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

MEMORANDUM OF LAW OF DEFENDANT DAVID BODNER IN OPPOSITION TO PLAINTIFFS' SECOND SET OF MOTIONS *IN LIMINE*

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Defendant David Bodner respectfully submits this memorandum of law in opposition to Plaintiffs' Second Set of Motions *in Limine* ("Motion") (ECF No. 757),[1] which seek rulings that: (i) the criminal convictions of Mark Nordlicht, David Levy, and Daniel Small, including "judicial findings" in *United States v. Landesman*, 17 F.4th 298 (2d Cir. 2021) (ECF No. 751-1), relating to the Black Elk scheme, should serve as collateral estoppel against Bodner; and (ii) directing adverse inferences against Bodner based upon Nordlicht's anticipated invocation of his Fifth Amendment privilege against self-incrimination if called to testify at trial. For the reasons set forth below, the Motion should be denied in its entirety.

PRELIMINARY STATEMENT

Notwithstanding the Court's definitive determination that "no evidence connects Bodner . . . [to] any [] aspect of the Black Elk scheme" (ECF No. 624 at 28) ("Summary Judgment Order"), Plaintiffs argue that the criminal convictions of Nordlicht, Levy and Small related solely to the Black Elk scheme should serve as collateral estoppel against Bodner in this action. And, notwithstanding this Court's express refusal in the Summary Judgment Order to draw an adverse inference against Bodner based upon Nordlicht's invocation of the Fifth Amendment at his deposition, Plaintiffs now repeat their request for an adverse inference, without offering any basis (because there is none) for the Court to revisit its earlier ruling, which is law of the case. In fact, the Motion fails to even mention the Court's prior ruling that Nordlicht's invocation of the Fifth Amendment could not be used against Bodner.

In addition to being barred by this Court's Summary Judgment Order, Plaintiffs' Motion is also unsupportable as a matter of law. Plaintiffs have cited no case law (and counsel has found none) holding that the findings made in connection with one party's criminal conviction can serve

[1] Citations to docket entries refer to the *Trott* docket, No. 18-cv-10936, unless otherwise stated.

as collateral estoppel in a civil trial against a different party. Moreover, the non-exclusive factors set forth in *LiButti v. United States*, 107 F.3d 110 (2d Cir. 1997) still do not support an adverse inference against Bodner based upon Nordlicht's expected invocation of the Fifth Amendment where, as here, Nordlicht remains in criminal jeopardy, as he awaits a decision on a motion for new trial, and is yet to be sentenced. The Motion lacks merit and should be denied.

FACTUAL BACKGROUND

A. The Criminal Convictions

On December 14, 2016, a grand jury issued an indictment against Nordlicht, Levy and Small, among others. *Landesman*, 17 F.4th at 317. After a nine-week jury trial, on July 9, 2019, a jury convicted Nordlicht and Levy on charges related to the Black Elk scheme. *Id.* The jury acquitted Nordlicht and Levy on charges related to Platinum's alleged "fraudulent[] overvalu[ation] [of] its investment assets[.]" *Id.* at 317 n.4. A jury later convicted Small on charges related to the Black Elk scheme. *See* ECF No. 751-2. Bodner was never accused, or even interviewed, in connection with the criminal case.

In September 2019, the U.S. District Court for the Eastern District of New York ("Eastern District Court") granted Levy's motion for acquittal and Nordlicht's motion for a new trial on the Black Elk scheme. *Landesman*, 17 F.4th at 304. The government appealed and, on November 5, 2021, the Second Circuit set aside the Eastern District Court's decision, holding that a new trial was not warranted for Nordlicht and reinstating Levy's conviction. *Id.* at 342.

On October 14, 2022, Nordlicht filed a renewed motion for a new trial, arguing that the record developed during Small's criminal trial demonstrated that the government had misled the jury during Nordlicht's trial and won a conviction based on false evidence. *See United States v. Nordlicht, et al.*, No. 16-cr-640-BMC (E.D.N.Y. Oct. 14, 2022), ECF No. 971. Levy joined. *Id.*, ECF No. 972. To date, their renewed motion for a new trial remains *sub judice*. The Eastern

District Court has scheduled a joint hearing for Nordlicht, Levy, and Small on the issue of loss calculation under the sentencing guidelines for February 15, 2023. *Id.*, Order dated November 15, 2022. Nordlicht is scheduled to be sentenced on February 17, 2023. *Id.*, Order dated Sept. 28, 2022.

B. The Summary Judgment Order

On March 31, 2020, Plaintiffs filed a supplemental memorandum of law in opposition to Bodner's motion for summary judgment, in which they argued, *inter alia*, that summary judgment should be denied because Nordlicht's invocation of the Fifth Amendment at his deposition could be used to draw an adverse inference against Bodner (and other defendants who, at that time, remained in the case) under *Libutti*. *See generally* ECF No. 609. In support of their position, Plaintiffs made the same arguments that they do in the instant Motion: (1) that the "close working relationship" between Nordlicht and Bodner "favors imputation of the adverse inference"; (2) that "there is a perfect alignment of interests between Nordlicht" and Bodner; (3) that Nordlicht is "the primary Defendant in this case"; and (4) that Bodner exercised some degree of control over Nordlicht. *See id.* at 7-10; Motion at 10-14.

In response, Bodner argued that Nordlicht's assertion of the Fifth Amendment had no probative value because Nordlicht faced criminal exposure on matters within the scope of his examination. ECF No. 618. In particular, Bodner argued that while Nordlicht at that time faced re-trial only on the Black Elk scheme, "the government's theory of Nordlicht's motive placed Nordlicht in criminal jeopardy with respect to virtually any aspect of Platinum's business" and it was, therefore, "unsurprising" that Nordlicht refused to waive his Fifth Amendment rights in this case. *Id.* at 2-3. Bodner also argued that Plaintiffs failed to establish that the *Libutti* factors favored drawing an adverse inference. *Id.* at 3-5.

In its Summary Judgment Order, the Court rejected Plaintiffs' argument that Nordlicht's invocation of the Fifth Amendment could be used against Bodner. It held that while:

> Nordlicht's loyalty to some of the moving defendants is quite clear, claims against him substantially overlap with claims against some of the moving defendants, and Nordlicht occupies the most central role in this litigation, … drawing adverse inferences relying on the non-exclusive Libutti factors alone, without considering the overall context of this deposition, not only has minimal probative value but does not advance the ultimate goal of the search for the truth.

Summary Judgment Order at 16 n.6 (internal citations and quotation marks omitted). The Court thus declined to draw an adverse inference from Nordlicht's invocation of the Fifth Amendment, holding that "[b]ecause Nordlicht remains under a serious threat of criminal prosecution, the most reasonable inference from his silence is that he did so because of the prosecution." *Id.* The Court agreed with Bodner that "[a]lthough Nordlicht's retrial would focus on the Black Elk scheme, the prosecution's case puts Nordlicht in criminal jeopardy with respect to many other aspects of Platinum business." *Id.* The Court then quoted the Eastern District Court's statement that "it would be virtual malpractice for a lawyer not to advise his or her client, when there's a criminal case pending, to take the Fifth everywhere," and "the reason for doing it would be to preserve one of the few advantages that a defendant has in a criminal case, which is the right to silence." *Id.* (quoting Transcript 5/3/2019, ECF No. 616-1, at 42:23-43:4).

In the Summary Judgment Order, the Court also granted summary judgment in favor of Bodner on all remaining counts in the Second Amended Complaint "to the extent that these eight Counts are not premised on the overvaluation of PPVA's net asset value …." Summary Judgment Order at 2. The Court specifically addressed and dismissed Plaintiffs' claim that Bodner should be held liable for the Black Elk scheme, holding that "no evidence connects Bodner … [to] any [] aspect of the Black Elk scheme as described in ¶¶ 440-515 of the SAC." *Id.* at 28. Thus, as a result of the Summary Judgment Order, the only remaining claim against Bodner is that he "owed

a fiduciary duty to PPVA," came to have actual knowledge that PPVA's NAV was fraudulently inflated, and "breached [his] fiduciary duty by failing to disclose the overvaluations of PPVA's NAVs." *Id.* at 24-26.

ARGUMENT

I. COLLATERAL ESTOPPEL CANNOT BE APPLIED AGAINST BODNER

Nordlicht's, Levy's and Small's criminal convictions related to the Black Elk scheme cannot be given collateral estoppel effect against Bodner in this civil action in which all claims related to the Black Elk scheme have been dismissed.

As the Second Circuit has observed in a case on which Plaintiffs rely:

> Under general principles of collateral estoppel, or issue preclusion, a judgment in a prior proceeding bars a party and its privies from relitigating an issue if, but only if:
>
> (1) the issues in both proceedings are identical, (2) the issue in the prior proceeding was actually litigated and actually decided, (3) there was full and fair opportunity to litigate in the prior proceeding, and (4) the issue previously litigated was necessary to support a valid and final judgment on the merits.

N.L.R.B. v. Thalbo Corp., 171 F.3d 102, 109 (2d Cir. 1999) (internal quotation marks omitted).

The requirement that collateral estoppel "is applicable only against one who was a party to the prior proceeding, or was in privity with such a party, is designed to insure that one not be foreclosed from litigating an issue unless its interests were in a meaningful sense represented in the prior proceeding." *Id.* at 109-110. Here, there is no dispute that Bodner was not a party to the prior criminal proceedings. Instead, Plaintiffs argue that "Bodner is in privity" with Nordlicht, Levy, and Small because "the interests of Bodner were fully represented by the Criminal Defendants at their respective trials." Motion at 5. Not so. Plaintiffs admit that in order to have privity based on representation, the interests of the person alleged to be in privity must have been "represented [in the prior proceeding] ***by another vested with the authority of representation.***"

Id. (quoting *Monahan v. New York City Dep't of Corrections*, 214 F.3d 275, 285 (2d Cir. 2000))[2] (emphasis supplied). Plaintiffs do not and cannot offer any evidence to support their nonsensical claim that Nordlicht, Levy, and Small were somehow vested with authority during their criminal trials to represent the legal interests of Bodner, a non-party who was not charged with any crime. Plaintiffs attempt to manufacture privity between Nordlicht and Bodner by arguing that they were "friends and partners" and "participated in various investment ventures together," which gave them "an identical financial interest in the success or failure" of their co-investments. Motion at 5-6. Unsurprisingly, Plaintiffs cite no authority for the proposition that a supposed friendship and co-investor relationship creates privity for purposes of collateral estoppel.

In addition to the fact that Bodner's interests were plainly not represented in the prior criminal proceedings, collateral estoppel also cannot be applied here because the issues in the criminal proceedings are not identical to those in this action. Nordlicht, Levy, and Small were all convicted of charges relating to the Black Elk scheme. Nordlicht and Levy were acquitted of charges relating to the overvaluation of PPVA's NAV. Conversely, this Court has dismissed all claims relating to the Black Elk scheme due to the lack of any evidence connecting Bodner to that scheme, and the only remaining claim against Bodner is that he allegedly failed to disclose what he came to learn was the alleged fraudulent overvaluation of PPVA's NAV. A review of Plaintiffs' proposed order confirms that the "judicial findings" by the Second Circuit that they seek to preclude Bodner from "relitigating" are ones that have no relevance to the actual claims that will

[2] *Monahan* involved a claim for *res judicata*, not collateral estoppel, and applied *res judicata* to claims brought by union members regarding the city's sick-leave policy, where similar claims had already been litigated by the union's president on behalf of the members. It is a reasonable conclusion that a union president is tasked with representing union members' legal interests when he brings suit to vindicate their purported rights.

be submitted to the jury. *See* ECF No. 757-1.[3] Moreover, while Plaintiffs cherry-pick "issues" that they believe help their case, they conveniently ignore other key points made by the Second Circuit, including that "Nordlicht was the CIO of Platinum and its various hedge funds, and in his role as CIO, Nordlicht made the 'final decision' regarding investments." *Landesman*, 17 F.4th at 305; ECF No. 751-1.

Finally, collateral estoppel should not be applied in this case because to do so would be fundamentally unfair to Bodner. *See Bifolck v. Philip Morris USA Inc.*, 936 F.3d 74, 84 (2d Cir. 2019) ("Even if a court concludes that all four prongs of the nonmutual offensive collateral estoppel analysis have been established, it must still assure itself that it is fair to apply the doctrine."). This fairness inquiry "reflects judicial wariness of nonmutual offensive collateral estoppel," which courts have recognized is "detailed, difficult, and potentially dangerous." *Id.* Here, Plaintiffs have identified no authority (and research has revealed none) in which one party's criminal conviction was used to offensively collaterally estop a different party in a civil action involving different issues. It would be fundamentally unfair to expand the doctrine of collateral estoppel under these circumstances.

Accordingly, Plaintiffs' Motion seeking collateral estoppel should be denied.

II. NO ADVERSE INFERENCE SHOULD BE MADE AGAINST BODNER

Plaintiffs' second request in their Motion is for "a pre-trial determination permitting adverse inferences" against Bodner based upon Nordlicht's anticipated invocation of the Fifth Amendment at trial. Motion at 8-9. This request should also be denied.

First, Plaintiffs' request for an adverse inference is foreclosed by the law of the case doctrine, which "posits that 'when a court decides upon a rule of law, that decision should continue

[3] It is also not clear that all of these "judicial findings" were actually litigated or decided by the Second Circuit. *Compare id.*, *with* ECF No. 751-1.

to govern the same issues in subsequent stages in the same case.'" *Hodnett v. Medalist Partners Opportunity Master Fund II-A, L.P.*, 2021 U.S. Dist. LEXIS 27205, at *8 (S.D.N.Y. Feb. 12, 2021) (quoting *Musacchio v. United States*, 577 U.S. 237 (2016)). Here, Plaintiffs already sought an adverse inference against Bodner based upon Nordlicht's invocation of the Fifth Amendment, and the Court denied that request because Nordlicht remained under threat of criminal exposure, which offered a reasonable explanation for his silence. Summary Judgment Order at 16 n.6. Plaintiffs now attempt to reassert the identical claim, without making any argument whatsoever as to why the Court should depart from its earlier ruling. To the contrary, Plaintiffs *ignore* the Court's prior ruling in its entirety.[4]

Second, even if not treated as law of the case, the Court's rationale for denying the adverse inference in the Summary Judgment Order remains sound. As the Court observed, "[w]hether to draw an adverse inference turns on 'whether the adverse inference is trustworthy under all of the circumstances and will advance the search for the truth.'" Summary Judgment Order at 15 n.6 (quoting *LiButti*, 107 F.3d at 121). "[D]rawing adverse inferences relying on the non-exclusive LiButti factors alone, without considering the overall context of [Nordlicht's testimony], not only has minimal probative value but does not advance the ultimate goal of 'the search for the truth.'" *Id.* at 16 n.6. Likewise, today, Nordlicht remains under "serious threat of criminal prosecution." *Id.* He has moved for a new trial, he has an upcoming hearing on the issue of loss calculation, and he has not been sentenced. Thus, even if Nordlicht were to assert the Fifth Amendment if called to testify in this trial, "the most reasonable inference from his silence [would be] that he did so

[4] Plaintiffs quote from the very footnote in which the Court rejected their request for an adverse inference, without acknowledging the Court's ruling. Instead, Plaintiffs argue only that "[a]s the Court noted in its Summary Judgment Opinion and Order, 'a finder of fact in a civil case may … draw an adverse inference against the alleged co-conspirators from a co-conspirator's assertion of the Fifth Amendment.'" Motion at 8 (quoting ECF No. 624 at n.6).

because of the prosecution." *Id.* Indeed, "it would be virtual malpractice" for Nordlicht's lawyer "not to advise" him "to take the Fifth everywhere[.]" *Id.* Accordingly, Nordlicht's potential invocation of the Fifth Amendment at trial would have no more probative value than it did when he invoked the Fifth Amendment at his deposition.

Third, while Plaintiffs argue in support of their Motion—as they did in opposition to Bodner's motion for summary judgment—that "Nordlicht is a critical witness who is central to this action, and thus imposition of an adverse inference against Bodner is appropriate in the likely event that Nordlicht asserts his Fifth Amendment rights at trial," Motion at 13-14, Plaintiffs' own actions belie this assertion. Indeed, Plaintiffs know very well that Nordlicht will likely invoke the Fifth Amendment at trial precisely because he will remain under threat of criminal prosecution. If Nordlicht's testimony were truly so "critical" to Plaintiffs' case, they could have simply requested that the trial be adjourned for a few months until after Nordlicht's sentencing and resolution of his pending motion for a new trial. They did not. Their failure to do so is an admission that they do not actually believe that Nordlicht's testimony would help them, which is why they are trying to avoid the testimony and instead seek to have the jury simply infer Plaintiffs' entire case against Bodner, including their allegation that the March 20, 2016 Release Agreement lacked a genuine business purpose. *See* ECF No. 757-2, Proposed Order.

Plaintiffs' request for an adverse inference is without merit and should be denied.[5]

[5] Bodner does not concede that any of the non-exclusive *Libutti* factors are satisfied. Bodner does not address each factor individually for purposes of efficiency and because the Court has already ruled that "drawing adverse inferences relying on the non-exclusive Libutti factors alone . . . has minimal probative value . . ." Summary Judgment Order at 16 n.6.

CONCLUSION

For the foregoing reasons, the Motion should be denied in its entirety.

Dated: November 23, 2022
New York, New York

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