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.

Civil Case No. 16-6848 (DLI)(VMS)

ECF CASE

OPPOSITION OF RICHARD SCHMIDT, TRUSTEE OF THE BLACK ELK LITIGATION TRUST, TO THE SEC AND RECEIVER'S EMERGENCY MOTION FOR (I) AN ORDER MODIFYING THE PLATINUM TRO AND RECEIVER ORDER, (II) ORDER TO SHOW CAUSE, AND (III) TEMPORARY RESTRAINING ORDER

Date of Service: January 19, 2017

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Richard Schmidt ("Trustee"), the Trustee of the Black Elk Litigation Trust ("Trust"), files this Opposition to the Securities and Exchange Commission ("SEC") and Receiver's Emergency Motion for (I) an Order Modifying the Platinum TRO and Receiver Order, (II) Order to Show Cause, and (III) Temporary Restraining Order (the "Emergency Motion"). The Court should deny the Emergency Motion for at least the following reasons:

- Through their Emergency Motion, the SEC and the Receiver seek in effect to vacate a valid order of a bankruptcy court in another district entered months before the SEC's invocation of this Court's jurisdiction to place Platinum Partners Credit Opportunities Master Fund, L.P. ("PPCO") and affiliated entities (along with PPCO, such affiliated entities are referenced herein collectively as "Platinum") into receivership. They present no viable basis for such extraordinary relief.

- The bankruptcy court's TRO precludes PPCO and its affiliates' transfer of $100 million stolen from Black Elk. These funds constitute property of the Black Elk bankruptcy estate—not property of the entities that stole the money, which are now in receivership. This Court lacks jurisdiction to override the bankruptcy court's TRO, which concerns property of the bankruptcy estate.

- The SEC and the Receiver seek to enjoin the Trustee's pursuit of a claim for $100 million in funds that Platinum fraudulently transferred out of Black Elk Offshore Energy, LLC ("Black Elk")—a claim that forms one of the primary bases for the SEC's complaint in this action and that constituted a primary factual basis for its request for appointment of a receiver in the first instance. Having relied on the truth of the Trustee's claim as the primary factual predicate for seeking appointment of the Receiver, the SEC cannot now seek to block the Trustee's right to a timely adjudication of that claim.

- Contrary to the SEC and the Receiver's contention, the Trustee has not refused to approve expenses the Receiver seeks to pay. Instead, the Trustee requested the Receiver's compliance with an obligation imposed upon the Trustee, PPCO and Platinum Partners Liquid Opportunities Master Fund, L.P. ("PPLO") by the bankruptcy court's orders to negotiate in good faith regarding alternative security for the Trustee's claims—an obligation included in those orders at the insistence of PPCO and PPLO at a time when the Receiver served as their appointed oversight advisor. Moreover, prior to filing the Emergency Motion, the Receiver never requested that the Trustee consent to payment of any particular expense, and since the filing, the Trustee has consented to *every expenditure the Receiver has proposed*.

- The SEC and Receiver seek to prevent enforcement of the bankruptcy court's orders as to PPLO even though PPLO is not named as a "Receivership Entity" in

the Court's Order Appointing Receiver. Since PPLO is not even in receivership, no conceivable basis exists for enjoining the Trustee's claims against it.

FACTUAL AND PROCEDURAL BACKGROUND

1. Platinum's fraudulent looting of Black Elk[1]

In 2009, a group of hedge funds under the general umbrella of Platinum Partners, LP ("Platinum")—primarily controlled and directed by Defendants Mark Nordlicht, Daniel Small, and David Levy— began investing in Black Elk, a Houston-based oil and gas company. That investment initially appeared very successful.

On November 16, 2012, an explosion and fire occurred on an offshore Black Elk platform, and three workers died. Both because of that explosion and deteriorating investment and market conditions, Black Elk's business began to suffer and decline. By early 2014, Black Elk was effectively insolvent, and a year later would be forced into involuntary Chapter 11 bankruptcy proceedings.

Also by early 2014, Platinum dominated and controlled Black Elk—being its majority and by far largest investor—and faced the prospect of losing more than $100 million in the impending demise of Black Elk, which it had invested in Series E Preferred Equity in the company. To ameliorate that loss, Platinum devised several schemes to divert money to Platinum ahead of Black Elk's secured creditors and trade creditors. Chief among these was a scheme to transfer nearly $100 million, the bulk of the proceeds realized from the sale of Black Elk's prime oil and gas assets to Renaissance Offshore Operations, LLC, to Platinum and its affiliates. Platinum accomplished this objective by rigging a fraudulent vote of the holders of Black Elk's Senior Secured Notes, which had preference rights over Platinum's Series E

[1] The factual background regarding Platinum's looting of Black Elk is set forth in substantial detail in the Trustee's Complaint in the Adversary Proceeding, as hereinafter defined. Doc. No. 1-77. Those factual allegations are substantially repeated and adopted by the SEC in its Complaint in this action, as well as its Emergency Application for Appointment of Receiver. Doc. Nos. 1, 1-2.

Preferred Equity, to permit redemption of the Series E Preferred Equity ahead of the Senior Secured Notes. Platinum's fraudulent schemes ultimately led to Black Elk's collapse and bankruptcy.

2. Black Elk bankruptcy proceedings

On August 11, 2015, three petitioning creditors filed an involuntary bankruptcy petition against Black Elk under Chapter 7 of Title 11 of the United States Code in the United States Bankruptcy Court for the Southern District of Texas, Houston Division. On August 31, 2015, Black Elk filed its Consent to the Order for Relief and filed its Motion to Convert the Involuntary Chapter 7 Case to a Voluntary Chapter 11 Case. On September 1, 2015, the Court entered the Order for Relief and entered an order granting Black Elk's Motion to Convert. Black Elk initially operated its business as a debtor-in-possession pursuant to Sections 1107 and 1008 of the Bankruptcy Code.

On June 20, 2016, Black Elk filed its Third Amended Plan of Liquidation under Chapter 11 of the Bankruptcy Code. On July 14, 2016, the Court entered an Order confirming the Third Amended Plan under Chapter 11 of the Bankruptcy Code. Pursuant to the Third Amended Plan, Richard Schmidt was appointed and approved to serve as the Litigation Trustee (the "Trustee").

On October 26, 2016 the Trustee filed an Original Complaint and Application for Emergency Relief against Platinum Partners Arbitrage Fund, LP, Platinum Partners Credit Opportunities Master Fund, LP ("PPCO"), Platinum Partners Liquid Opportunities Master Fund LP ("PPLO"), and PPVA Black Elk (Equity) LLC in an adversary proceeding assigned Cause No. 16-3737 (the "Adversary Proceeding"). Doc. No. 1-77; Smyser Decl. ¶ 2.

On October 26, 2016, United States Bankruptcy Judge Marvin Isgur entered a Temporary Restraining Order in the Adversary Proceeding, finding that the TRO was needed because the

evidence submitted "demonstrate[d] that the distribution of the funds from the Renaissance transaction were illegally siphoned off to allow various Platinum entities to be paid preferentially." Doc. No. 1-78, at 2; Smyser Decl. ¶ 3. The bankruptcy court found that the Platinum entities had engaged in a "scheme to illegally control the vote by the bondholders, resulting in an artificial and impermissible vote to authorize the transaction [transferring funds illegally obtained to the Platinum entities]." Doc. No. 1-78, at 2; Smyser Decl. ¶ 3.

The bankruptcy court's Order further barred PPCO from transferring funds from their accounts "if, after giving effect to such transfer, the total unencumbered funds held by [PPCO] is less than $24,600,584.31" and barred PPLO from transferring funds if it left the total unencumbered funds after transfer at less than $5,000,000. Doc. No. 1-78, at 2; Smyser Decl. ¶ 4. The court set a hearing on a preliminary injunction for November 2, 2016. Doc. No. 1-78, at 4; Smyser Decl. ¶ 5.

PPCO and PPLO disclosed that neither had in their accounts the amount of money the bankruptcy court's TRO required them to maintain. Instead, PPCO and PPLO disclosed that their access to capital depended entirely on "liquidity events" wherein the companies sold investments or otherwise obtained returns on investments. *Id*. ¶ 6.

In order to satisfy the bankruptcy court's TRO, PPCO and PPLO both requested forbearance from the Trustee while PPCO and PPLO worked to obtain security in an amount equal to the amount the bankruptcy court required the entities to keep in their accounts, which security would be placed in escrow until a hearing on the preliminary injunction was held or until a final judgment was rendered. *Id*. ¶ 7.

Thus, in the week following that initial TRO, the Trustee began the process of reviewing and approving expenses for PPCO and PPLO with the goal of obtaining the promised security. *Id*. ¶ 8.

The TRO provided that should PPCO or PPLO (or any defendant) request it, the bankruptcy court "will consider motions to amend or vacate this order on an emergency basis." Doc. No. 1-78, at 4; Smyser Decl. ¶ 9. Although on occasion counsel for PPCO or PPLO has threatened to apply to the bankruptcy court for relief from a decision by the Trustee, neither company ever made an application to the bankruptcy court, and in every instance, the Trustee and the Platinum entities have resolved any issues regarding expense approval. *Id*. ¶ 10.

In the week following the TRO, the Trustee's counsel spoke with Mr. Bart Schwartz, now the Receiver but then a paid "oversight advisor" of PPCO and PPLO. *Id*. ¶ 11. When the Trustee's counsel reviewed the expense requests made by PPCO and PPLO with Mr. Schwartz, he admitted he was unfamiliar with the requests and that instead his oversight involved approving gross amounts as requested rather than a detailed analysis of what, if any, factual basis justified individual expenses. *Id*. ¶ 11. After that call, Mr. Schwartz never spoke again with the Trustee or his counsel, and never, insofar as the Trustee was aware, had any complaint with any of the Trustee's decisions on expenses. *Id*. ¶ 11.

Beginning on October 31, 2016, the Trustee, at PPCO and PPLO's request, entered into a series of Agreed Orders postponing the hearing on the Trustee's Application for a Preliminary Injunction. *Id*. ¶ 12. The reason for the Agreed Orders was so that the Parties, again at PPCO and PPLO's request, could negotiate acceptable security to obviate the need for a preliminary injunction hearing. *Id*. ¶ 12.

At PPCO and PPLO's insistence, the Trustee agreed to the inclusion of the following language in the Agreed Orders:

> During the period before the hearing on the preliminary injunction, the parties named in this order agree to make a good faith effort to reach an agreement regarding the provision by Defendants [PPCO] and [PPLO] of security acceptable to the Trustee in order to obviate the need for the Temporary Restraining Order and a preliminary injunction as to these Defendants.

E.g., Doc. No. 1-79, at 2; Smyser Decl. ¶ 13. The bankruptcy court entered four of these Agreed Orders, the latest of which the court signed on December 14, 2016 and which continued the hearing on the Trustee's preliminary injunction application to January 26, 2017. *Id*. ¶ 14.

3. The Trustee's cooperation with the SEC and the DOJ

Since the filing of the Original Complaint and entry of the TRO in the Adversary Proceeding, the Trustee has conferred on a non-infrequent basis with agencies of the United States Government, including the Securities and Exchange Commission ("SEC") and the Department of Justice ("DOJ"). *Id*. ¶ 15. Lawyers with each of these agencies asked and obtained information regarding the factual basis for the Trustee's allegations against the Platinum-related entities. *Id*. ¶ 16.

On November 3, 2016, the Trustee spoke with Jess Velona, Senior Attorney with the SEC Division of Enforcement, regarding the Trustee's Complaint. *Id*. ¶ 17. At his request, on November 18, 2016 the Trustee provided Mr. Velona with a copy of various documents. *Id*. ¶ 17. Then, on November 22, 2016 the Trustee provided Mr. Velona with additional documents, including transcripts of depositions taken in Black Elk's bankruptcy proceedings. *Id*. ¶ 17. The conversations with Mr. Velona, and subsequently with Mr. Kenneth Byrne, Senior Counsel with the SEC, were always cordial and in the spirit of free exchange. *Id*. ¶ 17.

On December 9, 2016, Mr. Byrne requested that the Trustee's counsel call him. *Id*. ¶ 18. The ensuing conversation concerned a request from the SEC that the Trustee waive the attorney-

client privilege with respect to certain documents. *Id*. ¶ 18. On December 19, 2016, the Trustee confirmed by email to Messrs. Byrne and Velona that the Trustee waived the privilege as requested by the SEC. *Id*. ¶ 19. The Trustee had agreed to a similar waiver at the request of the DOJ. *Id*. The Trustee has never refused a request from the SEC. *Id*. ¶ 20.

4. Conversation with Messrs. Schwartz and Burstein

On December 21, 2016, counsel for PPCO and PPLO, Mr. Chris Lindstrom, advised the Trustee's counsel that Mr. Schwartz, now the Receiver, and his associate Mr. Dan Burstein "would like to set up an introductory call with you to discuss their role moving forward. Please let me know your availability." *Id*. ¶ 21.

On December 23, the Trustee's counsel indicated he would be available on Tuesday, December 26, for the requested call to discuss the Receiver's role going forward. *Id*. ¶ 22. A call was then scheduled for December 26, 2016. *Id*.

On December 26, without explanation, PPCO and PPLO's counsel cancelled the call and asked to reschedule because "an urgent matter come [sic] up." *Id*. ¶ 23. When the Trustee's counsel asked if one of Mr. Lindstrom's co-counsel could substitute for him, no response was forthcoming. *Id*. The next day, the Trustee's counsel sent an email to Mr. Lindstrom asking him "to let me know what time/date the call will be rescheduled for." *Id*. When again no response came, the Trustee's counsel repeated the request on December 28, 2016. *Id*.

On December 29, a Thursday, after the Trustee's counsel sent an email (quoted in Paragraph 19 of Mr. Schwartz's declaration, Doc. No. 22), that the Trustee did not feel comfortable acting on PPCO/PPLO expense requests without first conferring with the Receiver—who had requested this conference—about the Receiver's role going forward, Mr. Lindstrom responded with an inquiry as to whether Wednesday of the following week, January 4, 2017, would suffice. *Id*. ¶ 24.

Thus, neither the Receiver nor PPCO/PPLO's counsel could schedule a call regarding expense requests it now characterizes as "time-sensitive" for two weeks. *Id.* ¶ 25.

On that January 4 call, attended by counsel for the Receiver, Mr. Schwartz, Mr. Burstein, counsel for PPCO/PPLO, and counsel for the Trustee, Mr. Schwartz indicated that the call was "the Trustee's call," even though PPCO and PPLO's counsel had indicated that the Receiver had initiated the request for a discussion of his role going forward. *Id.* ¶ 26.

Regardless, the Trustee's counsel proceeded to provide a summary of the Trustee's dealings with PPCO/PPLO since the TRO of October 26 in the Adversary Proceeding, which included observations regarding PPCO/PPLO's failure to take any steps to set aside any funds to comply with the bankruptcy court's freezing order and that the Trustee had made a proposal to PPCO/PPLO several weeks earlier on an orderly plan to find substitute security—a plan that resulted from a lengthy meeting with principals from PPCO in Houston. *Id.* ¶ 27.

Mr. Schwartz, while saying that he was "drinking from a fire hose" since his appointment, acknowledged that he was aware of the settlement proposal but that he had not yet read it. *Id.* ¶ 28. Mr. Schwartz indicated that after he read about the proposal and had an opportunity to obtain advice about it from his counsel, he would get back to the Trustee "in a couple of days." *Id.*

At no time during the conversation did Mr. Schwartz—or indeed anyone else on the call—indicate that critical expenses needed action by the Trustee. *Id.* ¶ 29. Mr. Schwartz made no request for payment of any specific expense request. *Id.* Nor did Mr. Schwartz indicate he or Mr. Burstein had any problem with the Trustee's review and decisions on expense requests to that time. *Id.*

Mr. Schwartz made no request to speak with the Trustee, a former bankruptcy judge in the Southern District of Texas, to discuss the path forward. *Id.* ¶ 30. Mr. Schwartz made no statement that the Trustee or any of his representatives were "interfering with" his authority or "preventing" him from performing his duties as Receiver. *Id.* Neither Mr. Schwartz nor anyone else on the call indicated that, absent the Trustee's action in some regard, the SEC, with the Receiver's support and blessing, would seek emergency relief. *Id.*

Contrary to the statement in Paragraph 14 of Mr. Schwartz's Declaration, the Trustee has *never* maintained that Mr. Schwartz "must seek his permission in order to make expenditures using PPCO or PPLO funds that are necessary to preserve the value of the Receivership Entities." Doc. No. 22, at 7; Smyser Decl. ¶ 31. Nor is there any exhibit or writing supporting that assertion. *Id.*

Contrary to the somewhat ambiguous statement in Paragraph 15 of Mr. Schwartz's Declaration, neither the Trustee nor his counsel has ever said or maintained that "the Bankruptcy Litigation Trustee will no longer approve *any* expenditures (other than expenditures needed to preserve life insurance assets that the Bankruptcy Litigation Trustee wants as part of a security package) unless I agree to provide security for Black Elk's claims." Doc. No. 22, at 8; Smyser Decl. ¶ 32. That understanding—or statement of the Trustee's intent with regard to future requests for expenditure, should they be submitted to the Trustee—is incorrect. *Id.*

Instead, the Trustee's counsel said to the Receiver that, before approving any further expenses, the Trustee wanted a response from PPCO/PPLO—now overseen by the Receiver—to the Trustee's request for security, a response Mr. Schwartz acknowledged he owed the Trustee. *Id.* ¶ 33. The Trustee's counsel explained that the reason for requesting the response, as stated in the Trustee's counsel's email quoted in Mr. Schwartz's Declaration at paragraph 19, was that in

the three and a half months since the TRO, PPCO/PPLO had "not set aside *one penny*" in escrow to satisfy the TRO. Doc. No. 22, at 10; Smyser Decl. ¶ 34.

This statement was and is consistent with the email quoted in Mr. Schwartz's Declaration at Paragraph 20, which stated, "At this point, the Trustee does not feel comfortable acting on and will not act on this or other requests without first conferring with the Receiver(s) regarding the path and their role going forward." Doc. No. 22, at 10; Smyser Decl. ¶ 35.

The Trustee thus anticipated that the January 4, 2016 call would illuminate the Receiver's and the Trustee's "path and their role going forward" in connection with dealing with PPCO/PPLO's request for expenses. *Id*. ¶ 36. Mr. Schwartz offered no insight and no request of the Trustee in that call, including any request that the Receiver be excused from seeking expense approval from the Trustee or otherwise complying with the bankruptcy court's TRO. *Id*.

5. PPCO/PPLO expense requests

At no point in the call discussed above or at any other point before filing his Emergency Motion, did the Receiver discuss or raise issues about any of the expense requests set out in Paragraph 24 of his Declaration, many of which had never been submitted to the Trustee. *Id*. ¶ 37.

As an example, however, one expense the Receiver desired to approve and as to which the Trustee voiced significant concerns is the "Patent Litigation Funding" request for $600,000, to pay a law firm handling a non-operating entity's (also known in the popular literature as a "patent troll") suit on a number of patents. *Id*. ¶ 38. The Receiver maintains "it is imperative to make this payment to preserve the value of [PPCO/PPLO's] interest in the patent litigation." Doc. No. 22, at 12-13; Smyser Decl. ¶ 38.

Data reviewed by the Trustee indicates that this litigation is years—many years—away from completion. *Id*. ¶ 39. At least some of the patents at issue are involved in *inter partes*

review at the U.S. Patent and Trademark Office, reviews that typically take years in themselves and may result in the patents being invalidated. *Id.*

Regardless, PPCO has not paid the law firm handling the claim any significant money in many months, and there is no indication the firm is intending to withdraw. *Id.* ¶ 40. It appears last year the court dismissed the patent case for lack of standing and currently has before it another motion to dismiss on constitutional grounds. *Id.* The case will cost millions of dollars in expenses going forward, assuming it survives the latest bid for dismissal. *Id.*

The Trustee believes that a hard look should be taken at this patent case, especially in view of the Receiver's acknowledged duty to wind down PPCO. *Id.* ¶ 41. It seems at least incompatible with the Receiver's instruction to wind down PPCO to spend millions of dollars on a long-term contingent patent case recovery. *Id.*

Nonetheless, since the SEC and Receiver filed their Emergency Motion, the Receiver has requested the Trustee's consent to all of the expenditures identified in the Receiver's declaration. *Id.* ¶ 42. The Trustee has provided that approval, even for expenses as to which the Trustee previously expressed concern. *Id.*

6. The SEC now seeks to block the claim forming the basis for appointment of the Receiver

The SEC's Complaint is based in significant measure on the allegations regarding the Black Elk fraudulent transfer scheme as laid out in the Trustee's Original Complaint in the Adversary Proceeding.[2] The SEC supported its application for appointment of the Receiver with documentary evidence voluntarily supplied by the Trustee, as well as transcripts of depositions

[2] The DOJ's indictments of Platinum's principals also substantially incorporate the substance of the Trustee's Complaint. Moreover, PPCO and PPLO—acting at the direction of the Receiver—have agreed that, at least for purposes of the preliminary injunction hearing in the Adversary Proceeding, the Trustee need not establish that there is a substantial likelihood that the Trustee will succeed on the merits of his claims, relieving the Trustee of the burden of establishing one of the elements entitling him to the preliminary injunction he seeks. Smyser Decl. ¶43

the Trustee took in the Adversary Proceeding. *See, e.g.*, Doc. No. 1-58, 1-59, Doc. No. 1-80, Doc. No. 1-81. To the extent the SEC stands by its allegations, the Trustee's goal is the same as the SEC's and the Receiver's: to remedy the wrong perpetrated by Platinum—a wrong that rests on money the SEC acknowledges was stolen from Black Elk. Thus the SEC and the Receiver's request to defang the bankruptcy court's TRO and block the Adversary Proceeding is in concert with PPCO/PPLO's strategy to delay the day of reckoning in any way possible. For the reasons set forth below, the SEC and the Receiver's Emergency Motion should be denied.

ARGUMENT

1. The SEC and Receiver present no viable basis for overriding the bankruptcy court's pre-existing TRO.

The SEC and Receiver ask this Court to enjoin the Trustee from "enforcing the Bankruptcy TRO in the [Adversary Proceeding] against the Receiver." Doc. No. 21-1, at 3. Of course, as the SEC and Receiver well know, the Trustee has no authority to "enforce" the bankruptcy court's orders—against the Receiver or anyone else. Only the bankruptcy court has that authority. Thus, what the SEC and Receiver really ask this Court to do is enjoin another federal court from enforcing its own pre-existing, validly-entered order. No basis exists for the Court to undertake this extraordinary measure. This is particularly true where the Receiver has never availed himself of the bankruptcy court's express invitation to seek—on an emergency basis if need be—a dissolution or modification of the TRO. Doc. No. 1-78, at 4.

1.1 The bankruptcy court's TRO concerns property of the Black Elk bankruptcy estate—not property of the Platinum entities now in receivership.

The SEC and Trustee predicate their argument that this Court has authority to preclude enforcement of a validly entered order of another federal court on the general proposition that this Court possesses exclusive jurisdiction to administer "receivership property." Doc. No. 24, at

5. The problem with this argument is that the funds the bankruptcy court's TRO freezes are not funds of the entities now in receivership. Rather, this money constitutes property of the Black Elk bankruptcy estate that the Platinum entities now in receivership stole. The face of the SEC's complaint and application for appointment of a receiver acknowledge as much. Specifically, the SEC alleges, among other things, the following:

- "In part to cope with the fund's deepening liquidity crisis, Nordlicht, two of his colleagues, Levy and Small, and Black Elk CFO Shulse, schemed to divert almost $100 million – proceeds of a forthcoming asset sale – out of Black Elk to benefit [Platinum] and its affiliates." Doc. No. 1, ¶ 5.

- "All told, from August 18 to 21, 2014, Black Elk wired approximately $98 million in Renaissance sale proceeds for the benefit of PPVA and its affiliated funds, including PPCO and PPLO." Doc. No. 1, ¶ 101.

- "Nordlicht used both PPCO and PPLO to further the Black Elk fraud by having them vote their notes in favor of the proposed amendment to the note indenture and both funds benefitted from the fraud by receiving proceeds from the Renaissance sale (PPLO: $5 million; PPCO: approximately $24.6 million) based on their ownership of preferred shares." Doc. No. 1-2, at 31.

As the SEC thus acknowledges, the funds frozen by the bankruptcy court's TRO do not constitute property of the entities in receivership, but rather property of Black Elk's bankruptcy estate. *Begier v. I.R.S.*, 496 U.S. 53, 58 (1990) ("The Bankruptcy Code does not define 'property of the debtor.' Because the purpose of the avoidance provision is to preserve the property includable within the bankruptcy estate-the property available for distribution to creditors-"property of the debtor' subject to the preferential transfer provision is best understood as that property that would have been part of the estate had it not been transferred before the commencement of bankruptcy proceedings."); *In re Enron Corp.*, No. 01-16034 AJG, 2006 WL 2400096, at *4 (Bankr. S.D.N.Y. June 1, 2006) ("[T]he primary consideration in determining if funds are property of the debtor's estate is whether the payment of those funds diminished the resources from which the debtor's creditors could have sought payment." (quoting *In re*

Southmark Corp., 49 F.3d 1111, 1116–17 (5th Cir.1995)); *N.L.R.B. v. Martin Arsham Sewing Co.*, 873 F.2d 884 (6th Cir. 1989) (holding that "property fraudulently conveyed and recoverable under [the Bankruptcy Code] remains property of the estate and, if recovered, should be subject to equitable distribution under the Code."). Simply put, the Receiver cannot have exclusive authority—or any authority, for that matter—to dispose of money stolen by the entities subject to his receivership because the money in question does not belong to the receivership entities and never did. Instead, as the SEC acknowledges, that money belongs to Black Elk.

"Section 1334(e) of the Judicial Code confers on the district court in which a bankruptcy proceeding is pending 'exclusive jurisdiction of all of the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate.'" *In re Gucci*, 309 B.R. 679, 681–82 (S.D.N.Y. 2004). Because the bankruptcy court's TRO concerns property of the Black Elk bankruptcy estate, the bankruptcy court to which the Black Elk bankruptcy case was referred possesses exclusive jurisdiction over the matter, and this Court lacks jurisdiction to grant the emergency injunctive relief the SEC and the Receiver seek.

The Trustee acknowledges the existence of Second Circuit authority indicating that property fraudulently transferred from a bankrupt party is not property of the bankruptcy estate "until it is recovered" *In re Colonial Realty Co.*, 980 F.2d 125, 131 (2d Cir. 1992). This authority is contrary to the law of the Fifth Circuit, in which the bankruptcy court presiding over the Adversary Proceeding is located. *See In re MortgageAmerica Corp.*, 714 F.2d 1266, 1275 (5th Cir. 1983) ("The transferee [of fraudulently transferred property] may have colorable title to the property, but the equitable interest-at least as far as the creditors (but not the debtor) are concerned—is considered to remain in the debtor so that creditors may attach or execute judgment upon it as though the debtor had never transferred it. We think that when such a debtor

is forced into bankruptcy, it makes the most sense to consider the debtor as continuing to have a 'legal or equitable interest[ ]' in the property fraudulently transferred within the meaning of section 541(a)(1) of the Bankruptcy Code.").

The Trustee respectfully submits that, because the bankruptcy court presiding over the Adversary Proceeding first exercised jurisdiction over PPCO, PPLO, and their property, as a matter of comity, the law of the Fifth Circuit should control the inquiry of whether the fraudulently transferred funds at issue constitute property of Black Elk's bankruptcy estate versus property of PPCO and PPLO over which this Court possesses jurisdiction. If the Court concludes otherwise, however, the Trustee submits that the circumstances of this case warrant a conclusion—even under Second Circuit precedent—that the money PPCO and PPLO stole from Black Elk constitutes property of the Black Elk bankruptcy estate. In analyzing the split in authority between the Second and Fifth Circuits, the Tenth Circuit provided the following rationale for the Second Circuit's approach:

> Section 541(a)(1) [of the Bankruptcy Code] defines the bankruptcy estate as including "all legal or equitable interests" the debtor holds "as of the commencement of the case." . . . An equitable interest is "[a]n interest held by virtue of an equitable title or claimed on equitable grounds, such as the interest held by a trust beneficiary." Black's Law Dictionary (9th ed. 2009). "Equitable title" is defined as "a beneficial interest in property [which] gives the holder the right to acquire formal legal title." *Id.* Reading "equitable title" to include any property a trustee merely alleges to have been fraudulently transferred would violate the concept of equity. *See* Michael R. Cedillos, Note, Categorizing Categories: Property of the Estate and Fraudulent Transfers in Bankruptcy, 106 Mich. L. Rev. 1405, 1416–17 (2008). "[O]ne of the fundamental principles [of] equity jurisprudence is ... that before a complainant can have [ ] standing in court he must first show that ... [he has] a good and meritorious cause of action...." *Keystone Driller Co. v. Gen. Excavator Co.*, 290 U.S. 240, 244, 54 S.Ct. 146, 78 L.Ed. 293 (1933). It follows that a mere allegation, without any showing of merit, cannot create "equitable title."

Rajala v. Gardner, 709 F.3d 1031, 1038 (10th Cir. 2013). Here, the Trustee has offered far more than a naked allegation of the Black Elk estate's interest in the funds PPCO and PPLO stole from

it. Instead, the Trustee supported its application for a TRO in the bankruptcy court with overwhelming evidence, leading the bankruptcy court to conclude that the proceeds "were illegally siphoned off to allow various Platinum entities to be paid preferentially." Doc. No. 1-78, at 2. Since the bankruptcy court entered its TRO, the Platinum principals who were the primary architects of Platinum's fraudulent scheme have been indicted for the conduct forming the basis of the Trustee's fraudulent transfer claim and invoked their Fifth Amendment privileges against self-incrimination in response to all deposition questions about that conduct. Doc. Nos. 1-80, 1-81. Moreover, the SEC has sought a receivership in this Court *on the basis of the facts underlying the Trustee's claim*. Perhaps most tellingly, the Receiver has agreed through counsel for PPCO and PPLO that the Trustee does not need to establish that there is "a substantial likelihood that the Trustee will prevail on the merits" of the Trustee's fraudulent transfer claim, thus eliminating the need for the Trustee to establish that element as part of the Trustee's request for a preliminary injunction in the Adversary Proceeding. Smyser Decl. ¶ 43. Even in the context of a contested preliminary injunction hearing, how can the Receiver and the entities in receivership admit that the Trustee does not need to establish the likelihood that he will succeed on the merits of his fraudulent transfer claim and still maintain that the fraudulently transferred money does not belong to the bankruptcy estate?

In sum, the Trustee has established—and the SEC has admitted through its own pleadings—that the Trustee's claim is meritorious and that PPCO and PPLO stole more than $29 million of funds belonging to Black Elk. In light of these circumstances, there is no basis to conclude that these funds are anything other than property of the Black Elk bankruptcy estate, over which the bankruptcy court in the Adversary Proceeding possesses exclusive jurisdiction.

1.2 The SEC's enforcement authority does not divest the bankruptcy court of jurisdiction over property of the Black Elk bankruptcy estate.

The authority the SEC cites in support of its contention that its request for an appointment of the Receiver in this Court divests the bankruptcy court of its exclusive jurisdiction over property of the Black Elk bankruptcy estate is inapposite. First, *S.E.C. v. Miller*, 808 F.3d 623 (2d Cir. 2015), concerned whether an asset freeze order in an SEC enforcement action initiated against debtors four years before the debtors sought bankruptcy protection was subject to the automatic stay provision of § 362(b)(4) of the Bankruptcy Code. *Id.* at 627-28. In upholding the freeze order, the Court observed that the "order is narrowly framed to exclude assets in the bankruptcy proceeding and to be lifted as soon as the assets are clearly under the control of the Bankruptcy Court." *Id.* at 634. *Miller* offers no support for the SEC's contention that its institution of receivership proceedings in this Court divests the bankruptcy court of jurisdiction over assets of the Black Elk bankruptcy estate—assets over which the bankruptcy court has directly exercised control via its own TRO concerning those assets.

Moreover, unlike the debtor in *Miller*, the Trustee did not "seek refuge in bankruptcy proceedings" as a means to frustrate SEC enforcement action against Black Elk. To the contrary, Black Elk's bankruptcy proceeding long predated the SEC's suit here, and Black Elk initiated the Adversary Proceeding to recover property of the bankruptcy estate held by PPCO and PPLO months before the SEC's enforcement action—an action directed not at Black Elk, *but at the parties that stole Black Elk's money*. Indeed, the SEC modeled its enforcement efforts on the Trustee's own in the Adversary Proceeding. Finally, unlike the debtor in *Miller*, the Trustee does not seek to stay this proceeding under § 362(b)(4); rather, he insists only that the bankruptcy court retains jurisdiction over stolen funds belonging to the Black Elk bankruptcy

estate, and that jurisdiction does not disappear merely because the thieves are placed into receivership.

The SEC's reliance on *S.E.C. v. First Financial Group of Texas*, 645 F.2d 429 (5th Cir. 1981), is likewise misplaced. There, the Court held that the initiation of involuntary bankruptcy proceedings did not preclude appointment of a "temporary receiver" for the debtor in an SEC enforcement action. Again, the Trustee does not contend that the pendency of the Adversary Proceeding precludes this Court's appointment of a receiver over entities that are defendants in the Adversary Proceeding. However, *First Financial* provides *no support* for the SEC's contention that the appointment of a receiver here divests the bankruptcy court of jurisdiction over property of the Black Elk Bankruptcy estate held by entities placed into receivership. In fact, *First Financial* dictates the opposite conclusion:

> [T]he appointment of a receiver for the debtor pursuant to a governmental unit's enforcement of its regulatory powers is within the jurisdictional power of the district court in which the civil proceeding is prosecuted. *To the extent that the exercise of this jurisdiction threatens the assets of the debtor's estate, the bankruptcy court may issue a stay of those proceedings.* 11 U.S.C. § 105(a). Additionally, 11 U.S.C. § 543 protects the bankruptcy court's exclusive jurisdiction over the property of the estate by *requiring the custodian of such property to preserve it and deliver it to the bankruptcy trustee*.

Id. (emphasis added). Far from supporting a conclusion that this Court's receivership order divests the bankruptcy court of jurisdiction over property of the bankruptcy estate held by PPCO and PPLO, *First Financial* establishes that the bankruptcy court's jurisdiction continues and that the Receiver must exercise his authority over the receivership entities consistent with it.

Finally, *S.E.C. v. Credit Bancorp*, 290 F.3d 80 (2d Cir. 2002), does not address the issue of a bankruptcy court's continuing jurisdiction over estate property in the face of an SEC-established receivership at all. Rather, it concerns only the equitable authority of a receivership court to order a pro rata distribution of comingled receivership assets to defrauded investors who

"were similarly situated with respect to their relationship to the defrauders." *Id.* at 88. *Credit Bancorp* provides no basis for concluding that the Receiver possesses jurisdiction—much less exclusive jurisdiction—to dispose of funds PPCO and PPLO stole from Black Elk and that remain property of Black Elk's bankruptcy estate. Moreover, unlike investors in PPCO and PPLO who chose to invest their money with these entities and assumed the risk inherent in any hedge fund investment, Black Elk entered into no voluntary exchange with PPCO and PPLO. Instead, they stole Black Elk's money. As such, Black Elk is not "similarly situated [with PPCO and PPLO investors] with respect to [its] relationship to the defrauders." *Id.* at 89.

Accordingly, the SEC and the Receiver advance no viable argument for overriding the bankruptcy court's pre-existing TRO concerning property of the Black Elk bankruptcy estate.

2. Even if the Court had jurisdiction to enjoin prosecution of the Adversary Proceeding, such an injunction is unwarranted.

Even assuming the Court possesses jurisdiction to enter an injunction staying the Adversary Proceeding—and the Trustee respectfully submits it does not—the Court should decline to exercise that discretion to stay the Adversary Proceeding. The case law on which the SEC and the Receiver rely indicate that the following factors govern whether to permit a stay of litigation based on the existence of a receivership:

> (1) [w]hether 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.

S.E.C. v. Wencke, 742 F.2d 1231 (9th Cir.1984). These factors militate categorically in favor of declining a stay of the Adversary Proceeding.

First, as detailed in the Trustee's Complaint, submitted as an exhibit to the SEC's application for appointment of a receiver, (Doc. No. 1-77), the $100 million fraudulent transfer

the Trustee seeks to avoid in the Adversary Proceeding forced Black Elk into bankruptcy and cheated its legitimate trade creditors, who had labored for years under false promises of payment. Those trade creditors, whom the Trustee represents, have already been substantially prejudiced through years of non-payment. A stay of litigation only compounds that prejudice. By contrast, permitting the Trustee to at least liquidate the unsecured creditors' collective claim in no sense threatens the status quo or the preservation of receivership assets. *See Geig v. Mar. Co.*, 59 F.3d 170 (6th Cir. 1995) ("[T]he Supreme Court distinguished between liquidating a claim, which does not interfere with the receivership court's authority, and distributing assets, which is the essence of the receivership court's authority . . . .").

Second, although the Receiver seeks a stay early in his appointment as receiver, he is not the typical receiver stepping into a business with which he has no familiarity. To the contrary, prior to his appointment, the Receiver had served as an "independent oversight advisor" for all of the Platinum entities now in receivership since mid-summer 2016. Doc. No. 1-16. In such capacity, he was charged with (1) "the orderly management and disposition of the assets of the [Platinum] Funds and related matters;" (2) "verifying the current assets of the Funds and any third parties' ownership interests in the assets;" (3) reviewing "all material transactions of the Funds, including any material transfers of money or assets;" (4) "establishing a process for communication to shareholders and members of the Funds;" and (5) advising Fund management on "whether a Fund should commence liquidation, . . . the proposed terms under which such Fund will liquidate, and . . . the actual disposition of assets and other requirements of the liquidation process." Doc. No. 1-16, at 1-2. To the extent the Receiver performed these tasks, he requires no further time to get "up to speed" before proceeding with litigation of the Trustee's claims against the Platinum entities that are the subject of his receivership.

Third, and most importantly, there can be no question as to the merits of the Trustee's claims against Platinum. For this factor to weigh in favor of denying a stay of litigation, the claimant "is not required to show that it is likely to prevail on the merits, only that it has 'colorable' claims that justify [denial of] the stay." *S.E.C. v. Provident Royalties, L.L.C.*, No. 3:09-CV-1238-L, 2011 WL 2678840, at *4 (N.D. Tex. July 7, 2011). Here, the Trustee has not merely pleaded colorable claims against the Platinum entities in receivership. To the contrary, the Trustee's claims form *the very factual basis on which the SEC sought the Receiver's appointment*. Having secured his appointment on the strength of the Trustee's claims, the Receiver can advance no credible argument why the Trustee should be further delayed in vindicating those claims through litigation of the Adversary Proceeding.

The SEC and Receiver's request for a TRO enjoining prosecution of the Adversary Proceeding should be denied.

3. The Receiver cannot establish imminent, irreparable injury warranting a temporary restraining order against the Trustee.

The SEC and the Receiver insist that they face imminent, irreparable injury absent a TRO prohibiting the Trustee's prosecution of the Adversary Proceeding because the Trustee is "interfering . . . with the Receiver's ability to manage the Receivership Property for the benefit of all investors and creditors of the Receivership Entities." Doc. No. 24, at 3. As an initial matter, this complaint is ironic in the extreme, as the SEC sought the Receiver's appointment on the strength of the Trustee's claims and with the benefit of evidence marshaled by the Trustee, including documentary exhibits the Trustee voluntarily provided at the SEC's request and transcripts of depositions taken by the Trustee in the litigation the SEC now seeks to enjoin. *See, e.g.*, Doc. No. 1-58, 1-59, Doc. No. 1-80, Doc. No. 1-81.

Moreover, the Receiver's contention that the Trustee has in any way "interfered" with the Receiver's management of receivership property is without factual basis. The lynchpin of this claim is the Receiver's statement in his Declaration that "[i]t is [his] understanding . . . that the . . . Trustee will no longer approve *any expenditures* [by the Platinum entities in receivership] unless [the Receiver] agree[s] to provide security for Black Elk's claim." Doc. No. 22. The Receiver has no factual basis for this purported "understanding." Before filing his Emergency Motion, the Receiver never had any discussion with the Trustee or his counsel regarding the purported advisability or necessity of *any* particular expenditure. Moreover, the Trustee has never stated, either in writing or verbally, that he refuses to approve future expenses. Instead, the Trustee's counsel stated in the sole call he has been permitted with the Receiver that the Trustee would wait to approve or reject expenses until after receiving a response from the Receiver regarding the Trustee's security proposal—a proposal the Receiver acknowledged he had not even read and to which he acknowledged that he owed the Trustee a response. Instead of responding to the proposal, the Receiver and the SEC filed an ex parte request for emergency relief from this Court. Since that filing, the Trustee has consented to *every expenditure* the Receiver has indicated he wishes to make.

Moreover, the Trustee's negotiations with PPCO and PPLO regarding the potential for security for his claim is not an effort to gain some improper priority. Rather, those negotiations are in compliance with the bankruptcy court's order—insisted upon by PPCO and PPLO at a time when the Receiver served as their independent oversight advisor—that the parties "make a good faith effort to reach an agreement regarding the provision by [PPCO and PPLO] of security acceptable to the Trustee in order to obviate the need for the Temporary Restraining Order and a preliminary injunction as to these Defendants." Doc. No. 1-79, at 2.

In any event, neither the Receiver nor the SEC provides any explanation as to what other creditor or investor could possibly have priority over the Trustee regarding his claim for recovery of the $100 million the SEC openly acknowledges Platinum stole from Black Elk. No other creditor or investor has any conceivable priority claim on Black Elk's stolen funds. The only party with any credible claim to those funds is the Trustee, who acts for the benefit of Black Elk's defrauded creditors.

4. No basis exists for enjoining prosecution of the Trustee's claims against PPLO in any event, as PPLO is not a "Receivership Entity" as defined in the Court's order appointing the Receiver.

Enjoining the Trustee's prosecution of claims against PPLO or enforcement of the TRO against PPLO is improper for the additional reason that PPLO has not been placed in receivership. Although the Court's order appointing the Receiver makes reference to presumably related entities, such as Platinum Partners Liquid Opportunity Management (NY) LLC, the Receivership Order omits PPLO—Platinum Partners Liquid Opportunities Master Fund, L.P.—from the list of "Receivership Entities" defined in the Order. Doc. No. 5, at 1-2. Because PPLO is not even under receivership, there is no conceivable basis for enjoining the Trustee's prosecution of claims against it in the Adversary Proceeding or the bankruptcy court's TRO against PPLO.

CONCLUSION

For the foregoing reasons, the Trustee respectfully requests that the Court deny the SEC and the Receiver's Emergency Motion for (I) an Order Modifying the Platinum TRO and Receiver Order, (II) Order to Show Cause, and (III) Temporary Restraining Order.

Dated: January 19, 2017

Respectfully submitted,

By: */s/ Craig Smyser*

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