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**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.

**Civil Case No. 16-6848 (DLI) (VMS)
ECF CASE**

**SECURITIES AND EXCHANGE COMMISSION'S AND RECEIVER'S JOINT
MEMORANDUM OF LAW IN SUPPORT OF THEIR EMERGENCY MOTION FOR (I)
AN ORDER MODIFYING THE PLATINUM TRO AND RECEIVER ORDER, (II)
ORDER TO SHOW CAUSE, AND (III) TEMPORARY RESTRAINING ORDER**

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I.

PRELIMINARY STATEMENT

Plaintiff Securities and Exchange Commission (the “SEC”) and Bart M. Schwartz, the Receiver in this case, respectfully request that the Court enter emergency relief to prevent the Bankruptcy Litigation Trustee¹, a single creditor of the Receivership Entities, from interfering with this Court’s jurisdiction over Receivership Property and the ability of the Receiver to manage Receivership Property for the benefit of all investors and creditors of the Receivership Entities. The Bankruptcy Litigation Trustee is invoking the Bankruptcy Court TRO entered in the Fraudulent Transfer Action to prevent the Receiver from using Receivership Property for the benefit of the Receivership Estate and is also attempting to obtain a secured priority claim superior to all other investors and creditors of the Receivership Entities.

As set forth in the Schwartz Declaration, the Bankruptcy Litigation Trustee for Black Elk Energy Offshore Operations, LLC (“Black Elk”) initiated an action prior to appointment of the Receiver against certain of the Receivership Entities to recover a fraudulent transfer of close to \$100 million in cash to the detriment of independent bondholders of Black Elk, and obtained the Bankruptcy Court TRO which requires certain of the Receivership Entities to maintain close to \$30 million in cash in certain bank accounts. (Schwartz Decl. at pp. 5-7) However, the Receivership Entities do not have liquid assets that come close to the amount required to be maintained in the accounts. The Bankruptcy Litigation Trustee, relying on the Bankruptcy Court TRO, has refused to approve necessary expenditures of the Receiver since his appointment.

(Schwartz Decl. at pp. 7-13)

¹ Capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the January 9, 2017 Declaration of Receiver Bart M. Schwartz in Support of Joint Motion of Securities and Exchange Commission and Receiver for Modification of the Platinum TRO and Receiver Order and for Emergency Relief (“Schwartz Declaration”).

The Bankruptcy Litigation Trustee's actions interfere with this Court's jurisdiction over the Receivership Entities and Receivership Property. Accordingly, the SEC and the Receiver respectfully request that the Court modify the litigation stay set forth in the Receivership Order (Dkt. # 6 at pp. 10-11) and the Platinum TRO (Dkt. # 5 at pp. 9-10) by deleting the handwritten addendum to the litigation stay that excepts bankruptcy cases in which the Receivership Entities are involved,² and that the Court enter a temporary restraining order (i) temporarily staying the Fraudulent Transfer Action and (ii) authorizing the Receiver to expend approximately \$3.1 million as set forth in the budget attached to the Schwartz Declaration necessary to preserve Receivership Property for the benefit of all of the Receivership Estate's investors and creditors including the Black Elk bondholders.

II.

SUMMARY BACKGROUND FACTS

On December 19, 2016, the SEC filed a Complaint charging the Platinum TRO Defendants and others³ variously with wide ranging violations of the anti-fraud provisions and other sections of the federal securities laws. (Schwartz Decl. at ¶¶ 3-4) Included among the allegations in the Complaint are allegations that certain of the defendants engaged in a fraudulent scheme to divert almost \$100 million out of Black Elk at the expense of non-affiliated

² As set forth in the January 9, 2017 Rule 6.1(d) Declaration of Neal Jacobson, Esq., ("Jacobson Declaration") the handwritten addendum was added at the request of counsel to the Platinum TRO Defendants, who believed that the addendum might be required to protect certain interests of the Platinum TRO Defendants. The Platinum TRO Defendants did not intend that the addendum interfere with the Receiver's control over Receivership Property, and they consent to the relief requested herein. (See Jacobson Declaration at ¶ 6)

³ The other Defendants are David Levy ("Levy"); Daniel Small ("Small"); Uri Landesman ("Landesman"); Joseph Mann ("Mann"); Joseph SanFilippo ("SanFilippo") (collectively with Nordlicht the "Platinum Defendants") and Jeffrey Shulse ("Shulse") (all collectively "Defendants"). The individual defendants were arrested the same day and charged with criminal violations of various federal securities laws.

noteholders of that company due to significant liquidity problems that the Platinum TRO Defendants were facing since 2012. (Schwartz Decl., Ex. A at ¶¶ 68-103)

On the same day, the SEC moved for entry of the Platinum TRO and the Receivership Order. The Court (Matsumoto, J.) entered the orders on consent of the TRO Defendants after SEC counsel included an addendum to the litigation stay in both orders at the request of the Platinum TRO Defendants that excluded from the stay bankruptcy cases in which the Receivership Entities were involved. (Jacobson Decl. at ¶¶ 5-6) At the time of entry of the orders neither the SEC staff nor counsel to the Platinum TRO Defendants anticipated that the Bankruptcy Court TRO might interfere with the Court's jurisdiction over the Receivership Entities or the Receivership Property. (*Id.*)

As set forth in the Schwartz Declaration, the Bankruptcy Litigation Trustee's invocation of the Bankruptcy Court TRO in the Fraudulent Transfer Action is preventing the Receiver from expending Receivership monies for the benefit of the Receivership Entities and interfering with the Court's jurisdiction over Receivership Property and the Receiver's ability to manage the Receivership Property for the benefit of all investors and creditors of the Receivership Entities. In addition, the Receiver is subject to a request for the production of documents, a potential deposition, and a hearing on the Bankruptcy Litigation Trustee's motion for a preliminary injunction in the Fraudulent Transfer Action scheduled for January 26, which are diverting his attention away from managing the Receivership Entities. (Schwartz Decl. at pp. 17-18) Accordingly, the SEC and the Receiver respectfully request that the Court modify the language in the litigation injunction in the Receivership Order and Platinum TRO to cover bankruptcy proceedings against the Receivership Entities and Receivership Property, and, pending a hearing on the SEC's and Receiver's joint motion, that the Court enter an order temporarily staying the

Fraudulent Transfer Action, enjoining enforcement of the Bankruptcy Court TRO against the Receiver, and authorizing the Receiver to utilize Receivership Property in accordance with the budget attached to the Schwartz Declaration.

III.

ARGUMENT

A. The Fraudulent Transfer Action and The Litigation Trustee's Actions to Enforce the Bankruptcy TRO Interfere With the Court's Jurisdiction Over the Receivership Entities and Should Be Enjoined

It has long been recognized that the federal securities laws confer general equity powers upon the district courts and that these equity powers allow them to impose receiverships in securities fraud and other actions to prevent dissipation of assets and to preserve the assets for the benefit of the receivership estate's investors and creditors. *See SEC v. Wencke*, 783 F.2d 829, 837 n.9 (9th Cir. 1986); *SEC v. Manor Nursing Ctrs., Inc.*, 458 F.2d 1082, 1104-5 (2d Cir. 1972); *accord Esbitt v. Dutch-Am. Mercantile Corp.*, 335 F.2d 141, 142-3 (2d Cir. 1964).

In order to effectuate this goal, district courts possess the equitable power to impose broad stays of litigation against the receivership entities, their properties, and the receiver. *SEC v. Byers*, 609 F.3d 87 (2d Cir. 2010) (upholding district court's stay of litigation including the filing of involuntary bankruptcy cases against the receivership entities). In *Byers*, the Second Circuit joined other circuits in affirming a district court's equitable power to enjoin litigation against receivership entities. In *Byers*, a group of creditors challenged the district court's injunction against the filing of bankruptcy cases against certain receivership entities which would have had the effect of excluding certain assets from the receivership estates. *Id.* at 91. The Second Circuit held that:

This is precisely the situation in which an anti-litigation injunction may assist the district court and receiver who will want to maintain maximum

control over the assets. The current injunction prevents small groups of creditors from placing some entities into bankruptcy, thereby removing assets from the receivership estate to the potential detriment of all. We are persuaded that the powers afforded the receiver and the district court allow it to adequately protect the assets of the estate.”

Id. at 92-93.

Similarly, in *SEC v. Wencke*, 622 F.2d 1363 (9th Cir. 1980) (“*Wencke I*”), the Ninth Circuit Court of Appeals upheld a district court’s anti-litigation injunction of a state court action involving a creditor of the receivership estate that sought to assert its interest in a lease that became part of the receivership estate upon appointment of a receiver in the SEC enforcement action. *Wencke I*, 622 F.2d at 1366. The Ninth Circuit held that the authority of a district court to issue an order staying a non-party from bringing litigation derived from “the inherent power of a court of equity to fashion effective relief.” *Wencke I*, 622 F.2d at 1369 (“The power of the district court to issue a stay, effective against all persons, of all proceedings against the receivership entities rests as much on its control over the property placed in receivership as on its jurisdiction over the parties to the securities fraud action.”). *See also Liberte Capital Group, LLC v. Capwill*, 462 F.3d 543, 551-552 (6th Cir. 2006) (“Once assets are placed in receivership, a district court’s equitable purpose demands that the court be able to exercise control over claims brought against those assets. . . . Because the court’s power of injunction in a receivership proceeding arises from its power over the assets in question, non-parties to the underlying litigation may be bound by a blanket stay, so long as the non-parties have notice of the injunction.”); *Schauss v. Metals Depository Corp.*, 757 F.2d 649, 654 (5th Cir. 1985) (“[S]everal courts have recognized the importance of preserving a receivership court’s ability to issue orders preventing interference with its administration of receivership property. In both securities fraud cases and bankruptcy proceedings, Courts of Appeals have upheld orders enjoining broad classes of individuals from taking any action regarding receivership property. Such orders can serve as

an important tool permitting a district court to prevent dissipation of property or assets subject to multiple claims in various locales, as well as preventing piecemeal resolution of issues that call for a uniform result.”) (internal citations omitted).⁴

Here, the Fraudulent Transfer Action and Litigation Trustee’s attempts to enforce the Bankruptcy TRO are interfering with the Court’s jurisdiction over the Receivership Entities and the Receivership Property by using the Bankruptcy TRO obtained in the Fraudulent Transfer Action to attempt to obtain a priority over all other creditors and investors in the Receivership Entities. The Litigation Trustee’s actions are also impeding the Receiver’s ability to use the Receivership Property in a manner contemplated by the Receivership Order for the benefit of the Receivership Estates. (Schwartz Decl. Ex. B at §§ I.6.C., D., F., G. & J (granting Receiver control over all Receivership Property, using Receivership Property for the benefit of the Receivership Estate, engaging counsel to assist the Receiver, and bringing legal actions, among other powers); III.13. (prohibiting self-help liens); VI. (injunction against interfering with the Receiver); XIII. (retention of personnel to assist the Receiver); and XIII. (compensation of the Receiver and Retained Personnel)).

The fact that the Fraudulent Transfer Action was brought by a bankruptcy litigation trustee does not affect this Court’s power to enjoin actions against Receivership Property as the

⁴ The Anti-Injunction Act, 28 U.S.C. § 2283, which prohibits a federal court from enjoining a state court action except under limited circumstances does not apply to the federal bankruptcy Fraudulent Transfer Action but, even if it did, it would not preclude the relief sought herein to further the centralization of asset collection and a fair distribution to all constituents in an SEC enforcement action. *Wencke I*, 622 F.2d at 1368 (anti-injunction act did not bar litigation injunction in SEC action “designed to protect the innocent shareholders and promote investor confidence”); *SEC v. Bliss*, 2015 WL 7013631 at *1 n.12 (D. Utah, Nov. 12, 2015) (Anti-Injunction Act does not apply to SEC enforcement action in which a receiver was appointed). *Cf. FTC v. 4 Star Resolution, LLC*, 2016 WL 4138229 at **3-4 (W.D.N.Y., Aug. 4, 2016) (Anti-Injunction Act did not apply to Federal Trade Commission receivership created to preserve and marshal assets to effectuate an orderly and equitable administration of the estate).

accounts subject to the Receiver's control are not property of the bankruptcy estate, and, even if the Bankruptcy Litigation Trustee were to assert an equitable interest in the accounts, the SEC's enforcement action and its ability to reach property of a bankruptcy estate are exempt from the Bankruptcy Code's automatic stay provisions pursuant to the police and regulatory power exception to the automatic stay in Section 362(b)(4) of the Bankruptcy Code. *See SEC v. Miller*, 808 F.3d 623, 632 (2d Cir. 2015) (upholding district court's determination that SEC asset freeze imposed after bankruptcy filing was excepted from the automatic stay under Section 362(b)(4)); *SEC v. First Fin. Group of Texas*, 645 F.2d 429, 436-8 (5th Cir. 1981) (affirming appointment of temporary receiver in SEC action after corporate bankruptcy case commenced). *See also SEC v. Credit Bancorp*, 290 F.3d 80, 89 (2d Cir. 2002) ("whatever beneficial interest [the creditor] might have had in the transferred shares, arising from a constructive trust, does not defeat the equitable authority of the District Court to treat all fraud victims alike").

As discussed above, if the Bankruptcy Litigation Trustee is permitted to continue to enforce the Bankruptcy TRO he will in effect be obtaining a priority over all other similarly situated creditors and investors in the Receivership Entities for the benefit of the Black Elk bondholders. By contrast, if the Court grants the relief requested by the SEC and Receiver the Receivership Property will be preserved for the benefit of all investors and creditors of the Receivership Entities including the Black Elk bondholders.

CONCLUSION

For the foregoing reasons, as well as those set forth in the accompanying declarations and exhibits thereto, the Commission and the Receiver respectfully request that the Court grant their motion to (i) modify the Platinum TRO Order and the Receivership Order, (ii) enter the Order to Show Cause, (iii) enter the Temporary Restraining Order, and (iii) grant such other and further relief as is just.

Dated: January 9, 2017
New York, New York

Respectfully submitted,

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