UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re

PLATINUM-BEECHWOOD LITIGATION

Civil Action No. 18-cv-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,

- against -

PLATINUM MANAGEMENT (NY) LLC, *et al.*,

Defendants.

Civil Action No. 18-cv-10936 (JSR)

PLAINTIFFS' OPPOSITION TO DEFENDANT DAVID BODNER'S MOTION *IN LIMINE* TO (1) EXCLUDE PROOF OF INCENTIVE FEE PAYMENTS BASED ON UNCHALLENGED 2012 FUND PERFORMANCE; AND (2) TO PRECLUDE ANY STATEMENT THAT BODNER WITHDREW FEES FROM PPVA AFTER SEPTEMBER 2014

TABLE OF CONTENTS

Page

PRELIMINARY STATEMENT 1

ARGUMENT 4

A. The JOLs Will Offer Evidence and Expert Testimony that PPVA's NAV Did Not Increase (and Was Negatively Impacted) in 2012 Such that Incentive Fees Charged During the Damages Period on Account of 2012 Were Unearned. 4

B. The JOLs Should Be Permitted to Refer to Any Illicit Gains Received by Bodner and Other Defendants During the Course of Their Disloyalty to PPVA. 9

C. The Amounts Recoverable by the JOLs Include Non-Cash Incentive Fees Paid to the Defendants. 13

CONCLUSION 16

TABLE OF AUTHORITIES

Page(s)

Cases

In re Blumenthal,
822 N.Y.S.2d 27 (1st Dep't 2006) 9

Coty v. Steigerwald,
291 A.D.2d 796 (4th Dep't 2002) 10

Diamond v. Oreamuno,
24 N.Y.2d 494 (1969) 10

Don v. Singer,
941 N.Y.S.2d 537 (Sup. Ct. N.Y. Cnty. 2011) 10

Excelsior 57th Corp. v. Lerner,
160 A.D.2d 407 (1st Dep't 1990) 10, 13

Gibbs v. Breed,
271 A.D.2d 180 (1st Dep't 2000) 10

Lamdin v. Broadway Surface Advertising Corp.,
272 N.Y. 133 (1936) 9

Milbank, Tweed, Hadley & McCloy v. Boon,
13 F.3d 537 (2d Cir. 1994) 10

Mosionzhnik v. Chowaiki,
972 N.Y.S.2d 841 (Sup. Ct. N.Y. Cnty. 2013) 10

Schweizer v. Mulvehill,
93 F. Supp. 2d 376 (S.D.N.Y. 2000) 10, 13

Stanley v. Skowron,
989 F. Supp. 2d 356 (S.D.N.Y. 2013) 3, 9

TPL Assocs. v. Helmsley-Spear, Inc.,
146 A.D.2d 468 (1st Dep't 1989) 9

Tyco Int'l, Ltd. v. Kozkowski,
No. 02 Civ. 7317 (TPG), 2011 WL 2038763 (S.D.N.Y. May 24, 2011) 3, 10

Wolf v. Rand,
258 A.D.2d 401 (1st Dep't 1999) 10

Plaintiffs Martin Trott and Christopher Smith, as Joint Official Liquidators and Foreign Representatives of Platinum Partners Value Arbitrage Fund L.P. (in Official Liquidation) (the "**Joint Official Liquidators**") and Platinum Partners Value Arbitrage Fund L.P. (in Official Liquidation) ("**PPVA**" and collectively with the Joint Official Liquidators, the "**JOLs**") submit this opposition to the Motion *in Limine* to (1) Exclude Proof of Incentive Fee Payments Based on Unchallenged 2012 Fund Performance; and (2) to Preclude any Statement that Bodner Withdrew Fees from PPVA after September 2014 ("**First Motion in *Limine***") filed by Defendant David Bodner ("**Bodner**"). *See* ECF No. 667.[1]

PRELIMINARY STATEMENT

The first prong of Bodner's First Motion in Limine seeks to exclude evidence of incentive fees paid to Platinum Management's owners in 2013 and attributable to PPVA's 2012 Net Asset Value ("**NAV**"). According to Bodner, the JOLs and their valuation expert Ronald G. Quintero ("**Quintero**) have "conceded" that PPVA's NAV was not inflated in 2012, and that incentive fees paid with respect to 2012 value were proper and are "not in this case."

The purported "concessions" on which Bodner premises the first prong of the instant motion simply do not exist. Bodner attempts to spin Quintero's practical use of year-end 2012 NAV as the starting point for his "straight line" damages calculation on Management Fees into a substantive concession on Incentive Fees. To wit, the ludicrous notion that that all was well with PPVA's stated valuations through the end of 2012. This is both pure fiction and a truly disingenuous argument by Bodner.

To be very clear: the JOLs, and their experts, will prove at trial that PPVA's stated NAV was inflated by the end of 2012, and that PPVA's actual 2012 NAV certainly did not ***increase***

[1] The ECF citations herein refer to the Court's docket in the *Trott* litigation. *See Trott, et al. v. Platinum Management (NY) LLC, et al.*, No. 1:18-cv-10936 (S.D.N.Y.).

from that of the prior year. As a result, *no* incentive fees – which this Court has noted were payable only where PPVA's NAV ***increases*** over base cost year-over-year – were properly paid on account of PPVA's 2012 performance.

As detailed below, PPVA's sizable position in Black Elk Energy Offshore Operations, LLC ("**Black Elk**") comprised 35% of PPVA's assets under management in late-2012. Yet, despite a major explosion on Black Elk's offshore oil platform in November, 2012 that immediately crippled Black Elk's already-distressed business and led to an acute (and fatal) financial crisis at the company, Platinum Management failed to materially mark down its valuation of PPVA's investment in Black Elk as of year-end 2012. Indeed, Platinum Management *increased* the valuation of its Black Elk holdings from approximately $254 million in September 2012 to $268 million for December 2012, despite knowing that the company was insolvent, and that PPVA's equity holdings were likely worthless, by the end of 2012. Accordingly, PPVA's incorrect value in 2012, and incentive fees improperly paid with respect thereto, are very much "in this case," and any fair reading of the record evidence and of the reports of the JOLs' experts makes that abundantly clear. The first prong of Bodner's motion simply wishes all this away, trying to manufacture what amounts to a final jury determination out of nothing.

Bodner's attempt to expunge 2012 from this case fails for yet another reason. Regardless of whether there was a genuine increase in PPVA's true NAV in 2012 – *and the evidence will show there was not* – the law does not permit Bodner to retain fees he received for the period when he will be shown to have been breaching his fiduciary duty to PPVA. Any ill-gotten gains received by Defendants Bodner, Murray Huberfeld ("**Huberfeld**") and Bernard Fuchs ("**Fuchs**") after a breach of their fiduciary duties to PPVA, are recoverable by the JOLs as damages and under the remedy of disgorgement, which is available in connection with breach of fiduciary duty and fraud

claims under New York law. *Stanley v. Skowron*, 989 F.Supp.2d 356, 363 (S.D.N.Y. 2013); *Tyco Int'l, Ltd. v. Kozkowski*, No. 02 Civ. 7317 (TPG), 2011 WL 2038763, at *3 (S.D.N.Y. May 24, 2011).

Here, it is clear that the Defendants, including Bodner, engaged in acts comprising fraudulent overvaluation and breached their fiduciary duties (and aided and abetted Platinum Management's fraudulent overvaluation and breach of its fiduciary duty) no later than November 2012, when the Black Elk Explosion (defined below) made immediately clear that the stated valuations of PPVA's Black Elk holdings were unjustified. These breaches were compounded by the fact that, in early 2013, Defendants Bodner, Huberfeld and Fuchs had created, invested in, and/or marketed the Platinum Partners Black Elk Opportunities Fund LLC and Platinum Partners Black Elk Opportunities Fund International Ltd. (collectively, the "**BEOF Funds**"), a separate hedge fund unaffiliated with PPVA (other than the common ownership of its investment managers), which was created with the explicit purpose of subordinating PPVA's interests in Black Elk, and thereby to further decrease the true value of PPVA's Black Elk holdings. Any amount by which Bodner profited subsequent to these fiduciary breaches in late 2012 and early 2013 – including all incentive fees paid to Bodner in 2013 – are recoverable by the JOLs under a theory of disgorgement.

The second prong of Bodner's First Motion in Limine, which seeks to limit evidence of damages against Bodner to incentive fees actually paid to Bodner in the form of cash on or before September 2014, is equally infirm. Bodner's motion seeks, by *ipse dixit*, to narrow radically the scope of damages and remedies properly available to the JOLs. The JOLs are entitled to seek and recover disgorgement of not only the incentive fees paid to Platinum Management's partners in the form of cash, but also the value of incentive fees paid to them in the form of limited partner

interests in PPVA's feeder funds, which held value at the time such incentive allocations were awarded. By focusing myopically only on cash payments, Bodner seeks to escape liability for the share of incentive allocations that the JOLs will prove at trial were improperly paid to him. In particular, PPVA is entitled to the following forms of damages, depending on the relevant claim at issue (and as detailed in the accompanying opposition to the consolidation of claims): (i) direct damages to the PPVA master fund as a result of the overvaluation and unearned fee payments to Platinum Management, Bodner, Fuchs and Huberfeld in the form of cash; (ii) consequential damages that are directly related and are a foreseeable result of the overvaluation and failure to disclose the overvaluation;[2] and (iii) disgorgement damages of any benefit obtained by Bodner, Fuchs and Huberfeld in connection with the fraudulent overvaluation and breach of duty, irrespective of whether PPVA was directly harmed by the same.

For these reasons, and as detailed below, Bodner's First Motion *in Limine* should be denied.

ARGUMENT

A. The JOLs Will Offer Evidence and Expert Testimony that PPVA's NAV Did Not Increase (and Was Negatively Impacted) in 2012 Such that Incentive Fees Charged During the Damages Period on Account of 2012 Were Unearned.

Bodner's First Motion in *Limine* argues that incentive fees paid to Defendants in 2013 based on Platinum Management's 2012 calculation of PPVA's net asset value are "not in this case." (ECF No. 667) at p. 4. This is a fundamental misunderstanding of the JOLs' claims, the testimony to be provided by the JOLs' experts, and the evidence to be presented at trial. The JOLs intend to prove at trial that Platinum Management fraudulently overvalued PPVA's net asset value by the end of 2012, in particular, PPVA's sizable position in Black Elk which comprised 35% of

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[2] Confirmation of the consequential damages at issue in this matter will be the subject of a forthcoming motion in limine by the JOLs.

PPVA's assets under management at the time, and that no incentive fees should have been charged for that year.

As this Court noted, incentive fees are only earned in the event that the NAV of PPVA ***increases*** over the course of a particular year. *See* October 19, 2020 Declaration of Richard A. Bixter, Jr. in Opposition to Defendant David Bodner's Motions in *Limine* ("**Bixter Decl.**") at Ex. 1. PPVA will present unequivocal evidence that PPVA's NAV did not increase, and should have decreased, in late-2012, proximate to the Black Elk Explosion and the immediately-ensuing financial crisis at the company. If PPVA's NAV had not been wrongfully increased in 2012, the incentive fees paid in 2013 on account of 2012 performance should have been a hard "zero."

As the JOLs' have alleged since the outset of this case, the impetus of the overvaluation scheme perpetrated by Defendants was the decision they made, subsequent to the November 2012 explosion on Black Elk's West Delta 32 platforms that resulted in the death of Black Elk employees and prompted numerous investigations and a financial crisis within Black Elk (the "**Black Elk Explosion**"), to overvalue PPVA and collect fees. Evidence to be submitted at trial will prove that in the wake of the Black Elk Explosion, Black Elk faced litigation claims exceeding $100 million and government-mandated shut-ins of the majority of Black Elk's wells due to rampant safety violations. Bixter Decl. Ex. 2 (Excerpts of Black Elk's 2013 2nd Quarter 10-Q filing). Bodner had knowledge of the Black Elk Explosion and the negative media reports surrounding the company by the end of 2012, and its concomitant impact on the Black Elk position of PPVA. Bixter Decl. Ex. 3 (David Levy sending Angela Albanese, David Bodner's secretary, a press article on the Black Elk Explosion in December 2012); *id.* at Ex. 4 (Bodner scheduling a partners meeting five days after the Black Elk Explosion).

The calamitous effect of the Black Elk Explosion was immediately apparent to Platinum Management and its owners. The afternoon of the Black Elk Explosion, Mark Nordlicht told Huberfeld and Uri Landesman that there would be a significant investigation due to the Black Elk Explosion. *Id.* at Ex. 5. In the following days, Levy and Nordlicht discussed that "lost production is going to be a real issue" and that Black Elk had lost 600 barrels of oil a day due to the Black Elk Explosion. *Id.* at Exs. 6 and 7.

On November 22, 2012, Nordlicht emailed Levy, with respect to Standard & Poor's decision to place Black Elk bonds on negative credit watch and the government investigations, and said: "rating watch negative, regulators demanding plan, oy vey!!!!!!!" *Id.* at Ex. 8. Joseph SanFilippo, Platinum Management's Chief Financial Officer and Rule 30(b)(6) witness, testified that, in the wake of the Black Elk Explosion, "[i]t was not a great time at Black Elk and not a particularly great time at Platinum either." *Id.* at Ex. 9 (SanFilippo Transcript at 153:2-10)

Despite the Black Elk Explosion, and the immediate effect it had on Black Elk's financial condition, Platinum Management failed to materially mark down its valuation of PPVA's investment in Black Elk. Rather, it ***increased*** the valuation from approximately $254 million in September 2012 to $268 million for December 2012. The majority of this stated value was in Series A and Series B common equity shares in Black Elk, which comprised $215 million of the stated investment position. *Id.* at Exs. 10 and 11 (September 2012 and December 2012 SS&C NAV statements).

For the avoidance of any doubt, Quintero will offer his opinion at trial that PPVA's NAV should not have increased for year 2012 and that defendants did not earn any incentive fees for that year. As stated plainly on the face of Quintero's report: "all of the Incentive Fees charged to Platinum during the Damages Period constitute damages sustained by Platinum." *Id.* at Ex. 12

(Excerpt of Quintero Report at ¶ 32; emphasis added). Quintero calculates this amount to be $55.083 million during the damages period, which begins in December 2012. *Id.* Any interpretation of Quintero's Report that is inconsistent with this clear and unequivocal statement above is in error.

This opinion is supported by Quintero's opinion on PPVA's Black Elk position. *Id.* (Quintero Exhibit 23). In his fair value opinion, Quintero states that PPVA's Series A and Series B common equity position in Black Elk (which made up the vast majority of the investment) **"likely were worthless in their entirety."** *Id.*

This opinion is further supported by Black Elk's financial statements, which are summarized in Quintero's Report. *Id.* (Quintero Report at Exhibit 23.4). Black Elk was clearly insolvent by the end of 2012, with a negative shareholder value of more than $88 million, yet Platinum Management valued PPVA's common equity in Black Elk at $215 million and the total investment at approximately $284 million.

In Quintero's "fair value considerations section," he clearly references the events of 2012 as having a negative impact on the value of Black Elk:

- 9/17/12: S&P lowered its corporate credit rating on Black Elk to CCC+, with a negative outlook, for reasons including: (1) vulnerable business risk; (2) highly-levered financial risk; (3) small reserve and production base; (4) high operating costs; (5) weak sources of liquidity; and (6) insufficient cash flow to cover anticipated capital expenditures

- 11/16/12: Oil platform on Gulf of Mexico explodes, resulting in 2 deaths, and several injuries ("West Delta 32 Explosion)

Id.

The JOLs' other expert, Bill Post, whom Bodner, for reasons that are not clear, chose not to depose, will testify regarding his opinion of the Black Elk Explosion and the negative effect that

it had on PPVA's overall assets such that there could not have been a proper increase in the year 2012. As stated verbatim in Post's Report:

- In the latter part of 2012, [Black Elk] was heavily leveraged and in poor financial condition. Production had decreased, and the price of oil was low enough that costs of drilling and extracting oil offshore was becoming uneconomical.

- At this time, the Master Fund held a significant position in Black Elk, primarily common equity, that it was valuing at approximately $250 million. The fund also had a $30 million position in Black Elk's Senior Secured Notes ("SSNs"). In aggregate, the fund's investment in Black Elk was its largest single holding, comprising 35% of total NAV.

- According [to] Black Elk's regulatory filings, oil exploration and drilling can be unsuccessful for a myriad of reasons including adverse weather events, cost overruns, equipment shortages and mechanical difficulties. Offshore drilling activities have an even higher degree of inherent risk due to fires, explosions, uncontrollable flows of gas, etc. that may cause loss of life, severe destruction of property, environmental damage and liability, regulatory investigations and penalties, and other adverse events for the company.

- One of these risks came to fruition in November 2012, when an explosion and fire occurred on one of Black Elk's oil drilling platforms approximately 17 miles offshore from Louisiana. Several workers were injured or killed.

- In November 2012, following the explosion, Standard & Poor's Ratings Services placed their Corporate Credit Rating of Black Elk (then at CCC+) on CreditWatch and described how: "The ratings on Black Elk reflect our view of its "vulnerable" business risk and "highly leveraged" financial risk, incorporating the company's small reserve and production base, high operating costs…" The Credit Watch "reflects the potential for Black Elk's liquidity to deteriorate further.

Id. at Ex. 13 (Excerpt from Post Report at p. 30).

Post will testify to his opinion that Black Elk was a financially distressed company throughout 2012, and that the Black Elk Explosion had an immediate adverse impact on Black Elk's financial condition and the health and financial condition of PPVA's investment portfolio.

The first prong of Bodner's instant motion entirely ignores all of this abundant fact and expert evidence showing significant overvaluation of PPVA's assets as of the end of 2012. Instead, Bodner opts for sleight of hand. He notes that the linear diminutions in value on which Quintero's

damages calculations are premised use stated 2012 valuations as their starting point, and from that suggests that both Quintero and the JOLs substantively concede that everything was fine in 2012. But nothing could be further from the truth and Bodner makes a baseless argument based upon the an out-of-context (and wrong) characterization of the slope of *management fee damages model* as being indicative of *incentive fees*. But as detailed above, even a cursory review of Quintero's actual opinion – and of that of Post, and of the abundant record evidence – shows Bodner's premise to be false. The JOLs will show at trial that PPVA's NAV did not increase in 2012, and therefore that any incentive fees attributable to 2012 performance were wholly unearned. Bodner's attempt to unilaterally excise 2012 from this case should be rejected.

B. The JOLs Should Be Permitted to Refer to Any Illicit Gains Received by Bodner and Other Defendants During the Course of Their Disloyalty to PPVA.

An independent reason why the JOLs should be permitted to reference the 2013 payments for the 2012 incentive fees is that Plaintiffs allege that Bodner's breach of fiduciary duty occurred in 2013 (as well as late 2012). It is black letter law that gains obtained *during the period of the breach of fiduciary duty* are subject to disgorgement. Accordingly, whether or not there was an increase in PPVA's NAV in 2012, the law does not permit Bodner to retain the benefit of fees paid after the date upon which his fiduciary duty was breached.

New York courts have consistently held that disgorgement is a remedy for breach of a fiduciary duty, including profits obtained, and compensation and expenses paid to a fiduciary during the period of his disloyalty. *See, e.g., Stanley v. Skowron*, 989 F. Supp. 2d 356, 363 (S.D.N.Y. 2013) (concluding that defendant who was not paid on a task-by-task basis must forfeit one hundred percent of the compensation he received during period of disloyalty); *see also Lamdin v. Broadway Surface Advertising Corp.*, 272 N.Y. 133 (1936); *TPL Assocs. v. Helmsley-Spear, Inc.*, 146 A.D.2d 468, 471 (1st Dep't 1989); *In re Blumenthal*, 822 N.Y.S.2d 27, 28–29 (1st Dep't

2006). Similarly, courts have held that "where claims of self-dealing and divided loyalty are presented, a fiduciary may be required to disgorge any ill-gotten gain even where the plaintiff has sustained no direct economic loss." *Excelsior 57th Corp. v. Lerner*, 160 A.D.2d 407, 407-408 (1st Dep't 1990); *see also Schweizer v. Mulvehill*, 93 F.Supp. 2d 376, 401 (S.D.N.Y. 2000) (holding that the proper remedy for breach of fiduciary duty is disgorgement even if plaintiff sustained "no direct economic loss").

The New York Court of Appeals has held that "there can be no justification for permitting officers and directors . . . to retain for themselves profits which . . . they derived solely from exploiting information gained by virtue of their inside positon as corporate officials." *Diamond v. Oreamuno*, 24 N.Y.2d 494, 498-99 (1969) (concluding that officers and directors may be disgorged of gains realized in breach of their fiduciary duty)). Courts have similarly held that disgorgement is a proper remedy where a corporate director breaches his fiduciary duty to the corporation by engaging in a self-dealing scheme. *Mosionzhnik v. Chowaiki*, 972 N.Y.S.2d 841, 847 (Sup. Ct. N.Y. Cnty. 2013); *see also Don v. Singer*, 941 N.Y.S.2d 537 (Sup. Ct. N.Y. Cnty. 2011) ("A plaintiff may seek disgorgement damages in connection with claims of self-dealing and divided loyalty to deprive a defendant of ill-gotten gains even in instances where a plaintiff sustains no direct economic loss. Disgorgement damages consist of profits and other benefits realized by a defendant with the goal of deterring improper conduct.").

Disgorgement damages are also available under New York law in cases where a defendant is liable for constructive fraud. *Tyco Int'l, Ltd. v. Kozkowski*, No. 02 Civ. 7317 (TPG), 2011 WL 2038763, at *3.[3]

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[3] While plaintiffs in breach of fiduciary duty actions have the burden of proving damages, *Coty v. Steigerwald*, 291 A.D.2d 796 (4th Dep't 2002), these cases "comprise a special breed . . . that often loosen normally stringent requirements of causation and damages. *Gibbs v. Breed*, 271 A.D.2d

By the end of 2012 and in the wake of the Black Elk Explosion, if the true value of PPVA had been disclosed, Mr. Quintero and Mr. Trott will testify there would have been a wave of additional redemptions resulting in the bankruptcy and liquidation of PPVA (as occurred in 2016). Moreover, the prudent decision of a fiduciary such as Bodner should have been to challenge the increasing PPVA NAV, disclose the true NAV, and to liquidate PPVA.

Bodner, and others with a fiduciary duty to PPVA, took a different course. Beginning in January 2013, Bodner and other Defendants established the ***directly competing*** BEOF Funds, and saddled PPVA with an implicit (and in some cases, explicit) guarantee of the BEOF Funds' investments. Bixter Decl. Ex. 14 (Huberfeld testimony regarding PPVA guarantees of BEOF investments); *id*. at Ex. 15 (Huberfeld promising Twosons Corporation a full PPVA guarantee on its BEOF Investment); *id.* at Ex. 16 (Nordlicht discussing a sense of urgency in setting up the BEOF Funds and asking David Levy to call Bodner).

Bodner, Mark Nordlicht, Murray Huberfeld and David Levy held an interest in the BEOF Funds' management company and received fees therefrom, to the direct detriment of PPVA. *Id.* at Ex. 17 (breakdown of BEOF management and fees paid in 2013); *id.* at Ex. 18 (Email forwarded to Bodner's personal email notifying him of receipt of BEOF fees in 2014).

The purpose of the BEOF Funds was to provide certain preferred investors – including the Huberfeld Family Foundation, Bernard Fuchs, David Levy, Mark Nordlicht's parents and Daniel Small – with preferred equity in Black Elk which was senior to PPVA's sizable common equity position. *Id.* at Ex. 19 (list of BEOF investors).

180, 189 (1st Dep't 2000) (quoting *Milbank, Tweed, Hadley & McCloy v. Boon*, 13 F.3d 537, 543 (2d Cir. 1994)). Accordingly, the court is "accorded significant leeway in ascertaining a fair approximation of the loss." *Wolf v. Rand*, 258 A.D.2d 401, 402 (1st Dep't 1999) (noting that difficulty faced in calculating damages is attributable to the defendant's misconduct).

In January 2013, Black Elk's operating agreement was amended to provide for the issuance of Series E preferred equity in Black Elk to these preferred investors at the exorbitant interest rate of up to **36%** per annum. *Id.* at Ex. 20.

Despite the Black Elk Explosion, the government well shut-ins, the criminal investigation of Black Elk, and the subordination of PPVA's equity interests to Platinum Management's friends and family through the unaffiliated BEOF Funds, Platinum Management and PPVA's fiduciaries caused the value of PPVA's common equity position in Black Elk to increase throughout 2013, beginning at approximately $215 million for the period ending December 2012 and hitting approximately $250 million by the end of September 2013. *Id.* at Ex. 21

The Black Elk Explosion, the subsequent creation of the BEOF Funds, and the failure to account for the subordination of PPVA's interests in Black Elk within the NAV of PPVA is at the heart of the overvaluation scheme (along with the Beechwood debt transfers and interest payments to create the illusion that the PPVA equity positions in various investments, including, but not limited to, Golden Gate, were stable, when, in fact, the debt was in default, Platinum was paying the debt interest, and were near or actually worthless). The creation of the BEOF Funds for this fraudulent purpose, and the resultant overvaluation of PPVA, was a clear breach of Bodner's and Platinum Management's fiduciary duties to PPVA, and any amount by which Bodner profited subsequent to this late 2012/January 2013 breach is recoverable by the JOLs under a theory of disgorgement, which is a remedy available under New York law for breach of fiduciary duty and constructive fraud claims.

Bodner's period of fiduciary duty breach dates to late 2012, and evidence to this effect will be adduced at trial. All fees, including the value of cash and non-cash incentive fees he received after this date, are subject to disgorgement. Bodner participated in the creation and marketing of

the BEOF Funds and profited from them. The very creation of these unaffiliated funds, and their use to subordinate PPVA's interests in Black Elk, caused the overvaluation of PPVA. This is true for Defendants Murray Huberfeld and Bernard Fuchs as well, who led the marketing efforts for the BEOF Funds and were active investors in the scheme. Accordingly, the JOLs should be able to introduce evidence at trial concerning the payments made to Defendants during 2013.[4]

C. The Amounts Recoverable by the JOLs Include Non-Cash Incentive Fees Paid to the Defendants.

Bodner is under the mistaken belief that the damages available to the JOLs are limited to the incentive fees paid by PPVA ***in cash***, and that the JOLs should be precluded from offering any evidence regarding incentive fees paid to Bodner after September 2014.

Once again, Bodner proceeds from a fundamentally incorrect premise. Quintero will testify that, due to the overvaluation of PPVA, approximately $55 million in unearned incentive fees were paid to Defendants either in cash payments ***or non-cash transfers of PPVA Limited Partnership Interests to their investor accounts*** with PPVA's onshore feeder fund.

All such payments, whether in the form of cash or limited partnership interests in PPVA, are ill-gotten gains subject to disgorgement. *See Excelsior 57th Corp.*, 160 A.D.2d at 407-408; *see also Schweizer*, 93 F.Supp. 2d at 401 (holding that the proper remedy for breach of fiduciary duty is disgorgement even if plaintiff sustained "no direct economic loss"). The PPVA limited partnership interests granted in 2013-2014 and early 2015 had significant value.

Quintero's testimony will discuss how incentive fees accrued to the general partner of PPVA's onshore feeder fund, Platinum Partners Value Arbitrage LP (the "**GP Account**"), equal to 20% of the increase in Platinum Management's calculation of PPVA's net asset value. At times,

[4] In addition, the JOLs will introduce evidence concerning other ill-gotten gains received by Bodner, Huberfeld and Fuchs in connection with Beechwood and/or the BEOF Funds, which were created in order to perpetuate the overvaluation scheme.

and as will be proven at trial, funds originating with PPVA were used to make cash payments to the GP Account as payment for these incentive fees (approximately $14 million in the Damages Period).

At other times, incentive fees were paid to Defendants in the form of limited partner interests in PPVA's onshore feeder fund, whereby the incentive fees that had accrued in the GP Account were transferred to the limited partner investor accounts established for Platinum Management's partners, their families or entities under their control. A portion of these reinvestments were thereafter paid with cash through redemption requests, calculated by Quintero to be approximately $26.8 million in the Damages Period. The remaining amounts were permitted to stay on the books of PPVA's onshore feed fund for the benefit, and in the name of, the Defendants' investor accounts.[5] That does not mean the fees were "not paid" as Bodner seems to contend, they were simply paid in forms other than cash.

While cash payments for incentive fees appear to have ended by the end of 2014, Bodner and the other Platinum Management owners continued to receive payments of incentive fees in the form of limited partner interests in PPVA's onshore feeder fund throughout the damages period, and, of course, Platinum Management was paid unearned management fees through August 2016, which fees are recoverable as direct damages.

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[5] At trial, the JOLs will demonstrate through the testimony of Quintero, fact witnesses, and admission of bank statements and fund records that Bodner, his family, and Bodner's entities received cash incentive fee payments totaling approximately <u>$9.8 million</u>. There appears to be several factual disputes to be resolved at trial concerning the amount of fees paid and the nature of the payments. Bodner's assertion that he received less than $200,000 in cash for incentive fees is facially incorrect. Evidence to be submitted at trial will show direct payments and redemptions of millions of dollars paid to accounts under Bodner's account, with the vast majority ultimately hitting the bank account of Grosser Lane Management, LLC, the entity by which Bodner has admitted that he held his interests in Platinum Management. Second, while Fuchs has admitted his elevation to partner, the exact timeline is disputed. There is substantial evidence that will be admitted at trial that Fuchs was made a partner in 2013.

The fact that Bodner and the other Defendants never redeemed certain of these limited partnership interests is inconsequential; the additional limited partnership shares were payouts of unearned incentive fees and ill-gotten gains in connection with the overvaluation scheme. While the JOLs argue that these investor interests had little to no value by late-2015 in the wake of the overvaluation scheme and the series of dissipating transactions, at the time the limited partnership interests were transferred in 2013-2014 in particular, they held significant value, and the JOLs should be permitted to recover the value of these interests from Defendants, including Bodner, as disgorgement damages.

Surely, Bodner cannot be claiming that investor interests in PPVA held no value at the time they were rendered. To do so would be an admission of the precise overvaluation scheme alleged. Indeed, these same limited partnership interests were used as collateral to secure the $75 million demand note used to backstop the fraudulent Beechwood reinsurance business used by Defendants to perpetuate the overvaluation scheme. Bixter Decl. Ex. 22 (Beechwood Demand Note). Further, as late as December 2015, Nordlicht told Fuchs that Bodner and Huberfeld had made $100 million from PPVA. Bixter Decl. Ex. 23.

If Defendants had properly valued PPVA, and had properly accounted for the true value of non-performing investments such as Black Elk and Golden Gate Oil, these limited partnership interests would not have been credited to their accounts, as all such limited partnership interests were awarded as incentive fees. Instead, they wielded these then valuable interests with their asset profiles, including to create Beechwood and perpetuate a continuation of the overvaluation scheme. PPVA suffered harm from these fraudulent actions and the value of these interests at the time they were credited to Defendants' accounts are subject to disgorgement.

CONCLUSION

For the reasons set forth above, the JOLs request that Bodner's First Motion *in Limine* be denied.

Dated: October 19, 2020
New York, New York

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