

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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SECURITIES AND EXCHANGE COMMISSION, :

Plaintiff, :

-v- :

No. 16-cv-6848 (DLI)(VMS)

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. :
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**APPLICATION FOR ORDER APPROVING THE RETENTION OF
OTTERBOURG P.C. NUNC PRO TUNC TO THE APPOINTMENT DATE**

Melanie L. Cyganowski, the duly appointed successor Receiver in this action (the “Receiver”), applies to the Court for an order, substantially in the form attached hereto as Exhibit A, approving the retention of Otterbourg P.C. (“Otterbourg”) as counsel for the Receiver, *nunc pro tunc* to July 6, 2017, the date on which the Receiver was appointed as the successor receiver (the “Application”).

Preliminary Statement

1. The Receiver seeks an order approving the retention of outside counsel to assist her in connection with carrying out her duties as Receiver. It is routine for a court-appointed Receiver to retain counsel, and the Receiver Order (defined below) explicitly allows the Receiver to retain counsel upon application to this Court. The Receiver seeks to retain Otterbourg, a full service law firm, as her counsel.

2. The Receiver seeks the Court's approval of Otterbourg *nunc pro tunc* to her appointment date. It is routine for a court-appointed Receiver to ask professionals to begin work immediately on the understanding that Court approval for their retention will be sought on a *nunc pro tunc* basis. Here, the Securities and Exchange Commission ("SEC") has asked the Receiver to step in as the successor Receiver and seamlessly and quickly take control and continue to review and dispose of the assets of the Receivership estates. This required immediate action by the Receiver, and necessarily entailed her need for immediate legal advice and assistance. Accordingly, the Receiver asked Otterbourg to begin work immediately on the understanding that she would seek approval for Otterbourg's retention *nunc pro tunc* to the date on which she was appointed.

3. The Receiver has spoken to the SEC regarding her intention to seek the retention of Otterbourg as her counsel, and the SEC supports and consents to the instant Application.

4. In support of this Application, the Receiver submits the Declaration of Richard G. Haddad (the "Haddad Declaration"), which is attached to this Application as Exhibit B. In further support of this Application, the Receiver states as follows:

Jurisdiction and Venue

5. The Court has jurisdiction to consider this Application pursuant to Sections 20(b) and 22(a) of the Securities Act of 1933, 15 U.S.C. §§ 77t(b) & 77v(a), Sections 21(d), 21(e) and 27 of Securities Exchange Act of 1934, 15 U.S.C. §§ 78u(d), 78u(e) & 78aa(a), and 28 U.S.C. § 1331.

6. Venue of this action in this District is proper pursuant to Section 22(a) of the Securities Act, 15 U.S.C. § 77v(a), Section 27 of the Exchange Act, 15 U.S.C. § 78aa.

Background

7. On December 19, 2016, the U.S. Attorney for the Eastern District of New York unsealed an eight-count indictment (the "Indictment") against seven individuals who are formerly affiliated with a purported \$1.7 billion hedge-fund family based in New York ("Platinum"). The

Indictment alleges that the defendants defrauded Platinum investors through, among other things, the overvaluation of assets, the concealment of severe cash flow problems, and the preferential payment of redemptions. The Indictment also charges four of the defendants with defrauding the independent bondholders of Black Elk Energy Offshore Operations, LLC (“Black Elk”), a portfolio company owned by Platinum, through a fraudulent offering document and diverting more than \$95 million in proceeds to Platinum by falsely representing in the offering document that Platinum controlled approximately \$18 million of the bonds when, in fact, Platinum controlled more than \$98 million of the bonds.

8. On December 19, 2016, the SEC filed this action against the defendants, and other individuals, asserting violations of the anti-fraud provisions of federal securities laws and seeking, among other relief, temporary and permanent injunctive relief, disgorgement of ill-gotten gains, imposition of civil penalties, and appointment of a receiver (the “Complaint”) [Docket No. 1].

9. On December 19, 2016, the Court entered an Order to Show Cause and Temporary Restraining Order (the “Restraining Order”) against the defendants, granting certain specified relief to the SEC, including the appointment of a Receiver, and granting the Receiver control over the assets of Platinum Credit, Platinum Partners Credit Opportunities Master Fund L.P.; Platinum Partners Credit Opportunities Fund (TE) LLC; Platinum Partners Credit Opportunities Fund (BL) LLC; Platinum Liquid Opportunity Management (NY) LLC; and Platinum Partners Liquid Opportunity Fund (USA) L.P. (collectively, the “Receivership Entities”) [Docket No. 5].

10. On December 19, 2016, the Court also entered the Order Appointing Receiver, as amended on January 30, 2017, the “Receiver Order”) [Docket Nos. 6 and 59]. The Receiver Order appointed Bart Schwartz as the Receiver.

11. On January 31, 2017, Mr. Schwartz sought to retain Cooley LLP (“Cooley”) as his counsel and Guidepost Solutions LLC (“Guidepost”) to advise, assist and support him with his duties as Receiver. [Docket Nos. 63 and 65]. Such retention applications were approved by this Court on February 17, 2017.

12. On June 23, 2017, Mr. Schwartz requested that the Court approve his resignation as Receiver of the Receivership Entities, effective upon the Court’s appointment of a successor in accordance with the Receiver Order. [Docket No. 170]. On July 6, 2017, the Court accepted the resignation of the original receiver, Mr. Schwartz, and appointed Melanie L. Cyganowski as Receiver effective immediately (i.e., July 6, 2017 (the “Appointment Date”)). [Docket No. 216]. The Receiver is operating under the current Receiver Order until such time that it may be amended.

13. It is the Receiver’s understanding that, effective upon her appointment, Cooley and Guidepost were relieved of their responsibilities as counsel and financial advisor, respectively, to Mr. Schwartz, but will be assisting the Receiver in the transition. Consequently, the retention of Otterbourg and Goldin Associates LLC will not be duplicative of services of the prior professionals.

The Terms of the Receiver Order

14. Under the terms of the Receiver Order, the Receiver is, among other things, to preserve the *status quo*, ascertain the extent of commingling of funds, ascertain the true financial condition of the Receivership Entities, prevent further dissipation of property and assets of those entities, prevent the encumbrance or disposal of property or assets of the Receivership Entities, preserve the books, records, and documents of the Receivership Entities, be available to respond to investors’ inquiries, protect investors’ assets, conduct an orderly wind down, including a responsible disposition of assets and an orderly and fair distribution of those assets to investors, and determine whether one or more of the Receivership Entities should undertake bankruptcy filings.

15. Further, under paragraphs 44 and 45 of the Receiver Order, the Receiver is authorized, empowered, and directed to develop a plan for the fair, reasonable, and efficient recovery and liquidation and distribution of all remaining, recovered, and recoverable Receivership Property and is required to prepare a full report and accounting of the Receivership Estates within thirty (30) days after the end of each calendar quarter (the “Quarterly Status Report”). The Quarterly Status Reports must include: summaries of the operations of the Receiver; accounting of the cash on hand; a schedule of the Receiver's receipts and disbursements; descriptions of all known property owned by the Receivership; descriptions of liquidated and unliquidated claims held by the Receivership, including valuations of claims, proposed methods of enforcing such claims, reducing the claims to judgments, and collecting judgments; a summary of the status of the Receiver's investigation; a listing of all known investors and creditors and the amount of their investments; the status of investor and creditor claims proceedings; and the Receiver's recommendations for a continuation or discontinuation of the Receivership.

16. In support of these powers and duties, paragraph 33 of the Receiver Order authorizes and empowers the Receiver, subject to leave of Court, “to resume or commence . . . litigation” and to “investigate, prosecute, defend, intervene in or otherwise participate in” 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” property owned by the Receivership Entities. Paragraph 34 of the Receiver Order further authorizes, empowers, and directs the Receiver “to investigate the manner in which the financial and business affairs of the Receivership Entities were conducted” and, with leave of this Court, “institute such actions and legal proceedings, for the benefit and on behalf of the Receivership Estate, as the Receiver deems necessary and appropriate.”

17. Paragraph 49 of the Receiver Order empowers the Receiver to “solicit persons and entities (“Retained Personnel”) to assist the Receiver in carrying out the duties and responsibilities described in [the Receiver Order]” subject to obtaining an Order of the Court authorizing such engagement.

The Receiver's Tasks and Need for Legal Counsel

18. While much work has been done in this action by the initial Receiver, significant work remains to be done. The initial Receiver reports that he took immediate action to, among other things, reduce expenses and take initial steps to prevent the dissipation of assets. The successor Receiver must dispose of the assets of the Receivership Entities. The investment positions of the Receivership Entities have approximately one hundred investments that are held in over thirty special purpose vehicles and subsidiaries. The investments largely consist of private debt and equity positions in a variety of operating companies and encompass all levels of the capital structure with a concentration in senior debt. *See* First Quarterly Report of Receiver. [Docket No. 130-1] As of May 1, 2017, the Receivership Entities had a combined \$9,687,167.75 in cash. *See* May 19, 2017 letter to the Court from the Receiver and the SEC [Docket No. 142]

19. The Receiver must continue to reduce expenses and dispose of assets. In this regard, the Receiver must immediately begin or continue the preparation of a proposed plan to dispose of the assets of the Receivership Entities (the “Asset Disposition Plan”), review on-going litigations and bankruptcy proceedings relating to some of the entities under the Receiver’s control, and review possible litigation to recovery property of the Receivership Entities. The Receiver will require Otterbourg’s assistance with, among other things, preparing the Asset Disposition Plan and quarterly reports, commencing and defending litigation as needed, reviewing transaction documents to avoid or minimize any legal risks associated with divestiture, negotiating and preparing any necessary documents in connection with the disposal of assets, and analyzing the claims against the

Receivership Estates. In addition, some funds are in liquidation under the authority of the Grand Court of the Cayman Islands and, because some Receivership Entities jointly own certain investments with those entities, and have other relationships, the Receiver will need legal advice to evaluate the Receivership Entities' interests in those arrangements, and work with the liquidators appointed in the Cayman Islands.

Services to be Provided by Otterbourg

20. The professional services of Otterbourg are necessary to enable the Receiver to perform and exercise faithfully and confidently her rights, remedies, powers, duties, and responsibilities under the Receiver Order. Subject to further Order of the Court, the Receiver proposes to retain Otterbourg as her counsel to render services including, but not limited to, the following:

(a) To advise, assist, and represent the Receiver with respect to her rights, remedies, powers, duties, and obligations under the Receiver Order and to prepare or assist in the preparation of pleadings, applications, motions, reports, and other papers incidental to the performance by the Receiver of her rights, powers, duties and responsibilities under the Receiver Order;

(b) To advise, assist, and represent the Receiver in connection with the preparation of the Asset Disposition Plan;

(c) To advise, assist, and represent the Receiver in connection with insurance matters;

(d) To advise and represent the Receiver in the review and analysis of any legal issues incident to any proposed sale or other disposition of or transaction involving any Receivership Entity assets;

(e) To advise, assist and represent the Receiver in connection with the preparation of the reports required under the Receiver Order;

(f) To advise, assist and represent the Receiver in any dealings with the SEC or any other regulatory authorities;

(g) To advise, assist and represent the Receiver in connection with the sale, collection or other disposition of any Receivership Entity assets and the closing of any such transactions;

(h) To conduct, defend or otherwise participate in any investigation, deposition, examination and/or document production as may be held or conducted in connection with this case;

(i) To advise and, if necessary, commence affirmative litigation to recover funds paid by any Receivership Entity or to recover damages sustained by any Receivership Entity;

(j) To appear, as necessary, on behalf of the Receiver before the Court and any other courts, including defending the Receiver in any litigation commenced against her and in connection with enforcing the Receivership Estate's rights in any foreign insolvency proceedings; and

(k) To perform any and all other legal services requested by the Receiver in the performance and exercise of her rights, remedies, powers, duties and responsibilities under the Receiver Order.

Otterbourg's Qualifications

21. The performance of the Receiver's rights, remedies, duties and responsibilities under the Receiver Order will require counsel with extensive experience in a wide array of legal fields. Otterbourg has deep experience in a variety of fields relevant to this action, including complex commercial litigation, bankruptcy and corporate reorganization, insurance coverage, investment

funds, litigation funding, life settlements, securities law, corporate transactions, secured transactions and other commercial law matters. The Otterbourg lawyers who will advise the Receiver have extensive knowledge and experience in these fields. The Receiver is a Member of the Otterbourg firm and Chair of the Bankruptcy Department. The Receiver does not intend to charge for her own legal services as a Member of the Otterbourg firm, but will submit a separate application for compensation for her time as Receiver.

22. More specifically, as set forth in the Haddad Declaration, Otterbourg attorneys have experience in securities fraud and related litigation representing issuers, officers, directors and receivers. Representations include the defense of an officer and director of Refco, Inc. in consolidated class-action securities fraud litigation, consolidated foreign exchange customer fraud litigation, and D&O insurance coverage litigation. Representations also include serving as special counsel for the SEC receiver for *Credit Bancorp Ltd.* and representing secured creditor Regions Bank in *In re Wextrust Capital, LLC., et al.* (SEC receivership).

23. The Haddad Declaration describes the qualifications of Otterbourg and its attorneys and the terms and conditions of its employment, including the hourly rates currently charged by Otterbourg.

24. For all of these reasons, the Receiver believes that Otterbourg is well qualified to represent the Receiver in this case.

Compensation and Expense Reimbursement

25. Subject to the Court's approval, Otterbourg will charge the Receiver for its legal services at hourly rates in effect each year less a public service discount of ten percent (10%) on the aggregate fees billed, and for reimbursement of all costs and expenses incurred in connection with this action, subject to the "Billing Instructions for Receivers in Civil Actions Commenced by the U.S. Securities and Exchange Commission" (the "SEC Receivership Billing Instructions").

26. As of January 1, 2017, Otterbourg's actual recorded time charges are based on our hourly rates which are currently in the following ranges: Members of the Firm \$720 - \$995, Counsel \$695 - \$940, Associates \$295 - \$725, and Paraprofessionals \$275. Specifically, my hourly billing rate is \$950. However, other attorneys may also work on Receivership matters as requested by the Receiver, including, among others, the following: (i) Adam C. Silverstein, Esq., Member of the Firm, Litigation Department (\$795/hr); (ii) Daniel Fiorillo, Esq., Member of the Firm, Restructuring Department (\$925/hr); (iii) Jennifer S. Feeney, Esq., Of Counsel, Bankruptcy Department (\$725/hr); (iv) Erik B. Weinick, Esq., Of Counsel, Litigation Department (\$725/hr); (v) Nneoma Maduikwe, Esq., Associate, Banking and Finance, and Corporate (\$550/hr); (vi) Pauline McTernan, Esq., Associate, Litigation Department (\$545/hr); (vii) Chad Simon, Esq., Associate, Restructuring Department (\$475/hr); and (viii) Meaghan Millan, Esq., Associate, Litigation Department (\$350/hr). In the normal course of its business, Otterbourg revises its billing rates on an annual basis, typically in October of each year. This list of attorneys is intended to be a representative, but not definitive, listing of individuals who may, if appropriate, provide services in relation to this matter. A wide range of qualified Otterbourg professionals are available to provide services in the most efficient manner possible in connection with this matter. Ultimately, the needs of the Receiver will dictate staffing determination.

27. In addition to the hourly rates set forth above, Otterbourg customarily charges its clients for all costs and expenses reasonably incurred, including electronic discovery management, computerized legal research, non-local telephone calls, facsimile and other telecommunication charges, transportation, photocopying, delivery and messenger services, secretarial overtime charges, if required, filing fees, and other disbursements, in accordance with our then current policies. Otterbourg proposes to charge the Receiver for these costs and expenses in the same manner as

Otterbourg charges its other clients for the same costs and expenses, subject to the SEC Receivership Billing Instructions.

28. Otterbourg has advised the Receiver that Otterbourg will apply to the Court for allowance of compensation for professional services rendered and for reimbursement of reasonable costs and expenses incurred in connection with this matter in accordance with the Receiver Order and any other applicable Orders of the Court. Otterbourg has further confirmed to the Receiver that, in applying to the Court for compensation, Otterbourg will comply with the SEC Receivership Billing Instructions.

No Adverse Interest Precluding Representation by Otterbourg

29. Otterbourg has advised the Receiver that in connection with its proposed retention as counsel to the Receiver, it has performed a computerized search of its records for the Defendants, their professionals, and other parties in interest based upon a review of the docket and information provided by the SEC to determine if any conflicts of interest would result from our appointment. Based upon this review, Otterbourg does not have any conflict of interest with any interested party in these cases, except that Otterbourg disclosed the following connections:

(a) In 2014, Melanie Cyganowski was retained by the legal advisors of the Joint Official Liquidators (the “JOLs”) of ICP Strategic Credit Income Fund Ltd. and ICP Strategic Credit Income Master Fund Ltd. to provide expert services in the *In re ICP Strategic Credit Income Fund Ltd and In re ICP Strategic Credit Income Master Fund Ltd.* matters (Grand Court of the Cayman Islands, Financial Services Division) (Cause Nos. FSD 82 & 269 of 2010 (AJJ)), in which the JOLs were then seeking authority from the Court to pursue a claim for fraudulent trading against DLA Piper LLP (US), counsel to a party in interest.

(b) Melanie Cyganowski was appointed as the arbitrator of e-discovery disputes in *Picard v. Merkin*, Adv. Pro. No. 09-1182 (Bankr. SDNY) (the “Merkin Adversary Proceeding”)

from 2012-2015. During the pendency of the Merkin Adversary Proceeding, Bart M. Schwartz (the original Receiver in this case) was appointed as the Receiver of Ariel Fund Ltd. and Gabriel Capital LP, both of which were defendants in the Merkin Adversary Proceeding.

(c) Goldin Associates, the proposed financial advisor to the Receiver, is providing valuation-related litigation support services to Otterbourg on behalf of a common client in an unrelated matter in New York State Surrogate's Court.

30. Otterbourg further disclosed in the Haddad Declaration that from time to time Otterbourg works with other professionals that may be parties in interest in these cases in unrelated matters. The other professionals in these unrelated matters may be co-counsel, counsel to or professionals engaged by adversaries, or counsel to or professionals engaged by other interested parties in a particular matter.

31. To the best of the Receiver's knowledge, Otterbourg has disclosed all connections relevant to these matters upon which it is to be engaged.

Relief Requested

32. By this Application, the Receiver seeks entry of an Order, pursuant to Paragraphs 6.F. and 49 of the Receiver Order, authorizing the Receiver to retain and employ Otterbourg as her counsel in this action *nunc pro tunc* to the Appointment Date.

33. The Receiver is asking for the appointment of Otterbourg *nunc pro tunc* because the Receiver required legal assistance from Otterbourg immediately after her appointment with respect to a number of pressing matters, including the transition from Mr. Schwartz to Ms. Cyganowski as the Receiver and the focus on the Asset Disposition Plan. The Receiver consulted with the SEC about the use of Otterbourg prior to entry of a court order. The SEC agreed that the Receiver should use Otterbourg and seek the Court's approval of Otterbourg *nunc pro tunc* to the Appointment Date.

34. Otterbourg has not received payment for any fees to date, and is not seeking approval of fees it has already incurred at this time. Payment of Otterbourg's fees will be the subject of a separate fee application to this Court.

Notice

35. The Receiver proposes to serve this Application on (a) the SEC and its counsel; (b) the Defendants and their counsel; and (c) any person or entity that has filed a notice of appearance in this action. In light of the nature of the relief requested, the Receiver respectfully submits that no further notice is necessary.

WHEREFORE, for all the foregoing reasons, the Receiver requests that the employment of the law firm of Otterbourg P.C. as her counsel in this action be approved, effective *nunc pro tunc* to the Appointment Date, upon the terms as set forth above and that the Receiver be granted such other and further relief as the Court deems appropriate.

Respectfully submitted, this 11th day of July, 2017.

/s/ Melanie L. Cyganowski
Melanie L. Cyganowski
Court-Appointed Receiver