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 *IN LIMINE* TO PRECLUDE REFERENCES AT TRIAL TO PUNITIVE DAMAGES AND TO EXCLUDE PUNITIVE DAMAGES JURY INSTRUCTIONS

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Defendant David Bodner respectfully submits this memorandum of law in support of his motion *in limine* to preclude references at trial to punitive damages and to exclude references to punitive damages in the Court's instructions to the jury, both as they relate solely to Bodner.

PRELIMINARY STATEMENT

This motion arises out of the Joint Official Liquidators' ("JOLs") unfounded request for punitive damages in conjunction with their claims against Bodner. The JOLs have failed to satisfy the applicable standard for punitive damages where the underlying claims have their "genesis in" a contractual relationship: that Bodner's alleged conduct was "part of a pattern of similar conduct directed at the public generally." *Icebox-Scoops, Inc. v. Finanz St. Honore, B.V.*, 715 Fed. Appx. 54, 56 (2d Cir. 2017). The JOLs have made no allegation, and there is no evidence in the case, to support the exacting "public harm" standard with respect to Bodner.

The JOLs' breach of fiduciary duty and other claims[1] all have their "genesis in" contract: the Fourth Investment Management Agreement between Platinum Management (NY) LLC ("PMNY") and Platinum Partners Value Arbitrage Fund L.P. ("PPVA"), initially dated as of March 9, 2007 (the "Investment Management Agreement" or "IMA") (ECF No. 543-4)[2], and in the Second Amended Limited Partnership Agreement of PPVA, dated as of July 1, 2008 (the "Limited Partnership Agreement" or "LPA") (ECF No. 543-5). The JOLs' contention is that Bodner, while not a party to either the IMA or the LPA, exercised control over PMNY (the

[1] Bodner has moved *in limine* to consolidate the eight remaining claims against him into the single fiduciary duty claim that is the exact basis for each of the eight duplicative claims. (ECF No. 669).

[2] 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.

investment manager under the IMA and the general partner under the LPA) and thereby assumed fiduciary duties to PPVA. (ECF No. 571 ¶ 14).

In the Court's Order resolving Bodner's motion for summary judgment (ECF No. 624) (the "April 21 Opinion"), the Court granted summary judgment on all claims asserted against Bodner, except to the extent that such claims are premised on the theory that Bodner was a fiduciary of PPVA and breached his fiduciary duty by failing to disclose his knowledge that PPVA's net asset value ("NAV") was fraudulently inflated, and, as a result, PPVA sustained damages. *Id*. at 22-29. Thus, nothing about the alleged conduct at issue even approaches "a pattern of similar conduct directed at the public generally." *Icebox-Scoops, Inc.*, 715 Fed. Appx. at 56.

For these reasons, Bodner respectfully requests an Order directing the JOLs not to make any references at trial to punitive damages in connection with claims against him, and that no instruction be given to the jury regarding punitive damages with respect to him.

FACTUAL BACKGROUND

In their Second Amended Complaint (ECF No. 285) ("SAC"), the JOLs assert a number of claims against Bodner, including breach of fiduciary duty (First and Second Counts); fraud and constructive fraud (Fourth and Fifth Counts); aiding and abetting breach of fiduciary duty and fraud (Third, Sixth, Seventh, and Eighth Counts); and civil conspiracy (Sixteenth Count). *See* SAC ¶¶ 763-868; 960-967. The JOLs alleged that "this case arises out of the relationship between and among PPVA, its general partner Platinum Management (NY) LLC…and the individuals who owned, operated and managed Platinum Management…[including] Bodner[.]" SAC ¶ 7 (emphasis supplied).

The SAC alleges that duties of the "Platinum Defendants"—a group defined to include Bodner—to PPVA arise out of the LPA and IMA. "Platinum Management, in its

capacity as PPVA's general manager, and its principals/managers/advisers/owners…[including] Bodner…(the 'Platinum Defendants') were obligated to manage and operate PPVA in good faith, in accordance with the terms of the partnership agreement, [and] other operating documents." SAC ¶ 34.[3] *See also* SAC ¶ 249 (describing the IMA and alleging PMNY's obligations thereunder) and SAC ¶ 764 ("Platinum Defendants, who are comprised of the General Partner of PPVA and the individuals who oversaw the management, operations, valuation and administration of PPVA and its subsidiaries, owed [and breached] fiduciary duties to PPVA").

THE APRIL 21 OPINION

In its April 21 Opinion, the Court granted summary judgment in favor of Bodner on "(a) the Sixteenth Count (civil conspiracy) in its entirety and (b) parts of the First and Second Counts (breach of fiduciary duty), parts of the Fourth and Fifth Counts (fraud and constructive fraud), parts of the Third, Sixth, Seventh, and Eighth Counts (aiding and abetting breach of fiduciary duty and fraud), to the extent that these eight Counts are not premised on the overvaluation of PPVA's net asset value[.]" April 21 Opinion at 2.[4] With respect to the JOLs' claims for breach of fiduciary duty, the Court concluded that there was a genuine dispute of material fact as to whether Bodner: (1) owed a fiduciary duty to PPVA; and (2) "breached that fiduciary duty by failing to disclose the overvaluations of PPVA's NAV when he admittedly had

[3] Section 3.06(a)(x) of the LPA requires PMNY to determine PPVA's NAV and, in its discharge of that obligation, requires that PMNY determine the "fair value" of Level 3 assets "in such manner as may be selected by the General Partner [PMNY] in its discretion." *Id.* at p. 12.

[4] The Court also found that "no evidence connects Bodner to any of the more specific self-dealing transactions at issue in this action," including the "Black Elk scheme," the "Montsant transactions," and the "Agera sale" and, therefore, concluded that plaintiffs' claims could not be premised on those transactions. April 21 Opinion at 27, 31, 33.

knowledge of the overvaluations" and/or "despite such knowledge, [] allegedly took unearned fees and distributions . . . based on such overvaluations." April 21 Opinion at 25-27.

With respect to the claims for fraud and constructive fraud, the Court noted that "pure omissions are actionable when defendant had an affirmative duty to disclose that information to plaintiff, such as when defendant owes a fiduciary duty to plaintiff or under the special facts doctrine where defendant has superior knowledge to plaintiff[,]" and that a "constructive fraud claim modifies the claim for actual fraud by replacing the scienter requirement with the requirement that Defendants maintained either a fiduciary or confidential relationship with Plaintiff." *Id.* at 30 (citations and quotation marks omitted). The Court further stated that "pure omission may here be actionable, because Bodner might have had the obligation, as a fiduciary, to disclose the fraudulent nature of such valuations to PPVA, from which he was receiving excessive management fees and distributions." *Id.* Thus, the Court concluded that "for substantially the same reason as in the context of the claim for breach of fiduciary duty, the Court grants summary judgment in favor of Bodner on portions of the claims for fraud and constructive fraud that are not premised on the overvaluations of PPVA's NAVs, but denies the motion in all other respects." *Id.* at 31.

With respect to the claims for aiding and abetting fraud, the Court held that "[b]ecause the same activity is alleged to constitute the primary violation underlying both claims," the claims "overlap[] substantially[.]" *Id.* at 32 (citations and quotation marks omitted). The Court further recognized that the analysis of the aiding and abetting claims "largely follows from the [] analysis of Bodner's motion on the claims for breach of fiduciary duty, fraud, and constructive fraud." *Id.* The Court concluded that "the inaction of an aider and abettor is

actionable [as substantial assistance] when the aider and abettor has an affirmative duty to act or has a fiduciary duty to plaintiff, as possibly applicable here." *Id.*

With respect to these remaining claims, the JOLs seek punitive damages. *See* SAC ¶¶ 773, 781, 791, 813, 837, 845, 857, 868.[5]

ARGUMENT

THE COURT MAY EXERCISE ITS DISCRETION TO PRECLUDE REFERENCES TO PUNITIVE DAMAGES WITH RESPECT TO BODNER

Motions in limine stem from the "district court's inherent authority to manage the course of trials[.]" *Highland Capital Mgmt., L.P. v. Schneider*, 551 F. Supp. 2d 173, 176 (S.D.N.Y. 2008) (citing *Luce v. United States*, 469 U.S. 38, 41 n.4, 105 S. Ct. 460 (1984)). Courts within the Second Circuit have routinely considered the issue of whether to exclude references to punitive damages on motions in limine. *See, e.g., Command Cinema Corp. v. VCA Labs, Inc.*, 464 F. Supp. 2d. 191, 205 (S.D.N.Y. 2006) (granting defendant's motion in limine to exclude plaintiff's request for punitive damages because defendant's actions were not "part of a pattern of behavior aimed at the public generally"); *EMI Music Mktg. v. Avatar Records*, 334 F. Supp. 442, 444 (S.D.N.Y. 2004) (granting defendants' motion in limine precluding the presentation of evidence relating to any request for punitive damages because there was no suggestion that the conduct alleged as to the breach of contract was part of a larger pattern of activity directed at the public generally).

Under New York law, it is well-established that where an action "has its genesis in [a] contractual relationship between the parties," punitive damages are available only if: (1)

[5] As described in Bodner's Motion in Limine to Consolidate Duplicative Claims (ECF No. 669), the JOL's claims for fraud, constructive fraud, aiding and abetting fraud, and aiding and abetting breach of fiduciary duty should be consolidated in the Court's instructions to the jury, on the basis that they are duplicative of the JOL's claim for breach of fiduciary duty. For completeness, however, this Motion addresses the impropriety of punitive damages with respect to all claims for which punitive damages were pled in the SAC and survived summary judgment.

the defendant's conduct constitutes an independent tort; (2) the tortious conduct is of a sufficiently egregious nature; and (3) the conduct is "part of a pattern of similar conduct directed at the public generally." *Icebox-Scoops*, 715 Fed. Appx. at 56 (citing *New York Univ. v. Continental Ins. Co.*, 87 N.Y.2d 308 (1995) and *Rocanova v. Equitable Life Assur. Soc'y of the U.S.*, 83 N.Y.2d 603 (1994)). This standard is applied in cases in which a fiduciary duty based upon a contractual relationship was allegedly breached. *See, e.g., Starr Indem. Liab. Co. v. Am. Claims Mgmt.*, No. 14 Civ. 0463, 2015 U.S. Dist. LEXIS 59634, at *4 (S.D.N.Y. May 6, 2015) ("Plaintiff's breach-of-fiduciary-duty claim would not exist but for the parties' contractual relationship[.]").

The JOLs' breach of fiduciary duty and other claims all have their genesis in the IMA and the LPA, pursuant to which PMNY was investment manager and general partner to PPVA. But for PMNY's undertaking to manage PPVA's investments on the terms set forth in the IMA and to determine PPVA's NAV in accordance with the LPA, PPVA would have no claims against PMNY. Likewise, the claims against the "Platinum Defendants" like Bodner, whom the JOLs claim were acting for or on behalf of PMNY, are derived from those same contractual relationships. *See, e.g.*, SAC ¶ 7 ("[T]his case arises out of the relationship between and among PPVA, its general partner Platinum Management (NY) LLC, . . . and the individuals who owned, operated and managed Platinum Management . . . [including] Bodner[.]"); *see also* SAC ¶ 764 (The "Platinum Defendants [including Bodner], who are comprised of the General Partner of PPVA and the individuals who oversaw the management, operations, valuation and administration of PPVA and its subsidiaries, owed fiduciary duties to PPVA[.]"); SAC ¶ 775 (same); April 21 Opinion p. 26 ("[T]he Court concludes that there is a genuine dispute of a material fact regarding whether Bodner owed a fiduciary duty to PPVA."); *id.* at 30 ("[P]ure

omission may here be actionable, because Bodner might have had the obligation, as a fiduciary, to disclose the fraudulent nature of such valuations to PPVA, from which he was receiving excessive management fees and distributions."). Thus, the JOLs' claims against Bodner have their "genesis" in the IMA and the LPA, and are governed by the "directed at the public generally" standard for purposes of assessing whether punitive damages may be assessed.

The JOLs make no allegations and have garnered no evidence to even attempt to meet the requisite standard, which is met only in exceptional cases. For instance, in *Aramony v. United Way of Am.*, 28 F. Supp. 2d 147 (S.D.N.Y. 1998), *aff'd in part and rev'd in part on other grounds*, 191 F.3d 140 (2d Cir. 1999), the court concluded the "public" prong was satisfied, where the defendants were alleged to have defrauded the United Way of America, "a quintessentially public charity." The court found that the defendant's behavior "is akin to an attack on motherhood or the flag. Millions of Americans have contributed to the United Way . . . Aramony's conduct, in some small way, squandered those contributions." *Id.* at 184.

Here, the JOLs have not even suggested that Bodner's alleged omission regarding PMNY's NAV determinations was aimed at the general public. As the Court noted in its April 21 Opinion: "Assuming Bodner owed a fiduciary duty to PPVA, the Court finds that there is a genuine dispute of whether Bodner breached that fiduciary duty by failing to disclose the overvaluations of PPVA's NAVs when he admittedly had knowledge of the overvaluations[;]" "pure omission may here be actionable, because Bodner might have had the obligation, as a fiduciary, to disclose the fraudulent nature of such valuations to PPVA, from which he was receiving excessive management fees and distributions." April 21 Opinion pp. 26, 30 (emphasis added); *see also id.* at 31 ("The Sixth and Third Counts allege that Bodner, in his capacity as a Platinum defendant, aided and abetted Platinum Management's fraud and breach of

its fiduciary duties to PPVA . . . .") (emphasis added). Indeed, in cases in which the conduct at issue involves interactions between private parties, the conduct is not deemed to be "part of a pattern directed at the public generally." *See, e.g.*, *EMI Music Mktg.*, 334 F. Supp. at 444 (granting motion in limine because "[t]here is no suggestion in this case that EMI's conduct as to its alleged breach of the contract, if proven, was part of any larger pattern of activity directed at the general public.").

Thus, Bodner respectfully requests that the Court preclude references at trial to punitive damages and exclude references to punitive damages in the Court's instructions to the jury as they relate to Bodner.

CONCLUSION

For the foregoing reasons, Bodner respectfully requests that the Motion be granted and the Court enter an Order precluding references at trial to punitive damages and excluding references to punitive damages in the Court's instructions to the jury as they relate to Bodner.

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New York, New York

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