

# Holland & Knight

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*Via ECF*

December 14, 2022

Honorable Jed S. Rakoff  
United States District Court, Southern District of New York  
500 Pearl Street, Room 1340  
New York, New York 10007

Re: *In re Platinum-Beechwood Litigation*, 18-cv-6658 (JSR) (Master Docket)  
*Trott et al. v. Platinum Management (NY) LLC et al.*, 1:18-cv-10936 (JSR)

Dear Judge Rakoff:

The following addresses part 5 of Defendant David Bodner’s December 14, 2022 Letter Memorandum, concerning whether \$1.35 million in incentive fee redemptions paid to Uri Landesman and \$2.5 million in incentive fee redemptions paid to Mark Nordlicht should be treated on a first-in, first-out (“FIFO”) or last-in, first-out (“LIFO”) due to the fact that Landesman and Nordlicht both had unredeemed incentive fees in their LP accounts for years prior to 2012.

First, it must be noted that the only evidence concerning this issue is the expert testimony of Mr. Quintero, who testified on cross-examination:

Q: Can you explain very briefly to the jury the accounting concept known as FIFO?

A. FIFO was used for inventory analysis and it assumes that the first inventory in is the first inventory out. LIFO—last in first out—assumes that the last in is the last out, but those don’t particularly pertain to investments.

See Transcript at p. 1699, ln. 22 to 1700, ln. 2. Bodner has not offered an expert for trial in this case on any matter, including the LIFO vs. FIFO issue, and Boner has offered no fact witness on Platinum Management’s internal practices concerning this issue. Rather, Bodner sought to raise this issue on the day before the end of trial.

In the event that this Court believes Defendant properly raised the LIFO vs. FIFO issue, Plaintiffs’ submit that the Court should use its discretion to determine that all payment of cash redemptions for commingled incentive fees should be treated on a “LIFO” basis.

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As stated in *Sec. Inv'r Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC*, 581 B.R. 370, 386 (Bankr. S.D.N.Y. 2017):

While it is true that [the expert] does not opine on the appropriate tracing methodology, a description of the methodologies may assist the Court in making its own determination as to the proper methodology. The tracing methodologies reflect legal rules or fictions designed to assist a Court in dealing with an improper transfer from a commingled fund. *See* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 59 & cmts. (2011); 2 DAN B. DOBBS, LAW OF REMEDIES § 6.1(4), at 17 (2d ed. 1993). Expert opinion regarding the appropriate methodology may prove helpful, but the Court's selection of an appropriate methodology is committed to the Court's discretion. *United States v. Henshaw*, 388 F.3d 738, 739 (10th Cir. 2004) (“Adherence to specific equitable principles, including rules concerning tracing analysis, is subject to the equitable discretion of the court.”) (quoting *United States v. Durham*, 86 F.3d 70, 72 (5th Cir. 1996)) (alterations omitted); *accord McHale v. Boulder Capital LLC (In re 1031 Tax Grp., LLC)*, 439 B.R. 78, 81 (Bankr. S.D.N.Y. 2010) (“Courts have discretion when determining how to allocate commingled funds where a party has acted improperly in obtaining the funds.”). Thus, the Court may select a different methodology than the one supported by the opinion of the Defendants' expert.

Here, Plaintiffs submit that, if the Court believes it has discretion on this issue, the appropriate and equitable methodology to employ is LIFO. Bodner permitted his partners Landesman and Nordlicht to redeem incentive fees through payments of cash throughout 2013 and 2014, after Bodner had knowledge of the Black Elk explosion and the obvious impact this would have on PPVA's NAV, and after Bodner had created and capitalized Beechwood and the BEOF Funds to effectuate the debt stability scheme. One of the core premises of Plaintiffs' case is that if Bodner had put a stop to the payment of incentive fees in December 2012 – similar to his directive in January 2015 – PPVA would have avoided \$31 million in damages on account of the cash payment of unearned incentive fees. The fact that the particular redemptions for which the LIFO/FIFO issues arises were not directly received by Bodner is irrelevant. Bodner permitted these cash payments to be made. Accordingly, to the extent this Court believes it has discretion to determine the proper tracing methodology, Plaintiffs respectfully request that LIFO be employed to this matter.

Respectfully submitted,

HOLLAND & KNIGHT LLP

s/ Warren E. Gluck

To: All Counsel By ECF

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