**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF NEW YORK**

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

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

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Melanie L. Cyganowski, as Receiver,[1] respectfully submits this Reply Memorandum[2] in further support of her Motion to Confirm Her Determinations Regarding Certain Claims (Dkt. Nos. 597-600 and 602-03).[3]

## PRELIMINARY STATEMENT

The Claimants' oppositions are a study in contrasts. On the one hand, O'Brien, the attorneys for the one fully acquitted defendant, SanFilippo, recognize that he is only entitled to indemnification by entities he actually worked for, and therefore the Receiver's allocation was correct (if not overly beneficial to him), despite incorrectly asserting a priority. On the other hand, Levy, his counsel Wilson, and Small, all continue to press for: (i) indemnification for all of their expenses even if not remotely related to the Receivership Entities; (ii) those claims to be given priority over all others with a stake in this Receivership; (iii) establishment of tens of millions of dollars in reserves which would stop the Receivership in its tracks until they have exhausted all of their appeals; and (iv) payment of other non-indemnification claims to which they are not entitled. For these reasons, the Court should enter an order granting the Receiver's Motion.[4]

## ARGUMENT

### I. LEVY'S UNSUPPORTABLE INDEMNIFICATION CLAIM.

Unlike O'Brien's concession, Levy continues to press for payment of $8.7 million in legal fees to date plus a reserve for millions in future fees, in spite of: (i) his conviction for securities fraud; (ii) his admission that the majority of his fees related to matters on which he was convicted

[1] All capitalized terms not defined herein shall have the meanings ascribed by the Declaration of Melanie L. Cyganowski, as Receiver, in Support of the Motion (Dkt. No. 597-1) (the "***Cyganowski Dec***.") and the Amended Memorandum of Law in Support of the Motion (Dkt. No. 602) (the "***Memo.***").

[2] This Reply does not address each argument raised in opposition to the Motion, only the most egregious, and the Receiver's decision not to address an argument raised by a Claimant should not be viewed as a concession thereto.

[3] Dkt. Nos. 597-600 and 602-03 are collectively referred to as the "***Motion***."

[4] A revised proposed order is annexed hereto.

and which bear no relation to the Receivership Entities; (iii) the matters for which he was acquitted bearing little or no relation to the Receivership Entities; and (iv) his receipt of over $3 million from insurance paid for by the Receivership.

As established by the Motion, the Second Circuit Decision precludes indemnification in favor of Levy under the unambiguous terms of the Operating Agreements. Memo. 3-4, 7, 11-20, 30, 37. In response, Levy and Wilson argue that "Levy was fully acquitted of all the Platinum-based charges" and is "entitled to indemnification for that part of the case." Levy 15.[5] Yet, this ignores that: (i) Levy is not entitled to indemnification for "that part of the case" irrespective of his conviction because by his admission it was unrelated to the Receivership Entities; and (b) the conviction demonstrates his bad faith and ineligibility for 100% priority indemnification as sought.

While Levy claims 8 Del. Code §145(c) ("***§145***") entitles him to mandatory indemnification, that statute requires the person indemnified to be an "officer or director" of the entity indemnifying him and restricts indemnification to expenses that are "reasonably incurred." So, even if Levy is correct that the conviction only eliminates indemnification for the Black Elk charges on which he was convicted (and he is not), he is still not entitled to indemnification because he was not an officer of any Receivership Entity on or before December 31, 2014, thereby precluding any recovery for any of the charges that arose from acts that occurred before that date. Memo. 26. Moreover, even the "Platinum based charges" are based primarily upon allegations that Levy, among others, caused assets of PPVA (not Receivership Entities) to be overvalued and concealed a liquidity crisis at PPVA, not PPCO. *Id.*; Indictment, Dkt No. 599-66, ¶¶ 54-72.

Further, at all times thereafter, he held himself out as having the title of Co-Chief

[5] References to "***Levy __***" are to the Memorandum of Law of Defendant David Levy and Non-Party Claimant Wilson Sonsini Goodrich & Rosati, P.C. in Opposition to The Receiver's Omnibus Motion to Confirm Claims Determinations. Dkt. No. 610.

Investment Officer of each of PPVA Portfolio Manager and PPCO Portfolio Manager. Rogers Dec. ¶¶ 10(C)-(E). At *minimum*, those dual roles require an allocation amongst the Receivership and non-Receivership entities for post January 1, 2015 actions that were at issue at trial, and Levy and Wilson conceded as much when, on June 21, 2019, Levy proposed that SHIP advance 65% of fees in the Criminal Case, which he claimed were incurred in connection with the Black Elk criminal claims and "SHIP's PPVA Northstar-related investments." Cyganowski Dec. ¶ 93 & Dkt. 598-83, 22. Because 65% of Wilson's fees in the Criminal Case were admittedly expended to defend the criminal claims in the Black Elk Scheme (on which Levy was convicted and arise out of pre-2015 conduct) or the "SHIP's PPVA/Northstar investments" (unrelated to the Receivership Entities), Levy and Wilson have admitted that indemnification by the Receivership Entities is not proper for *at least* 65% of Wilson's fees in the Criminal Action. The remainder is subject to the allocation explained in the Motion (*i.e.*, 64% to PPVA, 34% to PPCO, 2% to PPLO, meaning at most, Levy would have a $1,035,300 claim against PPCO and $60,900 against PPLO). Memo. 34.

Moreover, because he already received $3,283,990 in insurance paid for by the Receivership, Levy has already been compensated for any indemnifiable expenses he "reasonably incurred" in defense of those counts, justifying the Receiver's decision. Cyganowski Dec. ¶ 87.

## II. WILSON IS NOT ENTITLED TO PAYMENT UNDER THE WILSON LETTER OR OTHERWISE.

Wilson may not contract around the Operating Agreements' prohibition of indemnification for Levy, and ruling in Wilson's favor would have profound public policy consequences — requiring indemnification by an entity for someone who did not work for that entity and/or would otherwise be barred from indemnification due to their misdeeds.

***First***, in *Blankenship v. Alpha Appalachia Holdings, Inc.*, 2015 WL 3408255, at *19-20 (Del. Ch. May 28, 2015), the Court held that a law firm's engagement letter cannot be used to

grant unconditional indemnification obligations without regard to "the scope of indemnification that a Delaware corporation may lawfully undertake." Here, Wilson seeks to use the Wilson Letter to avoid the Operating Agreements' prohibitions on indemnification for non-Receivership matters and/or for matters on which the indemnitee acted fraudulently or in bad faith, as Levy did.

***Second***, the Wilson Letter is unenforceable because, notwithstanding §145(f), under the public policy set forth in §145(a), "a Delaware corporation lacks the power to indemnify a party who did not act in good faith." *Mayer v. Exec. Telecard, Ltd.*, 705 A.2d 220, 225 (Del. Ch. 1997) (citing *Waltuch v. Conticommodity Servs., Inc.*, 88 F.3d 87, 95 (2d Cir. 1996) (charter provision "which would require indemnification of [a corporate official] even if he acted in bad faith, is inconsistent with §145(a) and thus exceeds the scope of a Delaware corporation's power to indemnify"). *See also Sun-Times Media Grp., Inc. v. Black*, 954 A.2d 380, 404 n.93 (Del. Ch. 2008) (contract may not grant indemnification rights "'contrary to the limitations or prohibitions set forth in the other section 145 subsections, other statutes, court decisions, or public policy'") (quoting *Cochran v. Stifel Fin. Corp.*, 2000 WL 286722, at *18 (Del. Ch. Mar. 8, 2000), *rev'd on other grounds*, 809 A.2d 555 n.6 (Del. 2002)); *SN Liquidation, Inc. v. Icon Int'l, Inc.* (*In re SN Liquidation, Inc.*), 388 B.R. 579, 584 n. 5 (Bankr. D. Del. 2008) ("under Delaware law, 8 Del. Code § 145, fraud may vitiate indemnification obligations"). Thus, Delaware's public policy, embodied in §145(a) and reflected in the Operating Agreements, precludes use of the Wilson Letter to indemnify Levy's bad faith conduct for which he was convicted of securities and wire fraud.

***Third***, in *Charney v. Am. Apparel, Inc.*, 2015 WL 5313769, at *14 (Del. Ch. Sept. 11, 2015), the Court explained that, "[a]lthough 8 Del. C. § 145(f) allows corporations to provide indemnification rights via contract, … such contractual provisions must comply with the requirements … in subsections 145(a) and (b) that a person must be made a party to a proceeding

'by reason of the fact' that he or she is or was a director, [or] officer, … of the corporation[.]" Thus, even if Wilson were correct that allocation was not considered or agreed to in the Wilson Letter (Levy 23), that agreement would be unenforceable because the Operating Agreements restrict indemnification to defense of acts while employed by, or for the benefit of, that particular entity, and enforcing the letter as Wilson asks would endorse breaching those agreements.

***Fourth***, contrary to what Wilson claims (Levy 22 n. 10, 23), the Wilson Letter does not state or imply that the Receivership Entities agreed to indemnify Levy, or pay Wilson for fees incurred defending Levy for actions he performed for non-Receivership Entities.

***Fifth***, while this Court recognized the Wilson Letter, the Court did not expressly address whether the Receivership Entities are obligated for fees relating to acts performed by Levy on behalf of Beechwood, PPVA Portfolio Manager, the PPVA Funds, PPVA Black Elk, or the Black Elk Scheme, or whether such an agreement is permissible under Delaware law. Adv. Op. I, 4-5.

***Sixth***, in referring to "investigations being conducted by the United States Attorneys' Offices … and matters related thereto" (Dkt. No. 598-88, 1), the Wilson Letter does not come close to saying that it covers the Civil Cases or criminal charges arising out of services performed for the Beechwood entities. Moreover, it provides that if there are criminal charges, "we will then have a further discussion about a more substantial retainer to be posted on Mr. Levy's behalf," demonstrating that it was not meant to give Wilson *carte blanche* in its representation of Levy. *Id*.

***Seventh***, Wilson's summary of its communications with the two Receivers belies an assertion that either ever affirmatively accepted that the Wilson Letter imposed an obligation on the Receivership Entities to indemnify Levy or to pay Wilson. Instead, Wilson merely asserts that the Prior Receiver and the Receiver *knew* of the existence of the Wilson Letter and did not immediately disavow it. Levy 18. However, mere knowledge of the letter would not bind the

Receiver or the Receivership Entities because a receiver is not bound until she/he has affirmed a contract and assumed its burdens. *Pacific Western Oil Co. v. McDuffie*, 69 F.2d 208, 213 (9th Cir. 1934). *See Menke v. Wilcox*, 275 F. 57, 58-59 (S.D.N.Y. 1921) (Hand, J.). Mere inaction does not equal adoption as Levy and Wilson argue. Ralph E. Clark, A Treatise on the Law and Practice of Receivers, § 428(a), p. 722 (3d ed. 1992).[6]

***Finally***, the Receiver expressly rejected Wilson's demands for advancement on several occasions including: (i) in a letter dated April 13, 2018; (ii) in a letter dated September 25, 2018[7]; (iii) in opposing motions for advancement and indemnification; and (iv) despite Wilson's current assertion that the Receivership Entities were required to pay its bills for all of its services for anything within 15 days of receipt, the Receiver (along with the Prior Receiver before her), never authorized or paid a cent of Wilson's bills over a five-year period. Sommer Dec. ¶¶ 22-26, 29-30, Dkt. No. 611; Dkt. 404-8, 404-9, 404-10. Wilson proceeded to bill millions of dollars in additional fees at its own risk in the face of the Receiver's disaffirmance.

## III. SMALL IS NOT ENTITLED TO INDEMNIFICATION OR ADVANCEMENT.

Small is not entitled to indemnification because the crimes for which he stands accused had nothing to do with the Receivership Entities, and regardless, his relationship to any Receivership Entity entitling him to indemnification is tenuous at best.

***First***, Small is only charged with what the Indictment refers to as the "Black Elk Bond Scheme", a matter wholly unrelated to his work as an officer or director of a Receivership Entity or for the benefit of a Receivership Entity. Memo. 26-28 (Indictment ¶¶73-87, 99-105).

[6] *See also SEC v. Churchville*, 2016 WL 3816373, at *3 (D.R.I. July 12, 2016) ("for a pre-receivership contract to bind a receiver, 'the receiver must positively indicate his intention to take over the contract'"); *Janvey v. Alguire*, No. 3:09-CV-0724-N, 2014 WL 12654910, at *7-11 (N.D. Tex. July 30, 2014), *aff'd*, 847 F.3d 231 (5th Cir. 2017).

[7] While Wilson claims that "the Receiver now took the position that any payment under the Wilson [Letter] would have to await the Receiver's distribution plan," (Levy 9), the Receiver did not say or imply payment would be made.

Specifically, Small had: (i) no relationship to any of the PPCO Receivership Entities (other than Credit Funding, which itself has no material relation to the allegations or proceedings against Small in any of the cases); (ii) a minimal relationship with the PPLO Funds as a portfolio manager; and (iii) was the Vice President and Secretary of PPVA Black Elk, a Delaware corporation, of which PPVA, not PPCO, owned 100% of the shares. Rogers Dec. ¶¶ 11(A)-(C).

***Second***, Small's opposition fails to refute these facts and instead, relies on the "law of the case" to argue that, in Adv. Op. I, the Court determined that Credit Funding's governing agreement entitles him to indemnification. Small 20-21.[8] However, the sentence he relies on was analyzing whether the language of the agreement gave Levy, Small, SanFilippo and Mann any advancement rights at all, not whether those rights covered the allegations in any particular case.

***Third***, Small distorts references to "Platinum" (which includes the PPVA, PPCO and PPLO funds), in the Second Circuit Decision and in the Indictment by inferring that every reference to "Platinum" therein refers to PPCO or PPLO. From this, Small erroneously concludes that because he was a "portfolio manager" and an employee of "Platinum" he must have been an employee and portfolio manager of PPCO, and that because Small "co-managed Platinum's position in [Black Elk]," he did this for PPCO and PPLO. Small 5-6. Small can only summarily state that he "is also entitled to indemnification under Section 5.4(a) of the of PPCO's Third Amended and Restated Agreement of Limited Partnership" because "the only Platinum entity that the Indictment identifies by name as receiving a distribution of the proceeds of this asset sale is PPCO." Small 7, 10. This does not grant Small an indemnifiable position at a PPCO Receivership Entity or entitle him to indemnification under the PPCO Limited Partnership Agreement.

[8] References to "***Small __***" are to Small's Opposition to Receiver's Motion to Confirm Receiver's Determinations as to Claims 24 and 227-232 Filed by Daniel Small. Dkt No. 613.

Small plays the same shell game with PPLO, claiming that because the Second Circuit Decision states that "Platinum was a significant investor in Black Elk" PPLO was a significant investor in Black Elk. Small 7-8. According to Small, because he was a portfolio manager for PPLO, it would follow that Small is thereby entitled to indemnification under the PPLO investment management agreements. *See id.* Here, too, Small's argument relies on a false premise: just as "Platinum" does not automatically equate to PPCO, neither does it automatically mean PPLO, and certainly it cannot be both depending on which is most beneficial to Small.

***Fourth***, Small's argument that he managed PPCO or PPLO's investments in Black Elk fails because Small was the Vice President and Secretary of PPVA Black Elk, and PPVA Black Elk was wholly owned by PPVA. Rogers Dec. ¶ 11(D). Small purposely ignores that, as it relates to his alleged role in the Black Elk Scheme, Small worked for PPVA, the 100% owner of PPVA Black Elk, *not* PPCO or PPLO, who held no stake in PPVA Black Elk. *Id*.

***Fifth***, Small's attempt to associate himself with the Receivership Entities by citing the Prior Receiver's settlement with the Black Elk Trustee (Small 24-25) also fails because the Prior Receiver, the SEC, and the Black Elk Trustee entered the settlement agreement "to avoid the cost, expense, and uncertainty of litigation," (*see* Black Elk Settlement, Dkt. No. 598-63, p. 3), and such a resolution says nothing about what Small did for whom that would entitle him to indemnification.

***Finally***, if Small is convicted of the charges against him, he will be disqualified from indemnification eligibility for acting in bad faith by §145(a) and (c) and the relevant agreements.

## IV. THE INDEMNIFICATION CLAIMANTS ARE NOT ENTITLED TO PRIORITY DISTRIBUTIONS OR A RESERVE.

### A. The Operating Agreements Are Not Binding on the Receiver.

Levy and Wilson argue that the PPCO Feeder Funds' governing documents give Wilson's claims priority over those of other creditors, and that all of the Receivership Entities' governing

documents give creditors' claims priority over claims by equity holders. Levy 25-30. Small also argues any plan must give creditors' claims priority over those of equity holders. Small 37-40.

However, given an equity receiver's broad authority to distribute assets equitably, and even to approve plans of distribution that treat investors and unsecured creditors with the same priority for purposes of distributions, (*see SEC v. Byers*, 637 F. Supp. 2d 166, n.20 (S.D.N.Y. 2009), *aff'd sub nom. SEC v. Male*k, 397 F. App'x 711 (2d Cir. 2010) (citations omitted), and *aff'd sub nom. SEC v. Orgel*, 407 F. App'x 504 (2d Cir. 2010)), courts have approved plans of distribution that do not follow contractual priorities in a fund's governing agreements. *See, People v. Merkin*, 194 A.D.3d 657, 658 (1st Dep't 2021) (citing *SEC v. Wang*, 944 F.2d 80, 81 (2d Cir. 1991)), *leave to appeal denied*, 2021 WL 5934219 (N.Y. Dec. 16, 2021); *Cuomo v. Merkin*, 2020 WL 4016237, at *3 (Sup. Ct. N.Y. Cty. July 16, 2020); *Cf. In re Tremont Sec. L., State L. & Ins. Litig.*, 699 F. App'x 8, 15 (2d Cir. 2017); *SEC v. Hyatt*, 2016 WL 2766285, at *9 (N.D. Ill. May 13, 2016); *SEC v. McGinn, Smith & Co.*, 2016 WL 6459795, at *1, *4 (N.D.N.Y. Oct. 31, 2016); *SEC v. Enter. Tr. Co.*, 2008 WL 4534154, at *3 (N.D. Ill. Oct. 7, 2008), *aff'd*, 559 F.3d 649 (7th Cir. 2009). Thus, there is ample support for the Receiver's decision not to prioritize their claims.

***First***, due to its size, prioritizing Wilson's claim would have the practical effect of prioritizing Levy's indemnification claim over the claims of other unsecured creditors and investors. This would undermine the Court's rulings that "[t]he former officers have shown no compelling reason why they should get to jump the line," and that indemnification claims are "just two unsecured claims among many and they must wait for any payment alongside the other unsecured creditors" Adv. Op. 1, 1; Adv. Op. II; Levy 25-30.

***Second***, given Levy's criminal conviction, compensating him and Wilson ahead of innocent investors is repugnant to the purposes of "a responsible liquidation of assets and orderly

and fair distribution of those assets to investors," under the Receivership Order. Receivership Order 2. The same will be true of Small if convicted.

***Third***, due to: (i) the millions of dollars already paid for Levy, Small and SanFilippo's defense costs from insurance policies purchased using receivership assets (in SanFilippo's case totaling 56% of his costs); (ii) the Receiver's waiver of any entitlement to those insurance proceeds; (iii) the contribution of the criminal conduct proven by the government to the demise of the Receivership Entities; (iv) the SEC's pending enforcement action against both Levy and Small; (v) the massive amount of the indemnification claims; (vi) the limited amount of assets remaining in the Receivership Estate; and (vii) the large number of investor claimants, equity does not favor giving any of the Indemnification Claimants a priority over other creditors or anyone else.

***Fourth***, because none of the Indemnification Claimants holds a secured or administrative claim, Wilson, Levy and Small's reliance on *SEC v. Spongetech Delivery Systems, Inc.*, 98 F.Supp.3d 530, 549 (E.D.N.Y. 2015); *SEC v. Credit Bancorp, Ltd.*, 386 F.3d 438, 446-47 (2d Cir. 2004); and *Marshall v. New York*, 254 U.S. 380 (1920), is misplaced.[9]

***Finally***, while the Receiver's broad powers as an equity receiver permit her to treat creditors' claims and claims of investors the same, she requests that the Court defer on that issue to the plan confirmation stage, when investors will have standing to participate. For now, the Court should simply rule that the Indemnification Claimants do not have *any* priority.

### B. Wilson's Claims Do Not Have Priority Over Other Creditors.

Even assuming that the Receiver is bound by purported contractual priorities, Wilson's

[9] *Spongetech* merely held that an SEC receiver could not apply broad equitable principles to override a secured judgment. *See Spongetech*, 98 F.Supp.3d at 549; *SEC v. Quan*, 870 F.3d 754, 761 (8th Cir. 2017)). *Credit Bancorp*, involved whether a bank had a security interest under the UCC, not a claim of contractual priority. 386 F.3d at 446-7. Moreover, *Marshall*, 254 U.S. 380, did not involve a claim of contractual priority and enforced New York State's "prerogative right" to payment of franchise taxes and license fees regardless of whether such property is in the hands of the debtor or the custody of the court. *Cf. SEC v. Wealth Mgmt. LLC*, 628 F.3d 323, 334 (7th Cir. 2010).

argument that its claims have priority over other creditors fails. Levy 26-27. Wilson argues that Levy was a "Member" of PPCO Fund, and thus, PPCO Fund's operative agreement entitles Wilson to a priority. However, as stated above, the Receiver has disaffirmed any obligations under the Wilson Letter, and since Levy cannot, and did not, show he is a "Member" of any PPCO entity other than PPCO Fund, Wilson can hold this priority, at most, on obligations of PPCO Fund, not of the other PPCO feeder funds, PPCO Master Fund, PPCO Portfolio Manager, any PPLO Fund or PPLO Portfolio Manager. Wilson fails to show how the priority can apply to any fees arising out of actions taken by Levy for any other Receivership Entities, any PPVA entity, or the Beechwood Parties.[10] Moreover, because Wilson asserts that it was not "aware" of the applicable Operating Agreements at the time of the Wilson Letter, it cannot argue that it was not willing to accept a risk that it would be paid under the equitable principles of a receivership. Levy 5.

### C. O'Brien's Overstated Claim Is Not Entitled To Priority.[11]

While the Receiver appreciates that the only Indemnification Claimant who was actually fully acquitted is also the only one to recognize the propriety of the Receiver's allocation methodology to his indemnification claim, the claim is still not entitled to priority treatment.

Specifically, O'Brien — SanFilippo himself has not submitted an indemnification claim — clarifies that it has now "accepted the allocation the [Receiver] used in its Claims Analysis Report: approximately 34 percent of his total claims, or $922,863.04." O'Brien 2.[12] Provided that

[10] Wilson has not adequately supported its claim because it has not submitted a copy of Levy's engagement letter demonstrating his liability for their fees. Even if Levy did sign such an agreement, the two engagement letters would be separate debts – a direct obligation owed by Levy to Wilson on the retainer letter it executed and a separate and independent obligation allegedly owed by PPCO Fund to Wilson on the retainer letter it executed. O'Brien abandoned a similar argument because he cannot show that he was a Member of any PPCO Feeder Fund. *See* Dkt 490-5, 8.

[11] As noted in the Cyganowski Dec. at ¶ 147, it is only SanFilippo's lawyers who continue to press for payment, not SanFilippo himself. Despite SanFilippo never filing a claim for indemnification, O'Brien attempts to add him as a claimant. O'Brien 1 n.1. O'Brien's last-minute attempt to get around the Bar Date Order should be denied.

[12] References to "***O'Brien*** __" are to O'Brien's Memorandum of Law in Opposition to Receiver's Omnibus Motion. Dkt. No. 609.

O'Brien is not granted the priority to which it claims to be entitled, the Receiver will abide by her determination to grant O'Brien a non-priority claim for $922,863.04.[13]

O'Brien argues that in light of public policy favoring indemnification, the Court should "grant Mr. SanFilippo's allowed claim priority over the claims of all other unsecured creditors (including investors), and honor his claim in full" and annexes his mediation statement in which he asked the Receiver to do the same. O'Brien 3-4, 8-10.[14] But this Court rejected that argument when previously raised by SanFilippo, holding that "the former officers' rights to advancement of legal fees do not have priority over the claims of unsecured creditors" and SanFilippo (and Levy) were "just two unsecured claims among many and they must wait for any payment alongside the other unsecured creditors." Adv. Op. I, 9; Adv. Op. II.

O'Brien also argues that *In re RegO Co.*, 623 A.2d 92 (Del Ch. 1992), supports its request that the Court exercise its discretion to grant SanFilippo's indemnification a priority. In *RegO Co*. the Court determined that a proposed five-year limit of $500,000 per occurrence on claims against a post-dissolution trust should not apply to indemnification claims, reasoning that "[t]he express policy of Section 145 of the Delaware General Corporation Law provide[d] one ground" for granting a priority to indemnification claims, along with the effects of not doing so on "the innovative dissolution procedures of Sections 280-82." 623 A.2d at 101, 110-11. *RegO* is thus *sui generis* and does not override this Court's prior rulings that advancement claims (which are a subset of indemnification claims, *see Henson v. Sousa*, 2015 WL 4640415, at *1 (Del. Ch. Aug. 4, 2015)),[15] are not ahead of other unsecured claims, or *Andrikopoulos v. Silicon Valley Innov. Co.*,

[13] For the record, the Receiver believes that O'Brien's claim is overstated for, among other reasons, those set forth in the Memo. at 21-28 and O'Brien did not dispute any of the Receiver's conclusions in this regard.

[14] Mediation Statement of Claimant Joseph SanFilippo/Ford O'Brien LLP, Dkt. No. 609 at 1 ("***Med. Stmt.***").

[15] *Sousa* notes that 6 Del. C. § 18–108 "provid[es] that an LLC may provide for indemnification rights, of which advancement rights are a subset, in its LLC agreement." 2015 WL 4640415, at *1.

120 A.3d 19, 25 (Del. Ch. 2015), on which the Court relied. Adv. Op. I, 6. *RegO* does not override the Receiver's "mandate … 'to carefully craft a particularized plan to achieve the most equitable distribution possible'" and "to apply broad equitable principles subject to an abuse-of-discretion standard on appeal" (Med. Stmt., 3) (citing *Malek*, 397 Fed. Appx. at 715), as the Receiver has done in determining that, despite any public policy concerns favoring indemnification, it would be inequitable for O'Brien, which has already received $3,429,996 (equal to 56% of its legal fees) from directors and officers liability coverage funded with the Receivership Entities' assets to receive full payment ahead of other unsecured creditors and investors. Cyganowski Dec. ¶¶ 82-87. O'Brien should not be granted a priority.

**D. Levy, Wilson and Small Are Not Entitled to a Reserve.**

Put in the simplest terms, if the Claimants' are given a reserve, the Receivership will be frozen until they exhaust their appeals, perhaps years from now. This is because if their claims for fees already incurred would not themselves swamp the Receivership boat (Cyganowski Dec. ¶ 179), then Levy/Wilson's demand for a $13-17 million reserve and Small's demand for an $8-11 million reserve certainly would. *See* Receiver's Seventh Status Report, 11, Dkt. No. 591.

***First***, practical concerns aside, the Claimants are not entitled to a reserve, at least not 100%, for the same reasons they are not entitled to full indemnification. Memo. 21-36.

***Second***, Levy's argument that it is Wilson, not he, which is entitled to a reserve due to the Wilson Letter, is untenable. Levy 32. Because the Wilson Letter says nothing about a reserve Wilson pivots to rely on Section 10.2.1 of the PPCO operating agreements even though that argument is inconsistent with Wilson's repeated assertions that the Wilson Letter was a completely "separate obligation[]" from those obligations which "Platinum" owed to Levy. *Id.* 8-9. Said differently, in order to avoid the Operating Agreements' restrictions against indemnification, Wilson argues that the Wilson Letter stands on its own, but when it comes to establishing a reserve

and/or a priority, Wilson seeks the benefits of those agreements. Wilson cannot have it both ways.

***Third***, Small admits that the Receiver has identified the relevant precedent in *SEC v. Byers*, 671 F. Supp. 2d 531, 541 (S.D.N.Y. 2009), in explaining how unmatured and contingent claims should be reserved, to the extent they must be reserved at all. Small 28-29. There, because a claimant was determined to hold an unmatured and contingent claim, the *Byers* court directed the Receiver to hold a sufficient reserve to satisfy the claimant's future liability, but only to the extent that the reserve would satisfy the *pro rata* share of the future liability. *Byers*, 671 F. Supp. 2d at 541. Levy differs from Small and argues that the Receiver's intention to treat Wilson's claims with the same priority as other creditors and investors is "utterly flawed" given his insistence that he is entitled to a priority and demands a full, not *pro rata*, reserve. Levy 32. Levy's position that Wilson is unique is wrong. If anything, they must share with all other creditors and investors.

***Fourth***, the Receiver is charged to "estimate the amount of a Claim that is contingent, unliquidated, or unmatured for purposes of determining the allowed amount of an Approved Claim." Claims Process Order I.A.i. This is exactly what she has done. In the face of this, Levy cannot plausibly argue that following his conviction he may charge an additional $13-$17 million in legal fees in a potential second criminal trial and pending Civil Cases to the Receivership. He fails to justify this figure, but rather appears to now recognize its exaggeration, suggesting that the Receiver establish a reserve that is "reasonable and appropriate" under the PPCO Fund TE operating agreement to satisfy what Levy now clarifies is Wilson's claim. Levy 33.

***Fifth***, the Receiver's position on Levy's "contingent claim" is consistent with this Court's decisions. As this Court has explained on two occasions, "the former officers' rights to advancement of legal fees do not have priority over the claims of unsecured creditors" (Adv. Op. I, Dkt. No. 417, 9) and Levy's claim is just an "unsecured claim[] among many" (Adv. Op. II).

***Finally***, Small's request that, "[p]ursuant 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" (Small 29) is misplaced because, to the contrary, the Court has twice rejected claims for advancement. Adv. Op. I; Adv. Op. II.[16]

## V. THE BLACK ELK TRUSTEE'S "CLAIM" IS NOT YET RIPE.

The Receiver does not dispute that the Black Elk Trustee has a $24.6 million creditor claim against PPCO Master Fund and a $5 million creditor claim against PPLO Master Fund under a settlement agreement. Memo. 9. In opposition, the Black Elk Trustee no longer seeks priority over other creditors and instead claims only that "he should be paid ahead of any equity holders and that any equitable distribution should favor the Black Elk Trustee." Black Elk 7. Consequently, the only disagreement between the Receiver and the Black Elk Trustee involves whether, as a creditor, the Black Elk Trustee should be paid ahead of equity holders, which the Black Elk Trustee submits in order "to preserve its ability to argue that the Black Elk Trustee should be paid ahead of the equity holders of PPCO and PPLO." Black Elk 3 n. 1.[17] As established by the Motion, issues regarding whether unsecured creditors should be paid ahead of, or *pari passu* with, equity holders are premature at this time.[18] Supra, 10; Memo. 47.

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[16] At various places, Small makes assertions such as that "[t]he 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." Small 5. The Court certainly did not rule that Small was entitled to advancement – indeed, it ruled that he was *not* entitled to advancement.

[17] References to "***Black Elk __***" are to the Black Elk Trustee's Response to Receiver's Omnibus Motion. Dkt. 612.

[18] If the Court addresses this issue now, then the Second Circuit may approve a receiver's distribution plan that treats investors and unsecured creditors with the same priority for purposes of distributions. *See SEC v. Byers*, 637 F. Supp. 2d 166, n.20. Importantly, none of the cases that the Black Elk Trustee cites involved an equity receivership or held that a creditor was a third-party beneficiary of an operating agreement, a partnership agreement or a limited liability company agreement and none of those cases are on point. In *Bayerische Landesbank v. Aladdin Capital Mgmt LLC*, 692 F.3d 42, 54 (2d Cir. 2012), the agreement cited expressly provided that "such obligations shall be enforceable at the insistence of each Issuer, the Trustee on behalf of the holders of the relevant Notes, or the requisite percentage of holders of the relevant Notes on behalf of themselves, as provided in the relevant Indenture." Both *McClane v. Mass.*

## VI. LEVY'S OTHER CLAIMS SHOULD BE DISALLOWED.

The Receiver denied Levy's employee claims (Claims 292-301) because: (i) the claims lacked supporting documentary evidence, (ii) the claims failed to set forth the terms of Levy's employment, and (iii) the claims did not articulate how the amounts asserted in the claims were calculated. Memo. 48. Similarly, the Receiver denied Levy's loan claim (Claim 291) because: (i) the claim seeks repayment of a loan to a non-Receivership entity, (ii) Levy has failed to support his allegation that PPCO Portfolio Manager guaranteed the purported loan, and (iii) the purported term note upon which Levy's claim relies bears no signatures. Memo. 49.

Levy does not dispute the substance of the Receiver's determinations. Instead, Levy complains that the Receiver failed to provide him with evidence to support his claims. Levy 33. The Receiver, however, is not required to mount an expedition to substantiate Levy's claims. It is Levy's burden to support his claims and not the Receiver's, and Levy's questioning of the Receiver's efforts to identify evidence supporting his claims is a red herring because ***the Receiver made it clear to Levy during her attempts to voluntarily resolve his claims that the records and books the Receiver is in possession of do not show that Levy is entitled to his employee claims***. Levy meekly suggests that "if the Receiver will make available to us the database of Platinum documents," he will be able to find the documents "that would certainly satisfy the Receiver in this regard." Levy 34. Levy had every opportunity to ask the Receiver to make her records available to him in the past — either in the Receivership action since he should have realized he lacked documentation to support his claim or in *In re Platinum-Beechwood Litigation*, Case No.

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*Bonding & Ins. Co.*, 266 N.Y. 371-379-80 (N.Y. Ct. App. 1935) and *Merchants Mut. Cas. Co. v. U.S. Fidelity & Guaranty Co.*, 2 NYS2d 370, 373 (N.Y. Super. Ct. 1938), were cases against sureties. The Black Elk Trustee takes the passage he quotes from *Consol. Edison, Inc. v. Ne. Utilities*, 426 F.3d 524, 531 (2d Cir. 2005), completely out of context, and the Court held that the shareholders did not have the right to sue that they claimed to have. Moreover, *Mount Sinai Hosp. v. Loutsch*, 462 NYS2d 1004, 430-31 (N.Y. Civ. Ct. 1983), involved the question of whether tenants are considered third-party beneficiaries of regulatory agreements that impose duties on private landlords.

18-06658 (JSR), where the parties, including Levy, were offered full access to all of the Receiver's electronic and hard copy documents. Levy never asked to look because he knew he would not find any documents supporting his claims.

Levy does not dispute the remainder of the Receiver's justification for denying the non-Indemnification claims. Memo. 48-49. Thus, the claims should be disallowed.

## VII. SMALL'S OTHER CLAIMS SHOULD BE DISALLOWED.[19]

The Court should confirm the Receiver's decision to deny Small's Claim 229 because Small has failed to show, as is his burden, that joint and several liability between PPLO Portfolio Manager and PPVA Portfolio Manager was ever raised or litigated, much less decided, before the filing of Claim 229, so as to impose more than, at most, *pro rata* liability upon PPLO Portfolio Manager. Importantly, Small could not have asserted joint and several liability in the arbitration — absent allegations of piercing the corporate veil of the two distinct entities — because the contract upon which he relied provided that each entity was only obligated to Small for its *pro rata* share of the payment of his bonus.

Left with no other option, Small incorrectly portrays the Receiver's argument as seeking judicial review of the Arbitration Award on the basis that the Arbitration Award is "ambiguous" as to joint and several liability and an attempt to re-litigate issues decided by the Arbitrator in the Arbitration Award. Small 30, 33. That is wrong. To sustain that argument, Small would need to show that the issue of joint and several liability was raised, litigated, and decided in the arbitration, which it was not.[20] Because the relief Small seeks involves a core function of the administration

[19] In the Small Objection, Small sought accrued pre-judgment interest, for a total claim of $13,201,269.06. Small 2. However, Small now concedes that he is no longer seeking accrued pre-judgment interest and that his claim is limited to $9,566,326.92. Small 3, 16 n.4.

[20] Because the Confirmation Proceeding has been stayed as to PPLO Portfolio Manager, the time for the Receiver to object to confirmation has similarly been stayed. The Receiver reserves the right to object to confirmation of the Arbitration Award or cross-move for *vacatur* of the Arbitration Award.

of the Receivership, adjudication of Claim 229 should be centralized in the Receivership and the Court should accept the Receiver's determination that PPLO Portfolio Manager, and the funds it manages, are only obligated to Small for their *pro rata* share of his compensation, which is at most $27,535.43. Alternatively, the Court could apply the Receiver's *pro rata* allocation to the Arbitration Award, resulting in a claim of $191,326.53. Memo. 58-60.

### A. The Unconfirmed Arbitration Award Does Not Have Preclusive Effect in the Receivership As to Joint and Several Liability.

The unconfirmed Arbitration Award does not have preclusive effect in the Receivership as to the issue of joint and several liability, and Small has failed to show otherwise.[21]

#### 1. Elements 1 and 2: Small Has Failed to Show The Issue of Joint and Several Liability was Raised, Litigated, or Decided in the Arbitration Proceeding.

The issue of joint and several liability was not litigated by the parties or decided by the Arbitrator. The Statement of Claim that Small filed in the arbitration did *not* mention joint and several liability once. Dkt. No. 599-11. The Arbitration Award does *not* state that PPLO Portfolio Manager and PPVA Portfolio Manager are jointly and severally liable. Dkt. Nos. 598-37-40. In the petition to confirm the Arbitration Award in State Court, Small did *not* assert that PPLO Portfolio Manager and PPVA Portfolio Manager were jointly and severally liable to Small. Dkt. No. 614-2. Small has failed to show with "*clarity and certainty*" that he ever asserted that PPLO Portfolio Manager and PPVA Portfolio Manager had joint and several liability prior to his submission of Claim 229.[22] *Postlewaite*, 333 F.3d at 49 (emphasis in original).

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[21] The Second Circuit has stated that collateral estoppel applies when: "(1) the identical issue was raised in a previous proceeding; (2) the issue was actually litigated and decided in the previous proceeding; (3) the party had a full and fair opportunity to litigate the issue; and (4) the resolution of the issue was necessary to support a valid and final judgment on the merits." *Austin v. Downs, Rachlin & Martin Burlington St. Johnsbury*, 270 F. App'x 52, 53–54 (2d Cir. 2008). *Postlewaite v. McGraw-Hill*, 333 F.3d 42, 49 (2d Cir. 2003)

[22] Small is well aware of the importance of a *plaintiff* explicitly raising a claim of joint and several liability in a request for relief. Earlier this year, Small filed a petition for a judgment against the Estate of Uri Landesman, in which he sought to find Landesman "jointly and severally liable" for the stipulated judgment against PPVA Portfolio Manager arising from the Arbitration Award. *Small v. Estate of Landesman*, Index. No. 158492/2021 (N.Y. Supp. Ct. Sep. 15

Small's argument that the Arbitrator decided joint and several liability because the Arbitrator referred to PPLO Portfolio Manager and PPVA Portfolio Manager collectively in the Arbitration Award as "Platinum" or "Respondents," is incorrect because it assumes that Small actually asserted claims for joint and several liability in the arbitration, which he has not established. Moreover, Small has not shown that the Arbitrator's reference to them collectively as "Platinum" or "Respondents" was a reference to their joint and several liability.[23]

Small's citation to *BSH Hausgerate v. Kamhi*, is misplaced. 291 F. Supp. 3d 437 (S.D.N.Y. 2018. *Kamhi* is inapplicable because that decision was in the context of confirmation of a *foreign* arbitration award, where the court was sitting in "secondary jurisdiction," and did not have the authority to consider whether the arbitration award was "ambiguous" with respect to joint and several liability. *Id*. at 445-46. Here, Small is not seeking to confirm a foreign arbitration award, rather he is seeking to offensively use the unconfirmed Arbitration Award in the claims process.[24]

Even if this dispute was being litigated in the context of a confirmation proceeding (Memo. 55, n. 20), Small's attempts to distinguish *NYKCool* (Small 31) fail because he omitted the

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2021) (NYSCEF Doc. No. 1). While Small used the term "jointly and severally liable" in bringing claims against Landesman, he did not do so in bringing claims against PPLO Portfolio Manager in the arbitration.

[23] Small's assertions are also belied by the fact that in his Statement of Claim he referenced specific "Platinum" entities, while the Arbitrator described those entities generally in the Arbitration Award. (*Compare* Statement of Claim ¶33, Dkt. No. 599-12 ("[i]n September 2014, a wholly-owned subsidiary of PPVA acquired a 100 percent equity stake in … Northstar") *with* Arbitration Award, 35 ("In September 2014, the Funds made a significant investment of capital to acquire Northstar.")); (*Compare* Statement of Claim ¶35 ("PPVA's 'valuation summary' for the third quarter of 2014 … lists Small as the 'Portfolio Manager' for … Northstar") *with* Arbitration Award, 38 ("schedules prepared for the Platinum investors in the third and fourth quarters of 2014 identify Small alone as the portfolio manager for Northstar.") Moreover, Small recognized that PPVA Portfolio Manager and PPLO Portfolio Manager were distinct entities. Statement of Claim ¶¶ 22-24.

[24] Even if Small were seeking to confirm the Arbitration Award, which he is not, *Kamhi*, is inapplicable because a court with primary jurisdiction (i.e. a court sitting under the law where the award was made), has "much broader discretion to set aside an award" than a court sitting in secondary jurisdiction, such as the *Kamhi* court. *Id*. at 445, n.4. (citing *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 500 F.3d 111, 115 n.1 (2d Cir. 2007)). While "ambiguity" is not grounds for consideration of confirmation of a foreign arbitration award where a court sits in secondary jurisdiction, a court sitting in primary jurisdiction may refuse to enforce an award that is "incomplete, ambiguous or contradictory." *Id*. at 445, n.4. Small has failed to cite to any cases from courts sitting in primary jurisdiction in support of his argument regarding "ambiguity."

following reasoning from the decision: "Magistrate Judge Peck construed the award as intending to impose joint and several liability. I cannot agree with that interpretation. ***First the award does not in fact say that***." *NYKCool A.B. v. Pacific Fruit, Inc.*, 10-CV-3867 (S.D.N.Y. Apr. 1, 2011), Dkt. No. 27 (emphasis added); Dkt. No. 614-7. Here, like in *NYKCool*, the 95-page Arbitration Award does not mention joint and several liability once. *Urquhart v. Kurlan*, is not distinguishable because, here, joint and several liability cannot be "definitively resolve[d]" from the record and there, the petitioners expressly requested the arbitrator find joint and several liability, whereas here, no such request was made by Small. 2017 WL 781742, at *3 (N.D. Ill. Feb. 28, 2017).

**2. Element 3: Small Has Not Shown That PPLO Portfolio Manager Had a Fair and Full Opportunity to Litigate the Issue of Joint and Several Liability.**

Small has not shown that PPLO Portfolio Manager was given notice of a claim of joint and several liability, or an opportunity to offer evidence to the contrary, prior to Small filing Claim 229.[25] Small's assertion that PPLO Portfolio Manager should have raised the issue of joint and several liability during the arbitration proceeding (Small 30) is improper because such an argument inverts the burden of proof by requiring PPLO Portfolio Manager to have defended against claims that were never raised in the arbitration in the first instance.

Additionally, the stipulated judgment against PPVA Portfolio Manager entered in the Confirmation Proceeding for the full amount of the Arbitration Award does not have preclusive effects against PPLO Portfolio Manager with respect to the issue of joint and several liability (Small 15, 30, 32; Dkt. No. 614-4), because: (i) the stipulated judgment does not mention joint and several liability or contain findings of fact as to the issue of joint and several liability; and (ii)

[25] *Citcon USA, LLC v. MaplePay Inc.*, No. 19-CV-02112-NC, 2021 WL 1238231, at *15 (N.D. Cal. Apr. 2, 2021) (noting denial of post-verdict request for joint and several liability where parties did not "actually litigate the issue of joint and several liability").

PPLO Portfolio Manager was not a party to the consent judgment.[26] Because the Confirmation Proceeding was stayed against PPLO Portfolio Manager at the time of the stipulated judgment any adverse impact to PPLO Portfolio Manager would run afoul of the Receivership stay.

### 3. Element 4: Small Has Not Shown The Issue of Joint and Several Liability Was Necessary to Support a Valid and Final Judgment on the Merits.

Small has not shown that the issue of joint and several liability was necessary to support a valid and final judgment on the merits.[27] Small fails to even address that the contract upon which he relied provides that the payments of his compensation were to be paid by PPLO Portfolio Manager and PPVA Portfolio Manager "***on a pro rata basis***[.]" Dkt. 598-41, § 3(a), (d) (emphasis supplied). Memo. 51, 55. Moreover, the Arbitrator did not address the "*pro rata*" payment, leaving the issue of apportionment unresolved. *NYKCool*, 10-CV-3867; Dkt. No. 614-7.

Because PPLO Portfolio Manager had no duty or authority to pay Small for PPVA's share of his bonus, PPLO Portfolio Manager could not be jointly and severally liable to Small under the Small IMA.[28] Small's assertion of joint and several liability is a back-door attempt to pierce the corporate veil of the two discrete entities — relief that he did not seek in the arbitration or through the filing of Claim 229.[29] *Matter of Seagroatt Floral Co., Inc.*, 78 N.Y.2d 439, 450 (1991).

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[26] *Arizona v. California*, 530 U.S. 392, 414 (2000) (settlements ordinarily occasion no issue preclusion unless it is clear that the parties intend their agreement to have such an effect), *supplemented*, 531 U.S. 1 (2000); *Olaes Enterprises, Inc. v. A.D. Sutton & Sons, Inc.*, No. 09 CIV 8680 CM PED, 2010 WL 3260064, at *7 (S.D.N.Y. Aug. 6, 2010) (stating stipulation of settlement is not binding on third party who had no opportunity to litigate the issue).

[27] The Receiver disputes that a valid and final judgment has been entered. Although "res judicata and collateral estoppel apply to issues resolved by arbitration where there has been a final determination on the merits, notwithstanding a lack of confirmation of the award" (*Jacobson v. Fireman's Fund Ins. Co.*, 111 F.3d 261, 267-68 (2d Cir. 1997) (internal citations omitted)), "[u]nder New York law," however, "an arbitral award has preclusive effect only when it is final, *i.e.*, when (a) the award has been confirmed, (b) vacatur has been denied on the merits, or (c) no vacatur motion is pending and the time limit in which to file a vacatur motion has expired." (*Glob. Gold Mining, LLC v. Ayvazian*, 612 F. App'x 11, 13 (2d Cir. 2015) (summary order) (internal quotation marks and citations omitted)).

[28] *See* Restatement (Second) of Contracts § 288 ("Where two or more parties to a contract make a promise or promises to the same promisee, the manifested intention of the parties determines whether they promise that the same performance or separate performances shall be given."); Restatement (Second) of Contracts § 289.

[29] Small is well aware that to hold PPLO Portfolio Manager and PPVA Portfolio Manager jointly and severally liable, he would need to assert a cause of action for piercing the corporate veil. Indeed, in the cause of action seeking to hold

### B. Joint and Several Liability May Not Be Arbitrated.

#### 1. Small Consented to This Court's Jurisdiction and Waived his Right to Arbitrate Joint and Several Liability.

By filing Claim 229, Small explicitly consented to this Court's jurisdiction to resolve claims arising from the Arbitration Award. Dkt. No. 598-36. In spite of this, and notwithstanding that joint and several liability was never raised in the arbitration, Small requests this Court remand to the Arbitrator the issue of joint and several liability to the extent the Court determines there is "ambiguity" as to that issue. Small 32, n.5. That request should be denied because Small waived his right to arbitrate joint and several liability by never raising it in the arbitration and seeking to litigate the issue through the claims process in the Receivership.[30]

Over six years have elapsed since Small's July 16, 2015 request to arbitrate (Cyganowski Dec. ¶125), yet Small first asserted that PPLO Portfolio Manager was jointly and severally liable on March 29, 2019. Dkt. No. 598-36. Now, only after the claims process has reached the final stage, has Small requested that the issue of joint and several liability be decided by the Arbitrator.

Referring joint and several liability to the Arbitrator would prejudice the Receiver to the detriment of creditors and investors in the Receivership. The Receiver has been prejudiced by delay and litigation expenses as a result of Small's decision to litigate the issue of joint and several liability through the Receivership claims process before seeking to have the issue of joint and several liability decided through arbitration. Moreover, arbitration would distract from the

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Landesman jointly and severally liable for the stipulated judgment entered against PPVA Portfolio Manager for the Arbitration Award, Small asserted that PPVA Portfolio Manager's "corporate veil should be pierced." *Small v. Estate of Landesman*, Index. No. 158492/2021 (N.Y. Supp. Ct. Sep. 15 2021) (NYSCEF Doc. No. 1).

[30] In determining whether a party has waived its right to arbitrate, a court will consider "(1) the time elapsed from the commencement of litigation to the request for arbitration, (2) the amount of litigation (including any substantive motions and discovery), and (3) proof of prejudice." *PPG Indus., Inc. v. Webster Auto Parts, Inc.*, 128 F.3d 103, 107 (2d Cir. 1997). "There is no bright-line rule, however, for determining when a party has waived its right to arbitration: the determination of waiver depends on the particular facts of each case." *Id*.

administration of the Receivership and from distributing assets to creditors and investors.

**2. Arbitrating Joint and Several Liability Would Result in Piecemeal Litigation.**

Arbitrating joint and several liability would frustrate the purpose of the Receivership and result in piecemeal litigation.[31] The Arbitrator cannot resolve all of the issues as to Claim 229 because they concern core issues regarding the administration of the Receivership. The Arbitrator twice declined to grant relief to Small to require "Platinum" to cause the funds they managed to pay his bonus under § 3(i) of the Small IMA, and instead deferred that relief until a later date after the Arbitration Award would be confirmed. Memo. 52-53. Small has now shifted his approach by relying on § 11(c) of the PPLO Investment Management Agreement — an entirely different agreement — to require the Receiver to submit a claim against the PPLO Funds to pay their "***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." Small 34-35. Small is not a party to that agreement, however, and he has failed to show how he can compel the Receiver to arbitrate the relief he seeks under that agreement.[32] Instead, as Small admits, the Receiver's administration of the Receivership Entities' claims is subject to the Receivership Order.[33] Small 33-34. Even if joint and several liability were to be decided by the Arbitrator (which it should not), according to Small's assertions, it is necessary to determine PPLO Funds' "*pro rata*" share of his compensation under § 11(c). Requiring the Receiver to arbitrate joint and several liability,

[31] The purpose of federal equity receiverships is to "marshal assets, preserve value, equitably distribute to creditors, and, … orderly liquidate." *Janvey v. Alguire*, 2014 WL 12654910, at *17 (denying defendant's motion to compel arbitration of receiver's claims).

[32] Small opposes the notion that he is seeking relief under the contract that governs his right to arbitrate, which is the Small IMA. Small 33-34. *See* Small IMA, Dkt. No. 598-41.

[33] Small's citation to *New York Life Ins. Co. v. Waxenberg*, for the principle that the Receiver is required to cause PPLO Master Fund to seek reimbursement from the PPLO Funds is unfounded. 07-CV-401, 2009 WL 632896, at *5 (M.D. Fl. 2009). The court in *Waxenberg* held that a receiver was not entitled to immunity from a state court statute, which provided for the award of fees to the defendants where the receiver refused an offer of judgment.

and then litigate the issues regarding the Receiver's administration of the Receivership Entities' purported claims under § 11(c), would result in piecemeal litigation with potential incongruous results. Moreover, the Receiver has already determined that the PPLO Funds' collective *pro rata* share of Small's compensation is at most $27,535.43 (Memo. 58-60) — a calculation that Small does not dispute — and it would be a waste of resources to require arbitration. There would be no prejudice with respect to Small's claims against PPVA Portfolio Manager because Small has obtained a consent judgment against PPVA Portfolio Manager for the full amount of the award. Accordingly, the Court should confirm the Receiver's disallowance of Claim 229.

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

In Claims 227 and 24, Small asserts an unsecured claim against Credit Funding for unpaid "net profit interest" in the amount of $130,000 for 2012 and 2013. Small 35-36.

Small overlooks the structure of his relationship with Credit Funding — as a portfolio manager, if Credit Funding made "New Net Profit" for a given year, a portion of that profit would be *allocated* to his *capital account*, which was known as the "Performance Allocation."[34] Dkt. No. 598-34, § 6.2. PPCO Master Fund was not required to *distribute* the Performance Allocation, or the balance of the capital account, to Small on a yearly basis, it was only required to *allocate* the Performance Allocation to his capital account. *Id.* §§ 4, 6.2. Conversely, if Credit Funding had losses for a year, those losses were also allocated to Small's capital account. *Id.* § 3.

There is no dispute that Small's capital account started 2014 with a positive balance of $398,412, which was cumulative of prior years' profits and losses that had previously been allocated to his account less any distributions received in prior years. Small received distributions

[34] Despite the Credit Funding Agreement explicitly defining the applicable provision as the "Performance Allocation," Small, in his opposition, redefines the provision as "Net Profits Compensation." Small 17.

of $265,000 in 2014. Also, Credit Funding suffered losses that year, which were allocated to his account in the amount of negative $249,046. As a result, Small's capital account in Credit Funding ended 2014 with a negative balance of $115,634. Dkt. No. 599-10, Box L.

Small incorrectly asserts that he did not receive full distributions in 2012 and 2013 of his Performance Allocation and that the losses of 2014 should not decrease the Performance Allocation of 2012 and 2013. Small 35-36. His arguments fail because: (i) there is no dispute over the amounts that were allocated to his capital account in 2012 and 2013; (ii) *distributions* from a member's capital account were in the discretion of PPCO Master Fund and PPCO Master Fund had no obligation to make a *distribution* to Small in 2012, 2013, or 2014 (Credit Funding Agreement, § 4); and (iii) his capital account was subject to the losses of Credit Funding, which were in the amount of $249,046 for 2014, leaving him with a negative balance in his account (*Id.* § 3; Dkt. No. 599-10, Box L). Thus, Small is owed no amounts from Credit Funding and the Court should confirm the Receiver's decision to disallow Small's Claims 227 and 24.

## CONCLUSION

The Motion should be granted and an order in the form annexed hereto should be entered.

Dated: December 28, 2021

**OTTERBOURG P.C.**

By: */s/ Erik B. Weinick*

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**PROPOSED ORDER**

**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF NEW YORK**

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

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

THIS MATTER coming before the Court on the motion (the "***Motion***")[1] by Melanie L. Cyganowski, as Receiver (the "***Receiver***") for Platinum Credit Management, L.P., Platinum Partners Credit Opportunities Master Fund LP, Platinum Partners Credit Opportunities Fund (TE) LLC, Platinum Partners Credit Opportunities Fund LLC, Platinum Partners Credit Opportunities Fund (BL) LLC, Platinum Liquid Opportunity Management (NY) LLC, Platinum Partners Liquid Opportunity Fund (USA) L.P., Platinum Partners Liquid Opportunity Master Fund L.P., Platinum

[1] Capitalized terms not otherwise defined herein shall have the meaning ascribed to such term in the Amended Memorandum of Law in Support of the Motion.

Partners Credit Opportunities Fund International Ltd, and Platinum Partners Credit Opportunities Fund International (A) Ltd (collectively, the "***Receivership Entities***"), for the entry of an order pursuant to Section IV(A) of the Claims Process Order, disallowing: (i) Claims 282-301, filed by David Levy; (ii) Claims 313-322, filed by David Levy's counsel, Wilson Sonsini Goodrich & Rosati, P.C.; (iii) Claims 156, 329 and 330, filed by Ford O'Brien LLP; (iv) Claims 24 and 227-232, filed by Daniel Small; and denying the priority request with respect to (v) Claims 37-38 and 41-42, filed by Richard Schmidt, as trustee of the Black Elk Energy Offshore Operations, LLC Litigation Trust; and upon the Declaration of the Receiver in Support of the Motion, together with the exhibits annexed thereto [Dkt. Nos. 597-1, 598 – 598-94]; and upon the Declaration of Trey Rogers in Support of the Motion, together with the exhibits annexed thereto [Dkt. Nos. 597-2, 599 – 599-14]; and upon the Amended Memorandum of Law in Support of the Motion [Dkt. No. 602 – 603]; and upon the Memorandum of Law of Ford O'Brien LLP in Opposition to the Motion [Dkt. No. 609]; and upon the Memorandum of Law of David Levy and Wilson Sonsini Goodrich & Rosati, P.C. in Opposition to the Motion [Dkt. No. 610]; and upon the Declaration of Michael S. Sommer in Opposition to the Motion, together with the exhibits annexed thereto [Dkt. Nos. 611 – 611-6]; and upon the Response of the Black Elk Trustee to the Motion [Dkt. No. 612]; and upon the Memorandum of Law of Daniel Small in Opposition to the Motion [Dkt. No. 613]; and upon the Declaration of Seth L. Levine in Opposition to the Motion, together with the exhibits annexed thereto [Dkt. Nos. 614 – 614-7]; and upon to the Receiver's Reply in Further Support of the Motion; and upon due notice of the Motion [Dkt. No. 597], after due deliberation and for sufficient cause shown, it is hereby

**ORDERED**, that the Motion is granted in all respects, except as set forth herein; and it is further

**ORDERED**, that Claim 329 filed by Ford O'Brien LLP, shall be allowed in the Receivership as one general unsecured claim against PPCO Master Fund in the amount of $922,863.04 (the "***Allowed O'Brien Claim***"), and all other claims of Ford O'Brien LLP and Joseph SanFilippo are disallowed; and it is further

**ORDERED**, that the Allowed O'Brien Claim shall not be entitled to any priority in the Receivership over the claims of other general unsecured creditors, and that all distributions in the Receivership on account of the Allowed O'Brien Claim will be subject to the terms and conditions of a plan of distribution, subject to further approval by the Court; and it is further

**ORDERED**, that all objections to the Motion are overruled; and it is further

**ORDERED**, that the Receiver is authorized to take all actions necessary or appropriate to effectuate the relief granted in this Order in accordance with the Motion.

Dated: _____, 2021
Brooklyn, New York

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THE HON. BRIAN M. COGAN
UNITED STATES DISTRICT JUDGE
EASTERN DISTRICT OF NEW YORK