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' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT DAVID BODNER'S FOURTH MOTION *IN LIMINE* TO PRECLUDE ARGUMENT OR EVIDENCE IN SUPPORT OF PLAINTIFFS' THEORIES FOR DISGORGEMENT AND CONSEQUENTIAL DAMAGES

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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 "**JOLs**"), and Platinum Partners Value Arbitrage Fund L.P. (in Official Liquidation) ("**PPVA**") (collectively, the "**JOLs**") submit this memorandum of law in opposition to the Fourth Motion *In Limine* of David Bodner ("**Bodner**") to "preclude argument or evidence in support of the JOLS" purportedly "belated and unpleaded theories of disgorgement and consequential damages" (the "**Motion**"). ECF Nos. 746, 747.[1]

OVERVIEW

At the heart of Bodner's Motion is the astounding argument that the JOLs should be precluded from presenting argument or evidence in support of "previously unasserted theories of disgorgement" and "consequential damages" at the upcoming trial in this action. Commencing with this faulty premise, Bodner argues that "the JOLs' novel damages are also legally unsupportable." *See* Bodner Memorandum of Law ("**Bodner Mem.**") at 1. Bodner's Motion should be rejected for, *inter alia*, the following reasons.

First, the JOLs' claims against Bodner and other fiduciaries at Platinum Management (NY) LLC ("**Platinum Management**") sought the recovery of any and all fees, distributions or other interests of any kind received by Bodner and the other fiduciaries, including management fees, incentive fees, distributions and non-cash limited partnership interests received by Bodner and the other fiduciaries. Indeed, this Court's Decision denying in part Bodner's motion for summary judgment concluded (ECF No. 624 at 26-27):

> Assuming Bodner owed a fiduciary duty to PPVA, the Court finds that there is a genuine dispute of whether Bodner breached that fiduciary duty by failing to disclose the overvaluations of PPVA's NAVs when he admittedly had

[1] All docket citations refer to the case captioned *Trott v. Platinum Management (NY) LLC*, No. 18-cv-10936-JSR.

> knowledge of the overvaluations. In addition to raising his concerns about the overvaluations to other Platinum partners as discussed above, Bodner also admitted that, during the relevant time, he received reports involving PPVA's NAVs. See Plaintiffs 56.1 CS ¶ 193. *And, despite such knowledge, he allegedly took unearned fees and distributions – amounting to $100 million between him and Huberfeld according to Nordlicht's email to Fuchs dated January 15, 2016 – based on such overvaluations.* See *ECF* No. 577, Ex. 31. *All this evidence supports that Bodner had the knowledge of the overvaluation but may have withdrawn fees in breach of his duty, sufficient to deny Bodner's motion for summary judgment on the claim for breach of fiduciary duty with respect to the overvaluations of PPVA's NAVs*. (Emphasis added).

In connection with the recovery of such fees, distributions and non-cash interests, the JOLs served discovery demands and requests for admissions and took depositions of, *inter alia,* Bodner, Naomi Bodner (Bodner's wife) and officers of Platinum Management to discover the management fees, distributions, incentive fees and non-cash interests received by Bodner in any capacity, including through Grosser Lane Management LLC ("**Grosser Lane**"), Monsey Equities LLC ("**Monsey Equities**") or any other entity in which Bodner had an interest. The JOLs' claim for "compensatory damages" against Bodner includes the recovery of such fees, distributions and non-cash interests received by Grosser Lane, Monsey Equities or any other Bodner-controlled entity as well as the disgorgement and forfeiture of such fees, distributions and non-cash interests. Thus, Bodner's cursory statement that "disgorgement" is an "eleventh-hour attempt" to assert a new theory is meritless and factually and legally unsupportable.

Nothing better exemplifies the weaknesses of Bodner's Motion than his argument that 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 interest, or cash for that matter, received by Grosser Lane or by his family members." *See* Bodner Mem. at 10. Although the JOLs were not aware of Grosser Lane or Monsey Equities at the time of their Rule 26(a) disclosures, they learned in discovery that Bodner did not receive fees, distributions or non-cash interests in his own name, but instead

through Grosser Lane, Monsey Equities or some other Bodner-controlled entity. Indeed, the Court's Summary Judgment Decision held (ECF Doc. No. 624 at 5-6):

> The members of Platinum Management consisted of the Mark Nordlicht Grantor Trust (passive member) ("MNG Trust"), Nordlicht (passive member), and Uri Landesman (member & sole manager). See Second Amended and Restated Operating Agreement of Platinum Management (NY) LLC, ECF No. 585-2. *The beneficiaries of MNG Trust were Nordlicht Management III LLC, Grosser Lane Management LLC ("Grosser Lane"), and Manor Lane Management LLC ("Manor Lane").* See Trust Agreement of Mark Nordlicht Grantor Trust, ECF No. 585-3 ("MNG Trust Agreement"). Nordlicht served as the trustee of MNG Trust. See id.
>
> *Moving defendant David Bodner and his wife were the members of Grosser Lane, which held a 24.99% Economically Equivalent Membership Interest (as defined in the MNG Trust Agreement) in MNG Trust. See Bodner 56.1 ¶ 4; MNG Trust Agreement. Through MNG Trust and Grosser Lane, Bodner was entitled to a portion of the profits generated through the funds managed by Platinum Management, including PPVA.* See *Bodner 56.1 ¶ 8. Also, in late 2013, the Bodner family made an investment in Beechwood*. See id. ¶ 35. (Emphasis added).

In short, in denying in part Bodner's summary judgment motion, this Court explicitly recognized that Bodner's receipt of fees, distributions or any other non-cash interest was through Grosser Lane or some other Bodner-controlled entity and that the relief or remedy if the JOLs prevailed on their claims against Bodner would expressly include monies, distributions or non-cash interests received by Grosser Lane or other Bodner-controlled entities.[2]

Second, judicial authority uniformly holds that preclusion is a "harsh remedy" that should be "imposed only in rare situations." *Update Art, Inc. v. Modlin Pub., Ltd.*, 843 F.2d 67, 71 (2d Cir. 1988). Bodner has failed to satisfy his high burden that this case presents one of these "rare situations." Notably, Bodner, *inter alia*, has utterly failed to show that he is prejudiced in any

[2] Significantly, the Second Circuit in *Gasson v. Premier Capital, LLC*, 43 F.4th 37 (2d Cir. 2022), recently held that a debtor continues to have a de facto property interest in a company in his wife's name where he exercises dominion and control over it.

respect by the JOLs disgorgement theory. Bodner has always been aware that the JOLs are seeking to recover the fees, monies, distributions or non-cash interests that Grosser Lane, Monsey Equities or other Bodner-controlled entities received in connection with the overvaluation of PPVA's net asset value ("**NAV**"). In the absence of any prejudice (let alone the substantial prejudice required) arising from the JOLs' purported failure to amend its damages disclosure, Bodner's motion for preclusion under Rule 37 must fail. Motions to preclude are routinely rejected where, as here, the defendant was aware of the theory or evidence and improperly attempts to use Rule 37 as a vehicle to deprive the party of key evidence or theories to prove that the defendant is liable for millions of dollars that should be disgorged or forfeited and paid to the injured party (here, PPVA) as a result of the clear overvaluation of PPVA's NAV.

Third, New York courts have consistently held that disgorgement of all monies, fees or other interests received by the fiduciary is a remedy for a breach of fiduciary duty. *See, e.g.*, *Stanley v. Skowron*, 989 F. Supp. 2d 356, 363 (S.D.N.Y. 2013); *Lightbox Ventures, LLC v. 3rd Home Limited,* 16cv2379 (DLC), 2018 WL 1779346, at *11 (S.D.N.Y. Apr. 13, 2018) ("Disgorgement is available to the victim of a breach of fiduciary duty."). Simply put, Bodner's Motion fails to distinguish between a claim and a remedy.

Fourth, the "faithless servant" doctrine arises out of the same breach of the duty of loyalty that is the subject of the JOLs' claims for breach of fiduciary duty or aiding and abetting a breach of fiduciary duty against Bodner. *See Phansalker v. Andersen Weinroth & Co.*, LP, 344 F.3d 184, 200 (2d Cir. 2003); *Johnson v. Summit Acquisitions, LLC*, 5:15-CV-1193 (LEK/ATB), 2019 WL 1427273, at *9 (N.D.N.Y Mar. 29, 2019) ("Breach of duty of loyalty and violation of the faithless servant doctrine are essentially the same claims, except that under the faithless servant doctrine, the employer need not show that the employee caused damages.")

Contrary to Bodner's barebones' assertion (*see* Bodner Mem. at 11-12), the JOLs can pursue the "faithless servant" remedy against Bodner because he owed fiduciary duties to PPVA. Furthermore, the same disgorgement or forfeiture that results from a breach of fiduciary duty also results from the finding that Bodner is a "faithless servant."

Fifth, Bodner's attempt to "apportion" the fees, monies, distribution or non-cash interests received by Grosser Lane or other Bodner-controlled entity (*see* Bodner Mem, at 12-13) fails for two reasons: (a) "New York's strict application of the faithless servant doctrine 'mandates the forfeiture of all compensation ... where ... one who owes a duty of fidelity to a principal is faithless in the performance of his services.'" *Art Capital Group, LLC v. Rose*, 149 A.D.3d 447, 449 (1st Dep't 2017) (citation omitted); and (b) Bodner's breach of fiduciary duty occurred during the entire period of the overvaluation of PPVA's NAV and thus his "repeated acts of disloyalty" during the entire period results in "complete and permanent forfeiture" of monies, distributions or other interests that he received. *See, e.g., Panos v. Mid Hudson Medical Group, P.C.*, 204 A.D.3d 1016, 1019 (2d Dep't 2022).

ARGUMENT

I. Bodner Has Failed To Satisfy The High Burden Required On A Motion To Preclude Under Fed. R. Civ. P. 37

A. The Applicable Standard Under Fed. R. Civ. P. 37

Fed. R. Civ. P. 37 (c)(1), in pertinent part, provides that "[i]f a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless." The purpose of the rule is to "prevent the practice of 'sandbagging' an opposing party with new evidence." *Ebewo v. Martinez*, 309 F. Supp. 2d 600, 607 (S.D.N.Y. 2004).

The burden is on the movant to establish that the alleged dilatory party breached its disclosure obligations under Rule 26. *See In re September 11th Liab. Ins. Coverage Cases*, 243 F.R.D. 114, 125 (S.D.N.Y. 2007). However, even when the movant establishes that there is a violation of Rule 26(a), a court may not impose sanctions under Rule 37(c)(1) on the dilatory party if that party's failure to comply with Rule 26 was "substantially justified" or where its conduct was "harmless." *See* Fed. R. Civ. P. 37(c)(1).

As noted, the Second Circuit has held that preclusion is a "harsh remed[y]" that "should be imposed only in rare situations." *Update Art*, 843 F.2d at 71; *see also Ebewo,* 309 F. Supp. 2d at 607. As a result, "[b]efore the extreme sanction of preclusion may be used," courts "should inquire more fully into the actual difficulties which the violation causes, and must consider less drastic responses." *Outley v. City of New York*, 837 F.2d 587, 591 (2d Cir. 1988).

In determining whether preclusion or another sanction is appropriate, courts in the Second Circuit consider the following factors: "(i) the party's explanation for the failure to comply with the [disclosure requirement]; (ii) the importance of the ... precluded [evidence]; (iii) the prejudice suffered by the opposing party as a result of having to prepare to meet the new [evidence]; and (iv) the possibility of a continuance." *Patterson v. Balsamico*, 440 F.3d 104, 117 (2d Cir. 2006). Even where the plaintiff failed to amend its damages disclosure or there was a technical violation of Rule 26(a), the courts in this District have consistently denied the motion to exclude the challenged evidence or theory where, as here, the defendant was on notice of the damages or the damages theory as a result of the plaintiff's expert report and the defendant failed to show that it was prejudiced. *See Cates v. Trustees of Columbia University in City of New York*, 330 F.R.D. 369, 373-374 (S.D.N.Y. 2019); *New York City Transit Authority v. Express Scripts, Inc.*, 588 F. Supp. 3d 424, 440-441 (S.D.N.Y. 2022).

B. Bodner Has Failed To Demonstrate That This Is The Rare Case Where This Court, In Its Discretion, Should Preclude The JOLs From Asserting Certain Damages Or Damage Remedies

Preclusion is not warranted under each of the *Patterson* factors.

First, the JOLs' initial damage disclosures under Rule 26(a) stated that they were seeking "compensatory damages of not less than $1 billion" and the JOLs' Second Amended Complaint (SAC ¶¶ 769-773, ¶¶ 777-781) sought compensatory and punitive damages against Bodner. The reference to "compensatory damages" includes the equitable remedy of disgorgement. Unlike a SEC disgorgement action where the recovered monies are paid to the government, here the monies, distributions, non-cash interests that Bodner will be required to disgorge or forfeit if the JOLs prevail on their breach of fiduciary duty claims will be paid to PPVA and thus fall within the term "compensatory damages." *See Lexington Furniture Industries, Inc. v. Lexington Company, AB,* 19-cv-6239 (PKC), 2022 WL 13848274, at *10 (S.D.N.Y Oct. 24, 2022) ("Courts in this District routinely characterize the disgorgement of profits under the Lanham Act as an award of actual or compensatory damages.")(citing cases); *Pension Benefit Guaranty Corp. v. Mizrachi*, 363 F. Supp. 3d 342, 343-344 (S.D.N.Y. 2019) (recognizing that disgorgement is <u>compensatory</u> where the "PBGC seeks to have Defendants 'restore to the Plan' any funds and 'make good to the Plan ... any losses' resulting from breach of their fiduciary duties" because "such relief is designed to benefit and *compensate* Plan participants, not to punish Defendants for a violation of public laws.")

The same result is appropriate here. The purpose of the disgorgement and forfeiture of monies, distributions or any other interests received by Bodner-controlled entities is to return the monies or interests to PPVA, the victim of a massive fraud involving an overvaluations of PPVA's NAV by hundreds of millions of dollars. Thus, disgorgement is "compensatory" in nature.

Moreover, as noted above, much of the key discovery, including the depositions of Bodner and his wife Naomi Bodner, the JOLs' Request for Admissions and the JOLs Rule 56.1 Statement

in opposition to Bodner's Rule 56.1 Statement (Nos. 2-5, 8-12, 17, 41-44, 85-87) went to the central issue of the fees, monies, distributions and non-cash interest distributions made to Grosser Lane, Monsey Equities or other Bodner-controlled entities.[3] In short, Bodner was on notice of the JOLs' disgorgement remedy.

Additionally, the Expert Report of Ronald G. Quintero, dated November 14, 2019 ("**Quintero Expert Report**") (ECF No. 634-1) detailed the damages sought by the JOLs and supplements the JOLs' Rule 26(a) disclosure. *See Cates*, 330 F.R.D. at 373-374 (citation omitted). By a June 29, 2020 Decision (ECF No. 646), this Court denied in large part Bodner's motion to exclude Ronald G. Quintero from testifying as the JOLs damages expert at trial based on the Quintero Expert Report. This Court held that Ronald Quintero could testify about the "damages resulting from inflated management fees and inflated incentive fees" which he concluded "are, at least, respectively, $15.844 million and $55.083 million." *See* ECF No. 646 at 34.

The damages available to the JOLs are not limited to the management fees or the incentive fees paid by PPVA in cash. As pointed out in the JOLs' Opposition to Bodner's First Motion In Limine (ECF No. 678) at 13-15, filed on October 19, 2020:

> Bodner is under the mistaken belief that the damages available to the JOLs are limited to the incentive fees paid by PPVA in cash, and that the JOLs should be precluded from offering any evidence regarding incentive fees paid to Bodner after September 2014.
>
> Once again, Bodner proceeds from a fundamentally incorrect premise. Quintero will testify that, due to the overvaluation of PPVA, approximately $55 million in unearned incentive fees were paid to Defendants either in cash payments or non-cash transfers of PPVA Limited Partnership Interests to their investor accounts with PPVA's onshore feeder fund.

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[3] Defendant David Bodner's Responses to Plaintiffs' First Request For Admission ("RFAs"), dated December 30, 2019, admitted many RFAs that related to Grosser Lane. See RFAs Nos. 6, 8, 10, 12, 15, 94, 96, 98, 99

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

Quintero's testimony will discuss how incentive fees accrued to the general partner of PPVA's onshore feeder fund, Platinum Partners Value Arbitrage LP (the "GP Account"), equal to 20% of the increase in Platinum Management's calculation of PPVA's net asset value. At times, and as will be proven at trial, funds originating with PPVA were used to make cash payments to the GP Account as payment for these incentive fees (approximately $14 million in the Damages Period).

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

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

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

There is another core point for this Court to consider regarding Bodner's ill-gotten receipt of incentive fees through non-cash limited partnership interests: these interests, which always were improperly paid to Bodner, were the assets that Bodner used to provide the collateral necessary to form Beechwood as a reinsurance company. Between August 2013 and May 2014, a series of demand notes were issued in favor of Beechwood by Beechwood re Investments, LLC, an entity through which Bodner, Mark Nordlicht and Murray Huberfeld held their ownership interests in Beechwood, as reinsurance regulations require owners of a reinsurance company to contribute substantial amounts of capital. The demand notes issued by Beechwood re Investments, LLC were secured by the very non-cash limited partnership interests Bodner, Huberfeld and Nordlicht had received in connection with the fraudulent overvaluation in the previous years. Thus, Bodner's non-cash limited partnership interests were not only an ill-gotten gain, but they were the mechanism by which Bodner and the other Platinum Partners were able to create Beechwood and continue the overvaluation fraud through various Platinum/Beechwood insider transactions.

Second, the importance of the JOLs remedy seeking disgorgement and forfeiture of all fees, monies, distributions or incentive fees in cash or limited partner interests received by Grosser Lane, Monsey Equities or other Bodner-controlled entities cannot be understated. Given that disgorgement is the remedy for breach of fiduciary duty, Bodner has no basis to argue that this is a "new" theory or remedy. Moreover, if preclusion would preclude the JOLs from recovering millions of dollars due to Bodner's breach of fiduciary duty or fraud, the courts of this district have denied motions to preclude. Particularly instructive is *Express Scripts, Inc.*, 588 F. Supp. 3d at 441, where the District Court held:

> Such a "particularly severe result ... weighs against preclusion." *Ritchie Risk-Linked Strategies Trading (Ireland), Ltd. v. Coventry First LLC*, 280 F.R.D.

> 147, 162 (S.D.N.Y. 2012) (explaining that "precluding Plaintiffs from pursuing $12-plus million in damages would seem a particularly severe result" and declining to preclude the evidence in question).

See also *Cates*, 330 F.R.D. at 374 ("If Columbia's motion to preclude were to be granted, then the Plaintiff Class would be deprived of the opportunity to recover over $ 70 million in damages.")

Third, Bodner has not demonstrated any prejudice that he will suffer by reason of the disgorgement remedy. Having been fully aware of the disgorgement theory, Bodner will not be unduly prejudiced to "defend" this theory and "certainly not prejudiced to the extent sufficient to warrant the 'extreme sanction of preclusion.'" *See Express Scripts*, 588 F. Supp. 3d at 441.

(a) Bodner's Inapposite Authority

The cases cited by Bodner (*see* Bodner Mem. at 6-8) are readily distinguishable. For example, in *Funk v. Belneftekhim,* 14-cv-376 (BMC), 2020 WL 7642868, at *1-2 (E.D.N.Y. Dec. 23, 2020), the District Court held that preclusion was appropriate because plaintiff had stated in their oppositions to two prior motions *in limine* that they would seek "damages for non-economic losses" only. In stark contrast to *Funk*, the JOLs has always asserted that they are entitled to recover all management fees, distributions, incentive fees in cash or in the form of limited partnership interests or other interests that Bodner (through Grosser Lane, Monsey Equities or other Bodner-controlled entities) received..

Austrian Airlines Oesterreichische Lufverkehrs Ag v. UT Finance Corp., No. 04 Civ. 3854 RCCAJP, 2005 WL 977850, at *2 (S.D.N.Y Apr. 28, 2005), is inapposite because the District Court held that "since it is highly unlikely that plaintiff would prevail on this [currency] conversion damage issue, even if its late disclosure were permitted, …there is no reason to excuse plaintiff's failure to comply with Rule 26(a)(1)(C)." Similarly, preclusion was warranted in *Mortgage Resolution Servicing, LLC v. JPMorgan Chase Bank, N.A.*, No. 15 CV 293-LTS-RWL, 2019 WL 4735387, at *10-11 (S.D.N.Y. Sept. 27, 2019), because the District Court held that "Plaintiffs have

waived their disgorgement claims" and that, in any event, the "disgorgement claim also fails on the merits." Thus, these cases have no bearing on the issue before this Court.

II. Bodner Is A Faithless Servant Who Is Required To Disgorge Or Forfeit All Fees, Monies Or Distributions Of Any Kind, Or Nature Whatsoever, Whether In Cash Or In The Form Of Limited Partner Interests

Bodner asserts that the "faithless servant doctrine upon which the JOLs' disgorgement theory is based is completely inapplicable to Bodner" because he "was never an employee or agent of PPVA" and "was not a managing member, officer or employee of Platinum Management." *See* Bodner Mem. at 11. This assertion cannot withstand scrutiny.

First, it bears repeating that the JOLs are entitled to the remedy of disgorgement under its breach of loyalty claim and fraud claims against Bodner. *See* cases at page 4, *supra*.

Second, the faithless servant doctrine is not strictly limited to employer-employee relationships. Indeed, the faithless servant doctrine can apply to any situation where the party has a fiduciary relationship to the plaintiff. This precise issue was considered in *Schulhof v. Jacobs*, 157 A.D.3d 647, 648 (1st Dep't 2018), where the Appellate Division held that an art collector's former advisor had a fiduciary relationship with the art collector, stating: "*Given the existence of a fiduciary relationship, the faithless servant doctrine applies,* and the motion court correctly granted plaintiff summary judgment on that claim." (Emphasis added).

Similarly, in *Phansalker,* 344 F.3d at 184, 189-190, 200, the Second Circuit applied the faithless servant doctrine to the plaintiff even though he was denominated as a partner in a limited liability corporation. *See* also *G.K. Alan Assoc, Inc. v Lazzari*, 44 A.D.3d 95, 101-102 (2d Dep't 2007) (faithless servant doctrine applied to a person who provided consulting services in connection with the management of the company); *Dawes v. J. Muller & Co.,* 176 A.D.3d 473, 473-474 (1st Dep't 2019) (summary judgment granted on plaintiff's faithless servant claims against decedent who provided legal and accounting services to company).

The foregoing cases clearly demonstrate that Bodner can be a "faithless servant" to PPVA even though he was not an officer, employee, managing member or agent of Platinum Management and received no fees, distributions, incentive fees or the like in his personal capacity. As this Court found in its Summary Judgment Decision, "the management of PPVA was exclusively vested in defendant Platinum Management, PPVA's general partner," "Platinum Management was responsible for calculating PPVA's NAV and allocating net capital appreciation and depreciation to the account of all partners" and "Platinum Management served as PPVA's investment manager." ECF No. 624 at 3. Thus, Platinum Management had a fiduciary relationship to PPVA and owed fiduciary duties to PPVA. *See In re Soundview Elite Ltd*., 594 B.R. 108, 127 (Bankr. S.D.N.Y 2018) ("The fiduciary duties owed by investment advisors and fund managers include the duty of loyalty and the duty of care.").

Concluding that the "evidence strongly supports that Bodner exercised significant "superiority or influence over' PPVA's affairs," the "Court concludes that there is a genuine dispute of a material facts regarding whether Bodner owed a fiduciary duty to PPVA." *Id.* at 25-26. In light of the evidence presented, this Court, *inter alia*, denied Bodner's summary judgment motion on the JOLs claims for breach of fiduciary duty and aiding and abetting a breach of fiduciary duty "with respect to the overvaluations of PPVA's NAV." *Id*. at 27.

In short, the faithless servant doctrine is based on the existence of a fiduciary duty. Thus, if the JOLs prevail on their fiduciary duty claims against Bodner, Bodner can and should be held liable as a faithless servant and subject to the disgorgement and forfeiture remedy applicable to a faithless servant.

Nor is there any merit to Bodner's position that the "2012 Incentive Fees are 'separate from and untainted by' any alleged later act of disloyalty" and therefore should not be disgorged or

forfeited. *See* Bodner Mem. at 12-13. As noted earlier, Bodner's facile contention fails for two fundamental reasons. *First,* "New York's strict application of the faithless servant doctrine 'mandates the forfeiture of all compensation" or other interests received by the faithless servant. *See Art Capital,* 149 A.D.3d at 449.

Second, Bodner's breach of fiduciary duty occurred during the entire period of the overvaluation of PPVA and thus his "repeated acts of disloyalty" during the entire period results in "complete and permanent forfeiture" of monies, distributions or other interests that he received. *See, e.g., Panos,* 204 A.D.3d at 1019. The law is clear that disloyal fiduciaries must disgorge all wrongful benefits obtained by their disloyalty, including compensation and interests. *See Phansalkar,* 344 F.3d at 208–210 (Second Circuit orders forfeiture of disloyal fiduciary's compensation, including non-cash "partner allocations" and interests in investment opportunities); *In re Blumenthal*, 32 A.D.3d 767, 768 (1st Dep't 2006) ("In light of respondent's repeated disloyalty throughout his tenure, there is no merit to his assertion that there should have been an apportionment of his salary or of Wise Acre commissions as to which disloyalty was not found."); *Salus Capital Partners, LLC v. Moser*, 289 F. Supp. 3d 468, 481 (S.D.N.Y. 2018) (same).[4]

III. The Disgorgement Remedy Is Not Limited To A Government Enforcement Context

In a last-ditch effort to insulate Bodner and the Bodner-controlled entities such as Grosser Lane and Monsey Equities from the remedy of disgorgement, Bodner contends "that remedy is limited to a government context." *See* Bodner Mem. at 10. The simple answer to this specious contention is that the JOLs' remedy of disgorgement arises from Bodner's breach of fiduciary duty under the fiduciary duty cases and the faithless servant doctrine cases cited above. Thus, the SEC

[4] Apportioning the amount of compensation to be forfeited under the faithless servant doctrine has been limited to circumstances where, unlike here, the employee or agent is compensated on a task-by-task basis. *See, e.g.*, *Stanley*, 989 F. Supp. 3d at 363.

disgorgement cases have no bearing on this issue. Simply put, the disgorgement remedy is not limited to a government enforcement context.

IV. The JOLs' Consequential Damages Theory Is Not Barred By Law Of The Case

Finally, Bodner contends that the "JOLs unpleaded consequential damages theory for losses allegedly sustained in the Second Scheme transactions" is barred by law of the case doctrine" and should be excluded from the trial. *See* Bodner Mem. at 13-14.

The JOLs do not dispute that this Court dismissed the fiduciary duty claims against Bodner that "are not premised on the overvaluations of PPVA's NAVs." *See* ECF No. 624 at 29; *id.* at 31, 33. But Bodner is confusing *liability* with damages and causation. The question for the jury is not whether Bodner had any direct input into a transaction such as the June 9, 2016 sale of PPVA's interests in Agera (the "**Agera Sale**"), but whether the damages suffered by PPVA from the Agera Sale were the foreseeable consequence of the overvaluation scheme for which Bodner is liable. *See in re Refco Sec. Litig.*, 826 F. Supp. 2d 478, 514 (S.D.N.Y. 2011) (finding allegations sufficient for defendants' breach of fiduciary duty to serve as the "natural and probable consequence" of certain transactions, despite the subsequent intervening acts of other tortfeasors).

The answer to this question is clearly yes. The overvaluation scheme was perpetrated through the creation of the Beechwood reinsurance enterprise, a fund which *directly competed* with PPVA yet held overlapping ownership with Platinum Management. These competing funds were used as a temporary repository for uncollectible debt and equity interests, with secret guarantees and interest payments provided by PPVA, to create the illusion of debt stability in PPVA's failing investments in companies such as Black Elk, Golden Gate Oil, Northstar and PEDEVCO. The foreseeable consequence of this overvaluation scheme is that the debt and equity interests held by Beechwood (and guaranteed by PPVA) would need to be paid or somehow taken off the books, as the underlying investment companies lacked sufficient revenue to pay off the

debt to Beechwood. And this is exactly what happened through the Agera Sale, whereby PPVA's interests in Agera were sold in exchange for a small amount of cash and the transfer of near-worthless debt interests to PPVA.

Because "[a]n action for breach of fiduciary duty is a prophylactic rule intended to remove all incentive to breach—not simply to compensate for damages in the event of breach," the standard for proving the causal link between the breach and the asserted damages is lessened. *Malmsteen v. Berdon, LLP*, 369 Fed. Appx. 248, 251 (2d Cir. 2010) (quoting *ABKCO Music, Inc. v. Harrisongs Music, Ltd.,* 722 F.2d 988, 995–96 (2d Cir. 1983)).

"The breach must merely be a substantial factor in causing the loss." *Id. (*citing *Milbank, Tweed, Hadley & McCloy v. Boon,* 13 F.3d 537, 543 (2d Cir.1994); *see also New York Pattern Jury Instructions—Civil* 3:59 (2020). Moreover, it is sufficient for the plaintiff on a breach of fiduciary duty claim to provide the jury with "a sound basis for approximating with reasonable certainty" the loss as a result of the defendants' actions; "it need not prove the amount of loss with certainty." *Malmsteen,* 369 Fed. Appx. at at 251(citation omitted). When the resulting injury is cognizable, 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) (citations omitted). As this Court held in *Refco*, 826 F. Supp. 2d at 514-515 ("New York law provides that proximate causation is present where it was 'reasonably foreseeable' that the damage incurred would follow from the wrongful act."). As a result, the JOLs should be permitted to argue that the damages suffered by PPVA from the Agera Sale were the "foreseeable" consequence of the overvaluation scheme for which Bodner is liable.

CONCLUSION

WHEREFORE, Plaintiffs respectfully request that this Court deny Bodner's Fourth Motion *in limine* in all respects.

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