UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

-against-

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.

Case No.: 1:16-cv-06848-BMC

MEMORANDUM OF LAW OF DEFENDANT DAVID LEVY AND NON-PARTY CLAIMANT WILSON SONSINI GOODRICH & ROSATI, P.C. IN OPPOSITION TO THE RECEIVER'S OMNIBUS MOTION TO CONFIRM CLAIMS DETERMINATIONS

MICHAEL S. SOMMER
MORRIS J. FODEMAN
WILSON SONSINI GOODRICH & ROSATI
Professional Corporation
1301 Avenue of the Americas, 40th Floor
New York, New York 10019
Telephone: (212) 999-5800

Counsel for Defendant David Levy and Non-Party Claimant Wilson Sonsini Goodrich & Rosati, P.C.

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PRELIMINARY STATEMENT

Pursuant to a claims process approved by this Court, both David Levy and the law firm that has represented him since June 2016, Wilson Sonsini Goodrich & Rosati, P.C. ("Wilson Sonsini"), submitted claims to the Receiver in identical amounts for legal fees and costs that had actually been incurred but not paid by Platinum or its insurance company – $8.7 million (the "Legal Fees Claim"). At the request of the Receiver, Wilson Sonsini also submitted estimates of future contingent legal fees and costs (the "Contingent Claim") arising out of the same subject matter as the criminal charges filed against Mr. Levy and the claims asserted by the United States Securities and Exchange Commission (the "SEC") in a parallel civil enforcement action. Finally, Mr. Levy submitted claims for unpaid salary for his work at Platinum, and for the repayment of loans he had made to the Company (the "Salary/Loan Claim").

On March 9, 2021, the Receiver filed with the Court her evaluation of those claims (the "Claims Report"). Dkt. 564. In connection with the Legal Fees Claim, the Receiver determined, without any challenge to the work that had actually been performed by Wilson Sonsini on behalf of Mr. Levy, that only 36% of the Legal Fees Claim should be allowed. This was because the Receiver concluded that 64% of the work performed was properly allocated to Platinum's PPVA Fund, which was not one of the receivership entities. In contrast, 34% was allocated to Platinum's PPCO Fund, and 2% was allocated to Platinum's PPLO Fund, both of which were receivership entities. As a result, the Receiver allowed the claims of Mr. Levy and Wilson Sonsini in the amount of $3,127,032.33.[1] As for the Contingent Claim, the Claims Report did

[1] Because the claim of Wilson Sonsini covers the same legal fees and costs as the claim of Mr. Levy, the Receiver did not list the same amount twice and noted that the claims were duplicative. *See id.* at 7-8, 31.

not address it at all. The Salary/Loan Claim was denied by the Receiver based on her view that there was inadequate documentation supporting it.

On March 10, 2021, Mr. Levy and Wilson Sonsini submitted their objections to the Claims Report. Dkt. 598-51 (Ex. 45 to Nov. 23, 2021 Decl. of Melanie Cyganowski ("Cyganowski Decl.")). In addition to disagreeing with the allocation advanced by the Receiver, the objection noted among other things that the Claims Report had failed to address the Contingent Claim and had also ignored the critical issue of priority of payment. Extensive discussion ensued, during which Wilson Sonsini explained to the Receiver and her counsel that certain of her determinations were both legally and factually erroneous, that the Contingent Claim was proper, and that Wilson Sonsini should be paid ahead of the investors.

The Receiver has now moved to confirm her claim determinations, raising five issues with respect to the claims filed by Mr. Levy and Wilson Sonsini. *See* Dkt. 602 ("Br."). (1) As to Mr. Levy's Legal Fees Claim, the Receiver has now disallowed that claim in its entirety. The Receiver's rationale for this change in position is the Second Circuit's reinstatement of Mr. Levy's conviction on charges relating to the Black Elk indenture and her view that the various agreements that promise indemnification to Mr. Levy have now been extinguished by the reinstated conviction. *See id.* at 12-17. But as set forth below, the proper course is to either deny the Receiver's determination or defer any final decision on Mr. Levy's Legal Fees Claim until the appeals process and any related proceedings in the district court, which are still ongoing, are concluded. (2) The Receiver has also now for the first time disallowed the Legal Fees Claim of Wilson Sonsini. The purported justification for this position is the Receiver's argument that the Wilson Sonsini Legal Fees Claim is based on the same indemnification agreements as Mr. Levy's Legal Fees Claim. *See id.* at 17-20. But, as set forth below, this is plainly wrong. The

Wilson Sonsini Legal Fees Claim is based on a separate agreement (the "Wilson Agreement") approved by two lawyers at Platinum, executed by Platinum's founder and top executive, and already found by this Court to be enforceable. Accordingly, the Wilson Sonsini Legal Fees Claim should be allowed in its entirety. (3) The Receiver has also for the first time addressed and now rejected the Contingent Claim, arguing that such claim has also been extinguished by Mr. Levy's reinstated conviction. *See id.* at 37-38. But this too is wrong. The clear and unambiguous language of the Fund documents require the Receiver to establish a "reasonable and appropriate" reserve to pay Wilson Sonsini for the contingent legal fees Mr. Levy will still incur. (4) As for priority of payment, the Receiver has announced – without providing any justification or relevant authority – that she will treat all unsecured creditors and investors on equal footing with respect to any distributions. *See id.* at 38-41. But, as set forth below, such a position ignores the clear and unambiguous language of the operative Fund documents that all investors agreed to be bound by, and the Receiver's claim that she has the power to ignore those documents is unsupported both by the law and any legitimate justification. (5) As for Mr. Levy's Salary/Loan Claim, the Receiver has adhered to her position that there is inadequate documentary support for the claim, despite the fact that she has unfettered access to Platinum's documents (whereas Mr. Levy does not). She also now argues that because Mr. Levy agreed to defer his salary during the final two years of his employment at Platinum in order to put the interests of the investors first, that this somehow acts as a waiver of his salary that now bars him from recovering. *See id.* at 48-49. But, as set forth below, this argument is specious – the very testimony cited by the Receiver makes clear that Mr. Levy ***deferred*** his salary during his

employment to put the interests of investors first; but he did not agree to forego it or continue to defer it in the context of a liquidation of the Company.

Each of these issues is addressed below.

STATEMENT OF FACTS

Attorneys from Wilson Sonsini met with David Levy for the first time in or around the second week of June 2016. Dec. 13, 2021 Decl. of Michael Sommer ("Sommer Decl.") ¶ 2. At that meeting, Mr. Levy asked Wilson Sonsini to represent him in connection with investigations being conducted by the Eastern and Southern Districts of New York and any other matters that may arise relating thereto (the "Engagement"). Mr. Levy explained that he had been assured that his employer, Platinum Partners ("Platinum"), would pay his legal fees and costs associated with Wilson Sonsini's representation of him. *Id.*

Either the same day or the following day, Michael Sommer of Wilson Sonsini had separate telephone conversations with Harvey Werblowsky, an in-house lawyer at Platinum, and Suzanne Horowitz, Platinum's general counsel. *Id.* ¶ 3. In those telephone conversations, it was confirmed to Mr. Sommer that Platinum had agreed to pay Mr. Levy's fees and costs associated with the Engagement. When Mr. Sommer raised the issue of a retainer to be paid by Platinum to Wilson Sonsini, Mr. Sommer was directed to speak with Mark Nordlicht, the founder and head of Platinum. *Id.*

On June 14, 2016, Mr. Sommer had a telephone conversation with Mr. Nordlicht. In that conversation, Mr. Nordlicht also confirmed that Platinum had agreed to pay Mr. Levy's legal fees and costs associated with the Engagement. *Id.* ¶ 4. Mr. Sommer explained that despite Platinum paying Wilson Sonsini's fees and costs, the firm would owe its professional duties solely to Mr. Levy, but also expected that Wilson Sonsini would be working cooperatively and extensively with both in-house and outside counsel to Platinum (at that time, Platinum was

represented by the law firms of Dechert and Curtis Mallet). *Id.* Mr. Sommer further explained to Mr. Nordlicht, as he had in his conversations with Platinum's in-house lawyers, that the scope of the Engagement would cover the investigations then being conducted by the Eastern and Southern Districts of New York, as well as any other matter that related to those investigations. *Id.* Mr. Sommer informed Mr. Nordlicht that he would prepare a letter agreement confirming the discussions he had had with the various Platinum representatives, and that the agreement would also call for a retainer payment to be made from Platinum to Wilson Sonsini. *Id.* ¶ 5.

In none of the conversations with either of the Platinum in-house lawyers or Mr. Nordlicht was there any discussion about any advancement or indemnification rights that Mr. Levy had from any of the underlying agreements of the Platinum funds (the "Funds"). Indeed, Wilson Sonsini was not aware of any such agreements at that time. *Id.* ¶ 6.

On June 14, 2016, Wilson Sonsini prepared an engagement letter for Mr. Levy to execute. The engagement letter confirmed what Wilson Sonsini had been told – that Platinum had agreed to pay the fees and costs of Mr. Levy's Engagement. The letter went on to make clear that "if Platinum should fail to pay any portion of our statements for any reason, Client will be responsible for paying these amounts in full." *Id.* ¶ 7. Mr. Levy agreed to the terms of the engagement letter and executed it on June 15, 2016. *Id.* The above terms of Mr. Levy's engagement letter, and in particular, that Mr. Levy would be liable to Wilson Sonsini to pay the fees and costs incurred on his behalf should Platinum for any reason fail to pay, were shared with Platinum's in-house lawyers, Mr. Werblowsky and Ms. Horowitz. *Id.* ¶ 8.

On June 16, 2016, consistent with the telephone conversations described above, Mr. Sommer sent Mr. Nordlicht the Wilson Agreement confirming the terms of Wilson Sonsini's Engagement to represent Mr. Levy, and Platinum's commitment to pay the fees and costs

associated with that Engagement. *Id.* ¶ 9. The Wilson Agreement was not contingent upon the enforceability of any advancement or indemnification rights extending to Mr. Levy from Platinum, and it made no reference to any such advancement or indemnification rights. *Id.* ¶ 10. Indeed, as noted, at the time, Wilson Sonsini was completely unaware of any advancement and indemnification rights that Mr. Levy had through any of the Funds. *Id.* Instead, the Wilson Agreement was plain and straightforward, and confirmed Platinum's unequivocal obligation to pay Mr. Levy's fees and costs with respect to investigations being conducted by the United States Attorney's Offices for the Southern and Eastern Districts of New York and any matters related thereto. *Id.* ¶ 11. Consistent with the telephone call Mr. Sommer had with Mr. Nordlicht, the Wilson Agreement also provided for Platinum to pay a retainer to Wilson Sonsini, and "in the event Mr. Levy [was] charged with any crime relating in any way to his employment or work while at Platinum . . . a further discussion about a more substantial retainer to be posted on Mr. Levy's behalf" would then occur. *Id.*; Dkt. 598-88 (Cyganowski Decl. Ex. 81).

Mr. Nordlicht then executed the Wilson Agreement on behalf of Platinum Partners and caused Platinum to wire a retainer payment to Wilson Sonsini, as called for by the Wilson Agreement. *Id.* ¶ 12.

Wilson Sonsini immediately began its work. That work not only involved meetings with Mr. Levy himself, but also included numerous meetings and conferences with Platinum's outside counsel at both Dechert and Curtis Mallet. These meetings and conferences continued throughout the balance of 2016 and extended into the ensuing years. *Id.* ¶ 13.

In July 2016, in connection with Wilson Sonsini's submission to Platinum of its first invoice reflecting the law firm's work on behalf of Mr. Levy, Mr. Sommer was informed by Platinum's general counsel that there was a waterfall of insurance coverage in place that

Platinum hoped would cover Wilson Sonsini's invoices, and that Wilson Sonsini should, in the first instance, submit its invoices to the insurance company. *Id.* ¶ 15. Wilson Sonsini was directed by Platinum attorneys Ms. Horowitz and Mr. Werblowsky to continue sending its invoices to Platinum so that if the insurance did not pay for any reason, Platinum would then pay Wilson Sonsini's invoices pursuant to the Wilson Agreement. *Id.* Wilson Sonsini complied and sent its invoices both to the insurance company and to Platinum. The insurance companies agreed to pay Wilson Sonsini's invoices. *Id.*

Six months later, on December 16, 2016, a grand jury in the Eastern District of New York returned an indictment charging Mr. Levy, Mr. Nordlicht, and five others with various crimes (the "Indictment"). *Id.* ¶ 16. The SEC filed a parallel civil enforcement action the same day. *Id.* At the request of the SEC, Bart Schwartz was appointed the Receiver of certain of the Platinum Funds. *Id.*

On January 4, 2017, shortly after Mr. Schwartz's appointment as Receiver, Mr. Sommer and fellow Wilson Sonsini lawyer Moe Fodeman met with Mr. Schwartz and his counsel regarding Wilson Sonsini's ongoing representation of Mr. Levy. *Id.* ¶ 17 . At that meeting, among other things, Mr. Sommer and Mr. Fodeman made sure that Mr. Schwartz was aware of the existence of the Wilson Agreement and provided Mr. Schwartz and his counsel with a copy of the Wilson Agreement. Mr. Schwartz acknowledged that he had already been made aware of the Wilson Agreement, made no effort to attack it or suggest in any way that it was not entirely appropriate and binding on Platinum, and sought confirmation from Mr. Sommer and Mr. Fodeman that Wilson Sonsini's invoices were being paid by the insurance. *Id.* at 18. Mr. Schwartz confirmed that Wilson Sonsini should continue to submit its invoices to the insurance company for payment of its legal fees and costs incurred in connection with the

Engagement, but that it should continue to send copies of the invoices to Platinum in the event there was any issue with the insurance. There was no discussion at all about any advancement or indemnification rights that existed in other Platinum agreements for the benefit of Mr. Levy. *Id.*

On July 6, 2017, Bart Schwartz was replaced as Receiver by Melanie Cyganowski. Dkt. 216. On January 31, 2018, Mr. Sommer and Mr. Fodeman had a meeting with Ms. Cyganowski and her counsel regarding Wilson Sonsini's ongoing representation of Mr. Levy. Sommer Decl. ¶ 20. At that meeting, among other things, Mr. Sommer and Mr. Fodeman again made sure that Ms. Cyganowski was aware of the existence of the Wilson Agreement and that Wilson Sonsini was relying upon it. They provided Ms. Cyganowski and her counsel with a copy of the Wilson Agreement. Ms. Cyganowski acknowledged that she had already been made aware of the Wilson Agreement, and made no effort to attack it or suggest in any way that it was not entirely appropriate and binding on Platinum. Ms. Cyganowski confirmed that Wilson Sonsini should continue to submit its invoices to the insurance company for payment, with copies to her counsel. *Id.* ¶ 21. Ms. Cyganowski gave no indication whatsoever that she believed Platinum's payment obligation to Wilson Sonsini was in any way tethered to any advancement or indemnification obligations flowing from any of the Platinum Funds to Mr. Levy. *Id.*

In or around April 2018, with the insurance coverage nearly depleted, certain other former Platinum employees who were also named in the Indictment demanded that the Receiver agree to start advancing legal fees (pursuant to certain Fund agreements) once the insurance proceeds were exhausted. *See* Dkt. 404-8 (Ex. 8 to Oct. 19, 2018 Decl. of Eli B. Richlin ("Oct. 19, 2018 Richlin Decl.")). By letter dated April 13, 2018, Ms. Cyganowski set forth her reasons for declining to advance fees under those Platinum Fund advancement agreements. *See id.*

Ms. Cyganowski did not, however, in any way disavow the separate obligation of Platinum set forth in the Wilson Agreement. *See id.*

By the fall of 2018, the insurance was exhausted. Sommer Decl. ¶ 24. Mr. Levy's trial was now just months away (February 2019) and the Wilson Sonsini lawyers were fully engaged in preparing for that trial. The government had produced tens of millions of pages of documents which were being reviewed, fact investigation and interviews of witnesses by defense counsel were well underway, pre-trial motions were being drafted and submitted, and witness examination outlines were being prepared. *Id.*

Having been alerted that the insurance was now exhausted, on September 18, 2018, Wilson Sonsini wrote to Ms. Cyganowski's counsel to confirm that the Receiver would cause Platinum to meet its obligations to Wilson Sonsini under the Wilson Agreement. *See id.* ¶ 25; Dkt. 404-9 (Oct. 19, 2018 Richlin Decl. Ex. 9). On September 25, 2018, however – 27 months after the Wilson Agreement was executed; 21 months after the first Receiver Bart Schwartz acknowledged the Wilson Agreement; and 9 months after the second Receiver, Melanie Cyganowski, acknowledged the Wilson Agreement – Ms. Cyganowski, through her counsel, for the first time indicated that Platinum would not timely pay Wilson Sonsini's invoices for fees and costs incurred in representing Mr. Levy. Instead, the Receiver now took the position that any payment under the Wilson Agreement would have to await the Receiver's distribution plan. *See* Sommer Decl. ¶ 26; Dkt. 404-10 (Oct. 19, 2018 Richlin Decl. Ex. 10).

The timing of this decision by the Receiver could not have been more unfair to Wilson Sonsini. Having devoted more than two years to learning a vastly extensive record and preparing for a lengthy trial, and with just months to go before the commencement of that trial, Wilson Sonsini, having relied on Platinum's unequivocal promise to pay Mr. Levy's legal fees and costs,

had no option other than continue to work diligently on behalf of Mr. Levy, but now it was being told for the first time that its work would be uncompensated for the foreseeable future.[2] *See* Sommer Decl. ¶ 27.

On October 19, 2018, with the Receiver still refusing to pay Mr. Levy's legal fees and costs, Mr. Levy moved this Court: (i) to enforce Platinum's obligation to pay the fees and costs of his counsel under the Wilson Agreement; and (ii) to obtain advancement of his legal fees and costs under various Platinum Fund agreements.[3] Dkts. 402-404.

On October 30, 2018, the Receiver opposed the motion. Dkts. 410-411. The Receiver challenged both the Wilson Agreement[4] and Mr. Levy's entitlement to advancement under the various Fund documents. Dkt. 410 at 9, 21-25. The Receiver also argued that if any payment obligation was owed by Platinum to Mr. Levy, it should await a final distribution plan. *Id.* at 14-17.

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[2] Mr. Levy did not have the means to independently pay the Wilson Sonsini invoices moving forward. *See* Sommer Decl. ¶ 28.

[3] Mr. Levy was granted mandatory advancement and indemnification rights by the following Platinum Agreements, among others:

- The Amended and Restated Operating Agreement of Credit Funding LLC (Dkt. 598-57 (Cyganowski Decl. Ex. 51));
- The PPCO Fund LLC Fourth Amended and Restated Limited Liability Company Agreement (Dkt. 404-3 (Oct. 19, 2018 Richlin Decl. Ex. 3));
- The PPCO Fund (TE) LLC Fourth Amended and Restated Limited Liability Company Agreement (Dkt. 404-4 (Oct. 19, 2018 Richlin Decl. Ex. 4)) (hereinafter "PPCO (TE) LLC Agreement");
- The PPCO Fund (BL) LLC Amended and Restated Limited Liability Company Agreement (Dkt. 404-5 (Oct. 19, 2018 Richlin Decl. Ex. 5));
- The Third Amended and Restated Agreement of Limited Partnership of PPCO Master Fund LP (Dkt. 598-55 (Cyganowski Decl. Ex. 49)); and
- The PPLO Master Fund Limited Partnership Agreement (Dkt. 598-58 (Cyganowski Decl. Ex. 52)).

[4] The Receiver argued that there were purported defects in the Wilson Agreement, including that it referred to Mr. Nordlicht as the "Managing Partner" of "Platinum Partners," that somehow made the Wilson Agreement unenforceable. *See, e.g.*, Dkt. 410 at 9-10 & 22 n.13.

On November 25, 2018, this Court issued its Memorandum Decision and Order on Mr. Levy's motion. Dkt. 417. The Court found that the Wilson Agreement was enforceable and obligated Platinum to pay Mr. Levy's legal fees and costs: "Platinum Partners founder Mark Nordlicht also entered into a letter agreement (the 'Wilson Sonsini Agreement') committing Platinum Partners to pay bills from Levy's counsel 'within 15 days of receipt.'" *Id.* at 3. The Court also found that Mr. Levy was entitled to advancement of his legal fees and costs under various Platinum agreements. *Id.* The Court, however, did not require the Receiver to make immediate payment on the open invoices at that time because the amounts owed to Mr. Levy's counsel were unsecured, and since there were other unsecured creditors who were also owed money by Platinum, any such payments would need to await the "orderly wind up" of the Platinum entities. *Id* at 6-9.[5]

Notwithstanding that its bills were now not being paid, Wilson Sonsini continued to vigorously prepare for Mr. Levy's criminal trial. *See* Sommer Decl. ¶ 31.

The trial of Mr. Levy commenced on February 19, 2019. After one week of jury selection, trial was then adjourned to April 15. *See id.* ¶ 32. Trial recommenced on April 15 and concluded on July 9, when the jury returned its verdict, acquitting Mr. Levy of all charges relating to the purported "Platinum Scheme," but convicting him of the charges relating to the purported "Black Elk Scheme." *See id.* ¶ 33; Jury Verdict, *United States v. Nordlicht, et al.*, No. 16-cr-00640 (BMC) (E.D.N.Y. July 9, 2019), Dkt. 774.

[5] The briefing on Mr. Levy's motion did not address at all the Fund documents that set out the sequence under which creditors of Platinum would be paid in the event of a liquidation. Accordingly, to the extent the Receiver now disingenuously suggests that the Court already did pass on these contractual provisions, *see* Br. at 39-41, all one need do is review the briefing and the Court's decision to see that this is just not so.

On October 1, 2019, this Court entered a judgment of acquittal as to Mr. Levy on the Black Elk charges pursuant to Federal Rule of Criminal Procedure 29, finding, among other things, that there was insufficient evidence that Mr. Levy had criminal intent. Mem. Decision & Order at 27-32, *United States v. Nordlicht et al.*, No. 16-cr-00640 (BMC) (E.D.N.Y. Sept. 27, 2019), Dkt. 800. The Court also provisionally granted Mr. Levy's Rule 33 motion. *Id.* at 37.

In 2020 and continuing into 2021, the Receiver instituted a detailed procedure for claims to be submitted by creditors and investors and then reviewed and evaluated by the Receiver. Sommer Decl. ¶ 35. In connection with that procedure, Mr. Levy submitted indemnification claims flowing from various Fund agreements for fees and expenses actually incurred but not paid by either Platinum or insurance in the amount of $8.7mm. *Id.* Separately, Wilson Sonsini submitted its own claims pursuant to the Wilson Agreement, for fees and expenses actually incurred but not paid by either Platinum or insurance in the amount of $8.7mm. *Id.* ¶ 36. The Levy and Wilson Sonsini claims made clear that they covered the same incurred but unpaid fees and costs.

On March 9, 2021, the Receiver issued her Claims Report. Dkt. 564. Consistent with this Court's November 25, 2018 decision upholding Platinum's advancement and indemnification obligations to Mr. Levy under various Fund documents, and upholding Platinum's separate payment obligation to Wilson Sonsini under the Wilson Agreement, the Receiver acknowledged Platinum's payment obligations to both Mr. Levy and Wilson Sonsini. As for Mr. Levy's indemnification claims of $8.7mm, the Receiver "allowed" PPCO claims in the amount of $2,988,694.84. This represented 34% of the total Levy claims based on the Receiver's allocation of the claims among PPVA (64%), PPCO (34%), and PPLO (2%). *See*

Dkt. 564-1 at Schedule C. The Receiver also "allowed" an additional $138,337.49 for Levy's PPLO claims based on the same percentages. *Id.* at Schedule H.

As for Wilson Sonsini's claims, those too were allowed in the same amounts as the Levy claims, but as the Levy and Wilson Sonsini claims covered the same incurred but unpaid fees and costs, no *additional* dollar amount was "allowed." *Id.* at Schedules C & H.

On March 10, 2021, consistent with the procedure established by the Receiver and Ordered by the Court, Wilson Sonsini, on behalf of Mr. Levy and itself, submitted objections to the Claims Report. *See* Dkt. 598-51 (Cyganowski Decl. Ex. 45). Five objections were raised: (1) that the Receiver had failed to include any allowance for Mr. Levy's contingent claims arising from ongoing criminal and civil proceedings; (2) that the exclusion of 64% of Mr. Levy's claims based on the Receiver's allocation approach was inappropriate; (3) that the exclusion of 64% of Wilson Sonsini's claim was baseless as Platinum's obligations to Wilson Sonsini were not tied to allocating fees and costs to any particular Fund; (4) that the Receiver had failed to address priority of payment to creditors – an issue that had been discussed at length by the Receiver's counsel and Wilson Sonsini in advance of the Receiver issuing her Claims Report; and (5) that the Claims Report had improperly denied Mr. Levy's claims for salary and loan repayment. *See id*.

On November 5, 2021, following a government appeal of this Court's Rule 29 decision relating to the purported "Black Elk Scheme," the Second Circuit reversed that decision. The Second Circuit also reversed this Court's provisional granting of Mr. Levy's Rule 33 motion. Judgment, *United States v. Levy*, No. 19-3207(L) (2d Cir. Nov. 5, 2021), Dkt. 143. On November 19, 2021, Wilson Sonsini, on behalf of Mr. Levy, filed a motion for rehearing and

rehearing en banc. Pet. for Rehearing or Rehearing En Banc, *United States v. Levy*, No. 19-3207(L) (2d Cir. Nov. 19, 2021), Dkt. 149.[6]

On November 12, 2021, the Receiver filed her Memorandum of Law in support of her omnibus motion to confirm her claim determinations. The Receiver had by this time changed her position as to Mr. Levy's indemnification claims in light of his conviction being reinstated by the Second Circuit. According to the Receiver, Mr. Levy's reinstated conviction had now extinguished his indemnification claims in their entirety. Br. at 11-17.

The Receiver had also changed her position with respect to the claims of Wilson Sonsini. According to the Receiver – and failing to cite any authority whatsoever – Mr. Levy's reinstated conviction somehow acted to extinguish Platinum's obligations under the separate and independent Wilson Agreement. Br. at 17. In addition, despite having already raised certain challenges to the content of the Wilson Agreement, the Receiver elected to raise those issues again, even though they had already been litigated and rejected by the Court. *Id.* at 17-20, 36. Finally, in obvious recognition that her challenges to Wilson Sonsini's claims lacked merit altogether, the Receiver raised new and baseless arguments that were never previously raised by the Receiver either in the litigation over the enforceability of the Wilson Agreement or in connection with the claims process. *Id.* Specifically, the Receiver for the first time argued that: (i) Platinum's payment obligation under the Wilson Agreement was limited only to pre-Indictment "investigations" by the government, *id.* at 36; and (ii) the timing of the Wilson Agreement was somehow suspicious, *id.* at 18.

[6] As of the date of the filing of this pleading, the motion before the Second Circuit remains *sub judice.*

ARGUMENT

I. THE COURT SHOULD REJECT THE RECEIVER'S DISALLOWANCE OF MR. LEVY'S INDEMNIFICATION CLAIMS

The Receiver argues that the Second Circuit's reinstatement of Mr. Levy's conviction with respect to the Black Elk charges renders him ineligible for indemnification in any amount. In support of this position, the Receiver points to language in the indemnification provisions of Fund documents which contain carve-outs for conduct that was known by the individual to have been unlawful, or where the conduct was undertaken willfully. Br. at 12-17. The Receiver also points to a decision of Judge Rakoff in an action implicating the Black Elk charges ***but not the Platinum charges.*** In that case, Judge Rakoff found that Mr. Levy's conviction extinguished his right to advancement and indemnification in connection with claims relating to the Black Elk charges. *Id.* at 15-17.

Mr. Levy certainly acknowledges the language of the relevant indemnification provisions. However, as the Court is well-aware, Mr. Levy was fully acquitted of all the Platinum-based charges. Therefore, he is entitled to indemnification for that part of the case. *See Merritt-Chapman & Scott Corp. v. Wolfson*, 321 A.2d 138, 141 (Del. Super. Ct. 1974) (holding that 8 Del. C. § 145 "provides for indemnification to the extent of success 'in defense of any claim, issue or matter' in an action. Claimants are therefore entitled to partial indemnification if successful on a count of an indictment, which is an independent criminal charge, even if unsuccessful on another, related count."), *superseded by statute on other grounds,* 6 Del. C. § 145(k); *Fasciana v. Elec. Data Sys. Corp.*, 829 A.2d 178, 185 (Del. Ch. 2003) (agreeing with approach in *Merritt-Chapman* "that a § 145 claimant is entitled to a partial indemnification if he successfully defends himself against one count of a criminal

indictment but is convicted on another count.").[7] The Receiver has not pointed to any contrary and relevant authority. For this reason, the Court should reject the Receiver's denial of Mr. Levy's indemnification claim.

Moreover, the Receiver's determination that Mr. Levy is ineligible for full indemnification is premature. Mr. Levy has filed a motion for rehearing and rehearing en banc in the Second Circuit. As a result of that motion and further proceedings that will still need to occur in the district court, it is too early to assume that the conviction of Mr. Levy will ultimately stand. As a final matter, the indemnification claims of Mr. Levy cover the same incurred but unpaid fees and costs covered by the Wilson Sonsini claims. Therefore, because Wilson Sonsini is entitled to recover for its claims, that could potentially moot the claims of Mr. Levy.

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[7] The *Merritt-Chapman* decision explicitly addresses partial indemnification if the claimant is "successful on a count of an indictment, which is an independent criminal charge, ***even if unsuccessful on another, related count***." 321 A.2d at 141 (emphasis added). A later Delaware Superior Court case explained:

> In my view, *Merritt-Chapman II* stands for the proposition that if a director is partially successful, he is entitled to indemnification under 8 Del.C. § 145(c). . . . . The clear language of 145(c) supports the conclusion that a director who has been partially successful in defending three out of four counts of a civil complaint is entitled to indemnification. Subsection (c) provides in pertinent part: '*[t]o the extent* that a director . . . of a corporation has been successful on the merits or otherwise in defense of any action, suit or other proceeding referred to in subsections (a) and (b) of this section, or in defense of *any claim, issue or matter therein,* he shall be indemnified against expenses (including attorneys' fees) actually and reasonably incurred by him in connection therewith.' The legislature used fairly expansive language [as indicated by the underscoring] to set the parameters of mandatory indemnification. The underscored language indicates that a director who has been partially successful is entitled to indemnification. . . . This was precisely the result reached by the court in *Merritt-Chapman II.*

MCI Telecommunications Corp. v. Wanzer, No. C.A. 89C-MR-216, 1990 WL 91100, at *9 (Del. Super. Ct. June 19, 1990) (emphasis and alteration in original).

In light of the above, the Court should reject the Receiver's denial of Mr. Levy's indemnification claim, or at least, defer any final decision on Mr. Levy's indemnification claims at this time.

II. THE COURT SHOULD REJECT THE RECEIVER'S DISALLOWANCE OF THE WILSON SONSINI CLAIMS UNDER THE WILSON AGREEMENT

The Receiver advances a series of arguments to try to avoid Platinum's obligations under the Wilson Agreement. Each is baseless.

A. The Wilson Agreement

First, the Receiver argues, without citation to any authority (as none exists), that because Mr. Levy has been convicted of a crime and his own indemnification rights have arguably been extinguished, Wilson Sonsini's right to be paid under the separate Wilson Agreement is similarly extinguished. *See* Br. at 17. This argument flies in the face of the clear and unambiguous language of the Wilson Agreement.

The starting point to assess the contours any agreement is the language of the agreement itself. *See, e.g.*, *Paul v. Deloitte & Touche, LLP*, 974 A.2d 140, 145 (Del. 2009) ("We start by looking to the four corners of the contract to conclude whether the intent of the parties can be determined from its express language. In interpreting contract language, clear and unambiguous terms are interpreted according to their ordinary and usual meaning.") (internal quotation marks and citation omitted).

Here, the language of the Wilson Agreement is clear and unambiguous. There is no reference at all to any advancement or indemnification rights in other agreements. Indeed, in the conversations leading to the creation of the Wilson Agreement, there was no discussion about any such advancement or indemnification rights that might have existed in other agreements, and the Wilson Sonsini lawyers were not aware of any such agreement. *See* Sommer Decl. ¶¶ 6, 10.

Similarly, there is no reference to any contingent obligation on the part of Platinum. To the contrary, the Wilson Agreement could not be clearer: ***"Platinum has agreed to pay Mr. Levy's fees and costs associated with [Wilson Sonsini's] engagement."*** Dkt. 598-88 (Cyganowski Decl. Ex. 81). Accordingly, there is nothing on the face of the Wilson Agreement that even remotely ties it to any other obligation of Platinum to provide advancement or indemnification to Mr. Levy, and Wilson Sonsini is entitled to be paid even if Mr. Levy's indemnification rights are extinguished.

Second, the Receiver argues that the Wilson Agreement "does [not] provide an independent basis for reimbursement of Wilson's fees." Br. at 17. This is nonsense. "[A]n independent basis for reimbursement" is *precisely* what the Wilson Agreement provides for by assuring the payment of Wilson Sonsini's legal fees without any reference to Mr. Levy's advancement or indemnification rights.

Third, the Receiver suggests that the timing of the execution of the Wilson Agreement somehow raises an issue – even though the Receiver does not identify what the issue is or what relief might possibly be warranted because of it. *See* Br. at 17-18. But the entire presentation by the Receiver in this regard is so utterly preposterous – and known to be so by the Receiver and her counsel – that no legitimate basis exists for the Receiver to have included such baseless innuendo in her submission at all. For example, the Receiver lists a series of events that occurred ***after*** the execution of the Wilson Agreement that the Receiver seems to suggest the Wilson Sonsini lawyers knew would happen, such as (i) a search warrant being executed by the FBI (a month after the Wilson Agreement was executed); (ii) the appointment of Bart Schwartz as Receiver (six months after the Wilson Agreement was executed); and (iii) the Indictment of Mr. Levy and Mr. Nordlicht (also six months after the Wilson Agreement was executed). *Id.* at

18-19. It is hard to fathom that the Receiver is seriously suggesting that these events were somehow known to Wilson Sonsini in mid-June 2016, well before these events occurred. The Receiver also makes the irresponsible suggestion that Wilson Sonsini might have been trying to shield the Wilson Agreement from review. This is particularly inappropriate given the undisputed fact that Wilson Sonsini immediately identified the Wilson Agreement both to Mr. Schwartz and then to Ms. Cyganowski. If there was something untoward or suspicious about the Wilson Agreement – which of course there was not – how does Ms. Cyganowski explain that neither she nor Mr. Schwartz, from January 2017 until the most recent submission of November 2021, ever once raised the slightest issue about the circumstances surrounding the execution of the Wilson Agreement? No explanation of any kind is even suggested in the Receiver's submission.

Despite the Receiver's misguided effort to cloud the circumstances surrounding the execution of the Wilson Agreement, the reality is that there is nothing extraordinary about the Wilson Agreement at all. Agreements such as this are entered into by companies and lawyers on a daily basis. It is standard practice among the defense bar to confirm with the company that it will be paying the fees associated with the representation of one of the company's employees where the company has made the decision to do so. *See* Sommer Decl. ¶ 14.

Here, an individual client came to see lawyers at Wilson Sonsini seeking representation. He had been told that his employer would cover the fees and costs associated with that engagement. The Wilson Sonsini lawyers then confirmed that commitment by Platinum with two in-house lawyers at Platinum, including the general counsel, and with the founder and head of Platinum, who not only signed the Wilson Agreement, but then caused a retainer payment to

be made to Wilson Sonsini consistent with the terms of the Wilson Agreement.[8] And those same Wilson Sonsini lawyers then made sure that both Receivers were fully aware of the Wilson Agreement and that Wilson Sonsini was relying on that Agreement – and neither Receiver raised the slightest objection or question with respect to either the execution or the terms of the Wilson Agreement. *See* Sommer Decl. ¶¶ 17-23. For the Receiver now to suggest that Wilson Sonsini was being anything other than forthright and transparent with Platinum and both Receivers is unsupported by even a scintilla of evidence and is knowingly false.

Fourth*,** the Receiver suggests that Wilson Sonsini executed the Wilson Agreement aware of the limitations of indemnification under the other Platinum Fund agreements, and as such, could not have had an expectation that it would get paid under the Wilson Agreement if Mr. Levy was convicted. Br. at 20. This is yet another entirely frivolous argument unsupported by any evidence. Wilson Sonsini entered into the Wilson Agreement ***without any knowledge of the advancement and indemnification obligations contained in the various Fund agreements. *See* Sommer Decl. ¶¶ 6, 10. Moreover, no such agreements are referenced in the Wilson Agreement. Neither Mr. Schwartz nor Ms. Cyganowski ever suggested that the Wilson Agreement was in any way limited by any other Fund agreement as Ms. Cyganowski now disingenuously suggests. The bottom line is that the Wilson Agreement is a free-standing agreement, untethered to any other agreement, that unequivocally obligates Platinum to pay the fees and costs incurred by Wilson Sonsini in its professional and tireless representation of Mr. Levy – the Receiver has not come forward with anything even remotely suggesting otherwise.

[8] The Receiver must concede that there is no obligation on the part of Platinum to make a retainer payment under any of the Fund agreements. The payment of the retainer arose exclusively from Platinum's recognized obligations under the Wilson Agreement.

B. The Scope of the Wilson Agreement and Related "Allocation"

The Receiver devotes many pages of her submission to her argument that, under the various Fund-specific agreements, an allocation must be made as to the portion of fees and costs that are to be charged to each Fund. Br. at 21-28. The Receiver understandably does not make a similar argument with respect to the Wilson Agreement, which obligated Platinum to pay Mr. Levy's legal fees and costs and did not specify Platinum's payment obligation as flowing to any particular Fund. Instead, the Receiver seems to argue that Wilson Sonsini is not entitled to payment under the Wilson Agreement for the work it performed in connection with the various ***civil*** cases that were filed in the wake of the Indictment. *Id.* at 28-30. The Receiver's arguments are unavailing.

First, the Receiver argues in summary fashion that Wilson Sonsini is only entitled to be paid its fees and costs associated with specific investigations and nothing more. According to the Receiver, the Wilson Agreement "limit[s] the attorneys' engagement[] to 'investigations' by the U.S. Attorneys for the Southern and Eastern Districts of New York and the fees sought . . . go well beyond that." Br. at 12.[9] This again is an entirely disingenuous argument. The Wilson Agreement is clear on the scope of its coverage. By its very terms, it extends to "investigations being conducted by the United States Attorney's Offices for the Southern and Eastern Districts of New York ***and matters related thereto***[.]" Dkt. 598-88 (Cyganowski Decl. Ex. 81) (emphasis

[9] It is a little more than ironic that the Receiver repeatedly argues that the Wilson Agreement should be viewed as merely an affirmation of Platinum's advancement and indemnification obligations found in other agreements, but then seeks to limit the scope of the Wilson Agreement to just the "investigations" conducted by the government. If the Receiver genuinely believed that the Wilson Agreement was an affirmation of Platinum's advancement and indemnification obligations, she would concede that those obligations plainly extend beyond just the investigations that were conducted in the Eastern and Southern Districts of New York.

added). And it ***expressly*** covers a criminal case against Mr. Levy. *See id.*[10] Moreover, the invoices Wilson Sonsini submitted to Platinum (and then later directly to Ms. Cyganowski and her counsel) and to the Platinum insurance carrier made clear that Wilson Sonsini's work was not limited just to the government "investigations," as the Receiver now disingenuously claims they should have been. To the contrary, the invoices covered work on the parallel SEC enforcement action and a series of civil cases arising from the same allegations as contained in the Indictment and the SEC complaint. *See* Sommer Decl. ¶ 21. As Wilson Sonsini was submitting these invoices for payment based solely on the Wilson Agreement, if the Receiver genuinely believed that Platinum's payment obligations were limited to just the "investigations," the Receiver or her counsel would surely have said something. But neither the Receiver nor her counsel ever uttered a word about this purported limitation because no such limitation existed – as the clear and unambiguous terms of the Wilson Agreement make plain.[11]

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[10] The Receiver also appears to argue that neither Wilson Sonsini nor Mr. Levy should recover for any civil fees and costs incurred relating to Mr. Levy's tenure at Beechwood, intimating he was not working for Platinum at that time and therefore any such fees and costs should not be the responsibility of Platinum. *See, e.g.*, Br. at 4-5, 20. But as this Court is well-aware, Mr. Levy, after moving to Beechwood, continued to perform services for Platinum in connection with its investments in Black Elk, which was contemporaneously disclosed to the SEC. Indeed, this very fact appeared to be of particular significance to the Second Circuit when it identified numerous inferences that arguably could be drawn from Mr. Levy's dual roles at Platinum and Beechwood. *See, e.g.*, Opinion at 57-59, *United States of America v.Levy*, No. 19-3207(L) (2d Cir. Nov. 5, 2021), Dkt. 138. In any event, as it cannot be disputed that Mr. Levy continued to perform services for Platinum during his tenure at Beechwood, the Receiver's arguments about fees and costs arising from the civil cases is unavailing.

[11] The incurred fees and costs claimed by Wilson Sonsini in connection with its work on the civil cases is $731,567, a very small part of the $8.7 million listed in the Claims Report. The amounts relating solely to the criminal case that have been incurred now aggregate to just over $8.5 million taking into account the fees and costs incurred in the past year in connection with the government's Rule 29 appeal, the Second Circuit's decision, and the petition for rehearing. Accordingly, the total claim of Wilson Sonsini is now $9.2 million.

Second, the Receiver posits again that Wilson Sonsini has failed to "provide a valid independent basis for payment of their legal fees . . . ." Br. at 32-33. This assertion, with no explanation at all, is mystifying. Wilson Sonsini's position is simple: in a free-standing, independent, self-contained written and executed agreement, Platinum promised to pay Wilson Sonsini, in full, the fees and costs it incurred in representing Mr. Levy. In the face of Platinum's unequivocal commitment to pay those fees and costs, what further independent basis could possibly be necessary?

Third, the Receiver suggests that any payment on work performed under the Wilson Agreement should be allocated among the various Platinum Funds according to the allocation formula adopted by the Receiver, where 64% is attributed to PPVA, 34% is attributed to PPCO, and 2% is attributed to PPLO. Br. at 33-36. Yet the Receiver completely fails to articulate why that allocation should apply at all to the Wilson Sonsini claims. Platinum obligated itself in the Wilson Agreement to pay the fees and costs incurred by Wilson Sonsini in its representation of Mr. Levy, regardless of whether the time was spent looking at a PPVA document, a PPCO document, or a PPLO document – and the Court is well aware that all three Funds were squarely implicated both in the Indictment[12] and at the criminal trial.[13] The plain terms of the Wilson Agreement make clear that no such allocation was considered or agreed to by any of the parties to the Wilson Agreement.

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[12] *See* Indictment ¶¶ 3-4, 25, 42, 54, 58-59, 72, 80, 82, 85, 89, 92, *United States v. Nordlicht et al.*, No. 16-cr-00640 (BMC) (E.D.N.Y. Dec. 14, 2016), Dkt. 1.

[13] Indeed, had Wilson Sonsini not put in the time to understand the issues at play with each of the Platinum Funds, it would not have been in a position to correct the erroneous testimony presented by government witnesses about transactions undertaken by one fund or another. *See, e.g.*, Sommer Decl. Ex. 1.

In an effort to somehow strengthen her position, the Receiver also suggests that there is some infirmity in the Wilson Agreement because it was executed by "Platinum Partners" and not by a specific Fund or Funds. *See* Br. at 18 (noting that there is no such entity as "Platinum Partners"). But this suggestion is certainly less than sincere, and one look no further than the Receiver's own articulation of what "Platinum Partners" encompasses: on April 13, 2018, the Receiver's counsel stated in a letter that it was "counsel to Melanie L. Cyganowski, the receiver (the 'Receiver') for certain entities commonly referred to as Platinum Partners." Dkt. 404-8 at 1-2 (Oct. 19, 2018 Richlin Decl. Ex. 8). Accordingly, even the Receiver understood and acknowledged that "Platinum Partners" referred to the entire group of Funds at issue, encompassing all the Receivership entities.

In all, the Receiver has failed to come forward with any credible or legitimate argument why Wilson Sonsini's claim for $8.7 million (now $9.2 million) should not be allowed in its entirety.[14]

III. THE COURT SHOULD REJECT THE RECEIVER'S DETERMINATION WITH REGARD TO PRIORITY OF PAYMENT

The Receiver claims that the issue of priority of payment under Platinum's various contracts and agreements has already been decided by the Court. This is plainly incorrect.

As set forth above, *see supra* at 10-11 & n.5, none of the papers submitted to the Court by Mr. Levy to enforce Platinum's obligation to pay the fees and costs of his counsel under the

[14] The Receiver also makes the argument that any distribution by the Receiver – presumably to Mr. Levy, Wilson Sonsini, or any other indemnified former employee claimants – would amount to a "double recovery" as the Platinum Receiver paid the premiums for the waterfall of insurance in the amount of $880,000. Br. at 7. This argument is incorrect. No claimant received even one penny of those premium payments, so there could not possibly be a "double recovery." Moreover, the fact that Platinum, by the Receiver, made those payments and then directed Wilson Sonsini and the indemnified former employees to submit legal fees and costs to the insurance companies is proof positive of Platinum's acknowledgment of its payment obligations.

Wilson Agreement and to obtain advancement of his legal fees and costs under various Platinum agreements included any discussion of the sequence of payments that are to be made upon liquidation or dissolution. Nor was there any such discussion in the Receiver's papers ***or*** in the Court's decision. Instead, on November 25, 2018, the Court found that: (i) the Wilson Agreement was enforceable and obligated Platinum to pay Mr. Levy's legal fees and costs; (ii) Mr. Levy was entitled to advancement of his legal fees and costs under various Platinum agreements; and (iii) because the amounts owed to Wilson Sonsini were unsecured, any such payments would need to await the "orderly wind up" of the Platinum entities. Dkt. 417 at 3-9. A year later, after Mr. Levy had been fully acquitted on all charges, the Court adhered to its earlier decision by ordering that the unsecured claims of Wilson Sonsini and Mr. Levy would have to wait until a determination was made as to the demands of other unsecured creditors – with no reference at all to the claims of investors. Again, there was no discussion of the liquidation and dissolution sections of the controlling Fund documents. *See* Order denying Dkts. 490, 494 (Jan. 22, 2020).

To be sure, there are other unsecured creditors of Platinum. We understand from the Receiver that such unsecured creditors are almost exclusively the claimants whose claims are at issue on this motion. But the Receiver has not come forward with any reason at all why this Court should not enforce Platinum's express agreements regarding the sequencing of paying those creditors, which every Platinum investor agreed to – for that issue has never before been passed on by the Court.

A. The PPCO Framework

The partnership Agreements for the PPCO Feeder Funds contain an express provision regarding the sequencing of payments should PPCO be liquidated. Section 10.2, which is found

in each of the operative Partnership Agreements for, among others, PPCO (TE) LLC, PPCO (BL) LLC and PPCO LLC, provides as follows:

> **10.2 Liquidation.**
>
> 10.2.1 Upon dissolution of the Company, the Managers, or liquidating trustee if one is appointed, shall:
>
> (i) wind up the affairs of the Company, and subject to the provisions of Section 10.2.2 liquidate such of the Company assets as they consider appropriate, determining in its discretion the time, manner and terms of any sale or other disposition thereof;
>
> (ii) apply and distribute the assets to the payment of all taxes, debts and other obligations and liabilities of the Company, and the necessary expenses of liquidation, provided, however, 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, as to which no such personal liability exists; and, provided, further, that where a contingent debt, obligation or liability exists, a reserve, in such amount as the Managers deem reasonable and appropriate, shall be established to satisfy such contingent debt, obligation or liability, which reserve shall be distributed as provided in this Section 10.2.1 only upon the termination of such contingency;
>
> (iii) make the allocations and adjustments to Capital Accounts provided in Section 3; and
>
> (iv) apply and distribute the remaining proceeds of such liquidation to all Members in proportion to and to the extent of the positive balances in their respective Capital Accounts.

E.g., PPCO (TE) LLC Agreement (Dkt. 404-4) at 22.

The plain language of section 10.2 lays out the sequencing of payments upon liquidation. Section 10.2.1(ii) requires that the Company first "distribute the assets [of the Company] to the payment of all . . . obligations and liabilities of the Company" *before* any distribution is made to the investors. *See id.* (Sections 10.2.1(ii) and (iv)).

This Court has already held that the Company has an obligation to Wilson Sonsini under the Wilson Agreement to pay the fees and costs incurred in representing Mr. Levy. *See* Dkt. 417 at 3-5. The plain language of the first portion of section 10.2.1(ii) therefore makes clear that the Company must meet its obligations to Wilson Sonsini ***before*** it makes any distribution to

investors. Every investor agreed to this distribution sequence in exchange for being permitted to invest with Platinum. *See, e.g.*, PPCO (TE) LLC Agreement (Dkt. 404-4) at 19 (Section 8). On the basis of this language, Wilson Sonsini would stand on the same level as other unsecured creditors of PPCO, but ahead of PPCO investors.

However, and separately, the second portion of Section 10.2.1(ii) requires the Company to meet its obligations to Wilson Sonsini even before the satisfaction of most, if not all, other unsecured creditors. That section 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, as to which no such personal liability exists." Accordingly, if a Member faces personal liability for an obligation of the Company, that obligation is to be paid even before any other unsecured creditor.

The application of that Section to the claim of Wilson Sonsini is clear. ***First***, it cannot be disputed that Mr. Levy was a "Member" of PPCO. *See* Sommer Decl. Ex. 2. ***Second***, it cannot be disputed that Platinum has a payment obligation to Wilson Sonsini, as this Court has already found. ***Third***, it is also beyond dispute that Mr. Levy has a personal liability to Wilson Sonsini for the payment of his unpaid legal fees and costs incurred on his behalf – a personal liability that flows from the Company's failure to meet its obligations to Wilson Sonsini under the Wilson Agreement, and Mr. Levy's personal liability to pay those fees and costs should Platinum for any reason fail to make payment as set out in Mr. Levy's engagement letter. Sommer Decl. ¶ 7. Accordingly, the unpaid legal fees and costs are obligations of the Company as to which personal liability exists for Mr. Levy, and must therefore be paid before ***any other debt*** of the Company is paid, even to any other unsecured creditor, much less any investor.

The controlling agreement for the PPCO Master Fund is somewhat different from the Feeder Funds. Section 9.2(b) of that Agreement provides as follows:

> 9.2 Winding Up and Termination.
>
> (a) *Winding Up*. Upon the occurrence of a Dissolution Event, the property and business of the Partnership shall be wound up by the General Partner, or, in the event of the unavailability of the General Partner, by a Person designated as a liquidating trustee by a majority in interest of the Limited Partners. Subject to the requirements of applicable law and the further provisions of this Section 9.2, the General Partner (or any other Person conducting the winding up of the Partnership's affairs) shall have discretion in determining whether to sell or otherwise dispose of Partnership assets or to distribute the same in kind and the timing and manner of such disposition or distribution. The General Partner may also authorize the payment of fees and expenses reasonably required in connection with the winding up of the Partnership.
>
> (b) *Distributions Upon Winding Up*. Within a reasonable period of time following the occurrence of a Dissolution Event, after allocating all items of income, gain, loss or deduction pursuant to Section 3.9 (such allocations to be determined as if distributions were to be made pursuant to Section 4.6 rather than this Section 9.2), distributions from the Partnership shall be applied and distributed in the following manner and order of priority:
>
> (i) the claims of all creditors of the Partnership (including Partners except to the extent not permitted by law) shall be paid and discharged other than liabilities for which reasonable provision for payment has been made; and
>
> (ii) thereafter, to the Partners in accordance with the positive balances of their respective Capital Accounts.

Dkt. 404-2 (Oct. 19, 2018 Richlin Decl. Ex. 2) at 44.

This section makes clear that there is an express sequencing of distributions upon dissolution. Distributions are to be made "in the following manner ***and order of priority***." Payment is first to be made to satisfy the claims of creditors who are not investors. Only after those obligations are satisfied is there to be any distribution to investors. As a result, Wilson Sonsini is to be paid – alongside other unsecured creditors – before any distribution is made to PPCO investors. The language of the operative documents could not be clearer – language that every PPCO investor agreed to.

As a result, while Wilson Sonsini's claim does not stand ahead of other unsecured creditors in connection with the assets of the PPCO Master Fund (as it does in connection with the assets of the PPCO Feeder Funds), its claim plainly stands ahead of PPCO investors.

Accordingly, based on the clear and unambiguous language of PPCO's operative documents, Wilson Sonsini's claim is to be paid before any distribution to any investor, and before any distribution to any other secured creditor for which a Member does not face a personal liability for the liability of the Company.

B. The PPLO Framework

Section 7.02 of PPLO's Limited Partnership Agreements[15] also provides a specific sequencing of payments upon dissolution:

> Section 7.02 Dissolution.
>
> (a) On dissolution of the Partnership, no further business shall be done in the Partnership's name except the completion of incomplete transactions and the taking of such action as shall be necessary for the winding up of the affairs of the Partnership and the distribution of its assets. The maintenance of offices to effectuate or facilitate the winding up or liquidation of the Partnership's affairs shall not be construed to be a continuance of the Partnership. Upon the completion of the winding up and liquidation of the assets of the Partnership, a final statement with respect thereto shall be prepared and submitted to each Partner.
>
> (b) In the event of a winding up of the Partnership, the General Partner may appoint one or more liquidators, including one or more general partners, who shall have full authority to wind up and liquidate the business of the Partnership and to make final distributions as provided in this Section. The appointment of any liquidator may be revoked, or a successor or additional liquidator or liquidators may be appointed, at any time by an instrument in writing signed by the General Partner. Any such liquidator may receive such compensation as shall be fixed, from time to time, by the General Partner.
>
> (c) The liquidator shall, within no more than 30 days after completion of a final audit of the Partnership's books and records (which shall be performed within 90 days of such termination or as soon thereafter as is reasonably practicable) and subject to the provisions of Section 7.02(d), make distributions out of Partnership assets, either in cash and/or in kind, in the following manner and order:
>
> (i) to payment and discharge of the claims of all creditors of the Partnership who are not Partners;
>
> (ii) to payment and discharge of the claims of all creditors of the Partnership who are Partners pro rata based on such Partners' Partnership Percentages;
>
> (iii) to payment and discharge of the Incentive Allocation and any other amounts due to the General Partner; and
>
> (iv) to the Partners in the proportion of their respective Partnership Percentages.

[15] *See, e.g.* PPLO (USA) L.P. Limited Partnership Agreement (Sommer Decl. Ex. 3) (hereinafter "PPLO L.P. Agreement"); PPLO (USA) II L.P. Limited Partnership Agreement (*id.* Ex. 4); PPLO Intermediate Fund L.P. Exempted Amended and Restated Limited Partnership Agreement (*id.* Ex. 5).

E.g., PPLO L.P. Agreement at 23-24.

This section makes clear that there is an express sequencing of distributions upon dissolution – one agreed to by every PPLO investor. Distributions are to be made "in the following manner ***and order***[.]" Payment is first to be made to satisfy the claims of creditors who are not investors. Only after those obligations are satisfied is there to be any distribution to investors. As a result, Wilson Sonsini is to be paid – alongside other unsecured creditors – before any distribution is made to PPLO investors. The language of the operative documents could not be clearer – language that every PPLO investor agreed to. *See id.* at 21 (Section 5.01).

As a result, while Wilson Sonsini's claim does not stand ahead of other unsecured creditors in connection with the assets of PPLO (as it does in connection with the assets of PPCO Feeder Funds), its claim does stand ahead of PPLO investors.

C. The Receiver's Flawed Argument

The Receiver does not dispute the clear and unambiguous language of the operative Fund documents agreed to by every PPCO and PPLO investor, or the sequencing of payments set forth therein. Rather, the sole argument advanced by the Receiver is that she can ignore those documents: according to the Receiver, she "is not required to distribute assets in accordance with the contractual rights of the parties." Br. at 42 (quoting *SEC v. Quan,* 870 F.3d 754, 762 (8th Cir. 2017)). This position does not withstand scrutiny.

As an initial matter, the Receiver has not advanced a single reason ***why*** the assets of the Funds should not be distributed in accordance with the sequencing set out in the Fund documents. Beyond the Receiver's failure to give any such reason, the *Quan* decision does not even support the Receiver's position. There, the issue before the Eighth Circuit was how to treat different classes of ***investors*** in a fund. Both classes had been defrauded, but the operative plan document – the very document containing the fraudulent statements at issue – called for one

class of investors to be paid ahead of another. As the court concluded, both classes of investors "'were similarly situated in relationship to the fraud, in relationship to the losses, in relationship to the fraudsters, and in relationship to the nature of their investments, so that a . . . pro rata distribution is equitable.'" *Quan*, 870 F.3d at 762 (ellipses in original) (quoting *Commodity Futures Trading Comm'n v. Walsh*, 712 F.3d 735, 748 (2d Cir. 2013)).

But here, there is no issue about multiple classes of investors, no suggestion that one class of investors should be paid ahead of another, and the operative Fund documents here contained no misrepresentations of any kind. As a result, there can be no legitimate argument from the Receiver that Wilson Sonsini is situated akin to an investor of Platinum, as Wilson Sonsini made no investment of any kind in any Platinum Fund and therefore had no relationship to the gains or losses of any of the Funds. As a result, the reasoning of the Eighth Circuit in deciding how to treat different classes of investors has no application here.

Moreover, the Receiver's assertion that she can simply do what she wants notwithstanding the controlling Fund documents is contrary to the law of this Circuit. "[A] receiver appointed by a federal court takes property subject to all liens, priorities, privileges existing or accruing under the law of the State." *See Marshall v. People of New York,* 254 U.S. 380, 385 (1920). As such, "the [law] and the language of the agreements, rather than the law of federal equity receivership, govern the dispute." *S.E.C. v. Credit Bancorp, Ltd.*, 386 F.3d 438, 446 (2d Cir. 2004) (affirming *S.E.C. v. Credit Bancorp, Ltd.*, 279 F. Supp. 2d 247, 261 (S.D.N.Y. 2003)); *see also S.E.C. v. Spongetech Delivery Sys., Inc.*, 98 F. Supp. 3d 530, 537 (2015) ("[t]he Court's equitable authority, however, does not extend to abrogating property rights created by state law and protected by due process; ***equity follows the law***.") (emphasis added) (quoting *SEC v. Haligiannis,* 608 F. Supp. 2d 444, 449 (S.D.N.Y. 2009)).

As a result, the Receiver's claim that she can unilaterally decide to ignore the controlling Fund documents agreed to by every investor relating to the sequencing of distributions upon liquidation or dissolution cannot be sustained.

D. The Establishment of a Reserve

The PPCO operative documents also call for a reserve to be established for the payment of Wilson Sonsini's incurred fees and costs moving forward – and that too, as set forth above, is to occur ***before*** the distribution of any assets to other unsecured creditors and investors.

At the request of the Receiver, Wilson Sonsini identified contingent obligations relating to ongoing criminal proceedings and related civil proceedings, including the parallel SEC enforcement action. The Receiver now advances several arguments why a reserve should not be established, even though such is clearly required by the operative Fund documents. ***First,*** the Receiver argues that no reserve should be established as Mr. Levy is no longer entitled to indemnification in light of the reinstatement of his conviction. Br. at 37. This argument misconstrues the reserve claim. It is not a claim of Mr. Levy, it is a claim of Wilson Sonsini. Platinum is obligated to pay the fees and costs of Wilson Sonsini under the Wilson Agreement. Accordingly, Section 10.2.1 of the PPCO agreements requires an appropriate reserve to be established – before any distribution to any investor.

Second, the Receiver challenges the amount of the required reserve estimated by Wilson Sonsini, arguing that it should only be required to reserve an amount that would reasonably be required to be paid under a plan of distribution – noting that "the Receiver intends to treat . . . Wilson's . . . claims with the same priority as other creditors and investors." Br. at 38. But as explained above, Wilson Sonsini's Contingent Claim has priority over investors, rendering the Receiver's rationale utterly flawed.

Rather, what the Receiver should have argued, but did not, is that the plain language of the operative PPCO documents addresses how the amount of the required reserve is to be determined. Section 10.2.1(ii) provides that "where a contingent debt, obligation or liability exists, a reserve, ***in such amount as the Managing Member deems reasonable and appropriate***, shall be established to satisfy such contingent debt, obligation or liability . . . ." *See* PPCO (TE) LLC Agreement (Dkt. 404-4) at 22 (emphasis added). As the Receiver now stands in the shoes of the Managing Member due to this Court's Order of Appointment, it is the Receiver that is to determine the "reasonable and appropriate" amount of the reserve that "shall be established." We believe that the Court's decision on certain of the contested issues discussed herein will assist the Receiver in formulating a reserve amount that is "reasonable and appropriate" for meeting such contingent obligations. Accordingly, we suggest that Wilson Sonsini and the Receiver confer on the reserve amount following the Court's resolution of the other issues implicated by the Receiver's Claims Report and its related omnibus motion.

IV. MR LEVY'S CLAIMS FOR SALARY AND LOAN REPAYMENT

The Receiver has disallowed the employment and loan claims of Mr. Levy in the aggregate amount of $2.465 million on the basis of inadequate documentation. Br. at 48-49. Despite having these claims for now over two years, and with full access to all Platinum documents, the Receiver argues that Mr. Levy has failed to provide the Receiver with the documents she has access to, but which he does not. This is a troubling position from the Receiver. In response to the Claims Report, we alerted the Receiver to the fact that we no longer had access to any Platinum documents. *See* Dkt. 598-51 (Cyganowski Decl. Ex. 45) at 8. We asked the Receiver why no effort was undertaken by the Receiver or her counsel over the past years to locate whatever additional documentation the Receiver believed was necessary. *See id.* We received no response. *See* Sommer Decl. ¶ 42. As the Receiver appears disinterested in

locating any documents herself, if the Receiver will make available to us the database of Platinum documents, we would be able to identify documents that would certainly satisfy the Receiver in this regard. But the Receiver should not be permitted to claim that Mr. Levy has not come forward with sufficient documentation when it is the Receiver and not Mr. Levy who has control over and access to those documents.

The other contention raised by the Receiver relates solely to Mr. Levy's claim for deferred salary. The Receiver argues that because at the criminal trial, undisputed evidence was presented that Mr. Levy had agreed to defer his salary to put the interests of the investors first, that this somehow amounted to a waiver by Mr. Levy of his salary claim now that Platinum is being liquidated. *See* Br. at 48-49. This argument from the Receiver is completely made up. Mr. Levy agreed to ***defer*** his salary – that is what the evidence from the criminal trial showed. *See* Sommer Decl. Ex. 6. But there was no waiver of salary by Mr. Levy, and the Receiver has failed to point to anything suggesting that there was. Mr. Levy's agreement, in 2015 and 2016, to defer his salary in the hope that Platinum would navigate through its financial troubles and thereby be able to meet all investor redemption requests, was nothing more than a salary deferment. *See id.* For the Receiver to suggest that it was some kind of waiver of salary for all time has no good faith basis whatsoever.

CONCLUSION

For the reasons set forth above, the Court should:

- overrule the Receiver's determination that Mr. Levy is not entitled to indemnification, or, in the alternative, defer ruling on that argument;
- overrule the Receiver's determination that Wilson Sonsini is not entitled to be paid under the Wilson Agreement, and instead Order that the fees and costs incurred by Wilson Sonsini but not paid by Platinum or its insurance coverage are to be allowed as claims;
- overrule the Receiver's determination that no reserve need be established for future fees and costs of Wilson Sonsini (the Contingent Claim), and instead Order that the Receiver and Wilson Sonsini confer on a reserve level that the Receiver deems "reasonable and appropriate;"
- overrule the Receiver's determination that unsecured creditors are to be placed on the same footing as investors in terms of priority of payment, and instead Order that in connection with the funds of PPCO, Wilson Sonsini is to be paid ahead of investors and other unsecured creditors, and that in connection with the funds of PPLO, Wilson Sonsini is to be paid along with other unsecured creditors but ahead of investors; and
- overrule the Receiver's argument that Mr. Levy has failed to provide adequate documentation to support his Salary/Loan Claim, and that Mr. Levy has somehow waived his salary claim by deferring his salary in 2015 and 2016, and instead Order the Receiver to give Mr. Levy and his counsel access to the Platinum document database so that relevant documents may be identified to the Receiver.

Dated: New York, New York
December 13, 2021

Respectfully submitted,

WILSON SONSINI GOODRICH & ROSATI

By: *s/ Michael S. Sommer*

Michael S. Sommer
Morris J. Fodeman
1301 Avenue of the Americas, 40th Floor
New York, New York 10019
Telephone: (212) 999-5800
Email: msommer@wsgr.com
mfodeman@wsgr.com

Counsel for Defendant David Levy and Non-Party Claimant Wilson Sonsini Goodrich & Rosati