UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE PLATINUM-BEECHWOOD LITIGATION	Master Docket No. 1:18-cv-06658-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, -v- PLATINUM MANAGEMENT (NY) LLC, et al., Defendants.	Case No. 1:18-cv-10936-JSR

MEMORANDUM OF LAW OF DEFENDANT HUBERFELD FAMILY FOUNDATION, INC. IN RESPONSE TO PLAINTIFFS' SUPPLEMENTAL BRIEF IN OPPOSITION TO MOTIONS FOR SUMMARY JUDGMENT

MORRISON COHEN LLP
909 Third Avenue
New York, NY 10022
(212) 735-8600

Attorneys for Defendant Huberfeld Family Foundation, Inc.

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HFF respectfully submits this response to Plaintiffs' Supplemental Memorandum of Law in Opposition to Defendants' Motions for Summary Judgment ("Pl. Supp. Mem.").[1]

PRELIMINARY STATEMENT

Plaintiffs' supplemental submission fails entirely to connect HFF to Mark Nordlicht, much less to meet Plaintiffs' burden to demonstrate why Nordlicht's broad invocation of his Fifth Amendment privilege (because he is under criminal indictment) should result in some form of adverse inference against HFF. Plaintiffs point to no relevant corroborative evidence to support an adverse inference and even fail to articulate what precise inference they seek to impose on HFF, leaving the Court to grapple with what they are even seeking. In any event, Nordlicht's testimony has no bearing on any of the salient dispositive issues previously demonstrated by HFF in its summary judgment motion (the "Motion"), *i.e.*, that HFF did not substantially assist the Black Elk Scheme or proximately cause Plaintiffs' damages. From a legal and factual perspective, Nordlicht's deposition is simply immaterial to HFF's Motion. In the end, Plaintiffs' legal "Hail Mary" submission is easily batted down as the clock expires, and serves only to underscore the complete absence of material issues of fact in opposition to HFF's Motion.

ARGUMENT

I. Plaintiffs Are Not Entitled To Any Adverse Inference Against HFF

Under limited circumstances, one party's invocation of its Fifth Amendment privilege in a civil action may warrant drawing an adverse inference against a different party. *See LiButti v. U.S.*, 107 F.3d 110, 121 (2d Cir. 1997). In determining whether to do so, "the [Court's]

[1] See ECF Doc. No. 852. Capitalized terms not otherwise defined herein refer to the definitions set forth in the Memorandum Of Law Of Defendant Huberfeld Family Foundation, Inc. In Support Of Summary Judgment ("HFF Mem.", 1:18-cv-06658-JSR, ECF Doc. No. 746) and the Reply Memorandum Of Law Of Defendant Huberfeld Family Foundation, Inc. In Further Support Of Its Motion For Summary Judgment ("HFF Reply Mem."), 1:18-cv-06658, ECF Doc. No. 834).

overarching concern is fundamentally whether the adverse inference is trustworthy under all of the circumstances and will advance the search for the truth." *LiButti*, 107 F.3d at 124. Here, the JOLs themselves recognize that Nordlicht is facing a criminal trial specifically related to the Black Elk Scheme and the Black Elk Consent Solicitation. (Pl. Supp. Mem. at 2.) It should therefore hardly come as a surprise to anyone that he invoked the Fifth Amendment, particularly as to those very issues in his pending criminal case, which issues are also precisely the subject of HFF's Motion. It is certainly not plausible to conclude on this record that Nordlicht invoked the Fifth Amendment to avoid giving damaging testimony about HFF (who is a relative "bit player" in this case). Indeed, Nordlicht also invoked the Fifth Amendment in response to questions asked by other *defendants* seeking to elicit facts to support *their* cases. (*See* Supp. Bixter Dec., Ex. 2.) Any adverse inference under these circumstances is neither trustworthy nor worthy of probative value and will not advance the search for the truth. *See generally Akinyemi v. Napolitano*, 347 Fed. Appx. 604, 607 (2d Cir. 2007) (inference not trustworthy); *Progressive Cas. Ins. Co. v. Monaco*, No. 16-cv-823 (VAB), 2017 U.S. Dist. LEXIS 103326, at *34 (D. Conn. July 5, 2017) (same).

Putting aside the lack of probative value of any Nordlicht testimony in these circumstances, which alone justifies the denial of any adverse inference against HFF, the Second Circuit has also set forth four non-exclusive factors to guide a trial court in making a determination of whether an adverse inference based on a witness's invocation of the Fifth Amendment may be imputed to another party. Those factors are: (i) the nature of the relationship between the defendant and the witness; (ii) the degree of control over the witness by the party; (iii) the alignment of interests between the witness and the party; and (iv) the role of the witness in the litigation. *Libutti*, 107 F.3d at 123. Applying these factors, Plaintiffs have utterly failed to provide the necessary supporting evidence to meet their burden to justify an adverse inference against HFF.

The "nature of the relationship" between the witness and the defendant is "invariably . . . the most significant circumstance." *LiButti*, 107 F.3d at 123. The relationship "should be examined . . . from the perspective of [the] witness' loyalty to the [defendant] . . . .." *Id.* Here, there is no evidence of any relationship, much less a close and loyal one, between Nordlicht and HFF. To the contrary, it is undisputed that HFF is a not-for-profit charitable corporation. (HFF 56.1 ¶¶ 30-31.) HFF has had various directors and officers through the years, but Nordlicht was never one of them. (HFF 56.1 ¶¶ 37-38.) HFF is not an alleged co-conspirator of Nordlicht, and it is not alleged to have engaged in any wrongdoing in collaboration with him. (*See* Pl. Supp. Mem. at 8.) Plaintiffs also do not proffer any facts to suggest that Nordlicht necessarily would have testified against HFF's interests with respect to any issue relevant to HFF's Motion. Absent a relationship of loyalty between Nordlicht and HFF, no adverse inference should be drawn against HFF based on Nordlicht's testimony. *See, e.g.*, *Akinyemi*, 347 Fed. Appx. at 607 (not imputing adverse inference to defendant based on lack of relationship).

The other *LiButti* factors likewise fail to provide any basis to hold Nordlicht's invocation against HFF. Plaintiffs do not even argue, let alone provide evidence sufficient to raise an issue of fact, that HFF exercised any degree of control over Nordlicht. (Pl. Supp. Mem. at 10.) Hence, it cannot be credibly inferred that Nordlicht had any incentive to protect HFF's interests in this case. *See, e.g.*, *Progressive Cas. Ins. Co.*, 2017 U.S. Dist. LEXIS 103326, at *33 (no degree of control over witness by party); *In re Handy & Harman Ref. Grp., Inc.*, 266 B.R. 32, 35 (Bankr. D. Conn. 2001). Likewise, Plaintiffs proffer no facts from which it can be inferred that Nordlicht's interests are aligned with HFF's, and offers no basis to suggest that Nordlicht's invocation of the Fifth Amendment advances HFF's interests in the action.[2]

[2] Given the page limitations, HFF will rely on the submissions of Bodner and Huberfeld concerning the application of any adverse inference in connection with the Release Agreement.

II. Nordlicht's Testimony Has No Impact On HFF's Entitlement To Summary Judgment

Although Nordlicht's testimony clearly does not support any form of adverse inference against HFF, even if *arguendo* it did, it would still not impact the merits of HFF's Motion. In their opposition to HFF's Motion, Plaintiffs failed to point to any disputed issue of fact central to their claims, and confirmed that HFF did not engage in any affirmative conduct to substantially assist the Consent Solicitation, which is the only alleged fraud and breach of fiduciary duty underpinning Plaintiffs' aiding-and-abetting claims against HFF. (HFF Reply Mem. at 3-13.) "[T]he claim of privilege will not prevent . . . summary judgment if the litigant does not present sufficient evidence to satisfy the usual evidentiary burdens in the litigation." *LiButti*, 107 F.3d at 124 (citation omitted).

The only questions to which Nordlicht invoked the Fifth Amendment that have any possibly bearing on HFF's alleged substantial assistance concerned (1) HFF's charitable loan to the Fuchs Family Foundation (Pl. Supp. 56.1 at ¶ 66), (2) Nordlicht's recollection as to whether HFF invested in the BEOF Funds (*Id.* at ¶ 67), and (3) a loan that Nordlicht received from Hutton Ventures (*Id.* at ¶ 68). As set forth in HFF's Motion, there are no disputed issues of material fact concerning HFF's loan to the Fuchs Family Foundation (which was entirely proper, as confirmed by all witnesses) or that HFF invested in the BEOF Funds. (HFF Reply Mem. at 3-5, 11-13.) As to Hutton Ventures,[3] any inference would be immaterial because Plaintiffs did not even oppose

[3] Disappointingly, but unsurprisingly, Plaintiffs again put forward inaccurate and misleading information to inflame the Court. In the SAC, Plaintiffs made a provocative allegation that HFF made a loan "to a company involved in a student loan scam whereby indebted students were defrauded." (SAC ¶ 151.) The company in question was identified as Hutton Ventures, LLC. (*Id.*) Yet, as disclosed in the Declaration of Donald H. Chase in Support of [HFF's] Motion to Dismiss the [SAC], dated April 22, 2019, ECF Doc. No. 306, at ¶¶ 7-8 and Exs. 3 and 4, Plaintiffs confused a California business of the same name (Hutton Ventures) with a separate Delaware entity with which HFF dealt, which had no dealings whatsoever in student loans. (*See* Declaration of Donald H. Chase, dated April 3, 2020 ("Chase Supp. Dec."), Ex. 2.) Now, Plaintiffs again seek to inflame the Court by asking the Court to infer that HFF participated in Hutton

HFF's Motion on the basis that HFF participated in any loan from Hutton Ventures to Nordlicht. (Pl. Opp. at 23.) Moreover, it is undisputed in any event that HFF did *not* participate in any such Hutton Ventures loan.[4] (Chase Supp. Dec. at ¶ 3, Ex. 1.). Plaintiffs also offer no corroborating evidence whatsoever to justify any adverse inference in connection with the Hutton Ventures loan. Since Plaintiffs have obviously failed to meet their evidentiary burden in opposition to HFF's Motion, no adverse inference should preclude summary judgment. *See In re Jacobs*, 394 B.R. 646, 663 (Bankr. E.D.N.Y. 2008) ("the testimonial assertion of the Fifth Amendment is not a substitute for relevant and persuasive evidence").

Finally, Plaintiffs' apparent argument that a general adverse inference should be levied against HFF should be rejected. (Pl. Supp. Mem. at 10.) It is axiomatic that the "[t]he Fifth Amendment privilege must be invoked on a question-by-question basis, and an adverse inference can only be drawn as to questions that are actually asked." *See, e.g.*, *Kirschenbaum v. 650 Fifth Avenue*, 257 F. Supp. 3d 463, 511 (S.D.N.Y. 2017) (citation omitted). Nordlicht did not invoke the Fifth Amendment in response to any direct questions concerning HFF's involvement (or more accurately, its lack of involvement) in the Consent Solicitation, which is the only alleged "substantial assistance" that forms the predicate for Plaintiffs' aiding-and-abetting claims against HFF. Accordingly, no adverse inference on that issue can possibly be warranted.

For all the foregoing reasons, no adverse inference is warranted against HFF and its Motion should be granted and the remaining claims in the SAC against HFF should be dismissed with prejudice.

Ventures' mortgage loan to Nordlicht. But Plaintiffs neglect to state that it is undisputed that HFF did not participate in Hutton Ventures' mortgage loan to Nordlicht. (*See supra* at 4-5.)

[4] This is now the *second* time that Plaintiffs marshalled misleading evidence to drum up a purported issue of fact in opposition to HFF's Motion. (*See* HFF Reply Mem. at 11-13.) Respectfully, enough is enough.

Date: April 3, 2020

Respectfully submitted,

MORRISON COHEN LLP

/s/ Donald H. Chase

Donald H. Chase
Y. David Scharf
Daniel C. Isaacs
909 Third Avenue
New York, NY 10022
Tel: (212) 735-8600
dchase@morrisoncohen.com
dscharf@morrisoncohen.com
disaacs@morrisoncohen.com

Attorneys for Defendant Huberfeld Family Foundation, Inc.