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 ARGUMENT OR EVIDENCE IN SUPPORT OF THE JOLS' BELATED AND UNPLEADED THEORIES FOR DISGORGEMENT AND CONSEQUENTIAL DAMAGES

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Defendant David Bodner respectfully submits this memorandum of law in support of his motion *in limine* (the "Motion") to preclude argument or evidence in support of the Joint Official Liquidators' ("JOLs") belated and unpleaded theories of disgorgement and consequential damages.

PRELIMINARY STATEMENT

After the close of discovery and after the Court resolved Bodner's motion for summary judgment (ECF No. 624)[1] (the "Summary Judgment Order")—thereby substantially reducing the amount of damages potentially available to the JOLs—the JOLs raised new theories of disgorgement and consequential damages that were not pleaded in the Second Amended Complaint (ECF No. 285) (the "SAC"), not disclosed in the JOLs' Rule 26(a)(1) disclosures, and not included in the report of the JOLs' damages expert, Ronald G. Quintero. Indeed, it was only in response to Bodner's pretrial motions *in limine* that the JOLs first attempted to expand their claims by raising previously-unasserted theories of disgorgement and consequential damages.

The JOLs' eleventh-hour attempt fails. As set forth below, permitting the JOLs to submit their unpleaded and unpreserved damages theories to the jury would be procedurally improper, unfairly prejudicial and inconsistent with the Court's prior rulings. The JOLs' novel damages theories are also legally unsupportable. For these reasons, the JOLs should not be permitted to present them to the jury. The Motion should be granted.

BACKGROUND

The SAC seeks compensatory and punitive damages from Bodner resulting from the so-called First Scheme (the alleged fraudulent overvaluation of Platinum Partners Value Arbitration Fund L.P.'s ("PPVA") net asset value ("NAV") in an effort to inflate management and incentive

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[1] ECF citations refer to the *Trott* docket, 18 Civ. 10936, unless otherwise noted.

fees) and Second Scheme (the alleged self-dealing transactions designed to strip PPVA of value). (SAC ¶¶ 769-73, 777-781.) There is no claim for disgorgement pleaded in the SAC. Consequential damages are mentioned just once in the SAC: in the Second Scheme allegations, regarding the sale of Agera to Beechwood. (*Id.* at ¶ 671) ("The loss of PPVA's interest in Agera has caused substantial consequential damages in an amount to be determined at trial.").

The JOLs' Rule 26(a)(1) disclosures also do not mention disgorgement, and refer only to "compensatory damages of not less than $1 billion arising out the First Scheme and Second Scheme, including without limitation, Platinum Management's inflated fees, PPVA's inflated NAV, the value of assets diverted from PPVA to the benefit of various defendants, and amounts paid to creditors, all of which are detailed in Plaintiffs' amended complaint. Plaintiffs also seek punitive damages and treble damages."[2] (Ex. 1 at 14). The JOLs "reserve[d] the right to amend and supplement their computation of damages given the voluminous documents and transactions that must be considered in computing Plaintiffs' claim for damages" and "anticipate[d] that expert discovery and testimony will be needed on the issue of damages," but no amendment, supplement or expert ever mentioned disgorgement. (*Id.* at 14-15).

In support of their claim for compensatory damages, the JOLs presented the Quintero report. (ECF No. 634-1). Quintero opines that PPVA's alleged damages as a result of the First Scheme consist of inflated management and incentive fees paid by PPVA, and Quintero purports to calculate those. With respect to purported incentive fee damages, Quintero presented a detailed chart calculating the amounts of allegedly inflated incentive fees by asset within the damages period. (*Id*. at 17 & Ex. 21). While Bodner disputes (i) that the identified assets were fraudulently inflated and (ii) the amount of any inflation, Quintero's charts provide an orderly approach to

[2] Treble damages are no longer at issue after the Court's dismissal of the JOLs' RICO claims.

determining the amount, if any, that incentive fees were inflated during the period of January 2013 to March 2016. Quintero makes no reference to claims for disgorgement or consequential damages.

In the Summary Judgment Order, the Court dismissed all claims against Bodner other than First Scheme claims premised on the alleged overvaluation of PPVA's NAV. (ECF No. 624 at 2, 18, 29, 31, 33; *see also id.* at 42-43). The Court ruled that there was *no* connection between Bodner and the Second Scheme transactions, including the Agera sale. (*See* ECF No. 624 at 27-28). As a result, all Second Scheme claims against Bodner—including claims for damages associated with the Second Scheme—were disposed of in the Summary Judgment Order.

Bodner then filed three motions *in limine*. Bodner's first motion sought to exclude at trial any evidence of incentive fee distributions in 2013 that were made on account of PPVA's lawfully earned and *unchallenged* 2012 NAV (ECF No. 667) (the "Incentive Fee Motion").[3] The Incentive Fee Motion also sought to preclude the JOLs from arguing that Bodner made cash withdrawals from PPVA after September 2014, as the evidence shows none were made. (ECF No. 667).[4] Bodner's second motion *in limine* sought to consolidate the JOLs' eight duplicative claims into a

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[3] The earned and unchallenged 2012 incentive fee was $18,533,635 (inclusive of appreciation during 2012). Ex. 2, Quintero 191030 Capital Accounts Review, Dec. 2012 and Jan. 2013 Tabs. $4,347,243 was distributed in January 2013 to non-party Grosser Lane Management, LLC ("Grosser Lane"), an investment vehicle owned jointly by Bodner and his wife, in the form of limited partnership interests. Grosser Lane redeemed $4,226,469.50 of that amount in cash in 2013 and 2014. Ex. 2, Quintero 191030 Capital Accounts Review, June 2013 and Feb. 2014 Tabs). The JOLs have never stated a claim against Grosser Lane.

[4] This part of the Incentive Fee Motion was necessary to dispose of the false assertion made by the JOLs in opposition to summary judgment—and referenced by the Court in the Summary Judgment Order (at 27)—that Bodner took "millions of dollars in fees and distributions" (ECF No. 573 at 16) from PPVA while he allegedly had knowledge that the NAVs were fraudulently inflated. There is no dispute that Bodner took no cash distributions after the January 2015 dinner that is the focus of the JOLs' case against him. (ECF No. 624 at 20, 25; ECF No. 634-1).

single claim for breach of fiduciary duty (ECF No. 669 at 4) (the "Consolidation Motion"). Bodner's third motion *in limine* sought to preclude references at trial to punitive damages (ECF No. 671) (the "Punitive Damages Motion"). In opposition to Bodner's motions *in limine*, the JOLs asserted previously-unpleaded theories of disgorgement and consequential damages.

Specifically, in opposition to the Incentive Fee Motion (ECF No. 678), the JOLs argued that even if certain incentive fees cannot be recovered as compensatory damages because they were based on uninflated NAV calculations (the "2012 Incentive Fees"), any portion of the 2012 Incentive Fees that was distributed to Bodner during such time that he was allegedly breaching his fiduciary duty is nevertheless "recoverable by the JOLs . . . under the remedy of *disgorgement*." (ECF No. 678 at 2) (emphasis supplied). In support, the JOLs cite cases addressing the so-called "faithless servant" doctrine, whereby an employee or agent must return compensation earned during a period of disloyalty to an employer or principal.

As a second theory of disgorgement, the JOLs argued that even if Bodner did not receive a *cash* distribution of incentive fees after September 2014, Grosser Lane received a *non-cash* allocation of Feeder Fund interests from the General Partner[5] on account of the prior year's incentive fees. The JOLs argue that these Feeder Fund interests, when they were allocated to Grosser Lane, had some value, even if the value was substantially below the notional value

[5] The "Feeder Funds" are the U.S. and Cayman companies that are the limited partners of PPVA, the "Master Fund." The general partner of the Feeder Funds, Platinum Partners Value Arbitrage LP (the "General Partner" or "GP"), is the entity that earned the incentive fees. The General Partner accrued the fees on a monthly basis based on a formula of 20 percent of the appreciation in the NAV of each limited partner's capital account. (*See* ECF No. 646 at 35-36).

reported at that time, and, therefore, can be disgorged from Bodner personally. (ECF No. 678 at 3-4, 13-14).[6] Quintero did not offer any opinion on the value of these Feeder Fund interests.

It is undisputed that these Feeder Fund interests were never redeemed for cash, nor could they have been, given the liquidity constraints at PPVA. It is likewise undisputed that these Feeder Fund interests presently have no known value and exist as worthless or near worthless claims in the PPVA liquidation. Accordingly, the JOLs' new disgorgement theory is that Bodner can somehow be required to come up with current cash to disgorge whatever the fair value of the Feeder Fund interests was in 2014 and 2015.

In opposition to the Incentive Fee Motion, the JOLs also argued for the first time that "PPVA is entitled to . . . *consequential damages* that are directly related and are a foreseeable result of the overvaluation and failure to disclose the overvaluation." (ECF No. 678 at 4) (emphasis added). The JOLs then argued that Bodner could be liable for consequential damages from "the sale of PPVA's indirect ownership interest in Agera Energy to Beechwood at an unconscionable discount" (ECF No. 680 at 1 n.2), notwithstanding the Court's explicit summary judgment ruling that Bodner had no connection to the Agera sale. (*See* ECF No. 624 at 27-28).

ARGUMENT

I. THE JOLS' FAILURE TO PLEAD OR DISCLOSE THEIR THEORIES OF DISGORGEMENT AND CONSEQUENTIAL DAMAGES PRECLUDES RELIANCE ON SUCH THEORIES AT TRIAL

The JOLs should be precluded from introducing at trial argument or evidence in support of their theories of disgorgement and consequential damages, neither of which was timely pleaded or disclosed. It is well-established that a complaint must "give each defendant fair notice of what the

[6] The General Partner allocated $301,698 in Feeder Fund interests to Grosser Lane in January 2014 based upon the 2013 NAVs, and $1,381,837 in Feeder Fund interests in January 2015 based upon the 2014 NAVs.

plaintiff's claim is and the ground upon which it rests." *Atuahene v. City of Hartford*, 10 F. App'x 33, 34 (2d Cir. 2001) (internal citation omitted); *see also Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). In addition, Federal Rule of Civil Procedure 26(a) requires a plaintiff to disclose "a computation of *each category of damages* claimed by the disclosing party—who must also make available for inspection and copying as under Rule 34 the documents or other evidentiary material . . . on which each computation is based, including materials bearing on the nature and extent of injuries suffered." FED. R. CIV. P. 26(a)(1)(A) (emphasis supplied); *see also LaMonica v. CEVA Grp. PLC (In re CIL Ltd.)*, 2019 Bankr. LEXIS 1179, at *63 (Bankr. S.D.N.Y. Apr. 8, 2019) ("It was incumbent upon the Trustee to disclose the universe of the damages he is seeking in this action and provide a computation of such damages."); *Funk v. Belneftekhim & Belneftekhim USA, Inc.*, 14-cv-376 (BMC), 2020 U.S. Dist. LEXIS 241978, at *9-11 (E.D.N.Y. Dec. 22, 2020) (citing Rule 26 damages disclosure requirements); *Serin v. Northern Leasing Sys.*, No. 7:06-CV-1625, 2010 U.S. Dist. LEXIS 142713, at *3 (S.D.N.Y. Oct. 25, 2010) (required disclosures "are not 'meaningless rituals.'").

Rule 37(c) enforces Rule 26(a) 's mandatory disclosure requirements by providing that a party may not use at trial information or a witness that it failed to properly disclose, "unless the failure was substantially justified or is harmless." FED. R. CIV. P. 37(c)(1). "[C]ase law supports application of [Rule 37] to failure to disclose damage theories in the Rule 26(a)(1)(C) initial disclosure." *Funk*, 2020 U.S. Dist. LEXIS 241978, at *10-11 (citation omitted); *see also Austrian Airlines Oesterreichische Lufverkehrs AG v. UT Fin. Corp.*, No. 04 Civ. 3854 (RCC) (AJP), 2005 U.S. Dist. LEXIS 7283, at *4-5, *9 (S.D.N.Y. Apr. 28, 2005) (collecting cases, noting that "Rule 37 requires virtually automatic preclusion of information not disclosed pursuant to Rule 26(a)(1),"

and holding that plaintiff should have disclosed damages theory in initial disclosures even if it could not yet calculate damages).

Here, the JOLs failed to plead their theories of disgorgement and consequential damages in the SAC and failed to disclose them in their Rule 26(a)(1) disclosures. It was not until their oppositions to Bodner's motions *in limine* that the JOLs first advanced these damages theories. Disclosure of two new damages theories at this late stage of the litigation is not "substantially justified or harmless." FED. R. CIV. P. 37(c)(1). To the contrary, the JOLs offer no justification for their failure to disclose and Bodner will suffer meaningful prejudice from the late introduction of new damages theories, including because he lost the opportunity to challenge those theories during discovery. *See Funk*, 2020 U.S. Dist. LEXIS 241978, at *15-16 ("Reversing course [on failure to disclose Rule 26(a) damages information] would prejudice defendants," as "discovery had long since closed, and defendants had lost their opportunity to probe the adequacy of this theory" and "[t]his is the type of prejudice that Rule 26 seeks to prevent"); *see also Spotnana, Inc. v. Am. Talent Agency, Inc.*, 09 Civ. 3698 (LAP), 2010 U.S. Dist. LEXIS 86457, at *2-5 (S.D.N.Y. Aug. 17, 2010) (precluding damages counterclaim where defendant failed to provide damages figures in its initial disclosure, failed to supplement this incomplete initial disclosure, and discovery had been closed for four months); *Oceans Cuisine, Ltd. v. Fishery Prods. Int'l, Inc.*, 05-CV-3613 (DRH) (AKT), 2006 U.S. Dist. LEXIS 22133, at *16-17 (E.D.N.Y. Apr. 21, 2006) (affirming magistrate court's sanctions on plaintiff for failing to provide statement of damages in initial disclosures and then attempting to assert new theory of damages after discovery cutoff).

Courts in this circuit have dismissed belated disgorgement claims at even earlier stages of litigation, where, as here, defendants lacked fair notice of the claims. In *Mortgage Resolution Servicing, LLC v. JPMorgan Chase Bank*, the court dismissed plaintiff's disgorgement claim at

summary judgment where plaintiffs first proffered the claim through an expert report. No. 15 CV 293-LTS-RWL, 2019 U.S. Dist. LEXIS 167845, at *12-13, 32 (S.D.N.Y. Sept. 27, 2019). The court held that the complaint only sought "compensatory and punitive damages," which were "not sufficient to give [defendant] fair notice that [p]laintiffs intended to assert a claim against [defendant] for disgorgement." *Id.* at *32. Furthermore, the plaintiffs could "offer no explanation for their failure to include this theory in their initial disclosures pursuant to Federal Rule of Civil Procedure 26(a)(1)." *Id.*

Likewise, here, the JOLs only sought compensatory and punitive damages for their claims against Bodner. (SAC ¶¶ 769-73; ¶¶ 777-781). The JOLs did not state a claim for disgorgement (or consequential damages) in their Rule 26(a)(1) initial disclosures, let alone provide a computation or any supporting materials. Instead, they claimed they were seeking "*compensatory damages* of not less than $1 billion." (Ex. 1) (emphasis supplied). Disgorgement cannot be considered "compensatory" to PPVA. PPVA's claim for compensatory damages is and always has been the *inflated* portion of any *cash* payment by PPVA on account of incentive or management fees. (SAC Counts 1-16, ¶¶ 18-19, 22). Allowing this late theory would therefore be substantially prejudicial to Bodner.

In particular, because the JOLs never disclosed that they would seek to disgorge the value of the Feeder Fund interests (about which Quintero never opined), Bodner never had the opportunity to develop a factual record addressing the negligible value of those interests at the time they were allocated, or to introduce expert opinion regarding their fair value at that or any later date. Clearly, today they are worth virtually nothing. But even at the time the General Partner distributed them—if that is in fact the appropriate measurement date—they were partnership interests in a closely-held hedge fund that was operating with low liquidity, and which could not

honor redemptions in any substantial amount. A fair value assessment of the Feeder Fund interests would have to be discounted even further to reflect that there was no market for them—they were unassignable under the fund documents—and because they could not be liquidated on any predictable time frame. There is no lay or expert testimony available on these issues because the JOLs did not plead or timely disclose the theory in this case. Thus, the unpleaded and belated claims for disgorgement should not be permitted at trial.

Bodner is similarly prejudiced by the JOLs' failure to plead or disclose a claim for consequential damages. Because the JOLs never pleaded the Second Scheme damages as the consequential result of the First Scheme, Bodner had no need during discovery to go beyond his lack of connection to the Second Scheme transactions. Further, had the JOLs even hinted at the purported consequential damages link between the First and Second Schemes, Bodner would have challenged the claim in his summary judgment motion. Bodner had no notice that he would still somehow have to address, under the guise of the First Scheme, all Second Scheme transactions that this Court expressly dismissed in the Summary Judgment Order.

II. THE JOLS' UNPLEADED DISGORGEMENT THEORY FAILS ON ITS MERITS

The JOLs' disgorgement theory also fails because it is unsupportable as a matter of law.

A. The JOLs Cannot Disgorge From Bodner Personally What He Did Not Receive Personally

The JOLs stated in opposition to the Incentive Fee Motion that "[a]t 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 $9.8 million." (ECF No. 678 at n.5). Bodner's family members and entities, however, are not parties to this lawsuit. The JOLs sued Bodner and Bodner alone. The JOLs cannot assert disgorgement claims against nonparties solely because of their familial or

other connection to Bodner. *See, e.g., Sec. Investor Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC*, 12 MC 115 (JSR), 2013 U.S. Dist. LEXIS 172638, at *46-47 (S.D.N.Y. Dec. 5, 2013) ("*Madoff*") (Rakoff, D.J.) (rejecting claims against "spouses solely by virtue of their marriage to, and their receiving of joint transfers with, corporate insiders.").

The JOLs offer no basis or even a working theory as to how Bodner personally could be forced to disgorge the value of the Feeder Fund interests, or cash for that matter, received by Grosser Lane or by his family members. This Court recognized in *Madoff* that while there are certain limited circumstances where a defendant must disgorge profits received by non-parties associated with the defendant, that remedy is limited to a government enforcement context, and the law enforcement considerations at play in those cases do not apply in a private civil action. *Id.* at 50-51 (citing *SEC v. Cavanagh*, 155 F.3d 129, 137 (2d. Cir. 1998), and noting "the statutory right of the SEC, as a regulatory entity, to seek disgorgement of ill-gotten gains is a different matter entirely from the Trustee's assertion of standing to bring common law claims in order to claim additional funds on behalf of a bankruptcy estate."). The Supreme Court has recognized that "[t]he rule against joint-and-several liability for profits that have accrued to another appears throughout equity cases awarding profits," because defendants should be "liable to account for such profits only as have accrued to themselves." *Liu v. SEC*, 140 S. Ct. 1936, 1945, 1949 (2020) (quoting *Belknap v. Schild*, 161 U.S. 10, 25-26 (1896), and collecting cases); *see also SEC v. Yin*, No. 17-CV-972 (JPO), 2020 U.S. Dist. LEXIS 216786, at *27-29 (S.D.N.Y. Nov. 19, 2020) ("Recent case law . . . casts serious doubt on the Court's authority to disgorge innocent parties' investment profits, even if they flow from a culpable party's misconduct.") (citing *Liu*).

Furthermore, if the JOLs did have a theory on that front—for example, that Grosser Lane was Bodner's alter ego—it was incumbent upon them to plead that theory or at the very least

disclose it in their initial disclosures. They did neither. As a result, Bodner had no opportunity to present facts and argument to address the theory at summary judgment. The JOLs cannot advance it now.

B. Bodner Was Never A "Faithless Servant" of PPVA, And, In Any Case, the 2012 Incentive Fees Are Apportionable from any Period of Alleged Disloyalty

The "faithless servant doctrine" upon which the JOLs' disgorgement theory is based (*see* ECF No. 678 at 9-10) is completely inapplicable to Bodner. "New York's faithless servant doctrine holds that one who owes a duty of fidelity to a principal and who is faithless in the performance of his services is generally disentitled to recover his compensation." *Yukos Capital S.A.R.L. v. Feldman*, 977 F.3d 216, 229 (2d Cir. 2020) (internal citation omitted). It is well-settled, however, that the allegedly faithless party must have been an employee or agent of the plaintiff for a faithless servant claim to proceed. *See Fed. Ins. Co. v. Mertz*, 12-cv-1597-NSR-JCM, 2015 U.S. Dist. LEXIS 132690, at *12 (S.D.N.Y. Sept. 29, 2015) ("Absent an agency or employment relationship," the "faithless servant claim fails as a matter of law"); s*ee also Elia v. Perla*, No. 603535-13, 2015 N.Y. Misc. LEXIS 5213, at *23-24 (Sup. Ct. Nassau Cty. Sept. 21, 2015) (finding faithless servant action "not viable because Plaintiff has not alleged the existence of a principal/agency or employer/employee relationship").

Bodner was never an employee or agent of PPVA. The Court confirmed in its summary judgment ruling that "[i]t is undisputed that Bodner was not a managing member, officer, or employee of Platinum Management." (ECF No. 624 at 22-23). While the JOLs also rely on cases supporting disgorgement of improper gains of corporate officers and directors, Bodner was never an officer or director. Nor was he "constructively" an employee or agent under the doctrine because PPVA did not control him. *See Rudin v. Talisman, Rudin & DeLorenz, P.C.*, 14 Misc. 3d

1218(A) at *1218A (Sup. Ct. N.Y. Cty. 2005) ("[A]bsent any provision for control of" defendant, agreement did not create employment relationship).

Bodner's sole connection to PPVA was indirect. Grosser Lane, of which he held a 50 percent interest, held a minority beneficial interest in the fees earned by the General Partner. The Court determined at summary judgment that a triable issue exists as to whether Bodner took on a fiduciary role by exerting control over PPVA's affairs. (ECF No. 624 at 25-26). There is no triable issue as to whether Bodner was controlled *by* PPVA and thus could be deemed a constructive employee or agent subject to the faithless servant doctrine.

The JOLs' disgorgement theory should be barred for the additional reason that New York law holds that even a "faithless servant" is entitled to retain remuneration he received during a period of disloyalty where, as here, the remuneration is "apportionable" from the disloyal conduct. "[W]here compensation is expressly allocated among discrete tasks," an "employee may keep compensation derived from any transactions that were *separate from* and *untainted by the disloyalty*." *Shamrock Power Sales, LLC v. Scherer*, No. 12-CV-8959 (KMK), 2015 U.S. Dist. LEXIS 133650, at *84 (S.D.N.Y. Sept. 30, 2015) (emphasis supplied) (internal citation omitted); *see also Design Strategies, Inc. v. Davis*, 384 F. Supp. 2d 649, 669 (S.D.N.Y. 2005) (apportioning untainted commission payments from disgorgement of salary paid during employee's period of disloyalty). Apportioned compensation must meet three qualifications: "(1) the parties must have agreed that the agent will be paid on a task-by-task basis, for example a commission on sales, (2) the agent engaged in no misconduct at all with respect to certain tasks, and (3) the agent's disloyalty with respect to other tasks neither tainted nor interfered with the completion of the tasks as to which the agent was loyal." *Shamrock Power Sales*, 2015 U.S. Dist. LEXIS 133650, at *84 (citation omitted).

Here, the General Partner distributed $4,226,469.50 in cash to Grosser Lane in 2013 and 2014 on account of 2012 Incentive Fees. On the first *Shamrock* prong, the 2012 Incentive Fees were accrued by the General Partner on a monthly basis during 2012. (ECF No. 667 at 6). Grosser Lane had a contractual right, via the Mark Nordlicht Grantor Trust, to a percentage of those accrued fees. That right was vested and enforceable as of December 31, 2012, and was discrete from, and not dependent upon, any later-period performance. *Accord Mosionzhnik v. Chowaiki*, 41 Misc. 3d 822, 832 (Sup. Ct. N.Y. Cty. 2013) (holding that fair market value of faithless servant's equity shares was "not impaired by her bad acts because her equity is not compensation for her services and not dependent on her job performance"). Likewise, to the second and third prongs, there is no assertion of wrongdoing by Bodner (or by Grosser Lane) in 2012.

Therefore, even if the JOLs can prove that Bodner was a "servant" of PPVA and that, in 2013, he learned but failed to disclose that Platinum Management was inflating the NAV, that has nothing to do with his loyalty in 2012, nor in any way taints the 2012 NAV calculations. Accordingly, because the 2012 Incentive Fees are "separate from and untainted by" any alleged later act of disloyalty, they should be apportioned under *Shamrock*, 2015 U.S. Dist. LEXIS 133650, at *84, and excluded from trial.

III. THE JOLS' UNPLEADED CONSEQUENTIAL DAMAGES THEORY IS BARRED BY LAW OF THE CASE

In addition to being procedurally improper, the JOLs' theory of consequential damages is also barred by the law of the case doctrine. "Under the law of the case doctrine, a determination by the Court at one stage of a proceeding becomes the 'law of the case' to be followed in successive stages of the same litigation, thus ensuring 'the orderly progress of court proceedings.'" *Nat'l Union Fire Ins. Co. v. L.E. Myers Co. Grp.*, 937 F. Supp. 276, 284 (S.D.N.Y. 1996). Evidence may not be introduced at trial that contradicts the Court's explicit legal determinations at summary

judgment. *Id.* at 286; *see also MF Global Holdings Ltd. v. PricewaterhouseCoopers LLP*, 232 F. Supp. 3d 558, 570-71 (S.D.N.Y. 2017) (granting motion *in limine* to exclude evidence when summary judgment ruling had conclusively decided the issue); *Washington v. Kellwood Co.*, 05-CV-10034 (SN), 2016 U.S. Dist. LEXIS 120028, at *4 (S.D.N.Y. Sept. 6, 2016) (discussing law-of-the-case doctrine).

The JOLs' unpleaded consequential damages theory for losses allegedly sustained in the Second Scheme transactions is only viable as to Bodner if the JOLs have evidence connecting Bodner in some causative way to the Second Scheme. *See Refco Inc. Sec. Litig. v. Aaron*, 826 F. Supp. 2d 478, 514 (S.D.N.Y. 2010) (plaintiff seeking damages for breach of fiduciary duty must prove proximate cause) (citing *LNC Invs. v. First Bank, N.A.*, 173 F.3d 454, 465 (2d Cir. 1999)). Yet, the Court expressly ruled in the Summary Judgment Order there was no such connection. (Summ. J. Order, ECF No. 624 at 27) ("[N]o evidence connects Bodner to any of the more specific self-dealing transactions at issue in this action"). It follows that Bodner could not have caused any damages, either directly or proximately, from "insider transactions that Platinum Management (NY) LLC coordinated with its alter ego, Beechwood, arising out of the overvaluation scheme." (ECF No. 680 at n.2). If the JOLs had facts connecting Bodner, including the assertion that the First Scheme omission created the connection, it was incumbent upon them to offer that evidence in opposition to summary judgment. The JOLs cannot now try this claim as if it has not been dismissed. *See National Union,* 937 F. Supp. at 286. The JOLs' theories of consequential damages should be excluded from evidence and argument at trial.

CONCLUSION

Bodner respectfully requests that the Motion be granted.

Dated: November 4, 2022
New York, New York

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