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)

DECLARATION OF WARREN E. GLUCK IN SUPPORT OF PLAINTIFFS' SECOND SET OF MOTIONS *IN LIMINE*

I, Warren E. Gluck, declare under the penalty of perjury pursuant to 28 U.S.C. § 1746 as follows:

1. I am a partner in the law firm Holland & Knight LLP, counsel for 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 for Platinum Partners Value Arbitrage Fund L.P. (in Official Liquidation) ("**PPVA**," and together with the JOLs, the "**Plaintiffs**"). I am admitted in the State of New York and to practice in this District.

2. I respectfully submit this Declaration in support of Plaintiffs' Second Set of Motions *in Limine* seeking pretrial determinations: (i) that the criminal convictions of Mark

Nordlicht ("**Nordlicht**"), David Levy ("**Levy**"), and Daniel Small serve as collateral estoppel against Defendant David Bodner ("**Bodner**") in this action; and (ii) directing adverse inferences against Bodner as a result of Nordlicht's anticipated invocation of his rights under the Fifth Amendment to the United States Constitution at the upcoming trial in this action. I further respect submit this Declaration in support of Plaintiffs' Motion in *Limine* for a ruling as to imputation of knowledge of held by Curtis, Mallet-Prevost, Colt & Mosle LLP to Bodner.

3. The information contained herein is based on my review of the relevant documents and is true to the best of my knowledge. I am competent to testify as to the facts stated herein.

4. Attached as **Exhibit 1** is a true and correct copy of the United States Court of Appeals for the Second Circuit's order issued on November 5, 2021, in *United States v. Landesman*, 17 F. 4th 298 (2d Cir. 2021).

5. Attached as **Exhibit 2** is a true and correct copy of the jury verdict submitted on August 12, 2022, in the action captioned *United States of America v. Small*, No. 16-cr-00640 (BMC), ECF No. 960.

6. Attached as **Exhibit 3** is a true and correct copy of the excerpts of the transcript of the November 12, 2019 deposition of Bodner.

7. Attached as **Exhibit 4** is a true and correct copy of the Second Amended and Restated Operating Agreement of Platinum Management (NY) LLC, effective as of January 1, 2011, which was produced in these actions with control number CTRL1968806.

8. Attached as **Exhibit 5** is a true and correct copy of excerpts of the transcript of the October 2, 2019 deposition of Fuchs.

9. Attached as **Exhibit 6** is a true and correct copy of excerpts of the transcript of the November 19, 2019 deposition of Michael Katz.

10. Attached as **Exhibit 7** is a true and correct copy of excerpts of Defendant David Bodner's Responses to Plaintiffs' First Request for Admissions, dated December 30, 2019.

11. Attached as **Exhibit 8** is a true and correct copy of a November 16, 2012 email from Joan Janczewski to Bodner with the subject line "Black Elk Investors," which was produced in these actions with control number CTRL3312593.

12. Attached as **Exhibit 9** is a true and correct copy of a September 12, 2014 email from Nordlicht to Levy, which was produced in these actions with control number CTRL5006332.

13. Attached as **Exhibit 10** is a true and correct copy of a memorandum from Gabriel Hertzberg to Eliot Lauer, produced in these actions with control number PPVA_RH_0155846.

I hereby declare under penalty of perjury that the foregoing is true and correct.

Dated: November 16, 2022
New York, New York

/s/ Warren E. Gluck

EXHIBIT 1

17 F.4th 298
United States Court of Appeals, Second Circuit.

UNITED STATES of America, Appellant,
v.
Uri LANDESMAN, Joseph Sanfilippo, Joseph Mann, Daniel Small, Jeffrey Shulse, Defendants, David Levy, Mark Nordlicht, Defendants-Appellees.

Docket Nos. 19-3207-cr/19-3209-cr
|
August Term, 2020
|
Argued: December 3, 2020
|
Decided: November 5, 2021

Synopsis

Background: After jury convicted hedge fund's co-chief investment officers (CIO) of securities fraud, conspiracy to commit securities fraud, and conspiracy to commit wire fraud, the United States District Court for the Eastern District of New York, Brian M. Cogan, J., 2019 WL 4736957, granted their motions for judgment of acquittal or for new trial. United States appealed.

Holdings: The Court of Appeals, Sack, Senior Circuit Judge, held that:

[1] there was sufficient evidence of one CIO's membership in charged conspiracy and fraudulent intent to support his convictions;

[2] new trial was not warranted;

[3] government did not improperly argue indenture's affiliate rule; and

[4] CIOs misrepresentation in consent solicitation statement was sufficiently material to support their convictions.

Vacated and remanded.

Procedural Posture(s): Appellate Review; Post-Trial Hearing Motion.

West Headnotes (42)

[1] **Criminal Law** Construction in favor of government, state, or prosecution

Criminal Law Inferences or deductions from evidence

110 Criminal Law
110XXIV Review
110XXIV(M) Presumptions
110k1144 Facts or Proceedings Not Shown by Record
110k1144.13 Sufficiency of Evidence
110k1144.13(2) Construction of Evidence
110k1144.13(3) Construction in favor of government, state, or prosecution
110 Criminal Law
110XXIV Review
110XXIV(M) Presumptions
110k1144 Facts or Proceedings Not Shown by Record
110k1144.13 Sufficiency of Evidence
110k1144.13(5) Inferences or deductions from evidence

Where defendants appeal their convictions following jury trial, for purposes of review of district court's decision on their motions for judgment of acquittal, Court of Appeals views evidence in light most favorable to government, crediting any inferences that jury might have drawn in its favor. Fed. R. Crim. P. 29.

[2] **Criminal Law** Motion for new trial

110 Criminal Law
110XXIV Review
110XXIV(L) Scope of Review in General
110XXIV(L)4 Scope of Inquiry
110k1134.54 Motion for new trial

For purposes of Court of Appeals' review of district court's decision on motions for new trial, all facts and circumstances must be examined to make objective evaluation. Fed. R. Crim. P. 33.

[3] **Criminal Law** Review De Novo

110 Criminal Law
110XXIV Review
110XXIV(L) Scope of Review in General

110XXIV(L)13 Review De Novo
110k1139 In general
Court of Appeals reviews de novo district court's grant of motion for judgment of acquittal based on finding that trial evidence was insufficient to support jury's verdict, applying same standard district court applies in review of evidence. Fed. R. Crim. P. 29.

[4] **Criminal Law** New Trial
110 Criminal Law
110XXIV Review
110XXIV(N) Discretion of Lower Court
110k1156 New Trial
110k1156(1) In general
Court of Appeals reviews district court's grant of new trial for abuse of discretion. Fed. R. Crim. P. 33.

[5] **Criminal Law** Discretion of Lower Court
110 Criminal Law
110XXIV Review
110XXIV(N) Discretion of Lower Court
110k1147 In general
District court abuses its discretion when its decision rests on error of law or clearly erroneous factual finding, or when its decision cannot be located within range of permissible decisions.

[6] **Criminal Law** Discretion of Lower Court
110 Criminal Law
110XXIV Review
110XXIV(N) Discretion of Lower Court
110k1147 In general
District court does not abuse its discretion simply because it has made different decision than Court of Appeals would have made in first instance.

[7] **Criminal Law** Burden of showing error
110 Criminal Law
110XXIV Review
110XXIV(M) Presumptions
110k1141 In General
110k1141(2) Burden of showing error
Defendant challenging sufficiency of evidence bears heavy burden.

1 Cases that cite this headnote

[8] **Criminal Law** Reasonable doubt
110 Criminal Law
110XXIV Review
110XXIV(P) Verdicts
110k1159 Conclusiveness of Verdict
110k1159.2 Weight of Evidence in General
110k1159.2(7) Reasonable doubt
In reviewing sufficiency of evidence, Court of Appeals must determine whether upon evidence, giving full play to jury's right to determine credibility, weigh evidence, and draw justifiable inferences of fact, reasonable mind might fairly conclude guilt beyond reasonable doubt.

[9] **Criminal Law** Construction in favor of government, state, or prosecution
Criminal Law Inferences or deductions from evidence
110 Criminal Law
110XXIV Review
110XXIV(M) Presumptions
110k1144 Facts or Proceedings Not Shown by Record
110k1144.13 Sufficiency of Evidence
110k1144.13(2) Construction of Evidence
110k1144.13(3) Construction in favor of government, state, or prosecution
110 Criminal Law
110XXIV Review
110XXIV(M) Presumptions
110k1144 Facts or Proceedings Not Shown by Record
110k1144.13 Sufficiency of Evidence
110k1144.13(5) Inferences or deductions from evidence
In reviewing sufficiency of evidence, Court of Appeals views evidence presented in light most favorable to government, and all permissible inferences must be drawn in government's favor.

1 Cases that cite this headnote

[10] **Criminal Law** Weight and sufficiency

Criminal Law Inferences or hypotheses from evidence

110 Criminal Law
110XXIV Review
110XXIV(L) Scope of Review in General
110XXIV(L)2 Matters or Evidence Considered
110k1134.17 Evidence
110k1134.17(3) Weight and sufficiency
110 Criminal Law
110XXIV Review
110XXIV(P) Verdicts
110k1159 Conclusiveness of Verdict
110k1159.2 Weight of Evidence in General
110k1159.2(8) Inferences or hypotheses from evidence

In reviewing sufficiency of evidence, evidence must be viewed in its totality, as each fact may gain color from others, and government need not negate every theory of innocence.

1 Cases that cite this headnote

[11] **Criminal Law** Suspicion or conjecture; reasonable doubt

110 Criminal Law
110XX Trial
110XX(F) Province of Court and Jury in General
110k753 Direction of Verdict
110k753.2 Of Acquittal
110k753.2(3) Insufficiency of Evidence
110k753.2(6) Suspicion or conjecture; reasonable doubt

If court concludes that either of two results, reasonable doubt or no reasonable doubt, is fairly possible, court must let jury decide matter.

[12] **Criminal Law** Reasonable doubt

110 Criminal Law
110XXIV Review
110XXIV(P) Verdicts
110k1159 Conclusiveness of Verdict
110k1159.2 Weight of Evidence in General
110k1159.2(7) Reasonable doubt

Guilty verdict must be upheld if any rational trier of fact could have found crime's essential elements beyond reasonable doubt.

[13] **Criminal Law** Hearing and determination

110 Criminal Law
110XX Trial
110XX(F) Province of Court and Jury in General
110k753 Direction of Verdict
110k753.2 Of Acquittal
110k753.2(8) Hearing and determination

On motion for judgment of acquittal, court must defer to jury's determination of weight of evidence and credibility of witnesses, and to jury's choice of competing inferences that can be drawn from evidence. Fed. R. Crim. P. 29.

[14] **Criminal Law** Particular offenses and prosecutions

110 Criminal Law
110XXIV Review
110XXIV(P) Verdicts
110k1159 Conclusiveness of Verdict
110k1159.2 Weight of Evidence in General
110k1159.2(10) Particular offenses and prosecutions

High degree of deference afforded to jury verdict is especially important when reviewing conviction of conspiracy, because conspiracy by its very nature is secretive operation, and it is rare case where all aspects of conspiracy can be laid bare in court with precision of surgeon's scalpel.

[15] **Conspiracy** Direct or Circumstantial Evidence

Conspiracy Inferences from circumstantial evidence

91 Conspiracy
91II Criminal Responsibility
91II(K) Weight and Sufficiency of Evidence
91k342 Direct or Circumstantial Evidence
91k343 In general
91 Conspiracy
91II Criminal Responsibility
91II(K) Weight and Sufficiency of Evidence
91k342 Direct or Circumstantial Evidence
91k344 Inferences from circumstantial evidence

Agreement to participate in conspiracy may be inferred from facts and circumstances of case, and both existence of conspiracy and defendant's participation in it with requisite criminal intent may be established through circumstantial evidence.

[16] **Criminal Law** Suspicion or conjecture; reasonable doubt

110 Criminal Law
110XX Trial
110XX(F) Province of Court and Jury in General
110k753 Direction of Verdict
110k753.2 Of Acquittal
110k753.2(3) Insufficiency of Evidence
110k753.2(6) Suspicion or conjecture; reasonable doubt

On motion for judgment of acquittal, jury's inferences must be reasonable, and specific inferences should not be indulged, because it would not satisfy Constitution to have jury determine that defendant is probably guilty. Fed. R. Crim. P. 29.

[17] **Criminal Law** Elements of offenses in general

110 Criminal Law
110XVII Evidence
110XVII(V) Weight and Sufficiency
110k568 Elements of offenses in general

Where fact to be proved is also element of offense, it is not enough that inferences in government's favor are permissible, but rather, court must also be satisfied that inferences are sufficiently supported to permit rational juror to find that that element, like all elements, is established beyond reasonable doubt.

[18] **Criminal Law** Suspicion or conjecture; reasonable doubt

110 Criminal Law
110XX Trial
110XX(F) Province of Court and Jury in General
110k753 Direction of Verdict
110k753.2 Of Acquittal
110k753.2(3) Insufficiency of Evidence
110k753.2(6) Suspicion or conjecture; reasonable doubt

On motion for judgment of acquittal, direct evidence is not required; in fact, government is entitled to prove its case solely through circumstantial evidence, provided, of course, that government still demonstrates each element of charged offense beyond reasonable doubt.

[19] **Criminal Law** Reasonable Doubt

110 Criminal Law
110XVII Evidence
110XVII(V) Weight and Sufficiency
110k561 Reasonable Doubt
110k561(1) In general

If evidence viewed in light most favorable to prosecution gives equal or nearly equal circumstantial support to theory of guilt and theory of innocence, then reasonable jury must necessarily entertain reasonable doubt.

[20] **Securities Regulation** Fraudulent transactions

349B Securities Regulation
349BI Federal Regulation
349BI(G) Offenses and Prosecutions
349Bk193 Fraudulent transactions

To establish intent for purposes of substantive securities fraud charge, government must prove that defendant acted willfully and knowingly and with intent to defraud.

[21] **Criminal Law** Aiding, abetting, or other participation in offense

110 Criminal Law
110VII Parties to Offenses
110k59 Principals, Aiders, Abettors, and Accomplices in General
110k59(5) Aiding, abetting, or other participation in offense

For purposes of aiding and abetting liability, government must prove that defendant willfully and knowingly associated himself in some way with crime, and sought by some act to help make crime succeed.

[22] **Conspiracy** Knowledge and intent as to combination, agreement, and participation

Conspiracy Intent to commit underlying offense or other object of conspiracy

91 Conspiracy

91II Criminal Responsibility
91II(A) In General
91k140 Knowledge and Intent
91k142 Knowledge and intent as to combination, agreement, and participation
91 Conspiracy
91II Criminal Responsibility
91II(A) In General
91k140 Knowledge and Intent
91k143 Intent to Commit Act or Engage in Conduct
91k143(2) Intent to commit underlying offense or other object of conspiracy

To sustain conspiracy charge, government must prove that defendant willfully and knowingly became member of conspiracy, with intent to further its illegal purposes – that is, with intent to commit charged conspiracy's object.

[23] **Conspiracy** Knowledge and intent as to combination, agreement, and participation

Conspiracy Intent to commit underlying offense or other object of conspiracy

91 Conspiracy
91II Criminal Responsibility
91II(A) In General
91k140 Knowledge and Intent
91k142 Knowledge and intent as to combination, agreement, and participation
91 Conspiracy
91II Criminal Responsibility
91II(A) In General
91k140 Knowledge and Intent
91k143 Intent to Commit Act or Engage in Conduct
91k143(2) Intent to commit underlying offense or other object of conspiracy

To convict defendant of conspiracy, government must show that defendant had at least degree of criminal intent necessary for substantive offense itself, but is not required to show that he knew all of conspiracy's details, so long as he knew its general nature and extent.

[24] **Conspiracy** Mail and wire fraud

91 Conspiracy
91II Criminal Responsibility
91II(B) Particular Subjects of Criminal Conspiracy
91k169 Fraud and False Pretenses
91k171 Particular Practices
91k171(3) Mail and wire fraud

To sustain conviction for conspiracy to commit wire fraud, government must prove that defendant acted with specific intent to obtain money or property by means of fraudulent scheme that contemplated harm to victim's property interests.

[25] **Conspiracy** Mail and wire fraud

Conspiracy Securities offenses

Securities Regulation Weight and sufficiency

91 Conspiracy
91II Criminal Responsibility
91II(K) Weight and Sufficiency of Evidence
91k346 Particular Subjects of Conspiracy
91k359 Fraud and False Pretenses
91k359(3) Mail and wire fraud
91 Conspiracy
91II Criminal Responsibility
91II(K) Weight and Sufficiency of Evidence
91k346 Particular Subjects of Conspiracy
91k373 Securities offenses
349B Securities Regulation
349BI Federal Regulation
349BI(G) Offenses and Prosecutions
349Bk196 Evidence
349Bk199 Weight and sufficiency

There was sufficient evidence of hedge fund's chief investment officer's (CIO) membership in charged conspiracy and fraudulent intent to support his convictions for securities fraud, conspiracy to commit securities fraud, and conspiracy to commit wire fraud, in light of evidence that CIO knew that company in which fund had heavily invested as preferred equity holder was heading toward bankruptcy, that indenture barred payment of proceeds from sale of company's assets to equity holders, and that CIO participated scheme to circumvent bondholders by transferring bonds that fund owned to entity it controlled in order to amend indenture to give equity holders priority, even though he was aware that indenture required that securities owned by entities it controlled be

disregarded. Securities Exchange Act of 1934 §§ 10, 32, 15 U.S.C.A. §§ 78j(b), 78ff; 18 U.S.C.A. §§ 371, 1349.

[26] **Criminal Law** Elements of offenses in general

110 Criminal Law
110XVII Evidence
110XVII(V) Weight and Sufficiency
110k568 Elements of offenses in general

Criminal intent may be proven entirely through circumstantial evidence.

[27] **Fraud** Presumptions and burden of proof

184 Fraud
184III Criminal Responsibility
184k69 Prosecution and Punishment
184k69(3) Presumptions and burden of proof

When necessary result of defendant's scheme is to injure others, fraudulent intent may be inferred from scheme itself.

[28] **Criminal Law** Of Acquittal

Criminal Law Discretion of court as to new trial

110 Criminal Law
110XX Trial
110XX(F) Province of Court and Jury in General
110k753 Direction of Verdict
110k753.2 Of Acquittal
110k753.2(1) In general
110 Criminal Law
110XXI Motions for New Trial
110k911 Discretion of court as to new trial

Although trial court has broader discretion to grant new trial than to grant motion for judgment of acquittal, where truth of prosecution's evidence must be assumed, that discretion should be exercised sparingly and only in the most extraordinary circumstances. Fed. R. Crim. P. 29, 33.

1 Cases that cite this headnote

[29] **Criminal Law** Weight and sufficiency of evidence in general

110 Criminal Law
110XXI Motions for New Trial
110k935 Verdict Contrary to Evidence
110k935(1) Weight and sufficiency of evidence in general

In evaluating motion for new trial, court must examine entire case, take into account all facts and circumstances, and make objective evaluation, keeping in mind that ultimate test for such motion is whether letting guilty verdict stand would be manifest injustice. Fed. R. Crim. P. 33.

1 Cases that cite this headnote

[30] **Criminal Law** Weight and sufficiency of evidence in general

110 Criminal Law
110XXI Motions for New Trial
110k935 Verdict Contrary to Evidence
110k935(1) Weight and sufficiency of evidence in general

District courts have duty to assure that competent, satisfactory, and sufficient evidence in record supports jury verdict, and district court may therefore grant new trial if evidence does not support verdict. Fed. R. Crim. P. 33.

[31] **Criminal Law** Weight and sufficiency of evidence in general

110 Criminal Law
110XXI Motions for New Trial
110k935 Verdict Contrary to Evidence
110k935(1) Weight and sufficiency of evidence in general

On motion for new trial, while district court may weigh evidence and credibility of witnesses, it must take care not to usurp jury's role. Fed. R. Crim. P. 33.

[32] **Criminal Law** Weight and sufficiency of evidence in general

110 Criminal Law
110XXI Motions for New Trial
110k935 Verdict Contrary to Evidence
110k935(1) Weight and sufficiency of evidence in general

It is only in exceptional circumstances, where there is real concern that innocent person may have been convicted, that court may intrude upon jury function of credibility assessment and grant motion for new trial. Fed. R. Crim. P. 33.

[33] **Criminal Law** Weight and sufficiency of evidence in general

110 Criminal Law
110XXI Motions for New Trial
110k935 Verdict Contrary to Evidence
110k935(1) Weight and sufficiency of evidence in general

District court may not grant motion for new trial based on weight of evidence alone unless evidence preponderates heavily against verdict to such extent that it would be manifest injustice to let verdict stand. Fed. R. Crim. P. 33.

1 Cases that cite this headnote

[34] **Criminal Law** Weight and sufficiency of evidence in general

110 Criminal Law
110XXI Motions for New Trial
110k935 Verdict Contrary to Evidence
110k935(1) Weight and sufficiency of evidence in general

On motion for new trial, district court may not reweigh evidence and set aside verdict simply because it feels some other result would be more reasonable. Fed. R. Crim. P. 33.

[35] **Criminal Law** Weight and sufficiency of evidence in general

110 Criminal Law
110XXI Motions for New Trial
110k935 Verdict Contrary to Evidence
110k935(1) Weight and sufficiency of evidence in general

On motion for new trial, absent situation in which, for example, evidence was patently incredible or defied physical realities, where evidentiary or instructional error compromised verdict's reliability, or where government's case depends upon strained inferences drawn from uncorroborated testimony, district court must defer to jury's resolution of conflicting evidence. Fed. R. Crim. P. 33.

[36] **Criminal Law** Determination

110 Criminal Law
110XXI Motions for New Trial
110k948 Application for New Trial
110k961 Determination

In applying "preponderates heavily" standard for granting motion for new trial, district court must be careful to consider any reliable trial evidence as a whole, rather than on piecemeal basis. Fed. R. Crim. P. 33.

[37] **Conspiracy** Mail and wire fraud

Conspiracy Securities offenses

Criminal Law Weight and sufficiency of evidence in general

Securities Regulation Weight and sufficiency

91 Conspiracy
91II Criminal Responsibility
91II(K) Weight and Sufficiency of Evidence
91k346 Particular Subjects of Conspiracy
91k359 Fraud and False Pretenses
91k359(3) Mail and wire fraud
91 Conspiracy
91II Criminal Responsibility
91II(K) Weight and Sufficiency of Evidence
91k346 Particular Subjects of Conspiracy
91k373 Securities offenses
110 Criminal Law
110XXI Motions for New Trial
110k935 Verdict Contrary to Evidence
110k935(1) Weight and sufficiency of evidence in general
349B Securities Regulation
349BI Federal Regulation
349BI(G) Offenses and Prosecutions
349Bk196 Evidence
349Bk199 Weight and sufficiency

Trial evidence did not preponderate heavily against verdict finding hedge fund's co-chief investment officer (CIO) guilty of securities fraud, conspiracy to commit securities fraud, and conspiracy to commit wire fraud, and thus new trial was not warranted; evidence indicated that CIO knew that company in which

fund had heavily invested as preferred equity holder was heading toward bankruptcy, that indenture barred payment of proceeds from sale of company's assets to equity holders, and that CIO participated scheme to circumvent bondholders by transferring bonds that fund owned to entity it controlled in order to amend indenture to give equity holders priority, even though he was aware that indenture's affiliate rule required that securities owned by entities it controlled be disregarded. Securities Exchange Act of 1934 §§ 10, 32, 15 U.S.C.A. §§ 78j(b), 78ff, 18 U.S.C.A. §§ 371, 1349; Fed. R. Crim. P. 33.

[38] **Conspiracy** Mail and wire fraud

Conspiracy Securities offenses

Criminal Law Weight and sufficiency of evidence in general

Securities Regulation Weight and sufficiency

91 Conspiracy
91II Criminal Responsibility
91II(K) Weight and Sufficiency of Evidence
91k346 Particular Subjects of Conspiracy
91k359 Fraud and False Pretenses
91k359(3) Mail and wire fraud
91 Conspiracy
91II Criminal Responsibility
91II(K) Weight and Sufficiency of Evidence
91k346 Particular Subjects of Conspiracy
91k373 Securities offenses
110 Criminal Law
110XXI Motions for New Trial
110k935 Verdict Contrary to Evidence
110k935(1) Weight and sufficiency of evidence in general
349B Securities Regulation
349BI Federal Regulation
349BI(G) Offenses and Prosecutions
349Bk196 Evidence
349Bk199 Weight and sufficiency

Trial evidence did not preponderate heavily against verdict finding hedge fund's co-chief investment officer (CIO) guilty of securities fraud, conspiracy to commit securities fraud, and conspiracy to commit wire fraud, and thus new trial was not warranted; evidence could have reasonably been interpreted to demonstrate that CIO did not intend to comply with affiliate rule or any other legal restriction preventing distribution of proceeds from company's sale to preferred equity holders, that he was aware that reinsurer was affiliate of hedge fund, that he concealed hedge fund's ownership of company bonds, and that he chose not to disclose affiliates in order to prevent their shares from being excluded in vote to amend indenture to give equity holders priority over bondholders. Securities Exchange Act of 1934 §§ 10, 32, 15 U.S.C.A. §§ 78j(b), 78ff, 18 U.S.C.A. §§ 371, 1349; Fed. R. Crim. P. 33.

[39] **Criminal Law** Theory and Grounds of Decision in Lower Court

110 Criminal Law
110XXIV Review
110XXIV(L) Scope of Review in General
110XXIV(L)5 Theory and Grounds of Decision in Lower Court
110k1134.60 In general

Court of Appeals may affirm grant of new trial on any basis for which there is sufficient support in record, including grounds not relied on by district court. Fed. R. Crim. P. 33.

[40] **Criminal Law** In particular prosecutions

110 Criminal Law
110XXXI Counsel
110XXXI(F) Arguments and Statements by Counsel
110k2084 Statements Regarding Applicable Law
110k2086 In particular prosecutions

Government did not improperly argue indenture's affiliate rule in hedge fund's co-chief investment officers' (CIO) prosecution for securities fraud, conspiracy to commit securities fraud, and conspiracy to commit wire fraud when it urged jury to use their "common sense" and to look at definition of "affiliate" in indenture, and defined it as "power to control"; there was nothing improper about government directing jury to use proper standard but also reminding jury not to leave its common sense at door.

[41] **Securities Regulation** Materiality

349B Securities Regulation
349BI Federal Regulation
349BI(C) Trading and Markets
349BI(C)7 Fraud and Manipulation
349Bk60.17 Manipulative, Deceptive or Fraudulent Conduct
349Bk60.28 Nondisclosure; Insider Trading
349Bk60.28(10) Matters to Be Disclosed
349Bk60.28(11) Materiality

To fulfill materiality requirement for securities fraud claim, defendant must show substantial likelihood that disclosure of omitted fact would have been viewed by reasonable investor as having significantly altered total mix of information made available. Securities Exchange Act of 1934 §§ 10, 32, 15 U.S.C.A. §§ 78j(b), 78ff.

[42] **Securities Regulation** Fraudulent transactions

349B Securities Regulation
349BI Federal Regulation
349BI(G) Offenses and Prosecutions
349Bk193 Fraudulent transactions

Hedge fund's co-chief investment officers' (CIO) misrepresentation in consent solicitation statement accompanying proposed amendments to indenture to give equity holders priority over bondholders that fund held only $18.3 million bonds was sufficiently material to support CIOs' securities fraud convictions; statement provided that proposed amendments would pass only if majority of outstanding bonds, excluding any bonds affiliated with company, voted in favor of amendments, and CIOs failed to disclose that entities controlled by fund owned additional $80.3 million bonds, thereby misleading bondholders into thinking that outcome of public consent solicitation process would be product of legitimate vote when, in fact, it was predetermined based on controlled entities' votes. Securities Exchange Act of 1934 §§ 10, 32, 15 U.S.C.A. §§ 78j(b), 78ff.

***303** Appeal from the United States District Court for the Eastern District of New York

Attorneys and Law Firms

Lauren Howard Elbert, Assistant United States Attorney (Kevin Trowel, David Pitluck, Lauren Howard Elbert, Patrick Hein, Assistant United States Attorneys, on the brief), for Jacquelyn M. Kasulis, Acting United States Attorney for the Eastern District of New York;

Michael S. Sommer (Morris J. Fodeman, Katherine T. McCarthy, on the brief), Wilson Sonsini Goodrich & Rosati, P.C., for Defendant-Appellee David Levy;

William A. Burck (Daniel R. Koffman, on the brief), Quinn Emanuel Urquhart & Sullivan, LLP, for Defendant-Appellee Mark Nordlicht.

Before: Sack, Chin, and Lohier, Circuit Judges.

Opinion

Sack, Circuit Judge:

This appeal concerns a scheme allegedly executed by defendants-appellees Mark Nordlicht and David Levy to defraud bondholders of an oil and gas company, Black Elk Energy Offshore Operations, LLC ("Black Elk"), of the proceeds of a lucrative asset sale to Renaissance Offshore, LLC (the "Black Elk Scheme"). In connection with their participation in the Black Elk Scheme, the defendants were both convicted of securities fraud, conspiracy to commit securities fraud, and conspiracy to commit wire fraud.

Central to the alleged Black Elk Scheme was a New York-based hedge fund known as Platinum Partners L.P. ("Platinum"). Platinum consisted of multiple investment funds, including Platinum Partners Value Arbitrage Fund, L.P. ("PPVA"), Platinum Partners Credit Opportunities Master Fund, L.P. ("PPCO"), and Platinum Partners Liquid Opportunity Master Fund, L.P. ("PPLO"). Nordlicht and others founded Platinum in 2003, and Nordlicht was the Chief Investment Officer ("CIO") of PPVA, PPCO, and PPLO. Platinum also had a relationship with a reinsurance company named Beechwood, which was founded in or around early 2014 by a group of investors that included Nordlicht. Beechwood included several entities: Beechwood Bermuda International Ltd. ("BBIL"), Beechwood Re, and B Asset Management ***304** ("BAM"). Levy worked at Platinum as a portfolio manager. In early 2014, Levy left Platinum and

joined Beechwood as its CIO. He later returned to Platinum where he became co-CIO with Nordlicht.

One of Platinum's largest investments was in Black Elk, an oil and gas company headquartered in Houston, Texas. In 2010, Black Elk raised capital by issuing $150 million in bonds. Black Elk also issued a Series E preferred security in early 2013, of which Platinum purchased the majority.

But Black Elk experienced significant financial setbacks between 2012 and 2014. An explosion in November 2012 at one of its offshore oil platforms in the Gulf of Mexico, coupled with ensuing civil litigation and regulatory scrutiny, resulted in a sharp decline in its business. Black Elk was also plagued by rampant mismanagement and poor financial planning. By 2014, it appeared to be spiraling towards bankruptcy.

At trial, the government alleged that Nordlicht, Levy, and their co-conspirators sought to limit Platinum's losses in the event of a Black Elk bankruptcy. They did so by orchestrating the sale of Black Elk's most valuable assets, and fraudulently manipulating the priority structure by which Black Elk debt and equity holders would be repaid to ensure that the proceeds of any asset sales went to the preferred equity holders (among whom Platinum was prominent) instead of the bondholders who would have otherwise had priority to those proceeds. In order to modify the priority structure, it was necessary for a majority of the outstanding bonds to consent (against their interest) to an amendment to the bond indenture. The government alleged that the defendants rigged the vote of bondholders by fraudulently concealing their control over certain bonds – in violation of the bond indenture – to ensure that the amendment would pass. As a result of this alleged fraud, the defendants unlawfully diverted nearly $100 million in asset sale proceeds from the bondholders to the preferred equity holders – who were not entitled to it – to Platinum's benefit.

After a nine-week trial, a jury convicted Nordlicht and Levy on the charges related to the Black Elk Scheme. After the verdict, Nordlicht and Levy both moved for judgments of acquittal or, in the alternative, for new trials. The district court denied Nordlicht's motion for a judgment of acquittal, concluding that "when viewed in the light most favorable to the Government, the Government adduced sufficient evidence ... to make a judgment of acquittal under Rule 29 inappropriate." *United States v. Nordlicht*, No. 16-cr-00640 (BMC), 2019 WL 4736957, at *9 (E.D.N.Y. Sept. 27, 2019). Despite this, however, the district court concluded that "letting the verdict stand against Nordlicht would be a manifest injustice" and therefore granted his motion for a new trial. *Id.* at *16. The district court separately granted Levy's motion for a judgment of acquittal, reasoning that "[e]ven making reasonable inferences in favor of the Government, and deferring to the role of the jury in weighing evidence and assessing credibility, the Government failed to meet its burden of proving beyond a reasonable doubt that Levy had criminal intent." *Id.* at *14. The district court also "conditionally grant[ed] Levy's motion for a new trial in the event that the judgment of acquittal [was] later vacated or reversed." *Id.* at *18. The government now appeals.

For the reasons set forth below, we conclude that the district court erred in granting the defendants' respective Rule 29 and Rule 33 motions. We therefore vacate the district court's judgment of acquittal as to Levy, vacate the district court's order granting new trials to Levy ***305** and Nordlicht, and remand for further proceedings consistent with this opinion.

BACKGROUND

Factual Background [1]

[1] Because the defendants appeal their convictions following a jury trial, for purposes of our review of the district court's decision on the Rule 29 motions, "our statement of the facts views the evidence in the light most favorable to the government, crediting any inferences that the jury might have drawn in its favor." *United States v. Rosemond*, 841 F.3d 95, 99-100 (2d Cir. 2016); *see infra* p. 320. For purposes of our review of the district court's decision on the Rule 33 motions, "all facts and circumstances" must be examined to "make an objective evaluation." *United States v. Aguiar*, 737 F.3d 251, 264 (2d Cir. 2013); *see infra* p. 331.

A. The Relevant Entities

1. Platinum Partners L.P.

[1] **[2]** Defendant-appellee Mark Nordlicht and his two partners, Murray Huberfeld and David Bodner, founded Platinum – a New York-based hedge fund – in 2003. Platinum

consisted of multiple investment funds, which included PPVA, PPCO, and PPLO. Nordlicht was the CIO of Platinum and its various hedge funds, and in his role as CIO, Nordlicht made the "final decision" regarding investments. GA.194.

Defendant-appellee David Levy is Huberfeld's nephew. Levy worked as a portfolio manager at Platinum until around early 2014. As a portfolio manager, Levy was responsible for overseeing some of Platinum's portfolio investments, as well as finding other potential investment opportunities. One of Platinum's largest investments, on which Levy worked, was in a company named Black Elk.

In early 2014, Levy left Platinum to join a reinsurance company, Beechwood, as its CIO. Around late 2014 or early 2015, after his brief stint as Beechwood's CIO, Levy returned to Platinum as its co-CIO alongside Nordlicht.

Black Elk

a) Platinum's Relationship with Black Elk

Black Elk was a Houston-based oil and gas exploration company that held and managed valuable oil and gas assets in the Gulf of Mexico. Black Elk raised money for its operations by issuing common equity as well as various forms of debt. In November 2010, Black Elk issued $150 million of publicly traded senior secured bonds. In 2013, to raise additional capital, Black Elk also issued a Series E preferred security, which functioned like debt. In the event of a bankruptcy or liquidation, the secured bondholders would be paid first, followed by those with preferred equity and then those with common equity.

Platinum was a significant investor in Black Elk. Levy and Daniel Small – another portfolio manager at Platinum – co-managed Platinum's position in the company. PPVA continued investing in Black Elk over time. By 2014, PPVA owned 85% of Black Elk's common equity. As of 2014, PPVA, PPLO, and PPCO also held most of its preferred equity.

Because of Platinum's significant investments in Black Elk, Nordlicht, Levy, and Small were involved in Black Elk's management. Nordlicht, Levy, and Small maintained close communication with Black Elk management, including its co-founder and Chief Executive Officer ("CEO") John Hoffman, Chief Financial Officer ("CFO") Jeffrey Shulse, Chief Technical Officer Art Garza, and Vice President of Operations Joseph Bruno. For example, Black Elk ***306** management met with Nordlicht, Levy, and Small to discuss prospective Black Elk acquisitions and strategic objectives. Nordlicht, Levy, and Small also often worked out of Black Elk's offices and participated in its management meetings.

The Indenture

The relationship between Black Elk and its bondholders was governed by an indenture (the "Indenture"). The Indenture contains several key provisions, including ones that govern the use of proceeds from an asset sale (Section 4.10), establish limitations on Black Elk's annual capital expenditures (Section 4.21), set forth the circumstances under which a default could be called and waived (Sections 6.01 and 6.04), and establish the procedure for amending the Indenture (Article 9).

Under Section 4.10(b) of the Indenture, Black Elk could use any asset sale proceeds: (1) to repay indebtedness, including money owed to Black Elk bondholders; (2) to acquire assets of an oil and gas business; (3) to acquire the majority of the voting stock of an oil and gas business; or (4) to make capital expenditures or acquire long-term assets for its oil and gas business. Under the Indenture, the proceeds from a sale of Black Elk's assets could not be paid to any equity holder.

Section 4.21 of the Indenture sets forth strict limitations on Black Elk's capital expenditures in any one year. Section 6.01 provides that holders of 25% of the aggregate principal amount of the bonds may call a default alleging that Black Elk violated the terms of the Indenture. Section 6.04, however, allows holders of a majority of the aggregate principal amount of the bonds to waive any default called by the bondholders.

Section 9.02(a) permits amendment of the Indenture with the consent of the holders of a majority in aggregate principal amount of the outstanding bonds. Section 2.09 (the "Affiliate Rule"), however, explains that – when determining consent – bonds held "by the Permitted Holders, the Issuers or any Guarantor, or by any Person directly or indirectly controlling or controlled by or under direct or indirect common control with the Permitted Holders, the Issuers or any Guarantor, will be considered as though not outstanding." GA.888.[2] In other words, such Black Elk bonds could not be counted in determining whether holders of a majority in aggregate principal amount of the bonds consented to any proposed amendments.

[2] As cited herein, "GA" refers to the Government Appendix, "Supp. GA" refers to the Government's Supplemental Appendix, "SGA" refers to the Government's Special Appendix submitted with its opening brief, and "SA" refers to the defendants' Supplemental Appendix.

In Section 1.01, the Indenture defines the terms "affiliate" and "control" as follows:

> "*Affiliate*" of any specified Person means any other Person directly or indirectly controlling or controlled by or under direct or indirect common control with such specified Person. For the purposes of this definition, "*control*," as used with respect to any Person, means the possession, directly or indirectly, of the power to direct or cause the direction of the management or policies of such Person, whether through the ownership of voting securities, by agreement or otherwise; *provided* that beneficial ownership of 10% or more of the Voting Stock of a Person will be deemed to be control. For purposes of this definition, the terms "*controlling*," "*controlled by*" ***307** and "*under common control with*" have correlative meanings.

GA.861 (emphases in original).

2. *Beechwood*

Around 2013 or early 2014, a group of investors – consisting of the founders of Platinum (Nordlicht, Huberfeld, and Bodner), as well as Mark Feuer and Scott Taylor – founded a reinsurance company named Beechwood. Beechwood was paid a premium by primary insurers to invest those companies' funds. BAM, BBIL, and Beechwood Re were entities related to Beechwood.

Nordlicht, Levy, and their associates at Platinum retained significant control over Beechwood's investment decisions. Email correspondence among Feuer, Huberfeld, and Nordlicht from 2013 outlined Beechwood's corporate terms as follows: "1-Nordlicht group to put any capital necessary to secure funds"; "2-Capital to receive 8 percent preferred return"; "3-Capital to be returned and preferred return to be re[ ]paid before any profit split"; "4-Feuer group to receive 750k a year in draws (deducted from their profit split) after 100 million in funds deployed"; "5-Feuer group will run the insurance end"; "6-Nordlicht group will run the investment allocation side"; "7-all profits split 50-50 to each group (After paying back the original capital)"; "8-Nordlicht group to retain all fees generated by invest[m]ents in Platinum funds." GA.582-83. Consistent with this, when Beechwood was first created, Nordlicht and Levy together decided which investments would be purchased and transferred from Platinum to Beechwood. And Beechwood invested in many portfolio companies and securities in which Platinum was already invested, including Black Elk, and in the Platinum funds themselves.

Shortly after Beechwood was founded, Levy left Platinum to become CIO of Beechwood. As such, he controlled the investment side of Beechwood and made investment decisions on behalf of the company on a day-to-day basis, while Feuer and Taylor ran the "insurance side" of the company. GA.206. While CIO of Beechwood, Levy also continued to work for Platinum on its investment in Black Elk.

Platinum and Beechwood also shared employees, and Platinum employees frequently worked out of Beechwood's office, which was only a few blocks away from Platinum's. While CIO of Beechwood, Levy, as mentioned, continued working for Platinum on Black Elk-related issues. Nordlicht would periodically enter the Beechwood office to take phone calls and participate in meetings. Naftali Manela, who was CFO of PPCO through late 2014, also worked simultaneously at Platinum and Beechwood; at Beechwood, Manela assisted Nordlicht in figuring out how much money Beechwood could invest in Platinum and what form those investments could take. In addition, Israel Wallach – although never a Platinum employee – worked at BAM as a portfolio manager from January 2014 to March 2016 and had links to Nordlicht: He learned about the position at Beechwood from Nordlicht, met with Nordlicht to discuss the position at Beechwood, and communicated with Nordlicht about his work at Beechwood after he was hired.

Manela testified, on cross-examination, that Feuer and Taylor engaged legal counsel to ensure that Beechwood was structured in such a way that it would not be an "affiliate" of Platinum. Manela further testified that Levy was present for one conversation where Feuer and Taylor stated that Beechwood was not an affiliate of Platinum.

B. Black Elk Spirals Towards Bankruptcy

Black Elk began experiencing significant financial difficulties from late 2012 through ***308** early 2014. In November

2012, Black Elk's business suffered a sharp decline after one of its oil platforms, West Delta 32, exploded in the Gulf of Mexico, resulting in three fatalities. Following the explosion, government regulators shut down several of Black Elk's platforms, rendering them nonoperational and unable to produce revenue. The cessation of oil production, heightened regulatory scrutiny, and ensuing civil lawsuits put a cash flow strain on the company. As a result, Black Elk did not have enough incoming revenue to cover its expenses and was having trouble paying its bills. There was also evidence that Black Elk's executives and employees engaged in extravagant spending, including on private jet travel (in at least one instance with New Orleans Saints Cheerleaders onboard), trips to Mardi Gras in New Orleans, the purchase of a fleet of helicopters, the purchase of a condo on Bourbon Street in New Orleans, attendance at strip clubs, hunting trips, and the purchase of a speedboat. By the end of 2013, Black Elk was heavily in debt.

At Black Elk management meetings during the period following the West Delta 32 explosion, Black Elk management discussed with Levy and Small Black Elk's financial difficulties and the possibility of putting Black Elk into bankruptcy. Black Elk's Vice President of Operations, Joseph Bruno, testified that at one such management meeting at which Levy was present, Levy – in response to the prospect of bankruptcy – stated, "We cannot do that. It's a lot of money to lose." Bruno testified that it was his impression that Levy was in charge of managing Platinum's investment in Black Elk.

C. Platinum Seeks to Sell Black Elk's Assets to Pay Preferred Equity Holders

Despite Black Elk's financial difficulties, its oil and gas reserves retained significant value. In 2014, to raise cash, the company began contemplating the sale of its most valuable assets – its oil and gas wells – to a variety of companies, including Renaissance Offshore, Fieldwood, Talos Energy, and W&T Offshore.

On March 16, 2014, Small emailed Nordlicht about the severe financial challenges Black Elk was facing. Small wrote that, in 2012, Black Elk had been generating more than $100 million in annualized earnings before interest, taxes, depreciation, and amortization ("EBITDA") and negotiating to sell itself for more than $500 million but "[w]e know what happened subsequently – two major wells watered-out and the company had an explosion both of which exposed its underperforming properties, bloated cost structure, poorly negotiated escrow agreements and lack of financial planning and controls." GA.590-91. Small explained that their strategy moving forward was "to renegotiate escrow agreements and surety coverage to release cash that can be used to decommission negative cash flowing fields, further reduce the cost structure, drill low/high return ... and ... acquire under-reserved fields." *Id.*

Nordlicht responded to Small the same day:

> Happy to discuss this week and come to final arrangement. This is also the week I need to figure out how *to restructure and raise money to pay back 110 million of preferred [equity in Black Elk] which if unsuccessful, w[oul]d be the end of the fund [(PPVA)]. This "liquidity" crunch [at PPVA] was caused by our mismanagement – yours*[,] *David [Levy] and I – of the black elk position* so I will multitask and also address your concerns but forgive me if I am a little distracted. I have been up until 3am for the last two weeks working through this issue.

GA.590 (emphasis added).

On April 16, 2014, after Nordlicht received an email regarding problems with ***309** Black Elk's oil production, he wrote to Small, Levy, Hoffman and Shulse: "This is starting to become major issue. When will production get back up?" GA.596. One month later, on May 20, 2014, Shulse wrote to Nordlicht, Small, and Levy:

> I am working on a revised cash forecast, but not good news from Houston ... Oil check is going to be $9.2 million instead of the $12.0 million I was expecting ... [.]
>
> There are not enough bonds on the short term horizon to cover this kind of deficit ... We will have royalties, hedges, payroll, insurance, rent and other "have" to pays that will not be covered by the current or future oil check[.]

> *We will need to discuss some sort of bridge with Platinum and then seriously consider the options in front of us around the Talos/Renaissance transaction ... the Fieldwood/Sandridge offer ... and any other short term liquidity events we can make happen ...* $6 million is a shortfall we can[']t make up[.]

GA.614-15 (emphasis added) (ellipses in original). Nordlicht responded, copying Black Elk in-house counsel Marizza Pichè, and chastising Shulse for failing to label his email as "atty client privilege." GA.614. Shulse responded that he was not sure "why a business issue such as cash flow would need to be covered by attorney client privilege?" *Id.*

On June 16, 2014, Nordlicht expressed grave concerns about PPVA's liquidity to PPVA President Uri Landesman:

> I think we need to revamp the strategy on PPVA and figure out what to do. *It can't go on like this or practically, we [(PPVA)] will need to wind down*. This is not a rhetoric thing, it's just not possible to manage net outflows of this magnitude. *I think we can overcome this but this is code red, we can't go on with status quo*.

GA.628 (emphasis added). Landesman replied: "We are pushing hard, illiquidity a bigger hurdle than energy concentration .... Need monetization/liquidity events in the fund; I know you realize this and are doing your best." *Id.* Nordlicht responded: "We are getting some liquidity from black elk – though not the equity. ... Am hesitant to put myself in position of using that for reds [(redemptions)]. We just need to short term go crazy, get everyone focused, and long term try to come up with marketing pitch where we can raise even when we are illiquid." *Id.*

On July 2, 2014, Shulse wrote to Small, Levy, Nordlicht, and Hoffman: "We [Black Elk] are officially out of money next week .... We had a lot of [Accounts Payable] obligations to keep production from shutting in last week ... I am doing everything humanly possible to keep this ship moving forward[.] Just letting everyone know where things stand." GA.632.

Around this same time, Black Elk began pursuing a significant sale of assets to Renaissance Offshore, LLC (the "Renaissance Sale"). Black Elk ultimately entered into a Purchase and Sale Agreement with Renaissance on July 10, 2014, and the sale was expected to close in August 2014.

D. Black Elk and Platinum's Attempts to Amend the Indenture

1. The Failed Private Consent Solicitation

In early 2014, Nordlicht, Levy, and others endeavored to amend the Black Elk Indenture through a private consent solicitation process. Late in 2013 or early in 2014, a group of Black Elk bondholders who held at least 25% of the Black Elk bonds began to threaten Black Elk with a default based on Black Elk exceeding the capital expenditure limits set forth in Section 4.21 of the Indenture. Nordlicht, faced ***310** with the prospect of these bondholders filing for default, sought to gain control over at least 50% of the principal amount of the Black Elk bonds to override any default action and adopt certain amendments to the Indenture. In particular, Platinum sought to amend, *inter alia*, Sections 4.09 and 4.21 of the Indenture to address Black Elk's capital expenditure covenant and its ability to incur additional debt. The proposed amendments did not then include any changes to the provision governing the use of asset sale proceeds (Section 4.10).

On February 6, 2014, Nordlicht wrote to Black Elk CEO John Hoffman with a copy to in-house counsel Pichè:

> John - FYI - am close to buying 20 million bonds from msd.[3] It will at that point be easy task to buy additional 25 if bondholders don't behave and we can change covenants at any time by flipping our bonds to friendlies who will [d]o right by the company.

GA.581 (footnote added). On March 3, 2014, Nordlicht updated Black Elk's CFO, Jeffrey Shulse, as well as Small, Pichè, Hoffman, and Levy: "Their [(the bondholders threatening default)] group is falling apart. Msd just sold their position. They still have 25 percent but likely we will have 50

percent in friendly hands relatively quickly in which case this is all academic." GA.584.

3 "MSD" was a holder of Black Elk bonds that had threatened a default. **GA.435**.

On March 5, 2014, Rob Shearer of BakerHostetler – outside counsel to Black Elk – emailed Shulse: "For purposes of calculating whether the requisite consent has been obtained, ... indenture securities owned by an obligor ... or by any person directly or indirectly controlling or controlled by or under direct or indirect common control with any such obligor" must be excluded under section 316(a) of the Trust Indenture Act ("TIA"). GA.587 (emphasis omitted). Shulse then forwarded Shearer's email quoting section 316(a) of the TIA to Nordlicht, Levy and others, stating: "We need to be mindful of this provision when assuming we control the bonds or not." *Id.* Nordlicht responded: "I see u accidentally forgot to include Marizza and label this attorney client privilege. I have corrected .... But when we say we have friendly holders we will be fully compliant with this provision." *Id.*

As a part of the private consent solicitation process to amend the Indenture, on May 6, 2014, three of the Platinum funds – PPVA, PPCO, and PPLO, which collectively held about $93 million in Black Elk bonds (or about 62% of the issued bonds) – submitted consents in favor of the proposed amendments to the Indenture. The consents disclosed that PPVA held $50,308,000 in bonds, PPLO held $10,046,000 in bonds, and PPCO held $32,917,000 in bonds. These consents were distributed to counsel, including Shearer.

Shearer testified that, at the time, he did not raise any concerns that Nordlicht's actions in "flipping bonds to friendly companies" might violate the Affiliate Rule. SA.173. He further testified that he could not recall any discussions where he told anyone at Black Elk that it was improper for Platinum to flip bonds to friendly companies in order to amend the Indenture. Shearer also testified, however, that neither he, the trustee's counsel, nor the other lawyers at BakerHostetler working on the private consent solicitation knew that the Platinum entities were voting their bonds until after they received the consents. Shearer nevertheless also testified that neither he nor any of the lawyers working on the transaction raised any concerns about Platinum voting their bonds ***311** after they received the consents. BakerHostetler drafted, signed, and submitted to the trustee a legal opinion indicating that the firm had reviewed the Indenture and that all conditions necessary for its amendment had been met. Shearer explained at trial that the lawyers working on the transaction had not been focused on the Affiliate Rule at the time of the private consent solicitation process and had erred in overlooking it.

In June 2014, Shearer notified Shulse that the trustee for the Black Elk bondholders was "not comfortable that the consents were properly obtained," and was insisting that a public solicitation process be used. GA.796. In particular, in a June 2, 2014 email, Shearer wrote to Shulse:

> They are insisting that we run a new consent solicitation process. Among other things, they pointed out that when you run a more customary process, DTC [(Depository Trust Company)] will freeze trading of the bonds held by holders who consent to the proposed amendments so that they cannot be traded until the second supplemental indenture is signed. Without that, they are not comfortable that the consents were properly obtained. I think they are uncomfortable with other aspects of the process, but that one by itself is enough to cause them to require us to start over.

Id.

Later that day, Shulse forwarded to Nordlicht the public consent solicitation documents he received from Shearer, and Nordlicht replied to Shulse, Levy, and Small: "David [Levy] – u needn't explain to me what the hell is going on and why we are wasting time on this." GA.625-26. Shulse replied to all: "The short answer is the trustee refused to sign unless we did the solicitation process ... they don't trust our consents are valid because we have received a default notice in the past 60 days and we have the behind the scenes process with various dates on our consents ...." *Id.* Nordlicht asked what was the "quickest way to end [the] process," and Shulse replied that "[t]he quickest way is to do the formal solicitation ... get our 51% in order ... vote it through the DTC / BNY [(Bank of New York)] agents and end it ...." GA.625. Nordlicht replied to Levy, Small, and Shulse: "There is a disconnect here. No more talking to lawyers. David [Levy], u f'd this one up bad for no reason. We will have one pager signed by 51% of

bondholders, no trustee necessary. It's fine. We don't need any process. Bondholders are being taken out, this is all moot." *Id.*

The private consent process was ultimately terminated.

2. The Public Consent Solicitation Process and the Amendment of the Asset Sales Provision

a) The Consent Solicitation's Proposed Amendments

After Nordlicht and Levy failed in their attempt to amend the Indenture through the private consent solicitation process, they began to move forward with a public process (the "Consent Solicitation").

On June 23, 2014, Small emailed Shearer an earlier draft of the proposed amendments to the Indenture and asked him to "eliminate all of the existing amendments in the attached" except those pertaining to the elimination of the capital expenditure covenant (Section 4.21). GA.797. Small also requested that Shearer add an amendment allowing Black Elk to "use proceeds from Asset Sales under section 4.10 to make an offer at par for outstanding bonds which offer will be open for 10 business days and any remaining proceeds following the 10 day offer period may be used to repurchase ***312** preferred equity of the company." *Id.* The proposed amendment to Section 4.10 thus allowed for a fifth use of asset proceeds beyond the four enumerated uses originally specified in the Indenture: it permitted Black Elk to use the proceeds of an asset sale to purchase at par any Black Elk bonds that Black Elk bondholders elected to tender and then to use any remaining asset sale proceeds to "repurchase or redeem preferred equity of [Black Elk]." GA.832. Black Elk bondholders had three options in responding to the Consent Solicitation: (1) tender their bonds at par (thereby consenting to the proposed amendments); (2) consent to the proposed amendments without tendering, thereby continuing to own their bonds; or (3) neither tender nor consent.

The Renaissance Sale was the specific asset sale that would provide proceeds in connection with the Consent Solicitation. The amendment of the asset sales provision would therefore permit Black Elk – which Platinum was actively managing – to pay Platinum and other Black Elk preferred equity holders with funds obtained from the Renaissance Sale.

b) Platinum Transfers Black Elk Bonds to Beechwood to Manipulate the Consent Solicitation Vote

On April 8, 2014 – more than three months before the Consent Solicitation Statement was distributed to the Black Elk bondholders – Levy, Nordlicht, and Small were assessing the Black Elk bonds that they controlled at Platinum's hedge funds (PPVA, PPCO and PPLO) and the Beechwood entities (BAM and, later, BBIL), which were summarized in one consolidated table. Small wrote to Platinum trader Nicholas Marzella, copying Levy, with the subject "Black Elk bonds": "Nick, can you send the holder and amount of bonds that are with each broker." GA.609. Marzella replied to Levy and Small by sending the following table, which showed that various Platinum and Beechwood entities held a total of $98,730,500 of the $150 million of outstanding Black Elk bonds:

22,870,000.00	PPCO NMRA
10,046,500.00	PPCO NMRA
24,987,000.00	PPVA NMRA
25,321,000.00	PPVA CS
10,146,000.00	PPLO CS
5,360,000.00	BAM
98,730,500.00	

GA.609-10.

Around this time, Nordlicht also asked Wallach and another Beechwood employee, David Shirreffs, to obtain the third-

party market pricing for the Black Elk bonds and to include them on their profit and loss statements going forward, so that they could monitor the price of the Black Elk bonds on a daily basis. They subsequently added the Black Elk bonds to their profit and loss statements for tracking purposes and kept Nordlicht apprised of the price. During April and May 2014, Nordlicht inquired several times regarding the price of Black Elk bonds and whether BAM and BBIL had the capacity to purchase those bonds.

Between April 8, 2014, and July 7, 2014, Nordlicht directed that over $30 million of Black Elk bonds be sold from Platinum's funds to Beechwood. On May 13, 2014, Nordlicht instructed Wallach to purchase $8 million worth of Black Elk bonds on BAM's behalf, and instructed Marzella to sell $4 million of Black Elk bonds each from Platinum accounts at Credit Suisse ***313** and Nomura. On June 23, 2014 – the same day that Small wrote an email to Shearer, with a copy to Levy, initiating the public consent solicitation process – Nordlicht asked Wallach how many Black Elk bonds Beechwood owned and Wallach informed him that the principal value was $13,360,000. Later that day, Nordlicht emailed Marzella, copying Wallach and Shirreffs, instructing him to sell $10 million worth of Black Elk bonds from PPVA Nomura to BBIL Nomura. On July 1, 2014, Nordlicht emailed Marzella, copying Wallach, directing him to sell another $7 million in Black Elk bonds from PPVA Nomura to BBIL. On July 7, 2014, Nordlicht instructed Marzella to sell $6.7 million of Black Elk bonds from Platinum to Beechwood ($3.35 million from PPCO and $3.35 million from PPLO).

Levy was kept aware of the sales of Black Elk bonds from Platinum's hedge funds to Beechwood. For example, on July 2, 2014, Marzella sent a table to Small reflecting Black Elk bond holdings. Small responded to Marzella: "Nick, can you update the below for recent BAM purchases. Also[,] can you confirm with [Credit Suisse] how much would show up as of today that is owned by the PPVA and PPLO." GA.634. After Marzella made these changes, Small sent the updated table to Nordlicht and Levy, saying: "We need to decide on a record date for the consent. Below is a summary of the positions held by PPBE and BAM." *Id.* In addition, on July 23, 2014, Manela sent Levy a list of investments that Beechwood held related to Platinum and wrote: "Let[']s discuss." GA.748-49. One of the listed Beechwood investments was $31,051,000 in "Black Elk Energy Public Debt 13.75%," with the comment: "Purchased 3,335,000 each from PPCO and PPLO and 24,381,000 from PPVA." GA.749.

c) The Defendants Do Not Disclose the Black Elk Bonds Held by PPCO, PPLO, or Beechwood

On July 3, 2014, about two weeks before the Consent Solicitation was distributed to the Black Elk bondholders, Small asked Black Elk attorneys Shearer and Brittany Sakowitz to confirm "that under the TIA [(Trust Indenture Act)] if $5MM of the bonds were owned by an affiliate then in order for the consent to be approved a majority of $145MM (greater than $72.5MM) would need to consent rather than greater than $75MM." GA.636. Sakowitz replied:

> Correct. Securities owned by the obligor or by any person directly or indirectly controlling or controlled by or under direct or indirect common control with the obligor must be disregarded for purposes of calculating the vote required to approve the proposal. (Trust Indenture Act, Section 316(a)).

Id. Small then forwarded this exchange to Nordlicht and Levy, stating: "See below regarding the majority consent calculation." *Id.* And on July 7, 2014, Small again emailed Nordlicht and Levy, stating that "[t]he company must disclose how many bonds are owned by affiliates in order to establish the requisite number to constitute a majority. ... Let's discuss asap ...." GA.641.

On July 8, 2014, Manela emailed to Levy and Small a table listing the amount of Black Elk bonds Platinum's hedge funds and Beechwood held. The latest number of Black Elk bonds that PPVA, PPCO, PPLO, BAM, and BBIL held totaled approximately $98 million.

On July 9, 2014, Small wrote to Shearer and Sakowitz, among others: "$18,321,000 bonds are controlled by PPVA and should be disclosed and excluded from the calculation." GA.703. On July 13, 2014, Small ***314** again reiterated to Shearer and Sakowitz that $18,321,000 bonds are "controlled by and should be disclosed and excluded from the calculation." GA.705.

The Offer to Purchase and Consent Solicitation Statement was circulated to the Black Elk bondholders on July

16, 2014. The Consent Solicitation Statement provided that, for the proposed amendments to pass, tenders or consents needed to be received from "at least a majority in aggregate principal amount of all the outstanding Notes [approximately $150 million] (disregarding any Notes held by affiliates of the Company)." GA.816. In other words, once all Black Elk bonds held by affiliates of Black Elk were removed from consideration, the proposed amendments would pass only if more than half of the remaining Black Elk bondholders tendered their bonds or consented to the proposed amendments.

The Consent Solicitation further provided that, as of July 16, 2014:

> [PPVA] and its affiliates, which own approximately 85% of our outstanding voting membership interests, own approximately $18,321,000 principal amount of the outstanding Notes. Otherwise, neither we, nor any person directly or indirectly controlled by or under direct or indirect common control with us, nor, to our knowledge, any person directly or indirectly controlling us, held any Notes.

GA.819. Shearer testified that, in preparing the Consent Solicitation, he relied on Small's representations as to the amount of Platinum-owned bonds. At trial, this language in the Solicitation Consent was central to the government's allegations of fraud.

d) The Defendants Vote Beechwood and Platinum's Black Elk Bonds to Ensure that the Amendments Would Pass

Bruno testified that, after the Consent Solicitation Statement was sent, he participated in a Black Elk management meeting with Shulse, Levy, and Hoffman where they discussed the status of the Consent Solicitation. At that meeting, according to Bruno, Shulse indicated that they had not yet heard anything and Hoffman commented that he did not think anyone in their right mind would do it and said, "[Y]ou're not going to hear anything." GA.243-45. Levy was visibly agitated in response, and Bruno overheard Levy say to Shulse: "It's covered." GA.245.

Consistent with Levy's representation to Shulse, Levy, Nordlicht, and Small collaborated to ensure that Platinum and Beechwood voted their bonds so that the amendments would pass. On July 28, 2014, Beechwood employee Samuel Adler wrote to Wilmington Trust, with a copy to Levy, stating that the Black Elk bonds held by BAM and BBIL were voting "consent without tendering." GA.750. The same day, Adler wrote to Nomura, with a blind copy to Levy, also stating that the Black Elk bonds held by BAM and BBIL were voting "consent without tendering." GA.753.

On July 29, 2014, at 9:29 a.m., Nordlicht wrote to himself with the subject heading, "To do today": "Black elk – 1 – need budget for post renaissance properties. We need immediate p and a [(plugging and abandonment)] plan. *We need plan as to how to distribute money to the right places (preferred, preferred, preferred*)." GA.757 (emphasis added). That afternoon, Nordlicht wrote to Small with a copy to Levy: "[H]ow is partial close renaissance talks going?" GA.759. Small replied to Nordlicht and Levy: "CEO of Renaissance on vacation. Jeff [Shulse] texted him last night and this morning ... and if balance doesn't close we can unwind deal and keep deposit if it is Renaissance's fault. We are waiting for a response." GA.758. Nordlicht replied to Small and Levy: "David [Levy] – ***315** I have Beechwood at 36,422,400 in terms of ownership of bee [(Black Elk)] bonds. Dan – Do u know respective funds?" *Id*. Small responded to Nordlicht and Levy by sending a table of Black Elk's bond holdings.

The table Small sent to Nordlicht and Levy provided a breakdown of how many Black Elk bonds were owned by each of the Platinum and Beechwood entities. The table listed the "BlackElk Bond Holders" as PPCO Nomura ($29,582,000), PPVA Credit Suisse ($18,321,000), PPLO Credit Suisse ($13,711,000), BAM Wilmington Trust ($13,360,000), and BBIL Wilmington Trust ($23,657,000), for a total of $98,631,000. GA.764. The table also provided a calculation of the aggregate principal amount of bonds that were needed to consent to ensure that the amendments passed, assuming that only PPVA Credit Suisse's $18,321,000 in bonds were ineligible to vote. In particular, the table listed the total outstanding Black Elk bonds ($150,000,000), subtracted PPVA's holdings ($18,321,000) from that number to get $131,679,000, and then listed $65,839,500 (half of $131,679,000) — i.e., the number of bonds necessary to pass the Consent Solicitation, assuming that the bonds held by PPCO, PPVA, PPLO, BAM, and BBIL would not be disclosed as affiliates and would be voted. *Id.*

On August 1, 2014, after the votes were cast, Shearer emailed Small a draft Officer's Certificate, setting forth the $18,321,000 worth of bonds that Small had disclosed as controlled by Platinum. On August 13, 2014, Shearer followed up, asking Small to review and complete the certificate so that Black Elk could issue a press release. Shortly thereafter, Small emailed Nordlicht and Levy with the subject heading "Officer Certificate," seeking their approval for his email response to Shearer. GA.770. Small wrote: "See attached wording and let me know if you are ok. Below is a table that shows under all three scenarios there is 50% approval." *Id.* These three scenarios included counting (1) all $110 million consenting votes ($11.4 million tendered bonds plus the $98.6 million Platinum-controlled bonds that voted to consent only); (2) all consenting votes except the approximately $18 million PPVA-owned bonds; and (3) all consenting votes except the approximately $18 million PPVA-owned bonds and the approximately $43 million PPCO- and PPLO-owned bonds (which Small classified as "PPVA and Possible Affil"). *Id.* None of these three scenarios disclosed that the Black Elk bonds that Beechwood owned were bonds that should be excluded. *Id.* At 8:51 a.m. the next day, August 14, 2014, Small resent his email to Nordlicht and Levy, writing: "Trustee wants to see this this morning in order to finalize results of tender/consent which ended last night. U ok with language?" *Id.* Nordlicht responded to Small and Levy: "K." *Id.*

Later that day, at 12:36 p.m., Small sent the Officer's Certificate to Shearer with a copy to Shulse. Small wrote: "Rob, see attached officer's certificate and below analysis which is also set forth on the attached spreadsheet. Let me know if you have any comments and we will have executed." GA.772-73. The email contained a table outlining the same three scenarios Small had shared with Nordlicht and Levy, except that Small referred to the PPCO- and PPLO-owned bonds as "Not Deemed Affil." GA.772.

Shearer testified that, after receiving this email, he had a telephone conversation with Shulse and Small because he had questions regarding the newly disclosed information. In response to Shearer's questions, Small indicated that there was a different group of bonds held by entities that Platinum had relationships with and ***316** that they could be considered affiliates, but that he did not think that they were affiliates like PPVA was. In light of the lack of clear information regarding these entities and their relationship to PPVA and Black Elk, Shearer could not conclude that the PPCO- and PPLO-owned bonds were eligible to be counted. Shearer therefore decided to exclude the PPCO- and PPLO-owned bonds from the consent calculation in the Officer's Certificate.

Despite the exclusion from the consent calculation of the bonds held by PPVA, PPLO, and PPCO, the amendments to the Indenture ultimately passed. As a result of the exclusion of the Platinum fund-held bonds, $61 million ($18.3 million PPVA-held bonds, plus $43 million PPLO- and PPCO-held bonds) worth of the $150 million outstanding bonds were ineligible to vote, leaving only $89 million worth of the bonds that were eligible. In order to receive a majority, only $44.5 million worth of the bonds needed to consent to the amendments. Shearer determined that the Consent Solicitation had passed based on the following votes: $37,017,000 held by the Beechwood funds (which had consented and not tendered); $600,000 of bonds held by unidentified bondholders (which had also consented and not tendered); and $11,333,000 of bonds held by unidentified bondholders (which had tendered and thus consented). Over 99% of the bonds that voted to consent but not tender were controlled by Platinum and Beechwood, which was Platinum-affiliated and controlled. The Consent Solicitation would not have passed without the Beechwood-held bonds that voted to consent. *See* GA.541-43.

e) Black Elk Uses the Proceeds from the Renaissance Sale to Pay the Preferred Equity Holders

Three days after the Consent Solicitation vote closed, on August 16, 2014, Manela emailed Levy, asking "did Black Elk sale [i.e., the Renaissance Sale] go thru yesterday??" Levy responded seven minutes later: "Sale closed. 135 mln Cash will be in the account at black elk Monday am." GA.779.

On the morning of August 18, 2014, PPVA CFO Joseph SanFilippo sent an email to Nordlicht, copying Levy and Manela, with the subject heading "Series E as of August 18." GA.780. The email contained a list of the Black Elk preferred equity holders, which included PPVA, PPLO, PPCO, and PPVA Black Elk Equity LLC.

On August 18, 2014, Shearer advised that Texas law might prohibit distribution of the proceeds of the Renaissance Sale. He wrote to Shulse and Black Elk General Counsel Stephen Fuerst advising them to review Texas Business Organizations Code section 101.206. The statute prohibits a limited liability company from making distributions to its

members if such a distribution would render the company insolvent. Tex. Bus. Org. § 101.206.

Shulse forwarded Shearer's email to Nordlicht, Small, Levy, and Samuel Salfati and stated: "Advice of counsel ... we need to be mindful of this in our planning." GA.781. At 4:23 pm that same day, Nordlicht forwarded Shulse's email to Levy, changing the subject heading of the email to "urgent" and writing: "David – get these wires out!!!!! Call him right now please!!!!" *Id.* Twenty minutes later, at 4:43 p.m. on August 18, 2014, Small wrote to Shulse with a copy to Salfati — who had recently joined Small on the three-person Black Elk Board of Directors — with the subject heading "Wires": "Jeff, on behalf of Sam Salfati and myself constituting a majority of the board of managers you are hereby authorized to wire $70MM in partial payment of Preferred E units." GA.783.

***317** Between August 18 and August 21, 2014, Black Elk transferred proceeds from the Renaissance Sale to the defendants and the Platinum-related entities. Black Elk transferred: (1) on August 18, 2014, approximately $32.5 million to PPVA's "Black Elk" Sterling account and $15.3 million to PPVA's Sterling account; (2) on August 20, 2014, $24.6 million to PPCO's Capital One account; and (3) on August 21, 2014, $5 million to PPLO's Sterling account. In addition, on August 21, 2014, PPCO transferred – through various accounts – approximately $7.7 million to Mark Nordlicht's parents, Jules and Barbara Nordlicht, including approximately $500,000 to the Jules and Barbara Nordlicht Family Foundation; $256,679 to Levy; $102,672 to Small; and approximately $1 million to the Huberfeld Family Foundation.

After the Platinum entities received the proceeds from the Renaissance Sale, Levy informed Platinum CFO Daniel Mandelbaum that Platinum would not be providing any more financing to Black Elk. In light of Black Elk's outstanding bills, Mandelbaum asked Levy if Black Elk would be declaring bankruptcy. Levy indicated that Black Elk had to wait twelve months to declare bankruptcy to avoid the risk that the proceeds from the Renaissance Sale could be clawed back during the bankruptcy proceedings. A year later, in August 2015, Black Elk's creditors initiated an involuntary bankruptcy proceeding against the company.

Procedural History

On December 14, 2016, a grand jury returned an eight-count indictment in the United States District Court for the Eastern District of New York against seven individuals, including Nordlicht and Levy, relating to their alleged participation in two fraudulent schemes – one of which was the Black Elk Scheme. Count Six (conspiracy to commit securities fraud), Count Seven (conspiracy to commit wire fraud), and Count Eight (securities fraud) all related to the Black Elk Scheme.

Trial began on April 23, 2019, before Judge Cogan. On July 9, 2019, the jury returned its verdict, acquitting Nordlicht and Levy on Counts One through Five, [4] and convicting them on Counts Six through Eight. Following the verdict, Nordlicht and Levy both moved for judgments of acquittal pursuant to Federal Rule of Criminal Procedure 29, and, in the alternative, for new trials pursuant to Federal Rule of Criminal Procedure 33.

4 Counts One through Five related to a different alleged scheme involving the Platinum entities. The indictment alleged, *inter alia*, that Platinum fraudulently overvalued its investment assets in order to attract new investors and obtain unearned management fees from its investors; that the overvaluation led to a liquidity crisis that Platinum concealed from its investors; and that the defendants made material misrepresentations and omissions to current and prospective investors to keep the scheme from being exposed. In connection with this alleged scheme, Levy and Nordlicht were charged with conspiracy to commit securities fraud and investment adviser fraud (Count One); conspiracy to commit wire fraud (Count Two); two counts of securities fraud (Counts Three and Four); and investment adviser fraud (Count Five).

On September 27, 2019, the district court issued an opinion and order granting Levy's motion for a judgment of acquittal, and conditionally granting his motion for a new trial "in the event that the judgment of acquittal is later vacated or reversed." *United States v. Nordlicht*, No. 16-cr-00640 (BMC), 2019 WL 4736957, at *18 (E.D.N.Y. Sept. 27, 2019). The district court denied Nordlicht's motion for a judgment of acquittal but granted his motion for a new trial. *Id.* at *9-14, 16-18.

***318** In granting Levy's motion for a judgment of acquittal, the court concluded that "[e]ven making reasonable inferences in favor of the Government, and deferring to the role of the jury in weighing evidence and assessing credibility, the Government failed to meet its burden of proving beyond

a reasonable doubt that Levy had criminal intent." *Id.* at *14. The district court explained that the evidence "f[ell] into the following categories: testimony from Bruno and Mandelbaum; evidence that Levy was involved in processing wire transfers after the Renaissance [S]ale; and evidence that Levy received emails about Black Elk bonds and the consent solicitation." *Id.* The district court considered each category of evidence and found it either "too speculative" or insufficient to sustain a guilty verdict. *Id.* at *14-16. The district court emphasized that there was nothing inherently unlawful about structuring a transaction to avoid a claw-back or "processing wire transfers, which are a routine aspect of transactions like the Renaissance [S]ale." *Id.* at *15. Similarly, the district court reasoned that the emails on which Levy was copied had limited probative value because "even assuming Levy read these emails, the[y] ... merely show that Levy knew or should have known that Beechwood held Black Elk bonds." *Id.* Lastly, the court found that the government had "adduced no evidence that Levy: considered Beechwood to be an affiliate of Platinum; played any role in shifting Black Elk bonds to Beechwood; or played any role in Beechwood voting its bonds." *Id.* The district court also emphasized witness testimony that Levy had been present during a meeting where individuals discussed how Beechwood was not a Platinum affiliate. *Id.* The district court therefore concluded that there was insufficient evidence of Levy's criminal intent. *Id.* at *15-16.

The district court also conditionally granted Levy's motion for a new trial. *Id.* at *18. The court stated that, for the same reasons it granted Levy's Rule 29 motion, "the jury's guilty verdict was a manifest injustice because there was insufficient evidence that Levy possessed criminal intent." *Id.*

With respect to Nordlicht's motion for a judgment of acquittal, the district court concluded that "when viewed in the light most favorable to the Government, the Government adduced sufficient evidence ... to make a judgment of acquittal under Rule 29 inappropriate." *Id.* at *9. The court reasoned that there was sufficient evidence for the jury to conclude that: Nordlicht knew about the Affiliate Rule; Beechwood was an affiliate under the Indenture and that Nordlicht knew or should have known that Beechwood was an affiliate; and that the defendants' disclosures regarding the amount of affiliate-held bonds were material misrepresentations. *Id.* at *9-14.

As to Nordlicht's motion for a new trial, however, the district court concluded that "[a]lthough the Government adduced sufficient evidence for a judgment of acquittal to be unwarranted, letting the verdict stand against Nordlicht would be a manifest injustice." *Id.* at *16. The court reasoned that while the evidence suggested that Nordlicht knew about the Affiliate Rule, "he and Beechwood went to great lengths to comply with [it]." *Id.* The court also found that even if the jury could fairly conclude that the Beechwood entities were affiliates, there was "insufficient evidence that Nordlicht was on notice of their affiliate status." *Id.* at *17. The court also concluded that it would be a manifest injustice to sustain Nordlicht's conviction based on his failure to disclose that PPCO and PPLO were affiliates, because "[u]nder all of the facts and circumstances of the case, Black Elk provided Shearer with sufficient information that the jury could ***319** not fairly conclude that Nordlicht intended to conceal PPCO's and PPLO's affiliate status from Shearer." *Id.* at *18.

The government timely appealed.

DISCUSSION

I. Standard of Review

[3] "We review *de novo* a district court's grant of a Rule 29 motion based on a finding that the trial evidence was insufficient to support the jury's verdict, applying the same standard the district court applies in review of the evidence." *United States v. Pauling*, 924 F.3d 649, 656 (2d Cir. 2019).

[4] **[5]** **[6]** "We review a district court's grant of a new trial for abuse of discretion." *United States v. Truman*, 688 F.3d 129, 141 (2d Cir. 2012); *see also* *United States v. Polouizzi*, 564 F.3d 142, 159 (2d Cir. 2009) ("[Rule 33] 'confers broad discretion upon a trial court to set aside a jury verdict and order a new trial to avert a perceived miscarriage of justice.' ") (quoting *United States v. Sanchez*, 969 F.2d 1409, 1413 (2d Cir. 1992)). A district court "abuses its discretion when its decision rests on an error of law or a clearly erroneous factual finding, or when its decision ... cannot be located within the range of permissible decisions." *Truman*, 688 F.3d at 141

(ellipsis in original) (quoting *United States v. Gonzalez*, 647 F.3d 41, 57 (2d Cir. 2011)). It does not, however, "abuse[ ] [its] discretion simply because [it] has made a different decision than we would have made in the first instance." *United States v. Robinson*, 430 F.3d 537, 543 (2d Cir. 2005) (quoting *United States v. Ferguson*, 246 F.3d 129, 133 (2d Cir. 2001)).

II. Levy's Rule 29 Motion

A. Legal Standard

Federal Rule of Criminal Procedure 29 provides that "[i]f the jury has returned a guilty verdict, the court may set aside the verdict and enter an acquittal." Fed. R. Crim. P. 29(c)(2).

[7] [8] [9] [10] [11] [12] "[A] defendant challenging the sufficiency of the evidence 'bears a heavy burden.' " *United States v. Martoma*, 894 F.3d 64, 72 (2d Cir. 2017) (quoting *United States v. Coplan*, 703 F.3d 46, 62 (2d Cir. 2012)). We "must determine whether upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt." *United States v. Autuori*, 212 F.3d 105, 114 (2d Cir. 2000) (quoting *United States v. Mariani*, 725 F.2d 862, 865 (2d Cir. 1984)). In so doing, we "view the evidence presented in the light most favorable to the government[,]" and "[a]ll permissible inferences must be drawn in the government's favor." *United States v. Guadagna*, 183 F.3d 122, 129 (2d Cir. 1999). Moreover, "the evidence must be viewed in its totality, 'as each fact may gain color from others,' " *United States v. Cassese*, 428 F.3d 92, 98-99 (2d Cir. 2005) (internal citations omitted), and "the Government need not negate every theory of innocence," *United States v. Lorenzo*, 534 F.3d 153, 159 (2d Cir. 2008) (internal quotation marks omitted). "[I]f the court concludes that either of the two results, a reasonable doubt or no reasonable doubt, is fairly possible, [the court] must let the jury decide the matter." *Autuori*, 212 F.3d at 114 (alterations in original) (internal quotation marks omitted). The verdict "must [therefore] be upheld if '*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' " *Guadagna*, 183 F.3d at 130 (emphasis in original) (quoting *United States v. Resto*, 824 F.2d 210, 212 (2d Cir. 1987)).

***320 [13] [14] [15]** A court must "defer to the jury's determination of the weight of the evidence and the credibility of the witnesses, and to the jury's choice of the competing inferences that can be drawn from the evidence." *Klein*, 913 F.3d at 78 (quoting *United States v. Reifler*, 446 F.3d 65, 94 (2d Cir. 2006)). This "high degree of deference we afford to a jury verdict is 'especially important when reviewing a conviction of conspiracy.' " *United States v. Anderson*, 747 F.3d 51, 72-73 (2d Cir. 2014) (quoting *United States v. Pitre*, 960 F.2d 1112, 1121 (2d Cir. 1992)). "This is so because a conspiracy by its very nature is a secretive operation, and it is a rare case where all aspects of a conspiracy can be laid bare in court with the precision of a surgeon's scalpel." *Id.* at 73 (internal quotation marks omitted). The "agreement [to participate in the conspiracy] may be inferred from the facts and circumstances of the case[,]" and "[b]oth the existence of the conspiracy and the defendant's participation in it with the requisite criminal intent may be established through circumstantial evidence." *United States v. Wexler*, 522 F.3d 194, 207-08 (2d Cir. 2008) (internal quotation marks omitted). Moreover, "[s]eemingly innocent acts taken individually may indicate complicity when viewed collectively and with reference to the circumstances in general." *Mariani*, 725 F.2d at 865-66.

[16] The jury's inferences, however, must be reasonable. "[S]pecious inferences [should] not [be] indulged, because it would not satisfy the Constitution to have a jury determine that the defendant is *probably* guilty." *United States v. Valle*, 807 F.3d 508, 515 (2d Cir. 2015) (emphasis in original) (quoting *United States v. Lorenzo*, 534 F.3d 153, 159 (2d Cir. 2008)); *see also* *United States v. D'Amato*, 39 F.3d 1249, 1256 (2d Cir. 1994) ("[A] conviction based on speculation and surmise alone cannot stand."). "An inference is not a suspicion or a guess. It is a reasoned, logical decision to conclude that a disputed fact exists on the basis of another fact that is known to exist." *Pauling*, 924 F.3d at 656 (internal quotation marks omitted). "Impermissible speculation, on the other hand, is 'a complete absence of probative facts to support the conclusion reached.' " *Id.* (quoting *Lavender v. Kurn*, 327 U.S. 645, 653, 66 S.Ct. 740, 90 L.Ed. 916 (1946)).

[17] **[18]** **[19]** "Where a fact to be proved is also an element of the offense ... it is not enough that the inferences in the government's favor are permissible," but rather, the court "must also be satisfied that the inferences are sufficiently supported to permit a rational juror to find that the element, like all elements, is established beyond a reasonable doubt." *Id.* at 657 (internal quotation marks and alteration omitted); *see also* *D'Amato*, 39 F.3d at 1256 ("[T]he government must introduce sufficient evidence to allow the jury to reasonably infer that each essential element of the crime charged has been proven beyond a reasonable doubt."). "Direct evidence is not required; '[i]n fact, the government is entitled to prove its case solely through circumstantial evidence, provided, of course, that the government still demonstrates each element of the charged offense beyond a reasonable doubt.' " *Lorenzo*, 534 F.3d at 159 (alteration in original) (quoting *United States v. Rodriguez*, 392 F.3d 539, 544 (2d Cir. 2004)). "If the evidence viewed in the light most favorable to the prosecution gives equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence, then a reasonable jury must necessarily entertain a reasonable doubt." *United States v. Hawkins*, 547 F.3d 66, 71 (2d Cir. 2008) (alteration omitted) (quoting *United States v. Glenn*, 312 F.3d 58, 70 (2d Cir. 2002)).

***321** *B. A Rational Jury Could Have Concluded that Levy Participated in the Black Elk Scheme with Criminal Intent*

Counts Six, Seven, and Eight, on which Levy was convicted, charged him with, respectively, conspiracy to commit securities fraud, conspiracy to commit wire fraud, securities fraud, and aiding and abetting securities fraud. The district court granted Levy's motion for a judgment of acquittal because it concluded that, even viewing the evidence in the light most favorable to the government, the government failed to prove beyond a reasonable doubt that Levy acted with criminal intent. The district court also concluded that there was insufficient evidence to establish "that Levy was a member of a conspiracy," as "evidence of his alleged co-conspirators' intent [did] not constitute evidence of Levy's intent." *Nordlicht*, 2019 WL 4736957, at *15 n.4.

[20] **[21]** **[22]** **[23]** **[24]** To establish intent for purposes of the substantive securities fraud charge, the government was required to prove that Levy "acted willfully and knowingly and with the intent to defraud." *United States v. Rosen*, 409 F.3d 535, 549 (2d Cir. 2005). For purposes of aiding and abetting liability, the government was required to prove that "[the defendant] willfully and knowingly associate[d] himself in some way with the crime, and [sought] by some act to help make the crime succeed." *United States v. Prado*, 815 F.3d 93, 100 (2d Cir. 2016); *see* *Rosemond v. United States*, 572 U.S. 65, 76, 134 S.Ct. 1240, 188 L.Ed.2d 248 (2014) ("[A] person aids and abets a crime when (in addition to taking the requisite act) he intends to facilitate that offense's commission."). To sustain the conspiracy charge, the government was required to prove that Levy "willfully and knowingly became a member of the conspiracy, with intent to further its illegal purposes – that is, with the intent to commit the object of the charged conspiracy." *United States v. Archer*, 977 F.3d 181, 190 (2d Cir. 2020) (internal quotation marks omitted). In other words, "the government was required to show that [Levy] had 'at least the degree of criminal intent necessary for the substantive offense itself,' but was not required to show that he 'knew all of the details of the conspiracy, so long as he knew its general nature and extent.' " *Id.* (internal citations omitted). And lastly, "[t]o sustain a conviction for ... conspiracy to commit ... wire fraud, the government must prove that [Levy] acted with specific intent to obtain money or property by means of a fraudulent scheme that contemplated harm to the property interests of the victim." *United States v. Carlo*, 507 F.3d 799, 801 (2d Cir. 2007).

[25] The government argues that the district court erred in granting Levy's motion for a judgment of acquittal because the court failed to consider all the relevant evidence in context and improperly relied on isolated pieces of evidence. For the reasons explained below, we agree. We conclude that a rational jury could reasonably infer from the circumstantial evidence presented at trial that Levy was a member of the charged conspiracy and acted with the requisite intent.

1. The Scope and Purpose of the Black Elk Scheme

[26] **[27]** Criminal intent "may be proven entirely through circumstantial evidence." *United States v. Romano*, 794 F.3d 317, 335 (2d Cir. 2015). "When the necessary result of the [defendant]'s scheme is to injure others, fraudulent intent may

be inferred from the scheme itself." *Id.* (alteration in original) (quoting *D'Amato*, 39 F.3d at 1257).

At trial, the government adduced evidence that: the Black Elk scheme benefitted ***322** Platinum investors to the detriment of the Black Elk bondholders; the outcome of the vote was inconsistent with the actions of a rational bondholder; and the Consent Solicitation would not have passed without the votes of Beechwood, a Black Elk affiliate. Prior to the Consent Solicitation, Black Elk was headed towards bankruptcy, and PPVA – which had heavily invested in Black Elk – was in the midst of a liquidity crisis. The Consent Solicitation Statement's proposed amendments allowed Black Elk to pay Black Elk's preferred equity holders – which consisted of a significant number of Platinum-controlled entities and associates, including PPVA – with proceeds from the Renaissance Sale before paying the Black Elk bondholders.

Black Elk bondholders could respond to the Consent Solicitation in one of three ways: (1) tender their bonds at par (thereby consenting to the proposed amendments); (2) consent to the proposed amendments without tendering, thereby continuing to own their bonds; or (3) neither tender nor consent. Government witnesses Todd Pulvino and Dixon Yee – bondholders who lost money as a result of the Black Elk scheme – testified that the "consent only" option in the Consent Solicitation Statement (the option to consent to the amendments without tendering the bonds) was not a rational choice for a bondholder to select. Pulvino explained that it made no financial sense for a bondholder to consent and retain his or her bonds because the bondholder would be giving up protections and allowing the preferred equity holders to have priority over the bondholders' interests without getting anything in exchange for giving up those protections. Yee similarly testified that it would have been "kind of stupid" for a bondholder to agree to the changes without tendering his or her bonds, because the bondholder would be giving up his or her rights without getting anything in return. GA.289-90.

Yet, the consent-only option received the majority of votes. Notably, that majority comprised $37 million worth of bonds held by Beechwood, which voted to consent but declined to tender. In addition to the $37 million of Beechwood-held bonds that voted to consent but not tender, approximately $43 million of the PPCO- and PPLO-held bonds voted to consent but not tender. Aside from the bonds owned by the Platinum-related entities, only $600,000 in bonds voted to consent but declined to tender. Thus, of all the bonds that voted to consent but not tender, over 99% were controlled by Platinum and Beechwood, which was Platinum-affiliated and controlled. And ultimately, the Consent Solicitation was only able to pass because the Beechwood-held bonds voted to consent.

As the district court did not dispute, *Nordlicht*, 2019 WL 4736957, at *10-14, this evidence could have led a rational jury to conclude beyond a reasonable doubt that the scheme was fraudulent and that those involved in it acted with criminal intent to defraud the bondholders.

2. Levy's Involvement and Role in the Black Elk Scheme

Having determined that the government presented sufficient evidence from which a rational jury could conclude beyond a reasonable doubt that the goal of the Black Elk scheme was to defraud bondholders, we consider whether there was sufficient evidence from which a rational jury could have concluded beyond a reasonable doubt that Levy willfully participated in the Black Elk scheme with criminal intent. We conclude that there was.

The evidence adduced at trial established that Levy was aware of Black Elk's dire financial straits and that a Black Elk bankruptcy would have negative ramifications ***323** for PPVA. As a portfolio manager at Platinum and later, as Beechwood's CIO, Levy oversaw PPVA's investments in Black Elk and knew that PPVA was heavily invested in the company. Even after Levy left Platinum to become CIO of Beechwood, he continued to work for Platinum to manage PPVA's investment in Black Elk. Levy continued to participate in meetings with Black Elk management and received updates regarding Black Elk's financial status. For example, Levy knew that there were major problems with Black Elk's oil production and that Black Elk was struggling to pay its bills. Levy also participated in a Black Elk management meeting at which the prospect of Black Elk filing for bankruptcy was discussed.

At that meeting, Levy said: "We cannot do that. It's a lot of money to lose." GA.238. Although motive is not an element of the crimes charged, it is probative of whether the defendant acted with criminal intent. Here, Levy's knowledge of Black Elk's impending bankruptcy and its negative ramifications for PPVA provided Levy with a motive to seek to amend the Indenture to ensure that the proceeds of the Renaissance Sale would go to the preferred equity holders, which included the Platinum-related entities.

The evidence presented at trial also established that Levy was notified of the Affiliate Rule on several occasions. On March 5, 2014, in connection with the private consent solicitation process, Shulse forwarded an email from Shearer to Nordlicht, Levy, Small, and Hoffman, commenting, "We need to be mindful of this provision when assuming we control the bonds or not ...." GA.587. The email from Shearer indicated that under section 316(a) of the TIA, "securities owned by any obligor ... or by any person directly or indirectly controlling or controlled by or under direct or indirect common control with any such obligor" must be excluded from the consent calculation. *Id.* (emphasis omitted). On July 3, 2014, Small forwarded an email exchange with Black Elk attorneys Shearer and Sakowitz to Nordlicht and Levy. Sakowitz, citing section 316(a) of the TIA, confirmed that "[s]ecurities owned by the obligor or by any person directly or indirectly controlling or controlled by or under direct or indirect common control with the obligor must be disregarded for purposes of calculating the vote required to approve the proposal." GA.636. And on July 7, 2014, Small again emailed Nordlicht and Levy, explaining that "[t]he company must disclose how many bonds are owned by affiliates in order to establish the requisite number to constitute a majority." GA.641.

Levy was also involved in the private consent solicitation process. He was copied on correspondence relating to the consents that were submitted as a part of the private consent solicitation process, supporting an inference that Levy was involved in Black Elk's initial efforts to amend the Indenture. This inference is further supported by the fact that, after the private consent solicitation process failed, Nordlicht demanded that Levy explain "what the hell is going on." GA.625-26. After Shulse explained that the trustee wanted to move forward with a public consent solicitation process because of concerns about the way in which the consents had been obtained, Nordlicht blamed Levy: "David, u f'd this one up bad for no reason. We will have one pager signed by 51% of bondholders, no trustee necessary. It's fine. We don't need any process. Bondholders are being taken out, this is all moot." GA.625. This evidence establishes that Levy was: aware of Black Elk's efforts to amend the Indenture; actively involved in the private consent solicitation process; aware that they might have to proceed with a public consent solicitation process ***324** because of concerns about the way in which the consents were obtained; and aware of Nordlicht's desire to circumvent the bondholders in order to ensure that Black Elk's proposed amendments to the Indenture quickly passed.

The evidence further appears to demonstrate that Levy remained involved in Black Elk's efforts to amend the Indenture through the public consent solicitation process after the private process failed. On June 23, 2014, for example, Small emailed Shearer Black Elk's proposed amendments to the Indenture – which included modification of the asset sale proceeds provision to allow Black Elk to pay the preferred equity holders before the bondholders – and copied Levy. And in a July 7, 2014 email, Small forwarded a draft of the Consent Solicitation Statement to Nordlicht and Levy, explaining that they would have to disclose how many bonds were owned by affiliates for purposes of calculating whether a majority of the bondholders had consented to the proposed amendments to the Indenture. Small stated: "Let's discuss asap in order to finalize and launch by Thursday." GA.641. Two days later, on July 9, 2014, Small wrote to Shearer and Sakowitz, disclosing only that the $18.3 million bonds controlled by PPVA should be excluded from the consent calculation. This email correspondence supports an inference that Levy was involved in the preparation of the Consent Solicitation Statement and the determination to disclose only the $18.3 million of PPVA-controlled bonds to Shearer.

In addition, viewed in the light most favorable to the government, the evidence supports an inference that Levy was aware of Beechwood's role in the Black Elk scheme and was actively involved in that scheme. By early 2014, Levy was CIO of Beechwood. Naftali Manela – who was CFO of PPCO through late 2014 – testified that, as CIO at Beechwood, Levy made the "final decision on which investments were made." GA.205-06. And although there were no writings reflecting Levy himself directing Beechwood's purchase of Black Elk bonds, he was aware of Beechwood's purchases of a significant number of Black Elk bonds from Platinum, supporting an inference that he, as Beechwood's CIO, had signed off on those transactions.

In April 2014, for example, Platinum trader Nicholas Marzella emailed Small and Levy a breakdown of the Black Elk bonds held by PPVA, PPCO, PPLO, and Beechwood, respectively. As of April 2014, Beechwood held only $5 million in Black Elk bonds. Later, on July 2, 2014, Small forwarded Nordlicht and Levy a summary of Platinum and Beechwood's Black Elk bond holdings, which indicated that Beechwood now owned around $30 million worth of bonds. And on July 23, 2014, Manela emailed Levy a chart entitled "Beechwood Investment related to Platinum." GA.749. These investments included

$31,051,000 in "Black Elk Energy Public Debt 13.75%," with the comment: "Purchased 3,335,000 each from PPCO and PPLO and 24,381,000 from PPVA." GA.749. While there was no direct evidence that Levy "played any role in shifting Black Elk bonds to Beechwood," *Nordlicht*, 2019 WL 4736957, at *15, circumstantial evidence from which the jury could draw rational inferences is sufficient. *See* *Wexler*, 522 F.3d at 207-08; *Lorenzo*, 534 F.3d at 159. The district court therefore was mistaken when it found that the government "adduced *no* evidence" of Levy's role in transferring Black Elk bonds to Beechwood. *Nordlicht*, 2019 WL 4736957, at *15 (emphasis added). Levy's dual role working at Beechwood and Platinum, coupled with his position as Beechwood's CIO and the email correspondence demonstrating that he was apprised of Beechwood's purchases of Black Elk bonds, supports an inference ***325** that he understood Beechwood's role in the Black Elk scheme, was a part of the conspiracy, and was acting in furtherance of the conspiracy as Beechwood's CIO.

Levy's involvement in the Black Elk scheme is further corroborated by the circumstantial evidence suggesting that he was responsible for directing the voting of Beechwood's Black Elk bonds. On July 28, 2014, Beechwood employee Samuel Adler wrote to Wilmington Trust, with a copy to Levy, stating that the Black Elk bonds held by BAM and BBIL were voting "consent without tendering." GA.750. The same day, Adler, with a blind copy to Levy, wrote to Nomura also stating that the Black Elk bonds held by BAM and BBIL were voting "consent without tendering." GA.753. Adler's open and blind copies to Levy, respectively, considered together with the evidence establishing that Levy was simultaneously working on Platinum's Black Elk investment while acting as Beechwood's CIO and that he was actively monitoring Beechwood's investment in Black Elk, supports an inference that Adler was voting Beechwood's Black Elk bonds "consent without tendering" based on instructions given to him by Levy.

Circumstantial evidence also supports an inference that Levy was aware, and was actively working to ensure, that Platinum controlled a sufficient number of bonds to ensure that the amendments would pass. On June 29, 2014, during the pendency of the public consent solicitation process, Nordlicht wrote to Small and Levy: "David [Levy]—I have Beechwood at 36,422,400 in terms of ownership of [Black Elk] bonds. Dan—Do u know respective funds?" GA.758. In response to that message, Small responded to Nordlicht and Levy and sent the following table:

BlackElk Bond Holders

	Nomura	Credit Suisse	Wilmington Trust	Total	
PPCO	29,582,000			29,582,000	
PPVA		18,321,000		18,321,000	
PPLO		13,711,000		13,711,000	
BAM			13,360,000	13,360,000	
BBIL			23,657,000	23,657,000	
Total				98,631,000	
				80,310,000	150,000,000
					131,679,000
					65,839,500

GA.764.

The table shows the Black Elk bonds collectively held by Beechwood and Platinum and sets forth the vote analysis that underlies the Black Elk Scheme. First, in the second column from the right, under the "Total" heading, the chart subtracts

the $18,321,000 in PPVA-held bonds that were disclosed in the Consent Solicitation Statement and excluded from the vote, resulting in $80,310,000 bonds held by Platinum and Beechwood. The calculation in the far-right column subtracts the same $18,321,000 in excluded PPVA-held bonds from the total number of outstanding bonds (150,000,000), yielding $131,679,000. The chart then divides the latter figure in half, yielding $65,839,500 – the number of "yes" votes needed in order for the Consent Solicitation to pass. The district court minimized this email evidence, concluding that it merely "show[s] that Levy knew or should have known that Beechwood held Black Elk bonds." ***326** *Nordlicht*, 2019 WL 4736957, at *15. But it also illustrates that Levy knew that Platinum and Beechwood controlled enough of the bonds to determine the outcome of the vote. Moreover, the fact that the table only excludes the $18.3 million bonds held by PPVA supports an inference that Levy knew the PPCO-, PPLO-, and Beechwood-held bonds had been concealed from Shearer and the bondholders and were being voted to ensure that the amendment would pass.

The government did not present this evidence to the jury in isolation. As noted above, email correspondence illustrates that in July 2014, Small consulted with Nordlicht and Levy about which bonds to disclose to Shearer for purposes of the Consent Solicitation Statement. There was also trial testimony that during the public consent solicitation process, Black Elk CEO John Hoffman was skeptical about the notion that Black Elk bondholders would consent to the amendments to the Indenture. In response, Levy said to Shulse: "It's covered." GA.245. And on August 14, 2014, immediately following the bondholders' vote, Small wrote to Nordlicht, copying Levy, to ask for their approval of the language to send to Shearer regarding the consent calculation for the Officer's Certificate. Small's proposed language identified the $18.3 million in PPVA bonds as "affiliated," and for the first time also flagged the PPCO- and PPLO-controlled bonds as "[p]ossible [a]ffil[iates]" to be excluded from the final vote count. GA.770. Small emphasized that regardless of whether they chose to then disclose the PPCO- and PPLO-controlled bonds, Black Elk had received a majority vote due to the votes cast by Beechwood. The jury could reasonably infer from the context and timing of Levy's comment to Shulse, considered together with the voluminous email evidence presented, that Levy knew that the PPCO-, PPLO-, and Beechwood-held bonds had not been disclosed to Shearer or the bondholders; knew that the PPCO-, PPLO-, and Beechwood-held bonds were voted to ensure that the amendments to the Indenture would pass; and was deeply involved in the Black Elk Scheme.

Levy's role in disbursing the proceeds of the Black Elk Scheme, coupled with his efforts to ensure that these proceeds were protected from a claw-back in Black Elk's bankruptcy proceedings, provides further circumstantial evidence of Levy's knowledge of, involvement in, and intent to further the objectives of the Black Elk Scheme. On August 18, 2014, Shearer advised Shulse that Texas law might prohibit the distribution of the proceeds of the Renaissance Sale if that distribution would render Black Elk insolvent. Shulse forwarded this email to Nordlicht, Small, and Levy, writing: "Advice of counsel ... we need to be mindful of this in our planning." GA.781. Immediately thereafter, Nordlicht forwarded this email to Levy, changing the subject heading to "urgent" and instructing Levy to "get these wires out!!!!! Call him right now please!!!!" *Id.* Twenty minutes later, Small wrote to Shulse with a copy to Salfati — who had just joined Small on the three-person Black Elk Board of Directors — authorizing a wire transfer of $70 million "in partial payment" to Black Elk's preferred equity holders. GA.783. Nordlicht's email to Levy, combined with the rapid sequence of events, supports a permissible inference that Levy subsequently spoke to Small and directed him to initiate the wire transfer of the proceeds from the Renaissance Sale. The fact that Nordlicht did not have to explain to Levy what needed to be done, or why it needed to be done with such urgency, suggests that Levy was aware of and supported the object of the fraud. Moreover, Nordlicht and Levy's willingness to disburse the proceeds of the Renaissance ***327** Sale rapidly, notwithstanding the possible legal risks, supports a finding that both Nordlicht and Levy were willing to circumvent governing legal restrictions to ensure that the proceeds from the Renaissance Sale were paid to Black Elk's preferred equity holders.

Furthermore, after the proceeds from the Renaissance Sale were distributed, Levy had a conversation with Platinum CFO Daniel Mandelbaum regarding the timeline of Black Elk's bankruptcy. Levy indicated that, to prevent the proceeds from the Renaissance Sale from being clawed back during the bankruptcy proceedings, Black Elk would not declare bankruptcy for a year. This provides further support for the government's theory of the case because it illustrates that Levy apparently understood the importance to Platinum of securing the proceeds from the Renaissance Sale and was taking steps in furtherance of the Black Elk Scheme to ensure that this money would be protected.

The district court discounted the evidence of Levy's involvement in disbursing the Renaissance Sale proceeds and delaying Black Elk's bankruptcy, reasoning that there could have been innocent explanations for these acts. *Nordlicht*, 2019 WL 4736957, at *14-15. The district court explained that "[t]here is nothing unlawful about processing wire transfers, which are a routine aspect of transactions like the Renaissance [S]ale." *Id.* at *15. Similarly, in dismissing the evidence that Levy sought to avoid a bankruptcy claw-back, the district court explained that "businesses may legitimately consider the risk of a claw-back when deciding when to conduct a certain transaction." *Id.* at *14. But the government did not contend that the wire transfer or Levy's efforts to avoid a claw-back were inherently inculpatory standing alone. Rather, the government argued that this evidence, considered in context alongside the other evidence establishing Levy's knowledge of, and involvement in, the Black Elk Scheme, could have given rise to a rational inference of Levy's intent to defraud the bondholders. *See Mariani*, 725 F.2d at 865-66 ("Seemingly innocent acts taken individually may indicate complicity when viewed collectively and with reference to the circumstances in general."). The district court's analysis suggests that it erroneously viewed the evidence in isolation, weighed the evidence, and drew inferences against the government. *See United States v. Tocco*, 135 F.3d 116, 123 (2d Cir. 1998) (cautioning that courts must "defer to the jury's resolution of witness credibility and, where there is conflicting testimony, to its selection between competing inferences").

Viewing the evidence as a whole and in the light most favorable to the government, we conclude that a rational jury could have found, beyond a reasonable doubt, that Levy participated in the Black Elk Scheme with criminal intent.

3. The Exculpatory Evidence Cited by Levy Does Not Support the District Court's Decision

Levy argues that despite the foregoing, there is insufficient evidence to support a conclusion that he acted with criminal intent because there was no evidence that he understood that Beechwood was an affiliate and other evidence in the record showed that he lacked the requisite criminal intent. In particular, Levy contends that he was told that Beechwood and Platinum were not affiliates, and that he was informed by the lawyers during the private consent solicitation process that Platinum was permitted to vote all of its Black Elk bonds. Levy's arguments are without merit.

***328** As an initial matter, we find no evidence to support Levy's assertion that he was told during the private consent solicitation process that Platinum was permitted to vote the bonds held by PPVA, PPCO, and PPLO, nor do we find evidence that the lawyers involved in the transaction knew and approved of Platinum voting these bonds. To the contrary, Shearer testified that he did not know that the Platinum entities were voting their bonds, and that he did not believe the trustee's counsel or anyone else at BakerHostetler knew either. Shearer explained that the lawyers involved in the private consent solicitation process did not learn that Platinum was voting the Black Elk bonds held by PPVA, PPCO, and PPLO until after Platinum voted them and transmitted the consents to counsel for purposes of demonstrating that a majority of the bondholders had consented to the proposed amendments. And we find no evidence in the record that Levy or Nordlicht provided any information to the lawyers regarding PPVA, PPCO, or PPLO's relationship with Black Elk or their possible status as affiliates, nor do we find evidence that any of the lawyers working on the private consent solicitation provided Levy with legal advice regarding whether these entities qualified as affiliates. While it is true that neither Shearer nor anyone else at BakerHostetler raised any concerns about PPVA, PPCO, or PPLO voting their Black Elk bonds after they received the consents, Shearer testified that they had not focused on the Affiliate Rule at the time and had mistakenly overlooked it. Moreover, Levy was aware that the trustee ultimately terminated the private consent solicitation process in light of concerns about the way in which the consents were obtained.

By contrast, in connection with the public consent solicitation process, Shearer and the other lawyers working on the transaction recognized that the Affiliate Rule applied and informed Black Elk that affiliates could not vote their bonds. And Small repeatedly notified Levy and Nordlicht, on July 3 and 7, 2014, that Black Elk was required to disclose how many bonds were owned by affiliates. Levy was therefore aware of the Affiliate Rule and Black Elk's obligation to disclose any bonds owned by affiliates—which included the Platinum and Beechwood entities.

Notwithstanding this legal advice, we are not aware of any evidence in the record that Levy, Nordlicht, or Small disclosed the PPLO-, PPCO-, or Beechwood-owned bonds to

Shearer prior to the dissemination of the Consent Solicitation, or sought Shearer's – or any other attorney's – advice regarding whether PPCO, PPLO, or Beechwood qualified as affiliates and should therefore be excluded from the consent calculation. Levy argues that, because none of the lawyers objected to PPVA, PPLO, or PPCO voting their Black Elk bonds during the private consent solicitation process, he had no reason to believe that Platinum could not vote the PPVA-, PPLO-, or PPCO-owned bonds. But the private consent solicitation process ultimately failed, and Levy was subsequently made aware on several occasions that bonds under direct or indirect common control with Black Elk had to be excluded from the consent calculation. Moreover, the fact that – after discussion with Levy and Nordlicht – Small ultimately disclosed the $18.3 million PPVA-owned bonds to Shearer undercuts Levy's argument that he believed, based on the private consent solicitation process, that the Platinum entities could lawfully vote their bonds. Additionally, Small's August 13, 2014 email to Levy and Nordlicht – after the Consent Solicitation had passed – referred to the PPCO- and PPLO-held bonds as "Possible Affil" to be excluded from the consent calculation, and asked for Levy and Nordlicht's ***329** permission to disclose these bonds to Shearer now that they knew they had acquired sufficient votes to pass the amendments using solely the Beechwood-held bonds. Notably, the approximately $37 million of Beechwood-held bonds were included in Small's email as consent votes to be counted, not excluded. The email evidence supports an inference that Levy understood the Platinum-controlled bonds, including those owned by PPCO, PPLO, and Beechwood, likely qualified as affiliates, and that they had concealed this information to ensure the amendments would pass.

There was also sufficient circumstantial evidence to support the conclusion that Levy knew Platinum controlled Beechwood. Most notably, Levy was working for Platinum on the Black Elk investment and assisting with the public consent solicitation process while he was working as Beechwood's CIO. As CIO, Levy controlled and exercised final authority over Beechwood's investment decisions. When Beechwood was first created, for example, Nordlicht and Levy jointly decided which investments would be purchased and transferred from Platinum to Beechwood, and Beechwood invested in many portfolio companies and securities in which Platinum was already invested, including Black Elk. Levy knew that Nordlicht was keeping tabs on how many Black Elk bonds were owned by Beechwood, was kept aware of Beechwood's purchases of Black Elk bonds from Platinum, and was actively monitoring the number of Beechwood-, PPVA-, PPCO-, and PPLO-held bonds to ensure that Platinum secured a sufficient number of votes to pass the amendments. In addition, Nordlicht gave Levy instructions while he was working at Beechwood, and Levy was aware that Nordlicht also directed and received reports from other Beechwood employees. As mentioned above, there was also evidence supporting an inference that Levy directed Beechwood's voting of Black Elk's bonds while he was simultaneously CIO of Beechwood and working for Platinum on Black Elk, and that Beechwood employees deferred to Levy and Nordlicht when voting Beechwood's Black Elk bonds. This evidence, viewed collectively, provides an ample basis to conclude that Levy understood that Black Elk and Beechwood were under the common control of Platinum and that Beechwood therefore likely qualified as an affiliate.

Levy points out that he was involved in a conversation with Feuer and Taylor where they indicated that Beechwood was not an affiliate of Platinum. In particular, on cross-examination, Manela testified that Feuer and Taylor were very concerned about ensuring that Beechwood and Platinum were not "the technical word affiliates," and that Feuer told Manela that he was working to ensure that Beechwood was not a Platinum affiliate. SA.55, GA.220. Manela agreed that "Beechwood had lawyers reviewing everything about the structure of Beechwood so it would not be an affiliate of Platinum." SA.55. Manela also recalled "multiple conversations" with Feuer and Taylor where they discussed Beechwood's affiliate status, and specifically recalled that Levy was present at one of those meetings. GA.220. According to Manela, Feuer and Taylor told him and Levy that Beechwood was not a Platinum affiliate. Manela, however, could not recall what went into the definition of "affiliate" or what the term "affiliate" meant in the context of that conversation. SA.60. Manela was not privy to, and did not testify to, the specifics of any of the legal advice that Feuer and Taylor purportedly received regarding Beechwood's affiliate status. And it is unclear what, if any, facts Beechwood's lawyers were provided to determine ***330** whether Beechwood was an affiliate of Platinum.

In light of the substantial evidence indicating that Levy knew that Platinum exercised control over Beechwood (and that Levy, in fact, played a pivotal role in the exercise of such control), a jury could have rationally discounted Manela's vague recollection of Feuer and Taylor's conversation with him and Levy regarding Beechwood's status as a Platinum

affiliate, particularly since there was no evidence that Feuer and Taylor were referring to Beechwood's status as an affiliate within the meaning of the Indenture. Viewing the evidence as a whole, a rational jury could have concluded (as this jury apparently did) that Levy understood that Platinum controlled Beechwood and that Beechwood likely qualified as an affiliate for purposes of the Indenture.

We conclude that the district court erred in granting Levy's Rule 29 motion.

III. The Rule 33 Motions

A. Legal Standard

[28] **[29]** Rule 33 provides that, "[u]pon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires." Fed. R. Crim. P. 33(a). "Although a trial court has broader discretion to grant a new trial pursuant to Rule 33 than to grant a motion for a judgment of acquittal pursuant to Fed. R. Crim. P. 29, where the truth of the prosecution's evidence must be assumed, that discretion should be exercised sparingly" and only in the most extraordinary circumstances. *Sanchez*, 969 F.2d at 1414 (internal citation omitted); *see also* *Ferguson*, 246 F.3d at 134. "In evaluating a Rule 33 motion, the court must 'examine the entire case, take into account all facts and circumstances, and make an objective evaluation,' keeping in mind that the 'ultimate test' for such a motion is 'whether letting a guilty verdict stand would be a manifest injustice.' " *United States v. Alston*, 899 F.3d 135, 146 (2d Cir. 2018) (quoting *United States v. Aguiar*, 737 F.3d 251, 264 (2d Cir. 2013)).

[30] **[31]** **[32]** District courts have a duty to assure "that 'competent, satisfactory and sufficient evidence' in the record supports the jury verdict," *Ferguson*, 246 F.3d at 134 (quoting *Sanchez*, 969 F.2d at 1414), and "a district court may [therefore] grant a new trial if the evidence does not support the verdict," *Archer*, 977 F.3d at 187. While the district court "may weigh the evidence and credibility of witnesses," *United States v. Cote*, 544 F.3d 88, 101 (2d Cir. 2008), it must take care "not to usurp the role of the jury," *United States v. Canova*, 412 F.3d 331, 349 (2d Cir. 2005). And we have long recognized that courts should "generally ... defer to the jury's resolution of conflicting evidence and assessment of witness credibility." *Ferguson*, 246 F.3d at 133. It is accordingly only in exceptional circumstances, where there is "a real concern that an innocent person may have been convicted," that a court "may intrude upon the jury function of credibility assessment" and grant a Rule 33 motion. *United States v. McCourty*, 562 F.3d 458, 475-76 (2d Cir. 2009) (internal quotation marks omitted).

[33] Although we have not defined exactly what constitutes an "extraordinary circumstance" sufficient to warrant Rule 33 relief, we recently provided further guidance: "[A] district court may not grant a Rule 33 motion based on the weight of the evidence alone unless the evidence preponderates heavily against the verdict to such an extent that it would be manifest injustice to let the verdict stand." *Archer*, 977 F.3d at 188 (internal quotation marks omitted); *see* *Sanchez*, 969 F.2d at 1415 ("It surely cannot be said in this case that ***331** the evidence 'preponderates heavily against the verdict, such that it would be a miscarriage of justice to let the verdict stand.' " (alteration omitted) (quoting *United States v. Martinez*, 763 F.2d 1297, 1313 (11th Cir. 1985))).

[34] **[35]** **[36]** We note that the district court did not have the benefit of our decision in *Archer* when it granted Levy and Nordlicht's Rule 33 motions. Under the "preponderates heavily" standard, which was first articulated in *Sanchez* and later applied in *Archer*, "a district court may not reweigh the evidence and set aside the verdict simply because it feels some other result would be more reasonable." *Archer*, 977 F.3d at 188 (internal quotation marks omitted). "To the contrary, absent a situation in which," for example, "the evidence was 'patently incredible or defie[d] physical realities,' ... where an evidentiary or instructional error compromised the reliability of the verdict," *id.* (internal citation omitted) (quoting *Ferguson*, 246 F.3d at 134), or where the government's case depends upon strained inferences drawn from uncorroborated testimony, "a district court must 'defer to the jury's resolution of conflicting evidence.' " *Id.* (quoting *McCourty*, 562 F.3d at 475-76); *see also* *Ferguson*, 246 F.3d at 136-37 (affirming district court's grant of Rule 33 motion where, among other things, there was no evidence that the defendant participated in the gang's activities and the only evidence supporting his gang membership was the speculative testimony of one of the government's witnesses). Of course, in *Archer* we provided the clearest examples of when it would be appropriate to grant a Rule 33 motion, but they were merely examples,

and not an exhaustive list. Moreover, in applying the "preponderates heavily" standard, a district court "must be careful to consider any reliable trial evidence as a whole, rather than on a piecemeal basis." *Archer*, 977 F.3d at 189; *see also* *Sanchez*, 969 F.2d at 1414 (explaining that when considering whether sufficient evidence "supports the jury's finding that th[e] defendant is guilty beyond a reasonable doubt," the district court must objectively "examine the totality of the case," taking "[a]ll the facts and circumstances" into account (internal quotation marks omitted)).

B. Levy's Motion for a New Trial

The district court conditionally granted Levy's motion for a new trial for the same reasons it granted Levy's motion for a judgment of acquittal, explaining that "the jury's guilty verdict was a manifest injustice because there was insufficient evidence that Levy possessed criminal intent." *Nordlicht*, 2019 WL 4736957, at *18. The government contends that there is no legal basis upon which to affirm the district court's decision granting Levy a new trial because, if we agree that the district court erred in granting Levy's Rule 29 motion, our rejection of the district court's reasoning in the Rule 29 context must necessarily extend to the Rule 33 motion. We disagree.

While both the Rule 29 and Rule 33 analyses in this context require an assessment of evidentiary sufficiency, they have different governing legal standards. As explained, the Rule 33 inquiry requires an objective evaluation of the evidence and an assessment of whether the evidence preponderates heavily against the verdict. Accordingly, a Rule 33 motion may properly be granted even where a Rule 29 motion is denied.

[37] We conclude, however, that application of the "preponderates heavily" standard does not warrant a new trial here. In light of the wealth of evidence, circumstantial and otherwise, detailed above, there was ample basis for the jury to conclude that Levy acted with the requisite criminal ***332** intent. We therefore conclude that the district court erred in granting Levy a new trial.

C. Nordlicht's Motion for a New Trial

In ruling on Nordlicht's Rule 33 motion, the district court noted that "[t]he heart of the Government's case against Nordlicht is that he knew – but concealed from the bondholders – that, under the Affiliate Rule, bonds held by BAM, BBIL, PPCO, and PPLO should be excluded from the consent solicitation." *Nordlicht*, 2019 WL 4736957, at *16. The district court concluded that it would be a manifest injustice to let the verdict stand because (1) "although Nordlicht knew about the affiliate rule, he and Beechwood went to great lengths to comply with [it]"; (2) there was "insufficient evidence that Nordlicht was on notice of [Beechwood's] affiliate status"; and (3) there was "insufficient evidence that the affiliate status of PPCO and PPLO was ... concealed from BakerHostetler" or "that Nordlicht intended to conceal PPCO's and PPLO's affiliate status from Shearer." *Id.* at *16-18.

[38] Applying the "preponderates heavily" standard here, we conclude that letting the verdict stand as to Nordlicht would not result in manifest injustice. The district court's factual findings in connection with Nordlicht's Rule 29 motion, as well as the ample record evidence illustrating Nordlicht's knowledge and intent, undermine the district court's conclusions in the Rule 33 context and demonstrate that the evidence did not preponderate heavily against the verdict. The district court therefore abused its discretion in granting Nordlicht's motion for a new trial.

1. Nordlicht Did Not Endeavor to Comply with the Affiliate Rule

The district court concluded, based on a March 2014 email in which Nordlicht stated that he would be "fully compliant with the affiliate rule," that Nordlicht actually "went to great lengths to comply with the affiliate rule." *Nordlicht*, 2019 WL 4736957, at *16. In particular, in connection with the private consent solicitation process, Shearer emailed Shulse, explaining that, in calculating consent, bonds owned "by any person directly or indirectly controlling or controlled by or under direct or indirect common control with any such obligor" must be excluded. GA.587. Shulse forwarded this email to Nordlicht, Levy, and others, stating: "We need to be mindful of this provision when assuming we control the bonds or not." *Id.* Nordlicht responded: "I see u accidentally forgot to include Marizza and label this attorney client privilege. I have corrected .... But when we say we have friendly holders we will be fully compliant with this provision." *Id.* While Nordlicht's email could be subject to innocuous

interpretations, the jury was entitled to conclude that it was, in fact, a self-serving exculpatory statement that was intended to conceal, rather than reveal, his intentions. Nordlicht did not identify his "friendly holders" or explain why they were not considered "affiliates"; he did not ask any questions or seek further advice regarding the application of the Affiliate Rule; and he reprimanded Shulse for failing to label the email "attorney client privilege" and then changed the subject heading to "Atty client privilege" in what a rational jury could have concluded was an effort to shield this email from discovery. Indeed, as the district court noted in denying Nordlicht's Rule 29 motion, the jury could have reasonably concluded that under the circumstances, Nordlicht's email "indicated a desire to create a favorable paper trail, rather than a good faith desire to comply with the affiliate rule." *Nordlicht*, 2019 WL 4736957, at *9; ***333** *id.* at *16 (acknowledging that Nordlicht may have been "dissembling" to create a "favorable paper trail"). It was not, we think, the province of the district court to grant a new trial "simply because it believes other inferences and conclusions are more reasonable." *Van Steenburgh v. Rival Co.*, 171 F.3d 1155, 1160 (8th Cir. 1999); *see also Archer*, 977 F.3d at 188.

Moreover, the trial evidence as a whole undercuts any notion that Nordlicht was acting in good faith to comply with the Affiliate Rule. For example, after the private consent solicitation process was terminated based on concerns about the manner in which the consents had been obtained, Nordlicht expressed disdain for the rules and urged Shulse, Small, and Levy to cut out the lawyers and circumvent the bondholders. Nordlicht wrote: "No more talking to lawyers. ... We will have one pager signed by 51% of bondholders, no trustee necessary. It's fine. We don't need any process. Bondholders are being taken out, this is all moot." GA.625. Similarly, once the amendments to the Indenture passed, Nordlicht was apprised that distribution of the proceeds from the Renaissance Sale might violate Texas law. Instead of seeking further guidance from Black Elk's lawyers, Nordlicht immediately emailed Levy, directing him to "get th[o]se wires out!!!!!" GA.781. This email evidence, viewed collectively, supports an inference that Nordlicht intended to secure the passage of the amendments to the Indenture, regardless of whether he violated any laws or harmed the bondholders in the process.

In addition, Nordlicht had a habit of labeling sensitive emails relating to Black Elk's impending bankruptcy "attorney client privilege" even when they did not involve advice of counsel. Specifically, on May 20, 2013, Shulse emailed Nordlicht, Small, and Levy about Black Elk's precarious financial situation and the need to generate liquidity through asset sales. Nordlicht responded, with a copy to Pichè, Black Elk's in-house counsel, calling Shulse "hysterical" and reprimanding him for failing to label his email "atty client privilege." GA.614. Nordlicht also changed the subject heading of the email to "atty client privilege." *Id.* As Shulse noted, it is not clear why "a business issue such as cash flow would need to be covered by attorney client privilege." *Id.* This email exchange further supports the inference that Nordlicht likely knew he was engaged in wrongful conduct and was seeking to cover his tracks.

Taken together, these emails can reasonably be interpreted to demonstrate that Nordlicht did not intend to comply with the Affiliate Rule (or, for that matter, any other legal restriction preventing the distribution of the proceeds from the Renaissance Sale to the preferred equity holders). And viewed in context, there was ample support for a jury to conclude that Nordlicht's March 2014 email was simply a part of a cover-up to conceal the fraud perpetrated against the bondholders.

2. Sufficient Evidence Supports the Conclusion that Beechwood Was an Affiliate and that Nordlicht Was on Notice of its Affiliate Status

The district court also concluded that it would be a manifest injustice to let the verdict stand, because – even assuming that the Beechwood entities (BBIL and BAM) were considered Platinum entities and therefore Black Elk affiliates under the Affiliate Rule – there was insufficient evidence that Nordlicht was on notice of the Beechwood entities' affiliate status. *Nordlicht*, 2019 WL 4736957, at *17. Nordlicht contends that the district court did not abuse its discretion in granting his motion for a new trial because (1) the ***334** record does not support the conclusion that Beechwood was an affiliate; and (2) the district court correctly concluded that Nordlicht did not believe Beechwood was an affiliate. We disagree.

Under the terms of the Indenture, in determining whether there is consent to any proposed amendment, bonds held "by the Permitted Holders, the Issuers or any Guarantor, or by any Person directly or indirectly controlling or controlled by or under direct or indirect common control with the Permitted Holders, the Issuers or any Guarantor, will be considered as though not outstanding." GA.888. In other words, Black Elk – as the issuer – as well as entities that controlled, or were

under common control with, Black Elk, were not entitled to have their votes counted in determining whether a majority of bonds consented to any proposed amendment. The Indenture defined the terms "affiliate" and "control" as follows:

> "*Affiliate*" of any specified Person means any other Person directly or indirectly controlling or controlled by or under direct or indirect common control with such specified Person. For purposes of this definition, "*control*," as used with respect to any Person, means the possession, directly or indirectly, of the power to direct or cause the direction of the management or policies of such Person, whether through the ownership of voting securities, by agreement or otherwise; *provided* that beneficial ownership of 10% or more of the Voting Stock of a Person will be deemed to be control. For purposes of this definition, the terms "*controlling*," "*controlled by*" and "*under common control with*" have correlative meanings.

GA.861 (emphases in original). These definitions of affiliate and control mirror those found in the TIA. *See* 17 C.F.R. § 260.0-2(b) ("The term 'affiliate' means a person controlling, controlled by, or under common control with, another person."); *id.* § 260.0-2(f) ("The term 'control' means the power to direct the management and policies of a person, directly or through one or more intermediaries, whether through the ownership of voting securities, by contract, or otherwise.").

It is undisputed that Platinum, through PPVA, controlled Black Elk, because PPVA owned 85% of the common equity of Black Elk. Accordingly, as the parties note, the relevant question is whether Beechwood was also under the common control of Platinum, such that it constituted an affiliate of Black Elk. Whether Beechwood was under Platinum's control, in turn, depends on whether Platinum could in effect direct Beechwood's management and policies.

Here, as the district court found in denying Nordlicht's Rule 29 motion, there was sufficient evidence to support the jury's conclusion that Beechwood was under the common control of Platinum and therefore was a Black Elk affiliate. *See Nordlicht*, 2019 WL 4736957, at *11. The government presented evidence 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. Upon the creation of Beechwood, Nordlicht filled several critical positions at Beechwood with Platinum employees. Levy (who had served as a portfolio manager at Platinum and had been heavily involved in managing Platinum's investments in Black Elk) joined Beechwood as its CIO and worked at Beechwood while continuing his work related to Black Elk at Platinum. Naftali Manela (who had served as Chief Financial Officer of PPCO from 2008 through 2014, and Chief Operating Officer of Platinum from late 2014 through 2015) was asked in early 2014 to assist in ***335** "set[ting] up [Beechwood's] reporting," determining how much money could be invested by Beechwood into Platinum, and assessing how those investments in Platinum could be made. GA.198-201. Will Slota – another Platinum employee – also worked at Beechwood, and Huberfeld acted as an advisor to Beechwood. And Beechwood investment manager Wallach, whom Nordlicht had assisted in obtaining a position at Beechwood, followed Nordlicht's instructions regarding the tracking and purchase of Black Elk bonds.[5] Nordlicht also occasionally worked out of Beechwood's offices to take phone calls and participate in meetings.

[5] Nordlicht relies on Wallach's testimony for the proposition that Nordlicht merely held an advisory role at Beechwood and did not have the authority to direct Wallach to buy a particular position. But Wallach's statements on cross-examination were inconsistent with his direct testimony and contemporaneous email communications with Nordlicht, which demonstrate that, on multiple occasions, Nordlicht directed Wallach to purchase Black Elk bonds from the Platinum funds, and that Wallach deferred to Nordlicht regarding how to vote Beechwood's Black Elk bonds. Wallach also testified that he frequently communicated with Nordlicht about his work at Beechwood, and that Nordlicht told Wallach how much money Wallach and his partner could invest on behalf of BAM. In light of the documentary evidence and testimony suggesting that Nordlicht exercised significant control over Wallach and Beechwood, the jury was entitled to weigh Wallach's testimony and discount Wallach's statements that contradicted the documentary and other evidence presented at trial.

Moreover, pursuant to an email from Huberfeld outlining Beechwood's corporate terms, the "Nordlicht group" was responsible for "run[ning] the investment allocation side" of Beechwood, while the "Feuer group w[ould] run the insurance end." GA.582. Similarly, Manela testified that Feuer and Taylor were running the "insurance side" of

the business, while Levy was "running the investment side [of the business]" and making the decisions regarding the "private equity type investments." Supp. GA.04-06. After Beechwood was founded, Nordlicht and Levy directed Beechwood's investments into portfolio companies and securities in which Platinum had already invested, and transferred certain investments from Platinum to Beechwood to benefit Platinum. And Nordlicht had sufficient control over Beechwood to be able to direct the trading of over $37 million in Black Elk bonds from the Platinum funds to Beechwood over a three-month period prior to the public consent solicitation process.

Nordlicht himself acknowledged that Platinum exercised control over Beechwood. In a May 22, 2014 email chain, Nordlicht wrote to Peter Muehlsiegl – a potential business partner – regarding investment opportunities: "Get me good risk adjusted opportunity!! I feel like I sh[oul]d do some more due diligence on co before I answer rate. ... On this one I w[oul]d do whole piece *by splitting up between our fund [PPVA] and our reinsurance mandate [(Beechwood)] so it's [P]latinum or designees*." GA.620 (emphasis added). After Muehlsiegl notified Nordlicht of a potential investment, Nordlicht wrote to him: "Do you mind if I have my pm [(portfolio manager)] who handles specifics on these kind of trades, Bernie Hutman call u? Obviously it's large amount, don't want to miss anything. *The issue is besides Platinum we have reinsurance mandate and I'd like to split it among entities, though all controlled by us*." GA.618 (emphasis added). Later in the email chain, Nordlicht wrote to Hutman: "If it helps we sh[oul]d be b asset manager [(BAM)] as opposed to [P]latinum on these things." GA.617. Nordlicht's email correspondence confirms that Platinum exercised significant control over Beechwood's investment decisions. Viewed collectively with the other record evidence, ***336** there appears to have been ample evidence from which the jury could conclude that Platinum had "the power to direct or cause the direction of the management or policies of" Beechwood and that therefore Beechwood and Black Elk were under the common control of Platinum. Accordingly, the evidence does not preponderate heavily against a finding that Beechwood was an affiliate. [6]

6 The civil cases cited by Nordlicht do not compel a different result. Unlike in *Waldman ex rel. Elliott Waldman Pension Tr. v. Riedinger*, 423 F.3d 145, 151-52 (2d Cir. 2005), where there was no evidence that Riedinger actually exercised control over any of the relevant entities and his actions were subject to veto, there is no evidence that Nordlicht's decisions were subject to veto by anyone, either pursuant to Beechwood's corporate terms or in practice, and there is significant evidence in the record supporting the conclusion that Platinum had the power to cause the direction of Beechwood's management and policies. Similarly, in contrast to *Rothstein v. AIG*, 837 F.3d 195, 207-09 (2d Cir. 2016), where we found that AIG lacked control over several employee benefit plans because the Employee Retirement Income Security Act of 1974 ("ERISA") imposed stringent limitations on AIG's authority to manage the plans, here there was no complicated regulatory scheme that restricted Platinum's ability to control Beechwood. In *Grail Semiconductor, Inc. v. Stern*, No. 2:13-cv-03687-SJO-AGR, 2014 WL 12647935, at *4-5 (C.D. Cal. Feb. 27, 2014), the court merely denied a motion for summary judgment because it concluded that there were material disputes of fact as to the defendant's affiliate status for purposes of section 4(1) of the Securities Act; the court there made no determination as to what was necessary to qualify for affiliate status. Moreover, *Grail* did not involve a company, like Platinum, whose executives (here, Nordlicht and Levy) ran a core part of the alleged affiliate company's business, controlled the alleged affiliate company's investment decisions, and controlled the way in which the alleged affiliate company voted in connection with its investments. And lastly, *Emerson v. Mut. Fund Series Tr.*, 393 F. Supp. 3d 220 (E.D.N.Y. 2019), did not discuss in what circumstances an entity may qualify as an "affiliate" and therefore has no relevance here.

In addition, based on all the foregoing evidence, there was sufficient evidence for the jury to conclude that Nordlicht knew Beechwood was an affiliate of Black Elk. Indeed, as the district court noted in connection with Nordlicht's Rule 29 motion, there was ample evidence "to suggest that Nordlicht knew about the affiliate rule" and did not have a "good faith desire to comply with" it. *Nordlicht*, 2019 WL 4736957, at *9. As reflected in the May 2014 email chain, Nordlicht recognized that Platinum exercised control over Beechwood and that Beechwood's relationship to Platinum could potentially implicate the Affiliate Rule. Nordlicht could have disclosed Beechwood's relationship with Platinum to Shearer and sought legal advice. But instead, "Nordlicht

and his colleagues played their cards close to their vests by providing limited and potentially contradictory information to Shearer about PPCO and PPLO while concealing the extent of Beechwood's ties to Platinum." *Id.* at *10. The district court discounted the May 2014 email exchange, concluding that "[t]here is no reason to believe Nordlicht meant 'controlled' in the technical sense of 'control' under the TIA or the bond indenture," and noted that there "would have been nothing unlawful about Nordlicht simply attempting to persuade individuals at Beechwood to vote in a certain manner" just like any stakeholder in the consent solicitation. *Id.* at *17. But it was reasonable for the jury to conclude that, in light of Nordlicht's express statements recognizing that Platinum controlled Beechwood, Nordlicht understood that Beechwood likely qualified as an affiliate. While the language in the May 2014 email "could be subject to both legitimate and nefarious interpretations, the jury did not misinterpret[ ] the email[ ] in concluding the latter." ***337** *Archer*, 977 F.3d at 191 (first alteration in original) (internal quotation marks omitted).

This conclusion is buttressed by the wealth of other circumstantial evidence supporting an inference that Nordlicht knew Beechwood was an affiliate and intended to use Beechwood to defraud the Black Elk bondholders. As discussed above, Nordlicht was notified of the Affiliate Rule on several occasions. Nordlicht expressed disdain for amending the indenture through any formal process and directed his co-conspirators not to talk to the lawyers working on the transaction. Nordlicht went out of his way to label communications with his alleged co-conspirators regarding the Affiliate Rule, Black Elk, and the Renaissance Sale "attorney client privilege" in what the jury could have reasonably concluded was an effort to cover his tracks. As one of the founders of both Platinum and Beechwood, Nordlicht actively monitored the number of Black Elk bonds collectively and individually held by the Platinum and Beechwood entities, and exercised control over Beechwood's investments, including in Black Elk. And Nordlicht decided to inform Shearer of the affiliate status of the two other Platinum entities – PPCO and PPLO – only after confirming that the amendments would pass with just Beechwood's votes. The trial evidence, taken together, does not preponderate heavily against the conclusion that Nordlicht knew Beechwood was an affiliate and acted with criminal intent in concealing this information from the bondholders.

3. Nordlicht Concealed Platinum's Ownership of Black Elk Bonds

The district court further concluded that it would be a manifest injustice to sustain Nordlicht's conviction because it found that there was insufficient evidence for the jury to conclude that Platinum intended to conceal PPCO and PPLO's affiliate status from Shearer. *Nordlicht*, 2019 WL 4736957, at *17. In reaching this conclusion, the district court noted that (1) in or around May 2014, when Black Elk submitted its consents in connection with the private consent solicitation process, Shearer was made aware that PPCO, PPLO, and PPVA collectively owned about $100 million of the Black Elk bonds; (2) a BakerHostetler memorandum, dated July 1, 2014, indicated that approximately $90 million of Black Elk bonds were owned by companies that were "friendly" to Platinum; and (3) Small informed Shearer on August 14, 2014 about PPLO's and PPCO's bonds. *Id.* We have, however, several problems with the district court's analysis.

First, even if the district court were correct that the evidence demonstrates that Nordlicht never intended to conceal PPCO and PPLO's affiliate status from Shearer (which we conclude it is not), there is, as we have discussed, substantial circumstantial evidence from which a jury could conclude that Nordlicht understood that Beechwood was an affiliate and intended to conceal its affiliate status from the bondholders in order to ensure that the proceeds from the Renaissance Sale would go to the preferred equity holders. Because Beechwood's Black Elk bonds were independently sufficient to fraudulently secure the passage of the amendments to the Indenture, any disclosures made by Nordlicht regarding the PPCO- and PPLO-held Black Elk bonds do not undermine the jury's verdict or lead us to conclude that the evidence preponderates heavily against the verdict.

Moreover, the purported disclosures upon which the district court relied do not preponderate heavily against the conclusion that Nordlicht acted with criminal ***338** intent. The May 2014 disclosure related solely to the private consent solicitation process and occurred three months prior to the public consent solicitation process. This alleged disclosure was not made by Nordlicht in the course of a discussion with Shearer about the Affiliate Rule. Instead, it simply consisted of an email sent to Shearer and Shulse – from outside counsel, not Nordlicht – towards the end of the private consent solicitation process for the purpose of demonstrating that the consents Black Elk had received "constitute[d] a majority of

the outstanding [n]otes." SA.1402-08. To that end, the email disclosed the number of bonds held by PPVA, PPCO, and PPLO at that time and indicated that those bondholders had consented to the proposed amendments. ***See id.*** There is no evidence of which we are aware that after being notified of the Affiliate Rule in March 2014, Nordlicht disclosed the PPCO- or PPLO-held bonds as having a relationship with Platinum and Black Elk that could render them affiliates. Nor is there any evidence that Nordlicht solicited guidance from Shearer regarding PPCO or PPLO's affiliate status. The email also disclosed the Platinum entities' bond holdings as of May 2014, and Platinum transferred many of these bonds to Beechwood after this date. The May 2014 disclosure therefore did not accurately reflect the number of PPCO- and PPLO-held bonds prior to the public consent solicitation process.

In addition, in connection with the later public consent solicitation process, Shearer asked Small on several occasions to verify Platinum's and its affiliates' ownership of Black Elk bonds, and – after consulting with Nordlicht and Levy – Small repeatedly told Shearer that only PPVA's $18.3 million bonds should be disclosed and excluded from the calculation. Nordlicht was aware of how many Black Elk bonds PPCO and PPLO owned, and Small's email disclosure of the PPCO- and PPLO-owned bonds to Shearer only after the Consent Solicitation had passed – when they knew they had enough votes to secure the passage of the amendments based on the Beechwood-held bonds – supports an inference that Nordlicht understood that PPCO and PPLO would likely be deemed affiliates and chose not to disclose them. This inference is further corroborated by the email evidence that Nordlicht discouraged involving the lawyers and expressed a desire to circumvent the bondholders.

The BakerHostetler memo upon which the district court relied also does not render the verdict a manifest injustice. The memo was not admitted into evidence and is therefore not a part of the record; the district court excluded it as hearsay. On cross-examination, Shearer testified that after the public consent solicitation process terminated, he later learned of an internal BakerHostetler memo (dated July 1, 2014) that disclosed that Platinum, along with companies friendly to it, owned $90 million of Black Elk bonds. That information, however, was not disclosed to Shearer at the time of the public consent solicitation process. Moreover, there is no evidence in the record that Nordlicht provided the information that formed the basis for this memo, that this memo was completed at Nordlicht's request, or that the memo opined on the affiliate status of any of the Platinum-related entities. Nor is there any evidence that Nordlicht received or relied on any such memo in formulating his views about the Affiliate Rule. It is unclear how a memo unrelated to Nordlicht, undisclosed (at the time) to Shearer and sent to lawyers who were not working on the public consent solicitation process negates Nordlicht's intent to conceal the PPCO- and PPLO-owned bonds, particularly where, as here, Nordlicht affirmatively concealed information related to PPCO, ***339** PPLO, and Beechwood in response to Shearer's inquiries related to the Affiliate Rule. While we agree with the district court that "BakerHostetler attorneys could have communicated better internally ... and externally" and that Shearer could have been more proactive in "spot[ting] and explor[ing] a significant legal issue," *Nordlicht*, 2019 WL 4736957, at *18, we do not agree, in light of the record evidence as a whole, that Shearer's perhaps less-than-exemplary legal work in this instance preponderates heavily against a finding that Nordlicht harbored criminal intent.

We find the district court's reliance on Small's August 14, 2014 email to Shearer disclosing the PPLO- and PPCO-owned bonds also to be misplaced. At this point, the public consent solicitation process had closed and Nordlicht and Levy had successfully obtained the votes necessary to secure the passage of the amendments to the Indenture notwithstanding the PPCO- and PPLO-owned bonds. Moreover, Small's email gave no indication that Platinum also controlled the bonds held by Beechwood. The jury was entitled to infer that Small's email – sent after the transaction closed and Platinum had secured a sufficient number of votes to ensure the amendments' passage – was simply an effort to cover their tracks, rather than an act in good faith. Viewing the evidence as a whole, a reasonable jury could have concluded, we think, that Nordlicht acted with the intent to conceal the PPCO- and PPLO-owned bonds from Shearer. "[T]he mere fact that competing inferences existed does not compel a finding that the evidence preponderated heavily against the verdict." *Archer*, 977 F.3d at 195.

4. Nordlicht's Alternative Grounds for Affirming the District Court's Decision Are Unpersuasive

[39] On appeal, Nordlicht raises several additional bases for affirming the district court's decision. First, Nordlicht argues that a new trial is warranted because the government asked the jury to convict on a theory of "affiliate" that has no basis in law. Second, Nordlicht contends that the record does not support the inference that the $18.3 million bond

disclosure in the Consent Solicitation was material. Lastly, Nordlicht argues that the evidence weighed overwhelmingly against the conclusion that he had criminal intent. For all the reasons set forth above, the evidence does not preponderate against the conclusion that Nordlicht had criminal intent. We therefore turn to Nordlicht's first two arguments, which we also conclude lack merit. [7]

7 The government argues that we should not reach Nordlicht's alternative grounds for affirmance because an appellate court may not affirm "the grant of a new trial under Rule 33 on a basis other than that identified by the district court." But as the government itself acknowledges, we have long held that "we may affirm on any basis for which there is sufficient support in the record, including grounds not relied on by the [d]istrict [c]ourt." *Havlish v. 650 Fifth Ave. Co.*, 934 F.3d 174, 183 n.10 (2d Cir. 2019) (quoting *Ferran v. Town of Nassau*, 471 F.3d 363, 365 (2d Cir. 2006)). We therefore reject the government's argument.

a) The Government Did Not Improperly Argue the Affiliate Rule

[40] Nordlicht argues that letting the verdict stand would result in manifest injustice because "the government openly encouraged the jury to apply a version of the affiliate rule that was entirely unmoored from the applicable legal definition." Nordlicht Br. at 51. Nordlicht points out that the government argued and elicited testimony from Shearer and Dixon Yee, a Black Elk bondholder, that the purpose of the Indenture's Affiliate Rule was to ensure ***340** that "affiliated" bondholders who were not looking out for the best interests of the bondholders could not vote in the consent solicitation process. *Id.* Nordlicht also faults the government for urging the jury – during its closing argument – to use common sense in evaluating the evidence of control. We find Nordlicht's arguments to be unpersuasive.

As the district court noted in rejecting Nordlicht's challenges to the government's summation in connection with his Rule 29 motion, in addition to urging the jury to use their "common sense," the government "also informed jurors that they 'will have the definition of affiliate' and 'should ask for it, it is in the indenture, but it is the power to control.' " *Nordlicht*, 2019 WL 4736957, at *12; *see also* GA.568. The government further told the jury that "control" was "defined in the indenture, Government's Exhibit 9507, page seven." GA.525. As the district court explained: "There is nothing improper about the Government directing the jury to use the proper standard but also reminding the jury not to leave its common sense at the door." *Nordlicht*, 2019 WL 4736957, at *12.

Nor was the government's argument or witness testimony regarding the purpose of the Affiliate Rule and the TIA so prejudicial that it would be a manifest injustice to let the verdict stand. The government's evidence concerning the Affiliate Rule was based on the text of the Indenture, the Consent Solicitation, and the TIA. Shearer testified that the TIA seeks

> to make sure the bondholders who are voting[ ] are looking out for the best interest of the bondholders, not looking out for the best interest of Black Elk. So if Black Elk held bonds, you wouldn't count those bonds in a vote. In other words, Black Elk couldn't vote its own bonds to amend the indenture to help itself and, by the same token, entities that controlled Black Elk and held bonds, you couldn't vote those bonds either. ... [A]nybody that was under a common control with Black Elk, would be picked up by th[e Affiliate] [R]ule.

GA.432–33. Yee testified that "affiliated" or "interested" bondholders were not permitted to vote in the consent solicitation process. SA.119–20. Similarly, the government argued in summation that "the whole point" of the Affiliate Rule is that a person who is "an insider who's voting for their own separate interests and not the bondholders' interest" cannot be counted. GA.525. There was nothing improper about this line of testimony or argument. It merely conveyed the obvious fact that, under the Black Elk Indenture, affiliated bondholders who are looking out for the interests of Black Elk, instead of the larger interests of the Black Elk bondholders, are not permitted to vote on something that alters the rights of all the bondholders.

b) The Defendants' Fraudulent Disclosures and Omissions Were Material

Nordlicht also argues that the government failed to prove that the misrepresentation in the Consent Solicitation that PPVA and its affiliates held $18.3 million Black Elk bonds was material, because the evidence does not establish that a reasonable investor would find it important in making an investment decision. We disagree.

[41] Whether a given omission or misrepresentation is material "is a mixed question of law and fact that the Supreme Court has identified as especially 'well suited for jury determination.' " *United States v. Litvak*, 808 F.3d 160, 175 (2d Cir. 2015) (quoting *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 450, 96 S.Ct. 2126, 48 L.Ed.2d 757 (1976)). To fulfill the materiality ***341** requirement, the defendant must show "a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the total mix of information made available." *Basic Inc. v. Levinson*, 485 U.S. 224, 231-32, 108 S.Ct. 978, 99 L.Ed.2d 194 (1988) (internal quotation marks omitted); *see also* *Litvak*, 808 F.3d at 175 (finding that a misrepresentation is material "where there is a substantial likelihood that a reasonable investor would find the ... misrepresentation important in making an investment decision" (ellipsis in original) (internal quotation marks omitted)).

[42] Here, there was ample evidence to support the conclusion that the defendants' misrepresentation in the Consent Solicitation Statement was material. The Consent Solicitation Statement provided that the proposed amendments would pass only if a majority of the outstanding bonds, excluding any bonds affiliated with Black Elk, voted in favor of the amendments. Yet the defendants and their co-conspirators disclosed only the $18.3 million bonds owned by PPVA and otherwise indicated that "neither we, nor any person directly or indirectly controlled by or under direct or indirect common control with us, nor, to our knowledge, any person directly or indirectly controlling us, held any Notes." GA.819. By misrepresenting the number of bonds held by affiliates under common control with Black Elk, the defendants misled the bondholders into thinking that the outcome of the public consent solicitation process would be a product of a legitimate vote when, in fact, it was predetermined based on the votes of the PPCO-, PPLO-, and Beechwood-held bonds, over which Platinum exercised control.

The number of affiliated bonds was "material to [the] bondholders because it altered the calculus of consent." *Nordlicht*, 2019 WL 4736957, at *12. As the district court explained in rejecting Nordlicht's argument in connection with his Rule 29 motion:

> The bondholders knew the total number of bonds involved in the vote – $150 million. If no bonds were held by Platinum affiliates, then the consent solicitation would only pass if the bondholders representing over $75 million in bonds voted in favor of it.
>
> But the more bonds held by Platinum affiliates, the lower the threshold for the consent solicitation to pass since fewer bondholders have to vote in favor of the amendment for it to pass. If the bondholders who opposed the amendment but thought it would fail had known that PPCO, PPLO, BAM, or BBIL – in addition to PPVA – were Platinum affiliates, they would have inferred that the amendment would be more likely to pass. The probability that the amendment would pass mattered to Black Elk bondholders because of the stakes of the amendment: the bondholders gave up their rights to get paid before the preferred equity holders from the Renaissance [S]ale. If the bondholders who opposed the amendment knew the amendment was more likely to pass, they would then be more likely to tender their bonds in the consent solicitation if they decided it would not be worth investing in Black Elk in light of the amended indenture.

Id.

This conclusion is buttressed by testimony from victim bondholders who explained at trial that accurate information regarding the number of bonds controlled by Platinum would have been important to them in deciding whether to tender their bonds. Yee, for example, testified that he would have found that information to be important. Pulvino, another Black Elk ***342** bondholder, similarly testified that the number of affiliated bondholders "had a lot of significance ... because [he] w[as] trying to figure out the probability that the consents would pass" and that probability increased based on the number of affiliated bonds that were excluded from the vote. GA.487-88. Pulvino reasoned that if only $18.3 million bonds were affiliates "that meant there were 132 million [bonds] left outstanding, 150 million minus the 18," and therefore, in order to get a majority vote, Black Elk would

need "66 million bonds to vote in favor" of the amendments. *Id.* Based on this calculus, Pulvino concluded that "that was too many bonds to convince to remove the restricted covenants on the bonds" and he therefore thought that the likelihood of the amendments' passage was slim. GA.488-89. If, instead, he had known that a much larger number of bonds were affiliates and would therefore be excluded from the vote, the probability of the amendments' passage would have increased and he "would have thought more about tendering [his] notes" because he "wouldn't have wanted to hold th[o]se notes without the protective covenants that were in place." GA.501-02.

The trial evidence as to materiality leads us to conclude that the evidence does not preponderate heavily against the verdict.

CONCLUSION

We have considered the parties' remaining arguments on appeal and conclude that they are without merit. For the reasons explained above, we VACATE the district court's order and judgment and REMAND for further proceedings consistent with this opinion.

All Citations

17 F.4th 298

End of Document

EXHIBIT 2

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	:	16-cr-00640 (BMC)
- against -	:	
DANIEL SMALL	:	
Defendant.	:	

DANIEL SMALL

COUNT ONE: Conspiracy to Commit Securities Fraud

On the charge of conspiracy to commit securities fraud in connection with the Black Elk Consent Solicitation, how do you find the defendant DANIEL SMALL?

GUILTY ✓ **NOT GUILTY** ____

COUNT TWO: Conspiracy to Commit Wire Fraud

On the charge of conspiracy to commit wire fraud in connection with the Black Elk Consent Solicitation, how do you find the defendant DANIEL SMALL?

GUILTY ____ **NOT GUILTY** ✓

COUNT THREE: Securities Fraud

On the charge of securities fraud in connection with the Black Elk Consent Solicitation, how do you find the defendant DANIEL SMALL?

GUILTY ✓ **NOT GUILTY** ____

DATED: Brooklyn, NY
August 12, 2022

Signature of Foreperson

EXHIBIT 3

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
CASE NO. 18-CV-6658(JSR)
CASE NO. 18-CV-10936(JSR)

IN RE: PLATINUM-BEECHWOOD LITIGATION

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,

vs.

PLATINUM MANAGEMENT (NY) LLC, et al.,

Defendants.

(Caption continued)

NON-CONFIDENTIAL PORTION

Pages 411-421 have been designated Privileged and Confidential and have been Bound Separately

TRANSCRIPT OF VIDEOTAPED DEPOSITION OF DAVID BODNER

TRANSCRIPT of the stenographic notes of the proceedings in the above-entitled matter, as taken by and before TAB PREWETT, a Registered Professional Reporter, a Certified LiveNote Reporter, Certified Shorthand Reporter and Notary Public, held at the offices of US Legal Support Company, 90 Broad Street, Suite 603, New York, New York, on Tuesday, November 12, 2019, commencing at 10:37 a.m.

David Bodner

Q -- a little bit about Mr. Nordlicht, Mark Nordlicht. Do you remember meeting Mark Nordlicht?

A If I met him, yes.

Q No. When did you meet him?

A When did I meet him? Well, Mark Nordlicht is my cousin.

Q Okay.

A So I might have met him by -- I might have met him over the years by different events, you know.

Q Tell me the family relationship as to how he's your cousin.

A His -- his mother and my mother were first cousins.

Q So fair to say you've known him for much of your life?

A Not known him known him. He comes from a different culture.

Q Okay.

A I might have met him. You asked if I met him -- when did I meet him.

Q Yes.

A I didn't really know him until we

David Bodner

You were the initial investors into Platinum Management; is that correct?

A Initial investors, yes.

Q Okay.

A When you say "Platinum," do you mean PPVA or PPCO?

Q Well, let's start with Platinum Management. Which one came first? You tell me.

A To my recollection, I think PPVA came first.

Q Okay. And that was a fund that you three initially put in seed money to -- to begin; is that right?

A Myself and Murray I know put in seed money. I'm not sure if Nordlicht put in seed money.

Q Okay. Do you remember how much?

A No.

Q Okay. Do you remember when this was?

A When it started -- was it two thousand and -- I don't know.

Q Okay.

David Bodner

A No.

Q How about any quarterly meeting? Did they go into any quarterly meetings?

A I don't remember any quarterly meetings.

Q How about -- do you know if they met with anyone else at Beechwood?

A Not to my knowledge.

MR. SANTORO: I think I am at my allotted time. So that's it. I am done.

THE WITNESS: Thank you very much.

MR. HERTZBERG: Thank you.

THE VIDEOGRAPHER: This completes the video deposition of David Bodner on November 12, 2019, at 8:06 p.m. We are off the record.

(There was a discussion off the record.)

(The deposition adjourned at 8:06 p.m.)

J U R A T

I DO HEREBY CERTIFY that I have read the foregoing transcript of my deposition testimony.

SWORN TO AND SUBSCRIBED
BEFORE ME THIS
DAY OF 2019

_ _ _ _ _ _ _ _ _ _ _

EXHIBIT 4

SECOND AMENDED AND RESTATED OPERATING AGREEMENT OF PLATINUM MANAGEMENT (NY) LLC

Table of Contents

SECOND AMENDED AND RESTATED OPERATING AGREEMENT OF PLATINUM MANAGEMENT (NY) LLC

This Second Amended and Restated Operating Agreement (the "**Agreement**") of Platinum Management (NY) LLC (the "**Company**"), effective as of January 1, 2011, is entered into by and among URI LANDESMAN (the "**Manager**"), and MARK NORDLICHT and MARK NORDLICHT GRANTOR TRUST (each, a "**Passive Member**" and, collectively with Uri Landesman, in his individual capacity, the "**Members**").

WHEREAS, the Company was formed on August 22, 2001 as a limited liability company under the Delaware Limited Liability Company Act, 6 Del. C. § 18-101 et seq. (the "**Act**");

WHEREAS, the Company was governed by the terms of that certain Operating Agreement dated as of January 1, 2006, which was amended and restated as of November 1, 2008 (as amended, the "**Amended Agreement**");

WHEREAS, Ari Glass and A. Glass Management, LLC have withdrawn as Members and/or Managers of the Company, as applicable, and Uri Landesman has been admitted as a Member of the Company effective as of April 13, 2010 and has replaced Mark Nordlicht as the sole Manager of the Company effective as of January 1, 2011;

WHEREAS, the Members desire to further amend and restate the Amended Agreement to reflect such withdrawals, admission and change in Manager; and

WHEREAS, this Agreement completely restates, amends and supersedes the Amended Agreement.

NOW, THEREFORE, in consideration of the mutual covenants hereinafter contained and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Members hereby agree as follows

ARTICLE I
Definitions

The capitalized terms used in this Agreement shall have the meanings specified in this Article I.

"**1/1/10 Company Value**" has the meaning set forth in Section 7.5.2.

"**Act**" has the meaning set forth in the preamble.

"**Adjusted Capital Account Deficit**" has the meaning set forth in Section 6.2.1.

"**Affiliate**" means, with respect to any specified Person, any other Person that directly or indirectly, through one or more intermediaries, has control of, is controlled by, or is under common control with, such specified Person. For these purposes, "control" means the

possession, directly or indirectly, of the power to direct or cause the direction of the management of any Person, whether through the ownership of voting securities, by contract or otherwise.

"**Agreement**" has the meaning set forth in the preamble.

"**Allocable Incentive Fee Share**" means, in respect of any Former Member to whom a Withdrawal Amount has been paid, an amount equal to what would have been the amount of such Former Member's share of the actual incentive fees received by the Company in respect of the year of the relevant Retirement Date or Removal Date, as the case may be, had such Former Member been a Member for the entire year; provided, however, that the Allocable Incentive Fee Share in respect of Uri Landesman shall be determined without giving effect to Section 8.5 hereof (i.e., with all Interests of such Members being deemed vested).

"**Allocation Formula**" has the meaning set forth in Section 6.1.1.

"**Beneficiary**" means each natural person beneficiary of the Trust and each natural person who is a managing member or general partner of a beneficiary of the Trust that is a limited liability company or limited partnership.

"**Beneficiary Percentage Interest**" means, with respect to a Beneficiary, such Beneficiary's then-current percentage entitlement to Distributions received by the Trust from the Company.

"**Authorized Representative**" has the meaning set forth in Section 10.1.

"**Business Day**" means a day other than a Saturday or Sunday on which banks are open for business in New York City.

"**Buy-Out Amount**" has the meaning set forth in Section 8.6.3.

"Capital Account" has the meaning set forth in Section 5.2.1.

"Capital Contribution" means any contribution to the Company of property or services made by or on behalf of a Member.

"**Cause**" means, with respect to Uri Landesman, his:

(i) conviction of a felony or a plea of guilty or nolo contendere to a charge of commission of a felony, in each case, that involves theft or embezzlement by him;

(ii) willful malfeasance in the performance of his duties to the Company; or

(iii) commission of any act or acts that results in a restriction on or the suspension of his activities by a governmental or regulatory authority or that results in a governmental or regulatory authority imposing other sanctions on him that involves a fine of at least $50,000, unless any other Member commits the same act.

"**Certificate of Formation**" means the Company's Certificate of Formation as filed with the Delaware Secretary of State, as it may be amended, supplemented or restated from time to time.

"**Code**" means the Internal Revenue Code of 1986, as amended from time to time, and any corresponding provisions of any succeeding law.

"**Company**" has the meaning set forth in the preamble.

"**Company Percentage**" means, at any time and with respect to any Member, including any Retired Member, such Member's interest in the Net Profit and Net Loss of the Company, as listed on the books and records of the Company at such time. The aggregate amount of all Company Percentages (including both Voting Company Percentages and Non-Voting Company Percentages) shall always be equal (as nearly as possible) to 100%.

"**Confidential Information**" has the meaning set forth in Section 10.1.

"**Deferred Fees**" means any performance-based and/or asset-based fees earned by the Company the receipt of which has been deferred by the Company to a period beyond the year in which such fees were earned, as adjusted for any appreciation or depreciation at the conclusion of the applicable deferral period on account of any hypothetical investment of the deferred fees.

"**Family Interest**" has the meaning set forth in Section 9.1.

"**Family Member**" has the meaning set forth in Section 9.1.

"**Fiscal Period**" means a period commencing on the day immediately following the last day of the immediately preceding Fiscal Period and ending on the earliest of (a) December 31, (b) the date immediately preceding the date on which any Member's Company Percentage is adjusted pursuant to this Agreement, (c) the date immediately preceding the effective date of any distribution to any Member, (d) the date on which the Company is liquidated and wound-up, and (e) such other date as the Managers may determine.

"**Fiscal Quarter**" of the Company means the calendar quarter.

"**Fiscal Year**" means the period ending December 31 of each calendar year; provided, however, that the Company's final Fiscal Year shall end on the date on which the Company is liquidated and wound-up.

"Former Member" means any Retired Member and Uri Landesman if removed for Cause pursuant to Section 8.1.

"**Initial Members**" means, collectively, Mark Nordlicht, Uri Landesman and the Trust.

"Interest" means the rights in the Company afforded under this Agreement and the Act, whether of an economic or voting character or a combination thereof.

"Losses" has the meaning set forth in Section 11.2.

"**Manager**" means, at any time, any Person listed on the books and records of the Company as a manager at such time.

"**Member**" means a Passive Member or a Manager where no distinction is required and shall include a Retired Member unless otherwise provided or the context otherwise requires.

"**Member Deferred Fee Election**" means, with respect to each Member for any Fiscal Year, the deferral elections, if any, such Member has made pursuant to the Company's Deferred Income Allocation Plan (or similar plan), as the same may be amended from time to time, with respect to its prospective allocable share of Deferred Fees. For the avoidance of doubt, (a) a Member Deferred Fee Election shall include any election made by a Member (at the same time as Member Deferred Fee Elections are made by other Members) not to defer payment of its allocable share of any Deferred Fees, (b) 40% of any Deferred Fees earned in respect of any Fiscal Year ending prior to January 1, 2010 shall be deemed to be the Member Deferred Fee Election of Mark Nordlicht or, upon his death, his heirs, and (c) 60% of any Deferred Fees earned in respect of any Fiscal Year ending prior to January 1, 2010 shall be deemed to be the Member Deferred Fee Election of the Trust, solely for the benefit of Mark Nordlicht, or his transferees and/or successors, as beneficiary.

"**Member Specific Deferred Fee Income**" means, with respect to each Member and for any Fiscal Period, that portion of the income recognized by the Company, if any, that is attributable to Deferred Fees and is covered by a Member Deferred Fee Election made by such Member.

"Net Distributable Cash" means all cash receipts of the Company, less the portion thereof used to pay or establish reserves for all Company expenses and contingencies, all as reasonably determined by the Managers in accordance with industry standard practices and to the extent applicable, consistent with prior Fiscal Periods. Net Distributable Cash shall not be reduced by depreciation, amortization, cost recovery deductions or similar allowances, but shall be increased by any reductions in reserves previously established.

"**Net Profit**" and "**Net Loss**" mean, with respect to each Fiscal Period, an amount equal to the Company's Taxable Income or Tax Loss, as the case may be, for such Fiscal Period, together with the following adjustments:

(a) any income of the Company that is exempt from federal income tax and not otherwise taken into account in computing Net Profit or Net Loss pursuant to this definition shall be added to such Taxable Income or Tax Loss (but in no event shall any amount be included on account of Deferred Fees until such Deferred Fees are recognized by the Company as income for federal income tax purposes);

(b) any expenditures of the Company described in Code Section 705(a)(2)(B) or treated as Code Section 705(a)(2)(B) expenditures pursuant to Regulations §1.704-1(b)(2)(iv)(i) and not otherwise taken into account in computing Net Profit or Net Loss pursuant to this definition shall be subtracted from such Taxable Income or Tax Loss;

(c) upon a distribution of property (other than cash) to a Member, Net Profit or Net Loss for the Fiscal Period in which the distribution occurs shall be determined as if such property

were sold for its then fair market value, and the income, gain or loss from such deemed sale shall be allocated as provided in Section 6.1; and

(d) where the book value of an asset is different than its tax basis, Net Profit or Net Loss will be determined based on the asset's book value. Similarly, depreciation or amortization for this purpose shall be based on the asset's book value.

"**Net Residual Income or Loss**" means, for any fiscal period, the Company's Net Profit or Net Loss excluding all Member Specific Deferred Fee Income.

"**Non-Voting Company Percentage**" means the Company Percentage attributable to a Retirement Interest.

"**Paid Incentive Fee Share**" means, in respect of any Former Member to whom a Withdrawal Amount has been paid, an amount equal to that portion of the Withdrawal Amount paid to such Former Member that is attributable to any accrued incentive fees.

"**Passive Member**" means, at any time, any Person listed on the books and records of the Company as a passive member at such time.

"**Permanent Disability**" means, in respect of any Manager or Member, physical or mental illness or disease or impairment which renders such Manager or Member unable to perform the essential functions of his job with the Company for 180 consecutive days.

"**Person**" means any individual, partnership, corporation, limited liability company, unincorporated organization or association, trust or entity.

"**Regulations**" means the Treasury Regulations promulgated under the Code.

"**Removal Date**" has the meaning set forth in Section 8.1.

"**Retired Member**" means any retired, removed or Permanently Disabled Member, or the estate of any deceased Member, whose Interest has not been purchased by the Company pursuant to Section 8.6.

"**Retirement Date**" has the meaning set forth in Section 8.2.

"**Retirement Interest**" means the Interest held by a Retired Member, which Interest shall have no right to vote on any matter.

"**Tax Matters Partner**" has the meaning set forth in Section 12.3.

"**Taxable Income**" or "**Tax Loss**" means, with respect to each Fiscal Period, an amount equal to the Company's taxable income or loss for such year or period determined in accordance with Code Section 703(a) (for this purpose, all items of income, gain, loss or deduction required to be separately stated pursuant to Code Section 703(a)(1) shall be included in such taxable income or loss).

"**Transfer**" means any sale, transfer, gift, assignment or pledge of, or grant of a security interest in an Interest, by operation of law or otherwise, excluding, however any grant of such a security interest in favor of the Company.

"**Transferring Member**" means a Member that makes a Transfer of all or any portion of its Interest to a Family Member pursuant to Section 9.1.

"Trust" means the Mark Nordlicht Grantor Trust.

"Trust Agreement" means the trust agreement of the Trust dated November 1, 2008.

"**Trustee**" means Mark Nordlicht solely in his capacity as trustee of the Trust and any successor trustee of the Trust.

"Vested Interest" has the meaning set forth in Section 8.5.

"**Voting Company Percentages**" means the aggregate of the Company Percentages of all Members other than Retired Members.

"**Withdrawal Amount**" means, in respect of any retired, removed, disabled or deceased Member (or, with respect to the Trust, the death or Permanent Disability of a Beneficiary), the book value of such Member's Capital Account (or, in the case of the death or Permanent Disability of a Beneficiary, a portion of the Trust's Capital Account equal to such Beneficiary's Beneficiary Percentage Interest) as of the Retirement Date or the Removal Date, as the case may be, increased by the aggregate of such Member's portion of management fee and incentive fee income which has accrued to such date but not yet been allocated to such Member, if any (or, in the case of the death or Permanent Disability of a Beneficiary, a portion of the Trust's portion of such management and incentive fee income equal to such Beneficiary's Beneficiary Percentage Interest), and, solely with respect to the removal of Uri Landesman for Cause pursuant to Section 8.1, reduced by any amounts reasonably reserved by the Company to defend any lawsuits reasonably relating to any acts or omissions of Uri Landesman that gave rise to such Cause. Any unused amounts so reserved shall be paid out to Uri Landesman upon the Company's reasonable determination that such reserve is no longer needed.

ARTICLE II
General Provisions

2.1 Formation and Foreign Qualification.

2.1.1 The Members (i) unanimously ratify, confirm and approve the continuance of a limited liability company pursuant to the provisions of the Act and this Agreement and (ii) acknowledge and agree that the Certificate of Formation for the Company, dated August 22, 2001, has heretofore been filed with the Delaware Secretary of State and that, effective as of the date hereof, this Agreement constitutes the Operating Agreement of the Company.

2.1.2 The Managers shall cause the Company to comply with any requirements necessary to qualify the Company as a foreign limited liability company in any

jurisdiction in which the Company shall be conducting business so as to require such compliance.

2.2 Name.

The name of the Company is "Platinum Management (NY) LLC." The business of the Company may be conducted under any other name deemed necessary or desirable by the Managers.

2.3 Purpose.

The Company is formed for the purpose of, and the nature of the business to be conducted and promoted by the Company is, engaging in (i) any lawful act or activity for which a limited liability company may be formed under the Act and (ii) any and all activities necessary or incidental to the foregoing, including, without limitation, investment management activities.

2.4 Principal Business Office.

The location of the principal office of the Company shall be 152 West 57th Street, 4th Floor, New York, New York or such other location as the Managers may from time to time designate.

2.5 Registered Office and Registered Agent.

The address of the registered office of the Company in the State of Delaware is c/o The Corporation Trust Company, Corporation Trust Center, 1209 Orange Street, Wilmington, Delaware 19801. The Corporation Trust Company shall act as the Company's registered agent for the purpose of accepting service of process within the State of Delaware.

2.6 Duration.

The term of the Company commenced on the date that the Certificate of Formation was filed with the Delaware Secretary of State and shall continue in full force and effect until terminated in accordance with the provisions of this Agreement.

ARTICLE III
Members

3.1 Members.

The names, addresses, status as Manager, Passive Member or Retired Member, Capital Contributions and Company Percentage of the Members shall be maintained by the Managers with the records of the Company.

3.2 Passive Members.

No Passive Member shall have the right, authority or power to act for or on behalf of the Company or to take any action or do any thing that would be binding on the Company, or to

make any expenditures or incur any indebtedness in the name or on behalf of the Company solely by reason of being a Passive Member. The Passive Members shall have only such voting rights and other rights of consent or approval as expressly set forth in this Agreement or in the Act.

3.3 Liability of Members.

All debts, obligations and liabilities of the Company, whether arising in contract, tort or otherwise, shall be solely the debts, obligations and liabilities of the Company, and no Member shall be obligated personally for any such debt, obligation or liability solely by reason of being a Member, except to the extent provided by the Act.

3.4 Additional Members.

3.4.1 The admission of a new Member to the Company requires the consent of 100% of the Voting Company Percentages. Each new Member, as a condition precedent to admission to the Company as a Member, shall execute and acknowledge such instruments, in form and substance reasonable satisfactory to the Managers, as the Managers may deem necessary or desirable to effectuate such admission and to confirm that the Person to be admitted as a Member has agreed to be bound by the terms of this Agreement.

3.4.2 Unless otherwise consented to by 100% of the Company Percentages, the admission of a new Member to the Company shall reduce the Company Percentages of all Members, including Retired Members, on a pro rata basis.

3.5 Meetings; Actions by Members.

3.5.1 Meetings of Members (a) may be called by the Managers at any time and for any purpose(s), and (b) shall be called by the Managers upon the direction of 50% or more of the Voting Company Percentages. Notice of any meeting shall be sent to all Members (other than Retired Members) at least three days prior to such meeting and shall specify the time, date, place and purpose(s) of such meeting.

3.5.2 Meetings of Members may take place in person or by telephone. Any Member not present at a meeting in person by telephone or by proxy will be promptly informed by the Managers of any action(s) taken at such meeting.

3.5.3 Any action requiring the consent of 75% or 100%, as the case may be, of the Voting Company Percentages, may be taken either at a meeting where the holders of 75% or 100%, as applicable, of the Voting Company Percentages are present, or by the written consent of the holders of 75% or 100%, as applicable, of the Voting Company Percentages.

ARTICLE IV
Management

4.1 Managers.

4.1.1 Except to the extent expressly limited by this Agreement or by the Act, the business and affairs of the Company shall be managed by the Managers who shall have the exclusive right and power to manage the business of the Company. The Managers shall be authorized to do on behalf of the Company all things that are necessary or appropriate to carry out the Company's purposes and shall be responsible for policy setting, approving the overall direction of the Company and making all decisions affecting the business and affairs of the Company. Effective as of January 1, 2011, Mark Nordlicht voluntarily resigned as a Manager and Uri Landesman became the Company's sole Manager.

4.1.2 The Managers each shall have an equal say in all matters relating to the management of the Company and no Manager shall have the authority to bind the Company unless authorized by a vote of all Managers with each Manager having one vote; provided, however, that in the event of a deadlock with respect to any vote of the Managers, the right to break the tie vote shall alternate between the Managers with the first Manager to break a tie vote being decided by a coin toss. Except to the extent expressly limited by this Agreement, all instruments, contracts, agreements and documents providing for the acquisition, mortgage or disposition of the property of the Company shall be valid and binding on the Company if properly authorized by a vote of the Managers and executed by any one of the Managers.

4.1.3 Each of the Managers shall devote such time, resources and attention in order to carry out his duties hereunder as he shall determine to be necessary or appropriate.

4.1.4 The Managers shall owe to the Company and the Members duties of care and loyalty equivalent to those owed by the officer of a Delaware corporation to such corporation and its stockholders.

4.1.5 The Managers may appoint officers of the Company and may delegate any or all of their duties to one or more such officers and may revoke any such delegation at any time. Mark Nordlicht is hereby appointed as the Company's Chief Investment Officer effective as of January 1, 2011, and he shall have such responsibilities as are customarily assigned to such office.

4.2 Limitations on the Authority of the Managers.

4.2.1 Notwithstanding anything to the contrary herein, the following actions shall require the consent of not less than 75% of the Voting Company Percentages:

(a) the removal or replacement of a Manager. Upon removal as Manager of a Manager who is also a Member, such Manager shall become a Passive Member;

(b) the sale or merger of the Company;

(c) the dissolution of the Company;

(d) a voluntary bankruptcy filing with respect to the Company; and

(e) issuing preferred Interests in the Company.

4.2.2 Notwithstanding anything to the contrary herein, the following actions shall require the consent of not less than 100% of the Voting Company Percentages:

(a) admission of a new Member;

(b) a non-pro-rata dilution of Members' Interests in connection with the admission of a Member;

(c) transfer of all or any portion of any Member's Interest to any Person other than a Family Member;

(d) incurrence of indebtedness for which the Company is liable in excess of 1% of the 1/1/10 Company Value;

(e) guaranteeing the debt of a third party;

(f) loaning money in excess of 1% of the 1/1/10 Company Value;

(g) amending this Agreement or the Company's Certificate of Formation; and

(h) any transaction between the Company and any Affiliate of the Company, any Manager or any Member that is not expressly contemplated by this Agreement.

4.3 Removal and Appointment of Managers.

4.3.1 Each Manager shall serve as Manager for so long as he is a Member or is a beneficiary of any trust that is a Member, unless removed as Manager as provided herein. With the exception of Uri Landesman, who may be removed as a Manager and as a Member, as applicable, pursuant to Section 8.1 below, a Manager may be removed as a Manager, but not as a Member, only with the consent of 75% of the Voting Company Percentages. Upon such a removal, the removed Manager shall become a Passive Member.

4.3.2 If at any time, a Manager retires from the Company, is removed as Manager, dies or suffers a Permanent Disability and there is no other Manager, a new Manager shall promptly be selected by a vote of 75% of the Voting Company Percentages. Notwithstanding the foregoing, in the event that Mark Nordlicht dies or suffers a Permanent Disability while he is a Manager, the Members agree to appoint and

select such individual, if any, who has been previously designated by Mark Nordlicht in writing to all of the Members to serve as a Manager in replacement of Mark Nordlicht; provided that such individual is reasonably acceptable to all of the other Managers. In the event that no such individual has been so designated or such individual is not reasonably acceptable to all of the other Managers, a replacement Manager shall promptly be selected by a vote of 75% of the Voting Company Percentages.

4.3.3 The Managers, without the consent of the Passive Members, may appoint any Member or non-Member to serve as an additional Manager.

ARTICLE V
Capital Contributions; Capital Accounts

5.1 Capital Contributions.

5.1.1 Prior to or concurrently with the execution of this Agreement, each Member has made, or is making, a Capital Contribution as set forth on Schedule 1 attached hereto. Any additional Capital Contributions by a Member from time to time shall be reflected on Schedule 1.

5.1.2 To the extent approved by the Managers from time to time, the Members may be permitted to make additional Capital Contributions if and to the extent they so desire. If the Managers determine that additional Capital Contributions are necessary or appropriate for the conduct of the Company's business, including, without limitation, the expansion or diversification of such business, the Members (other than Retired Members) shall be obligated to contribute such additional Capital Contributions on a pro rata basis; provided, however, that no Member shall be required to make Capital Contributions in excess of an aggregate of $25,000 during any rolling twelve-month period.

5.1.3 No Member shall be paid interest on any Capital Contribution.

5.2 Capital Accounts.

5.2.1 An individual capital account (a "**Capital Account**") shall be established on the books of the Company and maintained for each Member in compliance with this Agreement and in accordance with Regulation § 1.704-1(b)(2)(iv).

5.2.2 Each Member's Capital Account shall be increased by:

(a) The amount of such Member's Capital Contributions to the Company;

(b) The amount of Net Profit allocated to such Member pursuant to Article VI hereof; and

(c) Any other increases required by Regulation § 1.704-1(b)(2)(iv).

5.2.3 Each Member's Capital Account shall be decreased by:

(a) The amount of Net Loss allocated to such Member pursuant to Article VI hereof;

(b) All amounts paid or distributed to the Member by the Company (other than any distribution in respect of repayment of principal or interest on any loan made by such Member to the Company pursuant to Section 5.3); and

(c) Any other decreases required by Regulation § 1.704-1(b)(2)(iv).

5.2.4 The Members' Capital Accounts may (but are not required to) be adjusted in accordance with, and upon the occurrence of any event described in, Regulation § 1.704-1(b)(2)(iv)(f) and at such other times as may be determined by the Managers to reflect a revaluation of the Company's assets and liabilities and the Company's books.

5.2.5 All provisions of this Agreement relating to the maintenance of Capital Accounts are intended to comply with Section 704(b) of the Code and the Regulations promulgated thereunder and shall be interpreted in a manner consistent with such Regulations. The Company shall make any appropriate modifications in the event unanticipated events might otherwise cause this Agreement not to comply with Regulations under Section 704(b) of the Code.

5.3 Member Loans.

Subject to Section 4.2.2 hereof, any capital that the Managers determine is required in connection with the operation of the Company may, at the election of the Managers, in whole or in part, be borrowed by the Company from third parties and/or one or more Members or any Affiliate of a Member; provided, however, that (i) any such loan(s) made to the Company by a Member and/or an Affiliate of a Member shall be on such terms as are agreed by the Managers and the Members and/or Affiliates making such loan(s); (ii) any such loan(s) must be evidenced in writing by a promissory note of the Company; and (iii) the Managers shall offer all Members the same opportunity to make any such loan(s) to the Company on a pro rata basis based on their respective Company Percentages. No Member shall be required to loan money to the Company.

5.4 Drag Along Right.

If Members holding at least 75% of the Voting Company Percentages decide to sell all or substantially all of the Interests of the Company to a bona fide third party buyer in an arm's length transaction, each Member (including a Retired Member) agrees that he will sell a pro rata portion of his Interest in the Company to such buyer at the same time and on the same terms as the other Members; provided, that such Member receives his pro rata share of the entire purchase price.

ARTICLE VI
Allocations

6.1 Allocations of Net Profit and Net Loss.

6.1.1 Except as otherwise provided herein, Net Profit and Net Loss for each Fiscal Period, shall be allocated among the Members in the following manner (the "**Allocation Formula**"):

(a) each Member's Member Specific Deferred Fee Income, if any, shall be allocated to such Member; and

(b) Net Residual Income or Loss shall be allocated among the Members in accordance with their respective Company Percentages.

6.2 Regulatory Allocations.

6.2.1 Notwithstanding any other provision of this Agreement, Net Loss (or items of deduction as computed for book purposes) shall not be allocated to a Member to the extent that the Member has or would have, as a result of such allocation, an Adjusted Capital Account Deficit. As used herein, a Member's "**Adjusted Capital Account Deficit**" means such Member's Capital Account has a deficit, after the Capital Account has been: increased by any amounts which such Member is obligated to restore pursuant to the terms of this Agreement or is deemed to be obligated to restore pursuant to the penultimate sentences of Regulations § 1.704-2(g)(1) and § 1.704-2(i)(5); and reduced by any adjustments, allocations or distributions described in Regulations § 1.704-1(b)(2)(ii)(d)(4), (5) or (6). Any Net Loss (or items of deduction as computed for book purposes) which otherwise would be allocated to a Member, but which cannot be allocated to such Member because of the application of the immediately preceding sentence, shall instead be allocated to the other Members, in accordance with their respective Company Percentages, subject to the limitation imposed by the immediately preceding sentence.

6.2.2 In order to comply with the "qualified income offset" requirement of the Regulations under Code Section 704(b), and notwithstanding any other provision of this Agreement to the contrary, if a Member for any reason (whether or not expected) has an Adjusted Capital Account Deficit, items of Net Profit (consisting of a pro-rata portion of the items thereof) shall be allocated to such Member in an amount and manner sufficient to eliminate as quickly as possible the Adjusted Capital Account Deficit.

6.2.3 If as a result of Section 6.2.1 or 6.2.2, any Member has been allocated at any time cumulative allocations of Net Profit or Net Loss in excess of the allocations such Member would have received but for such Sections, the Managers shall make offsetting allocations of the Net Profit and Net Loss to the Members to the extent allowable under the Code and the Regulations so that after giving effect to such offsetting allocations (or expected future allocations) each Member has been finally allocated amounts of Net Profit and Net Loss that such Member would have been allocated without Sections 6.2.1 and 6.2.2.

6.2.4 If the respective Company Percentages of the existing Members in the Company change or if an Interest is transferred to any other Person, all income, gains, losses, deductions, tax credits and other tax incidents resulting from the operations of the Company for the Fiscal Year of transfer shall be allocated, as between transferor and transferee, by taking into account their varying Company Percentages and by utilizing an interim closing of the Company's books in accordance with Section 706 of the Code and the Regulations thereunder. A transferee of an Interest shall succeed to the Capital Account of the transferor Member to the extent it relates to the transferred Interest.

6.3 Tax Allocations.

6.3.1 Unless otherwise required by Section 704(c) of the Code and the Regulations thereunder, items of income, gain, loss and deduction of the Company for U.S. federal income tax purposes shall be allocated among the Company in the same manner as the related item was allocated under Section 6.1 hereof. The required allocations of Section 704(c) of the Code or similar allocations under the Regulations are hereby incorporated.

6.3.2 Allocations pursuant to this Section 6.3 are made solely for income tax purposes and shall not affect, or in any way be taken into account in computing, any Member's Capital Account or share of Net Profit or Net Loss or distributions pursuant to any provision of this Agreement.

ARTICLE VII
Distributions

7.1 Withdrawals and Distributions in General.

No Member shall have any right to withdraw or demand distribution of any amount in its Capital Account except as expressly provided in this Article VII and Article VIII.

7.2 Member Draws.

In respect of any Fiscal Year, the Company, in the sole discretion of the Managers, may pay each Member who also provides services to the Company or any of its Affiliates an advance against its allocable share of the Net Profit for such Fiscal Year to the extent of available cash (the "**Draw**"). Each Member's annual Draw shall be payable in equal monthly installments on the first Business Day of each month. The Managers shall determine each Member's Draw in respect of each Fiscal Year; provided, that Draws shall be made on a pro rata basis among eligible Members based on their respective Company Percentages, unless a Member consents in writing to receive less than his pro rata share. Any draw payments made to the Trust pursuant to this Section 7.2 shall be solely for the benefit of Mark Nordlicht, or his transferees and/or successors, as beneficiary. All payments made pursuant to this Section 7.2 shall be treated as "guaranteed payments" within the meaning of Section 707(c) of the Code.

7.3 Tax Distributions.

In the sole discretion of the Managers, no less frequently than quarterly and consistent with the Members' obligations to make quarterly estimated income tax payments, the Company may distribute to each Member a minimum cash distribution in an amount reasonably determined by the Managers to be necessary for such Member to pay any applicable taxes or estimated taxes attributable to allocations of Net Profit to such Member for the related Fiscal Period. The amounts to be distributed pursuant to this Section 7.3 shall be calculated by the Managers in their reasonable discretion taking into account the maximum combined United States federal, State of New York and City of New York tax rates applicable to individuals (or, if any Member is subject to higher combined United States federal, state and local tax rates and such Member so requests, such higher combined tax rates) on ordinary income and net short-term and long-term capital gain (as applicable), and otherwise based on such reasonable assumptions as the Managers determine in good faith to be appropriate. The highest distribution percentage applicable to any Member shall be applied equally to each Member regardless of its actual tax liability with respect to income of the Company.

7.4 Ordinary Distributions.

Subject to Section 7.5, as soon as practicable after the Net Profit for each Fiscal Year has been determined, the Company shall make distributions to the Members in an aggregate amount equal to the Company's Net Distributable Cash in respect of such Fiscal Year in excess of distributions made pursuant to Sections 7.2 and 7.3 during such Fiscal Year. In the sole discretion of the Managers, distributions may also be made during any Fiscal Year from the Company's Net Distributable Cash in respect of such Fiscal Year in excess of distributions made pursuant to Sections 7.2 and 7.3 during such Fiscal Year, at such times and in such amounts as may be determined by the Managers from time to time. All amounts distributed to the Members pursuant to this Section 7.4 shall be made in the same proportion as the related Net Profit was allocated under Section 6.1. Distributions with respect to realized Member Specific Deferred Fees shall be made to the applicable Members under Sections 7.3 and 7.4.

7.5 Distributions Upon Sale, Merger or Dissolution.

7.5.1 Notwithstanding anything else to the contrary in this Agreement, in the event of the sale, merger or dissolution of the Company, the Company shall make distributions in the following order and priority:

(a) first, to the payment and discharge of all of the claims of all creditors of the Company that are not Members or Affiliates of any Member;

(b) second, to the setting up of any reserves that the Managers deem reasonably necessary for any contingent or unforeseen liabilities or obligations of the Company; provided that any reserves not necessary to satisfy such liabilities or obligations are distributed in accordance with this Section 7.5.1 as soon as practicable;

(c) third, to the payment and discharge of all of the claims of all creditors of the Company that are Members or Affiliates of any Member;

(d) fourth, pro rata to (i) Mark Nordlicht or, upon his death, his heirs until Mark Nordlicht or his heirs, as applicable, have received an amount equal to 40% of the 1/1/10 Company Value, and (ii) the Trust, solely for the benefit of Mark Nordlicht, or his transferees and/or successors, as beneficiary, until the Trust has received an amount equal to 60% of the 1/1/10 Company Value; and

(e) fifth, to each of the Members (including, for the avoidance of doubt, the Trust and any Retired Members) in proportion to their Company Percentages. Any Member Specific Deferred Fees shall be allocated and distributed to such Members, as applicable.

7.5.2 The Managers expressly agree to retain, at the expense of the Company, an independent third party appraiser to determine the fair value of the Company as of the opening of business on January 1, 2010, excluding any Member Specific Deferred Fees (the "**1/1/10 Company Value**").

7.6 Limitation on Distributions.

The right of any Member or the legal representatives of such Member to receive any distribution in respect of its Capital Account pursuant to this Article VII is subject to the provision by the Managers for all Company liabilities in accordance with Section 18-607(a) of the Act. Furthermore, no distribution shall be made (a) if such distribution would violate any contract or agreement to which the Company is then a party, or any law, rule, regulation, order or directive of any governmental authority then applicable to the Company, (b) to the extent that the Managers, in their reasonable discretion, determine that any amount otherwise distributable should be retained by the Company to pay, or to establish reasonable reserves for the payment of, any liability or obligation of the Company, whether liquidated, fixed, contingent or otherwise, or (c) to the extent that the Managers, in their reasonable discretion, determine that cash available to the Company in insufficient to permit such distribution.

7.7 Distributions In-Kind.

The Managers may direct that any asset of the Company be distributed, pro rata, in-kind in accordance with the provisions of this Article VII.

7.8 Withholding.

The Managers may withhold from any amount allocable or payable to any Member any taxes required to be paid or withheld by the Company on behalf of or for the account of such Member. Any such taxes shall be deemed to be a distribution or payment to such Member, reducing the amount otherwise distributable to such Member pursuant to this Agreement and reducing the Capital Account of such Member.

7.9 Distribution of Reserves.

Subject to Sections 7.5 and 7.6, the Managers, in their reasonable discretion, may determine that all or part of any amount previously retained by the Company to establish or fund a reserve should no longer be retained by the Company may distribute any such amounts to the

Members pro rata in proportion to their respective Capital Account balances as of the date any such determination is made.

7.10 Expenses.

Except as otherwise provided in this Agreement or in any agreement to which the Company is a party, the Company will be responsible for all expenses incurred by the Company.

ARTICLE VIII
Withdrawal, Removal, Death and Disability

8.1 Removal.

Uri Landesman may be removed by Mark Nordlicht as a Manager and as a Member at any time either (a) for Cause on not less than 10 days' prior written notice, or (b) without Cause on not less than 30 days prior written notice, in each case effective as of a date (the "**Removal Date**") specified in such notice, provided that Uri Landesman shall have 10 days from the date of his receipt of any notice purporting to remove him for Cause to cure the circumstances resulting in such Cause (if such circumstances are capable of being cured within such 10 days).

8.2 Retirement, Permanent Disability or Death.

8.2.1 Any Member may retire from the Company at any time on not less than 30 days' prior written notice to the Managers and the Members, as of a date (the "**Retirement Date**") specified in such notice. In the event that Mark Nordlicht retires from the Company at a time when he is the trustee of the Trust, the Trust shall be deemed to have retired from the Company as of the same time. From the day immediately following the Retirement Date, the retiring Member shall (i) have no further power or authority to perform any services for or on behalf of the Company, (ii) cease all activities on behalf of the Company, (iii) have no authority to act or on behalf of the Company, and (iv) cease to be a Manager (if applicable).

8.2.2 In the event of the death or Permanent Disability of a Manager, Passive Member or Beneficiary, the date of death or Permanent Disability shall be the Retirement Date.

8.3 Retirement Interests.

8.3.1 Subject to Sections 8.5 and 8.6, as of any Retirement Date (or Removal Date, as the case may be), a removed, retired, Permanently Disabled or deceased Member's Interest (or, in the case of the death or Permanent Disability of a Beneficiary, a portion of the Trust's Membership Interest) equal to such Beneficiary's Beneficiary Percentage Interest) shall be exchanged for a Retirement Interest, which Retirement Interest shall grant to the Retired Member a Non-Voting Company Percentage in an amount equal to the retired, removed, Permanently Disabled or deceased Member's Company Percentage (or, in the case of the Trust, the applicable portion of the Trust's Company Percentage) as of the Retirement Date (or Removal Date, as the case may be).

8.3.2 Subject to Sections 8.5 and 8.6, upon the retirement, removal, Permanent Disability or death of any Member, and upon the death or Permanent Disability of a Beneficiary, the Company shall pay to the Retired Member (or the Trust in the case of the death or Permanent Disability of a Beneficiary), the Withdrawal Amount; provided, however, that such Retired Member shall remain liable to the Company for the amount by which its Paid Incentive Fee Share exceeds its Allocable Incentive Fee Share. Except in extraordinary circumstances, 90% of the Withdrawal Amount (less such Retired Member's portion of any management fee and incentive fee income which has accrued to such date but not yet been allocated to him) shall be paid to such Retired Member within 60 days of the Retirement Date (or Removal Date, as the case may be), and the balance shall be paid within 30 days of the completion of the audits of the private investment funds managed by the Company for the Fiscal Year in which the Retirement Date (or Removal Date, as the case may be) occurs; provided, that to the extent Section 409A requires an earlier payout date, then such amount shall be paid by no later than such earlier date.

8.4 Return of Confidential Information.

Upon the removal, retirement, Permanent Disability or death of any Member, such Member, or the heirs of such Member, as the case may be, shall return, or cause to be returned, to the Company all Confidential Information (as defined in Section 10.1 hereof) that is or was in such Member's possession or control, and such Confidential Information shall remain in the possession and control of the Company.

8.5 Vesting.

Upon the retirement, removal for Cause or death of Uri Landesman, in each case, prior to January 1, 2015, Uri Landesman's Non-Voting Company Percentage shall be reduced by an amount, in respect of each Fiscal Quarter (or portion thereof) remaining between the applicable Retirement Date or Removal Date, as the case may be, and January 1, 2015, equal to 5% of Uri Landesman's Voting Company Percentage as of the applicable Retirement Date or Removal Date, as the case may be (each such resulting Non-Voting Company Percentage, a "**Vested Interest**"); provided, however, that each such Vested Interest shall not be less than 20% of Uri Landesman's Voting Company Percentage as of the applicable Retirement Date or Removal Date, as the case may be. Upon the removal of Uri Landesman without Cause or the Permanent Disability of Uri Landesman, in each case prior to January 1, 2015, Uri Landesman's Vested Interest shall equal 100% of his Voting Company Percentage as of the applicable Removal Date or Retirement Date, as the case may be.

8.6 Buy-out.

8.6.1 No Member shall have the right to acquire any other Member's Interest.

8.6.2 In the event that Uri Landesman is removed for Cause pursuant to Section 8.1 prior to January 1, 2015, the Company shall have the right, in the sole discretion of Mark Nordlicht, to purchase all of Uri Landesman's Interest (including, for the avoidance of doubt, his Vested Interest) for the Withdrawal Amount in respect of such Interest;

provided, however, that Uri Landesman shall remain liable to the Company for the amount by which his Paid Incentive Fee Share exceeds his Allocable Incentive Fee Share.

Upon such a repurchase by the Company of Uri Landesman's Interest in the Company:

(a) beginning on the day immediately following the Removal Date, Uri Landesman shall no longer be a Member of the Company and the other Members of the Company shall participate in Uri Landesman's Company Percentage on a pro rata basis; and

(b) 90% of the Withdrawal Amount (less such former Member's portion of any management fee and incentive fee income which has accrued to such date but not yet been allocated to him) in respect of Uri Landesman shall be paid to him within 60 days of the Removal Date, and the balance shall be paid within 30 days of the completion of the audits of the private investment funds managed by the Company for the Fiscal Year in which the Removal Date occurs; provided, that to the extent Section 409A requires an earlier payout date, then such amount shall be paid by no later than such earlier date.

8.6.3 In the event that Uri Landesman retires from the Company pursuant to Section 8.2 hereof prior to January 1, 2015, the Company shall have the right, in the sole discretion of Mark Nordlicht, to purchase all of Uri Landesman's Interest (including, for the avoidance of doubt, his Vested Interest) at the fair market value of such Vested Interest as of the Retirement Date (as determined by an independent valuation firm having a national reputation and having experience in valuing interests in entities like the Company, jointly selected by Mark Nordlicht and Uri Landesman, each acting reasonably. In the event such individuals cannot agree upon such a valuation firm within 90 days of the Retirement Date, each individual shall choose a valuation firm meeting the above criteria, and such valuation firms shall jointly select a third valuation firm meeting the above criteria, and such third valuation firm shall determine such fair market value (the "**Buy-Out Amount**").

Upon such a repurchase by the Company of Uri Landesman's Interest in the Company:

(a) beginning on the day immediately following the applicable Retirement Date, Uri Landesman shall no longer be a Member of the Company in any capacity and the other Members of the Company shall participate in his Company Percentage on a pro rata basis; and

(b) the Buy-out Amount shall be paid to Uri Landesman by means of a three-year promissory note having, as principal terms, equal quarterly payments of principal and interest with interest calculated monthly at a rate equal to the one-month LIBOR rate as of the last day of the immediately preceding month plus 2%, compounded monthly.

ARTICLE IX
Transfers of Interests

9.1 Transfer Provisions.

No Member shall have the right to Transfer all or any portion of its Interest to any Person without the prior written consent of all of the Members (but not any Retired Member); provided, however, that a Member may Transfer all or a portion of its Interest in the Company (the "**Family Interest**") to his spouse, children, grandchildren or siblings, to a trust for the benefit of the Member or such family members and/or to an entity solely owned by such Member, such family members or such a trust and, in the case of the Trust, to another trust for the benefit of the same beneficiaries (collectively, "**Family Members**"), if such transferee complies with Section 9.2 below, in which case, (i) the Transferring Member shall be deemed to have voting control over all decisions to be made with respect to the Family Interest, (ii) the Transferring Member shall execute or shall cause to be executed all documents or instruments required to be executed by the Company evidencing such voting control, and (iii) the Family Interest shall be deemed to be owned by the Transferring Member for the purposes of Article VIII and this Article IX and shall be included in any permitted Transfer by such Transferring Member pursuant to this Article IX (other than to a Family Member). Any Transfer made in violation of the provisions of this Article IX shall be null and void and shall not bind the Company or any Member.

9.2 Substituted Members.

The transferee of an Interest shall have the right to become a substituted Member of the Company only if (i) the consent referred to in Section 9.1 has been obtained, and (ii) the transferee executes and acknowledges such instruments, in form and substance reasonably satisfactory to the Managers, as the Managers may deem necessary or desirable to effectuate such Transfer and to confirm that the transferee has agreed to be bound by the terms of this Agreement.

ARTICLE X
Confidentiality, Non-Competition and Restrictive Covenants

10.1 Confidentiality.

Each Member acknowledges that he or it will from time to time have access to information of a confidential or proprietary nature, as commonly and generally understood, including, without limitation, confidential or proprietary investment methodologies, trade secrets, proprietary or confidential plans, client identities and information, client lists, business operations or techniques, records and data that are not matters of public record (other than through a breach by such Member of this Agreement or any confidentiality agreement with the Company or an Affiliate of the Company) (collectively, the "**Confidential Information**") owned or used in the Company and its Affiliates. Each Member agrees to keep confidential and not ever disclose, publish, divulge, furnish, use or make accessible, nor permit any of representative or other Person acting on behalf of such Member (an "**Authorized Representative**") to disclose, publish, divulge, furnish, use or make accessible, to anyone any Confidential Information; provided, however, that a Member (or an Authorized Representative of a Member) may disclose

any such Confidential Information (a) that has become a matter of public record (other than through a breach by such Member of this Agreement or any confidentiality agreement with the Company or an Affiliate of the Company), (b) as may be required or appropriate in any report, statement or testimony submitted to any governmental authority having or claiming to have jurisdiction over such Member (or any Authorized Representative of such Member), but only that portion of the Confidential Information which, in the written opinion of counsel for the Member (or any Authorized Representative of such Member), is required or would be required to be furnished to avoid liability for contempt or the imposition of any other material judicial or governmental penalty or censure, (c) as may be required or appropriate in response to any summons or subpoena or in connection with any litigation, or (d) as to which the Managers have unanimously consented in writing. Each Member hereby further agrees that, upon the termination of such Member as a Manager or Passive Member, all data, memoranda, client lists, notes, programs and other papers, items and tangible media, and reproductions thereof, relating to the foregoing matter in such Member's possession or control shall be returned to the Company and remain in the possession of the Company. This Section 10.1 shall survive any termination of this Agreement, any Member's change of status to a Former Member and any Transfer by a Member.

10.2 Non-Competition and Non-Solicitation.

10.2.1 During the term of the Company, except with the prior written consent of the Initial Members, no Member (including, for the avoidance of doubt, any Retired Member) or any Affiliate of any of the foregoing shall:

(a) engage in, or become a passive investor in, any investment manager to a hedge fund, private equity fund or other privately offered pooled investment vehicle, unless such Member or principal of any Member shares all his profits from such business with the other Members of the Company (including Retired Members) on a pro rata basis in accordance with their respective Company Percentages; or

(b) solicit any employee of the Company or its Affiliates (other than any employees who at the time of such solicitation are also employees of any investment management company owned in full or in part by such soliciting Member in accordance with the terms of clause (a) above).

Notwithstanding the foregoing, if Uri Landesman is removed without Cause, the provisions in clauses (a) and (b) above shall not apply to him or his Affiliates.

10.2.2 Each Member agrees that the provisions of Section 10.2.1 are reasonable and necessary for the protection of the Company and its Affiliates, and that each provision, and the period or periods of time, geographic areas and types and scope of restrictions on the activities specified therein are, and are intended to be, divisible. Each Member further acknowledges that the goodwill, good name, and good standing of the Company in the investment industry are essential for the Company's day-to-day operation and existence. In the event that any provision of Section 10.2.1, including any one sentence, clause or part thereof, shall be deemed contrary to law or invalid or unenforceable in any respect by a court of competent jurisdiction, the remaining

provisions shall not be affected, but shall, to the full extent permitted by law, remain in full force and effect and any invalid and unenforceable provisions shall be deemed, without further action on the part of the parties hereto, modified, amended and limited to the extent necessary to render the same valid and enforceable, but in no event shall such provisions be modified, amended or limited to be more restrictive than the provisions contained herein.

10.2.3 This Section 10.2 shall survive any termination of this Agreement, any Member's change of status to a Former Member and any Transfer by a Member.

ARTICLE XI
Indemnification

11.1 Exculpation.

Notwithstanding any other provision of this Agreement, whether express or implied, or obligation or duty at law or in equity, no Member (including, with limitation, the Managers) shall be liable to the Company for any act or omission in relation to the Company, this Agreement, any related document or any transaction or investment contemplated hereby or thereby taken or omitted by a Member in the reasonable belief that such act or omission is in or is not contrary to the best interests of the Company and is within the scope of authority granted to such Member; provided that such act or omission does not constitute gross negligence, willful misconduct, bad faith or fraud.

11.2 Indemnification.

The Company shall indemnify and hold harmless each Member (including, without limitation, the Managers) and his or its Affiliates from and against any and all losses, claims, damages, liabilities, expenses (including, without limitation, legal fees and expenses), judgments, fines, settlements and other amounts relating to any and all acts, omissions, claims, demands, actions, suits or proceedings, whether civil, criminal, administrative or investigative, which relate to the Member's relationship to, or status or activities with, the Company or which otherwise relate to or arise in connection with the property, business or affairs of the Company ("**Losses**"). The Member's expenses paid or incurred in defending itself against any Losses shall be reimbursed as paid or incurred. The indemnification provided pursuant to this Section 11.2 shall not apply with respect to a Member for that portion of any Losses determined by the final decision (from which an appeal cannot be taken or is not timely taken) of a court of competent jurisdiction to have been caused by such Member's gross negligence, willful misconduct, bad faith or fraud. Any payments made to or on behalf of a Member who is later determined not to be entitled to such payments shall be refunded to the Company promptly following such determination. This indemnity shall be provided out of Company assets only, and no Member shall have any personal liability with respect to this indemnity. The provisions of this Section 11.2 shall survive the termination of this Agreement with respect to all actions of a Member which occurred prior to such termination.

ARTICLE XII
Records and Accounting, Fiscal Affairs

12.1 Records and Accounting.

12.1.1 The Company shall maintain books and records which shall reflect all Company transactions and which shall be appropriate and adequate for the Company's business. The Members shall have the right during normal business hours to request access to and copy such books and records, upon at least 1 Business Day's prior written notice to the Managers, in person or by their authorized attorney or agent, but only if (i) the request to access and/or copy: (i) is for a purpose reasonably related to the Company's business and the Member's Interest in the Company, is not for any commercial purpose, is not detrimental to the best interest of the Company, is not damaging to the Company or its business and the Company is not required by law or by agreement with third parties to keep such books and records confidential (as reasonably determined by the Managers in good faith); (ii) the Member agrees (in form and substance satisfactory to the Manager) to use such information only for Company purposes and to maintain such information in strict confidence; and (iii) reasonable reproduction and distribution costs are paid by the Member.

12.1.2 The books and records of the Company shall be kept on the accrual basis in accordance with generally accepted accounting principles (except for revenues, which shall be accounted for on a cash basis).

12.2 Tax Status.

The Members intend that the Company will be treated as a partnership for U.S. federal, state and local income tax purposes and will be subject to all provisions of Subchapter K of the Code.

12.3 Tax Matters Partner.

Pursuant to Section 6231(a)(7)(A) of the Code, Mark Nordlicht is hereby designated as the "**Tax Matters Partner**" of the Company for all purposes of the Code and for the corresponding provision of any U.S. state or local statute. All of the Members hereby consent to such designation and agree to take any such further action as may be required by the Regulations or otherwise to effectuate and maintain such designation. In his capacity as the Tax Matters Partner, Mark Nordlicht shall have the exclusive right and authority to determine the accounting methods and conventions to be used in the preparation of the Company's tax returns and make such elections under the tax laws of the United States, the several states and other relevant jurisdictions as to the treatment of items of income, gain, loss, deduction and credit of the Company, or any other method or procedure related to the preparation of such returns; provided, that no such election under any such tax law shall be made which would have a negative impact on any Member not shared by the other Members in proportion to their respective interests hereunder. Promptly after any filing is made by the Tax Matters Partner with the Internal Revenue Service or with any other taxing authority, the Tax Matters Partner will provide a copy of same to each of the other Members.

12.4 Reports.

The Company shall furnish to each Member detailed financial statements and information and documents (including Form K-1 or comparable information) necessary or desirable for the preparation or support of such Member's tax returns required in any jurisdiction, as soon as practicable after the end of each Fiscal Year.

12.5 Member Representations and Warranties.

12.5.1 Each Member represents and warrants that such Member has been advised to consult, and has consulted, independent counsel and tax counsel concerning the consequences of receiving such Member's Interest in the Company and becoming a Member, and such Member has neither received nor relied upon any investment, financial or tax advice from the Managers or counsel for the Company.

12.5.2 Each Member agrees, with respect to each Company income tax return that is prepared and filed in compliance with the provisions of this Agreement, that such Member shall not (a) treat, on such Member's income tax returns, any item of income, gain, loss, deduction or credit relating to such Member's interest in the Company in a manner inconsistent with the treatment of such item by the Company as reflected on Form K-1 or any other information statement furnished by the Company to such Member for use in preparing such Member's income tax returns, or (b) file any claim for refund relating to any such item based on, or which would result in, such inconsistent treatment.

12.5.3 In the event of a breach by any Member of the provisions of this Section 12.5, such Member shall be liable to the Company and the other Members for any costs, liabilities and damages (including, without limitation, consequential damages) incurred by any of them on account of such breach.

12.5.4 This Section 12.5 shall survive any termination of this Agreement, any Member's change of status to a Former Member and any Transfer by a Member.

ARTICLE XIII
Company Property

13.1 Company Property.

All property now or hereafter owned by the Company shall be deemed owned by the Company as an entity and no Member, individually, shall have any ownership of such property. Title to the assets and properties, real and personal, now or hereafter owned by or leased to the Company, shall be held in the name of the Company; provided, however, that if the Managers determine that title shall be held other than in the name of the Company, the Person or Persons who hold title shall certify by instrument duly executed and acknowledged, in form for recording or filing, that title is held as nominee and/or trustee for the sole benefit of the Company pursuant to the terms of this Agreement, and an executed copy of such instrument shall be delivered to each Member.

13.2 Prohibition Against Partition.

Each Member hereby permanently waives and relinquishes any and all rights it may have to cause all or any part of the property of the Company to be partitioned, it being the intention of the Members to prohibit any Member from bringing a suit for partition against the other Members, or any one of them.

ARTICLE XIV
Dissolution, Liquidation and Termination

14.1 Dissolution and Liquidation.

14.1.1 The Company shall dissolve upon, but not before, the first to occur of the following:

(a) the holders of 75% of the Voting Company Percentages consent in writing to the dissolution of the Company;

(b) the retirement, removal, death or Permanent Disability of the last remaining Manager unless the Members select a replacement Manager pursuant to Section 4.3.2 within 90 days of the relevant Retirement Date or Removal Date, as the case may be;

(c) the bankruptcy or insolvency of the Company; or

(d) operation of law.

14.1.2 Upon dissolution of the Company, but prior to the cancellation of the Certificate of Formation, the Company shall immediately commence to wind up its affairs, and the Managers shall proceed with reasonable promptness to liquidate the business of the Company.

14.1.3 During the period of the winding up of the affairs of the Company, the rights and obligations of the Members shall continue as provided herein.

14.1.4 The Company shall terminate after its affairs have been wound up and its assets fully distributed in accordance with Section 7.5.1.

14.1.5 No Member shall be obligated to repay any deficit in such Member's Capital Account to the Company or any other Member or have any right to demand property other than cash upon dissolution and termination of the Company.

14.2 Cancellation of Certificate of Formation.

Upon the completion of the liquidation of the Company's property, the Managers shall cause the cancellation of the Certificate of Formation and all qualifications of the Company as a foreign limited liability company in all foreign jurisdictions.

ARTICLE XV
Miscellaneous

15.1 Governing Law.

This Agreement shall be interpreted and construed exclusively in accordance with the laws of the State of Delaware without regard to its conflicts of laws rules.

15.2 Notice.

15.2.1 All communications required or permitted to be given hereunder shall be in writing and shall be deemed to have been duly given if (i) delivered personally with receipt acknowledged; (ii) sent by registered or certified mail, return receipt requested; (iii) transmitted by facsimile (receipt of which shall be confirmed by telephone and by a writing sent by registered or certified mail on the Business Day that such facsimile is sent); or (iv) sent by recognized overnight courier for next Business Day delivery; to, in the case of notice to a Member, the address or facsimile number, as the case may be, set forth with respect to such Member in the books and records of the Company (or at such other address or facsimile number for a Member as such Member shall specify by notice to the Company, or, in the case of notice to the Company, to the attention of the Managers at the Company's principal business office.

15.2.2 Notice of change of address shall be deemed given when actually received or upon refusal to accept delivery thereof; all other communications shall be deemed to have been given, received and dated on the earliest of: (i) when actually received or upon refusal to accept delivery thereof, (ii) the date when delivered personally, (iii) one Business Day after being sent by facsimile or overnight courier and (iv) four Business Days after registered or certified mailing.

15.3 Severability.

In case any one or more of the provisions contained in this Agreement shall be invalid or unenforceable in any respect, the validity and enforceability of the remaining provisions contained herein shall not in any way be affected or impaired thereby and the parties will attempt to agree upon a valid and enforceable provision which shall be a reasonable substitute for such invalid and unenforceable provision in light of the tenor of this Agreement and, upon so agreeing, shall incorporate such substitute provision in this Agreement.

15.4 Headings.

The headings in this Agreement have been inserted solely as a matter of convenience and are in no way intended to describe, interpret, define or limit the scope, extent or intent of this Agreement or any provisions hereof.

15.5 Interpretation.

All pronouns and any variations thereof shall be deemed to refer to the masculine, feminine, neuter, singular, or plural as the identity of the Person or Persons referred to may require

15.6 Entire Agreement.

This Agreement constitutes the entire agreement among the parties with respect to the subject matter hereof and supersedes any and all prior agreements or understandings among the parties relating to the subject matter hereof, oral or written, all of which are hereby merged into this Agreement. There are no promises, agreements, conditions, understandings, warranties, or representations, oral or written, express or implied, among the parties hereto, other than as set forth in this Agreement.

15.7 Termination, Revocation, Waiver, Modification or Amendment.

No termination, revocation, waiver, modification or amendment of this Agreement shall be binding unless agreed to in writing by the Members holding at least 75% of the Voting Company Percentages. Without the written consent of each Member (including a Retired Member) adversely affected thereby, no amendment of this Agreement shall be made that (i) increases the obligations of any Member to make Capital Contributions, (ii) alters the allocation for tax purposes of any items of income, gain, loss, deduction or credit, (iii) alters the manner of computing the distributions of any Member, or (iv) allows the obligation of a Member to make a Capital Contribution to the Company to be compromised by the consent of less than all the Members.

15.8 Binding Effect.

This Agreement shall be binding upon, and shall inure to the benefit of, the parties hereto and their respective successors, permitted assigns, heirs, executors, administrators and legal representatives.

15.9 Further Assurances.

Each of the parties hereto agrees to execute, acknowledge, deliver, file, record and publish such further certificates, instruments, agreements and other documents, and to take all such further actions as may be required by law or deemed by the Managers to be necessary or useful in furtherance of the Company's purposes and the objectives and intentions underlying this Agreement and not inconsistent with the terms hereof.

15.10 Waiver

No consent or waiver, express or implied, by any Member to or of any breach or default by any other Member in the performance by any other Member of its obligations hereunder shall be deemed or construed to be a consent to or waiver of any other breach or default in the performance by such other Member of the same or any other obligation of such Member hereunder. Failure on the part of a Member to declare such other Member in default, irrespective

of how long such failure continues, shall not constitute a waiver by such Member of its rights hereunder.

15.11 Additional Remedies.

The rights and remedies of any Member hereunder shall not be mutually exclusive. The respective rights and obligations hereunder shall be enforceable by specific performance, injunction or other equitable remedy, but nothing herein contained is intended to, nor shall it limit or affect, any other rights in equity or any rights at law or by statute or otherwise of any party aggrieved as against the other for breach or threatened breach of any provision hereof, it being the intention of this paragraph to make clear the agreement of the parties hereto that their respective rights and obligations hereunder shall be enforceable in equity as well as at law or otherwise.

15.12 No Reliance by Third Parties.

Except as expressly provided herein, the provisions of this Agreement are not for the benefit of any creditor or other Person (including, without limitation, a Beneficiary) other than a Member, and no creditor or other Person shall obtain any rights under this Agreement or by reason of this Agreement. Beneficiaries shall in no event be considered Members of the Company, and the Managers, in their capacity as such, shall not have any fiduciary duties to the Beneficiaries.

15.13 Arbitration.

Any dispute arising out of, or relating to, this Agreement or the breach thereof (other than Article 10 hereof), or regarding the interpretation thereof, shall be finally settled by arbitration conducted in New York City in accordance with the rules of JAMS then in effect before a single arbitrator appointed in accordance with such rules. Judgment upon any award rendered therein may be entered and enforcement obtained thereon in any court having jurisdiction. The arbitrator shall have authority to grant any form of appropriate relief, whether legal or equitable in nature, including specific performance. For the purpose of any judicial proceeding to enforce such award or incidental to such arbitration or to compel arbitration and for purposes of Article 8 hereof, the parties hereby submit to the non-exclusive jurisdiction of the Supreme Court of the State of New York, New York County, or the United States District Court for the Southern District of New York, and agree that service of process in such arbitration or court proceedings shall be satisfactorily made upon it if sent by registered mail addressed to it at the address referred to in Section 15.2 above. The parties agree that money damages would be an inadequate remedy for any breach of any provisions of Article X and in the event of a breach or threatened breach of such provisions, the Managers or their successors or assigns may, in addition to other rights and remedies existing in their favor, apply for specific performance and/or injunctive or other relief in order to enforce, or prevent any violations of, such provisions, without posting a bond or other security.

15.14 Counterparts.

This Agreement may be executed in multiple counterparts, each of which shall be deemed an original and all of which shall constitute one agreement. The signatures of any party

to a counterpart shall be deemed to be a signature to, and may be appended to, any other counterpart.

[Remainder of page intentionally left blank.]

IN WITNESS WHEREOF, the parties hereto have executed this Agreement effective as of the date first written above.

Manager:

URI LANDESMAN

Passive Members:

MARK NORDLICHT

MARK NORDLICHT GRANTOR TRUST

By: _____
Mark Nordlicht,
solely in his capacity as Trustee

Schedule I

Schedule of Members

Name	Address	Member Status	Company Percentage /Voting Status
Mark Nordlicht		Passive Member; Chief Investment Officer	10% Voting Company Percentage
Uri Landesman		Manager; Member	25% Voting Company Percentage
Mark Nordlicht Grantor Trust		Passive Member	65% Voting Company Percentage

EXHIBIT 5

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
CASE NO. 18-CV-6658(JSR)
CASE NO. 18-CV-10936(JSR)

IN RE: PLATINUM-BEECHWOOD LITIGATION

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,

vs.

PLATINUM MANAGEMENT (NY) LLC, et al.,

Defendants.

VOLUME I

TRANSCRIPT OF DEPOSITION OF
BERNARD FUCHS

TRANSCRIPT of the stenographic notes of the proceedings in the above-entitled matter, as taken by and before TAB PREWETT, a Registered Professional Reporter, a Certified LiveNote Reporter, Certified Shorthand Reporter and Notary Public, held at the offices of US Legal Support Company, 90 Broad Street, Suite 603, New York, New York, on Wednesday, October 2, 2019, commencing at 10:36 a.m.

Bernard Fuchs

A All three.

Q All -- so it was Mr. Nordlicht; it was Mr. Bodner; and it was Mr. Huberfeld?

A Mr. Huberfeld, correct.

Q So this is in 2014 they asked you to become a partner?

A Right, in the middle of 2014.

Q Okay. So -- so, again, you -- you -- you used this -- you alleged that they utilized a:

"... classic rope the dope scheme to convince Fuchs to become a member of management."

So tell me what the "rope the dope scheme" is again.

A Six months later, in January 2015, we had a dinner with the partners. Now, I'm a partner. We have a dinner in the City in a restaurant.

Q Who was there?

A Mark Nordlicht, Murray Huberfeld, and David Bodner, and myself.

Q Okay.

A And a fight broke out between

Bernard Fuchs

Q Well --

A By saying, also:

"I don't know what's going on in the fund. I didn't know there was a problem. Until this meeting 2015, I didn't -- I wasn't aware of any problems."

Q Okay. All right. And you believe he did?

A Yes.

Q Okay. What evidence do you have that Mr. Huberfeld knew that there was a problem with the PPVA fund before this dinner in 2015?

A I have no evidence.

Q Well, you have alleged that he acted deceitfully here, so you must have something, right?

MR. HERTZBERG: Object to the form.

MR. NOVAK: Objection to the form.

A All I know is that those three were partners from the beginning and throughout the end; even though at the last couple of years only Mark Nordlicht was there, but there were always meetings, at least once a month -- a private meeting.

Bernard Fuchs

So I imagine that they knew what's going on. They weren't meeting just about dinner discussions. And I felt that they knew what's going on, and I was not privy to any of those meetings.

Q And I am assuming it's the same for Mr. Nordlicht with regard to how he acted deceitfully toward you.

How did he?

A Mr. Nordlicht acted deceitfully by not telling me how he's running the fund different than what Mr. Huberfeld and Mr. Bodner ran the fund.

Q Okay. Well, with regard to Mr. Nordlicht, and his -- your allegation here of self-dealing, tell me -- tell me what that means.

Tell me what he did so that that caused you to make that allegation against Mr. Nordlicht of self-dealing.

A He always tried to reassure me that everything is fine, that it's only short-term issues that have to be resolved; he's getting out of this position; he's going to sell this mine; he is going to sell this one that is going to

Bernard Fuchs

what's the best deal and maybe even can get a good price to help the company.

Q Okay. Was Mr. Bodner the only person you communicated in this manner where you would send it to a secretary who would then give it to him, or were there others?

A Yes, only him.

Q Only him.

Any -- any reason -- do you know why -- did he ever tell you why he did that?

A I don't know why he didn't have an E-Mail address.

Q Okay. All right. Tell me a little bit about David Levy. What was his role that you -- from your vantage point?

A He worked for Mark Nordlicht, and he was like an advisor to him. He was -- he worked at Platinum. He was -- he was -- I think I -- I would say he was Mark's right-hand man, helping him with everything in the business.

Q Okay. Did you have much interaction with him?

A A fair amount.

Q Okay. What about Mr. Landesman?

Bernard Fuchs

employment?

A No, no, nothing.

MR. SEIBERT: All right. We reserve rights, but I think -- I think it's time. I think we're done questioning.

THE WITNESS: That's it?

MR. NOVAK: Reserve rights for more questions at some other time? No more than seven hours.

THE WITNESS: Anybody else today?

MR. NOVAK: We'll take that.

THE VIDEOGRAPHER: This completes the video deposition of Bernard Fuchs, October 2, 2019, at 6:27 p.m. We are off record.

(There was a discussion off the record.)

(The deposition adjourned at 6:27 p.m.)

EXHIBIT 6

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES DISTRICT COURT
CASE NO. 18-CV-6658 (JSR)
CASE NO. 18-CV-10936 (JSR)

IN RE: PLATINUM-BEECHWOOD LITIGATION

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,

vs.

PLATINUM MANAGEMENT (NY) LLC, et al.,

Defendants.

DEPOSITION OF MICHAEL KATZ

Tuesday, November 19, 2019

10:00 a.m.

Reported by:
Joan Ferrara, RMR, FCRR
Job No. 283582

M. Katz

Q. And you said you were not employed at Platinum?

A. That's correct.

Q. Why did you have a Platinum e-mail address?

A. I was given an address as just part of my oversight of my grandfather's investment in the funds.

Q. And your grandfather was Marcos Katz, is that right?

A. That's correct.

Q. And your grandmother's name was?

A. Is.

Q. Is. I apologize.

A. Yes, is Adella.

Q. Say it again?

A. Adella, A-D-E-L-L-A.

Q. And did you have -- in that capacity, did you have an office at Platinum at their office space?

A. I had use of the office space. I didn't have an office.

Q. So you didn't have pictures up there?

M. Katz

please?

Q. Certainly.

In terms of this knowledge, that there were misrepresentations being made to --

A. Oh, the misrepresentations -- no, it was after the fact, no.

MR. GLICK: Again, let him finish the question so the record is clear.

BY MR. GOULD:

Q. I'm pretty sure I know this, but would you just define for us what MDK Hijos Trust is?

A. It's the estate trust that holds the rights to the former asset of Platinum.

Q. And you are the managing trustee, do I have that correct?

A. That's correct.

Q. And are there other trustees?

A. No.

Q. If you would flip to page 3, and looking at paragraph 14 -- I apologize, let's back to paragraph 13, halfway through that, it says, "Bodner and Huberfeld were

M. Katz

co-equal partners and Nordlicht was treated as a more junior partner."

I realize that this document was written a while ago. Sitting here now, is that statement, to your knowledge, still accurate?

A. Yes.

Q. And when did you learn, when did you become aware of that, that Bodner and Huberfeld were co-equal partners and Mr. Nordlicht was more of a junior partner?

A. From just their interactions with one another.

Q. From what you observed?

A. From what I observed.

Q. And then looking at paragraph 14, it says, "Bodner was the only person who had greater influence and power than Huberfeld within the Platinum Management organization."

Sitting here now, you understand that still to be true?

A. Yes.

Q. And is that also from your

M. Katz

just us. There were the three of them and me. I just happened to be there, I think.

Q. Was that common that Mr. Nordlicht, Mr. Huberfeld and Mr. Bodner would have a meeting and you would attend?

A. No, it wasn't that they called a meeting. They just happened to be -- I was in the room probably for something else and they would walk in and start talking. So it wasn't kind of a formal set meeting. They met. This presumably I think took place in Mark's apartment in his kitchen.

Q. What were you doing in Mark's apartment at that time?

A. Discussing the investments.

Q. Did Mark call a meeting for you to come to his apartment to discuss the investments?

A. Yes. In fact, I think on that occasion it was Murray who asked me to come because he lived in the same building. So Murray and then we went to Mark's apartment.

Q. And Mr. Bodner was there?

C E R T I F I C A T E

STATE OF NEW YORK)
: ss.
COUNTY OF NEW YORK)

I, Joan Ferrara, a Notary Public within and for the State of New York, do hereby certify:

That MICHAEL KATZ, the witness whose deposition is hereinbefore set forth, was duly sworn by me and that such deposition is a true record of the testimony given by the witness.

I further certify that I am not related to any of the parties to this action by blood or marriage, and that I am in no way interested in the outcome of this matter.

IN WITNESS WHEREOF, I have hereunto set my hand this 24th day of November, 2019.

Joan Ferrara

Joan Ferrara

EXHIBIT 7

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)

DEFENDANT DAVID BODNER'S RESPONSES
TO PLAINTIFFS' FIRST REQUEST FOR ADMISSIONS

Defendant David Bodner, by and through his attorneys Curtis, Mallet-Prevost, Colt & Mosle LLP, hereby responds pursuant to Rule 36 of the Federal Rules of Civil Procedure to the First Request for Admissions, dated November 30, 2019 (the "Requests") of 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 for Platinum Partners Value Arbitrage Fund L.P. (in Official Liquidation) ("PPVA" and collectively with the JOLs, the "Plaintiffs").

GENERAL OBJECTIONS

1. Bodner objects to the Requests to the extent that they purport, through definitions or otherwise, to impose burdens and duties that exceed the scope of reasonable and

REQUEST FOR ADMISSION NO. 43:

Admit that there is an unincorporated partnership between David Bodner and Murray Huberfeld.

RESPONSE TO REQUEST FOR ADMISSION NO. 43:

Objection as to this Request as vague, ambiguous and not reasonably limited in time or scope. Further objections to the definition of "unincorporated partnership" and to this Request calling for a purely legal conclusion. Subject to the objections, denied. (Bodner Tr. 42:17 – 23).

REQUEST FOR ADMISSION NO. 44:

Admit that there is an unincorporated partnership among David Bodner, Murray Huberfeld and Charles Kushner.

RESPONSE TO REQUEST FOR ADMISSION NO. 44:

Objection as to this Request as vague, ambiguous and not reasonably limited in time or scope. Further objections to the definition of "unincorporated partnership" and to this Request calling for a purely legal conclusion. Subject to the objections, denied. (Bodner Tr. 303:22 – 23).

REQUEST FOR ADMISSION NO. 45:

Admit that Mark Nordlicht, Murray Huberfeld, David Bonder, Uri Landesman and Bernard Fuchs attended partner meetings to discuss management of PPVA and its subsidiaries.

RESPONSE TO REQUEST FOR ADMISSION NO. 45:

Objection as to this Request as vague, ambiguous and not reasonably limited in time or scope. Subject to the objection, denied. David Bodner attended periodic meetings in which Mark Nordlicht and Uri Landesman would update the other holders of interests in Platinum Management on the performance of the funds managed by Platinum Management, including PPVA.

Dated: December 30, 2019
New York, New York

CURTIS, MALLET-PREVOST,
COLT & MOSLE LLP

By: */s/ Gabriel Hertzberg*

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Attorneys for Defendant David Bodner

36285499

EXHIBIT 8

From: Joan Janczewski [joan@platinumlp.com]
Sent: 11/16/2012 10:41:15 PM
To: Joseph SanFilippo [JSanFilippo@platinumlp.com]
Subject: Black Elk Investors

Hi Joe:

I need to leave a message on Bodner's phone today letting him know how much more we have to pay to the Black Elk investors.

Would you know that info. I am not able to each Chaya.

Bodner seemed anxious for data

Joan Janczewski
Chief Operations Officer
Platinum Management (NY), LLC
152 West 57th Street, 4th Floor
New York, New York 10019
212-271-7828

EXHIBIT 9

From: Mark Nordlicht [mnordlicht@platinumlp.com]
Sent: 9/12/2014 7:21:42 AM
To: David Levy [dlevy@platinumlp.com]

You need to prep jeff we want to buy back roughly 30 million of bonds. We will go out to the market starting next week with 10 and then do the other 20 as they come off. Please tell him today. I will talk to Dovid over the weekend but if he asks, u can tell him about position swap. We might need bridge of 20 from beechwood but wd only be for a little bit either until I sold other 20 of bee at which point I will have completed exchange or until platinum gets leverage at which point we will have bonds to buy. Please get docs out to the private people. I think 18 months with option for prepay after 6 from both parties with 1 month notice. Either way, just get docs done. We really want to close Tuesday. Let's not wait until Thursday. Prep Dov for Tuesday close as well please. R u going to Houston next week to close northstar and initiate strategic plan we have laid out? Need very good legal structurer as there are a lot of moving parts and we want to close wt fast if they are interested. Please send me email be fore shabbos updating me on everything so that I could know where we stand alter shabbos here. Also, as Dov said, can we add our existing funding to the debt and just make it 100 million piece? Please also communicate with lawyer about estimate closing number we will have to put up after runoff.

Private people - here is the book- looking for at least 30
Jn- 5
Mf - 5
Leon- 1
Fab- possible 15
Sol werdiger?
Rechnitz?

Dov - looking for 30
Aqr- 15?
??????

Beechwood swap with bee

30

Sent from my iPad

EXHIBIT 10

[REDACTED]