FORD O'BRIEN LLP

October 5, 2018

Via CM/ECF
The Honorable Brian M. Cogan
United States District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Re: *Securities and Exchange Commission v. Platinum Management (NY) LLC, et al.*, Docket No: 1:16-cv-06848 (BMC)

Dear Judge Cogan:

We represent defendant Joseph SanFilippo in the above-captioned matter, as well as the parallel criminal matter *United States v. Nordlicht, et al.*, No. 16-cr-00640 (BMC). We write pursuant to Your Honor's individual practice rules to request a pre-motion conference in anticipation of SanFilippo's motion to compel the receiver for the Receivership Entities, Melanie L. Cyganwoski (Receiver or SEC Receiver), to continue advancing SanFilippo's reasonable attorney's fees and defense costs so that he may continue defending himself in the upcoming criminal trial.

SanFilippo has a contractual right to advancement of reasonable attorney's fees to defend himself in these proceedings, which was honored by "Platinum Partners LP" (the umbrella organization that included the Receivership Entities) prior to the appointment of the SEC Receiver. Platinum began advancing SanFilippo's reasonable attorney's fees incurred in defending himself in these matters in July 2016. These advancement payments were assumed by Platinum's insurance carrier in December 2016, but the policy limits are now close to being exhausted. Given the expiration of insurance proceeds, the rapidly approaching criminal trial and anticipated trial expenses, and clear contractual right to have his defense costs continued to be advanced by the Receivership Entities, SanFilippo respectfully requests that Your Honor expedites the pre-motion conference and motion briefing schedule. SanFilippo stands ready to submit his memorandum of law in support of this motion immediately.

Background

SanFilippo is only a few months away from the start of a criminal trial in which he has been charged with five counts in an Indictment alleging that he knowingly and intentionally conspired to engage in a billion-dollar securities fraud, a crime that the government believes should result in SanFilippo being imprisoned for the rest of his life. The Indictment's allegations arise from SanFilippo's performance of his duties as the Chief Financial Officer (CFO) of – among other Platinum Partner LP entities – both the Platinum Partners Credit Opportunities Fund LLC (PPCO) and Platinum Partners Value Arbitrage Fund L.P. (PPVA).

While the allegations of wrongdoing against SanFilippo are all demonstrably false, proving his innocence before a jury, as this court has recognized on numerous occasions, requires significant financial resources. SanFilippo is in immediate need of funds to pay for (1) the electronic database that is hosting the 14 million relevant documents the government has produced to him; (2) experts for various complex subjects who are needed to consult or testify at trial; and (3) ordinary legal fees and defense costs to defend what the government has said would be a two month prosecution presentation where the government has explicitly told SanFilippo in words or effect that "as CFO his conduct touched upon everything."

SanFilippo's employment agreement unequivocally provided that any costs incurred in defending himself in these proceedings could be advanced by the relevant Platinum Partners entity for which he acted as an employee or agent, including the Receivership Entities, in the sole discretion of the Managing Member. (PPCO Operating Agreement §§ 5.4.2, 5.4.3). PPCO's Managing Member exercised its discretion to advance SanFilippo defense costs in connection with the investigation by the United States Attorney's Office of the Eastern District of New York and the Securities and Exchange Commission that resulted in the criminal prosecution and began advancing defense costs in July 2016.

Notwithstanding this determination, when SanFilippo requested that the SEC Receiver continue to advance his defense costs, on the eve of his insurance coverage being exhausted, the Receiver refused to provide such advancement, asserting that the Receiver has been given sole discretion over how to handle PPCO's obligations upon the creation of the Receivership Entities, and had determined that SanFilippo had no right to "discretionary advancement." Consequently, the SEC Receiver asserted it would therefore not honor the Receivership Entities' prior agreement to advance his defense costs.

SanFilippo Has a Right to Continued Advancement

Having already agreed to advance SanFilippo's defense fees, PPCO's operating agreement prohibits the Receiver from discontinuing advancement. (PPCO Operating Agreement § 5.4.3) ("All rights to indemnification permitted in this Agreement and payment of associated expenses *shall not be affected by the termination and dissolution of the Company or the removal*, redemption, insolvency, bankruptcy, termination or dissolution *of the Managing Member*") (emphasis added); *see also Paolino Mace Sec. Inc.*, No. Civ 4462, 2009 WL 3652895, at *6 (Del Ch. Dec. 8, 2009). Thus, PPCO's Operating Agreement "expressly states its intention to mandate the advancement" by prohibiting the Receiver from withholding, revoking, or discontinuing the Managing Member's advancement determination following its removal. *See Advanced Mining Systems v. Fricke*, 623 A.2d 82, 84 (Del. Ch. 1992).

The reasons set forth by the SEC Receiver for purporting to discontinue advancement fail to adhere to this clear contractual language and Delaware statutory and case law. Rather, the Receiver rests its decision primarily on the dubious premises that SanFilippo was *not* the CFO of PPCO and that the engagement letter was signed on behalf of "Platinum Partners LP," an entity which the Receiver claims it has never heard of and does not exist. These arguments are clearly wrong – as evidenced by the Indictment in this matter charging SanFilippo with alleged crimes based on his role as an agent and CFO of PPCO, as well as the documentary evidence and universal knowledge among Platinum employees that "Platinum Partners LP" refers to all Platinum entities, including PPVA and PPCO. As a fallback position, the Receiver asserts that any decision to continue advancing fees is now within the sole discretion of the Receiver. But this position ignores the governing documents, and in any event is an insufficient basis to discontinue advancement because even if such discretion transferred to the SEC Receiver – it did not – the Receiver has failed to exercise any good-faith "discretion," in violation of the Operating Agreement's plain terms and the reasonable expectations of SanFilippo. *See Feeley v. NHAOCG, LLC*, 62 A.3d 649, 668 (Del. Ch. 2012); *see also Dunlap v. State Farm Fire and Cas. Co.*, 878 A.2d 424, 441 (Del. 2005) ("the implied covenant [of good faith and fair dealing] attaches to every contract").

For these and other reasons, SanFilippo respectfully requests Your Honor set an expedited pre-motion conference and motion schedule for his motion to compel the Receiver to continue to advance reasonable costs and fees, so as to avoid violations of SanFilippo's right to continued advancement and to avoid continued impingement on his right to defend himself using funds that he is entitled to use in defending against the baseless criminal charges that have been filed against him.

Respectfully Submitted,

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Attorneys for Joseph SanFilippo

cc: all counsel of record (via ECF)