UNITED STATES DISTRICT COURT
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,	:	No. 16-cv-6848 (BMC)
Defendants.	:	

RECEIVER'S MEMORANDUM OF LAW IN OPPOSITION TO MOTIONS FOR ADVANCEMENT OF LEGAL FEES

OTTERBOURG P.C.
230 Park Avenue
New York, NY 10169
(212) 661-9100

Attorneys for Melanie L. Cyganowski, as Receiver

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

PRELIMINARY STATEMENT 1

BACKGROUND 2

ARGUMENT - THE MOVANTS' MOTIONS FOR ADVANCEMENT SHOULD BE DENIED 14

A. IN THE CONTEXT OF AN EQUITY RECEIVERSHIP, ADVANCEMENT OF LEGAL FEES TO DIRECTORS AND OFFICERS IS NEITHER REQUIRED NOR APPROPRIATE 14

1. As a Matter of Law, Claims for Advancement under Pre-Receivership Contracts Are Not Entitled to Priority over Other Claims 14

2. The Sixth Amendment Does Not Compel Advancement 17

a. The Receiver Is Not a State Actor 17

b. The Commencement of the Enforcement Action and Installation of the Receiver Did Not Violate the Sixth Amendment 19

B. THE MOVANTS HAVE NOT ESTABLISHED THAT, IN THE ABSENCE OF A RECEIVERSHIP, THE AGREEMENTS ON WHICH THEY RELY ENTITLE THEM TO ADVANCEMENT OF THEIR CRIMINAL DEFENSE FEES 21

1. As a Matter of Law, the PPCO LLC Agreements Do Not Provide for Mandatory Advancement 21

2. Movants Have Not Established Their Right to Advancement of Criminal Defense Fees under the Credit Funding or PPCO LP Agreements 23

CONCLUSION 25

TABLE OF AUTHORITIES

Page

Cases

Aleynikov v. Goldman Sachs Grp., Inc.,
2012 WL 6603397 (D.N.J. Dec. 14, 2012) 24

Andrikopolous v. Silicon Valley Innovation Co., LLC,
120 A.3d 19 (Del. Ch. 2015), aff'd, 142 A.3d 504 (Del. 2016) 15, 16

Blankenship v. Alpha Appalachia Holdings, Inc.,
No. CV 10610-CB, 2015 WL 3408255 (Del. Ch. May 28, 2015) 23

Booth Oil Site Administrative Group v. Safety-Kleen Corp.,
137 F.Supp.2d 228 (W.D.N.Y. 2000) 25

Grace v. Ashbridge, LLC,
2013 WL 6869936 (Del. Ch. Dec. 31, 2013) 21

Happy Kids, Inc. v. Glasgow,
2002 WL 72937 (S.D.N.Y. Jan. 17, 2002) 25

Henson v. Sousa,
2015 WL 4640415 (Del. Ch. Aug. 4, 2015) 15, 16

Herron v. Fannie Mae,
857 F.Supp.2d 87 (D.D.C. 2012) 17, 18

Litton Indus., Inc. v. Lehman Bros. Kuhn Loeb Inc.,
125 F.R.D. 51 (S.D.N.Y. 1989) 18

Luis v. United States,
136 S. Ct. 1083 (2016) 21

Matter of Pooling & Servicing Agreements,
2018 WL 1229702, at (S.D.N.Y. March 9, 2018) 24

Paolino v. Mace Sec. Intern., Inc.,
985 A.2d 392 (Del. Ch. 2009) 22

SanFrancisco Arts & Athletics, Inc. v. U.S. Olympic Comm.,
483 U.S. 522 (1987) 17

Seaford Golf & Country Club v. E.I. duPont de Nemours & Co.,
925 A.2d 1255 n.14 (Del.2007) 21

United States v. Beszborn, 21 F.3d 62 (5th Cir. 1994) 18

United States v. Johnson, 2016 WL 4087351 (D. Utah July 28, 2016) 20, 21

United States Sec. & Exch. Comm'n v. FTC Cap. Mkts., Inc.,
2010 U.S. Dist. LEXIS 65417 (S.D.N.Y. June 29, 2010)..20

United States Sec. & Exch. Comm'n v. Illarramendi,
2014 WL 545720 (D. Conn. Feb. 10, 2014) 15, 16

United States Sec. & Exch. Comm'n v. Schooler,
2015 WL 1510949 (S.D. Cal. March 4, 2015)...18

Statutes

8 Del. C. §145(f) 23

Melanie L. Cyganowski, the duly appointed Receiver (the "***Receiver***") of various Platinum entities (the "***Receivership Entities***" or "***Platinum***"), respectfully submits this memorandum of law in opposition to the motions to compel advancement of legal fees of Defendants Joseph SanFilippo ("***SanFilippo***") (Dkt. Nos. 392-94), David Levy ("***Levy***") (Dkt. Nos. 402-04), Daniel Small ("***Small***") (Dkt. No. 405), and Joseph Mann ("***Mann***" and, collectively with SanFilippo, Levy and Small, the "***Movants***") (Dkt. No. 406).

PRELIMINARY STATEMENT

By these motions, former directors and officers of Platinum-related entities, indicted for defrauding investors of hundreds of millions of dollars, seek to compel the Receiver to expend the limited resources of the receivership on the advancement of their legal fees in defending against these charges, above and beyond the tens of millions of dollars that their lawyers already have been paid from insurance coverage. The motions should be denied in their entirety.

Delaware law – which governs the agreements that the Movants seek to enforce – is crystal clear that, notwithstanding a strong policy favoring the enforcement of advancement in *other* contexts, in the context of *receiverships*, former directors and officers seeking advancement under pre-receivership agreements are entitled to *no* priority over other creditors and investors holding pre-receivership claims. Moreover, and contrary to the Movants' contentions, the Sixth Amendment to the Constitution does not compel a different result. The Receiver's business judgment not to prioritize advancement claims of former directors and officers of Platinum-related entities over the claims of other creditors and investors is not a state action that implicates Sixth Amendment rights. For these reasons alone, the motions should be denied.

Beyond that, even if there were no receivership, the Movants, on this record, have failed to demonstrate their entitlement to advancement of fees defending against criminal charges largely alleging their fraudulent manipulation of certain entities associated with the Platinum Partners Value Arbitrage Master Fund ("***PPVA***") on the basis of agreements providing for indemnification of certain persons based on their work on behalf of specific entities associated with the Platinum Partners Credit Opportunities Master Fund ("***PPCO***"). For this reason, too, advancement is unwarranted.[1]

BACKGROUND

A. The Movants

Without submitting any sworn statements, or other competent evidence, establishing the nature and dates of their respective prior positions, the Movants rely on the unsworn statements of their attorneys to position themselves for coverage under various indemnification provisions.

SanFilippo asserts that he served "as Chief Financial Officer (CFO) of Platinum Partners Credit Opportunities Fund LLC (PPCO) and Platinum Partners Value Arbitrage Fund L.P. (PPVA)" "at times relevant to the allegations in the Indictment, which begin in 2011 and conclude in 2016." (SanFilippo Mem. at 3, 7[2]) In support of his assertion, he submits a "Confidential Private Placement Memo" (the "***PPM***") (Dkt. No. 392-5), which he contends "include[s] SanFilippo under the 'key personnel' section as CFO of PPCO." (SanFilippo Mem. at 17-18) In fact, the PPM purports to identify the "Key Personnel of the *Managing Member* and *Loan Portfolio Manager*." (PPCO PPM, at p. 12; emphasis added). The "Managing Member" is

---

[1] In addition to this Memorandum of Law, the Receiver also submits Declaration of Melanie L. Cyganowski, as Receiver, in Opposition to Motions for Advancement of Legal Fees (the "***Receiver Decl.***") in opposition to the Motions.

[2] References to "***SanFilippo Mem. at __***" are to the Memorandum of Law on Behalf of Joseph SanFilippo in Support of His Motion to Compel the SEC Receiver to Continue Advancing His Reasonable Attorneys' Fees and Defense Costs (Dkt. No. 392-8), at the indicated page(s).

defined as Platinum Credit Holdings LLC. (*Id.*, at 2) The "Loan Portfolio Manager" is defined as Platinum Credit Management LP ("***Credit Management***"). (*Id.*) The reference in the PPM to SanFilippo as "Chief Financial Officer," thus, identifies him as CFO of either Platinum Credit Holdings LLC or Credit Management. It does *not* identify him as CFO of PPCO. Indeed, Platinum's records reflect that, from 2012 through 2015, SanFilippo was the CFO or Managing Director of Finance of Platinum Management (NY) LLC ("***Platinum Management***"), a *non*-Receivership Entity that, according to Platinum's records, paid his salary through October 2016 and was the management company for PPVA, another *non*-Receivership Entity. (Receiver Decl., at ¶3a)[3] Platinum's records appear to accord with those of the Government, which alleges, both in its criminal and civil pleadings, that SanFilippo was the CFO of PPVA, not PPCO, and which levels criminal and civil charges against him on that basis. *See United States v. Nordlicht, et al.*, No. 1:16-cr-00640-BMC (E.D.N.Y. 2016) (the "***Criminal Case***"), Dkt. No. 1 (the "***Indictment***") at ¶28; *SEC v. Nordlicht, et al.*, No. 1:16-cv-06848-BMC (E.D.N.Y. 2016) (the "***Enforcement Action***"), Dkt. No. 1 (the "***SEC Complaint***") at ¶3.[4] PPCO's CFOs during the eight-plus years prior to the commencement of the Receivership action, according to Platinum's records, were Naftali Manela (2008 to 2014) and Daniel Mandelbaum (2015). (Receiver Decl., at ¶3a)

Levy vaguely asserts that he "provided services over a number of years to various Platinum Partners entities, including Receivership Entities, first as portfolio manager and subsequently as Chief Investment Officer [CIO]." (Levy Mem. at 2[5]) Platinum has documents

---

[3] Consistently, the engagement letter between Ford O'Brien LLP and SanFilippo, dated June 27, 2016, and on which SanFilippo relies for his motion (the "***SanFilippo Engagement Letter***"), is addressed to "Joseph SanFilippo, Chief Financial Officer, Platinum Management LLC." (Dkt. No. 392-2)

[4] *See also, e.g.*., Implant Sciences Corp. Schedule 13-D, April 6, 2016, https://www.sec.gov/Archives/edgar/data/1068874/000114036116072856/issch13dajul2016.htm ; Navidea Biopharmaceuticals, Inc. Schedule 13-D, February 23, 2016, https://www.sec.gov/Archives/edgar/data/810509/000119312516497413/d155265dsc13d.htm.

[5] References to "***Levy Mem. at __***" are to the Memorandum of Law in Support of Defendant David Levy's Motion to Compel Advancement of Legal Fees (Dkt. No. 403), at the indicated page(s).

reflecting that Levy held himself out as Deputy Chief Investment Officer at PPVA until September 2013, at which time he began holding himself out as Chief Investment Officer of Beechwood Re. (Receiver Decl. ¶3b.) Platinum's records also show Levy as holding the title of Co-Chief Investment Officer of Platinum Management and Credit Management in 2015 and 2016. (*Id.*) Again, Platinum's records accord with many of the Government's allegations. In the SEC Complaint, the SEC alleges that Levy is "an owner and co-CIO of Platinum Management and Platinum Credit [Platinum Credit Management, L.P.]," who "previously served as PPVA portfolio manager from 2006 to the end of 2013," at which time he "became the CIO and 10% owner of B Asset Manager LP and B Asset Manager II LLP (together 'BAM'), the CIO, CFO and 49.9% owner of Beechwood Re Ltd., and the CIO and 49.99% [owner] of Beechwood Bermuda Ltd. (the latter two, together, 'Beechwood')." (SEC Complaint, ¶27)

Small does not claim to have had any role with any of the Receivership Entities. Rather, he asserts that he was "a Member and Portfolio Manager of Credit Funding LLC." (Small Ltr. at 1[6]) In an employment arbitration in which Small succeeded in obtaining a substantial award, he alleged that he was "hired" by Platinum Management and Platinum Liquid Opportunity Management (NY) LLC ("***PPLO***") (a Receivership Entity) to serve as "portfolio manager" for PPVA, Platinum Partners Liquid Opportunity Master Fund L.P. (a Receivership Entity) and Platinum Partners Liquid Opportunity Master Fund II L.P. (a *non*-Receivership Entity). *See Daniel Small v. Platinum Management (NY) LLC, et al,* Supreme Court for the State of New York, County of New York, Index No. 656047/2016, Dkt. No. 7. Platinum's records reflect that Small served as Portfolio Manager of PPLO, and various affiliated entities. (Receiver Decl. ¶3c) As for Mann, he maintains he was "an employee of . . . Platinum Credit Holdings LLC [a *non*-

---

[6] References to "***Small Ltr. at*** __" are to the letter from Seth L. Levine to The Honorable Brian M. Cogan, dated October 19, 2018 (Dkt. No. 405), at 1.

Receivership Entity] . . . and . . . Platinum Credit Management LP [a Receivership Entity]." (Mann Ltr. at 1[7]) According to Platinum's records, Mann was employed by Platinum Management, the management company for PPVA from 2012 through October 2016. (Receiver Decl. ¶3d)

B. The Purported Agreements to Advance Legal Fees

The Movants collectively stake their claims to advancement in an assortment of Platinum-related operating agreements. Small relies on the "PPCO Operating Agreement," from which he quotes but fails to submit. (SanFilippo Mem. at 11-13[8]) Levy relies on the Third Amended and Restated Operating Agreement of Limited Partnership of Platinum Partners Credit Opportunities Master Fund LP (the "***PPCO LP Agreement***"), as well as on the Amended and Restated Operating Agreement of Credit Funding LLC (the "***Credit Funding Agreement***"), the Platinum Partners Credit Opportunities Fund LLC Fourth Amended and Restated Limited Liability Company Agreement (the "***PPCO LLC Agreement***"), the Platinum Partners Credit Opportunities Fund (TE) LLC Fourth Amended and Restated Limited Liability Company Agreement (the "***PPCO (TE) LLC Agreement***"), and the Platinum Partners Credit Opportunities Fund (BL) LLC Amended and Restated Limited Liability Company Agreement (the "***PPCO (BL) LLC Agreement***," and, collectively with the PPCO LLC Agreement and the PPCO (TE) LLC Agreement, the "***PPCO LLC Agreements***"). (Levy Mem. at 3-6; Dkt. Nos. 404-1 – 404-5) Small relies on the Credit Funding Agreement. (Small Ltr. at 1) And Mann relies on the PPCO LP Agreement. (Mann Ltr. at 1)

---

[7] References to "***Mann Ltr. at __***" are to the letter from Benjamin S. Fischer to The Honorable Brian M. Cogan, dated October 19, 2018 (Dkt. No. 406), at 1.

[8] Based on the excerpts quoted in the SanFilippo Mem., it appears that SanFilippo is relying on the "Platinum Partners Credit Opportunities Fund LLC Fourth Amended and Restated Limited Liability Company Agreement," a copy of which Levy has submitted under Dkt. No. 404-3.

The collection of agreements – each of which is expressly governed by Delaware law (Credit Funding Agreement §13.2; PPCO LP Agreement §11.4; PPCO LLC Agreement §14.2; PPCO (TE) LLC Agreement §14.2; PPCO (BL) LLC Agreement §14.2) -- essentially contain three sets of relevant provisions. *First,* Section 11.2 of the Credit Funding Agreement provides:

> [T]he Company [Credit Funding] shall indemnify each Member [which include Levy and Small], and each Portfolio Manager [which also include Levy and Small] . . . and hold them harmless from and against any *Damages suffered or incurred by such indemnified person . . . in the course of serving in any office or other capacity of, or otherwise representing or acting for or on behalf of the Company*, including, without limitation, in connection with any investigation, claim, allegation, action or proceeding, whether criminal, civil, administrative, arbitrative or investigative . . .; provided, however, that any other provision hereof notwithstanding, any such indemnification shall be solely from the net assets of the Company, and the Managing Member [PPCO] (but not other Member . . .) 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 such amount from its own assets.

(Credit Funding Agreement, §11.2; emphasis added) The agreement fails to define "Damages." Without any definition of the Damages to which indemnified persons are entitled to make a claim for indemnification, it then goes on to state that: "Upon making a claim for indemnification, the Member, 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*." (*Id.*; emphasis added) By distinguishing "Damages suffered or incurred by [an] indemnified person" for which a Member, *e.g.* Levy or Small, may assert an indemnification claim, on the one hand, from "the expenses of defending the claim, action, suit or proceeding giving rise to such indemnification claim," on the other, and without making any provision for the return of advanced monies in the event indemnification ultimately is rejected, the Credit Funding Agreement is ambiguous.

Second, Section 5.4(a) of the PPCO LP Agreement provides:

> [T]he 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, and any amounts expended in settlement of any claims approved by the General Partner (collectively, "Liabilities"), to which any Protected Person may become subject:
>
> (i) by reason of any act or omission taken or omitted to be taken by such Protected Person or any other Person with respect to the Partnership, a Portfolio Company or any Subsidiary thereof; or
>
> (ii) by reason of the fact that such Protected Person or any other Person was or is a broker for or an agent of the Partnership or of the General Partner . . .

(PPCO LP Agreement, §5.4(a)) Section 5.4(b) of the PPCO LP Agreement further provides:

> 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 Section 5.4; *provided*, that such Protected Person executes a written undertaking to repay the Partnership for such reimbursed or advanced expenses if it is financially judicially determined that such Protected Person is not entitled to the indemnification provided by this Section 5.4.

(*Id.*)[9]

Third, Section 5.4.2 of each of the PPCO LLC Agreements provides:

> The Company shall indemnify and hold harmless the Managing Member, the Loan Portfolio Manager, 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

[9] The wording of Section 5.4(a) and (b) – which expressly defines "Liabilities" as including legal fees in defending against a criminal proceeding for which a Protected Person is entitled to indemnification and expressly provides for the return of any such legal fees advanced in the event indemnification is unwarranted – stands in stark contrast to the wording of Section 11.2 of the Credit Funding Agreement, and raises further questions as to the meaning of Section 11.2 of the Credit Funding Agreement.

> 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, *provided, however, that such indemnity shall be payable only if the indemnified party or parties in good faith acted or failed to act in a manner it reasonably believed to be in, or not opposed to, the best interests of the Company (as determined by the Managing Member), and such indemnification would be in the best interest of the Company (as determined by the Managing Member) and in the case of criminal proceedings, that the indemnified party had no reasonable cause to believe was unlawful.*

(PPCO LLC Agreements, §5.4.2) (emphasis added) It further provides:

> The Managing Member *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. . . . Any indemnity under this Section 5.4.2 shall be paid from, and only to the extent of, Company assets, and no Member shall have any personal liability on account thereof.[10]

(*Id*; emphasis added.)

C. The Commencement of Platinum-Related Investigations, the Purchase of D&O Insurance Coverage and the Execution of Engagement Letters

Beginning in May 2015, the Government commenced an investigation into an alleged bribery scheme between Murray Huberfeld, of Platinum Management, and Norman Seabrook, of the New York Corrections Officers' Benevolent Association. *See Freedom Specialty Ins. Co., et al. v. Platinum Management (NY) LLC, et al.,* Supreme Court of the State of New York, County of New York, Index No. 652505/2017 (the "***Coverage Dispute***"), Dkt. No. 15 (the "***Coverage Complaint***") at ¶ 19.[11] Whether coincidentally or deliberately, following the Government's commencement of the investigation, Platinum Management increased its directors and officers

[10] According to Platinum's books, the only assets of each of Platinum Partners Credit Opportunities Fund LLC, Platinum Partners Credit Opportunities Fund (TE) LLC and Platinum Partners Credit Opportunities Fund (BL) LLC are limited partnership interests in the Platinum Partners Credit Opportunities Master Fund LP. (Receiver Decl. ¶4)
[11] Huberfeld was indicted on July 7, 2016, and pled guilty on May 25, 2018. (*United States v. Norman Seabrook, et al*., United States District Court for the Southern District of New York, No. 1:16-cr-00467-AKH-2, Dkt. Nos. 10, 200-03)

liability insurance coverage from $5 million to $25 million. (Coverage Complaint, ¶¶ 28-29) In addition to renewing its primary policy of $5 million with U.S. Specialty Insurance Co., Platinum Management acquired excess policies of $5 million from each of Berkshire Hathaway Specialty Insurance Co., Freedom Specialty Insurance Co. ("***Freedom***"), Atlantic Specialty Insurance Co. ("***Atlantic***") and Berkley Insurance Co. ("***Berkley***"), for the policy period November 20, 2015 to November 20, 2016 (collectively, the "***D&O Coverage***") (*Id.*, ¶¶ 28-39)

In addition to increasing D&O Coverage, Platinum Management or its affiliates entered into agreements to pay the legal fees incurred by certain Platinum Management-related officers and directors. Mark Nordlicht, as "Managing Partner" of "Platinum Partners," executed an engagement letter with counsel for Levy, Wilson Sonsini Goodrich & Rosati P.C., dated June 16, 2016 (the "***Levy Engagement Letter***"), in which he purported to agree, on behalf of "Platinum Partners," "to pay Mr. Levy's fees and costs associated with Mr. Levy's engagement" and to "advance to WSGR a retainer in the amount of $250,000." (Dkt. No. 404-6) According to Platinum's records, Platinum Management (not any of the Receivership Entities) paid Wilson Sonsini a total of $75,000 in July 2016. (Receiver Decl. ¶5) Around the same time, SanFilippo's counsel prepared the SanFilippo Engagement letter, providing for "Platinum Partners LP" "to pay the cost of [SanFilippo's] representation in this matter" and "to advance the Firm a $50,000 retainer deposit." (Dkt. No. 392-2) The SanFilippo Engagement Letter makes clear, however, that: "In the event that Platinum were to withdraw its agreement to advance your legal costs, we would look to you [SanFilippo] for payment." (*Id.*) While the SanFilippo Engagement Letter includes a signature block for Harvey Werblowsky on behalf of "Platinum Partners LP," the letter, in fact, appears *not* to have been signed by Werblowsky or anyone else on behalf of "Platinum Partners LP." (*Id.*; Receiver Decl. ¶6) In July 2016, Platinum

Management paid SanFilippo's firm, Ford O'Brien LLP, $50,000. (*Id.*) Levy and SanFilippo have submitted no competent evidence demonstrating that any of the Receivership Entities ever paid their legal fees or agreed to be bound by their engagement letters. (Receiver Decl. ¶¶5-6)

D. The Criminal and Civil Enforcement Actions, the Appointment of the Prior Receiver and the Prior Receiver's Continued Payment of D&O Coverage Premiums

On December 16, 2016, the Office of the United States Attorney for the Eastern District of New York unsealed an indictment charging, among others, Levy, SanFilippo, Small and Mann with eight counts of securities, investment advisor and wire fraud and conspiracy to commit same. (Indictment, ¶¶ 88-105) The Indictment charges that:

> In or about and between November 2012 and December 2016, the defendants [including] DAVID LEVY, . . . JOSEPH SANFILIPPO AND JOSEPH MANN . . . engaged in a scheme to defraud investors and prospective investors in Platinum through material misrepresentations and omissions relating to, among other things: (1) the performance of some of PPVA's Level 3 assets; (ii) PPVA's liquidity; (iii) the purpose of PPNE [Platinum Partners Northstar Equity] and the use of PPNE's proceeds; (iv) PPVA's preferential redemption process; and (v) related party transactions involving PPVA and PPCO.

(*Id.* ¶ 42) The Indictment then details the scheme over the course of the ensuing 30 paragraphs (*id.* ¶¶ 43-72), mentioning Receivership Entities, namely, PPCO, no more than a small handful of times and only as a "related part[y]" from which "PPVA was relying on undisclosed high interest loans" in order to fund redemption requests that PPVA did not otherwise have the liquidity to pay. (*See id.* ¶¶ 54, 58-59) The overwhelming thrust of the charges concerns the Movants' allegedly fraudulent manipulation of PPVA, a *non*-Receivership entity that is in separate liquidation proceedings in Grand Cayman. (*See id.* ¶¶ 43-72)

The Indictment further charges that:

> In or about and between November 2011 and December 2016, the defendants [including] DAVID LEVY [and] DANIEL SMALL . . . engaged in a scheme to defraud third-party holders of the BE Bonds (the "Bondholders") and to deprive the Bondholders of the proceeds of the sale of the vast majority of Black Elk's

> most lucrative assets through material misrepresentations and omissions about, among other things, Platinum's ownership of and control over the BE Bonds.

(*Id.* ¶73) In the next 14 paragraphs describing the scheme (*see id.* ¶¶ 74-87), the Indictment mentions the Receivership Entities – PPCO and PPLO – again no more than a small handful of times, as a portion of the holders of the BE Bonds at the heart of the fraud scheme. (*See id.* ¶ 85)

The same day that the Indictment was unsealed, the United States Securities and Exchange Commission ("***SEC***") commenced a civil enforcement action against, among others, the Movants. (SEC Complaint) Contemporaneously with filing the SEC Complaint, the SEC applied for appointment of a receiver. (Dkt. No. 6) That same day, the Court entered an order (the "***First Receiver Order***") appointing Bart Schwartz as receiver (the "***Prior Receiver***") of 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 Opportunities Fund (BL) LLC, Platinum Liquid Opportunity Management (NY) LLC, Platinum Partners Liquid Opportunity Fund (USA) L.P., Platinum Partners Liquid Opportunity Master Fund L.P., and prescribing the powers and duties of the Prior Receiver. (Dkt. No. 6) Nothing in the First Receiver Order froze the assets of the Receiver Entities or otherwise prevented the Prior Receiver from paying, if in his business judgment he determined to do so, the Movants' legal fees. (*Id.*) In fact, in the exercise of his own business judgment, the Prior Receiver authorized the payment, and paid, over $880,000 in premiums in order to extend the D&O Coverage for the benefit of all Platinum-related directors and officers, including the Movants. (Receiver Decl. ¶8)

E. The D&O Coverage Dispute, the Replacement of the Prior Receiver with the Receiver, and the Receiver's Continued Efforts to Ensure D&O Coverage

On May 8, 2017, Atlantic and Berkley, the third and fourth layers of excess insurance in the tower, commenced an action in the New York Supreme Court for a declaration that they had no obligation to provide coverage, naming as defendants, among others, each of the Movants. (D&O Coverage Dispute, Dkt. No. 1) On June 9, 2017, Freedom, the second lawyer of excess insurance, was added as the lead plaintiff. (*Id.*, Dkt. No. 15) Each of the Movants answered and counterclaimed to compel coverage. (*Id.* Dkt. Nos. 47, 50, 53)

Meanwhile, in the Enforcement Action, on June 23, 2017, the Prior Receiver applied to the Court to be relieved as receiver. (Dkt. No. 170) The application, along with follow-up correspondence from each of the SEC and the Prior Receiver (Dkt. Nos. 179-80), elicited reactions from various interested parties, including certain of the Movants. Notably, SanFilippo acknowledged in a letter to the Court that a "receiver is an 'officer of the court' and not an arm of the SEC." (Dkt. No. 187, at p. 1) For his part, Levy wrote to the Court, acknowledging that the imposition of a "*receivership* was the appropriate construct." (Dkt. No. 184, at pp. 3-4; emphasis in original) The resignation of the Prior Receiver resulted in the appointment of the Receiver (Dkt. No. 216), and the entry of the Second Amended Order Appointing Receiver (the "***Second Receiver Order***"). (Dkt. No. 276) Like the First Receiver Order, nothing in the Second Receiver Order froze the assets of the Receiver Entities or otherwise prevented the Receiver from paying the Movants' legal fees. (*Id.*) In fact, the Receiver repeatedly has taken steps to facilitate the Platinum-related directors' and officers', including Movants', receipt of D&O Coverage, including by having Platinum's General Counsel serve as a liaison between the insurance carriers and the individual directors and officers. (Receiver Decl. ¶8)

On September 29, 2017, the defendants in the D&O Coverage dispute moved by order to show cause in that action for a preliminary injunction mandating the excess insurance carriers to

advance defense costs in the criminal proceeding and in certain civil proceedings, including the Enforcement Action. (D&O Coverage Dispute, Dkt. Nos. 120-44) On December 27, 2017, the court granted the motion for a preliminary injunction, and ordered the excess carriers to advance defense costs, including to Movants. (*Id.*, Dkt. No. 163-64) On June 5, 2018, Atlantic moved by order to show cause to interplead the limits of its policy so that the court could determine the appropriate allocation amongst the insureds. (*Id.*, Dkt. Nos. 217-22) In connection with the interpleader motion, the Receiver was asked whether she was making any claim on behalf of the Receivership Entities to the interpleaded insurance proceeds. She denied any claim to the insurance proceeds, thereby facilitating their distribution to the Platinum-related directors and officers. (*Id.*, Dkt. Nos. 251-52)

F. Pre-Motion Correspondence Between the Parties and the Impending Exhaustion of D&O Coverage

Within a matter of months after the commencement of the Enforcement Action (well more than a year ago), certain of the criminal defendants, including certain Movants, wrote to the Prior Receiver demanding advancement of legal fees for defending their clients in connection with both the Criminal Case and the Enforcement Action. (Receiver Decl. Exs. 1, 3) By two separate letters dated March 7, 2017, Mann based his demand for advancement on ten different agreements, only one of which he relies on now in his motion for advancement (the PPCO LP Agreement). (Receiver Decl. Ex. 1) By letter dated April 13, 2017, Small invoked two agreements, only one of which he now relies on in his motion (the Credit Funding Agreement). (*Id.* Ex. 3) By letters dated March 15 and April 21, 2017, the Prior Receiver responded, indicating that he "does not expect that he would pay even *bona fide* claims for advancement and indemnification on behalf of person who are no longer employed by Platinum outside of a Court-approved liquidation plan." (*Id.* Exs. 2, 4)

Following the appointment of the Receiver, the individual Defendants asked her to set out her position with regard to advancement. By letter, dated April 13, 2018, to counsel for each of the individual Defendants, the Receiver set out her position that the agreements collectively referenced by the Defendants do not require advancement and that, even if they did, advancement in an equity receivership would be entirely inappropriate. (Dkt. No. 404-8) By letter dated July 26, 2018, SanFilippo made a request for advancement largely on the same grounds as advanced in his motion, except without once suggesting, let alone arguing, that the Sixth Amendment to the United States Constitution somehow compelled the Receiver to advance his fees. (Dkt. No. 392-3) The Receiver responded by letter dated August 9, 2018, reiterating her position that the agreement on which SanFilippo was relying did not require advancement and that, in all events, in the context of a receivership, advancement would be inappropriate. (*Id.* 392-4) On September 18, 2018, Levy sent a two sentence e-mail forwarding a copy of the Levy Engagement Letter and demanding advancement (*Id.*, 404-9), also without invoking any Sixth Amendment rights, which demand, once again, the Receiver rejected by letter dated September 25, 2018. (*Id.* 404-10)

By these motions, with $25 million in D&O Coverage (most of which having been paid to Movants' counsel) (Receiver Decl. ¶7)) on the verge of exhaustion, Movants now seek to compel the Receiver to advance their legal fees in connection with the Criminal Case.

<u>ARGUMENT</u>

THE MOTIONS FOR ADVANCEMENT SHOULD BE DENIED

A. IN AN EQUITY RECEIVERSHIP, ADVANCEMENT OF LEGAL FEES TO DIRECTORS AND OFFICERS IS NEITHER REQUIRED NOR APPROPRIATE

1. As a Matter of Law, Claims for Advancement under Pre-Receivership Contracts Are Not Entitled to Priority over Other Claims

Even if the pre-receivership agreements on which the Movants rely were to obligate the Receiver to use receivership funds to advance legal fees and expenses to Movants' counsel in connection with the criminal case (which Movants have not demonstrated), advancement still would be inappropriate in the context of this receivership.

The right to advancement in each of the agreements on which the Movants rely is governed by Delaware law. (*See* p. 6-8 *supra*.) Decisions applying Delaware law in similar circumstances hold that, in a receivership, "advancement claims should be treated the same as the claims of other unsecured creditors," for several reasons: (1) "while advancement is important, so is the successful winding up of a corporation or other business entity"; (2) similar to their treatment in bankruptcy proceedings, "[a]dvancement obligations are contractual in nature and generally arise from pre-receivership transactions" and, thus, "are no different from other creditors' claims"; (3) "balancing the existence of advancement rights against the realities of insolvent entities" renders "insurance as the best solution"; and (4) the reality of practical administration weighs in favor of treating advancement claims the same as the claims of other unsecured creditors. *Andrikopolous v. Silicon Valley Innovation Co., LLC*, 120 A.3d 19, 25-26 (Del. Ch. 2015), *aff'd*, 142 A.3d 504 (Del. 2016) (Strine, C.J.); *see also Henson v. Sousa*, 2015 WL 4640415, at *2 (Del. Ch. Aug. 4, 2015) ("equity and public policy favor[] treating advancement claims as, in effect, indemnification claims in this limited circumstance [of a receivership] relegating those claims to an equivalency with other creditors' claims"). We have found no case decided after *Andrikopolous* reaching a contrary conclusion.

The one decision within the Circuit addressing the right to advancement in the context of a receivership, *United States Sec. & Exch. Comm'n v. Illarramendi*, 2014 WL 545720 (D. Conn. Feb. 10, 2014), was decided *before*, and was expressly *rejected* by, *Andrikopolous*. In

Illarramendi, the district court relied on "the strong Delaware policy of indemnification and advancement of attorneys' fees" to conclude that, subject to the outcome of an evidentiary hearing on the former directors' and officers' alleged unclean hands and a determination of limits on any sums to be advanced, advancement of legal fees and expenses might be warranted. *Id.*, at *7. In rejecting *Illarramendi*, the court in *Andrikopolous* made clear that, in the context of a receivership, the "strong Delaware policy of indemnification and advancement of attorneys' fees" is not so strong as to prioritize advancement claims above the claims of other unsecured creditors. *Illarramendi* also based its ruling on the factually distinguishable circumstance that, there, the directors and officers sought advancement of legal fees and expenses incurred in defending against claims asserted by the receiver, who the court presumed had "determined that despite the administrative costs attendant to pursuing the lawsuit . . ., the potential recovery will produce a net economic benefit for the Receivership Estate." That is not the situation here.

Movants – on notice of *Andrikopolous* and *Henson* for more than six months – have come not forward with any authority to the contrary. Rather, Levy seeks to distinguish the cases on the grounds that they "only address claims for advancement in ***civil litigation****,* where the Sixth Amendment right does not apply." (Levy Mem. at 15) But where, as here (*see* pp. 17-21 *infra*), the Movants' Sixth Amendment rights are not implicated by the Receiver's decision not to advance legal fees – the distinction is one without a difference. In a footnote (*id*. n.5), Levy also dredges up *Illarramendi*, which, as set forth above, has been abrogated and is inapplicable. SanFilippo, Small and Mann do not even address, let alone attempt to distinguish, *Andrikopolous* and *Henson*. Because, under Delaware law (which governs Movants' rights), claims for advancement of legal fees by directors and officers under pre-receivership agreements are not

entitled to any priority over the pre-receivership claims of any other creditors or investors, the Movants' motions to compel advancement of their criminal defense costs should be denied.

2. The Sixth Amendment Does Not Compel Advancement

Notwithstanding clear Delaware law treating claims by directors and officers for advancement like any other pre-receivership creditor claim, Movants nevertheless contend (having curiously not done so earlier) that the Receiver's failure to advance their criminal defense costs – beyond the tens of millions of dollars already funded by D&O Coverage – somehow would violate their Sixth Amendment rights. (Levy Mem. at 12-16; SanFilippo Mem. at 21-26) Levy (joined by Small and Mann) argues that his "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 incurred in the criminal matter." (Levy Mem. at 112) Yet nowhere does he articulate precisely what state action – the *sine qua non* of a constitutional violation – is depriving him of that right. Recognizing the need to demonstrate state action, SanFilippo – without either any legal or factual support – seeks to equate the Receiver with the SEC. (SanFilippo Mem. at 25) As set forth below, none of these arguments has merit, and the Movants' reliance on the Sixth Amendment is sorely misplaced.

a. The Receiver Is Not a State Actor

It is axiomatic that "[t]he threshold question for invoking constitutional protection is whether a federal actor was involved, as purely private action does not trigger constitutional protection." *Herron v. Fannie Mae*, 857 F.Supp.2d 87, 92 (D.D.C. 2012) (citing *SanFrancisco Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 542 (1987)). Indeed, Movants – as they must – recognize this. As SanFilippo asserts, "the Sixth Amendment protects against 'unjustified *government* interference with the right to defend oneself . . . ." (SanFilippo Mem. at

21-22; emphasis added) Yet, despite undoubtedly having spent the last of their generous D&O Coverage researching this issue, Movants have not cited a single case holding that an equity receiver, installed by a court on a motion by the SEC or any other government agency, is a state actor whose actions are capable of violating the Constitution.

To the contrary, the case law addressing the question of whether a government-requested receiver or conservator is a state actor is uniform: Such a receiver or conservator is *not* a state actor. In *Litton Indus., Inc. v. Lehman Bros. Kuhn Loeb Inc.*, 125 F.R.D. 51, 53 (S.D.N.Y. 1989) an SEC receiver (Goldfarb) sought to invoke the deliberative process privilege available only to the Government; the court rejected the assertion of privilege, holding: "Goldfarb, in his capacity as receiver, was an agent of the court and not a government agent." *Id.* (In writing to the Court following the Prior Receiver's resignation, SanFilippo made this very point, asserting: "the receiver is 'an 'officer of the court' and not an arm of the SEC.'" (Dkt. No. 187) (quoting *United States Sec. & Exch. Comm'n v. Schooler,* 2015 WL 1510949, at *3 (S.D. Cal. March 4, 2015)). In *United States v. Beszborn*, 21 F.3d 62, 68 (5th Cir. 1994), the court addressed whether the Double Jeopardy clause of the Constitution was violated by the Government's prosecution of the defendants after the Resolution Trust Corporation ("***RTC***"), in its capacity as receiver, already had obtained a judgment of punitive damages against the defendants. The court rejected the argument, ruling: "It is well settled in the law that the RTC may function in a corporate or regulatory capacity or in a capacity as receiver. . . . In its capacity as receiver, the RTC stands as a private, non-governmental entity, and is not the Government for purpose of the Double Jeopardy Clause." *Id.* And in *Herron*, the court dismissed a First Amendment claim asserted against the Federal Housing Finance Agency ("***FHFA***") for actions taken as conservator. *See* 857 F.Supp.2d at 94. The court held: "[L]ike FDIC when it serves as a conservator or receiver

of a private entity, FHFA when it serves as conservator 'step[s] into the shoes' of the private corporation, Fannie Mae. In such circumstances, the federal agency in its guise as a conservator or receiver of a private corporation is not a government actor." *Id.* We have found no decision, and the Movants do not cite one, reaching a contrary conclusion.

Recognizing that state action is required in order to invoke the Sixth Amendment, SanFilippo attempts to manufacture it by baldly asserting that "the SEC is entwined with the Receiver." (SanFilippo at 25) The assertion is entirely unfounded (Receiver Decl. ¶2), and SanFilippo does not even seriously attempt to support it. The most he can muster is to contend that, because "the Receiver's 'Quarterly Fee Applications' must be sent to the SEC and are subject to holdback at the SEC's discretion," "[t]he SEC has effective veto power over the Receiver's fee applications, a pure example of state control or influence." (*Id.*) The contention is baseless: It is the Court that determines the Receiver's (and her retained professional's) fees, not the SEC. Were standard guidelines giving the Government the right to review and comment on a fiduciary's fee application sufficient for state action, every SEC receiver – indeed, every bankruptcy trustee – in the country would be subject to claims of constitutional deprivations.

Because the Receiver's determination not to advance Movants' criminal defense fees is not a state action, Movants' reliance on the Sixth Amendment is misplaced.

b. The Commencement of the Enforcement Action and Installation of the Receiver Did Not Violate the Sixth Amendment

Movants also appear to argue that the *SEC* has violated the Sixth Amendment, by commencing the Enforcement Action and seeking the installation of an equity receiver that ultimately has led to denial of advancement. Specifically, Levy asserts that "corporate assets to which a criminal defendant has advancement rights may not be temporarily encumbered through a civil action by the SEC," and analogizes this situation to those in decisions basing Sixth

Amendment violations on Government asset freezes and/or forfeitures resulting in a criminal defendant's denial of access to funds needed to pay their lawyers. (Levy Mem. at 13) (citing to *United States Sec. & Exch. Comm'n v. FTC Cap. Mkts., Inc.*, 2010 U.S. Dist. LEXIS 65417 (S.D.N.Y. June 29, 2010) and cases cited at Levy Mem. at 14-15) Levy's suggestion that the SEC's commencement of the Enforcement Action and installation of the Receiver violates the Sixth Amendment is baseless.

We have found not a single case – and Movants have not cited one – even suggesting, let alone holding, that the SEC's commencement of a civil enforcement action and installation of an equity receiver violates the Sixth Amendment. Indeed, on its face, the Government's commencement of a civil action and installation of a receiver, whose Court-ordered authority and duties do not prevent her from advancing the Movants their criminal defense costs (if she determines to do so) is in no way comparable to the Government's affirmative freezing or forfeiture of assets on which a criminal defendant depends to fund his or her defense.

United States v. Johnson, 2016 WL 4087351, at *3 (D. Utah July 28, 2016), is on point. There a criminal defendant moved for a new trial following his conviction on the basis of a claimed Sixth Amendment violation arising from his lack of access to funds placed under the control of a Federal Trade Commission ("***FTC***") receiver. In denying the defendant's motion, the court specifically *contrasted* a criminal defendant's denial of access to funds under the control of a Government-installed receiver *with* the defendant's denial of access to funds due to a Government freeze or forfeiture. The court held:

> Johnson claims that . . . his Sixth Amendment rights were violated when the court-ordered receiver in the civil Federal Trade Commission (FTC) action in the District of Nevada would not release funds frozen by court order for Johnson to hire a defense attorney in the criminal case in the District of Utah. . . . [R]eceivership assets are distinctly different from assets frozen under criminal

> statutes. Receivership assets are held pursuant to equitable powers under Rules 65 and 66 of the Federal Rules of Civil Procedure in the civil matter.
> . . . Unlike [*Luis v. United States,* 136 S. Ct. 1083 (2016)], there was never any pretrial restraint of assets under criminal forfeiture statutes in Johnson's criminal case. . . . Consequently, there was no Sixth Amendment violation when Johnson was denied access to funds to hire an attorney when the funds were held by the receiver pursuant to court order in a civil case in another jurisdiction.

Id. The reasoning of *Johnson* applies with full force here: The Receiver's determination not to use limited receivership resources to pay the Movants' exorbitant criminal defense costs has nothing to do with an asset freeze, forfeiture or other dictate of the SEC. In short, the Sixth Amendment does not elevate Movants' claims to advancement above other pre-receivership creditor claims.

B. THE MOVANTS HAVE NOT ESTABLISHED THAT, IN THE ABSENCE OF A RECEIVERSHIP, THE AGREEMENTS ON WHICH THEY RELY ENTITLE THEM TO ADVANCEMENT OF THEIR CRIMINAL DEFENSE FEES

1. As a Matter of Law, the PPCO LLC Agreements Do Not Provide for Mandatory Advancement

It is well settled that "[w]hen interpreting advancement and indemnification provisions in a limited liability company agreement, a Delaware court will follow ordinary contract interpretation principles." *Grace v. Ashbridge, LLC*, 2013 WL 6869936, at *4 (Del. Ch. Dec. 31, 2013). "Thus, '[w]hen the language of a ... contract is clear and unequivocal, a party will be bound by its plain meaning, because creating an ambiguity where none exists could, in effect, create a new contract with rights, liabilities and duties to which the parties had not assented....'" *Id.* (quoting *Seaford Golf & Country Club v. E.I. duPont de Nemours & Co*., 925 A.2d 1255, 1261 n.14 (Del.2007)). Applying those principles here, it is clear that no claim for mandatory advancement under any of the PPCO LLC Agreements – the sole agreement on which SanFilippo relies – can lie.

While section 5.4.2 of each of the PPCO LLC Agreements provides for mandatory *indemnification* of certain specified persons, it does *not* provide for mandatory *advancement* to such persons. (*See* §5.4.2) Nor does the mandatory indemnification provision in section 5.4.2 provide for indemnification of losses or expenses "as incurred." Indeed, section 5.4.2 of each of the PPCO LLC Agreements makes crystal clear that advancement is purely *discretionary* (PPCO's Managing Member "may *in its discretion* advance to any person or entity entitled to indemnification hereunder reasonable attorneys' fees . . ."). Accordingly, any contention that the PPCO LLC Agreements requires advancement is belied by its plain language.[12]

Nor is there any merit to SanFilippo's contention that, "[w]hile the initial determination to advance fees was discretionary, pursuant to relevant entity documents and Delaware law, the Receiver does not have, at this time, lawful authority to change that original decision made by the Managing Member to advance SanFilippo's fees." (SanFilippo Mem. at 13) None of the contractual or statutory provisions, or case authorities, on which he relies stand for the proposition that, once a discretionary decision is made (assuming PPCO's Managing Member even made the discretionary decision[13]) to advance SanFilippo's fees, it cannot later be reversed. Section 5.4.3 of the PPCO LLC Agreements states that "[a]ll rights to indemnification permitted in this Agreement and payment of associated expenses shall not be affected by the termination

[12] SanFilippo's argument that the PPCO LLC Agreements "include[] the exact same language that is consistently found by the Chancery Courts – and by New York courts interpreting Delaware law – to provide for mandatory indemnification" is baseless. Citing *Paolino v. Mace Sec. Intern., Inc.,* 985 A.2d 392, 398 (Del. Ch. 2009) [incorrectly cited as *Paolino Mace Sec. Inc*., No. Civ. 4462, 2009 WL 3652894(Del. Ch. Dec. 8, 2009)], SanFilippo asserts that every provision that states that a company "shall" indemnify a person is construed under Delaware law as an obligation to advance fees. (SanFilippo Mem. at 11-12) The assertion is erroneous. *Paulino* neither holds nor suggests any such thing. Indeed, the express language of the PPCO LLC Agreements, providing that the company "may, in its discretion," advance a person's legal fees, would defeat any such construction.

[13] As set forth above (*see* p. 9 *supra*), if Werblowsky agreed to pay SanFilippo's legal bills, he did so on behalf of "Platinum Partners LP," not the Managing Member of PPCO. The Receiver is not bound by any decision of a *non*-Receivership Entity, such as Platinum Partners LP, to grant advancement. Furthermore, even if Werblowsky had been acting on behalf of PPCO's Managing Member when he determined to grant advancement to SanFilippo (prior to the commencement of the Receivership action), under the plain terms of the PPCO Operating Agreement, advancement was, and remains, discretionary. Indeed, the SanFilippo Engagement Letter expressly recognizes that.

and dissolution of the Company or the removal, redemption, insolvency, bankruptcy, termination, or dissolution of the Managing Member." (SanFilippo Mem. at 13) The provision is inapplicable to the circumstances here. PPCO has not been terminated or dissolved. Further, SanFilippo's rights to indemnification (whatever they are) remain intact; rather, only his receipt of discretionary advancements has ceased.

In the same vein, 8 Del. C. §145(f) states that a "right to indemnification or to advancement of expenses arising under a provision of the certification or a bylaw shall not be eliminated or impaired by an amendment to the certificate of incorporation or the bylaws . . ." (SanFilippo Mem. at 14) Again, the statute has no application to the circumstances here. SanFilippo has no "right" to advancement. Additionally, there has been no amendment to the certificate of incorporation or bylaws that impacted SanFilippo's receipt of advancement of payments. Finally, SanFilippo's reliance on *Blankenship v. Alpha Appalachia Holdings, Inc.*, No. CV 10610-CB, 2015 WL 3408255, at *1, 19 (Del. Ch. May 28, 2015), for the proposition that "mandatory advancement decisions that were previously made must be maintained," also is misplaced. (SanFilippo Mem. at 15) Contrary to his suggestion, the Chancery Court did not rule, nor even suggest, in that case that once a company makes a discretionary decision to advance legal fees, the decision is irreversible. In short, the PPCO LLC Agreements do not require advancement and SanFilippo's motion, on that basis alone, must be denied.[14]

2. Movants Have Not Established Their Right to Advancement of Criminal Defense Fees under the Credit Funding or PPCO LP Agreements

[14] Because advancement under the PPCO LLC Agreements is *not* mandatory, the Court need not reach SanFilippo's argument that claims for mandatory advancement "must be paid ***before*** the Receiver satisfies PPCO's" other creditor claims. (SanFilippo Mem. at 16) His reliance on section 10.2.1 of the PPCO LLC Agreements is misplaced. That provision prescribes an asset distribution waterfall for the liquidating trustee to follow "[u]pon dissolution" of the entity. Since PPCO has not been dissolved, the prescribed waterfall has no application.

The Movants' motions to compel advancement are tantamount either to a motion for preliminary injunction or a motion for summary judgment. In either case, where, as here, questions of material fact as to advancement exist, the motion should be denied. *Aleynikov v. Goldman Sachs Grp., Inc.*, 2012 WL 6603397, at **3-12 (D.N.J. Dec. 14, 2012) (denying advancement sought as a matter of law under Delaware law).

In the absence of any definition of "Damages" for which an indemnified person may seek indemnity, section 11.2 of the Credit Funding agreement is ambiguous. *See, e.g., Matter of Pooling & Servicing Agreements*, 2018 WL 1229702, at * (S.D.N.Y. March 9, 2018) (agreement "rendered ambiguous" in the absence of any definition of "Liquidation Expenses"). That, in and of itself, necessitates denial of the motions of Levy, Small and Mann, who collectively rely on that agreement. Further, section 5.4(a) of the PPCO LP Agreement, also relied on by Levy, Small and Mann, requires the indemnified person to provide a "written undertaking to repay the Partnership for such reimbursed or advanced expenses if it is financially judicially determined that such Protected Person is not entitled to the indemnification provided by this Section 5.4." *See* p. 8 *supra*. No such undertakings have been provided on these motions.

More to the point, even if the Credit Funding and PPCO LP Agreements were to provide for advancement of legal fees in the abstract, Movants provide *no* competent evidence as to whether and what extent *they* are entitled to avail themselves of the right to advancement under those agreements. Movants submit *no* affidavits, other testamentary or even documentary, evidence establishing their positions, and/or on whose behalf they were performing work, at particular points in time. Moreover, the books and records of the Receivership Entities *contradict* many of Movants' unsworn statements concerning these details. (*See* p. 2-5 *supra*)

Beyond that, it is axiomatic that "only those fees which may ultimately be eligible for indemnification may be advanced: a demand for expenses for which indemnification would not be possible would not be reasonable." *Aleynikov v. Goldman Sachs Grp., Inc.*, 2012 WL 6603397, at *5 (D.N.J. Dec. 14, 2012) (quotation omitted; applying Delaware law). Thus, even if the Movants were entitled to advancement under the operative agreement, such advancement would have to be apportioned to reflect the extent to which the defense of the criminal proceeding is based on indemnifiable conduct during the relevant time period. *See, e.g., Happy Kids, Inc. v. Glasgow*, 2002 WL 72937, at **4-5 (S.D.N.Y. Jan. 17, 2002) (apportioning advancement duty on a claim by claim basis); *Booth Oil Site Administrative Group v. Safety-Kleen Corp.*, 137 F.Supp.2d 228, 238-39 (W.D.N.Y. 2000) (apportioning advancement duty by overall time of employment and overlap with time when alleged wrong occurred). Given that the indemnity agreements on which they rely concern their work (during unspecified times) in connection with *PPCO*, but the vast majority of the criminal charges concern the Movants' work for *PPVA*, even if the Receiver were required to advance the Movants' criminal defense fees (which she is not), her advancement obligation should not exceed any more than a small fraction of the Movants' total defense costs.

Conclusion

For all of the foregoing reasons, the Movants' motions for advancement should be denied in their entirety.

Dated: New York, New York
October 30, 2018

Respectfully submitted,

OTTERBOURG P.C.

By: /s/ Adam C. Silverstein
Adam C. Silverstein
Erik B. Weinick
230 Park Avenue
New York, New York 10169
(212) 661-9100
Attorneys for the Receiver