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)

JOLS' SUPPLEMENTAL MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

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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) (the "**Joint Official Liquidators**") and Platinum Partners Value Arbitrage Fund L.P. (in Official Liquidation) ("**PPVA**" and collectively with the Joint Official Liquidators, the "**JOLs**") respectfully submit this supplemental memorandum of law in opposition to the motions for summary judgment filed by the following Defendants: (i) David Bodner ("**Bodner**"), (ii) Murray Huberfeld ("**Huberfeld**"), (iii) the Huberfeld Family Foundation, Inc. ("**HFF**"), (iv) Bernard Fuchs ("**Fuchs**"), (v) Ezra Beren ("**Beren**"); (vi) Seth Gerszberg ("**Gerszberg**"), (vii) the Beechwood Entities[1]; (viii) Mark Feuer ("**Feuer**"), (ix) Scott Taylor ("**Taylor**"), and (x) Dhruv Narain ("**Narain**" and collectively with Bodner, Huberfeld, HFF, Fuchs, Beren, Gerszberg, the Beechwood Entities, Feuer and Taylor, the "**Defendants**").

PRELIMINARY STATEMENT

"Silence in the face of accusation is a relevant fact . . . [and] 'is often evidence of the most persuasive character.'" *Baxter v. Palmigiano*, 425 U.S. 308, 319 (1976) (quoting *U.S. ex rel. Bilokumsky v. Tod*, 263 U.S. 149, 153-54 (1932)). Mark Nordlicht's repeated invocation of his Fifth Amendment right during his recent deposition further supports and corroborates the JOLs' primary evidence offered during initial summary judgment briefing: there are genuine disputes as to material facts for all claims brought by the JOLs against the Defendants, and, therefore, summary judgment should be denied.

Nordlicht was deposed for nearly seven hours. During his deposition, Nordlicht's invocation of his Fifth Amendment right was not limited to the Black Elk Scheme and the Black

[1] All capitalized terms not defined herein shall have the meaning prescribed in the JOLs' Amended Statement of Material Facts Pursuant to Local Rule 56.1 ("**R. 56.1**") (Dkt. No. 576).

Elk Consent Solicitation, events which were the focus of his criminal trial. Rather, Nordlicht invoked the Fifth Amendment as to every aspect of this case and the allegations against all the Defendants, including, *inter alia*, (i) the circumstances of the March 2016 Release, and the U.S. Attorney's investigation of the COBA bribery scheme which led to the execution of the Release, (ii) the nature of the corrupt Platinum/Beechwood relationship, and (iii) the transactions by which Platinum Management and Beechwood diverted over $300 million in PPVA assets to Beechwood, including the Agera Note. Nordlicht's failure to answer these questions under oath is material and admissible evidence that, when taken with the overwhelming corroborating evidence submitted with the JOLs' initial Opposition Brief, should result in the denial of Defendants' respective motions for summary judgment.

STATEMENT OF FACTS

On March 26, 2020, the parties took the deposition of Nordlicht. (JOLs' Supplemental Statement of Material Facts Pursuant to Rule 56.1 "**Supp. 56.1**" at ¶ 2). During his deposition, Nordlicht declined to answer nearly every question and invoked his right against self-incrimination approximately 550 times. (Supp 56.1 ¶ 3).[2]

Nordlicht's Invocation of the Fifth Amendment

Nordlicht invoked the Fifth Amendment in response to the JOLs' questions concerning, *inter alia*, the myriad individuals, entities, and transactions forming substantially all of the issues in dispute between the parties as set forth in their respective Motions for Summary Judgment, Oppositions, and Replies. (Supp. 56.1 ¶¶ 5, 7, 11-68). As a broad, non-exclusive summary of the

[2] Nordlicht invoked the Fifth Amendment in response to substantially all questions, with the exception of questions concerning Ezra Beren and the Affirmation (the "**Nordlicht Affirmation**") that he submitted on February 14, 2020, in support of Beren's Motion for Summary Judgment (Dkt. Nos. 510, 513). (Supp. 56.1 ¶ 4).

invocations set forth in the JOLs' Supplemental Rule 56.1 Statement, Nordlicht invoked the Fifth Amendment in response to questions concerning:

- Bodner's, Huberfeld's, and Fuchs' ownership interests in Platinum Management, their control and management of Platinum Management and PPVA, and fees and other payments received by them as the ultimate owners of Platinum Management (Supp. 56.1 ¶¶ 7(i), 13-14, 33, 41-43);

- The overvaluation of PPVA's NAV, including, but not limited to, Bodner's, Huberfeld's and Fuchs' knowledge of the overvaluation of PPVA's NAV as evidenced by the January 2015 Partner Meeting (Supp. 56.1 ¶¶ 7(ii), 31);

- The COBA scheme, including the relationship between Huberfeld and Rechnitz, the payment of the $60,000 bribe to Norman Seabrook, the liability of Huberfeld and Bodner to PPVA in connection with their receipt of $1.8 million each immediately after COBA's initial $10 million investment in PPVA, and the resulting government investigation of the COBA scheme (Supp. 56.1 ¶¶ 7(iii), 21, 33, 38-39);

- The circumstances of the March 2016 Release, including the pending government investigation into Platinum/Beechwood, Nordlicht's knowledge that Platinum Management's membership interests were worthless at the time, the lack of independent representation for Platinum Management, and Nordlicht ceding complete authority to "negotiate" the March 2016 Release to Bodner, Huberfeld and their counsel (Supp. 56.1 ¶¶ 7(iv), 15-28);

- Bodner's and Huberfeld's ownership, management and control of Beechwood (Supp. 56.1 ¶¶ 7(v), 14, 29-30, 33-37, 48-49, 51-53);

- The concealment of Nordlicht's, Huberfeld's and Bodner's ultimate control and authority over Beechwood, including a purported "Chinese Wall" between Platinum Management and Beechwood (Supp. 56.1 ¶¶ 7(vi));

- HFF's substantial assistance to the Platinum/Beechwood fraud, including the issuance of "loans" with counterparties such as Fuchs and Hutton Ventures, meant to delay the ultimate reckoning and buy time until PPVA's assets could be transferred to Beechwood (Supp. 56.1 ¶¶ 7(vii), 7(viii), 44, 66-68);

- Beren's role as a facilitator for directives from Huberfeld and Bodner (Supp. 56.1 ¶¶ 7(ix));

- The Alpha Re negotiations and aborted transaction, and the subsequent formation of Beechwood as the reinsurance arm of Platinum, including Huberfeld, in an email to Feuer, dictating the terms of what became of the Platinum/Beechwood relationship (Supp. 56.1 ¶¶ 7(x), 47-49);

- Platinum Management hiring Feuer and Taylor to perform due diligence on Alpha Re, their working out of the offices of Platinum Management, and Platinum Management's subsequent installation of them as the public-facing ownership of Beechwood (Supp. 56.1 ¶¶ 7(xi), 47-50);

- The alter ego relationship among Platinum Management and the Beechwood Entities, including Nordlicht's belief that Platinum Management and Beechwood have the same management and are treated as affiliates. (Supp. 56.1 ¶¶ 7(xii), 59-65);

- The July 30, 2015 email from Bodner's personal email account, stating concerns regarding CNO's knowledge of Beechwood's money being put into Platinum "with its illiquid investments" (Supp. 56.1 ¶¶ 7(xiii), 29);

- The Black Elk scheme, including the overvaluation of PPVA's investment position in Black Elk, the Consent Solicitation which resulted in the subordination of PPVA's bond interests in preference to the interests of Platinum Management insiders, and the subsequent Black Elk Bond Buyback (Supp. 56.1 ¶¶ 7(xiv), 64-67);

- The Rachmanus email, an admission that Platinum Management had overvalued PPVA's NAV by more than $400 million and failed to disclose $100 million in liabilities that Platinum/Beechwood caused PPVA to owe to the Beechwood Entities, resulting in an overstatement of more than 75% of value (Supp. 56.1 ¶¶ 7(xvi)); and

- The dissipation of PPVA's assets through the Agera Transactions, including Narain's efforts on June 9, 2016, the day after Huberfeld's arrest, to close and fund the Agera Transactions (Supp. 56.1 ¶¶ 7(xvii), 14, 54, 65).

Nordlicht's Assertion of the Attorney-Client Privilege

Nordlicht, as the managing member of Platinum Management, repeatedly asserted attorney-client privilege and declined to answer questions by the JOLs, among others. (Supp. 56.1 ¶¶ 8-10, 17, 69-77).

As an example, Nordlicht invoked the attorney-client privilege when confronted with an email concerning the March 2016 Release, which he sent, on March 18, 2016, to Platinum Management's co-Chief Investment Officer David Levy and Platinum Management's outside counsel at Curtis, Mallet-Prevost, Colt & Mosle ("**Curtis Mallet**"). (Supp. 56.1 ¶¶ 69-77). Nordlicht's acknowledgement that Curtis Mallet served as Platinum Management's outside counsel while also serving as counsel for Bodner and Huberfeld for the negotiations of the March

2016 Release confirms that the Release was a product of "unfair circumstances" and would be "inequitable to allow the release to serve as a bar to the [JOLs'] claim[s]." *Mangini v. McClurg*, 249 N.E. 2d 386, 392 (N.Y. 1969); *see also* ECF No. 521-15 (Huberfeld Mem. at pp. 5, 11).

STANDARD OF REVIEW

Under Federal Rule of Civil Procedure 56, the Court "shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986). The moving party must show that "under the governing law, there can be but one reasonable conclusion as to the verdict." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). In determining whether summary judgment is appropriate, the Court must resolve all ambiguities and draw all reasonable inferences in the light most favorable to the non-moving party. *See Scott v. Harris*, 550 U.S. 372, 378 (2007). Summary judgment is improper if "there is any evidence in the record from any source from which a reasonable inference could be drawn in favor of the nonmoving party." *Chambers v. TRM Copy Ctrs. Corp*., 43 F.3d 29, 37 (2d Cir. 1994).

ARGUMENT

I. The Adverse Inference Raised by Nordlicht's Invocation of the Fifth Amendment Should be Imputed to the Other Defendants.

The U.S. Supreme Court has held that while the Fifth Amendment precludes drawing adverse inferences against defendants in criminal cases, invocation of the privilege permits the finder of fact in a civil case to draw an adverse inference from the assertion of the Fifth Amendment. *See Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976); *see also Brink's Inc. v. City of New York*, 717 F.2d 700, 709 (2d Cir. 1983) (imputing the adverse inference is appropriate where there is corroborating evidence); *see also Hansen v. Wwebnet, Inc.*, 2017 WL 1032268, at *3 (S.D.N.Y. March 16, 2017) (collecting cases and noting that the plaintiff, as the party denied

discovery by the witness's invocation of the Fifth Amendment, can ask the court to draw an adverse inference based on that invocation).

Here, Nordlicht was the Chief Investment Officer of PPVA and the public face of Platinum Management, and the primary defendant in this case. His invocation of the Fifth Amendment on all matters of inquiry relevant to the JOLs' claims is admissible evidence that there are contested issues of material fact in this case, which a finder of fact must be permitted to assess, thus rendering summary judgment on the JOLs' claims inappropriate. Nordlicht's invocation of his Fifth Amendment right corroborates the evidence previously submitted by the JOLs — including a 177 page Rule 56.1 Statement and approximately 700 exhibits — demonstrating that Defendants engaged in various forms of fraudulent activity with the ultimate purpose of looting PPVA's assets for their own benefit.[3]

In order to impute a witness's Fifth Amendment invocation to another party, the party seeking to impute the adverse inference must establish some relationship or loyalty between the witness and the other party. *See LiButti v. United States*, 107 F.3d at 122. Courts addressing this issue have rejected bright-line rules, and instead have concluded that the party urging the use of the inference must show that the circumstances of the particular case justify the imputation of the adverse inference. *See, e.g.*, *LiButti*, 107 F.3d at 121; *Fed. Deposit Ins. Corp. v. Fidelity & Deposit Co.*, 45 F.3d 969, 978 (5th Cir. 1995); *RAD Servs., Inc. v. Aetna Cas. & Sur. Co.*, 808 F.2d 271,

[3] On May 13, 2019, this Court entered an Order providing minimal weight to the adverse inference resulting from David Levy's invocation of his Fifth Amendment right in his answer to the complaint and in written discovery requests served by SHIP. *See* 1:19-cv-03211-JSR at ECF No. 26 at p. 18. The Court's holding as to Levy is distinguishable. First, in connection with the Levy Order, SHIP had requested drawing the adverse inference to defeat Levy's preliminary injunction motion for advancement of fees. *Id*. Here, the JOLs are seeking to draw the adverse inference as to Nordlicht's invocation in connection with significant corroborating evidence already submitted in connection with a summary judgment motion. Second, Nordlicht's invocation of the Fifth Amendment in several instances was significantly broader in scope than protection of his own legal interests, and included questions directed solely at the actions and culpability of other Defendants. Accordingly, "the circumstances of the particular case justify the imputation of the adverse inference." *See LiButti v. United States*, 107 F.3d 110, 121 (2d Cir. 1997).

277 (3d Cir. 1986); *Cerro Gordo Charity v. Fireman's Fund Amer. Life Ins. Co.*, 819 F.2d 1471, 1481 (8th Cir. 1987); *United States v. District Council of New York City*, 832 F.Supp. 644, 651-52 (S.D.N.Y. 1993).

In *LiButti*, the plaintiff, Edith LiButti, was the purported owner of a race horse. *LiButti*, 107 F.3d at 112. Ms. LiButti sued the federal government for enforcing a tax levy against the racehorse, which the government claimed was legally owned by her father. When questioned about the horse's ownership, Ms. LiButti's father (a non-party) invoked the Fifth Amendment and refused to answer any questions. On appeal, the Second Circuit held that the father's refusal to testify supported admissibility of an adverse inference against his daughter, stressing that "the overarching concern is fundamentally whether the adverse inference in trustworthy under all of the circumstances and will advance the search for truth." *LiButti*, 107 F.3d at 124 (citing *Idaho v. Wright*, 497 U.S. 805, 819 (1990)).

The Second Circuit enumerated four "non-exclusive factors" to guide trial courts in determining whether imputation of the adverse interest is appropriate: (i) the nature of the relationship between the defendant and the witness; (ii) role of the witness in the litigation; (iii) alignment of interests of the defendant and the witness in the outcome of the litigation; and (iv) degree of control over the witness by other defendants or co-conspirators. *Id.* at 123.

Nature of the Relationship between Defendants and Witness

The close working relationship among Nordlicht and the other Defendants favors imputation of the adverse inference. The more attenuated the relationship with the defendant, the less likely courts have been to admit a co-conspirator's refusal to testify. *See, e.g.*, *In re Urethane Antitrust Litig.*, 2013 WL 100250, at *2 (D. Kan. Jan. 8, 2013); *United States v. Dist. Council of New York City*, 832 F. Supp. 644, 652 (S.D.N.Y. 1993); *In re Polyurethane Foam Antitrust Litig.*, 2015 WL 12747961, at *5 (N.D. Ohio Mar. 6, 2015).

Here, the evidence is uncontested that the relationship between Nordlicht and the other Defendants was (and remains) extremely close, with Nordlicht, Huberfeld and Bodner forming the Platinum enterprise in 2003. (R. 56.1 ¶ 77). Nordlicht served as the lynchpin of the Platinum/Beechwood fraud, as he was the Chief Investment Officer and co-owner of Platinum Management and a co-owner of Beechwood. (R. 56.1 ¶ 56). Nordlicht, Huberfeld and Bodner worked to create Beechwood in the wake of the Alpha Re transaction, and at all times exercised their control over the enterprise. (R. 56.1 ¶¶ 382-411) The JOLs' Rule 56.1 Statement sets forth substantial corroborating evidence that Nordlicht and the other Defendants were co-conspirators, including making decisions in furtherance of the fraud at partner dinners and at in-person meetings with Nordlicht, Huberfeld and Bodner making "decisions by committee." (R. 56.1 ¶ 98).

Role of the Witness in the Litigation

The more central a witness is to the events underlying the lawsuit, the more likely a court will allow adverse inferences. *See, e.g.*, *Coquina Invs. v. TD Bank, N.A.*, 760 F.3d 1300, 1311-12 (11th Cir. 2014); *Cerro Gordo Charity v. Fireman's Fund Am. Life Ins. Co.*, 819 F.2d 1471, 1482 (8th Cir. 1987). Courts likewise consider whether the witness is also a party. *See, e.g.*, *State Farm v. Abrams*, 2000 WL 574466, at *7 (N.D. Ill. May 11, 2000). If the witness was an executive or officer at the time of the misconduct, the court is more likely to permit the adverse inference. *See S.E.C. v. Monterosso*, 746 F. Supp. 2d 1253, 1264 (S.D. Fla. 2010).

Unlike many of the cases applying the *LiButti* factors, Nordlicht is not a non-party witness, but, instead, the primary Defendant in this case, and his lack of involvement in the proceedings is solely due to the Court's Order staying discovery and other deadlines against him due to his pending criminal trial. (Dkt. No. 276). Accordingly, this factor weighs strongly in favor of imputation of the adverse interest against the other Defendants.

Alignment of Interests in Outcome of Litigation

As the former Chief Investment Officer of PPVA and the public face of Platinum Management, Nordlicht is the central Defendant in this case, and, the JOLs' claims against him are the same claims brought against the other Defendants. Accordingly, there is a perfect alignment of interests between Nordlicht and the other Defendants, namely, defeating the claims brought by the JOLs in connection with the Defendants' fraud, breach of fiduciary duties, and aiding and abetting the same.

An alignment of interests will be found where the witness is also a party, an alleged co-conspirator, or otherwise alleged to be intimately involved with the wrongdoing. *See, e.g.*, *State Farm Mut. Auto. Ins. Co. v. Abrams*, 2000 WL 574466, at *7 (N.D. Ill. 2000); *S.E.C. v. Monterosso*, 746 F. Supp. 2d 1253, 1264 (S.D. Fla. 2010).

The corroborating evidence submitted with the JOLs' initial Opposition Brief places Nordlicht at the heart of the wrongdoing. Nordlicht was the executive that worked directly with Platinum Management and Beechwood employees to engage in the scheme to overvalue PPVA's assets in investment positions such as Golden Gate Oil and Black Elk. (R. 56.1 ¶¶ 243-352). Nordlicht was one of the key drivers of the looting of PPVA's assets that began with the Black Elk scheme and Bond Buyback and continued until the Agera Transactions on June 9, 2016. (R. 56.1 ¶¶ 492-566) Nordlicht also is the purported signatory of the Nordlicht Side Letter, a three paragraph document where Nordlicht attempted to provide Beechwood with a $35 million security interest in PPVA's right to sale proceeds from Implant Sciences. (R. 56.1 ¶¶ 614-645). It is clear that Nordlicht's interests are aligned with those of the other Defendants and, as a co-conspirator, was involved with all facets of the wrongdoing related to the JOLs' claims against the other Defendants.

Degree of Control over Witness

This factor is more appropriate in situations where a current or former employee is testifying in a case involving his former employer. *See, e.g., In re Polyurethane Foam Antitrust Litig. Direct Purchaser Class*, 2015 WL 12747961, at *7 (N.D. Ohio Mar. 6, 2015). It should be noted, however, that Nordlicht submitted the Nordlicht Affirmation in this case at the urging of another defendant, which resulted in this Court authorizing the Nordlicht deposition. (Supp. 56.1 ¶ 4). Nordlicht testified that he did not make a single editorial change to the Nordlicht Affirmation prior to signing it. (Supp. 56.1 ¶ 4).

Accordingly, given the satisfaction of the controlling factors set forth above, imputation of the adverse inference to the other Defendants is appropriate.

CONCLUSION

For the foregoing reasons, the JOLs respectfully request the Court: (i) impute the adverse inference to the other Defendants, (ii) deny the Defendants' motions for summary judgment in their entirety; and (iii) grant any additional relief that this Court deems just and proper.

Dated: New York, New York
March 31, 2020

HOLLAND & KNIGHT LLP

By: /s/ Warren E. Gluck, Esq.

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