

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE PLATINUM-BEECHWOOD LITIGATION

Master Docket No. 1:18-cv-06658-JSR

MARTIN TROTT and CHRISTOPHER SMITH,
as Joint Official Liquidators and
Foreign Representatives of
PLATINUM PARTNERS VALUE ARBITRAGE
FUND L.P. (in Official Liquidation) and
PLATINUM PARTNERS VALUE ARBITRAGE
FUND L.P. (in Official Liquidation),

Case No. 1:18-cv-10936-JSR

Plaintiffs,

-v-

PLATINUM MANAGEMENT (NY) LLC,
et al.,

Defendants.

**MEMORANDUM OF LAW OF DEFENDANT MURRAY HUBERFELD
IN RESPONSE TO PLAINTIFFS' SUPPLEMENTAL BRIEF IN
OPPOSITION TO MOTIONS FOR SUMMARY JUDGMENT**

HOROWITZ AND RUBENSTEIN, LLC
4 Carren Circle
Huntington, NY 11743
(516) 745-5430

Attorneys for Defendant Murray Huberfeld.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
ARGUMENT.....	1
I. There Is No Basis To Impute To Huberfeld Any Adverse Inference Based On Nordlicht’s Invocation Of The Fifth Amendment	1
II. In Any Event, No Adverse Inference Warrants Denial Of Huberfeld’s Motion	3
III. Plaintiffs’ Memorandum Of Law Misleads The Court About Nordlicht’s Testimony Regarding The Release Agreement	5
CONCLUSION.....	5

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Akinyemi v. Napolitano</i> , 347 Fed. Appx. 604 (2d Cir. 2007).....	2, 3
<i>In re Bernard L. Madoff Invs. Secs. LLC</i> , 560 B.R. 208 (Bankr. S.D.N.Y. 2016).....	4
<i>In re Handy & Harman Ref. Grp., Inc.</i> , 266 B.R. 32 (Bankr. D. Conn. 2001)	2-3
<i>In re Jacobs</i> , 394 B.R. 646 (Bankr. E.D.N.Y. 2008).....	4
<i>Kirschenbaum v. 650 Fifth Avenue</i> , 257 F. Supp. 3d 463 (S.D.N.Y. 2017).....	3-4
<i>LiButti v. U.S.</i> , 107 F.3d 110 (2d Cir. 1997).....	1
<i>Progressive Cas. Ins. Co. v. Monaco</i> , No. 16-cv-823 (VAB), 2017 U.S. Dist. LEXIS 103326 (D. Conn. July 5, 2017)	2-3
<i>In re Urethane Antitrust Litig.</i> , No. MDL No. 1616, 2013 U.S. Dist. LEXIS 3166 (D. Kan. Jan. 8, 2013)	3

Defendant Murray Huberfeld (“Huberfeld”) respectfully submits this response to Plaintiffs’ Supplemental Memorandum of Law in Opposition to Defendants’ Motions for Summary Judgment (“Pl. Supp. Mem.”).¹

ARGUMENT

I. There Is No Basis To Impute To Huberfeld Any Adverse Inference Based On Nordlicht’s Invocation Of The Fifth Amendment

Whether to apply an adverse inference against a party based upon another witness’s invocation of its Fifth Amendment privilege turns on “whether the adverse inference is trustworthy under all of the circumstances and will advance the search for the truth.” *See LiButti v. U.S.*, 107 F.3d 110, 121 (2d Cir. 1997). The Second Circuit has set forth four non-exclusive factors which may guide a trial court in making this determination: (i) the nature of the relationship between the defendant and the witness; (ii) the degree of control over the witness by the party; (iii) the alignment of interests between the witness and the party; and (iv) the role of the witness in the litigation. *See generally LiButti*, 107 F.3d at 123.

Initially, Plaintiffs have not met their burden of establishing a sufficient relationship of loyalty between Mark Nordlicht and Huberfeld so as to warrant imputing an adverse inference to Huberfeld. The “nature of the relationship” between the witness and the defendant is “invariably . . . the most significant circumstance.” *LiButti*, 107 F.3d at 123. The relationship “should be examined . . . from the perspective of [the] witness’ loyalty to the [defendant]” *Id.* Here, Plaintiffs proffer no facts to support a plausible inference that Nordlicht was loyal to Huberfeld, or that Nordlicht had any economic, emotional, or other reason to invoke the Fifth Amendment for

¹ Capitalized terms not otherwise defined herein refer to the definitions set forth in the Memorandum of Law of Defendant Murray Huberfeld in Support of Summary Judgment (“Huberfeld Mem.”, 1:18-cv-06658-JSR, ECF Doc. No. 742-15) and Reply Memorandum of Law of Defendant Murray Huberfeld in Further Support of Summary Judgment (“Huberfeld Reply Mem.”, 1:18-cv-06658, ECF Doc. 826).

Huberfeld's benefit. *See, e.g., Akinyemi v. Napolitano*, 347 Fed. Appx. 604, 607 (2d Cir. 2007) (not imputing adverse inference to defendant based on lack of relationship).

Plaintiffs also fail to adduce evidence that Huberfeld did, or even could, manifest any degree of control over Nordlicht. To the contrary, Plaintiffs point only to facts concerning a purported relationship of control between a *different* defendant and Nordlicht. (Pl. Supp. Mem. at 10.) Absent such connection between Huberfeld and Nordlicht, it cannot be plausibly inferred that Nordlicht had reason to testify in a way that protected Huberfeld's interests in this case. *See, e.g., Progressive Cas. Ins. Co. v. Monaco*, No. 16-cv-823 (VAB), 2017 U.S. Dist. LEXIS 103326, at *33 (D. Conn. July 5, 2017) (no degree of control over witness by party); *In re Handy & Harman Ref. Grp., Inc.*, 266 B.R. 32, 35 (Bankr. D. Conn. 2001) (same).

Critically, Nordlicht's and Huberfeld's interests are not aligned with respect the Release Agreement, which is the sole basis upon which Huberfeld moved for summary judgment. As set forth in Huberfeld's moving papers, the relevant parties to the Release Agreement were Huberfeld and David Bodner, on the one hand, and PPVA (and PMNY), on the other hand. (Huberfeld 56.1 ¶ 13.) Through the Release Agreement, Huberfeld relinquished his indirect Beneficiary Interest in PMNY, agreed to a lock-up of investments in PPVA, and broadly released PPVA from claims. (Huberfeld 56.1 ¶ 20.) In exchange, PPVA provided a similarly broad release to Huberfeld. (Huberfeld 56.1 ¶ 21.) Nordlicht, in his personal capacity, was not a beneficiary of the Release Agreement, and the entities that Nordlicht controlled were adverse to Huberfeld with respect to the negotiation and terms of the agreement. Because Huberfeld's and Nordlicht's interests are not aligned with respect to the Release Agreement, it would be unwarranted to impute a negative inference to Huberfeld based on Nordlicht's invocation related to that issue.

Finally, the circumstances surrounding Nordlicht's deposition otherwise do not support a

conclusion that imputing an adverse inference to Huberfeld would be “trustworthy” or “advance the search for truth” in this case. As the Court is aware, Nordlicht remains under threat of criminal prosecution broadly related to his role as Chief Investment Officer of PPVA. The most plausible inference to draw from Nordlicht’s invocation of the Fifth Amendment is that he did so based on his pending criminal case, and not to avoid giving damaging testimony about Huberfeld. Indeed, Nordlicht did not merely refuse to answer questions related to the Release Agreement, but rather in response to virtually every question, including seemingly innocuous ones. (*See generally* Supp. Bixter Dec., Ex. 2.) Nordlicht also invoked the Fifth Amendment in response to questions asked by other *defendants* seeking to elicit facts to support *their* cases. (*Id.*) Based on the totality of the circumstances, the negative inference urged by Plaintiffs against Huberfeld relating to the Release Agreement has minimal probative value. *See generally Akinyemi*, 347 Fed. Appx. at 107 (inference not trustworthy); *In re Urethane Antitrust Litig.*, No. MDL No. 1616, 2013 U.S. Dist. LEXIS 3166, at *36-37 (D. Kan. Jan. 8, 2013) (same); *Progressive Cas. Ins. Co.*, 2017 U.S. Dist. LEXIS 103326, at *34 (same); *In re Handy & Harman Ref. Grp., Inc.*, 266 B.R. at 35 (same).

II. In Any Event, No Adverse Inference Warrants Denial Of Huberfeld’s Motion

Even if the Court were to find it legally appropriate to impute in some manner an adverse inference against Huberfeld based on Nordlicht’s invocation, it does not warrant invalidating the Release Agreement. Initially, Plaintiffs do not actually articulate what adverse inference they wish to impute to Huberfeld; Huberfeld and the Court are instead left to wonder to which purported issues of fact a negative inference should arguably be applied. Plaintiffs’ apparent argument that an adverse inference should be levied against Huberfeld generally should be rejected. It is axiomatic that the “[t]he Fifth Amendment privilege must be invoked on a question-by-question basis, and an adverse inference can only be drawn as to questions that are actually asked.” *See*,

e.g., *Kirschenbaum v. 650 Fifth Avenue*, 257 F. Supp. 3d 463, 511 (S.D.N.Y. 2017) (citation omitted). Nordlicht did not invoke the Fifth Amendment in response to any direct questions about which there are material issues of fact. (*See infra.*) Accordingly, no generalized “adverse inference” should be applied to those issues about which Nordlicht did not specifically invoke the Fifth Amendment. *See, e.g., In re Bernard L. Madoff Invs. Secs. LLC*, 560 B.R. 208, 227 (Bankr. S.D.N.Y. 2016) (“The way the adverse inference works is that if a witness refuses to answer a question by invoking the Fifth Amendment, the Court can draw an inference that the answer to that question would be adverse to the claimant.”) (citation omitted).

Applying an adverse inference to Huberfeld is also inappropriate because Plaintiffs failed to point to any disputed issue of fact in opposition to Huberfeld’s motion for summary judgment. *See In re Jacobs*, 394 B.R. 646, 663 (Bankr. E.D.N.Y. 2008) (“the testimonial assertion of the Fifth Amendment is not a substitute for relevant and persuasive evidence”). As set forth in Huberfeld’s reply papers:

- Plaintiffs’ opposition based on lack of consideration fails because such a defense is not a legal ground upon which to invalidate a written release of claims. (Huberfeld Reply Mem. at 1-3.)
- Plaintiffs adduced no facts to warrant invalidating the Release Agreement based on public policy (even assuming such legal ground exists). (Huberfeld Reply Mem. at 3-7.)
- The Release Agreement was undoubtedly entered into with the mutual assent of the parties, and Plaintiffs adduced no evidence (and made no allegations) of a “separate and distinct fraud” on PPVA in connection with the Release Agreement. (Huberfeld Reply Mem. at 7-9.)

As it relates to the Release Agreement, the only questions to which Nordlicht invoked the Fifth Amendment concerned the value of Huberfeld’s consideration (Pl. Supp. 56.1 ¶¶ 15-17, 22-25) and comments made by non-parties to the Release Agreement about the agreement (Pl. Supp. 56.1 ¶¶ 18-21, 26-28). None of the questions to which Nordlicht invoked the Fifth Amendment

are material to the determination of Huberfeld's motion for summary judgment, nor the enforceability of the Release Agreement generally. (*See supra*; *see generally* Huberfeld Reply Mem.) Because there are no issues of material fact concerning the validity of the Release Agreement, no adverse inference should be permitted to substitute for Plaintiffs' evidentiary burden.

III. Plaintiffs' Memorandum Of Law Misleads The Court About Nordlicht's Testimony Regarding The Release Agreement

In their supplemental opposition, Plaintiffs argued that Nordlicht "invoked the attorney-client privilege when confronted with an email concerning the March 2016 Release" Plaintiffs wrote that Nordlicht, "acknowledge[d] that Curtis Mallet served as Platinum Management's outside counsel while also serving as counsel for Bodner and Huberfeld for the negotiations of the March 2016 Release," and that such dual representation "confirms that the Release was a product of 'unfair circumstances' and would be 'inequitable to allow the release to serve as a bar to the [JOLs'] claims.'" (Pl. Supp. Mem. at 4-5.)

Plaintiffs' argument is unequivocally false. As Nordlicht testified, and as Plaintiffs acknowledge in their supplemental 56.1 Statement, Nordlicht *withdrew* his assertion of attorney-client privilege on this point and clarified that Curtis Mallet did *not* represent Platinum Management in connection with the Release. (Supp. Bixter Dec., Ex. 2 at Tr. 93:12-24; Pl. Supp. 56.1 ¶¶ 75-77). Plaintiffs' red herring argument should be disregarded.

CONCLUSION

Huberfeld's motion for summary judgment should be granted and all the claims in the SAC against Huberfeld should be dismissed with prejudice.

Date: April 3, 2020

/s/ Jeffrey C. Daniels
Jeffrey C. Daniels, Esq.
Of Counsel to Horowitz and Rubenstein, LLC
4 Carren Circle
Huntington, NY 11743
Tel: (516) 745-5430
jdaniels@jcdpc.com

Attorneys for Murray Huberfeld