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June 13, 2018

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

Re: *SEC v. Platinum Mgmt. (NY) LLC, et al., No. 1:16-cv-06848-BMC*
Docket No. 326

Dear Judge Cogan:

This office represents Schafer and Weiner, PLLC, in connection with its application pending before you, seeking an Order granting its Final Application for Allowance of Compensation and Reimbursement of Expenses Incurred from December 19, 2016 through June 13, 2017 (the "Final Application"). DN 326.

We are taking the liberty of enclosing for the Court's consideration with regard to the Final Application, the transcript of the decision of Judge Nelms, United States Bankruptcy Judge sitting in the United States Bankruptcy Court for the Northern District of Texas on In Re Arabella Exploration, LLC, case number 17-40120-rfn-11 (Exhibit "A").

We would ask the Court, under the circumstances set forth below, to accept this submission and incorporate it into its consideration of the Final Application.

There was a hearing before Judge Nelms on May 10 to consider a Notice of Claim Transfer made by the Participant. In making his decision, Judge Nelms considered, among other things, the interpretation and viability of the Participation Agreement, which is the very same document which is in issue in the motion and cross-motion now pending before this Court. Judge Nelms' decision is relevant because the Court made two findings which have a direct bearing on the interpretation of the Participation Agreement.

Thus, Judge Nelms held that the Participation Agreement was unambiguous and acted as a "true" participation agreement, giving the Receiver the sole right to pursue the claim. We cite to this holding on pages 11 and 22 of our Opposition to the Receiver's Cross-Motion for Disgorgement

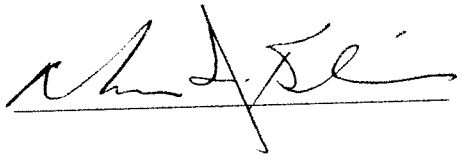
of Fees and Reply to the Receiver's Objection to Schafer and Weiner's Final Application (the "Response"). DN 332. The holding is found at TR28:L8-16; TR10:L11-TR12:L15; TR13:L14-TR15:L14 of the enclosed transcript.

Judge Nelms also held that the First Receiver Order authorized the Initial Receiver to enter into the Participation Agreement. We cite to this holding on pages 11 and 24 of our Response. The holding is found at TR7:L-24 of the enclosed transcript.

We were unable to provide the Court with this transcript earlier. Although the decision was rendered on June 7th, it was not available until yesterday, the day after we filed the Response.

Thank you for your courtesy and cooperation.

Respectfully,
CARLET, GARRISON, KLEIN
& ZARETSKY, L.L.P.

By: 

Norman I. Klein

Cc: Counsel of Record via ECF

NIK:dn
Encls.

EXHIBIT A

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

In Re:	**Case No. 17-40120-rfn-11**
ARABELLA EXPLORATION, LLC,	
Debtor.	Fort Worth, Texas Thursday, June 7, 2018 1:30 p.m.
	RENDER RULING - TRANSFER AGREEMENT 3001(e) (#300)

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE RUSSELL F. NELMS,
UNITED STATES BANKRUPTCY JUDGE.

COURTROOM APPEARANCES:

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Proceedings recorded by digital sound recording;
transcript produced by transcription service.

FORT WORTH, TEXAS - JUNE 7, 2018 - 1:30 P.M.

THE CLERK: All rise.

THE COURT: Please be seated. At 1:30 we have Arabella Exploration. We have attorneys who are appearing both in the courtroom and telephonically. So what I'm going to do is ask for in-court appearances first.

MR. TAYLOR: Clay Taylor on behalf of 30294 LLC, Your Honor.

MR. CALLAHAN: Good afternoon, Your Honor. I'm Dan Callahan for the SEC receiver of the Platinum entities.

THE COURT: Thank you. We also have the following persons who are appearing telephonically. First we have Mr. Weinick. Are you with us?

MR. WEINICK: Good afternoon, Your Honor. I am. Thank you for allowing the telephonic participation, Your Honor.

THE COURT: Of course. And then Ms. Hillegonds? Are you with us, Ms. Hillegonds?

MS. HILLEGONDS: Yes, Your Honor. Yes, Your Honor, I'm here.

THE COURT: Okay. Thank you.

MS. HILLEGONDS: Thank you, Your Honor.

THE COURT: All right, parties. Well, we're here today for me to render my ruling on the alleged assignment. I guess I'll start off with addressing the Court's jurisdiction,

since that was broached by the receiver. First, I determine that I do have jurisdiction over this matter pursuant to 11 U.S.C. Section 1334(a). Moreover, this matter is a matter within my core jurisdiction pursuant to 28 U.S.C. Section 157(b)(2)(A) and (b)(2)(B).

Next, I address questions concerning the second receivership order dated October 16, 2017. I need to address that because the receiver says that Paragraph 22 of that order precludes 30294 and presumably this Court as well from taking any action on the matter before me because it constitutes an action that would interfere with receivership property.

This argument would require the employment of circular logic in order to sustain it. The question before the Court is whether the interest at issue is receivership property. The receiver's argument starts with the assumption that the interest is receivership property, and because it is receivership property, I am enjoined from resolving this dispute.

Well, not only is circular logic faulty logic, it's noteworthy that nothing in Paragraph 22 of the second receivership order prevents a court other than the receivership court from determining whether an interest is or is not receivership property.

I would say, though, that such an injunction does appear in Paragraphs 25 and 26 of the second receivership order.

These injunctions are certainly broad enough to cover this contested matter. And I would say that Paragraph 24 is broad enough to effectively stay not just this particular discrete contested matter but indeed this entire bankruptcy case. The receiver's position, if it were to be accepted, would mean that everything that any party has done in this bankruptcy case since October 16, 2017 and everything that I've done in the case since October 16, 2017 has been in violation of the stay imposed by the second receivership order.

I related to the parties at our hearing my own experience of how it is that such sweeping language finds its way into orders, but I also note that when we compare the first receivership order with the second receivership order, they are either identical or almost identical, but in the first receivership order, the judge, whose name I can't make out, made an interlineation that took bankruptcy proceedings out of the definition of ancillary proceedings, and ancillary proceedings were considered to be an exception to the stay.

In the second receivership order, Judge Irizarry did not make such an interlineation on the second order. And I suppose you can -- that can cut both ways. One, it could mean that in light of the fact that it was there in the first one, the failure to specifically include it was done knowingly; or you can make the argument that it was just an oversight. But the fact of the matter is that the second receivership order says

what it says, and I have to deal with it.

The way I resolve it is by employing the doctrine of waiver. The current receiver never took the position that this bankruptcy case was stayed by the second receivership order until it did so in response to the assignment of interest. This was not an oversight on the receiver's part. She knew this bankruptcy case was pending. And in fact, on November 27, 2017, the Debtors in this case moved for the authority to use cash collateral. In Paragraph 22 of that motion, the Debtors said that the SEC receiver had consented to the use of cash collateral.

Now, one thing that the receiver did not do was come into this Court and tell me that the bankruptcy case was stayed or that I was somehow enjoined from taking any action in this case. Waiver is the relinquishment of a known right. Clearly, the receiver knew of this case. It knew of the stay that it itself procured in the Eastern District of New York. And it's failed to raise that issue of stay or injunction until it did so in response to this assignment.

So, for those reasons, I conclude that the receiver waived the right to complain about the stay or injunction at this time.

Of course, it's always possible that I'm wrong, and if I am wrong, then, in the Fifth Circuit, actions taken in violation of the automatic stay are voidable but not void on their face.

And quite frankly, I don't know what the rules are as they pertain to SEC stays either in this circuit or other circuits. But suffice it to say, if Judge Cogan deems my actions today to be a violation of Judge Irizarry's order, he's certainly free to void them. But for my part today, I rule that I am not stayed and I'm not enjoined.

Having determined that I have both the jurisdiction and the authority to act in this matter, I now turn to the question of whether the first receiver, Mr. Schwartz, had the authority to sell this interest to 30294, because, of course, the receiver takes the position that he did not. I'll look to the first receivership order to answer this question. I find that Mr. Schwartz had the authority to enter into the participation agreement. That authority, I think, is found in Subsections -- excuse me, Subparagraphs E and G in Paragraph 6 of the first receivership order, where Mr. Schwartz was authorized to take any action that officers and directors of Platinum could have taken and to take all acts necessary for the preservation of receivership property.

Clearly, under these provisions, Mr. Schwartz could have sold, if he wanted to, 100 percent of the loan for the benefit of the receivership estate. So if he could sell the whole thing, it seems logical to infer that he could also sell just a piece of it.

Now, the question of whether the sale constituted a sound

exercise of Mr. Schwartz's business judgment is a matter for Judge Cogan to decide, not me. Which is to say I note that in the hearing before me there were allegations of impropriety in connection with the sale. I'm not dealing with any allegations concerning those improprieties. I'll leave those for another day to Judge Cogan. I'm just saying that, under the receivership order, he had the authority to do what he did.

So that finally leads us to the merits of this dispute. The question raised in this contested matter is whether the interest conveyed to 30294 pursuant to the participation agreement dated December 28, 2016 constitutes an assignment of claim that should be recorded as such pursuant to Rule 3001(e) of the Federal Rules of Bankruptcy Procedure. On this issue, the participation agreement creates no ambiguity. The interest in question is a participation. It is not an assignment as contemplated by Rule 3001(e).

I start with the definition of a participation agreement: that being an agreement where, one, money is advanced by a participant to the lead lender; two, the participant's right to repayment arises only when the lender, lead lender, is paid; and three, only the lead lender can seek recourse against the borrower.

I find authority for that definition in the case of *In re Coronet Capital*, 142 B.R. 78, a case out of the Southern District of New York Bankruptcy Court, 1992. I apply that

definition to the participation agreement executed by these parties.

The first thing that I note about that agreement is that it is called a participation agreement. And here I pause to note that parties are free to use whatever words that they choose to describe their relationship, and it is certainly true also that sometimes parties, for economic reasons, choose to call what is in fact one thing by another name. We see this from time to time when it comes to capital leases. But, still, words have meaning, and when those words have a well-accepted meaning, we assume that sophisticated parties such as these understand and intend to adopt that meaning. So when in the introductory paragraph of the participation agreement 30294 is denominated as the participation purchaser, I assume that the parties know what the word participation means and that they intend to embrace that meaning.

In Paragraph M on Page 3, it is stated as follows, "Platinum agrees that Participation Purchaser will receive 45 percent of any monies recovered by Platinum relating to the Notes, Note Documents, and Secured Loan (the 'Participation')." This language is significant in the following respects. First, it specifies that 30294 is to receive 40 [sic] percent of monies recovered by Platinum relating to the notes. This means that it is Platinum that's responsible for recovering the monies due under the note and that it is to Platinum that the

money is to be paid.

This language, of course, is fully consistent with the participation in that typically the participant has no right to recover directly from the borrower. In the typical participation, the participant has no privity with the borrower whatsoever. The authority for that is *In re Autostyle Plastics*, 269 F.3d 726, a case from the Sixth Circuit in 2001.

The participant's relationship is solely with the lead lender, and it is solely to the lead lender that it must look for recovery.

In Paragraph 2 on Page 3, 30294 purchases "the participation," which as we will remember as a matter of contractual definition is 45 percent of any monies recovered by Platinum.

Now, Paragraph 3 on Page 3 could be said to be consistent with either a participation or an undivided interest in a note and collateral documents. That paragraph says that Platinum acknowledges that the participation purchased by 30294 confers on it -- that being 30294 -- 45 percent of the rights and interest in the note documents. Now, that language, if it was just considered by itself, might be said to be ambiguous. But when it's considered in the context of the document as a whole, its meaning is explained.

So that, in turn, leads us to the second sentence of Paragraph 5. That sentence says, and I quote again, "For

clarity, Platinum retains the right to manage, perform, and enforce the terms of the Note and to exercise and enforce all privileges and rights exercisable by it thereunder in its sole and unfettered discretion, including the right to amend the Note. However, notwithstanding the above, Platinum agrees that any settlement or sale regarding any and all collateral or the sale of any and all collateral under the Note Documents is subject to Participation Purchaser's consent, which shall not be unreasonably withheld."

This language is fully consistent with a participation and not an assignment of an undivided interest in the note itself to 30294. And then this conclusion is further bolstered by Paragraph 6, where, in the second sentence, Platinum agrees to keep 30294 appraised of all steps it is taking in connection with litigation regarding the note and collateral.

Here again it is clear that the right to enforce the note resides with Platinum, whose duty is to keep 30294 informed of its collection efforts.

Next we go to Paragraph 9. On first reading, Paragraph 9 might be said to give rise to an ambiguity, but, in actuality, a careful reading of Paragraph 9 dispels any notion of ambiguity. I quote Paragraph 9 as follows. "Nothing in this agreement will be construed to limit or restrict Platinum from in any way exercising any rights or remedies arising from and under the Note or Note Documents. Contemporaneously, Platinum

authorizes Participation Purchaser, who shall have the same rights and powers as Platinum under the Note Documents, to enforce the Note or Note Documents as Platinum's agent, including but not limited to exercising any rights or remedies arising from the Note or Note Documents or as provided for under applicable law."

Clearly, the notion that 30294 would have the same rights and powers under the note documents on its face appears to be inconsistent with the very definition of a participation in that, in a true participation, only the lead lender can pursue legal recourse against the borrower. But the key phrase in Paragraph 9 for the resolution of the assignment question is the phrase "to enforce the Note and Note Documents as Platinum's agent."

I cannot deny that Paragraph 9 purports to give both Platinum and 30294 the right to enforce the note documents. And I cannot deny that Paragraph 9 creates complete confusion as to what would happen in the event that both Platinum and 30294 were to attempt to enforce the note at the exact same time. But what is clear to me is that even if 30294 were fully authorized and did in fact enforce the note, it would only be doing so as Platinum's agent. So when it comes to collection, 30294's rights are pretty much the same as those of a third-party loan servicer. It acts strictly as an agent for Platinum.

Now, the question of who, as between 30294 and the receiver, gets to call the shots on the enforcement of the note -- and here when I say that, I mean 100 percent of the note, not part of it -- that particular issue is going to have to be decided by Judge Cogan. The importance of Paragraph 9 for today's purposes is that it completely removes any ambiguity about whether or not this is a participation. That is because, even if 30294 is enforcing the note, it's only doing so as the agent for Platinum. And, as such, the second and third elements of the very definition of a participation agreement are met. It is still Platinum that is enforcing the note. So it's clear that the interest at issue here is participation. It's not an assignment.

I've held that I do have jurisdiction to decide whether or not this is an assignment, but I do not have jurisdiction to decide under what circumstances 30294 can become, for lack of a better phrase, the administrative agent for the loan as a whole. The question of who should fill that role for all practical purposes is of no moment to this Court. That is a question that should be resolved by Judge Cogan.

Now, I've employed the following maxims of contract construction to reach this result. The first is that the Court's first job is to determine from the face of the document whether the contract is ambiguous.

Second, the Court is to give meaning to every word in the

contract.

Third, if there are seemingly inconsistent provisions in the contract, the Court should see if any perceived conflict can be resolved by reading the inconsistent provisions in the context of the contract as a whole.

And fourth, while a court may consider extrinsic evidence if a contract is ambiguous, it should not receive extrinsic evidence for the purpose of rendering a contract ambiguous.

In this case, I did receive extrinsic evidence, but because I've determined that on this very narrow issue the contract is not ambiguous, it does not alter my conclusion that the interest in question is a participation. So the interest is not an assignment as contemplated by Rule 3001(e). And accordingly, that assignment is not recognized.

So, parties, as you can see, these constitute my findings and conclusions. It's not going to, unfortunately, resolve all the questions the parties have about this. But that is where we stand for today's purposes.

I guess I'm going to ask counsel for the receiver to prepare an order to this effect. If you would, circulate it by Mr. Taylor for his approval as to form. You don't need to attempt to summarize my findings and conclusions. You can just make note of the fact that I made those findings and conclusions on the record today.

MR. CALLAHAN: I will, Your Honor.

THE COURT: Parties, --

MR. TAYLOR: May I briefly be heard, Your Honor?

MR. WEINICK: Certainly, Your Honor.

MR. TAYLOR: Your Honor, Clay Taylor on behalf of 30294. I appreciate the time the Court spent on it and the findings of fact and conclusions of law. Would request that the final order entered on this matter -- indeed, as the Court has already said -- reflect those findings of fact and conclusions of law so that we can have the appropriate record to the extent that any party wishes to appeal or enforce that order. And also wish that -- it is our position that this is a final order, that it is not interlocutory, it's final and appealable, and would like the order to so state.

THE COURT: Well, on those two issues, I'll say this. When it comes to the findings and conclusions, typically what I do is that parties just get a copy of the transcript and those will be my -- those will constitute my findings and conclusions.

The reason I don't put it into a formalized order is that because, if I have to actually incorporate those into a final order or separate findings and conclusions, anything that meets the definition of a written opinion has to be posted on our public website. Once it gets posted on our public website, it gets picked up for publication. Because it gets picked up for publication, then that means that, just as a matter of pride,

judges want to make it a scholarly effort, and so it takes a long time to get it out. It would end up being much, much more -- well, there would be much more authority built in here and citations and stuff like that. And the fact of the matter is that, inasmuch as I'm just kind of interpreting what I understand the law to be and applying it to these facts, I don't consider this to be very groundbreaking.

MR. TAYLOR: No. Let me be clear. I was not asking it to actually be in the form of the written order, just wanted it to recite, as your orders normally do, and adopting the rulings made today as your findings and as your conclusions of law, and then, more importantly for my purposes, that this is both final and not an interlocutory order.

THE COURT: I'm glad to have that incorporated in the order.

Now, here's the only thing about that, is that whether or not it's actually final for appellate purposes or not, as you know, that's not up to me. I don't get to decide whether what I just did is final or whether it's not.

MR. TAYLOR: What I'm saying --

THE COURT: But in the sense that you can put it in there, as far as I'm concerned, I want it to be final. And as I tell everybody who is mulling over the possibility of appealing me, I have no problem with being appealed. I'm fine with that. Whatever you do, do not get this remanded to me.

That's the only thing I ask. Okay, parties.

MR. TAYLOR: Thank you.

THE COURT: Thank you. We'll adjourn.

(Proceedings concluded at 1:54 p.m.)

--oOo--

CERTIFICATE

I certify that the foregoing is a correct transcript from the digital sound recording of the proceedings in the above-entitled matter.

/s/ Kathy Rehling **06/11/2018**

Kathy Rehling, CETD-444 Date
Certified Electronic Court Transcriber

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