Otterbourg P.C.

230 Park Avenue
New York, NY 10169
otterbourg.com
212 661 9100

Adam C. Silverstein
Member of the Firm
asilverstein@otterbourg.com
212 905 3628

August 14, 2018

VIA ECF

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

Re: *SEC v. Platinum Mgmt. (NY) LLC, et al., No. 1:16-cv-06848-BMC*

Dear Judge Cogan:

This firm represents Melanie L. Cyganowski, as Receiver (the "***Receiver***"). We write in response to the letter (the "***Letter***") filed after the close of business on Friday, August 10, 2018 by Mr. Kingsbery [Dkt. No. 369], requesting, on behalf of his clients, Zanhav Holding LLC ("***Zanhav***") and Piping Brook LLC ("***Piping Brook***"), (i) a hearing on their joint objection [Dkt. No. 364-3] (the "***Objection***") to the Abdala sale motion [Dkt. No. 357] (the "***Sale Motion***"), (ii) a pre-motion conference with respect a proposed motion to intervene in the action for purposes of the Sale Motion, and (iii) a pre-motion conference with respect to a proposed motion to take limited discovery in connection with the Sale Motion.

For the reasons set forth in the reply filed by the Receiver last Friday morning in further support of the Sale Motion (the "***Reply***") [Dkt. Nos. 367-68], the Receiver does not believe that the Objection raises any material question of fact that warrants either discovery or a hearing. We, thus, respectfully submit that the Court can and should approve the Sale Motion on the basis of the papers before it (just as it did in approving the sale of certain ALS life insurance policies over objection). [Dkt. No. 318] Nothing in the Letter, which largely resembles a sur-reply, is to the contrary.[1]

[1] In fact, the case law cited by Zanhav in support of its request for a hearing and discovery is largely unhelpful to it. *Lawsky v. Condor Capital Corp.*, 154 F. Supp. 3d 9 (S.D.N.Y. 2015), on which Zanhav places heavy reliance, did not involve a challenge to a sale by an unsuccessful bidder. Rather, in *Lawsky*, the objecting party sought to enforce certain provisions in a contract with the receiver governing the sale. Although Judge McMahon conducted a hearing in *Lawsky*, she directed that it be held promptly and she denied any discovery. *See Lawsky* Dkt. No. 247. Following the hearing, she observed that finding "good business reason to grant [a receiver's sale application] . . . is not . . . a high bar, even when the trustee is liquidating the estate," and that "[a]ll the Receiver is required to establish is that

Otterbourg P.C.

Below, we focus primarily on the fundamental issue raised, but nowhere established, in the Letter – namely, whether Zanhav and Piping Brook have standing to challenge the sale and to intervene directly in the action, thereby obtaining discovery and appellate rights that they undoubtedly will use in an effort to delay and derail the sale.

As set out in the Reply and acknowledged in the Letter, Zanhav is a spurned bidder whose "last and best" offer, prior to its post-Sale Motion effort to float a non-binding, trial-balloon, new "last and best offer," was not accepted by the Receiver. Zanhav cites not a single case, and we have found none, holding that an unsuccessful bidder in *the context of a receivership* is an aggrieved party who has standing to challenge the receiver's sale of an asset.

Indeed, in other contexts (not applicable here), courts uniformly have observed that "an unsuccessful bidder -- whose only pecuniary loss is the speculative profit it might have made had it succeeded in purchasing property at an auction -- usually lacks standing to challenge a . . . court's approval of a sale transaction." *Kabro Assocs., LLC v. Colony Hill Assocs. (In re Colony Hill Assocs.)*, 111 F.3d 269, 273 (2d Cir. 1997) (citing *Collier on Bankruptcy*, ¶ 5.06 (15th ed. rev. 1996)); *see Edelman v. Federal Housing Administration*, 382 F.2d 594, 597 (2d Cir. 1967) ("Bidding procedures are for the benefit of the public generally and confer no private rights on the bidder.") Moreover, the rare circumstances in which courts have recognized an unsuccessful bidder's standing to challenge a sale, in contexts outside of receivership, do not apply here. *See, e.g., In re Colony Hill Assocs.*, 111 F.3d at 274 ("Kabro [the unsuccessful bidder] claims that Holiday [the winning bidder], Colony [the debtor] and the creditors unlawfully sought to 'ensure that no auction would take place' by conspiring to exclude Kabro, the highest bidder at that time, from participating in the sale hearing. This type of conduct, if proven, would call into question the 'intrinsic fairness' of the sale hearing."); *In re Beck Industries, Inc.*, 605 F2d 624, 634 (2d Cir. 1979) (unsuccessful bidder, Edison, had standing because Edison claimed that the successful bidder and another bidder had entered into a collusive agreement that "chilled" bidding); *contrast with Wallach v. Kirschenbaum,* 2011 WL 2470609, at * 6 (E.D.N.Y June 16, 2011) (unsuccessful bidder lacked standing in the absence of evidence of "fraud, bad faith, collusion, deceit, mistake or unfairness"); *In Matter of REA Holding Corp.*, 447 F. Supp. 167, 169 (S.D.N.Y. 1978) ("unsuccessful bidder lacked standing to bring appeal unless he could show that there was some evidence of fraud, deceit, mistake of fact or other inequitable overreaching.").

---

there are sound business reasons for selling assets and for accepting the offer he selected." *Id.* at 22-23 (internal citations omitted). Judge McMahon also noted that "a trustee is not obligated to mechanically accept the highest offer" and that "trustees routinely consider factors aside from the total dollar amount offered." *Id.* As set forth in the Receiver's Reply, applying these well-settled standards here, the Objection should be overruled and the Sale Motion should be granted. Neither discovery nor a hearing is needed for the Court to reach this conclusion.

Otterbourg P.C.

Zanhav's intervention analysis is thus built upon a false premise: Zanhav has *no interest* in the property or transaction at issue, *i.e.*, Abdala, that would require or warrant its intervention. Zanhav may have the desire to own the Abdala tailings pond – a desire that nevertheless resulted in its strategic withholding of its truly best offer until *after* the Sale Motion – but that desire is *not* a protectable interest that gives Zanhav a sufficient stake in the property requiring or warranting its intervention.

As for Piping Brook, it is an investor with no known or claimed unique relationship either to the Receivership Entities or the Abdala asset and, thus, has no different or better basis to intervene in this action for purposes of the Sale Motion than any other Platinum investor. The Court already has directed that "THE COURT WILL NOT ENTERTAIN ANY MOTION TO INTERVENE BASED SOLELY ON THE FACT THAT THE PROPOSED INTERVENOR IS A VICTIM OR CREDITOR." [Dkt. Entry 6/30/17] The Court's recognition now of Piping Brook's standing to intervene for purposes of the Sale Motion would not only constitute a reversal of the Court's prior directions on the docket, but would open the floodgates for all investors to seek and gain the right to intervene on the same basis.

In accordance with the protocols approved by the Court [Dkt. No. 271], Zanhav and Piping Brook have had the opportunity to be heard on the Sale Motion, and the Receiver has considered and responded to their Objection. Zanhav's and Piping Brook's rights extend no further. The Receiver, therefore, does not believe that either a hearing on the Sale Motion or a pre-motion conference to discuss Zanhav's and Piping Brook's proposed motions to intervene and take discovery are necessary.

We thank the Court for its continued attention to this matter.

Respectfully submitted,

Adam C. Silverstein

cc: Paul C. Kingsbery, Esq. (*via e-mail*)
Neil A. Steiner, Esq. (*via e-mail*)
All Counsel of Record (*via ECF*)