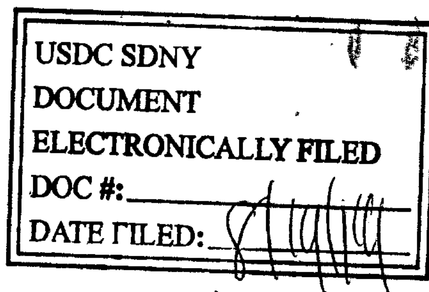

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August 16, 2019

The Honorable Jed S. Rakoff, U.S.D.J.
U.S. District Court for the Southern District of New York
Daniel Patrick Moynihan U.S. Courthouse
500 Pearl Street
New York, New York 10007-1312

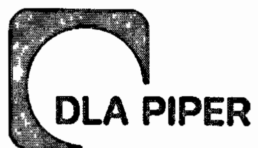
**Re: In re Platinum-Beechwood Litigation, No. 18-cv-06658 (JSR)
Related Docket: Melanie L. Cyganowski, as Receiver v. Beechwood Re Ltd., et al., No. 18-cv-12018 (JSR)**

Dear Judge Rakoff:

We represent defendants Senior Health Insurance Company of Pennsylvania and Fuzion Analytics, Inc. in connection with the referenced matter. In accordance with Your Honor's instruction during yesterday's oral argument on the pending motions to dismiss the Receiver's first amended complaint, we write to address the decision in *In re E.S. Bankest, L.C.*, No. 04-17602, 2010 WL 2926203 (Bankr. S.D. Fla. July 23, 2010), which the Receiver submitted for the Court's consideration.

In *Bankest*, the bankruptcy court stated that "[t]here is substantial law that imputation and *in pari delicto* do not apply to a Court-appointed receiver." *Id.* at *3. With all due respect to that court, that is an incorrect statement of the law. The Second Circuit recognized in *Shearson Lehman Hutton, Inc. v. Wagoner* that the *in pari delicto* doctrine applies to court-appointed bankruptcy trustees, noting that "a bankruptcy trustee . . . may only assert claims held by the bankrupt corporation itself." 944 F.2d 114, 118 (2d Cir. 1991). Consistent with that holding, Judge Wood held that "the *Wagoner* rule applies to [an SEC] receiver because he fulfills a role sufficiently analogous to that of a bankruptcy trustee." *Cobalt Multifamily Inv'rs I, LLC v. Arden*, 857 F. Supp. 2d 349, 362 (S.D.N.Y. 2011) (internal quotation marks omitted). The *Bankest* court's contrary understanding proceeds from a misinterpretation of the Seventh Circuit case on which it relied, *Scholes v. Lehmann*, 56 F.3d 750 (7th Cir. 1995), which solely concerned a receiver's standing to assert fraudulent conveyance claims on behalf of a receivership entity in the narrow circumstance where the entity served as a creditor of the transferor. The Second Circuit, discussing *Scholes* at length, recognized this distinction in *Eberhard v. Marcu*, 530 F.3d 122, 132-35 (2d Cir. 2008).

The decision in *Bankest* accordingly is inconsistent with the law in this Circuit, which expressly permits application of the *Wagoner* rule to court-appointed receivers such as the Receiver here.



Respectfully submitted,

/s/ Kathleen A. Birrane

Kathleen A. Birrane

cc: All Counsel of Record