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.	:	

REPLY MEMORANDUM OF LAW OF DEFENDANT DAVID BODNER IN SUPPORT OF MOTION PURSUANT TO NEW YORK GENERAL OBLIGATIONS LAW § 15-108 [CORRECTED]

Eliot Lauer
Gabriel Hertzberg
Julia Mosse
Nathaniel Ament-Stone
KATTEN MUCHIN ROSENMAN LLP
50 Rockefeller Plaza
New York, New York 10020-1605
Tel.: (212) 940-8800
Fax: (212) 940-8776
Email: eliot.lauer@katten.com
gabe.hertzberg@katten.com
julia.mosse@katten.com
nathaniel.ament-stone@katten.com

Attorneys for Defendant David Bodner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

Defendant David Bodner respectfully submits this reply memorandum of law in support of his Motion[1] pursuant Section 15-108 to offset the Damages Verdict from $8,150,601.80 to zero on the basis of the JOLs' settlements with the Released Tortfeasors.

PRELIMINARY REPLY STATEMENT

The JOLs have received $40.1 million from the Released Tortfeasors. It was the JOLs' burden to establish that a portion of this amount should not be applied to reduce the verdict because it is attributable to injuries other than the inflated fees resulting from the overvaluation of PPVA's net asset value ("NAV"). Instead of even attempting to meet their burden, the JOLs make a mockery of Section 15-108 by relying on unproven and inflated numbers for meritless claims that lack any connection to most Released Tortfeasors. For example, they offer no documents, testimony, or other evidence connecting the identified Second Scheme transactions to [redacted], whose combined overlapping settlements totaled $22.4 million counting prejudgment interest—far exceeding the verdict, which, with prejudgment interest, is $14.3–14.8 million, depending upon when interest begins to accrue.

As for the other Released Tortfeasors—[redacted]—they all faced liability for overvaluation damages, but some portion of their settlements may reasonably be allocated to injuries for which Bodner was not found liable. If the Court were to apply a portion of their settlements to the overlapping injury of inflated fees, in an amount proportional to the true value of the total claims against them, that would add almost $9.1 million to the offset, taking it to over $31.5 million.

[1] Capitalized terms used but not defined herein shall have the meanings ascribed in Bodner's opening brief ("Bodner Br."), ECF No. 824. ECF citations refer to the *Trott* docket, 18 Civ. 10936.

Moving beyond apportionment of dollars, the JOLs fail entirely to engage with the parallel statutory requirement that the factfinder (here, the Court) determine each Released Tortfeasor's equitable share of fault for the relevant injury. Relying on a manufactured claim of "waiver" (JOLs' Opposition Brief, ECF No. 825 ("Opp.") at 17), the JOLs declined to counter Bodner's proposed allocation of 92 percent fault to the Released Tortfeasors with any proposal of their own. This is because they recognize that the proposed allocation of 8 percent responsibility to Bodner is reasonable and difficult to dispute given the significant responsibility and roles held by the Released Tortfeasors.

REPLY POINTS

I. A Section 15-108 Offset Is Mandatory Here, Where All of the Released Tortfeasors Were Claimed to Be Liable for the Same Injury as Bodner

The JOLs argue that "Section 15-108 does not apply" in this case because the verdict represents some "unique injury caused by Bodner" and no one else. *See* Opp. at 18-21. That argument is meritless. Section 15-108 applies "[w]hen a release . . . is given to one of two or more persons liable or **claimed to be liable** in tort for the **same injury** . . ." G.O.L. § 15-108(a) (emphasis added). Nothing in Section 15-108 "requires that the two defendants be liable upon the same theory. All that is required is that they be subject to liability for damages for the same injury." *Koch v. Greenberg*, 14 F. Supp. 3d 247, 269-70 (S.D.N.Y. 2014) (quoting *Roma v. Buffalo Gen. Hosp.*, 103 A.D.2d 606 (3d Dep't 1984)); *Barkley v. United Homes, LLC*, 848 F. Supp. 2d 248, 266-67 (E.D.N.Y. 2012) (where settlements "were not entirely for the 'same injury,'" evaluating "degree of overlap" between the alleged injuries).

The JOLs have claimed that each of the Released Tortfeasors, like Bodner, injured PPVA by causing it to pay unearned fees, either through their affirmative role in the inflation of PPVA's

NAV or through their failure to detect and disclose the inflated NAV. *See* Bodner Br. at 3-19.[2] There can be no serious dispute that Bodner and the Released Tortfeasors were "subject to liability for damages for the same injury" of inflated management and incentive fees from 2013-2016. The fact that the jury rejected the JOLs' damages number and quantified the JOLs' injury at $8.15 million instead of the $50 million that the JOLs sought (Tr. 2026-27, 2031; Opp. at 2) does not make the verdict an assessment that Bodner is "uniquely" liable for some different set of inflated fees than any Released Tortfeasor was "claimed to be liable" for.[3] The verdict represents the only adjudication of the true value of the JOLs' inflated fees claim. Accordingly, Section 15-108 plainly applies and requires that the verdict be offset.[4]

---

[2] That the JOLs may have asserted a different *theory* of liability as to the auditors and law firms is of no moment. *See Koch*, 14 F. Supp. 3d at 269-70. Equally futile is the JOLs' new contention that the "the unique injury caused by Bodner . . . was Bodner's failure to provide PPVA with the honest services required of him." Opp. at 18; *see also id.* at 21. "Honest services"—which appears now for the first time in this over four-year litigation—is a theory of liability, not an injury. The injury is the inflated fees. Nor does the JOLs' claim that certain Released Tortfeasors "had different positions of authority" from Bodner have any bearing; they were claimed to be liable for the same injury as Bodner. Opp. at 21. And the JOLs' argument that [redacted] Bodner Br. at 23.

[3] Nor does it support the JOLs' argument that the "jury verdict against David Bodner in the amount of $8.15 million [was] due to Bodner's breach of his fiduciary duty in connection with <u>his</u> receipt of certain fees which were unearned." Opp. at 1 (emphasis added). Nothing in the jury instructions directed the jury to assess damages as fees <u>received by</u> Bodner, and the JOLs' disgorgement claim was rejected *in limine*. And nothing in the verdict supports the JOLs' contention that the jury's finding was that there were $50 million in inflated fees but that Bodner "caused" just $8.15 million of them to be paid. To the contrary, the JOLs' trial presentation was that Bodner was responsible for <u>all</u> inflated fees paid.

[4] Because Bodner and the Released Tortfeasors were claimed to be liable for the same injury, the JOLs' reliance (Opp. at 19-20) on *Getty Petroleum Corp. v. Island Transp. Corp.*, 862 F.2d 10 (2d Cir. 1988), *Ackerman v. Price Waterhouse*, 252 A.D.2d 179 (1st Dep't 1998), and *Fox Paine & Co., LLC v. Equity Risk Partners, Inc.*, No. 526072014, 2019 WL 5872535 (N.Y. Sup. Ct. N.Y. Cty. Aug. 23, 2019), is misplaced. Those cases stand for the unremarkable proposition that where parties are not liable or claimed to be liable for the same injury, Section 15-108 does not apply.

II. The JOLs Have Not Satisfied Their Burden to Establish That the Released Tortfeasors Faced Meaningful Exposure for the Non-Overlapping Injuries

The verdict is approximately $14.5 million with prejudgment interest.[5] It is "plaintiffs' burden to prove what portion," if any, of the approximately $40.1 million that they received from the Released Tortfeasors should ***not*** be applied to offset the verdict. *See Hill v. St. Clare's Hosp.*, 67 N.Y.2d 72, 86 (1986); *Carter v. State*, 139 Misc. 2d 423, 428 (Ct. Cl. 1988) (plaintiff must "establish why and to what extent [a settlement] should be accorded less than its apparent full effect," and "the damages against which the settlement is sought to be applied should be determined so a proper comparison can be made between them and the damages covered by the settlement"), *aff'd*, 154 A.D.2d 642 (2d Dep't 1989). "Indeed, unless the injured party is required to bear the burden, the possibility of his or her double recovery for the same damages looms large." *Hill*, 67 N.Y.2d at 84 (internal citation and quotation marks omitted).

Under New York law, "the trial court [must] make an independent determination of what the proper apportionment of settlement proceeds should be, based on the monetary value of each cause of action," meaning the trial court must make its apportionment *de novo* and look to the actual value—not the self-serving stated value—of plaintiffs' claims. *See Andrulonis v. United States*, 924 F.2d 1210, 1225 (2d Cir. 1991); *see also Hill*, 67 N.Y.2d at 86 (trier of fact must consider "the gravity of the respective injuries" in applying settlements against judgment); *Casey v. State*, 119 A.D.2d 363, 367 (2d Dep't 1986) (trial court's apportionment must be "based on the merits of the respective causes of action," meaning "predicated on the evidence adduced at the trial with regard to the monetary value of each cause of action.") (emphasis added).

[5] The total is either $14,324,515.19 (using Bodner's computation) or $14,871,163.90 (using the JOLs'). *See* Section IV below.

Here, the JOLs ignore their burden entirely. This is unsurprising, since a careful analysis of the merits of the JOLs' claims against [redacted] reveals that their settlement payments are entirely attributable to the same injury for which Bodner was found liable—the payment of inflated fees as a result of the overvaluation scheme. The JOLs' other claims against these Released Tortfeasors were grossly inflated and meritless.[6] Aside from their *ipse dixit* listing of alleged injuries associated with various transactions involving PPVA (Opp. at 2-3), the JOLs offer no evidence connecting these parties to these transactions, no evidence supporting the claimed damages, and no facts from which a trier of fact could reasonably conclude these transactions created any realistic exposure for the Released Tortfeasors. The overlapping settlement payments made by [redacted] add up to nearly $20.3 million, reducing the verdict to zero even before adding prejudgment interest or applying any portion of the amounts paid by the remaining Released Tortfeasors.

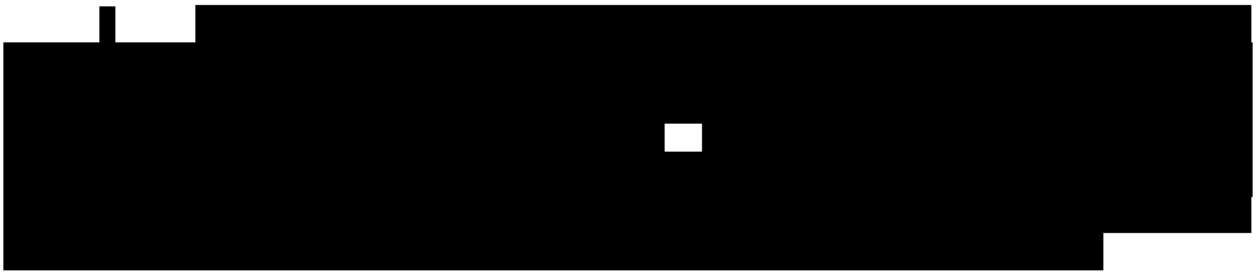
[redacted]

[6] The inflation in the JOLs' stated claim values is exemplified by reference to the opinion of their own damages expert, Ronald G. Quintero, who did not find specific damages for many of the transactions identified in the SAC (ECF No. 285) and in the Opposition. In fact, of the $297.5 million in damages claimed by the JOLs relating to the Black Elk Bond Buyback, Nordlicht Side Letter, March 2016 Restructuring, and Security Lockup (Opp. at 2-3), Quintero only quantified $3.1 million in damages associated with the Second Montsant Scheme, a component of the March 2016 Restructuring. *See* ECF No. 634-1, Quintero Rpt. at ¶ 11. In addition, Quintero quantified the JOLs' Agera injury as between $63.5–93.8 million, but the JOLs in their Opposition use only the higher number. *Compare id.*, *with* Opp. at 2-3. The JOLs should not be permitted to rely on claimed damages figures that were unsupported and unquantified by their damages expert at a time when all of these allegedly responsible parties were still in the case.

[redacted]

[redacted]

[redacted]



[redacted]

III. In Apportioning Between Overlapping and Non-Overlapping Claims, the Comparison Is Claims to Claims, Not Verdict to Claims

The JOLs' summary chart (Opp. at 24) computes a suggested offset by dividing the Damages Verdict by the "Damages Sought by the JOLs" against each Released Tortfeasor, which produces a percentage ("Verdict % of Claim Amount") that they then multiply against the settlement payments. This is an erroneous, apples-to-oranges comparison, intended to unfairly minimize the resulting offsets. The appropriate formula is claim to claim, where the numerator is not the $8.15 million verdict but the $50.2 million claim sought at trial. *See Koch*, 14 F. Supp. 3d at 272 (comparing respective claim amounts); *see also Carter*, 139 Misc. 2d at 429 (same).

The fallacy in the JOLs' methodology is most obvious in the example of [redacted], a Released Tortfeasor who indisputably faced 100 percent of the damages faced by Bodner (and no additional damages) at the time of [redacted], and whose $2 million settlement payment is completely overlapping, resulting in a dollar-for-dollar offset of the verdict. Yet the JOLs would apportion only 16.2 percent of the [redacted] an offset by dividing the $8.15 million verdict by the $50.2 million claim [redacted]. This defies logic and must be rejected.

Where there is a *bona fide* non-overlapping injury, the cases instruct that the Court should derive an offset percentage by dividing the triable claim against the nonsettling defendant (the numerator) by the *bona fide* value of the claim against the settling tortfeasor (the denominator). Section III above addresses the denominator for each Released Tortfeasor. Here, the numerator is the $50.2 million the JOLs asked the jury to award against Bodner.

IV. Interest Must Be Accrued on the Released Tortfeasors' Payments and Should Accrue from October 15, 2014, Not January 2014

The JOLs ignore the binding case law requiring that prior settlements, before being compared with the verdict, should be converted into "judgment-time dollars by adding hypothetical prejudgment interest from the time of the settlement to the time of the judgment before subtracting the settlement amount from the verdict." *In re Joint E. Dist. & S. Dist. Asbestos Litig.*, 18 F.3d 126, 132 (2d Cir. 1994); *see also Mulholland v. Philip Morris USA, Inc.*, 598 F. App'x 21, 24 (2d Cir. 2015) (affirming use of this methodology). The JOLs erroneously compute interest on the verdict, but not on the settlements.

Further, since the verdict does not specify when damages began, the Court should adopt a "reasonable intermediate date." *See* C.P.L.R. § 5001(b); *Hilt Constr. & Mgmt. Corp. v. Permanent Mission of Chad to United Nations in N.Y.*, No. 16 CV 6421 (VB), 2019 WL 3564571, at *2 (S.D.N.Y. Aug. 6, 2019) (applying this provision), *aff'd*, 860 F. App'x 764 (2d Cir. 2021). The verdict does not specify a date for the earliest payment of inflated fees, but it was plainly sometime between February 2013 (when the first management fees for calendar year 2013 were paid) and June 2016 (when the last management fees were allegedly paid). The intermediate date would therefore be October 15, 2014. Using that date, the accrued prejudgment interest on the verdict through February 28, 2023 would be $6,145,777.06.[11]

The below alternative offset calculations appropriately consider that five settlements encompassed the same claims as the Bodner trial; compares claims with claims; and converts settlements into judgment-time dollars:

[11] This amount is $574,785.04 less than the figure proposed by the JOLs, which does not follow the CPLR's requirement to select a "reasonable intermediate date."

Released Tortfeasor(s)	Realistic Damages Exposure	Overlap in Claims	Settlement Amount	Offset Amount (Principal)	Settlement Date	Interest from Settlement Date through 2/28/2023
[redacted]	$50.2 million	100%	$10,000,000	$10,000,000	[redacted]	$752,055
[redacted]	$50.2 million	100%	$2,000,000	$2,000,000	[redacted]	$51,288
[redacted]	$50.2 million	100%	$337,500	$337,500	[redacted]	$93,039
[redacted]	$50.2 million	100%	$2,350,000	$2,350,000	[redacted]	$60,263
[redacted]	$8.7 million	77%	$7,250,000	$5,583,333	[redacted]	$1,182,596
[redacted]	$96.2 million	52.18%	$10,500,000	$5,478,900	[redacted]	$168,870
[redacted]	$85.2 million	58.92%	$199,000	$117,251	[redacted]	$31,600
[redacted]	$148.1 million	33.9%	$4,459,825	$1,511,881	[redacted]	$376,148
[redacted]	$80 million	62.75%	$1,750,000	$1,098,125	[redacted]	$314,906
			Total Offset Amount (Principal)	***$28,476,989***	***Total Offset Interest***	***$3,030,764***
				Total Offsets to the Verdict		**$31,507,753**

V. Bodner More Than Carried His Burden to Establish His Statutory Right to Equitable Apportionment of 92 Percent Fault to the Released Tortfeasors, and the JOLs Offer No Counter

Section 15-108 requires a parallel inquiry that mandates an offset of the Damages Verdict by the aggregate equitable share of fault of the Released Tortfeasors. The JOLs, avoiding this analysis, argue only that "Bodner has waived his right to seek an offset . . . due to his Motion's complete absence of proof as to the overvaluation of PPVA's NAV and the Settling Defendants' responsibility for the same." Opp. at 17. This bizarre assertion of "waiver" is contradicted by the record and unsupported in the case law. The JOLs offer no counter to Bodner's proposed

apportionment because Bodner's estimate of 8 percent responsibility for himself, and 92 percent for the others, is appropriate and grounded in evidence.

First, Bodner unquestionably preserved his Section 15-108 rights. His affirmative defense under the statute is stated in his answer and was flagged in the pretrial order. *See* ECF Nos. 654, 760. The parties agreed during the testimony of plaintiff Martin Trott to empower the Court with calculating Section 15-108 offsets to spare the jury a lengthy cross-examination of Trott regarding his allegations against, and settlements with, the Released Tortfeasors. Tr. 1006:2-1007:24. Trott's allegations against the Released Tortfeasors are offered as evidence against him here. In addition, Bodner relied on evidence adduced at trial with respect to the Platinum/Beechwood transactions, evidence that [redacted]. *See generally* Bodner Br. Further, [redacted] Thus, there is no "absence of proof." Opp. at 17.[12]

Bodner had a *prima facie* burden to show the relative culpability of the Released Tortfeasors and satisfied it by pointing to the JOLs' own allegations against them. The JOLs offer no authority, and counsel knows of none, forbidding a non-settling defendant from using the plaintiffs' own statements in the same or related litigation to satisfy this burden. In the cases cited in the Opposition, the defendant either (a) failed to plead Section 15-108 at all, or (b) offered the factfinder no support upon which an equitable sharing of fault could be made. *See Schipani v. McLeod*, 541 F.3d 158, 163 (2d Cir. 2008) (defendant never argued other tortfeasors were liable);

[12] The JOLs' claim that Bodner failed to offer "proof as to the overvaluation of PPVA's NAV" is particularly puzzling, given that the overvaluation of PPVA's NAV was a necessary element of the fiduciary claim for which Bodner was found liable. *See* ECF No. 787, Jury Instructions.

Hamilton v. Garlock, Inc., 96 F. Supp. 2d 352, 356-57 (S.D.N.Y. 2000) (no proof of settling tortfeasor liability); *Hyosung Am., Inc. v. Sumagh Textile Co.*, 25 F. Supp. 2d 376, 387 (S.D.N.Y. 1998) (record was "devoid of any evidence that" codefendant "was aware of or had any role in the fraud"), *aff'd*, 189 F.3d 461 (2d Cir. 1999); *Whalen v. Kawasaki Motors Corp., U.S.A.*, 92 N.Y.2d 288, 293 (1998) (defendant did not plead Section 15-108, but could amend); *Gerdik v. Van Ess*, 5 A.D.3d 726, 727 (2d Dep't 2004) (no evidence presented of codefendant's malpractice).

CONCLUSION

Bodner respectfully requests that the Motion be granted and the Damages Verdict be reduced to zero.

Dated: February 16, 2023
New York, New York

KATTEN MUCHIN ROSENMAN LLP

By: */s/ Eliot Lauer*

Eliot Lauer
Gabriel Hertzberg
Julia Mosse
Nathaniel Ament-Stone
50 Rockefeller Plaza
New York, New York 10020-1605
Tel.: (212) 940-8800
Fax: (212) 940-8776
Email: eliot.lauer@katten.com
gabe.hertzberg@katten.com
julia.mosse@katten.com
nathaniel.ament-stone@katten.com

Attorneys for Defendant David Bodner