UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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

THE BLACK ELK TRUSTEE'S RESPONSE TO
RECEIVER OMNIBUS MOTION (ECF NO. 597)

Richard Schmidt, as the Trustee of the Black Elk Energy Offshore Operations, LLC Litigation Trust (the "Black Elk Trustee"), respectfully submits this response to the Receiver's Omnibus Motion to Confirm Receiver's Determinations as to (1) Claims 282-301 filed by David Levy, (2) Claims 313322 filed by Wilson Sonsini Goodrich & Rosati, P.C., (3) Claims 156, 329, and 330 filed by Ford O'Brien LLP, (4) Claims 24 and 227-232 filed by Daniel Small, and (5) Claims 37-38 and 41-42 filed by Richard Schmidt, as Trustee of the Black Elk Energy Offshore Operations, LLC Litigation Trust.

Introduction

As the Court is aware, the Platinum Partners hedge funds, including through Mark Nordlicht and David Levy, orchestrated a criminal and fraudulent scheme to funnel nearly $100

million away from Black Elk Energy Offshore Operations, LLC ("Black Elk"). Integral to this scheme were the receivership entities. The Platinum scheme to loot Black Elk had a devastating effect on the company, cementing its path to bankruptcy. The Black Elk Trustee is now endeavoring to recover fraudulently transferred funds for the benefit of Black Elk's creditors.

Accordingly, the Black Elk Trustee brought claims for fraudulent transfers against Platinum Partners Credit Opportunities Master Fund LP ("PPCO") and Platinum Partners Liquid Opportunity Fund LP ("PPLO"). The court-appointed receiver settled for fully allowed claims in favor of the Black Elk Trustee. The Court should implement a disbursement scheme that recognizes the Black Elk Trustee's position as a creditor and as a victim of the Platinum scheme, and as having priority over equity claims.

Background

The Platinum hedge funds, including PPCO and PPLO, were central to Platinum's scheme to use Black Elk to improperly enrich Platinum Partners. *See, e.g*, *United States v. Landesman*, 17 F.4th 298, 303 (2d Cir. 2021). Black Elk was one of Platinum's largest investments in 2014. *Id.* at 304. But as Platinum Partners and Black Elk both experienced financial difficulties, Platinum Partners, including Mark Nordlicht and David Levy, devised a scheme to improperly send nearly $100 million from Black Elk to Platinum.

That scheme involved using Platinum and Beechwood entities to fraudulently vote an amendment to Black Elk's bond indenture. That amendment allowed Black Elk to use asset sales proceeds from its best remaining oil and gas properties to repurchase Black Elk's preferred equity that was held by Platinum, instead of paying Black Elk senior secured notes or other trade creditors. The effect of the transfer of nearly $100 million to repurchase preferred equity rather than payoff debt or trade creditors ensured Black Elk's demise.

After Richard Schmidt was appointed as the trustee, he brought fraudulent transfer claims against several Platinum entities, including PPCO and PPLO. The Black Elk Trustee settled those claims with the previous receiver, Mr. Schwartz. That settlement left the Black Elk Trustee with fully allowed claims against PPCO and PPLO. The Black Elk Trustee now respectfully requests that any distribution plan implemented by the Court and Receiver emphasize repaying the creditors, including the Black Elk Trustee, over PPCO's and PPLO's equity holders.

Argument

I. PPCO and PPLO creditors, including the Black Elk Trustee, should be paid ahead of any PPCO or PPLO equity holders.[1]

Even though the PPCO and PPLO partnership agreements provide for a method of distribution, the Receiver appears to argue that the Court can and should ignore the partnership agreements' distribution method. Black Elk is a third-party beneficiary of those agreements, being one of the class of "creditors" specifically identified in the partnership agreements. As one court has explained the long-established principle:

> It is said, however, that no recovery may be had under the third party beneficiary rule where the **class** designated to be benefited is so broad as to include the general public or is indeterminate. But here the class consists of **creditors** of the Collar City Athletic Club who have supplied work or materials applicable to boxing, sparring, and wrestling matches or exhibitions. Clearly, the class is sufficiently narrow in scope. *Johnson Service Co. v. E. H. Monin, Inc.*, 253 N. Y. 417, 419, 171 N. E. 692, 77 A. L. R. 214; *Pond v. New Rochelle Water Co*., 183 N. Y. 330, 76 N. E. 211, 1 L. R. A. (N. S.) 958, 5 Ann. Cas. 504. It is not essential to the creation of a right in a creditor beneficiary or even in the case of a donee beneficiary that he be identified when the obligation is made. American Law Institute, Restatement of the Law of Contracts, § 139.

[1] Although the Receiver argues that any argument about any distribution as between creditors and equity holders should be considered at a later date, the Black Elk Trustee files this brief in an abundance of caution to preserve its ability to argue that the Black Elk Trustee should be paid ahead of the equity holders of PPCO and PPLO.

McClane v. Mass. Bonding & Ins. Co., 266 N.Y. 371-379-80 (N.Y. Ct. App. 1935) (emphasis added); *see also generally Merchants Mut. Cas. Co. v. U.S. Fidelity & Guaranty Co.*, 2 NYS2d 370, 373 (N.Y. Super. Ct. 1938) ("The extent of the undertaking is determined by the surety's words of express promise. Accordingly, in the case before us, we need not strain the words of the defendant's bond to hold that third parties, within a definite class, were intended as its beneficiaries. We find in the language of the condition of the bond as adopted by the defendant the essential 'clear intent' to benefit a class of creditors of which the plaintiff is one."); *Consolidated Edison, Inc. v, Northeast Utilities,* 426 F.3d 524, 529 n.2 (2d Cir. 2005) ("In this case, there is a clear intent to grant a designated class of third-party beneficiaries the right to enjoy a specified fund…."); *Mount Sinai Hosp. v. Loutsch,* 462 NYS2d 1004, 430-31 (N.Y. Civ. Ct. 1983) ("I hold that the respondents' contentions are correct and that [as tenants] they are third party beneficiaries of the provision in question."). Moreover, the PPLO agreement states that "Persons dealing with the Partnership are entitled to rely conclusively upon the power and authority of the General Partner as herein set forth," and does not contain a negating clause. *See* Receiver Ex. 52, § 2.03 and Article X. The PPCO agreement does contain a negating clause, but that clause begins: "Except as otherwise set forth in this Agreement,…." Receiver Ex. 49, § 11.21. That exception language recognizes that third-party rights are created in other parts of the agreement, e.g. for creditors in terms of a liquidation. *See, e.g.*, *Bayerische Landesbank v. Aladdin Capital Mgmt LLC*, 692 F.3d 42, 53-4, 55, 55-58 (2d Cir. 2012) (Noteholders had third-party rights because of dependent clause "except as otherwise specifically provided herein" in negating clause).

However, even if Black Elk were not a specifically identified third-party beneficiary, that does not mean the Court can or should ignore the agreements and their provisions; the Receiver

has a duty to make priority determinations considering the agreements, and the Black Elk Trustee still would have the ability to challenge the priority determinations. As a receiver, the Receiver steps into the shoes of the entities. *See, e.g.*, *Mist Properties, Inc. v. Fitzsimmons Realty Co.*, 228 N.Y.S.2d 406, 410 (Sup. Ct. 1962). Accordingly, the Receiver must consider what the entities and the partners have already agreed to about the wind down and dissoution of PPCO and PPLO.

The PPCO partnership agreement has explicit provisions for paying creditors ahead of equity holders, providing:

> 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.
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> (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.

Receiver Ex. 49, § 9.2. Thus, there can be no doubt that PPCO intended to pay its creditors ahead of any limited partners having equity in the fund.

Similarly, PPLO's partnership agreement states that distirbution should be made in the follow manner:

> (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;
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> (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 any amounts due to the General Partner; and
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> (iv) to the Partners in the proportion of their respective Partnership Percentages.

Receiver Ex. 52, § 7.02. Thus, PPLO's agreement also clearly states that creditors should be paid before any of the partners, i.e. equity holders, are paid: "(i) to payment and discharge of the claims of all creditors of the Partnership who are not Partners."

The Receiver steps into the shoes of the receivership entities and should be bound to follow the partnership agreements. *See, e.g.*, *Mist Properties, Inc. v. Fitzsimmons Realty Co.*, 228 N.Y.S.2d 406, 410 (Sup. Ct. 1962). The Court should ensure that the Receiver's distribution plan follows PPCO's and PPLO's partnership agreements.

II. A balancing of equities also favors creditors, including the Black Elk Trustee, in any distribution scheme.

Any distribution based on equities should favor the Black Elk Trustee for two reasons. First, Black Elk's creditors were the victim of Nordlicht and Platinum's scheme to fraudulently amend Black Elk's indenture and to send $100 million of Black Elk's money to Platinum.

Second, investors in PPCO and PPLO agreed to the terms of distribution in the respective partnership agreements. And unlike the investors in PPCO and PPLO, the creditors of Black Elk, who were the victims of Nordlicht's fraud, never had the opportunity to agree to any distribution scheme—they were an unwillingly put in the position in which they now find themselves. Thus,

it would not be inequitable to hold PPCO and PPLO's equity holders to the terms of their agreement as limited partners.

III. While the Black Elk Trustee does not request payment ahead of other creditors generally, he does agree with the Receiver that some claims should be disallowed or subordinated.

While the Black Elk Trustee does believe he should be paid ahead of any equity holders and that any equitable distribution should favor the Black Elk Trustee, it is not his position that the Black Elk Trustee should be paid ahead of other general creditors of PPCO and PPLO. He does, however, agree with the Receiver that some of claims against PPCO and PPLO should be disallowed and that the Black Elk Trustee should be paid ahead of claims like those submitted by Mark Nordlicht, *see, e.g.*, Receiver Br. at 2, n.2. Allowing Nordlicht, who has been convicted of defrauding Black Elk's creditors, to dilute the pool of funds to be distributed would be inequitable.

IV. The Black Elk Trustee's claims are not and should not be disallowed.

The Receiver's brief defines the Black Elk Trustee's claims as the "Black Elk Trustee Claims," which is then included in the definition of "the Disputed Claims," Receiver Br. at 2. The Receiver states that the Receiver's motion should be granted and "the Receiver's determinations to disallow the Disputed Claims should be confirmed," *id.* at 10. However, the Receiver clarifies in a footnote that she is not seeking disallowance of the Black Elk Trustee's claims. Receiver Br. at 38, n.15. Accordingly, the Trustee understands that his claims are not disputed, which is in accordance with the parties' settlement agreement. But in the event that the Receiver does actually dispute the Black Elk Trustee's claims, he reserves his right to object and brief the issues.

Conclusion

For all the foregoing reasons, the Court should ultimately approve a distribution plan that allows the Black Elk Trustee to be paid similarly to PPCO's and PPLO's other creditors, but ahead of PPCO's and PPLO's equity holders and other disallowed or subordinated claims.

Respectfully submitted,

By: */s/ Craig Smyser*

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CERTIFICATE OF SERVICE

I hereby certify that all counsel of record who are deemed to have consented to electronic service are being served with a copy of this document via the Court's CM/ECF system on December 13, 2021.

/s/ *Jeff Potts*
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