UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

-v-

PLATINUM MANAGEMENT (NY) LLC;
PLATINUM CREDIT MANAGEMENT, L.P.;
MARK NORDLICHT;
DAVID LEVY;
DANIEL SMITH;
URI LANDESMAN;
JOSEPH MANN;
JOSEPH SANFILIPPO: and
JEFFREY SHULSE,

Defendants.

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No. 16-CV-6848 (BMC)

MEMORANDUM OF LAW IN OPPOSITION TO RECEIVER'S OMNIBUS MOTION

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<u>Rules and Statutes:</u>

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Claimant Joseph SanFilippo/Ford O'Brien LLP[1] submits this Memorandum of Law in Opposition to the Receiver's Omnibus Motion, filed on November 11, 2021 [Dkt. No. 597-3],[2] to confirm its determination as to Mr. SanFilippo's claims for indemnification. Mr. SanFilippo's claims are for his unpaid legal fees and expenses arising from his successful defense in *United States v. Nordlicht, et al.,* Case No. 16-CR-00640, E.D.N.Y. 2016 (BMC) *("Nordlicht"),* a 2019 criminal trial in which a jury acquitted Mr. SanFilippo of all the charges against him.

INTRODUCTORY STATEMENT

Mr. SanFilippo occupies a unique position in this dispute between the Receiver and various claimants asserting their indemnification rights: He alone is entitled to **mandatory indemnification** under Delaware law after having been acquitted of all charges at trial. Mr. SanFilippo's unique status is the central, defining fact in his case for indemnification, although the Receiver does not mention it in its 65-page brief. Consequently, it is the focus of this Memorandum of Law. Mr. SanFilippo is, to quote the Supreme Court in a different context, "a legitimate class of one." *Nixon v. Administrator of General Services*, 433 U.S. 425, 472 (1977).

The Receiver's Motion has two objects: first, confirmation that Mr. SanFilippo's claims should be "disallowed;" and second, alternatively, confirmation that his claims are not entitled to priority [Dkt. No. 597-3 at 1-2]. Neither of these arguments has merit, and the first

[1] The claim was filed in the name of Ford O'Brien LLP, which is owed fees and expenses from Platinum [Dkt. No. 564-1, Schedule C, Claim Nos. 156, 329, 330], but Mr. SanFilippo is likewise a party in interest since he is obligated under the Engagement Agreement to pay the fees and expenses of the law firm should Platinum fail to do so [Dkt. No. 490-3, Exh. B].

[2] All cited documents are referred to by case docket number and, where applicable, the exhibit number for the exhibits the Receiver has filed with the Court. *See* Dkt. Nos. 599-1 through 599-87.

one – that Mr. SanFilippo's claims are not even entitled to recognition – is raised here for the first time, after the Receiver previously had partially allowed those claims. The Receiver's about-face can only be explained as retaliation for Mr. SanFilippo's continued objection to the Receiver's treatment of his claims.

Indeed, the Receiver's ostensible arguments for disallowance are paper thin. First, the Receiver asserts that Mr. SanFilippo did not come forward with an allocation of his claims to the receivership entities specifically, overlooking that Mr. SanFilippo accepted the allocation **the Trustee** used in its Claims Analysis Report: approximately 34 percent of his total claims, or $922,863.04. Second, the Receiver argues that Mr. SanFilippo was not an officer of Platinum Partners Credit Opportunities Fund LLC ("PPCO") or any other receivership entity, despite the factual record in its motion papers showing otherwise, and despite its representation to the Court that allocating 34 percent of Mr. SanFilippo's total claims to his PPCO-related claims "is fair, reasonable, and appropriate … [a]bsent objective evidentiary support for an alternative allocation of [his] fees." Finally, the Receiver says Mr. SanFilippo is seeking a "double recovery" insofar as the Receiver helped pay premiums on the Platinum D&O insurance policies that he used to help fund his defense, when in reality Mr. SanFilippo seeks indemnification only for costs **not** covered by the insurance, and the premium payments were a bargain for the estate by reducing its exposure to indemnification claims for a fraction of the coverage dollars provided.

However, even if Mr. SanFilippo's claims are allowed (as the Receiver originally determined), that treatment alone would not do justice to his indemnification rights, which are rooted in Delaware's provision requiring mandatory indemnification of corporate officers who successfully "defend[] their honesty and integrity" at trial. *See VonFeldt v. Stifel Fin. Corp.*,

Del. Super., 714 A.3d 79, 84 (1998). The relevant language says that officers (like Mr. SanFilippo) who have been vindicated "shall be indemnified," not "indemnified on a pro rata basis with investors and other unsecured creditors to the extent there is any cash." Yet the Receiver apparently takes the latter position, which would reduce what Mr. SanFilippo could recover to a pittance, in effect nullifying his indemnification rights under Delaware law.

Of all the claimants seeking indemnification that disputed the Receiver's determinations in its Claims Analysis Report (whom the Receiver labels the "Indemnification Claimants"), **only** Mr. SanFilippo can claim the right to mandatory indemnification under Delaware law. Mr. SanFilippo's unique status undermines the Receiver's complaint that honoring his indemnification rights would empty the estate of cash or discriminate against other claimants.[3]

For these reasons, and others below, the Court should exercise its inherent equitable discretion to grant Mr. SanFilippo's allowed claim priority over the claims of all other unsecured creditors (including investors), and honor his claim in full.

STATEMENT OF RELEVANT FACTS

A. Mr. SanFilippo Was Acquitted in the *Nordlicht* Criminal Trial

The Indictment in *Nordlicht* was handed down in December 2016. It charged Mr. SanFilippo and six other defendants with multiple counts of conspiracy, securities fraud, and investment adviser fraud [*Nordlicht,* Dkt. No. 1]. On July 9, 2019, after a nine-week trial involving three of the defendants, Mr. SanFilippo was found not guilty by the jury of all five

[3] The Receiver asserts, for example, that it would be "inequitable" to grant a priority to the Indemnification Claimants because "it would 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." [Dkt. No. 597-3 at 46-47]. Whatever the basis for this assertion, it certainly does not apply to Mr. SanFilippo's $922,863.04 in claims.

counts against him. The following day, the Court ordered that Mr. SanFilippo be acquitted and discharged, and any bond exonerated [*Nordlicht,* Dkt. No. 776].

B. The Court's Prior Decisions Acknowledged Mr. SanFilippo's Indemnification Rights

As the Court has already recognized [Dkt. No. 417 at 4-5], under Delaware law Mr. SanFilippo as an officer of CFO was entitled to advancement of fees to cover his litigation expenses by virtue of the permissive provisions of the PPCO Operating Agreement [Dkt. No. 490-2, Ex. A at ¶¶ 5.4.2, 5.4.3], coupled with Platinum's agreement with Ford O'Brien to cover such expenses [Dkt. No. 490-3, Ex. B]. Similarly, according to the Court, he is now entitled to indemnification for these expenses as a result of his acquittal [Dkt. Nos. 519-20 ("SanFilippo's acquittal [] undoubtedly entitle[s] [him] to payment by the Platinum Partners entities")].

In these earlier rulings, the Court also held that Mr. SanFilippo, like the other Indemnification Claimants, had failed to show how he differed from other unsecured creditors and would therefore be entitled to "jump the line." According to the Receiver, under "the law of the case" the Court's ruling in this regard remains binding against Mr. SanFilippo [Dkt. No. 597-3 at 41].

But that conclusion could be true only if the circumstances in effect in January 2020, when the Court ruled on the indemnification claims, remained in effect today. As shown in Point II below, that is emphatically not the case. It is now clear that Mr. SanFilippo, alone among the Indemnification Claimants, can invoke the mandatory indemnification provisions of Delaware law. His unique status entitles him to "jump the line" and be indemnified for all of his allowed losses.

C. The Receiver, After Analyzing All Claims, Allowed a Portion of Mr. SanFilippo's Claims

Pursuant to the order of the Court [Dkt. No. 554], the Receiver filed its Claims

Analysis Report on March 9, 2021 [Dkt. No. 564/564-1]. Among the analyzed claims were Mr. SanFilippo's claims, in the amount of $2,686,426.31, for unpaid legal fees and expenses incurred in vindicating himself in the *Nordlicht* criminal trial. The Receiver **allowed** Mr. SanFilippo's claims, after reducing them from $2,686,426.31 to $922,863.04, based on the share of the claims (estimated at approximately 34 percent) attributable to PPCO and other receivership entities as opposed to non-receivership entities [Dkt. No. 564-1, Schedules A, C].

The Receiver's tune changed, however, after Mr. SanFilippo objected in July 2021, not to the size of the allowed claim, or to the allocation on which it was based, but to the Receiver's refusal to accord it priority with respect to other unsecured creditor claims. *See* annexed Ex. 1, Mediation Statement of Claimant Joseph SanFilippo/Ford O'Brien, dated July 16, 2021 ("Mediation Statement"). Attempts at mediation, conducted in July 2021, failed to produce a resolution, notwithstanding Mr. SanFilippo's good faith participation. Now, with the filing of its Motion, the Receiver holds for the first time that Mr. SanFilippo's claims should be disallowed in their entirety.

ARGUMENT

I. Mr. SanFilippo's Claims Should Be Allowed, as the Receiver Itself Concluded

The Receiver, in analyzing Mr. SanFilippo's claims in March 2021, originally determined that they should be allowed in the amount of $922,863.04. Only now does the Receiver hold that his claims should be disallowed in their entirety. The Receiver offers several reasons for this reversal, which are so threadbare they cannot conceal its real motivation: to punish Mr. SanFilippo for continuing to assert his rights as a PPCO officer to indemnification for expenses he incurred in carrying out his duties to this entity.

First, the Receiver alleges that "throughout the claims reconciliation process, the

Receiver requested that each of the Indemnification Claimants [namely, Levy/Wilson, Small, SanFilippo/O'Brien, and the Black Elk Trustee [Dkt. No. 597-3 at 1-2]] 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." [*Id*. at 12; *see also id*. at 6, 32-33]. There is no rationale for this punishment. It makes no sense to disallow a claim in its entirety when the Receiver itself has advanced allocations it deems to be appropriate.[4]

Moreover, the factual basis for this argument is incorrect. The Receiver never asked Mr. SanFilippo to propose an allocation, and in any case Mr. SanFilippo made it clear during the mediation that for purposes of the mediation he would not dispute the Receiver's allocation of 34 percent. *See* annexed Ex. 1, Mediation Statement at *3*. After the mediation, Mr. SanFilippo never heard from the Receiver concerning allocation. His position remains that the 34 percent allocation is appropriate and acceptable.

Second, the Receiver asserts that Mr. SanFilippo held no position with any receivership entity, including PPCO, and therefore is not entitled to indemnification in these proceedings [Dkt. No. 597-3 at 5, 35]. The Receiver cannot seriously make such an argument after telling the Court that its allocation formula for "all indemnification claims" (including Mr. SanFilippo's) – "PPVA 64%; PPCO 34%; and PPLO 2%" – "is fair, reasonable, and appropriate … **[a]bsent objective evidentiary support for an alternative allocation** of [the claimants'] fees." [*Id*. at 34-35] (emphases added). The Receiver's allocation "was based on a formula of the *pro rata* share of the purported total assets under management across PPCO,

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[4] Even the Receiver is unsure of the rationale, since it falls back on the position that "at most, the Court should adopt the Receiver's allocations," which is precisely Mr. SanFilippo's position.

PPLO, and the non-Receivership entity PPVA, as of the end of 2015, the last full year before the commencement of the Receivership." [*Id.* at 34]. Now the Receiver is asking the Court to disregard "this standard approach" *[id.*] in Mr. SanFilippo's case, even though, in the Receiver's own words, there is no "objective evidentiary support for an alternative allocation."

Had the Receiver a valid factual basis for further reducing Mr. SanFilippo claims to under $922,863.04, the Receiver would have raised it in the claims reconciliation process.[5] It did not do so, and for good reason. The factual record – including documents included in the Receiver's motion papers – shows that Mr. SanFilippo was employed by PPCO's Managing Member as PPCO's CFO, and therefore is entitled to indemnification for a portion of his losses, consistent with the 34 percent allocation that results from the "standard approach" of comparing assets under management.

Attached to the Declaration of Trey Rogers in Support of the Receiver's Omnibus Motion [Dkt. No. 597-2], for example, is Ex. 2 [Dkt. No. 599-1], a Certificate of Incumbency for PPCO, dated March 14, 2016, that includes Mr. SanFilippo's signature as the fund's "CFO." The Certificate is a signed certification by Mark Nordlicht, Chief Investment Officer of PPCO, that Mr. SanFilippo and the other listed signatories "are qualified and acting individuals on behalf of PPCO (each an 'Authorized Signatory') in the capacity set forth across from their respective names." In addition, attached to Mr. SanFilippo's original motion for advancement of fees as Ex. D is a PPCO Private Placement Memorandum, dated October 2015, that contains a section headed in relevant part "Key Personnel of the Managing Member." Included in this section are profiles of, among others, Mr. Nordlicht as Chief Investment

[5] In its Claims Analysis Report, the Receiver disallowed numerous claims on the ground that the "Claim [was made] against [a] non-Receivership entity" [Dkt. No. 564-1, Schedule E], which is similar to what the Receiver now belatedly asserts against Mr. SanFilippo's claims.

Officer and Mr. SanFilippo as "Chief Financial Officer" [Dkt. No. 392-5 at 13]. The Receiver's contention that Mr. SanFilippo was not employed as an officer of PPCO, in sum, is belied by the documentary record that is before the Court.

Finally, the Receiver argues that any distribution from the Receivership to the Indemnification Claimants (including Mr. SanFilippo) would result in a "double recovery" because the Receiver helped defray the costs of the D&O insurance policies upon which they drew to pay for their defense, and also elected to forego any claim to the proceeds of the policies. [Dkt. No. 597-3 at 7-8] The Receiver has it backwards. Mr. SanFilippo submitted to the Receiver claims only for fees and expenses incurred **after the insurance had been exhausted**. Therefore, the Receiver's assistance in maintaining the insurance actually benefited the estate and did so disproportionately, since the millions of dollars in insurance coverage reduced the Receiver's exposure to the Indemnification Claimants dollar-for-dollar, yet presumably dwarfed the premiums that the Receiver had to pay to maintain the coverage. The insurance, all told, was a bargain for the Receivership.

II. Mr. SanFilippo's Claims Must Be Given Priority Over Those of Other Unsecured Creditors

Ruling that the Receiver must allow Mr. SanFilippo's indemnification claims is, however, only the first step in the relief this Court should impose in his favor. In addition, in order to actually vindicate his right to **mandatory** indemnification under Delaware law, the Court should prioritize his claims over those of other unsecured creditors. This follows from three principles. First, courts supervising equity receiverships are not bound by bankruptcy rules but instead have discretion to achieve the most equitable distribution of estate assets possible. Second, because of his complete victory at trial, **only** Mr. SanFilippo, of all the Indemnification Claimants, can claim the mantle of the mandatory indemnification provisions in Delaware law,

which embody that state's public policy of enabling honest corporate officers to "defend their honor and integrity" in court. Third, because of the paucity of funds remaining in the Receivership estate, Mr. SanFilippo stands to receive next to nothing in indemnification unless his claims are prioritized over those of other unsecured creditors.

A. This Court Can and Should Achieve the Most Equitable Distribution of Assets Possible

Under well-established law, courts supervising equity receiverships such as this one enjoy the "latitude … to carefully craft a particularized plan to achieve the most equitable distribution possible." *SEC v. Malek*, 397 Fed.Appx. 711, 715 (2nd Cir. Oct. 25, 2014) (citation and internal quotations omitted). This is in sharp contrast to a bankruptcy proceeding, in which treatment of claims is governed by formal priority rules. *See generally* Skibell & Gallagher, "Choosing Between an SEC Receivership and Bankruptcy," *Law360* (March 11, 2021).

This Court has previously rejected the suggestion that the Receiver file a bankruptcy petition to deal with competing claims [Dkt. Nos. 519-20 ("The Court is persuaded that compelling the Receiver to file a bankruptcy petition at this point would not be in the best interest of all parties.")]. Consistent with a non-bankruptcy approach, the Court instead should exercise its inherent powers in achieving "the most equitable distribution possible" of the estate's assets.

B. Only Mr. SanFilippo, of All the Claimants, is Entitled to Mandatory Indemnification

Mr. SanFilippo's across-the-board acquittal in the *Nordlicht* trial means that, under a unique provision of Delaware law, he is entitled to **mandatory** indemnification from the Receiver. This right is codified in 8 *Del.C.* § 145 (West's Del. Code Ann. 2020), which provides in relevant part that:

"(c)(1) To the extent that a present or former director or officer of a corporation has

> been successful on the merits or otherwise in defense of any action, suit or proceeding [to which the director or officer is or was a party 'by reason of the fact that the person is or was a director [or]officer of the corporation'], such person shall be indemnified against expenses (including attorneys' fees) actually and reasonably incurred by such person in connection therewith."

See generally Green v. Westcap Corp. of Del., Del. Sup., 492 A.2d 260, 265 (1982).

Mr. SanFilippo's successful fight to defend himself illustrates the rationale for Delaware's mandatory indemnification provision:

> "We have long recognized that Section 145 serves the dual policies of: (a) allowing corporate officials to *resist unjustified lawsuits*, secure in the knowledge that, if vindicated, the corporation will bear the expense of litigation; and (b) encouraging capable women and men to serve as corporate directors and officers, secure in the knowledge that the corporation will absorb the cost of *defending their honesty and integrity*."

VonFeldt v. Stifel Fin. Corp., Del. Supr., 714 A.3d 79, 84 (1998) (citation omitted; emphases added). *See also Hibbert v. Hollywood Park, Inc.,* Del. Super., 457 A.2d 339, 343-44 (1983). In short, Section 145 is designed not only to sustain corporate officers such as Mr. SanFilippo in resisting "unjustified lawsuits," but to encourage capable candidates in the future to serve in these positions knowing they will be indemnified for the cost of "defending their honesty and integrity."

Section 145 could not fulfill its purpose of enlisting qualified corporate officers and directors if the critical clause "**shall** be indemnified" were read to mean "sometimes shall be indemnified," or "perhaps shall be indemnified," or "indemnified on a pro rata basis along with

unsecured creditors and investors to the extent cash is available." Yet the last reading appears to be what the Receiver has in mind [*See* Dkt. No. 597-3 at 48 ("The Receiver thus agrees with the Court that the Indemnification Claimants must wait their turn…[N]one of the Claimants may 'jump the line in front of other deserving creditors.'")].[6] Such a construction guts Section 145 and thwarts the public policy goals it is meant to advance.

The Receiver's preference must give way to the law of Delaware, as articulated by the Supreme Court of that state. *See also In re RegO Co.,* 623 A.2d 92, 110–111 (Del Ch. 1992) (holding "interim limit" on claims against company in voluntary dissolution not applicable to "indemnification claims" because "those claims legitimately deserve a priority and thus an exception from the interim limit for several reasons," specifically "[t]he express policy of Section 145 of the Delaware General Corporation Law").

Of all the Indemnification Claimants, only Mr. SanFilippo can invoke Section 145, because he alone was "successful on the merits or otherwise" in defending himself against an action that resulted at least in part from his duties as an officer of PPCO. As Delaware courts have held, "[s]ubsection (c) applies only where there has been a prior proceeding in which the lack of merit of the attack upon the indemnitee has been established." *Green,* 492 A.2d at 265. "Lack of merit of the attack on the indemnitee" is exactly what the jury established in acquitting Mr. SanFilippo of all charges. By contrast, none of the other Indemnification Claimants can

[6] The Receiver is on record opposing any distribution plan that would shut out investors [Dkt. No.516 at 25 (arguing against a suggested bankruptcy filing by noting that "if the Bankruptcy Code's strict priority rules were applied, the Black Elk Trustee's [$29,600,584] claim, which likely would be classified as a general unsecured creditor claim against the PPCO and PPLO Masters, alone would leave Platinum's investors without any recovery."]. However, despite its opposition to applying bankruptcy priority rules that would disadvantage investors, the Receiver argued against Mr. SanFilippo's pretrial motion for advancement of fees on the grounds that rules from bankruptcy **should** be imported, namely, rules that would deny priority to advancement claims unless they had administrative priority [Dkt. No. 410 at 14-17]. *Compare generally SEC v. Illarramendi*, 2014 WL 545720 (D.Conn. Feb. 10, 2014) at *5-8 *with Andrikopoulos v. Silicon Valley Innovation Company, LLC*, 120 A.3d 19, 21-25 (Del. Ch. 2015). This is a glaring case of the Receiver wanting to have it both ways.

claim success "on the merits or otherwise" in "defense of an action, suit, or proceeding."[7]

C. Unless Mr. SanFilippo's Claims Are Given Priority Over Other Unsecured Claims (Including Investor Claims), He Will Likely Recover Little if Anything

According to the Receiver's most recent Status Report to the Court, as of September 30, 2021, with the review of the Receivership's asset portfolio almost complete, the receivership entities had approximately $20.7 million in funds, and $5.7 million in accrued and unpaid administrative expenses [Dkt. No. 591 at 4, 11]. This would leave approximately $15.0 million in unencumbered funds – a figure that has shrunk steadily and will continue to shrink until distribution.

On the other hand, the potential liabilities of the Receivership are enormous. Unaffiliated investor claims total approximately $337.1 million (including claims for unpaid redemptions), and affiliated investor claims total at least $19.7 million [Dkt. No. 591 at 17]. Moreover, according to the Claims Analysis Report, the Receiver has allowed unsecured claims against PPCO that total approximately $33,088,105 (including Mr. SanFilippo's claims), and unsecured claims against PPLO that total approximately $6,544,945 [Dkt. No. 564-1, Schedules B-D, F-I, K].[8]

The Receiver has cautioned that it cannot state at this time what the distributions ultimately will be to creditors and investors. However, to the extent that the Receiver favors a pro rata distribution among all unsecured claims (including investor claims), as it states in its Memorandum, the result would leave Mr. SanFilippo with little to show for his

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[7] The Receiver has allowed claims for indemnification by claimants other than Mr. SanFilippo [Dkt. No. 564-1, Schedules C, H], but that is presumably because agreements or other documents provided an alternative basis for indemnification. Only Mr. SanFilippo can claim the mantle of Delaware public policy.

[8] The size of these dollar amounts is mostly attributable to the Receiver's settlement with the Black Elk Litigation Trust for $29,600,584, allocated between PPCO and PPLO, which the Receiver allowed in its entirety. [Dkt. No. 564-1, Schedules F & K]

indemnification rights, because the massive volume of investor claims alone would swamp Mr. SanFilippo's claims. Unless Mr.SanFilippo is given priority over other unsecured creditors and investors, he will not recover more than a pittance at most.

CONCLUSION

For all these reasons, the Court should exercise its inherent discretion to grant Mr. SanFilippo's allowed claim priority over the claims of all other unsecured creditors (including investors), and honor his claim in full.

Dated: New York, New York
December 13, 2021

Respectfully submitted,

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EXHIBIT 1

MEDIATION STATEMENT OF CLAIMANT JOSEPH SANFILIPPO/FORD O'BRIEN LLP

Claimant Joseph SanFilippo/Ford O'Brien LLP[1] submits this Mediation Statement in support of its objections to the Claims Analysis Report filed by the Receiver on March 9, 2021. [Dkt. No. 564/564-1][2] Mr. SanFilippo submitted to the Receiver a claim in the amount of $2,686,426.31 for unpaid legal fees and expenses incurred in his successful defense in *United States v. Nordlicht, et al.,* Case No. 16-CR-00640 (BMC) *("Nordlicht"),* a criminal case tried before a jury in the Eastern District of New York in 2019. The jury acquitted Mr. SanFilippo of all the charges against him. The value of Mr. Sanfilippo's allowed claim, which he does not dispute for purposes of this mediation, is $922,863.04. [Dkt. No. 564-1, Schedule C]

The Receiver has acknowledged that under Delaware law, which governs here, as well as the applicable fund operating agreement, Mr. SanFilippo is entitled to indemnification for all of his allowed fees and expenses. Nevertheless, the Receiver to date has not indicated that Mr. SanFilippo will receive any meaningful indemnification. In fact, a pro rata distribution of Receivership assets among all unsecured claims (including investor claims), which the Receiver appears to favor, would reduce what Mr. SanFilippo could recover to a pittance, nullifying his indemnification rights.

Under well-established law, because courts supervising equity receiverships enjoy the "latitude … to carefully craft a particularized plan to achieve the most equitable distribution possible," *SEC v. Malek*, 397 Fed.Appx. 711, 715 (2nd Cir. Oct. 25, 2014) (citation and internal quotations omitted), a receiver, in making distributions, is empowered to act in accordance with broad principles of fairness. These principles compel full indemnification for Mr. SanFilippo, for he stands above the vast bulk of the unsecured creditors and investors of Platinum Partners Credit Opportunities Fund LLC ("PPCO") who have lodged claims with the Receiver. Unlike these other claimants, who typically had purely transactional relationships with PPCO, Mr. SanFilippo was an officer of the fund – its Chief Financial Officer. In that trusted position, he served the funds faithfully, secure in the knowledge that, if this service were challenged in subsequent legal proceedings, he would be indemnified for the costs incurred in "defending [his] honor and integrity" as Delaware law and public policy require. *VonFeldt v. Stifel Fin. Corp*., Del. Super., 714 A.3d 79, 84 (1998). Ultimately, Mr. SanFilippo was acquitted of every charge against him. He is therefore entitled to be indemnified for successfully defending his "honor and integrity" at trial.

For these reasons, and others below, the Receiver should exercise her discretion to give Mr. SanFilippo's allowed claim priority over the claims of all other unsecured creditors (including investors), and honor his claim in full.

---

[1] The claim was filed in the name of Ford O'Brien LLP, which is owed fees and expenses from Platinum [Dkt. No. 564-1, Schedule C, Claim Nos. 156, 329, 330], but Mr. SanFilippo is likewise a party in interest since he is obligated under the Engagement Agreement to pay the fees and expenses of the law firm should Platinum fail to do so. [Dkt. No. 490-3, Exh. B]

[2] All cited documents, unless otherwise indicated, are contained in the List of Background Documents for Mediation compiled by the Receiver.

I. Facts Not in Dispute

A. Joseph SanFilippo and His Acquittal at Trial

Joseph SanFilippo was Platinum's CFO, responsible for financial reporting, from 2005 until 2016.

Mr. SanFilippo was born and raised in Brooklyn. He got his first job at age 12, working in a bowling alley. He has worked continuously since then. At age 19, he met his future wife Maria; both worked as security guards in a Century 21 store, in Brooklyn. They have raised three boys together.

Mr. SanFilippo worked his way through college, graduating from Brooklyn College with an Accounting degree in 2000. Following college, he went to work as an auditor for an accounting firm. Eventually, Platinum became one of his audit clients. During this engagement, the management at Platinum became impressed with his ability, and in 2005 they offered him a job as CFO. Until his surprise indictment in December 2016, Mr. SanFilippo had no professional blemish of any kind, and never had an experience with law enforcement or the legal system.

The indictment charged Mr. SanFilippo and six other defendants with multiple counts of conspiracy, securities fraud, and investment adviser fraud. [*Nordlicht,* Dkt. No. 1] On July 9, 2019, after a nine-week trial, Mr. SanFilippo was found not guilty by the jury of all five counts against him. The following day, the Court ordered that Mr. SanFilippo be acquitted and discharged, and any bond exonerated. [*Nordlicht,* Dkt. No. 776, copy of which is attached]

B. Mr. SanFilippo's Rights to Mandatory Indemnification

The Court has already recognized that, under Delaware law and the PPCO Operating Agreement, Mr. SanFilippo is entitled to be indemnified for the fees and expenses incurred in his successful defense against the criminal charges. [Dkt. No. 417 at 3-4; Dkt. Nos. 519-20 ("SanFilippo 's acquittal [] undoubtedly entitle[s] [him] to payment by the Platinum Partners entities")]. This right follows from Delaware's express policy in favor of mandatory indemnification, codified in 8 *Del.C.* § 145 (West's Del. Code Ann. 2020), which provides in relevant part that:

"(c)(1) To the extent that a present or former director or officer of a corporation has been successful on the merits or otherwise in defense of any action, suit or proceeding [to which the director or officer is or was a party 'by reason of the fact that the person is or was a director [or] officer of the corporation'], such person shall be indemnified against expenses (including attorneys' fees) actually and reasonably incurred by such person in connection therewith." *See generally Green v. Westcap Corp. of Del*., Del. Sup., 492 A.2d 260, 265 (1982).

The reasoning behind Delaware's mandatory indemnification policy applies squarely to Mr. SanFilippo's successful fight to defend himself: "We have long recognized that Section 145 serves the dual policies of: (a) allowing corporate officials to *resist unjustified lawsuits*, secure in

the knowledge that, if vindicated, the corporation will bear the expense of litigation; and (b) encouraging capable women and men to serve as corporate directors and officers, secure in the knowledge that the corporation will absorb the cost of *defending their honesty and integrity*." *VonFeldt v. Stifel Fin. Corp*., Del. Supr., 714 A.3d 79, 84 (1998) (citation omitted; emphases added). *See also Hibbert v. Hollywood Park, Inc.,* Del. Super., 457 A.2d 339, 343-44 (1983).

PPCO's Operating Agreement is in accord with Delaware's policy. It states that PPCO "shall" indemnify Mr. SanFilippo for his legal fees and other expenses, and adds that his rights to indemnification and "payment of associated expenses shall not be affected by the … removal of the Managing Member." [Dkt. No. 490-2, Ex. A at ¶¶ 5.4.2, 5.4.3]

C. The Face Value of Mr. SanFilippo's Allowed Claim

The Receiver has reduced Mr. SanFilippo's allowable claim from $2,686,426.31 to $922,863.04, based on the share of the claim purportedly attributable to PPCO and other receivership entities as opposed to non-receivership entities. [Dkt. No. 564-1, Schedules A, C] For purposes of this mediation only, Mr. SanFilippo does not dispute the Receiver's allocation.

D. Settlement Discussion to Date

The parties have had periodic settlement discussions since the Receiver published its Claims Analysis Report in March 2021. Mr. SanFilippo has taken the position that his allowed claim should be honored ahead of those of other unsecured creditors, including equity investors in the funds. The Receiver has not agreed to this proposal, nor has it made a counterproposal. In May, the Receiver suggested mediation as a means of reaching agreement, to which Claimant consented.

II. The Equities Strongly Favor Full Payment of Mr. SanFilippo's Indemnification Claim

In contrast to a bankruptcy proceeding, in which treatment of claims is governed by formal priority rules, in an SEC receivership the receiver is free to apply broad equitable principles subject to an abuse-of-discretion standard on appeal. *See generally* Skibell & Gallagher, "Choosing Between an SEC Receivership and Bankruptcy," *Law360* (March 11, 2021). The receiver's mandate is "to carefully craft a particularized plan to achieve the most equitable distribution possible." *Malek*, 397 Fed.Appx. at 715.

The equitable force of Mr. SanFilippo's claim lies, in the first instance, in its harmony with the public policy of Delaware, which is to provide indemnification to a corporate officer or director who incurs costs while successfully "resisting unjustified lawsuits" and "defending his honor and integrity." Mr. SanFilippo, in contrast to most of the other unsecured creditors and investors with claims before the Receivership, incurred his costs in the service of PPCO and related entities. But for his service, he would not have been indicted, and he would not have suffered the ordeal that culminated in his acquittal. To attract other capable men and women to serve as officers and directors of Delaware corporations, Mr. SanFilippo should be indemnified in full.

Not only does Mr. SanFilippo stand out among the other unsecured creditors of Platinum, but he also appears to be the *only* claimant to date who can invoke the mandatory indemnification provisions of Delaware Code § 145(c)(1). As courts have held, "[s]ubsection (c) applies only where there has been a prior proceeding in which the lack of merit of the attack upon the indemnitee has been established." *Green,* 492 A.2d at 265. "Lack of merit" is exactly what the jury established in acquitting Mr. SanFilippo. But in the case of all the other indemnification claims, the claimant has not been involved in a prior proceeding that reached a final conclusion as to the allegations against him.[3] Granted, the Receiver has allowed claims for indemnification by persons other than Mr. SanFilippo [Dkt. No. 564-1, Schedules C, H], but that is presumably because fund operating agreements and other documents provide an alternative basis for indemnification. Only Mr. SanFilippo, in other words, can claim the mantle of Delaware public policy.

III. Unless Mr. SanFilippo's Claim is Given Priority Over Other Unsecured Claims (Including Investor Claims), He Will Likely Recover Little for His Sacrifices

According to the Receiver's most recent Status Report to the Court, as of March 31, 2021, with the review of the Receivership's asset portfolio "substantially complete," the receivership entities had approximately $22.8 million in funds, and $5.6 million in accrued and unpaid administrative expenses. [Dkt. No. 565 at 4, 9-10] This would leave approximately $17.2 million in unencumbered funds – a figure that has shrunk since March 31st and will continue to shrink until distribution.

On the other hand, the potential liabilities of the Receivership are enormous. Unaffiliated investor claims total approximately $337.1 million (including claims for unpaid redemptions), and affiliated investor claims total at least $19.7 million. [Dkt. No. 565 at 14-15] Moreover, according to her Claims Analysis Report, the Receiver has allowed unsecured claims against PPCO that total approximately $33,088,105 (including Mr. SanFilippo's claim), and unsecured claims against PPLO that total approximately $6,544,945.[4] [Dkt. No. 564-1, Schedules B-D, F-I, K]

The Receiver cautions that "the total amount of allowed claims will not be known until the claims reconciliation process has concluded" and that "the Receiver cannot state at this time what [the] distributions will ultimately be to creditors and investors." [Dkt. No. 565 at 14, 18] However, if the Receiver is inclined toward a pro rata distribution among all the unsecured claims, the result would leave Mr. SanFilippo with little to show for his sacrifices, because the massive volume of the investor claims alone would swamp Mr. SanFilippo's claim. The Receiver is on record opposing any distribution plan that would shut out investors. [Dkt. No. 516 at 25 (arguing against a suggested bankruptcy filing by noting that "if the Bankruptcy Code's strict priority rules were applied, the Black Elk Trustee's [$29,600,584] claim, which likely would be classified as a general unsecured creditor claim against the PPCO and PPLO

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[3] The appeals of two other defendants in the *Nordlicht* criminal case remain sub judice as of this date.

[4] The size of these dollar amounts is mostly attributable to the Receiver's settlement with the Black Elk Litigation Trust for $29,600,584, allocated between PPCO and PPLO, which the Receiver allowed in its entirety. [Dkt. No. 564-1, Schedules F & K]

Masters, alone would leave Platinum's investors without any recovery."][5] Therefore, unless Mr. SanFilippo is given priority over other unsecured creditors and investors, he will not recover more than a pittance in indemnification in these proceedings.

IV. Conclusion

For these reasons, the Receiver should exercise her discretion to give Mr. SanFilippo's allowed claim priority over the claims of all other unsecured creditors (including investors) and honor his claim in full.

New York, New York
July 16, 2021

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[5] Despite her opposition to applying bankruptcy priority rules that would disadvantage investors, the Receiver argued against Mr. SanFilippo's pretrial motion for advancement of fees on the grounds that rules from bankruptcy *should* be imported, namely, rules that would deny priority to advancement claims unless they had administrative priority. [Dkt. No. 410 at 14-17] *Compare generally SEC v. Illarramendi*, 2014 WL 545720 (D.Conn. Feb. 10, 2014) at *5-8 *with Andrikopoulos v. Silicon Valley Innovation Company, LLC*, 120 A.3d 19, 21-25 (Del. Ch. 2015). This is a glaring case of the Receiver wanting to have it both ways.