UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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

AMENDED MEMORANDUM OF LAW IN SUPPORT OF RECEIVER'S OMNIBUS MOTION TO CONFIRM RECEIVER'S DETERMINATIONS AS TO (1) CLAIMS 282-301 FILED BY DAVID LEVY, (2) CLAIMS 313-322 FILED BY WILSON SONSINI GOODRICH & ROSATI, P.C., (3) CLAIMS 156, 329 AND 330 FILED BY FORD O'BRIEN LLP, (4) CLAIMS 24 AND 227-232 FILED BY DANIEL SMALL, AND (5) CLAIMS 37-38 AND 41-42 FILED RICHARD SCHMIDT, AS TRUSTEE OF THE BLACK ELK ENERGY OFFSHORE OPERATIONS, LLC LITIGATION TRUST

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Melanie L. Cyganowski, the duly appointed Receiver (the "***Receiver***") for Platinum Credit Management, L.P. ("***PPCO Portfolio Manager***"), Platinum Partners Credit Opportunities Master Fund LP ("***PPCO Master Fund***"), Platinum Partners Credit Opportunities Fund (TE) LLC ("***PPCO Fund TE***"), Platinum Partners Credit Opportunities Fund LLC ("***PPCO Fund***"), Platinum Partners Credit Opportunities Fund (BL) LLC ("***PPCO Fund BL***"), Platinum Liquid Opportunity Management (NY) LLC ("***PPLO Portfolio Manager***"), Platinum Partners Liquid Opportunity Fund (USA) L.P. ("***PPLO Fund US***"), Platinum Partners Liquid Opportunity Master Fund L.P. ("***PPLO Master Fund***" together with PPLO Fund US, collectively, the "***PPLO Funds***," and, together with PPLO Portfolio Manager, collectively, the "***PPLO Receivership Entities***"), Platinum Partners Credit Opportunities Fund International Ltd ("***PPCO Fund International***") and Platinum Partners Credit Opportunities Fund International (A) Ltd ("***PPCO Fund International A***" together with PPCO Master Fund, PPCO Fund TE, PPCO Fund, PPCO Fund BL, and PPCO Fund International, collectively, the "***PPCO Funds***," and, together with PPCO Portfolio Manager, collectively, the "***PPCO Receivership Entities***") (collectively, the "***Receivership Entities***" in this receivership, the "***Receivership***"), by and through her undersigned counsel, respectfully submits this memorandum of law in support of her motion (the "***Motion***")[1] for the entry of an order pursuant to Section IV(A) of the Claims Process Order (as defined below), disallowing: (i) Claims 282-301 (the "***Levy Claims***"), filed by David Levy ("***Levy***"); (ii) Claims 313-322, filed by Levy's counsel, Wilson Sonsini Goodrich & Rosati, P.C. ("***Wilson***") (the "***Wilson Claims***" and together with the Levy Claims, the "***Levy/Wilson Claims***"); (iii) Claims 156, 329 and 330, filed by Ford O'Brien LLP ("***O'Brien***") (the "***O'Brien Claims***"); (iv) Claims 24 and 227-232, filed by Daniel Small ("***Small***") (the "***Small Claims***"); and denying the priority request with respect to (v) Claims

[1] All capitalized terms not defined herein shall have the meanings ascribed by the Declaration of Melanie L. Cyganowski, as Receiver, in Support of the Motion filed contemporaneous herewith (the "***Cyganowski Dec***.").

37-38 and 41-42, filed by Richard Schmidt, as trustee of the Black Elk Energy Offshore Operations, LLC Litigation Trust (the "***Black Elk Trustee***," together with Levy, Wilson, O'Brien and Small, collectively, the "***Claimants***") (the "***Black Elk Trustee Claims***," together with the Levy/Wilson Claims, the O'Brien Claims, the Small Claims, collectively, the "***Disputed Claims***").

PRELIMINARY STATEMENT

This Court entered the Order Establishing Claims and Interest Reconciliation and Verification Procedures on December 1, 2020, Dkt. No. 554 (the "***Claims Process Order***"). Section I(B)(i) of the Claims Process Order required the Receiver to issue a "***Claims Analysis Report***" containing the Receiver's determinations as to each filed claim. In accordance with the Claims Process Order, the Receiver carefully analyzed hundreds of claims asserted by dozens of claimants and issued her Claims Analysis Report on March 9, 2021, Dkt. No. 564. Section IV(A) of Claims Process Order provides for a summary proceeding in the event that the Receiver and any claimants cannot amicably resolve objections to the Receiver's claims determinations. As a result, there are now less than eight claimants[2] who are still disputing the Receiver's determinations, which includes these Claimants, who each served the Receiver with an objection to the Receiver's Claims Analysis Report. (Cyganowski Dec. Exs. 45, 46, 47, 48). In this Motion,

[2] One such claimant is Defendant Mark Nordlicht ("***Nordlicht***"). On March 29, 2019, Nordlicht filed Claim 305 against the Receivership Entities seeking payment for his legal fees in the estimated amount of $10,000,000 (the "***Nordlicht Claim***"). On June 29, 2020, Nordlicht filed a Chapter 7 bankruptcy petition in the United States Bankruptcy Court for the Southern District of New York assigned Case No. 20-22782-rdd. The Nordlicht Claim is now the property of Nordlicht's bankruptcy estate and is under the control of the Chapter 7 Trustee. In the Claims Analysis Report, the Receiver disallowed the Nordlicht Claim due to, among other things, a lack of documentation and failure to allocate. The Receiver is not seeking any relief in the Motion with respect to the Nordlicht Claim, but reserves all rights in connection with the Nordlicht Claim, including, but not limited to, complete disallowance of the Nordlicht Claim as a result of the Second Circuit Decision (defined below).

the Receiver seeks to resolve disputes over a subset of these remaining claims through a summary proceeding.[3]

The Indemnification Claims

Having already collectively exhausted at least $7,148,049 in insurance proceeds (for which the Prior Receiver expended $880,000 of Receivership funds to maintain the insurance policies post-Receivership), Levy, Wilson, O'Brien and Small seek additional recovery for indemnification and/or reimbursement from various Receivership Entities for legal fees they or their clients claim to have incurred in connection with their roles at, or for the benefit of, Receivership Entities. (Cyganowski Dec. ¶ 82-83, 86-87, 147-152, 155-156). Specifically: (i) Levy and Wilson seek $8,700,000 (Claims 282-290, 313-322, Cyganowski Dec. Exs. 1-9; 21-30); (ii) O'Brien, which represented Joseph SanFilippo ("***SanFilippo***"), seeks $2,686,424.31 (Claims 156, 329 and 330, Cyganowski Dec. Exs. 31-33); and (iii) Small seeks $2,861,533.15 (Claims 228, 230-232, Cyganowski Dec. Exs. 36, 38-40).[4] The primary disagreements between the Receiver, on one hand, and the Indemnification Claimants, on the other, relate to the amount of indemnification owed, if any, and whether such payments are entitled priority treatment. The Receiver's determinations should be confirmed for the following reasons:

First, as to Levy, the Second Circuit's decision in *United States v. Levy*, 19-3207-CR, 19-3209-CR (2d Cir. Nov. 5, 2021), Dkt. No. 138 (the "***Second Circuit Decision***") on November 5, 2021 to reverse this Court's post-trial decision to grant Levy's motion for a judgment of acquittal

[3] The Receiver is still negotiating with certain other parties that submitted proofs of claim, who disagreed with the Receiver's determinations, but have not yet entered into settlements regarding their claims.

[4] Claims 156, 228, 230-232, 282-290, 313-322, 329-330 are collectively referred to herein as the "***Indemnification Claims***." The amounts asserted in the proofs of claim forms do not reflect the current amounts requested by Levy, Wilson, Small, and O'Brien (the "***Indemnification Claimants***") because the Indemnification Claimants have supplemented their Indemnification Claims to take into account fees and expenses incurred after the filing of the Indemnification Claims.

and a new trial, vitiates any claim that Levy may have to indemnification because the agreements on which he and his counsel Wilson rely, all have unambiguous exceptions precluding indemnification where the covered individual, in this case, Levy, shall have been "adjudged to be liable for gross negligence, willful misconduct or fraud." Levy's conviction therefore disqualifies him from any claim to indemnification and by extension, any claim by his counsel for reimbursement of legal fees.

Second, the Indemnification Claimants are not entitled to indemnification or reimbursement by the PPCO Receivership Entities or the PPLO Receivership Entities because the legal fees they seek to recover were incurred in connection with activities *outside* of any affiliation they may have had at any point with any of the Receivership Entities or any benefit they may have conferred upon those entities.

As to Levy, irrespective of his ineligibility for indemnification because of his criminal conviction, the criminal action captioned *United States v. Nordlicht, et al.*, No. 1:16-cr-00640-BMC (E.D.N.Y. 2016) (the "***Criminal Case***") and the civil cases for which he and Wilson seek compensation (the "***Civil Cases***"),[5] arose almost entirely out of actions performed by Levy on behalf of Platinum Management (NY) LLC ("***PPVA Portfolio Manager***"), Platinum Partners Value Arbitrage Fund L.P. ("***PPVA***") and its related funds, PPVA's subsidiaries including PPVA Black Elk (US) Corp. ("***PPVA Black Elk***"), and/or certain entities referred to collectively as "Beechwood" ("***Beechwood***") — none of which are Receivership Entities or are entities for which the Receivership Entities bear any liability. In seeking indemnification from one of the parties in

[5] The "Civil Cases" include: (a) *CNO v. Beechwood, et al.*, Case No. 01-16-0004-2510 (AAA); (b) *Senior Health Insurance Company of Pennsylvania v. Beechwood Re Ltd., et al.*, Case No. 1:18-cv-6658-JSR (S.D.N.Y.); (c) *Trott et al. v. Platinum Management (NY) LLC, et al.*, l:18-cv-10936-JSR (S.D.N.Y.); (d) *Schmidt v. Nordlicht, et al.*, Case No. 2016-76291 (Dist. Ct. Harris Cnty., Tex.); (e) *Securities and Exchange Commission et al. v. Platinum Management (NY) LLC et al.*, Case No. 1:16-cv-06848-BMC (E.D.N.Y.). (*See E.g.* Cyganowski Dec., Ex. 1., p. 3).

the Beechwood Case (defined below) for his legal fees, Levy himself argued that "the *core* of the alleged Black Elk Scheme misconduct is that *Beechwood* entities, including using SHIP funds, made purchases of Black Elk bonds." *See In re Platinum-Beechwood Litig.*, 390 F. Supp. 3d 483, 498 (S.D.N.Y. 2019) (citing Memorandum of Law in Support of Plaintiff David Levy's Position on Advancement and Allocation and in Opposition to Defendants' Position (attached to the Cyganowski Dec. as Ex. 76), 19-cv-3211, Dkt. No. 35), *reconsideration denied*, No. 18-CV-6658 (JSR), 2019 WL 3759171 (S.D.N.Y. July 23, 2019), *and appeal withdrawn sub nom. B Asset Manager, L.P. v. Senior Health Ins. Co. of Pennsylvania*, No. 19-3026 (L), 2020 WL 1479854 (2d Cir. Jan. 6, 2020)). Thus, the legal fees for which Levy and Wilson seek indemnification and/or reimbursement had nothing to do with the Receivership Entities, but instead arose from his service as Beechwood's chief investment officer.

As to O'Brien, the allegations against its client, SanFilippo, were that he was acting in a capacity that did not involve work for a Receivership Entity and so no indemnification obligation arose on the part of the Receivership Entities. Indeed, two of O'Brien's claims indicate that the amount is owed jointly by PPCO Portfolio Manager and PPVA Portfolio Manager, which is not a Receivership Entity, acknowledging that, at a *minimum*, the Receivership is not liable for *all* of SanFilippo's fees as sought by O'Brien. (Claims 156, 329, 330; Cyganowski Dec., Exs. 31-33).

As to Small, he had (i) no relationship to any of the PPCO Receivership Entities (other than Credit Funding LLC ("***Credit Funding***"), which itself has no material relation to the allegations or proceedings against Small in any of the cases), and (ii) a minimal relationship with the PPLO Funds as a portfolio manager. (Cyganowski Dec. ¶¶ 12(C), (A)). Like SanFilippo, the allegations against Small are devoid of any relationship to the Receivership Entities, and are

therefore not among the expenses incurred by him for which the Receivership Entities may have an indemnification obligation.

Third, even assuming *arguendo* that the Indemnification Claimants are entitled to indemnification and/or reimbursement by the Receivership Entities at all (they are *not*), they are not entitled to one hundred percent (100%) of the fees they seek because they failed to allocate those expenses amongst all of the entities (both Receivership and non-Receivership) which may have payment obligations. At a *minimum*, those fees should have been allocated among the various entities who may actually have indemnification obligations to them. Because the Indemnification Claimants failed to do so, the Receiver submits that at *most*, the PPCO and PPLO Funds should be obligated to reimburse the Claimants only to the extent of those funds' share of the purported total assets under management ("***AUM***") of the various Platinum funds, which would be thirty-four percent (34%) for the PPCO Funds and two percent (2%) for the PPLO funds. (*See*, *e.g.*, Claims Analysis Report, Dkt. No. 564-1 at Schedules C, at 1, H, at 1 (allowing $2,988,694.84 of $8,700,000 claimed by Levy against PPCO Master Fund and $138,337 against PPLO Master Fund; $922,863.04 of $2,686,426 claimed by O'Brien against PPCO Master Fund; and $983,017 of $2,861,533 claimed by Small against PPCO Master Fund and $45,500.84 against PPLO Master Fund). *See also* Cyganowski Dec. ¶ 169; Rogers Dec.[6] ¶¶ 26-28.)

Fourth, even if the Indemnification Claimants are entitled to payment for any or all of their legal fees by the Receivership Entities this Court has twice before determined that such payments are *not* entitled to priority over the interests of others. Memorandum Decision and Order dated

[6] Citations to "***Rogers Dec.***" herein are in reference to the accompanying Declaration of Trey Rogers in Support of the Receiver's Omnibus Motion to Confirm Receiver's Determinations as to (1) Claims 282-301 Filed by David Levy, (2) Claims 313-322 Filed by Wilson Sonsini Goodrich & Rosati, P.C. (3) Claims 156, 329 and 330 Filed by Ford O'Brien LLP, (4) Claims 24 and 227-232 filed by Daniel Small, and (5) Claims 37-38 and 41-42 Filed by Richard Schmidt, as Trustee of the Black Elk Energy Offshore Operations, LLC Litigation Trust.

November 25, 2021, Dkt. No. 417 (the "***Advancement Op. I***"), at 1 ("Platinum Partners may well indeed owe reimbursement to these former officers. But it owes lots of money to people and entities that it lacks sufficient funds to pay, which is why it is in receivership. The former officers have shown no compelling reason why they should get to jump the line. Their motion is therefore denied."); Minute Order dated January 22, 2020 (the "***Advancement Op. II***") ("The Receiver thus has broad authority to reasonably distribute funds by order of claim priority. The Court maintains that both SanFilippo and Levy are entitled to indemnification (*see* [417] 11/25/2018 Order Denying Motions to Compel Payment or Advancement of Legal Fees); however, these are just two unsecured claims among many and they must wait for any payment alongside the other unsecured creditors."). Other than the Second Circuit Decision, nothing has changed since those earlier rulings to alter those determinations, and the time to appeal or otherwise challenge this Court's previous rulings has long since passed. In short, the law of the case is that the Claimants' Disputed Claims are not entitled to priority over those of others who are owed money. Moreover, to the extent the Indemnification Claimants assert that their other claims are entitled to priority, those assertions are at least as baseless because those claims are unsecured and not subject to any administrative priority.

Fifth, any distribution from the Receivership on account of the Indemnification Claims would result in a double recovery for the Indemnification Claimants to the detriment of creditors and investors because the prior receiver for the Receivership Entities, Bart M. Schwartz, Esq. (the "***Prior Receiver***") expended $880,000 of Receivership funds to maintain insurance policies, which would have otherwise been available for distribution to investors and creditors. Specifically, the Indemnification Claimants have received a significant share of the proceeds of directors' and officers' insurance policies with aggregate limits of $25 million (the "***D&O Policy***"): Out of $25

million of aggregate limits, the Receiver understands that $3,429,996 was paid for SanFilippo's defense; $3,283,990 was paid for Levy's defense; and $434,063 was paid for Small's defense. Additionally, the Receiver waived any entitlement to the insurance proceeds, leaving more of the proceeds available to officers and directors, such as the Indemnification Claimants. (*See also* Cyganowski Dec. ¶¶ 85-87.)[7]

Levy's Additional Claims

In addition to his indemnification claims, Levy's claims for repayment of $765,000 for an alleged loan by Levy (Claim 291; Cyganowski Dec. Ex. 10), as well as compensation of $1.7 million allegedly owed to Levy by each of the Receivership Entities (Claims 292-201; Cyganowski Dec. Exs. 11-20) are also without merit, and the Receiver's determination to disallow those claims was correct and the Court should confirm that determination, especially in light of the Receiver's mandate to make an equitable distribution — it would be, on its face, inequitable to provide any distribution to a claimant such as Levy who has been convicted of illegal actions detrimental to the very entities from whom he now seeks to recover.

Small's Additional Claims

In addition to his indemnification claims, Small objects to the Receiver's disallowance of his claim for an unconfirmed partial arbitral award and additional unpaid supposed "net profits." (Claims 229, 227, 24; Cyganowski Dec. Exs. 37, 35, 34). As demonstrated below, the Receiver's disallowance of the Small additional claims should be confirmed because:

First, the Receivership Entities are not liable on the unconfirmed partial arbitration award in favor of Small because the vast majority of any liability under the unconfirmed partial arbitration

[7] *See e.g. SEC v. McGinn, Smith & Co.*, 1:10-cv-457 (GLS/CFH) 2016 WL 6459795 (N.D.N.Y. Oct. 31, 2016) (approving receiver's collateral offset plan provision where investors who "receive third party recoveries will have their allotted distribution from the receivership estate reduced on a dollar for dollar basis.").

award is attributable to PPVA, and only a small fraction of that liability, if any, is attributable to the PPLO Receivership Entities. The unconfirmed arbitration award does not provide otherwise.

Second, Small's request for "unpaid Performance Allocation due from Credit Funding" is baseless because he was in fact paid more than he was entitled to under the agreement as evidenced by a *negative* capital balance of $115,634 at the end of 2014. Furthermore, he received a final K-1 in 2015, which reflects that his capital account had an ending balance of $0, and that from 2015 through today, Credit Funding has incurred a $39.6 million net *loss*, making any claim that he is owed funds untenable. (Rogers Dec. ¶¶ 31-32; Exs. 8, 10).

The Black Elk Trustee Claims

The Black Elk Trustee asserts claims for $24,600,584.31 and $5,000,000 against PPCO Master Fund and PPLO Master Fund. Both amounts arise under a settlement agreement between the Prior Receiver and the Black Elk Trustee, which granted the Black Elk Trustee "allowed claim[s]" against PPCO Master Fund and PPLO Master Fund, respectively, in those amounts (the "***Black Elk Settlement Agreement***," Cyganowski Dec. ¶¶ 113-114). (Claims 37, 38, 41, 42, Cyganowski Dec. Exs. 41-44, 56). The Receiver does not dispute that the Black Elk Trustee has valid claims due to the Black Elk Settlement Agreement, but disputes that those claims are entitled to any priority over other claims.

In a document entitled "Black Elk Litigation Trust Claim Confirmation and Priority Distribution Request" (the "***Black Elk Request***"), the Black Elk Trustee claims that Sections 9.2(b) and 10.2.1 of "[t]he PPCO Master Fund LP and PPCO LLC agreements establish a priority creating a payment waterfall in which the Black Elk Litigation Trustee should be paid first." (Black Elk Request at 1, Cyganowski Dec. Ex. 48). That is wrong for the following reasons:

First, the Court has already ruled, with respect to the Indemnification Claims, that these

operating agreement provisions do not give an unsecured creditor a priority over other unsecured creditors, and irrespective of that prior ruling, the Black Elk Trustee fails to explain how those provisions elevate his unsecured, non-administrative, claims to a priority claim.

Second, the provisions of the agreements on which the Black Elk Trustee relies do not give the Black Elk Trustee's claims priority, and those agreements expressly provide that there are no intended third-party beneficiaries of those agreements or the provisions in question. (Third Amended and Restated Agreement of Limited Partnership of Platinum Partners Credit Opportunities Master Fund LP, Cyganowski Dec. Ex. 49 § 11.21). Moreover, the Black Elk Trustee does not cite any provision of the Amended and Restated Exempted Limited Partnership Agreement of Platinum Partners Liquid Opportunity Master Fund L.P. (Cyganowski Dec. Ex. 52).

Third, the Black Elk Settlement Agreement does not provide that the Black Elk Trustee's claims will have priority over other claims, or give the Black Elk Trustee a lien against any of the Receivership Entities' assets, and expressly provides that the SEC and the Prior Receiver retained their right to object to Black Elk's claims of priority. (Cyganowski Dec. ¶ 114; Ex. 56, p. 5.)

Fourth, to the extent the Black Elk Trustee seeks a ruling that creditors should have priority over equity holders, that issue should be addressed at the time of plan confirmation.

Accordingly, for the foregoing reasons, as well as those more fully set forth herein, the Motion should be granted and the Receiver's determinations to disallow the Disputed Claims should be confirmed.

FACTUAL BACKGROUND

In addition to the facts specified throughout this memorandum, the complete factual background is set forth in the Cyganowski Dec., and the Rogers Dec., and the claims at issue on this Motion are attached thereto.

ARGUMENT

POINT I

THE COURT SHOULD SUSTAIN THE RECEIVER'S DISALLOWANCE OF LEVY, WILSON, O'BRIEN AND SMALL'S REQUESTS FOR INDEMNIFICATION AND/OR REIMBURSEMENT FOR PRESENT AND FUTURE LEGAL FEES, JUDGMENTS AND/OR SETTLEMENTS

Despite having significantly contributed to the exhaustion of the $25 million in insurance coverage from the D&O Policy obtained by the Receivership Entities, the Indemnification Claimants continue to seek indemnification or (in the case of attorneys, reimbursement) for present and future legal fees and related expenses, as well as future settlements and judgments in the Criminal Case and the Civil Cases. The Court should reject those claims.

First, as to Levy, the Second Circuit Decision requires application of the agreements' exceptions to indemnification for those who have been "adjudged to be liable for gross negligence, willful misconduct or fraud." Thus, the inquiry as to Levy's claim for indemnification should end there because he now stands convicted of fraud. Because Levy is not entitled to indemnification, his counsel, Wilson, is similarly not entitled to a claim for reimbursement of its fees in representing Levy where Levy himself is precluded from indemnification.[8]

Second, the governing agreements on which the Indemnification Claimants rely only permit indemnification for claims arising out of their actions and positions for the applicable entities, not other entities. However, the legal fees for which the Indemnification Claimants seek compensation do not arise out of actions taken by Levy, SanFilippo or Small on behalf of the Receivership Entities or entities for which they are liable. Instead, they arise in whole or in part out of actions the Indemnification Claimants took on behalf of the PPVA Funds, PPVA's

[8] The Receiver reserves the right to setoff against the Levy Claims and/or Small Claims or assert claims against Levy and/or Small because the Second Circuit Decision makes clear that Levy and Small caused tens of millions of dollars in damages to the Receivership Entities.

subsidiary wholly-owned PPVA Black Elk and/or PPVA's indirect subsidiary Black Elk Energy Offshore Operations, LLC ("***Black Elk***"), and/or Beechwood. Thus, indemnification by the Receivership Entities would be improper.

Third, even if *any* portion of the legal fees for which the Claimants seek to recover did arise from covered actions, then the Claimants are required to allocate the requested fees between covered and non-covered activities. Through the claims reconciliation process, the Receiver requested that each of the Indemnification Claimants submit allocations, but none of the Indemnification Claimants have done so. Accordingly, their claims should be denied, or if not, at most, the Court should adopt the Receiver's allocations.

Fourth, Wilson incorrectly relies upon a letter dated June 16, 2016 with "Platinum Partners," signed by Nordlicht (the "***Wilson Letter***"), and O'Brien erroneously relies upon an unsigned engagement letter with "Platinum Partners LP" (not an entity) (the "***O'Brien Letter***"). As a threshold matter, both letters limit the attorneys' engagements to "investigations" by the U.S. Attorneys for the Southern and Eastern Districts of New York, and the fees sought be these Claimants go well beyond that. Moreover, even if the letters purported to expand the scope of the indemnification the Receivership Entities are obligated to provide — which they do not — they are *ultra vires* and a nullity. Finally, the O'Brien Letter contains a space for Harvey Werblowsky of "Platinum Partners LP" to sign, which, putting aside any questions as to his authority, was, in any event, not signed by anyone on behalf of any Receivership Entity.

A. Levy's Conviction Renders Him Ineligible for Indemnification and Precludes Reimbursement of Wilson's Fees

1. Levy is Ineligible for Indemnification as a Result of his Conviction

The Second Circuit Decision confirms that Levy is not entitled to contractual indemnification. Levy had been acquitted at the time (i) this Court issued its Minute Order dated

January 22, 2020, in which it stated "[t]he Court maintains that both SanFilippo and Levy are entitled to indemnification," and (ii) at the time the Receiver issued the Claims Analysis Report with respect to Levy's claims for indemnification. However, the Second Circuit Decision has changed the circumstances of this case, and the Claims Process Order provides that "[t]he Receiver may periodically modify the Claims Analysis Report as necessary." Claims Process Order I.B.ii. As a result, it is entirely proper for the Receiver to modify her determinations in the Claims Analysis Report from her original determination, that Levy receive some measure of indemnification based on an allocation, to now determining not to provide any indemnification as a result of the conviction.[9]

Indeed, the Second Circuit Decision establishes that Levy's acts are not just alleged to have been fraudulent, they have proven to be fraudulent. The allowance of Levy's indemnification claims would now be inconsistent with the very contractual provisions under which Levy seeks indemnification, as well as Delaware law.

Levy's conviction invokes two exceptions to indemnification under the agreements upon which he relies: (i) in criminal actions where the indemnified party had "reasonable cause to believe" its actions were "unlawful;" and (ii) for those who have been "adjudged to be liable for gross negligence, willful misconduct or fraud." (Fourth Amended and Restated Limited Liability Company Agreement of PPCO Fund, Cyganowski Dec. Ex. 50, § 5.4.2). Thus, the inquiry as to Levy's claim for indemnification should end there. Specifically, the indemnification provisions upon which Levy relies have similar language as follows:

> . . . . The Company shall indemnify and hold harmless the Managing Member, the Loan Portfolio Manager, and their affiliates, members, officers, directors, employees, shareholders, agents, and other applicable

[9] The Receiver reserves the right to disallow any other claims, including, but not limited to the Small Claims, in the event the Receiver determines Small is ineligible to receive a distribution based upon either a conviction or a civil finding against him.

> representatives, as the case may be, from and against any and all losses, damages, obligations, penalties, claims, actions, suits, judgments, settlements, liabilities, costs, and expenses (including, without limitation, ***reasonable*** attorneys' and accountants' fees, as well as other costs and expenses incurred in connection with the defense of any actual or threatened action or proceeding) and amounts paid in settlement of any claims suffered or sustained by any of the foregoing persons as a result of or in connection with any act performed by them under this Agreement or otherwise on behalf of the Company, provided, however, that such indemnity shall be payable only if the indemnified party or parties in good faith acted or failed to act in a manner it reasonably believed to be in, or not opposed to, the best interest of the Company (as determined by the Managing member) ***and in the case of criminal proceedings, that the indemnified party had no reasonable cause to believe was unlawful.*** The Managing Member may, in its discretion, advance to any person or entity entitled to indemnification hereunder reasonable attorney's fees and other costs and expenses incurred in connection with the defense of any action or proceeding which arise out of such conduct, provided that all such advances will be promptly repaid if it is subsequently determined that the person or entity receiving such advance was not entitled to indemnification hereunder. No indemnification may be made and each indemnified party shall reimburse the Company to the extent of any indemnification previously made in respect of any claim, issue or matter as to which the indemnified party shall have been adjudged to be liable for ***gross negligence, willful misconduct or fraud*** in the performance of its duties to the Company or would not otherwise be entitled to be held harmless under Section 5.1.4.1 hereof unless, and only to the extent that, the court in which such action or suit was brought determines that in view of all the circumstances of the case, despite the adjudication of liability the indemnified party is fairly and reasonably entitled to indemnity for those expenses which the court deems proper. . . . .

(Fourth Amended and Restated Limited Liability Company Agreement of PPCO Fund, Cyganowski Dec. Ex. 50, § 5.4.2, emphasis supplied). Similarly, Section 5.4(a) of the Third Amended and Restated Agreement of Limited Partnership of Platinum Partners Credit Opportunities Master Fund LP dated as of June 3, 2011, has an exclusion for indemnification where "such Liability results from such Protected Person's own gross negligence as such term is construed under the laws of Delaware), willful misconduct or a willful violation of law." (Cyganowski Dec. Ex. 49 § 5.4(a)). Additionally, the Operating Agreement for Credit Funding dated April 1, 2012 has an exclusion for indemnification where "to the extent that a judgment or

other final adjudication adverse to such Person establishes that his or her acts were committed in bad faith or were the result of gross negligence or willful misconduct[.]" (Credit Funding Agreement, Cyganowski Dec. Ex. 51 at § 11.2).

Levy had "reasonable cause to believe" that his actions, for which he seeks indemnification, were unlawful. Indeed, following the jury verdict in the Criminal Case, Senior Health Insurance Company of Pennsylvania ("***SHIP***"), filed a motion in the Southern District of New York, to stay a preliminary injunction against SHIP for the immediate advancement of Levy's expenses in certain of the Civil Cases and the Criminal Case. (*See Levy v. Senior Health Insurance Co. of Pennsylvania*, 19-cv-03211-JSR (S.D.N.Y. June 21, 2019), Dkt. No. 61.) Judge Rakoff, in interpreting an indemnification provision similar to the provisions upon which Levy now relies, stated "[in] the criminal action, the jury determined beyond a reasonable doubt that Levy was guilty of the three counts related to the so-called 'Black Elk' scheme. … As a result, there is 'reasonable cause to believe his [Black Elk-related] conduct was unlawful,' which, to begin with, totally extinguishes Levy's rights to indemnification for any expenses incurred in the criminal action in connection with defending the charges related to the Black Elk scheme." (*Levy v. SHIP*, 19-cv-03211-JSR, 2019 WL 4411886, at *3 (S.D.N.Y. Aug. 21, 2019), Dkt. No. 67, Cyganowski Dec. Ex. 84. *See also Levy v. SHIP*, 19-cv-03211-JSR, No. 19-CV-3211 (JSR), 2019 WL 4562415, at *1 (S.D.N.Y. Sept. 10, 2019)).

Moreover, because Levy had "reasonable cause to believe" that his actions were unlawful, he is not entitled to indemnification under Delaware law. Section 145(a) gives a corporation the power to indemnify any person who is a party to a criminal or civil action pursuant to their corporate role or because they were serving at the request of the corporation at another corporation. (Del. Code tit. 8 § 145(a)). However, this power is limited to situations where the indemnified

party "acted in good faith and in a manner the person reasonably believed to be in or not opposed to the best interests of the corporation, and, with respect to any criminal action or proceeding, had no reasonable cause to believe the person's conduct was unlawful." (*See id.*) As a result of the conviction, it has been proven that Levy had a non-indemnifiable state of mind, which is "conclusive evidence that [Levy] is not entitled to indemnification." (*Sun-Times Media Grp., Inc. v. Black*, 954 A.2d 380, 401 n.83 (Del. Ch. 2008)).

Similarly, Levy is not entitled to indemnification because in light of Levy's conviction for securities fraud, conspiracy to commit securities fraud, and conspiracy to commit wire fraud, (*Levy*, 19-3207-CR, Dkt. No. 138, at *38-39), he has been "adjudged to be liable for gross negligence, willful misconduct or fraud." (Fourth Amended and Restated Limited Liability Company Agreement of PPCO Fund, Cyganowski Dec. Ex. 50, § 5.4.2). This bar to indemnification applies not only to the payment of his fees and expenses incurred in the Criminal Case, but also his fees incurred in the Civil Cases, notwithstanding that the Civil Cases remain pending against Levy. The indemnification provision upon which he relies bars indemnification "in respect of any claim, issue or matter" for which he is found "liable for gross negligence, willful misconduct or fraud." *Id*. The allegations in the Civil Cases with respect to the Black Elk fraud relate to the "claim, issue or matter" as to which he was found guilty in the Criminal Case. (Cyganowski Dec. ¶¶ 43, 64, 69, 71, 72, 74, Exs. 60, 61). Indeed, Judge Rakoff, in determining whether Levy was entitled to continued advancement in the pending Civil Cases stated that "given that the jury has determined beyond a reasonable doubt that Levy is guilty of the three counts related to the Black Elk scheme, it is hard to imagine how his Black Elk-related conduct would not constitute 'fraud, gross negligence or willful misconduct' in the civil actions. Instead, he may well be collaterally estopped from contesting this conclusion. This, in turn, would bar his

indemnification rights (and his claim for advancement) in the civil cases[.]" (*Levy v. SHIP*, 1:19-cv-03211-JSR, Dkt. No. 67, at *4; Cyganowski Dec. Ex. 84). Following the Government's appeal of the Court's reversal of Levy's conviction, Judge Rakoff stated "if the Government is successful on that appeal," Levy's right to advancement or indemnification would be negated because he would have been found to have engaged in "fraud, gross negligence, or willful misconduct." (*Levy v. SHIP*, 1:19-cv-03211-JSR, Dkt. No. 85, p. 1-2; Cyganowski Dec., Ex. 78.).

Thus, in light of Levy's conviction, he is absolutely ineligible for any indemnification by the Receivership Entities.

2. Because Levy is Not Entitled to Indemnification, Wilson is Precluded from Receiving Reimbursement of its Fees

Because Levy is ineligible for any indemnification by the Receivership Entities, his counsel, Wilson, is similarly precluded from receiving reimbursement of its fees. Wilson's reliance on the Wilson Letter, which it purportedly entered into with "Platinum Partners" for payment of fees in advising Levy "with respect to investigations being conducted by the United States Attorney's Offices for the Southern and Eastern Districts of New York and matters related thereto" does not override the indemnification provisions of the agreements nor does it provide an independent basis for reimbursement of Wilson's fees. (Cyganowski Dec. Ex. 81).

The fact that the Wilson Letter provides that Wilson has been "retained to advise" Levy as the "Client" and that "We have been informed by Mr. Levy that Platinum Partners … has agreed to pay Mr. Levy's fees and costs associated with our engagement" demonstrates that the Wilson Letter was nothing more than confirmation and satisfaction of Levy's advancement and indemnification rights, if any. Indeed, absent satisfaction of the funds' indemnification responsibilities, the Wilson Letter was an obligation incurred on the eve of the Receivership, that

saddled "Platinum Partners" with an over $8 million obligation for which the funds received no consideration.

The timing of the Wilson Letter is also significant; it is dated June 16, 2016, which was one week after Huberfeld was charged with honest services fraud based on alleged kickbacks using PPVA's funds to bribe Norman Seabrook, the former President of the Correction Officer's Benevolent Association of New York, in exchange for its investment of $20 million into PPVA. (Cyganowski Dec. ¶ 37). Also around the time of the Wilson Letter, the FBI executed a search warrant at PPVA Portfolio Manager's offices, which occupied the same physical space as PPCO Portfolio Manager. (Dkt. No. 1, ¶ 175, Rogers Dec. ¶ 9(A)). Further at around the time of the Wilson Letter, Nordlicht announced to investors that PPVA Portfolio Manager decided PPVA would no longer take in new investors, (Cyganowski Dec. ¶ 39), after which time PPVA's brokerage firms began to declare events of default, made margin calls, demanded additional collateral and sought the immediate unwinding of their relationships with PPVA. (Cyganowski Dec. ¶ 40). Additionally, the Wilson Letter was entered into approximately one month before Bart Schwartz was installed as an Independent Oversight Advisor over the PPVA Portfolio Manager, the PPCO Portfolio Manager, and the PPLO Portfolio Manager. (Cyganowski Dec. ¶ 41). By entering into the Wilson Letter on the eve of the installment of Bart Schwartz, and the commencement of the Receivership, the Wilson Letter was not reviewed by these independent parties.

The Wilson Letter is signed by Nordlicht as "Managing Partner" of "Platinum Partners," even though no such entity exists. (Cyganowski Dec. Ex. 81). Moreover, the Wilson Letter did not follow corporate form because it did not identify the Receivership Entity with which Wilson was contracting. Nordlicht was well aware that in order for the "Platinum Funds" to contract with

a third party, Nordlicht would need to sign as a representative for each of the Platinum entities entering into the contract, not just on behalf of the non-existent entity "Platinum Partners." For example, approximately one month after signing the Wilson Letter, Nordlicht signed the letter agreement to retain Guidepost Solutions LLC. Nordlicht signed the agreement three times: once for each of PPVA Portfolio Manager, PPCO Portfolio Manager, and PPLO Portfolio Manager. (Dkt. No. 1-16, p. 11 of 14).

The Wilson Letter is distinguishable from the letter at issue in *SEC v. FTC Cap. Mkts., Inc.*, where the court granted an employee's motion for advancement premised upon an agreement that the corporate defendant's chief executive officer signed agreeing to pay for the employee's legal services in a criminal proceeding. (No. 09 CIV. 4755 (PGG), 2010 WL 2652405, at *2, *10 (S.D.N.Y. June 30, 2010)). In *FTC Cap. Mkts.*, the chief executive officer was not under indictment and continued to operate the company, including by entering into multiple agreements with the SEC to unfreeze company funds for particular purposes. (*Id*. at *5-6). This Court previously distinguished *FTC Cap. Mkts.* from the facts here, noting that "[i]n the instant case, however, the Receiver has not frozen any of the former officers' funds. She has, instead, taken control of company assets, and is under a fiduciary obligation not to prefer one creditor's claim against those assets over that of another except as necessary to preserve the estate." (Advancement Op. I, 8, n.4.) Unlike the chief executive officer in *FTC Cap. Mkts.*, at the time of the Wilson Letter, Nordlicht was soon to be indicted and his control over the Receivership Entities would soon be replaced by the Prior Receiver.

Further, unlike *FTC Cap. Mkts.*, there is no longer a valid expectation that the payment of Levy's criminal defense fees will be paid because he is excluded from indemnification as a result of the conviction in the Criminal Case. (*See FTC Cap. Mkts.*, 2010 WL 2652405, at *5).

Moreover, prior to the conviction, Wilson could not have had an expectation that it would be reimbursed for its fees in the event Levy was convicted because Wilson knew of the limitations of indemnification under the purportedly applicable agreements.

As a result of Levy's conviction in the Criminal Case, Wilson is similarly precluded from receiving reimbursement of its fees under the Wilson Letter.

B. The Indemnification Claimants Cannot Recover for Fees Incurred in Connection with Claims Involving Non-Receivership Entities

Although this Court has previously determined that Levy, SanFilippo and Small are entitled to some measure of advancement or indemnification, the Court explained that its determination did not provide the Indemnification Claimants with a blank check for reimbursement of all of the legal fees they may have incurred in all litigation against them. (Advancement Op. I, 1, 5-6). Instead, the Court concluded that "Platinum Partners *may well* owe reimbursement to these former officers," but expressly did not address the Receiver's assertions that any advancement or indemnification should not exceed a minute fraction of the total defense costs sought to, and should be, determined at a later date. (Advancement Op. I, 1, 5-6, emphasis supplied). Nevertheless, the Indemnification Claimants continue to make a blanket demand of the Receiver for reimbursement of fees defending against criminal and civil charges largely involving their work for PPVA or Beechwood, which are not Receivership Entities. Consequently, the Receiver has determined to modify the Claims Analysis Report to not indemnify the Indemnification Claimants, pending their providing the Receiver with their allocations, which they have not done. For the reasons set forth below, the Receiver's determination was correct.

1. The Governing Documents Unambiguously Limit Indemnification to Expenses Resulting from or in Connection with Acts Performed for or on Behalf of the Receivership Entities

The Indemnification Claimants incorrectly assert that several agreements support their right to indemnification.

Levy, Wilson and Small each rely heavily upon the Operating Agreement for Credit Funding dated April 1, 2012 (the "***Credit Funding Agreement***"). (Cyganowski Dec. Ex 51). PPCO Master Fund owned 99.3% of the membership interests in Credit Funding, with Small and Levy respectively owning .455% and .245% of the membership interests in Credit Funding, until they were fully redeemed in 2014 and 2015, meaning they were no longer members. (Rogers Dec. ¶ 29, Exs. 5, 8.) Small and Levy were also "Portfolio Managers" of Credit Funding. (*See* Credit Funding Agreement, § 6.2, Cyganowski Dec. Ex 51.)

By mid-2014, Credit Funding's largest asset was, by far, its 100% membership interest in LC Energy Holdings LLC ("***LC Energy Holding***") which, in turn, owned 100% of LC Energy Operations LLC ("***LC Energy***"). Rogers Dec. ¶ 30.

The indemnification clause in the Credit Funding Agreement provides, in pertinent part:

> 11.2. *Indemnification*. The Company shall indemnify each Member, the Managing Member, and each Portfolio Manager, and their respective successors and assigns, and hold each of them harmless from and against any ***Damages*** suffered or incurred by such indemnified person or any of them ***in the course of serving in any office or other capacity of, or otherwise representing or acting for or on behalf of the Company (in each case within the scope of his or her authority)***, including, without limitation, in connection with any investigation, claim, allegation, action, or proceeding, whether civil, criminal, administrative, arbitrative or investigative, or any appeal in connection with any of the foregoing, initiated by any person, regardless of when brought, and regardless of whether such Member, Managing Member, or Portfolio Manager is or was, at the time such investigation, claim, allegation, action, or proceeding was brought, no longer serving in such capacity with respect to the Company….

(Credit Funding Agreement, Cyganowski Dec. Ex. 51 at § 11.2, emphasis added).

The indemnification provided by this clause covers only "Damages" sustained "in the course of serving in any office or other capacity of, or otherwise representing or acting for or on behalf of the Company [i.e., Credit Funding] (in each case within the scope of his or her authority)." (Credit Funding Agreement, Cyganowski Dec. Ex. 51, at § 11.2). However, none of the claims against Levy, SanFilippo or Small in the Criminal Case or any of the Civil Cases relate to any actions they took on behalf of Credit Funding or LC Energy. (*See generally* Criminal Indictment, Second Amended Complaint in Trott Action; Complaint in SHIP Action; Complaint filed by Black Elk Trustee, Cyganowski Dec. Exs. 59, 61, 60.) Consequently, the Credit Funding Agreement does not provide indemnification or reimbursement to any of the Indemnification Claimants.

Levy, Wilson and Small each also rely upon Section 5.4(a) of the Third Amended and Restated Agreement of Limited Partnership of Platinum Partners Credit Opportunities Master Fund LP dated as of June 3, 2011 (Advancement Op. I at 2-3), which provides in pertinent part:

> To the fullest extent permitted by law, the Partnership shall indemnify, hold harmless, protect and defend each Protected Person against any losses, claims, damages or liabilities, including without limitation ***reasonable legal fees or other expenses*** actually incurred in investigating such losses, claims, damages or liabilities, and any amounts expended in settlement of any claims approved by General Partner (collectively, the "Liabilities") to which any Protected Person may become subject:
>
> (i) ***by reason of any act or omission taken or omitted to be taken by such Protected Person or any other Person with respect to the Partners, a Portfolio Company or any Subsidiary thereof***; or
>
> (ii) ***by reason of the fact that such Protected Person or any other Person is or was a broker for or an agent of the Partnership or of the General Partners or its controlling entities or that such Protected Person or any other Person is or was serving at the request of the Partnership as a partners, stockholder, member, manager, director, office, employee, Affiliate or Specified Agent or any Person***; unless such Liability results from such Protected

> Person's own gross negligence as such term is construed under the laws of Delaware), willful misconduct or a willful violation of law.

(Cyganowski Dec. Ex. 49 § 5.4(a), emphasis added).

Levy, Wilson and SanFilippo also rely upon Section 5.4.2 of the Fourth Amended and Restated Limited Liability Company Agreement of PPCO Master Fund (the "***PPCO Fund LLC Agreement***") (which is materially identical to the governing agreements of the PPCO Master Fund's other feeder funds). It provides:

> The Company shall indemnify and hold harmless the Managing Member, the Loan Portfolio Manager, and their affiliates, members, officers, directors, employees, shareholders, agents, and other applicable representatives, as the case may be, from and against any and all losses, damages, obligations, penalties, claims, actions, suits, judgments, settlements, liabilities, costs, and expenses (including, without limitation, ***reasonable*** attorneys' and accountants' fees, as well as other costs and expenses incurred in connection with the defense of any actual or threatened action or proceeding) and amounts paid in settlement of any claims ***suffered or sustained by any of the foregoing persons as a result of or in connection with any act performed by them under this Agreement or otherwise on behalf of the Company***, provided, however, that such indemnity shall be payable only if the indemnified party or parties in good faith acted or failed to act in a manner it reasonably believed to be in, or not opposed to, the best interest of the Company (as determined by the Managing member) and in the case of criminal proceedings, that the indemnified party had no reasonable cause to believe was unlawful. ***The Managing Member may, in its discretion, advance to any person or entity entitled to indemnification hereunder reasonable attorney's fees and other costs and expenses incurred in connection with the defense of any action or proceeding which arise out of such conduct, provided that all such advances will be promptly repaid if it is subsequently determined that the person or entity receiving such advance was not entitled to indemnification hereunder***. No indemnification may be made and each indemnified party shall reimburse the Company to the extent of any indemnification previously made in respect of any claim, issue or matter as to which the indemnified party shall have been adjudged to be liable for ***gross negligence, willful misconduct or fraud*** in the performance of its duties to the Company or would not otherwise be entitled to be held harmless under Section 5.1.4.1 hereof unless, and only to the extent that, the court in which such action or suit was brought determines that in view of all the circumstances of the case, despite the adjudication of liability the indemnified party is fairly and reasonably entitled to indemnity for those expenses which the court deems proper. Any indemnity under this Section 5.4.2 shall be paid

> from, and only to the extent of, Company assets, and no Member shall have any personal liability on account thereof.

(Fourth Amended and Restated Limited Liability Company Agreement of PPCO Fund, Cyganowski Dec. Ex. 50, § 5.4.2, emphasis supplied; cited in SanFilippo's Memorandum of Law in Support of his Motion for Indemnification, Dkt. No. 490-5, 6; Levy's Memorandum of Law in Support of his Motion for Indemnification, Dkt. No. 494-1, 5).

Small also claims that he is entitled to indemnification under Section 5(a) of an "Investment Management Agreement" entered into among PPLO Portfolio Manager and the hedge funds it managed, including the PPLO Funds (*e.g.*, Claim 231, Cyganowski Dec. Ex. 39), which provides:

> Losses sustained … by reason of (i) the fact that the Investment Manager [PPLO Portfolio Manager] was or is a portfolio manager to each of the [PPLO] Funds, as the case may be, including, without limitation, all legal, professional and other expenses incurred by the Investment Manager, or persons designated by it, in the performance of its duties and obligations hereunder, all indemnity obligations owed by the Investment Manager to persons designated by it and any loss as a result of any misdelivery or error.

(Cyganowski Dec. Ex. 55 § 5(a)).

In his claims against PPLO Master Fund and its feeder fund, PPLO Fund US (Claims 289 and 290, Cyganowski Dec. Exs. 8, 9), Levy relies upon Section 2.06 of the Amended and Restated Exempted Limited Partnership Agreement of PPLO Master Fund and Section 2.06 of the Limited Partnership Agreement of PPLO Fund U.S. (Cyganowski Dec. Exs. 52 and 53).

Both provisions state, in pertinent part:

> Section 2.06 Indemnification of General Partner. To the fullest extent permitted by law, the Partnership shall indemnify and hold harmless the General Partner, each Affiliate of the General Partner, each direct or indirect general or limited partner, director, officer, employee, agent, member and shareholder of the General Partner, or of any Affiliate of the General Partner and each person who otherwise serves as an advisor, consultant or legal representative to the General Partner in respect of the Partnership's affairs (each an "Indemnified Party") from and against any loss or expense suffered or sustained by an Indemnified Party by reason of the fact that it is or was an Indemnified Party, including, without limitation, any judgment,

> settlement, reasonable attorney's fees and other costs or expenses incurred in connection with the defense of any actual or threatened action or proceeding, provided that such loss or expense resulted from a mistake of judgment on the part of an Indemnified Party, or from action or inaction that said Indemnified Party reasonably believed to be in the best interests of the Partnership. The Partnership shall, in the sole discretion of the General Partner, advance to any Indemnified Party, reasonable attorney's fees and other costs and expenses incurred in connection with the defense of any action or proceeding that arises out of such conduct. The Indemnified Parties shall agree that in the event an Indemnified Party receives any such advance, such Indemnified Party shall reimburse the Partnership for such fees, costs and expenses to the extent it shall be determined that it was not entitled to indemnification under this section. Notwithstanding any of the foregoing to the contrary, the provisions of this Section 2.06 shall not be construed so as to provide for the indemnification of the General Partner or its Affiliates for any liability (including liability under U.S. securities laws which, under certain circumstances, impose liability even on persons that act in good faith), to the extent (but only to the extent) that such indemnification would be in violation of applicable law, but shall be construed so as to effectuate the provisions of this Section 2.06 to the fullest extent permitted by law.

(Cyganowski Dec. Exs. 52 and 53 § 2.06).

However, Levy has failed to provide any evidence that he is covered by these provisions or provided any services to the PPLO Receivership Entities. In addition, there are no allegations in the Criminal and Civil Cases that Levy committed any acts on behalf of either of these entities.

As demonstrated below, the Indemnification Claimants cannot show that the Criminal and Civil Cases involve conduct or alleged conduct by Levy, SanFilippo and Small in their roles with any of the Receivership Entities, Credit Funding, LC Energy Holdings or LC Energy as required by the foregoing provision. Consequently, the Indemnification Claimants are not entitled to indemnification for any of those matters.

2. The Indemnification Claimants Are Not Entitled to Indemnification for the Criminal Case under Any of the Purportedly Applicable Agreements

The vast majority of the attorneys' fees sought by each of the Indemnification Claimants are for fees purportedly incurred in defending the Criminal Case. Having presided over the Criminal Case, this Court is ideally suited to determine whether there is a sufficient nexus between

(i) the allegations and issues in that proceeding and (ii) the Indemnification Claimants' work on behalf of, or for the benefit of, PPCO Receivership Entities, PPLO Receivership Entities and/or Credit Funding, as opposed to with PPVA, its wholly-owned subsidiary PPVA Black Elk, and/or Beechwood. The Receiver has concluded there is not.

As detailed in the Cyganowski Dec. at ¶¶ 53-62, it is clear that the Criminal Case had little, if anything, to do with Levy, SanFilippo or Small's work for any Receivership Entity:

- The Indictment alleges that the criminal defendants "engaged in two separate schemes: (i) a scheme to defraud investors and prospective investors in funds managed by Platinum; and (ii) a scheme to defraud third-party holders of the [Black Elk] Bonds." (Indictment ¶ 41, Cyganowski Dec. Ex. 59). Both schemes related entirely or primarily to PPVA rather than to PPCO, PPLO, Credit Funding, LC Energy Holding or LC Energy.

- The alleged scheme involving Black Elk took place entirely during 2014 (Indictment ¶¶ 6, 7, 26, 30, 44, 45, 47, 48, 52, 73-87, 90, 99-105). However, Levy, SanFilippo and Small were not employees of PPCO Portfolio Manager or any other PPCO Receivership Entities during 2014. (Rogers Dec. ¶¶ 9(A)-(K), 10(A)-(E), 11(A)-(D)). For example, from at least 2012 up through December 31, 2014, Levy was not employed by any of the Receivership Entities. (Rogers Dec. ¶¶ 10(A)-(E)). He was affiliated with PPVA Black Elk, (a subsidiary of PPVA, which owned Black Elk), Credit Funding (which had nothing to do with the Criminal Case and was never mentioned in the Indictment), and Beechwood (*see United States v. Levy*, 19-3207-CR, 19-3209-CR at *57 (2d Cir. Nov. 5, 2021), Dkt. No. 138, but he was not an officer, director or employee of any the Receivership Entities. *Id.*

- The Indictment is also based upon allegations that the criminal defendants, including Levy and SanFilippo, engaged in a "scheme to defraud investors and prospective investors in funds managed by Platinum". This scheme is based primarily upon allegations that these individuals caused assets of PPVA (not of any of the Receivership Entities) to be overvalued and concealed a liquidity crisis at PPVA. (Indictment, Cyganowski Dec. Ex. 59, ¶¶ 54-72). Those actions were plainly undertaken for the benefit of PPVA, not PPCO or PPLO. (*Id.*)

- As to SanFilippo, the Indictment focuses upon SanFilippo's roles as "PPVA's Chief Financial Officer from approximately 2005 through 2016," and alleges that SanFilippo "played a pivotal role in determining PPVA's AUM, management fees and incentive fees" (Indictment, ¶ 28), that SanFilippo, among others, led investors to believe that "PPVA was performing extremely well and had little to no liquidity concerns" (Indictment, ¶ 45), and that SanFilippo, among others, improperly increased the value of certain assets on PPVA's books (Indictment, ¶ 47). In an

affidavit filed in the litigation entitled *In Re Platinum-Beechwood Litigation*, 18-cv-6658-JSR (S.D.N.Y.), SanFilippo confirmed that from 2007 to 2016, he was Chief Financial Officer of PPVA Portfolio Manager and served on PPVA's valuation committee; he was a salaried employee of PPVA; and from January 2015 to October 2015, he temporarily stepped down from that position and occupied a lower position because of medical issues affecting a family member; and one of his principal responsibilities was to supervise the preparation of PPVA's annual audited financial statements. (Cyganowski Dec. Ex. 63, SanFilippo Aff. ¶¶ 1-3, 5, 7). Moreover, SanFilippo did not become an employee of any of the PPCO Funds until October 31, 2016, which was precipitated by PPVA's liquidation proceedings, and less than two months before the Indictment on December 14, 2016 (Rogers Dec. ¶¶ 9(A)-(G)). Thus, SanFilippo's alleged conduct is largely, if not entirely, not covered by the indemnification provisions of the agreements upon which O'Brien's claims are based. Because the Indictment does not allege that SanFilippo was acting in any capacity at a Receivership Entity, but instead alleges that he was the CFO of PPVA, the Receiver correctly determined that the Receivership Entities should not be liable to O'Brien for the O'Brien Claims and, at most, the O'Brien Claims must be allocated across the Platinum Funds.

- Levy, Wilson and Small each rely on the Credit Funding Agreement (Cyganowski Dec. Ex. 51) as the basis for asserting that they are entitled to indemnification for fees incurred in the Criminal Case. (Claims 228, 230, 231 and 232, Cyganowski Dec. Exs. 36, 38, 39, 40). However, the Indictment is devoid of any mention of Credit Funding or its direct and indirect subsidiaries, LC Energy and LC Energy Holdings, or any actions by Small on behalf of those entities. Consequently, that agreement cannot possibly give rise to an obligation to indemnify anyone for the Criminal Case.

- In addition to relying upon the Credit Funding Agreement, Small claims to be entitled to indemnification based upon an "Investment Management Agreement" between PPLO Portfolio Manager and the funds it managed (the "***PPLO Investment Management Agreement***"). (*See, e.g.*, Claim 231, Cyganowski Dec. Ex. 39). However, the PPLO Investment Management Agreement only covers "Losses sustained … by reason of (i) the fact that the Investment Manager was or is a portfolio manager to each of the [PPLO] Funds, as the case may be, including, without limitation, all legal, professional and other expenses incurred by the Investment Manager, or persons designated by it, in the performance of its duties and obligations hereunder, all indemnity obligations owed by the Investment Manager to persons designated by it and any loss as a result of any misdelivery or error." (*See*, *e.g.*, Claim 231, Cyganowski Dec. Ex. 39 § 5(a)). By contrast, the Indictment does not allege that Small committed any wrongdoing on behalf of PPLO Portfolio Manager and instead focuses upon Small's role in the alleged Black Elk scheme, including the public disclosures made by Black Elk (a PPVA subsidiary) regarding the ownership of outstanding Black Elk notes, including primarily PPVA Black Elk and Black Elk, both PPVA subsidiaries. (Indictment, ¶¶ 30, 44, 73, 75, 77, 78, 79, 80, 81, 82, 84, 85, 86, 90, 101, 103, 105).

- PPVA also has a governing agreement which provides for indemnification. (Second Amended and Restated Limited Partnership Agreement of PPVA dated July 1, 2008, § 2.07, Cyganowski Dec. Ex. 58). The Indemnification Claimants may well have submitted claims under those indemnification clauses, yet they seek to hold the Receivership Entities one-hundred percent liable.

- Small has not yet been tried in the Criminal Case against him. If he is convicted of acts constituting "gross negligence or a willful violation of law," indemnification would be precluded. (*See*, *e.g.*, Claim 231, Cyganowski Dec. Exs. 39, 54 § 5(a)).

- The three claims submitted by O'Brien recognize that the fees they seek arise, at least in part, from PPVA by asserting claims against both PPVA Portfolio Manager (which is mentioned first) and against PPCO Portfolio Manager. (Claims 156, 329 and 330, Cyganowski Dec. Exs. 31-33).

Accordingly, the legal fees incurred in the Criminal Case do not qualify under the relevant governing agreements for indemnification and/or reimbursement.

3. The Indemnification Claimants Are Not Entitled to Indemnification for the Civil Cases under Any of the Purportedly Applicable Agreements

a. Levy Is Not Entitled to Indemnification for the Civil Cases

Levy, and by extension Wilson, have admitted that they are not entitled to indemnification/reimbursement by the Receivership Entities because, as Levy has conceded in another proceeding, the legal fees for which they seek indemnification incurred in connection with Levy's activities outside any affiliation he may have had at any point with Receivership Entities. In a pleading in the Beechwood litigation, in connection with Levy's request of SHIP for payment of *all* of his fees and expenses incurred in connection with the Black Elk claims in the Criminal Case, as well as certain of the Civil Cases, Levy conceded that "the *core* of the alleged Black Elk Scheme misconduct is that *Beechwood* entities, including using SHIP funds, made purchases of Black Elk bonds …." (*See* Memorandum of Law in Support of Plaintiff David Levy's Position on Advancement and Allocation and in Opposition to Defendants' Position, 35 at 17; Cyganowski Dec. Ex. 76 (emphasis supplied)).

Additionally, Levy stated that the "crux of the alleged misconduct at the center of ***all*** of the Black Elk Claims is that Mr. Levy … was CIO of Beechwood[.]" (*Id*. at 12 (emphasis in original)). He also conceded that "the Criminal Matter is based in significant part on allegations … [regarding] actions taken when Mr. Levy was serving as CIO of Beechwood." (*Id*. at 10.) Having voluntarily conceded that the "crux" of the allegations underlying the Black Elk scheme involved his role at Beechwood, a non-Receivership and non-Platinum entity, Levy cannot credibly claim that the alleged misconduct underlying the Black Elk scheme was primarily taken in connection with his role at a Receivership Entity or for their benefit, and that as a result, any Receivership Entity is obligated to indemnify him for legal fees incurred as a result of non-Receivership matters such as the Black Elk scheme.

Thus, this Court need look no further than Levy's own pleading in the Beechwood litigation to conclude that neither he nor Wilson should be allowed to extract assets from the Receivership Entities to pay for *all* of his outstanding legal fees from the Criminal and Civil Cases because he has already acknowledged and conceded that the allegations in those cases for which he seeks indemnification primarily concern his role with non-Receivership entities. However, the Court could also look to the Second Circuit Decision for further proof that the facts forming the basis to Levy's claims for indemnification arose from his role with non-Receivership entities. In its recitation of the facts underlying the Black Elk scheme, the Second Circuit repeatedly confirmed that Levy's role in the overall scheme was furthered by virtue of his positions at Beechwood and PPVA. For instance, the court explained, after Levy left Platinum to become the CIO of Beechwood, "he continued to work for Platinum to manage PPVA's investment in Black Elk." (*Levy*, 19-3207-CR, Dkt. No. 138 at *57). The court noted that it was Naftali Manela ("***Manela***") "who was CFO of PPCO through late 2014," not Levy, who was "CIO of Beechwood," (*see id.* at

*57), nor SanFilippo who was CFO of PPVA. (*See id.* at *36). In the context of *Beechwood's* role in the Black Elk scheme, Manela "testified that, as CIO at Beechwood, Levy made the 'final decision on which investments were made.'" (*See id.* at *57)

As the court framed the question before it, the issue was whether "viewed in the light most favorable to the government, the evidence support[ed] an inference that Levy was aware of Beechwood's role in the Black Elk scheme and was actively involved in that scheme." (*See id.*) As the Second Circuit explained, "the Consent Solicitation would not have passed without the votes of Beechwood." (*Id.* at *51.) The court went on to further state "although there were no writings reflecting Levy himself directing Beechwood's purchase of Black Elk bonds, [Levy's awareness of Beechwood's purchases of] Black Elk bonds from Platinum[] support[ed] an inference that he, as Beechwood's CIO, had signed off on those transactions." (*See id.* at *57-58.) Levy's role in the Black Elk scheme has been conclusively determined and he therefore has no plausible claim to indemnification by a Receivership Entity.

Because the legal fees incurred by Levy were the result of his work on behalf of non-Receivership entities, those fees were not "a result of or in connection with any act performed by them under this Agreement or otherwise on behalf of the Company," as required, and the Receiver is therefore well justified in disallowing them in their entirety. ((Fourth Amended and Restated Limited Liability Company Agreement of PPCO Fund, Cyganowski Dec. Ex. 50, § 5.4.2).

b. <u>Small and O'Brien Are Not Entitled to Indemnification/Reimbursement for any Civil Cases</u>

In Claims 156, 329 and 330, O'Brien seeks reimbursement from PPCO Portfolio Manager for legal fees it claims SanFilippo is entitled to recover in unspecified civil actions, and fails to indicate why indemnification is required. O'Brien's bills however, identify the case of *Trott v. Platinum Management (NY) LLC* (*e.g.*, Claims 329 & 330 at 3-8, Cyganowski Dec. Exs. 32, 33)

(the "***Trott Action***") — one of three actions comprising the Beechwood litigation — which was commenced against SanFilippo by the joint liquidators of ***PPVA***, and therefore obviously relates to PPVA, not PPCO or PPLO (*e.g.*, Claim 156 at 67, 107, 115, 125, 126-28, 130-31, 158, 201). The Second Amended Complaint naming SanFilippo as a defendant in the Trott Action relates solely to SanFilippo's roles in positions with PPVA (*e.g.*, Second Amended Complaint in Trott Action (the "***Trott SAC***"), Cyganowski Dec. Ex. 61, ¶ 11(ix), 34, 90-96, 254, 258, 466, 485, 527, 563, 606, 649, 724, 785, 873, 889); and SanFilippo's Rule 56.1 Statement filed in support of his motion for summary judgment in the Trott Action confirms that that action had nothing to do with any of the Receivership Entities by mentioning only roles with PPVA and describing only actions taken by SanFilippo with respect to PPVA and its investments (Joseph SanFilippo's Local Rule 56.1 Statement of Undisputed Material Facts, Cyganowski Dec. Ex. 69 ¶¶ 1-18). Additionally, SanFilippo was on PPVA Portfolio Manager's payroll through the end of October 31, 2016, others occupied the position of CFO of PPCO Portfolio Manager during at least 2015, and Manela signed the PPCO Funds' representation letters on April 30, 2015, while SanFilippo signed those letters effective September 16, 2015. (Rogers Dec. ¶ 9(A)-(K) & Exs. 1, 2, 3, 4). Consequently, O'Brien has no basis for seeking full indemnification from the Receivership Entities for any civil case.

In Claims 228, 230, 231, and 232, Small seeks indemnification for legal fees incurred in various unspecified civil actions in which he is named as a defendant. (Cyganowski Dec. Exs. 36, 38, 39, 40). However, he fails to identify those civil actions specifically (other than an uninformative reference to the SEC's enforcement action, the Complaint in which describes Small solely in various capacities for PPVA, Black Elk (a subsidiary of PPVA), and Platinum Partners Black Elk Opportunities Fund LLC, and not in any capacity for any of the Receivership Entities). (*See* Dkt. No. 1 ¶ 28). In addition, to the extent he seeks reimbursement for legal fees expended

in the Trott Action, the Trott SAC is based upon Small's roles with respect to PPVA, the "BEOF Funds," Beechwood and PPVA Portfolio Manager. (*See* Trott SAC, Cyganowski Dec. Ex. 61, ¶¶ 11(viii), 34, 87-89, 139, 256, 320, 391, 453, 456, 466-67, 479, 480, 483, 484, 486, 499, 502, 506, 708, 713, 714, 785, 873, 889, 990, 1010). Moreover, Small never held any position with any of the PPCO Receivership Entities. (Rogers Dec. ¶ 11(C)). Thus, Small has not shown any basis for recovery of any legal fees in the Civil Cases.

C. The Indemnification Claims Should be Denied in Their Entirety Because the Indemnification Claimants Have Failed to Allocate Their Fees

Even if some of the legal fees incurred by the Indemnification Claimants relate to work performed by Levy, SanFilippo or Small that they undertook on behalf of the Receivership Entities (and there has been no evidence presented to that effect), the Indemnification Claimants have failed to allocate any of their legal fees between claims covered under the purported agreements and claims that are not covered under such agreements, as is their burden. *See Fasciana v. Elec. Data Sys. Corp.*, 829 A.2d 160, 175 (Del. Ch. 2003) (party seeking indemnification is required to allocate legal fees and expenses between covered and uncovered claims); *Happy Kids, Inc. v. Glasgow*, 2002 WL 72937, at **4-5 (S.D.N.Y. Jan. 17, 2002) (apportioning advancement duty on a claim by claim basis); *Booth Oil Site Admin. Grp. v. SafetyKleen Corp*., 137 F.Supp.2d 228, 238-39 (W.D.N.Y. 2000) (apportioning advancement duty by overall time of employment and overlap with time when alleged wrong occurred). Therefore, the Indemnification Claims should be disallowed in their entirety.

For these reasons, it would be legally impermissible, not to mention inequitable to innocent investors and creditors of the Receivership Entities, to pay Levy's, SanFilippo's and/or Small's legal fees for matters that fall outside the scope of the agreements upon which the Indemnification Claimants rely. Moreover, Wilson and O'Brien do not provide a valid independent basis for

payment of their legal fees, which even if independently entitled to reimbursement, are duplicative of Levy and SanFilippo's Indemnification Claims.[10] Accordingly, the Receiver requests that this Court confirm her disallowance of the Indemnification Claims.

D. Alternatively, the Indemnification Claimants Are Not Entitled to One Hundred Percent of the Fees They Seek Because the Majority, If Not All, of the Fees Are Attributable to Non-Receivership Entities

Assuming *arguendo*, that part of the Indemnification Claimants' claims related to work for or benefits conferred upon a Receivership Entity, the Indemnification Claimants would still not be entitled to receive a complete reimbursement because they failed to allocate those claims amongst PPVA, the PPCO and PPLO Receivership Entities and any other entities that may have indemnification obligations.

1. The Receiver's Allocation of Fees Was Reasonable

Despite the Indemnification Claimants' fatal failure to allocate, in an effort to avoid unnecessary motion practice, during the claims reconciliation process the Receiver utilized an objective, administratively workable, and appropriate method to allocate the Indemnification Claimants' fees for them. Specifically, in the Claims Analysis Report, the Receiver allowed (i) Levy's asserted $8.7 million indemnification claim in the amounts of approximately $2.9 million against PPCO Master Fund and $138,337 against PPLO Master Fund; (ii) O'Brien's asserted $2,686,426 indemnification claim against PPCO Master Fund in the amount of $922,863.04; and (iii) Small's asserted $2,861,533 indemnification claim against PPCO Master Fund in the amount of $983,017 and against PPLO Master Fund in the amount of $45,500.84 (collectively, the "***Receiver's Allocation***").

[10] To the extent that this Court rules that the Claimants are entitled to such duplicative Claims, the Claimants should not be afforded multiple recoveries for the same legal fees.

The Receiver's Allocation was based on a formula of the *pro rata* share of the purported total assets under management across PPCO, PPLO, and non-Receivership entity PPVA, as of the end of 2015, the last full year before the commencement of the Receivership. (Cyganowski Dec. ¶ 169). As a result, the *pro rata* allocation that the Receiver applied to the indemnification claims was the following: PPVA 64%; PPCO 34%; and PPLO 2%. (Cyganowski Dec. ¶ 169; Rogers Dec. ¶¶ 27-28). The Receiver not only applied this allocation to all indemnification claims, she also applied the same allocation to the claims of individuals who were not employed by a Receivership Entity, but provided services to a Receivership Entity. (Cyganowski Dec. ¶ 169; Rogers Dec. ¶ 26).

This Court recognized the obligation to allocate between Receivership Entities and others in its earlier order denying requests for advancement, and that the amount of any allowed claims would be addressed in the claims reconciliation process. (*See* Advancement Op. I, 5-6. *See also Fasciana*, 829 A.2d at 175). Additionally, the Receiver cannot simply allow expenses against the Receivership Entities for indemnification liabilities of non-Receivership entities because the SEC has made it clear through numerous enforcement actions that hedge funds must allocate expenses between affiliate funds.[11] It is common for hedge funds to use AUM as a method to allocate expenses across affiliate funds,[12] and such allocations are appropriate here. (Rogers Dec. ¶¶ 25-28). The Receiver followed this standard approach in lieu of commissioning a comprehensive review of the issues surrounding the Indemnification Claimants' claimed entitlements to

[11] *See e.g. In re Cherokee Investment Partners LLC and Cherokee Advisers LLC*, Investment Advisers Act of 1940 Release No. 4258, Administrative Proceeding File No. 3-16945 (Nov. 5, 2015), available at https://www.sec.gov/litigation/admin/2015/ia-4258.pdf .

[12] *Expense Allocation: Establishing a Benchmark*, IntegriDATA (Apr. 1, 2016) available at https://integri-data.com/blog/expense-allocation-establishing-a-benchmark/ .

indemnification. Absent objective evidentiary support for an alternative allocation of their fees, the Receiver's Allocation of the Indemnification Claims is fair, reasonable, and appropriate.

O'Brien claims that the PPCO Fund LLC Agreement and Delaware's mandatory director and officer indemnification rule under Del. Code tit. 8, § 145 ("***Section 145***") require the Court to disregard the Receiver's Allocation and allow its claim for the full $2,686,426.31 in legal fees billed. However, because O'Brien fails to show that SanFilippo was a director or an officer of PPCO Fund LLC, that claim fails. (*See VonFeldt v. Stifel Financial Corp.*, 714 A.2d 79, 84 (Del. 1998) ("We have long recognized that Section 145 serves the dual policies of: (a) allowing *corporate officials* to resist unjustified lawsuits . . . and (b) encouraging capable women and men to serve as *corporate directors and officers* . . . .") (emphasis added)).

Importantly, even if an indemnification provision were binding upon the Receiver, O'Brien has pointed to no provision that purports to indemnify somebody who was not an officer, director, or member of a Receivership Entity. Rather, O'Brien relies on the O'Brien Letter, an unsigned letter agreement dated June 27, 2016, between O'Brien and "Platinum Partners LP" to retain O'Brien to represent SanFilippo in connection with "investigations" being conducted by the Eastern and Southern District U.S. Attorney's Offices, that was attached as an exhibit to the declaration in support of his motion for advancement. (Dkt. 392-2, Cyganowski Dec. Ex. 80). The O'Brien Letter cannot override the governing provisions of the applicable operating agreements or exclude O'Brien's fees from being subject to the Receiver's allocation.

O'Brien is not entitled to statutory or contractual indemnification by virtue of SanFilippo's relationship with any Receivership Entity. Nonetheless, the Receiver does not dispute that SanFilippo may be entitled to indemnification by PPVA under PPVA's indemnification

provisions.[13] But because, as explained above, the Indictment and Complaint and the Trott Action arise out of SanFilippo's roles with respect to PPVA, and SanFilippo was an employee of PPVA during the relevant time period, the Receivership Entities do not have any indemnification obligations to him.

2. The Wilson Letter Does Not Impose An Obligation on the Receivership Entities for all of the Legal Fees

For these same reasons, any fees supposedly due under the Wilson Letter are, *at a minimum*, subject to the same allocation. The fact that Wilson purportedly entered into an agreement with "Platinum Partners" for reimbursement of fees does not override the indemnification provisions of the governing agreements or mean that the Receivership Entities are jointly and severely liable with non-Receivership Platinum-related entities for the entire amount of Wilson's fees, or that the fees are not subject to equitable allocation.

As a threshold matter, the Wilson Letter does not identify specific "Platinum" entities which are purportedly bound thereby. Wilson cannot credibly argue that the Civil Cases are covered under the Wilson Letter, which was, at most, limited to the ongoing investigations conducted by the United States Attorney's Offices for the Southern and Eastern Districts of New York. (Cyganowski Dec. Ex. 81). Despite this, Wilson and Levy both assert $8.7 million claims, but Levy's claims include additional fees incurred in the Civil Cases. Therefore, it is not clear whether Wilson improperly seeks reimbursement for fees incurred in the Civil Cases, which it is not entitled to under the Wilson Letter.

[13] Indeed, if there was ever any doubt as to whether Delaware's mandatory director and officer indemnification rule also entitles to indemnification those who are not directors or officers, a revision to Section 145 in 1997 put that doubt to rest. The Delaware legislature then amended the law to clarify that Section 145 does *not mandate* indemnification for employees or agents of a corporation who are neither officers nor directors of the corporation, while adding a new subsection providing that corporations are free to so provide for their indemnification. *See* S. 106, 139th Gen. Assembly, 1997 DE SB 106, Synopsis at 3-11, enacting 71 Del. Laws 120 (June 30, 1997).

E. The Receiver Is Not Required to Reserve Funds for Levy or Small's Potential Future Legal Fees and Expenses

In addition to reimbursement of outstanding legal fees, in correspondence, Levy has requested that the Receiver establish a reserve in the amount of $5-7 million for future legal fees in the Criminal Case and $8-10 million for future legal fees in certain civil matters, and Small requested $8-$11 million for future legal fees and costs.[14] In light of the Second Circuit Decision, Levy has been convicted and he is not entitled to indemnification. At this point, Levy has failed to identify what fees he could incur in the future. Additionally, regardless of whether Levy is entitled to indemnification in the Civil Cases, it is unclear how Levy could incur $8-10 million for future legal fees in light of his criminal conviction. Nevertheless, as payment on his indemnification claims is, and necessarily must be, limited to only those fees actually incurred, the Receivership Entities have no obligation to make a distribution to Levy, or reserve for fees that have not yet been, and may never be, incurred, especially where, given the size of the anticipated fees, such a reservation would likely materially impact, or even prevent any distribution to other stakeholders. (Cyganowski Dec. ¶ 179; *see also* Claims Process Order I.A.i ("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.")).

Regardless, the Receiver is not required to reserve for the entire $13-$17 million that Levy estimates he will incur in legal fees in a potential second criminal trial and in the pending Civil Cases, or the $8-$11 million referred to by Small. Even if the Receiver were required to reserve for any of their estimated future fees, the Receiver would only need to reserve for the amounts they would hypothetically receive under a plan of distribution in the event the fees became non-

[14] *See* Objection to The Receiver's Claims Report on Behalf of David Levy and Wilson Sonsini Goodrich & Rosati (the "***Levy/Wilson Objection***"), Cyganowski Dec. Ex. 45, 2; Letter from Seth Levine, Esq. of Levine Lee LLP to Melanie L. Cyganowski, as Receiver dated April 22, 2021, Cyganowski Dec. Ex. 47, 2 (the "***Small Objection***").

contingent. (*See, e.g.*, *SEC v. Byers*, 671 F. Supp. 2d 531, 541 (S.D.N.Y. 2009) ("Ticor . . . holds an unmatured and contingent claim against the receivership estate. The Receiver is directed to retain sufficient reserves within the estate to satisfy the *pro rata* share of any future liability to Ticor, should it become due.") (emphasis supplied)). As stated above, under a plan of distribution, Levy and Wilson would not be entitled to priority on account of those fees. As the Receiver intends to treat Levy, Wilson and Small's claims with the same priority as other creditors and investors, absent subordination or exclusion, the reserve for their estimated future fees would at most be the estimated *pro rata* share they would receive under the Plan. That amount would be less than the $13-$17 million estimate and subject to the same plan allocation formula as others.

POINT II

THE CLAIMANTS ARE NOT ENTITLED TO PRIORITY DISTRIBUTIONS

None of the Claimants claim to have an administrative claim or a secured claim. Nevertheless, each claims to be entitled to priority distribution ahead of other creditors based upon (i) certain of the Receivership Entities' governing agreements, (ii) legal principles, and/or (iii) "equity." This Court has previously rejected each of the Claimants' arguments, and it should adhere to its prior determinations. Thus, even if the Court allows any of the Indemnification Claims (which it should not), it should not afford any of them, or the Black Elk Trustee's claim, priority.[15] The Court should reject all of the arguments in favor of priority because it has already determined, on two occasions, that (i) advancement, indemnification and reimbursement claims are unsecured and are not entitled to priority over claims of other unsecured creditors, and (ii)

[15] The Receiver does not seek disallowance of Claims 37-38 and 41-42 filed by the Black Elk Trustee because the Prior Receiver entered into a settlement agreement in which he agreed, on behalf of the Receivership Entities, to allow claims by the Black Elk Trustee in the amounts of $24,600,584.31 and $5,000,000, respectively, against PPCO Master Fund and PPLO Master Fund. However, the Receiver does dispute the Black Elk Trustee's assertion that any claims of the Black Elk Trustee should have priority over other unsecured creditors' claims or investors' interests.

neither contract nor equity divests the Receiver of her authority to determine the timing and priority of distributions.

A. The Court's Prior Advancement Opinions Control All Claims to Priority

Even if the Indemnification Claimants were entitled to payment for any portion of their legal fees in connection with the Criminal and/or Civil Cases, this Court has twice before determined that such payments are not entitled to be afforded priority over the interests of other creditors and investors. Other than the Second Circuit Decision, nothing has changed since those earlier rulings to alter those determinations, and the time to appeal or otherwise challenge this Court's previous rulings has long since passed.

In October 2018, SanFilippo and Levy, Small and Joseph Mann ("***Mann***") filed motions for advancement of their attorneys' fees and expenses in the Criminal Case and (in the cases of Levy and SanFilippo) the Civil Cases. (Dkt. Nos. 392, 402-06, 410, 411, 415, 417). In support of his motion for advancement, SanFilippo argued, among other things, that he was entitled to immediate advancement of his fees under applicable law and that Section 10.2.1 of the Third Amended and Restated Limited Liability Company Agreement of PPCO Fund required that "obligations that PPCO has to the Managing Member, such as obligations for advancement of legal fees that were previously made on its behalf, must be paid before the Receiver satisfies PPCO's general debts, taxes, and other obligations." (Dkt. No. 392-8 at 15-16). In support of his motion for advancement, Levy argued, among other things, that applicable law establishes a priority for advancement claims over claims of other creditors. (Dkt. No. 403 at 15 n. 5). Mann and Small joined in SanFilippo and Levy's motions, including their priority arguments. (Dkt. Nos. 405 and 406). O'Brien appears now to adopt SanFilippo's prior assertions under that provision for which they previously advanced as his counsel and which this court rejected; and the Black Elk Trustee

asserts that he is entitled to priority under that same provision Section 9.2(b) of the Third Amended and Restated Limited Partnership Agreement of PPCO Master Fund (the "***PPCO Master Fund LPA***"). (Cyganowski Dec. Ex. 49 § 9.2; Black Elk Request at 2-3, Cyganowski Dec. Ex. 48).

As noted, the Court rejected all of those claims of priority, explaining:

> Platinum Partners may well indeed owe reimbursement to these former officers. But it owes lots of money to people and entities that it lacks sufficient funds to pay, which is why it is in receivership. The former officers have shown no compelling reason why they should get to jump the line. Their motion is therefore denied.

(Advancement Op. I, Dkt. No. 417 at 1).

The Court also explained:

> In fact, the former officers' motions seek more than an accelerated payment of their claims. They seek 100% payment, something which no creditor of these estates may ever receive. Since the estates' assets have not been fully liquidated, there is no way to know whether creditors will receive a 10% distribution or a 90% distribution on their claims. But the former officers want it all, as if their claims were secured or administrative, which they are not.
>
> Because the Sixth Amendment does not compel the advancement of legal fees, granting the former officers priority over the claims of unsecured creditors would not only disregard established Delaware law but also interfere with the orderly wind up of the Receivership Entities. Thus, the former officers' rights to advancement of legal fees do not have priority over the claims of unsecured creditors.

(*Id*. at 10).

Thereafter, in October 2019, after the jury in the Criminal Case found SanFilippo not guilty and Levy's conviction was reversed by the Court, several defendants, including O'Brien on behalf of SanFilippo and Wilson on behalf of Levy, filed motions to compel indemnification for their legal fees. (Dkt. Nos. 490, 494, 496). SanFilippo claimed that both applicable law and Section 10.2.1 of the Third Amended and Restated Limited Liability Company Agreement of PPCO Fund gave his indemnification claim priority over the claims of other creditors. (Dkt. No. 490-5, p. 9). Levy relied upon legal principles and public policy. (Dkt. No. 494 at 9-19; Dkt. No. 501 at 6-8).

In its Advancement Op. II, this Court determined that SanFilippo may not "jump the line in front of other deserving creditors" and that his indemnification claims must "wait for any payment alongside the other unsecured creditors." (Advancement Op. II).

The Court's Advancement Op. I and its Advancement Op. II defeat the Claimants' assertions that their claims are entitled to priority over claims of other unsecured creditors, as these Advancement Opinions are the law of the case. The "[law of the case] doctrine posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Liona Corp. v. PCH Associates (In re PCH Associates)*, 949 F.2d 585, 592 (2d Cir. 1991) (citing *Christianson v. Colt Indus. Operating Corp*., 486 U.S. 800, 815-16 (1988)). In its Advancement Op. II, this Court rejected Levy and SanFilippo's arguments that his claims are entitled priority by characterizing them as "just two unsecured claims among many," and instructed that Levy's claims "must wait for any payment alongside the other unsecured creditors." This Court also denied Levy's previous attempts to receive 100% payment of his advancement claims and specifically found that his claims were not administrative or secured. (*See* Advancement Op. I, 9). In classifying the Claims as unsecured claims, the Receiver is "merely applying the fundamental rule of equal distribution among creditors of like kind." (*Id*.) This fundamental rule denying entitlement to priority is the law of the case. *See In re Navidea Biopharmaceuticals Litig.*, No. 19-CV-1578 (VEC), 2021 WL 2156276, at *8 (S.D.N.Y. May 27, 2021) ("Goldberg's request for advancement of fees incurred in the prosecution of his third-party claims is also denied. This Court has already held that Goldberg is not entitled to the advancement of those fees.… As such, this Court's prior finding is law of the case.") (citing *PCH Associates*, 949 F.2d at 592). Because no Claimant can distinguish its claims of entitlement to indemnification from those this Court has already ruled deficient, no Claimant is entitled to priority.

B. None of the Cited Documents Grant the Claimants Priority

All Claimants incorrectly rely upon contractual provisions, including provisions in certain Receivership Entities' governing agreements creating indemnification obligations or purporting to govern the distribution of assets in the Receivership. However, those provisions cannot provide a basis for insisting that any claims, including their indemnification claims, should receive priority. Put differently, a Receiver is "not required to distribute the assets in accordance with the contractual rights of the parties." (*SEC v. Quan*, 870 F.3d 754, 762 (8th Cir. 2017) (declining to enforce a contractual liquidation preference affording priority of one group of claimants to the detriment of other claimants) (citing *SEC v. Credit Bancorp, Ltd.*, 290 F.3d 80, 87 (2d Cir. 2002))). Moreover, the Court has already twice decided that the provisions in the governing agreements of the Receivership Entities do not divest the Receiver of her authority to determine the timing and priority of distributions, and its rulings are law of the case.

1. The Wilson Letter Does Not Create a Valid Claim, Priority or Otherwise

Wilson asserts a claim for repayment based on the Wilson Letter. As addressed above, however, the Receivership Entities have no liability to Wilson pursuant to the Wilson Letter, as Levy has been convicted, that document was limited to "investigations" and any amounts outstanding for investigations of Levy have been satisfied by insurance proceeds. Even if the Wilson Letter could lead to a valid claim, it would be inherently inequitable to grant Wilson a priority over other claimants, especially after Wilson benefitted so greatly from the D&O Policy whose significant premiums were paid for by the Prior Receiver at the beginning of this case, and after the current Receiver agreed not to claim any coverage so as to allow for those seeking an indemnitee to realize the full benefit of those policies. Further, neither the Receiver nor the Court have expressly approved the Wilson Letter. *See SEC v. Churchville*, C.A. No. 15-191 S, 2016 WL

3816373 at *3 (D.R.I. July 12, 2016) (holding that where a receiver did not expressly ask the court to adopt a pre-receivership contract or its indemnification provision, neither the receiver nor the court is bound by it). Moreover, no competent or admissible evidence has been submitted to this Court that Wilson's work on behalf of Levy benefited the estate so as to entitle either one of them to an administrative claim with priority of payment. The unsubstantiated claims that the criminal acquittals supposedly increased the value of Receivership assets was previously addressed and soundly discredited by the Receiver. (*See* Receiver's Omnibus Memorandum of Law in Opposition to SanFilippo's and Levy's indemnification motions, Dkt. No. 497, 8).

2. Black Elk is Not a Third-Party Beneficiary

In a document served on March 9, 2021 entitled "Black Elk Trust Claim Confirmation and Priority Distribution Request" (the "***Black Elk Confirmation Request***"), the Black Elk Trustee argues that this Court should grant priority to the Black Elk Litigation Trust's claims against PPCO Master Fund and PPLO Master Fund for $24,600,584.31 and $5,000,000 based upon a settlement agreement he entered into with the Receiver. (Cyganowski Dec. Ex. 48). That claim is baseless for the following reasons:

First, neither Section 10.2.1 nor Section 9.2(b) contains any language granting any of the Claimants a priority, let alone the Black Elk Trustee a priority claim. It is not surprising then that the Black Elk Trustee fails to explain how either Section 9.2(b) of the Third Amended and Restated Agreement of Limited Partnership of PPCO Master Fund or Section 10.2.1 of the PPCO Fund LLC Agreement or any legal or equitable principle entitles its claim to a priority. Section 9.2(b) of the Third Amended and Restated Agreement of Limited Partnership of PPCO Master Fund provides that "the claims of all creditors of the Partnership (including Partners except to the extent not permitted by law)" shall have priority over claims of equity. Nothing in this provision purports

to augment the priority of the Black Elk Trustee's unsecured claim to a claim having any priority over other claims of unsecured creditors. Section 10.2.1(ii) of the PPCO Fund LLC Agreement provides "that all debts, obligations and other liabilities of the Company, as to which personal liability exists with respect to any Member shall be satisfied, or a reserve shall be established therefor, prior to the satisfaction of any debt, obligation or other liability of the Company." (Cyganowski Dec. Ex. 50). This provision fails to grant priority to claims of the Black Elk Trustee because it was not a "Member" of PPCO Fund. There is also no basis for an assertion that paying the Black Elk Trustee's claim under the Black Elk Settlement Agreement is a claim "as to which personal liability exists with respect to any Member" of any of the Receivership Entities, as referred to in Section 10.2.1(ii). Further, the Black Elk Settlement Agreement (Cyganowski Dec. Ex. 56) confirms that Members are not liable for the obligations under it because it fails to include any provision indicating that the members of any of Receivership Entity are liable for a default under the Settlement Agreement. In any event, the Receiver is not required to distribute funds under contractual liquidation preferences. (*Quan*, 870 F.3d at 762).

Second, even if the language of these provisions was consistent with the grant of a priority to the Black Elk Trustee's claims, the Black Elk Trustee would lack standing to compel the Receiver to grant it a priority distribution under either of the two governing agreements he cites because the Black Elk Trustee, the Black Elk Litigation Trust and Black Elk were not a party to, or intended third-party beneficiaries of, either agreement. Under both New York and Delaware law, one who was not a party to a contract may only compel its enforcement if it was an intended third-party beneficiary. (*See Mortise v. U.S.*, 102 F.3d 693, 697 (2d Cir. 1996) ("Generally, only an intended beneficiary of a contract may assert a claim as a third-party beneficiary."); *Am. Fin. Corp. v. Computer Scis. Corp.*, 558 F. Supp. 1182, 1185 (D. Del. 1983) ("[U]nder Delaware law

both parties must in some manner express an intent to benefit the third-party before third-party beneficiary status is found.") (citations omitted)). In addition, where, as here, an agreement contains "[u]nequivocal language" that a non-party lacks a right to enforce an agreement, the non-party is not a third-party beneficiary with standing to invoke the contract as a third-party beneficiary. (*See CFIP Master Fund, Ltd. v. Citibank, N.A.*, 738 F. Supp. 2d 450, 478 (S.D.N.Y. 2010). *See also Am. Fin. Corp. v. Computer Scis. Corp.*, 558 F. Supp. 1182, 1186 (D. Del. 1983)).

Here, not only does the Black Elk Trustee fail to offer any justification why it, the Black Elk Trustee or Black Elk, was a third-party beneficiary of the governing agreements of PPCO Master Fund or its feeder funds including PPCO Fund, both agreements unambiguously state that there are no intended third-party beneficiaries of the agreement. Section 11.21 of the PPCO Master Fund LPA provides that "the provisions of this Agreement are intended solely to benefit the Partnership and the Partners and, to the fullest extent permitted by applicable law, shall not be construed as conferring any benefit upon any creditor of the Partnership (and no such creditor shall be a third party beneficiary of this Agreement)." (Cyganowski Dec. Ex. 49). Similarly, Sections 14.8 and 14.10 of the PPCO Fund LLC Agreement provide, respectively, that "[t]his Agreement is not intended and shall not convey any rights to persons not party to this Agreement" and "[n]one of the provisions of this Agreement shall be for the benefit of or enforceable by any creditors of the Company." (Cyganowski Dec. Ex. 50). Consequently, even if the Black Elk Trustee were correct that the provisions he cites afforded him priority, which he is not, he would lack standing to invoke those provisions.

C. The Equities Disfavor Priority

Certain of the Claimants also assert that their claims should be given priority over those of other creditors under principles of equity. (Small Objection, Cyganowski Dec. Ex. 47). This Court

previously gave all parties in interest, including each of the Claimants, the opportunity to argue that the Receivership should be converted into a bankruptcy proceeding, which would have divested the Receiver of comprehensive discretion over claims and distributions and her ability to act under her equitable powers of a receivership court, rather than in accordance with contractual and bankruptcy priorities.[16] (Docket Orders 12/12/2019 and 12/17/2019). Indeed, some of the Claimants, such as SanFilippo and Levy, expressly requested that the Court *not* dismiss the Receivership action in favor of a bankruptcy proceeding. (Dkt. Nos. 514, 515). As the Court has already held, "[a]mong other purposes, the receivership was instated in order to 'conduct an orderly wind down including a responsible liquidation of assets and orderly and fair distribution of those assets to investors.' The Receiver thus has broad authority to reasonably distribute funds by order of claim priority." (Advancement Op. II).

The Indemnification Claimants are not secured, and are not entitled to priority of payment. They have not cited to a security agreement with any Receivership Entity and they do not assert that they have a security interest in the Receivership assets. Indeed, in the proof of claim form submitted with each of their claims, in response to the question "Is all or part of the claim secured?" Levy, Wilson, and Small checked the box labeled "No." (Cyganowski Dec. Exs. 1, 21, 36). It would therefore not only be legally impermissible, but inequitable to grant such a priority at this juncture, which would, as a matter of pure economics, result in a distribution of substantially all the receivership's current cash to these Claimants (and those seeking indemnification on similar grounds), while leaving nothing for other creditors and investors. (Cyganowski Dec. ¶ 179).

[16] Although, as noted below, more appropriate for discussion when the Receiver files her proposed plan of distribution, in this regard, notwithstanding any pre-receivership contractual provisions or the Claimants' notions of equity, the Second Circuit may approve a receiver's distribution plan that treats investors and unsecured creditors with the same priority for purposes of distributions. *See SEC v. Byers*, 637 F. Supp. 2d 166, n.20 (S.D.N.Y. 2009) (approving plan treating investors and creditors with the same priority and rejecting the argument that the court lacks the authority to permit the receiver to treat unsecured creditors the same as investors), *aff'd sub nom. SEC v. Malek*, 397 F. App'x 711 (2d Cir. 2010) (citations omitted), and *aff'd sub nom. SEC v. Orgel*, 407 F. App'x 504 (2d Cir. 2010).

Furthermore, substantial uncertainty surrounds certain of the matters underlying the Claimant's Disputed Claims. In light of Levy's conviction, not only does the Receiver have the grounds to disallow Levy's claims, she also has sufficient grounds to subordinate his claims. Similarly, in the event Small is convicted, or is determined to have acted inequitably, the Receiver would have more than sufficient grounds to disallow or subordinate all of his claims. It would be imprudent to grant the Disputed Claims a priority, pay them, and then have to try and reclaim the funds once a disqualifying or subordination event takes place, leaving nothing for other creditors and investors unless and until the Receiver is successful in reclaiming those funds. In fact, substantial funds have already been advanced to Levy, including a $250,000 retainer that was paid to his counsel, which the Receiver may now have grounds to recover as a result of his disqualification for indemnification. (Cyganowski Dec. Ex. 81).

While the Claimants argue that they should be paid ahead of equity holders, in the interest of uniformity, issues regarding whether unsecured creditors should be paid ahead of, or *pari passu* with, equity holders should be addressed on a global basis at the plan confirmation stage, when investors have the right to participate in the proceedings on the issue. This will also enable investors — who were not even required to submit claims (Dkt. No. 453 ¶ 5(i)) — to participate in the determination of whether unsecured creditors should be paid ahead of equity holders, which they do not have standing to do on the Motion because the Claims Process Order provides that "[n]o 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." (Dkt. No. 554-1 ¶ I.C(i)). Consequently, determination of this issue is premature at this time.

Each Indemnification Claim is, if anything, nothing more than an unsecured pre-Receivership obligation. The pool of assets is not unlimited, and the Receiver understands that

each dollar one claimant takes is one less that another receives. The Receiver is thus forced to make difficult decisions about how and *when* it would be most equitable to pay claims. The Receiver has properly determined that none of the Disputed Claims should have priority over any other unsecured claim, and, as the Court has already determined, none of the Claimants may "jump the line in front of other deserving creditors" and all of the Claimants must "wait for any payment alongside the other unsecured creditors." Advancement Op. II. The Receiver thus agrees with the Court that the Indemnification Claimants must wait their turn. Consequently, the Receiver's disallowance should be affirmed.[17]

POINT III

LEVY IS NOT ENTITLED TO LOAN REPAYMENT AND/OR EMPLOYEE COMPENSATION

Levy's claims for repayment of a supposed loan that was purportedly guaranteed by PPCO Portfolio Manager, as well as for employment compensation are without merit and the Receiver's determination to disallow those claims should stand.

As a threshold matter, regardless of the validity of Levy's claims for repayment of a supposed loan and employment compensation, the Receiver is entitled to subordinate such claims as a result of Levy's conviction in the Criminal Case.

Nonetheless, the employee claims (Claims 292-301, Cyganowski Dec. Exs. 11-20), are deficient because they: (i) lack supporting documentary evidence; (ii) fail to set forth the terms of Levy's employment; and (iii) do not articulate how the amounts asserted in the claims were calculated. Moreover, Levy agreed to defer his salary until investors are made whole and he is not owed any amounts as of the commencement of the Receivership. (*See* Transcript of Criminal

[17] To the extent Levy and/or Small may be claiming a priority for their non-indemnification claims, their cases for priority are even weaker. These are unsecured claims not entitled to priority.

Cause for Jury Trial, dated June 27, 2019, 6850:5-8, 6851:1-13; Cyganowski Dec. Ex. 79). Levy's continued pursuit of this particular claim contradicts his averment to the contrary at the Criminal Case trial, as the investors have not, and are unlikely to be made whole.

Levy's loan claim (Claim 291, Cyganowski Dec. Ex. 10) is similarly deficient because the loan claim: (i) seeks repayment of a loan to a non-Receivership entity and the amounts outstanding, if any, are all obligations of "PPVA Management", which is not a Receivership Entity (*See* Email from Suzanne Horowitz stating "There is nothing for [PP]CO management, it's all PPVA Management," Cyganowski Dec. Ex. 10, Ex. 1); (ii) PPCO Portfolio Manager did not guarantee the purported loan, and Levy has failed to support such an allegation with any evidence showing otherwise; and (iii) the purported term note, upon which Levy relies is not signed by any parties and is thus unenforceable. (Cyganowski Dec. Ex. 10, Ex. 2).

In short, Levy has not met his burden to substantiate his employee or loan claims, and it is not the Receiver's duty to comb through the Receivership Entities' documents to find evidence to support his claims. *See 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).

POINT IV

THE COURT SHOULD CONFIRM THE RECEIVER'S DISALLOWANCE OF SMALL'S ARBITRATION CLAIM

A. The Small Arbitration

Through the filing of his Claim 229 (Cyganowski Dec. Ex. 37), Small has made a request for the payment of compensation consisting of bonuses that he purportedly earned while he was a portfolio manager of PPLO Portfolio Manager, as well as the non-Receivership entity of PPVA Portfolio Manager. In support, Small provided an unconfirmed partial arbitration award (the "***Arbitration Award***") (Cyganowski Dec. Ex. 37, Ex. B) that he claims provides certain

Receivership Entities owe him $9,566,326.92 (which he now claims has increased to over $13 million as a result of pre-judgment interest, *See* Small Objection, 2, Cyganowski Dec. Ex. 47). Although the Arbitrator (defined below) found that Small was entitled to a bonus in the amount $7,736,481.95, and that "Platinum" was obligated to him for that amount, the Arbitrator never determined that PPLO Portfolio Manager and PPVA Portfolio Manager were jointly and severally liable to Small. The Arbitrator twice declined to grant relief to Small to require "Platinum" to cause the funds they managed to pay his bonus, and instead deferred that relief until a later date after the Arbitration Award would be confirmed. Notwithstanding that the Arbitration Award was never confirmed against PPLO Portfolio Manager, Small, through his Claim 229, now seeks relief that was never granted in the Arbitration Award by relying on contractual provisions of an investment management agreement. Because the relief he primarily seeks is based on contractual provisions, as opposed to the relief granted in the Arbitration Award, the issue is more than simply enforcing the terms of the Arbitration Award: it is determining which funds Small provided services to that generated the income for calculating his bonus.

As Small admits, his bonus was generated primarily from investments managed by the non-Receivership entity, PPVA Portfolio Manager, thus the Receivership Entities, have limited, if any, liability to Small for the payment of his compensation. It would be inherently inequitable, and inconsistent with the terms of the Small IMA (as defined below), to require the Receivership Entities to pay Small's purported bonus calculated based on investments managed by non-Receivership entities because innocent creditors and investors of the Receivership Entities would be compelled to bear the expenses of non-Receivership entities. Moreover, it would be a breach of PPLO Portfolio Manager's fiduciary duties to cause the PPLO Funds to pay for obligations that that they did not incur.

1. Facts Relating to the Small Arbitration Claim

A complete factual background of the Small arbitration claim, and the Receiver's analysis of the claim is set forth in the Cyganowski Dec. at ¶¶ 116-142 and the Rogers Dec. at ¶¶ 33-50.

Small's Claim 229 is based on a July 12, 2016, "Partial Final Award," issued by the Hon. Theodore H. Katz (the "***Arbitrator***") in favor of Small against PPLO Portfolio Manager and PPVA Portfolio Manager (a non-Receivership entity) in the amount of $9,566,326.92 for payment of additional bonuses, fees and interests, in accordance with a March 11, 2012 Investment Management Agreement (the "***Small IMA***"), under which Small was hired to provide investment advisory services to PPVA Portfolio Manager and PPLO Portfolio Manager (Cyganowski Dec. Exs. 37, 55). In support of Claim 229, Small attached, among other things, a copy of the Arbitration Award and the Small IMA. (Cyganowski Dec. Ex. 37, Claim 229 Exs. A, B).

Although not addressed by the Arbitrator, according to the Small IMA, the payments of Small's base salary, and his bonus, were to be paid by PPLO Portfolio Manager and PPVA Portfolio Manager "***on a pro rata basis***[.]" (Cyganowski Dec. Exs. 37, 55, Small IMA § 3(a), (d)).

(i) Small's Statement of Claim

On July 16, 2015, Small submitted a demand for Arbitration and Statement of Claim and on September 16, 2015, Small filed a Second Amended Statement of Claim (the "***Statement of Claim***"). *See* Affirmation of Howard J. Rubin in Support of Petition to Confirm Arbitration Award and Enter Judgment, filed in the Supreme Court for the State of New York, in the action styled *Small v. Platinum Management (NY) LLC*, 656047/2016 (N.Y. Supp. Ct. Nov. 11, 2016) (NYSCEF Doc. No. 3). (Rogers Dec. ¶ 35, Ex. 12).

In the Statement of Claim, Small asserted that he was entitled to unpaid bonus compensation for the years 2012, 2013, and 2014 in the amounts of $1,852,473, $389,308, and

$5,477,120, respectively, based on net profits generated by his "***Account***" for the total amount of approximately $7.5 million. (Statement of Claim, ¶¶ 38, 39, Rogers Dec. ¶ 36, Ex. 12).

(ii) The Arbitration Award

A hearing was held before the Arbitrator on Small's arbitration claims in December of 2015 and January of 2016. (Arbitration Award, 6, Cyganowski Dec. Ex. 37).

On May 13, 2016, the Arbitrator issued an interim award (the "***Interim Award***"), finding, among other things, that: (i) "Platinum" owes Small bonus compensation in the amount of $7,916,482.25; (ii) Small is entitled to declaratory relief requiring that until all positions in his Account as of his termination date are liquidated, he "shall continue to receive the bonus calculated and payable as set forth in his [Small IMA]"[18]; and (iii) Small is entitled to reasonable attorneys' fees. (See *Id*. at 3).

Following the issuance of the Interim Award, Small made applications, seeking, among other things, an order requiring "Platinum" to use its reasonable best efforts to cause the funds they managed to pay Small the bonus compensation and directing them to perform their obligations under paragraph 3(i) of the Small IMA, which provides:

> In the event that (I) Manager is unable to pay the Portfolio Manager all or a portion of the Base Salary and/or the Incentive Fees due to him under this Agreement ***with respect to the services he provided to a Fund of which the Manager is the investment manager***, and (II) such Fund is permitted under its governing documents to pay compensation directly to the Portfolio Manager for such services, such Manager agrees to use its reasonable best efforts to cause such Fund to pay the Portfolio Manager such unpaid Base Salary and Incentive Fees ***to the extent it relates to services provided to such Fund***.

(Arbitration Award, 90 (emphasis supplied), Cyganowski Dec. Ex. 37).

In declining Small's request, the Arbitrator stated:

> "until this [Arbitration] Award is confirmed in a judicial proceeding, it is not enforceable as judgment. And until it is confirmed and is en [sic] enforceable

[18] Small has not identified any of these positions in Claim 229.

> judgment, Platinum has no obligation to pay Small the amounts required by this Award. Should it then be unable to do so, it will have the contractual obligation to make its best reasonable effort to secure payment from the Funds."

(Arbitration Award, 92, Cyganowski Dec. Ex. 37). The Arbitrator retained jurisdiction to address the issue of specific performance if and when such relief becomes necessary. (Arbitration Award, 93, Cyganowski Dec. Ex. 37).

In the Arbitration Award, the Arbitrator awarded Small bonus compensation in the following amounts: (i) $1,633,811.25 for 2012; (ii) $389,308 for 2013; and (iii) $5,713,362.70 for 2014. (*Id.*). Additionally, the Arbitrator awarded Small attorneys' fees and costs in the amount of $410,766.40 and $81,983.71, respectively. (*Id.* at 86-87). Small was awarded prejudgment interest at the statutory rate of 9% in the amount of $1,337,094.86. (*Id.*)

(iii) Small's Efforts to Confirm the Arbitration Award

On November 17, 2016, Small filed a Petition to Confirm Arbitration Award and Judgment with the Supreme Court of the State of New York County of New York (the "***State Court***"), captioned *Small v. Platinum Management (NY) LLC and Platinum Liquid Opportunity Management (NY) LLC.*, Index No. 656047/2016 (the "***Confirmation Proceeding***").

On November 15, 2017, the State Court entered an Order staying the Confirmation Proceeding pursuant to the Receivership Order stating that "[i]f the parties wish to continue this proceeding against [PPVA Portfolio Manager], the non-Receivership entity, Petitioner must obtain an Order from the District Court permitting this Court to continue such proceedings." (Confirmation Proceeding, NYSCEF 53; Transcript p. 8, 5-12, Cyganowski Dec. Ex. 85).

On December 24, 2019, apparently without obtaining an order from this Court in accordance with the State Court's order, Small filed a motion with the State Court seeking to lift the stay as to PPVA Portfolio Manager, and attaching as an exhibit a stipulation and proposed order dated March 14, 2018, between Small and PPVA Portfolio Manager, in which Small and

PPVA Portfolio Manager consented to entry of an order granting the petition as to PPVA Portfolio Manager and confirming the award in full as to PPVA Portfolio Manager. (Confirmation Proceeding, NYSCEF, 57, 71, Cyganowski Dec. Ex. 86).

On February 20, 2020, the State Court entered a Judgment and entered an Order lifting the stay as to PPVA Portfolio Manager. (Confirmation Proceeding NYSCEF 76, 77). On March 3, 2020, the County Clerk entered Judgment. (Confirmation Proceeding NYSCEF 78). The stay has not been lifted as to PPLO Portfolio Manager, and the State Court has not confirmed the Arbitration Award or entered a judgment as to PPLO Portfolio Manager.

B. The Arbitrator Did Not Determine that PPLO Portfolio Manager and PPVA Portfolio Manager are Jointly and Severally Liable, and thus Small is Seeking Contractual Relief Not Provided for by the Arbitration Award

The Receiver, through the claims reconciliation process, is not seeking to challenge the merits of the Arbitration Award itself. Instead, the Receiver is only seeking to resolve two issues that were not set forth in the Arbitration Award: (i) whether PPVA Portfolio Manager and PPLO Portfolio Manager have joint and several liability for the payment of Small's bonus, costs, or prejudgment interest; and (ii) whether PPLO Portfolio Manager may reasonably be required to cause the PPLO Funds to pay the entirety of Small's compensation.

As to the first issue, the Arbitration Award should not be given preclusive effect in the claims reconciliation process because the issue in question — whether PPLO Portfolio Manager is liable for the *entire* amount of the Arbitration Award — was not decided in the arbitration and the Receiver should not be required to impute to the Arbitration Award a determination that was not made by the Arbitrator. *Tucker v. Arthur Andersen & Co.*, 646 F.2d 721, 728 (2d Cir. 1981).[19]

[19] Although both entities signed the Small IMA, each of PPVA Portfolio Manager and PPLO Portfolio Manager only promised to pay Small for their "pro rata" share of the Base Salary and the Bonus. *See* IMA, § 3(a), 3(d).

Small has failed to meet his burden of showing "*with clarity and certainty*" that the issue of joint and several liability was addressed in the Arbitration because "[i]ssue preclusion will apply only if it is *quite clear* that this requirement has been met." *Postlewaite v. McGraw-Hill*, 333 F.3d 42, 49 (2d Cir. 2003) (emphasis in original).[20] This is not a case where both PPLO Portfolio Manager and PPVA Portfolio Manager promised to Small that each would be responsible for payment of all of his compensation. According to the Small IMA, the payments of Small's base salary, and his bonus, were to be paid by PPLO Portfolio Manager and PPVA Portfolio Manager "***on a pro rata basis***[.]" (Cyganowski Dec. Ex. 55, Small IMA § 3(a), (d) (emphasis supplied).

While at first blush, it may seem that the Arbitrator should be the one to decide whether PPVA Portfolio Manager and PPLO Portfolio Manager are jointly and severally liable, that is not the case here, because Small is seeking to enforce *contractual* rights under the Small IMA — not rights set forth in the Arbitration Award, and therefore, he has consented to this Court resolving the disputes at issue. Indeed, as to the second issue, Small asserts that PPLO Portfolio Manager must cause the PPLO Funds to pay his compensation:

> To the extent the [PPLO Portfolio Manager] receivership estate is not able to satisfy its creditor claims in full, it must submit a claim in the PPLO receivership for the amount it owes Mr. Small pursuant to the Arbitral Award.

(Claim 229, Proof of Claim Supplement, Cyganowski Dec. Ex. 37; Small Objection, 3, Cyganowski Dec. Ex. 47). Although Small cites to the "Arbitral Award" for such a proposition, contrary to Small's assertions, the Arbitrator specifically declined to grant Small the relief of

[20] The failure of the Arbitrator to determine whether PPLO Portfolio Manager and PPVA Portfolio Manager are jointly and severally liable constitute grounds for not giving the Arbitration Award preclusive effect as to that issue. *See e.g. NYKCool A.B. v. Pac. Fruit Inc.*, No. 10 Civ. 3867(LAK)(AJP), 2011 WL 3666579, at *2 (S.D.N.Y. Aug. 9, 2011) (noting that the judge remanded arbitration award to arbitrators "to determine whether the respondents are jointly and severally liable for the entire amount of the award and, if not, the amount of the several liability of each") *subsequently aff'd*, 507 F. App'x 83 (2d Cir. 2013); *Urquhart v. Kurlan*, No. 16 C 2301, 2017 WL 781742, at *3 (N.D. Ill. Feb. 28, 2017) (remanding matter to arbitrator for clarification where issue of joint and several liability cannot be definitively resolved from the record.). For these reasons, Small's arguments that "Arbitral Award would have been confirmed against [PPLO Portfolio Manager] but for the Receiver's stay order," similarly fail. *See* Small Objection, 4.

"specific performance" until the Arbitration Award is confirmed and is an enforceable judgment, and retained jurisdiction on the issue. (*See* Arbitration Award, 92-93 (emphasis supplied), Cyganowski Dec. Ex. 37). Because the Arbitration Award has not been confirmed and is not an enforceable judgment, under the very terms of the Arbitration Award, PPLO Portfolio Manager is not required to cause the PPLO Funds to pay Small's bonus. Accordingly, the rights that Small seeks to assert are not set forth in the Arbitration Award, but are instead *contractual* rights set forth under the Small IMA. The contractual provisions of the Small IMA provide that to the extent PPLO Portfolio Manager cannot pay Small his compensation, it is only responsible to use its reasonable best efforts to cause the funds it manages to pay Small his compensation "with respect to services he provided to a Fund of which *such Manager* is the investment manager … *to the extent it relates* to services provided to such Fund." (Small IMA § 3(i) (emphasis supplied), Cyganowski Dec. Exs. 37, 55).[21] Because Small is seeking to enforce a contractual provision, outside the four corners of the relief granted in the Arbitration Award, he has consented to this Court's jurisdiction to resolve the dispute through the claims reconciliation process, which this Court can resolve without sending the issue back to the Arbitrator.[22]

Moreover, Small's actions taken before this Court and the State Court in the Confirmation

[21] Small also cites to the PPLO Investment Management Agreement. That is not the document that requires PPLO Portfolio Manager to use its reasonable best efforts to cause PPLO Funds to pay Small's bonus. Instead that agreement provides that a fund shall bear its "***pro rata***" share of the performance fees and/or allocations paid to the portfolio managers who render services to PPLO Portfolio Manager. (Claim 229, Exhibit C, § 11(c) (emphasis supplied), Cyganowski Dec. Ex. 54). Moreover, Small has failed to demonstrate how he is a beneficiary of the PPLO Investment Management Agreement. (*Id*. at § 27).

[22] Small asserts that the Receiver "cannot now disclaim liability by arguing that the Arbitral Award was not confirmed against [PPLO Portfolio Manager], where it was stayed precisely because of the Receivership … [because it would be] … in contravention of the very purpose of the stay order and the mandate of this Receivership to ensure an orderly liquidation of assets to rightful claimants, including Mr. Small." (Small Objection, 4, Cyganowski Dec. Ex. 47). Small misconstrues the Receiver's point: the Receiver is not trying to disclaim liability because of the litigation stay, the Receiver is in fact determining the funds' liability to Small based on the contractual provisions upon which he relies. Indeed, it is Small who is using the litigation stay to hide behind the fact that the Arbitrator left substantial issues unresolved.

Proceeding, show that he has sat on his rights to confirm the Arbitration Award against PPLO Portfolio Manager, because: (i) Small did not seek relief from the Receivership's prior litigation stay to continue the State Court Confirmation Proceeding against PPLO Portfolio Manager — but in recognizing the importance of confirming the Arbitration Award, continued the proceeding against PPVA Portfolio Manager; (ii) Small never sought relief from this Court to confirm the Arbitration Award; (iii) Small consented to the claims reconciliation process by submitting Claim 229 and not objecting to the Receiver's Claims Motion; and (iv) Small seeks to enforce contractual provisions of the Small IMA for which relief was not granted in the Arbitration Award.

This Receiver's determinations, regarding Small's contractual rights under the Small IMA, do not affect the legal rights of PPVA Portfolio Manager or PPVA, because the Receiver only needs to determine the "services [Small] provided to a Fund of which [PPLO Portfolio Manager] is the investment manager … *to the extent* it relates to services provided to such Fund." (Small IMA § 3(i), Cyganowski Dec. Exs. 37, 55).[23] PPLO Portfolio Manager was not the manager of PPVA, so this can all be resolved without implicating PPVA Portfolio Manager or PPVA. Moreover, Small has confirmed the Arbitration Award against PPVA Portfolio Manager and the issues that the Arbitrator retained jurisdiction over can be addressed between PPVA Portfolio Manager and PPVA.[24]

[23] The Small IMA's reference in this section to the word "Manager" in the singular form indicates that only *one* of PPLO Portfolio Manager or PPVA Portfolio Manager would be responsible for causing their respective funds to pay Small's bonus "to the extent" it related to the services provided to such fund.

[24] Small seems to indicate that because counsel for the Receiver appeared as counsel for PPLO Portfolio Manager in the Confirmation Proceeding, the Receiver somehow agrees that the confirmation of the Arbitration Award against PPVA Portfolio Manager is preclusive as to PPLO Portfolio Manager, notwithstanding that the Confirmation Proceeding was stayed as to PPLO Portfolio Manager. (Small Objection, 3-4, Cyganowski Dec. Ex. 47) ("This judgment demonstrates that the Arbitral Award would have been confirmed against [PPLO Portfolio Manager] but for the Receiver's stay order.). Not only is that counterintuitive, it places the burden on the Receiver to actively protect her rights in proceedings that have been stayed.

C. The Funds Managed by PPLO Portfolio Manager only Generated a Minute Portion of the Income in Small's Account

Only a minute portion of Small's compensation is "with respect to services he provided to a Fund of which [PPLO Portfolio Manager] is the investment manager." (Small IMA § 3(i), Cyganowski Dec. Exs. 55, 37).

Indeed, Small recognized that the services he provided, upon which an overwhelming majority of his bonus compensation was based, primarily related to his services to PPVA, which was managed by PPVA Portfolio Manager, *not PPLO Portfolio Manager*. In the Statement of Claim, he asserted that Northstar was acquired in 2014 by "a wholly-owned subsidiary of PPVA" and that PPVA listed Small as a "Portfolio Manager" for the Northstar investment, and that he was not credited for the approximately $95 million in profits of Northstar. (Statement of Claim, ¶ 33, Rogers Dec. Ex. 12). In the Arbitration Award, the Arbitrator found that Small was entitled to a bonus of approximately $4.5 million for 2014 based on "Platinum's" reported profits of $100,192,153 from its investments in Northstar. (*See* Arbitration Award, 45, 93, Cyganowski Dec. Ex. 37). Small did not assert that any of the Northstar profits were attributable to a fund managed by PPLO Portfolio Manager.

Moreover, the Statement of Claim asserted that for 2012, Small's account generated net profit of $38,026,887.87. (Statement of Claim, ¶ 30, Rogers Dec. Ex. 12). That was the amount upon which the Arbitrator determined that Small was entitled to a bonus of $1,633,811.25 for the year of 2012. (Arbitration Award, 44, Cyganowski Dec. Ex. 37). In the Arbitration Award, the Arbitrator found that Small's account for 2012 generated net profits from investments in Black Elk of approximately $12 million and Implant Sciences of $11 million, but the Arbitrator did not determine that these investments were related to PPLO Portfolio Manager. (*See* Arbitration

Award, 31, 33-34, Cyganowski Dec. Ex. 37, Cyganowski Dec. ¶¶ 132-133). Based on the documents that Small apparently submitted with his Statement of Claim, all of the $38,026,887.87 generated in Small's Account for 2012 was related to entities managed by PPVA Portfolio Manager, not PPLO Portfolio Manager. (Rogers Dec. ¶¶ 37, 38, 39, 43, 44, 45, Ex. 13).

Similarly, the Statement of Claim asserted that for 2013, Small's account generated net profits of $8,758,584.50. (Statement of Claim ¶¶ 39, 30, Rogers Dec. ¶ 37, Ex. 12). That was the amount upon which the Arbitrator determined that Small was entitled to a bonus of $569,308 for that year. (Arbitration Award, 44, Cyganowski Dec. Ex. 37). Based on the documents that Small apparently submitted with his Statement of Claim, the net profits attributable to Small's account related to PPLO Portfolio Manager equaled a *loss* of $1,225,683.95. (Rogers Dec. ¶¶ 37, 38, 39, 40, 46, 47, Ex. 14).

According to the documents that Small apparently submitted in his Statement of Claim, the only positive net profits for the years of 2012 through 2014 that were generated by funds managed by PPLO Portfolio Manager were $423,622.05. (*See* Rogers Dec. ¶¶ 45, 47, 49, Exs. 13, 14, 15). Accordingly, at most, Small has a claim against PPLO Portfolio Manager for unpaid bonus compensation in the amount of $27,535.43 (*i.e.*, 6.5% of $423,622.05 pursuant to the terms of the Small IMA).

Small's assertions, that PPLO Portfolio Manager is responsible for the entire amount of his unpaid bonus for the years 2012 through 2014 in the amount of over $7.5 million, is not only belied by the facts that he asserted in the Statement of Claim, it makes no logical sense and is in contravention with the Small IMA. It would be a breach of PPLO Portfolio Manager's fiduciary duties to the funds it managed — the PPLO Funds — to force those funds to pay for the expenses that are not their obligations.

Pursuant to PPLO's audited financial statements, it had investment income of $21,702,955.00 for the years 2012-2014 *combined*. (*See* Rogers Dec. ¶ 50). Small did not manage all of the investments that generated that income, but even if he did, his bonus related to the PPLO Funds would have only been $1,410,692.08 for *all three years combined*. (i.e. 6.5% of $21,702,955.00). This begs the question, how could Small's bonus for 2014 be $5,713,362.70 when PPLO only reported investment income of $5,841,817.00 for that year? (*Compare* Arbitration Award, 93, Cyganowski Dec. Ex. 37, *with* Rogers Dec. ¶ 50).

It would be completely unfair to the investors and creditors of the PPLO Funds — and contrary to the investment management agreements — for PPLO Portfolio Manager to bear the burden of the expenses incurred by PPVA Portfolio Manager. Indeed, PPLO was a tiny fund in comparison to PPVA: as of December 31, 2014, PPLO had approximately $48 million of AUM, while PPVA had approximately $1 billion of AUM. The reported ***profits*** of PPVA for 2014 outstripped the total value ***of assets*** of PPLO by over $60 Million. (Rogers Dec. ¶¶ 14, 17, 18).

Even if the Court determined that the full amounts set forth in the Arbitration Award were enforceable against PPLO Portfolio Manager, the Court should use its equitable powers to apply the Receiver's *pro rata* allocation of the purported assets under management across the Platinum Funds to the Arbitration Award, which would provide for a *pro rata* allocation of: PPVA 98%; PPLO 2%. (*See* Cyganowski Dec. ¶ 169). This would be consistent with the Small IMA, which provides that Small's compensation shall be paid by PPLO Portfolio Manager and PPVA Portfolio Manager "***on a pro rata basis***[.]" (Cyganowski Dec. Ex. 55, Small IMA § 3(a), (d) (emphasis supplied). The *pro rata* allocation would result in Small's Claim 229 being reduced to $191,326.53. For the same reasons, PPLO Portfolio Manager should also not be liable for the full amount of attorney's fees, costs, and prejudgment interest awarded in the Arbitration Award.

Moreover, even if the Arbitration Award is enforceable in the full amounts, Small should not be entitled to any post-Receivership interest on account of Claim 229. In his objection, he asserts that "In connection with Claim 229, as of 9/30/2020, the additional accrued pre-judgment interest is $3,634,942.14 for a total [claim] of $13,201,269.06." (Small Objection, 2, Cyganowski Dec. Ex. 47). However, Small is not entitled to post-Receivership interest because after property passes into the hands of a receiver "'interest is not allowed on the claims against the funds' … This general rule 'achieve[s] fairness and administrative efficiency' because 'denying post-petition interest ensures that no party realizes a gain or suffers a loss due to the delays inherent in liquidation and distribution of the estate.'" (*SEC v. Cap. Cove Bancorp LLC*, No. SACV15980JLSJCX, 2015 WL 9701154, at *11 n.10 (C.D. Cal. Oct. 13, 2015) (quoting *Vanston Bondholders Protective Comm. v. Green*, 329 U.S. 156, 163 (1946); *Thrifty Oil Co. v. Bank of Am. Nat'l Trust and Sav. Ass'n*, 322 F.3d 1039, 1046 (9th Cir. 2002))).

Finally, because the issue of priority of distribution of assets are not addressed in the Claims Analysis Report, the Receiver's rights to subordinate Small's claims for compensation arising from the Arbitration Award are preserved. A majority of Small's compensation that was awarded in the Arbitration Award attributable to PPVA is based on the valuation of assets that were the subject of the Criminal Indictment, including Northstar and Black Elk. (Criminal Indictment ¶¶ 7, 9, 50, 51, 52, 57, 99-105, Cyganowski Dec. Ex. 59; Arbitration Award 29-45, Cyganowski Dec. Ex. 37).[25] In light of the Second Circuit Decision, and the pending Criminal Case and civil cases against Small, the Receiver may seek to subordinate his claims for compensation to other creditors and investors of the Receivership Entities.

[25] Indeed, Northstar was placed into bankruptcy in 2016 and PPCO realized an approximately $30 million loss on its investment in Northstar in 2017. In addition, PPCO and PPLO both granted the Black Elk Trustee allowed claims totaling $29 million for actions for which Small was criminally indicated but on which he is now seeking bonus compensation.

POINT V

SMALL IS NOT ENTITLED TO A CLAIM AGAINST CREDIT FUNDING

Small submitted Claims 227 and 24, which assert an unsecured claim against Credit Funding for unpaid "net profit interest" in the amount of $130,000. (Cyganowski Dec. Ex. 35).

Credit Funding was a subsidiary of PPCO Master Fund. Small held a .245% interest, in Credit Funding. (*See* Claim 227, Exhibit A, Credit Funding Agreement, Schedule A, Cyganowski Dec. Ex. 35). Pursuant to the Credit Funding Agreement, Small was also a "Portfolio Manager" of Credit Funding. (*See* Credit Funding Agreement, § 6.2.) Small's interest in Credit Funding was fully redeemed in 2015. (*See* Rogers Dec. ¶ 11(B), Ex. 8).

By the end of 2014, LC Energy made up approximately 95% of the total value of assets held by Credit Funding. LC Energy owned the Goldstar Coal Mine located in Green County, Indiana (the "***Mine***"), which was non-operational at the time PPCO acquired it out of the Lily Group bankruptcy by credit bidding $9 million in 2014. (Rogers Dec. ¶ 30).

During the Receivership, in consideration of a purchaser assuming the significant liabilities of the Mine, the Receiver ultimately had to *pay* the purchaser $380,000 and assign to the purchaser $250,000 in cash collateral securing a bond in favor of the State of Indiana. (*See* Declaration of Melanie L. Cyganowski, as Receiver in Support of Motion for the Sale of LC Energy (Dkt. No. 422-1) ¶ 30; Affidavit of Melanie L. Cyganowski, as Receiver, in Further Support of Motion for the Sale of LC Energy (Dkt. No. 487-1) ¶ 6).

From its formation in 2007 through the date of this Motion, Credit Funding has realized a total net loss of approximately $21 million. For the period from January 1, 2009, which was the first full year of activity for Small, through December 31, 2014, Credit Funding recorded net profits of approximately $16.6 million of which Small was allocated $748,551 and paid $866,168. Since January 1, 2015, Credit Funding has recorded a total net loss of $39.6 Million. (Rogers Dec. ¶ 31).

A. Small's Claims for the Net Profits of Credit Funding

As stated above, in Claim 227, Small asserts the Credit Funding Agreement provided for a "Performance Allocation," which required PPCO to "allocate" 4.55% of "New Net Profit" of Credit Funding to Small's capital account. (*See* Claim 227, Exhibit A, Credit Funding Agreement, Cyganowski Dec. Ex. 35).

In Claim 227, Small asserts that pursuant to a March 20, 2015 email exchange he had with Manela, a former employee of PPCO Portfolio Manager, it was allegedly explained to him that for the year of 2014 the unpaid "net profit interest" owed to Small was approximately $130,000. (*See* Claim 227, Exhibit B, Cyganowski Dec. Ex. 35; Small Objection, 2, Cyganowski Dec. Ex. 47). Small claims that he is also entitled to 4.55% of annual net profits for calendar year 2015 and thereafter, subject to any applicable "high-water mark." (*See* Claim 227, Proof of Claim Supplement, Cyganowski Dec. Ex. 35).

B. The Court Should Confirm the Receiver's Disallowance of Claims 227 and 24

The Court should confirm the Receiver's determination in the Claims Analysis Report, that Claims 227 and 24 are disallowed in their entirety on the basis that a Receivership Entity has no liability to Small. (*See* Claims Analysis Report, Dkt. No. 564, Schedule D, 1.) Small's Objection should be overruled for the following reasons:

First, Small was paid more from Credit Funding than what he was entitled to under the Credit Funding Agreement. In 2014 he had a beginning capital account of $398,412, which was cumulative of prior years' profits and losses allocated to his account less any distributions received in prior years. He received distributions of $265,000 in 2014, and he was allocated a net loss of $249,046 for the year, resulting in an ending capital account of negative $115,634. (*See* Small 2014 K-1 Credit Funding, Box L, Rogers Dec. Ex. 11). Similarly, in 2015, he had a beginning

capital account of negative $115,634, he was allocated net income of $115,634, and his ending capital account was $0. (Small 2015 Final K-1 Credit Funding; Rogers Dec. Ex. 8). The email that Small relies on shows that he ended 2014 with a negative capital account: Manela wrote to Small that ***before*** profit and losses of Credit Funding for 2014, Small had unpaid income of approximately $130,000, but that in 2014, Small's account had "negative [profit and losses] of approximately 250k." (*See* Claim 227, Exhibit B, March 20, 2015 3:51 PM Email from Manela, Cyganowski Dec. Ex. 35). Small wrote back to Manela asking "[i]s there a claw back provision as well?" (*See* Claim 227, Exhibit B, March 20, 2015 4:00 PM Email from Small, Cyganowski Dec. Ex. 35).

Second, Credit Funding nor any other Receivership Entity has an obligation under the Credit Funding Agreement to make annual distributions to the Portfolio Managers, including Small, as he incorrectly asserts. The Credit Funding Agreement, upon which Small relies, merely requires that 4.55% of net profits be allocated to Small's capital account, but it does not require that any distributions be made to Small on a yearly basis. (*See* Credit Funding Agreement, § 6.2, Cyganowski Dec. Ex. 35).

Third, Small has failed to allege any facts, or attach any evidence, to support his assertion that "Credit Funding and PPCO violated their fiduciary duties by failing to distribute Mr. Small's share at the time, where it made over ten million dollars in distributions to itself in 2014." (Small Objection, 2, Cyganowski Dec. Ex. 47). Under the Credit Funding Agreement, Small was only entitled to an allocation to his account of 4.55% of profits, not distributions made by Credit Funding. (*See* Credit Funding Agreement, § 6.2, Cyganowski Dec. Ex. 35). While Small seems to focus on the distribution made to PPCO Master Fund, he fails to acknowledge that PPCO Master Fund contributed approximately $17 million to Credit Funding in 2014, which resulted in net

contributions made by PPCO Master Fund to Credit Funding in the amount of approximately $7 million. (*See* Credit Funding Capital Activity, 2014-2020, Rogers Dec. Ex. 10). A return of capital to PPCO Master Fund is different than payment of net profits allocated to Small's account. Small received withdrawals from Credit Funding in 2014 of at least $265,000.

Fourth, Small has failed to provide any evidence that he is entitled to profits for the year of 2015 and thereafter. His only evidence in support of Claim 227 is an email chain from 2015 that addressed Small's Credit Funding capital account in 2014. From 2015 through today, Credit Funding has incurred a $39.6 million net loss. (*See* Credit Funding Capital Activity, 2014-2020, Rogers Dec. Ex. 10).

CONCLUSION

For the reasons set forth herein, and in the supporting declarations, the Motion should be granted and an order, in substantially the form of the proposed Order, should be entered.

Dated: November 23, 2021

OTTERBOURG P.C.

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