UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, -against- PLATINUM MANAGEMENT (NY) LLC, PLATINUM CREDIT MANAGEMENT, L.P., MARK NORDLICHT, DAVID LEVY, DANIEL SMALL, URI LANDESMAN, JOSEPH MANN, JOSEPH SANFILIPPO, and JEFFREY SHULSE, Defendants.	Case No.: 1:16-cv-06848-BMC

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

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

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

TABLE OF CONTENTS

Page

I. THE ENFORCEABILITY OF THE WILSON AGREEMENT 1

II. PRIORITY OF PAYMENT 12

III. THE ESTABLISHMENT OF A RESERVE 17

CONCLUSION 19

TABLE OF AUTHORITIES

Page(s)

CASES

Blankenship v. Alpha Appalachia Holdings, Inc.,
C.A. No. 10610–CB,
2015 WL 3408255 (Del. Ch. May 28, 2015)....2

Danenberg v. Fitracks, Inc.,
No. 6454-VCL,
2012 WL 11220 (Del. Ch. Jan. 3, 2012)....6

In re Tremont,
699 F. App'x 8 (2d Cir. 2017)....14

People v. Merkin,
194 A.D.3d 657 (1st Dep't 2021)....14

SEC v. Byers,
637 F. Supp. 2d 166 (S.D.N.Y. 2009)....13

SEC v. Enterprise Trust,
No. 08 C 1260,
2008 WL 4534154 (N.D. Ill. Oct. 7, 2008)....15

SEC v. Hyatt,
No. 08 C 2224,
2016 WL 2766285 (N.D. Ill. May 13, 2016)....15

SEC v. Orgel,
407 F. App'x 504 (2d Cir. 2010)....14

SEC v. Quan,
870 F.2d 754 (8th Cir. 2018)....13

Sun-Times Media Group, Inc. v. Black,
954 A.2d 380 (Del. Ch. 2008)....6, 7

VonFeldt v. Stifel Fin. Corp.,
714 A.2d 79 (Del. 1998)....17

Weil v. Vereit Operating P'ship, L.P.,
No. 2017-0613-JTL,
2018 WL 834428 (Del. Ch. Feb. 13, 2018)....5

White v. Curo Texas Holdings,
C.A. No. 12369-VCL,
2017 Del. Ch. LEXIS 39 (Del. Ch. Feb. 21, 2017)....6

STATUTES

Delaware Code Section 145(c) 6

Defendant David Levy and non-party claimant Wilson Sonsini respectfully submit this sur-reply brief to respond to the Receiver's reply brief, which is startingly misleading both as to the facts and the law.[1]

I. THE ENFORCEABILITY OF THE WILSON AGREEMENT

The Receiver has not challenged a single factual assertion contained in the December 13, 2021 declaration of Michael Sommer (the "Dec. 13, 2021 Sommer Decl."). As the Sommer Declaration makes clear, two Platinum in-house lawyers, including its general counsel, confirmed to Wilson Sonsini that Platinum would pay Mr. Levy's legal fees and costs. Dec. 13, 2021 Sommer Decl. ¶¶ 3, 8, 15. Platinum's founder then confirmed the same and executed the Wilson Agreement to memorialize that agreement. *Id.* ¶¶ 4-6, 9-10. Platinum then performed under the Wilson Agreement, paying a retainer and causing its insurance companies to pay Wilson Sonsini's invoices until the coverage under those policies was exhausted. *Id.* ¶¶ 12, 15, 24. And two different Receivers, including Ms. Cyganowski, were fully aware of the Wilson Agreement, confirmed that the Wilson Agreement was in effect and that Wilson should submit its invoices for payment both to Platinum and to the insurance companies (consistent with the Wilson Agreement), knew that Wilson Sonsini was relying on the Agreement in performing its services for Mr. Levy, and never once suggested that the Wilson Agreement was in anyway infirm or unenforceable. *Id.* ¶¶ 17-21, 25-26.

Unable to dispute a single fact set forth in the December 13, 2021 Sommer Declaration, the Receiver has opted for a different strategy: to misrepresent the law and misrepresent other

[1] This sur-reply does not address all the arguments set forth in the Receiver's reply brief. Rather, it is designed to be limited to those areas in which we believe the Receiver raised new issue for the first time on reply, misstated the facts, or misstated the law. To the extent any of the Receiver's arguments are not addressed in this sur-reply, we rely on the arguments made in our opposition brief.

facts in its baseless campaign to avoid the payment obligations that the law so clearly requires. Toward that end, the Receiver advances a series of enumerated arguments why Platinum should be released from its unequivocal commitment to pay the legal fees and costs incurred by Wilson Sonsini in representing Mr. Levy. As set forth below, each of those arguments should be rejected.

First, citing *Blankenship v. Alpha Appalachia Holdings, Inc.*, C.A. No. 10610–CB, 2015 WL 3408255, at *19-20 (Del. Ch. May 28, 2015), the Receiver argues that Wilson Sonsini is seeking unconditional indemnification beyond that permitted by Delaware law. This is a baseless argument. The *Blankenship* decision makes clear that Delaware law requires two things for advancement and indemnification to be proper: (i) that the fees be reasonable, and (ii) that there exist a "nexus between the legal services performed and [the defendant's] conduct as a current or former [protected person]." *Id.*

As to the first element, the Receiver has mounted no challenge at all to the reasonableness of Wilson Sonsini's fees; thus, that issue is moot. As to the second element, the Receiver makes no suggestion that Wilson Sonsini's services lacked a nexus to Mr. Levy's work on behalf of Platinum. Indeed, every invoice submitted to both Platinum and the insurance companies provided a description of the services provided by Wilson Sonsini, making clear how those services were related to Mr. Levy's status as Platinum's co-Chief Investment Officer. The Receiver never once raised any objection about the legal services performed or that they were not sufficiently related to Mr. Levy's status as the Co-Chief Financial Officer of Platinum. Jan. 14, 2022 Declaration of Michael S. Sommer ("Jan. 14, 2022 Sommer Decl.") ¶ 3.

The Receiver also claims that Wilson "seeks to use the Wilson Letter to avoid the Operating Agreements' prohibitions on indemnification for non-Receivership matters . . . ."

Reply Br. at 4. But this is pure misdirection. As an initial matter, Mr. Nordlicht signed the Wilson Agreement on behalf of "Platinum Partners," which indisputably covers all of the Receivership Entities. *See* Dec. 13, 2021 Sommer Decl. ¶ 12. The Receiver acknowledged as much when her counsel wrote as follows on April 13, 2018:

"Dear Counsel:

As you are aware, this firm is counsel to Melanie L. Cyganowski, the receiver (the "Receiver") for certain entities commonly referred to as Platinum Partners."[2]

Dkt. 404-8 at 1-2 (Oct. 19, 2018 Richlin Decl. Ex. 8).

And Platinum itself made this clear to its investors and the market when each month it distributed its financial results that identified Platinum Partners as a group of Funds, including PPCO, PPLO, and PPVA, with David Levy as Co-Chief Investment Officer of all entities. Jan. 14, 2022 Sommer Decl. ¶ 4

[2] The letter went on to identify certain of those "Platinum Partners" entities, including the PPCO entities and the PPLO entities. *See* n.1 thereto.

Platinum Partners

CREDIT OPPORTUNITIES MASTER FUND LP

June 2015
Offshore and TE Funds
Class B and/or C

FUND OVERVIEW

Platinum Partners Credit Opportunities Fund International LTD, Platinum Partners Credit Opportunities Fund International (A) LTD, Platinum Partners Credit Opportunities Fund (TE) LLC (collectively "PPCO") are asset-based investment fund designed to achieve superior risk-adjusted returns irrespective of the direction of broader financial market activity by originating loans and/or making equity investments in markets that are underserved by traditional sources of financing. PPCO conducts its business in various industries, including but not limited to, consumer finance, oil and gas, mining, litigation, receivables finance and secure trade finance. Platinum Credit Management LP (the "Manager") continuously seeks out new strategies it believes can provide superior rates of return to investors.

FIRM OVERVIEW

Platinum Partners (the "Firm") is a New York based investment management group with more than $1 Billion in assets under management. The Firm was founded in 2003 by Mark Nordlicht, an investor with over twenty years of experience in the asset management space. The Firm manages multiple funds, including Platinum Partners Credit Opportunities Master Fund L.P. ("PPCOMF"); Platinum Partners Value Arbitrage Fund L.P. ("PPVA"); Platinum Partners Liquid Opportunity Master Fund L.P. ("PPLO"); Bayberry Consumer Finance Fund LLC and Bayberry Consumer Finance Fund International Ltd. (collectively, "Bayberry"); Marbridge Energy Finance Fund II LLC and Marbridge Energy Finance Fund International II Ltd. (collectively, "Marbridge II"). Although each of the aforementioned funds have separate investment advisors, Mr. Nordlicht is the CIO of the investment advisors of PPCOMF, PPVA, and PPLO . The CIOs of the investment advisors of Marbridge II and Bayberry are Portfolio Managers of the Firm.

MANAGER BIOGRAPHY

Mark Nordlicht is the Chairman and Chief Investment Officer of PPCO. Mr. Nordlicht has over 20 years of experience in the investment industry and is responsible for oversight of all trading, asset allocation and risk management on behalf of the Platinum-managed funds. Mr. Nordlicht founded Platinum Energy Resources and Platinum Diversified Mining, publicly traded oil & natural gas and mining companies, respectively. Mr. Nordlicht is also the founder and served as non-executive Chairman of Optionable, Inc., a brokerage firm for energy options, until May 1, 2007. From 1997 to 2001, Mr. Nordlicht was a founder and managing partner of West End Capital, a New York-based money management firm. In 1991, Mr. Nordlicht founded Northern Lights Trading and was its general partner until 2000. Northern Lights Trading was a proprietary options firm based in New York which employed traders in the cotton, coffee, natural gas, crude oil, gold, and silver option trading pits. Mr. Nordlicht graduated from Yeshiva University with a B.A. in Philosophy.

David Levy serves as Co-Chief Investment Officer of Platinum Partners. Mr. Levy has spent his career as an investment specialist and portfolio manager. Mr. Levy oversees over $1 billion in total investments and has directly managed over $250 million in capital. The focus of Mr. Levy's investments is in asset-based lending in a variety of industries, and utilizing credit based strategies to generate returns with less risk than traditional strategies. Mr. Levy co-founded Crius Energy, a publicly listed national retail energy platform currently providing power to over 500,000 RCE's in the United States. Mr. Levy's prior experience also includes time spent in the New York City mayor's office for Mayor Bloomberg and with the Chief Counsels office of Senator Orrin Hatch. Mr. Levy also serves as a member of the International Crisis Group's Advisory Council. Mr. Levy holds a Bachelor of Science in Finance from Yeshiva University.

FUND STATISTICS ±

Average Annualized Return	10.42%	**Annualized Standard Deviation:**	0.84%	**Firm AUM:**	$1.39 Billion
Compounded Average Monthly Return:	0.82%	**Monthly Standard Deviation:**	0.24%	**PPCO Master Fund AUM:**	$493 Million
Percentage of positive months (94/95):	99%	**Largest Monthly Loss:**	0.40%	**PPCO Offshore Funds AUM:**	$298 Million

NET MONTHLY RETURNS[1]

	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	YTD	Cum
2007	n/a	n/a	n/a	n/a	n/a	n/a	n/a	+0.72%	+0.97%	+0.90%	+0.74%	+0.94%	**4.34%**	**4.34%**
2008	+1.08%	+0.83%	+0.70%	+1.09%	+1.03%	+0.96%	+1.13%	+1.21%	+1.08%	+1.00%	+0.88%	+1.00%	**12.67%**	**17.56%**
2009	+2.25%	+1.02%	+0.94%	-0.39%	+0.86%	+0.87%	+0.93%	+0.91%	+1.00%	+0.92%	+1.01%	+0.87%	**11.77%**	**31.40%**
2010	+1.12%	+0.83%	+0.96%	+0.96%	+0.80%	+0.86%	+0.83%	+0.86%	+0.70%	+0.65%	+0.69%	+1.10%	**10.87%**	**45.68%**
2011	+0.84%	+0.78%	+0.86%	+0.90%	+0.82%	+0.77%	+0.94%	+0.91%	+1.01%	+0.87%	+0.64%	+0.96%	**10.80%**	**61.41%**
2012	+0.86%	+0.84%	+0.83%	+0.71%	+0.93%	+0.86%	+0.71%	+0.72%	+0.90%	+0.67%	+0.77%	+0.68%	**9.90%**	**77.40%**
2013	+0.72%	+0.65%	+0.79%	+0.74%	+0.68%	+0.78%	+0.63%	+0.72%	+0.82%	+0.85%	+0.78%	+0.70%	**9.23%**	**93.77%**
2014	+0.70%	+0.58%	+0.71%	+0.48%	+0.75%	+0.76%	+0.68%	+0.74%	+0.54%	+0.62%	+0.79%	+0.65%	**8.30%**	**109.85%**
2015*	+0.69%	+0.63%	+0.90%	+0.92%	+0.51%	+0.54% ±							**4.26%**	**118.80%**

*Unaudited; ± Estimated and subject to change

[1]Class B was created in December 2010. All performance figures prior to December 2010 are representative of other share classes with different investment terms.

The information herein is part of a two page packet which incorporates and is qualified by disclosures on page two. Past performance is not necessarily indicative of future performance.

PLATINUM CREDIT MANAGEMENT LP
250 W. 55th Street, 14th Floor · New York, New York 10019 · Tel: (212) 582-2222 · Fax: (212) 581-0002 · InvestorRelations@platinumlp.com

See Jan. 14, 2021 Sommer Decl. Ex. 1 (Platinum Partners Credit Opportunities Master Fund LP monthly investor update letter ("tear sheet") dated June 2015).

Therefore, it is clear that the Wilson Agreement binds all of "Platinum Partners" – including the Receivership entities. And by its plain terms, the Wilson Agreement covers ***all*** reasonable fees that are incurred in connection with defending Mr. Levy's acts or omissions on behalf of Platinum Partners. Accordingly, the Receivership entities are plainly obligated by the Wilson Agreement to pay Wilson Sonsini's fees.

In addition, the language of the Operating Agreements for the Receivership Entities also obligates the Receivership Entities to fully pay Wilson Sonsini. For example, the PPCO Partnership Agreement makes clear the scope of its advancement and indemnification obligations to Mr. Levy. Subsection (i) of Section 5.4(a) covers any expense incurred "by reason of any act or omission taken or omitted to be taken by such Protected Person . . . with respect to the Partnership [or] a Portfolio Company . . . ." Dkt. 598-55 at 32-33 (Cyganowski Decl. Ex. 49) (Third Amended and Restated Agreement of Limited Partnership of PPCO Master Fund LP). There is no dispute here that Mr. Levy is a "Protected Person." Moreover, Mr. Levy's alleged conduct, as the Court is well-aware, related, among other things, to the valuation of the "Portfolio Companies" that PPCO, PPLO, and other Platinum entities invested in, including its investments in Black Elk. The Receiver appears to argue that because PPCO, PPLO, and PPVA all invested in these Portfolio Companies, there must be an allocation of fees among the various Funds. But the work that was performed was the same whether it was done for PPCO alone or for PPCO, PPLO, and PPVA, thus requiring advancement and indemnification for the entirety of the work. *See Weil v. Vereit Operating P'ship, L.P.*, No. 2017-0613-JTL, 2018 WL 834428, at *7-8 (Del. Ch. Feb. 13, 2018); *White v. Curo Texas Holdings*, C.A. No. 12369-VCL, 2017 Del. Ch. LEXIS 39, at *30 (Del. Ch. Feb. 21, 2017); *Danenberg v. Fitracks, Inc.*, No. 6454-VCL,

2012 WL 11220, at *5-6 (Del. Ch. Jan. 3, 2012). The Receiver fails to cite any authority to the contrary.

Second, the Receiver argues that Delaware law precludes Wilson Sonsini from now being paid for its work relating to the Black Elk counts because Mr. Levy's conviction on those charges has been reinstated. Reply Br. at 4.[3] This is patently wrong as a matter of law, as the very case cited by the Receiver herself makes clear.

In *Sun-Times Media Group, Inc. v. Black*, 954 A.2d 380 (Del. Ch. 2008), cited by the Receiver at page 4 of her reply brief, the Delaware Chancery Court was faced with the question of what constitutes a final judicial determination such that a person is no longer entitled to advancement and indemnification by reason of a criminal conviction. In that case, the company that was required to advance fees argued that the ***sentencing*** of the three convicted defendants ended its advancement and indemnification obligations because the sentencing constituted a final judicial determination that the defendants were not entitled to indemnification. *See id.* at 388-90. The individual defendants countered that the sentencing phase did not constitute a final judicial determination extinguishing their advancement and indemnification rights because appeal and petitions for a writ of certiorari to the United States Supreme Court were still available. *See id.* The Chancery Court concluded that the final judicial determination occurs when the case is "no longer subject to any further review as of right." *Id.* at 396. As a result, the sentencing of the defendants ***did not*** end the company's advancement and indemnification obligations as appeal and a petition for certiorari were still available as of right. *See id.* at 396-408.

---

[3] The Receiver appears to now concede that Delaware Code Section 145(c) permits both Mr. Levy and Wilson Sonsini to receive indemnification with respect to those counts on which Mr. Levy was acquitted – the alleged "Platinum Scheme."

The Court and the Receiver are both well aware of the status of Mr. Levy's case: there remains additional motion practice before this Court in advance of any sentencing; there remains the possibility of sentencing; and if there is a sentencing, there remains the appeal and the right to file a petition to the Supreme Court for certiorari. In other words, there plainly has been no final judicial determination that Mr. Levy engaged in any bad faith conduct that now extinguishes his advancement and indemnification rights.

The law is so abundantly clear in this regard that the Court should question why the Receiver has advanced the utterly baseless argument that Mr. Levy is no longer entitled to advancement and indemnification with respect to the Black Elk counts. In any event, her argument that the reinstatement of Mr. Levy's conviction on the Black Elk counts at this time acts to terminate Mr. Levy's advancement and indemnification rights with respect to those counts is plainly wrong, and the argument should be rejected. Mr. Levy continues to be entitled to advancement and indemnification of his legal fees and costs under Delaware law.[4]

Third, the Receiver argues that any advancement or indemnification for Mr. Levy must be limited to the defense of acts relating to the Receivership Entities. Reply Br. at 4-5. But as discussed above, the work performed by Wilson Sonsini in defending Mr. Levy against claims of overvaluation, improper shifting of funds between the Receivership Entities and other entities, and improper investments or conduct in connection with Portfolio Companies, among others, had to be performed whether that conduct related just to the Receivership entities, such as PPCO and PPLO, or to additional entities such as PPVA. Accordingly, those fees are properly paid both

---

[4] For the same reasons, the Court should overrule the Receiver's determination that Mr. Levy's claims are barred by the reinstatement of his conviction. Reply Br. at 1-2. For as set forth above, there has yet to be a final judicial determination that Mr. Levy acted in bad faith so as to eliminate his advancement and indemnification rights.

under the Wilson Agreement – which does not call for any allocation – and under the Partnership Agreements of PPCO and PPLO, as the work was performed in defense of claims asserted against Mr. Levy relating to the Receivership Entities.

Fourth, the Receiver argues, ***for the third time***, that there must be allocation, because the Wilson Agreement does not say the Receivership Entities will pay fees incurred in defending Mr. Levy for actions he performed for non-Receivership Entities. There is no dispute about what the Wilson Agreement says; it makes clear that Platinum Partners is obligated to pay the fees Wilson Sonsini incurred in defending Mr. Levy relating to the subject matter of the government investigations. As noted above, "Platinum Partners" encompasses all of the Receivership Entities, which means that each of the Receivership Entities is obligated to meet Platinum's obligations. Moreover, as noted twice above, the same work performed on behalf of Mr. Levy would have needed to be performed whether the charges related solely to the Receivership Entities or whether they extended (as they did) to other Platinum entities.

Fifth, the Receiver notes that, while this Court has already upheld the enforceability of the Wilson Agreement, it has not yet addressed whether the Receivership Entities are obligated for fees relating to acts performed by Mr. Levy on behalf of Beechwood in connection with the alleged Black Elk Scheme. No dispute here. This Court has indeed twice now held that the Wilson Agreement is binding and enforceable. But it has not yet evaluated whether the Receivership Entities are responsible for fees incurred in connection with Mr. Levy's conduct while he was employed at Beechwood in connection with the Black Elk charges. In this regard, we note that the only conduct of Mr. Levy while at Beechwood that has ever been challenged is in connection with the Black Elk charges – that Beechwood purchased from Platinum and then voted certain Black Elk bonds. As noted in our opposition brief at footnote 10, any conduct by

Mr. Levy while at Beechwood relating to Black Elk was the result of his having continuing responsibility for the investments of PPCO, PPLO, and PPVA in Black Elk, one of Platinum's Portfolio Companies. As also noted in that footnote, the SEC was contemporaneously informed of Mr. Levy's continuing role vis-à-vis Black Elk despite his move to Beechwood; indeed, the Second Circuit pointed to that conduct as purported evidence that Mr. Levy's alleged conduct in connection with Black Elk, while employed at Beechwood, was evidence that Mr. Levy was actually acting on behalf of Platinum's investments in PPCO, PPLO, and PPVA. Accordingly, there can be no question that the Receivership Entities are responsible to advance and indemnify Mr. Levy's legal fees and costs in this area – particularly as the advancement and indemnification obligation, as noted above, extends to any act or omission with respect to a Portfolio Company, which Black Elk was. Indeed, the Receiver does not even argue to the contrary.

Sixth, the Receiver claims that the language in the Wilson Agreement – which states that it covers the "investigations being conducted by the United States Attorneys' Offices … and any matters related thereto" – does not cover civil cases that relate to the same allegations as the Indictment or any criminal charges relating to Mr. Levy's services performed for Beechwood. Reply Br. at 5. This argument is preposterous. We agree that, if there was a civil case alleging conduct by Mr. Levy unrelated to what the Government was investigating or what was contained in the Indictment, that case ***might*** fall outside of the Wilson Agreement.[5] But the Receiver has not identified anything that falls into this category.[6] Indeed, the Receiver never once raised an

---

[5] Depending on the allegations, however, such civil cases might still fall within Platinum's advancement and indemnification obligations to Mr. Levy.

[6] For example, the Receiver has every one of the Wilson Sonsini invoices, and yet she has not identified a single entry that falls outside the scope of the Wilson Agreement.

objection to the payment of Wilson Sonsini's invoices for work on the civil cases when those invoices were each submitted to Platinum in connection with the Wilson Agreement and then paid by Platinum's insurance policy prior to its exhaustion. *See* Jan. 14, 2022 Sommer Decl. ¶ 3. The Receiver's failure to raise any objection and to allow those invoices to be paid clearly shows that the Receiver recognized that those services plainly related to the subject matter of the government investigations, and that Platinum was obligated to pay the fees and costs incurred in defending Mr. Levy in the civil cases.

As for the criminal charges relating to Mr. Levy's services for Beechwood, as noted immediately above, those services were performed on behalf of Platinum, and were performed in connection with the investments of PPCO, PPLO, and PPVA in Black Elk, one of Platinum's Portfolio Companies.

Seventh, the Receiver cites to out-of-district decisions from 1934 and 1921 in an attempt to support her position that her acknowledgement of and non-objection to the Wilson Agreement should be ignored. But the conduct of both Receivers was not limited to mere knowledge of the Wilson Agreement. As described in the December 13, 2021 Sommer Declaration – and not challenged at all by the Receiver – the Receivers did far more: they both acknowledged having been made aware of the Wilson Agreement prior to Wilson Sonsini informing them of it; each made no objection to any of the Wilson Agreement's terms; each instructed Wilson Sonsini to submit its invoices to the insurance company for payment as provided in the Wilson Agreement; and each instructed Wilson Sonsini to submit its invoices to Platinum in the event the insurance company failed to pay. Dec. 13, 2021 Sommer Decl. ¶¶ 17-21, 25-26. This is hardly conduct that is limited to "mere knowledge" or "mere inaction" as the Receiver suggests. Reply Br. at 5-6. Rather, it evinces an acknowledgement on the part of the Receiver that Platinum was

obligated to pay Wilson Sonsini for its defense of Mr. Levy – precisely what the Wilson Agreement said in clear and unambiguous terms.

Finally, the Receiver suggests that she ***did*** object to the Wilson Agreement when she rejected Wilson's demands for advancement on several occasions. But this is a wholly insincere argument. In neither letter, that of April 13, 2018 (Dkt. 404-8 (Oct. 19, 2018 Richlin Decl. Ex. 8)) or September 25, 2018 (Dkt. 404-10 (Oct. 19, 2018 Richlin Decl Ex. 10)), did the Receiver state or even imply that the Wilson Agreement was unenforceable. Rather, those letters focused exclusively on the timing of payments and appropriateness of advancement under various Fund agreements. And when the Receiver failed to abide by Platinum's obligations, Mr. Levy filed his motions in this Court for advancement and indemnification; both times the Court concluded that the Wilson Agreement was enforceable, but payment would have to await a payment plan where the interests of other unsecured creditors could be addressed. For the Receiver now to argue, in the face of this chronology, that Wilson Sonsini then went ahead and continued to bill for its services "at its own risk" is hardly candid. Rather, when the insurance proceeds ran out – just months before the criminal trial – Wilson Sonsini had a continuing duty to both Mr. Levy and to the Court to continue to diligently defend Mr. Levy. While it is true that Wilson Sonsini took on risk that there would not be sufficient funds available for Platinum to pay 100% of its fees and costs, Wilson Sonsini had been assured by the Court – on two occasions – and by the Platinum Receivers, that it was entitled to be paid some portion of its fees and costs.

Based on the above, the claims of Mr. Levy and Wilson Sonsini should be allowed in their entirety.

II. PRIORITY OF PAYMENT

There is actually very little dispute between the Receiver and Wilson Sonsini/Mr. Levy when it comes to the issue of priority of payment in the liquidation/dissolution of the Receivership Entities. For example, the parties agree that:

- the relevant operating and partnership agreements provide a specific sequencing of payments upon liquidation or dissolution;
- every investor in PPCO and PPLO specifically agreed that they would ***not*** receive any distribution in a liquidation or dissolution until all unsecured creditors were paid in full;
- pursuant to the terms of the PPCO Fund Agreement, the Wilson Sonsini/Levy claim has priority over other unsecured creditors, but that with respect to the PPCO Feeder Funds, the Wilson Sonsini/Levy claim stands on equal footing with the other unsecured creditors (but still ahead of investors); and
- because of the fees the Receiver has paid herself and her firm – nearly $29 million – there is only approximately $20.7 million remaining to distribute to unsecured creditors; an amount far less than the amount owed to those unsecured creditors.

So then what are the disagreements? The Receiver has identified but a few, and the Receiver's positions are meritless.

First, the Receiver again argues that she is not obligated to abide by the agreements Platinum and its investors entered into regarding sequencing of distributions in the event of a liquidation or dissolution. In her opening brief, she cited only one case purporting to support her view – the Eighth Circuit's decision in *SEC v. Quan*, 870 F.2d 754 (8th Cir. 2018). In our opposition brief, we explained how the *Quan* decision did not support at all the Receiver's

position that she could simply ignore the underlying Fund contracts. In the Receiver's reply brief, rather than advancing an argument that *Quan* somehow does lend support to her position, the Receiver completely (and appropriately) abandoned that decision altogether as providing any support for her position. In its place, she has cited to a series of different decisions that she claims support the proposition that "courts have approved plans of distribution that do not follow contractual priorities in a fund's governing agreements." Reply Br. at 9. But even the most cursory review of these decisions reveals that – like *Quan* – they offer no support at all for the Receiver's proposal that she be permitted to ignore the agreements that Platinum entered into with its investors.

In *SEC v. Byers*, 637 F. Supp. 2d 166 (S.D.N.Y. 2009), the issue before the court had to do solely with distributions to ***investors*** – not to creditors. There was no underlying contract that addressed the payment of creditors ahead of investors, and the receiver proposed a pro rata distribution to investors, which some investors objected to. The court concluded that a pro rata distribution to investors was appropriate in that case as; (i) investor funds were commingled; and (ii) the investor victims were similarly situated with respect to their relationship to the defrauders. In other words, this decision is entirely inapposite; it does not support at all the Receiver's position that she can ignore contracts that require creditors to be paid ahead of investors.

The Receiver next cites *SEC v. Orgel*, 407 F. App'x 504 (2d Cir. 2010). Again, that case had nothing to do with fund documents or any other contract that provided for sequencing of payment. To the contrary, the objection was focused on the timing of the victims' investment in the fraudulent scheme, and to extensions of time that the district court had granted in other circumstances. There was nothing in that decision that even remotely supports the proposition

that a receiver can simply ignore legitimate contracts entered into between a fund and its investors.

In *People v. Merkin*, 194 A.D.3d 657 (1st Dep't 2021), one of the many decisions coming out of the Madoff scandal, the issue again involved distributions solely to investors. The receiver in that case determined to make pro rata distributions to the investors, but some objected, arguing that the distributions should be based on the account values identified in the last statement balance. The court rejected such an approach for the simple reason that the balances in those statements were illusory; that is, they were fraudulent. Again, the decision did not address at all creditors, or any underlying contract addressing priority of payment.

In *In re Tremont*, 699 F. App'x 8 (2d Cir. 2017), a summary order of the Second Circuit that is identified by the Court as having no precedential effect (and which requires any citation to it to note that it was a summary order to that effect, which the Receiver failed to do), there were underlying documents that addressed allocation to investors. But those very investors then agreed to a subsequent agreement that addressed allocation. The court enforced the latter agreement, noting that the investors had specifically agreed to it. This summary order, therefore, does not offer any support for the Receiver's position that she can simply elect to ignore the underlying fund contracts.

In *SEC v. Hyatt*, No. 08 C 2224, 2016 WL 2766285 (N.D. Ill. May 13, 2016), a decision from the Northern District of Illinois, there was an underlying contract that provided for sequencing of payments. The receiver refused to honor that contract to the extent it would result in a distribution to a claimant who "was itself a participant in the fraudulent scheme." *Id.* at *1. As the court noted, a receiver "is not required to apportion assets in conformity with misrepresentations and arbitrary allocations that were made by the defrauder[.]" *Id.* at *10

(internal quotations and citation omitted). Significantly, the court's decision made clear that all other creditors in that case were paid ahead of the investors – as the underlying contract required.

And in *SEC v. Enterprise Trust*, No. 08 C 1260, 2008 WL 4534154 (N.D. Ill. Oct. 7, 2008), another decision from the Northern District of Illinois, the court again discussed how to distribute assets solely among investors. There was nothing whatsoever about any underlying contract addressing the sequencing of distributions to creditors.

In sum, for the Receiver to have cited these decisions as purportedly supporting the notion that a receiver can simply ignore underlying contracts that address the priority of distributions among creditors and investors is entirely baseless. Indeed, the Receiver has failed to identify a single decision from anywhere in the country where a receiver even proposed to ignore such contracts to the detriment of creditors, much less a decision by a court upholding such a decision.

Second, the Receiver repeatedly refers to her effort to do "equity" by distributing some of the remaining assets to investors. But the Receiver points to no explanation how doing so actually accomplishes equity. To the contrary, as noted, every investor agreed that he, she or it would stand behind unsecured creditors in the event of a liquidation or dissolution. As a result, there is nothing inequitable to the investors at all about following the very procedure they each agreed to, and the Receiver certainly has not identified any such inequity.

Third, the Receiver argues – without the slightest explanation – that because Mr. Levy has now had his conviction on the Black Elk charges reinstated, it would be "repugnant" to a responsible liquidation for Platinum to pay Wilson Sonsini the legal fees Platinum expressly agreed to pay that law firm for its diligent and tireless efforts on behalf of Mr. Levy. Indeed, as the law makes crystal clear that Mr. Levy's rights to advancement and indemnification remain

binding on Platinum, what could possibly be repugnant about Platinum meeting those legal obligations? The only thing that is even remotely repugnant here is that, in gathering roughly $20 million dollars to distribute to unsecured creditors, the Receiver has paid herself and her law firm nearly $29 million.

In sum, the Receiver has failed to identify any legitimate factual rationale or legal support for her proposal to simply ignore the sequencing of payments that Platinum and its investors agreed to – a sequencing that provides for unsecured creditors to be paid ahead of the investors.

Finally, it is critical that the priority of payment issue be resolved promptly. Mr. Levy and Wilson Sonsini first moved for advancement and payment of legal fees in 2018. Dkts. 402-404. The Court confirmed Platinum's obligations in both regards, but required Mr. Levy and Wilson Sonsini to be patient and await the Receiver's distribution plan so that the interests of other unsecured creditors could also be considered. Dkt. 417 at 6-9. In the ensuing three years, the Receiver has failed to come forward with a distribution plan, apparently content to continue to churn Platinum's remaining assets to the tune of millions of dollars more in fees to herself and her firm. Mr. Levy and Wilson Sonsini should not have to continue to be patient in the face of the alarming lack of progress by the Receiver. Mr. Levy continues to confront legal challenges, and the legal fees continue to be incurred. Requiring him to wait longer would eviscerate both Mr. Levy's advancement rights and Wilson Sonsini's right to be paid – for the entire point of advancement is to meet the covered person's legal obligations in "advance" of a final judicial determination. *See VonFeldt v. Stifel Fin. Corp.*, 714 A.2d 79, 84 (Del. 1998) (noting that the legislative mandate in favor of advancement "serves the dual policies of: (a) allowing corporate officials to resist unjustified lawsuits, secure in the knowledge that, if vindicated, the corporation will bear the expense of litigation; and (b) encouraging capable women and men to serve as

corporate directors and officers, secure in the knowledge that the corporation will absorb the costs of defending their honesty and integrity.")

We have been advised by the Receiver's counsel that all remaining and meaningful unsecured creditors are before the Court on this motion: Mr. Levy, Mr. Small, Mr. SanFillipo, Wilson Sonsini, and the Black Elk Trustee. Accordingly, in order to preserve any meaning to the advancement and payment obligations that Platinum owes to both Mr. Levy and Wilson Sonsini, we submit that the issue of priority of payment should be decided immediately. Once that issue is resolved by the Court, and given the limited assets that the Receiver has collected that remain, we are hopeful that we would then be in a position to reach a resolution with the Receiver regarding the claims of Mr. Levy and Wilson Sonsini.

III. THE ESTABLISHMENT OF A RESERVE

As set forth in our opposition brief, the express terms of the underlying Fund contracts require that a reserve be established for the benefit of Mr. Levy. The Receiver now argues that any reserve claim belongs solely to Mr. Levy and not to Wilson Sonsini. This position is both wrong and irrelevant.

There appears to be no dispute from the Receiver that the Fund documents require a reserve to be established for the payment of any "contingent debt, obligation or liability" before making any distribution to investors. PPCO (TE) LLC Agreement (Dkt. 404-4) at 22 (Section 10.2.1(ii)). Here, it is clear that such contingent obligations exist. First, this Court has already twice determined that the Wilson Agreement is enforceable and obligates Platinum to pay Mr. Levy's legal fees and costs. Dkt. 417 at 3 ("Levy entered into multiple agreements in which Platinum Partners entities agreed to indemnify him, including three agreements that provided for mandatory advancement of Levy's legal fees"); Dkt. Entry Order dated Jan. 22, 2020 ("The Court maintains that both SanFilippo and Levy are entitled to indemnification"). Relatedly, and

as set forth above, Mr. Levy has continuing advancement and indemnification rights under the Fund Agreements as there has yet to be a final judicial determination that he acted in bad faith. *See supra* at 6-7. It is plain that additional and substantial work still needs to be performed on behalf of Mr. Levy in the criminal case. Moreover, the civil cases, including the parallel SEC enforcement action, remain pending. Accordingly, it can hardly be disputed that, pursuant to both the Wilson Agreement and the underlying Fund Agreements, Platinum will continue to be obligated to pay Wilson Sonsini for the work it performs on behalf of Mr. Levy, thereby making those obligations "contingent obligations" for which a reserve is required to be established.

The Receiver suggests that Wilson Sonsini is inconsistent when it points to the Fund Agreements in support of the reserve obligation for the contingent fees it will still incur in defending Mr. Levy. Not so. While it is certainly true that the Wilson Agreement does not itself create a reserve obligation on the part of Platinum, the Wilson Agreement does create a contingent payment obligation. That obligation, pursuant to the Fund Agreements, requires an appropriate reserve to be established.

The result is the same whether one confronts the issue through the lens of the Wilson Agreement or through the lens of Platinum's advancement and indemnification obligations to Mr. Levy. Platinum's payment obligations are continuing, thereby making obligations incurred in the future "contingent obligations." The Fund Agreements make clear that in such an instance, a reserve must be established ***before*** making any distribution to investors.

As noted in our opposition brief (and now embraced by the Receiver), the amount of the reserve is to be "reasonable and appropriate." Opp. Br. at 33 (quoting PPCO (TE) LLC Agreement (Dkt. 404-4) at 22 (Section 10.2.1(ii))). And as further noted in our opposition brief, once the Court determines the issue of priority of payment, the Receiver and Wilson Sonsini/

Mr. Levy will be in a far better position to address the level of the reserve and try to agree upon an amount. *See id.* We continue to adhere to that recommended approach.

CONCLUSION

For the reasons set forth above, the Court should: (1) overrule the Receiver's determination that Mr. Levy is no longer entitled to advancement and indemnification, and instead Order that the fees and costs he has incurred in defending against the criminal and civil cases that have not been paid by Platinum or its insurance coverage be allowed as claims; (2) overrule the Receiver's determination that Wilson Sonsini is not entitled to be paid under the Wilson Agreement, and instead Order that the fees and costs incurred by Wilson Sonsini but not paid by Platinum or its insurance coverage are to be allowed as claims; (3) overrule the Receiver's determination that no reserve need be established for future fees and costs of Wilson Sonsini, and instead Order that the Receiver and Wilson Sonsini confer on a reserve level that is "reasonable and appropriate;" (4) overrule the Receiver's determination that unsecured creditors are to be placed on the same footing as investors in terms of priority of payment, and instead Order that in connection with the funds of PPCO, Wilson Sonsini is to be paid ahead of investors and other unsecured creditors, and that in connection with the funds of PPLO, Wilson Sonsini is to be paid along with other unsecured creditors but ahead of investors; and (5) as addressed in our opposition brief, overrule the Receiver's argument that Mr. Levy has failed to provide adequate documentation to support his Salary/Loan Claim, and that Mr. Levy has somehow waived his salary claim by deferring his salary in 2015 and 2016, and instead Order the Receiver to give Mr. Levy and his counsel access to the Platinum document database so that relevant documents may be identified to the Receiver.

Dated: New York, New York
January 14, 2022

Respectfully submitted,

WILSON SONSINI GOODRICH & ROSATI

By: s/ *Michael S. Sommer*

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

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