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 INDEMNIFICATION

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

PRELIMINARY STATEMENT

When Mr. Levy's counsel, Wilson Sonsini Goodrich & Rosati ("WSGR"), first approached the Receiver to confirm Platinum's indemnification and advancement obligations to Mr. Levy and Platinum's separate payment commitment to Mr. Levy's counsel at WSGR, the Receiver registered no express objection, and asked only to defer discussion of those obligations until the insurance policies covering Mr. Levy's legal fees were exhausted. Yet when that inevitability finally occurred, the Receiver then about-faced, refusing to advance Mr. Levy the expenses he was owed by contract and Delaware law, and further refusing to honor Platinum's payment obligations to WSGR.

Now that Mr. Levy has been vindicated in the Criminal Matter, the Receiver can no longer avoid her obligations to either Mr. Levy or WSGR. Mr. Levy has indemnification rights from Platinum that this Court has already confirmed. As a result of Mr. Levy's acquittal in the criminal trial, he is now entitled to be reimbursed for his legal fees and costs incurred in connection with that trial as a matter of law and public policy.

In addition, Platinum, through the Receiver, must now also meet its obligations to WSGR. WSGR was engaged by Platinum to provide a zealous legal defense for Mr. Levy. Platinum recognized that the services to be performed by WSGR would be ongoing through the Receivership. And WSGR has never once shirked those responsibilities despite the enormity of the fees and costs it has incurred in its representation of Mr. Levy and the non-payment of those fees and costs under the agreement between WSGR and Platinum. But it is now time for the Receiver to face the reality of the arrangement made between Platinum and Mr. Levy's counsel and the nature of the services WSGR continues to provide. Just like the Receiver and the professionals she has retained to provide services to Platinum, WSGR has incurred – and continues to incur – tremendous cost in fulfilling its obligations both to Platinum and the Court.

Yet, while the Receiver has asked that she be paid for her services, and while she has made numerous applications for the lawyers and other professionals she has engaged to be paid millions of dollars for the work they have performed – all of which have been approved by the Court – she continues to refuse to make an application on behalf of WSGR. WSGR should not be treated any differently than these other professionals, and under the terms of the agreement between Platinum and WSGR, it should immediately be paid for the legal representation it has provided to date and continues to provide.

ARGUMENT

I. MR. LEVY'S INDEMNIFICATION RIGHTS HAVE VESTED, AND HE IS ENTITLED TO IMMEDIATE PAYMENT OF HIS LEGAL FEES AND EXPENSES

Now that Mr. Levy has been fully vindicated in the Criminal Matter, he is entitled to ***mandatory indemnification*** pursuant to the express terms of the Credit Funding Agreement, the PPCO Master Fund Agreement, the PPCO LLC Agreement, the Platinum Partners Credit Opportunities Fund (TE) LLC Agreement, and the Platinum Partners Credit Opportunity Fund (BL) LLC Agreement. *See* Dkt. 494-1 at 3-6, 12-13. The Receiver does not dispute this – instead, she conflates indemnification and advancement, baselessly argues that Mr. Levy's claim is "premature," and draws inapposite analogies to support its opposition. These arguments all fail.

First, the Receiver's argument that Mr. Levy's motion is an "untimely appeal" of the Court's prior decision on Mr. Levy's motion for advancement (Receiver's Opp. Br., Dkt. 497 ("Opp.") at 12-13) is obviously wrong – that motion and decision concerned *advancement*, not *indemnification*. "Delaware law is well settled that the right to indemnification and the right to advancement are distinct." *Morgan v. Grace*, No. Civ. A. 20430, 2003 WL 22461916, at *3 (Del. Ch. Ct. Oct. 29, 2003). Indeed, while "[a]dvancement is determined as a matter of

contractual right and is generally determined without regard to the merits of the underlying suit[,]" *SEC v. Illarramendi*, No. 3:11CV78 JBA, 2014 WL 545720, at *5 (D. Conn. Feb. 10, 2014) (citing *Ridder v. CityFed Fin. Corp.*, 47 F.3d 85, 87 (3d Cir. 1995)), indemnification is not granted only by contract but is also ***mandatory*** as a matter of Delaware law and public policy.[1] *See* Dkt. 494-1 at 11 (citing 8 Del. C. § 145(a)-(c); *Brown v. Rite Aid Corp.*, No. CV 2017-0480-MTZ, 2019 WL 2244738, at *4 (Del. Ch. Ct. May 24, 2019)). Now that Mr. Levy has been acquitted of all charges in the Criminal Matter, his right to indemnification is squarely ripe. *See Green v. Westcap Corp. of Del.*, 492 A.2d 260, 265 (Del. Super. Ct. 1985) ("Under § 145 indemnification must be considered as each criminal or civil proceeding arises ***or is concluded***.") (emphasis added); *see also Perconti v. Thornton Oil Corp.*, No. Civ. A. 18630–NC, 2002 WL 982419, at *7 (Del. Ch. Ct. May 3, 2002) ("If the former officer is 'successful on the merits or otherwise' in a proceeding described in Section 145(a), then he is entitled to indemnification regardless of whether or not he acted in good faith or in what he perceived to be the best interests of the corporation. Dismissal of the charges against Perconti by the government, for whatever reason, constituted 'success.'"); *Merritt-Chapman & Scott Corp. v. Wolfson*, 321 A.2d 138, 141 (Del. Super. Ct. 1974) ("In a criminal action, any result other than conviction must be considered success.") (superseded by statute on other grounds). Accordingly, Mr. Levy's right to indemnification is distinct from his right to advancement and has nothing whatsoever to do with any kind of "appeal" from this Court's advancement Order.[2]

[1] The relevant agreements are all governed by Delaware law. *See* Credit Funding Agreement at § 13.2; PPCO Master Fund Agreement at § 11.4; PPCO LLC Agreement at § 14.2; PPCO (TE) LLC Agreement at § 14.2; PPCO (BL) LLC Agreement at § 14.2.

[2] The Receiver's reliance on *SEC v. Lauer*, No. 03-80612-CIV, 2012 WL 12892878 (S.D. Fla. July 24, 2012), is inapposite. *Lauer* concerns the timeliness of a director's application for

Second, the Receiver argues that Mr. Levy's claim for indemnification is somehow "premature." According to the Receiver, as Mr. Levy could one day still be found liable in a civil case, the exclusions for bad conduct could render him ineligible for indemnification. *See* Opp. at 10-11. The Receiver is wrong on this as well. Mr. Levy currently seeks indemnification solely with respect to the Criminal Matter; a case in which Mr. Levy has been fully vindicated. Both the law and the operative language of the agreements make clear that he is entitled to indemnification now. Indeed, the very argument being advanced by the Receiver has already been considered and rejected by Delaware courts:

> [W]here there is no punishment to avoid—i.e., there has been no conviction, no fine, and no settlement payment—the corporation may not inquire into the good faith and lawfulness of its indemnitees. Rather, the second integral part of the § 145 scheme is that corporate indemnitees have an absolute right to mandatory indemnification where they are 'successful on the merits or otherwise' in the underlying proceeding. In other words, § 145(c) assures corporate indemnitees that their reasonable legal expenses will be paid any time they are 'successful' in a proceeding. An indemnitee in a criminal proceeding is successful any time she avoids conviction: '[s]uccess is vindication . . . any result other than conviction must be considered success.' . . . [I]ndemnification decisions should be made on a case-by-case basis, especially where the governing bylaw or organizational document provides broad, mandatory indemnification rights. To do otherwise would be the same as requiring indemnitees to wait for all proceedings against them arising from the same set of operative facts to be concluded before receiving indemnification for any of them, which this court has held to be improper in similar circumstances.

Stockman v. Heartland Indus. Partners, L.P., No. Civ. A. 4227-VCS, 2009 WL 2096213, at *10-11 (Del. Ch. Ct. July 14, 2009) (quoting 8 Del. C. § 145(c); *Wolfson*, 321 A.2d at 141) (citing *Waltuch v. Conticommodity Servs., Inc.*, 88 F.3d 87, 96 (2d Cir. 1996) ("'[S]uccess' under § 145(c), does not mean moral exoneration. Escape from an adverse judgment or other detriment, for whatever reason, is determinative."); *Zaman v. Amedeo Holdings, Inc.*, No. Civ.

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legal fees to the receiver, which was made approximately seven years after the court-ordered deadline by which to submit claims against the receivership entities. *Id.* at *1-2. There is no similar issue here.

A. 3115-VCS, 2008 WL 2168397, at *22 (Del. Ch. May 23, 2008) ("The success on the 'merits or otherwise' standard is one that grants indemnification to corporate officials even when they have not been adjudged innocent in some ethical or moral sense.")). Mr. Levy has been adjudged not guilty and acquitted, and thus his indemnification claim is ripe.

Furthermore, the operative language of the governing agreements relating to Mr. Levy's indemnification rights is clear that these rights have now vested. In fact, the language quoted by the Receiver herself clearly states that *liability must be established first* before indemnification can be refused. *See* Opp. at 11-12 (quoting PPCO LLC Agreement at § 5.4.2 ("No indemnification may be made . . . as to which the indemnified party *shall have been adjudged to be liable* for gross negligence, willful misconduct, or fraud in the performance of its duties to the Company . . . ."); Credit Funding Agreement at § 11.2 ("[T]he Company [Credit Funding] shall indemnify . . . *except to the extent that a judgment or other final adjudication adverse to such Person establishes* that his or her acts were committed in bad faith or were the result of gross negligence or willful misconduct."); PPCO Master Fund Agreement at § 5.4(a) ("[T]he Partnership shall indemnify . . . *unless such Liability results* from such Protected Person's own gross negligence . . . willful misconduct or a willful violation of the law.")) (emphases added).

Faced with these clear contractual terms, the Receiver asks the Court to re-write the plain language of these contractual obligations to deny Mr. Levy indemnification for successfully defending against the allegations in the Criminal Matter on the *chance* that the judgment of acquittal might be reversed on appeal, or that he might be found liable at some later time in some other case. Suffice it to say that this position lacks basis in the governing agreements and the law: Mr. Levy has been vindicated in the Criminal Matter, his indemnification rights as to that matter are ripe, and the Court should reject the Receiver's request to re-write the Platinum

agreements.[3]

Third, the Receiver's continued reliance on bankruptcy law to erect some kind of priority payment scheme is unavailing and contrary to the law. Indeed, "the Second Circuit [has] warn[ed] that a 'receivership should not be used as an alternative to bankruptcy,' and has 'disapproved of district courts using receivership as a means to process claim forms and set priorities among various classes of creditors.'" *Illarramendi*, 2014 WL 545720, at *8 (quoting *Eberhard v. Marcu*, 530 F.3d 122, 132 (2d Cir. 2008)). As such, "implementing the Delaware policy of advancement [and indemnification] should supplant any contradictory analysis drawn [from] bankruptcy law." *Id.* That policy, as noted above, strongly favors that Mr. Levy be paid indemnification immediately. *See, e.g.*, *id.* at *7. ("In the context of the strong Delaware policy of indemnification and advancement of attorney's fees, the reasoning of *Weingarten* and *Lawson* is persuasive, even though the former directors there had already prevailed in the receivers' actions against them, because the same policy considerations that favor indemnification after a director prevails on the merits also favor the advancement of legal fees to defend a claim."); *Lawson v. Young*, 21 Ohio App. 3d 190, 192 (Ohio Ct. App. 1984).

The Receiver's attempt to distinguish *Illarramendi* and *Lawson* by simply noting that they involved "suits brought against [the directors] *by the receiver*," Opp. at 10 (emphasis in original), is similarly unpersuasive. Indeed, *Lawson* noted that "[w]e see no reason to hold that a

[3] The Receiver's reliance on Judge Rakoff's deferral of his decision on Mr. Levy's request for post-trial relief in *David Levy v. Senior Health Insurance Company of Pennsylvania*, No. 19-cv-3211 (S.D.N.Y.) (the "SHIP Matter"), is not dispositive in this regard. As an initial matter, the contract at issue in that matter had very different language, as Judge Rakoff himself acknowledged. *See* SHIP Matter, Dkt. 85 (Memorandum Decision & Order) at 3 n.1, 5-6. Moreover, Mr. Levy has filed a motion to reconsider in that matter, which like this motion, points out the fundamental differences between advancement and indemnification that is so firmly rooted in Delaware law. *See* SHIP Matter, Dkts. 87, 89.

corporation's insolvency acts to relieve the statutory right to indemnification and reimbursement due to the fact that the action was brought by the corporation's receiver on behalf of the creditors when the same action could have been easily brought by the corporation itself." 21 Ohio App. 3d at 192. The same logic applies here: Mr. Levy's "statutory right to indemnification and reimbursement" by the Receivership Entities is the same, regardless of whether the claims were brought by the receiver or the government.

That this is a motion for indemnification and not advancement similarly distinguishes this case from those cited by the Court in its decision on Mr. Levy's prior motion for advancement, *Andrikopoulos v. Silicon Valley Innovation Co., LLC*, 120 A.3d 19 (Del. Ch. Ct. 2015) and *Henson v. Sousa*, No. 8057–VCG, 2015 WL 4640415 (Del. Ch. Ct. Aug. 4, 2015), both of which concerned the priority treatment of advancement claims in the receivership context. Unlike the individuals in those cases, who sought advancement for legal fees while in the midst of defending themselves, Mr. Levy has been adjudged not guilty of any wrongdoing. As such, the policy concerns driving the indemnification cases relied upon by *Illarramendi* – that finding otherwise would dissuade talented individuals from serving as directors of corporations, or from attempting to revive the sagging fortunes of a potentially insolvent company out of fear of having to "face the prospect of having to defend their actions at their own costs without the opportunity to recover their expenses should they successfully defend those actions[,]" 2014 WL 545720, at *7 (quoting *Lawson*, 21 Ohio App. 3d at 192) – *are more significant here*. Indeed, this argument was so persuasive to the *Illarramendi* court that it applied the rationale supporting indemnification to advancement, even though the movants had not yet prevailed on the claims brought against them. *See Illarramendi*, 2014 WL 545720, at *7. As the *Lawson* court noted, Mr. Levy is "simply attempting to avoid a loss as a result of a misplaced or meritless lawsuit[,]"

and is situated differently than former directors seeking advancement. 21 Ohio App. 3d at 192.

Accordingly, both the law and public policy dictate that Mr. Levy's indemnification rights now be vindicated and that Platinum, through the Receiver, meet its indemnification obligations to Mr. Levy.

II. WSGR IS ENTITLED TO IMMEDIATE COMPENSATION FOR THE SERVICES IT CONTINUES TO PROVIDE PURSUANT TO ITS AGREEMENT WITH PLATINUM

The Receiver understandably wishes to ignore the central thrust of the motion that WSGR is entitled to be compensated pursuant to the WSGR Agreement. As noted in our opening brief, that Agreement provides that Platinum Partners will "pay all fees for legal services and all costs incurred at the prevailing hourly rates of WSGR for attorneys, legal assistants, and case clerks" in relation to the defense of Mr. Levy in the Criminal Matter, Sommer Decl. Ex. 6 (Dkt. 494-8). Faced with the reality that attacking WSGR's right to timely payment will undermine its own ability to be paid on a priority basis (and that of the other lawyers and professionals it has entered into similar agreements with), the Receiver argues that Platinum's obligations to WSGR are merely a "pre-receivership obligation[.]" Opp. at 7-8. This fully ignores the terms of the Agreement and reality.

As previously noted, the WSGR Agreement establishes that Platinum Partners will "pay [all] monthly bills within 15 days of receipt[,]" firmly establishing the intent for Platinum to pay WSGR for *ongoing* services – services it has rendered and continues to render. *See* Dkt. 494-1 at 17. Shortly after the Receivership was put into place, *see* Dkt. 6, counsel for Mr. Levy met with the Receiver to discuss Mr. Levy's advancement and indemnification rights under the Platinum governing agreements, as well as Platinum's obligation to directly compensate WSGR in connection with its representation of Mr. Levy in the Criminal Matter. *See* Dkt. 403 at 9. The Receiver did not disavow the Receiver's obligations, but requested that Mr. Levy defer

discussion of those rights while the insurance policies in place were sufficiently covering Mr. Levy's expenses. When Mr. Levy's counsel later raised this issue, the Receiver provided the same response. At no point did the Receiver indicate that there would not be payment on Mr. Levy's advancement and indemnification rights or Platinum's obligations to WSGR. In reliance on these discussions, WSGR continued its vigorous defense of Mr. Levy in the Criminal Matter, ***through the term of the receivership***. These ongoing services were rendered for years after the imposition of the receivership, at substantial cost, with no assertion by the Receiver that she would not abide by her advancement and indemnification obligations once the insurance policies covering Mr. Levy's legal fees were exhausted. *See* Dkt. 494-1 at 6-7.[4]

WSGR is not simply another creditor with a past-due invoice for services provided before the establishment of the Receivership. To the contrary, almost the entirety of the legal fees and costs owed to WSGR were incurred ***after*** the Receiver was appointed by the Court, and ***after*** the Receiver elected to allow WSGR to continue incurring costs through representation of Mr. Levy, without objection. Moreover, as the Court surely appreciates, once the Receiver announced (in

[4] Even the Bankruptcy Code relied upon by the Receiver supports the notion that WSGR should be entitled to payment for its services as "administrative expenses." Under the Code, parties providing services to the estate pursuant to a pre-petition contract may be entitled to "administrative expense treatment where the post-petition benefit is knowingly accepted and desired, post-petition, by the post-petition debtor-in-possession." *In re Adelphia Bus. Sols., Inc.*, 296 B.R. 656, 665 (Bankr. S.D.N.Y. 2003). Leading legal authority on equitable receiverships supports this conclusion. *See* 2 Ralph Ewing Clark, Treatise on the Law and Practice of Receivers § 428 (3d ed. 1959) ("The receiver has a reasonable time to elect whether or not he will adopt any or all such subsisting contracts. . . . If he make such usage and thereafter renounce the contract, he is liable for such usage during the time the other party was, without its consent or acquiescence, held subject to the contract."); 65 Am. Jur. 2d Receivers § 164 ("A receiver has a reasonable amount of time to reject or elect to perform an executory contract . . . . Adoption or acceptance of an executory contract may be inferred by the actions of the receiver or by the receiver's acceptance of contract benefits.") (citing *Anes v. Crown P'ship, Inc.*, 113 Nev. 195 (1997)). Here, the Receiver elected to accept the benefits of WSGR's representation of Mr. Levy – itself a service to the Receivership, pursuant to the Platinum agreements – and having received those benefits for years, the estate is liable to compensate WSGR.

2018) that she would cause Platinum not to meet its advancement and indemnification obligations (and its contractual obligation to WSGR) – three years into this engagement – there was no possibility for WSGR to withdraw as counsel to Mr. Levy. By that point, trial was just a few months away and WSGR had committed enormous time learning a record comprised of more than 40 million pages of documents. Of course, that was the very point of Platinum agreeing to pay WSGR for its continuous and ongoing service to one of Platinum's executives: so that the laudatory purpose of protecting the entity would be advanced by providing experienced and determined counsel to its employee, Mr. Levy. *See Wolfson*, 321 A.2d at 144 (granting indemnification and finding legal expenses were reasonably incurred where, "[i]n view of the statutory policy of indemnification for those who successfully defend actions arising from the performance of their corporate duties," those "fees were based on the rare skill necessary to increase the hope of a successful result in an unusual and difficult case.").

In this regard, WSGR is situated no differently than the Receiver herself and the professionals she has hired. WSGR has been obligated to continue providing legal services to Mr. Levy, and by extension, to Platinum. Unlike the Receiver, however, WSGR is now left uncompensated for the work it has performed and must continue to perform. For example, as the Court is aware, the government has indicated that it intends to appeal the Court's decision acquitting Mr. Levy on the Black Elk bond charges. Thus, WSGR's expenses will continue to accrue.

Platinum committed itself to paying WSGR for its fees and costs in representing one of its executives – David Levy. It is time for Platinum, through the Receiver, to now meet its obligations in this regard.

CONCLUSION

For the reasons set forth above and in Mr. Levy's opening brief, Mr. Levy respectfully requests that the Court grant his Motion and direct the Receiver to indemnify him and to pay his counsel, WSGR, for reasonable attorneys' fees and legal defense costs incurred in the Criminal Matter.

Dated: November 6, 2019

Respectfully submitted,

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