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

SECURITIES AND EXCHANGE COMMISSION'S MEMORANDUM IN RESPONSE TO THE COURT'S DECEMBER 12, 2019 ORDER

Plaintiff, Securities and Exchange Commission ("SEC"), responds to the Court's December 12, 2019 docket order requesting briefing from any interested party on "whether it would be appropriate for this Court to dismiss the case without prejudice to the right of the Receiver or creditors to file a bankruptcy petition against the company in light of the fact that this Court has been called upon to apply Bankruptcy Code concepts to substantial claims and procedures in this matter," ("Order") and represents as follows:

The SEC does not believe that the receivership should be dismissed at this time. The Court cites to *dicta* in *Eberhard v. Marcu,* 530 F.3d 122, 132 (2d Cir.2008) and *Esbitt v. Dutch-Am. Mercantile Corp.*, 335 F.2d 141, 143 (2d Cir. 1964) for the proposition that courts should not use a receivership to liquidate an estate or as an alternative to bankruptcy. However, we note that the United States Court of Appeals for the Second Circuit has approved the use of the

receivership process to effectuate an orderly liquidation and distribution of assets to investors and creditors. *See*, *SEC v. Malek*, 397 Fed. App'x 711, 714-15 (2d Cir., Oct. 25, 2010), *citing*, *SEC v. Credit Bancorp*, *Ltd.*, 290 F.3d 80, 85 (2d Cir. 2002). In *Malek*, the Second Circuit noted that it had "never vacated or modified a receivership order on the ground that a district court improperly attempted to effect a liquidation," and that "such restraint is particularly appropriate where . . . the receivership has progressed almost to completion and it would apparently not be in the interests of the parties to direct that further proceedings be diverted into bankruptcy channels." *Malek,* 397 Fed. App'x at 715. (internal citations omitted)

This receivership has been pending since December 2016. The Receiver has retained counsel, financial advisers, and investment bankers to assist her in analyzing and marketing the receivership assets, which included approximately 90 investments in over 60 different entities, and to evaluate claims against third parties. Substantially all of the receivership assets have been liquidated, and there remain only a few assets that are either subject to litigation, are in the process of being monetized, or have relatively insignificant value. Thus, the receivership has progressed almost to completion and we understand that the Receiver does not believe that one or more bankruptcy filings would be in the interests of the receivership's stakeholders.

In addition, the Receiver has commenced certain targeted litigations involving multiple parties, pending in other courts, to avoid liens on the receivership assets and to recover on claims against third parties. In the SEC's view, bankruptcy filings would provide no benefit, and, indeed, would likely hamper and delay those litigations as the Receiver or another fiduciary would have to analyze how the Bankruptcy Code's provisions, including the automatic stay, would apply to the claims and cross claims in those actions.

The filing of bankruptcy cases would also result in an added layer of unnecessary administrative costs and further delay distributions to investors. The costs associated with

preparing and filing bankruptcy petitions, schedules, and first day pleadings, let alone the continuing administrative and motion practice costs and fees while in bankruptcy, would result in substantial diminution of assets available to pay investors with no obvious countervailing benefit.

Bankruptcy filings would also lead to substantial uncertainty regarding the Receiver's and her professionals' continuing ability to manage the debtors' assets. Although the Second Amended Order Appointing Receiver ("Receiver Order") (Dkt. #276) empowers the Receiver to operate the receivership entities as debtor in possession in the event of a bankruptcy filing, there is no guarantee that she would be able to continue to act in that capacity. By way of example, because the Receiver and her professionals are still owed money on account of hold backs applied to their fees, it is possible that they would not be deemed to be "disinterested" fiduciaries and therefore may be disqualified from continuing to manage the debtors' assets unless they agreed to waive their substantial holdbacks. A new fiduciary would have a steep learning curve in analyzing the debtors' structure, determining if substantive consolidation of the estates is necessary or proper, and devising a fair plan for distribution of the debtors' assets.

The Receiver Order also authorizes the Receiver to seek leave of Court to file bankruptcy petitions if she believes that bankruptcy for one or more receivership entities would be in the best interests of the receivership estate. Indeed, as set forth in each of her quarterly reports, the Receiver has been engaged in a continuous evaluation of the advisability of filing bankruptcy cases for all or a subset of the receivership entities and has so far determined that such filings would not be in the best interests of the receivership.

The Court has also raised a concern that it may be asked to apply Bankruptcy Code concepts to claims and procedures in this case. As discussed in the Receiver's memorandum (Dkt.#497) in opposition to the motions for advancement of legal fees (Dkt.##490 & 494),

federal equity receivership courts can look to bankruptcy law for guidance when there is little or no precedent in federal equity receivership law for disputes pending before them.

Finally, although the SEC does not believe that the Court intended to imply that it might consider dismissing the civil enforcement actions themselves in favor of bankruptcy, as opposed to dismissing the ancillary receivership proceeding, in the SEC's view there is no basis at this time to dismiss the civil enforcement action against any of the defendants as the case has been stayed and there has been no disposition on the merits. Moreover, in the SEC's view, it is imperative that the civil enforcement cases remain pending before an Article III court with expertise in the subject matter.

For all of the foregoing reasons, the SEC does not believe that the filing of one or more bankruptcy cases for the receivership entities would be in the best interests of the receivership at this time.

Dated: New York, New York
January 17, 2020

SECURITIES AND EXCHANGE COMMISSION

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