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)

MEMORANDUM OF MELANIE L. CYGANOWSKI, AS RECEIVER, IN OPPOSITION TO NON-PARTY NAVIDEA BIOPHARMACEUTICALS, INC.'S MOTION FOR AN ORDER LIFTING THE LITIGATION STAY FOR NAVIDEA'S THIRD PARTY COMPLAINT AGAINST PLATINUM PARTNERS CREDIT OPPORTUNITIES MASTER FUND LP

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Melanie L. Cyganowski, the duly appointed Receiver (the "***Receiver***") of Platinum Credit Management, L.P., Platinum Partners Credit Opportunities Master Fund LP ("***PPCO***"), Platinum Partners Credit Opportunities Fund (TE) LLC, Platinum Partners Credit Opportunities Fund LLC, Platinum Partners Credit Opportunities Fund (BL) LLC, Platinum Liquid Opportunity Management (NY) LLC, Platinum Partners Liquid Opportunity Fund (USA) L.P., Platinum Partners Liquid Opportunity Master Fund L.P., Platinum Partners Credit Opportunities Fund International Ltd and Platinum Partners Credit Opportunities Fund International (A) Ltd (collectively, the "***Receivership Entities***" or "***Platinum***"), through her counsel, Otterbourg P.C., respectfully submits this memorandum in opposition to Non-Party Navidea Biopharmaceuticals, Inc.'s ("***Navidea***") Motion for an Order Lifting the Litigation Stay for Navidea's Third Party Complaint Against Platinum Partners Credit Opportunities Master Fund LP, Dkt. No. 342 (the "***Motion***"). In opposition to the Motion, the Receiver states as follows:

PRELIMINARY STATEMENT

Navidea's Motion, seeking leave to pursue an indemnification claim against PPCO, should be denied because Navidea does not have a colorable claim for indemnification against PPCO, and because this is not the appropriate time in this case for Navidea to prosecute its claim. The indemnification provision upon which Navidea relies only obligates PPCO, if at all, to indemnify Navidea if an affiliate of PPCO makes a claim against Navidea for repayment of the same portion of the same promissory note for which Navidea repaid PPCO in March 2017. The claim against which Navidea is now defending itself, and for which it seeks indemnification from PPCO, is not a claim for repayment of the same portion of the same promissory note for which PPCO was repaid, and has not been made by an affiliate of PPCO. Therefore, PPCO has no indemnification obligation to Navidea, and the Motion should be denied.

In February 2017, in the opening months of this receivership, the Prior Receiver (defined below) made a demand to Navidea for repayment of that portion of a promissory note which had been assigned to PPCO prior to the receivership by Platinum Partners Value Arbitrage Fund L.P. ("***PPVA***") and/or Platinum-Montaur Life Sciences LLC ("***Platinum-Montaur***"). At that same time, PPVA (then and now under the supervision of a separate fiduciary, before a separate court, in a separate country), on behalf of Platinum-Montaur, also demanded repayment of its own portion of the note.

Following PPCO's and PPVA's separate demands, Navidea paid PPCO its portion of the outstanding note, but did not pay PPVA's portion of the note. Navidea now alleges, as a result of a lawsuit brought by Platinum-Montaur to enforce the balance of the note, that PPCO has an indemnification obligation to Navidea. However, an objective reading of the indemnification provision which Navidea seeks to enforce demonstrates that it does not give rise to an indemnification obligation on the part of PPCO because, among other reasons:

1. The indemnity only applies to "Causes of Action" which, by definition, consist solely of claims that *PPCO* had against Navidea, namely enforcement of its portion of the note. Platinum-Montaur is only suing on the portion of the note that PPVA did *not* assign to PPCO, and thus, the indemnity does not apply. Navidea itself has confirmed the continued existence of an outstanding note balance in its own public filings with the Securities and Exchange Commission ("***SEC***") both prior to, and following the March 2017 repayment to PPCO; and

2. The indemnity only applies to "Causes of Action" asserted by *affiliates* of PPCO. At the time the indemnity was allegedly provided, and at the time Platinum-Montaur filed its complaint, PPCO and PPVA (and by extension, Platinum-Montaur), were not affiliates - - PPCO is in receivership under this Court's supervision, while PPVA is under the supervision of the Joint Liquidators appointed by the Courts of the Cayman Islands. Even under an expansive definition of the term "affiliates," PPCO and Platinum-Montaur are not affiliates because there was no common control of the entities at the relevant time. Thus, PPCO has no indemnification obligation even if PPVA's lawsuit constituted a Cause of Action, which it does not.

In all events, the indemnity claim is not one that needs to be brought at this point in either the receivership or the underlying litigation between PPVA and Navidea. Rather, the indemnity

claim should be raised in this Court when the underlying litigation concludes. Having to defend the indemnity claim now, regardless of the merits, is exactly the type of expense and distraction that the litigation stay was designed to avoid.

For these reasons, and those more fully set forth herein, Navidea's Motion should be denied.

BACKGROUND

The following are the relevant facts as gleaned from both Navidea's Proposed Complaint and the PPVA Complaint (both defined below), which the Receiver accepts as true for purposes of this opposition to the Motion, much in the same way as allegations in a complaint would be accepted as true for purposes of a motion to dismiss, the appropriate standard for whether or not Navidea has a colorable claim for indemnification.

A. The Loan Agreement, the Note and PPVA's Partial Assignment of the Note

On July 25, 2012, Navidea and Platinum-Montaur entered into a loan agreement (the "Loan Agreement") and related promissory note (the "***Note***"), pursuant to which, Platinum-Montaur agreed to extend loans to Navidea on certain terms and conditions. PPVA Complaint,[1] ¶¶ 8, 13; Navidea's Proposed Complaint, ¶16.[2]

On or about March 22, 2016, Platinum-Montaur assigned certain of its assets to PPCO, including $7,022,715.21 of the amounts then due and owing by Navidea under the Note, which at that time, was in excess of $8,500,000. PPVA Complaint, ¶¶19, 20. Navidea claims

[1] References to the "***PPVA Complaint***" are to the Verified Complaint filed by Platinum-Montaur against Navidea in the New York State Supreme Court, County of New York, Index No. 656710/2017 on or about November 2, 2017, and removed by Navidea to the U.S. District Court for the Southern District of New York, Case No. 17-cv-9591 on or about December 6, 2017. The PPVA Complaint is annexed as Exhibit A to the Motion. It is appropriate for purposes of this opposition to accept the allegations set forth in the PPVA Complaint as true, because they form the premise for the indemnification claim upon which Navidea's Motion is based.

[2] References to the "***Navidea Proposed Complaint***" are to Navidea's proposed Third Party Complaint Against Platinum Partners Credit Opportunities Master Fund, L.P., filed in U.S. District Court for the Southern District of New York, in the matter captioned *Platinum-Montaur Life Sciences, LLC v. Navidea Biopharmaceuticals, Inc.*, Case No. 17-cv-9591, Dkt. No. 30 (the "***PPVA Case***") and as Exhibit A to the Motion.

that this was not the only assignment of a portion of the Note. According to Navidea, Michael Goldberg, a former Platinum portfolio manager, and now Navidea's CEO, claims that he was previously also assigned a portion of, or limited rights in, the Note by PPVA, but Navidea has not sought indemnification for any claim he may have, or may make, not that PPCO would have an indemnification obligation in such a circumstance. *See* Navidea's Motion to Dismiss at Exhibit A, PPVA Case, Dkt. No. 32.

As of December 31, 2016, the outstanding balance on the entirety of the Note was approximately $9.5 million. PPVA Complaint ¶ 18, citing Navidea's 2016 SEC Form 10-K at p. 76.

B. PPVA's Liquidation

According to Platinum-Montaur, at all relevant times, PPVA is and was the holder of 99% of the membership interests in Platinum-Montaur. PPVA Complaint, ¶ 2.

By orders dated October 27, 2016 and December 16, 2016, the Financial Services Division of the Grand Court of the Cayman Islands, directed the winding up of PPVA, and appointed joint official liquidators ("***JOLs***") for PPVA. Platinum-Montaur is currently operated by PPVA's JOLs, pursuant to Platinum-Montaur's operating agreement and the written consents of the members of Platinum-Montaur. PPVA Complaint, ¶¶ 2, 3

C. The Receivership

On December 19, 2016, the SEC filed this case, and sought and obtained the appointment of Bart M. Schwartz as receiver of the Receivership Entities (the "***Prior Receiver***"). Dkt. No. 6.

On July 6, 2017, the Receiver was appointed to substitute for the Prior Receiver, who resigned. Dkt. No. 216. The Receivership Entities, including PPCO, Platinum Partners Credit Opportunities Fund (TE) LLC, Platinum Partners Credit Opportunities Fund LLC, Platinum

Partners Credit Opportunities Fund (BL) LLC, Platinum Liquid Opportunity Management (NY) LLC, Platinum Partners Liquid Opportunity Fund (USA) L.P., were all part of the PPLO and PPCO groups of funds.[3]

PPVA, including Platinum-Montaur, is a separate and distinct group of entities, which are not Receivership Entities. As explained above, PPVA is currently in a separate process of liquidation in the Cayman Islands and is, and more importantly was at the relevant time, under the control of the Cayman court-appointed JOLs, not the Prior Receiver.

D. Repayment Agreement and Alleged Indemnification Provision

In February, 2017, the Prior Receiver put Navidea on notice of Navidea's obligations to PPCO under the Note, including those which remained with entities other than PPCO. Specifically, on February 28, 2017, the Prior Receiver sent Jed Latkin of Navidea a letter explaining that "PPCO is the current holder of the *PPCO Portion* of the Platinum Debt and [Navidea] may only take direction from the Receiver with regards to the *PPCO Portion* of the Platinum Debt." PPVA Complaint Exhibit 88 at p. 116 of 135 (emphasis supplied). The Prior Receiver also cited Navidea's February 8, 2017 Definitive Proxy Statement Form 14A explaining that $9,300,000 remained outstanding on the Platinum Debt, as of September 30, 2016. PPVA Complaint, Exhibit 88 at p. 116 of 135 (referencing February 8, 2017 Proxy Statement attached to PPVA Complaint as Exhibit 77).

At the same time, on February 27, 2017, Platinum-Montaur sent a demand letter to Navidea seeking payment on a separate portion of the Note, $1,913,963.48, in which PPCO had no interest, thereby putting Navidea on notice of separate claims to separate portions of the Note. PPVA Complaint ¶ 27, Exhibit 9.

[3] Three funds, Platinum Partners Liquid Opportunity Master Fund L.P., Platinum Partners Credit Opportunities Fund International Ltd, and Platinum Partners Credit Opportunities Fund International (A) Ltd, are now Receivership Entities, but were not under the Receiver's control during the times relevant to the Motion.

Pursuant to a March 2, 2017, "***Repayment Agreement***" Navidea agreed to repay PPCO the portion of the Note it then held, in an amount of $7,022,715.21. Navidea Proposed Complaint, ¶ 26 and Exhibit A thereto.

The Repayment Agreement contained several important defined terms and provisions, which the Motion conveniently glosses over or only selectively quotes. These are as follows:

"***Indebtedness***" is defined as "all liabilities, obligations and indebtedness (the 'Indebtedness') owing by [Navidea] pursuant to [the Loan Agreement] and [the Note]."

"***Borrower***" is defined as "Navidea" and its affiliates.

"***Lender***" is defined as PPCO.

Importantly, the first paragraph of the Repayment Agreement concludes by stating that ". . . Lender is the current holder of the Indebtedness *to the extent of* $7,022,715.21 of principal and accrued interest as of March 22, 2016 plus all related accrued and outstanding interest amount." Repayment Agreement, first paragraph thereof (emphasis supplied).

In the following paragraph, the Repayment Agreement states that if paid by March 1, 2017, "the total amount owing to Lender" (not the total amount under the Note) is $7,714,109.47, including interest and any prepayment or termination fees and penalties, and such amount is defined as the "***Payoff Amount***." Repayment Agreement, second paragraph thereof.

The indemnification provision on which Navidea bases its Motion reads in its entirety as follows:

> To the extent that any Cause of Action is made against any of the Released Parties by any affiliate(s) of Lender, Lender agrees to reimburse, indemnify, and hold harmless the Released Parties against and in respect of any and all Liabilities incurred or suffered by any of them as a result of such Cause of Action.

Repayment Agreement, Page 2, Penultimate Paragraph (the "***Indemnification Provision***").

The definition of "***Causes of Action***" utilized therein is located in the second full paragraph of page 2 of the Repayment Agreement, which reads in its entirety, as follows:

> Effective as of the date (the "Release Date") of payment in full by or on behalf of Borrower of the Payoff Amount and any per diem interest payments added thereto, Lender hereby fully, finally and irrevocably releases, waives, acquits and forever discharges Borrower, Cardinal Health 414, LLC, and their respective subsidiaries, affiliates, divisions, predecessors, successors and assigns, and the officers, directors, stockholders, employees, agents, attorneys, lenders, investors, insurers and agents thereof (collectively, the "Released Parties") from any and all actions, causes of action, suits, debts, claims, counterclaims, commitments, agreements, contracts, damages, demands, liabilities, obligations, costs, expenses, and sums of money of every kind and nature whatsoever, past, present or future, at law or in equity, whether known or unknown, contingent or otherwise (collectively, the "Liabilities"), ***which Lender had, has or may have*** at any time based on facts, events, circumstances, agreements, acts or omissions existing or occurring on or prior to the Release Date, against the Released Parties, or any of them (collectively, "Causes of Action").

Repayment Agreement, Page 2, Second Full Paragraph (emphasis supplied).

Thus, "Causes of Action" are only those which PPCO had with respect to the Note, which were limited to the portion of the Note that had been assigned to it by PPVA, *not* claims other individuals or entities may have had with respect to separate portions of the Note.

E. <u>PPVA's Complaint Against Navidea and Subsequent Procedural History</u>

On November 2, 2017, Platinum-Montaur filed the PPVA Complaint against Navidea, suing for recovery of only that portion of the Note which it had not assigned to PPCO, and thus, PPVA's Complaint would not qualify as a Cause of Action under the Repayment Agreement. *See* PPVA Complaint, generally.

By way of example only:

- Pursuant to the Loan Agreement's provision allowing PPVA to freely assign the Note "in whole or in part," Platinum-Montaur assigned "$7,022,715.21 of the amounts then due and owing to" it under the Note to PPCO. PPVA Complaint ¶¶ 16, 19-20;

- The Assignment was only a partial assignment, as Navidea's total obligation under the Note at the time of the assignment was "in excess of $8.5 million," and PPCO subsequently paid the portion of the Note which PPVA assigned to PPCO. *Id.* ¶¶ 20-21, 29;

- Thus, PPVA presently seeks payment only for that portion of the Note which it did not assign to PPCO. *Id.* ¶¶ 7, 29-30; and

- As PPVA noted in its February 28, 2017 demand letter to Navidea, it presently asserts its "right to receive payment for the portion of the Navidea Note that had not been purportedly assigned to PPCO under the Assignment Agreement." *Id.* ¶ 26.

F. Navidea's SEC Filings Confirm That It Did Not Fully Satisfy The Outstanding Indebtedness Under the Note By Paying PPCO

Navidea's SEC filings before and after the Repayment Agreement demonstrate its knowledge that the assignment to PPCO was partial, rather than complete. In May, 2016, Navidea stated in a Form 10-Q that as of March 31, 2016, the remaining debt due on the Note was $8,500,000.

Additionally, on March 3, 2017, one day after signing the Repayment Agreement with PPCO, Navidea filed a Form 8-K with the SEC. The filing states in relevant part, that Navidea has "repaid to Platinum Partners Credit Opportunities Master Fund, LP ("PPCO") an aggregate of $7,714,109.47 in *partial* satisfaction of the Company's liabilities, obligations and indebtedness under that certain Loan Agreement, dated July 25, 2012 (as amended on June 25, 2013, March 4, 2014, May 8, 2015 and otherwise) by and between the Company and Platinum-Montaur Life Sciences, LLC ("Platinum-Montaur")." (emphasis supplied).

Similarly, in a Form 10-K for the fiscal year ended December 31, 2016, Navidea stated that [a]s of December 31, 2016, the outstanding principal balance of the [Note] was approximately $9.5 million" and that it had "repaid to PPCO an aggregate of approximately $7.7 million in *partial* satisfaction of [Navidea's] liabilities, obligations and indebtedness under the [Loan Agreement] which, to the extent of such payment, were transferred by

Platinum-Montaur to PPCO." Motion, Exhibit 55 at p. 83 of 135 (emphasis supplied).

Finally, in a Form 10-Q for the quarterly period ended June 30, 2017, filed with the SEC, Navidea stated that as of that date, "the remaining outstanding principal balance of the [Note] was approximately $2,000,000." PPVA Complaint, Exhibit 11 at p. 129 of 135.

G. Navidea's Requests for Indemnification

On November 22, 2017, Navidea sent the Receiver a letter requesting that PPCO "reimburse, indemnify and hold harmless Navidea against any and all Liabilities (as that term is defined in the Letter Agreement) incurred or suffered to date" including PPVA's present action against it.

On December 5, 2017, the Receiver replied, declining Navidea's request for indemnification because the causes of action asserted by PPVA are outside any as to which PPCO agreed to provide an indemnity in the Letter Agreement.

Subsequently, on April 10, 2018, Navidea sent a letter to the Receiver's counsel, announcing Navidea's Third-Party Complaint against PPCO for any damages owed to Platinum-Montaur in the PPVA Case. On April 27, 2018, the Receiver sent a letter to Navidea's counsel, again explaining that PPCO has no indemnification obligation to Navidea in the present action, and denying Navidea's request to consent to the relief sought by the Motion.

ARGUMENT

A. The Applicable Legal Standard

A party seeking to lift a litigation stay against an entity must prove that three factors, on balance, weigh in favor of lifting the stay: "(1) whether refusing to lift the stay genuinely preserves the status quo or whether the moving party will suffer substantial injury if not permitted to proceed; (2) the time in the course of the receivership at which the motion for relief

from the stay is made; and (3) the merit of the moving party's underlying claim." *See S.E.C. v. Byers*, 592 F. Supp. 2d 532, 536-37 (S.D.N.Y. 2008) *aff'd* 609 F.3d 87 (2d Cir.2010) (citing *SEC v. Wencke*, 742 F.2d 1230, 1231 (9th Cir.1984)); *U.S. v. Acorn Technology Fund, L.P.*, 429 F.3d 438, 443 (3d Cir. 2005); *S.E.C. v. Illarramendi*, No. 3:11CV78, 2012 WL 234016, at *4 (D. Conn. Jan. 25, 2012). Navidea, as the movant here, bears the burden of proving these factors; yet, it fails to allege any facts, as opposed to conclusory allegations in its Motion or Proposed Complaint, which would satisfy any of these prongs. *See Illarramendi*, 2012 WL 234016, at *4.

B. Navidea Does Not Have A Colorable Claim

Addressing the third factor first, Navidea's arguments in both the Motion and Navidea's Proposed Complaint do not satisfy the most basic pleading standards. The few reported decisions addressing how courts should consider the merits of a moving party's claim for purposes of the third prong of the "lift stay" test, demonstrate that the standard is akin to that applied to a motion to dismiss, in that there is no reason to require a receiver to defend an action where the proposed claims fail as a matter of law. *See e.g., Acorn Technology Fund, L.P.*, 429 F.3d at 445. In that vein, in *Schwartzman v. Rogue Intern. Talent Group, Inc.*, the court, in considering whether or not there was a colorable claim sufficient to satisfy the third factor, determined there was no colorable claim where the movant's allegations consisted of "unsupported, conclusory statements" failed to "provide details, dates, underlying facts, or specific losses attributable to [the] alleged breaches." *See* No. 12–5255, 2013 WL 460218, at *3 (Feb. 7, 2013 E.D. Penn.); *see also S.E.C. v. Illarramendi*, No. 3:11CV78, 2012 WL 234016, at *7 (Jan. 25, 2012). This standard is nearly, if not completely identical to that set forth in the Federal Rules of Civil Procedure, applicable to motions to dismiss and applicable case law.

The Federal Rules of Civil Procedure require that a pleading contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). "To

survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing id.). Thus, the plaintiff must offer more than "a formulaic recitation of the elements of a cause of action . . ." *See also Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 557 (2007). In deciding on a motion to dismiss, a court must disregard those pleadings which are nothing more than legal conclusions, and accept as true only well-pleaded factual allegations. *See id*. Unless those remaining allegations give rise to a cause of action, the court should dismiss the complaint. *See id*. Navidea's allegations in its Proposed Complaint, read in concert with PPVA's allegations in the PPVA Complaint, do not give rise to a sustainable claim for indemnification against PPCO under these standards.[4]

i. *Navidea Is Only Entitled To Indemnification, If At All, With Respect To Claims As To PPCO's Portion Of The Note*

By the plain words of the parties' agreement, any indemnification obligation PPCO may have to Navidea under the Repayment Agreement does not apply to PPVA's claims in the PPVA Case. Navidea alleges in its Motion that, under the Repayment Agreement, PPCO has an obligation to indemnify it in the PPVA Case; however, these allegations are belied by the clear language of the Repayment Agreement itself.

Most significantly, Navidea fails to include in its Motion the portion of the Repayment Agreement that defines "Causes of Action" as various causes of action "which [PPCO] had, has or may have at any time based on facts, events, circumstances, agreements, acts or omissions existing or occurring on or prior to the Release Date, against the Released Parties, or any of them . . .". Repayment Agreement. The definition encompasses *only* those causes of action which

[4] On a motion to dismiss, a court may consider the full text of documents that are quoted in or attached to the complaint, or documents that the plaintiff either possessed or knew about and relied upon in bringing the suit. *Rothman v. Gregor,* 220 F.3d 81, 88–89 (2d Cir. 2000).

PPCO, as opposed to any other entities, had against Navidea. Therefore, PPCO only released and indemnified Navidea for those causes of action related to the portion of the Note that PPVA assigned to PPCO. The term Causes of Action does not include claims made to the balance of the Note which may be asserted by PPVA, Platinum-Montaur, Goldberg, and/or any other party.

Moreover, contrary to Navidea's unsupported representations in its Motion, Navidea's SEC filings confirm that PPVA's Complaint does not relate to any portion of the note which PPVA assigned to PPCO.

First, in Navidea's Form 10-K for the fiscal year ended December 31, 2016, it stated that "[a]s of December 31, 2016, the outstanding principal balance of the [Note] was approximately $9.5 million" and that it had "repaid to PPCO an aggregate of approximately $7.7 million in partial satisfaction of [Navidea's] liabilities, obligations and indebtedness under the [Loan Agreement] which, to the extent of such payment, were transferred by Platinum-Montaur to PPCO." Motion, Exhibit 55 at p. 83 of 135. Similarly, Navidea's May, 2016 Form 10-Q and its June 30, 2017 Form 10-Q serve as further evidence that PPVA's Complaint is related only to that portion of the Note which was *not* assigned to PPCO.[5] Navidea's May, 2016 Form-Q stated that the balance on the Note was $8,500,000 as of March 31, 2016. Additionally, its June 30, 2017 Form 10-Q stated that as of that date, there was still approximately $2,000,000 outstanding on the principal of the Note. PPVA Complaint, Exhibit 11 at p. 129 of 135. Clearly PPVA's claims against Navidea are limited to a portion of the Note upon which PPCO had no claim, and therefore, are not Causes of Action for which PPCO had or has any indemnification obligation.

[5] Pursuant to Federal Rule of Evidence 201, this Court may take judicial notice of the Navidea SEC filings referenced herein, but not annexed to either the Motion, PPVA Complaint or Navidea Proposed Complaint. *See Kramer v. Time Warner Inc.*, 937 F.2d 767, 774 (2d Cir. 1991) (court may take judicial notice of public disclosure documents filed with the SEC).

ii. ***Navidea Is Only Entitled To Indemnification, If At All, Of Claims Made By PPCO Affiliates***

Even if PPVA's claims in the PPVA Case were "Causes of Action," (and they are not), Navidea cannot seek indemnification against PPCO because contrary to Navidea's unsupported and conclusory allegations, PPCO and PPVA were not affiliates at the time the Repayment Agreement was executed and are not affiliates now. The Repayment Agreement states "[t]o the extent that any Cause of Action is made against any of the Released Parties by any affiliate(s) of the Lender, Lender agrees to reimburse, indemnify, and hold harmless the Released Parties . . ." but is silent as to the definition of the term "affiliate." Navidea asserts in its Motion, in a merely conclusory fashion that is insufficient under *Twombly* and *Iqbal*, that PPCO and PPVA are affiliates merely because "Mark Nordlicht execut[ed]" the Assignment "from Platinum Montaur to PPCO on behalf of both Platinum Montaur and PPCO". Navidea cites no factual or legal support within the Repayment Agreement or otherwise suggesting Nordlicht's actions equate to an affiliation. Furthermore, Navidea's allegations center on the relationship of the entities before, rather than at the time of the Repayment Agreement, which is the relevant time to consider.

PPCO is not an affiliate of PPVA because presently, and at the time the Prior Receiver entered into the Repayment Agreement, the entities were controlled by entirely separate fiduciaries. An "affiliate" is "[a] corporation that is related to another corporation by shareholdings or other means of control; a subsidiary, parent, or sibling corporation. *See Affiliate*, Black's Law Dictionary (10h ed. 2014); *Rothstein v. American International Group, Inc.*, 837 F.3d 195, 206 (2d Cir. 2016) (following "general principles of contract law" and consulting Black's Law Dictionary's definition of affiliate in the securities context where a settlement agreement left the term undefined). The term "affiliate" is also defined as "an affiliated person or organization; *specifically*: a business entity effectively controlling or

controlled by another or associated with others under common ownership or control." *Affiliate*, Merriam-Webster's Online Legal Dictionary, (2018) https:// www.merriam-webster.com/ dictionary/affiliate#legalDictionary. Therefore, whether two entities are affiliates of one another depends on whether they are controlled by the same person or entity. *See id.*; *Affiliate*, Black's Law Dictionary (10h ed. 2014).

At the time the Prior Receiver entered the Repayment Agreement, Bart Schwartz as Prior Receiver controlled PPCO while the JOLs controlled PPVA. *See Ellington v. EMI Music, Inc.*, 21 N.E.3d 1000, 1004 (N.Y. 2014) (finding "[a]bsent explicit language demonstrating the parties' intent to bind future affiliates of the contracting parties, the term 'affiliate' includes only those affiliates in existence at the time that the contract was executed"). PPCO and PPVA were not "related" by any "means of control" within the definition of affiliate. *See id.*; Black's Law. Therefore, contrary to Navidea's baseless and conclusory assertions, PPCO is not an affiliate of PPVA, with the respect to the Repayment Agreement, and PPCO has no obligation to indemnify Navidea against PPVA.

C. Navidea Will Not Be Prejudiced By The Continuation Of The Litigation Stay

Navidea will not suffer substantial injury if this Court refuses to lift the Litigation Stay. Navidea asserts in its Motion that it "will suffer substantial injury if not allowed to proceed with its Third-Party Complaint against PPCO"; however, Navidea gives no indication of what injuries it might suffer if this Court refuses to lift the Litigation Stay. Motion at p. 5 of 7. This alone constitutes sufficient grounds for denial of the Motion. Regardless, even if Navidea could demonstrate a colorable claim against PPCO for indemnification, it cannot demonstrate that the indemnification must be made now as opposed to the conclusion of the case. In other words, if applicable at all, the clause is for reimbursement, not advancement of costs. Indeed, the Repayment Agreement contains no provision on which Navidea might rely for reimbursement of

litigation costs (presumably its only present damages) at this time. Repayment Agreement. Therefore, Navidea will suffer no harm if it waits to seek indemnification after the conclusion of its litigation with PPVA.

D. The Receiver Will Be Prejudiced If The Stay Is Lifted

Navidea alleges that the mere passage of time since the start of the Receivership entitles it to a lift from the stay. Putting aside the fact that Navidea incorrectly states the duration of the Receivership (two years when in fact it has been eighteen months, only twelve of which have been under the direction of the current Receiver), the need to allocate limited resources to a defense against Navidea's unsubstantiated indemnity claim, even after repeated warnings to Receiver's counsel as to the frivolousness of the same, represents an actual prejudice to the Receiver and harm to the investors, and militates in favor of a denial of the Motion due to the unnecessary expense and distraction of defending this matter now, as opposed to when the PPVA Case concludes and once the receivership is closer to conclusion. In any event, if the indemnification claim is to be litigated at all, it should be litigated before this Court, not before the U.S. District Court for the Southern District of New York, where the PPVA Case is pending.

RESERVATION OF RIGHTS

In the event this Court grants the Motion, the Receiver reserves her right to assert any and all defenses to Navidea's Proposed Complaint, even if not specifically set forth in this opposition. The Receiver also reserves her right, in the event it is determined that PPCO does have an indemnification obligation to Navidea, to argue as to what the scope of such indemnification includes, and whether or not it gives rise to rights on the part of PPCO, such as the right to direct Navidea's defense, and accept any settlement which PPVA may offer.

CONCLUSION

For the reasons set forth herein, the Receiver respectfully requests entry of an order: (a) denying Navidea's Motion; and (b) granting the Receiver such other and further relief as the Court deems appropriate.

Dated: New York, New York
June 28, 2018

OTTERBOURG P.C.

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