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

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

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Defendant David Levy respectfully submits this reply memorandum of law in further 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 Criminal Matter of *United States v. Nordlicht, et al.*, No. 1:16-cr-00640-BMC.

PRELIMINARY STATEMENT

As the Court is aware, the Receiver's refusal to honor Mr. Levy's advancement rights comes at a critical moment: not only is Mr. Levy's criminal trial just two months away, but the Government just belatedly produced over 260,000 pages of text messages and emails along with 20 hours of audio recordings, all obtained through undisclosed government cooperators—despite the Government having falsely and improperly represented for months that discovery had been completed. Mr. Levy's counsel had relied upon the Government's representations regarding the quantum of discovery, and had allocated resources so as to review the tens of millions of pages of documents already produced while conserving resources to examine 3500 material, retain and prepare expert witnesses, and defend Mr. Levy through trial. And in planning those resource allocations, Mr. Levy relied upon the knowledge that multiple agreements provided him with the right to have the Receivership Entities advance his attorneys' fees once Platinum Partners' insurance proceeds had been exhausted. The government's surprise production threw this careful planning into turmoil, and underlines the exigency of Mr. Levy's need for advancement so that he can mount the criminal defense the Constitution guarantees him.

Faced with Mr. Levy's Sixth Amendment right, the Receiver's opposition to Mr. Levy's motion resorts to mischaracterizing the relevant contracts, the nature of the charges pending in the Criminal Matter, and the applicable legal standards. The Receiver argues that Mr. Levy is not covered by the relevant agreements—yet two of those agreements ***expressly name Mr. Levy as a covered individual***. The Receiver argues that the Indictment relates to other Platinum

Partners entities and not the Receivership Entities—***yet PPCO (a Receivership Entity) is named in the first paragraph of the Indictment***, and dozens of more times throughout. The Receiver claims that as a matter of law, decisions by receivers do not implicate constitutional rights—yet the Receiver ignores ***multiple cases in which receivers have been held to account for violations of constitutional rights***. Finally, and though Mr. Levy's opening brief described at length other SEC litigations in which courts recognized the Sixth Amendment imperative to carve out funds for criminal defense from the temporary remedial measures instituted to protect resources otherwise, the Receiver simply ignores this compelling authority altogether.

The Receiver's denial of Mr. Levy's mandatory advancement rights on the eve of trial, especially in light of the Government's eleventh-hour discovery surprise, renders a Sixth Amendment violation incipient. As the Constitution requires, this Court should uphold Mr. Levy's right to access the funds to which he is entitled to defend his liberty.

POINT I: MULTIPLE AGREEMENTS PROVIDE MR. LEVY WITH A RIGHT TO THE ADVANCEMENT OF HIS CRIMINAL DEFENSE COSTS

The Receiver's position asks the Court to overlook the plain language of relevant agreements and the Indictment in the pending criminal manner. But ignoring the basis for Mr. Levy's claim does not excuse the Receiver from providing advancement.

A. Contractual Basis for Advancement

Mr. Levy's opening memorandum ("Levy Mem.") (DE 403) provided the multiple sources for Mr. Levy's advancement rights: the Credit Funding LLC Operating Agreement (the "Credit Funding Agreement") (Ex. 1), the Platinum Partners Credit Opportunities Master Fund LP Limited Partnership Agreement ("PPCO Master Fund Agreement") (Ex. 2), the Platinum Partners Credit Opportunities Fund LLC Agreement (Ex. 3), and the letter agreement dated June

16, 2016 (the "June 2016 Letter Agreement") (Ex. 6).[1] Each of these documents was provided to the Court as an exhibit in support of Mr. Levy's motion. And each of these agreements provides Mr. Levy with advancement rights against the Receivership Entities.[2]

1. June 2016 Letter Agreement: The Receiver does not and cannot contest that the June 2016 Letter Agreement provides mandatory advancement, or that it applies to Mr. Levy, or that it covers the allegations raised by the Criminal Matter—for those rights are its express purpose. Levy Mem. at 6-7. Instead, the Receiver is left to argue that the June 2016 Letter Agreement does not bind the Receivership Entities. Opp'n at 9-10. That is nonsense. The June 2016 Letter Agreement committed "Platinum Partners" to provide for advancement so as to provide Mr. Levy with indemnification and advancement rights payable by as broad as possible a group of corporate entities, including the Receivership Entities. The June 2016 Letter Agreement was signed by Mark Nordlicht on behalf of Platinum Partners, and the Receiver cannot contest that Mr. Nordlicht was an agent with authority to bind the Receivership Entities. Finally, the Receiver does not contest that the term "Platinum Partners" is a shorthand designation for the entire Platinum Partners family of funds and related entities. Levy Mem. at 6-7. Accordingly, the June 2016 Letter Agreement alone provides sufficient basis for advancement.

2. Credit Funding Agreement: The Receiver strains to read in ambiguity in the Credit Funding Agreement where none exists. Under Delaware law, a court interpreting a contract must construe terms which are "clear on their face" by giving them "their ordinary and usual meaning." *Ostroff v. Quality Servs. Labs., Inc.*, No. 423-N, 2007 Del. Ch. LEXIS 2, at *41 (Del. Ch. Jan. 5, 2007) (citations omitted). Under this standard, the advancement provision in the

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[1] Exhibits to October 19, 2018 Declaration of Eli B. Richlin in Support of Mr. Levy's Motion to Compel Advancement of Legal Fees (DE 404).

[2] The Receivership Entities are defined in the Second Amended Order Appointing Receiver. (DE 276).

Credit Funding Agreement can have only one meaning: that advancement is mandatory. That provision provides that upon a Portfolio Manager (defined to include Mr. Levy) may request "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.***" Ex. 1 § 11.2 (emphasis added). There is simply nothing ambiguous about this language. The Receiver then attempts to claim ambiguity as to the definition of "Damages," but the Credit Funding Agreement explicitly provides that indemnification and advancement includes expenses incurred "in connection with any investigation, claim, allegation, action, or proceeding, whether civil, ***criminal***, administrative, arbitrative or investigative." *Id.* (emphasis added). Nor can the Receiver contest that the Credit Funding Agreement covers Mr. Levy, as it expressly names him as a Portfolio Manager. Levy Mem. at 3-4.

3. PPCO Master Fund Agreement: The Receiver does not contest that the PPCO Master Fund Agreement provides for mandatory advancement—indeed, the Agreement expressly states that the PPCO Master Fund "***shall promptly reimburse (and/or advance to the extent reasonably required)*** each Protected Person for ***reasonable legal or other expenses (as incurred)***." Ex. 2 § 5.4 (emphasis added).

B. Mr. Levy's Role With The Receivership Entities And The Allegations In The Criminal Matter Trigger Advancement By The Receivership Entities

The Receiver's arguments that Mr. Levy did not provide services to the Receivership Entities, or that the Criminal Matter does not relate to the Receivership Entities, have no basis and do not excuse the Receiver's advancement obligations to Mr. Levy. As an initial matter, these arguments do not apply at all to Mr. Levy's advancement rights under the June 2016 Letter Agreement, because that agreement expressly names Mr. Levy, and also expressly guarantees advancement related to the Criminal Matter. Ex. 6. Similarly, the Credit Funding Agreement

expressly names Mr. Levy as a Portfolio Manager and provides him with advancement rights on that basis, as the Receiver cannot and does not contest.[3] Thus, the Receiver's arguments as to Mr. Levy's status are limited to the PPCO Master Fund Agreement.

Yet even as to that agreement, the Receiver cannot reasonably contest that Mr. Levy provided services to the PPCO Master Fund and related PPCO entities, all Receivership Entities. Indeed, the Receiver concedes that "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." Opp'n at 4. Though the Receiver attempts to cabin Mr. Levy's role, Platinum's records—to which the Receiver has access—reflect that he served in the same role for the PPCO Master Fund as well. For example, the PPCO Master Fund August 2015 letter identified Mr. Levy as the Co-Chief Investment Officer for that fund. November 6, 2018 Declaration of Eli B. Richlin in Support of Mr. Levy's Motion to Compel Advancement of Legal Fees, Ex. 11.

The Receiver's argument that the Criminal Matter does not relate to the Receivership Entities also strains credulity, as even a cursory review of the Indictment reveals. Indeed, ***PPCO is mentioned in the first paragraph of the Indictment***, and the Indictment is otherwise replete with references to PPCO, including the following:

- ¶ 3: Describing PPCO as "Platinum's credit fund [which] acted as a master fund comprised of four feeder funds." "In marketing materials sent to investors and prospective investors, Platinum claimed that PPCO had returned profits of more than eight percent in 2015 and an average annualized return of 10.25 percent for the period from August 2007 through December 2015."

- ¶ 42: Alleging that "between November 2012 and December 2016," Mr. Levy, among others, "engaged in a scheme to defraud investors and prospective investors in Platinum through material misrepresentations and omissions relating to, among other things . . . related party transactions involving PPVA and PPCO."

[3] The Managing Member of Credit Funding was PPCO, a Receivership Entity, and Mr. Levy and others provided services to PPCO through Credit Funding.

- ¶ 54: Alleging that in 2014, Mr. Levy, among others, engaged in a scheme that concealed that "PPVA was relying on undisclosed high interest loans from related parties such as PPCO and Beechwood."
- ¶ 59: Alleging that "between 2013 and 2016, Platinum moved money among PPVA, PPCO and PPLO to meet liquidity demands in the three funds."
- ¶ 69: Describing email correspondence from an investor forwarded to Mr. Levy regarding "6 million dollars tied up in PPVA and PPCO."
- ¶ 71: Describing alleged "fraudulent scheme" by Mr. Levy and others to pay "redemptions and interest payments on a preferential basis" when "Platinum was unable to fulfill the vast majority of redemption requests in either PPVA, PPCO or PPNE."
- ¶ 72: Alleging that as of January 29, 2016, Platinum owed "more than $84 million to PPCO's investors."
- ¶¶ 80-86: Describing alleged scheme related to Black Elk bonds, including bonds held by PPCO.

Criminal Matter, Indictment (DE 1). Moreover, the Government's recent production of an exhibit list contains thousands of PPCO documents, and the Government's 3500 material similarly reflects statements relating to PPCO by dozens of individuals. In sum, allegations regarding Mr. Levy's work for PPCO—whose master fund and sub-funds are all Receivership Entities—form an essential part of the prosecution and give rise to an advancement obligation.

POINT II: MR. LEVY'S ENTITLEMENT TO ADVANCEMENT CREATES A SIXTH AMENDMENT RIGHT THE RECEIVER MAY NOT DISREGARD

Mr. Levy's opening brief demonstrated that Delaware law requires enforcement of mandatory advancement rights, and that Mr. Levy's expectation of advancement—grounded in his contractual rights—amounted to a cognizable property interest protected by the Sixth Amendment. Further, Mr. Levy's opening brief discussed multiple cases holding that remedial measures instituted in the context of SEC civil actions may not impinge upon those rights. Remarkably, the Receiver ***ignores*** this authority to instead focus on altogether distinguishable cases that have nothing to do with Mr. Levy's claim for advancement.

It is telling that the Receiver does not even attempt to discuss the principal cases cited in Mr. Levy's opening brief. The Receiver argues that no constitutional rights may be implicated by her decisions because she is a private actor—but an action initiated by the SEC can present a paradigmatic threat to a criminal defendant's Sixth Amendment rights. Accordingly, courts have not hesitated to limit the intermediate remedies imposed during SEC actions so as not to infringe upon Sixth Amendment rights. Mr. Levy's opening brief cited two such cases, yet the Receiver pretends that they do not exist. In *SEC v. FTC Capital Markets, Inc.*, the Southern District of New York had implemented an asset freeze following the initiation of the civil action by the SEC. No. 09 Civ. 4755 (PGG), 2010 U.S. Dist. LEXIS 65417, at *4 (S.D.N.Y. June 29, 2010). One of the individual defendants had been charged in a parallel criminal action, and argued that the asset freeze infringed upon her Sixth Amendment right to advancement. *Id.* at *1. As the Receiver does here, the SEC opposed advancement by arguing that her Sixth Amendment rights were not implicated. *Id.* at *10. The court 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. 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.[4]

Similarly, in *SEC v. Thibeault*, the SEC moved for an asset freeze in connection with allegations of securities fraud and other deceptive conduct. 80 F. Supp. 3d 288, 290 (D. Mass.

[4] The Southern District in *FTC Capital Markets* relied upon the Second Circuit's decision in *United States v. Stein*, another case cited by Mr. Levy's opening brief which the Receiver does not address. In *Stein*, the defendants had expectations that KPMG would fund their legal defense costs. 435 F. Supp. 2d 330, 353, 367 (S.D.N.Y. 2006). KPMG decided to withhold payment of those legal defense costs in the midst of a Government investigation. *United States v. Stein*, 541 F.3d 130, 137-38 (2d Cir. 2008). Although this decision was made by a private actor, the Second Circuit agreed that the defendants' Sixth Amendment rights had been violated by KPMG's decision because it was made in the context of the Government's investigation. *Id.* at 143.

2015). The court agreed to freeze corporate and individual assets on the basis of the SEC's showing on its motion for a temporary restraining order. *Id.* Yet the court carved-out sufficient funds for an individual defendant to use "for attorneys' fees for [his] criminal defense," recognizing that his constitutional rights were threatened by the provisional remedy in the SEC action. *Id.* at 295. Indeed, the court made plain that "courts have recognized a distinction between civil and criminal cases because the Sixth Amendment right to counsel protects an individual's right to a lawyer of her choice." *Id.* at 294.[5]

The Receiver attempts to argue that *FTC Capital Markets* and *Thibeault* have no application here because they involved carve-outs from asset freezes rather than carve-outs from a receivership (Opp'n at 19-20), but that belies the above authority and common sense. What motivated the courts to provide for advancement in both cases was not the ***nature*** of the threat to a criminal defendant's Sixth Amendment right to counsel, but rather that the criminal defendants had a right to use funds for their criminal defense, that this created a constitutional entitlement, and the SEC action could not be used to infringe those rights. Indeed, it would be nonsensical (and create perverse incentives) to limit SEC asset freezes on the one hand while permitting SEC receivers to run roughshod over Sixth Amendment rights on the other hand.

Unable to contest the import of this authority, the Receiver resorts to misrepresenting the law. The Receiver first asserts that actions by court-appointed receivers can ***never*** infringe upon another person's constitutional rights, but that is plainly false. Indeed, and contrary to the Receiver's claim that no court has ever treated a receiver as "a state actor whose actions are capable of violating the Constitution" (Opp'n at 17-18), courts across the country have found just

[5] *See also SEC v. McGinn*, No. 10-CV-457 (GLS/DRH), 2012 U.S. Dist. LEXIS 47639, at *6, 13 (N.D.N.Y. Apr. 4, 2012) (noting that Sixth Amendment concerns apply "equally in an SEC civil enforcement action" and ordering release of frozen "assets from the preliminary injunction to pay attorney's fees and costs in the parallel criminal action").

that. *See, e.g.*, *Lebbos v. Judges of Superior Court, Santa Clara Cty.*, 883 F.2d 810, 818 (9th Cir. 1989) (court-appointed receiver's invasion of plaintiffs' business and seizure of real property deemed state action and implicated constitutional rights); *Downeast Ventures, Ltd. v. Wash. Cty.*, No. 05-87-B-W, 2005 U.S. Dist. LEXIS 32649, at *35-36 (D. Me. Dec. 12, 2005) (denying motion to dismiss and finding that receiver could be held liable under § 1983 for alleged violation of plaintiff's constitutional rights); *Hohensee v. Grier*, 373 F. Supp. 1358, 1364 (M.D. Pa. 1974).[6]

The Receiver then falls back on facially inapposite decisions. The Receiver cites again to two Delaware cases regarding demands for advancement in the context of a receivership,[7] but as discussed in Mr. Levy's opening brief, neither decision implicates constitutional rights and these cases have no application here. Levy Mem. at 15. Neither case involved a receiver appointed in the context of SEC litigation, and neither case considered a claim for advancement for purposes of criminal defense. The Receiver then falsely claims that a District of Utah decision is somehow controlling (Opp'n at 20-21), but as the Tenth Circuit recognized in the appeal of that decision, the district court that heard the defendant's Sixth Amendment challenge ***lacked***

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[6] By contrast, two of the cases the Receiver cites do not even relate to whether a court-appointed receiver has violated an individual's constitutional rights. *Litton Indus., Inc. v. Lehman Bros. Kuhn Loeb Inc.*, 125 F.R.D. 51, 53 (S.D.N.Y. 1989) (receiver could not invoke deliberative process privilege); *United States v. Beszborn*, 21 F.3d 62, 68 (5th Cir. 1994) (receiver's civil action did not constitute prosecution for double jeopardy purposes). And the third decision did not implicate Sixth Amendment rights or SEC action at all. *Herron v. Fannie Mae*, 857 F. Supp. 2d 87, 92 (D.D.C. 2012).

Moreover, while the initiation of the receivership pursuant to the SEC's request provides a sufficient nexus to implicate Mr. Levy's Sixth Amendment rights, the SEC has continued to enmesh itself in the Receiver's decisionmaking, as evidenced by its actions to remove the initial Receiver (Bart Schwartz), and its obtaining the ability to withhold fees sought by the Receiver in the SEC staff's discretion (DE 276).

[7] The cases are *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).

jurisdiction over the frozen funds the defendant had sought to use to fund his criminal defense, as those funds had been frozen by a District of Nevada court in a ***separate*** action. *See United States v. Johnson*, 731 F. App'x 638, 652 (10th Cir. 2018). Here, of course, this Court has jurisdiction over both the Criminal Matter and the SEC action, and has the ability to carve out Mr. Levy's criminal defense fees from the receivership in the same way that other courts have done in SEC litigation.

POINT III: THE RECEIVER'S LOGISTICAL CONCERNS DO NOT PROVIDEREASON TO DENY MR. LEVY'S MOTION

In a last-ditch effort to avoid her advancement obligations, the Receiver attempts to manufacture logistical obstacles, arguing that Mr. Levy has not provided an undertaking, and that the Indictment's allegations extend to other Platinum Partners entities beyond the Receivership Entities. Yet these concerns cannot trump Mr. Levy's constitutional rights, and are easily resolved. Indeed, it is telling that the Receiver never raised these concerns when Mr. Levy previously sought advancement. The undertaking is only required by the PPCO Master Fund agreement, so any absence of an undertaking has no impact on the Receiver's advancement obligations under the Credit Funding Agreement or the June 2016 Letter Agreement, and it may easily be supplied in any event. Finally, the Receiver's apportionment argument does not negate her advancement obligation, and any apportionment concerns can no doubt be addressed through billing practices in the ordinary course, as is common.

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,

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New York, New York

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