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 EXCLUDE FROM JURY INSTRUCTIONS AND TO CONSOLIDATE DUPLICATIVE CLAIMS

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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 exclude from jury instructions and to consolidate duplicative claims ("**Second Motion in *Limine***") filed by Defendant David Bodner ("**Bodner**"). *See* ECF No. 669.[1]

PRELIMINARY STATEMENT

While the Court's April 21 Decision (ECF No. 624) dismissed claims against Bodner to the extent they were premised on his involvement in the Black Elk, Montsant, and Agera schemes, the Court sustained all causes of action asserted against Bodner arising out of the PPVA overvaluation.[2] By seeking now to consolidate all of the causes of action asserted against Bodner under a single count for breach of fiduciary duty, Bodner attempts to usurp the role of the factfinder by arguing, in conclusory fashion, that all of the claims against Bodner are duplicative because they relate to PPVA's overvaluation. This ignores important distinctions in the elements of each cause of action, the factual predicates required to prove each cause of action, the different remedies available under each cause of action, and improperly seeks to boil down four years of conduct into a single conclusion.

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[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.).

[2] The remaining claims against Bodner include: (i) Count I: Breach of Fiduciary Duty (Duty of Care and Good Faith); (ii) Count II: Breach of Fiduciary Duty (Duty of Loyalty/Self-Dealing); (iii) Count III: Aiding and Abetting Breach of Fiduciary Duties (as a Platinum Defendant); (iv) Count IV: Fraud; (v) Count V: Constructive Fraud; (vi) Count VI: Aiding and Abetting Fraud (as a Platinum Defendant); (vii) Count VII: Aiding and Abetting Breach of Fiduciary Duties (as a Beechwood Defendant); and (viii) Count VIII: Aiding and Abetting Fraud (as a Beechwood Defendant). ECF No. 285.

The remaining claims against Bodner tie to his involvement in PPVA's overvaluation, and it is within the purview of the jury to determine which of Bodner's actions or failures to act ultimately led to PPVA's overvaluation scheme being effected. It is also the jury's prerogative to determine which facts satisfy which elements of each claim. The Court should deny Bodner's Second Motion in *Limine* because it is the jury's role to determine:

- Whether the facts establish that Bodner owed a fiduciary duty to PPVA sufficient to give rise to a duty to disclose, or whether Bodner had special knowledge and a special role that gave rise to a duty to disclose even if he was not a fiduciary;
- Whether the facts establish that Bodner substantially assisted Platinum Management's fraud and breach of fiduciary duties for the purposes of the aiding and abetting fraud and aiding and abetting breach of fiduciary duty claims; and
- If Bodner was a fiduciary, whether specific instances of conduct constituted breaches of the duty of care versus the duty of loyalty.

Each of these inquiries require analysis of a different set of factual predicates, and liability under each claim results in different available remedies. As such, Bodner's Second Motion in *Limine* should be denied.

LEGAL STANDARD

"A district court's inherent authority to manage the course of its trials encompasses the right to rule on motions *in limine*." *Highland Capital Mgmt., L.P. v. Schneider*, 551 F. Supp. 2d 173, 176 (S.D.N.Y. 2008). An *in limine* motion is intended to "aid the trial process by enabling the Court to rule in advance of trial on the relevance of certain forecasted evidence, as to issues that are definitely set for trial, without lengthy argument at, or interruption of, the trial." *Palmieri v. Defaria*, 88 F.3d 136, 141 (2d Cir. 1996).

Courts may consolidate claims where they are *entirely* premised on the same conduct *and* seek the same relief. *Neogenix Oncology, Inc. v. Gordon*, 133 F. Supp. 3d 539, 553 (E.D.N.Y. 2015). Both prongs of this analysis must be satisfied, and thus claims that are based on some

deviation of fact or that require consideration of different facts should not be consolidated. Nor should claims be consolidated when they result in different relief being available. *See id.*

None of the cases cited by Bodner in support of his motion to consolidate stand for the proposition that the Court may consolidate claims if they either require different factual analysis or result in different remedies. *See generally*, *Scott v. The Dime Savings Bank of N.Y.*, 886 F. Supp. 1073, 1077 (S.D.N.Y. 1995) (explaining only in summary of prior proceedings that 13 claims were consolidated to fraud, breach of fiduciary duty, and negligence, without explaining basis for decision); *Zamora v. N. Salem Cent. Sch. Dist.*, 414 F. Supp. 2d 418, 427 (S.D.N.Y. 2006) (opining on possibility of consolidation after close of evidence but making no determination); *Seippel v. Jenkens & Gilchrist, P.C.*, 341 F. Supp. 2d 363, 377 (S.D.N.Y. 2004), *amended on reconsideration*, No. 03 CIV. 6942 (SAS), 2004 WL 2403911 (S.D.N.Y. Oct. 26, 2004) (refusing to consolidate fraud and breach of fiduciary duty/malpractice claims); *Interventure 77 Hudson LLC v. Halengren,* No. 653913/2013, 2018 WL 2234878, at *11 (Sup. Ct. N.Y. Cnty. May 16, 2018) (consolidating claims where factual predicates were identical *and* remedies sought were identical).[3]

ARGUMENT

A. The Breach of Fiduciary Duty Claim Asserted against Bodner Is Not Duplicative of the Fraud Claim Asserted against Bodner.

Bodner's motion to consolidate the fraud and breach of fiduciary duty claims asserted against him should be denied because (i) the factual predicates underlying a fraud claim based on the special facts doctrine are distinct from a breach of fiduciary duty claim; (ii) the jury may find

[3] Bodner's reliance on decisions in criminal matters is inapposite, as the constitutional concerns related to convicting an individual of the same crime more than once (such as double jeopardy) do not arise here.

that certain circumstances gave rise to a duty to disclose (fraud) whereas other circumstances gave rise to a duty to investigate (fiduciary duty) without conflict; and (iii) the remedies available for each claim differ.

First, while there is no dispute that a fiduciary may be liable for fraud by omission by virtue of their status as a fiduciary, by seeking to consolidate the two claims, Bodner appears to argue that he may be liable for fraud *only* if it is determined that he owed fiduciary duties to PPVA. *See* Bodner Mem. (ECF No. 669) at 7. This argument ignores that Bodner may be liable for fraud by omission under the special facts doctrine *even if* the jury determines Bodner did not have a fiduciary relationship with plaintiff.

To establish a fraud by omission claim, the JOLs must establish that Bodner owed a duty to disclose, which arises *either* where the defendant owes a fiduciary duty[4] *or, absent a fiduciary duty*, where the defendant has superior knowledge to plaintiff (*e.g.* the special facts doctrine). *See* April 21 Decision (citing *SNS Bank, N.V. v. Citibank, N.A.*, 777 N.Y.S. 2d 62, 66 (1st Dep't 2004) and *Aetna Cas. & Sur. Co. v. Aniero Concrete Co.*, 404 F. 3d 566, 582 (2d Cir. 2005) (per curiam)). The special facts doctrine specifically does not require the existence of a fiduciary relationship. *Fertitta v. Knoedler Gallery, LLC*, No. 14-CV-2259 JPO, 2015 WL 374968, at *11 (S.D.N.Y. Jan. 29, 2015) (explaining that duty to disclose may still exist even if there is no fiduciary duty owed between parties).

The Court has already held that the fraud claim asserted against Bodner may be predicated on *either* the existence of a fiduciary duty *or* the application of the special facts doctrine. *See* April

[4] The JOLs do not oppose consolidation of the breach of fiduciary duty claim with the constructive fraud claim, as the constructive fraud claim only arises if there is a fiduciary duty owed by Bodner. *See Senior Health Ins. Co. of Pa. v. Beechwood Re. Ltd.*, 345 F. Supp. 3d 515, 529 (S.D.N.Y. 2018) (Rakoff, J.)

21 Decision at 30 (explaining that fraud by omission can arise either when there exists a fiduciary duty between the parties or where the special facts doctrine applies). The threshold inquiry of whether Bodner owed fiduciary duties is the difference in factual predicates between the two claims which requires keeping the two claims distinct. And whether Bodner is liable under the special facts doctrine (or as a result of being a fiduciary of PPVA) is, of course, a question of fact for the jury.

Second, the jury may determine that, in certain circumstances, Bodner had a duty to disclose information that should have affected PPVA's NAV (under either the fiduciary duty or special facts theory of fraud), whereas in other circumstances, Bodner obtained information that gave rise to a duty to investigate (which, failure to investigate breached his duty of care). For example, the jury could determine that Bodner had a duty to investigate PPVA's valuation of Black Elk after the West Delta 32 explosion in November 2012. The valuation of PPVA's interests in Black Elk increased for year-end 2012, despite Black Elk's reported revenues decreasing by approximately in 2012 and a negative shareholder value of more than $80 million, and despite the explosion occurring shortly before year-end. Evidence at trial will establish that Bodner had knowledge of the West Delta 32 explosion, and that Bodner was involved in discussions with other Platinum Management fiduciaries concerning Black Elk in the aftermath of the explosion. *See, e.g.*, October 19, 2020 Declaration of Richard A. Bixter, Jr. in Opposition to Defendant David Bodner's Motions in *Limine* ("**Bixter Decl.**") Ex. 4 (Bodner scheduling partners meeting days after the Black Elk Explosion). Yet, subsequent to the Black Elk Explosion, Bodner apparently took no steps to investigate why the valuation of PPVA's holdings in Black Elk increased - even in the face of the creation of the Black Elk Opportunities Funds, whose explicit purpose was to subordinate PPVA's interests. The jury could similarly determine that Bodner's receipt in January

2014 of a report prepared by the Seaport Group concluding that Black Elk had been overvalued over the past six quarters gave rise to a duty to disclose, the failure of which constituted a fraud. *See* Bixter Decl. Ex. 24. Ultimately, which of Bodner's acts or failures constituted a breach of fiduciary duty or a fraud are questions for the jury.

Third, the fraud and breach of fiduciary duty claims are not duplicative here, as the remedies available are not wholly duplicative. Under New York law, the measure of damages available for fraud claims is "actual pecuniary loss, excluding profits, sustained as a result of the fraud." *In re Signature Apparel Grp. LLC*, 577 B.R. 54, 93 (Bankr. S.D.N.Y. 2017). "Actual pecuniary loss may include both out-of-pocket losses and consequential damages incurred as a result of reliance on the fraudulent misrepresentations." *Id.* In contrast, the measure of damages under New York law for breaches of fiduciary duty is "the amount of loss sustained, including lost opportunities for profit . . . by reason of the faithless fiduciary's conduct." *Herman v. Herman*, 162 A.D.3d 459, 460 (1st Dep't 2018). The calculation of damages for each claim rests on separate factual predicates—specifically, what "lost opportunities for profit or harm avoided" may be considered if Bodner is found liable for breaching fiduciary duties to PPVA.

There are also important distinctions in the remedies available for fraud versus breach of fiduciary duties at issue in this matter. For example, a defendant with a fiduciary duty is "accountable for the waste of corporate assets notwithstanding the absence of proof that he benefitted personally, and he is liable for all damages flowing from his breach of fiduciary duty . . . *whether those consequential damages occurred during or after the actual period of his wrongful inaction.*" *Ault v. Soutter*, 204 A.D.2d 131, 131 (1st Dep't 1994) (citing *Rapoport v. Schneider*, 29 N.Y.2d 396 (1972); *Equity Corp. v. Groves*, 60 N.E.2d 19, 21 (N.Y. 1945)) (emphasis added). As such, the scope of remedies available for the breach of fiduciary claims against Bodner is broader

than the scope of remedies available for the fraud claims against Bodner, and as such, the claims are not duplicative.

B. The Breach of the Duty of Loyalty Claim Is Not Duplicative of the Breach of the Duty of Care Claim.

Even though the Court has limited the claims against Bodner to the overvaluation scheme, the factual predicates underlying the breach of the duty of loyalty and the breach of the duty of care claims are different, because the inquiries for these two claims are different.

While the duty of loyalty requires fiduciaries to avoid self-dealing and putting their personal interests ahead of those to whom the fiduciary owes a duty, the duty of care is broader, and includes more than simply avoiding fraud, bad faith, and self-dealing. *Hanson Trust PLC v. ML SCM Acquisition, Inc.*, 781 F.2d 264, 274 (2d Cir. 1986) (analyzing New York law). The duty of care requires the fiduciary to stay reasonably informed of the performance of the subject company, and conduct reasonable diligence in considering material information. *Id.* at 274-275. It also requires fiduciaries to ensure that an entity is managed by competent personnel. *See, e.g.*, *Kimmel v. Schaefer*, 89 N.Y.2d 257, 265 (1996) (where facts indicated defendant owed plaintiff a duty of care, defendant could only satisfy duty of care by relying on competent managers and employees).

Here, while the ultimate issue is whether Bodner breached his fiduciary duties or aided and abetted Platinum Management and the other Platinum Defendants' breach of fiduciary duties in overvaluing PPVA, the jury may determine that there are multiple breaches of Bodner's duty of care that led to PPVA's overvaluation, including, *inter alia*:

- Bodner participated in, and frequently called for, "partner meetings" during which PPVA's positions were discussed, *see* Bixter Decl. Ex. 25;
- Bodner also frequently met with his Platinum Management partners individually *see id.* at Ex. 26 (requesting four uninterrupted hours with Mark Nordlicht);

- Bodner had knowledge of the Black Elk West Delta 32 explosion in 2012 but failed to investigate why PPVA's valuation of its Black Elk holdings increased immediately thereafter, *see id.* at Exs. 3 and 27 (Bodner anxious for information on payments to Black Elk investors on the evening of explosion);

- Bodner failed to conduct any diligence on PPVA's contingent liabilities, which liabilities artificially inflated PPVA's NAV;

- Bodner knew David Levy – Murray Huberfeld's nephew – was hired as a portfolio manager of Platinum Management straight out of undergraduate studies, then elevated to co-chief investment officer status with multiple Platinum funds within a few years, with no prior investment experience, no prior employment experience at all, and no graduate degree in finance, and was aware that Levy played an integral part in inflating PPVA's NAV through, *inter alia*, the Black Elk Consent Solicitation and bond manipulation, and the Second Scheme transactions;

- No later than January 2015, Bodner knew that PPVA's valuation was incorrect, yet took no steps after January 2015 to correct PPVA's valuation, secure for PPVA assets that were actually valuable, disclose PPVA's overvaluation, or remove Nordlicht as chief investment officer, *see id.* at Ex. 28 (Fuchs Tr. 26:17-30:20); and

- Even though the Court determined at summary judgment there was insufficient evidence to raise an issue of fact as to whether Bodner controlled or managed the Black Elk, Montsant, and Agera transactions, Bodner was provided consistent information about these three and other PPVA transactions, such that his failure to conduct any diligence or to allow these transactions to proceed without independent opinions led to these transactions being consummated to the detriment of PPVA and specifically, the overvaluation of PPVA's NAV.

Each of the above examples may, in and of themselves, be breaches of Bodner's fiduciary duties, or instances of when Bodner had special facts that he was required to disclose. The culmination of these and other discrete acts and failures to act was, in the end, PPVA's overvaluation.

By contrast, the duty of loyalty claim, as it relates to the overvaluation of PPVA, concerns factual predicates such as:

- Bodner's involvement in the creation of Beechwood, and his role in diverting actually lucrative investment opportunities to Beechwood instead of PPVA;

- Bodner's involvement in the formation of BEOF and failure to stop the Black Elk sale to Renaissance Offshore and related Consent Solicitation despite the certainty that the Renaissance Sale would render Black Elk insolvent;

- Bodner's involvement in shepherding the COBA bribe to Jona Rechnitz and receipt of $1.8 million in fees directly tied to the COBA investment in PPVA; and

- Whether Bodner put his personal interests ahead of PPVA by allowing PPVA's overvaluation to continue in order to reap higher fees.

While there is no dispute that there is substantial overlap in the factual predicates underlying this duty of loyalty claim and the duty of care claim, the added questions of fact concerning Bodner's receipt of fees and the methods through which he was paid render the duty of loyalty claim distinct from the duty of care claim, and thus, the two should not be consolidated.

C. The Fraud and Breach of Fiduciary Duty Claims Asserted against Bodner Are Not Duplicative of the Aiding and Abetting Claims Asserted against Bodner.

Bodner cites no authority for his proposition that the aiding and abetting breach of fiduciary duties and aiding and abetting fraud claims asserted against him (secondary violation claims) should be deemed duplicative of the breach of fiduciary duty and fraud claims (primary violation claims). Instead, Bodner asserts in wholly conclusory fashion that "in light of the April 21 Decision, there is no longer a distinction between Bodner's alleged conduct that forms the basis of the primary and secondary liability claims" as "both are based on his alleged failure to act when he allegedly owed a fiduciary duty to PPVA." This assertion rings hollow and mischaracterizes the Court's analysis in the April 21 Decision.

The April 21 Decision recognized that, as pled, the aiding and abetting claims against Bodner are premised on *Platinum Management and other Platinum defendants*' committing the primary violations of fraud and breaching fiduciary duties. *See* April 21 Decision at 32; *see also* SAC ¶ 786 ("the Individual Platinum Defendants substantially assisted, aided and abetted, and participated in *Platinum Management's* breaches of its fiduciary obligations . . .") (emphasis

added). The aiding and abetting claims are specifically not predicated on Bodner's *own* fraud or breach of fiduciary duties. *See id.* That a party (or non-party) other than Bodner committed the underlying fraud or breach of fiduciary duty is precisely the type of distinction that precludes the conclusion here that the aiding and abetting claims are duplicative. *Loreley Fin. (Jersey) No. 3 Ltd. v. Wells Fargo Sec., LLC*, No. 12-CV-3723 (RJS), 2016 WL 5719749, at *6 (S.D.N.Y. Sept. 29, 2016)[5]; *Neogenix Oncology*, 133 F. Supp. 3d at 553 (refusing to dismissing aiding and abetting claim against law firm as duplicative of underlying breach of fiduciary duty claim against individual attorney); *see also Balta v. Ayco Co., LP*, 626 F. Supp. 2d 347, 354 (W.D.N.Y. 2009) (aiding and abetting breach of fiduciary duty claim against one party not duplicative of breach of fiduciary duty claim where breach of fiduciary duty was committed by different party).

The aiding and abetting claims asserted against Bodner, premised on Platinum Management's primary violations, also cannot be consolidated with the separate fraud and breach of fiduciary duty claims asserted against Bodner individually because the damages available for these claims are distinct. Critically, the jury may hold Bodner jointly and severally liable for all damages arising from Platinum Management's primary violations if it determines that Bodner persistently and substantially assisted Platinum Management's primary violations, causing a single, indivisible injury. *See In re Libor-Based Fin. Instruments Antitrust Litig.*, No. 11 MDL 2262 NRB, 2015 WL 4634541, at *100 (S.D.N.Y. Aug. 4, 2015) ("*Libor*"), amended sub nom. *In*

[5] Bodner's attempt to distinguish *Loreley* is unpersuasive. First, the fact that the *Loreley* opinion was related to a motion to dismiss is irrelevant, where the question before the Court is the same both at motion to dismiss phase or before trial—*i.e.,* whether the factual predicates underlying and damages sought with respect to both claims are identical. Second, Bodner's attempt to distinguish *Loreley* based on the court's explanation that a claim for aiding and abetting cannot merely be premised on that specific defendant's own conduct but instead must be premised on another party's conduct is precisely why the aiding and abetting claims here are not duplicative.

re LIBOR-Based Fin. Instruments Antitrust Litig., No. 11 MDL 2262 (NRB), 2015 WL 13122396 (S.D.N.Y. Oct. 19, 2015).[6] Such a finding would broaden the scope of damages attributable to Bodner, including:

- Damages relating back to the inception of the Platinum Management fraud and breach of duty, here in November 2012, upon proof of a consistent course of conduct by Bodner over multiple years to wit, compensatory damages including the diminution in value of PPVA's assets as a result of Platinum Management's fraud and breach of fiduciary duties, including but not limited to all incentive and management fees paid to Platinum Management and other Platinum Defendants based on PPVA's inflated NAV since late 2012, *see Rolf*, 570 2d at 49 (allowing recovery of fees in addition to diminution in value of portfolio);

- Consequential damages including damages arising from Platinum Management's waste of corporate assets, which were reasonably foreseeable as a result of Platinum Management's fraud and breach of fiduciary duties, *see Ault*, 204 A.D.2d at 131 (fiduciary is "accountable for the waste of corporate assets notwithstanding the absence of proof that he benefitted personally, and he is liable for all damages flowing from his breach of fiduciary duty . . . whether those consequential damages occurred during or after the actual period of his wrongful inaction"); and

- Punitive damages arising from Platinum Management's fraud and breach of fiduciary duties, *see* JOLs' Opposition to Bodner's Motion *in Limine* to Preclude References at Trial to Punitive Damages, filed concurrently herewith.

Because the factual predicates *and* the available remedies differ as between the primary violation claims asserted directly against Bodner and the secondary violation claims related to Platinum Management's fraud and breach of fiduciary duties, the secondary violation claims asserted against Bodner should not be consolidated the primary violation claims.

[6] Whether Bodner's persistently provided substantial assistance to Platinum Management in its overvaluation of PPVA over multiple years is itself a question for the jury, the answer to which may affect the damages calculation. *Compare Libor*, No. 11 MDL 2262 NRB, 2015 WL 4634541, at *100 (joint and several liability for entire damages period available if damages arise from single indivisible injury) *with Rolf v. Blyth, Eastman Dillon & Co., Inc.*, 570 F.2d 38, 48-50 (2d Cir. 1978) (damages attributable to party for aiding and abetting may be cabined if the injury arising from aiding and abetting is distinct).

D. The Aiding and Abetting Claims Asserted against Bodner May Be Consolidated under a Single Claim for Aiding and Abetting Platinum Management's Breach of Fiduciary Duty.

The JOLs do agree that the aiding and abetting fraud claims against Bodner (as both a Platinum and Beechwood Defendant) may be consolidated with the aiding and abetting breach of fiduciary duties claims against Bodner (as both a Platinum and Beechwood Defendant) as a single claim for aiding and abetting Platinum Management's breach of fiduciary duty. The underlying primary violation claims against Platinum Management for fraud and breach of fiduciary duties rest on the same factual predicates (including, *inter alia*, affirmative misrepresentations of PPVA's NAV, failure to disclose PPVA's actual NAV, engaging in various transactions to artificially inflate PPVA's NAV, and transferring PPVA's valuable assets to Beechwood). Contrary to the fraud and breach of fiduciary duty claims asserted directly against Bodner, there is no dispute that Platinum Management owed fiduciary duties to PPVA. Thus, there is no dispute that Platinum Management both had a duty to disclose, and an obligation to not make material misstatements. Under either the fraud or breach of fiduciary duty claim, the questions for the jury are whether Platinum Management made material misstatements or violated it duty to disclose.

The JOLs request, however, that the aiding and abetting claims against Bodner, based on Platinum Management's primary violations, be consolidated as a single aiding and abetting breach of fiduciary duty claim against Bodner. As discussed above, the damages available for a breach of fiduciary duty claim are distinct from fraud damages, and disgorgement of ill-gotten gains is only available for breaches of fiduciary duty. As the breach of fiduciary duty claim against Platinum Management provides the most complete remedy, that claim should survive.

E. The Court May Address Any Confusion Through Proper Jury Instructions.

Bodner's concern that allowing more than one cause of action to proceed will result in duplicative damages awards can be easily cured by a proper jury instruction explaining the claims'

various elements and the distinction between compensatory damages, disgorgement, consequential damages, and punitive damages. The Court may also instruct the jury on why duplicative damages may not be assessed.

CONCLUSION

For the reasons set forth above, the JOLs request this Court partially deny Bodner's motion *in limine* to exclude from jury instructions and to consolidate duplicative claims, and consolidate only (i) the First and Sixth Counts in the SAC; and (ii) the Third, Sixth, Seventh and Eighth Counts of the SAC, as set forth above.

Dated: October 19, 2020
New York, New York

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