UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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

SUR-REPLY DECLARATION OF ERIK B. WEINICK IN FURTHER SUPPORT OF RECEIVER'S OMNIBUS MOTION TO CONFIRM CLAIMS DETERMINATIONS

I, Erik B. Weinick, pursuant to 28 U.S.C. § 1746, hereby declare under penalty of perjury that the following is true and correct to the best of my knowledge, information and belief:

1. I am a Member of the Firm of Otterbourg P.C., which represents Melanie L. Cyganowski, in her capacity as the duly appointed receiver for the Receivership Entities[1] (the "***Receiver***").

2. In accordance with this Court's January 4, 2022 order regarding additional briefing on the Receiver's Motion, I submit this sur-reply declaration in order to respond to certain assertions made in the Declaration of Michael S. Sommer in Further Opposition to the Receiver's

[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 Declaration of Trey Rogers in Support of the Motion (Dkt. No. 597-2), the Amended Memorandum of Law in Support of the Motion (Dkt. No. 602), and the Receiver's Reply Memorandum of Law in Support of the Motion (Dkt. No. 617). Dkt. Nos. 597-99 and 602-03 are collectively referred to as the "***Motion***."

Omnibus Motion to Confirm Claims Determinations (Dkt. No. 620-1). I have personal knowledge of the facts set forth herein, and if called as a witness I could testify competently to them.

3. The Receiver raised objections to the invoices submitted by Mr. Sommer to the Receiver in a timely manner and at no time conceded, through action or inaction, that Wilson or Levy was entitled to payment for the purported services referred to in those invoices.

4. On September 18, 2018, Mr. Sommer sent me an email (the "***September 18, 2018 Sommer Email***,") attaching the Wilson Letter and stating:

> Erik – as you may be aware, the Platinum insurance is just about exhausted. Accordingly, our agreement to defer discussion concerning Mr. Levy's right to have Platinum pay for his defense until the insurance is exhausted must now give way to the need to have such a discussion. Pursuant to the attached agreement obligating Platinum to pay Mr. Levy's reasonable attorneys' fees and costs, I ask that you advise me to whom we should send our invoices once the insurance is fully exhausted so that Platinum can make payment on them within the agreed-upon 15-day period.

5. On September 25, 2018, I responded to the September 18, 2018 Sommer Email by sending Mr. Sommer an email attaching (i) a letter dated April 13, 2018, that I had sent to counsel for various individual defendants in the Criminal Case, including Levy (collectively, the "***Individual Defendants***"), on or around that date (Dkt. No. 404-8), and (ii) a letter dated September 25, 2018, from myself to Mr. Sommer (Dkt. No. 404-9).

6. In my April 13, 2018 letter, I set forth the Receiver's positions that certain governing agreements of the Receivership Entities referenced by the Individual Defendants did not require advancement of legal fees and expenses incurred by the Individual Defendants, and that advancement in an equity receivership would be entirely inappropriate; stated that "at best, those claims will be treated as indemnification claims and, if appropriate in the context of the claims process, paid in accordance with a court-approved process and plan developed by the Receiver"; and stated that the Receiver reserves all rights and remedies.

7. In the last two sentences of my September 25, 2018 letter to Mr. Sommer, I stated, among other things:

> As you will recall, by letter dated April 13, 2018, a copy of which is attached, we set forth the reasons why the Receiver rejected Mr. Levy's and other defendants' previous requests for advancement. The Receiver has not changed her previous position and the attachment to the E-mail [*i.e.*, the Wilson Letter] does not alter the Receiver's prior analysis.
>
> If there are additional facts or law you wish us to consider, please let us know. In the interim, the Receiver reserves all of her rights and remedies.

8. Copies of an email chain which includes the September 18, 2018 Sommer Email and my September 25, 2018 email responding to that email, together with the attachments to my email to Mr. Sommer, are attached hereto as Exhibit 88.

9. Following the April 2018 exchange, almost every time I received an invoice from Mr. Sommer, I responded by stating that I was acknowledging receipt with a full reservation of the Receiver's rights. For example, on January 21, 2019, Mr. Sommer emailed me a copy of an invoice from September 2018. Later that day, I responded with an email stating "Receipt acknowledged and all of the Receiver's rights reserved." A copy of the email chain which includes Mr. Sommer's email to me, and my response is attached hereto as Exhibit 89.

Executed this 28th day of January 2022, at New York, New York.

/s/ Erik B. Weinick
Erik B. Weinick

Exhibit 88

Andrew S. Halpern

From:	Erik B. Weinick <eweinick@otterbourg.com>
Sent:	Tuesday, September 25, 2018 5:51 PM
To:	'Sommer, Michael'; McCarthy, Kate; Fodeman, Moe
Cc:	Melanie L. Cyganowski; Adam C. Silverstein
Subject:	RE: Indemnification of David Levy
Attachments:	Platinum - Defendants - September 25, 2018 to Sommer_V_1.PDF; Platinum - Defendants - April 13, 2018 Correspondence_V_1.PDF

Michael,

Please see attached.

Regards,

Erik Weinick

From: Sommer, Michael [mailto:msommer@wsgr.com]
Sent: Tuesday, September 18, 2018 1:02 PM
To: Erik B. Weinick; McCarthy, Kate; Fodeman, Moe
Cc: Melanie L. Cyganowski; Richard G. Haddad; Adam C. Silverstein; Jennifer S. Feeney
Subject: Indemnification of David Levy

Erik – as you may be aware, the Platinum insurance is just about exhausted. Accordingly, our agreement to defer discussion concerning Mr. Levy's right to have Platinum pay for his defense until the insurance is exhausted must now give way to the need to have such a discussion. Pursuant to the attached agreement obligating Platinum to pay Mr. Levy's reasonable attorneys' fees and costs, I ask that you advise me to whom we should send our invoices once the insurance is fully exhausted so that Platinum can make payment on them within the agreed-upon 15-day period.

Best,
Michael Sommer

Michael S. Sommer ▪ Wilson Sonsini Goodrich & Rosati, PC
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Phone | 212.497.7728 ▪ Fax | 212.999.5899 ▪ Mobile | 201-906-1939

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April 13, 2018

VIA E-MAIL

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Re: Requests for Indemnification and Advancement

Dear Counsel:

As you are aware, this firm is counsel to Melanie L. Cyganowski, the receiver (the

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"Receiver") for certain entities commonly referred to as Platinum Partners.[1] We write further to our meeting on January 31, 2018 and your subsequent emails regarding your letters to the prior Receiver and his counsel (the "Demand Letters")[2] requesting indemnification and advancement of legal fees and expenses incurred by your clients in connection with their criminal defense in *United States v. Nordlicht, et al.*, No. 16-cr-640 (E.D.N.Y.).

We understand that your clients' legal fees and expenses in connection with the criminal case have been, and continue to be, reimbursed pursuant to several tiers of directors and officers liability insurance owned by the receivership, and that such insurance coverage has not yet been fully exhausted. First, it is possible that some or all of your clients may reach agreements with the Government that might avert the further incurrence of significant legal fees and expenses, and thus the exhaustion of coverage. Consequently, we believe your clients' requests for indemnification and advancement from the receivership, are, at this time, premature. That is particularly true with respect to the claims for indemnification (as opposed to advancement).

Second, regardless of the availability of insurance coverage, your clients' indemnification claims, by their nature, are claims for reimbursement from the receivership estate of previously-expended monies pursuant to contract rights under pre-receivership agreements. Such claims -- for reimbursement, damages or other amounts due under pre-receivership contracts -- will be addressed and determined during the receivership's claims process, which the Receiver has yet to develop and initiate, and which the Court has yet to approve. At that time, your clients will be afforded the opportunity to submit claims to the Receiver for any and all amounts that they claim they are owed, and those claims will be determined in accordance with a plan and process that

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1 The "Receivership Entities" are 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 Opportunity 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 Partners Credit Opportunities Fund International Ltd and Platinum Partners Credit Opportunities Fund International (A) Ltd.

2 The Demand Letters to which we refer consist of: (i) two letters from William A. Burck to Bart Schwartz, dated March 3, 2017; (ii) two letters to Alan Levine from Benjamin Fischer, dated March 7, 2017; (iii) a letter to Alan Levine from William A. Burck, dated March 15, 201; (iv) a letter to Alan Levine from Gregory J. O'Connell, dated March 23, 2017; (v) a letter to Alan Levine from Eric Breslin, dated March 28, 2017; and (vi) a letter to Alan Levine from Robert Henoch, dated April 13, 2017. If there were additional demands for indemnification and advancement made by criminal defendants, they were not forwarded to us.

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the Receiver has yet to formulate.

Claims for advancement – purporting to require the Receiver to distribute monies to your clients from the estate *now* (in advance of the claims process) in order to pay their criminal defense fees and expenses "as incurred" -- are fundamentally different from (albeit related to) claims for indemnification. We believe that the requests for advancement are premature in light of your clients' continued enjoyment of insurance coverage. Nonetheless, we address them here. For the reasons set forth below, the Receiver has determined that your clients are not entitled to advancement from the receivership estate of the legal fees and expenses as they incur them in the criminal proceeding.

1. <u>The Referenced Agreements Do Not Require Advancement</u>

We have reviewed the provisions you collectively have cited to us in the Demand Letters.[3] Without conceding the validity of any of the agreements in which these provisions can be found (which agreements are subject to ongoing investigation by the Receiver), we note only one provision that, on its face, provides for a right to advancement rather than a right to indemnification. That provision is Paragraph 14 of the Operating Agreement for Platinum Liquid Opportunity Management (NY) LLC ("<u>PLOM NY</u>"), dated June 19, 2009, which states, in part, that"[t]he Company shall indemnify and hold harmless the Managing Member from and

[3] Those provisions are: (i) Paragraph 14 of the Platinum Liquid Opportunity Management (NY) LLC Operating Agreement, dated June 19, 2009; (ii) Section 2.06 of the Platinum Partners Liquid Opportunity Master Fund L.P. Amended and Restated Exempted Limited Partnership Agreement, dated July 1, 2009; (iii) Section 2.06 of the Platinum Partners Liquid Opportunity Fund (USA) L.P. Limited Partnership Agreement, dated July 1, 2009; (iv) Section 2.06 of the Platinum Partners Liquid Opportunity Fund (USA) L.P. Limited Partnership Agreement, dated July 1, 2009; (v) Section 2.06 of the Platinum Partners Liquid Opportunity Intermediate Fund L.P. Amended and Restated Exempted Limited Partnership Agreement, dated July 1, 2009; (vi) Section 134 of the Platinum Partners Liquid Opportunity Immediate Fund Ltd. Articles of Association, dated April 3, 2009; (vii) Sections 180-81 of the Amended Restated Articles of Association of Platinum Partners Liquid Opportunity Fund (International) Ltd., dated June 30, 2009; (viii) Section 5(a) of the PPLO Investment Management Agreement, dated July 1, 2009; (ix) Section 5.4.2 of the Fourth Amended and Restated Platinum Partners Credit Opportunities Fund Limited Liability Company Agreement, dated June 1, 2014; (x) Paragraph 167 of the Memorandum of Association of Centurion Credit Group International (A) Ltd., dated October 21, 2008; (xi) Page 73 of the October 2015 Platinum Partners Credit Opportunities Fund LLC Private Placement Memorandum; (xii) Section 5 of Portfolio Management Agreement between Centurion Master Fund and Centurion Management, dated February 1, 2002; (xiii) Section 5 of the Amended and Restated Investment Management Agreement, dated March 11, 2012; and (xiv) Section 11.2 of the Amended and Restated Operating Agreement of Credit Funding LLC, dated April 1, 2012.

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against any and all losses, claims, damages, liabilities, expenses (including, without limitation, legal fees and expenses) . . . , whether civil, criminal, administrative or investigative, which relate to the Managing Member's relationship to, or status or activities, with the Company or which otherwise relate to or arise in connection with the property, business or affairs of the Company ('Losses')," and that "[t]he Managing Member's expenses paid or incurred in defending himself against any Losses shall be reimburses as paid *or incurred*." (Emphasis added).

The provision, on its face, imposes the duty only on PLOM NY, and confers the right only as to Mr. Nordlicht (as Managing Member of PLOM NY) of advancement of legal fees and expenses. As you may be aware, PLOM NY has no assets from which to advance legal fees and expenses. And Mr. Nordlicht has not demonstrated that (or the extent to which) the legal fees and expenses he is incurring in connection with the criminal case "relate to or arise in connection with the property, business or affairs" of PLOM NY.

Accordingly, the Receiver has concluded that the receivership has no duty to use receivership funds to advance any legal fees and expenses incurred by your clients in the criminal case under any of the agreements you collectively have cited.

2. In the Context of the Receivership, Advancement Would Be Inappropriate

Even if the agreements you have cited were to obligate the Receiver to use receivership funds to advance your clients' legal fees and expenses in connection with the criminal case, advancement would be inappropriate in the context of a receivership.

The right to advancement in each of the agreements you have referenced is governed by Delaware law. Decisions applying Delaware law in similar circumstances hold that, in a receivership, "advancement claims should be treated the same as the claims of other unsecured creditors," for several reasons: (1) "while advancement is important, so is the successful winding up of a corporation or other business entity"; (2) similar to their treatment in bankruptcy proceedings, "[a]dvancement obligations are contractual in nature and generally arise from pre-receivership transactions" and, thus, "are no different from other creditors' claims"; (3) "balancing the existence of advancement rights against the realities of insolvent entities" renders "insurance as the best solution"; and (4) the reality of practical administration weighs in favor of treating advancement claims the same as the claims of other unsecured creditors."

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Andrikopolous v. Silicon Valley Innovation Co., LLC, 120 A.3d 19, 25-26 (Del. Ch. 2015), *aff'd*, 142 A.3d 504 (Del. 2016) (Strine, C.J.); *see also Henson v. Sousa*, 2015 WL 4640415, at *2 (Del. Ch. Aug. 4, 2015) ("equity and public policy favor[] treating advancement claims as, in effect, indemnification claims in this limited circumstance [of a receivership] relegating those claims to an equivalency with other creditors' claims"). We have found no case decided after *Andrikopolous* reaching a contrary conclusion.

The one decision within the Circuit addressing the right to advancement in the context of a receivership, *SEC v. Illarramendi*, 2014 WL 542720 (D. Conn. Feb. 10, 2014), was decided *before*, and was expressly *rejected* by, *Andrikopolous*. In *Illamarendi*, the district court relied on "the strong Delaware policy of indemnification and advancement of attorneys' fees" to conclude that, subject to the outcome of an evidentiary hearing on the former directors' and officers' alleged unclean hands and a determination of limits on any sums to be advanced, advancement of legal fees and expenses might be warranted. *Id.*, at *7. In rejecting *Illaramendi*, the court in *Andrikopolous* made clear that, in the context of a receivership, the "strong Delaware policy of indemnification and advancement of attorneys' fees" is not so strong as to prioritize advancement claims above the claims of other unsecured creditors. (*Illamarendi* also based its ruling on the factually distinguishable circumstance that, there, the directors and officers sought advancement of legal fees and expenses incurred in defending against claims asserted by the receiver, who the court presumed had "determined that despite the administrative costs attendant to pursuing the lawsuit . . ., the potential recovery will produce a net economic benefit for the Receivership Estate." That is not the situation here.)

The Receiver is confident that Judge Cogan will reach the same conclusion that the courts in *Andrikopolous* and *Henson* did – *i.e.*, in the context of a receivership, your clients (even if they were able to demonstrate a right to advancement) simply are not entitled to a priority of payment from the receivership over other unsecured creditors.

Based on the forgoing, the Receiver is not prepared to use receivership assets to advance your clients their legal fees and expenses. Rather, at best, those claims will be treated as indemnification claims and, if appropriate in the context of the claims process, paid in accordance with a court-approved process and plan developed by the Receiver.

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The Receiver reserves all of her rights and remedies.

Very truly yours,

Erik B. Weinick

cc: Melanie L. Cyganowski, Esq., as Receiver
Adam C. Silverstein, Esq.
Brent Weisenberg, Esq.

Otterbourg

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Erik B. Weinick
Of Counsel
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212 905 3672

September 25, 2018

VIA E-MAIL

Michael S. Sommer, Esq.
Wilson Sonsini Goodrich & Rosati
1301 Avenue of the Americas, 40th Floor
New York, NY 10019

Re: Platinum – Levy's Request for Attorneys' Fees

Dear Michael:

We write on behalf of Melanie L. Cyganowski, as the Receiver (the "Receiver") of various Platinum entities (collectively, "Platinum"), in response to your September 18, 2018 email (the "E-mail"). While the E-mail invites a "discussion concerning Mr. Levy's right to have Platinum pay for his defense," it also requests that the Receiver "make payment on [your firm's invoices] within the agreed-upon 15-day period," and so we will treat the E-mail as a request for payment.

As you will recall, by letter dated April 13, 2018, a copy of which is attached, we set forth the reasons why the Receiver rejected Mr. Levy's and other defendants' previous requests for advancement. The Receiver has not changed her previous position and the attachment to the E-mail does not alter the Receiver's prior analysis.

If there are additional facts or law you wish us to consider, please let us know. In the interim, the Receiver reserves all of her rights and remedies.

Very truly yours,

Erik B. Weinick

cc: Melanie L. Cyganowski, Esq.
Adam C. Silverstein, Esq.

Exhibit 89

Andrew S. Halpern

From:	"Erik B. Weinick"
Sent:	Monday, January 21, 2019 5:28 PM
To:	'Sommer, Michael'; legalbilling@platinumlp.com
Subject:	RE: Invoice for legal services for David Levy

Michael,

Receipt acknowledged and all of the Receiver's rights reserved.

Thanks,

Erik

From: Sommer, Michael [mailto:msommer@wsgr.com]
Sent: Monday, January 21, 2019 12:01 PM
To: Erik B. Weinick; legalbilling@platinumlp.com
Subject: Invoice for legal services for David Levy

Erik – attached please find an invoice from September 2018 that was never paid by the insurance – seems to have fallen through the cracks. We are submitting pursuant to the various payment obligations of Platinum.

Best,
Michael

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- X

SECURITIES AND EXCHANGE COMMISSION, :

Plaintiff, :

-v- :

PLATINUM MANAGEMENT (NY) LLC; :
PLATINUM CREDIT MANAGEMENT, L.P.; :
MARK NORDLICHT; :
DAVID LEVY; :
DANIEL SMALL; :
URI LANDESMAN; :
JOSEPH MANN; :
JOSEPH SANFILIPPO; and :
JEFFREY SHULSE, :

Defendants. :

- X

No. 16-CV-6848 (BMC)

RECEIVER'S SUR-REPLY IN FURTHER SUPPORT OF HER OMNIBUS MOTION TO CONFIRM CLAIMS DETERMINATIONS

OTTERBOURG P.C.
230 Park Avenue
New York, NY 10169
(212) 661-9100

Attorneys for Melanie L. Cyganowski, as Receiver

Of Counsel:

Erik B. Weinick
Andrew S. Halpern

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES

STATUTES

In accordance with this Court's January 4, 2022 order regarding additional briefing on the Receiver's Motion,[1] the Receiver respectfully submits this response[2] to the Sur-Reply.[3] In short, the Motion should be granted because 140 pages[4] of briefing by Levy and Wilson on the issues of advancement and indemnification do not overcome the following fundamental truths:

1. <u>The Factual Timeline Precludes Indemnification</u>

Levy cannot be indemnified for legal fees relating to his acts prior to first becoming an officer, director, employee or agent of any of the PPCO Receivership Entities on January 1, 2015. Rogers Dec. ¶ 10(D) & Ex. 7, Dkt. 597-2, 599-6. All of Levy's wrongdoing in planning and implementing the Black Elk Scheme took place before then. Second Circuit Decision at 14-38, 50-67, *United States v. Levy*, Case 19-3207-CR (L) (2d Cir. Nov. 5, 2021), Dkt. 138. As by Levy's own admission, 65% of the legal fees he incurred relate to his pre-PPCO work on the Black Elk Scheme, the most indemnification he should be entitled to from the Receivership Entities is 35%, and it is actually less than that because as further detailed in the Motion: (i) the bulk of the post-January 1, 2015 activities at issue in his various cases relate to Levy's work for non-Receivership Entities, which are also not an obligation of this estate; and (ii) any remaining obligation is subject

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[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. 597-1) (the "***Cyganowski Dec***."), the Declaration of Trey Rogers in Support of the Motion (Dkt. 597-2), the Amended Memorandum of Law in Support of the Motion (Dkt. 602) (the "***Memo.***"), and the Receiver's Reply Memorandum of Law in Support of the Motion (the "***Reply Memo.***") (Dkt. 617). Dkt. 597-99 and 602-03 are collectively referred to as the "***Motion***."

[2] Like the Reply Memo., this response does not address each argument raised in the Levy Sur-Reply, 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, including, but not limited to the Claimants' vitriolic and unfounded attacks on the Receiver herself, which are a transparent attempt to distract from the issues at hand. The Receiver will not take the bait.

[3] Sur-Reply Memorandum of Law of Defendant David Levy and Non-Party Claimant Wilson Sonsini Goodrich & Rosati PC (Dkt. 619) (the "***Sur-Reply Memo.***") and the Declaration of Michael S. Sommer (Dkt. 620) (the "***Sommer Sur-Reply Dec.***," together with the Levy-Wilson Sur-Reply Memo., collectively, the "***Sur-Reply***") in Further Opposition to the Receiver's Omnibus Motion to Confirm Claims Determinations.

[4] Indeed, Levy and Wilson submitted 37 pages of briefing on their first motion for advancement, 39 pages in support of their motion for indemnification, and 64 pages of briefing on the Motion, the latter of which includes nearly 19 pages in response to 3 pages in the Receiver's last brief.

to the 64% PPVA, 34% PPCO, and 2% PPLO allocation. *See* Cyganowski Dec. ¶¶ 53-57, 93 & Ex. 76, Dkt. 597-1 & 598-83 at 22; Memo. 25-30; Indictment. Thus, consistent with this Court's rulings that indemnification amounts were still to be determined, the Court should now confirm the Receiver's determinations of the appropriate allocation of responsibility amongst those entities.

2. Levy Conceded That 65% of the Fees Do Not Relate to the Receivership Entities

Levy admits 65% of Wilson's fees in the Criminal Case and this case were billed to defend claims or allegations arising out of the Black Elk Scheme, which involves only pre-2015 conduct. Cyganowski Dec. ¶ 93 & Ex. 76, Dkt. 598-83, 22. Thus, right off the bat, 65% of the fees sought by Levy and Wilson are ineligible to be considered for indemnification because the acts they concern occurred *before* Levy's affiliation with a Receivership Entity. Therefore, they were not part of his role with the Receivership Entities or for their benefit, which is a prerequisite for indemnification under the governing documents and the law. Dkt. 598-55 § 5.4(a), Dkt. 598-56 § 5.4.2, Dkt. 598-58 § 2.06, Dkt. 404-4 § 5.4.2, Dkt. 404-5 § 5.4.2, Reply Memo. 3-6.

3. The Receiver's Allocation Method Has Not Been Meaningfully Challenged and the Platinum Entities are Not Jointly and Severally Liable for Indemnification

Other than the demonstrably false and unsupported claim that all of the "Platinum" entities are jointly and severally liable for each other's obligations, Levy and Wilson do not provide any valid reason why the Receiver's allocation of indemnification obligations amongst the various PPVA, PPCO and PPLO entities is incorrect, or that these entities are jointly and severally liable for their respective indemnification obligations, if any. Sur-Reply Memo. 1-11. To the contrary:

(a) The Wilson Letter says nothing about joint and several liability, and, even if it did, such an agreement would violate Delaware public policy, rendering it unenforceable. Memo. 36; Reply Memo. 3-6; Dkt. 598-88

(b) Levy and Wilson do not even attempt to argue that PPVA, PPCO or PPLO are *alter egos* of each other, nor could they. Each had separate governing documents, filed separate financial statements, and had separate master-feeder fund structures, and the investments of each were managed by separate portfolio management companies.

Cyganowski Dec., Dkt. 597-1, ¶¶ 10(A), 10(E), 13-32, 81; Rogers Decl., Dkt. 597-2, ¶¶ 5, 9(A), 9(E), 44; Dkt. 1-9; Dkt. 1-10; Dkt. 1-11; Dkt. 598-55; Dkt. 598-56; Dkt. 598-58; Dkt. 404-4; Dkt. 404-5; Dkt, 620-1. That is why PPVA is being wound down in separate proceedings from PPCO and PPLO. Cyganowski Dec. ¶¶ 1, 10(B)-(C); 32, 48, 66, 81; Dkt. 276, 297.

(c) Levy and Wilson's reliance on a June 2015 report to investors in PPCO Master Fund's offshore and tax-exempt funds (Dkt. 620-1; Sur-Reply Memo. 4) is misplaced because the document actually *eviscerates* their position. Specifically, it confirms the distinctness of the entities as it: (i) is entitled "Platinum Partners Credit Opportunities Master Fund LP" (*i.e.*, PPCO Master Fund); (ii) separately identifies PPCO Master Fund, PPCO Fund International, PPCO Fund International A, PPCO Fund International A, PPVA Fund, and PPLO Master Fund; (iii) states that the PPCO, PPVA and PPLO funds have "separate investment advisors," (iv) states that "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" and that "Platinum Credit Management LP (the 'Manager') continuously seeks out new strategies it believes can provide superior rates of return to investors"; (v) refers to "Platinum Partners" as "a New York based investment management group," which "manages ***multiple*** funds"; and (vi) notes that "each of the aforementioned [PPCO, PPVA and PPLO groups of] funds have ***separate*** investment advisors." Dkt. 620-1 (emphasis supplied).

Moreover, Levy and Wilson have failed to provide an alternative allocation of their own. Instead, they ignore both: (i) their own admissions made before Judge Rakoff (*see* "65% discussion, at Sections 1-2 *supra*); and (ii) the concession of co-Defendant Joseph SanFilippo, the only party found completely not guilty in this case, that the Receiver's allocation set forth in the Claims Analysis Report is correct.[5] *See* SanFilippo Memo., Dkt. 609, 6-7.

Instead, the Claimants argue, without citation to any support, that allocation would be improper because in essence, counsel had to look at PPCO issues to defend against PPVA claims. Sur-Reply Memo. 7. This argument fails for several reasons. *First*, just because counsel analyzed issues relating to PPCO does not impose an indemnification obligation on PPCO. *Second*, their analysis does not specifically refer to the Black Elk Scheme, presumably because that scheme took

[5] It is also telling that none of the other Claimants on this Motion chose to supplement their briefing even after being granted leave by the Court to do so.

place entirely before January 1, 2015, at a time when Levy held no role with respect to the PPCO or PPLO fund or their portfolio managers. *See* Second Circuit Decision at 14-38, 50-67, *United States v. Levy*, Case 19-3207-CR (L) (2d Cir. Nov. 5, 2021), Dkt. 138; Rogers Dec. ¶ 10(D). *Third*, because they have not submitted their own allocation, the Court should adopt the Receiver's. *Fourth*, the Court should not allow Levy to run away from his representations to Judge Rakoff that 65% of Wilson's fees in the Criminal Case and the SEC's civil enforcement proceeding were billed to defend claims or allegations arising out of Levy's pre-PPCO activities, namely the Black Elk Scheme, on which Levy's conviction has been reinstated, further rendering him ineligible for indemnification. *See* Cyganowski Dec. ¶ 93 & Ex. 76, Dkt. 597-1 & 598-83 at 22.

Further, to the extent that the Indictment is based upon allegations that Levy caused assets of PPVA (not of any of the Receivership Entities) to be overvalued and concealed a liquidity crisis at PPVA, those allegations related to PPVA, *not* PPCO and should not be a PPCO indemnification obligation. Indictment ¶¶ 42-45, 54-72, 77. Importantly, the allegations of overvaluation in the Indictment arise out of the valuation of PPVA's assets. Indictment ¶¶ 42-53. Moreover, the great majority of the allegations in the Indictment relate to PPVA. The Indictment contains 8 references to PPLO, 24 references to Beechwood, 29 references to PPCO, and 146 references to PPVA. *See* Indictment *passim*. Thus, Levy and Wilson are entitled, at most, to a fraction of the fees they seek for conduct not relating to the Black Elk Scheme, and should seek the remainder of those fees from PPVA, Beechwood, SHIP, and PPVA Black Elk. *See In re Platinum-Beechwood Litig.*, 390 F. Supp. 3d 483, 498-99 (S.D.N.Y. 2019).

4. <u>Levy and Wilson are Not Entitled to Priority</u>

In continuing to attempt to "jump the line" despite this Court's prior contrary determinations, all Levy and Wilson do is cause the estate to unnecessarily expend additional resources. Although the Court stated in Advancement Op. I that "Platinum Partners may well indeed owe reimbursement to these former officers," and in Advancement Op. II that "SanFilippo's and Levy's acquittals undoubtedly entitle them to payment by the Platinum Partners entities," the reinstatement of Levy's conviction requires a re-examination of those determinations as to Levy because the basis for those determinations no longer exists.

Additionally, in a classic example of "do as I say, not as I do," Levy and Wilson ask the Court to ignore the governing agreements when it comes to eligibility for indemnification, but to enforce them when it comes to a supposed contractual priority. Putting aside the infirmity of such a position, Levy and Wilson's argument fails to recognize the relationships amongst the various Receivership Entities themselves because:

(a) PPCO Master Fund is the entity that owns the investment assets held by the PPCO Funds (Cyganowski Dec. ¶¶ 5-6);

(b) Levy and Wilson's argument relies only on the PPCO Fund and the other PPCO feeder funds' operating agreements (Dkt. 610, 24-29), but not on the PPCO Master Fund limited partnership agreement, which states that PPCO Master Fund creditors are to be paid ahead of PPCO Master Fund equity holders, but does not include the provision relied upon by Levy and Wilson or any that could give Levy or Wilson priority over other creditors of PPCO Master Fund (Dkt. 610, 29; Dkt. 598-55 § 9.2); and

(c) the PPCO feeder funds hold only equity interests in PPCO Master Fund. *See* Cyganowski Dec. ¶ 5-6. Thus, under PPCO Master Fund's limited partnership agreement, creditor claims against PPCO Master Fund would be entitled to payment ahead of limited partnership claims against PPCO Master Fund, including those of the PPCO feeder funds.

In other words, under Levy and Wilson's own theory, all creditors of PPCO Master Fund would be entitled to payment *pari passu* – all ahead of the limited partnership interests in PPCO Master Fund held by the PPCO feeder funds, and therefore ahead of any priority claims Levy or Wilson could possibly have against the PPCO Feeder Funds.

5. <u>Levy Stands Convicted</u>

Recognizing the degree to which Levy's conviction undermines his entitlement to indemnification, especially now that the Second Circuit has denied Levy's petition for rehearing of the Second Circuit Decision (*see United States v. Levy*, Case 19-3207-CR (L) (2d Cir. Dec. 29, 2021), Dkt. 163), Levy and Wilson have pivoted and now are playing for time by arguing that there will not be a "final judicial determination that Mr. Levy engaged in any bad faith conduct that now extinguishes his advancement and indemnification rights" until Levy has been sentenced and has exhausted all possible appeals from his conviction to the Supreme Court. Sur-Reply Memo. 7. But Levy's sentencing will not alter the Second Circuit's reinstatement of his conviction, which is dispositive of Levy's fraudulent and bad faith conduct, and the prospect of a reversal of his conviction by the Supreme Court appears remote at best. Consequently, any future proceedings will, in all likelihood, only forestall the inevitable, and should not serve to delay the conclusion of the Receivership any further.

6. <u>The Wilson Letter Does Not Cure the Claims' Deficiencies</u>

As the Receiver has previously established (Memo. 36; Reply Memo. 3-6), Wilson may not use the Wilson Letter as a mechanism to contract around Delaware's public policy prohibiting a Delaware entity from indemnifying its agents, officers, directors or employees for liability or attorneys' fees incurred in defending their bad faith or fraudulent conduct (such as conduct that resulted in a criminal conviction for securities fraud or wire fraud) or any conduct not engaged in on behalf of those entities, as embodied in 8 Del. Code §§ 145(a) and (b); in *Blankenship v. Alpha Appalachia Holdings, Inc.*, 2015 WL 3408255, at *19-20 (Del. Ch. May 28, 2015); *Waltuch v. Conticommodity Servs., Inc.*, 88 F.3d 87, 95 (2d Cir. 1996); *Sun-Times Media Grp., Inc. v. Black*, 954 A.2d 380, 404 n.93 (Del. Ch. 2008); *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); and *Charney v. Am. Apparel, Inc.*, 2015 WL 5313769, at *14 (Del. Ch. Sept. 11, 2015); and in the Operating Agreements.

The Sur-Reply does not change this. Specifically, Levy and Wilson read *Blankenship* too narrowly and ignore the court's statement – referring to an engagement letter that is not materially different from the Wilson Letter – that, "given that the Engagement Letter does not limit [the company's] payment obligations by reference to whether [the former officer] is ultimately entitled to indemnification under the Charter or Delaware law, [the former officer's] argument about its meaning is untenable because such an unconditional payment obligation would exceed the scope of indemnification that a Delaware corporation may lawfully undertake." *Blankenship*, 2015 WL 3408255, at *20.

Blankenship thus confirms that a law firm cannot circumvent *Waltuch*, *Sun-Times Media Group*, *SN Liquidation* and *Charney*, by executing an engagement letter directly with an entity organized under Delaware law providing that the entity will compensate a law firm directly for services rendered by the law firm on behalf of its client, for which the entity was precluded from indemnifying the client under Delaware's public policy reflected in *Waltuch*, *Sun-Times Media Group*, *SN Liquidation*, and *Charney*.

Applied to these facts, the Wilson Letter does not enable Wilson or Levy to recover for legal fees incurred: (i) in defending litigation resulting from Levy's conduct on behalf of the PPVA Funds, PPVA Portfolio Manager, PPVA Black Elk, or Beechwood, rather than the Receivership Entities; (ii) for Levy's actions before January 1, 2015, when he first became affiliated with PPCO (including between early 2014 through December 31, 2014, when he was not employed by any PPLO, PPCO or PPVA entity); or (iii) for Levy's conduct which the Court has adjudicated to be criminal and which was therefore bad faith conduct (not to mention post-January 1, 2015 acts relating to work for PPVA, not PPCO or PPLO).

Moreover, even if *Blankenship* were restricted to require only the reasonableness of fees and a nexus between the legal services performed and the indemnitee's conduct for the indemnitor (2015 WL 3408255, at *19-20), as Levy and Wilson argue, *Blankenship* would not support them because there can be no possible nexus between charges relating to Levy's: (i) pre-January 1, 2015 conduct (the Black Elk Scheme) and post-January 1, 2015 indemnification (when he went onto PPCO Portfolio Manager's payroll); and/or (ii) work for PPVA, PPVA Black Elk or Beechwood, none of which are Receivership Entities (or are entities for which Receivership Entities are jointly and severally liable). Moreover, it would not be "reasonable[]" for the Court to require PPCO or PPLO to pay fees for defending conduct not performed for the Receivership Entities or underlying Levy's reinstated securities fraud conviction. *Id.* And, contrary to what Levy and Wilson claim, this Court has never held that the Wilson Letter is "binding and enforceable," *see* Sur-Reply Memo. 8, or that it can be enforced in a manner that would override Delaware public policy. Indemnification Op. I; Indemnification Op. II.

Claimants' assertion that the Receiver agreed to the Wilson Letter or to otherwise pay Wilson's invoices (Sur-Reply Memo. 1, 10) must also be corrected. *First*, Levy and Wilson's brief, in claiming that two Receivers admitted that the Wilson Letter was "still in effect," actually overstates that which was testified to in the supporting declaration proffered by Michael Sommer (Dkt. 611).[6] *Second*, the Receiver had actually expressly put Levy and Wilson on notice that, while she was acknowledging *receipt* of their invoices, she was doing so with a full reservation of her rights and made clear that the Receiver would respond to address the invoices in the claims

[6] For example, Sommer made the following statements at paragraphs 20-21 of his December 13, 2021 Declaration: "Ms. Cyganowski acknowledged that she had already been made aware of the Wilson Agreement, and made no effort to attack it or suggest in any way that it was not entirely appropriate and binding on Platinum"; "Ms. Cyganowski confirmed that Wilson Sonsini should continue to submit its invoices to the insurance company for payment, with copies to her counsel"; and "Ms. Cyganowski gave no indication whatsoever that she believed Platinum's payment obligation to Wilson Sonsini was in any way tethered to any advancement or indemnification obligations flowing from any of the Platinum Funds to Mr. Levy." Dec. 13, 2021 Sommer Dec., Dkt. 611, ¶¶ 20-21. However, this does not mean that the Receiver agreed to pay Wilson's bills or that the Receivership Entities were responsible to pay all of the fees referred to in those bills.

adjudication process. The Receiver did not concede, through action or inaction, that Wilson or Levy was entitled to payment for the invoices. Indeed, the Receiver never paid a cent of Wilson's bills. Sur-Reply Declaration of Erik B. Weinick ¶¶ 3-9 & Exs. 88-89 thereto.

Because neither the Receiver nor the Prior Receiver waived the right to challenge or agreed to pay Wilson's invoices, *Pacific Western Oil Co. v. McDuffie*, 69 F.2d 208, 213 (9th Cir. 1934) and *Menke v. Wilcox*, 275 F. 57, 58-59 (S.D.N.Y. 1921) (Hand, J.) are dispositive and require denial of Levy and Wilson's claims.

7. <u>Granting Claimants a Priority and/or a Reserve Would Be Inequitable</u>

The Receivership Order authorizes, empowers and directs the Receiver "to develop a plan, on the Receiver's behalf or in conjunction with any other party, for the fair, reasonable, and efficient recovery and disposition of all remaining, recovered, and recoverable Receivership Property …, which may be a plan of liquidation." Dkt. 276 ¶ 45. Here, Levy and Wilson continue to proclaim Levy's innocence and vow to appeal to the Supreme Court. Nonetheless, the irrefutable facts are that it would be inequitable and contrary to applicable law to turn over $8.7 million in attorneys' fees or to establish a reserve of $11-13 million of the Receivership's assets in favor of a former officer convicted of securities fraud on matters even he has admitted cover 65% of his claim. Most, if not all, of the remainder of the former officer's claim either pre-dated his involvement with the company or primarily related to other distinct companies – a former officer who, it bears repeating, has already received $3,283,990 from insurance paid for with funds of the Receivership Entities. Receiver Dec. ¶ 87. Moreover, these claims are one of the final remaining impediments to submission of a proposed plan of liquidation. If the Court awards Levy and Wilson all of the relief they seek, the liquidation of the entire Receivership and the payment of any claims to any creditors or investors may be delayed for years, and it is possible that the very investors Levy said at his criminal trial would be paid before him may see nothing.

Levy and Wilson's argument that the Receiver does not oppose establishment of a reserve (Sur-Reply Memo. 17) is not accurate because the Receiver declined to establish a reserve in her Claims Analysis Report. *See* Dkt. 564-1. The governing agreements and the Receivership Order give the Receiver (standing in the shoes of prior management) discretion whether to, and if so, in what amount, to reserve funds. Receivership Order, Dkt. 276, ¶¶ 3, 6(E); Cyganowski Decl. Ex. 49, Dkt. 598-55 §§ 3.8, 9.3; Dkt. 404-4 § 10.2.1(ii). Here, the Receiver, in the exercise of her discretion, has determined that a reserve should not be established, but if it is, it should be for only a small fraction of the millions of dollars Levy and Wilson seek because as explained in Section 4 *supra*, Wilson and Levy's claims are not entitled to priority over other creditors. Consequently, if a reserve is established for Wilson and Levy's claims, then that reserve should be limited to Wilson and Levy's *pro rata* share of all creditor and/or investor claims.[7]

CONCLUSION

The Motion should be granted, and Levy and Wilson's claims should be denied.

Dated: New York, New York
January 28, 2022

OTTERBOURG P.C.

By: */s/ Erik B. Weinick*

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[7] In arguing that the Court establish a reserve of millions of dollars for future attorneys' fees and/or should require advancement of fees Wilson may bill, Levy and Wilson continue to distort the Advancement Opinions, claiming that the Court determined that "this Court has already twice determined that the Wilson [Letter] is enforceable and obligates Platinum to pay Mr. Levy's legal fees and costs." Sur-Reply Memo. 17. A review of the language they cite, in context, makes clear that the Court did not so rule – let alone rule that Levy and Wilson are entitled to all past or future fees. However, this Court did twice rule that Levy is not entitled to priority because he does not get to jump the line. *See* Indemnification Op. I, 5-6; Indemnification Op. II.