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)

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION *IN LIMINE* TO EXCLUDE EVIDENCE OR ARGUMENT RELATING TO THE MARCH 2016 RELEASE AGREEMENT

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

Rules

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 "**JOLs**"), and Platinum Partners Value Arbitrage Fund L.P. (in Official Liquidation) ("**PPVA**") (together, "**Plaintiffs**"), submit this memorandum of law in support of their motion *in limine* for the Court to issue an order precluding the introduction of testimony, evidence, or argument that the Release Agreement[1] (the "**Release**"), dated March 20, 2016, executed by, among others, Platinum Management (NY) LLC ("**Platinum Management**"), Mark Nordlicht ("**Nordlicht**"), on behalf of Platinum Management and other entities, Murray Huberfeld ("**Huberfeld**"), and David Bodner ("**Bodner**," together with Huberfeld, "**Defendants**"), constitutes a defense to liability against Plaintiffs' remaining claims against Huberfeld and Bodner.

PRELIMINARY STATEMENT

Defendants seek to avoid liability through a purported Release, collusively entered into by and among Bodner, Huberfeld, and Nordlicht (on behalf of Platinum Management), long after they knew they were under criminal and SEC investigation, and faced significant personal liability for their breaches of duty and the fraud concerning PPVA. Specifically, in the Release, Bodner and Huberfeld – having already determined that the net asset value ("**NAV**") of PPVA was mismarked and that further distributions and redemptions should cease – caused co-conspirator and joint tortfeasor Platinum Management, via Nordlicht (now a convicted felon), to provide them a purported release from liability related to "Platinum." As such, this sham defense has always lacked merit.

[1] The Release Agreement is annexed as **Exhibit 1** to the Declaration of Warren E. Gluck, dated March 8, 2022 (the "**Gluck Decl.**"), which is filed contemporaneously herewith.

However, the defense is no longer even possibly meritorious, given that the facts on the ground have changed in the nearly two years since this Court's decision on summary judgment (the "**Summary Judgment Order**"), changes that have obviated and rendered unnecessary the introduction of any evidence relating to the Release at trial. *See* ECF No. 624.[2]

As this Court noted in the Summary Judgment Order, co-conspirators (and indeed joint tortfeasors) *cannot release each other* – such is the definition of a corrupt purpose. *See* ECF No. 624 at 21. At the time summary judgment was decided:

(i) Releasor Platinum Management was defending the very claims in this consolidated litigation for which it purported to release Bodner and Huberfeld;

(ii) Release signatory Nordlicht's criminal conviction in his criminal proceeding had been overturned;

(iii) Nordlicht was defending the very claims in the consolidated litigation for which he purported to authorize Platinum Management to release Bodner and Huberfeld; and

(iv) Nordlicht had not yet filed for personal bankruptcy.

The facts have now changed. First, Platinum Management has since defaulted in this consolidated litigation (after participating fully through discovery and summary judgment), thereby admitting the claims against it (including the claims for which it purported to release Bodner and Huberfeld). *See* Gluck Decl. Ex. 2. Second, Nordlicht's conviction in the criminal proceeding was reinstated by the Second Circuit. *See United States v. Nordlicht*, 17 F.4th 298, 332-342 (2d Cir. 2021) (the "**Second Circuit Order**"). Third, Nordlicht filed for personal bankruptcy in the Bankruptcy Court for the Southern District of New York. *See In re Mark Nordlicht*, 20-22782-rrd (Bankr. S.D.N.Y.) (the "**Nordlicht Bankruptcy**") & Gluck Decl. Ex. 3. Within the Nordlicht Bankruptcy, the same claims asserted by Plaintiffs against Huberfeld and

[2] Plaintiffs cite to the docket in the action captioned *Trott, et ano. v. Platinum Management (NY) LLC, et al.*, 18-cv-10936 (JSR).

Bodner are allowed and admitted claims against Nordlicht by virtue of PPVA's proof of claim. *See* Gluck Decl. Ex. 4.

Consequently, the Release provides no defense to the very liability at issue once Plaintiffs establish the liability of Platinum Management and Nordlicht under circumstances where the Defendants are to be tried as co-conspirators, joint tortfeasors, and aiders and abettors of those very same claims. In other words, whereas prior to the issuance of the Summary Judgment Order, there was concededly a potential outcome, based on Nordlicht's and Platinum Management's respective merits defenses, that Platinum Management and Nordlicht would not be found joint tortfeasors or co-conspirators against PPVA – that possibility no longer exists.

As such, this motion *in limine* should be granted because if Plaintiffs were to prevail at trial on liability against Bodner and Huberfeld for their fraudulent conduct, breaches of duty, and aiding and abetting of the same, then the Release by Platinum Management and executed on its behalf by Nordlicht is unenforceable as a matter of law because co-conspirators and joint tortfeasors cannot validly release other co-conspirators and joint tortfeasors. *See, e.g.,* Summary Judgment Order, ECF No. 624 at 21; *Aviles v. S&P Glob., Inc.*, 380 F. Supp. 3d 221, 301-02 (S.D.N.Y. 2019) (holding that co-conspirators cannot release themselves from liability).

As a result, entertaining evidence on the Release would needlessly enlarge the trial proceedings as the parties would be forced to engage in unnecessary pretrial disputes that are premised on the validity of the Release. Those disputes include, but are not limited to, the implications surrounding whether Plaintiffs will be required to call Bodner's trial attorneys at Curtis, Mallet-Prevost, Colt & Mosle LLP ("**Curtis**") as trial witnesses. Curtis acted as counsel for Bodner, Huberfeld, **and** Platinum Management with respect to the Release and the SEC's

ongoing investigation concerning PPVA's NAV and the relationship between PPVA and the Beechwood reinsurance enterprise ("**Beechwood**").

These pre-trial disputes are wholly unnecessary because the Release issue has been simplified by Platinum Management's and Nordlicht's liability: either Bodner and Huberfeld are not co-conspirators/joint tortfeasors with Platinum Management and Nordlicht, in which case the Release is irrelevant to the trial; or Bodner and Huberfeld are co-conspirators/joint tortfeasors with Platinum Management and Nordlicht, in which case the Release is void and unenforceable.

Accordingly, Plaintiffs respectfully request that this Court grant this motion *in limine* and preclude any attempt by Defendants to introduce the Release to establish the invalidity of the claims alleged in this action or to disprove liability in this action.

BACKGROUND

I. Platinum Management Defaults in this Consolidated Litigation

On March 29, 2019, Plaintiffs filed the operative Second Amended Complaint naming Platinum Management, among others, as a defendant (the "**SAC**"). ECF No. 285. Platinum Management participated in discovery, including the presentment of its Rule 30(b)(6) witness for deposition which took place on December 27, 2019. Platinum Management did not move for summary judgment, nor file any other motion.

On August 25, 2020, Platinum Management's counsel moved to withdraw, which was granted on August 28, 2020. ECF Nos. 652, 656. On November 16, 2020, the Court issued a certificate of default as to Platinum Management. ECF No. 687 & Gluck Decl. Ex. 2. As a result, Platinum Management has admitted the very allegations in the SAC against Huberfeld and Bodner. *See, e.g., CKR Law LLP v. Anderson Invs. Int'l LLC*, 544 F. Supp. 3d 474, 482 (S.D.N.Y. 2021)

("Because the respondents are in default, the Court accepts as true all well-pleaded allegations in the petition.") (citation omitted) (Rakoff, J.).[3]

II. Nordlicht is Convicted in the Criminal Action

On December 14, 2016, a grand jury empaneled in the Eastern District of New York indicted, among others, Nordlicht, and former Beechwood and Platinum Management co-Chief Investment Officer David Levy ("**Levy**"). *United States v. Nordlicht, et al.*, 1:16-cr-00640-BMC (E.D.N.Y.) (the "**Criminal Action**"). The Criminal Action focuses on the scheme hatched by Nordlicht and Levy to defraud bondholders of Black Elk Energy Offshore Operations LLC ("**Black Elk**") through the sale of substantially all of Black Elk's assets to Renaissance Offshore, LLC (the "**Renaissance Sale**"). On July 9, 2019, the jury convicted Nordlicht on the conspiracy counts. On September 27, 2019, the district court granted Nordlicht's motion for a new trial.

On November 5, 2021, the Second Circuit reinstated Nordlicht's conviction. As noted in the Second Circuit Order, among other things, the jury reasonably found that bondholders of Black Elk were harmed by Nordlicht's conduct. *See* 17 F.4th at 333 ("This email evidence, viewed collectively, supports an inference that Nordlicht intended to secure the passage of the amendments to the Indenture, regardless of whether he violated any laws or harmed the bondholders in the process.").[4] It is undisputed that PPVA was a bondholder in Black Elk (collectively, the "**Black Elk Bondholders**") and was hence harmed.[5]

Notably, under circumstances where Black Elk had sold and was to distribute substantially all of its assets via the Renaissance Sale, harm to Black Elk Bondholders was not possible under

[3] It is not seriously disputed that Platinum Management executed the Release as a Releasor and as the responsible party for PPVA, among others.
[4] Nordlicht is scheduled to be sentenced on June 16, 2022.
[5] Around this time, PPVA held approximately 85 percent of the common equity of Black Elk. *See* Expert Report of Bill Post, dated November 14, 2019, ECF No. 628-1 at 31-32

circumstances where PPVA's common equity had value, including a clear overvaluation of PPVA's NAV. Additional bonds in Black Elk that PPVA later re-purchased from Beechwood and valued at par were similarly mismarked and overvalued (together, the "**Black Elk Schemes**").

Plaintiffs' claims in this consolidated litigation against Huberfeld directly and fully encompass the Black Elk Schemes. Plaintiffs' claims against Bodner implicate the Black Elk Schemes to the extent they reflect an overvaluation of PPVA's NAV, including, but not limited to, the value of PPVA's bond and equity holdings in Black Elk, rendering the NAV statements materially false. Indeed, as set forth in the Expert Reports of William Post and Ronald Quintero, Beechwood was the mechanism by which the overvaluations of PPVA's assets was accomplished.[6]

III. The Nordlicht Bankruptcy and Plaintiffs' Allowed Proof of Claim

After the Nordlicht Bankruptcy commenced in June 2020, on October 25, 2020, Plaintiffs timely filed a proof of claim in the Nordlicht Bankruptcy in the amount of not less than $305,100,000, for the reasons set forth in the SAC (the "**Nordlicht Proof of Claim**"). *See* Gluck Decl. Ex. 4. The Nordlicht Proof of Claim is an allowed and undisputed claim in the full amount, to which no objection has been filed.

ARGUMENT

I. As a Matter of Law, the Release was Executed by Co-Conspirators, which Necessitates Granting this Motion

On April 21, 2020, this Court issued the Summary Judgment Order denying Bodner and Huberfeld's motion for summary judgment on the issue of whether the Release released them from

[6] The Second Circuit Order holds that "there was sufficient evidence for the jury to conclude that Nordlicht knew Beechwood was an affiliate of Platinum." *Nordlicht*, 17 F. 4th at 336. Such evidence included that Nordlicht founded Beechwood with the same partners with whom he founded Platinum (Huberfeld and Bodner), Nordlicht hired Platinum Management employees for important positions at Beechwood, and Nordlicht also occasionally worked out of Beechwood's offices to take phone calls and participate in meetings. *See id.* at 334-35.

all claims in this action. *See* ECF No. 624 at 18-22. In that Order, the Court held that there was a genuine issue of whether the Release was entered into for the "fraudulent purpose of permitting one co-conspirator, Platinum Management, to release its other co-conspirators, Bodner and Huberfeld, from liability." *Id.* at 19-20. This Court went on to opine that such a "fraudulent purpose" would constitute a violation of New York law. *Id.* at 20-21 ("Under New York law, a release or waiver clause may be attacked and set aside … for substantive flaws in its execution, such as fraud in the inducement, illegality, duress, or mutual mistake.") (citation omitted).[7]

The Summary Judgment Order is law of the case, which is a "rule of practice premised upon sound policy that once an issue is judicially determined, further litigation of that issue should be precluded in a particular case." *Martin v. City of Cohoes*, 37 N.Y.2d 162, 165 (1975)

At the time of the Summary Judgment Order, the relevant torts for which Plaintiffs sought hold Bodner and Huberfeld liable were *denied and defended* by both Platinum Management and Nordlicht. Moreover, Nordlicht's criminal conviction had been overturned.

As of now, in stark contrast, Platinum Management and Nordlicht have admitted liability in this consolidated litigation and Nordlicht has been criminally convicted. It is simply not possible to dispute in this action that Platinum Management or Nordlicht are liable for the very joint torts and civil conspiracy that are the subject of the upcoming trial against Bodner and Huberfeld.

Accordingly, there are only two potential outcomes:

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[7] Courts routinely hold that releases executed by co-conspirators are invalid. *See, e.g., Aviles*, 380 F. Supp. 3d at 301-02; *CMG Holdings Grp. v. Wagner*, No. 15-CV-5814 (JPO), 2016 WL 4688865, at *8 (S.D.N.Y. Sept. 7, 2016) (a release that is the product of fraudulent inducement is invalid); *Wimbledon Fin. Master Fund, Ltd. v. Weston Capital Mgmt.*, 160 A.D.3d 596, 598 (1st Dep't 2018) (a release procured by fraud is not enforceable); *Mangini v. McClurg*, 249 N.E. 2d 386, 392 (N.Y. 1969) ("The requirement of an 'agreement fairly and knowingly made' has been extended, however, to cover other situations where . . . because of the existence of overreaching or unfair circumstances, it was deemed inequitable to allow the release to serve as a bar to the claim of the injured party.").

(i) *either* Bodner and Huberfeld are joint tortfeasors and co-conspirators with Nordlicht or Platinum Management, in which case the Release cannot serve as a defense and is void as against public policy, *or*

(ii) Bodner and Huberfeld are not joint tortfeasors and co-conspirators with Nordlicht or Platinum Management, in which case the Release is irrelevant.

Should Plaintiffs prevail as to liability against Bodner and Huberfeld – partners of Platinum Management – for their roles in the same nucleus of conduct for which Platinum Management has admitted liability, Nordlicht's liability has been admitted, and Nordlicht has been convicted, then they would be co-conspirators and the Release would be rendered invalid because its purpose—to exonerate each-other from liability—is a fraudulent one prohibited by New York law. *See* Summary Judgment Order at 19-21; *Aviles*, 380 F. Supp. 3d at 301-02.

Aviles is instructive. There, the court declined to apply a purported release to bar claims against non-officer defendants for aiding and abetting breaches of fiduciary duty, in circumstances where there was a plausible basis to conclude that those issuing the purported release were themselves breaching fiduciary duties to the company. *See* 380 F. Supp. 3d at 301-02. Hence, *Aviles* stands for the essential (though unremarkable) proposition that co-conspirators cannot release themselves from liability. This case differs from *Aviles* only in that the Releasor (Platinum Management) and the signatory (Nordlicht), have already been judged liable - and is therefore simpler. In sum, any genuine issue of fact that existed at the time of the Summary Judgment Order has been obviated and eliminated via Nordlicht's conviction, PPVA's allowed claim in the Nordlicht Bankruptcy, and Platinum Management's default in the consolidated litigation.

II. Introducing the Release at Trial Creates Multiple Material Issues

Permitting evidence on the Release would also needlessly delay the proceedings as the parties would be forced to engage in unnecessary pretrial disputes, chief among them the permissibility of calling trial attorneys from Curtis as witnesses, which would likely be necessary

given their representation of Bodner, Huberfeld and Platinum Management with respect to the negotiation and execution of the Release.

Among other things, Curtis attorneys – including trial counsel – conveyed Bodner's interest to "give back pro rata" fees received in 2014 and 2015 provided that a corresponding (but unspecified) liability was reduced, debated with Nordlicht and Levy whether to include PPVA within the release, and prepared multiple drafts of the Release. *See* Gluck Decl. Exs. 5-6. As a specific example, a draft of the Release prepared by Curtis prompted incredulous warnings from, among others, Isaac Neuberger ("**Neuberger**"), who acted on behalf of potential angel investor Marcos Katz concerning the Release. Neuberger expressed shock with respect to provisions concerning indemnification, repayment of fees, and Nordlicht's authority to bind Platinum Management that disproportionately favored Bodner and Huberfeld. *See* Gluck Decl. Ex. 7.

Further, the Release should be excluded under Federal Rule of Evidence 403 because of the danger of unfair prejudice and unnecessary delay of these proceedings that would result from its introduction. *See* Fed. R. Evid. 403 ("The court may exclude relevant evidence if its probative value is substantially outweighed by . . . unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.").[8]

[8] At this stage of the proceedings, the Release has no probative value. Plaintiffs' right to the damages sought is not affected by a Release that was intended to improperly insulate Defendants from liability for their fraudulent conduct, thus, there is no need to hear evidence on this issue prior to a determination as to Defendants' liability on the underlying claims. On the other hand, undue prejudice will be caused to Plaintiffs if the information concerning the Release is admitted, particularly as the agreement lends an improper imprimatur of propriety to Defendants' conduct during their tenure at Platinum Management. Consequently, the introduction of the Release risks conveying a message that the conduct at issue in this case – particularly with respect to whether Defendants' acted as proper fiduciaries for PPVA in knowingly sanctioning inflated NAV statements – has been fairly absolved via an arms-length transaction. Moreover, if admitted, the evidence implies that Defendants could somehow relieve themselves of liability for their conduct through the execution of the Release, irrespective of their position on both sides of the agreement given their ownership and control of Platinum Management.

For these reasons, the probative value of the Release is, therefore, substantially outweighed by unfair prejudice, confusion of the true issues, and the difficult resolution associated with trial counsel for Bodner also being two of the central witnesses regarding the Release defense.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Motion be granted and the Court enter an order precluding the introduction of testimony, evidence, or argument that the Release constitutes a defense to liability against Plaintiffs' remaining claims against Huberfeld and Bodner.

Dated: New York, New York
March 8, 2022

HOLLAND & KNIGHT LLP

By:/s/ Warren E. Gluck

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