UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, -v- 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.	:	No. 16-cv-6848 (BMC)

PLAINTIFF SECURITIES AND EXCHANGE COMMISSION'S JOINDER TO RECEIVER'S: (I) OPPOSITION TO APPLICATION OF SCHAFER & WEINER, PLLC FOR ALLOWANCE OF COMPENSATION AND REIMBURSEMENT OF EXPENSES INCURRED FROM DECEMBER 19, 2016 THROUGH JUNE 13, 2017; AND (II) CROSS-MOTION FOR DISGORGEMENT OF PREVIOUSLY PAID LEGAL FEES

Plaintiff Securities and Exchange Commission ("SEC") submits this joinder to the Receiver's June 5, 2018 (I) Opposition to Application of Schafer & Weiner, PLLC for Allowance of Compensation and Reimbursement of Expenses Incurred From December 19, 2016 Through June 3, 2017; and (II) Cross-Motion for Disgorgement of Previously Paid Legal Fees (the "Opposition and Cross Motion"), and represents as follows:

The factual allegations against S&W[1] are nothing short of shocking. Purported counsel to the Prior Receiver, who owes a strict duty of loyalty to the Receivership estate, caused the

[1] Capitalized terms not otherwise defined herein have the meanings ascribed to them in the Opposition and Cross Motion and Memorandum in Support of the Opposition and Cross Motion ("Receiver's Memorandum").

Prior Receiver to enter into a hastily crafted and conflicted transaction for the benefit of S&W and to the detriment of the Receivership estate and its creditors. As set forth in the Receiver's Memorandum:

(i) The Court never approved of S&W's retention, as required by the Receivership Orders;

(ii) S&W's first post-receivership action was to advise the Prior Receiver to enter into a non-ordinary course Participation Agreement without Court approval that paid S&W $180,000 in pre-receivership fees, and caused the Receivership to part with a 45% interest in a $20 million outstanding loan in exchange for $500,000, all of which was used to pay pre-receivership professional fees and professional retainers;

(iii) The Participation Agreement was ambiguous, and has caused the Receivership to incur heavy costs in litigation before the Arabella Bankruptcy Court;

(iv) S&W has aligned itself with Platinum's adversary in litigation concerning the Participation Agreement, both by filing pleadings opposing Platinum's attempt to recover the transferred interest in the $20 million loan and by testifying against Platinum in the Arabella Bankruptcy Court; and

(v) S&W now seeks an additional $500,000 in legal fees in part to compensate it for drafting the Participation Agreement, which provided no benefit to the Receivership estate.

Receiver's Memorandum at pp. 2-3.

As set forth in the Receiver's Memorandum, S&W's advice to the Prior Receiver to enter into the Participation Agreement was a clear violation of Michigan Model Rule of Professional Responsibility 1.8(a), which prohibits a lawyer from entering into a business transaction with a client or acquiring a pecuniary interest adverse to a client unless (i) the terms are fair and reasonable to the client and fully disclosed in writing to the client; (ii) the client has a reasonable opportunity to seek the advice of independent counsel; and (iii) the client consents in writing to the transaction. Receiver's Memorandum at pp. 16-19.

Here, the Prior Receiver represented to the Court in a sworn declaration, that he was advised, apparently by S&W, "that there was an immediate need for a minimum of $500,000 to

defend Arabella Entities," and that "[he] understood that if [he] did nothing, the Arabella Interests would be wiped out." Declaration of Bart Schwartz in Support of His Application for an Order Authorizing the Arabella Settlement Agreement, dated April 25, 2017, at 6-7 (Dkt. # 128-1). Moreover, at the time he entered into the Participation Agreement, Receiver Schwartz did not know that the collateral for the Arabella Loan potentially included certain "tag along" rights that increased the potential value of the Arabella Loan. (Dkt.#142 at p.3, n.1) The Prior Receiver was thus put into a bind by S&W in the first hectic days of the Receivership– either enter into the conflicted transaction that benefits S&W, or lose the entire value of the Arabella Loan.

Michael Baum, an S&W Senior Counsel, admitted that he advised the Prior Receiver's staff that "defending against the Founders Litigation and putting AEX into bankruptcy required an immediate payment of $500,000 to pay a portion of the receivables owed to the Arabella professionals and various professionals working for Arabella Entities, and/or to provide retainers for work going forward." Declaration of Michael E. Baum in Support of the Receiver's Application for an Order Authorizing the Arabella Settlement Agreement, dated April 24, 2017 (Dkt. # 128-2, at p. 13). He also admitted that he "advised the [Prior] Receiver's staff that S&W . . . could not continue to work without being paid at least some of their past-due receivables." *Id.* Finally, Mr. Baum also admitted that he was involved in seeking potential investors in the Arabella Loan, and that he "recommended that the Receiver enter into the Participation Agreement as the only viable approach to saving PPCO's Arabella Interests." *Id.* at 13-14.

Not only did S&W's behavior violate the Michigan Model Rules of Professional Responsibility, but it also violated the duty of loyalty to the Receiver and the Receivership estate. "A receiver, as an officer or arm of the court, is a trustee with the highest kind of fiduciary obligations. He owes a duty of strict impartiality, of undivided loyalty, to all persons

interested in the receivership estate, and must not dilute that loyalty." *Phelan v. Middle States Oil Corp.*, 154 F.2d 978, 991 (2d Cir. 1946). As purported counsel to the Prior Receiver, S&W had a duty of loyalty to the Prior Receiver and the estate, which it violated by advising the Received to enter into a conflicted transaction for its own benefit. *Cf.*, *Bezanson v. Thomas*, 402 F.3d 257, 266 (1st Cir. 2005) ("counsel to a chapter 11 debtor owe a broad-based duty of care, candor, and undivided loyalty to the chapter 11 debtor.").

As set forth in the Receiver's Memorandum, S&W's actions have resulted in harm to the Receivership estate in the form of legal fees and expenses incurred as a result of litigation emanating from the Participation Agreement in addition to the transfer of a potentially valuable asset of the estate pursuant to the Participation Agreement. The SEC reserves its right to take appropriate legal action to seek damages on behalf of the Receivership estate, if appropriate, from S&W.

CONCLUSION

For the reasons set forth herein and in the Receiver's Opposition and Cross Motion and the Receiver's Memorandum, the SEC respectfully joins in the Receiver's request for entry of an order: (a) denying S&W's Application; (b) granting the Cross-Motion for disgorgement of S&W's legal fees paid by Platinum after the institution of this Receivership; and (c) granting the Receiver and the SEC such other and further relief as the Court deems appropriate.

Dated: New York, New York
June 6, 2018

SECURITIES AND EXCHANGE COMMISSION

By: /s/Neal Jacobson

Neal Jacobson
New York Regional Office
Brookfield Place
200 Vesey Street, Suite 400
New York, NY 10281
(212)336-0095

Jacobsonn@sec.gov

Of Counsel:
Alistaire Bambach