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)

PLAINTIFFS' SECOND SET OF MOTIONS *IN LIMINE*

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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 "**JOLs**"), and Platinum Partners Value Arbitrage Fund L.P. (in Official Liquidation) ("**PPVA**" and collectively with the JOLs, the "**Plaintiffs**") hereby move the Court *in limine* for rulings that: (i) the criminal convictions of Mark Nordlicht ("**Nordlicht**"), David Levy ("**Levy**") and Daniel Small ("**Small**" and collectively with Nordlicht and Levy, the "**Criminal Defendants**") including the judicial findings in the Second Circuit's November 5, 2021 Order in *United States v. Landesman*, 17 F.4th 298 (2d Cir. 2021) (the "**Conviction Order**")[1] serve as collateral estoppel against Defendant David Bodner ("**Bodner**") in this action as set forth in the proposed order attached as **Exhibit A**; and (ii) directing adverse inferences against Bodner as set forth in the proposed order attached as **Exhibit B** as a result of Mark Nordlicht's ("**Nordlicht**") anticipated invocation of his Fifth Amendment privilege at trial.

I. FIRST MOTION IN LIMINE: THE CRIMINAL CONVICTIONS SERVE AS COLLATERAL ESTOPPEL AGAINST BODNER

A. The Criminal Convictions of Nordlicht, Levy, and Small

On December 14, 2016, a grand jury empaneled in the Eastern District of New York issued an eight-count indictment against the Criminal Defendants. *See* Conviction Order, 17 F.4th at 317 (the "**Criminal Action**"). The indictment brings counts against the Criminal Defendants for, *inter alia*, conspiracy to commit securities fraud (Count 6), conspiracy to commit wire fraud (Count 7), and securities fraud (Count 8). *See* 17 F.4th at 317.

The Criminal Action concerns a scheme executed by the Criminal Defendants "to defraud bondholders of an oil and gas company Black Elk Energy Offshore Operations, LLC ("**Black**

[1] The Conviction Order is attached as **Exhibit 1** to the November 16, 2022 Declaration of Warren E. Gluck ("**Gluck Decl.**") filed contemporaneously herewith.

Elk") of the proceeds of a lucrative asset sale to Renaissance Offshore, LLC . . . ." (the "**Black Elk Scheme**"). *Id.* at 303.[2] A jury found Nordlicht and Levy guilty on Counts Six, Seven and Eight. *Id.* at 304. A jury similarly found Small guilty on Counts Six and Eight. Gluck Decl. at **Ex. 2**)

On November 5, 2021, the Second Circuit issued the Conviction Order, which upheld Nordlicht's conviction and reinstated Levy's conviction. *See generally* 17 F.4th at 319-341.[3] The Conviction Order sets forth specific factual findings on issues that mirror factual disputes in this action. In particular, the Conviction Order contains detailed factual findings that the "Nordlicht Group" (which included Bodner, Murray Huberfeld ("**Huberfeld**"), and Nordlicht) formed a group of entities engaged in the business of reinsurance collectively known as Beechwood and used PMNY, an entity the Nordlicht Group also formed, to control Beechwood's investment decisions. In the Conviction Order, the Second Circuit held that Platinum and Beechwood were under common control of the Nordlicht Group and that the Nordlicht Group used Platinum to "direct Beechwood's management and policies." *See* 17 F.4th at 334.

Specifically, the Conviction Order held that:

- "Nordlicht founded Beechwood with the same partners with whom he founded Platinum (Huberfeld and Bodner), as well as two additional investors – Mark Feuer and Scott Taylor." *Id.* at 334-335;

- Pursuant to a Huberfeld email outlining Beechwood's corporate terms, the Nordlicht Group was responsible for the "investment allocation side" of

[2] The Conviction Order includes a full summary of the relevant facts, which are incorporated herein. *See* 17 F.4th at 303-319. Of particular note, during the relevant time period, PPVA held approximately 85 percent of the common equity of Black Elk. *Id.* at 334. Platinum Management (NY) LLC ("**PMNY**") had received a report nearly a year prior estimating the value of the common equity held by PPVA in Black Elk at zero. *See* Plaintiffs' Rule 56.1 Statement of Material Facts, dated March 7, 2020, No. 18-cv-10936-JSR, ECF No. 555 ("**Rule 56.1 Statement**"), at pp. 75-76.
[3] The sentencing of Levy and Nordlicht are currently set for January 27 and February 17, 2023, respectively.

Beechwood, and Mark Feuer and Scott Taylor were responsible for running the "insurance side" of Beechwood. *Id*;

- Beechwood was staffed with a revolving door of Platinum employees, so that PMNY and the Nordlicht Group could fully control Beechwood's investment activities. This included, *inter alia*, Levy, who departed PMNY to become the CIO of Beechwood's investment manager, which resulted in Levy making day-to-day investment decisions on Beechwood's behalf at the same time he continued to work for PMNY on its co-investments with Beechwood. *Id*;

- The Nordlicht Group's control of Beechwood's investment activities was accomplished in practice through Platinum's "insurance mandate" to co-invest Beechwood's assets in investments also held by PPVA. *Id*.; and

- Nordlicht himself acknowledged that Platinum exercised significant control over Beechwood and its investment decisions. *Id.* at 335.[4]

At trial, the Criminal Defendants were convicted for perpetuating the Black Elk Scheme, whereby they used the Nordlicht Group's control over Beechwood to effectuate an amendment to the bond indenture (the "**Consent Solicitation**") governing secured bonds issued by Black Elk (the "**Black Elk Bonds**"), in order to subordinate Black Elk bondholders – including PPVA – to the interests of Black Elk's preferred equity-holders. For purposes of overvaluation, if Black Elk's bondholders were damaged by the Consent Solicitation, then any value ascribed to PPVA's equity-interests in Black Elk was inherently incorrect.

The Second Circuit specifically held:

- The Black Elk Scheme benefitted preferred equity-holders to the detriment of the Black Elk bondholders. Conviction Order, 17 F.4th at 321-322;

[4] The Conviction Order concluded that, as a result of the "common control" of Platinum and Beechwood by the Nordlicht Group, Beechwood could be considered an affiliate of Platinum and Black Elk, and thus in violation of a rule in the indenture that governed the relevant transaction with respect to Black Elk (the "**Affiliate Rule**"). *Id.* at 336. The violation of the Affiliate Rule supported Nordlicht's conviction because, among other things, it was evidence of his criminal intent. *See id.* at 332-336.

- The Consent Solicitation amending the indenture for the Black Elk Bonds (the "**Indenture**") would not have passed without the votes of Beechwood. *Id*. at 322;

- Prior to the Consent Solicitation, Black Elk was headed towards bankruptcy, and PPVA was heavily invested in Black Elk's common equity and the Black Elk Bonds. *Id*.;

- The Consent Solicitation's proposed amendments allowed Black Elk to pay Black Elk's preferred equity holders with proceeds from the sale of certain of Black Elk's assets to Renaissance Offshore, LLC (the "**Renaissance Sale**"), instead of paying the Black Elk bondholders, such as PPVA. *Id*;

- The Renaissance Sale involved the sale of substantially all of Black Elk's assets, and the Black Elk bondholders were damaged due to Black Elk's insolvency and certain bankruptcy and the lack of any additional assets to pay off the Black Elk Bonds, for which Nordlicht and Levy were fully aware. *Id*.; and

- The proceeds of the Renaissance Sale were indeed used to pay-off Black Elk's preferred equity-holders *to the detriment of the Black Elk bondholders*. *Id*. (Emphasis added).

B. Bodner Should Be Collaterally Estopped in this Action From Refuting the Actual and Necessary Findings in the Criminal Trial

"As a general matter, a criminal conviction can have preclusive effect in a subsequent civil proceeding relating to the same issues." *Gordon v Sonar Capital Mgmt. LLC*, 116 F. Supp. 3d 360, 364 (S.D.N.Y. 2015) (citing *United States v. Podell*¸ 572 F.3d 31, 35 (2d Cir. 1978)) (Rakoff, J.). Given that mutuality of estoppel is not required, a non-party to a criminal case can assert collateral estoppel in a civil case based on a prior criminal conviction. *See Gelb v. Royal Globe Ins. Co.*¸ 798 F.2d 38, 44 (2d Cir. 1986).

Collateral estoppel "applies only against a party to the previous adjudication and that party's 'privies.'" *See N.L.R.B. v. Thalbo Corp.*¸ 171 F.3d 102, 109 (2d Cir. 1999). Federal criminal convictions have offensive collateral estoppel in federal civil litigations if four elements are satisfied: "(1) the issues in both proceeding must be identical, (2) the issue in the prior proceeding was actually litigated and actually decided, (3) there was a full and fair opportunity for

litigation in the prior proceeding, and (4) the issue previously litigated was necessary to support a valid and final judgment on the merits." *Gordon*, 116 F. Supp. 3d at 364 (citing *United States v. Hussein*¸ 178 F.3d 125, 129 (2d Cir. 1999)). Trial courts have "broad discretion" in applying offensive collateral estoppel and should only decline to do so where it "would be unfair to a defendant." *Id.* (citation omitted).

Plaintiffs satisfy all elements necessary for the Conviction Order and resulting convictions to be collateral estoppel in this action.

First, Bodner is in privity with the Criminal Defendants for purposes of their convictions and Plaintiffs' claims in this action. To establish privity for purposes of collateral estoppel, there must be a "connection between the parties ... such that the interests of the nonparty can be said to have been represented in the prior proceeding." *U.S. v. East River Hous. Corp.*, 90 F. Supp. 3d 118, 148 (S.D.N.Y. 2015). Privity based on representation is apparent where the interests of the person alleged to be in privity were "represented [in the prior proceeding] by another vested with the authority of representation." *Monahan v. New York City Dep't of Corrections,* 214 F.3d 275, 285 (2d Cir. 2000) (holding that authority of representation is held by a fiduciary or organizational agent of the person against whom preclusion is asserted).

Here, the interests of Bodner were fully represented by the Criminal Defendants at their respective trials. Nordlicht, Levy and Small were organizational agents of PMNY and Beechwood, and the Nordlicht Group appointed them to roles such as chief investment officer and/or portfolio manager in order to effectuate the Black Elk Scheme and the broader overvaluation scheme. Nordlicht and Bodner had been friends and partners for more than 20 years that participated in various investment ventures together, including Platinum and Beechwood. Bodner and Nordlicht attended monthly partner meetings to discuss the performance of

Platinum/Beechwood co-investments, including the fateful meeting in January 2015 in which Bodner declared that PPVA's net asset value ("**NAV**") had been overvalued. Bodner and Nordlicht were both intimately involved in the operations of Beechwood and Platinum, and held investment allocation authority over Beechwood as part of the Nordlicht Group. Indeed, as co-owners of PMNY and Beechwood, Nordlicht and Bodner had an identical financial interest in the success or failure of all of these entities' co-investments.

Second, the relevant issues in the Conviction Order and this action are identical for purposes of a collateral estoppel finding in this action. In particular, the claims in both actions concern the implications of the Nordlicht Group's and PMNY's control of Beechwood's investment activity. In the Conviction Order, the common control of Platinum and Beechwood was a threshold issue as to whether Platinum, Beechwood and Black Elk were affiliates for purposes of the solicitation of votes to amend the Indenture governing the Black Elk Bonds. *See* Conviction Order, 17 F.4th at 334. Here, the common control of Beechwood and Platinum is at the heart of the overvaluation scheme, whereby PMNY caused PPVA to enter into a series of insider transactions with Beechwood in order to mask the failing nature of PPVA's investments in Black Elk, Golden Gate Oil, LLC ("**Golden Gate**") and other companies. Further, the Second Circuit's findings in the Conviction Order that the Black Elk Bonds were subordinated and bondholders were harmed due to Black Elk's inability to pay-off the bonds is proof positive that the valuation of the Black Elk Bonds and common equity, which PPVA held, was significantly inflated.

Third, there is no doubt that these issues were actually litigated in the criminal proceedings. The Nordlicht Group's and PMNY's control over Beechwood was the primary reason for the Second Circuit upholding the convictions against Nordlicht and Levy, as it resulted in a breach of

the Affiliate Rule, demonstrated that Nordlicht and Levy acted with criminal intent, and thereby proved the required elements for their conviction. *See* Conviction Order, 17 F.4th at 334-37. The subordination of the Black Elk Bonds, the certainty of Black Elk filing bankruptcy shortly after the Renaissance Sale, and the lack of funds to pay Black Elk bondholders, were also hotly-contested issues disputed by the Criminal Defendants. *Id*. For largely the same reasons, it cannot reasonably be questioned that the Criminal Defendants had a full and fair opportunity to litigate these issues in the Criminal Action. The Conviction Order has been issued by the Second Circuit and Nordlicht and Levy have exhausted their right to appeal.

Finally, the precluded issues outlined above were *sine qua non* to the Criminal Defendants' convictions. As aptly stated in the Conviction Order, the jury verdict (which was reinstated by the Conviction Order) is premised on the "wealth of … evidence supporting an inference that Nordlicht knew that Beechwood was an affiliate and intended to use Beechwood to defraud the Black Elk bondholders." 17 F.4th at 337.

At trial, Plaintiff will prove that Beechwood and what was known as the Black Elk Opportunities Fund ("**BEOF**") were the mechanisms by which the overvaluation of PPVA was covertly effected, and that Bodner actively aided and abetted this fraudulent overvaluation by founding, capitalizing, and overseeing the investment activity of these entities. In particular, Beechwood and BEOF were used to mask and camouflage the fact that the senior debt and bonds issued by PPVA's largest investments, including Black Elk and Golden Gate, were in default or severely distressed, thereby rendering the valuations of PPVA's equity holdings in those same entities to be credible to non-inner circle investors, creditors, auditors and valuation entities.

The criminal convictions set forth above serve to considerably narrow many disputed trial issues. For example, they hold that: (a) Bodner was a part of the "Nordlicht Group" as it pertains

to Beechwood, and that the same Nordlicht Group founded both Platinum and Beechwood; (b) the Nordlicht Group (including Bodner) controlled Beechwood's investment allocations; and (c) Platinum and Beechwood were affiliates by reason of this common control and founding. Bodner should be estopped from denying each and all of these facts at trial.

Additionally, the criminal convictions *require* the finding that the senior bondholders of Black Elk were harmed as a result of the criminal subordination of the Black Elk Bonds, and that it was the *intent* of the Criminal Defendants to do so. Setting aside the fact that PPVA held Black Elk Bonds and thus was necessarily harmed by this act, if the senior bondholders of Black Elk were capable of being harmed by the subordination, it is because Black Elk had insufficient value to repay the bondholders and was thus insolvent, leaving PPVA's common equity interests with zero value. This Conviction Order *requires* a finding that at the time of the subordination, the nine-figure valuation of PPVA's structurally junior common equity interests in Black Elk were false, wrong and overvalued.

WHEREFORE, Plaintiffs respectfully request this Court issue an order granting their motion *in limine* for a ruling permitting the criminal convictions of the Criminal Defendants to serve as collateral estoppel against Bodner in this case in the manner set forth in the proposed order attached as Exhibit A.

II. SECOND MOTION IN LIMINE: ADVERSE INFERENCES SHOULD BE MADE AGAINST BODNER AS A RESULT OF NORDLICHT'S ANTICIPATED INVOCATION OF THE FIFTH AMENDMENT

As the Court noted in its Summary Judgment Opinion and Order, "a finder of fact in a civil case may…draw an adverse inference against the alleged co-conspirators from a co-conspirator's assertion of the Fifth Amendment." ECF No. 624 at n. 6 (citing *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976)). During his deposition, Nordlicht invoked his Fifth Amendment right against self-incrimination to almost all questions asked, and Bodner's counsel has confirmed that

Nordlicht intends to do the same at the upcoming trial. Where, as here, a witness like Nordlicht has a long-standing and confidential relationship with Bodner, courts routinely impose an adverse inference against a party regarding the content of what the Fifth Amendment invoker's testimony would have been. Accordingly, Plaintiffs respectfully request a pre-trial determination permitting adverse inferences set forth in the proposed order attached as Exhibit B.

A. Adverse Inferences Should be Applied Against Bodner Based upon Nordlicht's Anticipated Invocation of the Fifth Amendment

It is well-settled law that adverse inferences are appropriate against parties to civil actions when they assert their rights under the Fifth Amendment to refuse to testify. *Mitchell v. United States*, 526 U.S. 314, 328 (1999) (quoting *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976)); *Brink's Inc. v. City of New York*, 717 F.2d 700, 707 (2d Cir. 1983) (holding that it was appropriate for the district court to inform the jury that it "may, but need not, infer by such refusal that the answers would have been adverse to the witness' interest").[5] Where a non-party witness invokes his or her Fifth Amendment privilege in a civil case, the courts likewise apply the adverse inference against connected parties when upon the presence of relevant factors. *See LiButti v. United States*, 107 F.3d 110, 121-124 (2d Cir. 1997); *see Daniel Small v. DMRJ Group LLC*, 2022 WL 2287296 (N.Y. Sup. Ct. June 22, 2022) (granting PPVA subsidiary's summary judgment motion due to Daniel Small's assertion of the Fifth Amendment in connection with Small's claim for compensation).

[5] The purpose underlying the allowance of an adverse inference in civil cases is equitable, not punitive, and serves to vitiate the prejudice to the party denied discovery by invocation of the privilege. *United States v. 4003–05 5th Ave.*, 55 F.3d 78, 82–83 (2d Cir. 1995). When a party invokes his or her Fifth Amendment privileges, that invocation "poses substantial problems … that might conceivably be determinative in a search for the truth." *Id.* at 82; *see also Amusement Indus. Inc. v. Stern*, 293 F.R.D. 420, 428 (S.D.N.Y. 2013) ("By hiding behind the protection of the Fifth Amendment as to his contentions, he gives up the right to prove them….defendant has forfeited the right to offer evidence disputing the plaintiff's evidence or supporting his own denials.").

The Second Circuit has articulated a four-factor test to determine whether a non-party's refusal to testify gives rise to an adverse inference against a defendant: (i) the nature of the relationship between the witness and the party against whom the witness' testimony is offered; (ii) the degree of control of the party over the witness; (iii) the alignment of the party and the witness' interests; and (iv) the role of the witness in the litigation. *See LiButti*, 107 F.3d at 123-124. These factors take into consideration "the true spirit of Federal Rule of Evidence 501," which calls for the exercise by the courts of "reason and experience" in interpreting the principles of common law governing the privileges of a witness, and Congress' express intent that the courts be afforded "the flexibility to develop ruled of privilege on a case-by-case basis." *Id.* at 121 (quoting *Trammel v. United States*, 445 U.S. 40, 47 (1980)).

Here, each of the four factors set forth in *LiButti* weigh heavily in favor of finding that an adverse inference should be applied to Bodner as a result of Nordlicht invoking his Fifth Amendment privilege. In the end, only Nordlicht knows what he told Bodner. Only Nordlicht knows the extent of Bodner's control over him and PMNY. Only Nordlicht knows Bodner's role in the Nordlicht Group that directed Beechwood and BEOF's "investments" designed to camouflage the overvaluation of PPVA, and only Nordlicht knows what he meant in emails referencing the overvaluation and Bodner's role and knowledge of the same. It is just and right for adverse inferences to be applied as to these matters in this action.

1. <u>The Nature of the Relationship Between Nordlicht and Bodner</u>

The relationship between the party and the non-party invoking the Fifth Amendment must be evaluated from the perspective of the non-party witness' loyalty to the party. *LiButti*, 107 F.3d at 123. The Second Circuit reasoned that the closer the bond between the party and the non-party, "whether by reason of blood, friendship, or business, the less likely the non-party witness would

be to render testimony in order to damage the relationship." *Id.* Indeed, the Second Circuit has held that this factor "will invariably be the most significant circumstance" to consider. *Id.*

This factor weighs heavily in favor of application of the adverse inference. Nordlicht, Huberfeld and Bodner were partners for over 20 years, who created and managed various enterprises such as Platinum and Beechwood. Bodner has admitted in sworn testimony that he provided the seed capital for PPVA, invested in Beechwood and has a long-standing relationship with Nordlicht in the form of a multi-purpose business partnership. Gluck Decl. at **Ex. 3** ("**Bodner Tr.**") at 63:13-18. Moreover, Bodner had both ownership interests and voting power in PMNY, alongside Nordlicht. *See* Gluck Decl. at **Ex. 4** (Schedule I). Bodner is also Nordlicht's cousin. Bodner Tr. at 60:7-8. Bodner was held out as one of the "Platinum Partners," alongside Nordlicht, and all major strategic decisions concerning PPVA were made by Bodner, Nordlicht and Huberfeld in close confidence with one another.

Together with Nordlicht, Bodner was responsible for using his unofficial position as a PMNY executive to falsely inflate the value of PPVA's assets, most notably through the creation of Beechwood and BEOF, which Bodner founded and owned, in order to cause PPVA to engage in transactions for the purpose of masking the significant loss of value at PPVA during the relevant 2012-2016 time period. During a partner meeting in January 2015, Bodner told Bernard Fuchs, Nordlicht and Huberfeld that PMNY had overvalued certain of the assets of PPVA. Fuchs Tr. 26:17-30:20 (testifying that Bodner had a heated argument with Nordlicht "about the fund [PPVA], about the investments, [and] about the valuations"). Gluck Decl. at **Ex. 5** ("**Fuchs Tr.**") at 26:17-30:20 (testifying that Bodner had a heated argument with Nordlicht "about the fund [PPVA], about the investments, [and] about the valuations").

2. The Degree of Control of Bodner Over Nordlicht

Second, Nordlicht's assertion of the Fifth Amendment privilege should be construed as a vicarious admission, admission of a co-conspirator, or an admission under agency. *See LiButti*, 107 F.3d at 123-124. The record is clear: Bodner exercised control over many of the decisions concerning PPVA, including what assets PPVA invested in, which investors to bring into PPVA, the compensation paid to owners of PMNY and the communications with major PPVA investors such as Marcos Katz. As described by Michael Katz, Marcos Katz's grandson, Bodner was held out as the "senior partner" with Nordlicht acting as a "junior partner." Gluck Decl. at **Ex. 6** ("**Katz Tr.**") at 18:10-12, 34:22-35:24. At a minimum, Nordlicht frequently "accepted and followed [Bodner's] leadership and actions and joined with [Bodner]." *See Willingham v. Cnty. of Albany*, 593 F. Supp. 2d 446, 452 (N.D.N.Y. 2006). Bodner was a "leader of the [Platinum Management] organization" because "if there was any disagreement as to what had to be done, [Bodner] was consulted and he had the last word." Bodner regularly participated—and frequently called for—partner meetings (which included Nordlicht) to discuss PPVA's performance, including the January 2015 meeting where Bodner declared that PPVA was overvalued. *See* Gluck Decl. at **Ex. 7** (Bodner Admissions #45); Katz Tr. at 260:4-18; Fuchs Tr. at 44:20-45:6.

Notably, Bodner, as one of the "Platinum Partners" with a significant ownership interest in PPVA, was well aware of the November 2012 explosion on Black Elk's West Delta 32 oil platform, and, in the immediate aftermath, sought information as to PPVA's obligations toward its investors with interests in Black Elk. *See* Gluck Decl. at **Ex. 8**. Nordlicht also sought Bodner's feedback in September 2014 when initially contriving a plan to buy Black Elk Bonds from the open market in order to prop up the bonds' price. *See* Gluck Decl. at **Ex. 9**. Moreover, Bodner was the key driver in the decision to create Beechwood for the purpose of entering into insider transactions to mask the failure of PPVA investments such as Black Elk and Golden Gate Oil. As

such, Nordlicht's testimony as to all of the written communications and his discussions with Bodner concerning the overvaluation of PPVA's assets is of critical importance to this case, and Nordlicht's invocation of his Fifth Amendment privilege will deprive the fact-finder of that testimony.

3. The Alignment of Bodner's and Nordlicht's Interests

Third, Bodner's interests are wholly aligned with Nordlicht's in defeating the Plaintiffs' claims concerning their collective involvement in the overvaluation of PPVA's NAV and the damage it caused to PPVA. Although the Court stayed this action against Nordlicht, Nordlicht was a co-defendant in this action and is subject to joint and several liability, and PPVA is collecting on the liability in his bankruptcy. He is clearly incentivized to not provide testimony concerning the collective acts of himself and the other "Platinum Partners" concerning PPVA's overvaluation.

4. The Role of the Witness in this Litigation

Fourth, it is beyond dispute that Nordlicht is a key figure in the litigation and played a central role in respect to its underlying aspects. *See LiButti*, 107 F.3d at 123-124. He was the chief investment officer of PMNY and a partner with Bodner. He regularly met with Bodner to discuss PPVA's performance at the monthly partner meetings. Nordlicht played a central role in creating BEOF and Beechwood for the purpose of causing PPVA to enter into insider transactions designed to mask the significant underperformance of PPVA's investments. As a junior partner to Bodner and Huberfeld, and later Fuchs, Nordlicht was involved in running the day-to-day operations of PMNY and reported to Bodner. If Nordlicht was to provide truthful testimony at trial, his testimony would assist the trier-of-fact in determining Bodner's status as a fiduciary to PPVA, Bodner's knowledge of the overvaluation of PPVA and the assistance Bodner provided with respect to the same. Nordlicht is a critical witness who is central to this action, and thus

imposition of an adverse inference against Bodner is appropriate in the likely event Nordlicht asserts his Fifth Amendment rights at trial.

Each and all of the *LiButti* factors weighs heavily in favor of this Court finding adverse inferences against Bodner given Nordlicht's anticipated invocation of the Fifth Amendment to preclude his testimony at trial. Nordlicht's silence to critical questions speaks volumes; this Court should permit the fact-finder to listen to that silence and from it, infer the truth.

WHEREFORE, Plaintiffs respectfully request this Court issue an order granting their motion *in limine* for a ruling permitting the adverse inferences set forth in Exhibit B as to Bodner as a result of Nordlicht's anticipated invocation of his Fifth Amendment rights at trial, and for any further relief that this Court deems just and proper.

Dated: New York, New York
November 16, 2022

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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)

[PROPOSED] ORDER GRANTING PLAINTIFFS' MOTION *IN LIMINE* CONCERNING COLLATERAL ESTOPPEL

WHEREAS, on November 16, 2022, Plaintiffs Martin Trott and Christopher Smith, as Joint Official Liquidators and Foreign Representatives ("**JOLs**") of Platinum Partners Value Arbitrage Fund L.P. (in Official Liquidation) and Platinum Partners Value Arbitrage Fund L.P. (in Official Liquidation) ("**PPVA**" and collectively with the JOLs, "**Plaintiffs**") filed its Second Set of Motions *in Limine*, seeking, in part, a pre-trial determination that the criminal convictions of Mark Nordlicht ("**Nordlicht**"), David Levy ("**Levy**") and Daniel Small ("**Small**" and collectively with Nordlicht and Levy, the "**Criminal Defendants**"), including the judicial findings in the Second Circuit's November 5, 2021 Order in *United States v. Landesman*, 17 F.4th 298 (2d Cir. 2021) (the "**Conviction Order**") serve as collateral estoppel against Defendant David Bodner

("**Bodner**") in this action (the "**Motion**"); and appropriate and timely notice of the Motion having been given; and a hearing on the Motion having been held on _____, 2022, granting all interested parties the opportunity to be heard; and after due deliberation and sufficient cause appearing therefore,

IT IS HEREBY ORDERED:

1. The Motion is **GRANTED** as set forth herein.

2. Bodner is precluded from offering any evidence at trial disputing the Second Circuit's resolution in the Conviction Order of the following issues as set forth below, which are deemed to be fully and finally settled and determined for purposes of the upcoming trial in this action:

   a. In 2003, Nordlicht, Bodner and Murray Huberfeld ("**Huberfeld**") founded Platinum Management (NY) LLC ("**PMNY**") and a group of affiliated investment funds, which included PPVA.

   b. Around 2013 or early 2014, a group of investors, consisting of the founders of PMNY (Nordlicht, Huberfeld, and Bodner) (collectively, the "**Nordlicht Group**"), as well as Mark Feuer and Scott Taylor, founded a series of reinsurance companies collectively known as Beechwood.

   c. The Nordlicht Group, which included Bodner, was entrusted with authority over all of Beechwood's investment decisions, and wielded control over Beechwood's investment allocations.

   d. The Nordlicht Group exercised its control over Beechwood's investment activities both directly and through its ownership and control of PMNY.

e. Beechwood's investment team was staffed primarily with PMNY employees, such that PMNY and the Nordlicht Group could control Beechwood's investment activities. This included, *inter alia*, Levy, who departed PMNY to become the CIO of Beechwood's investment manager, which resulted in Levy making day-to-day investment decisions on Beechwood's behalf at the same time he continued to work for PMNY.

f. The Nordlicht Group's control of Beechwood's investment activities was accomplished in practice through PMNY's insurance mandate to co-invest Beechwood's assets in investments also held by PPVA.

g. The holders of secured bonds issued by Black Elk Energy Offshore Operations, LLC ("**Black Elk**"), including PPVA, were harmed in connection with the fraudulent amendment to the indenture (the "**Indenture**") governing the Black Elk bonds (the "**Black Elk Bonds**") and the August 2014 sale of Black Elk's assets to Renaissance Offshore, LLC (the "**Black Elk Scheme**").

h. The Black Elk Scheme subordinated the interests of Black Elk bondholders to the holders of Black Elk's preferred equity-holders, which included funds affiliated with PMNY and the Nordlicht Group.

i. The August 2014 consent solicitation amending the Indenture governing the Black Elk Bonds would not have passed without the votes of Beechwood, which previously had purchased Black Elk Bonds from PPVA.

j. Prior to and after the August 2014 execution of the Black Elk Scheme, Black Elk was insolvent and headed towards bankruptcy.

k. At times relevant to the Black Elk Scheme, PPVA was invested in Black Elk's common equity and the Black Elk Bonds.

l. The amendment to the Indenture governing Black Elk Bonds allowed Black Elk to pay Black Elk's preferred equity holders with proceeds from the sale of Black Elk's assets to Renaissance Offshore LLC ("**Renaissance Sale**") before paying the Black Elk bondholders.

m. The Black Elk Scheme involved the sale of substantially all of Black Elk's assets in the Renaissance Sale, and the Black Elk bondholders, such as PPVA, were damaged due to Black Elk's insolvency, a certain future bankruptcy filing by Black Elk, and the lack of any additional assets to pay off the Black Elk Bonds.

n. The proceeds of the Renaissance Sale were used to pay off Black Elk's preferred equity-holders to the detriment of the Black Elk bondholders.

o. As a result of the Black Elk Scheme - the subordination of PPVA's interests in the Black Elk Bonds to that of Black Elk's preferred equity-holders -- had a detrimental impact on the value of the Black Elk Bonds, and, in turn, it is a necessary conclusion PPVA's structurally subordinate equity interests in Black Elk were overvalued, and damaged the value of PPVA's remaining and reacquired Black Elk Bond holdings.

SO ORDERED: _____

HONORABLE JED S. RAKOFF
UNITED STATES DISTRICT JUDGE

#180547353_v1

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)

[PROPOSED] ORDER GRANTING PLAINTIFFS' MOTION *IN LIMINE* CONCERNING ADVERSE INFERENCES

WHEREAS, on November 16, 2022, Plaintiffs Martin Trott and Christopher Smith, as Joint Official Liquidators and Foreign Representatives of Platinum Partners Value Arbitrage Fund L.P. (in Official Liquidation) ("**JOLs**") and Platinum Partners Value Arbitrage Fund L.P. (in Official Liquidation) ("**PPVA**" and collectively with the JOLs, "**Plaintiffs**") filed its Second Set of Motions *in Limine*, seeking, in part, adverse inferences against Defendant David Bodner ("**Bodner**") as a result of the anticipated invocation by Mark Nordlicht ("**Nordlicht**") of his rights under the Fifth Amendment of the United States Constitution at the upcoming trial in this action (the "**Motion**"); and appropriate and timely notice of the Motion having been given; and a hearing

on the Motion having been held on _____, 2022, granting all interested parties the opportunity to be heard; and after due deliberation and sufficient cause appearing therefore,

IT IS HEREBY ORDERED:

1. The Motion is **GRANTED** as set forth herein.

2. In the event that Nordlicht invokes his Fifth Amendment privilege during his testimony at trial in this action, and upon the admission of evidence supporting the following categories of material in trial, adverse inferences shall be directed as to the content of Nordlicht testimony and Nordlicht documents as follows:

   a. In 2003, Bodner, Murray Huberfeld ("**Huberfeld**") and Nordlicht formed Platinum Management (NY) LLC ("**PMNY**") and a group of investment funds which included PPVA.

   b. Since PPVA's inception, Bodner had fiduciary responsibility over PMNY and PPVA, and, along with Huberfeld, had final and ultimate authority over all operational and investment decisions for PPVA.

   c. At all relevant times following the creation of PMNY, Bodner was provided special knowledge and insider information concerning the performance of PPVA's investments and the true value of PPVA's net asset value ("**NAV**") due to Bodner's position as a founder and fiduciary of PMNY and PPVA.

   d. Nordlicht and other PMNY employees regularly updated Bodner with special and confidential information regarding the operational failures for certain of PPVA's investments and the inflated value of PPVA's NAV, which information was not disclosed to the auditors and valuation companies retained by PMNY on behalf of PPVA. This information included, but was not limited

to: (i) the overvaluation of PPVA's investment interests in Black Elk Energy Offshore Operations, LLC ("**Black Elk**") directly following the November 2012 explosion on Black Elk's West Delta 32 oil platform (the "**Black Elk Explosion**"); and (ii) the non-performance of PPVA's investment in Golden Gate Oil, LLC ("**GGO**") since its inception, and PMNY's refusal to account for GGO's non-performance in performing PPVA's NAV calculations, and the relationship between Platinum and Beechwood.

e. As a consequence of the Black Elk Explosion and PMNY's failure to accurately value PPVA's NAV, any and all incentive fees paid to Bodner or any other party with funds deriving from PPVA in or after November 2012 were unearned and Bodner was aware that the NAV of PPVA had *decreased* in the calendar year 2012. Similarly, in or after November 2012, PMNY received inflated payments of management fees with funds deriving from PMNY due to the overvaluation of PPVA's NAV.

f. Bodner was aware that PPVA's NAV was overvalued in and after November 2012, and Bodner never took any affirmative step in his fiduciary role to correct PMNY's monthly reporting of PPVA's NAV. Bodner personally approved the decision to tell then-investor Bernie Fuchs about the Black Elk detriment.

g. In January 2015, Fuchs was informed of PPVA's overvaluation by Bodner at a meeting of PMNY's partners, which included Nordlicht, Huberfeld, Bodner and Fuchs. At the same meeting, Bodner made the decision that none of the partners of PMNY would receive incentive fees going forward and that none of the

partners would be permitted to take their investments out of PPVA, a decision he had the power and authority to unilaterally enforce.

h. Following the Black Elk Explosion, Bodner, Huberfeld and Nordlicht took steps to create the investment entities referred to as the BEOF Funds for the purpose of masking or correcting the decrease in value of PPVA's investment in Black Elk. The true value of PPVA's investment in Black Elk was further deflated by the January 2013 decision of PMNY to subordinate PPVA's interests in Black Elk to that of the BEOF Funds and assume interest obligations to the BEOF Funds, of which Bodner was well aware.

i. Following the August 2014 sale of Black Elk's assets to Renaissance Offshore, LLC, Bodner had knowledge that the true value of PPVA's equity investment in Black Elk was zero and that the Black Elk bonds were compromised.

j. Bodner capitalized and formed the Beechwood reinsurance enterprise along with Nordlicht and Huberfeld. The fraudulent utilization of Beechwood was to apply Beechwood funds to PPVA investments (which Beechwood co-investments were fully guaranteed by PPVA) such as Black Elk, GGO and other companies, in order to falsely prop up the value of PPVA's NAV, and create the illusion that the PPVA investment equity valuations were reasonable even though significant relevant debt, transferred to Beechwood, was in default or distress.

k. Bodner had knowledge and significant input into Beechwood's investment allocations due to his position as a member of the "Nordlicht Group" (which included Nordlicht, Bodner and Huberfeld). Bodner had final authority over

Beechwood's investment decisions, similar to his authority over PMNY and PPVA.

l. From February 2014 and at all relevant times thereafter, Bodner had knowledge that PMNY had caused PPVA to incur millions of dollars of debt to Beechwood in connection with guarantee/put option obligations on PPVA/Beechwood co-investments, and that such debts were not accurately incorporated into the calculation of PPVA's NAV.

m. In January 2016, Bodner received a presentation from Seth Gerszberg and David Steinberg at the direction of Nordlicht, which outlined the debts PPVA owed to Beechwood and concluded that PPVA's NAV was materially overstated and cash-flow insolvent, wherein large assets ascribed 8-9 figure valuations on prior and subsequent NAV statements were accorded no value, lowered value or lowered net value on the basis that the Beechwood "debts" were valid. Thereafter, Bodner had detailed and special knowledge that PPVA's NAV was significantly overvalued.

n. Bodner was aware of the numerous governmental investigations into PMNY and its founders, which began in 2013 with an audit of PMNY's books and records, and expanded in February 2016 into an investigation of the Platinum/Beechwood relationship (the "**Expanding Government Investigations**").

o. On March 20, 2016, a Release Agreement (the "**Release**") was executed by, among others, PMNY, Nordlicht (on behalf of PMNY and other entities including PPVA), Huberfeld, and Bodner. The intent of Nordlicht, Bodner,

Huberfeld and PMNY in relation to the Release was to release each other from liability due to their collective roles in, among other fraudulent acts, fraudulently overvaluing PPVA's NAV.

SO ORDERED: _____

HONORABLE JED S. RAKOFF
UNITED STATES DISTRICT JUDGE