FORD O'BRIEN LLP

June 29, 2017

Via ECF

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

Re: *SEC v. Platinum Management (NY) LLC et al.*, No. 16 Civ. 6848 (DLI)(VMS)

Dear Chief Judge Irizarry:

We represent defendant Joseph SanFilippo with respect to the above-captioned case. We previously submitted a letter in response to the SEC's June 26, 2017 application for an Order to Show Cause for court appointment of a new receiver to replace Mr. Schwartz, *see* dkt. nos. 173, 177. We submit this letter, in consultation with the other individual defendants, in further response to that application, and also in response to the directives in the Court's June 27, 2017 Order regarding same.

In its Order, the Court directed that the parties address not only whether the SEC application should be granted, but also whether they would approve the appointment of the SEC's proposed new receiver, the Honorable Melanie Cyganowski, in the event the Court grants the SEC's application. In brief, we would oppose Ms. Cyganowski's appointment for many of the same reasons we initially opposed the SEC's application. In dictating to Mr. Schwartz how he should carry out his duties, and then forcing his resignation, the SEC has acted at odds with the independence of the Receiver. There is reason to fear it would act similarly in the case of its preferred candidate, contrary to law and to the receiver's fiduciary obligations to all parties. For this reason – which has nothing to do with Ms. Cyganowski's qualifications or background – we oppose her appointment.

1. The Receiver Is An Officer Of The Court, Not Answerable To Any Party

A receiver must not serve the interest of any party, not even the government. It is axiomatic that a receiver is "appointed on behalf and for the benefit of all the parties having an interest in the property, not for the plaintiff or defendant alone." *N. Am. Broad., LLC v. United States*, 306 Fed Appx. 371, 373 (9th Cir. 2008). As one court recently explained, the receiver is "an 'officer of the court' and not an arm of the SEC. As such, a receiver should be impartial between the parties and avoid the appearance of impropriety." *SEC v. Schooler,* No. 3:12 Civ. 2164-GPC-JMA, 2015 WL 1510949, at *3 (S.D. Cal. March 4, 2015) (citations omitted).

In short, in the words of the Second Circuit, "A receiver … is a trustee with the highest kind of fiduciary obligations." *Phelan v. Middle States Oil Corp.*, 154 F.2d 978, 991 (2d Cir. 1946). In order to fulfill these obligations, a receiver must be able to act independently.

2. Nevertheless, The SEC Has Attempted To Restrict Mr. Schwartz's Exercise Of His Duties

Already there is ample evidence before this Court of the SEC's failure to respect the independence of the Receiver.

The most glaring evidence is the SEC's restriction of the Receiver's Court-ordered powers. The Order appointing Mr. Schwartz as Receiver gave him plenary power to "transfer, compromise or otherwise dispose of any receivership Property, other than real estate," dkt. no. 174, Exh. 2 at 12-13. Nevertheless, as demonstrated in previous submissions to the Court, the SEC has substituted its own judgment for the Receiver's and decided that receivership assets must be liquidated even at fire-sale prices. The SEC's usurpation of authority is contrary not only to the appointing Order but also to case law that a receiver should attempt to preserve assets, not simply liquidate them, which is normally a function of the bankruptcy court. *See Securities v. Am. Bd. of Trade, Inc.*, 830 F.2d 431, 436-37 (2d Cir. 1987) ("equity receiverships should not be used to effect the liquidation of defendants in actions brought under the federal securities laws"); *accord Lawsky v. Condor Capital Corp.*, 2015 WL 4470332, at *6 (S.D.N.Y. July 21, 2015).[1]

3. There Is Reason To Believe That The SEC Would Seek To Similarly Restrict Its Proposed New Receiver

The SEC already has stripped from its proposed Amended Order for the new receiver all discretion as to the disposition of receivership assets – except liquidation, *see* dkt. no. 174, Exh. 2 at 12-13. Clearly, the SEC expects the new receiver to liquidate in short order the assets of the receivership, regardless of what the merits of any particular situation might be. However, such a demand is inconsistent with the independence and discretion a receiver requires to carry out its fiduciary responsibilities to all parties.

[1] To be sure, the SEC recommends specific receivers to aid the Court in its selection, but the SEC does not retain control or veto power over the receiver once appointed by the Court. To the extent the SEC disagrees with the direction or recommendations of the receiver, the proper place for airing that is an objection to the plan of distribution—not by manufacturing conflicts of interest where they do not exist or leveling baseless accusations of impropriety against the receiver in an effort to force him to resign.

Moreover, the SEC's failure to point out to this Court the Second Circuit's disfavor of liquidation-focused receiverships is troubling. *See Am. Bd. of Trade, Inc.,* 830 F.2d at 436-37 ("we expect counsel for the [SEC], as an officer of the Court and as part of his or her individual professional responsibility, to bring our views, as stated in this and other decisions, to the attention of the district court before the court embarks on a liquidation through an equity receivership"). In its Order to Show Cause papers, the SEC simply assumes the proposed Amended Order will pass muster, which is not the case.[2]

For these reasons, we would oppose the proposed appointment of Ms. Cyganowski in the event the SEC's Order to Show Cause is granted. Equally important, we would ask the Court to retain the original language, giving the receiver appropriate discretion over the disposition of receivership assets, in any order appointing a new receiver.

Finally, we respectfully suggest that, if a new receiver must be appointed, the Court adopt a procedure that allows affected parties, including investors and other stakeholders, to have input. The decision to recommend a new receiver should not be the SEC's alone.

Thank you for Your Honor's consideration of this matter.

Respectfully submitted,

Kevin J. O'Brien

[2] The SEC's website states in relevant part that "A receiver has a fiduciary duty to stakeholders and the court, and typically has the discretion to marshal, manage and liquidate the receivership company's assets …" *https://www.sec.gov/oiea/investor-alerts-bulletins/ib_receivers.html.*