UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, - against - 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 ACTION NO. 1:16-cv-06848-KAM-VMS (ECF Case)

RESPONSE TO DKT. NO. 173 MOTION TO APPOINT SUBSTITUTE RECEIVER

In accordance with the June 27, 2017 Court's Order, Heartland Bank files this response opposing the relief requested by the SEC in the [Proposed] Second Amended Order Appointing Receiver (Dkt. No. 174-1) (the "Proposed Order") and the SEC's request that Melanie L. Cyganowski be appointed the substitute receiver (Dkt. No. 173).

SUMMARY

1. Heartland Bank opposes the Proposed Order because the SEC has not demonstrated that the drastic changes to the scope of the Receiver's authority are necessary or appropriate in this situation. Heartland Bank also opposes the SEC's proposed substitute receiver at this time because it has failed to adequately demonstrate that Ms. Cyganowski has the experience necessary to fulfill the obligations that the Receiver may be required to undertake in this particular situation. Heartland Bank respectfully contends that this Court needs to resolve

the dispute between the current Receiver and the SEC regarding how to liquidate the Receivership Property[1] before further action is taken, which would require the current Receiver, Bart Schwartz, to file his proposed liquidation plan and an opportunity for all interested parties to present their positions to the Court. This would provide the Court with the information necessary to make a reasoned decision. If the Court determines a quick liquidation is appropriate, Heartland Bank believes bankruptcy is the appropriate route, which has been specifically recommended by the Second Circuit Court of Appeals. If the Court determines that the current Receiver's plan is more appropriate, then this action should continue and an appropriate receiver should be appointed, if the Court has also determined that Bart Schwartz may no longer serve.

THE COURT SHOULD REVIEW THE RECEIVER'S PROPOSAL

2. The Receiver and the SEC made it clear to the Court that they have a difference of opinion as to how the Receivership Property should be liquidated. For the reasons set forth below, Heartland Bank believes that this disagreement needs to be resolved before the Court takes other action. Depending on which liquidation plan is adopted, it may be appropriate to continue the receivership or use to liquidate the Receivership Property in bankruptcy proceedings. However, Heartland Bank believes the Court is unable to make a determination on this issue at this time because the Receiver withheld his proposed plan from the Court and the parties at the request of the SEC. Heartland Bank therefore requests the Court to order the Receiver to file his proposed plan so that the Court and all interested parties can consider the plan and provide input so that the Court can make a well-reasoned decision on how to proceed.

[1] Terms not otherwise defined herein refer to defined terms in the Proposed Order.

BANKRUPTCY IS APPROPRIATE FOR A QUICK LIQUIDATION

3. If the Court determines that the SEC's proposed quick liquidation is the appropriate way forward, the Second Circuit Court of Appeals has held that bankruptcy is the appropriate method to liquidate the Receivership Property instead of through a receivership:

> It is true that this Court has consistently expressed a preference against the liquidation of defendant corporations through the mechanism of federal securities receiverships, as opposed to through the bankruptcy courts.

SEC v. Malek, 397 Fed. Appx. 711, 714 (2d Cir. 2010). Courts appear to have created an exception in situations such as the one proposed by the Receiver—a partial liquidation up front with subsequent distributions in the future when additional assets become liquid. *Id*. at 714-15. Exceptions have also been made when the objection is raised toward the end of the receivership. *Id.*

4. Therefore, if the SEC's is correct, the bankruptcy court is the appropriate place to effectuate that quick liquidation. Presumably under the SEC's plan, the assets would be quickly liquidated and distributed so there would no need for multiple distributions. Further, virtually none of the assets have been liquidated to date, so there will not be duplication of costs associated with a bankruptcy. Finally, the bankruptcy courts and their trustees are familiar with liquidating estates and are guided by statutes and rules that give priority the various interest holders, such as secured creditors like Heartland Bank, so the process is administered in a consistent manner that meets the expectations of the interested parties. Accordingly, if the Court believes the SEC's liquidation plan is more appropriate, Heartland Bank requests that liquidation to occur in the bankruptcy court. This would likely eliminate the need for a receiver.

THE SEC'S REQUESTED ORDER EFFECTIVELY MAKES IT THE RECEIVER

5. If the Court determines that a continued receivership is appropriate, Heartland Bank objects to the Proposed Order because paragraphs 26-30 of the Proposed Order severely limit the Receiver's authority going forward and effectively makes the Receiver a pawn of the SEC. Indeed, the Proposed Order requires SEC approval on ANY transaction and if there is a disagreement between the Receiver and the SEC, this Court will be burdened with approving the transaction, even if it is for $100.00.

> The Receiver may engage in transactions outside 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 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.***

Dkt. No. 174-1, ¶ 29 (emphasis added). The SEC provided no justification for this draconian change in the Receiver's authority other than the conclusory statement that the Proposed Order "has been revised to reflect the current reality of this liquidating Receivership." Dkt. No. 174, p. 3. A review of the recent filings in this case by the Receiver and the SEC, including their May 19, 2017 joint letter (Dkt. No. 142), leads Heartland Bank to the conclusion that the only reason the SEC included these provisions in the Proposed Order is so that it, rather than the Receiver, can determine how the Receivership Property will be liquidated. Since the current Receiver believes the SEC's position on liquidation is contrary to the best interest of the Platinum creditors and investors, the Proposed Order is nothing more than the SEC substituting its judgment for the Receiver's. *Id.*

6. Heartland Bank believes that since the Receiver takes direction from the Court, not the litigants, the Receiver should not be subject to oversite from one of those litigants. *See Holland v Sterling Enter., Inc.*, 777 F.2d 1288, 1292 (7th Cir. 1985)(noting that a receiver is appointed by the court to conduct operations when it does not seem reasonable to the court that either party should conduct those operations). It appears to Heartland Bank that not only is the SEC at odds with the Receiver, but its desire for a quick liquidation of the assets is against the best interests of the individual defendants as well as secured creditors like Heartland Bank. If the Receiver is correct that the recovery from the assets will be maximized if further investments are made in certain assets, then that would reduce or maybe even eliminate the alleged damages to the creditors and investors and may weaken the SEC's case against the individual defendants. In other words, a fire sale liquidation is in the best interest of the SEC, but may not be in the best interests of all other interested parties.

7. Accordingly, the SEC should not be allowed to dictate the way in which the assets are liquidated—it should be between the Court and its agent, the Receiver. Heartland Bank believes that, if the Receivership is continued, the Amended Order Appointing Receiver should not be altered other than the installation of a new receiver if the Court deems that necessary.

IS THE PROPOSED RECEIVER QUALIFIED?

8. Heartland Bank does not have sufficient information to state a position regarding the qualifications of Ms. Cyganowski. Heartland Bank believes that if this matter is continued as a Receivership as opposed to in the bankruptcy court, then the substitute receiver should have demonstrated qualities regarding business operations, including whether additional investments would likely lead to greater returns over a relatively short period of time. There is no information before the Court regarding Ms. Cyganowski's qualifications on this issue. Of

course, if the Court determines that the SEC's liquidation methodology is appropriate, no receiver is necessary because the bankruptcy trustee could handle the situation.

For the foregoing reasons, Heartland Bank respectively requests the Court to order the relief requested herein and for such other and further relief to which Heartland Bank is entitled.

Dated: June 29, 2017

Respectfully submitted,

By: *s/ William R. Jenkins, Jr.*

William R. Jenkins, Jr.
Texas Bar No. 00784334
JACKSON WALKER L.L.P.
777 Main Street, Suite 2100
Fort Worth, Texas 76102
Telephone: (817) 334-7200
Facsimile: (817) 334-7290
Email: wjenkins@ jw.com

ATTORNEYS FOR INTERESTED PARTY HEARTLAND BANK

CERTIFICATE OF SERVICE

I certify that on June 29, 2017, a true and correct copy of this document was served on all counsel of record via ECF filing.

s/ William R. Jenkins, Jr.
William R. Jenkins, Jr.