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VIA CM/ECF

The Honorable Brian M. Cogan
United States District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Re: *SEC v. Platinum Management (NY) LLP et al.*, No. 1:16-cv-06848-BMC

Dear Judge Cogan:

This letter is respectfully submitted on behalf of my law firm, Wilson Sonsini ("Wilson"), a claimant in the Platinum Receivership, to alert the Court to newly discovered evidence bearing on the two issues the Receiver has pressed in objection to Wilson's claim: (i) allocation; and (ii) priority of payment.

BACKGROUND

The Wilson Claim

As the Court is aware, in June 2016, an agreement was entered into between Platinum Partners and Wilson pursuant to which Platinum agreed to pay Wilson for the legal fees and costs it incurred in representing David Levy in Platinum related matters. The Receiver had raised some meritless arguments in the past attacking the Wilson agreement, but at the recent oral argument on March 13, 2024, and after this Court twice confirmed the enforceability of that Agreement, the Receiver did not pursue those arguments. Instead, the Receiver pressed only one issue with respect to the Wilson agreement – allocation.

The Wilson law firm had submitted an original claim to the Receiver in the amount of $8.7 million, comprising the fees and costs that had not been paid by either Platinum or its insurance carriers. Of that amount, the Receiver unilaterally elected to allocate 64% of the amount Platinum owed to Wilson to non-receivership entities, and "allowed" the remaining 36% against receivership entities, for a total allowed claim of approximately $3,132,000.

By agreement between Wilson and the Receiver, Wilson was permitted to update its claim to include additional legal work performed for Mr. Levy after the original claim, largely in connection with post-trial motions in the criminal case, the government's appeal of Your Honor's

Rule 29 decision, and submissions and filings relating to Mr. Levy's sentencing. The revised claim is $11,365,766, which, pursuant to the Receiver's self-created allocation method, would result in an allowed claim of $4,091,676.

At the argument on March 13, 2024, the sole argument raised by the Receiver with respect to the Wilson claim was on the issue of allocation. The Receiver argued that as some of the work performed by Wilson related to PPVA, a portion of Wilson's legal fees should be allocated to that entity, which was not a receivership entity. The Receiver also suggested that Wilson had failed to make its own allocation, and without citing any authority, claimed that this purported failure could somehow be fatal to the Wilson claim.

Wilson responded first by reminding the Court that the Wilson agreement bound all of Platinum Partners to pay Wilson's fees and costs. That agreement did not call for any allocation and did not distinguish between the fees and costs incurred reviewing a PPVA document as distinguished from a PPCO document. As Platinum Partners – the entire organization – had agreed to pay all of Wilson's fees and costs, there was no allocation required, and the obligation to pay Wilson belonged to all of the Platinum entities.

Wilson next noted that even if the Wilson letter was interpreted as somehow contemplating allocation – which is not what the clear and unambiguous terms of that letter say – Wilson pointed to the ample controlling case law from Delaware that makes clear that where the Company is obligated to pay legal fees with respect to certain issues but not others, and where the issues are inextricably intertwined, then no allocation need be made and the Company is responsible for paying all amounts. As we explained, that is plainly the case here where the indictment describes conduct by Platinum spanning each of PPCO, PPLO, PPVA and PPNE (a PPCO entity), and how those entities all interacted with one another. Moreover, the indictment charged that bonds held by each of PPVA, PPCO and PPLO were integral to the so-called Black Elk scheme. In other words, this was precisely the type of case that the Delaware courts had repeatedly held was not subject to allocation, and we could not have done our work defending against the PPCO and PPLO aspects of the indictment without undertaking the work we did defending against the PPVA aspects of the indictment. As a result, Wilson maintained that its entire claim should be allowed.

Finally, in response to the Receiver's argument that Wilson had failed to make any allocation at all, Wilson explained that this was an erroneous assertion as Wilson claimed an allocation of 100%, as supported by controlling Delaware authority and the clear and unambiguous language of the Wilson letter. Moreover, Wilson further explained that even if the Court determined that there needed to be some amount of allocation, as each side had proposed its own allocation (Receiver at 36% and Wilson at 100%) the Court was well positioned to make the determination on the appropriate allocation between those two percentages.

The Newly Discovered Evidence

A. The Receiver's Non-Allocation of Claims from Other Law Firms

Last week, the Receiver for the first time produced to Wilson certain documents relating to the claims of other law firms involved in the Platinum investigations and prosecutions. Those documents revealed that the Receiver has repeatedly acknowledged that no allocation is appropriate in connection with the work of lawyers engaged to represent Platinum entities and individuals in the face of the sprawling criminal and regulatory investigations and prosecutions brought by the Department of Justice and the United States Securities and Exchange Commission.

Other than Wilson, there are three other law firms that have made claims against the Receivership based on having represented Platinum and certain of its employees in connection with the investigations and prosecutions of the DOJ and SEC. In every instance, the Receiver determined that no allocation was to be made:

- The law firm of Curtis, Mallet-Prevost was engaged by Platinum Credit Management, LP to represent it in connection with the criminal investigations being conducted by the Eastern and Southern Districts of New York. Curtis, Mallet incurred substantial legal fees and costs that were not paid, and the Receiver allowed 100% of those fees and costs against PPCO's remaining funds without making any allocation among the various Platinum Funds.

- The law firm of Dechert LLP was engaged to represent Platinum Management (NY) LLC, Platinum Credit Management LP, and Mark Nordlicht in connection with the various government investigations. Dechert incurred substantial legal fees and costs that were not paid for which it made a claim on the Receivership. The Receiver allowed 100% of Dechert's claim against PPCO's remaining funds without any allocation among the various Receivership entities.

- The law firm of Morrison Cohen LLP was engaged to represent an individual Platinum employee in connection with the Platinum investigations and that firm incurred legal fees and costs that were not paid. The Receiver allowed 100% of those fees and costs against the funds collected on behalf of PPCO without making any allocation among the various Platinum Funds.

These documents were startling, to say the least. While the Receiver has been advancing what we view as a frivolous "allocation" argument in opposition to the Wilson claim, she has allowed 100% of the claims of other law firms covering the same scope of work, without imposing any allocation at all. Put simply, the Receiver's decision not to allocate the claims of other law firms that were dealing with the very same matters that Wilson was handling is a clear admission on the part of the Receiver that no allocation is appropriate for the law firms involved in these matters. Certainly, there exists no principled or legal basis to allocate Wilson's claim when the claims of every other similarly situated law firm are not being so allocated.

Finally, in connection with the Receiver's factually and legally baseless argument that Wilson had failed to make any allocation, and that such could somehow be fatal to Wilson's claim, apart from that position being just factually wrong (as Wilson had claimed an allocation of 100%) the recently produced documents revealed that ***none*** of the other law firms made any allocation to their claims. Moreover, claims from former employees also made no allocation. Yet with respect to every other claimant, the Receiver advanced no argument that those claims were somehow infirm. It appears that this argument too was made up of whole cloth by the Receiver simply to try to mount a response to the Wilson claim.

B. The Receiver's New Position on Priority of Payment

The next newly discovered development has to do with the Receiver's position with respect to priority of payment between unsecured creditors and investors. The issue of priority of payment was not addressed at the recent oral argument as the Court deferred that issue for a later argument. But it appears that issue is now partially moot, as explained below.

As the Court is aware, each and every Platinum fund had controlling documents that every investor signed and agreed to, which provided for the specific sequencing of payments to creditors upon the dissolution, liquidation or winding up of these Funds. In every single one of these agreements, the investors agreed that they stood ***behind*** unsecured creditors such that unsecured creditors would be paid in full *before* any payment was made to investors. *See, e.g.*, ECF 619.

In response to the plain language of the Fund documents, the Receiver ***previously had*** taken the position that she should be permitted to ignore the controlling documents and treat unsecured creditors the same as investors – distributing the Receivership assets to all at the same time and *pro rata*. The Receiver cited no relevant authority supporting such an approach, nor did she or her counsel offer the slightest rationale for ignoring the plain language of the underlying agreements that every investor had signed. *See* ECF 597, 617. Moreover, the Receiver seemed to be ignoring this Court's prior Order acknowledging that distributions must be made according to claim priority. *See* Order of January 22, 2020 ("The Receiver has broad authority to reasonably distribute funds ***by order of claim priority.***") (emphasis supplied).

Then, at the outset of the argument on March 13, 2024, the Receiver's counsel announced that a settlement had been reached with the Ford O'Brien firm ("FOB"), counsel to Joseph SanFilippo. No details regarding that settlement were provided, and no details were shared with us after the argument by either the Receiver or FOB. Rather, the first time we learned of the terms of the settlement with FOB was when the Receiver filed her Notice of Settlement (ECF 705). We learned of the terms of the BET settlement when the Receiver filed her Notice of Settlement as to that unsecured creditor (ECF 709).

We were gratified to see that the Receiver has now finally acknowledged – by virtue of her agreement to pay FOB and BET ahead of investors – that the claims of unsecured creditors

do indeed stand ahead of investor claims; precisely what every Fund document confirms in clear and unambiguous language.[1]

We fully expect that the Receiver will adhere to that same position in connection with the Wilson claim – that Wilson stands ahead of the claims of investors. And if that is the case, then the issue of priority of payment between unsecured creditors and investors is now moot. On the other hand, should the Receiver take the position that she can follow the unambiguous language of the Fund documents and pay FOB and BET ahead of investors, but then not follow those same Fund documents with respect to the Wilson claim, such a position would be unprincipled, and we would ask the Court to preclude the Receiver from applying a different standard to us than she is applying to other unsecured creditors.

C. Priority of Payment of The Wilson Claim

The final issue relating to priority of payment has to do with the priority of the Wilson claim ahead of other ***unsecured creditor claims***.

According to the Receiver, she has received payment for her fees and those of her firm in an amount well beyond $30 million. Yet, she has managed to cobble together only approximately $12 million of distributable assets. That $12 million is comprised of approximately $3 million of assets from PPLO, and approximately $9 million which has been collected from the PPCO entities. The PPCO assets, according to the Receiver, have been aggregated in the PPCO Master Fund. This creates a significant new issue as to the PPCO assets, as set forth below.

The PPCO Master Fund had no investors – this is not subject to dispute. Rather, the limited partners to the Master Fund were the various PPCO "Feeder Funds." As a result, if all the PPCO assets belong to the Master Fund, as the Receiver has suggested in her "Allowed Claims" analysis, then no distributions may be made to investors as no investor has any valid claim against the Master Fund.

On the other hand, if the Master Fund is merely holding the assets of the Feeder Funds, such that the PPCO assets would go from the Master Fund to the Feeder Funds and then to the creditors of the Feeder Funds, then distributions to investors would at least be proper, subject to any issue of priority of payment.

As we have explained in our prior submissions to the Court, under the clear and unambiguous language of the PPCO Feeder Fund documents, Wilson has a priority over any

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[1] It is hardly surprising that not a single investor has lodged any objection to FOB and Black Elk Trustee ("BET") settlements which call for those creditors to be paid ahead of investors. This is because every investor agreed that unsecured creditors such as FOB and BET were to be paid first.

other ***unsecured creditor*** as to the PPCO assets. The reason for this is that the specific language of the Fund documents provides that the ***first*** to be paid from such PPCO assets, ahead of all other unsecured creditors, are:

> "[A]ll debts, obligations, and other liabilities of the Company, as to which personal liability exists with respect to any Member."

Here, it is undisputed that Mr. Levy was a Member of PPCO. Moreover, it is undisputed that through the Wilson letter, Platinum obligated itself to pay the fees and costs incurred by Wilson on behalf of Mr. Levy. And it is undisputed that Platinum has failed to meet those payment obligations.

Finally, Mr. Levy's engagement letter with Wilson provides that:

> "Platinum Partners has confirmed that it has agreed to pay all fees for legal services and all costs incurred . . . . Client agrees, however, that if Platinum should fail to pay any portion of our statements for any reason, Client will be responsible for paying these amounts in full."

Accordingly, this presents the precise scenario set out in the PPCO agreements for which the Wilson claim has a higher priority than the claims of other unsecured creditors: Mr. Levy has a personal liability to Wilson to meet the obligations that Platinum itself agreed to pay and which Platinum has failed to pay. The language could not be clearer, and the situation that language anticipates is precisely encompassed by the irrefutable facts. As a result, Wilson stands ahead of all other unsecured creditors with respect to the PPCO assets.

The distributable PPCO assets are, unfortunately, quite limited; there are not enough to meet the Wilson claim in full, and certainly not enough to pay each of FOB, BET, Daniel Small and Wilson. The settlement agreement with FOB calls for $450,000 to be paid from PPCO assets, and the settlement agreement with BET calls for $1,246,500 to be paid from PPCO assets (with an additional $253,500 paid from the PPLO assets). These payments stand to compromise Wilson's priority and its important rights. But as Wilson has explained to the Receiver's counsel, as well as to counsel at FOB and BET, Wilson is not looking to recover all of its fees and costs at the expense of other unsecured creditors with valid claims also making a reasonable recovery. The same, of course, would be true of any settlement with or determination in favor of Mr. Small, as we do not look to stand in the way of a reasonable payment to Mr. Small. Accordingly, we are not objecting to the FOB and BET settlement agreements being approved and payment being made, as those agreements are reasonable. The Receiver has agreed that our position in this regard is without prejudice to any of our "priority of payment" positions.

Therefore, based on the above, we respectfully ask the Court to: (i) approve the Wilson claim in the amount of $11,365,766; (ii) find that the Wilson claim has priority over investors; and (iii) find that the Wilson claim, with respect to the PPCO assets, has priority over other unsecured creditors.

We remain available to answer any questions the Court may have with respect to these issues, and respectfully request argument on the issues relating to priority of payment at the Court's very earliest convenience.

Respectfully submitted,

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Professional Corporation

s/ *Michael S. Sommer*
Michael S. Sommer

Counsel for Claimant Wilson Sonsini

cc: All Counsel of Record (via CM/ECF)