UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
NEW YORK REGIONAL OFFICE
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NEW YORK, NEW YORK 10281-1022

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August 2, 2018

Honorable Brian M. Cogan
U.S. District Judge
United States District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, NY 11201

Re: *SEC v. Platinum Management (NY) LLP, et al.*, 16-cv-6848

Dear Judge Cogan:

Plaintiff Securities and Exchange Commission ("SEC") and Schafer & Weiner, PLLC ("S&W") respectfully submit this joint letter concerning a discovery dispute regarding the attached Rule 30(b)(6) deposition notice ("Deposition Notice") served by S&W in connection with its fee application (the "Fee Application"). The SEC respectfully seeks authorization to file a motion to quash the Deposition Notice in its entirety. The parties' respective positions are summarized below but, in summary, the SEC submits that a Rule 30(b)(6) deposition of an SEC attorney on the ten topics identified in the Deposition Notice is irrelevant to the issues raised by the Fee Application and otherwise inappropriate and S&W disagrees.[1]

Background

S&W's Fee Application seeks payment for fees and expenses it incurred relating to a Platinum Partners Credit Opportunities Master Fund LP ("PPCO") loan (the "Arabella Loan") that went into default pre-Receivership, and a Participation Agreement that PPCO entered into on January 5, 2017, with S&W's assistance, that sold 45% of PPCO's interest in the Arabella Loan to a third party in return for $500,000, which was used, in part, to pay S&W $180,000 for pre-Receivership accrued fees and expenses. (Dkt. No. 326). The Receiver filed an opposition to the Fee Application and a cross-motion for disgorgement of the monies S&W received as a result of the Participation Agreement (Dkt. Nos. 328-29). The SEC joined in the Receiver's Opposition and Cross-Motion (Dkt. No. 330); S&W filed two replies (Dkt. Nos. 332 & 335), the Receiver filed a sur-reply (Dkt. No. 343); and the

[1] On July 24, 2018, SEC attorneys Kevin McGrath and Kenneth Byrne conferred telephonically with Norman Klein, counsel to S&W, for approximately 90 minutes regarding the SEC's objections to the Deposition Notice and S&W's objections to the SEC's response to its document request. On July 25, 2018, SEC attorneys McGrath and Neal Jacobson had a follow-up call with Mr. Klein lasting approximately 45 minutes further addressing these issues but were unable to reach agreement regarding the Deposition Notice or the Document Notice. S&W is preparing a joint letter regarding the document dispute which should be filed shortly.

SEC filed a Declaration of Neal Jacobson in further opposition to S&W's Fee Application (Dkt. No. 344).

S&W's Deposition Notice seeks to question an SEC attorney on ten topics: when, how and what the SEC learned of the Participation Agreement (Items 1-2); the SEC's basis for contending that S&W had a conflict of interest and inappropriately received funds pursuant to the Participation Agreement (Items 3-4); the SEC's opinion whether the Initial Receiver used his business judgement and performed satisfactory due diligence in entering into the Participation Agreement (Items 5-6); the basis for the SEC's factual allegations in Dkt. Nos. 330 and 344 (its Joinder and the Jacobson Declaration) and in Dkt. Nos. 142 and 179 (a May 19, 2017 status report and a June 21, 2017 letter to the Court raising concerns about the Initial Receiver) (Items 7-8); the SEC's objection to the Initial Receiver concerning S&W's proposed engagement (Item 9); and the SEC's knowledge of a March 2017 Mediation Settlement Agreement concerning the Arabella Loan (Item 10).

The SEC's Position

The SEC respectfully submits that none of the ten topics on which S&W seeks to question an SEC attorney are relevant to the Court's resolution of the issues before it. The Receiver and the SEC oppose the Fee Application on the ground that the Receivership Order (*see* ¶¶ 6.D &F, 28, 48,49) required prior Court approval before S&W could be retained as well as before the Participation Agreement could be entered into; and that the Receivership Order (¶¶ 6D&F, 28,44,48, 49), as well as receivership law, required prior Court approval before any payments to S&W, including for pre-Receivership fees, could be made. It is undisputed that no such prior Court approval was obtained. S&W instead argues that the Receivership Order and receivership law did not require such prior Court approval. But this presents a purely legal question requiring the Court's interpretation of the Receivership Order and applicable law, not a fact deposition of an SEC witness. The Receiver and SEC further contend that S&W put its interests ahead of the interests of its client when it took monies (pursuant to the Participation Agreement) that rightfully belonged to the Receivership, and that that conflict of interest nullifies any claim to fees S&W might otherwise advance. However, this argument is based on S&W's actions (as to which the SEC has no firsthand knowledge); thus, a deposition of an SEC witness is also unwarranted on this issue.

S&W apparently claims that it understood that the SEC knew in advance that the Participation Agreement would be executed, suggesting a potential defense of reliance or estoppel, and contends this justifies questioning the SEC on when it learned of the Participation Agreement. Significantly, however, S&W has not alleged that it had this understanding *before* it helped PPCO execute the Participation Agreement and received Receivership monies therefrom. This alone is dispositive of any purported reliance or estoppel defense, assuming such defenses are even available here. Nor has it alleged that the SEC *ever* told S&W it knew of or consented to the Participation Agreement and S&W's receipt of Receivership monies therefrom; or that anyone else ever told it the SEC so knew and consented. Further, as the Jacobson Declaration (*see* ¶¶ 26-34 *and* Ex. 2;3; 5 *)* and emails the SEC has subsequently produced to S&W make clear, the SEC did not learn of the Participation Agreement's terms or its execution until April 10, 2017, three months after the fact. Thus, S&W should not be permitted to depose an SEC attorney regarding its factually debunked and legally untenable and irrelevant claims relating to the SEC's knowledge of the Participation Agreement. Space limitations preclude the SEC from addressing each of the other topics except to say that they are either inappropriate to a Rule 30(b)(6) notice, irrelevant or seek information beyond the SEC's

firsthand knowledge. *See, e.g., Gov't Employees Ins. Co. v. Lenex Services, Inc. et al.*, 2018 WL 1368024 at * 3 (E.D.N.Y. Mar. 16, 2018)("The case law is clear that Rule 30(b)(6) depositions are intended to discover the facts, and it is improper to use [them] to ascertain how a party intends to marshal the facts and support its legal theories.") The SEC, accordingly, seeks authorization to move to quash the Deposition Notice in its entirety.

S&W's Position

A deposition of the SEC's 30(b)(6) representative is relevant to adjudication of the Fee Application. The SEC's position *in this document* displays the relevancy. The SEC states that it and the Receiver oppose the Fee Application solely because this Court did not approve the Participation Agreement or S&W's retention. The SEC then alleges that "S&W put its interests ahead of the interests of its client . . . and that that conflict of interest nullifies any claim to fees S&W might otherwise advance." The Receiver and the SEC have objected to the Fee Application based on this factual allegation and many others, including (but certainly not limited to) the allegation that S&W harmed the Estate through the Participation Agreement. (*See, e.g.* DN 321; DN 329, pp. 2-3; DN 330, pp. 1-4; DN 343, pp. 5-9; and DN 344 pp. 8-11).

S&W is entitled to depose the SEC and discover the basis of the factual allegations the SEC is using to object to S&W's Fee Application – factual allegations S&W maintains are grossly inaccurate. S&W should be able to depose the SEC and discover the factual basis for the SEC's allegation that S&W had a conflict. Similarly, S&W is entitled to question the SEC about the factual basis for its allegation that S&W harmed the Estate.

This is particularly important because, despite making these inflammatory allegations (and many others), the SEC has never adequately articulated the basis for them. For example, S&W has reason to believe that the SEC knows that the Initial Receiver's general counsel, Cooley LLP, reviewed the Participation Agreement before the Receiver signed it. Independent counsel's review of an agreement would normally obviate any conflict of interest issues the attorney drafting the agreement might have. *See, e.g* Michigan Rule of Professional Conduct 1.8(a); Model Rule of Professional Conduct 1.8(a). S&W is entitled to take a deposition to find out the SEC's basis for maintaining that despite the review of independent counsel, S&W had a conflict related to the Participation Agreement that precludes them from being compensated for their extensive work for the Estate.

S&W is likewise entitled to understand the factual basis for the SEC's allegations that S&W harmed the Estate by advising the Initial Receiver to enter into the Participation Agreement. The SEC maintains this position despite the fact that without selling the participation, the collateral for the entire Arabella loan would likely have been lost. S&W is entitled to understand before trial the factual basis for the SEC's allegation that the Participation Agreement nevertheless harmed the Estate.

Space limitations prevent a discussion of all of the issues on which S&W wishes to depose the SEC. But generally, S&W is entitled to question the SEC about the SEC's many factual assertions that it uses as the basis for its position that S&W is not entitled to compensation for the work it performed. *See, e.g.*, DN 330 pp. 1-4; DN 344 pp. 8-11.

Given these inflammatory factual allegations, it is disingenuous of the SEC to maintain that it is objecting to the Fee Application *only* based on legal issues. But if the SEC and the Receiver stipulate that: (1) S&W is a secured creditor of the Estate, (2) S&W never had a conflict of interest, (3) S&W acted in at all times in the best interest of the Estate, and (4) S&W's work benefitted the Estate, S&W will agree to forgo discovery. Otherwise, the SEC (and the Receiver) are relying on contested factual allegations to object to S&W's Fee Application, and S&W has the right to explore the basis for these allegations in discovery.

Respectfully submitted,

/s/ *Kevin P. McGrath*
Kevin P. McGrath
Counsel for the SEC

/s/ Norman Klein
Norman Klein
Counsel for S&W

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 (DLI)(VMS)

NOTICE OF DEPOSITION

PLEASE TAKE NOTICE that Schafer and Weiner, PLLC ("S&W"), will take the deposition of the United States Securities and Exchange Commission (the "SEC") by oral examination, pursuant to Fed. R. Civ. P. 30(b)(6), at the following date, time, and place:

Wednesday, August 15, 2018
9:00 a.m.
Carlet, Garrison, Klein & Zaretsky, LLP
623 Fifth Ave., 24th Floor
New York, NY 10022

The testimony shall be recorded by stenographic means. Pursuant to Fed. R. Civ. P. 30(b)(6), the SEC must "designate one or more officers, directors, or managing

agents, or designate other persons to testify on its behalf." The examination will focus on the following matters:

- The SEC's knowledge regarding the Participation Agreement (the "Participation Agreement") dated December 28, 2016, and executed by Bart M. Schwartz in his capacity as Receiver over Platinum Partners Credit Opportunities Master Fund, LP and its wholly owned subsidiary Platinum Long Term Growth VIII, LLC (the "Initial Receiver"), the time(s) at which the SEC obtained its knowledge, and the means by which the SEC obtained it.

- The extent of the SEC's knowledge regarding the distribution and intended use of funds under the Participation Agreement.

- The basis for the SEC's allegation that S&W had a conflict related to the Participation Agreement and/or any other conflict the SEC may allege that S&W had.

- The basis for the SEC's allegation that S&W inappropriately applied funds received from the Initial Receiver pursuant to the Participation Agreement.

- Whether the Initial Receiver's use of his business judgment to enter into the Participation Agreement was appropriate under the circumstances.

- Whether the Initial Receiver performed satisfactory due diligence prior to entering into the Participation Agreement.

- The basis for the factual allegations the SEC has made in the pleadings in this case filed at docket entries #330 and #344.

- The basis for the factual allegations the SEC has made related to the Arabella Loan in the pleadings in this case filed at docket entries #142 and #179.

- The objections the SEC expressed to the Initial Receiver related to the proposed engagement of S&W.

- The SEC's knowledge regarding the Mediation Settlement Agreement (the "Settlement Agreement") dated March 28, 2017, and executed the Initial Receiver, the time(s) at which the SEC obtained its knowledge, and the means by which the SEC obtained it.

Respectfully submitted,

CARLET, GARRISON, KLEIN & ZARETSKY, L.L.P

/s/ Norman I. Klein

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Dated: June 29, 2018