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June 29, 2017

**VIA CM/ECF**

The Honorable Dora L. Irizarry  
Chief Judge  
United States District Court  
Eastern District of New York  
225 Cadman Plaza East  
Brooklyn, New York 11201

**Re: *Securities and Exchange Commission v. Platinum Management (NY) LLC, et al.*,  
No. 1:16-cv-06848-DLI-VMS**

Dear Chief Judge Irizarry,

We are counsel to David Levy, a defendant before Your Honor in both the pending criminal and SEC cases, as well as an investor in the Platinum Funds. We write in anticipation of the hearing scheduled for July 7 to: (1) raise with the Court our alarm at the recent conduct of the SEC in connection with the Court's appointed Receiver, Bart M. Schwartz, and in particular, the SEC's newly proposed order delineating the proposed responsibilities and tasks for a new Receiver; and (2) request that the Court direct the SEC to notify other interested investors of the relevant events so that they may be heard at the scheduled July 7 hearing should they so choose.

The joint letter of the defendants submitted to the Court on June 26, 2017 recounted some of the relevant history relating to the qualifications and appointment of Mr. Schwartz. Dkt. No. 177. That will not be repeated herein. Suffice it to say, Mr. Schwartz has extensive experience as a Receiver, has a long record of successfully dealing with challenging business and legal proceedings, and has been involved in overseeing many of Platinum's investments since June 2016. *See* Dkt. No. 1-2 at 31-32 ("Moreover, the [SEC] staff believes that Bart Schwartz and Guidepost, which are already in place as [Independent Oversight Advisor], are uniquely qualified to serve as Receiver and advisers to the Receiver, respectively."). It was thus hardly surprising that when the SEC asked that a Receiver be appointed for certain of the Platinum entities, Mr. Schwartz was tasked by the Court to use his business acumen and skill to, among other things, achieve "realization of the true and proper value of [the] Receivership Property." Dkt. No. 6 at 12.

It came as quite a shock to Mr. Levy and his counsel, therefore, when we saw the joint letter of Mr. Schwartz and the SEC, dated May 19, 2017, requesting a conference with Your Honor. That letter made clear that the SEC disagreed with Mr. Schwartz's view that the use of additional limited capital with respect to certain Fund investments would likely be to the benefit of investors and



Chief Judge Dora L. Irizarry

June 29, 2017

Page 2 of 4

creditors.<sup>1</sup> Dkt. No. 142. As the Court had expressly authorized Mr. Schwartz to use his business judgment and experience to make just such decisions, we grew concerned that the SEC, which along with the U.S. Attorney's Office, had characterized the Fund's investments as "having no more value than a tarnished piece of cheap metal," and the Fund as "like a Ponzi scheme," was trying to interfere with Mr. Schwartz's authority and judgment seeking to maximize the value of Fund's assets and thereby make all investors whole.

Approximately a month later, Mr. Schwartz asked to resign as Receiver. Dkt. No. 170. Putting aside the transparent, non-issue of a possible conflict of interest,<sup>2</sup> it is clear from Mr. Schwartz's submission that he is beyond frustrated by the SEC's relentless opposition to his recommended steps. Mr. Schwartz was just days away from issuing his proposed plan. As part of that plan, Mr. Schwartz has indicated that he would seek to liquidate all but a handful of assets, and as to the few remaining assets he would make limited further investments in order to get far more money for investors. Dkt. No. 180 at 1. Indeed, Mr. Schwartz has made clear that these proposed additional investments in even just one of the assets could bring more than \$100 million to Platinum's investors, whereas liquidating that asset now could generate a loss. *Id.* at 2. Moreover, while Your Honor's Order called for Mr. Schwartz to be compensated for his efforts on behalf of Platinum, the SEC seemingly has sought to punish Mr. Schwartz by asking the Court to hold back 45% of his compensation. Dkt. No. 152.

In letters submitted to the Court on June 26 and 27, 2017, the concerns of investors and defendants were well articulated – replacing Mr. Schwartz at this late stage will, at a minimum, waste millions of dollars and unnecessarily delay a wind-up plan. Dkt. Nos. 177 and 178.

We write now, however, because the latest submission from the SEC appears to confirm our worst fear: the SEC is not interested in a Receiver that will bring business judgment to the challenging issues facing Platinum and seek to maximize the value of the Fund's assets for the benefit of investors and creditors, but rather someone who will have no authority to do anything other than liquidate the Fund's assets, even if that means causing losses to investors. As the SEC is an actual litigant, which has accused the defendants of perpetrating a fraud on investors by misstating the value of certain investments, we are concerned that the fire-sale being demanded by the

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<sup>1</sup> "[T]he SEC staff and the Receiver have differing views on how the Receivership should progress. ... The Receiver believes that additional cash will be coming into the estate and that a longer term horizon is necessary for him to evaluate whether Receivership assets should be invested into certain existing investments and ongoing operations in order for him to try to obtain a higher value for the benefit of investors." Dkt. No. 142 at 1-2.

<sup>2</sup> This conflict appears to be no conflict at all, and cannot come as a surprise to the SEC, who, in selecting Mr. Schwartz as Receiver, surely reviewed his publicly available CV, which includes his work with Milberg Weiss, LLP. See <http://www.guidedpostsolutions.com/our-experts/bart-schwartz/>.



Chief Judge Dora L. Irizarry

June 29, 2017

Page 3 of 4

SEC may be designed to save the SEC and the U.S. Attorney's Office from having to acknowledge that their inflammatory public comments about the Fund's investments were grounded neither in truth nor fact.

We refer the Court to Exhibit 2 to the SEC's Memorandum in Support of the Motion to Appoint Receiver Application, submitted June 26, 2017, and attached again here as Appendix A for the Court's convenience. Dkt. No. 174. This is a redline copy of the SEC's application for a new Receiver, against Your Honor's Order appointing Mr. Schwartz. As the Court will readily see, the SEC has removed nearly all sections empowering the Receiver to make decisions about the Fund's investments, and now vests authority in the Receiver only to liquidate assets. But this approach flies in the face of the Second Circuit's directive that an equitable receivership should not be used to effect a liquidation and act as an improper substitute for bankruptcy proceedings. *See SEC v. Am. Bd. of Trade, Inc.*, 830 F.2d 431, 436-38 (2d Cir. 1987). The SEC was required to, but did not, inform this Court of the Circuit's directive. *See id.* at 438. Furthermore, it is inconsistent with the SEC's own recognition, at the outset of this case, that a *receivership* was the appropriate construct for the purpose of assessing the value of the assets and, if warranted, managing them to maximize value.

While the SEC has left no doubt that it disagrees with Mr. Schwartz, it has provided no basis whatsoever to conclude that it is qualified in any way to substitute its views for his, or that its approach will best maximize the value of the Fund's assets, which is clearly the outcome this Court sought when it appointed Mr. Schwartz. Moreover, the SEC has failed entirely to justify its new request that nearly all actions of the Receiver now be undertaken only in consultation with the SEC.<sup>3</sup>

We respectfully submit that the SEC's conduct in frustrating Mr. Schwartz's efforts as Receiver is entirely inconsistent with Your Honor's Order appointing him in the first place. The Court assigned Mr. Schwartz with certain tasks. The SEC has so frustrated those tasks that an experienced professional such as Mr. Schwartz now feels compelled to resign. We further submit

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<sup>3</sup> This revised Order also seeks unilaterally to expand the scope of the Receivership. As Your Honor will recall, this expansion was initially the subject of an application made by Mr. Schwartz and – contrary to the SEC's assertions in its recent application – was partially opposed by the defendants. Specifically, the SEC has now represented to Your Honor that “Defendants Levy and Nordlicht consented to expansion of the Receivership as set forth in the Proposed Second Amended Receivership Order, but objected to the Receiver's ability to control the attorney-client privilege for Platinum Management (NY) LLC.” Dkt. No. 174 at 3. This simply is not so. In addition to opposing the Receiver's ability to control the attorney-client privilege for Platinum Management (NY) LLC (“PMNY”), Mr. Levy in fact objected to the inclusion of PMNY in the Receivership at all. Dkt. Nos. 119, 125, and 127. Your Honor has not yet ruled on this application, and should Your Honor consider accepting the SEC's newly proposed Order, we would raise our previously stated objections as to this unnecessary expansion. *See* Dkt. Nos. 112, 119, 120, 122, 125, 126, and 127.



Chief Judge Dora L. Irizarry  
June 29, 2017  
Page 4 of 4

that the SEC's newly proposed Order reveals the SEC's true intentions: to neuter the Receiver, bar decisions that stand to enhance the position of investors and creditors, and instead require a fire-sale of Fund assets, which will surely damage the very investors the SEC is charged to protect. It would be truly alarming if the SEC's motivation here was to damage the interests of investors simply to enhance its litigation position. This tension, and the obvious conflicting interests of the SEC, makes the independence of the Receiver in this matter all the more critical.

In light of the above, we ask that the Court deny the SEC's proposed Order for the appointment of a new Receiver. We also ask that in light of these important developments and the impact they stand to impose on all investors to the Funds, the SEC be directed forthwith to take all reasonable steps to notify Platinum investors of the relevant facts relating to and the hearing scheduled for July 7, 2017.

Respectfully submitted,

WILSON SONSINI GOODRICH & ROSATI  
Professional Corporation

s/ Michael S. Sommer  
Michael S. Sommer  
Morris J. Fodeman

Cc: All Counsel of Record (via CM/ECF)

# APPENDIX A

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK**

**SECURITIES AND EXCHANGE  
COMMISSION,**

**Plaintiff,**

**v.**

**PLATINUM MANAGEMENT (NY) LLC;  
PLATINUM CREDIT MANAGEMENT, L.P. ;  
MARK NORDLICHT;  
DAVID LEVY;  
DANIEL SMALL;  
URI LANDESMAN;  
JOSEPH MANN;  
JOSEPH SANFILIPPO; and  
JEFFREY SHULSE;**

**Defendants.**

**Civil Case No. 16-6848 (DLI) (VMS)**

**ECF CASE**

**[PROPOSED] SECOND AMENDED ORDER APPOINTING RECEIVER**

**WHEREAS** this matter has come before this Court upon motion of the Plaintiff U.S. Securities and Exchange Commission (“SEC”, “Commission” or “Plaintiff”) to appoint a

substitute receiver in the above-captioned action;

**WHEREAS** the Court finds that, based on the record in these proceedings, the appointment of a substitute receiver in this action is necessary and appropriate for the purposes of marshaling and preserving all assets of Platinum Credit Management, L.P.; Platinum Partners Credit Opportunities Master Fund LP; Platinum Partners Credit Opportunities Fund (TE) LLC; Platinum Partners Credit Opportunities Fund LLC; Platinum Partners Credit Opportunity Fund (BL) LLC; Platinum Partners Credit Opportunities Fund International Ltd; Platinum Partners

Credit Opportunities Fund International (A) Ltd; Platinum Credit Management LLC; Platinum Credit Holdings LLC; Platinum Liquid Opportunity Management (NY) LLC; and Platinum Partners Liquid Opportunity Fund (USA) L.P.-(“; Platinum Liquid Opportunity GP LLC; Platinum Partners Liquid Opportunity Fund (International) Ltd.; Platinum Partners Liquid Opportunity Intermediate Fund L.P.; Platinum Partners Liquid Opportunity Master Fund L.P.; and Platinum Management (NY) LLC (the “Receivership Entities”); to (i) preserve the status quo, (ii) ascertain the extent of commingling of funds among the Receivership Entities; (iii) ascertain the true financial condition of the Receivership Entities and the disposition of investor funds; (iv) prevent further dissipation of the property and assets of the Receivership Entities; (v) prevent the encumbrance or disposal of property or assets of the Receivership Entities; (vi) preserve the books, records and documents of the Receivership Entities; (vii) be available to respond to investor inquiries; (viii) protect investors’ assets; (ix) conduct an orderly wind down including a responsible liquidation of assets and orderly and fair distribution of those assets to investors; and (x) determine whether one or more of the Receivership Entities should undertake bankruptcy filings.

**WHEREAS** the Court has subject matter jurisdiction over this action and personal jurisdiction over the Receivership Entities, and venue properly lies in this district.

**NOW THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT:**

1. This Court hereby takes exclusive jurisdiction and possession of the assets, of whatever kind and wherever situated, of the Receivership Entities (the “Receivership Assets”).

2. Until further Order of this Court, ~~Bart~~ Schwartz is hereby appointed to serve without bond as substitute receiver (the “Receiver”) for the receivership estate of the Receivership Entities (the

“Receivership Estate”).

**I. General Powers and Duties of Receiver**

3. The Receiver shall have all powers, authorities, rights and privileges heretofore possessed by the officers, directors, managers, managing members, and general and limited partners of the Receivership Entities under applicable state and federal law, by the governing charters, by-laws, articles and/or agreements in addition to all powers and authority of a receiver at equity, and all powers conferred upon a receiver by the provisions of 28 U.S.C. §§ 754, 959 and 1692, and Fed.R.Civ.P. 66.

4. All officers, directors, managing members, general and limited partners of the Receivership Entities are hereby dismissed from any and all positions of management of the Receivership Entities, and the powers of any officers, directors, managing members, general and limited partners of the Receivership Entities, are hereby subject to the authority and discretion of the Receiver. The Receiver shall assume and control the operation of the Receivership Entities and shall pursue and preserve all of the Receivership Entities' claims.

5. No person holding or claiming any position of any sort with any of the Receivership Entities shall possess any authority to act by or on behalf of any of the Receivership Entities except as may be authorized or delegated by the Receiver.

6. Subject to the specific provisions in this Order, the Receiver shall have the following general powers and duties:

A. To use reasonable efforts to determine the nature, location and value of all property interests of the Receivership Entities, including, but not limited to, monies, funds, securities, credits, effects, goods, chattels, lands, premises, leases, claims, rights and other assets, together with all rents, profits, dividends, interest or other income



attributable thereto, of whatever kind, which the Receivership Entities own, possess, have a beneficial interest in, or control directly or indirectly (“Receivership Property”);

B. To take custody, control and possession of all Receivership Property and records relevant thereto from the Receivership Entities; to sue for and collect, recover, receive and take into possession from third parties all Receivership Property and records relevant thereto;

C. To manage, control, operate and maintain the Receivership Entities and hold in the Receiver’s possession, custody and control all Receivership Property, pending further Order of this Court;

D. To use Receivership Property for the benefit of the Receivership Estate, making payments and disbursements and incurring expenses as may be necessary or advisable in the ordinary course of business in discharging the Receiver’s duties as Receiver;

E. To take any action which, prior to the entry of this Order, could have been taken by the officers, directors, managers, managing members, and general and limited partners, and agents of the Receivership Entities;

F. To engage and employ persons in the Receiver’s discretion to assist the Receiver in carrying out the Receiver’s duties and responsibilities hereunder, including, but not limited to, accountants, attorneys, securities traders, registered representatives, financial or business advisers, liquidating agents, real estate agents, forensic experts, brokers, traders or auctioneers, subject to Court approval;

G. To take such action as necessary and appropriate for the preservation of Receivership Property or to prevent the dissipation or concealment of Receivership Property;

- H. To issue subpoenas for documents and testimony consistent with the Federal Rules of Civil Procedure and Court orders;
- I. To investigate transactions by and among Receivership Entities, defendants, and any other persons and entities.
- J. To bring such legal actions based on law or equity in any state, federal, or foreign court as the Receiver deems necessary or appropriate in discharging the Receiver's duties as Receiver;
- K. To pursue, resist and defend all suits, actions, claims and demands which may now be pending or which may be brought by or asserted against the Receivership Estate; and,
- L. To take such other action as may be approved by this Court.

## II. Access to Information

7. The Receivership Entities and the Receivership Entities' ~~and the~~ past and/or present officers, directors, managers, managing members, general and limited partners, agents, attorneys, accountants and employees ~~of the Receivership Entities~~, as well as those acting in their place, are hereby ordered and directed to preserve and turn over to the Receiver forthwith all paper and electronic information of, and/or relating to, the Receivership Entities and/or all Receivership Property; such information shall include but not be limited to books, records, documents, accounts and all other instruments and papers.

~~8. Within five (5) days of the entry of this Order, the Receivership Entities shall serve upon the Receiver and the Commission a sworn statement, listing: (a) all employees (and job titles thereof), other personnel, attorneys, accountants and any other agents or contractors of the Receivership Entities; and, (c) the names, addresses and amounts of investments of all known~~

~~investors of the Receivership Entities.~~

~~9. Within five (5) days of the entry of this Order, Receivership Entities shall provide to the Receiver and the Commission copies of Receivership Entities' federal income tax returns with all relevant and necessary underlying documentation.~~

~~10.8.~~ The Receivership Entities and the Receivership Entities' past and/or present officers, directors, agents, managers, managing members, general and limited partners, attorneys, employees, and accountants, shall cooperate with the Receiver and produce all documents as may be required by the Receiver regarding the business of the Receivership Entities, or any other matter relevant to the operation or administration of the receivership or the collection of funds due to the Receivership Entities.

### **III. Access to Books, Records and Accounts**

~~11.9.~~ The Receiver is authorized to take immediate possession of all assets, bank accounts or other financial accounts, books and records and all other documents or instruments relating to the Receivership Entities. All persons and entities having control, custody or possession of any Receivership Property are hereby directed to turn such property over to the Receiver.

~~12.10.~~ The Receivership Entities, as well as their past and/or present officers, directors, agents, managers, managing members, general and limited partners, attorneys, employees, and accountants, any persons acting for or on behalf of the Receivership Entities, and any persons receiving notice of this Order by personal service, facsimile transmission or otherwise, having possession of the property, business, books, records, accounts or assets of the Receivership Entities are hereby directed to deliver the same to the Receiver, the Receiver's agents and/or employees.

~~13.11.~~ All banks, brokerage firms, financial institutions, and other persons or entities which have possession, custody or control of any assets or funds held by, in the name of, or for the benefit of, directly or indirectly, of the Receivership Entities that receive actual notice of this Order by personal service, facsimile transmission or otherwise shall:

- A. Not liquidate, transfer, sell, convey or otherwise transfer any assets, securities, funds, or accounts in the name of or for the benefit of the Receivership Entities except upon instructions from the Receiver;
- B. Not exercise any form of set-off, alleged set-off, lien, or any form of self-help whatsoever, or refuse to transfer any funds or assets to the Receiver's control without the permission of this Court; and
- C. Cooperate expeditiously in providing information and transferring funds, assets and accounts to the Receiver or at the direction of the Receiver.

#### **IV. Access to Real and Personal Property**

~~14.12.~~ The Receiver is authorized to take immediate possession of all personal property of the Receivership Entities, wherever located, including but not limited to electronically stored information, computers, laptops, hard drives, external storage drives, and any other such memory, media or electronic storage devices, books, papers, data processing records, evidence of indebtedness, bank records and accounts, savings records and accounts, brokerage records and accounts, certificates of deposit, stocks, bonds, debentures, and other securities and investments, contracts, mortgages, furniture, office supplies and equipment.

~~15.13.~~ The Receiver is authorized to take immediate possession of all real property of the Receivership Entities, wherever located, including but not limited to all ownership and leasehold interests and fixtures. Upon receiving actual notice of this Order by personal service, facsimile

transmission or otherwise, all persons other than law enforcement officials acting within the course and scope of their official duties, are (without the express written permission of the Receiver) prohibited from: (a) entering such premises; (b) removing anything from such premises; or, (c) destroying, concealing or erasing anything on such premises.

~~16.14.~~ In order to execute the express and implied terms of this Order, the Receiver is authorized to change door locks to the premises described above. The Receiver shall have exclusive control of the keys and all other means of access to the real property. The Receivership Entities, or any other person acting or purporting to act on their behalf, are ordered not to change the locks in any manner, nor to have duplicate keys or other means of access made, nor shall they have keys or other means of access in their possession during the term of the receivership except as authorized by the Receiver.

~~17.15.~~ The Receiver is authorized to open all mail directed to or received by or at the offices or post office boxes of the Receivership Entities, and to inspect all mail opened prior to the entry of this Order, to determine whether items or information therein fall within the mandates of this Order.

#### **V. Notice to Third Parties**

~~18.16.~~ The Receiver shall promptly give notice of the Receiver's appointment to all known persons and entities including past and present officers, directors, managers, managing members, general and limited partners, agents, attorneys, accountants, and employees of the Receivership Entities, as the Receiver deems necessary or advisable to effectuate the operation of the receivership.

~~19.17.~~ All persons and entities owing any obligation, debt, or distribution with respect to an ownership interest to any Receivership Entities shall, until further ordered by this Court, pay

all such obligations in accordance with the terms thereof to the Receiver and its receipt for such payments shall have the same force and effect as if the Receivership Entities had received such payment.

~~20.18.~~ 21.18. In furtherance of the Receiver's responsibilities in this matter, the Receiver is authorized to communicate with, and/or serve this Order upon, any person, entity or government office that he deems appropriate to inform them of the status of this matter and/or the financial condition of the Receivership Estate. All government offices which maintain public files of security interests in real and personal property shall, consistent with such office's applicable procedures, record this Order upon the request of the Receiver or the SEC.

~~21.19.~~ 22.19. The Receiver is authorized to instruct the United States Postmaster to hold and/or reroute mail which is related, directly or indirectly, to the business, operations or activities of any of the Receivership Entities (the "Receiver's Mail"), including all mail addressed to, or for the benefit of, the Receivership Entities. The Postmaster shall not comply with, and shall immediately report to the Receiver, any change of address or other instruction given by anyone other than the Receiver concerning the Receiver's Mail. The Receivership Entities shall not open any of the Receiver's Mail and shall immediately turn over such mail, regardless of when received, to the Receiver. All personal mail of any individuals, and/or any mail appearing to contain privileged information, and/or any mail not falling within the mandate of the Receiver, shall be released to the named addressee by the Receiver. The foregoing instructions shall apply to any proprietor, whether individual or entity, of any private mail box, depository, business or service, or mail courier or delivery service, hired, rented or used by the Receivership Entities. The Receivership Entities shall not open a new mailbox, or take any steps or make any arrangements to receive mail in contravention of this Order, whether through the U.S. mail, a

private mail depository or courier service.

~~22.20.~~ Subject to payment for services provided, any entity furnishing water, electric, telephone, sewage, garbage, trash removal, and any other services to the Receivership Entities shall maintain such service and transfer any such accounts to the Receiver unless instructed to the contrary by the Receiver.

#### **VI. Injunction Against Interference with Receiver**

~~23.21.~~ The Receivership Entities and all persons receiving notice of this Order by personal service, facsimile or otherwise, are hereby restrained and enjoined from directly or indirectly taking any action or causing any action to be taken, without the express written agreement of the Receiver, ~~whieh~~that would:

- A. Interfere with the Receiver's efforts to take control, possession, or management of any Receivership Property; such prohibited actions include but are not limited to, using self-help or executing or issuing or causing the execution or issuance of any court attachment, subpoena, replevin, execution, or other process for the purpose of impounding or taking possession of or interfering with or creating or enforcing a lien upon any Receivership Property;
- B. Hinder, obstruct or otherwise interfere with the Receiver in the performance of the Receiver's duties; such prohibited actions include but are not limited to, concealing, destroying or ~~—~~altering records or information;
- C. Dissipate or otherwise diminish the value of any Receivership Property; such prohibited actions include but are not limited to, releasing claims or disposing, transferring, exchanging, assigning or in any way conveying any Receivership

Property, enforcing judgments, assessments or claims against any Receivership Property or any Receivership Entities, attempting to modify, cancel, terminate, call, extinguish, revoke or accelerate (the due date), of any lease, loan, mortgage, indebtedness, security agreement or other agreement executed by any Receivership Entity or which otherwise affects any Receivership Property; or,

D. Interfere with or harass the Receiver, or interfere in any manner with the exclusive jurisdiction of this Court over the Receivership Estate.

~~24.22.~~ The Receiver shall promptly notify the Court and SEC counsel of any failure or apparent failure of any person or entity to comply in any way with the terms of this Order.

## **VII. Stay of Litigation**

~~25.23.~~ As set forth in detail below, the following proceedings, *excluding* (i) the instant proceeding, (ii) all police or regulatory actions and actions of the Commission related to the above-captioned enforcement action, and for the avoidance of doubt, (iii) Cause No: FSD 118/2016 (NAS) and Cause No: FSD 131 of 2016 (AJJ) pending before the Grand Court of the Cayman Islands, and (iv) the bankruptcy cases *In re Platinum Partners Value Arbitrage Fund L.P.*, 16-12925 (Bankr. S.D.N.Y.) and *In re Platinum Partners Value Arbitrage Fund International Ltd.*, 16-12934 (Bankr. S.D.N.Y.), are stayed until further Order of this Court:

All civil legal proceedings of any nature, including, but not limited to, bankruptcy proceedings, arbitration proceedings, foreclosure actions, default proceedings, or other actions of any nature involving: (a) the Receiver, in the Receiver's capacity as Receiver; (b) any Receivership Property, wherever located; (c) any of the Receivership Entities; or, (d) any of the Receivership Entities' past or present officers, directors, managers,



managing members, agents, or general or limited partners sued for, or in connection with, any action taken by them while acting in such capacity of any nature, whether as plaintiff, defendant, third-party plaintiff, third-party defendant, or otherwise (such proceedings are hereinafter referred to as “Ancillary Proceedings”).

~~26.24.~~ The parties to any and all Ancillary Proceedings are enjoined from commencing or continuing any such legal proceeding, or from taking any action, in connection with any such proceeding, including, but not limited to, the issuance or employment of process.

~~27.25.~~ All Ancillary Proceedings are stayed in their entirety, and all courts having any jurisdiction thereof are enjoined from taking or permitting any action until further Order of this Court. Further, as to a cause of action accrued or accruing in favor of one or more of the Receivership Entities against a third person or party, any applicable statute of limitation is tolled during the period in which this injunction against commencement of legal proceedings is in effect as to that cause of action.

### **VIII. Managing Assets**

~~26.~~ The Receiver shall at all times administer Receivership Property with the care and diligence that an ordinary prudent individual would use in handling such person’s own estate.<sup>1</sup>

~~28.27.~~ The Receiver may, without further Order of this Court, ~~transfer, compromise, or otherwise dispose of any Receivership Property, other than real estate, pay expenses that arise in~~ the ordinary course of ~~business~~ the Receivership Entities’ orderly liquidation, on terms and in the manner the Receiver deems most beneficial to the Receivership Estate, ~~and with due regard to the realization of the true and proper value of such Receivership Property.~~

~~29.~~ ~~Subject to the specific provisions of this order, the Receiver is authorized to~~

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<sup>1</sup> See, e.g., *SEC v. Kirkland*, 2012 U.S. Dist. LEXIS 126739 at \*6 (S.D. Fla., Aug. 1, 2012); *Fleet Nat’l Bank v. H & D Entertainment*, 926 F. Supp. 226, 240 n.51 (D. Mass. 1996), aff’d, 96 F.3d 532 (1st Cir. 1996).

~~locate, list for sale or lease, engage a broker for sale or lease, cause the sale or lease, and take all necessary and reasonable actions to cause the sale or lease of all real property in the Receivership Estate, either at public or private sale, on terms and in the manner the Receiver deems most beneficial to the Receivership Estate, and with due regard to the realization of the true and proper value of such real property.~~

~~30. — Upon further Order of this Court, pursuant to such procedures as may be required by this Court and additional authority such as 28 U.S.C. §§ 2001 and 2004, the Receiver will be authorized to sell, and transfer clear title to, all real property in the Receivership Estate.~~

28. As soon as is practicable, the Receiver shall provide the SEC staff and submit for Court approval a budget for the subsequent six-month period of the Receivership's liquidation, and shall continue to prepare and submit for Court approval budgets for such periods that are appropriate under the facts and circumstances of the case until the close of the case.

29. The Receiver may engage in transactions outside of the ordinary course of business of the Receivership Entities' liquidation only upon submission of such transactions for review and comment by the SEC staff and upon motion and approval of the Court. For purposes of this paragraph, a transaction outside of the ordinary course of business is any transaction that involves Receivership Property whose valuation is \$1 million or more. The Receiver shall submit for SEC staff review all transactions involving Receivership Property whose valuation is less than \$1 million and shall submit any such transaction for Court approval if so requested by the SEC staff.

~~31.~~30. The Receiver is authorized to take all actions to manage, maintain, and/or wind-down business operations of the Receivership Estate, including making legally required payments to creditors, employees, and agents of the Receivership Estate and communicating

with vendors, investors, governmental and regulatory authorities, and others, as appropriate and necessary for the orderly liquidation of the Receivership Property consistent with 28 U.S.C. §959.

~~32.~~31. The Receiver shall take all necessary steps to enable the Receivership Funds to obtain and maintain the status of a taxable “Settlement Fund,” within the meaning of Section 468B of the Internal Revenue Code and of the regulations.

### **IX. Investigate and Prosecute Claims**

~~33.~~32. Subject to the requirement, in Section VII above, that leave of this Court is required to resume or commence certain litigation, the Receiver is authorized, empowered and directed to investigate, prosecute, defend, intervene in or otherwise participate in, compromise, and/or adjust actions in any state, federal or foreign court or proceeding of any kind as may in the Receiver’s discretion, and in consultation with SEC counsel, be advisable or proper to recover and/or conserve Receivership Property.

~~34.~~33. Subject to the Receiver’s obligation to expend ~~receivership~~Receivership funds in a reasonable and cost-effective manner, the Receiver is authorized, empowered and directed to investigate the manner in which the financial and business affairs of the Receivership Entities were conducted and (after obtaining leave of this Court) to institute such actions and legal proceedings, for the benefit and on behalf of the Receivership Estate, as the Receiver deems necessary and appropriate, the Receiver may seek, among other legal and equitable relief, the imposition of constructive trusts, disgorgement of profits and fees, asset turnover, avoidance of fraudulent transfers, rescission and restitution, collection of debts, and such other relief from this Court as may be necessary to enforce this Order.

~~35.~~34. The Receiver hereby holds, and is therefore empowered to waive, all privileges,

including the attorney-client privilege, held by all Receivership Entities.

#### **X. Bankruptcy Filing**

~~36.35.~~ The Receiver may seek authorization of this Court to file voluntary petitions for relief under Title 11 of the United States Code (the “Bankruptcy Code”) for any or all of the Receivership Entities. upon consultation with the SEC staff. If a Receivership Entity is placed in bankruptcy proceedings, the Receiver may become, and may be empowered to operate each of the Receivership Estate as, a debtor in possession. In such a situation, the Receiver shall have all of the powers and duties as provided a debtor in possession under the Bankruptcy Code to the exclusion of any other person or entity. Pursuant to Paragraph 3 above, the Receiver is vested with management authority for all entity Receivership Entities and may therefore file and manage a Chapter 11 petition. *See, In re Bayou Group, LLC*, 564 F.3d 541, 548-49 (2<sup>nd</sup> Cir. 2009).

~~37.36.~~ The provisions of Section VII above bar any person or entity, other than the Receiver, from placing any of the Receivership Entities in bankruptcy proceedings.

#### **XI. Liability of Receiver**

~~38.37.~~ The ~~receiver~~Receiver has a continuing duty to ensure that there are no conflicts of interest between the Receiver, the Receiver’s Retained Personnel (as that term is defined below), and the Receivership Estate.

~~39.38.~~ Until further Order of this Court, the Receiver shall not be required to post bond or give an undertaking of any type in connection with the Receiver’s fiduciary obligations in this matter.

~~40.39.~~ The Receiver and the Receiver’s agents, acting within scope of such agency (“Retained Personnel”) are entitled to rely on all outstanding rules of law and Orders of this

Court and shall not be liable to anyone for their own good faith compliance with any order, rule, law, judgment, or decree. In no event shall the Receiver or Retained Personnel be liable to anyone for their good faith compliance with their duties and responsibilities as Receiver or Retained Personnel.

41.40. The Receiver and the Receiver's advisers and agents shall be indemnified by each of the Receivership Entities except for gross negligence, willful misconduct, fraud, or breach of fiduciary duty determined by a final order no longer subject to appeal, for all judgments, costs, reasonable expenses including legal fees (which shall be paid under the indemnity after court approval as they arise), arising from or related to any and all claims of whatsoever type brought against any of them in their capacities as Receiver or advisers or agents of the Receiver; provided, however, that nothing herein shall limit the immunity of the Receiver and the Receiver's advisers and agents allowed by law or deprive the Receiver or the Receiver's advisers and agents of indemnity for any act or omission for which they have immunity.

42.41. This Court shall retain jurisdiction over any action filed against the Receiver or Retained Personnel based upon acts or omissions committed in their representative capacities.

43.42. In the event the Receiver decides to resign, the Receiver shall first give written notice to the Commission's counsel of record and the Court of its intention, and the resignation shall not be effective until the Court appoints a successor. The Receiver shall then follow such instructions as the Court may provide.

## **XII. Recommendations and Reports**

44.43. The Receiver is authorized, empowered and directed to develop, upon

consultation with the SEC staff, either a joint or separate plan for the fair, reasonable, and efficient recovery and liquidation and distribution of all remaining, recovered, and recoverable Receivership Property (the “Liquidation Plan”).

~~45.44.~~ Within ~~thirty (30)~~forty-five (45) days after the ~~end~~entry of ~~each calendar quarter~~this Order, the Receiver shall file and serve a full report and accounting of each Receivership Estate (the “~~Quarterly~~First Status Report”), reflecting (to the best of the Receiver’s knowledge as of the period covered by the report) the existence, value, and location of all Receivership Property, and of the extent of liabilities, both those claimed to exist by others and those the Receiver believes to be legal obligations of the Receivership Estate.

~~46.45.~~ The Quarterly Status Report shall contain the following:

- A. A summary of the operations of the Receiver;
- B. The amount of cash on hand, the amount and nature of accrued administrative expenses, and the amount of unencumbered funds in the estate;
- C. A schedule of all the Receiver’s receipts and disbursements (attached as Exhibit A to the Quarterly Status Report), with one column for the quarterly period covered and a second column for the entire duration of the receivership;
- D. A description of all known Receivership Property, including approximate or actual valuations, anticipated or proposed dispositions, and reasons for retaining assets where no disposition is intended;
- E. A description of liquidated and unliquidated claims held by the Receivership Estate, including the need for forensic and/or investigatory resources; approximate valuations of claims; and anticipated or proposed methods of enforcing such claims (including likelihood of success in: (i) reducing the claims

to judgment; and, (ii) collecting such judgments);

- F. A summary of the status of the Receiver's investigation of the transactions by and among the Receivership Entities;
- G. A list of all known investors and creditors and the amount of their investments and claims, as applicable, redacted to exclude personally identifiable information;
- H. The status of investor and creditor claims proceedings, after such proceedings have been commenced; and,
- I. The Receiver's recommendations for a continuation or discontinuation of the receivership and the reasons for the recommendations.

J. Any other information that the Receiver reasonably deems appropriate to include in the First Status Report.

46. Subsequent to the filing of the First Status Report, the Receiver shall file a quarterly status report (the "Quarterly Status Report") containing the same information set forth in the First Status Report. The Quarterly Status Report shall be filed within twenty (20) days of the end of each quarter, except that, the first Quarterly Status Report shall be filed upon the passing of the first full quarter after the First Status Report is filed.

47. On the request of the Commission, the Receiver shall provide the Commission with any documentation that the Commission deems necessary to meet its reporting requirements, that is mandated by statute or Congress, or that is otherwise necessary to further the Commission's mission.

### **XIII. Fees, Expenses and Accountings**

48. Subject to the specific provisions of this Order, the Receiver need not obtain

Court approval prior to the disbursement of Receivership Funds for expenses in the ordinary course of the ~~administration and operation of the receivership. Further, prior Court approval is not required for payments of applicable federal, state or local taxes.~~ liquidation of the Receivership Estate.

49. Subject to the specific provisions of this Order, the Receiver is authorized to solicit persons and entities (“Retained Personnel”) to assist the Receiver in carrying out the duties and responsibilities described in this Order. The Receiver shall not engage any Retained Personnel without first obtaining an Order of the Court authorizing such engagement. For the avoidance of doubt, the term “Retained Personnel” shall include any professionals retained to provide services to the Receivership Estate as a whole, and any counsel retained for any purpose. The term “Retained Personnel” shall not include persons retained by the Receiver for the purpose of assisting the Receiver in evaluating a specific Receivership Property whose fee is under \$50,000, subject to consultation with the SEC staff.

50. The Receiver and Retained Personnel are entitled to reasonable compensation and expense reimbursement from the Receivership Estate as described in the “Billing Instructions for Receivers in Civil Actions Commenced by the U.S. Securities and Exchange Commission” (the “Billing Instructions”) agreed to by the Receiver. Such compensation shall require the prior approval of the Court.

51. Within forty-five (45) days after the end of each calendar quarter, the Receiver and Retained Personnel shall apply to the Court for compensation and expense reimbursement from the Receivership Estate (the “Quarterly Fee Applications”). At least thirty (30) days prior to filing each Quarterly Fee Application with the Court, the Receiver will serve upon counsel for the SEC a complete copy of the proposed Application, together with all exhibits and relevant billing



information in a format to be provided by SEC staff.

52. All Quarterly Fee Applications will be interim and will be subject to cost benefit and final reviews at the close of the receivership. Such cost benefit review may include an evaluation of the results achieved in relation to the costs associated with any particular Receivership Asset. At the close of the receivership, the Receiver will file a final fee application, describing in detail the costs and benefits associated with all litigation and other actions pursued by the Receiver during the course of the receivership.

53. Quarterly Fee Applications may be subject to a holdback in the amount of 20% of the amount of fees and expenses for each application filed with the Court in the SEC staff's discretion or such other percentage holdback as the Court may order. on its own motion or on the request of the SEC. The total amounts held back during the course of the receivership will be paid out at the discretion of the Court as part of the final fee application submitted at the close of the receivership.

54. Each Quarterly Fee Application shall:

- A. Comply with the terms of the Billing Instructions agreed to by the Receiver; and
- B. Contain representations (in addition to the Certification required by the Billing Instructions) that: (i) the fees and expenses included therein were incurred in the best interests of the Receivership Estate; and, (ii) with the exception of the Billing Instructions, the Receiver has not entered into any agreement, written or oral, express or implied, with any person or entity concerning the amount of compensation paid or to be paid from the Receivership Estate, or any sharing thereof.

55. At the close of the Receivership, the Receiver shall submit a Final Accounting, in

a format to be provided by SEC staff, as well as the Receiver's final application for compensation and expense reimbursement.

**SO ORDERED.**

Dated: Brooklyn, NY  
January \_\_\_\_\_, 2017

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Chief United States District Judge