UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,	
Plaintiff,	Docket No.:16-CV-6848 (BMC)
- 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.	

MEMORANDUM OF LAW IN REPLY TO RECEIVER'S OPPOSITION TO JOSEPH SANFILIPPO'S MOTION TO COMPEL THE SEC RECEIVER TO INDEMNIFY HIM PROMPTLY FOR HIS REASONABLE ATTORNEY'S FEES AND DEFENSE COSTS

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Mr. SanFilippo submits this Memorandum in reply to the Receiver's Memorandum in opposition to his motion to compel the Receiver to indemnify him promptly for his attorney's fees and defense costs in the *Nordlicht* criminal case ("Opp. Mem.," filed on October 30, 2019 [Dkt. No. 497]).

PRELIMINARY STATEMENT

Under Delaware law – as expressed in Section 145 of the state's indemnification statute, in judicial decisions, and in PPCO's Operating Agreement – an exonerated defendant such as Mr. SanFilippo is entitled to swift and certain indemnification. This follows from Delaware's public policy that in-state corporations be able to attract qualified officers and directors who are "secure in the knowledge that the corporation will absorb the costs of defending their honesty and integrity," and that those who so serve be able to "resist an unjustified lawsuit" because they are "secure in the knowledge that, if vindicated, the corporation will bear the expense of litigation." *VonFeldt v. Stifel Fin. Corp.,* Del. Supr., 714 A.3d 79, 84 (1998). The *VonFeldt* court twice repeats that the defendant must be "**secure** in the knowledge" that he or she will be indemnified, to emphasize that the promise of indemnification must be ironclad, not conditional or hypothetical, for Delaware public policy to be realized. Having prevailed against an unjust lawsuit, at great personal expense but "secure in the knowledge" that his expenses would be covered, Mr. SanFilippo is now entitled to indemnification.

The Receiver, however, asserts that Delaware statutes and courts do not mean what they say. First, it argues that Mr. SanFilippo has no priority over other unsecured claimants, all of whom must wait in line until more privileged claims have been satisfied. [Op. Mem. at 5ff.] The Receiver asserts this even after it reaped **more than $4 million** in administrative fees for itself and its professionals during the most recent quarter – far larger than Mr. SanFilippo's total

claim – while foreseeing around $5 million more in such fees in the months ahead. [Receiver's Ninth Status Report to the Court, Dkt. No. 495, at 11-12]. The fundamental flaw in the Receiver's denigration of Mr. SanFilippo's claims as unsecured and not truly administrative is that all of these priority criteria are taken from **bankruptcy** rules, and this is not a bankruptcy proceeding. Even cases such as *Andrikopoulos*, which looked to these criteria in circumstances far different from those here [*see* Mr. SanFilippo's Opening Mem., Dkt No. 490-5, at 10-12], rightly considered bankruptcy law an "analogy" only, useful to the extent there was "minimal statutory guidance" in the area of advancement of legal fees and expenses by receivers. [*Id*. at 10]. In Mr. SanFilippo's case, by contrast, the Receiver's obligation to indemnify is clear under Delaware law.

The Receiver's second argument is even more startling. The Receiver asserts it would be "premature" to conclude that Mr. SanFilippo has any right to be indemnified at all for the costs of his nine-week criminal trial, notwithstanding his acquittal across the board. After all, speculates the Receiver, Mr. SanFilippo might yet be found to have acted fraudulently or committed willful misconduct in the SEC action, or in connection with Mr. Levy's Rule 29 appeal, or in connection with a "claims process" that has not yet even begun. Besides, the estate is subject to senior liens that may, in the fullness of time, prevent any distributions to unsecured creditors, depending among other things on the outcome of litigation **the Receiver itself** initiated against the lien holders. [Opp. Mem. at 10-12; Cyganowski Aff. Dkt. No. 496, at 2]. All these excuses, if allowed to stand, would mean Mr. SanFilippo, having survived and triumphed over one legal ordeal, must now endure another one – indefinitely – if he hopes to recover for his losses. This rank injustice is not tolerated under Delaware law.

For all these reasons, and those put forward in our prior papers, the Court should order

the Receiver to indemnify Mr. SanFilippo immediately for all of his outstanding legal fees and expenses incurred in his successful defense in the *Nordlicht* case.

ARGUMENT

I. Bankruptcy Priority Rules Are No Bar to Mr. SanFilippo's Right to Immediate Indemnification

According to the Receiver, Mr. SanFilippo's right to indemnification must give way to priority criteria adopted from bankruptcy proceedings, which establish that his claims "are neither administrative nor secured." [Opp. Mem. at 5]. However, none of these criteria, even on its face, is an impediment to Mr. SanFilippo's indemnification rights. The record – even in the absence of a hearing – shows that he should be entitled to administrative priority because (1) his claims are effectively post-petition, not pre-petition, claims; and (2) his actions amply benefited the estate.

While the Receiver conveys the impression that the distinction between pre- and post-petition claims is black-and-white, with any indemnification claim based on agreements reached **before** the receivership petition supposedly disqualified from administrative priority, the reality is very different. At least two of its cited cases disqualified claims because the **services themselves** occurred prior to the receivership. *See, e.g., In re Consolidated Oil & Gas, Inc.* ("claimants provided services to the Debtor pre-petition, exclusively and entirely") [Opp. Mem. at 6]; *In re Christian Life Center* ("the critical fact is that the claim for indemnity arose from prepetition services [that the officer of the debtor] provided the corporation") [*Id*. at 7]. By this standard, Mr. SanFilippo's claim is surely administrative, since his services to the estate culminated in his acquittal in July 2019, while the Receiver was appointed far earlier, in October

2017.[1] Moreover, it also cannot be disputed that Mr. SanFilippo's indemnification claim did not ripen until his July 2019 acquittal, making it effectively a post-petition claim under any fair standard. *See, e.g., Weingarten v. Gross*, 264 Va. 243, 249 (2003) ("[T]he claim for statutory mandatory indemnification for directors did not arise until the Directors 'entirely prevail[ed]' in the action brought against them by the Deputy Receiver.").

Similarly, Mr. SanFilippo plausibly benefited the estate in at least two respects, by buttressing the reputation of Platinum and therefore the sale price of Platinum assets, and by warding off litigation that might depress the value of those assets and add to the costs of administering the estate. The Receiver dismisses these benefits as speculative, pointing to the supposed lack of any hard evidence that asset prices rose following the jury verdict, but it is not a stretch to conclude that the values of estate assets and the costs of administration would have been far **worse** but for Mr. SanFilippo's well-publicized acquittal, which destroyed the government's central assertion that Platinum assets were fraudulently overvalued. Mr. Sanfilippo is entitled to a favorable inference in light of the jury's total rejection of all criminal charges against him.

More fundamentally, the Receiver mistakenly assumes that bankruptcy law, the source of the priority rules it relies on, should automatically be followed here. This Court, in ruling on Mr. SanFilippo's earlier Advancement Motion, did cite *Andrikopoulis,* which adopted bankruptcy law priority rules [Dkt. No. 417 at 6]. However, the *Andrikopoulis* court adopted these rules not because they necessarily applied – obviously not so in a non-bankruptcy matter – but because in an area of the law (prioritizing claims to advancement in a receivership proceeding) where there

[1] The receiver correctly notes that "Defendants stood trial for conduct that occurred *before* the receivership was created" [Opp. Mem. at 7], but that fact is irrelevant.

was "minimal statutory guidance," the court believed that "the bankruptcy *analogy"* was most persuasive under the specific circumstances. *Andrikopoulos v. Silicon Valley Innovation Company, LLC*, 120 A.3d 19, 21-22 (Del. Ch. 2015) (emphasis added); [Opening Mem., Dkt. No. 490-5, at 10-12]. The Receiver itself agrees that "[d]ue to the limited amount of case law available regarding receiverships, receivership courts *often look to bankruptcy law for guidance*." [Opp. Mem. at 6 (emphasis added)].

"Often" does not mean always. This is one case where the Court should **not** be constrained by bankruptcy rules. In contrast to *Andrikopoulis*, this is a case about indemnification, after total vindication at trial – not advancement. It is a case where the claimant's conduct benefited the estate, rather than threatening harm by diverting scarce assets to finance a defense against the estate itself. *See Andrikopoulis*, 120 A.3d at 20, 23. Finally, it is a case where the claimant's claim against the Receiver is directly mandated by the law of Delaware, after he successfully "resisted an unjust lawsuit" that would have deprived him of liberty.

II. Mr. SanFilippo's Claims for Indemnification Are Not "Premature"

The Receiver contends that Mr. SanFilippo is "ineligible" for indemnification because "even if" his "acquittal stand[s]" he "may be found civilly liable and/or the claims may determine that the Bad Actor Exclusions" apply. (Opp. Mem at 10–11). This rank speculation is no basis for refusing to indemnify him for the expenses he incurred in his successful defense of the criminal case. In fact, it would be improper for the Receiver to so refuse. Delaware law is clear that an officer or director exonerated of criminal charges is entitled to immediate indemnification for expenses incurred in **that** proceeding, regardless of any potential subsequent

civil liability. *See Green v. Westcap Corp.*, 492 A.2d 260, 265 (Del. Sup. Ct. 1985). As the court explained in *Westcap,* in terms directly applicable to Mr. SanFilippo:

> Here, [the indemnified individual] only seeks indemnification for his successful defense of the criminal charge. This suit goes no further than that criminal defense. It does not establish his right to indemnification for expense incurred in any other litigation. **Under § 145 indemnification must be considered as each criminal or civil proceeding arises or is concluded**. Presumably each will involve its own expenses…**Whether [the indemnified individual] is or will be entitled to indemnification for defense of the Texas civil litigation is, of course, not before the Court in this suit.**

Id. at 165–66 (emphases added). *See also Marino v. Patrio Rail Company*, 131 A.3d 325, 345–46 (Del. Ch. 2016) (unlike advancement, "mandatory indemnification" rights "ripen" on "the final disposition of the covered claim").

Delaware courts make even finer discriminations in order to uphold a successful claimant's right to indemnification, permitting **partial** indemnification where a criminal defendant successfully defends against some counts but not others. *See Fasciana v. Electonic Data Systems Corp.*, 829 A.2d 178, 186 (Del. Ch. 2003) (quoting *Merritt-Chapman & Scott Corp. v. Wolfson*, 321 A.2d 138, 141 (Del. Super. Ct. 1974) (permitting "partial indemnification")). The Receiver's assertion that it can evade indemnification payments for Mr. SanFilippo's successful defense in the criminal proceedings, based merely on the theoretical possibility that some day he might incur subsequent civil liability, has been rejected by Delaware law.

Finally, the Receiver argues that senior debt purportedly encumbering the assets of the Receivership with liens might render Mr. SanFilippo unable to obtain indemnification, no matter how deserving his claims. But this misconstrues Mr. SanFilippo's rights to indemnification. He is entitled to payment now from assets that are *not* subject to any liens in the same manner that

the Receiver's fees are paid promptly each quarter, and without regard to the outcome of the protracted litigation. If the Receiver is able to receive timely payment for her work from fund assets, so too should Mr. SanFilippo. In any event, lien encumbrance is only a bare possibility, which should not interfere with Mr. SanFilippo's right to immediate indemnification. Indeed, the Receiver itself has **sued** these very lien holders, seeking, "among other relief, **the avoidance of certain liens which may otherwise adversely impact potential distributions to investors and creditors**, as well as damages for claims arising from a fraudulent scheme perpetrated to the detriment of Platinum." [Cyganowski Aff. Dkt. No. 496, at 2; emphasis added].[2] Mr. SanFilippo should not have to wait upon a massive lawsuit, among other contingencies, before his indemnification claim is resolved. He is entitled to indemnification now.

CONCLUSION

For all these reasons, and those put forward in our prior papers, the Court should order the Receiver to indemnify Mr. SanFilippo immediately for all of his outstanding legal fees and expenses incurred in his successful defense in the *Nordlicht* case.

Dated: New York, New York
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[2] The case is *Cyganowski, et al. v. Beechwood Re LTD. et al.*, U.S. District Court for the Southern District of New York, Case No. 18-cv-12018 (JSR).