

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK**

SECURITIES AND EXCHANGE
COMMISSION,

Plaintiff,

-against-

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.

Case No.: 1:16-cv-06848-BMC

**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT
DAVID LEVY'S MOTION TO COMPEL ADVANCEMENT OF LEGAL FEES**

**WILSON SONSINI GOODRICH & ROSATI
Professional Corporation**

Michael S. Sommer
Eli B. Richlin
1301 Avenue of the Americas, 40th Floor
New York, New York 10019
Telephone: (212) 999-5800
Facsimile: (212) 999-5899
Email: msommer@wsgr.com
Email: erichlin@wsgr.com

Counsel for Defendant David Levy

TABLE OF CONTENTS

	<u>Page</u>
PRELIMINARY STATEMENT	1
BACKGROUND	2
A. Indemnification and Advancement Rights Provided By Governing Entity Agreements	2
B. Advancement Rights Confirmed By June 16, 2016 Letter Agreement	6
C. Criminal Charges Pending Against Mr. Levy.....	7
D. Appointment of Receiver Upon Motion By SEC	8
E. The Receiver’s Refusal to Advance Legal Fees to Mr. Levy	9
ARGUMENT	9
I. MR. LEVY HAS A CONTRACTUAL RIGHT TO ADVANCEMENT OF ATTORNEYS’ FEES AND LEGAL DEFENSE COSTS	10
II. MR. LEVY’S SIXTH AMENDMENT RIGHTS REQUIRE THAT THE RECEIVER ADVANCE ATTORNEYS’ FEES AND DEFENSE COSTS IMMEDIATELY	12
CONCLUSION.....	16

TABLE OF AUTHORITIES

Page(s)

CASES

Andrikopoulos v. Silicon Valley Innovation Company, LLC,
120 A.3d 19 (Del. Ch. 2015).....15

Blankenship v. Alpha Appalachia Holdings, Inc.,
C.A. No. 10610-CB,
2015 Del. Ch. LEXIS 145 (Del. Ch. May 28, 2015)10, 11

Henson v. Sousa,
Civil Action No. 8057-VCG,
2015 Del. Ch. LEXIS 205 (Del. Ch. Aug. 4, 2015).....15

Homestore, Inc. v. Tafeen,
888 A.2d 204 (Del. 2005)11

Scharf v. Edgcomb Corp.,
C.A. No. 15224,
1997 Del. Ch. LEXIS 169 (Del. Ch. Dec. 2, 1997)11

SEC v. Illarramendi,
Civil No. 3:11cv78 (JBA),
2014 U.S. Dist. LEXIS 16459 (D. Conn. Feb. 10, 2014)15

SEC v. Thibeault,
80 F. Supp. 3d 288 (D. Mass. 2015)14

Stockman v. Heartland Indus. Partners, L.P.,
C.A. Nos. 4227-VCS, 4427-VCS,
2009 Del. Ch. LEXIS 131 (Del. Ch. July 14, 2009).....11, 12

Sun-Times Media Grp., Inc. v. Black,
954 A.2d 380 (Del. Ch. 2008).....11

United States v. Rosen,
487 F. Supp. 2d 721 (E.D. Va. 2007)14

United States v. Stein,
541 F.3d 130 (2d Cir. 2008).....13, 14

VonFeldt v. Stifel Fin. Corp.,
714 A.2d 79 (Del. 1998)11

STATUTES

Delaware General Corporation Law Section 145(e).....10

OTHER AUTHORITIES

U.S. Const., Sixth Amendment..... *passim*

Defendant David Levy respectfully submits this memorandum of law in support of his Motion to Compel Receiver Melanie L. Cyganowski (the “Receiver” or “SEC Receiver”) to Advance Payment for his reasonable attorneys’ fees and defense costs to be incurred in the matter of *United States v. Nordlicht, et al.*, No. 1:16-cr-00640-BMC (the “Criminal Matter”). Mr. Levy also joins in the related motions of his co-defendants seeking the same relief.

PRELIMINARY STATEMENT

The SEC Receiver’s refusal to advance payment for Mr. Levy’s attorneys’ fees and defense costs in the criminal matter violates his contractual and constitutional rights. As a condition of the services that Mr. Levy agreed to provide to Platinum Partners and related entities over a number of years, Mr. Levy received multiple commitments by these entities to advance payment for his attorneys’ fees and defense costs should the need ever arise.¹ These commitments are contained in specific governing entity agreements and a separate letter agreement executed on behalf of Platinum Partners as a whole, and are expressed in ***mandatory, non-discretionary language***: “the Company ***shall advance*** such expenses”; “The Partnership ***shall promptly reimburse*** (and/or ***advance*** to the extent reasonably required) each Protected Person for reasonable legal or other expenses”; Platinum Partners “***agreed to pay Mr. Levy’s fees and costs,***” and to “pay [all] monthly bills ***within 15 days of receipt.***” Moreover, Delaware law requires that mandatory advancement provisions such as these must be enforced. Indeed, as acknowledged by the Delaware Supreme Court, “even when corporate officials . . . are accused of serious misconduct,” enforcing advancement rights supports important public policy concerns by providing an inducement for capable people to serve.

¹ This includes those entities (the “Receivership Entities”) placed under receivership by the Court upon motion by the SEC. DE 5,6, 276.

Moreover, with trial set to begin in January 2019 in the criminal matter, and with the insurance policies that have paid for Mr. Levy's criminal defense up to this point practically exhausted, the SEC Receiver's refusal to provide advancement inflicts a Sixth Amendment injury. Under binding Second Circuit authority, criminal defendants are protected against interference with "the right to defend oneself using whatever assets one has *or might reasonably and lawfully obtain*"—including a corporation's obligation to advance legal defense costs. Applying this principle, courts *reject* attempts in civil SEC litigation to withhold or encumber temporarily an individual criminal defendant's right to advancement. Yet the Receiver has ignored this authority altogether and sought to defend her refusal to advance legal fees by citing inapposite cases that consider only an individual's right to advancement in civil litigation, and do not address at all Mr. Levy's right to defend himself against *criminal* charges.

In short, with trial in the criminal matter fast approaching, Mr. Levy has a contractual and constitutional right to advancement from the Receivership Entities, and the Court should direct the Receiver to honor those rights.

BACKGROUND

A. Indemnification and Advancement Rights Provided By Governing Entity Agreements

Mr. Levy provided services over a number of years to various Platinum Partners entities, including the Receivership Entities, first as a portfolio manager and subsequently as Chief Investment Officer. Mr. Levy's services to these entities were conditioned on Mr. Levy obtaining the right to indemnification from claims, and to advancement of his legal fees and defense costs. And indeed, the governing agreements of multiple Receivership Entities establish indemnification and advancement rights for Mr. Levy, including the Credit Funding LLC Operating Agreement, the Platinum Partners Credit Opportunities Master Fund LP Limited

Partnership Agreement, and the Platinum Partners Credit Opportunities Fund LLC Agreement, among others.

1. Credit Funding LLC Operating Agreement

Mr. Levy was a portfolio manager for Credit Funding LLC, and the Operating Agreement for Credit Funding dated April 1, 2012 (the “Credit Funding Agreement”) provides him with mandatory indemnification and advancement rights. Ex. 1.² Section 6.2 of the Credit Funding Agreement named Mr. Levy (as well as co-defendant Daniel Small) as a Member and Portfolio Manager of Credit Funding. *Id.* The Credit Funding Agreement then provided for **mandatory and non-discretionary** indemnification and advancement of criminal defense legal fees for Mr. Levy (and Mr. Small):

11.2 *Indemnification.* The Company **shall indemnify** each Member, the Managing Member, and each Portfolio Manager, and their respective successors and assigns, and hold each of them harmless from and against any Damages suffered or incurred by such indemnified person or any of them in the course of serving in any office or other capacity of, or otherwise representing or acting for or on behalf of the Company (in each case within the scope of his or her authority), including, without limitation, in connection with any investigation, claim, allegation, action, or proceeding, whether civil, **criminal**, administrative, arbitratve or investigative, or any appeal in connection with any of the foregoing, initiated by any person, regardless of when brought, and regardless of whether such Member, Managing Member, or Portfolio Manager is or was, at the time such investigation, claim, allegation, action, or proceeding was brought, no longer serving in such capacity with respect to the Company. . . . Upon making a claim for indemnification, the Member, the Managing Member, or the Portfolio Manager, as applicable, may request in writing that the Company **advance to such indemnified person the expenses of defending the claim**, action, suit or proceeding giving rise to such indemnification claim **and the Company shall advance such expenses**. The rights granted pursuant to this Section 11 shall be deemed **contract rights**, and no amendment, modification or repeal of this Section shall have the effect of limiting or denying any such rights with respect to action taken or Proceedings arising prior to any such amendment, modification or repeal. The terms of this Section 11.2 shall survive the termination of this Agreement.

² All exhibits are annexed to the October 19, 2018 Declaration of Eli B. Richlin in Support of Mr. Levy’s Motion To Compel Advancement of Legal Fees.

Id. (emphasis added). In addition to the mandatory indemnification and advancement commitments, Section 11.2 also contained a funding mechanism that requires the Managing Member to fund such indemnification and advancement as necessary:

[A]ny other provision hereof notwithstanding, any such indemnification shall be solely from the net assets of the Company, and the **Managing Member** (but no other Member (including, without limitation, the Portfolio Manager)) **shall make such capital contributions to the Company as are necessary to cause the Company to comply with its indemnification obligations hereunder, or otherwise pay any such amount from its own assets.**

Id. (emphasis added). The Credit Funding Agreement defined the “Managing Member” as Platinum Partners Credit Opportunities Master Fund LP (“PPCO Master Fund”) (*id.* at 1),³ and the Managing Member was party to and executed the Agreement (*id.* at 8).

Thus, the Credit Funding Agreement contains a mandatory commitment by Credit Funding and, if necessary, the PPCO Master Fund, to advance Mr. Levy’s defense costs.

2. Platinum Partners Credit Opportunities Master Fund LP

Mr. Levy served as a portfolio manager and later Chief Investment Officer for the Platinum Partners Credit Opportunities funds, and the Limited Partnership Agreement for the PPCO Master Fund, dated June 3, 2011, also provides mandatory indemnification and advancement rights. Ex. 2. That agreement provides broad rights to anyone covered as a “Protected Person” under the agreement, defined to include:

(i) the General Partner [Platinum Credit Holdings LLC], the Portfolio Manager [Platinum Credit Management LP] and their respective partners, shareholders or members; (ii) the Affiliates of the General Partner; (iii) any officer, director, partner, member, manager, employee, stockholder of the General Partner or the Portfolio Manager or their respective Affiliates; and (iv) any Person who serves at the request of the General Partner or the Portfolio Manager hereunder on behalf of the Partnership as an officer, director, partner, member, manager or employee of any other Person.

³ The PPCO Master Fund is a Receivership Entity. DE 276 at 1.

Id. at 7. Section 5.4 of the agreement then provides ***broad and mandatory indemnification and advancement*** rights to all such Protected Persons:

Indemnification of Protected Persons. To the fullest extent permitted by law, the Partnership ***shall indemnify***, hold harmless, protect and defend each Protected Person against any losses, claims, damages or liabilities, ***including without limitation reasonable legal fees or other expenses actually incurred in investigating or defending against any such losses, claims, damages or liabilities***

Id. (emphasis added). Moreover, the agreement provides that advancement must occur:

Reimbursement of Expenses. The Partnership ***shall promptly reimburse (and/or advance to the extent reasonably required)*** each Protected Person for ***reasonable legal or other expenses (as incurred)*** of each Protected Person in connection with investigating, preparing to defend or defending any claim, lawsuit or other proceeding relating to any Liabilities for which the Protected Person may be indemnified pursuant to this Section 5.4

Id. (emphasis added).

3. Additional Governing Entity Agreements

In addition, governing agreements for various other Platinum Partners entities also provide Mr. Levy with indemnification and advancement rights. The indemnification and advancement provision in the Platinum Partners Credit Opportunities Fund LLC Fourth Amended and Restated Limited Liability Company Agreement is typical, and provides the following:

5.4.2 The Company ***shall*** indemnify and hold harmless the Managing Member [Platinum Credit Holdings, LLC], the Loan Portfolio Manager [Platinum Credit Management LP], and their affiliates, members, officers, directors, employees, shareholders, agents, and other applicable representatives, as the case may be, from and against any and all losses, damages, obligations, penalties, claims, actions, suits, judgments, settlements, liabilities, costs, and expenses (including, without limitation, ***reasonable attorneys' and accountants' fees, as well as other costs and expenses incurred in connection with the defense of any actual or threatened action or proceeding***) and amounts paid in settlement of any claims suffered or sustained by any of the foregoing persons as a result of or in connection with any act performed by them under this Agreement or otherwise on behalf of the Company

Ex. 3 (emphasis added). Section 5.4.2 of the Agreement further provides that:

The Managing Member [Platinum Credit Holdings, LLC] may, in its discretion, advance to any person or entity entitled to indemnification hereunder reasonable attorney's fees and other costs and expenses incurred in connection with the defense of any action or proceeding which arise out of such conduct, provided that all such advances will be promptly repaid if it is subsequently determined that the person or entity receiving such advance was not entitled to indemnification hereunder.

Id. Similar rights are contained in the governing agreements for other Platinum Partners entities, including Platinum Partners Credit Opportunities Fund (TE) LLC and Platinum Partners Credit Opportunity Fund (BL) LLC. Exs. 4-5.

B. Advancement Rights Confirmed By June 16, 2016 Letter Agreement

In or about June 2016, amidst the government's investigation of Platinum Partners, Platinum Partners determined that it would advance payment for Mr. Levy's criminal defense costs and legal fees. By a letter agreement dated June 16, 2016 (the "June 2016 Letter Agreement"), Platinum Partners confirmed that it had "agreed to pay Mr. Levy's fees and costs associated with" his engagement of Wilson Sonsini Goodrich & Rosati ("WSGR") "with respect to investigations being conducted by the United States Attorney's Offices for the Southern and Eastern Districts of New York and matters related thereto." Ex. 6. Platinum Partners expressly agreed "to pay all fees for legal services and all costs incurred at the prevailing hourly rates of WSGR for attorneys, legal assistants, and case clerks." *Id.* Moreover, Platinum Partners agreed to "pay [all] monthly bills within 15 days of receipt." *Id.*

The June 2016 Letter Agreement was signed by Mark Nordlicht on behalf of "Platinum Partners"—a designation meant to encompass the entire Platinum Partners family of funds and related entities, and thus providing Mr. Levy with indemnification and advancement rights payable by as broad as possible a group of corporate entities. The term "Platinum Partners" was (and continues to be) used as a shorthand designation for the entire Platinum Partners family of

funds and related entities, as evidenced by the SEC’s use of the term Platinum Partners in its Complaint and the government’s use of the term Platinum Partners in the Indictment. Indeed, public-facing documents such as Private Placement Memoranda, in providing information about the “Key Personnel,” use the generic term “Platinum Partners” in the biographical information about Mr. Levy, among others. *See, e.g.*, Ex. 7 at 14-15 (“Mark Nordlicht founded *Platinum Partners* in 2003, bringing with him more than 20 years of experience in the investment industry”; and “David Levy serves as Co-Chief Investment Officer of *Platinum Partners* and is responsible for overseeing more than \$1 billion in total investments.” (emphasis added)).

C. Criminal Charges Pending Against Mr. Levy

As the Court is aware, Mr. Levy is a defendant in the parallel Criminal Matter pending before this Court, and trial is set for January 7, 2019. The charges against Mr. Levy arise, in part, out of his service to Platinum Partners, including the Receivership Entities. Indeed, the Indictment expressly alleges:

The defendant DAVID LEVY was a senior executive at Platinum. Among other things, from approximately 2011 to 2014, LEVY served as Platinum’s co-portfolio manager for Black Elk. . . . In or about 2014, LEVY became Platinum’s co-Chief Investment Officer.

Indictment ¶ 26. The Indictment is replete with references to Mr. Levy’s alleged acts in connection with Platinum Partners, and also specifically with respect to PPCO (a Receivership Entity), including but not limited to ¶¶ 77-87. Mr. Levy vigorously maintains his innocence and denies any and all alleged wrongdoing.

The government has advised that its presentation of its case-in-chief is likely to last two months. Mr. Levy expects to present a defense case. Accordingly, under any formulation, the trial of this matter will require significant resources. Moreover, the period in the coming months leading up to trial will be critical to Mr. Levy’s defense: the government is to provide all witness

statements, exhibits, and its witness list to the defense by October 24, 2018; defense motions *in limine* are due three weeks later. Mr. Levy's counsel will also be working with various consultants and expert witnesses leading up to and through trial in connection with the complex securities claims and defenses raised by the Indictment. Accordingly, Mr. Levy's counsel expects that his defense will require significant resources over at least the next 6-8 months.

Moreover, Mr. Levy will be unable to continue to fund his legal defense costs absent advancement. Up to this point, his attorneys' fees incurred in his defense of the allegations relating to his service to Platinum Partners have been paid by insurance companies pursuant to Platinum Partners' insurance policies. These insurance policies, however, have now largely been exhausted, and will be insufficient to support Mr. Levy's legal defense relating to the Platinum Partners allegations (including experts and consultants) through trial.

D. Appointment of Receiver Upon Motion By SEC

In conjunction with the SEC's initiation of this action, the SEC moved by order to show cause for an order appointing a receiver on December 19, 2016. DE 5. Judge Matsumoto (then presiding) appointed a receiver. DE 6. Since then, the receivership has been confirmed through subsequent appointment orders. *See* DE 1/30/2017 (no docket number); DE 276. The Second Amended Order Appointing Receiver, entered by Chief Judge Irizarry (then presiding), named the following entities as "Receivership Entities": Platinum Credit Management, L.P.; Platinum Partners Credit Opportunities Master Fund LP; Platinum Partners Credit Opportunities Fund (TE) LLC; Platinum Partners Credit Opportunities Fund LLC; Platinum Partners Credit Opportunity Fund (BL) LLC; Platinum Liquid Opportunity Management (NY) LLC; and Platinum Partners Liquid Opportunity Fund (USA) L.P. DE 276 at 1. The Second Amended Order Appointing Receiver provided that the Court had "exclusive jurisdiction and possession" of all assets of the Receivership Entities, named Melanie L. Cyganowski Receiver, and provided

that the Receiver would have all powers, authorities, rights and privileges previously possessed by the officers, directors, managers, and partners of the Receivership Entities. *Id.* at 2.

E. The Receiver's Refusal to Advance Legal Fees to Mr. Levy

In connection with the various obligations of Platinum Partners to advance legal fees and costs for Mr. Levy, counsel to Mr. Levy has had several conversations with both appointed Receivers – first Bart Schwartz, and then Melanie L. Cyganowski. In each of these conversations, the Receiver (or counsel to the Receiver) requested that Mr. Levy forestall his request for advancement and indemnification until the legal fees and costs of Mr. Levy relating to the Platinum Partners allegations in the Indictment could no longer be paid by the Platinum Partners' insurance policies due to exhaustion. Mr. Levy, through counsel, assented.

This Spring, as it became apparent that the Platinum Partners' insurance policies would be insufficient to cover the legal fees and costs of Mr. Levy and his co-defendants through trial, counsel re-engaged with the Receiver on the issue of advancement and indemnification. On April 13, 2018, the Receiver responded in writing and refused to advance legal fees and expenses on behalf of any of the Defendants. Ex. 8.

In an effort to avoid litigation over advancement, counsel for Mr. Levy wrote again to the Receiver on September 18, 2018, and renewed his request for advancement of Mr. Levy's legal fees. Ex. 9. Notwithstanding these concerns and the contractual advancement rights described *supra*, the Receiver again rejected Mr. Levy's request. Ex. 10. Counsel can wait no longer to vindicate Mr. Levy's advancement and indemnification rights.

ARGUMENT

The Court should direct the Receiver to advance Mr. Levy his attorneys' fees and defense costs in connection with the criminal matter. Mr. Levy has a clear contractual right to those funds based upon the operating and organizational agreements of multiple Platinum Partners

entities. Moreover, Platinum Partners, including the Receivership Entities, expressly agreed to such advancement again in June 2016. Under governing Delaware law, enforcement of these contractual rights is mandated by applicable corporate statutes and required as a matter of public policy.

Moreover, the fact that the SEC moved to implement a receivership over various Platinum Partners entities, and the Court then appointed a Receiver, does not excuse the Receivership Entities from making prompt advancement. To the contrary, Mr. Levy's contractual right to the advancement of fees creates a constitutionally cognizable Sixth Amendment right, even while the receivership remains in effect.

I. MR. LEVY HAS A CONTRACTUAL RIGHT TO ADVANCEMENT OF ATTORNEYS' FEES AND LEGAL DEFENSE COSTS

Under Delaware law,⁴ an individual's right to advancement of attorneys' fees and legal defense costs must be enforced as a matter of contract, statute, and public policy. Section 145(e) of the Delaware General Corporation Law expressly permits Delaware companies the right to commit to advancing "[e]xpenses (including attorneys' fees) incurred by an officer or director of the corporation in defending any civil, criminal, administrative or investigative action, suit or proceeding." 8 Del. C. § 145(e). Once an entity commits to provide advancement, "advancement rights" are enforced "by their terms [as] contract rights." *Blankenship v. Alpha Appalachia Holdings, Inc.*, C.A. No. 10610-CB, 2015 Del. Ch. LEXIS 145, at *43 (Del. Ch. May 28, 2015) (ordering advancement of fees for plaintiff's criminal defense).

Further, Delaware public policy favors enforcement of advancement rights. Courts recognize that upholding valid advancement rights supports important public policy concerns such as providing "an inducement for attracting capable individuals into corporate service."

⁴ The Platinum Partners entities were formed under Delaware law.

Homestore, Inc. v. Tafeen, 888 A.2d 204, 211 (Del. 2005); *see also VonFeldt v. Stifel Fin. Corp.*, 714 A.2d 79, 84 (Del. 1998); *Blankenship*, 2015 Del. Ch. LEXIS 145, at *54 (Delaware public policy “supports resolving ambiguity in favor of indemnification and advancement”); *Sun-Times Media Grp., Inc. v. Black*, 954 A.2d 380, 404 (Del. Ch. 2008) (“the Delaware policy gloss favoring advancement to corporate officials supports resolving . . . ambiguity in favor of advancement”); *Scharf v. Edgcomb Corp.*, C.A. No. 15224, 1997 Del. Ch. LEXIS 169, at *14-15 (Del. Ch. Dec. 2, 1997) (although advancement provides an individual benefit to corporate officials, it is actually “a desirable underwriting of risk by the corporation in anticipation of greater corporate-wide rewards” for its shareholders). “[E]ven when corporate officials . . . are accused of serious misconduct,” these public policy objectives “will only be achieved if the promissory terms of advancement contracts are enforced by courts.” *Homestore*, 888 A.2d at 218-19 (ordering advancement of fees). Unsurprisingly, therefore, under Delaware law, a provision that legal defense costs and attorneys’ fees “**shall be advanced**” is accorded its “plain meaning” and given the interpretation “that **advancement is mandatory.**” *Stockman v. Heartland Indus. Partners, L.P.*, C.A. Nos. 4227-VCS, 4427-VCS, 2009 Del. Ch. LEXIS 131, at *23 (Del. Ch. July 14, 2009) (emphasis added).

Here, Mr. Levy has an express contractual right to mandatory advancement of his legal fees by the Receivership Entities through multiple sources:

1. Credit Funding Agreement. The Credit Funding Agreement provides that Credit Funding “**shall advance**” to Mr. Levy all “expenses of defending” any covered claim, which includes criminal proceedings; in addition, it requires that the PPCO Master Fund provide all funds necessary to satisfy that obligation. *Supra* at 3-4.

2. PPCO Master Fund: The PPCO Master Fund Limited Partnership Agreement similarly provides for mandatory advancement, stating that the Fund “*shall promptly reimburse (and/or advance to the extent reasonably required)* each Protected Person for reasonable legal or other expenses (as incurred) of each Protected Person.” *Supra* at 5. The PPCO Master Fund LP is a defined Receivership Entity under the Second Amended Order Appointing Receiver.
3. June 2016 Letter Agreement: By letter dated June 16, 2016, Platinum Partners agreed to provide broad advancement of legal fees and defense costs to Mr. Levy in connection with the criminal matter. *Supra* at 6. Platinum Partners “agreed to pay Mr. Levy’s fees” in connection with the criminal matter (then at the investigation stage), and agreed to advance payment directly to Mr. Levy’s chosen counsel by paying “bills within 15 days of receipt.” *Id.*

Each of these Agreements provides for advancement of Mr. Levy’s fees in a manner expressly contemplated, and supported, by governing Delaware law. *See supra* at 10-11. Moreover, all of these Agreements provide that advancement is mandatory, not discretionary, and mandatory advancement provisions must be enforced. *See Stockman*, 2009 Del. Ch. LEXIS 131, at *23. These Agreements establish that Mr. Levy has enforceable contractual rights to advancement of his legal fees and defense costs by the Receivership Entities.

II. MR. LEVY’S SIXTH AMENDMENT RIGHTS REQUIRE THAT THE RECEIVER ADVANCE ATTORNEYS’ FEES AND DEFENSE COSTS IMMEDIATELY

That the Court has appointed a Receiver—in response to the SEC’s application—to manage the assets of the Receivership Entities does not undermine Mr. Levy’s advancement rights, nor should the Receivership be used to delay payment to a later date. To the contrary, Mr. Levy’s advancement rights amount to a property interest protected by the Sixth Amendment, and

create a right for Mr. Levy to use advancement funds for purposes of his legal defense costs in the criminal matter now.

As the Second Circuit Court of Appeals has recognized, the Sixth Amendment protects against interference with “the right to defend oneself using whatever assets one has *or might reasonably and lawfully obtain*”—including a corporation’s obligation to advance legal defense costs. *United States v. Stein*, 541 F.3d 130, 156 (2d Cir. 2008) (emphasis added). *Stein* arose out of the Government’s investigation of the accounting firm KPMG and several of the firm’s employees. Under the guidance of the Department of Justice’s “Thompson Memorandum,” the AUSAs in *Stein* pressured KPMG to withhold payment of legal fees for its employees—despite such payment having been “common practice” at KPMG—as a way of showing that KPMG intended to fully cooperate with the Government. *Id.* at 137-38. In short, and as Judge Kaplan found (a finding the Second Circuit affirmed), “the government conducted itself in a manner that evidenced a desire to minimize the involvement of defense attorneys.” 435 F. Supp. 2d 330, 353, 367 (S.D.N.Y. 2006) (holding that the defendants had property interests in KPMG’s advancement of their legal defense costs, and “[t]he law protects such interests against unjustified and improper interference”). The Second Circuit ultimately affirmed Judge Kaplan’s holding that the defendant-employees had a cognizable Sixth Amendment right to the advancement of fees from KPMG, and that the Government had violated this right, given that “absent the Thompson Memorandum and the prosecutors’ conduct KPMG would have advanced fees without condition or cap.” 541 F.3d at 143.

Based on this principle, corporate assets to which a criminal defendant has advancement rights may not be temporarily encumbered through a civil action by the SEC, as illustrated by *SEC v. FTC Capital Markets, Inc.*, which is directly on point. No. 09 Civ. 4755 (PGG), 2010

U.S. Dist. LEXIS 65417 (S.D.N.Y. June 29, 2010). There, the Court had ordered an asset freeze of various accounts held by the corporate defendants and related entities. *Id.* at *4. One of the individual defendants had been charged in a parallel criminal action, and moved to lift the asset freeze to permit a corporate defendant to advance her legal fees. *Id.* at *1. To establish her right to advancement, the defendant pointed to a letter signed by a corporate representative committing the corporation to pay her legal fees in the criminal matter. *Id.* at *5-6. Opposing the defendant's motion, the SEC argued that the defendant had no Sixth Amendment right to advancement because she had "no property interest in the frozen funds because the funds are 'another person's money' and 'are not even held in her name.'" *Id.* at *10. Relying on *Stein*, however, the Southern District rejected the SEC's arguments and found that the corporation's agreement to advance fees "is sufficient to create a valid expectation on her part that her fees and expenses incurred in the criminal action would be advanced." *Id.* at *18. This expectation constituted "a Sixth Amendment claim to the frozen funds FTC had promised to advance as payment for her defense costs in the criminal action." *Id.* at *25. Accordingly, the Court ordered that the SEC's asset freeze be lifted to permit advancement of legal fees in the criminal matter to the defendant. *Id.* at *29.

Courts in other jurisdictions have recognized the same principle. *See SEC v. Thibeault*, 80 F. Supp. 3d 288, 294-95 (D. Mass. 2015) (ordering "carve-out" from asset freeze to provide funds for defendant's attorneys' fees "in his parallel criminal proceeding"); *United States v. Rosen*, 487 F. Supp. 2d 721, 730 (E.D. Va. 2007) (finding that "defendants' contractual rights to attorneys' fees . . . was not forfeited by statute, but instead is a property right belonging to defendants"; accordingly, "defendants have adequately established this element of their Sixth

Amendment claim”).⁵

Applied here, neither the Receiver nor the SEC can dispute that Mr. Levy has a legitimate expectation that Platinum Partners, including the Receivership Entities, would advance his criminal defense legal fees. That expectation derives directly from the multiple agreements through which Platinum Partners, including the Receivership Entities, agreed that they would advance such fees—*on a mandatory and non-discretionary basis*. *Supra* at 3-7. Indeed, the broadest advancement commitment, contained in the June 2016 Letter Agreement, is directly akin to the letter agreement at issue in *FTC Capital Markets*, and the Southern District of New York properly found that that agreement created a cognizable Sixth Amendment right. *Supra* at 6, 13-14. This Court should do no less here and confirm that Mr. Levy’s advancement rights create a constitutional right to use those funds for his criminal defense.

Notably, the Sixth Amendment interests at issue in Mr. Levy’s need for advancement of fees for purposes of his *criminal defense* distinguish this application from those considered in other cases previously cited by the Receiver in rejecting Mr. Levy’s request for advancement. In the Receiver’s letter dated April 13, 2018, the Receiver cited the Delaware decisions of *Andrikopoulos v. Silicon Valley Innovation Company, LLC*, 120 A.3d 19 (Del. Ch. 2015) and *Henson v. Sousa*, Civil Action No. 8057-VCG, 2015 Del. Ch. LEXIS 205 (Del. Ch. Aug. 4, 2015) for the proposition that advancement claims should be treated the same as the claims as other unsecured creditors. Ex. 8 at 4-5. Those decisions, however, only address claims for advancement in *civil litigation*, where the Sixth Amendment right to counsel does not apply.

⁵ In addition, a District of Connecticut court, when presented with a claim for advancement of civil defense claims in the context of an SEC receivership, held that advancement claims were entitled to priority over the claims of other creditors. *SEC v. Illarramendi*, Civil No. 3:11cv78 (JBA), 2014 U.S. Dist. LEXIS 16459, at *25-27 (D. Conn. Feb. 10, 2014). The reasoning in *Illarramendi* is all the more persuasive here given the Sixth Amendment rights at issue.

Accordingly, they have no bearing here, and they cannot justify withholding Mr. Levy's right to advancement.

CONCLUSION

For all of the reasons set forth above, Mr. Levy respectfully requests that the Court grant his Motion and direct the Receiver to advance his reasonable attorneys' fees and legal defense costs in the criminal matter.

Respectfully submitted,

Dated: October 19, 2018
New York, New York

WILSON SONSINI GOODRICH & ROSATI
Professional Corporation

s/ Michael S. Sommer

Michael S. Sommer

Eli B. Richlin

1301 Avenue of the Americas, 40th Floor

New York, New York 10019

Telephone: (212) 999-5800

Facsimile: (212) 999-5899

Email: msommer@wsgr.com

Email: erichlin@wsgr.com

Counsel for Defendant David Levy