

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

----- X

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, :

No. 16-CV-6848 (BMC)

Defendants. :

----- X

**MEMORANDUM OF LAW IN SUPPORT OF MOTION OF
MELANIE L. CYGANOWSKI, AS RECEIVER, FOR
ENTRY OF AN ORDER TO ESTABLISH CLAIMS AND
INTERESTS RECONCILIATION AND VERIFICATION PROCEDURES**

OTTERBOURG P.C.
230 Park Avenue
New York, New York 10169
(212) 661-9100

Attorneys for Melanie L. Cyganowski, as Receiver

TABLE OF CONTENTS

	<u>Page</u>
I. PRELIMINARY STATEMENT	1
II. PROCEDURAL BACKGROUND.....	4
A. Commencement of this Receivership	4
B. Bar Date Motion and Bar Date Order	5
III. RELIEF REQUESTED.....	7
IV. THE RECEIVER’S CLAIMS AND INTERESTS RECONCILIATION AND VERIFICATION PROCEDURES.....	8
A. The Receiver’s Determination of Claims	8
B. The Receiver’s Verification of Interests	11
C. Voluntary Resolution of Disputed Claims and Disputed Interests	13
D. Resolution of Disputed Claims and Disputed Interests by Court	14
V. RESERVATION OF RIGHTS	15
VI. APPLICABLE AUTHORITY	16
VII. NOTICE.....	18
VIII. CONCLUSION.....	18

TABLE OF AUTHORITIES

	<u>Page</u>
Cases	
<i>Cleveland Bd. of Educ. v. Loudermill</i> , 470 U.S. 532 (1985).....	16
<i>FDIC v. Bernstein</i> , 786 F. Supp. 170 (E.D.N.Y. 1992)	17
<i>Revere Copper & Brass, Inc. v. Adirance Machine Works, Inc.</i> , 76 F.2d 876 (2d Cir. 1935).....	17
<i>SEC v. Byers</i> , 637 F. Supp. 2d 166 (S.D.N.Y. 2009).....	passim
<i>SEC v. Callahan</i> , 193 F. Supp. 3d 177 (E.D.N.Y. 2016)	2, 16, 17
<i>SEC v. Correll</i> , 4:05-cv-00472-RAS, Dkt. No. 369, P. 7 (E.D. Tex. Dec. 12, 2008)	17
<i>SEC v. Credit Bancorp Ltd.</i> , 290 F.3d 80 (2d Cir. 2002).....	16
<i>SEC v. Credit Bancorp, Ltd.</i> , No. 99 CIV. 11395 RWS, 2000 WL 1752979 (S.D.N.Y. Nov. 29, 2000)	16
<i>SEC v. Elliott</i> , 953 F.2d 1560 (11th Cir. 1992)	16, 17
Rules	
Rule 56 of the Federal Rules of Civil Procedure	17

Melanie L. Cyganowski, the duly appointed Receiver (the “**Receiver**”) of Platinum Credit Management, L.P., Platinum Partners Credit Opportunities Master Fund LP, Platinum Partners Credit Opportunities Fund (TE) LLC, Platinum Partners Credit Opportunities Fund LLC, Platinum Partners Credit Opportunity Fund (BL) LLC, Platinum Liquid Opportunity Management (NY) LLC, Platinum Partners Liquid Opportunity Fund (USA) L.P., Platinum Partners Liquid Opportunity Master Fund L.P., Platinum Partners Credit Opportunities Fund International Ltd. and Platinum Partners Credit Opportunities Fund International (A) Ltd. (collectively, the “**Receivership Entities**,” the “**Platinum Entities**” or “**Platinum**” and each a “**Receivership Entity**” or “**Platinum Entity**”), by her undersigned counsel, hereby files this memorandum of law in support of her motion (the “**Motion**”) seeking entry of an order (the “**Order**”) establishing claims and interests reconciliation and verification procedures (the “**Claims Procedures**”) in connection with claims against, and interests in, any one or more of the Receivership Entities. In support of the Motion, the Receiver is contemporaneously filing the Declaration of Melanie L. Cyganowski (the “**Cyganowski Dec.**”) and hereby states as follows:

I.

PRELIMINARY STATEMENT

The October 16, 2017 Second Amended Order Appointing Receiver (the “**Receivership Order**”) directed the Receiver to marshal and preserve assets of the Receivership Entities and to develop a plan for the fair, reasonable, and efficient disposition of property of the Receivership Entities. *See* Receivership Order, ¶¶ 6, 45. In furtherance of the Receiver’s obligations, the Receiver believes it is in the best interests of the Receivership Entities and their respective investors and creditors to establish procedures by which the Receiver may finalize the

reconciliation and verification of Claims¹ against, and Interests² in, any one or more of the Receivership Entities, for purposes of recommending a plan of distribution and ultimately making a distribution to Claimants³ and Investors⁴ entitled to payment from the Receivership Entities. Cyganowski Dec., ¶ 3. Courts have held that “non-party claimants must be afforded notice and an opportunity to be heard before a Receiver or a Court resolves its claims.” *SEC v. Callahan*, 193 F. Supp. 3d 177, 204 (E.D.N.Y. 2016); *SEC v. Byers*, 637 F. Supp. 2d 166, 184 (S.D.N.Y. 2009) (approving summary proceedings to evaluate claims). Consistent with applicable authority, the Claims Procedures described herein will provide Claimants and Investors with notice and an opportunity to be heard regarding the validity and amount of their Claims and Interests.

By the Motion, the Receiver seeks entry of an order authorizing the Receiver to (i) determine the validity of Claims, including the allowed amount, if any, of Claims and whether a Claim is secured by property of a Receivership Entity; (ii) notify Claimants of the Receiver’s determinations regarding the validity, amount (if any) and secured nature, of their Claims; (iii)

¹ For purposes of the Motion, “*Claim*” is defined as: (1) a claim to a right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured, against one or more of the Receivership Entities; or (2) a claim to a right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured, against one or more of the Receivership Entities.

² For purposes of the Motion, “*Interest*” is defined as an equity interest in any of the Receivership Entities, which interest is based exclusively upon the ownership of membership interests or partnership interests in any of the Receivership Entities.

³ For purposes of the Motion, “*Claimant*” is defined as and includes any person or entity (including, without limitation, individuals, partnerships, corporations, estates, trusts, and governmental units) that holds a Claim. Without limiting the generality of the foregoing, the definition of Claimant includes, but is not limited to, any person or entity holding a Claim based on the provision of goods or services to any Receivership Entity that has not been paid in whole; money loaned to any Receivership Entity that has not been paid in whole; unpaid wages, compensation, or other employment benefits; tax liabilities, including those held by federal and state governments; primary, secondary, direct, indirect, secured, unsecured, or contingent liability; or contract, tort, indemnity, reimbursement, subrogation theories, or other legal or equitable theory. The term “Claimant” does not include any person or entity that holds an Interest.

⁴ For purposes of the Motion, “*Investor*” is defined as and includes any person or entity (including, without limitation, individuals, partnerships, corporations, estates, trusts, and governmental units) that holds an Interest.

notify Investors of the amounts they invested in and received from the Receivership Entities, as recorded in the Receivership Entities' books and records; (iv) provide Claimants with an opportunity to dispute the Receiver's determinations regarding their Claims, and Investors with an opportunity to dispute the Receivership Entities' records regarding their Interests; (v) negotiate and settle disputes in connection with Claims and Interests; and (vi) in the event disputes are not resolved by agreement, implement procedures to seek relief from the Court through summary proceedings that will be efficient and not a burden on the Court, while still affording a sufficient opportunity for Investors and Claimants to be heard. Cyganowski Dec., ¶ 3.

By the Motion, the Receiver is seeking only the Court's approval of the Receiver's proposed procedures for finalizing the reconciliation and verification of Claims and Interests and is not at this time seeking approval of the validity, amount, classification, or distribution methodology on account of any Claims against, or Interests in, any of the Receivership Entities. Rather, the Receiver will be filing a separate motion with the Court to approve a plan for making distributions to Claimants and Investors, including, but not limited to, the classification of Claims and Interests, and the distribution methodology she will seek to employ. Cyganowski Dec., ¶ 4. The Receiver reserves the right in the plan of distribution to have one or more classes of secured or unsecured Claims. *Id.*

The Receiver determined it appropriate to proceed with the Claims and Interests reconciliation and verification process in advance of the consideration of the Receiver's proposed plan of distribution because in her business judgment, she believes that beginning the process of finalizing the register of Claims and Interests will help ensure that the Receiver's decisions concerning the plan of distribution are grounded in verified information regarding the Claims and Interests. Cyganowski Dec., ¶ 5. The approval of the Claims Procedures is a critical and necessary

step to provide the Receiver with a fair and reasonable process to finalize her decisions regarding Claims and Interests, to propose a plan of distribution, and to expeditiously begin making distributions on account of approved Claims and Interests following the approval of a plan of distribution. Cyganowski Dec., ¶ 5.

II.

PROCEDURAL BACKGROUND

A. Commencement of this Receivership

On December 19, 2016, (the “*Receivership Commencement Date*”) the District Court for the Eastern District of New York (the “*Receivership Court*” or the “*Court*”) entered an Order Appointing Receiver, [Dkt. Nos. 6 and 16], which appointed Bart Schwartz as receiver (the “*Prior Receiver*”). At the time of his appointment, the Prior Receiver was serving as a monitor for the Platinum Entities.

On June 23, 2017, six months after his appointment, the Prior Receiver resigned. Upon the recommendation of the SEC, by Order dated July 6, 2017, Melanie L. Cyganowski was appointed as Receiver, effective immediately (*i.e.*, July 6, 2017), and ordered to assume all authority held by the Prior Receiver. [Dkt. No. 216].

On October 16, 2017, the Receivership Court entered the Receivership Order. [Dkt. No. 276]. The Receivership Order vests this Court with exclusive jurisdiction over each of the Receivership Entities and their respective property. *See* Receivership Order, ¶ 1. Among other powers relevant to the Motion, the Receivership Order:

authorized, 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.

Receivership Order, ¶ 45. Additionally, the Receivership Order directed the Receiver to determine the extent of liabilities believed to be the legal obligations of the Receivership Entities. *See* Receivership Order, ¶ 47.

B. Bar Date Motion and Bar Date Order

On December 10, 2018, the Receiver filed a Motion for Entry of an Order (I) Establishing Claims Bar Dates and (II) Approving (A) a Proof of Claim Form, (B) the Form and Manner of Notice to the Claims Bar Dates and (C) Procedures for Submitting Proofs of Claim by Receiver (the “*Bar Date Motion*”). [Dkt. No. 424]. The Bar Date Motion requested that this Court set the general bar date, governmental bar date, and approve the procedures for filing claims.

The Court entered two orders on February 11, 2019: The first order granted the Receiver’s Bar Date Motion (the “*Order Granting Bar Date Motion*”) [Dkt. No. 452]; and the second order established a bar date and approved the Receiver’s procedures for filing claims (the “*Bar Date Order*”) [Dkt. No. 453]. The Bar Date Order set the bar date to file a proof of claim asserting a claim arising before the Receivership Commencement Date as March 29, 2019 (the “*Bar Date*”) and the bar date for governmental units to file a proof of claim as April 12, 2019 (the “*Governmental Bar Date*”).

The Bar Date Order specifically established the categories of persons or entities that were required to timely file a Proof of Claim (as that term is defined in the Bar Date Order) and the categories of persons or entities that were relieved of filing a Proof of Claim. The Bar Date Order required the timely filing of a Proof of Claim by persons or entities that are:

- (i) “Claimants” that believe they are owed any money by, or have a right to distribution from, any of the Receivership Entities, *see* Bar Date Order, ¶ 5(i); and

- (ii) “Indemnification Claimants”⁵ holding claims for indemnification, advancement or reimbursement, but authorized such claimants to file “Supplemental Claims” to amend, supplement, and update any claims, provided the original proofs of claims are timely filed, to take into account costs, losses, damages, liabilities, legal fees or other expenses incurred following the Bar Date.⁶

The Bar Date Order did not require the filing of a Proof of Claim by persons or entities that are holders of:

- (i) “Interests” based on an equity interest in any of the Receivership Entities, which interest is based exclusively upon the ownership of membership interests or partnership interests,⁷ *see* Bar Date Order, ¶ 5(i);
- (ii) “Administrative Claims” based on the provision of goods or services to any of the Receivership Entities or the Receiver after the Receivership Commencement Date, *see* Bar Date Order, ¶ 5(ii); and
- (iii) “Previously Filed Claims”⁸ that have previously submitted a proof of claim, however at the request of the Receiver, the claimant may be required to submit additional supporting documentation in order for the claim asserted in the previously filed proof of claim to be evaluated. *See* Bar Date Order, ¶ 5(ix).

The Bar Date Order authorized the Receiver to “employ any procedures she deems necessary, in her sole and absolute discretion, for processing, reconciling, and verifying Proofs of Claim.” *See* Bar Date Order, ¶ (5)(xiii).

⁵ The Bar Date Order defined an “*Indemnification Claimant*” as a creditor “holding claims for indemnification, advancement or reimbursement . . . based on having suffered or incurred, or who may suffer or incur, any costs, losses, damages or liabilities (including without limitation legal fees or other expenses incurred in investigating or defending against any losses, claims, or liabilities) arising from any investigation, claim, allegation, action, or proceeding, whether civil, criminal, administrative, arbitrate or investigative, or any appeal in connection with any of the foregoing, that relates to their service in any office or other capacity of, or otherwise representing or acting for or on behalf of any Receivership Entity, or based on a post-receivership agreement with a Receivership Entity (other than for professional services)[.]” *See* Bar Date Order, ¶ 5(iii).

⁶ Additionally, the Bar Date Order authorized the Receiver to set a final Bar Date after which no additional Supplemental Claims may be filed. *See* Bar Date Order, ¶ 5(iii).

⁷ In the Order Granting Bar Date Motion, the Court recognized that the Receiver “already possesses books and records that reflect the claims of unpaid redeemers, so there is no need for them to submit duplicative claims.” *See* Order Granting Bar Date Motion, ¶ 4.

⁸ For the purpose of the Motion, Proofs of Claim that have been filed by Claimants or Indemnification Claimants (including their Supplemental Claims), or that have been filed through Previously Filed Claims, shall be collectively referred to as “*Filed Claims*”.

In compliance with the Bar Date Order, the Receiver mailed packages containing the Bar Date Notice and Proof of Claim Form (as those terms are defined in the Bar Date Order) to over 237 potential Claimants in multiple states and countries. *See* Cyganowski Dec., ¶ 14. The Receiver also caused publication notice of the Bar Date in the *Wall St. Journal* and on the Receiver's website (<http://www.platinumreceivership.com/#date>). *Id.* In total, 328 Proofs of Claim were filed prior to the Bar Date. *Id.* Some of these Claims may be duplicative, while others may be asserted against non-Receivership Entities. *Id.* In addition, as of the Receivership Commencement Date, there are currently calculated 286 known Investors in the Platinum Entities. *Id.* The Receiver is close to concluding her evaluation of the Claims asserted against the Receivership Entities, and her review of the Receivership Entities' books and records, to determine the validity, amount and classification of Claims held against, and Interests in, all Receivership Entities. *Id.* Additionally, the Receiver has settled various Claims asserted against, and Interests in, the Receivership Entities, and continues negotiations with parties to settle other Claims and Interests. *Id.*

III.

RELIEF REQUESTED

The Motion seeks the entry of an order, substantially in the form of the proposed Order annexed as **Exhibit A** to the Cyganowski Dec., approving the Receiver's Claims Procedures.

IV.

THE RECEIVER'S CLAIMS AND INTERESTS RECONCILIATION AND VERIFICATION PROCEDURES

A. The Receiver's Determination of Claims

The Receiver will finalize her analysis and verification of Filed Claims consistent with the following procedures.

1. Approved Claims

The Receiver will finalize her determination of whether a Filed Claim is an “*Approved Claim*” by taking into account, among other things, whether (i) the Claim is properly asserted through a timely filed Proof of Claim; (ii) the Claim is properly asserted against a Receivership Entity; (iii) the Claim is not duplicative of any other Claim asserted against a Receivership Entity; (iv) the Claim arises out of any Receivership Entity's activities, agreements, or other obligations; (v) any alleged Claim and Claim amount are consistent with the books and records of the Receivership Entity against which the Claim was asserted; (vi) the Claim is adequately supported by documentation; (vii) the Claim is secured by a lien on property of a Receivership Entity; (viii) the Claim is subject to any offsets or defenses that may be asserted, including with respect to any claimed lien purportedly securing the Claim; or (ix) whether other grounds exist for denying the Claim, in whole or in part. *See* Cyganowski Dec., ¶ 17.

The Receiver will determine the allowed amount of each Approved Claim. This will serve as the basis for calculating a Claimant's distribution of assets of the Receivership Entities in accordance with a plan of distribution, and is not necessarily indicative of the treatment of the Claim under any plan of distribution or the amount of distribution a Claimant may ultimately receive from the Receivership Entities. *See* Cyganowski Dec., ¶ 18. The Receiver may estimate

the amount of a Claim that is contingent, unliquidated, or unmatured for purposes of determining the allowed amount of an Approved Claim. *Id.*

2. Claims Analysis Report

Subject to the Court approving the relief requested herein, the Receiver will file and serve a notice of claims analysis report (the “*Claims Analysis Report*”). *See* Cyganowski Dec., ¶ 19. The Claims Analysis Report will be served by first-class mail on holders of Filed Claims, at the address listed on the Proof of Claim for notice, or as updated pursuant to a request by the Claimant or by returned mail from the post office with a forwarding address. *Id.* In addition to notice by mail, where a Claimant has provided an electronic mail address to the Receiver, the Receiver will serve the Claims Analysis Report on such Claimant via electronic mail. *Id.* The Receiver will post the Claims Analysis Report on the Receiver’s website (<http://www.platinumreceivership.com/>). *Id.*

The Claims Analysis Report will include a schedule that will set forth the Receiver’s determinations with respect to each Filed Claim. *See* Cyganowski Dec., ¶ 20. The Claims Analysis Report will identify each Filed Claim and state whether the Receiver deems it to be an Approved Claim and in what amount, and whether the Receiver deems the Claim to be secured by a lien on property of a Receivership Entity. *Id.* Where the Receiver does not recognize that a Claimant holds an Approved Claim, in whole or in part, the Claims Analysis Report will state that the Receiver does not recognize a Claim for such Claimant and shall indicate the reason(s) for disallowing, in whole or in part, the Claim. *Id.* For the avoidance of doubt, any party that failed to submit a Filed Claim pursuant to the Bar Date Orders shall not have an Approved Claim, shall not be entitled to receive a distribution under a plan of distribution, and will not have a claim

included in the Claims Analysis Report. *Id.* The Receiver may periodically modify the Claims Analysis Report as necessary. *Id.*

3. Disputed Claims

Any Claimant who disagrees with the Receiver's determination of their Claim as set forth in the Claims Analysis Report may serve on the Receiver any objection they may have to the analysis of their Claim in the Claims Analysis Report (each an "**Objection**"), including any objection to the Receiver's determination of whether the Claim is an Approved Claim, the allowed amount of the Approved Claim, and/or the Receiver's determination of whether the Claim is secured by property of a Receivership Entity. *See* Cyganowski Dec., ¶ 21. A Claimant may file an Objection on its own behalf or through its counsel of determinations reached with respect to its Claim(s). *Id.* No other party may file an Objection to the Claims Analysis Report, and Claimants may not object to the Receiver's determinations of other Claimants' Claims. *Id.* Objections to the Claims Analysis Report shall (i) be in writing, (ii) state the name and address of the objecting party, the name and address of their counsel, if any, the assigned claim number, and the nature of the Claim of such party, (iii) state with particularity the basis and nature of all objections, and (iv) be electronically mailed to the Receiver, at her email address, platinumreceiver@otterbourg.com, so as to be *actually received* not later than 45 days after the Receiver's mailing of the Claims Analysis Report. *Id.* Upon the timely service of an Objection, a Claim shall become a "**Disputed Claim**". *Id.*

Objections should not be filed with the Court. *See* Cyganowski Dec., ¶ 22. A Claimant's failure to timely submit to the Receiver an Objection that complies, in all respects, with the above instructions shall permanently preclude the Claimant's right to object to or contest the Receiver's Claims Analysis Report as it relates to their Claim(s). *Id.* If a Claimant fails to object to the

Receiver's determinations as to their Claim(s) as set forth in the Claims Analysis Report, then the Receiver's determinations set forth in the Claims Analysis Report shall be final and binding. *Id.* The list of Approved Claims and allowed amounts for such Claims will be used to calculate the distribution that the Claimant may receive pursuant to any approved plan of distribution. *Id.* The plan of distribution will be subject to separate review by the Court. *Id.*

B. The Receiver's Verification of Interests

The Receiver will finalize her verification of Interests consistent with the following procedures.

1. Verification of Interests

The Receiver will provide notice of the amounts that each Investor invested in the Receivership Entities on account of their Interest, and the amounts received by each Investor from the Receivership Entities on account of their Interest, based upon the books and records of the Receivership Entities. *See* Cyganowski Dec., ¶ 24. Each Investor, respectively, will be sent an individual statement (an "*Investor Statement*") containing the amounts invested in, and amounts received from, the Receivership Entities for the respective Investor on account of their Interest, as set forth in the Receivership Entities' books and records. *Id.*

To protect the privacy of Investors, the Investor Statement will assign each Investor an individual investor number unique to that Investor. *See* Cyganowski Dec., ¶ 25. The respective investor number will be used by the Receiver to identify individual investors in public filings with the Court. *Id.* The Investor Statement will also contain detailed information about how to dispute the information contained in the Investor Statement, and the deadline by which the Investor must do so. *Id.*

The Investor Statement is intended solely to advise Investors of the information contained in the Receivership Entities' books and records and to provide Investors with an opportunity to dispute the information contained in the books and records, if necessary. *See* Cyganowski Dec., ¶ 26. The information reflected in an Investor Statement will not state the priority, if any, of an Interest or the amount an Investor ultimately may receive from the Receivership Entities. *Id.* The Receiver will be filing a motion for approval of a plan of distribution in this case, and will, in that motion, seek this Court's approval of the distribution methodology to apply in calculating the allowed amount on account of each Interest and the treatment of Interests under the plan of distribution. *Id.* Following the approval of the Receiver's plan of distribution and approval of the distribution methodology, the Receiver will provide notice of her determinations of the distribution, if any to be received by each Investor, based upon the distribution methodology employed. *Id.* Investors and other parties in interest will have the opportunity to object to the plan of distribution and any of its provisions, including the distribution methodology, at the appropriate time. *Id.*

2. Disputed Interests

Any Investor who disagrees with the information contained in the Investor Statement regarding their own Interest, may serve on the Receiver any disputes they may have to the accuracy of the information in the Investor Statement as it relates to their own Interest (each an "***Investor Objection***"). *See* Cyganowski Dec., ¶ 27. The sole basis for an Investor Objection shall be that the books and records of the Receivership Entities are inaccurate. *Id.* An Investor may file an Investor Objection on its own behalf or through its counsel. *Id.* No other party may file an Investor Objection to an Investor Statement, and Investors may not file an Investor Objection with respect to other Investors' Interests. *Id.* Investor Objections shall (i) be in writing, (ii) state the name and

address of the objecting party, the name and address of their counsel, if any, and the assigned investor number, (iii) state with particularity all information the Investor believes to be inaccurate in the Investor Statement, (iv) provide documentation evidencing the information that the Investor believes is correct, and (v) be electronically mailed to the Receiver, at her email address, platinumreceiver@otterbourg.com, so as to be *actually received* not later than 45 days after the Receiver's mailing of the respective Investor Statement. *Id.* Upon the timely service of an Investor Objection, an Interest shall become a "*Disputed Interest*". *Id.*

Investor Objections should not be filed with the Court. *See* Cyganowski Dec., ¶ 28. An Investor's failure to timely submit an Investor Objection to the Receiver that complies with the above instructions shall permanently preclude the Investor's right to object to or contest its respective Investor Statement. *Id.* If an Investor fails to object to the information set forth in its respective Investor Statement, then the information set forth in the Investor Statement shall be final and binding and shall form the basis for calculating the allowed amount on account of each Interest, based upon the distribution methodology employed in accordance with a plan of distribution. *Id.*

C. Voluntary Resolution of Disputed Claims and Disputed Interests

The Receiver will make a good-faith attempt to resolve a Disputed Claim or a Disputed Interest with the respective Claimant or Investor. *See* Cyganowski Dec., ¶ 29. The Receiver may, in her discretion and subject to agreement with the applicable Claimant or Investor, utilize a disinterested mediator to seek to resolve a Disputed Claim or Disputed Interest, without further order of the Court. *Id.* The reasonable fees and expenses of a mediator shall be shared equally among the Receivership Entities and the Claimant or Investor whose Disputed Claim or Disputed Interest is the subject of the mediation. *Id.* The Receiver may, in her sole discretion, settle and

compromise any Disputed Claim or Disputed Interest on terms and for reasons that she deems, in her business judgment, to be appropriate, and the allowed Claim or Interest, and the respective allowed amount and classification, shall form the basis upon which distributions will be calculated in the Receivership, in accordance with a plan of distribution, without further Order of this Court.⁹

Id.

D. Resolution of Disputed Claims and Disputed Interests by the Court

Any Disputed Claim or Disputed Interest that cannot be resolved by agreement between the Receiver and the Claimant or Investor will be adjudicated by the Court in a summary proceeding as follows:

- (i) With respect to each Disputed Claim or Disputed Interest that is not resolved by agreement, the Receiver will commence a summary proceeding by filing with the Court a “*Motion for Claim Resolution*”, which shall include the following: the respective Claims Analysis Report or Investor Statement¹⁰, the relevant objection, and declarations or other evidence that the Receiver deems relevant to the Court’s determination of the Disputed Claim or Disputed Interest, including any legal or factual basis for the Receiver’s determination, if appropriate. The Receiver’s Motion for Claim Resolution and supporting brief shall be served on the applicable Claimant or Investor at the time of its filing. *See* Cyganowski Dec., ¶ 30.
- (ii) The Receiver may, in her discretion, file one or more omnibus Motions for Claim Resolution to avoid any burden associated with filing individual motions. *Id.*

⁹ This Motion is not intended to modify any prior agreements entered into by the Receiver or orders entered by this Court unless specifically stated.

¹⁰ The Receiver will identify the applicable Investor by investor number and will redact the applicable Investor’s personal information from public filings with the Court.

(iii) In accordance with the Order Adopting Protocols for Parties in Interest to be Heard on Receiver Motions (the “**Protocols Order**”) [Dkt. No. 271], on or before fourteen (14) days after the filing of a Motion for Claim Resolution by the Receiver (the “**Response Deadline**”), any Claimant or Investor wishing to be heard with respect to a Motion for Claim Resolution (other than parties named in the caption), shall electronically deliver to the Receiver’s email address (platinumreceiver@otterbourg.com), that Claimant or Investor’s response to the Motion for Claim Resolution (collectively, the “**Responses**”); Claimants and Investors (other than parties named in the caption) shall not file Responses on the ECF docket in this action. On or before two (2) days after the Response Deadline, the Receiver shall compile all of the Responses she has received, and shall file the Responses under one docket entry on the ECF docket in this action. The Receiver shall have no more than fourteen (14) days following the Response Deadline to file any reply in further support of a Motion for Claim Resolution. *Id.*

V.

RESERVATION OF RIGHTS

Nothing herein will prejudice the right of the Receiver to dispute, or assert offsets or defenses as to the nature, amount, liability, classification, or otherwise against, any amounts of an Interest or Claim asserted by a Claimant against the Receivership Entities. *See* Cyganowski Dec., ¶ 31. Nothing contained herein is intended to preclude the Receiver from objecting to any Claim or Interest on any grounds. *Id.*

VI.

APPLICABLE AUTHORITY

This Court's power to supervise an equity receivership and determine the appropriate actions to be taken in its administration is extremely broad. *See SEC v. Credit Bancorp Ltd.*, 290 F.3d 80, 82-83 (2d Cir. 2002). The relief sought by the Receiver in the Motion falls squarely within those powers. The proposed Claims Procedures are fair and reasonable and provide affected parties with notice and an opportunity to be heard. *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985); *SEC v. Elliott*, 953 F.2d 1560, 1566 (11th Cir. 1992). “[N]on-party claimants must be afforded notice and an opportunity to be heard before a Receiver or a Court resolves its claims.” *SEC v. Callahan*, 193 F. Supp. 3d 177, 204 (E.D.N.Y. 2016). Summary proceedings have been upheld when, as here, they are used to implement claims procedures and claimants receive an opportunity to be heard, to object to their claim determinations, and to have their claims considered by a court. *See SEC v. Credit Bancorp, Ltd.*, No. 99 CIV. 11395 RWS, 2000 WL 1752979, at *33 (S.D.N.Y. Nov. 29, 2000) (finding that summary proceedings used in a receivership appropriate because they afforded claimants an opportunity to be heard regarding the validity of their interest in the receivership estate), *aff'd*, 290 F.3d 80 (2d Cir. 2002); *SEC v. Byers*, 637 F. Supp. 2d 166, 184 (S.D.N.Y. 2009) (approving summary proceedings to evaluate claims). The proposed Claims Procedures achieve each of these requirements. As explained in *FDIC v. Bernstein*:

[T]he use of summary proceedings in equity receiverships as opposed to plenary proceedings under the Federal Rules of [Civil Procedure] is within the jurisdictional authority of a district court. Such procedures “avoid formalities that would slow down the resolution of disputes. This promotes judicial efficiency and reduces litigation costs to the receivership,” thereby preserving receivership assets for the benefit of creditors.

786 F. Supp. 170, 177-78 (E.D.N.Y. 1992) (citations omitted). “Rule 56 of the Federal Rules of Civil Procedure gives the district court summary jurisdiction over all the receivership proceedings and allows the district court to disregard the Federal Rules.” *Elliott*, 953 F.2d at 1569. In summary proceedings in receiverships, it is a claimant’s burden to establish a valid claim against the receivership estate. *Revere Copper & Brass, Inc. v. Adriance Machine Works, Inc.*, 76 F.2d 876, 878 (2d Cir. 1935) (claimants failed to sustain burden of proving claims against receivership).

Courts within and outside of this district commonly enter orders approving receivers’ procedures for verifying claims and interests. *SEC v. Callahan*, Case No. 2:12-cv-01065-JMA-AYS, Dkt. No. 186, P. 13-17 (E.D.N.Y. Feb. 20, 2014) (approving claim verification and objections procedures); *SEC v. Correll*, 4:05-cv-00472-RAS, Dkt. No. 369, P. 7 (E.D. Tex. Dec. 12, 2008) (approving procedures for resolving disputed claims, including summary proceedings). *See also Byers*, 637 F. Supp. 2d at 184.

Under applicable law, the Court should approve the proposed Claims Procedures because they provide Claimants and Investors with notice and opportunity to be heard and are fair and reasonable. *See Elliott*, 953 F.2d at 1567 (summary proceedings are appropriate where party has full and fair opportunity to present claims and defenses). Specifically, the proposed Claims Procedures provide for (1) notice to Claimants and Investors of the Receiver’s determinations of their Claims or Interests; (2) the opportunity for Claimants to object to the Receiver’s determinations; (3) the opportunity for Investors to object to the information contained in the Receivership Entities’ books and records with respect to their Interests; and (4) the review of unresolved Disputed Claims and Disputed Interests by the Court. Accordingly, the proposed Claims Procedures should be approved.

VII.

NOTICE

Notice of this Motion and supporting papers will be served through the Court's Electronic Filed ("ECF") system, will be available on the Receiver's website (<http://www.platinumreceivership.com/>), and will be emailed to parties that have registered for notice of documents filed in this case through the Receiver's website (<http://www.platinumreceivership.com/>).

VIII.

CONCLUSION

WHEREFORE, the Receiver seeks the entry of an order, substantially in the form of the proposed Order annexed as **Exhibit A** to the Cyganowski Dec., approving the Receiver's Claims Procedures.

Dated: New York, New York
November 13, 2020

OTTERBOURG P.C.

By: /s/ Adam C. Silverstein
Adam C. Silverstein
Erik B. Weinick
Jennifer S. Feeney
Michael A. Pantzer
230 Park Avenue
New York, New York 10169
Tel.: (212) 661-9100
Fax: (212) 682-6104
asilverstein@otterbourg.com
eweinick@otterbourg.com
jfeeney@otterbourg.com
mpantzer@otterbourg.com
*Attorneys for Melanie L.
Cyganowski, as Receiver*