UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE PLATINUM-BEECHWOOD LITIGATION	Master Docket No. 1:18-cv-06658-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.	Case No. 1:18-cv-10936-JSR

REPLY MEMORANDUM OF LAW OF DEFENDANT
MURRAY HUBERFELD IN FURTHER SUPPORT OF SUMMARY JUDGMENT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Defendant Murray Huberfeld ("Huberfeld") respectfully submits this Reply Memorandum of Law in further support of his Motion for Summary Judgment.[1]

ARGUMENT

Plaintiffs want this Court to reject the Release Agreement that PPVA executed with Huberfeld and Bodner in March 2016, despite Plaintiffs' lack of proof that there was anything nefarious about its execution at the time. Indeed, the Release Agreement was not entered into secretly in the dead of night, but rather carefully considered, with legal counsel on both sides, and a contemporaneous memorandum prepared by counsel to memorialize the considerations. In the end, Plaintiffs cannot dispute PPVA's ability to enter into such an agreement, they can only second guess well after the fact whether more consideration should have been obtained. Of course, the same can be said about any release agreement. As discussed below, none of Plaintiffs' myriad arguments passes legal scrutiny or precludes entry of summary judgment in favor of Huberfeld.[2]

I. The Release Agreement Was Supported By Ample Consideration

Plaintiffs argue that the Release Agreement is invalid for lack of adequate consideration. (Opp. at 2, 68.) This argument fails as a matter of fact and law. Not only did PPVA receive valuable benefits in exchange for giving the General Release, lack of consideration is not even a legal ground upon which to invalidate a written release of claims. Section 15-303 of New York's General Obligations Law provides that a release, such as the General Release, which "purports to be a total or partial release of all claims . . . shall not be invalid because of the absence of

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[1] Capitalized terms not otherwise defined herein refer to the definitions set forth in the Memorandum of Law of Defendant Murray Huberfeld in Support of Summary Judgment ("Huberfeld Mem.", 1:18-cv-06658-JSR, ECF Doc. No. 742).

[2] Although there are many inaccurate statements in Plaintiffs' submissions, we will not address them here since Huberfeld's Motion is based exclusively on the Release Agreement and the essential facts controlling his Motion remain undisputed.

consideration." *See W. P. Carey, Inc. v. Bigler*, No. 18 Civ. 585 (KPF), 2019 U.S. Dist. LEXIS 51975, at *44 (S.D.N.Y. Mar. 27, 2019); *Arneberg v. Georges Berges Galleries, LLC*, Nos. 16-CV-8955 & 17-CV-4973 (AJN), 2018 U.S. Dist. LEXIS 47876, at *16 (S.D.N.Y. Mar. 22, 2018).

Regardless of Section 15-303, the Release Agreement was amply supported by valuable consideration. First, Huberfeld's forfeiture of his Beneficial Interest – *i.e.*, his indirect interest in the Mark Nordlicht Grantor Trust, which in turn held a passive interest in PMNY – was valuable to PPVA at the time. As recognized by the parties' counsel contemporaneously, Huberfeld's (and Bodner's) forfeiture of their Beneficial Interests freed up their equity to be used by PPVA to attract significant new investors to the fund to address its liquidity needs, which PPVA – at a minimum – undisputedly attempted to do. (*See* Chase Dec., Ex. 11 at 3.)

Second, Huberfeld (and Bodner) also agreed to a two-year lock-up of their and their family member entities' nearly $80 million investment in PPVA (Chase Dec., Ex. 11 at 3). *See, e.g.*, *S.E.C. v. Cavanagh*, 445 F.3d 105, 113 (2d Cir. 2006) (quoting the District Court calling an option and lock-up provisions "material parts of the consideration" in an acquisition). Critically, Plaintiffs do not seriously dispute that the lock-up of the Funds Interest (the "Lock-Up") provided material benefits. (Opp. at 69.) Rather, Plaintiffs posit that the Lock-Up only provided benefits for the feeder funds rather than PPVA. (*Id.*) Their argument is myopic. Through the Lock-Up, PPVA retained (and was assured that it could continue to retain for two years) $80 million in its feeder funds. The certainty provided by the Lock-Up gave PPVA stability, the ability to make investment decisions knowing it would not have to honor redemptions of that Funds Interest for at least two years, and liquidity (including the ability to honor other PPVA investors' redemptions) with a substantial pool of money. It also provided a concrete benefit to other PPVA investors, who received priority to redemptions over Huberfeld, Bodner, and their family member entities.

Finally, Huberfeld also provided, both on behalf of himself and his family member entities, a general release to PPVA. Huberfeld and his family member entities have honored that release, declining to make claims, and forbearing from counterclaims, against PPVA despite their substantial investments (an economic benefit to the fund and its other investors). Indeed, the general release would ordinarily preclude Huberfeld from participating in any recovery made by the JOLs in their various actions to recover on behalf of PPVA investors, including Huberfeld. It is axiomatic that these mutual releases alone provide sufficient consideration to effectuate the Release Agreement. *See, e.g.*, *Lambertson v. Kerry Ingredients, Inc.*, 50 F. Supp. 2d 163, 169 (E.D.N.Y. 1999) ("This mutual release provides sufficient consideration to effectuate the General Release.").

II. There Is Insufficient Evidence To Support A Genuine Claim That The Release Agreement Is Void As Against Public Policy

It is a testament to the dearth of disputed issues of fact surrounding the execution of the Release Agreement that the JOLs' principal argument against its enforcement is that it is invalid on public policy grounds. Contrary to Plaintiffs' inflammatory rhetoric, however, what is "unthinkable" (Opp. at 62) is to ask the Court to ignore the Release Agreement based on the factual record before it and issue a ruling that runs contrary to long-settled New York law. The JOLs may be unhappy with the deal that PPVA struck four years ago (although there is no mention of it in the 1,000+ paragraph SAC), but that does not mean there are proper grounds to nullify it.

Plaintiffs do not confront the settled law of New York that a "sophisticated principal is able to release its fiduciary from claims – at least where . . . the fiduciary relationship is no longer one of unquestioning trust – so long as the principal understands that the fiduciary is acting in its own interest and the release is knowingly entered into." *Centro Empresarial Cempresa S.A. v. America Movil, S.A.B. de C.V.*, 17 N.Y.3d 269, 278 (2011); *see also Katt v. Markov*, 121 A.D.3d 542, 542

(1st Dept 2014) ("as a fiduciary, defendant could have obtained a release"); *Kafa Invs., LLC v. 2170-2178 Broadway LLC*, 114 A.D.3d 433, 433 (1st Dep't 2014) ("That defendants arguably are fiduciaries of plaintiffs does not invalidate the release, since they negotiated across the table from plaintiffs, who are sophisticated parties represented by counsel."). In confirming this rule, the New York Court of Appeals in *Centro* sustained a broad release given by a principal to its fiduciary in the face of allegations that the fiduciary committed fraud and intentional wrongdoing against the principal. Under analogous facts, the Court held that "Plaintiffs . . . are large corporations engaged in complex transactions in which they were advised by counsel. As sophisticated entities, they negotiated and executed an extraordinarily broad release with their eyes wide open. They cannot now invalidate that release by claiming ignorance of the depth of their fiduciary's misconduct."[3] *Centro*, 17 N.Y.3d at 278.

Here, as in *Centro*, PPVA, Huberfeld,[4] and Bodner exchanged valuable consideration and gave each other mutual general releases, which were set forth in writing and fully executed by the relevant parties. PPVA entered into the Release Agreement with its "eyes wide open"; indeed, the circumstances surrounding the Release Agreement were memorialized by counsel in a contemporaneous memorandum, and the benefits and costs of entering into the Release Agreement were heavily negotiated. Huberfeld, for his part, performed under the Release Agreement.

In their Opposition, Plaintiffs assert that the Release Agreement is void as a matter of public policy for essentially two reasons: (1) a purported issue of fact as to the purpose of the Release Agreement (Opp. at 65); and (2) a novel allegation that the execution of the Release Agreement

[3] Likewise, for the same reason, simply pointing to open government investigations into COBA or Beechwood does not alter the result. (Opp. at 63.)

[4] Huberfeld was not a fiduciary of PPVA. In any event, whether or not he was a fiduciary is irrelevant to deciding the Motion, because the Release Agreement is valid in either case. Any disputed facts concerning whether Huberfeld owed a fiduciary duty to PPVA are thus immaterial.

alone was itself a breach of fiduciary duty to PPVA (Opp. at 67). These arguments are specious and should be rejected.

Initially, the purpose of the Release Agreement is not subject to serious dispute. It was to reach terms for Huberfeld's (and Bodner's) separation from Platinum. (Chase Dec., Ex. 11.) Plaintiffs' argument to the contrary that it was simply to allow them to escape liability (Opp. at 65) is pure conclusory rhetoric: it does not cite to a single piece of evidence or testimony; it does not address the participation of counsel; and it seeks to minimize the significant consideration provided by questioning its ultimate value with the benefit of hindsight.[5]

Plaintiffs' next argument that the Release Agreement was a breach of fiduciary duty and should be invalidated because "co-conspirators cannot release themselves from liability" (Opp. at 64-65) is unsupported. Plaintiffs cite only to *Aviles v. S&P Global, Inc.*, 380 F. Supp. 3d 221 (S.D.N.Y. 2019). Yet, *Aviles* is not apposite precedent for many reasons. Initially, in *Aviles*, the Court addressed the defendants' Rule 12(b) motion to dismiss not a motion for summary judgment. *Id.* at 255-58. Briefly, plaintiff investors of a fund known as Lifetrade, which traded in life insurance policies, filed, *inter alia*, common-law aiding-and-abetting claims, in a derivative capacity on behalf of Lifetrade, against Wells Fargo. *Id.* at 306-07. Plaintiffs alleged that Wells Fargo aided-and-abetted a breach of fiduciary duty to Lifetrade by entering into an agreement with Lifetrade, pursuant to which Lifetrade surrendered its entire portfolio of assets to Wells Fargo contrary to the outcome of a vote by investors on such a surrender, and where Wells Fargo knew the assets had substantially greater value. *Id.* at 252-53. That same agreement also contained a general release, which purported to bar Lifetrade from bringing any claims against Wells Fargo

[5] Plaintiff also charges, without any citation to support, that Huberfeld (and Bodner) breached their fiduciary duties by even seeking a release. (Opp. at 66). We are aware of no legal support for such a proposition.

relating to the agreement. *Id.* at 301. When Wells Fargo moved to dismiss plaintiffs' claims based on the release in the agreement, plaintiffs sought to avoid enforcement of the release on the grounds that it arose from the same exact fiduciary breach that Wells Fargo allegedly aided-and-abetted, and which was a central subject of the complaint. *Id.* Although acknowledging that no controlling New York law existed on the issue, the court denied Wells Fargo's motion to dismiss "to the extent that the release arose from a fiduciary breach that the Wells Fargo Defendants knowingly abetted." *Id.* at 302.

The substantial differences between *Aviles* and the instant case are more important than any similarities. First, in *Aviles*, the release was alleged in the complaint to be part and parcel to the underlying breach of fiduciary duty that was the subject of plaintiffs' aiding-and-abetting claim against Wells Fargo. This case is dramatically different. Here, the Release Agreement has nothing to do with the conduct plead by Plaintiffs in the SAC to have been a breach of fiduciary duty to PPVA. In fact, the Release Agreement is not referenced anywhere in the SAC. Hence, unlike *Aviles*, the Release Agreement here is not one and the same as the breach of fiduciary duty that is the subject of the lawsuit. Instead, the Release Agreement that Plaintiffs ask this Court to avoid was a bargained-for agreement outside the subject matter of the lawsuit.

Second, in *Aviles*, the plaintiffs alleged (and the court assumed, as it must, on a Rule 12(b)(6) motion) that Lifetrade received no benefit for entering into the agreement that contained the release and that the transaction was specifically advanced against the wishes and vote of investors. (*Id.* at 252-53, 294, 306.) Here, PPVA received substantial consideration for entering into the Release Agreement and there was no expressed opposition by investors.

Third, in *Aviles*, the plaintiffs alleged that Wells Fargo "exploited" Lifetrade to enter into the agreement. *Id.* at 253. There are no such facts here since the Release Agreement was heavily

negotiated and vetted by attorneys on both sides of the transaction. (*See* Chase Dec., Ex. 11.)

Fourth, in *Aviles*, the company transferred its valuable portfolio to Wells Fargo. No property was transferred by PPVA to Huberfeld or Bodner. To the contrary, they effectively relinquished and transferred property rights to PPVA.

In view of the undisputed facts, it is not surprising that Plaintiffs elected not to include any claim against PMNY, Nordlicht,[6] Bodner, or Huberfeld in the SAC alleging that the Release Agreement was a fraud or breach of fiduciary duty. Tellingly, Plaintiffs never even took any discovery from, or depositions of, the Platinum attorneys who negotiated the Release Agreement on PPVA's behalf, Suzanne Horowitz and Harvey Werblowsky. (*See* Chase Decl., Ex. 11.)

Separating wheat from chaff, it is not the concept of the General Release that the JOLs object to, after all they have settled with other defendants they deemed "fraudsters". The JOLs simply do not like the deal that PPVA struck in March 2016 with Huberfeld and would like to renegotiate it. But that does not make the agreement void against public policy or unenforceable. There is no legitimate basis at law to second guess the business judgment behind the Release Agreement based on the factual record before the Court.

III. The Release Agreement Was Supported By Mutual Assent

Plaintiffs alternatively argue that there was no mutual assent because the Release Agreement was fraudulently induced. (Opp. at 70-71; *see also* Opp. at 66, 68.) Their argument – again made without citation to a single piece of evidence[7] – asserts that "PPVA was the victim of

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[6] In the Release Agreement, PPVA did not give a general release to PMNY or Nordlicht. Hence, Plaintiffs were and remain free to sue PMNY or Nordlicht to allege a claim for legal damages for breach of fiduciary duty based on the Release Agreement. Plaintiffs have not elected to do so.

[7] Not one of Plaintiffs' allegations that the Release Agreement was fraudulently induced is accompanied by a citation to record evidence, let alone admissible and competent evidence meeting Plaintiffs' burden under Rule 56(c)(1). (Opp. at 71.)

Platinum Management's, Bodner's and Huberfeld's fraud" because PPVA "was being told at the time that its net value (although negative at the time) was worth more than $700 million." (Opp. at 71.) The assertion that PPVA was somehow fraudulently induced to sign the Release Agreement is not supported by evidence, however, and the espoused legal theory has been soundly rejected time and time again by courts applying analogous facts.

As a general matter, a release may be ineffectual "if it is shown to have been procured by fraud or duress." *W.P. Carey, Inc.*, 2019 U.S. Dist. LEXIS 51975, at *36-37. Nevertheless, "conclusory allegations of fraudulent inducement are insufficient to overcome a release's unambiguous language." *Id.* Parties who have granted releases (including releases for fraud) can only challenge the release for fraudulent inducement by "pointing to a separate and distinct fraud from that contemplated by the agreement." *Consorcio Prodipe, S.A. de. C.V. v. Vinci, S.A.*, 544 F. Supp. 2d 178, 190 (S.D.N.Y. 2008) (internal quotations and citation omitted); *see also Alleghany Corp. v. Kirby*, 333 F.2d 327, 333 (2d Cir. 1964), *Bellefonte Re Ins. Co. v. Argonaut Ins. Co.*, 757 F.2d 523, 527 (2d. Cir. 1985). In such a case, the "party seeking to invalidate a release due to fraudulent inducement must establish the basic elements of fraud, namely a representation of material fact, the falsity of that representation, knowledge by the party who made the representation that it was false when made, justifiable reliance by the plaintiff, and resulting injury." *Arneberg*, 2018 U.S. Dist. LEXIS 47876, at *18-19 (citation omitted).

Here, Plaintiffs have not adduced any such evidence of a "separate and distinct fraud" in connection with the Release Agreement (because no such fraud occurred). Allegations that the Release Agreement was the subject of a specific and separate fraud are not even alleged in the SAC, nor are they supported by Plaintiffs in their Opposition. (*See* Opp. at 71.) To the contrary, the Release Agreement was knowingly negotiated by sophisticated parties with able counsel. (*See*

Chase Dec., Ex. 11.) Plaintiff has notably not charged any of the counsel who addressed the Release Agreement with any wrongdoing whatsoever.

Nor can the General Release be invalidated by any purported failure by Huberfeld to disclose to PPVA the very fraud alleged in the SAC. To the contrary, "a general release executed even without knowledge of a specific fraud bars a claim or defense based on that fraud." *Sotheby's, Inc. v. Dumba*, No. 90 Civ. 6458 (KMW), 1992 US Dist. LEXIS 965, at *21-22 (S.D.N.Y. Jan. 31, 1992); *Bellefonte Re Ins. Co.*, 757 F.2d at 527 ("Thus plaintiff's argument is, in essence, that where the parties have sought to settle a claim of fraud, they cannot be bound by a settlement agreement unless the alleged defrauder has made full disclosure to the other party prior to settlement. We know of no authority to that effect….").[8] Here, because the General Release broadly and unambiguously "encompasses claims of fraudulent inducement," Plaintiffs "cannot attack the agreement on the grounds that the agreement was fraudulently procured." *Consorcio Prodipe, S.A. de. C.V.*, 544 F. Supp. 2d at 191; *see also Dantas v. Citigroup, Inc.*, 779 F. App'x 16, 20 (2d Cir. 2019) ("New York law does not permit a plaintiff to circumvent a release agreement by using a released fraud claim to attack the validity of the release and then assert that very fraud claim for damages."); *Nycal Corp. v. Inoco P.L.C.*, 988 F. Supp. 296, 306 (S.D.N.Y. 1997); *Gerszberg v. Iconix Brand Group, Inc.*, No. 17-cv-8421 (KBF), 2018 U.S. Dist. LEXIS 76716, at *8-9 (S.D.N.Y. May 7, 2018).

IV. Plaintiffs May Not Rely Upon Foreign Law To Avoid The Release Agreement

Plaintiffs' desperate final argument that the release is barred as a preference by Cayman

[8] Although Plaintiffs suggest that Huberfeld cannot be released "from intentional or grossly negligent conduct" (Opp. at 2), they cite no authority in support of such a proposition and the cases are legion that such claims can be properly released. *See, e.g., Centro*, 17 N.Y.3d at 276.

Islands law (Opp. at 72) fails for a multitude of procedural and substantive reasons, including:

- The Release Agreement is by its terms governed by New York law, a fact not disputed by Plaintiffs. (Huberfeld 56.1 ¶ 26)
- Plaintiffs fail to address, much less demonstrate, that Cayman Islands preference law is enforceable against U.S. citizens in federal court.
- Plaintiffs have not plead a preference action against Huberfeld in the SAC, and can not amend the SAC at this late stage. *See* Case Management Order (ECF No. 158). *See also Jean-Pierre v. Citizen Watch Co. of America, Inc.*, No. 18-cv-0507 (VEC), 2019 U.S. Dist. LEXIS 196109, at *22-23 (S.D.N.Y. Nov. 12, 2019).
- Plaintiffs' belated reliance on expert testimony as to Cayman Islands law is also barred by Federal R. Civ. P. 44.1. *Local 875 I.B.T. Pension Fund v. Pollack*, 992 F. Supp. 545, 559 (E.D.N.Y. 1998) (Rule 44.1 requires reasonable notice of part's intent to rely on foreign law).
- Even if Cayman Islands law were for any reason deemed applicable, the cited provisions in the Companies Law underscore that Plaintiffs have failed even to meet their burden under that law to establish a claim in these circumstances since (a) there was no conveyance or transfer of property by PPVA; and (b) there was no preferential payment by PPVA to Huberfeld. Huberfeld also received no preference over other creditors. [9]

V. All Of Plaintiffs' Claims Against Huberfeld Accrued Prior To The Execution Of The Release Agreement

Plaintiffs also assert that the General Release does not release Huberfeld from claims accruing subsequent to its execution. Plaintiffs' Opposition sets forth no evidence, however, of any claim accruing against Huberfeld after execution of the Release Agreement. Nor do Plaintiffs point to any action by Huberfeld in connection with the Agera Transactions or otherwise during that time period that gave rise to any damages to PPVA. Accordingly, all of Plaintiffs' claims against Huberfeld are barred by the Release Agreement.

CONCLUSION

The Release Agreement should be enforced and all the claims set forth against Huberfeld in the SAC should accordingly be dismissed with prejudice.

[9] Plaintiffs' reference to the release as a "property" right is not supported by any citation to any relevant authority.

Dated: New York, New York
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