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, JOESPH SANFILIPPO, AND JEFFREY SHULSE Defendants.	:	Docket No: 1:16-cv-06848-BMC

REPLY MEMORANDUM OF LAW ON BEHALF OF JOSEPH SANFILIPPO IN FURTHER SUPPORT OF HIS MOTION TO COMPEL THE SEC RECEIVER TO CONTINUE ADVANCING HIS REASONABLE ATTORNEY'S FEES AND DEFENSE COSTS

November 6, 2018

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PRELIMINARY STATEMENT

In purporting to justify its discontinuance of advancement to SanFilippo – filed concurrently with the expiration of insurance proceeds relied on by SanFilippo for his defense and a government document dump of 260,000 pages of texts messages and emails as well as 20 hours of audio recordings – the SEC Receiver's opposition brief makes three points clear: that (1) San Filippo was properly granted advancement by the managing member of PPCO, because he served as CFO of PPCO's managing member, as the Receiver admits; (2) PPCO's operating agreement prohibits the Receiver from discontinuing advancement once the Managing Member is removed (even if PPCO is not "terminated or dissolved); and (3) the Sixth Amendment right to counsel bars the Receiver from cutting off funds to SanFilippo on the eve of trial given the significant encouragement and influence exercised by the SEC over the Receiver, including the SEC improperly forcing the previous Receiver, Bart Schwartz, to resign after Schwartz took the position that certain Platinum assets retained substantial value, a proposition at odds with the Indictment and SEC civil complaint.

The Receiver admits that SanFilippo was *in fact* the CFO of PPCO's Managing Member, as stated in operative PPCO documents, which establishes mandatory advancement rights for both officers, agents, and other representatives of PPCO's Managing Member. The Receiver also admits that the Managing Member made the decision to (and did) provide advancement to SanFilippo in this role. (Opp. Br. pg. 10 ("In July 2016, Platinum Management paid SanFilippo's firm, Ford O'Brien LLP, $50,000)). The Receiver's suggestion that Werblowsky lacked to the authority to act on PPCO's behalf lacks credulity, as, again, operative PPCO documents make clear that Werblowsky served as Legal Counsel and Senior Managing Director of PPCO (and its managing member and loan portfolio manager), and agreed on behalf of Platinum Partners LP,

(i.e., all entities under the Platinum umbrella, including PPCO) to advance legal fees to SanFilippo in defense of the allegations set forth in the indictment.

The plain language of § 5.4.3 of PPCO's operating agreement prohibits the Receiver (or anybody) from acting in a manner that affects SanFilippo's indemnification rights, including his right to advancement once the managing member has been removed. The Receiver fails to set forth a basis on which this Court may simply disregard this provision, and Delaware statutory and case law expressly forbids the Receiver from doing so. It is apparent that the previous Receiver, Schwartz, understood this, as it explains his decision to invest over $880,000 in insurance premiums to postpone mandatory advancement, and conserve Receivership resources.

That the Receiver has relied on such specious factual premises and clear breaches of PPCO's operating agreement exposes the manner in which the SEC has significantly encouraged the Receiver's decisions, and the Receiver's suggestion that the SEC never reviewed or provided input into its decision to discontinue advancing legal fees does not alter this obvious conclusion. The government's influence here is substantially more egregious than anything set forth in *Stein*, since here the SEC actively sought to intervene in this matter by forcing the resignation of Schwartz because his evaluation of Platinum's portfolio of assets conflicted with the government's case. Rather, following the forced resignation based largely on Schwartz's belief that Arabella and Brazil Recovery Project retained significant value, the SEC strong-armed Schwartz into entering the Arabella settlement before the new Receiver was installed because "the staff" believe the investments were "risky" and "distressed." That is, the SEC made clear that the Receiver needed to tow the government line, and unsurprisingly the new Receiver promptly declared all of Platinum's assets worthless while in same breath admitting that she had *no basis* for putting forth this factually dubious proposition. While the Receiver may imagine

scenarios under which a receivership does not share a sufficient nexus with the state, for example, when a Receiver is appointed, and litigation arises involving civil claims, the Court must here consider the actual facts before it, and disregard analogies to receivership (and bankruptcy) situations that do not implicate the Constitution's protections for criminal defendants.

ARGUMENT

I. SanFilippo was the CFO of PPCO, its Managing Member, and its Loan Portfolio Manager, was Entitled to Advancement under the Operating Agreement, and the Managing Member Duly Granted it to him.

The Receiver admits that the corporate documents and paystubs, among other evidence submitted by SanFilippo, show that he was *in fact* the CFO of PPCO's managing member, Platinum Credit Holdings LLC, it stakes out the position that he is not entitled to advancement because "[The operative company document] does *not* identify him as CFO of PPCO." (Opp. Br. pg. 2-3) (emphasis original). Yet, PPCO's operating agreement clearly states, "The Company shall indemnify and hold harmless *the Managing Member*, *Loan Portfolio Manager*, **and their** *affiliates, members, officers, directors, employees, shareholders, agents, and other applicable representations,*" and grants the same rights regarding advancement. (PPCO Op. Ag. § 5.4.2) (emphasis added). This language is clear and dispositive.

In denying advancement based on the erroneous assertion that SanFilippo was not the CFO of PPCO, the Receiver ignores that in SanFilippo's role as CFO of PPCO, he worked on drafting and preparing PPCO's 2015 audited financial statement, as evidenced by dozens of emails and draft audit related documents. These documents not only prove he was CFO of PPCO, but also show, as the Court will come to learn, his good faith (which PPCO's Managing

Member took into consideration in granting advancement) by contradicting the explicit allegations against SanFilippo in the Indictment (and SEC Complaint).

II. The Receiver Lacks the Discretion to Reverse the Decision of the Managing Member.

PPCO's operating agreement protects SanFilippo's right to advancement. Indeed, the Managing Member's decision to advance SanFilippo's reasonable attorney's fees vested and could not be discontinued, revoked, or altered by the Receiver following the removal of the Managing Member. Any attempt to do so would impermissibly "eliminate or impair" PPCO's operating agreement, an outcome expressly barred in PPCO's operating agreement, section 5.4.3, and by 8 Del. C. § 145(f) as well as Delaware case law permitting LLC's virtually limitless discretion with regard to contractual advancement provisions. *See Donohue v. Corning*, 949 A.2d 574, 578 (Del. Ch. 2008)). The Receiver argues that § 5.4.3 is non-operative because "PPCO has not been terminated or dissolved," but this argument is completely misguided, since that provision bars the Receiver from taking actions that "affect" SanFilippo's advancement rights once there has been a "removal . . . of the Managing Member." This provision vests SanFilippo's advancement rights, and the case law is clear that the Receiver may not now discontinue advancement.[1] Moreover, § 5.4.3 clearly applies to both advancement and indemnification.

III. *Andrikopoulos* is Irrelevant Because it is a Civil Case Involving a Receivership with No Assets that is not Confronted with a Documentary Limit on its Discretion or the Implication of the Sixth Amendment Right to Counsel.

[1] *See, e.g.*, *Blankenship v. Alpha Appalachia Holdings, Inc.*, 2015 WL 3408255, at *1, *29 (Del. Ch. March 28, 2015) (company may not "terminat[e] [] mandatory advancement to a former director and officer when [criminal] trial is approaching and it is needed most," and ordering "Defendants must (1) advance Blankenship's unpaid legal expenses incurred in connection with the federal criminal investigation and the Criminal Proceedings and (2) pay his reasonable expenses of litigating this action"); *see also SEC v. FTC Capital Markers, Inc.*, 2010 WL 2652405, at *8 (S.D.N.Y. June 30, 2010) ("Because Commission has not shown that the funds [defendant] seeks are traceable to fraud, it may not deny her advancement of fees for purposes of her criminal defense."); *SEC v. McGinn*, 2012 WL 1142516, at *13 (N.D.N.Y. April 4, 2012) (ordering release of frozen "assets from the preliminary injunction to pay attorney's fees and costs in the parallel criminal action.").

The disingenuousness of the Receiver's argument that a criminal defendant entitled to mandatory advancement is no different than a "creditor" in bankruptcy is apparent from the fact that the Receiver continues to deny that SanFilippo (and his co-defendants) are even entitled to advancement. The Receiver's argument relies exclusively on *Andrikopoulos* v. *Silicon Valley Innovation Company, LLC*, 120 A.3d 19 (Del. Ch. 2015) and mistakenly informs the Court that *Andrikopoulos* "abrogated" *S.E.C. v Illarramendi*, 2014 WL 8019048 (D. Conn Mar. 27, 2014).

To be clear, *Andrikopoulos* is completely inapposite. That case concerned a company (SVIC), which was placed in receivership on January 21, 2013 and "SVIC's only assets are contingent claims against the Company's former officers and directors." *Andrikopoulos*, 120 A.3d at 19-20. SVIC's non-government related Receiver filed many cases on behalf of the Company, that were consolidated in the Superior Court for Los Angeles County. *Id.* at 20. As the Court explained, "Two of the defendants in [the California] action are the plaintiffs in this case: Shaun Andrikopoulos and Michael A. Santer." *Id.* "Those individuals requested from SVIC advancement for their legal expenses . . . but that request was denied," so Andrikopoulos and Santer "commenced this advancement action." *Id.* Thus, at issue was a situation in which a company had been in receivership for a year and a half before any advancement had been requested, and the advancement was sought *from* the company for an action brought *by* the company, which had zero assets, *against* the very same individuals seeking advancement. It strains credulity to suggest this case "made clear" (Opp. Br. pg. 16) that a state-influenced actor can refuse to continue advancing SanFilippo, a criminal defendant, legal fees two months before jury selection where the pre-receivership entity, PPCO, had already agreed to and begun advancing him those fees, and the company's operating agreement expressly bars the Receiver from revoking this decision.

Nor does *Andrikopoulos* "abrogate" *Illarramendi*, which it actually speaks highly of, noting that *Illarramendi* accurately relies on "Delaware's strong policy in favor of advancement" and highlighting *Illarramendi's* reliance on "cases from various courts around the country that afforded administrative priority to mandatory indemnification claims in the receivership context," including an "older case from the Third Circuit Court of Appeals." *Id.* at 21-22. While the facts of *Illarramendi* are ultimately distinguishable from *Andrikopoulos*, neither case – both of which deal with requests for advancement by a civil defendant *after* the company was entered into receivership – is particularly relevant, since (1) advancement was granted to SanFilippo before the entities went into Receivership, (2) the PPCO operating agreement (as well as Delaware statutory and common law) prevents the Receiver from altering these rights, and (3) the Sixth Amendment right to counsel protects SanFilippo against the Receiver doing what it attempts to do here.

IV. The Sixth Amendment Right to Counsel Bars the Receiver from Interfering with SanFilippo's Contractual Right to Continued Advancement.

A. *The Receiver's conduct in this case constitutes state action*

Under *U.S. v. Stein*, 541 F.3d 130 (2d Cir. 2008), the Receiver's decision to discontinue advancing funds to SanFilippo on the eve of his criminal trial is *state action* and violates the Sixth Amendment. Here, the Receiver's decision is "a direct consequence of the government's overwhelming influence." *Stein*, 541 F.3d at 136. Even though the government need not use blunt tools – the government in *Stein* never explicitly told KPMG they could not advance fees to employees, the words were much more subtle, here the SEC's tools were blunt indeed.

Rather, the Second Circuit, in *Stein*, found that a private actor's conduct constitutes "state action" for purposes of determining whether a criminal defendant's Sixth Amendment right to counsel has been violated, if a "nexus" exists, such as when (i) "the state exercises coercive

power," or (ii) "is entwined in the management or control of the private actor," or (iii) provides the private actor with *significant encouragement*, either overt or covert," or (iv) "when the private actor operates as *a willful participant in joint activity* with the State or its agents, is controlled by an agency of the State, has been delegated a public function by the state, or is entwined with government policies." *Stein*, 541 F.3d at 147 (emphasis original). Thus, "state action" exists where the government has "made plain not only its strong preference for [the private conduct], but also its desire to share the fruits of such intrusions." *Id.*

The government's significant encouragement of, coercive power over, and entwinement with the Receiver is readily apparent. The SEC forced the initial Receiver, Schwartz, to resign just two days after the SEC filed a letter accusing Schwartz of, among other things, "us[ing] investor funds to maintain and invest in" Arabella Exploration and Brazilian Recovery Project, which the SEC described as "risky investment[s]" but which the original Receiver believed had significant value. (SEC Letter dated June 21, 2017 pg. 2-3)[2]. SanFilippo's counsel moved for an order to show cause objecting to these developments, requesting the Court defer action on Schwartz's application to resign and noting that the SEC's proposed order appointing a substitute Receiver substantially altered the Receiver's powers in a manner intended to protect the DOJ and SEC's case at the expense of investors and potential claimants. (Ford O'Brien Letter dated June 26, 2017).[3,4] As SanFilippo's counsel raised at the time of the Receiver's appointment, "the SEC has already stripped from its proposed Amended Order for the new Receiver all discretion as to

[2] November 6, 2018 Declaration of Adam Ford ("AF 11/6 Dec.") Ex. A.
[3] AF 11/6 Dec. Ex. B.
[4] The Receiver intentionally misquotes SanFilippo's counsel by modifying their comment that a "receiver is an 'officer of the court' and not an arm of the SEC". (Opp. Br. pg. 12). In fact, the June 29, 2017 letter notes, "In dictating to Mr. Schwartz how he should carry out his duties, and then forcing his resignation, the SEC has acted at odds with the independence of the Receiver," and thus "[i]n brief, we would oppose Ms. Cyganowski's appointment for many of the same reasons we initially opposed the SEC's application." (Ford O'Brien June 29, 2017 Letter pg. 1)(AF 11/6 Dec. Ex. C).

the disposition of receivership assets – except liquidation" thereby artificially deflating the value of Platinum's assets to assist the government in bringing its case while harming investors and potential creditors. (Ford O'Brien June 29, 2017 Letter pg. 2).[5]

On July 10, the Court authorized Schwartz's request to authorize the Arabella Settlement Agreement, and the SEC's motion to appoint a substitute Receiver was granted on October 16, 2017, pursuant to the Second Amended Order Appointing Receiver, which altered the Receiver's powers in favor of the SEC and authorized the Receiver to (i) "consult with any party in interest, including the SEC staff . . . regarding any Receivership matter" and making the SEC the protector of the purse from which the Receiver could get paid, including permitting the SEC staff to "holdback" fees sought by the Receiver in the SEC staff's discretion. (Dkt. 276).

Yet early in the receivership, Schwartz informed the Court that he retained Houlihan Lokey to assist with valuations, and that at times "deemed it necessary to commit additional capital to preserve the value of investment" but "only after significant due diligence and an independently formed confidence in the value being preserved and in the Receivership Entities' ability to recover the additional capital committed." (Dkt. 130). After Schwartz's forced resignation, the new Receiver while acknowledging she "has not had the benefit of written analyses and work product concerning these investments," proclaimed that "many of the investments" "have no established market value, with any future value being highly speculative." (Dkt. 237 pg. 8-9).

The cases cited for the proposition that the Receiver is not a state actor fail to provide any useful guidance *in this case*, since none deals with analogous facts. *See Litton Industries, Inc. v. Lehman Bros. Kuhn Loeb, Inc.*, 125 F.R.D. 51, 52–53, 55 (S.D.N.Y. 1989) (dismissing objection

[5] AF 11/6 Dec. Ex. C.

to magistrate judge's denial of order requiring receiver for corporation to turn over investigatory materials to SEC because private corporation may not invoke "common law deliberative process privilege," which applies to "recommendations and deliberations comprising part of a process by which government decisions and policies are formulated"); *U.S. v. Bezborn*, 21 F.3d 62, 68 (finding Fifth Amendment's protection against multiple prosecutions or punishments for the same crime not applicable to indictment following civil litigation by government receiver who brought lawsuit that "was purely an action between private individuals.").

The SEC has *certainly* provided *significant encouragement* both overt and covert, but the SEC control has at times been more direct. For example, prior to filing the present motion, SanFilippo's counsel contacted the SEC to inquire: "I see that in the S&W fee application motion that the SEC objected to their fee application. While our claim for advancement is obviously entirely different than the issue presented there, does the SEC intend to object to Mr. SanFilippo's request for continued advancement of his defense costs?" (Ford O'Brien Email dated September 26, 2018).[6] The SEC replied that "we are not prepared to consent to the advancement of legal fees from Receivership assets. We will reserve our right to take any further position if and when any particular defendant sets forth his basis for such relief in detail." *Id.* The import of the SEC's response could not be clearer: even if the Receiver abided by contractual and statutory advancement obligations, the SEC could and would object and attempt to thwart continuing advancement to SanFilippo. As reasoned in *Stein*, the Sixth Amendment does not tolerate this sort of government interference with a criminal defendant's right to monies to use in his defense to which he would be entitled but for the government's intervention.

B. *The SEC has wrongfully restrained untainted assets available to SanFilippo in violation of his Sixth Amendment rights*

[6] AF 11/6 Dec. Ex. D.

"[T]he pretrial restraint of legitimate, untainted assets needed to retain counsel of choice violates the Sixth Amendment." *Luis v. United States*, 136 S. Ct. 1083, 1088, (2016). The $43 million in cash currently in the complete control of the Receiver are not tainted and are not proceeds of any fraud or illegal conduct, and no one suggests that they are. Instead, the Receiver argues that because she has complete discretion to deny advancing SanFilippo's defense costs, the assets are not "restrained" in the same manner that they are in circumstances such as an asset freeze. But *Luis* did not limit its ruling to specific manners in which the government was precluded from restraining a defendant's right to use untainted assets in defense of a criminal proceeding, it made the broad ruling that *any restraint* was constitutionally impermissible.

There is no constitutional difference between the SEC freezing untainted assets and the SEC installing a Receiver who intentionally breaches an individual's employment agreement by refusing to transfer untainted assets available to that individual.

Nor should the Court permit the Receiver to discontinue advancement on the eve of trial in violation of SanFilippo's Sixth Amendment rights, because the defendants are only, in the words of the Receiver, accused of criminal conduct related to PPCO "no more than a small handful of times" in the Indictment, (Opp. Br. pg. 10), as this is no more than an admission that SanFilippo has *in fact* been charged with crimes for actions on behalf of PPCO, which he took in good-faith, but for which he must now defend himself against the government's spurious and ill-investigated allegations. The government's exhibit list contains thousands of PPCO documents and the 3500 material contains dozens of PPCO employees – clearly this is a case about Platinum Partners LP, equally implicating PPVA and PPCO. It is not realistic to suggest that the case can be divided between the two master funds given the extensive overlap in the allegations and that PPCO and PPVA shared many investments.

CONCLUSION

For the foregoing reasons, and those stated in SanFilippo's October 9, 2018 memorandum of law in support of this motion, SanFilippo respectfully requests the Court order the Receiver to cease its discontinuance of his advancement and to make immediate payments on all reasonable defense costs and expenses and to grant any other relief deemed just and proper.

Dated: New York, New York
November 6, 2018

FORD O'BRIEN LLP

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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, JOESPH SANFILIPPO, AND JEFFREY SHULSE Defendants.	Docket No: 1:16-cv-06848-BMC **DECLARATION OF ADAM C. FORD**

Adam C. Ford, Esq., pursuant to 28 U.S.C. §1746 declares the following subject to penalties of perjury:

1. I am a principal of the law firm of Ford O' Brien, LLP, attorneys of record for Joseph SanFilippo.

2. I have personal knowledge of the matters set forth below, and the exhibits annexed hereto are true and correct copies of the documents described.

3. I submit this declaration in support of Defendant's Motion to Compel the Receiver to continue advancing reasonable attorney fees and to place before the Court true and correct copies of certain documents and stenographically recorded sworn testimony.

4. Attached as Exhibit A is a true and correct copy of the June 21, 2017 letter from the SEC to Judge Irizarry.

5. Attached as Exhibit B is a true and correct copy of the June 26, 2017 letter from Ford O'Brien LLP to Judge Irizarry.

6. Attached as Exhibit C is a true and correct copy of the June 29, 2017 letter from Ford O'Brien LLP to Judge Irizarry.

7. Attached as Exhibit D is a true and correct copy of an email sent by Ford O'Brien LLP to the SEC dated September 26, 2018.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Dated: November 6, 2018

Adam C. Ford, Esq.

EXHIBIT A

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
NEW YORK REGIONAL OFFICE
BROOKFIELD PLACE, 200 VESEY STREET, SUITE 400
NEW YORK, NEW YORK 10281-1022

WRITER'S DIRECT DIAL LINE
(212) 336-0095

June 21, 2017

Filed on ECF

Honorable Dora L. Irizarry
Chief U.S. District Judge
United States District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, NY 11201

Re: SEC v. Platinum Management (NY) LLP, et al., No. 16-6848 (DLI)(VMS)

Dear Judge Irizarry:

We represent Plaintiff Securities and Exchange Commission ("SEC") in the above-captioned matter. We write to inform you that, yesterday, the SEC staff met with Bart M. Schwartz, the court-appointed Receiver, to address serious concerns about the conduct of the receivership and an apparent actual conflict of interest that the staff had recently learned about. As a result of the meeting, Mr. Schwartz agreed to move the Court for approval to resign as Receiver. Mr. Schwartz also agreed, subject to the Court's approval, to assist in an orderly transition to a new fiduciary. This letter sets forth the matters that the staff discussed with Mr. Schwartz and which the staff believes warrant his resignation from this case. The SEC staff is in the process of vetting substitute fiduciaries and hopes to have a recommendation shortly.

1. Recently Discovered Undisclosed Actual Conflict of Interest

Shortly after the SEC and the Receiver filed the Joint Letter on May 19, 2017 [Dkt.#142] disclosing the disagreements between the staff and the Receiver concerning the conduct of the receivership, the staff was contacted by a large insurance company investor who met with the staff on June 14. The investor expressed concerns regarding a specific litigation finance loan (the "Litigation Finance Loan") held by the Receivership Estate.

The loan was made to a large class action law firm[1] by a Platinum affiliate in January 2013, which subsequently sold participations but continued to service the loan and to retain a profit share in the loan, valued at approximately $6.5 million, which would be paid after a large portion of the loan was satisfied. On Friday, June 16, in addition to raising numerous concerns about the Receiver's conduct in failing to protect the loan participants rights under the loan agreement, the investor provided the staff with an opinion letter written by the Receiver, in his individual capacity, dated

[1] The identity of the borrower was redacted from the public version of the Receiver's First Quarterly Status Report [Dkt.#130] and is therefore not named in this letter.

January 18, 2013, in which the Receiver had been retained by the law firm borrower under the Litigation Finance Loan to opine on the ethical propriety of the loan. In the staff's view, this prior representation constitutes an actual undisclosed material conflict of interest that could jeopardize the receivership estate's ability to obtain value from the loan. The Receiver had never disclosed this prior representation of an adverse party to the receivership estate, the SEC staff, or to the Court. The staff subsequently learned that the Receiver had also been retained by the law firm as a monitor for the borrower in 2006 in connection with the firm's criminal prosecution. This fact had also not been previously disclosed to the staff or to the Court. In yesterday's meeting, the Receiver advised the staff that he had no recollection of having been retained by the law firm, but understood the SEC staff's position regarding the conflict raised by the prior representation and stated that he would resign from the case due to the prior representation.

2. Receiver's Breach of Escrow Agreement

Additionally, on June 16, the investor shared with the staff information concerning the Receiver's breach of an escrow agreement that had been established by the Receiver's staff for the purpose of segregating the proceeds of certain life insurance policies for the investor's benefit. The investor provided the staff with documentation showing that the Receiver's representative improperly directed an escrow agent to transfer to a receivership controlled account $6.3 million of proceeds from the sale of life settlements in the first quarter of 2017 without the required consent of the investor, which was documented by letter dated February 17, 2017 and signed by the Receiver's representative.[2] After the investor learned that the escrow agreement had been violated, it raised its concern with the Receiver's representatives. The investor advised the staff that only then, and upon the advice of counsel did the Receiver's representative return the funds to the escrow. Moreover, the staff learned that in February 2017, the Receiver's representative had asked the investor to consent to the use of the proceeds of the sale to invest in the Brazilian Gold Recovery Project (referenced at Dkt.#130 at pp. 21-22) – a distressed and risky project that the investor did not consent to, and which, in the staff's view should be liquidated as soon as possible. In yesterday's meeting, the Receiver advised the staff that he did not direct the release of the escrow, and that a member of his staff had negotiated the escrow agreement which he did not learn about until after the investor challenged the breach of the escrow. Although the Receiver conceded his responsibility for the actions of his staff, he never disclosed the breach of the escrow agreement to the SEC staff or to the Court.

3. Additional Concerns Regarding the Conduct of the Receivership

In the May 19 joint letter [Dkt.#142], the SEC staff expressed additional concerns regarding the conduct of the receivership including a matter involving the Arabella Loan, [3] and use of investor funds to maintain and invest in risky investments. As set forth in the joint letter [Dkt.# 142 at p. 3,

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[2] This sale is referenced in the redacted version of the Receiver's First Quarterly Report [Dkt.#130-1 at p. 23]. The sale was by ALS Capital Ventures, controlled by the Receiver.

[3] The Arabella Loan is a $16 million distressed secured loan made by Platinum to Arabella Exploration prior to the Receiver's appointment. [Dkt.#128 at p.3]

n.1], the Receiver sold 45% of the estate's interest in the Arabella Loan pursuant to a participation agreement to an investor who was introduced to the Receiver by an attorney representing the estate in the Arabella matter, and the $500,000 sale price was used to pay part of the attorney's and other professionals' pre-receivership fees.[4] Subsequent to the sale, the Receiver learned that the collateral securing the Arabella Loan was more valuable than he had previously thought. Upon learning of the transaction, it appeared to the staff that the attorney had an actual conflict of interest as a result of obtaining an investor, and negotiating a sales price to finance the payment of his attorney fees. However, despite the staff raising the conflict with the Receiver and his counsel, the Receiver continued to attempt to retain the attorney due to his familiarity with the matter, although the Receiver advised the staff yesterday that the attorney has been dismissed. On May 25, the staff sent an email to the Receiver asking what steps, if any, he has taken or will take to ensure that the $500,000 would not be drawn down prior to entry of any further order of the Court. The staff followed up with an email on June 8 requesting that the Receiver send a demand letter to safeguard the funds, and offered to write the letter if the Receiver did not want to. To date, despite these requests, the Receiver has not taken action to safeguard the transferred funds and on June 16, 2017, the staff sent its own letter to the law firm demanding that it escrow or otherwise preserve funds sufficient to repay the estate in the event the Court directs that the funds be returned to the estate.

4. Conclusion

Upon discussing the above matters with the Receiver, he agreed to offer his resignation to the Court based on the undisclosed prior representation of the law firm in connection with the Litigation Finance Loan. The staff understands that the Receiver will be seeking Court approval to resign, and has offered to cooperate in preserving the estate's assets and to assist in a transition to a substitute receiver. The staff will join in that request.

In addition, the SEC requests that the Court defer ruling on the fee applications and other pending motions filed by the Receiver until a new fiduciary is appointed. Specifically, the SEC requests that the Court defer ruling on the Receiver's (i) motion to retain Pricewaterhouse Coopers to provided limited tax services [Dkt.#110]; (ii) motion to retain Houlihan Lokey as valuation and investment banking advisors [Dkt.#111]; (iii) motion to expand the scope of the receivership [Dkt.#112]; (iv) motion to approve the Arabella Settlement Agreement [Dkt.#128]; (v) motion to approve fee applications of the Receiver and Guidepost Solutions, LLC [Dkt.#143]; and (vi) motion to approve the fee application of Cooley LLP [Dkt.#144].

The SEC staff is in the process of seeking qualified fiduciaries to substitute for the Receiver and his counsel. The staff hopes to be able to recommend a replacement Receiver within the next few days, assuming the Court approves the Receiver's resignation. The staff is also available to appear before the Court at the Court's convenience if so requested by Your Honor to address any of

[4] The Receiver advised the staff that another member of his firm entered into the participation agreement and he was not aware of it at the time.

the foregoing in more detail.

Respectfully,

Neal Jacobson

Cc (via email):

Bart M. Schwartz, Receiver

EXHIBIT B

FORD O'BRIEN LLP

June 26, 2017

Via ECF

Chief Judge Dora L. Irizarry
United States District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, NY 11201

Re: *SEC v. Platinum Management (NY) LLC et al.*, No. 16 Civ. 6848 (DLI)(VMS)

Dear Chief Judge Irizarry:

We represent defendant Joseph SanFilippo with respect to the above-captioned case. We write, in consultation with the other six individual defendants,[1] in response to (a) the June 23, 2017 application of Bart M. Schwartz, the Court-appointed Receiver for various Platinum entities, for an order authorizing his resignation as Receiver, *see* dkt. no. 170; and (b) the June 26, 2017 application of the SEC for an Order to Show Cause for court appointment of a second receiver, *see* dkt. no. 173.

For the reasons stated below, we request the opportunity to be heard on these significant developments and the SEC request, which raise substantial questions as to the fairness and efficiency of the receivership and suggest an effort by the SEC to exert undue, and inappropriate, influence on the Receiver appointed by the Court. Accordingly, the Defendants respectfully request that this Court defer action on the Receiver's application and the SEC's Order to Show Cause until it has heard from all interested parties, including the affected investors, and until the Court has received and reviewed the Receiver's plan for the orderly wind-down of the receivership entities, which Mr. Schwartz was prepared to submit by approximately the end of July. *See* dkt. no. 170-1 ¶¶ 3-4; dkt. no. 142 at 7.

Alternatively, in the event that the Court enters an Order to Show Cause, it should grant sufficient time for all of these points of view to be thoroughly considered.

We also respectfully suggest that these significant matters be addressed at a status conference on July 7 – the date of the next appearance in the parallel criminal case – or another date convenient to the Court.

[1] The seven individual defendants are Mark Nordlicht, David Levy, Daniel Small, Uri Landesman, Joseph Mann, Joseph SanFilippo, and Jeffrey Shulse.

At the outset, we note that a brief deferral of the Court's consideration of the SEC request will not have an adverse impact on investors or other interested parties. Mr. Schwartz has agreed to perform his duties until a new receiver is appointed, and there is no basis to question his capacity to perform the Receiver's duties fairly and reasonably until a resolution of open issues.

In key respects, Mr. Schwartz's resignation would be a setback to the receivership entities, their investors, and other potential claimants. For this reason alone, we respectfully submit, it should not be lightly entertained.

Mr. Schwartz was originally installed in June 2016, in consultation with the SEC, as Platinum's Independent Oversight Adviser. Even before the instant Complaint was filed, Mr. Schwartz engaged in extensive work to advise as to the orderly wind down of Platinum's assets. He was then formally appointed as the Receiver by the Court on December 19, 2016. Thus, Mr. Schwartz has already spent a full year advising the funds and faithfully discharging his duties as Receiver. In the process, he has incurred legal and other professional fees likely in excess of approximately $2.5 million. In the event the Receiver is authorized to resign and a new one appointed, the estate will be saddled with additional expenses as the necessary price of educating a new receiver as to its extensive duties, and possibly much of Mr. Schwartz's work, including his wind-down plan, may be wasted.

Moreover, Mr. Schwartz's professional judgment is that some of the receivership's holdings should not be liquidated quickly in order to maximize the value of the estate available to investors and other claimants. Mr. Schwartz believes that "putting limited additional funds into certain assets could potentially result in higher returns for the benefit of investors and creditors." *See* dkt. no. 170-1 ¶ 4 (citation omitted). In support of his analysis, Mr. Schwartz has carefully analyzed and valued the receivership assets with the help of valuation and other experts. The SEC evidently has a different view and wishes to substitute its judgment for that of the individual appointed by the Court on account of his expertise – without any basis shown as to why the SEC's judgment is superior to that of Mr. Schwartz.

Additionally, to the extent that the Receiver's resignation application rests on SEC "concerns" regarding a supposed "appearance of a conflict of interest," we note that even the Receiver did not see that previous work as a conflict, nor did it have any effect on his work as a Receiver. *See* dkt. #170-1 ¶¶ 5-6. Accordingly, we respectfully request that the Court consider, in deciding whether to replace the Receiver, whether the purported conflict can be effectively addressed without resort to the inefficiency of replacement of the Receiver.

Finally, we note that the SEC's proposed order, dkt. no. 174-1, seeks to change the Receiver's powers through changes to the underlying order, as well as appoint a new receiver. These proposed changes further warrant additional time for the Court and parties to consider their impact.

These are some of the issues which we believe should be vetted with the Court before it acts on Mr. Schwartz's application for an order authorizing his resignation. Accordingly, we respectfully request that the Court defer action on Mr. Schwartz's application until such time as it has heard from all interested parties and received his wind-down plan. We further request that time be set aside after the July 7 status conference in the criminal case for a discussion of these matters.

In short, we seek a brief time for the parties, the affected investors, and the Court to deliberate and weigh these important considerations. We also respectfully request that the Court unseal the SEC's letter, attached as Exhibit A to dkt. no. 168, which likely relates to the instant issue, so that the parties can fully address the reasons stated therein. Mr. Nordlicht made a similar application on June 22, 2017, dkt. no. 169.

This request will not adversely affect third parties because Mr. Schwartz has committed to remaining in place until these issues are resolved. It is, in fact, the SEC's actions that risk harm to investors and other potential claimants by seeking appointment of a new receiver, with all the attendant costs and delays, before the issues have adequately been addressed.

Alternatively, in the event that the Court decides to enter an Order to Show Cause as urged by the SEC, we ask that significant time be granted in the Order to address all of the concerns noted above, including a fair opportunity for investors and other stakeholders to be heard.

Thank you for Your Honor's consideration of this matter.

Respectfully submitted,

/s/ Kevin J. O'Brien

Kevin J. O'Brien

EXHIBIT C

FORD O'BRIEN LLP

June 29, 2017

Via ECF

Chief Judge Dora L. Irizarry
United States District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, NY 11201

Re: *SEC v. Platinum Management (NY) LLC et al.*, No. 16 Civ. 6848 (DLI)(VMS)

Dear Chief Judge Irizarry:

We represent defendant Joseph SanFilippo with respect to the above-captioned case. We previously submitted a letter in response to the SEC's June 26, 2017 application for an Order to Show Cause for court appointment of a new receiver to replace Mr. Schwartz, *see* dkt. nos. 173, 177. We submit this letter, in consultation with the other individual defendants, in further response to that application, and also in response to the directives in the Court's June 27, 2017 Order regarding same.

In its Order, the Court directed that the parties address not only whether the SEC application should be granted, but also whether they would approve the appointment of the SEC's proposed new receiver, the Honorable Melanie Cyganowski, in the event the Court grants the SEC's application. In brief, we would oppose Ms. Cyganowski's appointment for many of the same reasons we initially opposed the SEC's application. In dictating to Mr. Schwartz how he should carry out his duties, and then forcing his resignation, the SEC has acted at odds with the independence of the Receiver. There is reason to fear it would act similarly in the case of its preferred candidate, contrary to law and to the receiver's fiduciary obligations to all parties. For this reason – which has nothing to do with Ms. Cyganowski's qualifications or background – we oppose her appointment.

1. The Receiver Is An Officer Of The Court, Not Answerable To Any Party

A receiver must not serve the interest of any party, not even the government. It is axiomatic that a receiver is "appointed on behalf and for the benefit of all the parties having an interest in the property, not for the plaintiff or defendant alone." *N. Am. Broad., LLC v. United States*, 306 Fed Appx. 371, 373 (9th Cir. 2008). As one court recently explained, the receiver is "an 'officer of the court' and not an arm of the SEC. As such, a receiver should be impartial between the parties and avoid the appearance of impropriety." *SEC v. Schooler,* No. 3:12 Civ. 2164-GPC-JMA, 2015 WL 1510949, at *3 (S.D. Cal. March 4, 2015) (citations omitted).

In short, in the words of the Second Circuit, "A receiver … is a trustee with the highest kind of fiduciary obligations." *Phelan v. Middle States Oil Corp.*, 154 F.2d 978, 991 (2d Cir. 1946). In order to fulfill these obligations, a receiver must be able to act independently.

2. Nevertheless, The SEC Has Attempted To Restrict Mr. Schwartz's Exercise Of His Duties

Already there is ample evidence before this Court of the SEC's failure to respect the independence of the Receiver.

The most glaring evidence is the SEC's restriction of the Receiver's Court-ordered powers. The Order appointing Mr. Schwartz as Receiver gave him plenary power to "transfer, compromise or otherwise dispose of any receivership Property, other than real estate," dkt. no. 174, Exh. 2 at 12-13. Nevertheless, as demonstrated in previous submissions to the Court, the SEC has substituted its own judgment for the Receiver's and decided that receivership assets must be liquidated even at fire-sale prices. The SEC's usurpation of authority is contrary not only to the appointing Order but also to case law that a receiver should attempt to preserve assets, not simply liquidate them, which is normally a function of the bankruptcy court. *See Securities v. Am. Bd. of Trade, Inc.*, 830 F.2d 431, 436-37 (2d Cir. 1987) ("equity receiverships should not be used to effect the liquidation of defendants in actions brought under the federal securities laws"); *accord Lawsky v. Condor Capital Corp.*, 2015 WL 4470332, at *6 (S.D.N.Y. July 21, 2015).[1]

3. There Is Reason To Believe That The SEC Would Seek To Similarly Restrict Its Proposed New Receiver

The SEC already has stripped from its proposed Amended Order for the new receiver all discretion as to the disposition of receivership assets – except liquidation, *see* dkt. no. 174, Exh. 2 at 12-13. Clearly, the SEC expects the new receiver to liquidate in short order the assets of the receivership, regardless of what the merits of any particular situation might be. However, such a demand is inconsistent with the independence and discretion a receiver requires to carry out its fiduciary responsibilities to all parties.

[1] To be sure, the SEC recommends specific receivers to aid the Court in its selection, but the SEC does not retain control or veto power over the receiver once appointed by the Court. To the extent the SEC disagrees with the direction or recommendations of the receiver, the proper place for airing that is an objection to the plan of distribution—not by manufacturing conflicts of interest where they do not exist or leveling baseless accusations of impropriety against the receiver in an effort to force him to resign.

Moreover, the SEC's failure to point out to this Court the Second Circuit's disfavor of liquidation-focused receiverships is troubling. *See Am. Bd. of Trade, Inc.,* 830 F.2d at 436-37 ("we expect counsel for the [SEC], as an officer of the Court and as part of his or her individual professional responsibility, to bring our views, as stated in this and other decisions, to the attention of the district court before the court embarks on a liquidation through an equity receivership"). In its Order to Show Cause papers, the SEC simply assumes the proposed Amended Order will pass muster, which is not the case.[2]

For these reasons, we would oppose the proposed appointment of Ms. Cyganowski in the event the SEC's Order to Show Cause is granted. Equally important, we would ask the Court to retain the original language, giving the receiver appropriate discretion over the disposition of receivership assets, in any order appointing a new receiver.

Finally, we respectfully suggest that, if a new receiver must be appointed, the Court adopt a procedure that allows affected parties, including investors and other stakeholders, to have input. The decision to recommend a new receiver should not be the SEC's alone.

Thank you for Your Honor's consideration of this matter.

Respectfully submitted,

Kevin J. O'Brien

[2] The SEC's website states in relevant part that "A receiver has a fiduciary duty to stakeholders and the court, and typically has the discretion to marshal, manage and liquidate the receivership company's assets …" *https://www.sec.gov/oiea/investor-alerts-bulletins/ib_receivers.html.*

EXHIBIT D

---------- Forwarded message ---------
From: **McGrath, Kevin** <McGrathK@sec.gov>
Date: Wed, Sep 26, 2018, 2:30 PM
Subject: SEC v. Platinum, et al.: Status Conference before Judge Cogan on October 1, 2018
To: Adam Ford <aford@fordobrien.com>
Cc: Jacobson, Neal <JacobsonN@sec.gov>

Adam: Whether a particular defendant is entitled to advancement of legal fees may raise a variety of legal and fact specific questions. We understand that the Receiver has already advised defense counsel that it is her position that advancement of legal fees from the Receivership assets ahead of other creditors is inappropriate in this case. Absent any reason to dispute that determination, we are not prepared to consent to the advancement of legal fees from Receivership assets. We will reserve our right to take any further position if and when any particular defendant sets forth his basis for such relief in detail.

Kevin

From: Adam Ford [mailto:aford@fordobrien.com]
Sent: Wednesday, September 26, 2018 10:37 AM
To: McGrath, Kevin
Subject: Re: SEC v. Platinum, et al.: Status Conference before Judge Cogan on October 1, 2018

Kevin,

I see that in the S&W fee application motion that the SEC objected to their fee application. While our claim for advancement is obviously entirely different than the issue presented there, does the SEC intend to object to Mr. SanFilippo's request for continued advancement of his defense costs.

Adam

On Mon, Sep 24, 2018 at 3:46 PM McGrath, Kevin <McGrathK@sec.gov> wrote:

> Counsel: Attached is a copy of the status letter I propose filing on ECF on Wednesday re the pending status conference set for next Monday, October 1, 2018. Please let me know if I have your assent to file this letter. Thank you.
>
> Eric: I was sorry to hear of Mr. Landesman's passing.
>
> Kevin