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December 7, 2022

VIA EMAIL

The Hon. Jed S. Rakoff
United States District Court for the Southern
District of New York
Daniel Patrick Moynihan United States
Courthouse
500 Pearl St.
New York, NY 10007-1312

Re: *Trott v. Platinum Mgmt. (NY) LLC et al.*, No. 18-cv-10936-JSR -- Validity of Release Agreement

Dear Judge Rakoff:

Defendant David Bodner submits this letter pursuant to the Court's invitation today to provide argument on whether there is a "joint tortfeasor" exception to the strong presumption under New York law that a release agreement is valid. This Court stated that it was "ever more leaning toward instructing the jury that the release agreement [JX74] is void if it is made by joint tortfeasors who thereby release claims between themselves that could otherwise be brought." (Tr. 847:1-4.) With the greatest respect for this Court, we have found no authority supporting this proposition. Set forth below is our response on the applicable law and facts, and a proposed framework for how to instruct the jury on this issue, while preserving both parties' rights through the conclusion of the trial.

The Court should follow its own reasoning at summary judgment, where the Court raised a question about the "legitimate business purpose of making room for Marcos Katz," citing an April 2016 fax from Katz [PX372] in which he expressed confusion about the deal that his grandson and his counsel had been negotiating at his direction since at least February 2016. The Court concluded on the basis of the fax that there was a triable issue as to "whether the Release Agreement was entered into for a fraudulent purpose of permitting one co-conspirator, Platinum Management, to release its other [alleged] co-conspirators, Bodner and Huberfeld, from liability." (ECF No. 624 at 21.) Thus, the critical jury question is whether the Release Agreement was entered into for a "fraudulent purpose."

I. Background

On March 8, 2022, plaintiffs filed a motion *in limine* arguing that "the introduction of any evidence relating to the Release at trial" was "obviated and rendered unnecessary," relying on the argument that "co-conspirators and joint tortfeasors cannot validly release other co-conspirators and joint tortfeasors." (ECF No. 696.) On November 23, 2022, Bodner filed his opposition, detailing the overwhelming legal authority and admissible evidence in support of upholding the Release Agreement. (ECF No. 761.) On November 30, 2022, this Court denied plaintiffs' motion. (Tr. 6:17-19.) In reliance on that ruling, defense counsel discussed the Release Agreement in its opening argument and has since then examined numerous fact witnesses about the Release Agreement, adducing testimony from witnesses such as Bernard Fuchs, Seth Gerszberg, and Murray Huberfeld about the business purpose underlying the negotiations with Marcos Katz and the respective exits of Bodner and Huberfeld.

II. There Is No Law Supporting a Purported "Joint Tortfeasors" Exception

Putting aside that considerable trial testimony has already been adduced that defendant Bodner was not a joint tortfeasor and was not a fiduciary of PPVA, plaintiffs have never cited authority holding that an otherwise valid release is unenforceable if the parties releasing one another are joint tortfeasors. In *Golding v. Weissman*, 35 A.D.2d 941 (1st Dep't 1970), for example, 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. As the Court noted today, in *Aviles v. S&P Global, Inc.*, 380 F. Supp. 3d 221 (S.D.N.Y. 2019), Judge Oetken asked a rhetorical question (but did not decide) whether there might be an exception to the presumption of enforceability "where the release arises out of a fiduciary breach that was committed by the corporate officers and knowingly facilitated by the third party?" *Id.* at 301. This dicta was made in the course of Judge Oetken's denying a motion to dismiss on the basis of well-pleaded allegations that plaintiffs had been misled and exploited by a fiduciary, *i.e.*, fraudulently induced, into signing the settlement agreement. There was no ruling on the merits. Moreover, in *Aviles*, the allegation was that the settlement itself constituted a breach of fiduciary duty. There is no such allegation in this case, where the only surviving claims against Bodner concern Platinum Management's alleged overvaluations of certain PPVA assets and plaintiffs have never asserted that the Release Agreement itself gives rise to any liability separate from liabilities covered by the Release Agreement.

Aviles is the only relevant authority plaintiffs have ever offered for this purported "joint tortfeasors" exception. None of the other cases cited by plaintiffs for this proposition in their unsuccessful motion *in limine* even concerned allegations of a release among joint tortfeasors; rather, their cited cases related to releases between tortfeasors and their victims.

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 plaintiffs' heavy burden to prove "fraud, duress or some other fact which will be sufficient to void the release." *Id.* To that

end, once there is evidence of a signed release, 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*. Importantly, plaintiffs must prove a separate fraud or fiduciary-duty breach from any claims of fraud or breach that were themselves the subject of the Release Agreement. *Dantas v. Citigroup, Inc.*, 779 F. App'x 16, 20 (2d Cir. 2019) (citing *Centro Empresarial*, 17 N.Y.3d at 276). *Cf. Aviles*, 380 F. Supp. 3d at 295 (discussing breach of fiduciary duty claim regarding settlement agreement).

Centro Empresarial controls here. In that 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. Plaintiffs alleged that they had been provided with ***fraudulent tax and financial statements*** by the company and so were fraudulently induced into the transaction. Because the fraud alleged in the complaint ***fell within the scope of parties' release*** and the ***plaintiffs were sophisticated parties***, they could not invalidate the release by claiming ignorance of the depth of their fiduciary's misconduct.

Indeed, New York courts consistently uphold releases of former alleged fiduciaries where the parties were represented by counsel. 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). *See also DIRECTV Grp., Inc. v. Darlene Invs., LLC*, 05 Civ. 5819 (WHP), 2006 U.S. Dist. LEXIS 69129, at *12-13 (S.D.N.Y. Sept. 27, 2006) (enforcing release despite fraudulent inducement claim, holding that "[e]xperienced corporate executives negotiated the Mutual Release with the advice and assistance of sophisticated counsel. Therefore, Darlene had ample opportunity to protect itself by contract from continuation of the allegedly fraudulent behavior prior to the Mutual Release.").

Plaintiffs cannot point to *any* fraud—much less a "separate" fraud—in connection with the Release Agreement. *Centro Empresarial*, 17 N.Y.3d at 276. It was negotiated by sophisticated counterparties as a requisite component to the Katz deal, a serious effort by Platinum Management and the Katz family to turn around an illiquid company.

III. The Purported "Joint Tortfeasors" Exception Makes No Sense

No witness to date has disputed the testimony of percipient witnesses Bernard Fuchs, Seth Gerszberg, and Murray Huberfeld that the fund hoped to realize a substantial benefit from

bringing in new "management share class" investors in tandem with the return of Bodner's and Huberfeld's shares. Second, the interests of PPVA were ably represented by Platinum Management's experienced in-house counsel, Harvey Werblowsky and Suzanne Horowitz, neither of whom has been accused of any wrongdoing. Against this backdrop, we submit that the proposed rule that an otherwise valid release is void if entered into between two tortfeasors is not the law.

Such a rule would represent a sea change in the law. Consider, for example, a routine shareholder derivative action against two corporate officers who worked together on a transaction for the company and are accused of breaching their fiduciary duties in connection with a particular asset sale. One of the two officers separates from the company under routine circumstances, with mutual releases, after the transaction at issue but before the shareholders bring their claims. Under the proposed "joint tortfeasor" rule, the former officer would have no right to enforce the release against the derivative plaintiffs until he proves himself not liable for the underlying transaction-based claim. This would render the release a nullity, and plainly violates the principle of *Centro Empresarial* that a release is presumptively valid and not "a starting point for litigation."

This purported exception would also invalidate a release agreement where the alleged tort claim was modest and the agreement's benefit to non-tortfeasors greatly outweighed the value of any released claim, and where there is no suggestion that the interest of the non-tortfeasor principal was not fully protected. As detailed above, New York courts *do* uphold releases of alleged tortfeasors, including alleged fiduciaries, in the absence of fraud or duress.

IV. The Facts Regarding Consideration

As the Court acknowledged, "New York law is clear that you don't have to have consideration for the release." (Tr. 780:7-8.) Nevertheless, the Court invited defendant to address in this letter "what the consideration was for the release." (Tr. 848:4-6.)

Beyond the mutual releases here (of Bodner and Huberfeld by Platinum Management and the remaining Platinum Management partners, and vice versa), which under New York law are themselves consideration, Bodner and Huberfeld gave up their ownership and profit-shares in Platinum Management and Bodner, Huberfeld, and the remaining partners (Nordlicht, Fuchs, and Uri Landesman) all agreed to a lock-up provision whereby each of them would forgo any redemptions of their investments in PPVA for two years—far longer than the standard 60-day redemption period. (*See* JX 74 at ¶¶ 1, 3, 4(c).) Indeed, these locked-up interests represented well in excess of $100 million for the funds, guaranteed until March 2018. This would obviously be enormously beneficial, indeed crucial, to a fund that was illiquid and struggling.

The fact, relied on by plaintiffs, that Platinum Management partners stopped taking redemptions in 2014 is of no moment. Testimony by Fuchs, Gerszberg, and Huberfeld has already established that the partners hoped to bring in new investors and generate sufficient liquidity that distributions could resume in short order. There will be no evidence whatsoever

(and it would make no sense) that there was any agreement the partners would never resume redemptions once the fund's fortunes improved.

The fact that other Platinum Management partners—Nordlicht, Fuchs, and Landesman—agreed to a release of Bodner and Huberfeld while leaving themselves with continued liability to PPVA indicates that the exits of Bodner and Huberfeld had apparent value to the fund. And while plaintiffs have tried to make hay of Nordlicht's mocking disagreement with Bodner's request to be indemnified for any gift taxes, the very fact that Bodner thought his relinquishment of shares could subject him (as a donor) to gift taxes is proof that Bodner felt he was giving up something of value, and that he questioned whether the release was of sufficiently comparable value that gift taxes would not apply.

V. The Validity of the Bodner/Huberfeld Mutual Release with Platinum Parties

Even during plaintiffs' case-in-chief, considerable evidence of the authentic business purpose underlying the Release Agreement has already been adduced,[1] and far more evidence will be adduced during defendant's presentation in the coming days—for example, the anticipated testimony of the Katz family's counsel (Neuberger) and Platinum Management's in-house counsel (Horowitz) will firmly establish that:

- Amid PPVA's liquidity crisis in late 2015 and early 2016, Platinum Management pursued multiple investors in hopes of saving the fund, including Marcos Katz and Victor Hanna (DX-0240);

- By late February 2016, Marcos Katz's grandson, Michael, who had an office at Platinum,[2] had negotiated a term sheet with Platinum Management's in-house counsel, under Marcos's explicit direction and which Marcos would subsequently approve in writing (DX-0191, DX-0413);

- Platinum Management, Bodner and Huberfeld, and the Katz family each had separate, sophisticated counsel negotiating at arm's length a complex transaction in line with the term sheet whereby Marcos would gain an ownership interest in Platinum Management upon the respective exits of Bodner and Huberfeld;

- Neuberger insisted that all of the Bodner and Huberfeld families' interests in Platinum Management and its related entities would be "ceded back," and wanted confirmation of the precise Bodner and Huberfeld ownership interests that would be subject to the lockup provision in the Release Agreement (DX-0198);

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[1] *See*, *e.g.*, Tr. 507:17-508:3 (Fuchs); 690:22-691:8, 707:12-22, 714:5-7, 714:12-20 (Gerszberg); 753:10-755:21, 763:8-17 (Huberfeld).

[2] Tr. 423:12-15 (Fuchs); 546:19-21 (Huberfeld).

- The Katz family (including Marcos) was fully informed in March 2016 that Bodner and Huberfeld would be released upon their exits as a component of the transaction, and Neuberger even successfully negotiated the final language of that release before execution in March 2016, insisting that clear language be included to the effect that any indemnity obligations to Bodner and Huberfeld would not apply to incoming partners like Marcos (DX-0329);

- The mutual releases between Bodner and Huberfeld on one side, and the remaining Platinum Management partners on the other, named Marcos Katz as an intended third-party beneficiary and also included valuable consideration beyond the return of Bodner's and Huberfeld's shares—most notably, a two-year lockup of the Bodner and Huberfeld families' $80 million in combined investments in PPVA, as well as the same lockup period for investments by Fuchs, Landesman, and Nordlicht, all of which could not be withdrawn from the fund until March 20, 2018 (JX 074 at ¶¶ 1, 3, 4(c), 5(b); ECF No. 549 at ¶ 53 ($80 million amount of Bodner and Huberfeld investments subject to lockup is undisputed by plaintiffs);

- The negotiations regarding other components of the Katz deal continued through at least June 7, 2022, when the Katz family sent fully executed investment and rebalancing agreements to Platinum Management (DX-0422); and

- After Marcos Katz died in July 2016, the Katz family asked Platinum Management to relieve them from any contractual obligations they might have, which Platinum Management agreed to do (DX-0427).

That the Katz transaction ultimately fell apart as a result of Huberfeld's arrest, PPVA's continued liquidity crisis and voluntary liquidation, and Marcos Katz's death has no bearing on whether this transaction had a legitimate business purpose when the agreements were being negotiated between February and June 2016 and, in the case of the Bodner/Huberfeld release and the investment and rebalancing agreements, fully executed.

VI. Proposed Framework for Factual and Legal Resolution

We respectfully propose that the Court instruct the jury first on the Release Agreement and the issue of fraudulent purpose, and second, on the elements of plaintiffs' claims for breach of fiduciary duty and fraud. This leads to three possible outcomes:

A. The jury finds for Bodner on liability, mooting the legal issue of fraudulent purpose;

B. The jury finds the Release Agreement was entered into for a fraudulent purpose and finds for plaintiffs on liability, which also moots the legal issue; or

C. The jury finds the Release Agreement was not entered into for a fraudulent purpose but finds for plaintiffs on liability—only then is the issue not moot, in which case the Court will decide as a matter of law whether the purported "joint tortfeasors" exception exists and, if so, applies to this case.

In sum, (1) there is no absolute "joint tortfeasors" public-policy exception to the strong presumption that the Release is enforceable; (2) although consideration is not a required element under New York law, there was ample consideration here; (3) the trial evidence will convince any and all reasonable jurors that there was no fraudulent purpose and hence no basis to invalidate the Release; and (4) this Court can instruct in a manner that allows the jury to resolve all factual questions and tee up the legal issue of this purported "joint tortfeasors" exception, if necessary, for the Court's consideration.

Very truly yours,

/s/ Nathaniel Ament-Stone
Nathaniel Ament-Stone