THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION Plaintiff, v. PLATINUM MANAGEMENT (NY) LLC, d/b/a PLATINUM PARTNERS; PLATINUM CREDIT MANAGEMENT, L.P.; MARK NORDLICHT; DAVID LEVY; DANIEL SMALL; URI LANDESMAN; JOSEPH MANN; JOSEPH SANFILIPPO; and JEFFREY SHULSE; Defendants.	)	Case No.16-06848-DLI-VMS

THE INDEPENDENT INVESTORS' RESPONSE TO THE SECURITIES AND EXCHANGE COMMISSION'S APPLICATION FOR AN ORDER TO SHOW CAUSE (DKT. NO. 174)

Interested parties, Allen Kaplan, Philip and Patricia Faris, John and Lori Smith, Michael and Elizabeth Garatoni, Steven Singer 2006 Revocable Trust, the William J. Perlstein Revocable Trust and the Teresa L. Perlstein Revocable Trust, the Garatoni Family Foundation, the Garatoni Holdings Investment Partnership, the World Traveler Revocable Trust, Anthony Wright, Courtney Clayton Solcher, Felicia Ashley Solcher, Gerry Solcher, Sally Solcher, Whitney Elizabeth Solcher, The Perry and Ruby Stevens Charitable Foundation, Mary G. DeSimone Irrevocable Trust, Bruce Bullen, and Robb Charitable Lead Trust (together, the "Independent Investors")[1] submit their response to the *Application for an Order to Show Cause for Entry of a Second Amended Order Appointing Receiver and Appointment of a Substitute Receiver* and

[1] Each of the Independent Investors hold a membership interest in PPCO, and are not insiders or otherwise affiliated with any of the defendants. Moreover, it is anticipated that other similarly situated independent PPCO investors will be joining in this Response, and counsel will file the appropriate papers to so notify the Court.

supporting documents by the United States Securities and Exchange Commission (Dkt. Nos. 173-176) (the "Application").

For the reasons set forth below, the Independent Investors believe that it is in the best interest of the Platinum Partners Credit Opportunity Fund (the "Fund" or "PPCO") for the current Receiver, Bart Schwartz ("Schwartz" or "Receiver"), to file his proposed wind-down plan (the "Plan") as soon as practicable. Thereafter, investors and other stakeholders should be afforded the opportunity to share their position with the Court concerning the efficacy of the proposed Plan and the continued retention of Schwartz as Receiver.

Prior to the instant Order to Show Cause, the SEC and Schwartz jointly submitted a May 19, 2017 letter (the "Joint Letter") (Dkt. No. 142), which outlined a protocol for Schwartz to submit his Plan (and proposed budgets) to the Court and grant the SEC and interested parties the opportunity to respond prior to a decision by the Court (the "Protocol"). Since the Joint Letter, there have been allegations leveled against Schwartz by the SEC, but these do not affect the bona fides of the Protocol. Accordingly, the Independent Investors urge the Court to proceed with the Protocol.

The recent dispute between the SEC and Schwartz has placed the PPCO investors in what amounts to a nightmare scenario. It is now a year since the Fund was shut down, investment funds frozen, and several million dollars (of the investors' money) expended by the Receiver. The SEC's Application imposes a drastic remedy, i.e., replacing the Receiver and immediately liquidating the Fund without an opportunity for stakeholders to be heard at a meaningful time in a meaningful manner. Prior to endorsing this severe remedy, the Independent Investors request that the Court defer on the Order to Show Cause to enable stakeholders to evaluate, comment, and be heard on the work the current Receiver has performed to date.

In further response, the Independent Investors state that:

1. ***The Court Should Defer Ruling on the SEC's Application Until Schwartz's Liquidation Plan is Filed and Interested Parties Have Provided Comments***

"The decision whether to remove a receiver is, like the decision to appoint one, an equitable determination resting in the sound discretion of the district court." SEC v. Spence & Green Chemical Co., 612 F.2d 896, 904 (5th Cir. 1980). Here, the equities tip greatly in favor of permitting Schwartz to submit his Plan, and have it vetted by all stakeholders. If there is strong approval of the Plan, it should be implemented to avoid further delay and additional costs. See SEC v. Private Equity Mgmt. Grp., Inc., No. 09-2901, 2009 WL 2019747, at *6 (C.D. Cal. Jul 2, 2009) (declining to remove receiver where "there is . . . evidence that some of the investors, whose interests are materially affected by this litigation, resoundingly approve of his work so far."). Approval of the Plan may also ease the tensions between the SEC and Schwartz, as there would be a clear path forward. If the Plan ultimately lacks support and the SEC and Schwartz cannot reconcile, the Court could thereafter act on the Application.

When the SEC proposed that Schwartz be retained, he was described as "uniquely qualified." (Dkt. No.1-2, p. 32). The Order appointing Schwartz empowered him to "conduct an orderly wind down including a responsible liquidation of assets and orderly and fair distribution of those assets to investors." And he was charged with giving "due regard to the realization of true time and proper value of [] Receivership Property." (Dkt. No. 6).

Schwartz, first as IAO and then as Receiver and his team, have spent the last twelve months - - and millions of dollars - - gaining an understanding of the intricacies of PPCO's investments. These efforts should not so easily be discarded. See SEC v. Schooler, 3:12-cv-2164, 2015 WL 1510949, at *3 (S.D. Cal. Mar. 4, 2015) (declining to remove receiver that had "thoroughly reviewed the receivership estate regarding its administration."). As the SEC and

Schwartz stated in their Joint Letter to the Court: "[T]he Receiver moved quickly upon his appointment to reduce expenses, terminate some employees, retain others, understand the complex investment positions and assets of the Receivership Entities, and take the steps needed to prevent dissipation of those assets pending further action." (Dkt. No. 142, p. 2).

The culmination of Schwartz's work was to be his submission of a proposed liquidation plan, which the investors understand is ready to be filed. To get to this point has cost the Receivership Estate over $3 million in fees. Undoubtedly, the Plan is replete with important information that all stakeholders should evaluate concerning the fate of their investment - - irrespective of whether Schwartz ultimately remains Receiver.

"To replace [Schwartz] at this stage would present a significant cost to the receivership estate. A new receiver would have to spend time and resources gaining the institutional knowledge that [Schwartz] already has. Such expense would come at the cost of the receivership estate's already limited resources. Furthermore . . . the cost of replacing the receiver could be borne by innocent investors. Such a result would be inequitable." SEC v. Schooler, 3:12-cv-2164, 2015 WL 1510949, at *3 (S.D. Cal. Mar. 4, 2015) (citing Private Equity Mgmt. Grp., Inc., 2009 WL 2019747, at *6). The collateral damage from Schwartz's abrupt resignation would include the loss of a highly capable team including Guidepost Managing Director, Bob Rittereiser, who has inspired confidence in the investors.

The timing of the SEC's confrontation of Schwartz and its allegations of Schwartz's conflict and malfeasance (Dkt. Nos. 168-1, 179) had the effect of blocking the Plan's release. It is no secret that the SEC does not support the use of Fund cash for what it views as "risky investments" and prefers that the Fund be "wound down quickly." (Dkt. No. 142, p. 1).

Allowing Schwartz to file his Plan will remove this cloud from the process and provide transparency to both the stakeholders and the Court.

2. The May 19 Protocol Jointly Requested by the SEC and Schwartz Should be Implemented

Before the dispute between the SEC and Receiver reached its current level, a reasonable joint protocol was submitted to the Court. Specifically, the Protocol called for the Receiver to file motions and seek court approval on core issues including the approval of the operating and capital budgets, as well as the Liquidation Plan. (Dkt. No. 142). The Independent Investors welcomed this process, as it afforded them and other similarly situated investors greater understanding as to Schwartz's *and* the SEC's respective positions. Indeed, both the SEC and the Receiver noted:

> This approach will also increase public transparency into the Receivership process to that creditors, investors, and other stakeholders can weigh in on the Receivership by making filings in Court or otherwise

(Dkt. No.142, p. 7).

Based on the Order to Show Cause, the Protocol that the SEC itself signed onto will now be abandoned, and there will be no mechanism for either the Court or PPCO investors to comment upon the liquidation Plan. This is patently unfair to investors. Accordingly, the Court should order that the May 19 Protocol be adopted so a more fulsome assessment of the wind down can be made.

3. The Lapses Attributed to Mr. Schwartz Appear to have No Bearing on the Efficacy of his Plan

As the party seeking appointment of Melanie Cyganowski as replacement receiver, the SEC bears the burden to show sufficient grounds for her appointment. COR Clearing LLC v. Calissio Res. Grp., Inc., No. 8:15-cv-317, 2015 WL 7018758, at *2 (D. Nev. Nov. 10, 2015)

(denying motion for order appointing a limited purpose receiver). Schwartz, for his part, has performed his duties without adverse impact on the Receivership entities. While the Independent Investors do not minimize in any way the issues raised by the SEC, not every item of concern constitutes grounds for the removal of a duly-appointed receiver, particularly where there is no clear showing of a risk to the assets of the receivership estate. Compare Schooler, 2015 WL 1510949, at *7 (unduly close collaboration with the SEC during course of receivership not sufficient grounds to remove receiver) and Private Equity Mgmt. Grp., 2009 WL 2019747, at *4, 6 & n.6 (narrowing receiver's authority, but declining to remove receiver on the basis of "minor missteps" which had already been corrected) and SEC v. Cobalt Multifamily Investors I, Inc., 542 F. Supp. 2d 277, 282 (S.D.N.Y. 2008) (declining to remove receiver despite "occasionally profligate expenditure of time and money" which was "potentially detrimental to the interests of" the receivership estate with Bustos v. Lennon, No. SA-11-cv-00837, 2012 WL 12882897, at *2 (W.D. Tex. May 18, 2012) (receiver removed by court where he improperly "advanced" funds to himself and professionals he retained for expenses allegedly incurred).

Here, the Letter and Application do not reflect any immediate, specific or credible risk of loss to the Receivership Estate:

a. The Letter and Application do not explain how the conflict of interest they allege would jeopardize the Receivership Estate's ability to obtain value from the affected loan;

b. The Letter and Application identify no risk to the Receivership Estate posed by an alleged breach of an escrow agreement that they concede has already been cured; and

c. There appears to be minimal risk that the proceeds from the sale of Arabella Loan will be drawn down by an attorney that has already been dismissed from his work on behalf of the Receivership Estate.

In short, the SEC nowhere states how these events actually impair Schwartz's ability to complete and file the Plan that has already been prepared. And, for his part, Schwartz denies any wrongdoing or conflict of interest at all. (Dkt. No. 180). But, permitting Schwartz to release his Plan will allow all parties to vet any prejudice/harm to the Fund caused by these allegations.

4. The Proposed Second Amended Receivership Order is Overly Restrictive and Handcuffs the Receiver

"[T]he ultimate goal of a receivership is to maximize the recovery of the investor class." SEC v. Wealth Mgmt. LLC, 628 F.3d 323, 336 (7th Cir. 2010). See also Eberhard v. Marcu, 530 F.3d 122, 132-33 (2d. Cir. 2008) (discussing Scholes v. Lehmann, 56 F.3d 750 (7th Cir. 1995) (once receiver took control of assets, the receiver's "only object" was to maximize the value of the assets for the benefit of investors and creditors)); SEC v. Callahan, 193 F. Supp. 3d 177, 206 (E.D.N.Y. Jun. 9, 2016) ("[G]overnment entities, like the SEC, that bring enforcement proceedings are mandated to act in the interest of maximizing the recovery to all defrauded individuals."); SEC v. Hyatt, No. 08 C 2224, 2016 WL 2766285, at *3 (N.D. Ill. May 13, 2016) (receiver tasked with, among other things, "managing the Receivership's assets in order to preserve or enhance their value"). The SEC's proposed new Order (Dkt. No. 174), is a departure from the current order and significantly decreases the Receiver's discretion to maximize the recovery of investors. The proposed new order repeatedly emphasizes "liquidation" and deletes language relating to the "administration and operation" of the Fund, as well as the "realization of the true and proper value of Receivership Property." The new proposed order appears designed to prevent the Receivership from making capital expenditures to increase investment value including in the Brazilian Gold Recovery Project. According to Schwartz:

> Valuation firm Houlihan Lokey valued the [Brazilian Gold Recovery] Project at a range of $55 million to $114 million, assuming that PPCO invested $5 million into the Project to get it started, but concluded that

> PPCO would be unable to recover its cost basis (approximately $10 million) if the Receiver tried to sell it today.

(Dkt. No. 180).

In short, this project alone could swing the return to investors by over $100 million, and if successful could help close the gap caused by less promising investments. The SEC has already made clear that it vehemently opposes spending $5 million for what it views as a "risky investment."

It is for the receiver as fiduciary to the Fund's investors, and not the SEC, to make the determination of what course of action best maximizes the recovery available to the investors. See generally Wealth Mgmt., LLC, 628 F.3d at 336 (affirming district court approval of receiver's plan for administration of receivership as most cost effective and thus most likely to maximize investor recovery); SEC v. Kaleta, Nos. H-09-3674, H-12-1491, 2014 WL 12596558, at * 3 (S.D. Tex. Jun. 16, 2014) (approving receiver's proposed plan for administration of receivership as "the best option to . . . maximize the value of the Receivership Estate."). See also Schooler, 2015 WL 1510949, at *3 ("Though the SEC requests a receiver's appointment and often initiates the engagement, the receiver is still an 'officer of the court' and not an arm of the SEC.").

Finally, this Court has not been provided with any evidence that preserving the *status quo* and allowing the Receiver to present his work for consideration by this Court and the Fund's investors poses any material risk to the Receivership Estate. In stark contrast, liquidating the Receivership Estate before all options are vetted will cause harm to the Independent Investors and other stakeholders by foreclosing the option to pursue the opportunity for highly substantial investment returns from a small number of the Fund's positions, at relatively little risk.

CONCLUSION

For all of these reasons, the Independent Investors request that: (i) the Receiver file his wind-down plan by motion forthwith; (ii) the Court give interested stakeholders thirty (30) days to review and comment on the Plan; and (iii) defer a ruling on the pending Application to remove Schwartz until further order of this Court.

Respectfully submitted,

Allen Kaplan,
Philip Faris
Patricia Faris
John Smith
Lori Smith
Michael Garatoni
Elizabeth Garatoni
Steven Singer 2006 Revocable Trust
The William J. Perlstein Revocable Trust
The Teresa L. Perlstein Revocable Trust
The Garatoni Family Foundation,
The Garatoni Holdings Investment Partnership
The World Traveler Revocable Trust
Anthony Wright
Courtney Clayton Solcher
Felicia Ashley Solcher
Gerry Solcher
Sally Solcher
Whitney Elizabeth Solcher
The Perry and Ruby Stevens Charitable Foundation
Mary G. DeSimone Irrevocable Trust
Bruce Bullen
Robb Charitable Lead Trust

By their attorneys,

/s/ William C. Nystrom
William C. Nystrom (*pro hac vice*)
NYSTROM, BECKMAN, & PARIS LLP
One Marina Park Drive, 15th Floor
Boston, Massachusetts 02210
Tel: (617) 778-9100
Fax: (617) 778-9110
Email: wnystrom@nbparis.com

Dated: June 30, 2017

CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non registered participants on this 30th day of June, 2017.

/s/ William C. Nystrom