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 PLAINTIFFS' MOTION *IN LIMINE* FOR A RULING AS TO IMPUTATION OF KNOWLEDGE TO DEFENDANT DAVID BODNER

[REDACTED]

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Defendant David Bodner respectfully submits this memorandum of law in opposition to Plaintiffs' motion *in limine* ("Motion") (ECF Nos. 749, 750)[1] seeking a ruling imputing "all knowledge" of the law firm Curtis, Mallet-Prevost, Colt & Mosle LLP ("Curtis"), during the course of its separate, earlier representation of Platinum Management (NY) LLC ("Platinum Management") and Murray Huberfeld, to Bodner.

PRELIMINARY STATEMENT

The JOLs' Motion seeks unprecedented relief. They ask the Court to "impute" to Bodner purported "all knowledge" that Curtis, his counsel in this action, acquired in the course of its representation of other clients in other matters. The purported basis for this extraordinary request is that Bodner could have requested information about those prior representations from Curtis, even though there is no evidence that he actually did so.

The JOLs' Motion is based on a fundamental misconception of legal concepts. Early in this action, the JOLs sought to disqualify Curtis from representing Bodner because of the firm's prior representation of PPVA. Curtis established that its prior representation of PPVA was limited to two unrelated matters, but that, in any event, disqualification was improper under *Allegaert v. Perot*, 565 F.2d 246 (2d Cir. 1977), because PPVA's managers understood that "Bodner had the practical ability to access any [PPVA] information in connection with litigation matters in which Curtis served as counsel." (Memorandum Opinion, ECF No. 106) (denying disqualification motion) (emph. supplied). The absence of a hard informational barrier between PPVA and Bodner was sufficient to defeat the disqualification motion.

The JOLs seek to take Bodner's "practical ability" to access information "from time to time" (ECF No. 51 ¶ 13) and convert it to a finding by the Court, based on imputation principles,

[1] Citations to docket items ("ECF No. __") uses the numbering of the *Trott* docket.

that he had specific information about specific matters. There is no basis in law for this. The Motion relies on inapposite cases where a party's own attorney made factual representations, strategic decisions, or procedural mistakes while representing the client, and those actions were imputed to the same client in either the same or a related, contemporaneous proceeding. The imputation doctrine has never been, and cannot under basic agency principles be, applied to situations where the attorney's purported knowledge was acquired in the course of representing a different client in a separate matter.

The Motion also fails because Curtis has no relevant knowledge to impute. As set forth in the Background section below, Curtis represented Platinum Management in 2013-2014 in a routine Section 204 examination of Platinum Management's books and records (the "OCIE Matter"), and again in 2015-2016 in connection with the criminal investigation that led to the arrest of Murray Huberfeld in June 2016 for allegedly bribing a union official (the "COBA Matter"). Neither matter concerned valuation of PPVA assets, and there are no relevant facts to impute to Bodner, even if the law permitted such imputation in these circumstances (and it does not). The Motion should be denied.

BACKGROUND

In the course of its various representations of Platinum Management, Curtis obtained from Platinum Management documents and information relevant to Curtis's representation. (ECF No. 51 ¶ 12).[2] To the extent those representations were related in any way to Platinum Management's management of PPVA, Curtis's sole source of access to documents and information relating to PPVA was through Platinum Management and its personnel. (*Id.*). Bodner would inquire of Curtis from time to time about litigation that Curtis was handling on

[2] ECF No. 51 is the declaration of Jacques Semmelman, a Curtis partner, filed in opposition to the disqualification motion in 2019.

behalf of Platinum Management. (*Id.* ¶ 13). Platinum Management agreed that in any matter where a conflict arose between Platinum Management and Bodner, or in any matter where the two were adverse, Curtis could represent Bodner and not Platinum Management. (*Id.* ¶ 22.)

Curtis represented Platinum Management—and only Platinum Management—in 2013-2014 in the OCIE Matter. (ECF No. 51-1 at 3). Curtis's primary function was to provide a privilege review before Platinum Management produced millions of emails and documents to OCIE. *Id*. Curtis acquired no specific knowledge regarding Platinum Management's valuation of PPVA assets. Indeed, as the JOLs point out (Motion at 3), the examination concluded with a "deficiency letter," where the SEC suggested improved controls in various areas. OCIE did not conclude that any PPVA assets were misvalued.

Curtis also represented Platinum Management and Murray Huberfeld in 2015-2016 in the COBA Matter. *Id*. In February 2016, the prosecutor handling the matter, Assistant United States Attorney Russell Capone, requested that Curtis provide an explanation of transactions between Platinum funds and Beechwood. Curtis collected information from Platinum Management personnel and reported it verbally to Mr. Capone on March 2-3, 2016. Again, nothing about the information collected from Platinum Management and reported to Mr. Capone concerned valuation of PPVA assets.[3]

ARGUMENT

The Motion is based on incorrect facts and inapposite law. First, Curtis has no "firsthand knowledge of the government's investigation of PMNY's valuation procedures." (Motion at 6).

[3] Curtis's statement to Mr. Capone that [redacted] was mistaken and was promptly corrected the next day. As memorialized in [redacted] (Semmelman Decl. ¶ 17, Ex. B; Ex. 1.)

As the Court knows well, regulators and prosecutors do not typically inform defense counsel for a target or subject of an inquiry about the precise scope or aims of their investigations. Curtis's knowledge was confined to gathering information from Platinum Management to respond to the government's questions, and nothing about those questions, or the information provided in response, concerned valuation of PPVA assets. Moreover, contrary to Plaintiffs' unsupported statements, there was no "standing policy for Bodner to be fully briefed by Curtis concerning these investigations." (*Id.*)

Second, Plaintiffs have not identified any authority (and there is none) for imputing to Client A an attorney's knowledge obtained in the course of a prior representation of Client B. In every single case cited by Plaintiffs in which counsel's knowledge was imputed, the knowledge concerned matters to which Client A was a party, and was imputed to Client A. Additionally, all of these cases concern the imputation of a lawyer's factual representations, strategic decisions, or procedural mistakes in a given proceeding—such as failure to prosecute or answer, failure to object to inadmissible evidence, acknowledgement of a competing patent in a patent application, or failure to notify a client about a pending bankruptcy proceeding—not substantive knowledge about a different client's business, learned in the course of a different representation. To wit:

- In *SEC v. McNulty*, 137 F.3d 732 (2d Cir. 1998), a corporate officer's counsel took no action in response to the SEC's request for imposition of a civil fine and entry of a permanent injunction; thus, the district court entered a default judgment, and the Second Circuit affirmed, citing the attorney's willful neglect and the client's lack of diligence. *Id.* at 740.

- In *Veal v. Geraci*, 23 F.3d 722 (2d Cir. 1994), a criminal defense attorney failed to object to an improper (tainted) lineup; the defendant appealed his conviction, but the Second

Circuit held that the attorney's knowledge of the lineup's impermissibility was imputed to his client and that the client's action was therefore time-barred. *Id.* at 725-26.

- The attorney in *In re Linzer*, 264 B.R. 243 (Bankr. E.D.N.Y. 2001), represented a creditor in a non-bankruptcy arbitration and was an authorized agent to receive notice of a bankruptcy proceeding brought on the creditor's behalf; as such, the attorney's knowledge of the bankruptcy was imputed to the creditor. *Id.* at 248-49.

- Apple's counsel in *Eastman Kodak Co. v. Apple Inc. (In re Eastman Kodak Co.)*, 479 B.R. 280 (Bankr. S.D.N.Y. 2012), had referenced the allegedly infringed Kodak patent in 11 of Apple's patent applications, and this knowledge was imputed to Apple; in patent applications, Apple "effectively represented to the USPTO that [it] had sufficient knowledge of the cited patents." *Id.* at 299-300.

- In *Chira v. Lockheed Aircraft Corp.*, 634 F.2d 664 (2d Cir. 1980), the plaintiff in an employment case was chargeable with his lawyer's failure to prosecute. *Id.* at 667.

- In *Wells Fargo Bank, N.A. v. AMH Roman Two NC, LLC*, 859 F.3d 295 (4th Cir. 2017), counsel for Wells Fargo in a bankruptcy proceeding failed to respond to a motion, resulting in the subordination of its claim to that of another creditor. The court noted that "[a]t every critical juncture, Wells Fargo slept on its rights," and that in bankruptcy proceedings, "once an attorney files an appearance on behalf of a client, notice to the attorney is notice to the client." *Id.* at 300, 303 (citation omitted).

- Defense counsel in *Bailey v. Pataki*, 952 F. Supp. 2d 626 (S.D.N.Y. 2013), waived an affirmative defense by not asserting it in the answer, and this bound the client after he retained new counsel, despite his professed ignorance of the waiver. *Id.* at 628.

- In *N.Y. Univ. v. Autodesk, Inc.*, 495 F. Supp. 2d 369 (S.D.N.Y. 2007), a would-be patent-holder (New York University) was held to its former counsel's abandonment of two patent applications. *Id.* at 374 n.4.

- *Long v. Bd. of Governors of Fed. Rsrv. Sys.*, 117 F.3d 1145 (10th Cir. 1997), affirmed the imposition of penalties upon a banker. The Federal Reserve denied the banker's application for a merger and to become a registered bank holding company, and informed his attorney of this; nevertheless, the banker proceeded with the merger and concealed the transfer of assets. *Id.* at 1152-53. Counsel's knowledge that the banker's application had been denied by the Fed was imputed to the banker.

None of these cases informs the analysis here. There are obvious and well-established policy justifications for holding a client to counsel's actions in the course of representing that client, as the case law recognizes. Such considerations plainly do not apply to the JOLs' request that (nonexistent) attorney knowledge about the inner workings of Platinum Management's valuations of PPVA assets be imputed to a different client in a different proceeding. *See Jaufman v. Levine*, No. 1:06-CV-1295 (NAM/DRH), 2007 U.S. Dist. LEXIS 72883, at *50 (N.D.N.Y. Sept. 28, 2007) (knowledge of plaintiffs' counsel obtained in the course of representing different clients could not be imputed to plaintiffs).

CONCLUSION

The Motion should be denied.

Dated: November 23, 2022
New York, New York

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EXHIBIT 1

(originally Semmelman Declaration Exhibit B)

From: Hertzberg, Gabriel
To: Sareva, Sylvi; Lauer, Eliot
Subject: RE: 3.2.2016 Call to R. Capone
Date: Thursday, March 03, 2016 5:15:31 PM

[redacted]

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