**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF NEW YORK**

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| 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) |

**DECLARATION OF MELANIE L. CYGANOWSKI, AS RECEIVER,**
**IN RESPONSE TO THE MINUTE ORDER ENTERED DECEMBER 12, 2019**

I, Melanie L. Cyganowski, pursuant to 28 U.S.C. § 1746, hereby declare that the following is true to the best of my knowledge, information and belief:

1. I am the duly appointed receiver (the "***Receiver***") of Platinum Credit Management, L.P. ("***PPCO Manager***"), Platinum Partners Credit Opportunities Master Fund LP ("***PPCO Master***"), Platinum Partners Credit Opportunities Fund (TE) LLC ("***PPCO TE Feeder***"), Platinum Partners Credit Opportunities Fund LLC (***"PPCO US Feeder***"), Platinum Partners Credit Opportunities Fund (BL) LLC (*"**PPCO Blocker**"*), Platinum Partners Credit Opportunities Fund International Ltd. and Platinum Partners Credit Opportunities Fund International (A) Ltd. (collectively, "***PPCO Int'l Feeders***" and with PPCO TE and US Feeders, the "***PPCO Feeders,***" and, in turn, with PPCO Master and PPCO Blocker, "***PPCO***"), Platinum Liquid Opportunity Management (NY) LLC ("***PPLO Manager***"), Platinum Partners Liquid Opportunity Fund (USA) L.P. ("***PPLO US Feeder***"), Platinum Partners Liquid Opportunity

Master Fund L.P. ("***PPLO Master***" and with PPLO US Feeder, "***PPLO***," and, in turn, with PPCO, "***Platinum***" or, sometimes, following the commencement of this action, the "***Receivership***" or the "***Receivership Entities***"). I submit this declaration in order to respond to the December 12, 2019 minute order (the "***Minute Order***") (i) deferring any ruling on the motions of Joseph SanFilippo ("***SanFilippo***") and David Levy ("***Levy***") to compel the Receiver to indemnify SanFilippo's and Levy's criminal defense costs (the "***Indemnity Motions***") [Dkt. Nos. 490 & 494], and (ii) directing briefing and argument on the "sole issue [of] 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."

## INTRODUCTION

2. To respond directly to the issue raised by the Court, I continue to believe at this time that the interests of all stakeholders would be best served by continuing to administer the Receivership outside of bankruptcy. As I explain more fully below, I base my belief on, among other things, the facts that:

- the liquidation of the Receivership's assets is already substantially complete, and liquidating the remaining assets in bankruptcy would yield no higher recovery but far greater expense;

- unless and until the liens and debt of certain putative secured creditors (currently challenged in another court) are avoided, most or all of PPCO's assets, regardless of forum, may have to be distributed to the secured creditors, and doing so would be far more time- and cost-effective in this Court than in bankruptcy court;

- assuming the liens and debt of the putative secured creditors are avoided, then the facts and circumstances concerning Platinum's management that I have observed in fulfilling my duties, including the systematic overvaluation of assets, commingling of investor funds and self-dealing transactions, may warrant an equitable distribution of assets not available in bankruptcy court; and

- given the complexity of Platinum's structure, and the current status of the Receivership, the time and cost needed even to determine which entities to file for bankruptcy, let alone concluding the liquidation of those entities in bankruptcy, would be enormous.

3. On consent of all parties, Platinum has been under the control of a court-appointed receiver since December 19, 2016. [Dkt. Nos. 6, 59, 106] I have served as the Receiver since the Court appointed me as successor to the initial receiver, Bart Schwartz (the "***Prior Receiver***"), on July 6, 2017 [Dkt. No. 216]. During the first four months following my appointment, my authority as Receiver was set out in the Amended Order Appointing Receiver entered on January 30, 2017 [Dkt. No. 59-2], governing most of the Prior Receiver's tenure. Since October 16, 2017, I have looked to the Second Amended Order Appointing Receiver [Dkt. No. 276] (the "***Receiver Order***"), entered that day, for the scope of my authority and duties.

4. In entering the Receiver Order, the Court found that my appointment was "necessary and appropriate," among other things, to ". . . (ix) conduct an orderly wind down including a responsible liquidation of assets and orderly and fair distribution of those assets to investors; and (x) determine whether one or more of the Receivership Entities should undertake bankruptcy filings." (Receiver Order, 2nd WHEREAS clause)

5. Accordingly, in the Receiver Order, the Court specifically empowered me, among other things, to:

(i) "without further Order of this Court, transfer, compromise, or otherwise dispose of Receivership Property in the ordinary course of business of the Receivership Entities' orderly wind down, on terms and in the manner the Receiver deems most beneficial to the Receivership Estate";

(ii) "engage in transactions outside the ordinary course of business of the Receivership Entities' orderly wind down [defined as the expenditure of more than $3 million in cash and/or the disposition of the Receivership's interest in property in return for more than $3 million in cash or other assets] . . . upon motion and approval of the Court";

(iii) "take all actions to manage, maintain and/or wind-down business operations of the Receivership Estate"; and

(iv) "seek authorization of this Court to file voluntary petitions for relief under Title 11 of the United State Code (the 'Bankruptcy Code') for any or all of the Receivership Entities" and, if any Receivership Entity is placed in bankruptcy proceedings, "to operate each of the Receivership Entities as a debtor-in-possession." (*Id.* ¶¶ 28, 30, 32 & 37)

6. Further, the Court both empowered and directed me to "develop a plan . . . for the fair, reasonable, and efficient recovery and disposition of all remaining, recovered, and recoverable Receivership Property (the 'Disposition Plan'), which may be a plan of liquidation." (*Id.* ¶ 45)

7. At all times, I have tried to discharge, and believe I have discharged, the authority vested in me by the Court faithfully. That includes the authority to determine whether to seek to place one or more of the Receivership Entities in bankruptcy. I continually have been evaluating whether the interests of the Receivership would be best served by placing any of the Receivership Entities in bankruptcy. Indeed, in each of my quarterly status reports to the Court,

I specifically have addressed this issue. (*See* Dkt. Nos. 288, §VI; 304-1, §VI; 317, §VII; 354, §VIII; 407, §VIII; 445, §VIII; 461, §VIII; 481, §VIII; 495, §VIII.)

8. In my first quarterly status report, I explained at length the various reasons, with reference to case law, why I believed it was appropriate and preferable for the case to proceed in receivership rather than in bankruptcy. (*See* Dkt. No. 288, §VI.) In subsequent status reports, I have continued to find that "the continuation of the receivership is in the best interests of the creditors of and the investors in the Platinum Entities" and that "[w]hile the Platinum Entities could be liquidated in a bankruptcy proceeding, . . . the Receiver continues to believe that continuing with the orderly liquidation of the Platinum Entities in this receivership case and the pursuit of legal actions commenced by the Receiver provides greater flexibility to achieve an equitable result for the investors who have been wronged here." (*See* Dkt. Nos. 481, §VIII; 495, §VIII; *accord* Dkt Nos. 304-1, §VI; 317, §VII; 354, §VIII; 407, §VIII; 445, §VIII; 461, §VIII.)

9. For the reasons I describe herein, my view has not changed. That is so, notwithstanding that, from time to time (including with respect to the Indemnity Motions), my counsel and I may have invoked bankruptcy principles to bolster, supplement or, in some instances, fill in less developed areas of federal equity receivership law.

**THE FOUNDATIONS FOR MY CONCLUSION**

10. My conclusion that, at this time, Platinum should remain in receivership rather than bankruptcy is based, in most significant part, on my two and a half years of experience serving as the Receiver in *this* case, which I summarize below. I have reported in my quarterly status reports to the Court (*see* Dkt. Nos. 288, 304-1, 317, 354, 407, 445, 461, 481 and 495) (the "***Status Reports***") on the extensive efforts that the Receiver's professionals—the Receiver's financial advisors, Goldin Associates ("***Goldin***"), lawyers, Otterbourg P.C. ("***Otterbourg***"), and investment bankers, Houlihan Lokey ("***Houlihan***") and Conway McKenzie ("***Conway***")—and I

have undertaken to (1) understand, take control of, and realize the value of Platinum's diverse and complex assets, in the context of Platinum's orderly wind-down, and (2) review forensically Platinum's pre-Receivership affairs in the context of evaluating and pursuing potential claims on behalf of the Receivership, as well as to defend the Receivership against claims or counterclaims asserted by third parties.

11. My conclusion also is based, in part, on my substantial experience in bankruptcy court, including with cases involving alleged financial and accounting fraud. As the Court is aware, I served as a Bankruptcy Judge in this District for 14 years, including as the Chief Bankruptcy Judge from 2005 through the end of my term in 2007. Prior to and after my term as a Bankruptcy Judge, I have been a bankruptcy practitioner for over 25 years, including as Head of the Bankruptcy Practice at Otterbourg from 2015 through the present. I also have taught bankruptcy law as an Adjunct Professor at St. John's University School of Law since spring 2001. I am very familiar with the advantages and disadvantages of bankruptcy, both from the perspective of a debtor and a debtor's creditors.

12. Additionally, my conclusion is based, in part, on my, and my professionals', ongoing dialogues with the parties and interested parties to this proceeding over the past two and a half years, including the staff of the United States Securities Exchange Commission ("***SEC***"), counsel for the defendants, counsel for various creditors, and counsel for various investors representing a substantial percentage of the Platinum investor body, none of whom have expressed to date a preference or desire for this matter to proceed in bankruptcy court. To the contrary, in response to the Minute Order, certain investors or their representatives have contacted the Receivership to express concern about the prospect of a bankruptcy filing.

**THE HISTORY AND STATUS OF THE RECEIVERSHIP**

13. Because my views regarding whether the Receivership should proceed in or out of bankruptcy are largely informed by my experience as Receiver over the past two and a half years, I summarize below: (i) my efforts to date to fulfill the mandate that the Court has given to me, (ii) the observations I have drawn based on those efforts regarding Platinum's structure, management and operation prior to the Receivership, (iii) the current status of the Receivership, (iv) my current expectations of the next steps in the Receivership, and (v) my and my team's conversations with stakeholders, and/or their respective counsel, concerning the subject at hand.

***Recapitulation of the Receiver's Efforts to Date***

14. As I have described in my Status Reports, the investments that I was charged with preserving, and in the context of winding down Platinum's business disposing of, were or are diverse, complex, largely illiquid and, in general, highly speculative. (*See* Dkt. Nos. 237, §I.C; 288, §I.C&D; 304-1, §I.B; 317, §I.B; 354, §II.B; 407, §II.B; 445, §II.B; 461, §II.B; 481, §II.B; 495, §II.B.) There were a total of approximately 90 investments, in over 60 different portfolio entities, on Platinum's books when I was appointed Receiver. The vast majority of those investments were held by PPCO, and included life settlement investments (*i.e.*, investments in life insurance policies), litigation finance investments, and a wide variety of other investments mostly consisting of debt instruments and/or, following default, private equity investments in early stage ventures in the oil, gas, minerals, energy, pharmaceuticals and technology industries. PPLO's investments mostly consisted of publicly-traded equities, debt and/or derivatives in issues that generally were thinly traded.

15. My first order of business was to task Goldin and Otterbourg with gaining an understanding of all of these assets sufficient to determine what steps the Receiver would need to take in order to preserve them pending a decision on the most responsible method of liquidating

them in an orderly fashion. With respect to numerous of the assets, preservation required the expenditure of significant Receivership resources. For example, preserving PPCO's investment in its life settlement portfolio, held through ALS Capital Ventures LLC ("***ALS***"), required paying monthly premiums and servicing charges in the range of $500,000 per month; preserving PPCO's investment in its principal litigation finance investment, Acceleration Bay, necessitated meeting monthly funding requirements of $700,000 per month; and preserving PPCO's investment in certain of its mining ventures, *i.e.*, LC Energy and Abdala (defined below), required the collective expenditure of over $100,000 per month in security and other maintenance costs. In addition to paying these regular monthly expenses, my duties also required me to expend significant Receivership funds on an as needed basis to preserve numerous other assets, despite not having, at that time, the full picture on each of these complicated assets or the foresight as to which investments, in the end, would be profitable.

16. Without the capital contributions that, in the ordinary course, would fund such significant expenses, and in the face of a mandate to wind down Platinum's business, it was clear to me that I would have to liquidate all of the Receivership's assets as soon as practicable. I made that intention clear in the Status Reports, while, at the same time, assuring stakeholders that I would market and sell assets in an orderly fashion so as to avoid "fire sale" prices.

17. My decision to liquidate all of the Receivership's assets in relative short order was not uniformly welcomed. The approach differed from the approach favored by the Prior Receiver, who had stated that he "thought putting limited additional funds into certain assets could potentially result in higher returns" and, thus, should necessitate a "longer time horizon" within which to achieve those assets' "true and proper value." [Dkt. Nos. 142, 170-1] The Prior Receiver's approach apparently appealed to the defendants and certain investors, who opposed my, or any successor receiver's, appointment, because they wanted a "Receiver [who] will bring

business judgment to the challenging issues facing Platinum and seek to maximize the value of the Fund's assets for the benefit of investors and creditors, . . . rather [than] someone who will have no authority to do anything other than liquidate the Fund's assets." [Dkt. No. 184]

18. The differing views over the direction of the Receivership were put to the Court at a relatively early stage in my tenure, in connection with my application to retain Houlihan as the Receiver's investment banker to market and sell certain Receivership assets, including the Abdala gold mine tailings pond (the "***Houlihan Retention Motion***"). [Dkt. No. 275] My motion was opposed by a "large group of" investors (the "***Investor Group***"), who took exception to my decision "not to invest further" in the tailings pond venture and requested a hearing to explore "alternatives to the liquidation" of the asset. [Dkt. No. 277] In rejecting the Investor Group's position and approving Houlihan's retention, the Court clarified any misunderstanding as to my role in a Memorandum Opinion entered November 21, 2017 (the "***Houlihan Opinion***"). The Court stated:

> [T]he premise of the Objecting Investors' argument turns on a fundamental misunderstanding of the role of the Receiver. The Receiver is not tasked with making speculative investments. Instead, she is entrusted with the responsibility to prudently wind-down the Receiver Entities and dispose of the Receivership Assets in a manner that safely returns to stakeholders what value can be salvaged. She is not empowered to jeopardize that return by indulging in risky investment opportunities with the very money she has been charged to return to the victims of alleged years' long fraudulent conspiracies. It is clear to the Court that these investors are frustrated by their inability to realize the investment returns they were promised, but that frustration does not justify the Receiver using the limited remains of alleged conspiracies to look for South American gold. [Dkt. No. 407]

19. In accordance with the Court's mandate, I have liquidated, or collected on, the vast majority, as measured by value, of the assets that were in the PPCO or PPLO portfolios as of the time of my appointment. In the case of dispositions "outside the ordinary course of business" (per the terms of the Receiver Order), I have applied for, and received, the prior approval of the Court. In *all* cases, whether a disposition required Court approval or not, I have reported in the

Status Reports on each disposition or payoff during my tenure. The investments that have liquidated to date while I have served as Receiver are summarized (in alphabetical order) below:

| **Asset** | **Description** | **Fund** | **Quarter/Year of Disposition** | **Proceeds Received ($MM)**[1] |
|---|---|---|---|---|
| Abdala | Private equity | PPCO | Q4 2018 | $21.3 |
| Acceleration Bay | Litigation Finance | PPCO | Q4 2017 | $10.54 |
| Accutane | Litigation Finance | PPCO | Q3 2019 | $1.8 |
| AirDye | Private Equity/ Debt | PPCO | Q4 2017 | $1.265 |
| Alcor* | Debt | PPCO | Q2 2018 | $0.6 |
| ALS | Life Settlements | PPCO | Q2&3 2018 | $12.343 |
| American Patriot | Real Estate | PPCO | Q2 2019 | $0.25 |
| Arabella | Debt | PPCO | Q4 2019 | $0.2 |
| Azarga | Stock | PPCO/PPLO | Q4 2018 | $1.3 |
| Bang | Private Equity | PPLO | Q3 2017 | $0.05 |
| Clifford Chance/ Excalibur | Litigation Finance | PPCO | Q4 2017 | $0.099 |
| Cokal | Private Equity | PPCO/PPLO | Q1 2019 | $2.2 |
| Daybreak | Debt | PPCO | Q4 2018 | $0.7 |
| Desert Hawk | Debt | PPCO | Q1 2018 | $0.417 |
| Greentown | Debt/Private Equity | PPCO | Q1 2019 | $0.8 |
| Grey K* | Private Equity | PPCO | Q3 2017 | $0.136 |

* Denotes a payoff pursuant to a prior arrangement negotiated either (in my case) by the Prior Receiver or (in the case of the Prior Receiver) pre-Receivership portfolio managers.

[1] The amounts in this column are exclusive of any residual interest and inclusive of any closing costs, such as investment banking fees and taxes paid, in connection with the transaction.

| **Asset** | **Description** | **Fund** | **Quarter/Year of Disposition** | **Proceeds Received ($MM)** |
|---|---|---|---|---|
| Katrina Barge* | Litigation Finance | PPCO | Q3 2017 | $5.6 |
| Katrina Barge | Litigation Finance (Supp. Int.) | PPCO | Q3 2018 | $0.075 |
| Martin Kenney* | Litigation Finance | PPCO | Q3 2017 | $1.8 |
| Martin Kenney | Litigation Finance (Supp. Int.) | PPCO | Q2 2018 | $0.3 |
| Milberg | Litigation Finance (Supp. Int.) | PPCO | Q3 2017 | $2.25 |
| Pedevco | Debt | PPCO | Q2 2018 | $0.3 |
| Pedevco | Warrants | PPCO | Q3 2018 | $0.215 |
| Pro Player | Debt | PPCO | Q4 2018 | $0.02 |
| Rolling Acres | Real Estate | PPCO | Q2 2018 | $0.1 |
| Wintercrest | Stock | PPCO | Q1 2018 | $0.051 |

20. Monetization of the foregoing investments brought into the Receivership approximately $66 million in cash.

21. In addition, the Prior Receiver monetized or collected on the following investments during his tenure:

| **Asset** | **Description** | **Fund** | **Quarter/Year of Disposition** | **Proceeds Received ($MM)** |
|---|---|---|---|---|
| Alcor | Debt/Private Equity | PPCO | Q2 2017 | $3.075 |
| ALS* | Life Settlements | PPCO | Q1 2017 | $31.34 |
| Navidea* | Debt | PPCO | Q1 2017 | $7.6 |
| Stanford Int'l* | Debt | PPCO | Q4 2016 | $10.8 |

22. Monetization of the foregoing investments realized for the Receivership approximately $21.5 million in cash.[2]

23. At this time, assets in the PPCO portfolio that have not yet been liquidated generally fall into one of three categories: (i) assets the dispositions of which are subject to pending litigation, (ii) assets that are in the process of being, but have not yet been completely, monetized, and (iii) assets that are deemed to have relatively insignificant value and will be either disposed of in a remnant sale or abandoned. In PPLO, there are a handful of securities, believed to total in the range of approximately $20,000 in value, that require additional documentation and/or an uptick in market activity in order to dispose of them. These remaining assets do not require me to incur any preservation expenses.

24. In addition to monetizing the Receivership's assets, I have tasked the Receiver's professionals with performing such forensic analyses of Platinum's books and records as are necessary to determine any third party claims that the Receivership may hold and that may be worthwhile to assert. Such analyses have included reviews of: Platinum's pre-Receivership cash journals and bank account statements to understand the movement of cash into and out of Platinum; Platinum's significant transactions, particularly with respect to related parties; and Platinum's valuation methods and inputs during the last few years before the Receivership's commencement.

25. As a result of such analyses, and after weighing the potential costs and benefits, I have commenced, and been pursuing, certain targeted litigations. I commenced an action against Beechwood Re and certain of its affiliates (collectively with the unnamed principals of the affiliates, "***Beechwood***"), CNO Financial Group and certain of its affiliates (collectively,

[2] The proceeds from the sale of the ALS life insurance policies were paid to the putative secured lender that held a collateral interest in the policies (Beechwood) and to a co-owner of one of the policies, with the remaining proceeds being placed into escrow pursuant to a multi-party agreement. None of the proceeds were paid to the Receivership. There remains in escrow approximately $6.3 million.

"***CNO***") and Senior Health Insurance of Pennsylvania and an affiliate (collectively, "***SHIP***") in the United States District Court for the Southern District of New York, now captioned *In re Platinum-Beechwood Litig., Cyganowski v. Beechwood Re Ltd., et al.*, 18-cv-6658 (JSR), 18-cv-12018 (JSR) (the "***Beechwood Action***"), for, among other relief, the avoidance of debt claimed to be owed to them and liens asserted by them against PPCO's and its subsidiaries' assets. I commenced arbitration in the Institute for Conflict Prevention and Resolution (the "***Auditor Arbitration***") against the accounting firm that audited PPCO's 2014 financial statements for damages. I commenced an action in this District against Lincoln Life & Annuity Company of New York ("***Lincoln***"), captioned *ALS Capital Ventures, LLC v. Lincoln Life & Annuity*, 18-CV-0455I (AMD), for death benefits under an ALS policy that Lincoln improperly lapsed (the "***Lincoln Action***"). And I commenced an action, also in this District, to recover on a loan to Greehey & Co., captioned *Bakken Development Opportunities I, LLC, et al. v. Greehey & Co., Ltd., et al.*, 19-cv-04438 (BMC) (the "***Greehey Action***"). I also have reached agreement with the joint liquidators of the Platinum Partners Value Arbitrage Fund L.P. (together with Platinum Partners Value Arbitrage Fund (USA) L.P., Platinum Partners Value Arbitrage Fund (Intermediate) Limited, and Platinum Partners Value Arbitrage Fund (International) Limited, collectively and individually, "***PPVA***") on the sharing of costs and recoveries in connection with the pursuit of claims by Principal Growth Strategies, LLC ("***PGS***"), an LLC jointly owned by PPCO and PPVA, against various defendants in an action captioned *Principal Growth Strategies, LLC, et. al. v. AGH Parent LLC, et al.*, 19-cv-01319-CFC, currently pending in the United States District Court for the District of Delaware (the "***Agera Action***" and collectively with the Beechwood Action, Auditor Arbitration and Lincoln Action, the "***Litigations***"). Each of the Litigations is pending.

***Observations Regarding Platinum's Pre-Receivership Structure, Management and Operation***

26. Based on the work that the Receiver's professionals have had to perform in order to (i) understand, gain control, preserve and monetize the Receivership's assets, and (ii) develop and pursue claims in the Litigations, I have come to an understanding as to how Platinum was structured, managed and operated prior to the Receivership and which informs my view that Receivership stakeholders would fare better in this Court than in bankruptcy court.

27. More specifically, as I describe below, Platinum's intricate structure would render any bankruptcy analysis extraordinarily complicated, and the activities in which Platinum was made by its managers to engage pre-Receivership, including overvaluing assets, commingling of investor funds and transferring assets to related parties, may render bankruptcy an inhospitable forum for Platinum's investor body.

<u>Platinum's Structure</u>

28. Platinum's structure was complex and involved a myriad of domestic and foreign entities, not all of which are in the Receivership, but which, as Receiver, I currently control.

29. Platinum operated in a master-feeder hedge fund structure. With regard to PPCO, taxed domestic individuals and entities invested in PPCO US Feeder, a Delaware limited liability company ("***LLC***"). Tax exempt domestic investors invested in PPCO TE Feeder, also a Delaware LLC. International investors invested in either or both of PPCO Int'l Feeders, Cayman Islands exempted entities. PPCO US Feeder, in turn, invested its capital in PPCO Master, a Delaware limited partnership ("***LP***"), while each of PPCO TE Feeder and PPCO Int'l Feeders invested their capital, either in the form of debt or equity, in PPCO Blocker, a Delaware LLC, which, in turn, invested its capital in PPCO Master, a Delaware LP.

30. PPCO Master, in turn, invested its capital in various assets either directly or through various subsidiaries. There were over 30 direct or indirect, separately-organized subsidiaries of PPCO Master. Such subsidiaries included: Alpha Credit Resources LLC; Bakken Development Opportunities I, LLC; Beta Credit Services LLC; Burr Capital LLC; Credit Funding LLC; Credit Mining LLC; Credit Strategies LLC (and its subsidiary, ALS Capital Ventures); Diamed Holdings LLC; Financial Ventures LLC; Hamilton Capital LLC; Maximillian Investors LLC; Maximillian Resources LLC; North Rock Funding LLC; Pea & Eigh Co. LLC; Platinum Long Term Growth VIII LLC; Platinum Partners Credit International LLC; Pro Player Funding LLC; Principal Growth Strategies LLC; Real Estate Credit LLC; Regis Capital LLC; Secure Holdings LLC; West Ventures LLC; and Wintercrest Advisors LLC. With respect to all, or virtually all, of these LLCs, PPCO Master was a member along with (i) typically, the individual portfolio managers who managed the underlying investments, (ii) at times, PPVA, and/or (iii) sometimes, outside investors.

31. As for PPLO, taxed domestic individuals and entities invested in PPLO US Feeder, a Delaware LP. International investors and tax-exempt domestic investors invested in Platinum Partners Liquid Opportunity Fund (International) Ltd., a Cayman Islands exempt entity that is not in the Receivership, which, in turn, invested its capital in Platinum Partners Liquid Opportunity Intermediate Fund L.P., a Cayman Islands LP that is also not in the Receivership and which, in turn, along with PPLO US Feeder, invested its capital in PPLO Master.

32. PPLO Master, like PPCO Master, also acquired and held assets both in its own name and through subsidiaries. PPLO Master's subsidiaries were D Ward Capital, LLC, Empire Binary LLC, Empire Quantitative Ltd. and Jacob Trading LLC.

Platinum's Management and Operation

33. The work that the Receiver's professionals have undertaken to (i) understand, market and dispose of assets, and (ii) investigate and develops claims in the Litigations have allowed me to make certain observations regarding the manner in which Platinum was being managed and operated prior to the Receivership.

34. The individuals who managed and operated PPCO largely were employees or officers of PPCO Manager, which was engaged separately by each of the PPCO funds pursuant to contract on an independent contractor basis. Those individuals included, over time, Mark Nordlicht as Chief Investment Officer or co-Chief Investment Officer, David Levy as co-Chief Investment Officer, Uri Landesman as principal, Gilad Kalter as Chief Operating Officer, and Naftali Manela as Chief Financial Officer, of PPCO Manager. The individuals who managed and operated PPLO largely were employees or officers of PPLO Manager, which similarly was engaged separately by the PPLO funds pursuant to contract on an independent contractor basis. Those individuals included, over time, Mark Nordlicht as Chief Investment Officer or co-Chief Investment Officer, David Levy as co-Chief Investment Officer, Uri Landesman as President, Will Slota as Chief Operating Officer, and Joseph SanFilippo as Chief Financial Officer, of PPLO Manager (all of the individuals being collectively referred to as the "***Platinum Insiders***").

35. Based on the analyses that the Receiver's professionals have conducted, I have alleged in one or more of the Litigations that the Platinum Insiders were engaged in certain fraudulent conduct for their own financial enrichment and to the harm of PPCO. Because those are allegations that were made in accordance with applicable pleading standards and are subject to burdens of proof in pending Litigations, and not on my own personal knowledge (since I had no involvement with Platinum prior to the Receivership), I am not going to repeat the allegations

here in a sworn declaration. I will, however, share with the Court certain of the observations I have made which led me to make these allegations.

36. First, I have observed that PPCO's investments, as a whole, were systematically and grossly overvalued. In fact, in one or more of the Litigations, I expect to present expert opinion, based on the application of multiple valuation approaches to information known or knowable at the time, that, as of the commencement of the Receivership (December 19, 2016), PPCO's assets were overvalued by over 300% or $500 million (the carried value on PPCO Master's books totaled $667 million while actual fair value was in the range of $162 million).

37. Investments in portfolio companies with no track record, no demonstrated prospects and substantial unfunded capital requirements routinely were being carried on PPCO Master's books for tens of millions of dollars or more per investment. For example:

- Abdala Gold Tailings Pond ("***Abdala***"): PPCO Master acquired ten years of rights to mine Abdala as a result of a workout of a $13.9 million loan secured by Abdala and 50% of an adjacent nonoperational gold mine. As of the commencement of the Receivership, the asset was being carried on PPCO Master's books at a value of $124 million. Further, according to the Investor Group in its opposition to the Houlihan Retention Motion, "on a January 2016 conference call, Platinum's managers advised investors of projected returns of between $450 and $550 million" on the investment. [Dkt. No. 277] However, following the Receivership's sale of the PPCO Master subsidiary's, West Ventures LLC's, ownership of the Brazilian entity that owned the Abdala rights for a gross upfront payment of $27.5 million [Dkt. 380], the purchaser advised me that multiple tests have confirmed that Abdala has negligible gold content and is worthless.

- Marquis Healthcare Technologies, Inc. ("***Marquis***"): In 2014, PPCO had agreed to provide a loan facility of up to $5 million to Marquis, a reseller of medical equipment that:

had started up in the spring of that year, generated a total $68,000 in revenues and operated at a loss of $1.6 million for the year. On December 22, 2014, PPCO agreed to reduce its line of credit limit from $5 million to $2 million, which it had fully funded, in return for which PPCO received a "kicker" of 40% of Marquis's equity. As of December 31, 2014, 9 days later, PPCO Master marked the $2 million debt at par and the 40% equity kicker in the 9 month old company with no proprietary technology and $68,000 in total revenues for $10 million. Less than two years later, by October 2016, Marquis was completely out of business. Yet, as of the Receivership's start, the investment was valued on PPCO Master's books at $10 million.

- Buffalo Lake Advanced Biofuels, LLC ("***BLAB***"): PPCO Master acquired 100% of the equity of BLAB, owner of a dry mill ethanol plant in Minnesota, out of bankruptcy by credit bidding $5 million in August 2013, and immediately carried the investment on its books for $24 million. By December 31, 2014, the plant was only partially operating (at less than 65% of capacity), was losing money and was projected to continue losing money, yet PPCO was now carrying its BLAB investment at $50 million. By December 31, 2015, BLAB had ceased operating and been put into "care and maintenance" mode. Yet, as of the Receivership's commencement, PPCO Master was still carrying its BLAB investment at over $24 million.

- LC Energy Operations, LLC ("***LC Energy***"): PPCO Master acquired 100% of the equity of LC Energy, owner of non-operating coal mining facilities, out of the Lily Group bankruptcy by credit bidding $9 million in 2014. LC Energy briefly restarted the operations of one of its mines, but all operations ceased, after a roof collapse in September 2014, that was estimated to require $33 million in capital expenditures to restart. Despite having no operations and being projected to be unprofitable into the future, LC Energy was carried on PPCO Master's books as of December 31, 2014 at $20.5 million. By the end of 2016, LC Energy still was nonoperational, yet was being carried on PPCO Master's books at over $31 million. Ultimately, the Receivership had to pay to dispose of this asset in order to protect against the risk of future potential environmental liabilities from abandoning it.

38. I also have observed that Platinum investor funds effectively were commingled. Beginning in or about 2014, and continuing through the commencement of the Receivership, the Platinum Insiders effectuated repeat transfers of cash, booked as loans, from PPCO and PPLO to PPVA in order to assuage growing liquidity issues developing at PPVA. The loans were recorded as being partly, but not fully, paid down by virtue of subsequent asset transfers, mostly of distressed private equity or debt positions held by PPVA to PPCO at inflated valuations, as well as, from time to time, cash from PPVA to PPCO and PPLO. By the commencement of the Receivership, PPCO had transferred to PPVA a total of over $60 million in cash, and PPLO had transferred to PPVA a total of over $5.5 million in cash. The flow of funds from investors into PPCO and/or PPLO, from PPCO and PPLO to PPVA, and then from PPVA back to PPCO and PPLO, had the effect of commingling investor contributions amongst the three funds.

39. In addition to the "loan" transactions, I have observed that PPCO Manager caused PPCO Master to engage in other related party transactions, in which the Platinum Insiders had an interest on both sides of the transactions and in which the related parties benefitted to PPCO Master's detriment. The entirety of the transactions are too complex to recount here, but I expect to demonstrate through expert opinion in one or more of the Litigations that PPCO was harmed by these related party transactions in 2015 and 2016 alone by a total of over $57 million.

40. I describe the foregoing observations not to take a position on the claims or defenses in the SEC enforcement action on which this Receivership is predicated. Rather, I share my observations with the Court because, as a result of the stay of the enforcement action pending the criminal proceedings [Dkt. 217] and what I understand to have been the limited focus of the Government in the criminal proceedings, the Court likely has not received all of this

information concerning the pre-Receivership management and operation of PPCO and which, in my view, may support the equitable treatment of Platinum's outside investors.

***The Current State of the Receivership***

41. With substantially all of the Receivership assets having significant value already liquidated, the Receivership is heading toward the distribution stage.

42. On December 10, 2018, I filed a motion to set bar dates for the submission of claims [Dkt. No. 424], which motion was approved by order entered February 11, 2019 [Dkt. No. 453]. As a consequence, bar dates of (i) March 29, 2019 at 5:00 p.m., for the submission of non-Government proofs of claims, and (ii) April 12, 2019 at 5:00 p.m., for the submission of Government proofs of claims, against the Receivership were established. (Investors in any of the Receivership entities were not required to file proofs of claims.) A total of approximately 330 proofs of claim were received and are in the process of being analyzed.

43. The claims and/or Platinum books and records reflect: (i) secured creditor claims by Beechwood and SHIP, subject to challenge in the Beechwood Action, totaling over $42 million; (ii) unaffiliated unsecured creditor claims totaling at least $50 million, including a $29.6 million claim by the Trustee of the Black Elk Energy Offshore Operations LLC Litigation Trust (the "***Black Elk Trustee***"), agreed to in a settlement with the Prior Receiver; (iii) affiliated unsecured creditor claims totaling at least $16 million, not even including the unliquidated claims by Platinum Insiders for advancement and/or indemnification of legal fees; (iv) unaffiliated investor claims totaling at least $337 million, including claims for unpaid redemptions by unaffiliated investors totaling at least $34.5 million; and (v) affiliated investor claims totaling at least $50.7 million.

44. On the asset side, I am attempting to liquidate during the first half of this year all assets that have not been liquidated yet. The Receiver's attorneys are prosecuting the Lincoln

and Greehey Actions, which need to be resolved in order to liquidate the one ALS policy and Greehey loan that remain in the PPCO portfolio. Negotiations are in progress to dispose of certain other assets that also remain in the PPCO portfolio, such as debt and equity in Cleveland Mining Ltd. and Cleveland Mining Holdings, Australian entities owning gold mining and pig iron exploration ventures in Brazil. Further, diligence is underway for a remnant sale of the remaining assets in the PPCO portfolio that have relatively insignificant value. Progress also is being made on the disposition of the illiquid PPLO securities that remain to be liquidated.

45. A disposition plan is in the process of being developed. The Receiver's professionals have researched, gathered and analyzed precedent plans. The team has met on multiple occasions to discuss the nature and scope of possible plans. And memos have been prepared and circulated internally outlining the general contours of a plan that, at this time, I believe would be equitable in this case.

46. The lynchpin issue that still needs to be resolved before any plan can be finalized and submitted to the Court for approval is the status of the purported liens and debt asserted by Beechwood, CNO and SHIP against all of PPCO's and its subsidiaries' assets. As mentioned, I commenced the Beechwood Action in December 2018, in part, to avoid the asserted liens and debt as actual and/or constructive fraudulent conveyances. After a full year of litigation, discovery in the Beechwood Action concluded last month, and the deadline for summary judgment motions is next month. Argument on summary judgment and a final pre-trial conference are scheduled for March 26, 2020.

47. At the same time, my counsel and I have been engaged in ongoing settlement discussions with the defendants. A settlement in principle resolving the disputed liens with one of the three groups of defendants has been reached and is in the process of being finalized. While it is not yet clear whether settlements will be reached with the other defendants, I remain

open to reaching a resolution on terms favorable to the Receivership. Until all defendants' disputed liens are removed, either consensually or by judgment, I cannot distribute the Receivership's assets, whether in receivership or bankruptcy.

***Future Expectations***

48. After the disputed lien issues are resolved, either consensually or by judgment, I will submit a plan of disposition to the Court.

49. At this time, with questions concerning the disputed liens, the amount of assets to be distributed, and the nature and amount of claims to be allowed still unanswered, I am not prepared to commit to any particular features of a plan.

50. It may be, however, that the plan that I propose deviates from the priorities prescribed in the United States Bankruptcy Code, 11 U.S.C. §101, *et seq.* Rather, given my observations concerning Platinum's pre-Receivership management and operation described above, my proposed plan, in the name of equity, may seek to treat all outside creditors of, and investors in, the Platinum funds alike.

***Dialogue with Other Stakeholders***

51. As mentioned above and in my Status Reports, my counsel and I have had ongoing discussions on a variety of topics concerning the Receivership, including the liquidation of specific assets, with the SEC, the defendants, the Investor Group and/or their respective counsel.

52. In connection with the Houlihan Retention Motion, for example, both Nordlicht and the Investor Group separately requested to meet with me in an effort to persuade me to invest in Abdala rather than dispose of it in a sales process. Notably, neither during any of those meetings nor at any other time has any party or interested party ever expressed to me or to my counsel a preference or desire that the case, or the liquidation of any Receivership assets,

proceed in bankruptcy rather than receivership. Further, and obviously, no group of creditors has filed an involuntary bankruptcy petition.

**THE BASES FOR MY VIEW THAT, FOR AT LEAST THE TIME BEING, PLATINUM SHOULD REMAIN IN RECEIVERSHIP**

53. In light of the facts described above, I continue to believe at this time that the interests of all stakeholders would be best served by the Receivership remaining in this Court rather than in bankruptcy. My belief is based on several considerations.

54. First, the Receivership has proceeded for over three years in this Court, and is heading toward its conclusion. The vast majority, measured by value, of the Receivership assets, excluding litigation and arbitration claims, already have been liquidated. Further, the liquidation of the remaining assets is simply a matter of time (to conclude litigations, negotiations and a remnant sale required to dispose of such assets), rather than the result of any impediments of being in a receivership. I see no advantage to liquidating the remaining assets in bankruptcy. To the contrary, as discussed further below, I believe the procedures required to be followed in bankruptcy court would add significant delay and costs to the process of disposing of such assets, without enhancing the values to be recovered in any way. Moreover, the claims process already has been initiated in this Receivership, with bar dates set and expired, and would need to be repeated if Platinum were put into bankruptcy.

55. Next, because the status of the liens and debt claimed by Beechwood and SHIP on PPCO's and its subsidiaries' assets will remain unsettled until the Beechwood Action is resolved, consensually or by judgment, there is nothing to be gained from my perspective, at this time, from placing Platinum in bankruptcy. If Beechwood's and SHIP's liens cover and remain intact on all Receivership assets (except for the relatively small (less than $3 million) of PPLO assets) in amounts that well exceed the value of the Receivership, then all, or virtually all, of the

Receivership's assets seemingly would have to be distributed to the secured creditors, regardless of whether the case were to proceed in this Court or in bankruptcy. Thus, so long as Beechwood's and SHIP's liens remain in place, which is the current *status quo*, incurring the significant costs and delays attendant to a bankruptcy filing would be entirely unwarranted. In fact, the distribution of all Receivership assets to Platinum's secured creditors, in the event that were to come to pass, would be approved more time- and cost-effectively in this Court than in bankruptcy court.

56. On the other hand, assuming Beechwood's and SHIP's liens were removed, it may be that this Receivership would offer a superior forum within which to distribute the estate's assets to claimants than in bankruptcy. Based on my observations, which I have shared above, the manner in which Platinum was managed and operated prior to the Receivership may render a distribution based on the strict priorities in the Bankruptcy Code inequitable. The form in which Platinum accepted capital, whether as debt or equity, was largely driven by considerations—sometimes designed to favor the related parties, *e.g.*, Beechwood, which sourced the capital into Platinum, and other times based on tax consequences unique to Platinum's structure—that did not reflect the true substance of the transactions. As such, giving strict priority to unsecured creditor claims over investor claims, as demanded by the Bankruptcy Code, may not yield a just result. Indeed, it appears to me that the significant $29.6 million claim that the Prior Receiver allowed by settlement in favor of the Black Elk Trustee in the early stages of the Receivership did not contemplate that the Black Elk Trustee's claim (a claim given to an alleged victim of Platinum's alleged fraud) would be treated in accordance with ordinary bankruptcy priorities and thus elevated above the claims of others (*i.e.*, investors) who also allegedly were harmed by Platinum's conduct. The settlement agreement amongst the Black Elk Trustee, the Prior Receiver and the SEC provides for the Black Elk Trustee (the "***Black Elk Settlement***") simply to

receive "an allowed claim in the SEC Suit of $24,600,584.31," plus "an additional allowed claim in the SEC Suit of $5,000,000" "in the event the Receiver Order is amended to identify PPLO as a 'Receivership Entity.'" The Black Elk Settlement does not specify the nature of the allowed claim (*e.g.*, secured claim versus general unsecured creditor claim versus equity claim) nor the precise entity or entities against which such claim lies. Yet, if the Bankruptcy Code's strict priority rules were applied, the Black Elk Trustee's claim, which likely would be classified as a general unsecured creditor claim against the PPCO and PPLO Masters, alone would leave Platinum's investors without any recovery.

57. Additionally, in light of the effective commingling that occurred amongst the funds managed by the Platinum Insiders, it may not be equitable to treat investors in different Platinum feeder funds differently from each other. But that would be the result mandated by the Bankruptcy Code absent substantive consolidation, the standard for which, under applicable law, likely would not be met in this case. In contrast, the case law permits a court overseeing a receivership, such as this one, to approve a plan of disposition that treats outside investors in and creditors of different funds commonly managed by the same group of alleged securities laws violators on a parallel footing in appropriate circumstances.

58. Regardless, the delay and costs precipitated by putting Platinum into bankruptcy at this time would be enormous in my estimation. Given the complex organizational structure I have described above, substantial thought and resources would need to be devoted even before any bankruptcy filing in order to determine (i) the specific entities, whether currently in Receivership or not, that are insolvent and thereby appropriate candidates for bankruptcy, (ii) those parents, subsidiaries and/or affiliates, again, whether currently in Receivership or not, that are solvent and thus should continue to exist outside of bankruptcy, and (iii) the impact that placing some, but not all, of the aforementioned entities into bankruptcy would have.

Additionally, because not all of the entities in Receivership are domestic, additional resources would need to be devoted to considering and possibly commencing separate insolvency proceedings offshore in the Cayman Islands. The foregoing analyses, which have not been performed to date, but would need to be performed before any bankruptcy petitions were filed, would require considerable time and expense.

59. After expending significant time and expense on determining which, if any, Receivership entities and affiliates to place into bankruptcy, any bankruptcy proceedings themselves would impose far higher administrative costs on stakeholders than would be imposed by continuing in this Court. For example, under the Bankruptcy Code, the disposition of the remaining assets in PPCO's and PPLO's portfolios require motion practice and court approval, and all of the attendant expense of same, even though such assets have relatively small, if not insignificant, values and thus can be disposed of without such formality and expense in the Receivership. Additionally, the claims process (in order to satisfy the Bankruptcy Code) would have to be redone, imposing additional costs. Further, while I am authorized by the Receiver Order to continue to operate the Receivership entities in bankruptcy as "debtors in possession," my continued oversight of the Receivership entities, post-bankruptcy, is not guaranteed. Nor would the continued involvement of the Receiver's professionals be assured, because, by virtue of unpaid fees and expenses and an ongoing hold-back, they would be creditors of the estate and thus prevented from continuing to serve the estate unless they waived their creditor claims. The potential appointment of new professionals and/or a new fiduciary would necessitate the expenditure of significant "ramp up" time by the new team, which would impose additional, substantial costs. All of these costs would significantly reduce the total Receivership assets available for distribution to creditors and/or investors.

60. Furthermore, placing the Receivership entities into bankruptcy necessarily entails the strict priority system of recognizing administrative claims before general unsecured claims ahead of equity claims, and on a debtor by debtor basis, imposed by the Bankruptcy Code. As discussed above, that system may not fit the circumstances of Platinum, and may yield inequitable results. Moreover, any efforts to deviate from Bankruptcy Code priorities, or to substantively consolidate debtors, in bankruptcy court would require motion practice, could face an uphill battle on the merits under developed law, and would be time consuming and costly.

61. Additionally, although I am not a party to the underlying enforcement action, the proceeding is one for civil enforcement of the federal securities laws, relief that cannot be granted in bankruptcy court. Because the underlying claims in the action have been stayed pending the criminal proceedings since the filing of the action, I respectfully submit that it may be inappropriate either to dismiss or refer to bankruptcy court such claims at this time.

62. For all of these reasons, at this time, I continue to believe the interests of stakeholders would be served best by continuing in the Receivership and not in bankruptcy.

**INVOCATIONS OF BANKRUPTCY CONCEPTS**

63. I am, and throughout my tenure have been, cognizant of the United States Court of Appeals for the Second Circuit's admonitions against using an equitable receivership as a substitute for bankruptcy and against transforming a district court into a court of bankruptcy. *See, e.g., SEC v. American Bd. of Trade, Inc.*, 830 F.2d 431 (2d Cir. 1987). Accordingly, except as I have been required to do so by the Receiver Order, I have not sought to involve the Court in the administration of the Receivership.

64. Nevertheless, because the law of federal equity receiverships is not codified like, and is not as developed as, the law of bankruptcy, I may have invoked, and in the future may invoke, from time to time, bankruptcy law in order to bolster, supplement or, in some instances,

fill in federal equity receivership law, if and as appropriate. I have tried to do so sparingly, consistently with federal equity receivership case law, and not at all with the intention of transforming this Court into a bankruptcy court. By doing so, I also did not intend to indicate or suggest to the Court that my invocation of or analogy to bankruptcy law is necessary for the Court to decide any of the matters before it.

65. I believe the Indemnity Motions are cases in point. While, in responding to arguments advanced by Levy and SanFilippo, my counsel invoked certain bankruptcy principles [Dkt. No. 497], I respectfully submit that the Court need not decide any matters of bankruptcy law in order to determine these motions. The Court already effectively denied these Indemnity Motions as a matter of Delaware law, not bankruptcy law, when they were first presented as motions for advancement of attorneys' fees [Dkt. No. 417]. Because the defendants have presented no reason for the Court to alter its prior conclusion that prioritizing defendants' advancement/indemnification claims would be inappropriate, I respectfully submit that the Court can and should determine the Indemnity Motion without having to decide any matters of bankruptcy law.

## CONCLUSION

66. For the reasons I have recited above, I believe at this time that this case should proceed, as it has for the past three years, in this Court. I will continue to be open-minded about this issue, and will notify the Court if and when I conclude that proceeding in bankruptcy court is preferable.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 17th day of January, 2020, at New York, New York.

*/s/ Melanie L. Cyganowski*
Melanie L. Cyganowski

**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF NEW YORK**

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|---|---|---|
| SECURITIES AND EXCHANGE COMMISSION,<br><br>Plaintiff,<br><br>-v-<br><br>PLATINUM MANAGEMENT (NY) LLC;<br>PLATINUM CREDIT MANAGEMENT, L.P.;<br>MARK NORDLICHT;<br>DAVID LEVY;<br>DANIEL SMALL;<br>URI LANDESMAN;<br>JOSEPH MANN;<br>JOSEPH SANFILIPPO; and<br>JEFFREY SHULSE,<br><br>Defendants. | : | No. 16-cv-6848 (BMC) |

**MEMORANDUM OF LAW OF MELANIE L. CYGANOWSKI, AS RECEIVER, IN RESPONSE TO THE MINUTE ORDER ENTERED DECEMBER 12, 2019**

OTTERBOURG P.C.
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Of Counsel:

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Andrew S. Halpern

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Melanie L. Cyganowski, the duly appointed receiver (the "***Receiver***") of Platinum,[1] submits this Memorandum of Law in response to the Court's December 12, 2019 minute order (the "***Minute Order***") (i) deferring any ruling on the motions of Joseph SanFilippo ("***SanFilippo***") and David Levy ("***Levy***") to compel the Receiver to indemnify SanFilippo's and Levy's criminal defense costs (the "***Indemnity Motions***") [Dkt. Nos. 490 & 494], and (ii) directing argument and briefing on the "sole issue [of] 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."

## INTRODUCTION

The Receiver's accompanying declaration (the "***Receiver Decl***."), to which we respectfully refer the Court, describes at length the reasons why the Receiver has concluded, and concludes still, that the interests of all stakeholders are best served by continuing to administer, at least at this time, the liquidation of the Receivership Entities in this Court, notwithstanding the Second Circuit's preference (expressed in the cases cited in the Minute Order) for liquidating insolvent entities in bankruptcy court rather than equity receiverships.

The Receiver's conclusion is based on, among other things, the facts that: (i) the liquidation of the Receivership's assets is already substantially complete, and liquidating the remaining assets in bankruptcy would yield no higher recovery but far greater expense; (ii)

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[1] "Platinum" refers individually and collectively to Platinum Credit Management, L.P. ("***PPCO Manager***"), Platinum Partners Credit Opportunities Master Fund LP ("***PPCO Master***"), Platinum Partners Credit Opportunities Fund (TE) LLC ("***PPCO TE Feeder***"), Platinum Partners Credit Opportunities Fund LLC ("***PPCO US Feeder***"), Platinum Partners Credit Opportunities Fund (BL) LLC ("***PPCO Blocker***"), Platinum Partners Credit Opportunities Fund International Ltd. and Platinum Partners Credit Opportunities Fund International (A) Ltd. (collectively, "***PPCO Int'l Feeders***" and with PPCO TE and US Feeders, the "***PPCO Feeders***," and, in turn, with PPCO Master and PPCO Blocker, "***PPCO***"), Platinum Liquid Opportunity Management (NY) LLC ("***PPLO Manager***"), Platinum Partners Liquid Opportunity Fund (USA) L.P. ("***PPLO US Feeder***"), Platinum Partners Liquid Opportunity Master Fund L.P. ("***PPLO Master***" and with PPLO US Feeder, "***PPLO***," and collectively with PPCO, following the commencement of this action, the "***Receivership***" or the "***Receivership Entities***").

unless and until the liens and debt of certain putative secured creditors (currently challenged in another court) are avoided, most or all of PPCO's assets, regardless of forum, may have to be distributed to the secured creditors, and doing so would be far more time- and cost-effective in this Court than in bankruptcy court; (iii) assuming the liens and debt of the putative secured creditors are avoided, then the facts and circumstances concerning Platinum's management observed by the Receiver, including the systematic overvaluation of assets, commingling of investor funds and self-dealing transactions, may warrant an equitable distribution of assets not available in bankruptcy court; and (iv) given the complexity of Platinum's structure, and the current status of the Receivership, the time and cost needed even to determine which entities to file for bankruptcy, let alone to finish liquidating in bankruptcy, would be enormous.

This Memorandum discusses the legal framework within which the Receiver, based on the foregoing considerations, has concluded, at least for now, that Platinum should remain in receivership.

## FACTUAL BACKGROUND

The facts supporting the Receiver's conclusion are set out in detail in the Receiver Decl., to which we refer the Court. The salient facts are as follows:

### A. The Receiver's Appointment and Duties

On consent of all parties, Platinum has been under the control of a court-appointed receiver since December 19, 2016—Bart Schwartz (the "***Prior Receiver***"), initially, and, since July 6, 2017, the Receiver. (Receiver Decl. ¶ 3) In the order setting out the Receiver's powers and duties (the "***Receiver Order***"), the Court found that appointment of the Receiver was "necessary and appropriate," among other things, to ". . . (ix) conduct an orderly wind down including a responsible liquidation of assets and orderly and fair distribution of those assets to investors; and (x) determine whether one or more of the Receivership Entities should undertake bankruptcy filings." (*Id.* ¶ 4) Hence, the Court specifically empowered the Receiver, among other things, to:

- "without further Order of this Court, transfer, compromise, or otherwise dispose of Receivership Property in the ordinary course of business of the Receivership Entities' orderly wind down, on terms and in the manner the Receiver deems most beneficial to the Receivership Estate";

- "engage in transactions outside the ordinary course of business of the Receivership Entities' orderly wind down [defined as the expenditure of more than $3 million in cash and/or the disposition of the Receivership's interest in property in return for more than $3 million in cash or other assets] . . . upon motion and approval of the Court";

- "take all actions to manage, maintain and/or wind-down business operations of the Receivership Estate"; and

- "seek authorization of this Court to file voluntary petitions for relief under Title 11 of the United State Code (the 'Bankruptcy Code') for any or all of the Receivership Entities" and, if any Receivership Entity is placed in bankruptcy proceedings, "to operate each of the Receivership Entities as . . . a debtor-in-possession." (*Id.* ¶ 5)

The Court also empowered and directed the Receiver to "develop a plan . . . for the fair, reasonable, and efficient recovery and disposition of all remaining, recovered, and recoverable Receivership Property (the 'Disposition Plan'), which may be a plan of liquidation." (*Id.* ¶ 6)

**B. <u>The Performance of the Receiver's Duties to Date</u>**

In accordance with the Receiver Order, the Receiver has liquidated the vast majority, as measured by value, of the assets that were in the PPCO or PPLO portfolios as of the time of her appointment. (Receiver Decl. ¶¶ 19-23, 54) The only assets in those portfolios that remain to be liquidated, of relatively small, if not insignificant, collective value, are either subject to pending litigation, in the process of being liquidated per ongoing discussions or negotiations, and/or will be liquidated in relative short order, either in a remnant sale, by abandonment, or (in the case of PPLO's illiquid securities) in due course. (*Id.* ¶¶ 23, 54)

The Receiver also has commenced, and has been pursuing, several targeted litigations, including actions that need to be resolved in order for the Receiver to liquidate and/or distribute certain Receivership assets. (*Id.* ¶ 25) Notable among such actions is the action that the Receiver commenced in December 2018 against Beechwood Re Ltd. (with its affiliates and certain of its affiliates' principals, "***Beechwood***"), CNO Financial Group, Inc. (with its affiliates, "***CNO***") and Senior Health Insurance of Pennsylvania (with its affiliate, "***SHIP***") in the United States District Court for the Southern District of New York, captioned *In re Platinum-Beechwood Litig.*, *Cyganowski v. Beechwood Re Ltd.*, *et al.*, 18-cv-6658 (JSR), 18-cv-12018 (JSR) (the "***Beechwood Action***"). (*Id.*) There, the Receiver is pursuing, among other causes of action, claims for fraudulent conveyance to avoid certain debt purportedly incurred in favor of the defendants and certain purported liens against all of PPCO's and its subsidiaries' assets asserted by the defendants. (*Id.*)

Additionally, in the course of fulfilling her other duties, the Receiver has continually been evaluating whether the interests of the Receivership would be best served by placing all or some of the entities currently in Receivership in bankruptcy. (Receiver Decl. ¶ 7) In her first quarterly status report, the Receiver explained at length the various reasons, with reference to case law, why she believed it was appropriate and preferable for the case to proceed in receivership rather than in bankruptcy. (*Id.* ¶ 8) In subsequent status reports, the Receiver continued to find that "the continuation of the receivership is in the best interests of the creditors of and the investors in the Platinum Entities" and that "[w]hile the Platinum Entities could be liquidated in a bankruptcy proceeding, . . . the Receiver continues to believe that continuing with the orderly liquidation of the Platinum Entities in this receivership case and the pursuit of legal actions commenced by the Receiver provides greater flexibility to achieve an equitable result for the investors who have been wronged here." (*Id.*)

### C. <u>The Receiver's Observations Concerning Platinum Prior to Receivership</u>

In the course of discharging her duties as Receiver, the Receiver also has made certain observations regarding Platinum's pre-Receivership structure, management and operation that may render bankruptcy a particularly inhospitable forum under the circumstances of this case. (Receiver Decl. ¶¶ 26-40)

***First***, the Receiver has observed that Platinum's structure was extraordinarily complex, involving a myriad of domestic and foreign entities, not all of which are in the Receivership. (*Id.* ¶¶ 28-32) Separately organized domestic and off-shore feeder funds took in capital contributions from investors; those investor funds were then contributed, in some instances directly, and in other instances indirectly via separately organized blocker or intermediate funds, into the master fund; while the master fund, in turn, invested its capital in individual assets both directly and through multiple separately organized subsidiaries. (*Id.*) Analyses under domestic and foreign laws to determine which specific entities are eligible for bankruptcy, which parents, subsidiaries and affiliates of those entities are not so eligible, and what the implications are of placing into bankruptcy some, but not all, of these entities have not yet been performed. (Receiver Decl. ¶ 58) Performing such analyses would be time consuming and expensive. (*Id.*)

***Second***, the Receiver has observed that the individuals, several of whom are facing or who faced criminal proceedings, who managed and operated PPCO and PPLO pre-Receivership (on behalf of separately organized companies hired as independent contractors) engaged in the following, among other, activities:

- The routine and systematic overvaluation of PPCO Master's assets, collectively by hundreds of millions of dollars: Investments in portfolio companies with no track record, no demonstrated prospects and substantial unfunded capital expenditure requirements routinely were being carried on PPCO Master's books for tens of millions of dollars or more per investment. Abdala, Marquis, BLAB and LC Energy, assets disposed of in Receivership at a fraction of their carrying values or for no value at all, are cases in point. (Receiver Decl. ¶¶ 36-37)

- Commingling of investor funds: The flow of funds from investors into PPCO and/or PPLO, from PPCO and PPLO as "loans" to the separate, but related, Platinum Partners Value Arbitrage Fund L.P. ("***PPVA***," a fund under the management of the same insiders and which was experiencing severe liquidity issues), and then from PPVA back to PPCO and PPLO, had the effect of commingling investor contributions amongst the three funds. (*Id.* ¶ 8)

- Self-dealing transactions: The individuals caused PPCO Master to engage in a series of related party transactions in which the insiders had an interest on both sides of the transactions and in which the related party affiliates benefitted to the detriment of PPCO Master in the amount of $57 million in 2015 and 2016 alone. (*Id.* ¶ 39)

These circumstances may render the treatment of PPCO and PPLO outside investor claims under the strict priority rules in bankruptcy singularly inequitable.

### D. <u>The Current Status of the Receivership and Underlying Enforcement Action</u>

At this time, the Receivership is heading toward the distribution stage. (Receiver Decl. ¶ 41) The Receiver has established a claims process. Bar dates have been set and have expired, with some 330 claims having been received and which are now under review. (Receiver Decl. ¶ 42) The Receiver also is attempting to liquidate, during the first half of this year, the remaining assets in PPCO's and PPLO's portfolios. (*Id.* ¶ 44) Additionally, per the charge given to her in the Receiver Order, the Receiver is in the process of developing a plan of disposition. (*Id.* ¶ 45) Although the Receiver is not committed to any particular features of a plan yet, the observations she has drawn with respect to the manner in which Platinum was managed and operated prior to the Receivership, discussed above, may lead her to propose a plan that deviates from the priority rules applicable to bankruptcy proceedings. (*Id.*)

The lynchpin issue that must first be resolved before the Receiver can submit any plan of disposition and/or distribute any assets is the status of the liens and debt asserted by the putative secured creditors, Beechwood, CNO and SHIP, against all of PPCO's and its subsidiaries' assets. (*Id.* ¶ 46) Until such time as the liens are avoided, either by judgment or consent, PPCO's assets, the vast majority of the Receivership, cannot be distributed. (*Id.* ¶ 47) The Receiver has reached a settlement in principle with one of the three groups of defendants that would remove its purported liens; and she continues to engage in discussions with the other defendants. (*Id.* ¶ 47) Meanwhile, discovery in the Beechwood Action concluded last month, the deadline for summary judgment motions runs next month, and argument on summary judgment and a final pre-trial conference are scheduled for March 26, 2020. (*Id.* ¶ 46)

As for the underlying enforcement action (the "***Enforcement Action***") commenced by the Securities and Exchange Commission ("***SEC***"), proceedings remain stayed pending the outcome of the criminal proceedings now on appeal. (*Id.* ¶¶ 40, 61) Notably, the Memorandum and Order, dated July 7, 2017, granting the U.S. Attorney's motion to stay discovery in the Enforcement Action pending the criminal proceeding, specifically provided that "[n]othing contained in this Memorandum and Order is to be construed as affecting the responsibilities and actions of the Receiver in disposing of the receivership assets." (Dkt. No. 217 at 1-2, 13)

## LEGAL ANALYSIS

### A. Applicable Legal Principles

In the Minute Order, the Court cited *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) to support its directing of argument and briefing on the issue of "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." In *Eberhard*, the Second Circuit reversed a judgment setting aside a fraudulent conveyance in favor of an SEC receiver due to lack of standing. *Eberhard*, 530 F.3d at 133-37. In so doing, the court commented generally on the powers of an SEC receiver, noting that "the power of a securities receiver is not without limit." *Id.* at 132. As "example[s]," the court observed that it has "'expressed strong reservations as to the propriety of allowing a receiver to liquidate [an estate],'" *id.* (quoting *Lankenau v. Coggeshall & Hicks*, 350 F.2d 61, 63 (2d Cir.1965)), and that "because receivership should not be used as an alternative to bankruptcy, we have disapproved of district courts using receivership as a means to process claim forms and set priorities among various classes of creditors." *Id.* (citing *SEC v. Am. Bd. of Trade, Inc.*, 830 F.2d 431, 437-38 (2d Cir. 1987)).

In *Esbitt*, the Second Circuit affirmed a judgment in favor of an SEC receiver enforcing a debt owed to the receivership entity. *Esbitt*, 335 F.2d at 142. In rejecting the appellant's argument that the district court lacked jurisdiction over the receiver's claims, the Second Circuit found that, by virtue of the underlying SEC enforcement action, the district court had power over the receivership entity to which the debt was owed and, thus, that the "suit by the receiver must be considered ancillary to the main action." *Id.* at 143. Nevertheless, the Second Circuit observed that "[t]his is not to say that we approve the use of an equity receivership to perform the functions of the bankruptcy court." *Id*. Rather, the court stated that "[w]e see no reason why violation of the Securities Act should result in the liquidation of an insolvent corporation via an equity receivership instead of the normal bankruptcy procedures, which are much better designed to protect the rights of interested parties." *Id.*

Notwithstanding the concerns expressed in *dicta* in *Eberhard* and *Esbitt* that district courts in securities receiverships should not overreach to administer an insolvent entity's liquidation that is better administered in bankruptcy, the Second Circuit nevertheless has recognized, with equal clarity, that the practical considerations for retaining jurisdiction over the liquidation of an entity in receivership may trump those concerns. Indeed, in *Am. Bd. of Trade*, cited in *Eberhard*, the Second Circuit expressly noted that:

> Notwithstanding our oft-repeated view on the matter, . . . we have never vacated or modified a receivership order on the ground that a district court had improperly attempted to effect a liquidation. The reason we have acquiesced in the past, of course, is that by the time the issue had reached us, the liquidation was usually near termination, and claimants could not benefit from the initiation of bankruptcy proceedings.

830 F.2d at 437-38 (affirming the appointment of a receiver who oversaw the liquidation of assets and a claims process in an enforcement action).

Subsequent decisions within the Circuit emphasize the significance of such practical considerations in deciding whether to proceed with the liquidation and/or distribution of a receivership entity's assets in an SEC enforcement action rather than in bankruptcy court. In *SEC v. Credit Bancorp, Ltd.*, 2000 WL 1752979 (S.D.N.Y. Nov. 29, 2000), *aff'd*, 290 F.3d 80 (2d Cir. 2002), after weighing the Second Circuit's concern that "an equity receivership should not be employed as a substitute for a bankruptcy proceeding," on the one hand, with the practicalities of the case before it, on the other, the district court approved a partial plan of distribution in the receivership. *Id.* at *27-28. The court found:

> This issue is without doubt quite complex, and is a matter of no little concern for this Court. However, given that neither the Receiver nor, more importantly, the defrauded customers, have sought the initiation of bankruptcy proceedings, given the SEC's position, and given that the contemplated distribution is partial in nature, the Court will decline to exercise its inherent power to place this matter into bankruptcy at this juncture.

*Id.* at *28. On appeal, the Second Circuit affirmed, holding that "a *pro rata* distribution was within the equitable discretion of the District Court." 290 F.3d at 82-83.

Likewise, in *SEC v. Malek*, 397 F.App'x 711 (2d Cir. Oct. 25, 2010), the Second Circuit affirmed a district court's approval of a distribution plan that liquidated the receivership estate. The court reiterated its "preference against the liquidation of defendant corporations through the mechanism of federal securities receiverships, as opposed to through the bankruptcy courts," but nevertheless echoed that "we have never vacated or modified a receivership order on the ground that a district court improperly attempted to effect a liquidation" and noted that "[s]uch restraint is particularly appropriate where, as here, '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.'" *Id.* at 714-15. The court thus affirmed the plan's approval, because "both the Receiver and the district court made detailed findings, with the aid of experts, that liquidation or reorganization through bankruptcy would be unfavorable to the receivership estate." *Id.* at 715. Of particular significance to the Second Circuit was the receiver's finding that "initiation of bankruptcy proceedings would 'increase the administrative costs to be borne by the receivership estate,' would cause victims to 'wait significantly longer before receiving any payments,' and would forfeit the 'latitude enjoyed by courts overseeing equity receiverships to carefully craft a particularized plan to achieve the most equitable distribution possible.'" *Id.*

Taken collectively, *Esbitt*, *Eberhard*, *Am. Bd. of Trade*, *Credit Bancorp* and *Malek* appear to stand for the proposition that a district court overseeing a securities receivership should be concerned not to assume the administration of liquidating a receivership entity where such liquidation would be better performed in bankruptcy court, while nevertheless weighing those concerns against any practical considerations, like time, expense and equity, that may favor retaining jurisdiction over the liquidation of a receivership entity.

**B. <u>The Receiver's Analysis of Bankruptcy vs. Receivership Under Applicable Legal Principles</u>**

Upon the types of considerations weighed by the Second Circuit in the above-referenced cases, the Receiver consistently has concluded to date, as she explains in the Receiver Decl., that the interests of stakeholders would be best served at this time by continuing to administer Platinum in receivership rather than in bankruptcy court.

***First,*** the Receivership has proceeded for over three years in this Court, and is heading toward a distribution. The vast majority, as measured by value, of the Receivership assets, excluding litigation and arbitration claims, already have been liquidated. (Receiver Decl. ¶ 54) The liquidation of the remaining assets is simply a matter of time (needed to conclude litigations, negotiations and a remnant sale required to dispose of such assets), rather than the result of any impediments of being in a receivership. Consequently, there is no advantage to liquidating the remaining assets in bankruptcy. Moreover, as the Second Circuit found to be relevant in *Am. Board of Trade*, the claims process already has been initiated in this Receivership, with bar dates set and expired. 830 F.2d at 438. The claims process would need to be repeated if Platinum were placed in bankruptcy. (Receiver Decl. ¶ 54)

***Second,*** the procedures required to be followed in bankruptcy would add significant delay and costs to the process of disposing of such assets, without enhancing the values to be recovered in any way. In this regard, the delay and costs precipitated even by putting Platinum into bankruptcy likely would be enormous. (*Id.* ¶ 58) Given Platinum's complex organizational structure, substantial thought and resources would need to be devoted even before any bankruptcy filing, in order to determine those specific entities, whether currently in Receivership or not, that are currently insolvent and thereby appropriate candidates for bankruptcy, those parents, subsidiaries and/or affiliates, also whether currently in Receivership or not, that are solvent and thus should continue to exist outside of bankruptcy, and the impact that placing some, but not all, of the aforementioned entities into bankruptcy would have. (*Id.*) Additionally, because not all of the entities in Receivership are domestic, additional resources would need to be devoted to considering and possibly commencing separate insolvency proceedings in the

Cayman Islands. (*Id.*) Further, after expending significant time and expense on determining which, if any, Receivership Entities and affiliates to place into bankruptcy, any bankruptcy proceedings themselves would impose far greater administrative costs on stakeholders than would be imposed by continuing in this Court. (*Id.* ¶ 59) In addition to redoing the claims process and subjecting the liquidation of the remaining relatively insignificant assets to motion practice, there would be no assurance in bankruptcy that the Receiver or her professionals would retain oversight of the process. (*Id.*) The potential appointment of new professionals and/or a new fiduciary would necessitate the expenditure of significant "ramp up" time by the new team, which would impose additional, substantial costs. (*Id.*) All of these costs would significantly reduce the assets available for distribution to creditors and/or investors. *See, e.g., Malek,* 397 F.App'x at 715 (affirming distribution plan's approval, in part, because "the initiation of bankruptcy proceedings would 'increase the administrative costs to be borne by the receivership estate,' [and] would cause victims to 'wait significantly longer before receiving any payments'").

***Third,*** because the status of liens and debt asserted by putative secured creditors against all of PPCO's and its subsidiaries' assets will remain unsettled until the Beechwood Action is resolved, there is nothing to be gained, at this point, from placing any of the Platinum entities in bankruptcy. (Receiver Decl. ¶ 55) If the alleged liens cover and remain intact on all Receivership assets (except for the relatively small amount – less than $3 million – of PPLO assets) and in amounts that well exceed the value of the Receivership, then all or virtually all of the Receivership's assets would be distributed to secured creditors, regardless of whether the case were to proceed in this Court or in bankruptcy. (*Id.*) The distribution of the Receivership assets to Platinum's secured creditors would be approved more time- and cost-effectively in this Court than in bankruptcy court. (*Id.* ¶¶ 58-59)

***Fourth***, based upon the Receiver's observations, the manner in which Platinum was managed and operated prior to the Receivership may render a distribution based on the strict priorities in bankruptcy inequitable. (*Id.* ¶¶ 56-57, 60) The systematic overvaluation of assets, effective commingling of investor funds and serial self-dealing transactions in which the insiders engaged Platinum may render the different treatment of outside investors and outside creditors in different Platinum feeder funds unfair. *See, e.g.*, *Malek*, 397 F.App'x at 715 (affirming distribution plan's approval, where bankruptcy "would forfeit the 'latitude enjoyed by courts overseeing equity receiverships to carefully craft a particularized plan to achieve the most equitable distribution possible'"); *accord SEC v. Amerindo Inv. Advisors Inc.*, 2014 WL 2112032, at *15 (S.D.N.Y. May 6, 2014) ("For now, the Court agrees with the Receiver and the SEC that, because of the commingling of assets and the similar treatment of all investor funds, the Receiver's distribution formula is fair and equitable."), *aff'd sub nom. SEC v. Amerindo Inv. Advisors*, 639 F.App'x 752 (2d Cir. 2016); *CFTC v. Eustace*, 2008 WL 471574, at *7-8 (E.D. Pa. Feb. 19, 2008) (evidence of commingling, even if "not necessarily systematic," and "joint marketing of the funds [that] encouraged investors to perceive the funds as a part of a whole," "support[ed] [a receiver's] pro rata distribution plan").

***Finally***, although the Court is right to be concerned if "called upon to apply Bankruptcy Code concepts to substantial claims and procedures in this matter," the Indemnity Motions, respectfully, can be decided as a matter of Delaware law, without having to apply bankruptcy law. (Receiver Decl. ¶¶ 64-65) Moreover, because the law of federal equity receiverships is not codified like, and is not as developed as, the law of bankruptcy, it is appropriate for the Court to consider analogous bankruptcy law where gaps exist in federal equity receivership law. *See, e.g.*, *Bendall v. Lancer Mgmt. Grp., LLC*, 523 F.App'x 554, 557 (11th Cir. 2013) ("Given that a primary purpose of both receivership and bankruptcy proceedings is to promote the efficient and orderly administration of estates for the benefit of creditors, we will apply cases from the analogous context of bankruptcy law, where instructive, due to limited case law in the receivership context."). The Receiver's research has not identified any case within this or any other Circuit that has dismissed an equity receivership because of a litigant's invocation of bankruptcy law.

## CONCLUSION

For the foregoing reasons, and those set forth in the Receiver Decl., the Receiver concludes that the interests of stakeholders would best be served by the Court's continued retention of jurisdiction, at least for now, over the Receivership Entities.

Dated: New York, New York
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Otterbourg P.C.

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