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-06848 (BMC) **ORAL ARGUMENT REQUESTED**

CLAIMANT DANIEL SMALL'S OPPOSITION TO RECEIVER'S MOTION TO CONFIRM RECEIVER'S DETERMINATIONS AS TO CLAIMS 24 AND 227-232 FILED BY DANIEL SMALL

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE(S)**

OTHER AUTHORITIES

Claimant Daniel Small ("Mr. Small") respectfully submits this memorandum of law in opposition to Receiver Melanie L. Cyganowski's (the "Receiver") motion to confirm the Receiver's determination as to Claims 24 and 227-232 filed by Daniel Small (the "Motion"). (ECF 597-99, 602-03.)[1]

PRELIMINARY STATEMENT

The Receiver's Motion to deny paying Mr. Small the substantial sums of money due and owing to him as a creditor of certain entities over which she was appointed Receiver (the "Receivership") is without any legitimate basis and should be denied. Given that Mr. Small's criminal trial is scheduled to begin in only ten weeks on February 14, 2022, the Court should order an interim distribution to reduce the substantial prejudice being caused by the lack of resources to adequately prepare for trial.

Under contractual and governing documents, several Receivership entities are required to indemnify and advance payment for legal fees and expenses incurred in the defense of criminal and SEC charges arising from his work as a portfolio manager for these entities. As of the date of Mr. Small's Supplemental Proof of Claims, Mr. Small's unpaid legal fees and expenses were approximately $2.85 million, and he has requested that the Receiver establish a reserve for future legal fees and costs. Several Receivership entities are also liable to Mr. Small for an arbitral award of approximately $9.6 million and an additional $130,000 in unpaid compensation. While Mr. Small's entitlement to these amounts is clear, the Receiver has yet to pay him or any other unsecured creditor a penny from the Receivership estate in the five years since the establishment of the Receivership. (*See* ECF 591-1 at Ex. A.) Given the circumstances, it is time for the Receiver

[1] "ECF" refers to the documents filed on PACER in this case. Page number cites to the ECF documents are to the page number in the header generated by the PACER system at the time of filing. Mr. Small joins in the opposition arguments made by the other claimants whose claims are addressed in the Motion to the extent those arguments are applicable to his Claims.

to promptly make the distributions lawfully required to Mr. Small and the other creditors. Her Motion as to him should be denied.

On December 19, 2016, the United States Attorney's Office for the Eastern District of New York (the "Government") and the Securities and Exchange Commission ("SEC") filed parallel criminal and civil enforcement proceedings against Mr. Small based on his work as a portfolio manager of various hedge funds, subsidiaries and investment management companies doing business as Platinum Partners, including the funds involved in this Receivership. (*See* ECF 1 (the "SEC Complaint"); *United States v. Nordlicht*, 16-CR-640 (E.D.N.Y.) (the "Criminal Proceeding") (Doc 1 (the "Indictment")).) On the same date that this action was filed, the Court appointed a receiver over various Platinum Partner entities. (ECF 6.) The Receivership currently includes, but is not limited, the following Platinum Partners entities:

- Platinum Credit Management, L.P. ("PPCO Portfolio Manager");
- Platinum Partners Credit Opportunities Master Fund LP ("PPCO Master Fund" and, together with PPCO Portfolio Manager, "PPCO");
- Platinum Liquid Opportunity Management (NY) LLC ("PPLO Portfolio Manager");
- Platinum Partners Liquid Opportunity Fund (USA) L.P. ("PPLO Fund US"); and
- Platinum Partners Liquid Opportunity Master Fund L.P. ("PPLO Master Fund" and, together with PPLO Portfolio Manager and PPLO Fund US, collectively, "PPLO").

(ECF 597-1 (Declaration of Melanie L. Cygnaowski ("Cygnanowski Decl.") ¶ 1.) Mr. Small, as a creditor of PPCO and PPLO timely filed proofs of claims that the Receiver initially partially allowed, but now asserts should be fully disallowed. The Receiver's claims determinations and other arguments in the Motion as to Mr. Small are without merit, and the Court should deny the Receiver's Motion as to Mr. Small in its entirety.

First, the Court should reject the Receiver's disallowance of Claims 228 and 230-32 seeking indemnification and advancement of unpaid legal fees and costs that Mr. Small incurred in defense of the Criminal Proceeding and the SEC enforcement action (the "Legal Expense Claims") from PPCO, PPLO, and Credit Funding LLC ("Credit Funding"), a PPCO subsidiary. As this Court previously found with respect to PPCO in several rulings, Mr. Small has a right to indemnification and advancement of legal fees and costs. The Court's rulings in this regard are the law of the case, and the Receiver's is bound by the Court's earlier decisions. In addition, the plain meaning of the relevant PPCO and PPLO indemnification agreements entitled Mr. Small to indemnification on the Legal Expense Claims. As to Mr. Small, the Indictment and SEC Complaint allege a scheme related to his work as a PPCO and PPLO portfolio manager. As such, his legal defense fees and costs are clearly covered by the indemnification provisions of the relevant agreements. The Court should therefore reject the Receiver's disallowance of the Legal Expense Claims, as well as the Receiver's argument that Mr. Small's legal fees and costs should be allocated or apportioned among the various Platinum Partners' entities. For the same reason, the Receiver is required to reserve funds for Mr. Small's future legal fees and costs.

Second, the Court should reject the Receiver's disallowance of Claims 229 filed against PPLO based on an arbitral judgment in the amount of $9,566,326.57 (the "Arbitration Award Claim"). Under the unambiguous provisions of the arbitral judgment, PPLO Portfolio Manager is jointly and severally liable to Mr. Small for the full amount of the award and PPLO Master Fund and PPLO Fund US are obligated under the various agreements governing PPLO to cover the arbitral award to the extent the PPLO Portfolio Manager Receivership estate is not able to satisfy Mr. Small's claim in full.

Third, the Court should reject the Receiver's disallowance of Claims 24 and 227 filed against Credit Funding and PPCO Master Fund (the "Unpaid Compensation Claims"). The evidence clearly establishes that Mr. Small is owed approximately $130,000 in unpaid compensation based on his work as a PPCO portfolio manager for the years 2012 and 2013, and the relevant agreements unambiguously refute the Receiver's argument that she is entitled to clawback compensation that he earned in prior years based on PPCO's net operating losses in subsequent years.

Finally, the Court should find that Mr. Small's claims as an unsecured creditor have priority over the PPCO and PPLO equity holders. Under the governing fund documents and the Court's prior decisions, the Receiver is required to treat Mr. Small the same as every other unsecured creditor in this case and grant his claims priority status over the claims of PPCO and PPLO equity holders. The investors agreed to be bound by these documents, and there is no lawful basis on which the Receiver can abrogate or disregard Mr. Small's contractual and property rights. Given the amount of time that has passed since the creation of the Receiverships, both equity and fairness dictate the Receiver be directed to submit her plan of distribution by the end of the month and then, assuming the Court accepts the plan, make distributions to Mr. Small on all of his Claims by January 15, 2022, to allow him to prepare for his upcoming criminal trial. In the event the Receiver does not obtain Court approval for the plan of distribution by January 15, 2022, the Receiver should be required to advance Mr. Small his pro rata share of entitled legal fees pursuant to the Credit Funding Agreement (as hereinafter defined) based on the then-existing determination of allowed claims of other unsecured creditors to reduce the substantial prejudice being caused by the lack of resources to adequately prepare for trial.

FACTUAL BACKGROUND

A. Facts Relevant to the Legal Expense Claims (Claims 228 and 230-232)

As of August 7, 2020—the date that Mr. Small filed a Supplemental Proof of Claims—Mr. Small's unpaid legal fees and expenses were approximately $2.85 million in defense of the Criminal Proceeding and this SEC enforcement action, and Mr. Small previously requested that the Receiver establish a reserve of at least $8 million for potential future legal fees and costs. The Court previously ruled that Mr. Small was entitled to indemnification and advancement of these expenses pursuant to his agreement with PPCO Master Fund and Credit Funding. Mr. Small is similarly entitled to indemnification under the agreements governing PPLO.

1. The Credit Funding Agreement and PPCO Limited Partnership Agreement Entitle Mr. Small to Indemnification for His Legal Fees

On April 1, 2012, Mr. Small entered into the Amended and Restated Operating Agreement of Credit Funding LLC (the "Credit Funding Agreement") with Credit Funding and PPCO Master Fund—Credit Funding's "Managing Member" that owned 99.3% of Credit Funding's membership interests. (ECF 598-35 (Cyganowski Decl. Ex. 36) at 8-15.)[2] The Credit Funding Agreement, *inter alia*, set forth Mr. Small's duties to Credit Funding and provided Mr. Small with mandatory indemnification and advancement rights.

As to Mr. Small's duties, the Credit Funding Agreement named Mr. Small (as well as Mr. Levy) as "Portfolio Manager[s]" of Credit Funding and gave them "the power to negotiate, structure, sign documents, originate, terminate and otherwise deal with loans and related products on behalf of [Credit Funding], but only upon receiving approval from the Chief Investment Officer of the management company of [PPCO Master Fund]." (*Id.* at 10 § 6.2.) The Credit Funding

[2] The remainder of the membership interests in Credit Fund were owned by Mr. Small (0.455%) and Mr. Levy (0.245%). (*Id.* at 14.)

Agreement further provided that: "[t]he Portfolio Manager shall also carry out all other duties reasonably assigned to it by [PPCO Master Fund]." (*Id.*) Among these other duties that PPCO Master Fund assigned to Mr. Small, was the duty to serve as a portfolio manager for PPCO. *See United States v. Landesman*, 17 F.4th 298, 305 (2d Cir. 2021) ("*Landesman*") ("Platinum [defined to include PPCO] was a significant investor in Black Elk. Levy and Daniel Small – another portfolio manager at Platinum – co-managed Platinum's position in [Black Elk]."); Indictment ¶ 28 (alleging that Mr. Small was employed by Platinum (defined to include PPCO) and served as the co-portfolio manager of Platinum's, including PPCO's, holdings in Black Elk).

The Credit Funding Agreement also provided for mandatory and non-discretionary indemnification and advancement of civil and criminal defense legal fees for Mr. Small:

> 11.2 *Indemnification.* [Credit Funding] shall indemnify . . . each Portfolio Manager, and their respective successors and assigns, and hold each of them harmless from and against any Damages suffered or incurred by such indemnified person or any of them in the course of serving in any office or other capacity of, or otherwise representing or acting for or on behalf of [Credit Funding] (in each case within the scope of his or her authority), including, without limitation, in connection with any investigation, claim, allegation, action, or proceeding, whether civil, criminal, administrative, arbitrative or investigative, or any appeal in connection with any of the foregoing, initiated by any person, regardless of when brought, and regardless of whether such . . . Portfolio Manager is or was, at the time such investigation, claim, allegation, action, or proceeding was brought, no longer serving in such capacity with respect to [Credit Funding]. . . . Upon making a claim for indemnification, . . . the Portfolio Manager . . . may request in writing that [Credit Funding] advance to such indemnified person the expenses of defending the claim, action, suit or proceeding giving rise to such indemnification claim and [Credit Funding] shall advance such expenses.

(ECF 598-35 (Cyganowski Decl. Ex. 36) at 12 § 11.2.) Section 11.2 also required PPCO Master Fund, as Credit Funding's Managing Member, to fund such indemnification and advancement to Mr. Small:

> [A]ny other provision hereof notwithstanding, any such indemnification shall be solely from the net assets of [Credit Funding], and the Managing Member [*i.e.*, PPCO Master Fund] . . . shall make such capital contributions to [Credit Funding]

> as are necessary to cause [Credit Funding] to comply with its indemnification obligations hereunder, or otherwise pay any such amount from its own assets.

(*Id.* (emphasis added).)

Mr. Small is also entitled to indemnification under Section 5.4(a) of the of PPCO's Third Amended and Restated Agreement of Limited Partnership (the "PPCO Limited Partnership Agreement"). (ECF 598-55 (Cyganowski Decl. Ex. 49).) That section provided, in relevant part:

> [PPCO Master Fund] shall indemnify, hold harmless, protect and defend each Protected Person [defined to include each PPCO officer, director and employee] against any losses, claims, damages or liabilities, including without limitation reasonable legal fees or other expenses actually incurred in investigating or defending against any such losses, claims, damages or liabilities . . . to which any Protected Person may become subject: by reason of any act or omission taken or omitted to be taken by such Protected Person or any other Person with respect to the Partnership, a Portfolio Company or any Subsidiary thereof. . . .

(*Id.* § 5.4(a).)

2. <u>The PPLO Investment Management Agreements Entitle Mr. Small to Indemnification for His Legal Fees</u>

As the Receiver acknowledges, Mr. Small served as a portfolio manager for PPLO Portfolio Manager. (ECF 597-1 (Cyganowki Decl.) at 10 ¶ 12A; *see also Landesman*, 17 F.4th at 305 ("Platinum [defined to include PPLO] was a significant investor in Black Elk. Levy and Daniel Small – another portfolio manager at Platinum – co-managed Platinum's position in [Black Elk]."). As such, Mr. Small is an indemnitee under the Investment Management Agreements entered into between and among PPLO Portfolio Manager, PPLO Master Fund, and PPLO Fund US (*see* ECF 598-43 (Cygnanowski Decl. Ex. 39) at 9-20) (the "PPLO Entities IMA")) and between Mr. Small PPLO Portfolio Manager and another Platinum entity (*see* ECF 598-61, 598-62 (Cygnanowski Decl. Ex. 55) (the "Small PPLO IMA" and collectively with the PPLO Entities IMA, the "PPLO IMAs")).

Specifically, the list of "Indemnified Person(s)" under the PPLO Entities IMA include all officers and employees of PPLO Portfolio Manager. (ECF 598-43 (Cygnanowski Decl. Ex. 39) at 11 § 4(a).) Similar to the Credit Funding Agreement, the PPLO Entities IMA required PPLO Master Fund and PPLO Fund US to provide Mr. Small with mandatory and non-discretionary indemnification of civil and criminal defense legal fees relating to his work as a portfolio manager:

> Indemnity. Each Indemnified Person shall be indemnified and held harmless by each of the Funds, as the case may be, against any Losses sustained by any of the foregoing persons by reason of (i) the fact that the Investment Manager was or is a portfolio manager to each of the Funds, as the case may be, including, without limitation, all legal, professional and other expenses incurred by the Investment Manager, or persons designated by it, in the performance of its duties and obligations hereunder, all indemnity obligations owed by the Investment Manager to persons designated by it and any loss as a result of any misdelivery or error in any faxed or e-mailed transmission. . . .

(*Id.* at 12 § 5(a).)

The Small PPLO IMA also contained a broad indemnification provision that required PPLO Portfolio Manager to indemnify Mr. Small for all civil and criminal defense legal fees relating to his work as a PPLO portfolio manager:

> Indemnification. The Portfolio Manager [*i.e.*, Mr. Small] shall be indemnified by each Manager [defined to include the PPLO Portfolio Manager] (severally and not jointly) from and against any and all losses, claims, damages, liabilities, expenses, judgments, fines, settlements and other amounts (collectively, "Losses") that relate to any threatened, pending or contemplated action, suit or proceeding, whether civil or criminal, administrative, arbitrative or investigative (each, a "Proceeding") or anv appeal in or from any Proceeding relating to [Mr. Small's] performance or participation in the performance of duties or the rendering of advice or consultation with respect to such Manager. . . .

(ECF 598-61 (Cyganowski Decl. Ex. 55) § 5(a).)

3. The Allegations Against Mr. Small in the Indictment and SEC Complaint Relate to His Work as a Portfolio Manager for PPLO and PPCO

All the relevant legal actions for which Mr. Small seeks indemnification, *i.e.*, the Criminal Proceeding and this SEC enforcement action, are integrally intertwined with Mr. Small's work as

a PPCO and PPLO portfolio manager.[3] Indeed, the central focus of all these cases is the allegation that Mr. Small intentionally failed to disclose the affiliate status of PPCO and PPLO and the amount of their Black Elk ownership, in a consent solicitation process allegedly designed to use proceeds from a Black Elk asset sale to redeem PPCO, PPLO, and other Platinum Partners' holdings of Black Elk preferred equity.

Despite the Receiver's assertion that "Platinum Partners" is a non-existent entity (ECF 597-1 ("Cyganowski Decl.) ¶ 1), the Indictment's allegations against Mr. Small are based on his alleged work for "Platinum Partners," referred to in the Indictment as "Platinum" and alleged to be the manager of Receivership funds PPCO and PPLO and non-Receivership fund Platinum Partners Value Arbitrage Fund, L.P. ("PPVA"). (Indictment ¶¶ 1-4.) Mr. Small is only charged in the counts related to what the Indictment refers to as the "Black Elk Bond Scheme." (Indictment ¶¶73-87, 99-105.) The Indictment described the Black Elk Bond Scheme as one to collectively benefit all of the Platinum entities that held Black Elk preferred equity, including PPCO and PPLO. (*Id.*) Specifically, the Indictment described the scheme as involving "misrepresentations and omissions about, among other things, Platinum's ownership of and control over the BE Bonds" (*id.* ¶ 73), and as being designed "to bypass the [Black Elk] Bondholders' rights and misappropriate the proceeds of Black Elk's asset sales for Platinum's benefit through deceptive means." (*Id.* ¶ 75.) The Indictment's central allegation underlying the alleged Black Elk Bond Scheme is that Mr. Small and others failed to disclose the full amount of Black Elk bonds that Platinum owned in connection with a consent solicitation, including the Black Elk bonds owned

[3] The Receiver incorrectly suggests that Mr. Small is seeking indemnification for legal fees and costs in connection with certain civil actions filed in the Southern District of New York (*See* Receiver Br. at 31-32.) To the contrary, the only civil action for which Mr. Small has sought indemnification is this SEC enforcement action.

by PPCO and PPLO, and then caused PPCO's and PPLO's undisclosed bonds to be voted in favor of the proposed amendments addressed in the consent solicitation. (*Id.* at 83-85 (alleging that while the consent solicitation disclosed PPVA's bonds, it failed to disclose the bonds owed by PPCO, PPLO and other entities that were allegedly controlled by the principals of Platinum).) According to the Indictment, the alleged scheme caused the consent solicitation to be adopted, which permitted Black Elk to use the proceeds from an asset sale to pay preferred equity held by the Platinum entities, including PPCO and PPLO. (Indictment ¶¶ 85-86.) In fact, the only Platinum entity that the Indictment identifies by name as receiving a distribution of the proceeds of this asset sale is PPCO. (*Id.* ¶ 86 (alleging that approximately $24.6 million in proceeds from the asset sale were wired to PPCO).)

The allegations in the SEC complaint against Mr. Small are similarly focused on the alleged Black Elk Bond Scheme. (*See, e.g.*, ECF 1 ¶ 5.) Like the Indictment, the SEC Complaint alleges that Mr. Small and others drafted a consent solicitation that only disclosed PPVA's Black Elk bond ownership, but failed to disclose PPCO's, PPLO's and Beechwood's Black Elk bond ownership to the third-party Black Elk bondholders. (*See, e.g.*, *id.* ¶¶ 5, 95 (alleging that the consent solicitation failed to disclose the bonds owned by PPVA's affiliates (*i.e.*, PPCO and PPLO) and Beechwood).)

4. The Court Rules that Mr. Small Is Entitled to Indemnification and Advancement Under the Credit Funding Agreement

On October 19, 2018, Mr. Small and several other claimants (Mr. Levy, Joseph Mann, and Joseph SanFilippo) filed motions to compel the Receiver to advance payment for their reasonable attorneys' fees and defense costs in the criminal Proceeding. (*See* ECF 402-406.) On November 25, 2018, this Court ruled on these motions. (ECF 417.) Relevant here, the Court held that Mr. Small and Mr. Levy were entitled to indemnification and advancement of their legal fees under

the plain meaning of the indemnification and advancement provision of the Credit Funding Agreement. (*Id.* at 4.) The Court further ruled that Mr. Small's and Mr. Levy's "claims for advancement of legal fees ***are treated the same as the claims of other unsecured creditors***." (*Id.* at 6-9 (emphasis added).) The Court deferred decision on the amount of covered defense costs. (*Id.* at 5-6.)

In a January 22, 2020 minute entry Order, the Court reaffirmed Mr. Levy's right to indemnification and advancement under its prior decision, as well as its decision on the issue of priority. The minute entry Order stated:

> Although SanFilippo's and Levy's acquittals undoubtedly entitle them to payment by the Platinum Partners entities, the Court will still not permit them to jump the line in front of other deserving creditors. Among other purposes, the receivership was instated in order to "conduct an orderly wind down including a responsible liquidation of assets and orderly and fair distribution of those assets to investors." The Receiver thus has broad authority to reasonably distribute funds by order of claim priority. ***The Court maintains that both SanFilippo and Levy are entitled to indemnification*** (see 417 11/25/2018 Order Denying Motions to Compel Payment or Advancement of Legal Fees); however, these are just two unsecured claims among many and they must wait for any payment alongside the other unsecured creditors.

(1/22/20 Minute Entry Order (emphasis added).)

5. The Receiver Denies Mr. Small's Claims Seeking Reimbursement of His Legal Fees and the Creation of a Reserve for Expected Additional Legal Fees and Costs

Mr. Small timely filed proofs of claim which asserted that PPCO, Credit Funding, and PPLO were liable to him for indemnification and advancement of legal fees and costs in connection with the criminal and SEC matters. (ECF 598-35 (Cyganowski Decl. Ex. 36); ECF 598-42 (Cyganowski Decl. Ex. 38); ECF 598-43 (Cyganowski Decl. Ex. 39.1); ECF 598-44 (Cyganowski Decl. Ex. 39.2); ECF 598-45 (Cyganowski Decl. Ex. 40).) These proofs of claim sought payment for the unpaid invoices of Mr. Small's counsel—which then totaled to $1,540,746.57—as well as for any future indemnification expenses in connection with the criminal and SEC cases. (*See*, *e.g.*,

ECF 598-35 (Cyganowski Decl. Ex. 36).) On August 7, 2020, Mr. Small provided the Receiver with a Supplemental Proof of Claims that updated the balance of the unpaid invoices of Mr. Small's counsel which then totaled $2,841,344.65. (Declaration of Seth L. Levine in Opposition to the Motion ("Levine Decl.") Ex. 1 (8/7/20 Letter).) As to future expenses, Mr. Small asserted in December 2020 that the Receiver should set up a reserve of from $8 million to $11 million to cover potential future legal fees and costs. (ECF 597-1 (Cyganowski Decl.) ¶ 171.) \

On March 9, 2021, the Receiver filed a Claims Analysis Report with the Court partially allowing the Legal Expense Claims. Specifically, as to Claim 230, the Receiver allowed $983,017.17 and disallowed $1,878,515.98 on the ground that the allowed portion was "PPCO estimated share of asserted claim." (ECF 564-1 at 6.) As to Claim 231, the Receiver allowed $45,500.84 and disallowed $2,816,032.31 on the ground that the allowed portion was "PPLO estimated share of asserted claim." (*Id.*) The Receiver disallowed Claim 228, asserting: "Claim against non-Receivership entity; Duplicate of partially allowed claim (Claim 230)" (*id.* at 6), and she disallowed Claim 232 as "Duplicate of partially allowed claim (Claim 231)." The Receiver did not provide any support or additional explanation for the asserted bases on which she partially or fully denied the Legal Expense Claims, and the Claims Analysis Report did not address Mr. Small's contingent claim for a reserve against future legal fees and costs.

Mr. Small objected to these determination in a letter dated April 22, 2021. (ECF No. 598-53 (Cyganowski Decl. Ex. 47) at 4-5.) Based on the fact that Mr. Small objected to her claims determination, the Receiver inexplicably reversed her partial allowance of the Legal Expense Claims and now claims in the Motion that these Claims should be denied in their entirety merely because Mr. Small objected to her claims determination. (ECF 597-1 (Cyganowski Decl.) ¶ 170.)

B. Facts Relevant to the Arbitration Award Claim (Claim 229)

In July 2016, Mr. Small was awarded an arbitral award in the amount of $9,566,326.57 against PPLO Portfolio Manager (the "Arbitral Award"). Based on the Arbitral Award, Mr. Small timely filed the Arbitration Award Claim seeking the full amount of the Arbitral Award from PPLO. (*See* ECF 598-36 to 41 (Cyganowski Ex. 37).)

1. Mr. Small Prevails in His Arbitration Against PPLO Portfolio Manager

Mr. Small, PPLO Portfolio Manager, and non-receivership entity Platinum Management (NY) LLC ("PMNY") are parties to the Small PPLO IMA, referenced above, that governed the terms of Mr. Small's employment with PPLO and PPVA. (ECF 598-36 (Cyganowski Ex. 37) at 8-22.) The Small PPLO IMA contained a broad arbitration provision that provided, subject to limitations not at issue here, that:

> Any dispute, claim or controversy arising out of or relating to this Agreement of the breach, termination, enforcement, interpretation or validity thereof, including the determination of the scope or applicability of this agreement to arbitrate, shall be determined by arbitration in New York City before one arbitrator. The arbitration shall be administered by JAMS pursuant to its Streamlined Arbitration Rules and Procedures. Judgment on the award may be entered in any court having jurisdiction. . . . The arbitrator may, in the award, allocate all or part of the costs of the arbitration, including the fees of the arbitrator and the reasonable attorneys' fees of the prevailing party.

(*Id.* at 11 § 13(a).)

Pursuant to the Small PPLO IMA, on July 16, 2015, Mr. Small submitted a Demand for Arbitration and a Statement of Claim against PPLO Portfolio Manager and PMNY, alleging, *inter alia*, that PPLO Portfolio Manager and PMNY breached the Small PPLO IMA by failing to pay him non-discretionary bonus compensation. (Levine Decl. Ex. 2 ¶ 6.) Hon, Theodore H. Katz (ret.) was selected as Arbitrator pursuant to the JAMS Streamlined Arbitration Rules and Procedures. (*Id.* ¶ 7.)

On May 13, 2016, the Arbitrator issued an Interim Award in favor of Mr. Small against both PPLO Portfolio Manager and PMNY, in which the Arbitrator concluded, *inter alia*, that:

> Claimant Daniel Small ("Small" or "Claimant") has established that Respondents [PMNY] and [PPLO Portfolio Manager] (collectively "Platinum" or "Respondents"), owe him bonus compensation in the amount of $7,916,482.25 plus prejudgment interest.

(*Id.* at 2.) The Interim Award also found that Mr. Small was entitled to declaratory relief and reasonable attorneys' fees and expenses. (*Id.*) The Arbitrator deemed his initial ruling to be an "Interim Award" because "(1) he perceived a potential minor mathematical discrepancy in [Mr. Small's] calculation of the bonus compensation he claimed; (2) the determination of the amount of prejudgment interest required updated information; and (3) [Mr. Small] was directed to submit his application for attorneys' fees and costs, with appropriate support." (*Id.* at 3.)

On July 12, 2016, the Arbitrator issued the Arbitral Award in favor of Small against PPLO Portfolio Manager and PMNY in the total amount of $9,566,326.92. (ECF 598-37 to 40 (Cyganowski Decl. Exs. 37.2-37.5).) As the Receiver acknowledged, the Arbitrator awarded the entire final award against both PPLO Portfolio Manager and PMNY. (ECF 597-1 (Cyganowski Decl.) ¶ 117 ("The Arbitration Award defined PPLO Portfolio Manager and PPVA Portfolio Manager collectively as "Platinum," notwithstanding that they managed two separate funds, and according to the Arbitration Award, Small was employed by "Platinum" as a portfolio manager.").)

Specifically, the Arbitrator held that Mr. Small is entitled to the following relief against "***Respondents*** [defined as PPLO Portfolio Manager and PMNY]":

> (1) bonus compensation for the years 2012-2014 . . . for a total amount of $7,736,481.95;
>
> (2) attorneys' fees and costs in the amount of $492,750.11;
>
> (3) prejudgment interest in the amount of $1,337,094.86; [and]

> (4) declaratory relief requiring that until all securities positions in Small's Account ad of his termination date are liquidated by or on behalf of Platinum [*i.e.*, PPLO Portfolio Manager and PMNY], Small or his estate or heirs as applicable shall continue to receive the bonus calculated and payable as set forth in his Employment Agreement [*i.e*, the Small PPLO IMA] (to be construed in a manner consistent with this Award).

(ECF 598-40 (Cyganowski Ex. 37.5) at 10-11 (emphasis added) (footnote omitted).)

2. Confirmation Proceeding

On November 17, 2016, Mr. Small filed a Petition to Confirm Arbitration Award and Enter Judgment in New York County Supreme Court (the "Confirmation Proceeding"). (Levine Decl. Ex. 2.)

On January 23, 2017, counsel for the Receiver filed a letter in the Confirmation Proceeding that sought to stay that proceeding based on this Court's Order appointing the Receiver. (Levine Decl. Ex. 3.) The Receiver's counsel advised the court that "[t]he Receiver Order contains a provision staying Ancillary Proceedings, including '[a]ll civil legal proceedings of any nature' involving any Receivership Property or any of the Receivership Entities (see VII). The above-captioned matter is an Ancillary Proceeding." (*Id.* at 1.) On November 15, 2017, the Supreme Court entered an Order staying the Confirmation Proceeding pursuant to the Receivership Order entered in this case. (ECF 598-92 (Cyganowski Decl. Ex. 85).)

On December 24, 2019, Mr. Small filed an unopposed motion in the Confirmation proceeding seeking to lift the stay as to PMNY and to confirm the Arbitral Award against PMNY in full. (*See* Levine Decl. Ex. 4 at 3 (PMNY stipulating that an order be entered confirming the Arbitral Award in full as to PMNY).) On February 18, 2020, the court entered a Judgment confirming the Arbitral Award as to PMNY in the full amount of the Arbitral Award plus $3,137,231.05 in additional pre-judgment interest for a total judgment of $12,703,557.97. (Levine

Decl. Ex. 5.)[4] Mr. Small has not collected any money on this judgment. Based on the Receiver's motion and this proceeding, the stay of the Confirmation Proceeding remains in place as to PPLO Portfolio Manager.

3. The Receiver Denies Mr. Small's Claim

Mr. Small timely filed a proof of claim that asserted that PPLO Portfolio Manager was liable to him for $9,566,326.92 pursuant to the Arbitral Award. (Cyganowski Decl. Ex. 37.) Mr. Small further asserted that, to the extent the PPLO Portfolio Manager receivership estate is not able to satisfy the Arbitral Award, PPLO Portfolio Manager must submit a claim to the PPLO funds for the amount that it owes Mr. Small pursuant to Section 11 of the PPLO Entities IMA. Under the PPLO Entities IMA, the PPLO Funds are contractually obligated to reimburse PPLO Portfolio Manager for the amounts it owes to Mr. Small under the Arbitral Award. (Cyganowski Decl. Ex. 37.6 at 10, § 11(b) ("Each of the Funds shall bear its and its pro rata share of . . . extraordinary expenses, such as indemnification of . . . [PPLO Portfolio Manager] . . . "); §11(c) ("Each of the Funds shall also bear its pro rata share of the performance fees and/or allocations paid to Portfolio Managers and other persons who render services to the Master Funds or the Investment Manager.").) Accordingly, to the extent the PPLO Portfolio Manager Receivership estate is not able to satisfy its creditor claims in full, the Receiver must cause PPLO Portfolio Manager to submit a claim in the PPLO Receivership for the amount it owes Mr. Small on the Arbitration Award Claim.

On March 9, 2021, the Receiver filed a Claims Analysis Report with the Court objecting to Mr. Small Claim 229 on the basis of "No liability." (ECF No. 564-1 at 33.) Mr. Small objected to this determination in a letter dated April 22, 2021. (ECF No. 598-53 at 3-4.)

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[4] Mr. Small is not seeking the additional pre-judgment interest in the Arbitration Award Claim.

C. Facts Relevant to the Unpaid Compensation Claims (Claims 24 and 227)

As reflected in the Credit Funding Agreement, Mr. Small held a membership interest in Credit Funding, a subsidiary of PPCO Master Fund. Pursuant to this agreement, Mr. Small is entitled to 4.55% of Credit Funding's net profits calculated annually (the "Net Profits Compensation"). The Credit Funding Agreement further provides that the amount of Net Profits Compensation owed to Mr. Small for a certain year is not reduced based on Credit Funding's losses in subsequent years.

An email from Naftali Manela ("Manela")—PPCO's CFO, *see Landesman*, 17 F.4th at 307—confirms that Mr. Small was owed $130,000 in unpaid Net Profits Compensation for the years 2012 and 2013, despite the fact that Credit Funding suffered a loss in 2014. The Receiver does not dispute Mr. Manela's calculation of Mr. Small's Net Profits Compensation for 2012 and 2013, and there is no dispute that Mr. Small was not paid this $130,000 in Net Profits Compensation.

Rather than just accept Mr. Manela's calculation, the Receiver attempts to re-engineer the calculation by arguing that Mr. Small is not entitled to his 2012 and 2013 Net Profits Compensation based on losses that Credit Funding incurred in 2014 and 2015. The Receiver's position is directly contrary to the terms of the Credit Funding Agreement, and it should therefore be rejected.

1. The Credit Funding Agreement Entitles Mr. Small Net Profits Compensation

As reflected in the Credit Funding Agreement, Mr. Small was a Member of Credit Funding, owning a minority 0.455% stake. (ECF No. 598-34 (Cyganowski Decl. Ex. 35) at 9 §2.1, 14.) The Credit Funding Agreement further provided that no Member shall have personal liability for Credit Funding's losses or debts. (*Id.* at 9 § 5.)

Section 6.2 of the Credit Funding Agreement governed the terms of Mr. Small's compensation for his membership interest. (*Id.* at 10 § 6.2.) This provision provided that Mr. Small was entitled to Net Profits Compensation, calculated annually, pursuant to a specified formula. Specifically, Section 6.2 provided: "***At the end of each calendar year***, the Managing Member shall allocate ***for such calendar year*** (subject to a 'high water mark,') 2.45% of New Net Profit of [Credit Funding] to David Levy's capital account and 4.55% to Dan Small's capital account (the 'Performance Allocation')." (*Id.* (emphasis added).) As to the "high water mark" limitation, the Credit Funding Agreement provided that: "The 'high water mark' shall be calculated using the aggregate New Net Profit and net losses from all subsidiaries of the Managing Member for which David Levy and Dan Small act as Portfolio Manager (collectively, the 'Relevant Subsidiaries')." (*Id.*)

Significantly, the "high water mark" limitation did not impact Mr. Small's Net Profit Compensation in prior years, but only acted to potentially reduce Mr. Small's Net Profits Compensation in future years:

> The "high water mark" provides a benchmark so that no Performance Allocation will be allocated to the Portfolio Manager until all ***prior*** net losses of the Relevant Subsidiaries have been recouped by New Net Profit of one or more Relevant Subsidiaries. New Net Profit will not be reduced by the Performance Allocation allocable to such Interest or distributions or redemptions paid during the relevant period.

(*Id.* (emphasis added).) In other words, a net loss in 2014 would not impact Mr. Small's Net Profits Compensation for 2012 or 2013, but would reduce any Net Profits Compensation to which he would be entitled for 2015.

2. Mr. Manela Determines that Mr. Small Is Owed $130,000 in Net Profits Compensation for 2012 and 2013

In an email exchange on March 2015, Mr. Small asked Mr. Manela to confirm the amount of Net Profits Compensation that he is owed for 2012 and 2013 after he received a copy of his

2014 K-1. (*Id.* at 16-17.) Specifically, Mr. Small asked Mr. Manela to confirm the amount of compensation that he was owed for 2012 and 2013, indicating that Mr. Small's numbers showed "$95,380 still unpaid. (*Id.* at 16.) Mr. Manela responded that Mr. Small's numbers were low, stating: "I'm actually showing unpaid of around 130k before PNL [profit and loss] for 2014 (Prbbly [sic] a residual from prior years as well)." (*Id.*)

Mr. Manela also commented that Mr. Small had a net loss for 2014. (*Id.* ("Then during 2014 you negative pnl of approximately 250k.").) Given this comment Mr. Small asked Mr. Manela to confirm his understanding of the Credit Funding Agreement that PPCO Master Fund and Credit Funding cannot clawback Net Profits Compensation from a prior year based on a net loss from a subsequent year. (*Id.* ("I know my IMA is subject to a high water mark. Is there a claw back provision as well?").) Consistent with the clear terms of the Credit Funding Agreement, Mr. Manela confirmed that there is "[n]o clawback." (*Id.*)

3. The Receiver Denies Mr. Small's Claim

Mr. Small timely filed a proof of claim which asserted that PPCO and Credit Funding were liable to him for $130,000 in unpaid Net Profits Compensation. (ECF 598-33 (Cyganowski Decl. Ex. 34); ECF 598-34 (Cyganowski Decl. Ex. 35).)

On March 9, 2021, the Receiver filed a Claims Analysis Report with the Court objecting to Mr. Small Claims 24 and 227 on the basis of "No liability – No amounts owed." (ECF No. 564-1 at 10.) Mr. Small objected to this determination in a letter dated April 22, 2021. (ECF No. 598-53 (Cyganowski Decl. Ex. 47) at 2-3.)

ARGUMENT

I. THE COURT SHOULD REJECT THE RECEIVER'S DISALLOWANCE OF THE LEGAL EXPENSE CLAIMS

The Court should reject the Receiver's disallowance of the Legal Expense Claims because its prior ruling that Mr. Small is entitled to indemnification and advancement under the Credit Funding Agreement is the law of the case. In addition, the plain meaning of the indemnification provisions of the Credit Funding Agreement, the PPCO Limited Partnership Agreement, and the PPLO IMAs entitle Mr. Small to indemnification for all legal fees and costs incurred in connection with the Criminal Proceeding and this SEC enforcement action. The Court should also reject the Receiver's assertion that Mr. Small should be required to allocate his legal fees and costs between the various Platinum entities because the Receiver should not be permitted to rewrite the Indictment and SEC Complaint in order to support her apportionment arguments.

A. The Court Already Ruled that Mr. Small Is Entitled to Indemnification and Advancement under the Credit Funding Agreement

As the Receiver acknowledges, the Court "previously determined that . . . [Mr.] Small [is] entitled to some measure of advancement and indemnification." (Receiver Br. at 20.) The Court's prior decision is the law of the case, and the Court should therefore reject the Receiver's argument that Mr. Small is not entitled to any indemnification for his legal fees.

In deciding Mr. Small's motion to compel the Receiver to advance payment for his attorneys' fees and costs in the parallel criminal proceeding, the Court ruled that Mr. Small (and Mr. Levy) had a right to indemnification and advancement of his legal fees under the Credit Funding Agreement. (ECF 417 at 4-5 ("Levy and Small are entitled to advancement of their legal fees under the Credit Funding Agreement.").) The Court reiterated this ruling in the January 22, 2020 Minute Entry Order, when it ruled as to Mr. Levy that: "The Court maintains that . . . Levy [is] entitled to indemnification." (1/22/20 Minute Entry Order (citing ECF 417).)

The Court's ruling that Mr. Small is entitled to indemnification and advancement under the Credit Funding Agreement is therefore the law of the case and not subject to challenge by the Receiver. As the Receiver acknowledges, "the '[law of the case] doctrine posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.'" (Receiver Br. at 41 (quoting *Liona Corp. v. PCH Associates (In re PCH Associates)*, 949 F.2d 585, 592 (2d Cir. 1991)). Accordingly, the Court should reject the Receiver's argument that Mr. Small is not entitled to any indemnification under the Credit Funding Agreement pursuant to the law of the case doctrine.

B. The Plain Meaning of the Relevant Indemnification Agreements Entitle Mr. Small to Indemnification on His Legal Expense Claims

As the Receiver does not appear to dispute, the plain meaning of the indemnification provisions of the Credit Funding Agreement, PPCO Limited Partnership Agreement, and the PPLO IMAs entitle Mr. Small to indemnification for legal fees and costs that arise out or relate to his work as a portfolio manager for PPCO and PPLO, respectively. The Receiver instead claims, based on a skewed reading of the Indictment, that the Criminal Proceeding "had little, if anything, to do with . . . [Mr.] Small's work for any Receivership Entity" (Receiver Br. at 26), and seeks to deny Mr. Small indemnification for legal and costs related to the SEC enforcement action—which is based on the same theory as the Criminal Proceeding—for the same reason (*see id.* at 31). As the Court is aware, both the Criminal Proceeding and SEC enforcement action are integrally intertwined with Mr. Small's work as a portfolio manager of PPCO and PPLO. The Receiver's argument is not only frivolous, but contrary to the Receiver's own actions in allowing the Black Elk bankruptcy trustee's claim against PPCO and PPLO based on their conduct in the alleged Black Elk Bond Scheme.

Specifically, Mr. Small's duties for Credit Funding included serving as the co-portfolio manager of PPCO. *See Landesman*, 17 F.4th at 305 ("Platinum [defined to include PPCO] was a significant investor in Black Elk. Levy and Daniel Small – another portfolio manager at Platinum – co-managed Platinum's position in [Black Elk]."). The Credit Funding Agreement granted broad indemnification rights to Mr. Small, requiring both Credit Funding and PPCO Master Fund to indemnify Mr. Small for all legal fees and costs incurred in any investigation or criminal or civil proceeding arising out of or relating to his duties as PPCO's portfolio manager, regardless of whether Mr. Small remained in that capacity at the time of the investigation or proceeding. (ECF 598-35 (Cyganowski Decl. Ex. 36) at 12 § 11.2 (entitling Mr. Small to indemnification for "Damages suffered or incurred "in the course of serving in any office or other capacity of, or otherwise representing or acting for or on behalf of [Credit Funding]").)

In addition, the PPLO IMAs both entitled Mr. Small to indemnification of his legal fees and costs incurred in any investigation or criminal or civil proceeding arising out of or relating to his duties as PPLO's portfolio manager. The PPLO Entities IMA required PPLO Master Fund and the PPLO Fund US to indemnify Mr. Small against any losses, including legal fees and costs, incurred by reason of "the fact that the Investment Manager was or is a portfolio manager to each of the Funds." (ECF 598-43 (Cyganowski Decl. Ex. 39) at 12 § 5(a).) The Small PPLO IMA similarly required the PPLO Portfolio Manager, as well as the PPLO funds, to indemnify Mr. Small against any losses, including legal fees and costs, "relating to [Mr. Small's] performance or participation in the performance of duties or the rendering of advice or consultation with respect to [the PPLO Portfolio Manager]." (ECF 598-61 (Cyganowski Decl. Ex. 55) § 5(a).)

The Receiver argues that the Court should deny Mr. Small's Legal Expense Claims, arguing that the Criminal Proceeding and SEC enforcement action are unrelated to Mr. Small's

work as a portfolio manager for PPCO and PPLO. (Receiver Br. at 26, 31.) As is evident from the Receiver's papers, however, the Receiver's analysis of these charging documents is sloppy and self-serving. For example, in her declaration, the Receiver wrongly states that the Indictment as to Mr. Small is "based upon allegations that the criminal defendants, including . . . Small, caused assets of PPVA (not of any of the Receivership Entities) to be overvalued and concealed a liquidity crisis at PPVA" (ECF 597-1 (Cyganowski Decl.) ¶ 55), when, in fact, Mr. Small was not charged in the so-called Fraudulent Investment Scheme (*see, e.g.*, Indictment ¶ 42). The Receiver repeats this incorrect assertion in her brief in support of the motion. (*See* Receiver Br. at 26 (stating that "the criminal defendants 'engaged in two separate schemes'" including the "scheme to defraud investors and prospective investors in funds managed by Platinum").)

In fact, both the Indictment and SEC complaint are integrally intertwined with Mr. Small's work as a PPCO and PPLO portfolio manager. As the Court is aware, the Black Elk Bond scheme is alleged as an integrated scheme designed to benefit all of the Platinum entities that held preferred equity in Black Elk, including the PPCO and PPLO. (*See, e.g.*, Indictment ¶¶ 73-87.) The alleged scheme is based on Mr. Small's work for all the "Platinum" entities (*see, e.g.*, *id.* ¶¶ 73, 75), and Mr. Small's work for PPCO and PPLO are featured prominently in the Indictment. In fact, the central alleged omission underlying the Black Elk Bond Scheme is the failure to disclose the Black Elk bonds owned by PPCO and PPLO in the consent solicitation allegedly to enable PPCO, PPLO, and other Platinum entities to redeem their Black Elk preferred equity ahead of the Black Elk bondholders. (*See, e.g.*, Indictment ¶¶ 81-85.) In fact, the only entity specifically referenced in the Indictment as receiving these allegedly illicitly gained proceeds was PPCO. (*Id.* ¶ 86 (alleging that more than $24.6 million in illicit proceeds were wired to PPCO).) While Mr. Small maintains his innocence as to all charges against him and as the Court is aware the allegations concerning

the use of PPCO and PPLO votes to pass the consent solicitation has been demonstrated to be false, Mr. Small has and must continue to defend his alleged conduct which is directly attributable and related to his role as a portfolio manager for PPCO and PPLO and therefore falls clearly within the indemnification provisions of the Credit Funding Agreement, PPCO Limited Partnership Agreement, and PPLO IMAs. Mr. Small's legal fees and costs in connection with the SEC enforcement action, which is similarly premised on the Black Elk Bond Scheme, are likewise covered by these indemnification provisions.

Moreover, the Receiver's claim as to the absence of any relationship between the alleged Black Elk Bond Scheme and PPCO and PPLO is further belied by the Receiver's own conduct in allowing the Black Elk bankruptcy trustee's claim against PPCO and PPLO based on their conduct in the alleged Black Elk Bond Scheme. Specifically, the Black Elk bankruptcy trustee brought fraudulent conveyance claims against PPCO and PPLO in an adversary proceeding based on the same allegations underlying the Black Elk Bond Scheme. (Levine Decl. Ex. 6 ("Black Elk Trustee Complaint").) Among other things, the Black Elk Trustee Complaint described the "lynchpin" of the alleged fraudulent transfer scheme as "mak[ing] it appear that a majority vote of unaffiliated and disinterested Senior Secured Not Holders consented to amend the Indenture." (*Id.* ¶ 8.) Contrary to her assertion here as to the lack of any meaningful relationship between PPCO and PPLO and this alleged scheme, the Receiver entered into a settlement agreement with the Black Elk Trustee to resolve the adversary proceeding in which the Receiver agreed that the Black Elk Trustee was entitled to allowed claims against the PPCO and PPLO Receivership estates in the amounts of $24,600,584.31 and $5,000,000, respectively. (ECF 598-63 (Cyganowski Decl. Ex. 56) ¶¶ 1.1-1.2.) The Receiver's own actions thus belie her assertion against Mr. Small that the

alleged Black Elk Bond Scheme "had little, if anything, to do with . . . [Mr.] Small's work for any Receivership Entity." (Receiver Br. at 26.)

Accordingly, the Court should reject the Receiver's assertion as to the absence of a relationship between the allegations in the Indictment and SEC Complaint and Mr. Small's work as a PPCO and PPLO portfolio manager. The Court should therefore conclude that Mr. Small is entitled to indemnification under the Credit Funding Agreement, PPCO Limited Partnership Agreement, and the PPLO IMAs.

C. There Is No Requirement to Allocate or Apportion the Legal Expense Claims Among the Various Platinum Entities

The Court should reject the Receiver's assertion that Mr. Small's Legal Expense Claims should be denied because he was required to allocate fees and costs between the various Platinum entities. The Receiver seeks to rewrite the Government's Indictment and SEC Complaint in arguing that Mr. Small's legal fees and costs can and should be apportioned among the various Platinum entities. (*See* Receiver Br. at 32-36.) But the simple fact is that no apportionment is possible or required because the Government and SEC chose not to distinguish between Mr. Small's work for the various Platinum entities. Rather, the Indictment and the SEC Complaint alleged an integrated scheme designed to collectively benefit all of the Platinum entities who held Black Elk bonds without distinguishing between the various Platinum entities. (*See, e.g.*, Indictment ¶¶ 73-87.) For example, the Indictment described the scheme as involving "misrepresentations and omissions about, among other things, Platinum's ownership of and control over the BE Bonds" (*id.* ¶ 73), and as being designed "to bypass the [Black Elk] Bondholders' rights and misappropriate the proceeds of Black Elk's asset sales for Platinum's benefit through deceptive means." (*Id.* ¶ 75.) In each of these instances, "Platinum" refers to all of the Platinum funds that held Black Elk preferred equity, including PPCO and PPLO.

The Receiver's allocation argument conflates Mr. Small's indemnification rights with any rights of contribution that the Receiver may have against other indemnitors. *See Levy v. HLI Operating Co., Inc.*, 924 A.2d 210, 221 (Del. Ch. 2007) ("indemnification differs from contribution because it places the entire burden of a loss upon the party ultimately liable or responsible for it, and by whom the loss should have been discharged initially."); *Chamison v. HealthTrust, Inc.*, 735 A.2d 912, 918-24 (Del. Ch. 1999) ("As a general rule, in the absence of contractual language to the contrary, two insurers who insure the same person for the same risk must share the loss. If one insurer pays the full amount of a claim, it may seek contribution of one half from the other."). Where, as here, Mr. Small, as indemnitee, has concurrent indemnification rights under multiple agreements with different indemnitors, he is entitled to seek indemnification in full from any one of the indemnitors without any requirement to allocate or apportion his legal expenses. *See Chamison*, 735 A.2d at 918-24 (holding that an indemnitee under separate indemnification agreements with different indemnitors that indemnified him related to services for two different entities "had the right to legal counsel and to expect either [indemnitor] to pay his full litigation costs").

In fact, the Delaware Chancery Court in *Chamison* commented that accepting an allocation argument similar to that made by the Receiver here "would undermine the very purpose of indemnification." *Id.* at 925. The court stated:

> If a corporation thought it could escape the responsibility of indemnifying a director on the chance that the entire obligation could be shifted to another contractually obligated indemnitor, the director would suffer the same lack of protection that indemnification under [Delaware law] is intended to prevent. Thus, I conclude that [both indemnitors]—as voluntary, contractual indemnitors of [the indemnitee]—were equally responsible for [the indemnitee's legal] bills under the permissive provisions of [Delaware law].

Id.; *see also Hibbert v. Hollywood Park, Inc.*, 457 A.2d 339, 343–44 (Del. 1983) ("[t]he invariant policy of Delaware legislation on indemnification is to 'promote the desirable end that corporate

officials will resist what they consider' unjustified suits and claims, 'secure in the knowledge that their reasonable expenses will be borne by the corporation they have served if they are vindicated.'") (quoting Ernest L. Folk, III, *The Delaware General Corporation Law* 98 (1972)).

The cases cited by the Receiver in support of her argument are each distinguishable. (*See* Receiver Br. at 32.) Unlike here, they involved a charging document or complaint that did not charge an integrated scheme, but clearly set forth both indemnified and non-indemnified conduct. *See Fasciana v. Elec. Data Sys. Corp.*, 829 A.2d 160, 172-73 (Del. Ch. 2003) (sole indemnitor was liable for some of the alleged conduct, specifically, the indemnitee's conduct as an agent of indemnitor); *Happy Kids, Inc. v. Glasgow*, 01-CV-6434, 2002 WL 72937, at *4 (S.D.N.Y. Jan. 17, 2002) (where allegations involved both indemnified conduct (violation of fiduciary duties) and non-indemnified conduct (fraud in the inducement), sole indemnitor was liable for indemnified conduct only); *Booth Oil Site Admin. Grp. v. Safety-Kleen Corp.*, 137 F. Supp. 2d 228, 232, 238 (W.D.N.Y. 2000) (sole indemnitor was liable to directors and officers sued for indemnified conduct that occurred in their official capacity, but not for non-indemnified conduct in their individual capacity).

Moreover, the Court should reject the Receiver's allocation arguments under equitable principles based on the Receiver's unprincipled and seemingly retaliatory conduct. Specifically, despite the fact that the Receiver initially determined that two of Mr. Small's Legal Expense Claims should be partially allowed (*see* ECF 564-1 (Receiver's Claims Analysis Report) at 6 (allowing $983,017.17 on Claim 230 and $45,500.84 on Claim 231)), she reversed course in the Motion and argues that they should be disallowed in their entirety based solely on the fact that Mr. Small "objected to the [Receiver's] allocation in the Claims Analysis Report" (ECF 597-1 (Cyganowski Decl.) ¶ 170; *see also* Receiver Br. at 32 (arguing despite the Receiver's findings in

the Claims Analysis Report that Mr. Small's Legal Expense Claims "should be disallowed in their entirety")). Mr. Small had every right to raise objections to the Receiver's Claims Analysis Report, and there is no justification for the Receiver's punitive response to his exercise of this right, especially given that the Receiver's proposed allocation method has no basis in the facts of this case or the law.

As to the Receiver's proposed allocation, the Receiver asserts, without any support, that the Court should allocate based on a "formula of the *pro rata* share of the purported total assets under management across PPCO, PPLO and non-Receivership entity PPVA, as of the end of 2015, the last full year before the commencement of the Receivership." (Receiver Br. at 34.) The Receiver cites no case using this allocation method in the indemnification context (*see* Receiver's Br. at 34 & n.11 and n.12 (citing an administrative decision and article discussing allocating expenses between affiliated funds), and there is absolutely no connection between the amount of assets under management of the various Platinum funds at the end of 2015 and the Black Elk Bond Scheme. Again, the Receiver's argument conflates Mr. Small's right to indemnification with any potential contribution rights that the Receiver may have.

Accordingly, the Court should reject the Receiver's assertion that Mr. Small's Legal Expense Claims should be denied because he was required to allocate fees and costs between the various Platinum entities.

D. The Receiver Is Required to Reserve Funds for Mr. Small's Future Legal Fees and Costs

As the only case cited by the Receiver demonstrates (*see* Receiver Br. at 37-38), the Receiver is required to retain sufficient reserves to cover any future legal fees and costs that Mr. Small may incur in defending against the criminal case and SEC enforcement action. In *SEC v. Byers*, 671 F. Supp. 2d 531 (S.D.N.Y. 2009), the court addressed the proper procedure when a

receiver is responsible for an unmatured and contingent claim—like Mr. Small's claims for future legal expenses. *Id.* at 541. The court directed the receiver "to retain sufficient reserves within the estate to satisfy the pro rata share of any future liability to [the claimant], should it become due." *Id.* Mr. Small previously provided the Receiver with an estimate of his contingent claim, and to the extent the Court's decision regarding certain contested issues discussed herein affects the reserve amount that would be 'reasonable and appropriate,' Mr. Small suggests that Mr. Small and the Receiver confer on the reserve amount following the Court's resolution of these issues. Accordingly, in finalizing the plan of distribution, the Receiver should be directed to include an allowed contingent claim in favor of Mr. Small against PPCO and PPLO. Pursuant to the Court's decision that Mr. Small is entitled to advancement of his legal fees under the Credit Funding Agreement, the Receiver should further be directed to advance funds from this reserve as Mr. Small incurs additional legal fees and costs.

II. THE COURT SHOULD REJECT THE RECEIVER'S DISALLOWANCE OF THE ARBITRATION AWARD CLAIM

The Court should reject the Receiver's disallowance of Mr. Small's Arbitration Award Claim based on a straightforward application of the unambiguous provisions of the Arbitral Award. The Court should further conclude that to the extent the PPLO Portfolio Manager Receivership estate is not able to satisfy its creditor claims in full, it must submit a claim in the PPLO funds Receivership for the amount it owes Mr. Small pursuant to the Arbitral Award.

A. The Arbitrator Determined that PPLO Portfolio Manager Was Jointly and Severally Liable for the Entire Arbitral Award

The Receiver's objection to Mr. Small's claim is based on the flawed premise that the Arbitral Award contains an ambiguity as to whether PPLO Portfolio Manager and PMNY are jointly and severally liable for the entirety of the Arbitral Award. It does not. In both the decisions relating to the Interim Award and the Partial Final Award, the Arbitrator made clear that both

PPLO Portfolio Manager and PMNY owed Mr. Small the full amount of the award. Notably, neither PPLO Portfolio Manager or PMNY raised any concern about ambiguity with the Arbitrator in objecting to the Interim Award, and PMNY stipulated that it was liable for the full Arbitral Award, plus additional pre-judgment interest, in the Confirmation Proceeding.

Specifically, the Arbitrator concluded in the Interim Award that:

> Claimant Daniel Small ("Small" or "Claimant") has established that Respondents [PMNY] and [PPLO Portfolio Manager] (collectively "Platinum" or "Respondents"), owe him bonus compensation in the amount of $7,916,482.25 plus prejudgment interest.

(*See* ECF 598-37 (Cyganowski Decl. Ex. 37.2) at 2.) The Arbitrator provided the parties with the opportunity to object to the Interim Award, and both Mr. Small and PPLO Portfolio Manager and PMNY made certain applications to the Court, including an application by PPLO Portfolio Manager and PMNY to reopen the arbitration hearing to submit additional evidence. (*Id.* at 3-4.) Neither PPLO Portfolio Manager nor PMNY, however, argued that the Interim Award was indefinite or ambiguous because it was unclear as to whether it imposed the entire award against them or failed to allocate the award amount between them. (*Id.*)

As with the Interim Award, the Arbitrator ruled in the Partial Final Award that Mr. Small was entitled to bonus compensation, attorneys' fees and costs, and prejudgment interest in the total amount of $9,566,326.92 "against "***Respondents*** [defined as PPLO Portfolio Manager and PMNY]." (ECF 598-40 (Cyganowski Decl. Ex. 37.5) at 10-11 (emphasis added) (footnote omitted).) Moreover, the Partial Final Award refers to PPLO Portfolio Manager and PMNY collectively throughout the decision as "Respondents" or "Platinum," further making clear that his rulings and the Arbitral Award is against both of them collectively. (*See, e.g.*, ECF 598-37 (Cyganowski Decl. Ex. 37.2) at 2, 4; ECF 598-39 (Cyganowski Decl. Ex. 37.4) at 8; ECF 598-40 (Cyganowski Decl. Ex. 37.5) at 10-11.)

Ignoring the context in which the decision was issued, the Receiver argues that the Arbitrator's ruling is ambiguous merely because he did not use the words "joint and several" in imposing liability against both PPLO Portfolio Manager and PMNY. But the Arbitrator's failure to use those words does not render his decision ambiguous. The Southern District of New York rejected a similar argument in *BSH Hausgerate v. Kamhi*, 291 F. Supp. 3d 437 (S.D.N.Y. 2018). In that case, the arbitrator similarly did not use the words "joint and several" in ruling that "Claimants should bear the entirety of the costs of these proceedings." *Id.* at 443. The court held that the arbitrator's decision to refer to both claimants as a single party "demonstrates a decision not to apportion—in other words, to create joint and several liability." *Id.* at 444. It therefore concluded that the arbitrator's award was "not ambiguous." *Id.* at 444-45. Notably, the Arbitrator here similarly referred to PPLO Portfolio Manager and PMNY collectively as a single party in issuing the award and throughout his decision.

The two cases cited by the Receiver in a footnote on this issue are both distinguishable because the underlying arbitral decision in each had some other inconsistency that rendered the award ambiguous. (*See* Receiver Br. at 55 n.20.) In *NYKCool A.B. v. Pacific Fruit, Inc.*, 10-CV-3867, 2011 WL 3666579 (S.D.N.Y. Aug. 9, 2011), the court referenced an unpublished decision (that the Receiver declined to attached) that found that the underlying arbitration award was insufficiently definite to confirm because "the arbitrators 'failed either to apportion . . . liability between the respondents or to determine that the respondents were jointly and severally liable.'" *Id.* at *2 (alteration in original) (quoting Levine Decl. Ex. 7 (unpublished decision in *NYKCool A.B.*)). The unpublished decision, however, demonstrates that that the basis for the court's conclusion was that interpreting the arbitral award to find that it imposed joint and several liability "would be inconsistent with the arbitrators having left the allocation to the respondents, an exercise

that would have been meaningless if the arbitrators intended that both respondents would be liable jointly and severally for the entire amount." (Levine Decl. Ex. 7 (unpublished decision in *NYKCool A.B.*).) Similarly, in *Urquhart v. Kurlan*, 16-CV-2301, 2017 WL 781742 (N.D. Ill. Feb. 28, 2017), the court found the award to be ambiguous as to whether liability was joint and several because the decision inconsistently referred to several respondents in both the singular and plural and, in particular, used the singular term "Respondent" in the award section. *Id.* at *3. No such inconsistency is present here, as the Arbitrator collectively referred to PPLO Portfolio Manager and PMNY as "Respondents" or "Platinum" throughout the decision. In addition, the fact that PMNY stipulated that it was liable for the full Arbitral Award, plus additional pre-judgment interest, in the Confirmation Proceeding provides further evidence that the Arbitral Award in not ambiguous. (*See* Levine Decl. Ex. 4 at 3.)[5]

The Court should also reject the Receiver's argument that PPLO Portfolio Manager has no obligation to pay the Arbitral Award until it is confirmed against PPLO Portfolio Manager because it runs counter to the Receiver's previous actions. On November 17, 2016, within one year of the Arbitral Award and prior to the commencement of this matter, Mr. Small filed the Confirmation Proceeding against PMNY and PPLO Portfolio Manager in New York State Supreme Court. (*See* Levine Decl. Ex. 2.) The Receiver's counsel served as counsel of record for PPLO Portfolio Manager and participated in the state court hearing where the confirmation proceeding against PPLO Portfolio Manager was stayed because of the federal court order obtained by the Receiver.

[5] As evidenced in the cases cited by the Receiver, to the extent the Court disagrees and concludes that there is an ambiguity in the Arbitral Award, the proper remedy is to remand this issue to the Arbitrator to seek clarification of his decision. (*See, e.g.*, Levine Decl. Ex. 7 (remanding the matter to the arbitrators for clarification).) The Receiver provides no support for her assertion that the Court should rule on this issue in the first instance and allow the parties to re-litigate this issue in this proceeding.

(*See, e.g.*, Levine Decl. Ex. 3.) Given this conduct, the Receiver cannot now disclaim liability by arguing that the Arbitral Award was not confirmed against PPLO Portfolio Manager, where it was stayed precisely because of the Receivership. Such a position would effectively convert the stay order into a dismissal of Mr. Small's claims against PPLO Portfolio Manager in contravention of the very purpose of the mandate of this Receivership to ensure an orderly liquidation of assets to rightful claimants, including Mr. Small.

In addition, while the Receiver argues that she "is not seeking to challenge the merits of the Arbitration Award itself" (Receiver Br. at 54), her brief belies that argument and makes clear that she is seeking to relitigate before this Court the issues decided against PPLO Portfolio Manager by the Arbitrator. Indeed, the Receiver's brief wrongly argues that Mr. Small has consented to the jurisdiction of this Court to re-litigate the issues already decided by the arbitrator, and devotes a whole section of brief to arguing that the Court should find, without the benefit of any testimony or the full record before the Arbitrator, that the Arbitrator incorrectly failed to allocate Mr. Small's damages between PPLO Portfolio Manager and PMNY. (*See, e.g.*, Receiver Br. at 55-56, 58-61.) The Receiver provides no support for her argument that she should be permitted to re-litigate Mr. Small's breach of contract claim here or that the Court has the equitable power to disregard the Arbitrator's decision.[6]

[6] "Judicial review of [arbitral] awards is 'severely limited, so as not to frustrate the twin goals of arbitration, namely, settling disputes efficiently and avoiding long and expensive litigation.'" *Aksman v. Greenwich Quantitative Research LP*, 20-CV-8045, 2021 WL 4443148, at *7 (S.D.N.Y. Sept. 28, 2021) (quoting *Scandinavian Reins. Co. v. Saint Paul Fire & Marine Ins.*, 668 F.3d 60, 71-72 (2d Cir. 2012)). The petitioner must do more than show that the panel committed a serious error, and the court must confirm the award "'[i]f there is even a barely colorable justification for the outcome reached.'" *Id.* (internal quotation marks omitted) (quoting *Willemijn Houdstermaatschappij, BV v. Standard Microsys. Corp.*, 103 F.3d 9, 13 (2d Cir. 1997)).

Moreover, the entire premise for the Receiver's assertion that Mr. Small somehow consented to this Court's jurisdiction to re-litigate his breach of contract claim because he is seeking other contractual relief under the Small PPLO IMA is misleadingly wrong. (*See* Receiver Br. at 55 (arguing that Mr. Small is seeking to enforce contractual rights under the Small IMA to have the PPLO Funds pay for the arbitral award).) As the Receiver well-knows and as is demonstrated further in the following section, Mr. Small is not bringing a breach of contract claim or seeking to impose liability in this proceeding in the first instance under the Small PPLO IMA. To the contrary, Mr. Small asserts only that, under the PPLO Entities IMA, PPLO Portfolio Manager, as a creditor of the PPLO funds, must submit a claim to the PPLO funds for the amount that it owes Mr. Small to the extent the PPLO Portfolio Manager receivership estate is not able to satisfy the Arbitral Award.

Accordingly, the Court should reject the Receiver's assertion that the Arbitral Award contains any ambiguity and conclude based on the plain text of the decision that PPLO Portfolio Manager is liable to Mr. Small for the entirety of Arbitral Award.

B. PPLO Portfolio Manager Must Submit a Claim to the PPLO Funds for the Amount that It Owes Mr. Small to the Extent the PPLO Portfolio Manager Receivership Estate Is Not Able to Satisfy the Arbitral Award

Under Section 11 of the PPLO IMA, the PPLO funds are contractually obligated to reimburse PPLO Portfolio Manager for the amounts it owes to Mr. Small under the Arbitral Award. (Cyganowski Decl. Ex. 37.6 at 10, § 11(c) ("Each of the Funds shall also bear its pro rata share of the performance fees and/or allocations paid to Portfolio Managers and other persons who render services to the Master Funds or the Investment Manager.").) To the extent the PPLO Portfolio Manager receivership estate is not able to satisfy its creditor claims in full, it must submit a claim in the PPLO Receivership for the amount it owes Mr. Small pursuant to the Arbitral Award. The Court appointed the Receiver "for the purposes of marshaling and preserving all assets" of the

Receivership entities, including PPLO Portfolio Manager. (*See, e.g.*, ECF 6 (Order Appointing Receiver) at 1.) The Receiver is therefore required to preserve its contractual right to reimbursement from the PPLO funds through the filing of a claim on behalf of PPLO Portfolio Manager against these funds. *See New York Life Ins. Co. v. Waxenberg*, 07-CV-401, 2009 WL 632896, at *5 (M.D. Fl. 2009) (citing *Kermit Const. Corp. v. Banco Credito y Ahorro Ponceno*, 547 F.2d 1,3 (1st Cir. 1976) as noting that a "Receiver must *carefully* and faithfully carry out orders of the appointing judge").

III. THE COURT SHOULD REJECT THE RECEIVER'S DISALLOWANCE OF MR. SMALL'S UNPAID COMPENSATION CLAIMS

The Court should reject the Receiver's disallowance of the Unpaid Compensation Claims based on Mr. Manela's undisputed calculation that Mr. Small's was owed $130,000 in Net Profits Compensation for 2012 and 2013. (ECF No. 598-34 (Cyganowski Decl. Ex. 35) at 16.) While the Receiver does not dispute Mr. Manela's calculation, it argues that Mr. Small's claim should be disallowed because his 2012 and 2013 Net Profits Compensation should be reduced by net losses that Credit Funding incurred in 2014 and 2015. The Credit Funding Agreement is governed by Delaware law. (ECF No. 598-34 (Cyganowski Decl. Ex. 35) at 12 § 13.2.) Because the Receiver's argument is refuted by the unambiguous terms of the Credit Funding Agreement, the Court should reject the Receiver's disallowance of Claims 24 and 227. *See Sunline Commercial Carriers, Inc. v. CITGO Petroleum Corp.*, 206 A.3d 836, 846 (Del. 2019) ("To determine what contractual parties intended, Delaware courts start with the text. When the contract is clear and unambiguous, we will give effect to the plain-meaning of the contract's terms and provisions . . .") (citations omitted).

The Receiver made no calculation of the amount of Net Profits Compensation owed to Mr. Small for the years prior to 2014. (*See* Receiver's Br. at 63-64.) Rather, the Receiver argues

that the Court should conclude that Mr. Small is owed no Net Profits Compensation for those years based on Credit Funding's net losses and evidence concerning his capital account balances in 2014 and 2015. (*Id.*) Credit Funding net losses in 2014 and 2015 have no bearing on the amount of Net Profits Compensation for prior years pursuant to the compensation provision of the Credit Funding Agreement.

As shown above, while the compensation provision provided that Credit Funding's net losses in a given year would impact Mr. Small's Net Profits Compensation in future years, it had no impact on the Net Profits Compensation that he had already earned in prior years. Specifically, the compensation provision provided that Mr. Small's Net Profits Compensation was required to be calculated "[a]t the end of each calendar year . . . for such calendar year." (ECF No. 598-34 (Cyganowski Decl. Ex. 35) at 10 § 6.2.) Although Mr. Small's Net Profits Compensation was subject to a "high water mark" limitation that reduced his compensation based on years in which Credit Funding incurred a net loss, the Credit Funding Agreement expressly provided that the high water mark limitation only took "***prior*** net losses" into consideration and therefore did not act to reduce the Net Profits Compensation that Mr. Small had already earned in prior years. (*Id.* (emphasis added).) To use Mr. Manela's words, there were "[n]o clawbacks" in the compensation provision. (*Id.* at 16.)

The Receiver's brief demonstrates a complete lack of understanding of the clear terms of the compensation provision. In fact, the Receiver cites Mr. Manela's statement in his email that Mr. Small ended 2014 with a negative profit and loss account, while ignoring Mr. Manela's statement that 2014 has no impact on the Net Profits Compensation owed to Mr. Small for years prior to 2014. (*See* Receiver Br. at 64.)

The Receiver's remaining arguments do not bear on Mr. Small's entitlement to the $130,000 in Net Profits Compensation. The Receiver makes arguments as to whether Mr. Small in the past should have received annual distributions of the compensation owed and whether Credit Funding and PPCO violated their fiduciary duties to Mr. Small in not paying him the Net Profits Compensation while distributing over $10 million to itself. (*Id.* at 64-65.) But regardless of whether this is true, the fact remains that Mr. Small is currently owed $130,000 and his claim should therefore be allowed. The Receiver also argues that Mr. Small provided no evidence that he was entitled to Net Profits Compensation for 2015 or thereafter. (*Id.* at 65.) Mr. Small, however, is not arguing that he is entitled to Net Profits Compensation for any years following 2013.

Accordingly, the Court should reject the Receiver's disallowance of Mr. Small's Unpaid Compensation Claims because the undisputed evidence shows that Mr. Small is owed $130,000 in Net Profits Compensation.

IV. MR. SMALL'S CLAIMS HAVE PRIORITY OVER THE PPCO AND PPLO EQUITY HOLDERS AND THE RECEIVER SHOULD BE DIRECTED TO MAKE PRO RATA DISTRIBUTIONS TO HIM PRIOR TO HIS UPCOMING TRIAL

A. Mr. Small Is *In Pari Passu* with the Other Unsecured Creditors and His Claims Have Priority over PPCO and PPLO Investors

Under the governing fund documents and the Court's prior decisions, the Receiver is required to treat Mr. Small the same as every other unsecured creditor in this case and grant his claims priority status over the claims of PPCO and PPLO equity holders. As the Receiver acknowledges, Mr. Small is not claiming at this stage of the proceedings that his Claims have priority over the claims of other unsecured creditors. (*See* Receiver Br. at 46 (noting that Mr. Small check the "No" box on his proof of claim forms when asked if all or part of these claims are secured).) The Receiver nevertheless makes a priority argument that wrongly asserts that

Mr. Small is seeking to relitigate his status vis-à-vis the other unsecured creditors (he is not). (*See* Receiver Br. at 38-48.) In fact, the Receiver's focus on the other unsecured creditors is little more than a thinly-veiled attempt to have the Court issue a ruling on an uncontested issue containing *dicta* that the Receiver can later use to support her unjustified attempt to subordinate Mr. Small's claims to those of PPCO's and PPLO's investors. (*See, e.g.*, *id.* at 46 (stating that "It would therefore not only be legally impermissible, but inequitable to grant such a priority at this juncture, which would, as a matter of pure economics, result in a distribution of substantially all the receivership's current cash to these Claimants (and those seeking indemnification on similar grounds), while leaving nothing for other creditors and ***investors***.") (emphasis added).)

Specifically, in support of her law of the case argument, the Receiver mischaracterizes the Court's rulings on Mr. Small's and the other claimants' advancement claims as "twice before determin[ing] that [the legal expense] payments are not entitled to be afforded priority over the interest of creditors and ***investors***." (Receiver Br. at 39 (emphasis added).) The Court's rulings on the advancement motions, however, did not contain any findings concerning Mr. Small's priority status vis-à-vis PPCO and PPLO investors. Rather, the Court held only that "the former officers' rights to advancement of legal fees do not have priority over the claims of ***unsecured creditors***" based on the principle of Delaware law that "claims for advancement of legal fees are treated the same as the claims of ***unsecured creditors***." (ECF 417 at 6-9 (emphasis added).) The Court reiterated this ruling in the January 22, 2020 Minute Entry Order, stating that Mr. Levy and Mr. SanFilippo "must wait for payment alongside the other ***unsecured creditors***." (1/22/20 Minute Entry Order (emphasis added).) Given that the Receiver litigated the advancement related motions and later in her brief accurately quotes from the Court's decisions in relation thereto (*see*

Receiver's Br. at 40-41), it raises concerns that the Receiver's mischaracterization of the Court's decisions as extending to "***investors***" was deliberate as opposed to an inadvertent error.

Continuing with the straw man argument, the Receiver argues, without support, that "the Court has already twice decided that the provisions in the governing agreements of the Receivership Entities do not divest the Receiver of her authority to determine the timing and priority of distributions, and its rulings are law of the case." (*See* Receiver's Br. at 42.) The Court, however, made no such rulings, and the Receiver's assertion that she has the equitable power to disregard the priority provisions of PPCO's and PPLO's contractual 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, 386 (1920). As such, "the [law] and the language of the agreements, rather than the law of federal equity receivership, govern the dispute." *SEC v. Credit Bancorp, Ltd.*, 386 F.3d 438, 446 (2d Cir. 2004); *SEC v. Credit Bancorp, Ltd.*, 279 F. Supp. 2d 247, 261 (S.D.N.Y. 2003); *see also SEC v. Spongetech Delivery Systems, 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 the Receiver acknowledges, PPCO's and PPLO's fund documents give the unsecured creditors priority status over the funds' investors in the event of a liquidation. (*See* ECF 598-58 (Cyganowski Decl. Ex. 52) § 7.02)(c) (establishing order of distributions in the event of a PPLO dissolution that gives creditors priority over the partners (*i.e.*, investors)); ECF 404-2 (Exhibit submitted in support of David Levy's Motion to Compel Advancement of Legal Fees) § 9.2(b)

(establishing order of distributions in the event of a PPCO dissolution that gives creditors priority over the partners (*i.e.*, investors)).) As such, every PPCO and PPLO investor was informed and agreed that all creditors, including the unsecured creditors, would have priority status over them in a liquidation proceeding. The Receiver therefore has no basis on which to abrogate or disregard Mr. Small's contractual and property rights in favor of the investors.

The Receiver's reliance on a footnote in the district court decision in *SEC v. Byers*, 637 F. Supp. 2d 166, 183 (S.D.N.Y. 2009), *aff'd sub nom. SEC v. Malek*, 397 F. App'x 711 (2d Cir. 2010) and *SEC v. Orgel*¸ 407 F. App'x 504 (2d Cir. 2010), as support for her assertion that this Court is free to disregard the contracts to which the investors agreed is also misplaced. (*See* Receiver Br. at 46 n.16.) In one of the decisions affirming *Byers*, the Second Circuit made clear that the district court had acted within its allowable discretion in approving the liquidation plan because there was no "indication that any non-victim creditors of the [receivership entities] had any interest in the estate that would have been protected by bankruptcy proceedings but that were impaired by the liquidation plan." *Malek*, 397 F. App'x. at 715.[7] Moreover, the Receiver's position, in any event, is contrary to the law of this Circuit cited above holding that the Receiver may not abrogate Mr. Small's contractual and property rights under the guise of equity.[8]

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[7] The Receiver also relies on the out-of-circuit decision in *SEC v. Quan*, 870 F.3d 754, 762 (8th Cir. 2017), in support of her assertion that the Court may disregard Mr. Small's contractual and property rights in distributing the assets of the Receivership. (*See* Receiver's Br. 42.) *Quan*, however, is distinguishable because it addressed the rights of different classes of defrauded investors (not creditors) under a document that contained the fraudulent statements at issue. *Quan*, 870 F.3d at 761-62 ("The distinction between Class A and P investors was immaterial because "investor losses were not caused by market risk," but rather "by Defendants' false promises about anti-fraud protections that were never implemented—a risk that no investor knowingly assumed.").

[8] Although not raised by the Receiver, there is no basis on which to equitably subordinate Mr. Small's claims because Mr. Small's alleged misconduct, even accepting the Government's and SEC's allegations as true, did not cause injury to other creditors. *See Spongetech*, 98 F. Supp. at 551 (stating that a party raising a claim of equitable subordination must establish, *inter alia*, that

Finally, the Receiver again attempts to dodge the Court's prior adverse rulings on the issue of indemnification and advancement in arguing that:

> It would be imprudent to grant the Disputed Claims a priority, pay them, and then have to try and reclaim the funds once a disqualifying or subordination event takes place, leaving nothing for other creditors and investors unless and until the Receiver is successful in reclaiming those funds.

(Receiver Br. at 47.) The Receiver, however, is bound by the Court's prior rulings as the law of the case and her arguments, if accepted, would frustrate the very purpose of Mr. Small's right to advancement. *See, e.g.*, *Galante v. Queens Borough Public Library*, 15-CV-6267, 2016 WL 4573978, at *2 (E.D.N.Y. Sept. 1, 2016) ("The purpose of advancement is to allow directors [and officers] to defend themselves by ensuring that they can access funds to pay for legal fees during the pendency of the lawsuit.") (alterations in original) (citation and internal quotation marks omitted). The Receivership has been in effect for nearly half decade. The Receiver has not distributed a single penny to unsecured creditors while distributing almost $29 million in fees to herself and her attorneys and agents. Equity and fairness dictate the Receiver, at the very least, be directed to submit her plan of distribution by the end of the month and then, assuming the Court accepts the plan, allocate and make distributions to Mr. Small on all of his Claims by January 15, 2022, to allow him to prepare for his upcoming criminal trial.

B. Mr. Small Is Now Entitled to Advancement

Despite his entitlement to advancement, Mr. Small has had to defend himself for years against the Criminal Proceeding and SEC action without the resources contractually owed to him by the PPCO and PPLO Receivership estates. Mr. Small's criminal trial is approximately two-

"the misconduct caused injury to the creditors or conferred an unfair advantage on the claimant"). Here, Mr. Small's actions allegedly caused PPCO and PPLO to receive assets from Black Elk, and they therefore allegedly increased the assets available for distribution to PPCO's and PPLO's creditors.

and-a-half months away, and the Receiver should now be directed to advance him the legal fees and costs to which he is entitled in order to mount an effective defense.

In the event the Receiver does not obtain Court approval for the plan of distribution by January 15, 2022, the Receiver should be required to advance Mr. Small his pro rata share of entitled legal fees pursuant to the Credit Funding Agreement based on the then-existing determination of allowed claims of other unsecured creditors. In her Claims Analysis Report the Receiver allowed $32 million of non-duplicative unsecured claims against PPCO Receivership Entities. There are less than eight claimants disputing the Receiver's determinations. (Receiver Br. at 2). Mr. Small has incurred legal fees of approximately $2.85 million which he is entitled to advancement per the Credit Funding Agreement. At a minimum, the Receiver should advance Mr. Small the pro rata share of his advancement claims relative to all other undisputed admitted unsecured claims against PPCO Receivership Entities plus all disputed unsecured claims assuming the amount in dispute is resolved in favor of the claimants.[9] This requirement will fairly and equitably balance the interests of other unsecured creditors and that of Mr. Small to adequately defend himself in the Criminal Proceeding.

[9] An adjustment can be issued if claims are subsequently resolved more favorably to the Receivership.

CONCLUSION

For the foregoing reasons, the Court should deny the Receiver's Motion to confirm her determination as to Claims 24 and 227-232, allow these Claims in their entirety, order the Receiver to submit her plan of distribution by the end of the month, make distributions to Mr. Small on his indemnification advancement claims as set forth above by January 15, 2022, and grant such further and other relief as may be just and proper.

Dated: New York, New York
December 13, 2021

Respectfully Submitted:

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