

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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IN RE PLATINIUM-BEECHWOOD LITIGATION

1:18-cv-6658 (JSR)

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MARTIN TROTT and CHRISTOPHER SMITH,
as Joint Official Liquidators and Foreign
Representatives of PLATINIUM PARTNERS
VALUE ARBITRAGE FUND L.P. (in
OFFICIAL LIQUIDATION), et anno

Plaintiffs,

- against -

PLATINIUM MANAGEMENT (NY) LLC,
et al.

Civil Action No.
1:18-cv-10936 (JSR)

Defendants

-----X

**SUPPLEMENTAL REPLY MEMORANDUM OF LAW TO THE PLAINTIFF'S
SUPPLEMENTAL OPPOSITION TO DEFENDANT BERNARD FUCHS MOTION FOR
SUMMARY JUDGMENT**

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FOR SUMMARY JUDGMENT**

This supplemental memorandum of law is submitted on behalf of defendant Bernard Fuchs in reply to the plaintiff’s supplemental papers in opposition to his motion for summary judgment.

While adverse inferences may be drawn in a civil case from defendant Nordlicht’s asserting his Fifth Amendment rights, it would be unjust to take such an inference against defendant Bernard Fuchs (Fuchs) because of his unique status. He was not an officer of platinum management. He sat on none of its committees. He was never consulted about evaluating its assets. Fuchs Local Rule 56.1, #2- 5. He was rarely in their offices. L. 56.1, #9. On the key issue of what PPVA invested in, Nordlicht, in his extremely rare exception to taking the Fifth Amendment, testified that Fuchs had no discretion regarding PPVA’s investment decisions. Plaintiff’s Supp. Bixter Decl., Ex. 2, pg. 156, lines 12-24. In all other questions regarding Fuchs, he took the Fifth Amendment. He had no control over

Nordlicht nor over Platinum. Fuchs blindly followed Nordlicht until he discovered he was being lied to. Fuchs affidavit, para. 16.

In [*LiButti v. U.S.*, 107 F.3rd 110 \(2nd Cir. 1997\)](#), the Second Circuit set forth four non-exclusive factors to be used to determine whether there should be a negative inference. *Id.* At 123. Based on these factors, there should not be a negative inference against Fuchs.

A. The Nature of the Relevant Relationship.

Unlike in *LiButti*, there was no bond between Nordlicht and Fuchs. In fact, their ultimate positions were adversarial. Fuchs, as a large investor, had a stake in the honest management of Platinum. He depended on the accurate rendering of its financial statements. L. 56.1, #11-14, Fuchs affidavit, para. 15,16 & 19. He was made a member solely to keep him from redeeming his large investments and he received no return for his membership interest. L. 56.1, # 17-18, Fuchs aff., para. 11, 12. His relationship was nothing like that of Huberfeld and Bodner. Both at the time of the alleged conspiracy and especially at the time he took the Fifth Amendment, he owed no loyalty to Fuchs and there was no relationship warranting an inference. [*In re Urethane Antitrust Litigation*, 2013 WL 100250 at *2 \(D. Kansas, Jan. 8, 2013\)](#).

B. The Degree of Control.

The plaintiff does not even argue this point, stating that it is more appropriate where a current of former employee is testifying in a case against a former employer. More likely it is because no defendant had control over Nordlicht, especially not Fuchs.

C. Compatibility of Interests.

Nordlicht taking the Fifth Amendment was diametrically opposed to Fuchs' interests. Fuchs whole defense is based on the argument that he was a mere cheerleader for Platinum and had role in the alleged conspiracy. It was in Fuchs' vital interests to have Nordlicht testify to this effect and was

stymied by this taking the Fifth. He did let slip one confirmation of Fuchs position when he swore that Fuchs has no discretion in regards to PPVA's investment decisions. Plaintiff's Supp. Bixter Decl., Ex. 2, pg. 156, lines 12-24. He even took the Fifth when Fuchs' counsel asked whether Fuchs has anything to do with evaluating assets. Plaintiff's Supp. Bixter Decl., Ex. 2, pg. 279, lines 2-13.

On the other hand, it would be in Nordlicht's interest to place the blame on his other co-defendants in order to spread the blame and the liability.

D. Role of the Witness in the Litigation.

No one can dispute that Nordlicht is a central figure in this litigation. However, it is just one of the non-exclusive facts to consider. The "overarching concern is fundamentally whether the adverse inference is trustworthy under all the circumstances and will advance the search for the truth."

LiButti v. U.S., supra, 107 F.3rd at 124.

The adverse inference against Fuchs cannot be considered trustworthy. Nordlicht is currently facing criminal proceeding based on the same facts as in this case. He would be expected to take the Fifth no matter what was asked of him. See, *In re Platinum-Beechwood Litigation*, 378 F.Supp. 3rd 318, 328 (S.D.N.Y. 2019).

The inference against Fuchs would also not advance the truth. Fuchs was trying to prove his non-involvement with Platinum. The major way to do so was to have Nordlicht testify that that fact. His taking the Fifth has stonewalled Fuchs' defense. As to Fuchs, a negative inference it would be an injustice.

CONCLUSION

THE MOTION SHOULD BE GRANTED AND THE COMPLAINT DISMISSED

Dated: April 3, 2020

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