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' AMENDED[1] PROPOSED JURY INSTRUCTIONS

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[1] The undersigned certifies that on the morning of Friday, November 25, 2022, counsel noted that the topical edits provided to the trial team concerning instructions 13 and 14 were not incorporated in the as-filed draft. The amendments, set forth in redline, solely concern those unincorporated instructions.

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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) (together, the "**JOLs**") and Platinum Partners Value Arbitrage Fund L.P. (in Official Liquidation) ("**PPVA**" and collectively with the Joint Official Liquidators, "**Plaintiffs**"), by counsel, and pursuant to the Court's Individual Rules of Practice No. 7, effective April 1, 2022, hereby submit these proposed jury instructions for the Court's consideration.

I. GENERAL INSTRUCTIONS

INSTRUCTION NO. 1

The Parties[2]

There are two plaintiffs in this case. The first set of Plaintiffs are Martin Trott and Christopher Smith, who are known together as the "JOLs." The other plaintiff is PPVA, an investment fund formed in the Cayman Islands that, prior to its liquidation in August 2016, was operated and managed by Platinum Management (NY), LLC ("**PMNY**"). PMNY was also the general partner of PPVA and invested the assets of PPVA. PMNY has defaulted in this litigation, meaning it has failed to appear and defend this action. PPVA's limited partners included investment funds that were incorporated in the United States and the Cayman Islands (collectively, the "**Feeder Funds**"). The Feeder Funds were likewise operated and managed by PMNY.

As a result of multiple orders, the JOLs have been granted authority by courts in the Cayman Islands, as well as the United States Bankruptcy Court of the Southern District of New York, to liquidate the assets of PPVA and bring litigation on its behalf, including this case. As such, Plaintiffs in this case include the JOLs, as well as PPVA itself.

[2] Adapted from Jury Charge in *Gruber v. Gilbertson*, No. 16-cv-09727, Dkt. 478 (S.D.N.Y. June 14, 2022) (Rakoff, J.).

The remaining defendant in this trial is David Bodner ("**Bodner**"). Along with his partners Murray Huberfeld and Mark Nordlicht, Bodner provided part of the initial capital to fund and found PMNY and maintained an office at PMNY. PPVA was required to pay to PMNY and its owners certain fees, known as management fees and incentive fees. PMNY calculated these fees based on its determination of the net asset value ("**NAV**") of PPVA and in its capacity as the general partner of PPVA. Bodner indirectly received a portion of these fees paid by PPVA through companies he beneficially owned, including Grosser Lane Management LLC and Monsey Equities LLC.

Plaintiffs filed the operative Second Amended Complaint in this matter on March 29, 2019 against Bodner, PMNY, a group of reinsurance entities in which Bodner also held a beneficial ownership known as Beechwood, and numerous other individuals and companies that Plaintiffs allege were involved in the events that led to the liquidation of PPVA and the appointment of the JOLs. With the exception of Bodner and certain other Defendants against whom the case is currently stayed due to criminal proceedings, as ordered by the Court, the Court or the Plaintiffs have dismissed the parties from the case through settlement or otherwise. In conjunction with certain of the dismissals, Plaintiffs entered into settlement agreements with, among others, certain former Defendants. Parties settle cases for any of a great many reasons, and therefore you may not draw any inference about any issue in this trial from the fact that someone made a decision to enter a settlement agreement with Plaintiffs.

INSTRUCTION NO. 2

Duty of the Court[3]

We are now approaching the most important part of this case, your deliberations. You have heard all the evidence in the case, as well as the final arguments of the lawyers for the parties. Before you retire to deliberate, it is my duty to instruct you on the law that will govern your deliberations. These are the final and binding instructions, which entirely replace the preliminary instructions I gave you after opening statements, which you should now discard.

Regardless of any opinion that you may have as to what the law may be or ought to be, it is your sworn duty to follow the law as I give it to you. Also, if any attorney or other person has stated a legal principle different from any that I state to you in my instructions, it is my instructions that you must follow.

Because my instructions cover many points, I have provided each of you with a copy of them so that you can follow them as I read them to you now and so that you can have them with you for reference throughout your deliberations. In listening to them now and reviewing them later, you should consider my instructions as a whole and not single out any particular instruction as alone stating the law.

[3] *Id.*

INSTRUCTION NO. 3

Duty of the Jury[4]

Your duty is to decide the fact issues in the case and, if you can, arrive at a verdict. You, the members of the jury, are the sole and exclusive judges of the facts. You pass upon the weight of the evidence; you determine the credibility of the witnesses; you resolve such conflicts as there may be in the testimony; and you draw whatever reasonable inferences you decide to draw from the facts as you determine them.

In determining the facts, you must rely upon your own recollection of the evidence. To aid your recollection, we will provide you with copies of all the exhibits at the start of your deliberations, along with an index. If you need to review particular items of testimony, we can also arrange to provide them to you.

Please remember that none of what the lawyers have said in their opening statements, in their closing arguments, in their objections, or in their questions, is evidence. Nor is anything I may have said evidence. The evidence before you consists of just three things: the testimony given by witnesses that was received in evidence, the exhibits that were received in evidence, and the stipulations of the parties as to matters in evidence.

Testimony consists of the answers that were given by the witnesses to the questions that were permitted to be asked, either here in court or in the depositions that were read into evidence. Please remember that questions, although they may provide the context for answers, are not themselves evidence; only answers are evidence, and you should therefore disregard any question to which I sustained an objection. Also, you may not consider any answer that I directed you to

[4] *Id.*

disregard or that I directed be stricken from the record. Likewise, you may not consider anything you heard about the contents of any exhibit that was not received in evidence.

More generally, please be careful not to speculate about matters not in evidence. Your focus should be solely on the evidence that was permitted at this trial and not on any extraneous matters or speculations.

It is the duty of the attorney for each side of a case to object when the other side offers testimony or other evidence that the attorney believes is not properly admissible. Counsel also have the right and the duty to ask the Court to make rulings of law and to request conferences out of the hearing of the jury. All such questions of law must be decided by me. You should not show any prejudice against any attorney or party because the attorney objected to the admissibility of evidence, asked for a conference out of the hearing of the jury, or asked me for a ruling on the law.

Finally, I ask you to draw no inference from my rulings or from the fact that on occasion I asked questions of certain witnesses. My rulings were no more than applications of the law and my questions were only intended to clarify or to expedite matters. You should understand that I have no opinion as to the verdict that you should render in this case.

INSTRUCTION NO. 4

Duty of Impartiality[5]

You are to perform your duty of finding the facts without bias or prejudice or sympathy or hostility or any preconception whatsoever as to any party, for all parties are equal under the law. You are to perform your final duty in an attitude of complete fairness and impartiality. You are not to be swayed by rhetoric or emotional appeals. It must be clear to you that if you were to let extraneous considerations interfere with your thinking, there would be a risk that you would not arrive at a true and just verdict. So, do not be guided by anything except clear thinking and calm analysis of the evidence.

[5] *Id.*

INSTRUCTION NO. 5

Burden of Proof - Preponderance of the Evidence[6]

As you know, this is a civil case. In order to prevail in a civil case, a party who is making a claim against another party has what we call the "burden of proof," which is the burden of establishing each of the essential elements of the claim. There will be two burdens of proof standards by which you must weigh evidence in this case: preponderance of the evidence and clear and convincing evidence.

Here, the plaintiffs, Martin Trott and Christopher Smith, Court-appointed Joint Official Liquidators and Foreign Representatives (the "JOLs"), have brought claims against the defendant, David Bodner ("Bodner"), associated with breach of fiduciary duty and aiding and abetting breach of fiduciary duty, each of which require the Plaintiffs to prove their claims by a preponderance of the evidence. I will describe the essential elements of each claim shortly, but for now please note that in order to prevail on a breach of fiduciary duty claim, Plaintiffs must establish each essential element of that claim by what is called the "preponderance" of the credible evidence. To establish an element of a claim by a "preponderance" of the credible evidence means to prove that that element is more likely true than not true. It does not mean that proof is required to an absolute certainty. A preponderance of the credible evidence does not mean the greater number of witnesses, or how much time either side employs in the trial. The phrase refers to the quality of the evidence, its persuasiveness in convincing you of its truth. Bodner is asserting various affirmative defenses in relation to Plaintiffs' claims. For these affirmative defenses, including with respect to the validity of the Release Agreement and Bodner's contention that Bodner both

[6] *Id.*; Jury Charge in *SEC v. Payton*, No. 14-cv-4644, Dkt. 133 (S.D.N.Y. Mar. 1, 2016) (Rakoff, J.).

(i) in fact and (ii) reasonably, relied on outside auditors and valuation companies regarding PPVA, it is Defendant Bodner that must establish each essential element of that defense by what is called the "preponderance" of the credible evidence.

INSTRUCTION NO. 6

Burden of Proof - Clear and Convincing Evidence[7]

Plaintiffs also allege claims against Bodner sounding in fraud. Plaintiffs have the burden of proof of proving all of the elements of these claims by clear and convincing evidence. Clear and convincing evidence is proof that establishes in your mind that the proposition at issue is highly probable. Clear and convincing evidence leaves no substantial doubt in your mind. It is proof that establishes in your mind not only that the proposition at issue is probable but also that it is highly probable. The Plaintiffs satisfy their burden only if the evidence makes it highly probable that what Plaintiffs claim is what actually happened.

Clear and convincing evidence is a more exacting standard than proof by a preponderance of the evidence, where you need to believe that a party's claim is more likely than not true. Clear and convincing evidence cannot be met with evidence that is loose, equivocal, or contradictory, but rather must be met by a higher order of proof that produces a firm belief in your mind that the allegations sought to be proved are true. You should base your decision on all of the evidence, regardless of which party presented it.

[7] Jury Charge in *Cognex Corp. v. Microscan Sys., Inc.*, No. 13-cv-02027, Dkt. 203 (S.D.N.Y. May 2, 2014); *Waran v. Christie's Inc.,* 315 F. Supp. 3d 713, 718 (S.D.N.Y. 2018) (quoting *Crawford v. Franklin Credit Mgmt. Corp.*, 758 F.3d 473,491 (2d Cir. 2014)); New York Pattern Jury Instructions--Civil ("N.Y. PJI") 1:64 at l; N.Y. PJI 3:20 at l.

INSTRUCTION NO. 7

Direct and Circumstantial Evidence[8]

In deciding whether Plaintiffs and Defendant have met their burden of proof, you may consider both direct evidence and circumstantial evidence.

Direct evidence is evidence that proves a disputed fact directly. For example, where a witness testifies to what he or she saw, heard, or observed, that is called direct evidence.

Circumstantial evidence is evidence that tends to prove a disputed fact by proof of other facts. To give a simple example, suppose that when you came into the courthouse today the sun was shining and it was a nice day, but the courtroom blinds were drawn and you could not look outside. Then later, as you were sitting here, someone walked in with a dripping wet umbrella and, soon after, somebody else walked in with a dripping wet raincoat. Now, on our assumed facts, you cannot look outside of the courtroom and you cannot see whether or not it is raining. So you have no direct evidence of that fact. But, on the combination of the facts about the umbrella and the raincoat, it would be reasonable for you to infer that it had begun raining.

That is all there is to circumstantial evidence. Using your reason and experience, you infer from established facts the existence or nonexistence of some other fact. Please note, however, it is not a matter of speculation or guess; it is a matter of logical inference.

The law makes no distinction between direct and circumstantial evidence. Circumstantial evidence is of no less value than direct evidence, and you may consider either or both, and may give them such weight as you conclude is warranted.

[8] Jury Charge in *Gruber v. Gilbertson*, No. 16-cv-09727, Dkt. 478 (S.D.N.Y. June 14, 2022) (Rakoff, J.).

INSTRUCTION NO. 8

Witness Credibility[9]

It must be clear to you by now that counsel for the opposing parties are asking you to draw very different conclusions about various factual issues in the case. An important part of that decision will involve making judgments about the testimony of the witnesses you have listened to and observed. In making these judgments, you should carefully scrutinize all of the testimony of each witness and any other matter in evidence that may help you to decide the truth and the importance of each witness's testimony.

[9] *Id.*

INSTRUCTION NO. 9

Summaries and Charts Admitted as Evidence[10]

The parties have presented exhibits in the form of charts and summaries. I decided to admit some of these charts and summaries in place of the underlying documents that they represent to save time and avoid unnecessary inconvenience. You should consider these charts and summaries as you would any other evidence.

[10] 4 Leonard B. Sand et al., Modern Federal Jury Instructions - Civil (2019) ("Sand"), ¶ 74.06, Instr. 74-11.

INSTRUCTION NO. 10

Depositions[11]

Some of the testimony before you is in the form of excerpts from transcribed depositions that were received in evidence. A deposition is simply a procedure where prior to trial the attorneys may question a witness or a party under oath before a court stenographer. You should consider the deposition testimony received at this trial according to the same standards you would use to evaluate the testimony of a witness given live in court.

[11] Adapted from Jury Charge in *Gruber v. Gilbertson*, No. 16-cv-09727, Dkt. 478 (S.D.N.Y. June 14, 2022) (Rakoff, J.).

INSTRUCTION NO. 11

Specialized Testimony[12]

The law permits parties to offer opinion testimony from witnesses who were not involved in the underlying events of the case but who by education or experience have expertise in a specialized area of knowledge. In this case, you have heard testimony from two such witnesses offered by Plaintiffs, William Post and Ronald Quintero, and — potentially — one such witness offered by the defendant — Leon Metzger. This specialized testimony is presented to you on the theory that someone who is learned in the field may help you understand technical aspects of the evidence.

However, your role in judging credibility and assessing weight applies equally to these experts as to other witnesses. When you consider the expert opinions that were received in evidence in this case, you may give them as much or as little weight as you think they deserve. For example, an expert witness necessarily bases his or her opinions, in part or in whole, on what the expert was told by others, and you may conclude that the weight given the expert's opinions may be affected by how accurate or inaccurate that underlying information is.

[12] *Id.*

II. SPECIFIC INSTRUCTIONS

INSTRUCTION NO. 12

Partnerships

Plaintiffs in this case claim that Bodner was part of a *de facto*, also known as unincorporated, partnership with Huberfeld. Plaintiffs also claim that the Bodner-Huberfeld partnership effectively controlled PMNY. Bodner disputes that there was a partnership.

A partnership is an association of two or more persons to carry on as co-owners a business for profit.[13] Partnerships can be found in the absence of a formal, voluntary contract. For instance, certain relationships can create an unincorporated partnership. Under New York law, to find a *de facto* or unincorporated partnership between Bodner and Huberfeld, Plaintiffs must show some combination of the following elements:

(1) Bodner and Huberfeld shared in profits and losses from PMNY (both of whom beneficially owned interests in PMNY);

(2) Bodner and Huberfeld jointly controlled and managed PPVA;

(3) Bodner and Huberfeld contributed to the property, financial resources effort, skill, and/or knowledge of PPVA; and

(4) Bodner and Huberfeld showed an intention to be partners.[14]

If you find that Bodner and Huberfeld satisfy some combination of the above elements, you may find that there is a *de facto* partnership between them.

[13] N.Y. Partnership Law § 10 (McKinney 2022).
[14] *In re Fairfield Sentry Ltd.*, 627 B.R. 546, 563-64 (Bankr. S.D.N.Y. 2021); *see also* N.Y. Partnership Law § 11 (McKinney 2022); NY. Partnership Law § 23 (McKinney 2022).

INSTRUCTION NO. 13

Validity of the Release

As you have heard during trial, on March 20, 2016, Bodner, among others, entered into a Release Agreement with PMNY, under which they gave up their economic rights in PMNY (and related entities), and provided PMNY and related entities with a broad, unconditional, and general release from liability, in exchange from those Platinum entities — including PPVA — providing a similarly broad, unconditional, and general release of liability with respect to Bodner and others.

Bodner has argued that because the JOLs stand in the shoes of PPVA, they too are bound by the Release Agreement, and therefore, Bodner is released from any liability. In response, Plaintiffs argue the Release Agreement is unenforceable because it was entered into for an improper and fraudulent purpose — namely, permitting one co-conspirator, PMNY, to release certain of its co-conspirators, including Bodner, from liability. An agreement is unenforceable under New York law when the agreement is "prompted by the sinister intention of one acting in bad faith."[15]

Plaintiffs also point out that Bodner, PMNY, and others signed the Release Agreement after PMNY had received grand jury subpoenas relating to allegations of bribery involving the Correction Officers' Benevolent Association of New York, after PMNY, Bodner, and others learned that the Securities and Exchange Commission was investigating the valuations and Platinum-Beechwood relationship, and less than three weeks after learning that federal prosecutors had expanded their criminal investigations to transactions involving PMNY and its related entities, and the Beechwood reinsurance enterprise.

[15] *See Kalisch-Jarcho, Inc. v. City of N.Y.*, 58 N.Y.2d 377, 385, 448 N.E.2d 413, 417 (N.Y. 1983).

You, as the jury, are charged with weighing the evidence that has been presented with respect to this Release Agreement, including the circumstances that led to its execution and the knowledge of Bodner as of the date of its execution. Under New York law, it is Defendant Bodner's burden to demonstrate the Release Agreement is valid.[16] It is also Bodner's burden to prove that the Release Agreement is not void due to fraud, illegality or duress associated with the fact that the Release Agreement was executed by Mark Nordlicht and Platinum Management, purportedly on PPVA's behalf.[17]

Plaintiffs claim that the Release Agreement was entered into for a fraudulent purpose, given that it was executed after PMNY had received grand jury subpoenas for records relating to the COBA scheme, less than three weeks after learning that federal investigators had expanded their criminal investigation to transactions between PMNY and the Beechwood reinsurance enterprise, and at a time when Bodner knew that PPVA was overvalued. Plaintiffs also claim that the Release Agreement was not entered into for a legitimate business purpose, as evidenced by,

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[16] *Fleming v. Ponziani*, 24 N.Y.2d 105, 110-111, 247 N.E.2d 114, 118-119 (N.Y. 1969) (describing the "well established view in New York that the party seeking to prove the validity of a release has the burden of proof on the issue. This burden extends to proving lack of duress, illegality and fraud."); *Boxberger v. New York*, N.H. & H.R.R. Co., 237 N.Y. 75, 78, 142 N.E. 357 (N.Y. 1923); *Hill v. St. Clare's Hosp.*, 67 N.Y.2d 72, 84, 499 N.Y.S.2d 904, 911 (N.Y. 1986) ("the burden of proof as to the *validity* of a release is on the defendant who pleads it."); *see also Mangini v. McClurg*, 24 N.Y.2d 556, 563, 301 N.Y.S.2d 508, 514 (N.Y. 1969) (distinguishing the burden of proof for mutual mistake and fraud, holding "Where, however, the release is challenged on the grounds of duress, illegality, or fraud, the burden of persuasion remains with the releasee."). Hence, as here, once a prima facie showing is made that the Release is by and between joint-tortfeasors and conspirators in an overvaluation fraud case, the burden is on defendant to demonstrate the Release is nevertheless valid. In this case, it is undisputed that the Release purportedly binding PPVA was executed by Mark Nordlicht, for Platinum Management, in its capacity as general partner and manager of Plaintiff PPVA, which was controlled by Platinum Management. *Cf. Gerber Finance v. Volume Snacks Inc.,* 2021 WL 3038780 at *1, 4 (S.D.N.Y. 2021) (Rakoff, J.) (quoting *Flemming* but holding the "voidable" as opposed to "void" standard applicable to a release challenge based on lack of consideration and economic duress).

[17] *Id*.

among other things, Marcos Katz's shocked reaction to Bodner's efforts to disassociate with PMNY. Accordingly, Plaintiffs' claim that Bodner is attempting to immunize himself from liability based on a Release Agreement executed between him and his co-conspirators, including PMNY, immediately preceding the demise of PPVA.

If you find that the release agreement was executed for the purpose of permitting Bodner to escape liability for his wrongful acts and was negotiated and executed by and between Bodner and his co-conspirators, then the Release Agreement is unenforceable and Bodner cannot rely on the Release Agreement as a defense to Plaintiffs' claims.[18] On the other hand, if you find the evidence shows the Release Agreement was executed for a legitimate purpose and is otherwise devoid of any fraudulent intent, then Bodner can rely on the Release Agreement as a defense to Plaintiffs' claims.[19] The burden is on Bodner to prove, by a preponderance of the evidence, that the Release Agreement was executed for a legitimate purpose and for the improper purpose of having co-conspirators or joint-tortfeasors release each other.

[18] *Consorcio Prodipe, S.A. de C.V. v. Vinci, S.A.*, 544 F. Supp. 2d 178, 189 (S.D.N.Y. 2008) (quoting *Skluth v. United Merchs. & Mfrs., Inc.*, 163 A.D.2d 104, 106, 559 N.Y.S.2d 280 (1st Dep't 1990)) ("[A] release may be invalidated if it were 'the product of fraud, duress or undue influence.'").

[19] *See, e.g.*, *Arfa v. Zamir*, 76 A.D.3d 56, 58-60, 905 N.Y.S.2d 77 (1st Dep't 2010).

INSTRUCTION NO. 14

Inference from Assertion of Privilege Against Self-Incrimination

You have heard certain witnesses, namely Mark Nordlicht, decline to answer questions on the grounds of his Fifth Amendment privilege against self-incrimination. The Fifth Amendment of the United States Constitution affords every person the right to decline to answer any questions if he or she believes that the answers may tend to incriminate them. However, if ordered by the Court, the jury is required to adopt the inference that the withheld information would have been unfavorable to the defendant. This is called an adverse inference.

The Court has determined that certain adverse inferences be made against Nordlicht's invocation of the 5th Amendment. In the event that Nordlicht invokes his Fifth Amendment privilege during his testimony at trial, and upon the admission of evidence supporting the following categories of material in trial, you are required to find the following adverse inferences:

a) In 2003, Bodner, Huberfeld, and Nordlicht formed PMNY and a group of investment funds which included PPVA.

b) Since PPVA's inception, Bodner had fiduciary responsibility over PMNY and PPVA, and, along with Huberfeld, had final and ultimate authority over all operational and investment decisions for PPVA.

c) At all relevant times following the creation of PMNY, Bodner was provided special knowledge and insider information concerning the performance of PPVA's investments and the true value of PPVA's NAV due to Bodner's position as a founder and fiduciary of PMNY and PPVA.

d) Nordlicht and other PMNY employees regularly updated Bodner with special and confidential information regarding the operational failures for certain of PPVA's investments and the inflated value of PPVA's NAV, which information was not disclosed to the auditors and valuation companies retained by PMNY on behalf of PPVA. This information included, but was not limited to: (i) the overvaluation of PPVA's investment interests in Black Elk Energy Offshore Operations, LLC ("**Black Elk**") directly following the November 2012 explosion on Black Elk's West Delta 32 oil platform (the "**Black Elk Explosion**"); and (ii) the non-performance of PPVA's investment in Golden Gate Oil, LLC ("**GGO**") since its inception, and PMNY's refusal to account for GGO's non-performance in performing PPVA's NAV calculations, and the relationship between Platinum and Beechwood.

e) As a consequence of the Black Elk Explosion and PMNY's failure to accurately value PPVA's NAV, any and all incentive fees paid to Bodner or any other party with funds deriving from PPVA in or after November 2012 were unearned and Bodner was aware that the NAV of PPVA had decreased in the calendar year 2012. Similarly, in or after November 2012, PMNY received inflated payments of management fees with funds deriving from PMNY due to the overvaluation of PPVA's NAV.

f) Bodner was aware that PPVA's NAV was overvalued in and after November 2012, and Bodner never took any affirmative step in his fiduciary role to correct PMNY's monthly reporting of PPVA's NAV. Bodner personally approved the decision to tell then-investor Bernie Fuchs about the Black Elk detriment.

g) In January 2015, Fuchs was informed of PPVA's overvaluation by Bodner at a meeting of PMNY's partners, which included Nordlicht, Huberfeld, Bodner and Fuchs. At the same meeting, Bodner made the decision that none of the partners of PMNY would receive incentive fees going forward and that none of the partners would be permitted to take their investments out of PPVA, a decision he had the power and authority to unilaterally enforce.

h) Following the Black Elk Explosion, Bodner, Huberfeld and Nordlicht took steps to create the investment entities referred to as the Black Elk Opportunities Fund ("**BEOF**") for the purpose of masking or correcting the decrease in value of PPVA's investment in Black Elk. The true value of PPVA's investment in Black Elk was further deflated by the January 2013 decision of PMNY to subordinate PPVA's interests in Black Elk to that of the BEOF Funds and assume interest obligations to the BEOF Funds, of which Bodner was well aware.

i) Following the August 2014 sale of Black Elk's assets to Renaissance Offshore, LLC, Bodner had knowledge that the true value of PPVA's equity investment in Black Elk was zero and that the Black Elk bonds were compromised.

j) Bodner capitalized and formed the Beechwood reinsurance enterprise along with Nordlicht and Huberfeld. The fraudulent utilization of Beechwood was to apply Beechwood funds to PPVA investments (which Beechwood co-investments were fully guaranteed by PPVA) such as Black Elk, GGO and other companies, in order to falsely prop up the value of PPVA's NAV, and create the illusion that the PPVA investment equity valuations were reasonable even though significant relevant debt, transferred to Beechwood, was in default or distress.

k) Bodner had knowledge and significant input into Beechwood's investment allocations due to his position as a member of the "Nordlicht Group" (which included Nordlicht, Bodner and Huberfeld). Bodner had final authority over Beechwood's investment decisions, similar to his authority over PMNY and PPVA.

l) From February 2014 and at all relevant times thereafter, Bodner had knowledge that PMNY had caused PPVA to incur millions of dollars of debt to Beechwood in connection with guarantee/put option obligations on PPVA/Beechwood co-

investments, and that such debts were not accurately incorporated into the calculation of PPVA's NAV.

m) In January 2016, Bodner received a presentation from Seth Gerszberg and David Steinberg at the direction of Nordlicht, which outlined the debts PPVA owed to Beechwood and concluded that PPVA's NAV was materially overstated and cash-flow insolvent, wherein large assets ascribed 8-9 figure valuations on prior and subsequent NAV statements were accorded no value, lowered value or lowered net value on the basis that the Beechwood "debts" were valid. Thereafter, Bodner had detailed and special knowledge that PPVA's NAV was significantly overvalued.

n) Bodner was aware of the numerous governmental investigations into PMNY and its founders, which began in 2013 with an audit of PMNY's books and records, and expanded in February 2016 into an investigation of the Platinum/Beechwood relationship (the "**Expanding Government Investigations**").

o) On March 20, 2016, a Release Agreement was executed by, among others, PMNY, Nordlicht (on behalf of PMNY and other entities including PPVA), Huberfeld, and Bodner. The intent of Nordlicht, Bodner, Huberfeld and PMNY in relation to the Release was to release each other from liability due to their collective roles in, among other fraudulent acts, fraudulently overvaluing PPVA's NAV.

INSTRUCTION NO. 15

Imputation of Knowledge

You have heard testimony from an attorney currently or previously employed by the law firm of Curtis, Mallet-Prevost, Colt & Mosle LLP ("**Curtis**"), which is representing Bodner in this case and has represented Bodner and PMNY in myriad transactions, litigations, and investigations, including investigations involving PPVA that were conducted by various federal government agencies. This Curtis attorney testified to their knowledge related to, among other things, the valuation of PPVA's assets, including with respect to past government investigations concerning PMNY's valuation practices.

The conduct of an attorney is imputed to his or client for allowing the client to evade the consequences of their acts or omissions.[20] Additionally, a lawyer's knowledge is imputed to his or her client, and this imputation occurs at the time the attorney receives the information.[21] An attorney's knowledge of a related or prior matter can be imputed to this case.[22]

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[20] *SEC v. McNulty*, 137 F.3d 732, 739 (2d Cir. 1998) (quoting *Link v. Wabash R.R. Co.*, 370 U.S. 626, 633-34 (1962)); *see Veal v. Geraci*, 23 F.3d 722, 725 (2d Cir. 1994) ("The relationship between an attorney and the client he or she represents in a lawsuit is one of agent and principal.") (citation omitted); *see also In re Linzer*, 264 B.R. 243, 248 (Bankr. E.D.N.Y. 2001) (citing 6A N.Y. Jur. 2d Attorneys at Law § 101 (1997)) ("The general rule in agency law is that adequate notice to or actual knowledge acquired by an agent is imputed to the principal. This rule also applies to the relation of attorney and client.").

[21] *Eastman Kodak Co. v. Apple Inc. (In re Eastman Kodak Co.)*, 479 B.R. 280, 300 (Bankr. S.D.N.Y. 2012) (citing *Veal*, 23 F.3d at 725); *see also Chira v. Lockheed Aircraft Corp.*, 634 F.2d 664, 666 (2d Cir. 1980) (stating that a party cannot "avoid the consequences of the acts or omissions" of his chosen representatives, "absent a truly extraordinary situation," as "[a]ny other notion would be wholly inconsistent with our system of representative litigation . . . .") (internal quotations omitted); *L.I. Head Start Child Dev. Servs., Inc. v. Econ. Opportunity Comm'n of Nassau Cnty.*, 558 F. Supp. 2d 378, 394 (E.D.N.Y. 2008) (citation omitted).

[22] *See, e.g.*, *Linzer*, 264 B.R. at 248-49 (law firm's receipt of letter by creditors' securities litigation counsel concerning related bankruptcy proceeding warranted imputation of knowledge of bankruptcy proceeding to creditors); *Long v. Bd. of Governors of the Fed. Rsrv. Sys.*, 117 F.3d 1145, 1153 (10th Cir. 1997) (finding that an attorney's knowledge of the result of a governmental investigation is imputed to the attorney's client).

Here, Plaintiffs have argued that, during its representation of PMNY, Curtis obtained knowledge of, among other things, PMNY's valuation practices, the government's March 2016 investigation of the relationship between PMNY and the Beechwood reinsurance enterprise, and the use of Beechwood to falsely inflate the value of PPVA's NAV. Plaintiffs have also argued that Curtis regularly shared his information with Bodner, who Curtis has continuously represented since 2000. If you similarly find that Curtis obtained this knowledge, which you find that it shared with Bodner, you must find that Bodner also had this knowledge of Curtis.

INSTRUCTION NO. 16

Counts I and II - Breaches of Fiduciary Duty

Plaintiffs claim that Bodner breached his fiduciary duties owed to PPVA. Specifically, Plaintiffs allege that Bodner breached two types of fiduciary duties to PPVA — (1) the Duty of Care; and (2) the Duty of Loyalty — by using his control over PPVA's assets and PMNY's operations to knowingly take, receive, and cause other co-conspirators, including PMNY and the partners of PMNY, to take and receive unearned fees and distributions supposedly owed to PMNY by PPVA. Plaintiffs claim that Bodner took these unearned fees and distributions, and permitted PMNY and the partners of PMNY to also take fees and distributions, despite his knowledge that PPVA's NAV was overvalued, which he failed to disclose. Plaintiffs further claim that Bodner breached his duties of care and loyalty by forming and capitalizing Beechwood and BEOF, which were used for the purpose of inflating and concealing the overvaluation. According to Plaintiffs, this overvaluation resulted in Bodner, PMNY, and PMNY's partners benefiting from the unearned fees. Bodner denies these allegations.

In order to establish a breach of fiduciary duty under New York law with respect to a breach of either the duty of care or the duty of loyalty, Plaintiffs have the burden of proving: (1) that Bodner had a fiduciary duty to PPVA; (2) that Bodner breached his fiduciary duty; and (3) damages to PPVA resulted from the breach.[23] However, the inquiries associated with a breach of the duty of care claim and a breach of the duty of loyalty claim are different. The duty of loyalty requires fiduciaries to avoid self-dealing and to refrain from putting their best interests above those to whom a duty is owed.[24] The duty of care is broader, and includes more than simply avoiding self-dealing

[23] *See Meisel v. Grunberg*, 651 F. Supp. 2d 98, 114-15 (S.D.N.Y. 2009).
[24] *See Hanson Tr. PLC v. ML SCM Acquisition, Inc.*, 781 F.2d 264, 274 (2d Cir. 1986).

or bad faith, but instead requires the fiduciary to stay informed and diligent as to the entity to which the duty is owed.[25] The duty of care also requires a fiduciary to ensure that a company is managed by competent personnel.[26]

I will now instruct you on each one of these elements and instruct you as to the distinctions between Plaintiffs' claims for breach of the fiduciary duty of care and breach of the fiduciary duty of good faith.

1. A Fiduciary Relationship

As to the first element, under New York law, a fiduciary relationship exists when one person has reposed trust or confidence in another, and whether the second person accepts the trust and confidence, thereby gaining a resulting superiority or influence.[27] A fiduciary relationship is not dependent solely upon an agreement or contractual relationship, but instead results from the actual relationship between the parties.[28] A fiduciary relationship also does not depend on an individual's formal title or position in the company, only that the fiduciary exerted significant influence.[29] For example, when a defendant has discretionary authority to manage the plaintiff's investment accounts, it owes the plaintiff a fiduciary duty of the highest good faith and fair

[25] *See id.* at 274-75.
[26] *See Kimmel v. Schaefer*, 89 N.Y.2d 257, 265, 675 N.E.2d 450, (N.Y. 1996)
[27] *See Indep. Asset Mgmt. LLC v. Zanger*¸ 538 F. Supp. 2d 704, 709 (S.D.N.Y. 1993); N.Y. PJI – Civil 3:59 (Elements and Nature of Fiduciary Duty) (citing *Sokoloff v. Harriman Estates Development Corp.*, 96 N.Y.2d 409, 429-30, 754 N.E.2d 184, 188-89 (N.Y. 2001)); *Lamdin v. Broadway Surface Advertising Corp.*, 272 N.Y. 133, 138, 5 N.E.2d 66, 67 (N.Y. 1936); *Pokoik v Pokoik*, 115 A.D.3d 428, 429, 982 N.Y.S.2d 67 (1st Dep't 2014); *Matter of Estate of Naumoff*, 301 A.D.2d 802, 803, 754 N.Y.S.2d 70, 72 (3d Dep't 2003); *Cristallina S.A. v. Christie, Manson & Woods Int'l, Inc.*, 117 A.D.2d 284, 292, 502 N.Y.S.2d 165 (1st Dep't 1986); 2A N.Y. Jur. 2d Agency § 204).
[28] *EBC I, Inc. v. Goldman, Sachs & Co.*, 5 N.Y.3d 11, 20, 832 N.E.2d 26 (N.Y. 2005).
[29] *See Pergament v. Amton, Inc. (In re PHS Grp.)*, 561 B.R. 16, 38 (Bankr. S.D.N.Y. 2018).

dealing.[30] In the context of a partnership, limited partners who assume managerial control over a partnership will have fiduciary obligations.[31]

As members of the jury, you must determine, based on the evidence presented at trial, whether Bodner owed PPVA or PMNY a fiduciary duty.

2. Defendant's Breach of the Fiduciary Duty

Regarding the second element, after considering the testimony and evidence presented with respect to PPVA if you conclude a fiduciary relationship existed between PPVA and Bodner, your inquiry turns to whether Bodner, who owed PPVA a fiduciary duty, breached his fiduciary duty.

The heightened duties that exist in a fiduciary relationship are traditionally referred to as the duty of loyalty and duty of care. Plaintiffs allege that Bodner breached both his duty of care and his duty of loyalty to PPVA.

In the simplest terms, the duty of loyalty requires Bodner to have put the Interests of PPVA ahead of his own interests. If, for example, you find that Bodner took steps to profit at the expense of PPVA by concealing information that would have prevented him from taking management fees, then he has breached his duty of loyalty. Similarly, if Bodner, failed to disclose the overvaluation of PPVA in the face of a known duty to do so, he has breached his duty of loyalty.

The duty of care required Bodner to act, in managing the assets and business of PPVA with the same level of care as an ordinary person would in managing the same assets. If Bodner failed to exercise that level of care. He has breached his duty of care.

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[30] *See Assured Guar. (UK) Ltd. v. J.P. Morgan Inv. Mgmt. Inc.*, 80 A.D.3d 293, 305-06, 915 N.Y.S.2d 7, 16 (1st Dep't 2010).

[31] *See Int'l Equity Invs., Inc. v. Opportunity Equity Partners, Ltd.*, 472 F. Supp. 2d 544, 550 (S.D.N.Y. 2007).

As members of the jury, you must decide if Bodner breached either or both the duty of loyalty or duty of care by making statements or failing to disclose the overvaluation of PPVA's NAV, or by taking fees and distributions based on these overvaluations. If you find that Bodner breached either of these duties, you must find this element of Breach of Fiduciary Duty for Plaintiffs.

3. Damages to PPVA Caused by Bodner's Breach

The third and final element that Plaintiffs must establish to hold Bodner liable for breach of fiduciary duty pertains to the damages PPVA suffered as a result of Bodner's breach. Specifically, you must find the evidence presented at trial shows that Bodner's breach of duty of loyalty and/or duty of care — which Bodner owed to PPVA as a fiduciary — caused PPVA to incur the damages Plaintiffs have alleged.[32]

Under New York law, the party claiming a breach of fiduciary duty must establish that the offending party's actions were a substantial factor in causing an identifiable loss. Although Plaintiffs are not required to establish damages attributed to Bodner's breach of fiduciary duty with mathematical precision, you must still find based on the testimony and evidence presented at trial, that Plaintiffs have presented competent evidence of a monetary loss arising from Bodner's breach of his fiduciary duty so that the damages awarded are not merely speculative.[33]

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[32] N.Y. PJI 3:59 (Elements and Nature of Fiduciary Duty) (citing *Wallkill Medical Development. LLC v. Catskill Orange Orthopaedics, P.C.*, 178 A.D.3d 987, 988 115 N.Y.S.3d 67 (2d Dep't 2019); *Benjamin v. Yeroushalmi*, 178 A.D.3d 650, 653, 115 N.Y.S.3d 60 (2d Dep't 2019); *Pokoik*, 115 A.D.3d at 428; *Deblinger v Sani-Pine Products Co. Inc.*, 107 A.D.3d 659, 660, 967 N.Y.S.2d 394 (2d Dep't 2013); *Kurtzman v Bergstol*, 40 A.D.3d 588, 590, 835 N.Y.S.2d 644 (2d Dep't 2007); *see Daly v Kochanowicz*, 67 A.D.3d 78, 96-97, 884 N.Y.S.2d 144 (2d Dep't 2009) (purchaser's claim against real estate agent dismissed for failure to allege that damages were directly caused by agent's alleged misconduct)).

[33] N.Y. PJI 3:59 (Damages) (citing *E. W. Bruno Co. v Friedberg*, 28 A.D.2d 91, 94, 281 N.Y.S.2d 504 (1st Dep't 1967)); *see also Wolf v. Rand*, 258 A.D.2d 401, 402-03 (1st Dep't 1999).

Regarding how to measure the amount of damages resulting from a breach of fiduciary duty, New York law measures those damages by reference to the amount of loss sustained, by reason of a defendant's misconduct.[34] Additionally, where a fiduciary (in this case, Bodner) has financially benefited from a breach of the duty of loyalty, those financial benefits must be paid over to entity to whom the duty was owed, PPVA.[35] More generally, any damages you may choose to award for Bodner's breach of fiduciary duty should be governed by the objective that compensatory damages are intended to serve, which is "to make the plaintiff whole."[36]

[34] N.Y. PJI 3:59 (Damages) (citing *Duane Jones Co. v Burke*, 306 NY 172, 173, 117 N.E.2d 237 (1954); *Gibbs v Breed, Abbott & Morgan*, 271 A.D.2d 180, 189, 710 N.Y.S.2d 578 (1st Dep't 2000); *105 East Second Street Assocs. v Bobrow*, 175 A.D.2d 746, 746-47, 573 N.Y.S.2d 503 (1st Dep't 1991); *Stoeckel v Block*, 170 A.D.2d 417, 417, 566 N.Y.S.2d 625 (1st Dep't 1991); *E. W. Bruno*, 28 A.D 2d at 93, 281 N.Y.S.2d 504 (1st Dep't 1967); see *IBE Trade Corp. v Litvinenko*, 298 A. D.2d 285, 285 748 N.Y.S.2d 741 (1st Dep't 2002) (ownership of subsidiary restored to principal where agent wrested control of subsidiary from principal).

[35] N.Y. PJI3:59 (Damages) (citing *Hearst Magazines v. Greenstone/Fontana Corp.*, 139 A.D.3d 623, 624, 30 N.Y.S.3d 859 (1st Dep't 2016)).

[36] *Scalp & Blade, Inc. v. Advest, Inc.*, 309 A.D.2d 219, 225 (4th Dep't 2003) (collecting cases applying New York law).

INSTRUCTION NO. 17

Counts III and VII - Aiding and Abetting Breach of Fiduciary Duty[37]

Plaintiffs claim that Bodner aided and abetted PMNY's breach of fiduciary duty to PPVA in connection with the overvaluation of PPVA's NAV. Plaintiffs claim that, as a result, Bodner, PMNY, and the partners of PMNY to knowingly took and received unearned fees and distributions supposedly owed to PMNY by PPVA. The parties do not dispute that PMNY owed a fiduciary duty to PPVA. Bodner denies these allegations.

Beyond direct liability for one's own actions, New York law recognizes a cause of action for aiding and abetting another's breach of a fiduciary duty. A claim for aiding and abetting a breach of fiduciary duty requires that the defendant knowingly induced or participated in the breach.[38] A plaintiff is not required to allege that the aider and abettor had an intent to harm.[39] These aiding and abetting claims are distinct from Plaintiffs' claim that Bodner is primarily liable for his breach of his fiduciary duty to PPVA.[40]

In order for you to find that Bodner is liable for aiding and abetting a breach of fiduciary duty, you must be satisfied that Plaintiffs have proved the following by a preponderance of the evidence:

(1) PMNY breached either or both of its fiduciary duties of loyalty and care to PPVA; and

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[37] N.Y. PJI 3:59 (Aiding and Abetting Breach of Fiduciary Duty); 2 Restatement (Second) Torts § 876 (AM. L. INST. 1965). *See also* S*&K Sales Co. v. Nike, Inc.*, 816 F.2d 843, 847-48 (2d Cir. 1987); *Shearson Lehman Bros. v. Bagley*, 205 A.D.2d 467, 467, 614 N.Y.S.2d 5, 5 (1st Dep't 1994); *Kaufman v. Cohen*, 307 A.D.2d 113, 125, 760 N.Y.S.2d 157, 169 (1st Dep't 2003); *Krys v. Butt*, 486 Fed. App'x 153, 157 (2d Cir. 2012).

[38] *See Butt*, 468 F. App'x 153, 157 (2d Cir. 2012) (summary order).

[39] *Id.*

[40] *See Loreley Fin. (Jersey) No. 3 Ltd. v. Wells Fargo*, No. 12-cv-3723 (RJS), 2016 WL 5719749, at *6 (S.D.N.Y. Sept. 29, 2016).

(2) Bodner knowingly induced PMNY or the partners of PMNY to breach either or both of its fiduciary duties to PPVA, or that that Bodner participated in this breach.

INSTRUCTION NO. 18

Counts IV, VI and VIII - Fraud and Aiding and Abetting Fraud

Plaintiffs claim that Bodner committed actual fraud by using his control over PPVA's assets and PMNY's operations to knowingly take unearned fees and distributions to PMNY, Bodner, and the partners of PMNY by PPVA. Plaintiffs claim that Bodner took these unearned fees and distributions despite his knowledge that PPVA's NAV was overvalued, which he failed to disclose despite his superior knowledge, and which perpetrated an actual fraud on Plaintiffs. Plaintiffs also claim that Bodner actively participated in the fraud by forming and capitalizing Beechwood and BEOF, which were important mechanisms by which the overvaluation fraud was effected and concealed. Bodner denies these allegations.

This claim requires Plaintiffs to establish each element of their claim. As explained, the clear and convincing standard of proof requires evidence sufficient to prove that each element is highly probable, rather than merely more probable than not.

Under New York law, a material omission can be as much of a fraud as an affirmative misrepresentation. A material omission can form the basis for fraud liability where a special relationship exists between the plaintiff and defendant, which requires the defendant to disclose certain information.[41] This special relationship, which imposes an affirmative duty on a defendant to disclose that information, can exist when a defendant owes a fiduciary duty to the plaintiff, or under the "special facts" doctrine, where the defendant has superior knowledge to the plaintiff.[42]

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[41] *See Mandarin Trading Ltd. v. Wildenstein*, 16 N.Y.3d 173, 178, 944 N.E.2d 1104 (N.Y. 2011); *P.T. Bank Cent. Asia v. ABN AMRO Bank N.V.*, 301 A.D.2d 373, 373, 754 N.Y.S.2d 245 (1st Dep't 2003).

[42] *See SNS Bank, N.V. v. Citibank, N.A.*, 7 A.D.3d 352, 356, 777 N.Y.S. 2d 62, 66 (1st Dep't 2004).

The "special facts" doctrine requires satisfaction of a two-prong test: "that the material fact was information 'peculiarly within the knowledge' of [the defendant], and that the information was not such that could have been discovered . . . through the 'exercise of ordinary intelligence.'"[43] The "special facts" doctrine applies when the other defendant knows that the plaintiff is acting on the basis of this mistaken knowledge.[44] The "special facts" doctrine does not require the existence of a fiduciary relationship.[45] Application of the "special facts" doctrine is not dependent on whether the fraud is perpetrated by the actual party engaged in a transaction, nor must the defendant be in privity of contract with the plaintiff.[46]

Finally, Plaintiffs' fraud claim against Bodner is not duplicative of the aiding and abetting claims against him because the fraud claim is predicated on Bodner's primary violation, while the aiding abetting claims are premised on the primary violations by PMNY.[47]

If you find that Bodner had superior knowledge as to the overvaluations of PPVA's NAV, which was not readily available to PPVA as a whole, and that PPVA was operating on the basis that its actual NAV valuations were of higher value, you must find that Bodner had a duty to disclose these overvaluations. Generally, if you find that Bodner owed a duty to disclose facts concerning the overvaluation of PPVA's NAV, either by virtue of his fiduciary duty to PPVA, or through his superior knowledge that he did not disclose, you must find in favor of Plaintiffs on their fraud claim. If you find that Bodner committed a material act to further the overvaluation

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[43] *See Jana L. v. W. 129th St. Realty Corp.*, 22 A.D.3d 274, 278, 802 N.Y.S.2d 132 (1st Dep't 2005).
[44] *See Southwestern Payroll Serv., Inc. v. Pioneer Bankcorp, Inc.*, No. 1:19-CV-1349, 2020 WL 4353219, at *4 (N.D.N.Y. July 7, 2020).
[45] *See, e.g., Fertitta v. Knoedler Gallery, LLC*, No. 14-CV-2259 (JPO), 2015 WL 374968, at *11 (S.D.N.Y. Jan. 29, 2015).
[46] *See, e.g., Swersky v. Dreyer & Traub.*, 219 A.D.2d 321, 326-27, 643 N.Y.S.2d 33 (1st Dep't 1996); *Barrett v. Freifeld*, 64 A.D.3d 736, 738, 883 N.Y.S.2d 305 (2d Dep't 2009).
[47] *See Loreley*, 2016 WL 5719749 at *6.

fraud by forming, capitalizing or directing investment activity of BEOF or Beechwood relevant to the PPVA overvaluation, you must find in favor of Plaintiffs on their aiding and abetting fraud claim.

INSTRUCTION NO. 19

Count V - Constructive Fraud

Plaintiffs claim that Bodner committed constructive fraud by using his control over PPVA's assets and PMNY's operations to knowingly take unearned fees and distributions supposedly owed to PMNY, Bodner, and the partners of PMNY Plaintiffs claim that Bodner took these unearned fees and distributions, and permitted PMNY and the partners of PMNY to take these distributions and fees despite his knowledge that PPVA's NAV was overvalued, which perpetrated a constructive fraud on Plaintiffs. Bodner denies these allegations.

This claim requires Plaintiffs to establish each element of their claim. As explained, the clear and convincing standard of proof requires evidence sufficient to prove that each element is highly probable, rather than merely more probable than not. Constructive fraud modifies the claim for actual fraud by replacing the scienter (or bad intention) requirement with the requirement that the defendant maintained either a fiduciary or confidential relationship with the plaintiff.[48] A confidential relationship is found when a defendant misleads the plaintiff by false representations concerning information in which he or she has superior knowledge, or when the defendant fails to provide information material to a particular transaction.[49] As with actual fraud, a material omission can be the basis for a constructive fraud claim when the defendant owes a fiduciary duty to the plaintiff, which requires the defendant to disclose certain information.

If you determine that the evidence presented at trial establishes by "clear and convincing" evidence that Bodner maintained a fiduciary relationship with Plaintiffs and made material

[48] *See, e.g., LBBX Luxemburg S.A. v. Wells Fargo Sec., LLC*, 10 F. Supp. 3d 504, 524 (S.D.N.Y. 2014).
[49] *LBBW Luxemburg S.A. v. Wells Fargo Sec. LLC*, 10 F. Supp. 3d 504, 524 (S.D.N.Y. 2014).

omissions to Plaintiffs with respect to the overvaluation of PPVA's NAV, then your verdict must be for Plaintiffs and against Bodner with respect to the claim for Constructive Fraud.

INSTRUCTION NO. 20

Damages: Compensatory Damages[50]

If you find Bodner liable on any given claim – meaning you find Plaintiffs have met their burden of each necessary element against Bodner – you must consider the question of "damages," that is, the amount of money that you will award to Plaintiffs on that claim.

Generally speaking, damages seek to make the injured party whole – that is, to put the injured party in same position the party would have been if the party had not been injured. These damages are known as compensatory damages. The purpose of the law of damages is to award, as far as possible, just and fair compensation for the loss, if any, which resulted from Bodner's violation of Plaintiffs' rights.

At all times, Plaintiffs bear the burden of proving compensatory damages by a preponderance of the evidence. It is up to you to determine whether Plaintiffs have established that damages were proximately caused by the wrongful conduct of Bodner. The amount of money you award must be fair and reasonable based on the damages sustained and cannot be inadequate or excessive.

It is within your discretion to decide if certain damages were reasonably foreseeable, but you should not award compensatory damages for speculative injuries. Again, Plaintiffs must prove by a preponderance of the evidence that the damages to PPVA are real and not merely speculative.

In all instances, you are to use sound discretion in fixing an award of damages, drawing reasonable inferences where you deem appropriate from the facts and circumstances in evidence. If you decide to award compensatory damages, you must be guided by dispassionate common

[50] Matthew Bender, *Modern Federal Jury Instructions – Civil Instructions* at 77-3: Compensatory Damages.

sense. Computing damages may be difficult, but you must not let that difficulty lead you to engage in arbitrary guesswork.

INSTRUCTION NO. 21

Damages: Causation[51]

In considering whether to award damages, you must find that actions or omissions by Bodner was a substantial factor in causing injury to Plaintiffs. If the injury to Plaintiffs would have been sustained even if Bodner never took any wrongful action, or if Bodner had not failed to act when required to do so, then Bodner's conduct would not be a substantial factor in causing injury to Plaintiffs and you cannot award damages when there is lack of causation.

On the other hand, if you find that certain actions or omissions by Bodner were a substantial factor in causing one or more of Plaintiffs' injuries, then you may consider an award of compensatory damages necessary to address the particular injury. A certain action or omission is considered a substantial factor in causing injury if the injury to Plaintiffs would not have been sustained had Bodner not undertaken the particular action or omission at issue.

[51] N.Y. PJI 2:70 at 1; N.Y. PJI 3:57 at 3; *LNC Invs., Inc. v. First Fidelity Bank*, No. 92 Civ. 7584 MBM, 1997 WL 528283, at *28 (S.D.N.Y. 1997).

INSTRUCTION NO. 22

Damages for Breach of Fiduciary Duty - The Faithless Servant Doctrine

The Plaintiffs assert that Bodner, as a servant or fiduciary of PPVA, has breached his duty of loyalty to PPVA. The faithless servant doctrine arises out of the same breach that is the subject of Plaintiffs' claim for breach of fiduciary duty of the duty of loyalty.[52]

The faithless servant doctrine can apply whenever there is a fiduciary relationship between the parties.[53] If a party breaches their duty of loyalty, they must disgorge, or give up, all wrongful benefits obtained by their disloyalty, including compensation and interests.[54] Repeated omissions or acts of disloyalty during a certain period may result in a complete and permanent forfeiture in monies, distributions or other interests.[55]

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[52] *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.").

[53] *See Schulhof v. Jacobs*, 157 A.D.3d 647, 648, 70 N.Y.S.3d 462 (1st Dep't 2018) ("Given the existence of a fiduciary relationship, the faithless servant doctrine applies, and the motion court correctly granted summary judgment on that claim."); *see also Phansalkar v. Andersen Weinroth & Co., LP*, 344 F.3d 184, 189-90, 200 (2d Cir. 2003) (applying the faithless servant doctrine to the plaintiff even though he was denominated as a partner in a limited liability corporation); *G.K. Alan Assoc., Inc. v Lazzari*, 44 A.D.3d 95, 101-02, 840 N.Y.S.2d 378 (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, 473-74 (1st Dep't 2019) (summary judgment granted on plaintiff's faithless servant claims against decedent who provided legal and accounting services to company).

[54] *See Phansalkar*, 344 F.3d at 208-10 (ordering 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, 822 N.Y.S.2d 27 (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 Cap. Partners, LLC v. Moser*, 289 F. Supp. 3d 468, 481 (S.D.N.Y. 2018) (same).

[55] *See, e.g.*, *Panos v. Mid Hudson Medical Group, P.C.*, 204 A.D.3d 1016, 1019, 167 N.Y.S.3d 539 (2d Dep't 2022).

Here, Plaintiffs allege that Bodner breached his duty of loyalty by failing to disclose the overvaluation of PPVA's assets, and taking fees and distributions paid by PPVA to PMNY (and thus, Bodner, through Grosser Lane Management) based on these overvaluations. Moreover, Plaintiffs claim that Bodner repeatedly breached his duty of loyalty during the entire period of the overvaluation of PPVA's NAV (2012-2016) and thus Plaintiffs are entitled to complete and permanent forfeiture of these fees and distributions.

In the event that you find Bodner breached this duty of loyalty, Bodner should be deemed a faithless servant and is required to disgorge or forfeit all management fees, distributions, incentive fees, non-cash interests, or any other interest received by Bodner in any capacity, including through any entity in which Bodner had interest related to his role at PMNY, such as Grosser Lane Management. Moreover, fees and distributions paid to Naomi Bodner, Bodner's wife, by virtue of her ownership interest in Grosser Lane Management LLC can also be disgorged.

INSTRUCTION NO. 23

Damages: Punitive Damages[56]

In this case, Plaintiffs seek an award of punitive damages against Bodner. The purpose of punitive damages is to punish a defendant for shocking and outrageous conduct and to set an example in order to deter him or her or others from committing similar acts in the future. In the context of a fraudulent scheme systematically conducted for profit, the defendant is more likely to consider the consequences if they are forced to pay more than the actual loss of the plaintiff.[57]

Whether to award punitive damages and the amount of such award lies within your discretion.[58] However, you may only award punitive damages to Plaintiffs after you've decided to award compensatory damages. You may award punitive damages only if Plaintiffs prove by a preponderance of the evidence that Bodner's conduct was malicious and reckless, not merely unreasonable. An act is malicious and reckless if it is done in such a manner, and under such circumstances, as to reflect utter disregard for the potential consequences of the act on the safety and rights of others.[59] Under New York law, liability on a fraud claim triggers imposition of punitive damages.[60] Because the Plaintiffs have raised tort claims against Bodner that are

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[56] Matthew Bender, *Modern Federal Jury Instructions – Civil Instructions* at 77-5: Punitive Damages; *Kolstad v. American Dental Ass'n*, 527 U.S. 526, 535-8, 119 S. Ct. 2118, 2124-26 (1999); *Action House, Inc. v. Koolik*, 54 F.3d 1009, 1012 (2d Cir. 1995) (actual damages required before there can be a finding of punitive damages); *Goldberg v. Manhattan Ford Lincoln-Mercury, Inc.*, 129 Misc. 2d 123, 128, 492 N.Y.S.2d 318, 323 (N.Y. Sup. Ct. 1985); *Nelson v. All Am. Life & Fin. Corp.*, 889 F.2d 141, 150 (8th Cir. 1989); *In re Pester Ref. Co.*, 845 F.2d 1476, 1487 (8th Cir. 1988); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003); *Mendez v. Starwood Hotels & Resorts Worldwide, Inc.*, 746 F. Supp. 2d 575, 603-04 (S.D.N.Y. 2010); *Tse v. UBS Fin. Servs., Inc.*, 568 F. Supp. 2d 274, 314-15 (S.D.N.Y. 2008).

[57] *See Walker v. Sheldon*, 10 N.Y.2d 401, 403, 179 N.E.2d 497 (N.Y. 1961).

[58] *See Greenbaum v. Handelsbanken*, 67 F. Supp. 2d 228, 267 (S.D.N.Y. 1999).

[59] *See Walker*, 10 N.Y.2d at 403.

[60] *See Deng v. 278 Gramercy Park Grp. LLC*, No. 12 Civ. 7803(DLC)(JLC), 2014 WL 1016853, at * 16 (S.D.N.Y. Mar. 14, 2014).

independent of any contract claim, there is no limitation of an award of punitive damages based on your determination that Bodner's conduct was or was not aimed at the general public.[61]

Finally, if you determine that Plaintiffs have met their burden of showing that Bodner's conduct warrants an award of punitive damages, the amount to award also remains within your discretion. However, you must use sound reason in setting the amount – it must not reflect bias, prejudice, or sympathy toward any party. You must only award punitive damages in an amount that is proportionate to the harm actually incurred based on your assessment of compensatory damages.

When reporting your verdict in a situation where you have concluded that an award of punitive damages is appropriate, you must separately state — apart from an award of compensatory damages — the amount of punitive damages awarded against Bodner.

[61] *See, e.g., Don Buchwald & Assoc. v. Rich*, 281 A.D.2d 329, 330, 723 N.Y.S.2d 8 (1st Dep't 2001).

INSTRUCTION NO. 24

Disgorgement Damages for Breach of Fiduciary Duty

In addition to damages, Plaintiffs may be entitled to what is known as an "equitable remedy" in the form of disgorgement. If you determine that Plaintiffs have suffered damages, but that economic loss is not the appropriate measure of damages, you may award damages in the form of a disgorgement of benefits wrongfully paid to Bodner, who received portions of the incentive fees/distributions based on PPVA's inflated NAV. Disgorgement is available to a victim of a breach of fiduciary duty because this remedy is designed not only to compensate plaintiff for the wrongs committed by the defendant, but also to prevent it.[62]

If disgorgement is appropriate, Bodner must forfeit any and all management fees, distributions, incentive fees, non-cash interests, or any other interest received by Bodner in any capacity, including through any entity in which Bodner had interest related to his role at PMNY. The fees and distributions paid to Bodner via his beneficial ownership interest in Grosser Lane Management LLC and other entities under his control can be disgorged as well. Additionally, fees and distributions paid to Naomi Bodner, through her ownership interest in Grosser Lane Management LLC, can also be disgorged. The appropriate measure of disgorgement damages is based on the amounts received in connection with the aforementioned management and incentive fees/distributions.[63]

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[62] *See, e.g., Bon Temps Agency Ltd. v. Greenfield*, 184 A.D.2d 280, 281, 585 N.Y.S.2d 824 (1st Dep't 1992); *City of Binghamton v. Whalen*¸ 141 A.D.3d 145, 148, 32 N.Y.S.3d 727 (3rd Dep't 2016).

[63] *See Lightbox Ventures, LLC v. 3rd Home Ltd.*, 16cv2379(DLC), 2018 WL 1779346, at *11 (S.D.N.Y. Apr. 13, 2018); *Excelsior 57th Corp. v. Lerner*, 160 A.D.2d 407, 408-09, 553 N.Y.S.2d 763 (1st Dep't 1990).

You must only consider those benefits paid during the time periods where the evidence shows Bodner breached his fiduciary duty to PPVA, perpetrated a fraud on PPVA, or aided and abetted PMNY's breach of fiduciary duty to PPVA.

Plaintiffs have the initial burden of proving the total amount of benefits that were improperly paid to Bodner. If the Plaintiffs meet their burden, the burden then shifts to Bodner to show by a preponderance of the evidence that a portion of the benefits paid are not attributable to any wrongful conduct.[64]

[64] *SEC v. Universal Express, Inc.*, 646 F. Supp. 2d 552, 563 (S.D.N.Y. 2009).

INSTRUCTION NO. 25

Prejudgment Interest

In the event that Plaintiffs prevail on their claims for breach of fiduciary duty, aiding and abetting a breach of fiduciary duty, fraud or aiding and abetting a fraud, Plaintiffs are entitled to an award of prejudgment interest on each of such claims.[65] Under New York Civil Practice Law and Rules § 5004, prejudgment interest runs at 9% per annum.[66] "Prejudgment interest is typically computed from the earliest ascertainable date the cause of action existed, but, where damages were incurred at various times, may be computed from each date the damages were incurred or from a single reasonable intermediate date."[67]

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[65] *See Uddo v. DeLuca*, 425 F. Supp. 3d 138, 157 (S.D.N.Y. 2019) (prejudgment interest at 9% awarded on plaintiff's claims for breach of fiduciary duty, fraudulent inducement and aiding and abetting breach of fiduciary duty), *aff'd*, 837 Fed. Appx. 39 (2d Cir. 2020); *Korn v. Korn*, 206 A.D.3d 529, 531 (1st Dep't 2022) (prejudgment interest on breach of fiduciary duty claims); *In re Crazy Eddie Sec. Litig.*, 948 F. Supp. 1154, 1166 (E.D.N.Y. 1996).

[66] *See Regan v. Payne*, 2:20-CV-05423 (JMA) (ARL), 2022 WL 3220370, at *1 (E.D.N.Y. July 28, 2022).

[67] *Bolivar v. FIT Int'l Group*, 2017 WL 11473766, at *21 (E.D.N.Y. 2017) (quotation and alteration omitted) (quoting N.Y.C.P.L.R. § 5001(b)), Report adopted, 2019 WL 4565067 (S.D.N.Y.. 2019); *see also Conway v. Icahn & Co.*, 16 F.3d 504, 512 (2d Cir. 1994).