UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE PLATINUM-BEECHWOOD LITIGATION	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	18-cv-10936 (JSR)

MEMORANDUM OF LAW IN RESPONSE TO PLAINTIFFS' SUPPLEMENTAL OPPOSITION TO THE BEECHWOOD PARTIES' MOTION FOR SUMMARY JUDGMENT

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PRELIMINARY STATEMENT

Having failed to rebut the Beechwood Parties' summary judgment arguments and show the existence of specific, material disputed facts, the Liquidators now attempt to leverage Nordlicht's invocation of his Fifth Amendment privilege in their favor. This effort fails for multiple reasons. They are not entitled to an adverse inference in the first place; any adverse inference should not be attributed to the Beechwood Parties; and any inference would not defeat summary judgment in the absence of specific corroborating evidence, which the Liquidators have repeatedly failed to proffer.

ARGUMENT

I. There Is No Basis To Draw Any Adverse Inference From Nordlicht's Invocation of the Fifth Amendment.

The party seeking an adverse inference has the burden of showing its entitlement to that inference. The proponent must show that there is a reliable basis to conclude that the invoking party's truthful answers would be inculpatory, May 3, 2019 Tr. 42:17-23, *In re Platinum-Beechwood Litig.*, 18-cv-06658 (JSR) (S.D.N.Y. 2018), Lipsius Supp. Decl. Ex. A, and that the invocation has unfairly prevented the opposing party from obtaining discovery, *SEC v. Suman*, 684 F. Supp. 2d 378, 386 (S.D.N.Y. 2010), *aff'd*, 421 F. App'x 86 (2d Cir. 2011). Both of these rationales are wholly absent here.

First, Nordlicht's repeated invocation of the Fifth Amendment during his civil deposition (Supp. Br. 1, 2) is not probative of the truth of anything. Nordlicht is facing the prospect of a criminal re-trial in the Eastern District of New York for events underlying the Liquidators' claims in this case. *See United States v. Nordlicht et al.*, 16-cr-00640 (BMC) (E.D.N.Y. 2016). As this Court pointedly explained with regard to David Levy, "it would be virtual malpractice for a lawyer not to advise his or her client, when there's a criminal case pending, to take the Fifth *everywhere*." May 3, 2019 Tr. 42:22-43:1 (emphasis added). And take the Fifth everywhere is

exactly what Nordlicht did—not because he would have admitted the Liquidators' unsupported charges, but because he was "preserv[ing] one of the few advantages that a defendant has in a criminal case, which is the right to silence." May 3, 2019 Tr. 43:2-4. *See also Senior Health Ins. Co. of Pa. v. Beechwood Re Ltd. (In re Platinum-Beechwood Litig.)*, 378 F. Supp. 3d 318, 328 (S.D.N.Y. 2019). Nordlicht's across-the-board invocation of the Fifth was prudent behavior given his situation, not a reliable indicator of the truth of the Liquidators' charges.[1]

Second, the Liquidators have not shown that they have been prejudiced in otherwise obtaining discovery by Nordlicht's invocation. The inference is equitable, not punitive, to vitiate any prejudice to the party denied discovery by invocation of the privilege. *See, e.g.*, *Suman*, 684 F. Supp. 2d at 386. At the very least, a plaintiff's request for the inference "must be tied to *some specific evidence* that Plaintiff was unable to discover as a result of the invocation of the privilege." *English v. Lattanzi*, 2015 WL 5038315, at *6 (E.D.N.Y. Aug. 26, 2015) (emphasis added) (declining inference where "Plaintiff does not point to a single piece of evidence that he was unable to discover" as a result of defendant's invocation).

The Liquidators do not point to any piece of evidence they were unable to discover. Indeed, they had the opportunity to ask, and in fact did ask, the same questions posed of Nordlicht to no fewer than 20 witnesses deposed in this case, including almost a dozen former Platinum principals and employees (including Bodner, Huberfeld, Albanese, Beren, Kim, McGovern-Muller, Fuchs, Steinberg, Katz, Saks, and SanFilippo). The Liquidators evidently did not like the answers they heard. But they do not get to re-write them through application of the adverse inference. The Liquidators also had access to over 13 million documents from Platinum

[1] The Liquidators' attempts to distinguish Nordlicht's invocation from Levy's misses the point. (Supp. Br. 6 n.3.) The Court's decision about Levy had nothing to do with the fact that he sought a preliminary injunction. Nor does it matter if Nordlicht's invocation was broader than Levy's (if that is even so). An indicted defendant is well-advised to take the Fifth "everywhere."

Management's servers (ECF No. 21 at 4), including Nordlicht's email account, and Nordlicht's contemporaneous and highly probative statements on 16 investor calls (incidentally, not produced to Beechwood until January 2020, after the deadline for discovery had passed). (Lipsius Supp. Decl. ¶ 9.) The Liquidators are not victims of Nordlicht's silence, and they cannot show that equity requires the inference to be drawn.

II. There Is No Basis to Impute the Inference to Any Beechwood Party.

Besides the inherent unreliability of Nordlicht's invocation and the immense discovery available to the Liquidators, there is no basis to impute the inference to any Beechwood Party. The four factors the Second Circuit has directed courts to consider before resorting to the harsh measure of imputing a witness's adverse inference against a party plainly do not favor the Liquidators. *LiButti v. United States*, 107 F.3d 110, 123-24 (2d Cir. 1997).

1. The Nature of the Relationship Between the Witness and Defendant. The "most significant" of the four, this factor is examined "from the perspective of a non-party witness' loyalty to the plaintiff or defendant, as the case may be." *LiButti*, 107 F.3d at 123. The focus is on the invoking witness's *present* relationship to the party because the question is whether the witness's silence is motivated by an intent to preserve his good relationship with that party. *Id.* No such relationship exists for the Beechwood Parties. As the Liquidators know from their own documents in this case, Nordlicht was "persona non grat[a]" at Beechwood since as early as fall 2014. (*See, e.g.,* Lipsius Supp. Decl. Ex. E, Ex. F ("I am not advising [Beechwood] in any way anymore"), Ex. D ("have been completely shut out of Beechwood [sic]."). Narain, who did not even join BAM until 2016, testified that he never met or interacted with Nordlicht. (Narain Oct. 23, 2019 Tr. 42:17-23, Lipsius Supp. Decl. Ex. C; ECF No. 433 ¶ 388). And Nordlicht conceded that he has not had any relationship—business or social—with Feuer or Taylor in four years, and obviously not with Narain. (Nordlicht Tr. 280-81, Lipsius Supp. Decl. Ex. B). The Liquidators'

statement that Nordlicht was "extremely close" to all the Defendants (Supp. Br. 8) belies reality and has no support. Thus, this most important *LiButti* factor is not satisfied.

2. The Degree of Control of the Defendant Over the Witness. The Liquidators concede that this factor is not satisfied as to the Beechwood Parties. (Supp. Br. 10.)

3. The Compatibility of the Interests of the Invoking Witness and Party in the Outcome of the Litigation. The interests of Nordlicht and the Beechwood Parties are not aligned, other than that they have all found themselves, together with a few dozen others, at the battering-ram end of the Liquidators' baton. The Liquidators cannot simply label all Defendants co-conspirators and then claim that this factor is satisfied. (Supp. Br. 9.) They have supplied no evidence that it would make any difference to Nordlicht if the Beechwood Parties are found liable to PPVA. Personally, Nordlicht never had an ownership interest in Beechwood—rather, his children were beneficiaries of trusts which did. (Feuer Tr. 20:18-22, ECF No. 562-17.) And since the fall of 2016, neither Nordlicht nor any family member has had any ownership interest in any Beechwood entity. The Liquidators do not attempt to show otherwise.

4. The Role of the Witness in the Litigation. Finally, while Nordlicht is a prominent figure in this case, the Liquidators have not shown that his testimony is indispensable to their proof. As noted, he is only one of more than 20 witnesses who have testified, including a dozen Platinum principals and employees, as well as principals and employees at Beechwood. The inference should not be imputed in these circumstances.[2]

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[2] *See, e.g.*, *In re Urethane Antitrust Litig.*, 2013 WL 100250, at *2 (D. Kan. Jan. 8, 2013) (rejecting plaintiff's argument that high-ranking Bayer executives were "key" witnesses under the fourth *LiButti* factor where other high-ranking executives testified and plaintiffs had access to executives at Dow, against whom they sought imputation); *Salem Fin. Inc. v. United States*, 2013 U.S. Claims LEXIS 2119, *9-10 (Fed. Cl. 2013) (invoking witness was not "key figure" for fourth *LiButti* factor "in light of all the other evidence" presented, including testimony from "many of the key persons . . . who interacted" with invoking witness and many documents in evidence involving the invoking witness).

III. The Liquidators Have Not Identified Any Evidence to Corroborate the Inference.

Finally, the adverse inference is "not a substitute for relevant evidence," and it cannot by itself raise an issue of fact to defeat summary judgment. *United States v. Rylander*, 460 U.S. 752, 758, 761 (1983). That is, a proponent of the privilege is not "freed from adducing proof in support of a burden which would otherwise have been his," *id.*, as here. *See also Avirgan v. Hull*, 932 F.2d 1572, 1580 (11th Cir. 1991) ("Invocation of the fifth amendment privilege did not give rise to any legally cognizable inferences sufficient to preclude entry of summary judgment. The negative inference, if any, to be drawn from the assertion of the fifth amendment does not substitute for evidence needed to meet the burden of production."). The Liquidators boldly assert that the inference bolsters "all matters of inquiry relevant to [their] claims" and all "evidence previously submitted," including their 177-page, 800-paragraph 56.1 statement, and more than 700 exhibits. *Id.* But to ask the Court for "a blanket adverse inference pertaining to all 'the evidence proffered'" is "inappropriate." *English*, 2015 WL 5038315, at *6. As this Court put it, it is not the Court's job to "trudge the dry desert of the record of this case, searching for some rumored water hole" supposedly located in those vast reaches. *Olin Corp. v. Lamorak Ins. Co.*, 332 F. Supp. 3d 818, 875 (S.D.N.Y. 2018) (Rakoff, J.).

Remarkably, the Liquidators do not even mention Feuer, Taylor, or Narain in the argument section of their brief. Their names appear in just three bullet points in the statement of facts, and without any explanation of how the adverse inference would assist the Liquidators' claims. That is insufficient to defeat summary judgment.

CONCLUSION

For the reasons set forth above and in prior submissions, the Beechwood Parties respectfully request that the Court deny the Liquidators' adverse-inference request, enter summary judgment in their favor, and dismiss with prejudice the Liquidators' claims.

Dated: April 3, 2020
Kew Gardens, New York

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