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), Plaintiffs, v. PLATINUM MANAGEMENT (NY) LLC, *et al.*, Defendants.	No. 18 Civ. 10936 (JSR)

MEMORANDUM OF LAW OF DEFENDANT DAVID BODNER IN RESPONSE TO PLAINTIFFS' SUPPLEMENTAL MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

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David Bodner respectfully submits this Memorandum of Law in response to the JOLs' Supplemental Memorandum of Law ("Supplement" or "Supp.") (ECF No. 609) offered in further opposition to Bodner's Motion for Summary Judgment (ECF No. 523).[1]

PRELIMINARY STATEMENT

The JOLs' Supplement confirms that they have no evidence that Bodner did anything fraudulent or unlawful. They ask the Court to impute adverse inferences arising from Mark Nordlicht's exercise of his Fifth Amendment rights at his deposition (Supp. at 6), but never state what specific inference they would have the Court draw against Bodner or which claim in the SAC such inference would support. Nor do they point to any corroborative evidence that would make the inference permissible as against Bodner. Instead, the JOLs seem to argue for some blanket adverse inference that requires no logical basis or corroborative proof.

There is no authority for the JOLs' position. The case law allowing imputation of adverse inferences involves intimate familial relations or close principal-agent relationships where there exists clear identity of interests as to a particularized disputed fact. The JOLs point to no disputed fact where Nordlicht and Bodner have such identity of interests.

To support a specific adverse inference against Bodner, the JOLs were required to identify the inference to be drawn and to support the reasonableness and logic of drawing that inference through corroborative evidence of the fact to be inferred. Here, the JOLs have utterly failed both to identify a specific inference and to justify that inference with corroborative evidence. This is not surprising. The JOLs have no evidence that Bodner was involved in the creation of false NAV statements; no evidence that Bodner was involved in structuring or implementing the allegedly fraudulent Agera sale; and no evidence that Bodner had anything to

[1] ECF citations refer to the *Trott* docket, 18 Civ. 10936. Capitalized terms not defined herein shall have the meanings ascribed to them in Bodner's opening memorandum ("Bodner Mem.") (ECF No. 524).

do with the alleged Black Elk bond scheme. In sum, just as there is no basis for drawing an adverse inference against Bodner, there is no basis for the claims against him.

I. NORDLICHT'S ASSERTION OF HIS FIFTH AMENDMENT RIGHTS IS ENTITLED TO NO WEIGHT WHERE HE FACES CRIMINAL EXPOSURE

Before the JOLs can impute an adverse interest to anyone, they have to establish that *any* adverse inference has probative weight under Fed. R. Evid. 403. *See Brink's, Inc. v. City of New York*, 717 F.2d 700, 710 (2d Cir. 1983). As previously held in this case, a witness's refusal to testify lacks evidentiary value when the witness faces criminal exposure on matters within with the scope of the examination. *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).

The JOLs argue that Nordlicht's assertion of his Fifth Amendment rights has evidentiary value because his "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." (Supp. n.3). This is wrong.

While Nordlicht faces a re-trial only on the alleged "Black Elk Scheme," *United States v. Nordlicht*, No. 16 Cr. 00640, 2019 U.S. Dist. LEXIS 167084, at *58 (E.D.N.Y. Sept. 27, 2019), the government's theory of Nordlicht's motive places Nordlicht in criminal jeopardy with respect to virtually any aspect of the Platinum business. The government stated at closing argument in his first trial: "the evidence you've seen of the crisis at PPVA, its lack of cash, its inability to pay investors their money back is *equally important to the next scheme*, the Black Elk bond scheme that I'm about to discuss … PPVA, the defendant's hedge fund was in a liquidity crisis and the defendants were desperate for money." (*US v. Nordlicht*, 6/24/19 Tr. at 6611) (emphasis supplied).[2] On appeal from the district court's order vacating the verdict, the

[2] The relevant page of the trial transcript is annexed to this memorandum.

government argued that Nordlicht was "increasingly anxious about Black Elk's struggles and PPVA's related liquidity problems" at the time of the alleged Black Elk Scheme. (2d Cir. Case No. 19-3207, Doc. No. 52 at pp. 13, 15).

Nordlicht's refusal to waive his Fifth Amendment rights is thus entirely unsurprising, since, as this Court observed, "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*. There would be no question they would have a right to do it. But the reason for doing it would be to preserve one of the few advantages that a defendant has in a criminal case, which is the right to silence." (Case No. 19-cv-3211, 5/3/2019 Tr. at 42:23-43:4) (emphasis supplied). Nordlicht's invocation of his Fifth Amendment rights, at a time when he faces a second criminal trial, is entitled to no probative weight in this context.

II. THERE CAN BE NO ADVERSE INFERENCE AS TO BODNER

Even if Nordlicht's invocation of his Fifth Amendment rights could fairly be used against Nordlicht, the JOLs fail to establish this to be one of the exceptional situations in which an invocation by one party can be offered as evidence against another party. In the cases where the adverse inference is imputed to another party, the identity of interests is plain, the adverse inference is addressed to a particular disputed fact, and there exists substantial corroborative evidence to render the inference trustworthy in the circumstances. These elements are lacking here.

LiButti v. United States, 107 F.3d 110, 121 (2d Cir. 1997) (Supp. at 7) illustrates the rule. The IRS and the delinquent taxpayer disputed ownership of a racehorse: the IRS maintained that the taxpayer owned the horse and levied upon it; the taxpayer's daughter maintained that she (and not her father) owned the horse and challenged the IRS's levy in court. At trial, the father exercised his Fifth Amendment right in response to specific questions about

ownership of the horse and its stables. On appeal from the district court's denial of the IRS's motion for an adverse inference, the Second Circuit observed: "the circumstances of this case compel the admissibility and consideration by the trial court of Robert's [the father's] refusals to answer the questions addressed to him that *struck directly at the only issue before the court* — whether he or his daughter was the effective owner of [the stable] and/or [the horse]." *Id.* at 124 (emphasis supplied). The court reasoned that father and daughter had "precisely the same interest against the drawing of adverse inferences from Robert's invocation of the Fifth Amendment: their collective desire that [the horse and stable] be deemed in Edith's [the daughter's] ownership so that they would be insulated from levy by the government." *Id*. The court's holding was based on substantial corroborative evidence of the father's ownership and control of the horse and stables. *Id.*

The JOLs rely upon only one other case in the Second Circuit, *United States v. District Council of New York City*, 832 F. Supp. 644, 651 (S.D.N.Y. 1993), where the district court held that Fifth Amendment assertions by Salvatore Gravano and other union delegates may warrant an adverse inference against their union. The district court relied upon *Brink's, Inc.*, 717 F.2d 700, where the court of appeals held that armored car drivers' refusal to answer questions about whether they stole coins from New York City parking meters could warrant an adverse inference against their employer. Employer-employee and principal-agent relationships controlled the outcome in the cases the JOLs cite from outside the Second Circuit. *See Coquina Invs. v. TD Bank, N.A.*, 760 F.3d 1300, 1311–12 (11th Cir. 2014) (Supp. at 8); *Cerro Gordo Charity v. Fireman's Fund Am. Life Ins.*, 819 F.2d 1471, 1481 (8th Cir. 1987) (Supp. at 7); *RAD Services, Inc. v. Aetna Casualty and Surety Co*., 808 F.2d 271, 276 (3rd Cir. 1986) (Supp. at 6); *S.E.C. v. Monterosso*, 746 F. Supp. 2d 1253, 1264 (S.D. Fla. 2010) (Supp. at 8).

These cases offer the JOLs no support. Nordlicht and Bodner were not in an employer-employee relationship. Neither was the other's agent. The JOLs cannot reform their relationship merely by incanting an allegation that they were "co-conspirators" where there is no corroborative proof that Bodner conspired with Nordlicht or anyone else to do anything unlawful. (Supp. at 7-8).[3] Where no such relationship exists, it would be inappropriate to impute an adverse inference to Bodner. *See Progressive Cas. Ins. Co. v. Monaco*, No. 16 Civ. 823, 2017 U.S. Dist. LEXIS 103326, at *33 (D. Conn. July 5, 2017) (refusing to impute an adverse inference to defendant where defendant had no control over the witness).

Nor have the JOLs identified an identity of interests on any particularized fact. The JOLs identify no specific benefit to Nordlicht from seeing Bodner avoid liability. Likewise, with respect to the March 2016 Release Agreement (ECF No. 543 Ex. 12), the JOLs do not even attempt to identify a unity of interest where Nordlicht would benefit from seeing the agreement enforced for Bodner's benefit.[4] *Accord LiButti*, 107 F.3d at 124 (father and daughter had unified interest in avoiding IRS levy).

CONCLUSION

The Motion should be granted and judgment entered for Bodner.

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[3] The JOLs abandoned their civil conspiracy claim (SAC Count XVI) in their opposition to Bodner's summary judgment motion, yet brazenly invoke the charge of conspiracy in an effort to obtain an adverse inference.

[4] The JOLs write that Nordlicht "invoked the attorney-client privilege when confronted with an email [Bixter Ex. 42, Nordlicht to Bodner counsel at Curtis Mallet] concerning the March 2016 Release," thereby "acknowledg[ing] 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." (Supp. at 4-5). Yet, as the JOLs acknowledge in their Supplemental 56.1 Statement (but never in their Supplement) Nordlicht *withdrew* his assertion of attorney-client privilege and clarified that Curtis Mallet did *not* represent Platinum Management in connection with the Release. (Nordlicht 93:12-24; Supp. 56.1 ¶¶ 75-77). *Accord* ECF No. 543 Ex. 16 at 1 ("Historically, *but not in this matter*, we have been and continue to be counsel to Platinum Management. We received conflict waivers from all parties involved.") (emphasis supplied).

Dated: April 3, 2020
New York, New York

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APPENDIX

[US v. NORDLICHT TRANSCRIPT EXCERPT]

UNITED STATES DISTRICT COURT.
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	:	16-CR-640 (BMC)
PLAINTIFF,	:	
-against-	:	United States Courthouse Brooklyn, New York
MARK NORDLICHT, ET AL.,	:	
DEFENDANTS.	:	June 24, 2019 9:30 a.m.

TRANSCRIPT OF CRIMINAL CAUSE FOR JURY TRIAL
BEFORE THE HONORABLE BRIAN M. COGAN AND JURY
UNITED STATES DISTRICT COURT JUDGE

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P R O C E E D I N G S

--ooOoo--

(In open court; outside the presence of the jury.)

THE COURTROOM DEPUTY: All Rise.

THE COURT: Good morning. Everyone can have a seat, please.

You all got the last omnibus order this morning, right?

overwhelming evidence that proves all three defendants guilty of Counts One through Five. Guilty of lying to and deceiving investors and prospective investors in PPNA and PPNE.

And the evidence you've seen of the crisis at PPVA, its lack of cash, its inability to pay investors their money back is equally important to the next scheme, the Black Elk bond scheme that I'm about to discuss.

PPVA was in the midst of that crisis when the defendants, Mark Nordlicht and David Levy, chose to defraud another group of victims, the bond holders of Black Elk.

So now we're going to talk about the second scheme, the Black Elk bond scheme. In this scheme, the defendants Mark Nordlicht and David Levy, along with their co-conspirators engaged in a scheme to defraud Black Elk's bond holders and funnel more than $77 million to Platinum. And as I just mentioned at the time of this scheme, PPVA, the defendant's hedge fund was in a liquidity crisis and the defendants were desperate for money.

Black Elk, PPVA's investment, the oil company it owned, was headed towards bankruptcy was going to sell its best assets and defendants wanted to get that money from that sale selling its assets and get it to Platinum. To do this, they rigged a vote of the Black Elk bond holders by stuffing the ballot box with millions of votes they knew were not allowed to be counted. They carried out the scheme by hiding