JOLs' efforts to escape the Release Agreement are unavailing. *First*, they argue that the Release Agreement can be "set aside" because "those issuing the purported release were themselves breaching fiduciary duties to the company." (Opp. at 64) (citing *Aviles v. S&P Global, Inc.*, 380 F. Supp. 3d 221, 301–02 (S.D.N.Y. 2019)). In *Aviles*, however, the granting of the release by the corporate officers to their alleged co-conspirators in a settlement agreement was the matter at issue in the complaint; the plaintiffs alleged that the settlement agreement itself was the fiduciary breach. Here, the JOLs have not attacked the Release Agreement in the SAC, but seek to escape its impact in an opposition to summary judgment. Moreover, the plaintiffs alleged in *Aviles*—and the Court accepted as true for the motion to dismiss—that the corporation derived no benefit from the transaction. Here, it cannot be disputed that PPVA received substantial benefit from the transaction, where Bodner gave up his 19% profit share in Platinum Management so Nordlicht could use it to incentivize a new investor to provide fresh liquidity to PPVA; to lock-up his family's $40 million investments to provide long term stability to PPVA; and gave a release of claims, including claims against PPVA for indemnification, to which he would otherwise be entitled. (ECF No. 543 Exs. 12 & 16). Additionally, in *Aviles*, the plaintiffs alleged that the releasees "exploited" the corporation to enter into the settlement agreement (*id.* at 253), whereas here, PPVA's interests were represented by sophisticated and experienced in-house counsel, and there is no evidence of untoward influence.[15]

[15] The JOLs write that Bodner 's counsel also acted as counsel for Platinum Management with respect to the Release Agreement. (Opp. n.14). This is false. (ECF No. 543 Ex. 16 at 1) ("Historically, *but not in this matter*, we have been and continue to be counsel to Platinum Management. We received conflict waivers from all parties involved.").

Second, the JOLs argue that the Release Agreement is void for lack of consideration (Opp. at 69), but that is not a ground upon which a written release of claims may be invalidated. *Simel v. JP Morgan Chase*, No. 05 Civ. 9750 (GBD), 2007 U.S. Dist. LEXIS 18693, at *8 (S.D.N.Y. Mar. 9, 2007) (under N.Y. Gen. Obl. L. § 15-303, "[a] written release is not invalid because of the absence of consideration"). In any event, as set forth above, Bodner provided substantial consideration, including a general release to PPVA, which is sufficient consideration in and of itself. *See Lambertson v. Kerry Ingredient's, Inc.*, 50 F. Supp. 2d 163, 169 (E.D.N.Y. 1999).

Third, the JOLs argue that there are factual issues as to whether the parties to the Release Agreement had a "meeting of the minds" (Opp. at 70) but fail to articulate a single issue upon which the parties, each represented by experienced counsel, lacked agreement.

Fourth, and finally, the JOLs assert for the first time that PPVA's granting of the release was a voidable preference under Cayman law. (Opp. at 72). The Court should not consider this defective, late assertion because "a party may not use his or her opposition to a dispositive motion as means to amend the complaint," and it is therefore "inappropriate to raise new claims for the first time in submissions in opposition to summary judgment." *Jean-Pierre v. Citizen Watch Co. of Am. Inc.*, No. 18 Civ. 0507 (VEC), 2019 U.S. Dist LEXIS 196109 at *22–*23 (S.D.N.Y. Nov. 12, 2019). This new claim is also an end run around the Court's Case Management Order (ECF No. 158), by which no new claims could be asserted after March 29, 2019 without leave of court (which the JOLs never sought, even after Bodner raised the Release Agreement in his Answer) (ECF No. 431). Furthermore, the JOLs offer an expert declaration on

Cayman preference law (ECF No. 575) months after the deadline to do so (ECF No. 451).[16] Finally, the JOLs violate Fed. R. Civ. P. 44.1, which requires "reasonable notice" to the opposition if a party intends to rely on foreign law, in order to "avoid unfair surprise." *Desarrolladora Farallon S. de R.L. de C.V. v. Cargill Fin. Servs. Int'l*, 666 Fed. Appx. 17, 24 (2d Cir. 2016) (internal quotations and citations omitted); *Local 875 Int'l Bhd. Of Teamsters Pension Fund v. Pollack,* 992 F. Supp. 545, 559 (E.D.N.Y. 1998) (notice in summary judgment reply is not "reasonable notice").

Even if the Court were to consider the issue, however, the referenced Cayman statute establishes *on its face* that the preference claim lacks merit. The quoted statute defines a preference as a transfer to a "creditor" and "with a view to giving such creditor a preference over other creditors." (Opp. at 73). The JOLs do not offer any basis upon which the Court could conclude that Bodner was a "creditor" of PPVA in March 2016 (he was not) or how the release preferred Bodner to PPVA's actual creditors (it did not). The Court should reject the preference claim as procedurally defective and/or unavailing on the merits.

Finally, the JOLs note that the Release Agreement does not apply to claims accruing after March 20, 2016 (Opp. at 71), a fact of no moment here because the JOLs point to no action (or even inaction) by Bodner after that date.

CONCLUSION

The Motion should be granted and judgment entered for Bodner.

[16] The JOLs' expert disclosures said nothing about preference law and said only that the JOLs would offer an expert on "[d]uties of general partners of an exempted Cayman limited partnership and similar features of Cayman law." (Feuerstein Reply Decl. Ex. 5). Remarkably, the JOLs *did* provide a timely report from their Cayman law expert, but he offered no opinion on preference law. (ECF No. 575).

Dated: March 17, 2020
New York, New York

CURTIS, MALLET-PREVOST,
COLT & MOSLE LLP

By: */s/ Eliot Lauer*

Eliot Lauer
Gabriel Hertzberg
Abigail Johnston
101 Park Avenue
New York, New York 10178
Tel.: (212) 696-6000
Fax: (212) 697-1559
Email: elauer@curtis.com
ghertzberg@curtis.com
ajohnston@curtis.com

Attorneys for Defendant David Bodner

36977824