UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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| 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 EXCLUDE EVIDENCE: (1) OF UNRELATED MATTERS THAT OCCURRED 17 TO 30 YEARS AGO; AND (2) REGARDING CLAIMS DISMISSED AT SUMMARY JUDGMENT**

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Defendant David Bodner respectfully moves *in limine* to exclude, under Federal Rules of Evidence 402, 608 and 609, evidence of a misdemeanor conviction and civil settlements that occurred between 1992 and 2005. Bodner also seeks to exclude under Rule 402 evidence concerning claims that did not survive the Court's summary judgment ruling (ECF No. 624) (the "Summary Judgment Order") and are no longer in the case.[1]

## PRELIMINARY STATEMENT

As a result of the Summary Judgment Order, the sole triable claim against Bodner is that he learned at some point that PPVA's net asset value ("NAV") statements were fraudulently inflated and subsequently failed to disclose what he allegedly learned. (Summary Judgment Order at 26, 31 and 33). The Court held that Bodner's failure to disclose is actionable if he is deemed a fiduciary of PPVA. (*Id.* at 26).[2]

Notwithstanding that limited scope of triable facts, Bodner understands that plaintiffs, the Joint Official Liquidators ("JOLs"), will seek to elicit trial testimony from him or other witnesses about the following thirty-year-old misdemeanor conviction and two settlements with the SEC and FDIC, respectively, which did not contain acknowledgements of wrongdoing and which have no relevance to the issues to be tried:

- in 1992, David Bodner and Murray Huberfeld entered guilty pleas in the Eastern District of New York, admitting to having another person take their Series 7 securities license exams;
- in 1998, Bodner, Huberfeld, and their company, Broad Capital, entered a settlement with the SEC, on a "neither admit nor deny" basis, regarding Broad Capital's purported failure to file a requisite disclosure form; and
- in 2005, Bodner was a party to a settlement agreement with the FDIC and the Federal Reserve Bank of New York ("New York Reserve") regarding

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

[2] Also triable is Bodner's affirmative defense based on the written Release Agreement. (ECF No. 624 at 21-22).

> Bodner's alleged failure to obtain regulatory approval before his wife invested in an FDIC-insured bank.

The JOLs should be prohibited from making any reference to these irrelevant matters.[3] The misdemeanor is more than ten years old and is time-barred under Rule 609(b). The SEC and FDIC settlements are barred by Rule 608(b), and no cross-examination should be permitted because they have nothing to do with truthfulness. Also, the law is clear that private civil settlements with no admission of wrongdoing are not evidence of the settled claims, and cannot be offered as such.

Finally, the JOLs' pretrial disclosures pursuant to Federal Rule of Civil Procedure Rule 26(a)(3) indicate a refusal to accept the limited scope of claims that survived summary judgment. Their exhibit list contains hundreds of non-valuation-related documents concerning, for example, Beechwood, Black Elk Opportunity Fund ("BEOF"), the Agera sale, the Black Elk scheme, and the Montsant transactions. It also contains hundreds of documents relating to PPVA's stake in Over Everything and China Horizon, which positions the Court held in its *Daubert* Order could not be the subject of expert proof due to faulty valuation methodologies. None of this evidence is relevant to the actual triable issues, and should therefore be excluded under Rule 402.

## STATEMENT OF FACTS

### A. The 1992 Misdemeanor

In 1992, Bodner was accused of having another person take his Series 7 securities licensing exam for him. (Exhibit A, Bodner Tr., at 350:24-352:9). On July 28, 1992, Bodner pleaded guilty in the United States District Court in the Eastern District of New York to the

[3] The JOLs have not offered exhibits relating to the misdemeanor or these settlements in pre-trial disclosures but have stated that they will seek to elicit testimony.

misdemeanor of illegal possession of a false identification document in connection with taking a government-administered exam. (*U.S. v. Bodner*, 92 Cr. 00757 (JLC), ECF No. 2). Bodner was sentenced to probation for two years and fined $5,000. (*Id.*, ECF No. 5). His probation was terminated as of December 6, 1993. (*Id.*, ECF No. 16). Bodner was not suspended or barred, nor was he subject to any regulatory action relating to this incident.

**B. The 1998 SEC Settlement**

Broad Capital was a business partnership in which Bodner made investments with Murray Huberfeld. (Exhibit A, Bodner Tr., at 26:16-24; 503:21-23). In or about 1998, the SEC alleged that Broad Capital had failed to file a requisite disclosure stating that it had acquired more than five percent of the outstanding shares of a public company, as required by Regulation 13D and the Exchange Act. (Exhibit B, Huberfeld Tr., at 556:18-557:14). Broad Capital, Huberfeld, and Bodner entered a settlement with the SEC, neither admitting nor denying the SEC's allegations, and agreeing to pay a fine. (*Id.* at 556:18-558:06).

**C. The 2005 FDIC Matter**

In or about 2004, the FDIC alleged that Bodner failed to comply with Section 19 of the Federal Deposit Insurance Act (12 U.S.C. § 1829) by failing to obtain prior approval before assisting his wife in acquiring half of a 25 percent interest in a federally insured bank. (Exhibit C, Bodner Dep. Ex. 377, Tab 138; Exhibit A, Bodner Tr., at 352:5-15). Bodner entered into an agreement with the New York Reserve and the FDIC on February 18, 2005, in which he agreed to seek the prior written consent of the FDIC before acquiring or participating in the business of an FDIC-insured bank. (Exhibit C). Bodner did not admit to any wrongdoing in the FDIC agreement.

# ARGUMENT

## I. BODNER'S 1992 MISDEMEANOR SHOULD BE EXCLUDED

### A. It is Time-Barred under the Ten-Year Limit in Rule 609(b)

Under Rule 609, a witness may be impeached with evidence of a prior conviction that involves "dishonesty or false statement." *Olin Corp. v. Certain Underwriters at Lloyd's,* 468 F.3d 120, 135 (2d Cir. 2006). But, if over ten years have passed since the conviction, evidence of the conviction is generally inadmissible. *Id.; see also* Fed. R. Evid. 609(b). Such evidence is only admissible for impeachment purposes if its probative value "substantially outweighs the prejudicial impact." *Olin*, 468 F.3d at 135 (finding the probative value of an old conviction did not outweigh its prejudicial impact). "Convictions over 10 years old will be admitted very rarely and only in exceptional circumstances," because "convictions over ten years old generally do not have much probative value." Fed. R. Evid. 609(b) advisory committee's note (emphasis added); *see also United States v. Brown*, 606 F. Supp. 2d 306, 313 (E.D.N.Y. 2009) ("[T]he heightened standard of Rule 609(b) requires that the evidence has a greater probative value than that required under Rule 609(a)" for conviction less than ten years old).

To determine whether the facts and circumstances of a conviction demonstrate that the probative value of the evidence substantially outweighs the prejudicial effect, courts in the Second Circuit will consider: (i) the impeachment value of the crime, (ii) its remoteness in time, (iii) similarity between the crime and the conduct at issue and (iv) the importance of witness credibility. *Satterfield v. Maldonado*, 14 Civ. 0627 (JCF), 2016 U.S. Dist. LEXIS 30779, at *5 (S.D.N.Y. Mar. 10, 2016) (granting motion *in limine* in personal injury action, excluding evidence of defendant's driving record and convictions for petit larceny and manslaughter).

To determine the impeachment value of a prior conviction, courts consider the "the nature, age, and severity of the crime . . . and whether the defendant has 'mended his ways' or engaged in similar conduct more recently." *Daniels v. Loizzo*, 986 F. Supp. 245, 252 (S.D.N.Y. 1997) (in excessive force case, excluding evidence of 13-year-old drug conviction). The older a conviction, the less probative value it provides. *See*, *e.g.*, *Broadspring, Inc. v. Congoo, LLC*, 13-CV-1866 (JMF), 2014 U.S. Dist. LEXIS 177838, at *14 (S.D.N.Y. Dec. 29, 2014) (excluding evidence of nearly 25-year-old convictions and finding that the potential probative value was substantially outweighed by the dangers of unfair prejudice, wasting time, and juror confusion); *Wright v. Aargo Sec. Servs.*, 99 Civ. 9115 (CSH), 2001 U.S. Dist. LEXIS 13891, at *14-15 (S.D.N.Y. Sep. 6, 2001) (in employment litigation, finding the probative value of a 20-year-old attempted arson conviction "slight" and ultimately excluding it).

Prior convictions are generally unduly prejudicial where they "suggest[] that the party has a propensity to commit such acts." *Daniels*, 986 F. Supp. at 251; *United States v. Vasquez*, 840 F. Supp. 2d 564, 571 (E.D.N.Y. 2011) (excluding drug convictions in a gun case because jurors may unfairly link the two). Finally, to consider the importance of witness credibility, the Court must consider the other evidence that will be offered at trial. Unless "there is little other documentary or supporting evidence and 'the success at trial probably hinges entirely on [the witness's] credibility with the jury,'" the prior conviction should not be admitted. *See id.* at 572.

Application of these factors here compels exclusion. The 1992 misdemeanor is highly remote and has little or no impeachment value. It was an isolated incident, Bodner has done nothing like it since, and he has lived a law-abiding life as a businessman, philanthropist, and pillar of his community. The only purpose for which the JOLs would offer such evidence is

to prejudice the jury into thinking that Bodner has a propensity to cheat or lie for advantage. The JOLs hope the jury would improperly conflate the dishonesty associated with the 1992 incident with the JOLs' assertion that, decades later, he willfully failed to disclose his alleged knowledge that PPVA's NAV was overstated. (ECF No. 624, at 26).[4] Rule 609(b) offers a safeguard against such improper associations.

Further, this is not a he-said/she-said case where the jury's determination is based solely on Bodner's credibility. Bodner is accused of accepting fiduciary responsibility to a registered investment advisor with mandatory record-keeping rules. The JOLs have the ability to elicit testimony from the dozen or more officers and employees of Platinum Management deposed in this case as to Bodner's role (and lack thereof) with respect to PPVA, and the ability to search millions of documents and emails exchanged in discovery. The JOLs' ability (or inability) to prove their case hinges on whether there is evidence establishing Bodner's control or knowledge of fraud, or his lack thereof, and is not solely dependent upon Bodner's credibility. Evidence of the 1992 misdemeanor should be excluded under Rule 609(b).

In recent discussions with counsel and Chambers, the JOLs have previewed their intention to argue that Bodner's 1992 misdemeanor should come in to explain to the jury why Bodner was not listed as a Platinum officer or employee. This fanciful theory has no basis in the record or in reality. Bodner was never barred or suspended, whether by the SEC or any other regulatory authority, from serving as a corporate officer, director, executive, or investment advisor. There was no regulatory issue. Indeed, Murray Huberfeld—who was also convicted of

[4] Jurors may also have outsized reactions about dishonesty in test-taking. Recent years brought prominent press coverage of allegations that the former President paid a stand-in to take the SAT exam for him, *see*, *e.g.*, https://www.nytimes.com/2020/07/07/us/politics/mary-trump-book.html; and in the college admissions cases brought against prominent celebrities who procured admissions for their children, *see*, *e.g.*, https://www.nytimes.com/2019/03/21/learning/what-students-are-saying-about-the-college-admissions-cheating-scandal.html

the 1992 misdemeanor—was chief investment officer of another Platinum fund, Centurion Credit, the predecessor of Platinum Partners Credit Opportunities Fund LLC, from about 2006 until 2011. His name and position were disclosed in SEC filings as Centurion's Executive Officer, and he signed those filings on Centurion's behalf.[5] The JOLs' contention that Bodner was somehow "in hiding" as a result of the misdemeanor is an invention. The misdemeanor has zero probative value, is being offered solely to prejudice, and should be excluded under Rule 609(b).

**B. Evidence of the Misdemeanor Is Barred Under Rule 608(b), and the Court Should Not Permit Cross-Examination Regarding It**

Under Rule 608(b), "extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness." Thus, insofar as the JOLs seek to offer evidence of the incident for the purpose of establishing Bodner's ability to be deceptive, it must be excluded. And while Rule 608(b) may permit cross-examination of a specific extrinsic incident regarding the truthfulness of the witness, district courts in the Second Circuit have exercised their discretion to disallow cross-examination regarding prior convictions where allowing the question would constitute an end-run around the ten-year time bar of Rule 609(b). *United States v. Calderon-Urbina*, 756 F. Supp. 2d 566, 569 (S.D.N.Y. 2010) (barring defendants from cross-examination of a confidential informant's twelve-year-old conviction).

In addition, Rule 608(b) is analyzed in conjunction with Rule 403. *United States v. Schlussel*, 08 Cr. 694 (JFK), 2009 U.S. Dist. LEXIS 54876, at *8 (S.D.N.Y. Feb. 27, 2009);

[5] *See* Exhibit D (Jan. 4, 2011 *Hedge Funds Review* article); *see also* https://www.sec.gov/Archives/edgar/data/1459657/000145965710000002/xslFormDX01/primary_doc.xml (Centurion Form D); https://www.sec.gov/Archives/edgar/data/1459658/000145965810000002/xslFormDX01/primary_doc.xml (Centurion Form D).

see *also United States v. Schwab*, 886 F.2d 509, 513 (2d Cir. 1989). Here, for the reasons stated above, the incident has zero probative value given it occurred three decades ago, yet it presents a substantial risk of unfair prejudice. The JOLs should not be permitted to offer evidence of, or elicit any testimony, concerning the 1992 misdemeanor.

## II. THE SEC AND FDIC MATTERS SHOULD LIKEWISE BE EXCLUDED

Any reference at trial to the SEC and FDIC settlements, or testimony regarding the underlying conduct, should also be excluded. A settlement agreement without an adverse finding is not probative of a witness's truthfulness. *United States v. Ahmed*, No. 14-cr-277 (DLI), 2016 U.S. Dist. LEXIS 86373, at *8-9 (E.D.N.Y. July 1, 2016). Moreover, settlement agreements with governmental agencies, when resolved without admissions of guilt, "cannot be used as evidence in subsequent litigation." *Lipsky v. Commonwealth United Corp.*, 551 F.2d 887, 893 (2d Cir. 1976) (holding that SEC consent decree was the result of a "private bargaining," and not an adjudication on the merits or otherwise evidencing the truth of the SEC's allegations); *see also Barron Partners, LP v. Lab123, Inc.*, 07 Civ. 11135 (JSR), 2008 U.S. Dist. LEXIS 106813, at *10 (S.D.N.Y. Jan. 20, 2008) (consent decree had no bearing on the witness's character for truthfulness because it was not a "true adjudication of the underlying issues").

Testimony regarding these settlements would be elicited solely to confuse and prejudice the jury, and would invite a mini-trial as to whether Bodner had in fact complied with the relevant technical regulations even though compliance with those regulations has nothing to do with the issues in this case. The underlying conduct and the settlement agreements themselves are irrelevant to this case.

Nor should the JOLs be permitted to question Bodner about the underlying conduct on cross-examination under Rule 608(b). Neither matter evidences "untruthfulness" by Bodner; the SEC settlement is merely a resolution by Bodner of a claim that he failed to make a

disclosure that Broad Capital had acquired more than 5 percent of a public company's outstanding stock. And the FDIC settlement constitutes a resolution of that agency's claim that he should have obtained consent before he assisted his wife as part of a group that acquired more than 25 percent of an insured bank. Neither evinces any act of dishonesty. Neither contains any acknowledgement or admission that the claims are true. As such, any reference to the SEC settlement and the FDIC agreement should be excluded.

## III. MATTERS ALREADY ADJUDICATED SHOULD BE EXCLUDED FROM THIS TRIAL

The JOLs seem to pretend that the Court's Summary Judgment Order and *Daubert* Order never occurred. In those orders, the Court definitively determined matters involving the creation and capitalization of, and related-party transactions involving, Beechwood and BEOF, the Agera sale, the Black Elk scheme, and the Montsant transactions, on which summary judgment was granted for Bodner (*see* Summary Judgment Order at 18, 27-29); and the valuations of Over Everything and China Horizon, which were excluded from expert testimony in the *Daubert* Order (at 21). Nonetheless, the JOLs' Rule 26(a)(3) pretrial disclosures include hundreds of exhibits relating to these matters that were adjudicated in Bodner's favor and excluded from the JOLs' case. The JOLs' pretrial disclosures also appear to list witnesses whose testimony would concern these irrelevant and already-adjudicated issues.

Moreover, astonishingly, in their Second Set of Motions *in Limine* filed on November 16, 2022 (ECF No. 748), the JOLs argue that the criminal convictions of nonparties Mark Nordlicht, David Levy, and Daniel Small relating to the Black Elk scheme should have collateral estoppel effect against Bodner—even though, as this Court wrote in the Summary Judgment Order, "no evidence connects Bodner specifically to the amendment of the Black Elk

Indenture, the Consent Solicitation, or any other aspect of the Black Elk scheme." (Summary Judgment Order at 28.)

The only claim against Bodner to survive summary judgment is that he "owed a fiduciary duty to PPVA," came to have actual knowledge that PPVA's NAV was fraudulently inflated, and "breached [his] fiduciary duty by failing to disclose the overvaluations of PPVA's NAVs." (Summary Judgment Order at 24-25). The JOLs can, consistent with the *Daubert* Order, offer expert opinion that six assets were fraudulently inflated in the relevant period: Black Elk, Desert Hawk, Golden Gate, Northstar, PEDEVCO, and the Michael Goldberg notes receivable. No other position, and no other claim, is relevant in this trial.

**CONCLUSION**

Bodner respectfully requests that the Motion be granted.

Dated: November 16, 2022
New York, NY

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