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), Plaintiffs, v. PLATINUM MANAGEMENT (NY) LLC, *et al.*, Defendants.	No. 18 Civ. 10936 (JSR)

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

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Defendant David Bodner respectfully submits this Memorandum of Law in support of his Motion for Summary Judgment pursuant to Federal Rule of Civil Procedure 56.

PRELIMINARY STATEMENT

Bodner is entitled to summary judgment on all claims asserted by the Joint Official Liquidators ("JOLs") of Platinum Partners Value Arbitrage Fund L.P. ("PPVA") for two independent reasons. *First*, there are no facts implicating him in the alleged fraudulent transactions or in any of the claimed breaches of fiduciary duty set forth in the Second Amended Complaint ("SAC"). *Second*, PPVA and Bodner exchanged general releases in a 2016 agreement in which the Bodner family gave up its interests in Platinum Management (NY) LLC ("Platinum Management") to enable Platinum Management to offer those interests to a major investor who would help shore up the funds' liquidity. That release is binding upon the JOLs.

1. *Failure of Proof.* The JOLs alleged in the SAC that Bodner "orchestrated" and was "involved in every aspect of" the alleged fraudulent transactions described in the SAC, and that he had a direct role in the net asset value calculations that allegedly stripped PPVA of value between 2012 and 2016. (SAC ¶ 78). Each and every one of these claims was flatly contradicted by the testimonial and documentary evidence. Bodner was never a "senior Platinum Management executive" (*id.*) and was never employed at Platinum Management or any of its affiliated funds, including PPVA in any capacity. He was never a manager. He was never a supervisor. No one at Platinum Management reported to him, with the irrelevant exception of a shared personal secretary and a bookkeeper who assisted him on personal financial matters. The valuation committee did not communicate with Bodner. None of the portfolio managers took direction from Bodner on an investment decision.

To be sure, Bodner had a substantial financial and reputational interest in the Platinum funds. In consideration for a substantial investment at the founding of the funds almost

20 years ago, Bodner's family received a passive but financially significant interest in potential profits of the management company, Platinum Management. In addition, throughout the period of time relevant to the SAC, the Bodner family had over $40 million invested in the Platinum funds—all of which was lost as a result of the funds' collapse in 2016. Given his family's substantial financial interest in the funds, and in the success of Platinum Management, Bodner was afforded use of an office at Platinum Management, and a shared personal secretary. He communicated in person and by phone with Mark Nordlicht and others at Platinum Management in order to follow the progress of his family's investment. Bodner was deeply interested in Platinum's success.

But he never had any responsibility for or authority in Platinum Management. Over the course of more than 40 depositions taken in this case, one after another, the officers and employees of Platinum Management—at all levels in the corporate hierarchy—testified that they never took direction from Bodner, directly or indirectly. They confirmed that Bodner had no voice or role in the firm's robust valuation process. They confirmed that Bodner had no decision-making authority with respect to any investment by PPVA.

Likewise, with respect to Beechwood, Bodner's family made a significant early investment in 2013 in exchange for a share of the profits, but Bodner never had any authority or decision-making role there. This is confirmed through the many Beechwood depositions, in which the principals, officers and employees of that company all testified that Bodner had nothing to do with how they ran their business.

On these undisputed facts, Bodner does not and cannot have any liability to the JOLs. He did nothing that injured PPVA, and he did nothing to knowingly help anyone else injure PPVA.

2. *General Release.* Apart from having no exposure to PPVA, Bodner has been released by PPVA. In a March 2016 transaction, at a time when PPVA was desperately in need of new liquidity, Nordlicht entreated Bodner to give up his family's interests in Platinum Management so that a prominent investor, Marcos Katz, could take over the Bodner family's stake in exchange for a substantial new investment by Katz in the funds. While Katz ultimately did not make his investment, Platinum Management's agreement with Bodner was not conditioned upon the Katz investment going through. Bodner gave, and the Platinum releasing parties received, substantial consideration: among other things, he forfeited his family's interests in the profits of Platinum Management so those interests could be offered to a new investor; he agreed to a lock-up of his family's substantial investments in the funds for two years; and he gave a general release for all claims he might have had against PPVA and the other funds, including his right to indemnification. The mutual exchanges and releases are binding and enforceable upon the parties under New York law.

For each of these reasons—because the JOLs have no case on the merits, and because PPVA is bound by its general release—Bodner is entitled to summary judgment.

STATEMENT OF FACTS

A. Bodner's Platinum Interests

In or about 2001, Bodner helped Mark Nordlicht and Murray Huberfeld launch PPVA by providing a substantial seed investment. (56.1 ¶ 1).[1] In exchange for his investment, Bodner received an interest in the management fees generated by Platinum Management. (56.1 ¶ 2). This interest was held through Grosser Lane Management, LLC ("Grosser Lane"), of which Bodner and his wife are members. (56.1 ¶ 3).

[1] Citations to "56.1" refer to Bodner's Local Rule 56.1 Statement. ECF citations refer to the *Trott* docket, 18 Civ. 10936. Capitalized terms not defined herein shall have the meanings ascribed to them in the SAC.

Grosser Lane was not itself a member of Platinum Management; it was a 24.99% beneficiary of the Mark Nordlicht Grantor Trust ("MNG Trust"). (56.1 ¶ 4). That trust held of the membership interests of Platinum Management (which collected the management fees) and another entity, Platinum Partners Value Arbitrage, LP ("PPVALP") (which collected the incentive fees). (56.1 ¶ 5).[2] Thus, through the MNG Trust, Grosser Lane was entitled to approximately 19% of the profits generated through the management of PPVA and the other Platinum funds. (56.1 ¶ 8).[3]

Grosser Lane had no rights under the Platinum Management operating agreement: as a non-member, it had no vote on internal affairs; it could not appoint officers, directors or employees; and it could not direct or restrain any business activity. (56.1 ¶ 10). Its rights with respect to Platinum Management derived exclusively from the MNG Trust, where, under the trust instrument, it was entirely passive. (56.1 ¶ 11). It had no ability to control or direct the trustee, Mark Nordlicht, and Bodner was explicitly prevented from ever becoming the trustee. (56.1 ¶ 12).

Nordlicht was at all times the Chief Investment Officer of Platinum Management. Uri Landesman was the Managing Member of Platinum Management. (56.1 ¶ 13). Platinum Management was the investment manager and general partner of PPVA. (56.1 ¶ 14–15). Thus, Nordlicht and Landesman had complete, undisputed authority over all aspects of PPVA's business. (56.1 ¶ 16).

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[2] The management and incentive fees were charged to the feeder funds, not the master fund (PPVA). Contrary to the assertions in the SAC, PPVA never paid a management or incentive fee to Platinum Management. (56.1 ¶¶ 6–7).

[3] Grosser Lane last received a distribution from the MNG Trust in March 2014, on account of incentive fees allocated to PPVALP in 2013. (56.1 ¶ 9).

No facts elicited during discovery suggest that Bodner had any role at Platinum Management or PPVA. Bodner was never an officer or an employee of either entity. To the contrary, witness after witness testified that Bodner had no role at Platinum Management. For example, Joseph San Filippo, Chief Financial Officer for PPVA from 2005–2016, testified:

> Q: What was Mr. Bodner's role?
> A: **He didn't really have a role at Platinum**.
> …
> Q: I'm asking why -- because I want the record to be pretty clear here – why was the management company, Platinum Management … owned via this Mark Nordlicht Grantor Trust?
> A: Because Mark Nordlicht wanted control over the investment manager.
> Q: It wasn't to hide the role of Mr. Huberfeld and Mr. Bodner?
> A: **There wasn't any role of Mr. Huberfeld and Bodner**.

(56.1 ¶ 17; SanFilippo 73:5–22; 129:12–15; 417:7–20).[4] San Filippo was explicit that he never consulted with or took direction from Bodner in any context:

> Q: And then with respect to any transaction involving the purchase or sale of a PPVA asset or any transaction to pledge a PPVA asset as collateral, did you…take direction from David Bodner?
> A: No.
> Q: Consult with David Bodner?
> A: **No, I never consulted with David Bodner.**
> Q: Receive instructions from him?
> A: No.
> Q: Discuss it with him in any manner?
> A: No.
> …
> Q: [R]elating to the valuation of assets in PPVA's portfolio, did you take any direction from David Bodner?
> A: **I did not take any direction from David Bodner**.

(56.1 ¶ 17; SanFilippo 418:18–419:9; 417:8–20). Likewise, David Steinberg, Chief Risk Officer, testified that Bodner was merely an investor:

> Q: So that he [Bodner] capitalized the fund but was **not involved in running the day-to-day business**. Is that a summary?
> A: **Correct**.

[4] Throughout this memorandum, emphasis in deposition quotes is supplied.

(56.1 ¶ 18; Steinberg 371:2–6). Daniel Saks, Co-Chief Investment Officer, testified:

> Q: [D]id he [Bodner] ever tell you to do something in connection with your job at Platinum?
> A: **I don't recall him doing so**.

(56.1 ¶ 17; Saks 350:6–10). Ezra Beren, a portfolio manager at Platinum Management, testified:

> Q: Was David Bodner involved in making decisions as to Platinum investments?
> A. **No**.

(56.1 ¶ 17; Beren 80:4–6; 171:25–172:6). David Ottensoser, General Counsel, and later Chief Compliance Officer, testified when asked about Bodner:

> A: With regards to running, managing, performance of Platinum, I never had any other conversations with him other than performance – other than performance depending how you mean it, he had a nephew at Platinum . . . who worked with me on compliance and on several occasions, David Bodner did come to me to ask me how his nephew was doing in that role.
> Q: Okay.
> A: But I, to my recollection, **never had any other opportunity or instance where I discussed anything Platinum related with him**.

(56.1 ¶ 17; Ottensoser 97:25–98:13).

From October 2014 to April 2016, Bodner was provided an office at Platinum Management, where he visited approximately two days a week to take personal meetings with charitable institutions and religious leaders. (56.1 ¶ 24).[5] Bodner had use of a bookkeeper and a secretary. (56.1 ¶ 25). He occasionally took meetings with Nordlicht, Huberfeld and others, either in the office or in restaurants, in which he sought and received information about the performance of the funds managed by Platinum Management. (56.1 ¶ 26). At one such meeting

[5] Prior to October 2014, Bodner had use of an office at Centurion Credit Management, which managed a fund called Centurion Credit Group LLC, on West 57th Street. Nordlicht took over control of that fund in January 2011 from Huberfeld, who was its Chief Investment Officer. Nordlicht rebranded it Platinum Partners Credit Opportunities Master Fund ("PPCO"). PPCO is in receivership under Melanie Cyganowski, plaintiff in *Cyganowski* action, No. 18 Civ. 6658. In October 2014, Nordlicht consolidated the management of the two funds in a new office on West 55th Street, and Bodner was provided use of an office in that new space. (56.1 ¶¶ 19–23).

in January 2015, where Platinum Management member Bernard Fuchs was present, Bodner and Nordlicht had a disagreement, in which Bodner expressed to Nordlicht that Platinum Management should not be marking up investment positions based on unrealized gains. (56.1 ¶ 27). Nordlicht told Bodner that Bodner was uninformed and that his input was unwelcome. (56.1 ¶ 28).

Several of the younger portfolio managers within Platinum Management occasionally sought advice from Bodner on a particular transaction or matter. (56.1 ¶ 29). Bodner offered mentorship but never gave direction to those who sought his advice. (56.1 ¶ 30).

Bodner had only rare interactions with PPVA investors. (56.1 ¶ 31). Nordlicht occasionally requested that Bodner reach out to his contacts to seek new investors, but there is no evidence that Bodner did so. (56.1 ¶ 32). Michael Katz, the grandson of the longtime PPVA investor Marcos Katz, testified that Bodner occasionally met with his grandfather and sought to dissuade the grandfather from withdrawing his investments. (56.1 ¶ 33). The only investors Bodner ever brought into the funds were his family members and charitable foundation. (56.1 ¶ 34).

B. Bodner's Beechwood Interests

In late 2013, the Bodner family, through Monsey Equities, LLC ("Monsey Equities"), made an investment in the Beechwood reinsurance business. Bodner had no role in the conception, structuring or running of that business.

In 2013, Mark Feuer and Scott Taylor conceived of the reinsurance company that eventually became Beechwood Bermuda International Ltd. ("BBIL") and Beechwood Re Ltd. ("Beechwood Re" and collectively with BBIL, the "Beechwood Reinsurance Companies"). (56.1 ¶ 37). To find capital for the new business, Feuer approached Huberfeld. (56.1 ¶ 38). Huberfeld introduced Feuer and Taylor to Nordlicht. (56.1 ¶ 39). Feuer and Huberfeld

negotiated how Beechwood's capital stack would function and how the ownership and economic shares would be divided with Feuer and Taylor. (56.1 ¶ 40).

From the outset, Bodner had no involvement in the conception or development of Beechwood. (56.1 ¶ 41). Bodner himself did not have any ownership interest in any Beechwood entity. (56.1 ¶ 42). Monsey Equities made its capital contribution through Beechwood Re Investments, LLC ("BRILLC") Series C, in return for certain minority common and preferred stock in the Beechwood capital structure, certain of which was issued to Beechwood Trusts Nos. 7 through 14 ("Trusts 7–14"), settled by Mrs. Bodner for each of her eight children as beneficiaries. (56.1 ¶ 43). At all times, Mark Feuer and Scott Taylor controlled the voting within the Beechwood structure. (56.1 ¶ 44). The Bodner family lost millions of dollars through their investment in Beechwood. (56.1 ¶ 45).

Bodner had no physical presence at Beechwood and no authority: he did not maintain an office there, he was not involved in decision-making and his opinion was not treated with deference or given any particular weight. (56.1 ¶ 46). As Mark Feuer testified:

> Q: Now, what was Mr. Bodner's role at Beechwood?
> A: **I don't remember him having a role**.
> Q: Of any kind?
> A: **Of any kind**.

(56.1 ¶ 46; Feuer 550:11–16). Christian Thomas, the general counsel of Beechwood, testified:

> Q: [D]id David Bodner ever tell you to do something in connection with your job at Beechwood?
> A: No.
> Q: Did he ever tell you not do so something?
> A: No.
> Q: Did David Bodner have the authority to direct employees of Beechwood to do or not to do anything within the scope of their duties at Beechwood?
> A: **No**.

(56.1 ¶ 46; Thomas 458:15–24). No one at Beechwood reported to or took direction from Bodner. (56.1 ¶ 47).

In August 2016, the Bodner family, together with the Nordlicht and Huberfeld families, sold their interests in Beechwood to entities controlled by Feuer and Taylor. (56.1 ¶ 48). In exchange, the sellers received a promissory note, which remains unpaid to this date, and which has no value. (56.1 ¶ 49).

C. Bodner's Separation from Platinum Management and Release by PPVA

On March 20, 2016, Bodner and Huberfeld entered into a Release Agreement with Platinum Management (the "Release Agreement"). (56.1 ¶ 50). From Platinum Management's perspective, the purpose of the Release Agreement was to make available Bodner's and Huberfeld's interests in the MNG Trust so that Platinum Management could offer those interests as an incentive to a potential new investor in the Platinum funds. At the time, Nordlicht was negotiating a substantial new investment from Marcos Katz, a prominent longtime investor in PPVA. (56.1 ¶ 51).

The Release Agreement caused Bodner, and also Huberfeld, to forfeit their interests in the MNG Trust and to subject their families' limited partnership interests in the Platinum feeder funds 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 interests 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).

In exchange, the Release Agreement granted each of Bodner and Huberfeld a general release by the Platinum affiliates and funds, including PPVA. (56.1 ¶ 56). The release states that PPVA and the other releasing parties released Bodner and Huberfeld from:

> [A]ny and all manner of actions, causes of actions, suits … whether in law or in equity, whether known, unknown, or hereafter becoming known, foreseen or unforeseen, suspected or unsuspected … existing or hereafter arising … that are based in whole or in part on any act or omission, transaction, or event in connection in any manner whatsoever with Platinum, from the beginning of the world to the Effective Date.

(56.1 ¶ 57). Nordlicht executed the Release Agreement for Platinum Management, the general partner of PPVA. (56.1 ¶ 58).

D. The Albanese Email – SAC Ex. 33

When contesting Bodner's motion to dismiss on group pleading grounds, the JOLs relied heavily on Exhibit 33 of the SAC, an email written to Bodner in July 2015 from an email account used by his secretary, Angela Albanese. The JOLs contended that the email showed Bodner as an "insider" for group pleading purposes, and at oral argument, called it a "confession" by Bodner. (56.1 ¶ 59). In fact, the email was an invention by Albanese. Under oath, she testified that *she* (not Bodner) was the sole author of Exhibit 33; she wrote it of her own volition without any input or direction from Bodner or anyone else; and that she did it on her last day at Platinum with the intent to pressure Platinum Management to improve her severance pay. (56.1 ¶ 61).[6] 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* involving Bodner—and on press releases she found on the internet regarding CNO Group's earlier investment with Beechwood. (56.1 ¶ 62).

[6] On September 11, 2019, Albanese and Bodner entered into a written agreement in which Albanese agreed to testify truthfully about Exhibit 33, and Bodner agreed not to sue her in connection with her forged email. She appended a written statement to the agreement regarding Exhibit 33, which statement she swore at her deposition to be true and correct. (56.1 ¶¶ 60–61).

E. The Platinum Valuation Process

The SAC alleges that Platinum Management inflated the values of PPVA's assets in order to increase its management and incentive fees. Not a single witness or document places Bodner anywhere near the valuation process. The evidence does show, however, a robust set of procedures implemented by a number of Platinum Management professionals, independent valuation agents, a fund administrator and outside auditors at premier accounting firms. A detailed summary of the evidence is contained within the Declaration of Abigail Johnston, dated Feb. 14, 2020. The Johnston Declaration collects hundreds of valuation-related communications, memoranda and analyses by Platinum Management personnel and outside professionals. Bodner is not a participant. A brief summary follows.

As the general partner and investment manager of PPVA, Platinum Management had discretion over and final determination of the valuation of PPVA's assets. (56.1 ¶ 63). In 2012 and 2013, BDO Cayman Ltd. ("BDO") was PPVA's independent auditor. (56.1 ¶ 64). In 2014 and 2015, CohnReznick LLP ("CohnReznick") was PPVA's independent auditor. (56.1 ¶ 65). Platinum Management engaged independent valuators at Sterling Valuation Group ("Sterling") to help calculate PPVA's NAV from the first quarter of 2012 until the second quarter of 2015. (56.1 ¶ 66). On June 30, 2015, Platinum Management engaged Alvarez & Marsal ("Alvarez") as an independent valuator. (56.1 ¶ 67). Alvarez valued certain PPVA assets beginning in the first quarter of 2015 through March 2016, at which time it was preparing PPVA's fourth quarter 2015 valuation report. (56.1 ¶ 68). PPVA's third-party administrator was SS&C Technologies, Inc. ("SS&C"). (56.1 ¶ 69). SS&C sent NAV reports and statements directly to investors in the Funds. (56.1 ¶ 70).

Platinum Management's valuation policy (the "Valuation Policy") provided explicit valuation guidelines. It describes the valuation methodologies for various asset classes,

asset classification levels and the party responsible for the valuation process for each asset, among other items. (56.1 ¶ 71). PPVA also had an internal valuation committee (the "Valuation Committee"). The Valuation Policy contains the Valuation Committee Charter. (56.1 ¶ 72). The Valuation Policy states that the Valuation Committee "is responsible for assessing and resolving any exceptions or revisions to the valuation methodology, policies and procedure, as well as assessing the preliminary portfolio Net Asset Value (NAV)." (56.1 ¶ 73). In practice, the Valuation Committee approved valuation methodology, policy and procedures; approved revisions to the valuation methodology; approved the engagement of any third party to conduct valuations; and assessed the adequacy of PPVA's independent valuation. (56.1 ¶ 74).

The Valuation Committee met each month. The individual portfolio managers would review the assets under their oversight and update those in attendance on any major changes in "fundamentals, structure, or strategy" of that asset within the last two or three months. (56.1 ¶ 75). The Valuation Committee reviewed and revised the Valuation Policy periodically. (56.1 ¶ 76).

Platinum Management personnel held quarterly calls with Sterling and Alvarez to discuss PPVA's assets in preparation for a quarterly valuation letter. (56.1 ¶ 77).

Bodner was never on the Valuation Committee. Nor did he ever interact with the Committee or its members regarding valuation matters. He never interacted with Sterling, Alvarez, BDO or CohnReznick in any respect. He had no contact with or influence on the process. (56.1 ¶ 78). There is no evidence to the contrary.[7]

[7] Bodner does not ask the Court to conclude on this Motion that the NAV statements from 2013-2016 were materially accurate. Expert witness Leon Metzger, however, maintains that Platinum Management's valuation process was appropriate and consistent with industry best practices. He also observes that Platinum Management's valuations were always within the high-low range set independently by Sterling and Alvarez. (56.1 ¶ 79).

F. The Transactional Fraud Alleged in the SAC

The JOLs allege in the SAC a series of transactions through which, they claim, Platinum Management fraudulently encumbered or sold PPVA assets. There is no evidence connecting Bodner to any of them.

1. *Black Elk Scheme (SAC ¶¶ 440–515)*

The JOLs allege that the "Platinum Defendants"—a group defined to include Bodner—engaged in a fraudulent scheme to amend the indenture of Black Elk senior secured notes to enable the issuer to pay a junior class of securities (Series E preferred shares) ahead of the senior noteholders. It is alleged that PPVA held the senior notes, and the BEOF Funds, which were also organized and managed by Platinum Management, held the Series E preferred shares.

The JOLs alleged that Bodner was among those: "heavily involved in marketing the investment [in the BEOF Funds] to potential investors;" who were ""planning of all aspects of the transactions between and among the BEOF Funds and PPVA" (SAC ¶ 453); and who were "managing both PPVA and the BEOF Funds" (SAC ¶ 484). The SAC's 76 paragraphs describing the Black Elk-related allegations (and the 12 exhibits referenced therein), however, did not in any way connect Bodner to the Black Elk Scheme.

The JOLs fare no better after discovery. No evidence connects Bodner to the amendment of the indenture, the management of the BEOF Funds, or any other aspect of the purported scheme. There is no evidence that Bodner raised a nickel for the BEOF Funds. Neither Bodner nor his family invested in those funds. (56.1 ¶ 82).

The JOLs will tout an email in which Uri Landesman suggests in March 2014 that Bodner should contact his friends Aaron Elbogen, Bob Collins and Bob Cohen, presumably to raise money for the BEOF Funds. (56.1 ¶ 83). But the JOLs deposed Elbogen, and he

confirmed that Bodner did not ask him to invest. (56.1 ¶ 84). The JOLs never bothered with Collins or Cohen.[8]

2. *Agera Transaction (SAC ¶¶ 607–72)*

The SAC alleges that Bodner has responsibility for Platinum Management's sale of Agera to a Beechwood affiliate for too little value: "the Platinum Defendants, working in concert with the Beechwood Defendants and SHIP, caused PGS to transfer its interest in the Agera Note to AGH Parent LLC – an entity not affiliated with PPVA, but at that time controlled directly by the Platinum Defendants and Beechwood Defendants, and for the benefit of SHIP." (SAC ¶ 643).

Discovery produced no facts connecting Bodner to the Agera Transaction. David Steinberg negotiated the transaction on the Platinum side (56.1 ¶ 88), and he was explicit that never took direction from or discussed the matter with Bodner:

> Q: Okay. We've spent a lot of time on the Agera sale, so I do know that you're familiar with it. In your work on the Agera sale, did you take direction from David Bodner?
> A: No.
> Q. Did you receive input from him?
> A: No.

(56.1 ¶ 88; Steinberg 381:14–24, *see also id.,* 185:7–12). Dhruv Narain negotiated the transaction on the Beechwood side, and he did not take direction from or discuss the matter with Bodner. (56.1 ¶ 89).

To be sure, Bodner had knowledge of Agera as a company launched by Platinum Management. Bodner helped his son get a job there as sales agent, and Bodner occasionally took

[8] The JOLs may also note that Grosser Lane earned a distribution of fees from the management of the BEOF Funds in 2013. (56.1 ¶ 85). Grosser Lane received that distribution not because Bodner managed BEOF—he indisputably did not—but because he had a 2001 agreement with Nordlicht and Huberfeld that Bodner would share in the fees generated by any new fund created by Platinum Management. (56.1 ¶ 86).

business meetings at Agera's offices in Westchester, close to his home in nearby Rockland County. (56.1 ¶ 90). Later, Bodner helped his son structure an $18 million loan to Agera through a fund, Bainbridge Partners LLP ("Bainbridge"), in which Bodner participated. (56.1 ¶ 91). Bernard Fuchs recalled at his deposition that Bodner once gave him a tour of the Agera offices. (56.1 ¶ 92). In December 2015, with the Platinum funds under increasing liquidity constraints, Bodner floated an idea to David Levy that Agera could borrow money and lend it to the funds; the idea went nowhere. (56.1 ¶ 93).

None of these incidental connections to Agera, however, inculpate Bodner in an allegedly below-value sale of PPVA's stake in Agera to Beechwood. The Agera transaction was a nine-figure transaction, heavily negotiated by multiple professionals on both sides, with voluminous agreements and term sheets exchanged over email over a course of weeks or months. (56.1 ¶ 94). Neither Bodner nor his assistant is copied on those communications, and not a shred of evidence connects him to it.[9]

PROCEDURAL HISTORY

The Court held in its April 11, 2019 Opinion (ECF No. 290) (the "April 11 Opinion") that the JOLs sufficiently pleaded in their First Amended Complaint ("FAC") their allegations against the so-called "Platinum Defendants" with respect to written statements published by Platinum Management, such that those allegations could survive a motion to dismiss under the group pleading doctrine. (*Id.* at 44–45). The relevant written statements were the allegedly "inflated reports of PPVA's NAV" published between 2013 and August 2016. (SAC ¶ 250).

[9] There is no testimony or evidence connecting Bodner to any of the other transactions alleged in the SAC to be fraudulent: 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); Security Lockup (SAC ¶¶ 673–762).

Thereafter, the JOLs filed the SAC, and Bodner moved to dismiss the non-NAV claims. (ECF No. 321). On June 21, 2019, the Court issued an Opinion (ECF No. 408) (the "June 21 Opinion") holding that "any attempt to segregate 'NAV' from 'non-NAV' claims" at the motion to dismiss stage would be "premature," but cautioned that Bodner "may argue later in this litigation that plaintiffs are barred from relying on conduct that should have been alleged in the SAC." (Jun. 21 Op. at 34, n.11).

On July 12, 2019, Bodner filed an answer to the SAC, in which he asserted an affirmative defense based upon the Release Agreement. (ECF No. 431).[10]

STANDARD OF REVIEW

Summary judgment should be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *Golden Pac. Bancorp v. FDIC*, 375 F.3d 196, 200 (2d Cir. 2004). The non-moving party may not rely on "mere conclusory allegations nor speculation, but instead must offer some *hard evidence* showing that its version of the events is not wholly fanciful." *Mortg. Resolution Servicing, LLC v. JPMorgan Chase Bank, N.A.,* No. 15 CV 293-LTS-RWL, 2019 U.S. Dist. LEXIS 167845, at *17 (S.D.N.Y. Sep. 27, 2019) (quoting *Golden Pac.*, 375 F.3d at 200) (emphasis added); *see also RogersCasey, Inc. v. Nankof*, No. 02 Civ. 2599 (JSR), 2003 U.S. Dist. LEXIS 6960, at *15 (S.D.N.Y. Apr. 24, 2003) (Rakoff, J.).

[10] In the April 11 Opinion, the Court dismissed the Fourteenth Count in the FAC (unjust enrichment) as to Bodner, and dismissed the FAC entirely as to the Bodner family Beechwood Trusts, Nos. 7–14. (*Id.* at 34–37). The Court dismissed the Seventeenth Count in the SAC (the RICO claims) as to Bodner in the June 21 Opinion. (*Id.* at 4).

ARGUMENT

I. PPVA RELEASED ALL CLAIMS AGAINST BODNER IN THE MARCH 2016 RELEASE AGREEMENT

On behalf of PPVA, Platinum Management released Bodner in 2016 from "any and all manner of actions, causes of actions, suits… suspected or unsuspected … existing or hereafter arising … that are based in whole or in part on any act or omission, transaction, or event in connection in any manner whatsoever with Platinum, from the beginning of the world to the Effective Date." (56.1 ¶ 57) (Ex. 12 ¶ 3(b)).[11] The Release Agreement was made for valuable consideration by and between sophisticated parties and is valid and binding on all parties to the transaction. *See Consorcio Prodipe, S.A. de. C.V. v. Vinci, S.A.*, 544 F. Supp. 2d 178, 190 (S.D.N.Y. 2008); *Davis & Assocs. v. Health Mgt. Servs*., 168 F. Supp. 2d 109, 113 (S.D.N.Y. 2001); *Worth Constr. Co. v. I.T.R.I. Masonry Corp.*, No. 98 Civ. 2536 (CM), 2001 U.S. Dist. LEXIS 2144, at *12 (S.D.N.Y. Feb. 21, 2001). The JOLs stand in PPVA's shoes and are bound by the Release. *See United States SBA v. Coqui Capital Mgmt., LLC*, No. 08 Civ. 0978 (LTS), 2008 U.S. Dist. LEXIS 86772, *8 (S.D.N.Y. Oct. 27, 2008).

The Release Agreement is unambiguous and unequivocal on its face, and there can be no dispute as to the parties' intent. As described above, Platinum Management sought to have the Grosser Lane interests in the MNG Trust available so the interests could be offered to Marcos Katz to incentivize him to provide a new investment in the Platinum funds. Platinum Management also sought to create long-term stability by requiring Bodner and Huberfeld to agree not to redeem their families' limited partnership interests in the funds (approximately $80 million at that time) for two years, whereas the subscription agreement allowed them to redeem on 90 days' notice. Bodner was asked to release Platinum Management and the Platinum funds

[11] References to "Ex." refer to the Declaration of Betsy Feuerstein, dated February 14, 2020, filed contemporaneously with this memorandum.

(PPVA and others) from any and all claims, and Bodner asked for the same release in turn. (Ex. 16) ("David and Murray have insisted upon…a general release from Platinum Management, its principals, and the Platinum Funds that is equal in scope to the one they agreed to give").

As general partner of PPVA, Platinum Management was authorized to provide such a release on PPVA's behalf in accordance with law. *See Locafrance U.S. Corp. v. Intermodal Sys. Leasing*, 558 F.2d 1113, 1115 (2d Cir. 1977); *Consorcio Prodipe, S.A. de. C.V.*, 544 F. Supp. 2d at 189–190 (S.D.N.Y. 2008); *Global Entertainment, Inc. v. New York Tel. Co.*, No. 00 Civ. 2959 (SHS), 2000 U.S. Dist. LEXIS 16038, at *22 (S.D.N.Y. Nov. 6, 2000).

Thus, the JOLs are bound by PPVA's release of Bodner, and Bodner is entitled to summary judgment sustaining his affirmative defense. (ECF No. 431).

II. BODNER IS ENTITLED TO SUMMARY JUDGMENT ON THE MERITS OF THE PRIMARY ACTOR CLAIMS

Even if the Court were to reach the merits of the JOLs' claims, there are no genuine disputed issues of fact for a jury's resolution.

A. The Breach of Fiduciary Duty Claims Are Meritless (Counts One and Two)

The JOLs claim that Bodner "oversaw the management, operation, valuation and administration of PPVA and its subsidiaries" and, as such, "owed fiduciary duties to PPVA." (SAC ¶¶ 764, 775). The JOLs then allege that Bodner breached this fiduciary relationship by (i) misrepresenting and falsely overvaluing PPVA's NAV, (ii) engaging in the so-called "Black Elk Scheme" to the benefit of Preferred Investors in BEOF and the detriment of PPVA and (iii) transferring or encumbering "nearly all of PPVA's Remaining Assets for the sole benefit of Beechwood, PPCO and other select insiders and to the detriment of PPVA." (SAC ¶¶ 769, 777).

To succeed on a claim for breach of fiduciary duty, the JOLs must demonstrate that there exists a fiduciary duty between the parties and that the defendant has breached that

duty. *Thermal Imaging, Inc. v. Sandgrain Sec., Inc.*, 158 F. Supp. 2d 335, 343 (S.D.N.Y. 2001); *see also* April 11 Op. at 23–24. The JOLs do not raise a triable issue on either element.

In New York,[12] a fiduciary relationship is found "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.*, 158 F. Supp. 2d at 343 (internal citation omitted). "Mere reposal of one's trust or confidence in a party, however, does not create a fiduciary relationship; the trust or confidence must be accepted as well." *Id.*; *see also Jordan (Bermuda) Inv. Co. v. Hunter Green Invs. LLC*, 566 F. Supp. 2d 295, 299 (S.D.N.Y. 2008) ("[t]hat plaintiffs may have regarded defendants as their fiduciaries is not enough to establish a fiduciary duty when that duty otherwise would not exist.") (internal citation omitted).

It is undisputed that Bodner was never "under a duty to act for or to give advice for the benefit of" PPVA. *Thermal Imaging Inc.*, 158 F. Supp. 2d at 343. Nor is there any basis to suggest that PPVA reposed trust or confidence in Bodner, or that Bodner accepted that trust or confidence. *Id.* Rather, PPVA's fiduciary was Platinum Management, its general partner and SEC-registered investment advisor.

As employed above, Bodner was not the managing member of Platinum Management—that was Uri Landesman. Nor was Bodner an officer or employee of Platinum

[12] While PPVA is a Cayman partnership, and its general partner, Platinum Management, is a Delaware company with New York members, plaintiffs consented to the application of New York law to fiduciary issues in their motion to dismiss briefs (*see* ECF No. 222 at 8, and ECF No. 351 at 32 n.7). As such, New York law governs. *See Cargill, Inc. v. Charles Kowsky Resources, Inc.*, 949 F.2d 51, 55 (2d Cir. 1991) ("[Plaintiff] and [defendant] have, without exception, based their briefs and arguments in both the district court and this court on New York law. Clearly, [plaintiff] and [defendant] expect this case to be decided in accordance with New York law."); *NV Petrus SA v. LPG Trading Corp.*, No. 14-CV-3138 (NGG) (PIC), 2017 U.S. Dist. LEXIS 68351, at *12 (E.D.N.Y. May 4, 2017) ("The court finds that Defendants 'implied[ly] consent[ed]' to New York law governing this dispute, as they consistently relied on New York law in their memoranda of law.").

Management—that was Mark Nordlicht and his staff. Bodner was not even a *passive* member of Platinum Management, with voting rights and other rights over internal affairs under Delaware law; instead, his entity, Grosser Lane, held an entirely passive 24.99% interest in the profits of Platinum Management through Grosser Lane's beneficial interest in the MNG Trust. Under the trust instrument, Grosser Lane had no power to control or direct the trust, or even to remove the trustee, Mark Nordlicht. (See p. 4, *supra*).

It is unclear what plaintiffs' theory of fiduciary duty could even logically be. Even if the layers of separation between the MNG Trust and Platinum Management were somehow disregarded or collapsed (a remedy the SAC does not seek and law would not permit), rendering Grosser Lane a non-managing member of Platinum Management, New York law directs that non-managing members are comparable to shareholders of a corporation, or limited partners in a partnership, who do not owe fiduciary duties to the entity. *See Keith v. Black Diamond Advisors, Inc.*, 48 F. Supp. 2d 326, 333 n.3 (S.D.N.Y. 1999); *Geltzer v. Bedke (In re Mundo Latino Mkt.)*, 590 B.R. 610, 616 (Bankr. S.D.N.Y. 2018). A member must have actual, not perceived, duties and authority to owe fiduciary duties. *Keith*, 48 F. Supp. 2d 326 at 333 n.3 (distinguishing between corporate officers who owe express fiduciary duties, and vice presidents or other persons without specific duties, who do not, and as such can only bind the corporation if the authority has been formally conferred). Finally, even if plaintiffs could somehow establish that Bodner (through Grosser Lane) owed a fiduciary duty to *Platinum Management* and the stakeholders in that company (i.e., Nordlicht, Landesman, *et al.*), that says nothing about how he could possibly owe a duty to *PPVA*. PPVA was the advisory *client* of Platinum Management, and not a *member* of Platinum Management. There is no triable issue as to whether Bodner owed PPVA a fiduciary duty.

Nor are there any facts that support the JOLs' claims that Bodner engaged in *any* misconduct that could constitute a breach of his purported fiduciary duty. The JOLs cannot point to a single act of dishonesty, self-dealing, or breach of loyalty. Absent facts of affirmative wrongdoing, their claim appears to be that Bodner failed to disclose circumstances or events of which he allegedly had advance knowledge—*e.g.*, the illiquidity of PPVA, or the various transactions that allegedly devalued PPVA. But there are no facts indicating that Bodner had such advance knowledge of these matters. Nor have the JOLs articulated to whom Bodner should have made a disclosure (assuming he had information to disclose) given that PPVA had no personhood aside from its general partner, Platinum Management. Bodner had no duty to volunteer information to PPVA's constituents, *e.g.*, its limited partners or creditors, where he was not *their* fiduciary. There is no triable issue as to whether Bodner breached a fiduciary duty.

B. The Fraud and Constructive Fraud Claims Are Meritless (Counts Four and Five)

To prove common law fraud in New York, a plaintiff must allege "(1) a material representation or omission of fact; (2) made with knowledge of its falsity; (3) with scienter or an intent to defraud; (4) upon which the plaintiff reasonably relied; and (5) such reliance caused damage to the plaintiff." *Zaratzian v. Abadir*, No. 10 Civ. 9049 (VB), 2014 U.S. Dist. LEXIS 129616, at *32 (S.D.N.Y. Sept. 2, 2014); *Ernest Lawrence Group. v. Mktg. the Ams., Inc.*, No. 03 Civ. 1510 (PKC), 2005 U.S. Dist. LEXIS 25307, at *12–13 (S.D.N.Y. Oct. 26, 2005). "Constructive fraud requires establishing the same elements as actual fraud except that the element of scienter is replaced by a fiduciary or confidential relationship between the parties." *Zaratzian*, 2014 U.S. Dist. LEXIS 129616 at *32.

The record is devoid entirely of a single false statement made by Bodner to anyone. The JOLs necessarily rely on an omission theory—that Bodner failed to speak. But as

noted above, Bodner had no duty to speak. He was not a fiduciary. *Thermal Imaging Inc.*, 158 Supp. 2d 335 at 342.

There is likewise an absence of proof on the elements of reliance and causation, as the JOLs cannot possibly contend that PPVA relied on a statement by Bodner, or that a statement by Bodner was the cause of a loss to PPVA. *Zaratzian*, 2014 U.S. Dist. LEXIS 129616 at *32–*33. There is no triable issue on Counts Four and Five.

III. BODNER IS ENTITLED TO SUMMARY JUDGMENT ON THE MERITS OF THE SECONDARY ACTOR CLAIMS

A. The Aiding and Abetting Breach of Fiduciary Duty Claims are Meritless (Counts Three and Seven)

The elements of a claim for aiding and abetting a breach of fiduciary duty are: a breach by a fiduciary of obligations to another of which the aider and abettor had actual knowledge; (2) that the defendant knowingly induced or participated in the breach; and (3) that plaintiff suffered damage as a result of the breach." *Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC*, 592 F. Supp. 2d 608, 625 (S.D.N.Y. 2009) (quoting *In re Sharp Int'l Corp.*, 403 F.3d 43, 49–50 (2d Cir. 2005) (quotation marks omitted)).

In the Third Count of the SAC, the JOLs allege that the "Individual Platinum Defendants" aided and abetted Platinum Management's breach of its fiduciary duties to PPVA, while the Seventh Count alleges that the "Beechwood Defendants" aided and abetted the Individual Platinum Defendants and Platinum Management in their breach of fiduciary duties to PPVA, by engaging in the actions and transactions comprising the First and Second Schemes. (SAC ¶¶ 784, 847). Both defendant groups are defined to include Bodner. (SAC ¶¶ 785, 849).

There is a failure of proof on every element. The JOLs must show that Bodner had actual knowledge of the breach, rather than mere notice or even recklessness. *Design*

Strategies, Inc. v. Davis, 384 F. Supp. 2d 649, 670–71 (S.D.N.Y. 2005). Yet no evidence supports this assertion against Bodner.

The JOLs also need to prove that Bodner knowingly induced or participated in the breach, and there are no facts to be tried on this point. There would need to be at least *some* evidence that he provided substantial assistance to the primary violators. *See SPV OSUS, Ltd. v. UBS AG*, 882 F.3d 333, 345 (2d Cir. 2018). Substantial assistance "occurs when a defendant affirmatively assists, helps conceal or fails to act when required to do so, thereby enabling the breach to occur." *Id*. Further, the aider/abettor's actions must have "proximately caused the harm on which the primary liability is predicated," meaning that the harm must be a "direct or reasonably foreseeable result of the conduct." *Id*. Discovery produced no facts that show that Bodner was involved in any of the activities described in the Third and Seventh Counts. He had no involvement in the process of valuing PPVA's assets, and played no role in the allegedly fraudulent transactions like the sale of Agera, or the amendment of the Black Elk indenture. Bodner provided no assistance, let alone substantial assistance.

B. The Aiding and Abetting Fraud Claims are Meritless (Counts Six and Eight)

Similar to the aiding and abetting a breach of fiduciary duty claims, to establish that Bodner is liable for aiding and abetting fraud, the JOLs must show "(1) the existence of a fraud; (2) the defendant's knowledge of the fraud; and (3) that the defendant provided substantial assistance to advance the fraud's commission." *Abu Dhabi Commer. Bank v. Morgan Stanley & Co.*, 888 F. Supp. 2d 431, 445 (S.D.N.Y. 2012). The elements of aiding and abetting fraud are "substantially similar" to those of aiding and abetting a breach of fiduciary duty. *SPV OSUS, v. UBS AG*, 882 F.3d 333, 345 (2d Cir. 2018).

There are no facts from which a jury could reasonably conclude that Bodner had actual knowledge of any fraud. The standard that the JOLs must meet in order to prove the knowledge element of aiding and abetting fraud is higher than the standard required to show scienter for the underlying fraud. *Abu Dhabi Commer. Bank*, 888 F. Supp. 2d at 445. For the underlying fraud, "a strong inference of scienter can be satisfied by a showing of facts that constitute strong circumstantial evidence of recklessness," but aiding and abetting "requires a reasonable inference of actual knowledge." *Id.*

In the Sixth Count, the JOLs claim generally that the "Individual Platinum Defendants" knew that Platinum Management was "engaging in the acts and transactions and making the material misrepresentations and omissions comprising the First and Second Schemes." (SAC ¶ 841). The Eighth Count allegation against the so-called Beechwood Defendants is virtually identical. (SAC ¶ 864). No evidence supports these false and conclusory assertions against Bodner. Witness after witness at both Platinum Management and Beechwood testified that Bodner had no role and no involvement in either business, directly or indirectly, other than as an investor. See pp. 5–6, 8, *supra*. There is no evidence of actual knowledge, and no evidence that he provided substantial assistance.

There are no triable issues on Counts Six and Eight as to Bodner.

C. The Civil Conspiracy Claim is Meritless (Count Sixteen)

The Sixteenth Count for civil conspiracy is "entirely duplicative of [the JOLs'] aiding and abetting claims" because it seeks to hold the defendants "secondarily liable for the underlying tort – primary fraud and breach of fiduciary duty – committed by other primary actors," and because "the factual allegations of the Sixteenth Count are essentially identical to those set forth in the aiding and abetting claims." (Mem. Order of Jan. 2, 2020, ECF No. 499, p. 13). In any event, no evidence has emerged to support the SAC's assertion that Bodner "was a

knowing and intentional participant in the conspiracy and agreed to pursue its aims, namely, to transfer or encumber PPVA's assets for the benefit of the Defendants." (SAC ¶ 962). And nothing that Bodner did proximately caused PPVA's harm. There is no triable issue on Count Sixteen.

CONCLUSION

Bodner is entitled to summary judgment on all claims.

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