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),	:	No. 18 Civ. 10936 (JSR)
Plaintiffs,	:	
v.	:	
PLATINUM MANAGEMENT (NY) LLC, *et al*.,	:	
Defendants.	:	

MEMORANDUM OF LAW OF DEFENDANT DAVID BODNER IN OPPOSITION TO THE JOLS' MOTION IN *LIMINE* TO EXCLUDE EVIDENCE OR ARGUMENT RELATING TO THE MARCH 2016 RELEASE AGREEMENT

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Defendant David Bodner respectfully submits this memorandum of law in opposition to the motion *in limine* ("Motion") of the Joint Official Liquidators ("JOLs") to preclude all argument or evidence relating to the March 2016 Release Agreement (the "Release") (ECF No. 696).

PRELIMINARY STATEMENT

The JOLs' Motion masquerades as *in limine* but in reality is a long-belated attempt to obtain summary judgment on Bodner's affirmative defense that the Release bars the JOLs' claims. They ask that the Court "issue an order precluding the introduction of testimony, evidence, or argument that the Release . . . *constitutes a defense to liability* against Plaintiffs' remaining claims." (ECF No. 696 at 1) (emphasis added). But of course the Release is a "defense to liability"—and Bodner is entitled to trial on that issue. If the JOLs wanted to exclude the Release from the trial the proper time was in February 2020, when all parties were ordered to move for summary judgment per the Scheduling Order in this action. (ECF No. 500). They cannot use a motion *in limine* to dismiss one of Bodner's trial defenses without satisfying the procedural and substantive provisions of Federal Rule of Civil Procedure 56 (and Local Rule 56.1), which the JOLs have not even attempted to do. Their motion should be denied on that procedural defect alone.[1]

The Motion is also defective on its merits. It is premised upon a nonexistent and invented rule of New York law that alleged "co-conspirators and joint tortfeasors cannot validly release other co-conspirators and joint tortfeasors." (Motion at 3). Neither the Court's summary judgment decision (ECF No. 624) nor any of the JOLs' cited cases support this gross

[1] In the event this Court is inclined to entertain the JOLs' motion as if it were a proper vehicle to dismiss Bodner's defense on the Release, Bodner reserves all rights and requests an opportunity to submit his own cross-motion for summary judgment on the Release.

overstatement. In fact, the New York Court of Appeals has made crystal clear that releases are presumptively valid and will be set aside only in rare circumstances.

Here, uncontradicted evidence establishes the Release's validity. Platinum Management, for itself and PPVA, executed the Release in exchange for Bodner and Murray Huberfeld forfeiting their ownership interests in Platinum Management (NY) LLC ("Platinum Management") and PPVA's general partner (the "General Partner"), among other valuable consideration. This transaction aimed to incentivize investors (beginning with billionaire Marcos Katz) to inject new liquidity and take over the interests of the outgoing Bodner and Huberfeld in the entities that earned management and incentive fees from managing PPVA. Insofar as the Court had doubts at summary judgment as to whether there was a "genuine" business purpose to the agreement (ECF No. 624 at 21), Bodner submits herewith the declaration of Isaac Neuberger, the attorney who represented the Katz family in those negotiations. Neuberger's declaration establishes that the transaction was entirely genuine, that the Katz family was well aware that Bodner and Huberfeld were giving up their ownership interests, and that the mutual releases were rigorously negotiated and ultimately agreed by all sides. Indeed, two months after the April 11, 2016 facsimile from Marcos Katz (the "Fax") cited by this Court in its summary judgment decision, his grandson, Michael Katz, sent Platinum's Chief Legal Officer, Suzanne Horowitz, two agreements signed by Marcos and his wife, Adela—obligating the family to Marcos's investment.[2] Ultimately, Huberfeld's arrest and Marcos's death in summer 2016 derailed that investment, leading the parties to agree to relieve the Katz family of its obligations—but the Release had been executed months before and is binding upon the parties to it, including Bodner and PPVA.

[2] Bodner intends to call Horowitz at trial.

Furthermore, the JOLs' assertion that Bodner is a "co-conspirator" of Mark Nordlicht and/or Platinum Management is baseless. Nordlicht was convicted of charges relating to the Black Elk scheme, in which (as this Court concluded) Bodner had no involvement. (ECF No. 624 at 28). Nordlicht was acquitted of all counts relating to overvaluation fraud, the only surviving theory of liability as against Bodner. (*Id.* at 29).

The JOLs' remaining arguments to exclude the Release are equally unavailing. They contend (Motion at 9) that if the Release is in the trial, then the lawyers who represented Bodner in the negotiation of it—the same lawyers who have represented him in this action since 2019—may have to testify. This is another invented issue, intended only to create disruption. The JOLs' claim that Release should be excluded under Federal Rule Evidence 403 (Motion at 9) borders upon frivolous. The Motion has no basis and should be denied.

BACKGROUND

In early 2016, the Platinum funds desperately needed liquidity. (Declaration of Nathaniel Ament-Stone, dated Nov. 23, 2022 ("Ament-Stone Decl.") at Exs. 2-4; Ex. 10 at 38:2-10, 39:3-14, 182:21-183:11, 223:11-17; Ex. 11 at 621:14-16). In February 2016, Platinum Management and Marcos Katz's grandson, Michael Katz, exchanged drafts of a term sheet whereby Marcos would acquire an ownership interest between 7.5 and 15 percent in the "Management Companies"—including Platinum Management and the General Partner—with Bodner and Huberfeld to return their respective family interests in the Management Companies. (Neuberger Decl. Ex. 1 at 4). Under the term sheet, Marcos would enjoy observer rights, and his existing holdings would be rebalanced among certain assets and funds. The Term Sheet contemplated that all parties would "waive and provide mutual releases in connection with this arrangement such that the parties are released from any and all past liabilities, and waive any and all rights,

claims and causes of action each may have as they relate to PPVA." (Neuberger Decl. Ex. 1 at 6 (emph. supplied); Ament-Stone Decl. Ex. 10 at 229:6-17, 248:11-249:4).

Michael Katz, negotiating on Marcos's behalf and following his instructions (Ament-Stone Decl. Ex. 10 at 182:11-20), expressed his expectation that Bodner and Huberfeld would "exit" the Management Companies. (Neuberger Decl. ¶ 9). Marcos subsequently initialed the Term Sheet. (*Id*.). Around the same time, the Katz family was also negotiating a Rebalancing Agreement whereby Marcos Katz would receive a favorable "make-up payment" derived from whichever return was greater, that of (a) the so-called "Side Pocket" assets in which he was invested, or (b) his shares in the Management Companies. (*Id.* ¶ 11; Ament-Stone Decl. Ex. 10 at 236:17-237:10). The family would also negotiate anti-dilution terms in anticipation of Platinum's obtaining additional, new partner-level capital to replace the outgoing Bodner and Huberfeld. (Neuberger Decl. ¶ 24).

In the subsequent, extensive contract negotiations, the Katz family was represented by Neuberger (Ament-Stone Decl. Ex. 10 at 186:5-12, 232:4-12); Platinum Management by Horowitz and Harvey Werblowsky; and Bodner and Huberfeld by Gabriel Hertzberg and Joshua Geller of Curtis, Mallet-Prevost, Colt & Mosle LLP ("Curtis"). As Neuberger explains in his declaration:

- Neuberger advised Michael Katz on March 14, 2016 to confirm that Bodner's and Huberfeld's entire interests would "be ceded back to the [Management] Companies." (Neuberger Decl. ¶ 13). The Katz family also wished to enter into mutual releases with Platinum officers and entities, Bodner, and Huberfeld. (*Id.* ¶ 15).

- Neuberger, Horowitz, Werblowsky, and Curtis engaged in arm's-length negotiations over the ensuing days, exchanging numerous drafts and comments. (Neuberger

Decl. ¶¶ 16-20). For example, a March 18, 2016 draft of the Release provided that "Platinum (jointly and severally among each entity referred to therein), to the fullest extent permitted by applicable law, agrees to indemnify, defend and hold harmless the "BH [Bodner and Huberfeld] Released Parties . . .," but by March 20, the reference to "Platinum" was changed at Neuberger's request to "[t]he Platinum Management Entities," meaning the Management Companies but not PPVA and the other Platinum funds. (Neuberger Decl. Ex. 12, CTRL7752910-38, at § 3(c); Ament-Stone Decl. Ex. 5, CTRL7749519, at § 3(c)).

- A complete set of documents—an Investment Agreement, a Rebalancing Agreement, and three separate releases—were signed by all parties other than Marcos Katz by March 20, 2016. (Neuberger Decl. Ex. 12). The Release between Bodner and PPVA became effective on that date. (Neuberger Decl. ¶ 39).

- On March 21, 2016, Michael Katz sent the agreements to Marcos for his signature, along with detailed summaries of them in Marcos's native Spanish. (Neuberger Decl. ¶ 22; Exs. 12-13). Among other relevant information, Michael's summary noted that the Release "contains an obligation for Murray and David to return their shares in the Management Companies . . ." (Neuberger Decl. ¶ 42). The final agreements largely tracked the Term Sheet, providing, *inter alia*: Marcos's ownership of between 7.5 percent and 15 percent of the Management Companies, with anti-dilution provisions; corporate governance changes; rebalancing between certain assets/funds; and mutual releases among Bodner, Huberfeld, Katz, and the Platinum parties, with a lockup provision preventing the then-exiting partners (including Bodner and Huberfeld) from withdrawing family money from PPVA for two years. (*Id.* ¶¶ 23-42).

- On March 27, 2016, Neuberger met with Marcos and Adela in Israel to discuss the terms, which were consistent with Michael's prior instructions as well as the Term Sheet approved by Marcos. (Neuberger Decl. ¶ 44).

On April 11, 2016, Marcos Katz sent the Fax, expressing that he was "confused" about the departure of Bodner and Huberfeld, and making various cryptic statements. (Ament-Stone Ex. 8). Platinum executives responded in writing to remind Marcos of their prior discussions. (*Id.* Ex. 9). Discussions continued for nearly two months, with Platinum and its in-house counsel working with Michael Katz to finalize his deal with Platinum. (Neuberger Decl. ¶¶ 45-47; Ament-Stone Ex. 10 at 243:21-245:9).

On June 7, 2016, Michael sent execution-ready agreements to Platinum which would raise the Katz family's baseline ownership interest in Platinum from 7.5 percent to 12.5 percent (10 percent for Marcos and 2.5 percent for Michael), and requested that Platinum "send fully executed versions" either back to him or to Neuberger. (Neuberger Decl. ¶¶ 48-49 & Ex. 16). These versions of the Investment and Rebalancing Agreements had been signed on or before June 7 by Marcos (on behalf of himself) and by Adela (on behalf of the Katz company Atalanta Global Holdings LLC). (Neuberger Decl. ¶ 50).

On June 8, 2016, Huberfeld was arrested on charges related to commercial bribery of a union executive, and Marcos Katz passed away on July 26, 2016. (Neuberger Decl. ¶¶ 51-52; Ament-Stone Decl. Ex. 12). On July 27, 2016, Platinum Partners sent a letter relieving the Katz family from its contractual obligations. (Neuberger Decl. ¶ 52).

PROCEDURAL HISTORY

Bodner and other defendants moved for summary judgment on February 14, 2020. In their opposition brief, the JOLs argued in part that there were triable issues regarding the

Release's validity. (ECF No. 554, at 62-73.) This Court agreed. (ECF No. 624.) At no time did the JOLs argue that they were entitled to a judgment invalidating the Release.

ARGUMENT

A motion that "ask[s] the Court to weigh the sufficiency of the evidence to support a particular claim or defense" is not properly heard as a motion *in limine* because that "is the function of a motion for summary judgment." *Pavone v. Puglisi*, No. 1:08 C 2389 (MEA), 2013 U.S. Dist. LEXIS 9140, at *3 (S.D.N.Y. Jan. 23, 2013) (citations omitted, collecting cases). Courts are wary to dismiss claims or defenses *in limine* because such motions lack the "crucial procedural safeguards" of Rule 56. *Id.*

But if the Court were to address the Motion on its merits, the correct result would not be exclusion, but an order *sustaining* the affirmative defense, entering judgment for Bodner, and terminating the November 30 trial date. The JOLs co-conspirator/joint tortfeasor exception to the enforceability of commercial general release agreements is an invention, and there are no facts that would make Bodner a co-conspirator of anyone. The Court's concern at summary judgment—that the Marcos Katz Fax casts doubt on the genuine purpose of the Release—is now conclusively addressed here. Finally, the JOLs' perfunctory references to the attorney-witness rule and Rule 403 provide no basis for exclusion.

I. THE RELEASE IS VALID AND ENFORCEABLE AS A MATTER OF NEW YORK LAW

A. The Release Indisputably Had A Genuine Business Purpose

Under New York law, a release "should never be converted into a starting point for litigation except under circumstances and under rules which would render any other result a grave injustice." *Centro Empresarial Cempresa S.A. v América Móvil, S.A.B. de C.V.*, 17 N.Y.3d 269, 276 (2011) (quotation marks and citations omitted). It is the JOLs' burden to prove

"fraud, duress or some other fact which will be sufficient to void the release." *Id.* To that end, a plaintiff seeking to invalidate a release due to fraudulent inducement must prove all the basic elements of fraud, including a misrepresentation or omission of a material fact, scienter, justifiable reliance, and resulting injury. *Id*. The plaintiff must prove a *separate* fraud from any fraud claims that were themselves the subject of the Release. *Dantas v. Citigroup, Inc.*, 779 F. App'x 16, 20 (2d Cir. 2019) (citing *Centro Empresarial*, 17 N.Y.3d at 276). In *Centro Empresarial*, the leading New York case, the release in a buyout transaction of majority shareholders by minority shareholders (to whom the majority shareholders owed fiduciary duties) was enforced, where plaintiffs alleged the release had been induced by the majority shareholders' fraud as to the company's value, but did not allege a separate fraud. 17 N.Y.3d at 277-79.

New York courts have consistently applied *Centro Empresarial* in the context of a released former fiduciary. In *Kafa Invs., LLC v. 2170-2178 Broadway LLC*, 114 A.D.3d 433, 433-34 (1st Dep't 2014), the Appellate Division enforced a release in favor of an alleged fiduciary where the release was "negotiated across the table" and the releasors were "sophisticated parties represented by counsel." *Id*.; *see also Pappas v. Tzolis*, 20 N.Y.3d 228, 232-33 (2012) (similar). Where a "release was the result of prolonged arms' length negotiations between the parties," there is a strong presumption that the parties "had knowledge of, and assented to, the terms of the release." *Nat'l Union Fire Ins. Co. v. Walton Ins., Ltd.*, 696 F. Supp. 897, 903 (S.D.N.Y. 1988) ("Moreover, National Union was represented by independent counsel who took part in the negotiations and who himself actively participated in preparing the release."); *Arfa v. Zamir*, 76 A.D.3d 56, 58-59 (1st Dep't 2010) (similar). In *Golding v. Weissman*, 35 A.D.2d 941 (1st Dep't 1970), defendant directors won summary judgment based

on their release by the defendant corporation, even though plaintiff alleged the directors and corporation were joint tortfeasors. *Id.* at 941.

The JOLs cannot point to *any* fraud—much less a "separate" fraud—in connection with the Release. *Centro Empresarial*, 17 N.Y.3d at 276. It was negotiated by counsel for sophisticated counterparties as an integral component of the Katz deal, a serious effort by Platinum Management and the Katz family to turn around an illiquid company. Indeed, the JOLs themselves allege the basic facts in their Second Amended Complaint:

> In 2015, Marcos Katz sought to redeem his investment in PPVA but there was not sufficient funds to honor this request. Instead, Nordlicht, Huberfeld, Bodner and Fuchs offered Marcos Katz the opportunity to exchange his investment in PPVA for an interest in Platinum Management and certain other consideration. As part of the proposed deal, Marcos Katz was offered the opportunity to appoint a representative to oversee his interests. Although a term sheet was prepared, final documents between and among Marcos Katz and the other members of Platinum Management apparently were never finalized.

(SAC ¶¶ 125-26; *see also id.* at ¶ 127 (noting Michael Katz "began representing his grandfather's interests in 2016")).

The Katz transaction had a genuine purpose to provide the Platinum funds, including PPVA, with urgently needed liquidity. Bodner's giving up his interest in the Management Companies, and the mutual releases he gave *and* received, were basic components of the deal dating back to the original February 2016 Term Sheet negotiated between Platinum Management and the Katz family. Negotiations were rigorous and conducted at arm's length. New York law commands the Release be enforced.

B. The JOLs' Blanket "Co-Conspirators Exception" Does Not Exist

The JOLs state in the Motion that this Court ruled that "co-conspirators (and indeed joint tortfeasors) *cannot release each other* – such is the definition of a corrupt purpose." (Motion at

2). That is incorrect; this Court observed that a release may be invalidated "for substantive flaws in its execution, such as fraud in the inducement, illegality, duress, or mutual mistake." (ECF No. 624, at 19-20.) The Court held that the "facts raise an issue of whether the Release Agreement was entered into for a fraudulent purpose of permitting one co-conspirator, Platinum Management, to release its other co-conspirators, Bodner and Huberfeld, from liability." (*Id.* at 21).

Even *Aviles v. S&P Global, Inc.*, 380 F. Supp. 3d 221 (S.D.N.Y. 2019), on which the JOLs heavily rely, does not hold that alleged co-conspirators cannot release each other as a matter of law. In *Aviles*, the court invalidated a release contained in a settlement agreement that *itself* constituted a breach of fiduciary duty, and so "the release arose from a fiduciary breach that the [defendants] knowingly abetted." *Id.* at 301-02. Here, there is no allegation that the Release itself constituted a breach of duty. While the JOLs claim that "courts routinely hold that releases executed by co-conspirators are invalid" (Motion n.7), the cases they cite do not support this. *See CMG Holdings Grp. v. Wagner*, 15-CV-5814 (JPO), 2016 U.S. Dist. LEXIS 121135, at *21-22 (S.D.N.Y. Sept. 7, 2016) (invalidating release not involving "co-conspirators" based on fraudulent inducement); *Wimbledon Fin. Master Fund, Ltd. v. Weston Cap. Mgmt. LLC*, 160 A.D.3d 596, 598 (1st Dep't 2018) (same); *Mangini v. McClurg*, 24 N.Y.2d 556, 559, 568-69 (1969) (release between car-accident victim and drivers, not "co-conspirators," might be invalid due to mutual mistake). The JOLs have adduced no evidence providing a basis to set aside the Release, such as fraudulent inducement or mutual mistake.

C. Bodner Is Not A Co-Conspirator

The JOLs state that "as a matter of law, the Release was executed by co-conspirators, which necessitates granting [their] motion," citing Nordlicht's conviction, Platinum Management's default, and the JOLs' proof of claim in the Nordlicht bankruptcy. (Motion at 6-

7). First, there is no overlap between the claims against Bodner and Nordlicht's conviction. Second, neither the default nor the proof of claim can be offered as proof against Bodner.[3]

Nordlicht was convicted of fraud on the noteholders of Black Elk Energy. He was acquitted of overvaluation fraud on PPVA. (Ament-Stone Decl. Ex. 13 at 4-5).[4] In contrast, this Court granted summary judgment for Bodner on all claims involving the same Black Elk scheme. (ECF No. 624 at 29). The only remaining theory of liability against Bodner concerns his alleged knowledge that PPVA was overvalued—and Nordlicht was found not guilty of overvaluation. It was Nordlicht who managed the funds, their investments, and their valuations. Since there is no overlap in the claims against Bodner and the conviction of Nordlicht, there is no basis to deem them "co-conspirators."

The clerk's entry of default against Platinum Management also has no bearing upon Bodner. Collateral estoppel only applies to issues that were "actually litigated . . . and determined in the prior proceeding." *In re Iannelli*, 12 B.R. 561, 563 (Bankr. S.D.N.Y. 1981) (internal citations omitted); *see also Trans World Airlines, Inc. v. Hughes*, 449 F.2d 51, 58 (2d Cir. 1971) (same), *rev'd on other grounds*, 409 U.S. 363 (1973). With a default judgment, "no issues were actually litigated," *Iannelli*, 12 B.R. at 563, and Platinum Management's default has no effect on Bodner's liability:

> [T]he default of one party is not an admission of liability on the part of a nondefaulting coparty. Answering codefendants are not precluded from contesting factual allegations because one

[3] To the extent the JOLs intend to use documents concerning the proof of claim and the default against Bodner, Bodner reserves his right to move that they be excluded pursuant to Federal Rules of Evidence 402 and 403.

[4] Indeed, the evidence showed "that Platinum hired third parties to confirm its valuations; hired an experienced director of valuations; and maintained a valuation committee. There is insufficient evidence for a reasonable juror to conclude that defendants have falsified any valuations, let alone evidence that would support defendants' conviction for fraudulently overvaluing assets." (Ament-Stone Decl. Ex. 13 at 5).

> codefendant is in default and has thereby admitted those facts. . . . It could not, therefore, have any collateral estoppel liability effect on parties in another case.

Rivera v. Limassol Grocery, Corp., 16-CV-6301-KAM-SJB, 2019 U.S. Dist. LEXIS 2821, at *19-21 (E.D.N.Y. Jan. 4, 2019) (internal citations omitted) (emphasis added). Similarly, the proof of claim in Nordlicht's bankruptcy was not "actually litigated" and so cannot have preclusive effect. *See In re Best Payphones, Inc*., 523 B.R. 54, 73 (Bankr. S.D.N.Y. 2015) (reciting collateral estoppel factors). The JOLs do not say what was resolved by the proof of claim or how it relates to Bodner. No court has determined any issue that Bodner had an opportunity to litigate, so collateral estoppel cannot apply.

II. THE JOLS IDENTIFY NO LEGITIMATE REASON TO EXCLUDE THE RELEASE

The JOLs make two half-baked arguments to justify their sweeping request that all evidence of the Release be excluded. First, they argue that Curtis attorneys would be called as trial witnesses "given their representation of Bodner, Huberfeld and Platinum Management with respect to the negotiation and execution of the Release." (ECF No. 696, at 8-9). As they know, however, Curtis did *not* represent Platinum Management in this transaction. (ECF No. 543 Ex. 16 at 1) ("Historically, *but not in this matter*, we have been and continue to be counsel to Platinum Management. We received conflict waivers from all parties involved."). And there is no issue that genuinely requires testimony of trial counsel. Bodner, Huberfeld, Neuberger and Horowitz will testify, and counsel expects that Michael Katz (if available) will also confirm the transaction's bona fides. Bodner's counsel has no material additional facts to offer the

factfinder, and this manufactured attorney-witness issue has no bearing on the validity of the Release.[5]

Second, the JOLs argue that the Release is inadmissible under Rule 403 because "the agreement lends an improper imprimatur of propriety to Defendants' conduct." (Motion at 9). This unexplained assertion has no basis in law. The Release is not *evidence* that can be excluded from trial because it is prejudicial to the plaintiffs' case; the Release is the basis for an affirmative defense and presumptively valid under New York law. It is the JOLs' burden to prove the *invalidity* of the Release. They cannot meet that burden.

[5] The Court rejected an attempt by the JOLs to disqualify Curtis early in this action (ECF No. 106 at 5).

CONCLUSION

The Motion should be denied.

Dated: November 23, 2022
New York, New York

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