

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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**MEMORANDUM OF LAW OF RECEIVER MELANIE L. CYGANOWSKI IN  
SUPPORT OF MOTION APPROVING STIPULATION AND [PROPOSED] ORDER OF  
SETTLEMENT BETWEEN THE RECEIVER AND HEARTLAND BANK**

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Melanie L. Cyganowski, duly appointed Receiver (the “Receiver”) 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 Liquid Opportunity Management (NY) LLC, and Platinum Partners Liquid Opportunity Fund (USA) L.P. (the “Receivership Entities”), submits this Memorandum of Law in support of her motion (the “Motion”) for approval of the Stipulation and [Proposed] Order Regarding Settlement Between the Receiver and Heartland Bank (the “Settlement Stipulation”).

### **PRELIMINARY STATEMENT**

By this motion (the “Motion”), the Receiver -- pursuant to a proposed Second Amended Order Appointing Receiver that the Receiver and Securities Exchange Commission (“SEC”) are in the final stages of negotiating – seeks Court approval to pay off the senior secured creditor of Platinum Partners Credit Opportunities Master Fund LP (“PPCOMF”), Heartland Bank (“Heartland”), on a discounted basis when the loan comes due as a balloon payment on August 31, 2017. Because the Receiver’s investigation has validated the bona fides of the loan and the lender’s security interest, and the proposed settlement would result in savings to the Receivership estate of over a million dollars, the Receiver respectfully submits that the proposed settlement is in the best interests of the Receivership estate and should be approved.

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### **FACTUAL BACKGROUND**

The facts supporting the Motion are set out in the accompanying Declaration of Melanie L. Cyganowski (the “R. Decl.”) and the exhibits attached thereto, to which we respectfully refer the Court. The salient facts are set out below.

By a series of loan documents entered into as of August 31, 2015 (the “Loan Documents”), PPCOMF agreed to borrow, and Heartland agreed to lend, the principal amount of \$7,000,000 in the form of a term loan, payable in a balloon payment upon maturity on August 31, 2017 (the “Loan”). (R. Decl. ¶ 3 & Exs. 2 & 3.) The Loan accrues interest at the non-default rate of 5.875% per year, payable at the beginning of each quarter. Upon a Default (as defined in the loan documents, incremental default interest at the rate of 5% per year is added. (*Id.*) The Loan is secured by a lien on all of PPCOMF’s “Accounts, Chattel Paper, Documents, Equipment, Fixtures, General Intangibles, Investment Property, Instruments, Inventory, Pledged Deposits, Stock Rights and Other Collateral [collectively defined as “Collateral” in the loan documents], wherever located, in which [PPCOMF] now has or hereafter acquires any right or interest . . .,” which lien was duly recorded, in the form of a UCC-1 Financing Statement, with the Delaware Department of State on September 3, 2015. (*Id.* ¶¶ 4-5 & Exs. 4-5.)

The Receiver’s investigation has revealed that the principal amount of the Loan was, in fact, advanced to PPCOMF on or about August 31, 2015, that the Loan Documents appear to be genuine, and that the UCC-1 in favor of Heartland appears to have been validly filed. (*Id.* ¶7.) The Loan comes due at the end of this month, at which time PPCOMF is required to make a balloon payment in the amount of the outstanding principal balance and accrued interest; otherwise, interest on all outstanding amounts will accrue at the total default rate of 10.875%. (*Id.* ¶9.) The principal balance remaining on the Loan currently totals \$6,750,000 (the “Principal Balance”), and the amount of unpaid interest accruing at the non-default rate on the Loan totals \$151,000. (*Id.*) Heartland asserts that it is entitled to charge default interest that it has yet to charge of over \$213,000. (*Id.* ¶11.) Because PPCOMF is the legal or beneficial owner of the majority of the Receivership Entities’ assets that have been liquidated, and are expected to be

liquidated, during the course of this Receivership, Heartland's lien, if valid, would extend to much of the Receivership estate's assets. (*Id.* ¶8.)

The Settlement Stipulation provides for the Receiver, within five days of Court approval, to pay 85% of the Principal Balance, along with unpaid interest at the non-default rate, to Heartland in full satisfaction of the Loan. (*Id.* ¶14 & Ex. 1.) Heartland's agreement to discount the Principal Balance by 15% (a savings of \$1,012,500), and to waive interest at the default rate (a potential additional savings of tens of thousands of dollars, or more, per month in the event payment in full on the Loan is not made on maturity), were heavily negotiated and provide significant value to the Receivership Entities' estate. (*Id.*) The savings are especially significant in light of Heartland's first-priority lien on PPCOMF's assets, which could be foreclosed upon to recover amounts, including accrued default interest, far in excess of the discounted payoff amount. (*Id.*) Further, while the Settlement Stipulation contains mutual releases upon approval by the Court of the Settlement Stipulation and Heartland's receipt of the discounted payoff amount, the Settlement Stipulation carves-out from such mutual releases (i) any claims against Heartland "arising from or related to fraud, willful misconduct or gross negligence" (which would include claims for fraudulent conveyance with actual intent to defraud), and (ii) any claims, of any nature, against Heartland's current or former affiliates, officers, directors, employees, agents and other representatives. (*Id.* ¶15 & Ex. 1.)

Under the [Proposed] Second Amended Order Appointing Receiver in the final stages of negotiation between the Receiver and the SEC, "[t]he Receiver may engage in transactions outside of the ordinary course of business of the Receivership Entities' orderly wind down only upon motion and approval of the Court," including "any transaction that involves (i) the expenditure of cash constituting Receivership cash in excess of \$3 million, or the disposition of

the Receivership Estate's interest in Receivership Property in exchange for cash or property of value in excess of \$3 million . . ." (*Id.* ¶12.) Because the discounted payoff of the Loan involves the expenditure of more than \$3 million, the Receiver seeks a Court Order approving the Settlement Stipulation, even though the Proposed Receiver Order has not yet been fully agreed to by parties or approved by the Court and the current Amended Order Appointing Receiver does not appear to require Court approval. (*Id.* ¶13.)

## ARGUMENT

### I.

#### STANDARDS GOVERNING THE MOTION

The decisions of an SEC receiver generally are governed by the business judgment rule: "In carrying out [his or her] duty, the receiver must exercise ordinary care and prudence, that is, the same care and diligence that an ordinary prudent person would exercise in handling his or own estate, or under like circumstances." *Securities Exch. Comm'n v. Kirkland*, 2012 WL 3871920, at \*2 (M.D. Fla. Aug. 1, 2012 (citations omitted).

Nevertheless, in dealing with secured creditors of the Receivership estate, the Receiver's discretion is circumscribed. Courts long have recognized that the security interests possessed by a secured creditor constitute "property," and thus are accorded protection by the Takings Clause of the Fifth Amendment. *See, e.g., Wright v. Union Central Life Ins. Co.*, 311 U.S. 273, \_ (1940). Accordingly, the case law holds that "all valid, pre-existing liens on the property continue despite the receivership." *Securities Exch. Comm'n v. Colonial Tidewater Realty Inc. Partners, LLC*, 2015 WL 9460121, at \*15 (D. Md. Dec. 22, 2015) (quoting *Modart, Inc. v. Penrose Indus. Corp.*, 293 F. Supp. 1116, 1119 (E.D. Pa. 1967), *aff'd*, 404 F.2d 72 (3d Cir. 1968). Moreover, "[a] pre-existing contractual remedy between a creditor and debtor would

bind the receiver and, through the constitutional protection of contract, would control the court's exercise of discretion.” *Id.* (awarding bank default interest in SEC receivership); *see Securities Exch. Comm'n v. Madison Real Estate Group, LLC*, 647 F. Supp.2d 1271, 1283-85 (D. Utah 2009) (granting stay relief to secured creditor with respect to under-secured loan and ordering receiver to pay monthly interest and other obligations on secured loans).

## II.

### THE SETTLEMENT STIPULATION SHOULD BE APPROVED

The Settlement Stipulation falls squarely within the business judgment of the Receiver, as circumscribed by the rights of Heartland as a senior secured creditor, and should be approved.

The Receiver's investigation has confirmed the existence of the Loan, the genuineness of the Loan Documents and the validity of the UCC filing. As such, absent the Settlement Stipulation, the Loan would come due on August 31, 2015, and, unless paid in full at that time, would accrue default interest at the total rate of 10.875% until fully paid off and could become the subject of a lift stay motion by Heartland to foreclose on the Receivership's assets – all at the expense of the Receivership estate, which would be required to expend substantial legal fees responding to such efforts.

The Settlement Stipulation would provide the Receivership estate with a far superior outcome. The Settlement Stipulation provides the Receivership with a 15% discount on Principal Balance, resulting in savings to the estate of \$1,012,500. It also waives interest at the default rate, of which Heartland asserts more than \$213,000 already is outstanding and which could add up to tens of thousands of dollars per month of additional expense in the event payment in full on the Loan is not made on maturity. At the same time, the Settlement Stipulation provides protections to the Receivership in the event that further investigation later

results in the discovery of acts of wrongdoing with respect to the Receivership Entities. While the Settlement Stipulation contains mutual releases upon approval by the Court of the Settlement Stipulation and Heartland's receipt of the discounted payoff amount, the Settlement Stipulation carves-out from such mutual releases (i) any claims against Heartland "arising from or related to fraud, willful misconduct or gross negligence" (which would include claims for fraudulent conveyance with actual intent to defraud), and (ii) any claims, of any nature, against Heartland's current or former affiliates, officers, directors, employees, agents and other representatives.

In short, the Settlement Stipulation's combination of providing economic value to the Receivership estate in the form of a reduction of principal by over \$1 million, plus a waiver of default rate interest of at least \$213,000 and saved legal fees from not having to negotiate forbearance agreements and/or litigate defaults, all while providing the estate with the protection to pursue Heartland and/or its officers, directors or employees in the event further investigation reveals fraud, willful misconduct or gross negligence, is in the best interests of the Receivership Entities. Accordingly, the Settlement Stipulation should be approved.



**CONCLUSION**

For the reasons set forth herein, the Court should approve the Settlement Stipulations in its entirety.

Dated: New York, New York  
August 15, 2017

Respectfully submitted,

OTTERBOURG P.C.

By: /s/ Adam C. Silverstein

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