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,	No. 16-cv-6848 (BMC)
Defendants.	

DECLARATION OF NEAL JACOBSON IN SUPPORT OF RECEIVER'S SUR-REPLY IN FURTHER RESPONSE TO THE FILINGS OF SCHAFER & WEINER PLLC

NEAL JACOBSON, declares under penalty of perjury, as follows:

1. I am a Senior Trial Counsel employed by the New York Regional Office of the United States Securities and Exchange Commission ("SEC"). I have been employed by the SEC since April 2000 in the bankruptcy and insolvency area. I have extensive experience with SEC bankruptcy and receivership matters, and am the primary SEC attorney responsible for reviewing actions of the receivership in this case.

2. I submit this declaration in support of the Receiver's Sur-Reply in Further Response to the Filings of Schafer & Weiner PLLC. In particular, I submit this declaration to provide background regarding standard SEC receivership practice and to address what I believe are certain factually incorrect claims made by S&W in its Memorandum in Opposition to the Receiver's Cross-Motion for Disgorgement of Fees and in Reply to the Receiver's Objection to

Schafer & Weiner's Final Application ("S&W Opposition") (Dkt.#332). Specifically, S&W wrongly states that: (i) it could be retained by the Prior Receiver and be paid out of Receivership assets without prior Court approval of its retention; (ii) the SEC staff was aware of the terms of the Participation Agreement prior to its execution; and (iii) Cooley LLP, the Prior Receiver's counsel, opined on and provided the SEC staff with a detailed memorandum concerning the Participation Agreement prior to its execution.[1]

3. Except as otherwise disclosed herein, this declaration is based on personal knowledge and the knowledge of other SEC staff.

I. Summary Background Relevant to S&W's Fee Application.

4. According to S&W, the Platinum entities did not have the financial means to pay the Arabella professionals accrued legal fees that they demanded in order to continue to defend the Arabella Loan and Arabella Assets prior to inception of the Receivership on December 19, 2016, and that Platinum directed S&W and Mr. Hoebeke, the manager of an Arabella entity, to find a purchaser to purchase an interest in the Arabella Loan in order to fund the accrued fees and to pay retainers for future fees in connection with the initiation of insolvency proceedings for certain of the Arabella entities. S&W Opposition at 3-5.

5. On December 19, 2016, the SEC filed the instant action and the Prior Receiver was appointed. S&W Opposition at 5.

6. After the Receivership was commenced, S&W advised the Prior Receiver to enter into the Participation Agreement pursuant to which a Platinum entity sold a 45% interest in the Arabella Loan to a participant in exchange for $500,000. S&W knew that approximately $350,000 of the proceeds from the sale would be used to pay accrued, pre-Receivership legal

[1] Capitalized terms not otherwise defined herein have the meanings ascribed to them in the Receiver's Opposition and Cross Motion and supporting Memorandum.

fees of the Arabella professionals, including $180,000 paid to S&W, and the remainder would be used to fund future fees in connection with the initiation of insolvency proceedings for certain of the Arabella entities. S&W Opposition at 5-6.

7. At the time that the Prior Receiver entered into the Participation Agreement on the advice of S&W, S&W's retention had not been approved by the Court, no retention application was pending, and the Prior Receiver had not sought Court approval of the Participation Agreement or payment of pre- and post-Receivership legal fees to the Arabella professionals.

8. On July 6, 2017, the Prior Receiver was replaced by the Court after he tendered his resignation in light of the SEC's discovery of serious undisclosed conflicts of interest. The new Receiver elected not to seek to retain S&W.

9. As set forth in Receiver's Memorandum in Support of its Opposition and Cross Motion (Dkt.#329) and attached exhibits, in May of this year, S&W took positions adverse to the Receiver and the Receivership in a Texas bankruptcy court concerning the Participation Agreement.

II. S&W's Retention was Required to be Approved by the Court Pursuant to the Terms of the Order and Amended Order Appointing Receiver and SEC Practice.

10. S&W claims that Court approval of its retention was not required for it to be engaged by the Prior Receiver and to be paid by the Receivership estate. S&W Opposition at 11-14. This position is inconsistent with SEC receiver billing instructions and practice, as well as the terms of the Order and Amended Order Appointing Receiver, and S&W's own admission in this case.

11. In SEC receivership cases, receivers and their professionals must be subjected to strict conflicts checks and the court must approve the necessity of their

retention and their fee structure before they can be retained.

12. Incorporated into paragraph 50 of the Order Appointing Receiver is the SEC's "Billing Instructions for Receivers in Civil Actions Commenced by the U.S. Securities and Exchange Commission" ("Receiver Billing Instructions"), which governs the payment of fees and expenses to receivers and their professionals in SEC receiverships. In addition to being part of the record in this case, the Receiver Billing Instructions are publicly available on the SEC's website. A copy of the Receiver Billing Instructions is attached hereto as Exhibit 1.

13. The first paragraph of the Receiver Billing Instructions states as follows:

> Except where inconsistent with guidelines established by the applicable district or circuit court, the undersigned hereby represents that, if appointed receiver in a civil action commenced by the U.S. Securities and Exchange Commission (the "SEC" or the "Commission"), each application for professional fees and expenses (the "Application") submitted by the receiver, including all contractors and/or professionals retained by the receiver, will comply with these billing instructions (the "Billing Instructions"). Undersigned further represents that any deviation from the Billing Instructions will be described in writing and submitted to the SEC at least 30 days prior to the filing of the Application with the Receivership Court. Following its receipt and review of proposed applications, . . . the SEC may object to deviations and charges with which it does not agree.
>
> Undersigned acknowledges that all applications for compensation are interim and are subject to a cost benefit review and final review at the close of the receivership.

14. Paragraph A.2. of the Receiver Billing Instructions provides that "[a]t least 30 days prior to the filing of the Application with the Court, the Applicant will provide to SEC Counsel a complete copy of the proposed Application."

15. Here, the payment of S&W's and other non-Receivership-related professional fees out of the Receivership estate's proceeds from sale of the Arabella Loan participation was never submitted to either the SEC or the Court for review or prior approval, as is required by the Receiver Billing Instructions.

16. S&W's position that it can be paid from limited Receivership assets without its retention having been approved by the Court is also inconsistent with at least two provisions of the Order and Amended Order Appointing Receiver. Paragraph I.6.F. of the Order Appointing Receiver [Dkt.#6] permits the Receiver to engage and employ persons to assist the Receiver in carrying out the Receiver's duties and responsibilities "subject to Court approval."

17. Paragraph XIII.49. of the Order Appointing Receiver states that "[s]ubject to the specific provisions of this Order, the Receiver is authorized to solicit persons and entities ("Retained Personnel") to assist the Receiver in Carrying out the duties and responsibilities described in this Order. The Receiver *shall not* engage any Retained Personnel without first obtaining an Order of the Court authorizing such engagement." (emphasis added)

18. These provisions are consistent with SEC receivership practice, which requires that all professional retentions be approved by the Court, after an application describing the terms and necessity of the retention, and the disclosure of conflicts, if any.

19. S&W's statement that the Prior Receiver "had the power to pay S&W for pre-receivership fees using post-receivership funds," ignores the plain reading of the Order Appointing Receiver, the Receiver Billing Instructions, and common SEC receivership practice.

20. In my experience at the SEC, the payment of pre-receivership claims out of receivership assets has never been considered an ordinary course transaction that can be made without court approval. Because there are typically insufficient assets to pay all creditors of a receivership, the use of receivership assets to pay non-receivership-related claims outside of a plan of distribution can result in preferential and inequitable payment to certain creditors.

21. The payment of pre-receivership fees to estate fiduciaries here is even more unusual in light of the amount of fees paid, the fiduciaries' role in advising the Prior Receiver to make the payments, and the fiduciaries' structuring of the sale of a Receivership asset to obtain payment and their apparent knowledge of the precarious financial condition of the Receivership at the time that they structured the transaction that gave them a preferential payment.

22. S&W argues that the Receiver's and the SEC's position means "that S&W can work for months at the request of the Initial Receiver, that the Initial Receiver can repeatedly promise to retain S&W, that S&W can reasonably rely on these promises, and yet ultimately fail to be retained, and thus paid. . . . This is both unjust and unwise." S&W Opposition at 13-14.

23. As a self-described experienced insolvency law firm, S&W could have easily reviewed the docket in this case and the Order Appointing Receiver, which incorporated the Receiver Billing Instructions, and insisted on being retained with Court approval.[2] S&W was on notice that its retention had to be approved by the Court, that it would be subject to a conflicts check, and that its fees were subject to Court approval and a cost-benefit justification regardless of any alleged promises by the Prior Receiver. Because S&W did not insist on Court approval of its retention at the beginning of this case, the existence of the Participation Agreement and the allocation of its proceeds was not disclosed to the SEC until mid-April 2017. As discussed below, it appears that the existence of the Participation Agreement and the use of the proceeds from the sale of the participation were disclosed only because Cooley LLP, the Prior Receiver's counsel,

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[2] S&W's time entries show that Mr. Baum did in fact review the Order Appointing Receiver on December 20, 2016. *See* Dkt.#326-3 at p. 92 of 109.

disclosed them in connection with the motion for approval of the Arabella Settlement Agreement.

24. Despite its protestations in its Opposition, S&W knew that its retention should have been approved by the Court. Michael Baum of S&W filed a declaration in connection with the Prior Receiver's motion for approval of the Arabella Settlement Agreement [Dkt.#128-2]. In paragraph 3 of the Baum declaration, Mr. Baum stated that "[a]fter the Receiver's appointment, S&W and the other lawyers who were representing PPCO in connection with the Arabella matters continued to do legal work in those matters on the understanding, *common in receivership cases*, that the Receiver would seek this Court's permission to retain us *nunc pro tunc* to the date of his appointment." (emphasis added)

25. Apparently to justify its failure to seek to be retained by the Court, S&W now contends that the Court did not approve any other professional retentions prior to the time that the SEC allegedly requested that S&W's services be terminated.[3] This contention is at the very least grossly misleading. The Amended Order Appointing Receiver was entered on January 30, 2017. On January 31, 2017, the Prior Receiver sought Court approval of the retention of Guidepost Solutions LLC and Cooley LLP *nunc pro tunc* to the Prior Receiver's appointment date, at which time the First Receiver Order was in place, and the Court granted their retentions on February 17, 2017. Also, on March 22, 2017, the Prior Receiver sought Court approval of the retention of Houlihan Lokey for valuation services *nunc pro tunc* to the Receiver's appointment date

[3] S&W claims in footnote 8, page 13 of its Opposition that the "Initial Receiver had not yet engaged a single professional under the First Receiver Order at the time the SEC demanded, months into the receivership and based on misinformation, that the Initial Receiver Terminate S&W's services."

and of PricewaterhouseCoopers LLP for tax services. Although the latter retention request did not seek *nunc pro tunc* appointment, it was filed with the Court before any alleged request to terminate S&Ws services.

III. The SEC Staff First Learned of the Existence of a Signed Participation Agreement on April 10, 2017, Over Four Months After it was Purportedly Executed.

26. In an apparent effort to bolster their argument that the Participation Agreement was proper, S&W wrongly states that the SEC had prior knowledge of the terms of the Participation Agreement *prior to its execution.* At page 6 of the S&W Opposition, S&W asserts that "Cooley … drafted a memorandum on the Participation Agreement, which it shared with the SEC prior to execution of the Participation Agreement. See Cooley Email and Memo, Exhibit K." This statement is false. Exhibit K to the S&W Opposition is an April 12, 2017 email (sent at least four months *after* the Participation Agreement was purportedly executed) from Daniel Pohlman at Cooley to Joe Grekin at S&W attaching a "draft document that has answers to the questions the SEC has been asking us" that "will be incorporated into an email." In the email, Cooley requests that S&W "review it and let us know if you have any concerns, comments, or suggested edits."

27. The SEC staff first learned of the existence of the executed Participation Agreement on Monday, April 10, 2017, when Cooley emailed to the SEC staff a draft letter motion for approval of the Arabella Settlement Agreement. Cooley advised the SEC staff that the motion to approve the Arabella Settlement Agreement "must be filed on Tuesday [, April 11]." *See* email dated April 10, 2017, attached hereto as Exhibit 2.

28. Because the SEC staff had no familiarity with the Arabella Settlement Agreement and no knowledge of the existence or terms of any signed Participation Agreement, and was

asked to consent to the letter motion with only one day's notice, the SEC staff immediately sought clarification from Cooley.

29. On April 12, 2017, Cooley sent an email to the SEC staff explaining the Arabella Settlement Agreement. A copy of the April 12, 2017 email from Cooley to the SEC staff is attached hereto as Exhibit 3.

30. The SEC staff advised Cooley that it did not have sufficient time to evaluate the requests being made in the letter motion, and the Prior Receiver obtained an extension of time to file the letter motion seeking approval of the Arabella Settlement Agreement. The SEC staff ultimately concluded that it could not consent to the Prior Receiver's request to retain the Arabella professionals or to approve the Participation Agreement due to what it believed were serious conflicts of interest of S&W, and the fact that approximately $350,000 of the proceeds of the sale of the participation were used inappropriately to pay pre-Receivership attorney fees and the remainder to pay retainers without Court approval.

31. At page 18 of the S&W Opposition, S&W states that "Cooley even sent a memorandum to the SEC on January 3, 2017 – two days before the Receiver entered into the Participation Agreement – summarizing the status of the Participation Agreement and the difficulty Cooley was having negotiating with the Black Elk Trustee about it. Exhibit K."

32. This statement is grossly misleading and ignores the situation that the SEC and the Prior Receiver were dealing with at the time. The most pressing issue at that time was the fact that the TRO entered in the Black Elk bankruptcy case was preventing the Receiver from administering the day to day operations of the Receivership.

33. The Arabella bullet description was a short entry on page eight of a nine page memorandum Cooley emailed to the SEC staff on January 3, 2017, in anticipation of a meeting to discuss the Black Elk TROs interference with the day to day operations of the Receivership.

A copy of that email is attached hereto as Exhibit 4.

34. I do not recall discussing the Arabella matter at all at the meeting with the Prior Receiver. Moreover, the last sentence of the bullet states that the Prior Receiver has not been able to finalize the arrangement and there is no suggestion that any arrangement was imminent. In any event, the description of the "Arabella Participation" in the outline and in Exhibit K contains no details regarding the purported Participation Agreement, including the percentage participation that was being offered or the fact that the proceeds would be used to pay *pre-receivership* legal fees. There is certainly no suggestion that the arrangement was to be signed in two days, what its specific terms were, or that it would be entered into without the SEC staff's knowledge or consent and Court approval. The SEC staff learned nothing more about the Participation Agreement until April 10, 2017.

IV. S&W's Contention that Cooley Approved the Terms of the Participation Agreement Before it was Executed is Not Supported by the Record.

35. S&W contends that Cooley, the Prior Receiver's counsel, knew the details of the Participation Agreement prior to its execution. S&W states that "[t]he initial Receiver and Guidepost were further advised by their counsel, Cooley LLP ('Cooley'), as to the Participation Agreement. Exhibits C, D, H, I and J to the Rhodes Report; Cooley Time Record, Exhibit J." S&W Opposition at 6. The only apparent support for this contention is a January 5, 2017 time entry of 0.3 hours (out of 8.6 hours billed that day) by a Cooley attorney with the description "telephone calls with R. Rittereiser and C. Lindstrom regarding Arabella." *See* Ex. J to the S&W Opposition.

36. The SEC staff understood from Cooley that its role in the Arabella matter began only when it was provided a copy of the Arabella Settlement Agreement in order to prepare the motion for approval of that agreement by Chief Judge Irizzary. Attached hereto as Exhibit 5 is a

May 25, 2017 email from Celia Barenholtz at Cooley to the SEC staff. That email was written in response to the SEC's stated concerns to Cooley regarding the circumstances surrounding Cooley's request that the SEC staff consent to the Arabella Settlement Agreement and the Participation Agreement in April 2017.

37. On the first page of the email, Ms. Barenholtz states as follows:

> Cooley was not involved in the negotiation of the Participation Agreement. Nor was it involved with any of the Arabella-related litigations. Cooley did not participate in the court-supervised mediation that took place on March 27 and March 28, or the drafting of the Arabella Settlement Agreement. Our role began when we were given a copy of the Arabella Settlement Agreement in order to prepare an application to the Court seeking approval of that Agreement. Under the terms of the Arabella Settlement Agreement, that application had to be made by Tuesday, April 11.
>
> Given our lack of familiarity with Arabella, Michael Baum suggested, and we readily agreed, that he draft a declaration in support of the application. . . .
>
> …
>
> Based on my review of the materials supplied to us by Michael Baum, I decided that it would not be appropriate to seek approval of the Arabella Settlement Agreement without informing the Court of the Participation Agreement, and the payments that had been made to the Arabella Professionals as a result of the Participation Agreement. Accordingly, the draft Schwartz and Baum declarations that I sent to the SEC on Monday included a description of those facts. The draft letter application also discussed those facts, and asked the Court to approve the Participation Agreement[.]

38. This email suggests that Cooley first learned of the terms of the Participation Agreement and the payment of pre- and post-Receivership legal fees to the Arabella professionals well after the Participation Agreement was executed, and that it had not approved of the terms of the Participation Agreement before it was executed.

V. Conclusion.

39. S&W failed to comply with the Order and Amended Order Appointing Receiver, the Receiver Billing Instructions, or standard SEC receivership practice, and it is therefore not entitled to compensation from the Receivership estate due to its conflicted position, its failure to be retained by the Court, and its failure to seek Court approval of payment of its and other professional pre-and post-Receivership legal fees and the Participation Agreement.

Dated: New York, New York
June 22, 2018

SECURITIES AND EXCHANGE COMMISSION

By: */s/*Neal Jacobson

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BILLING INSTRUCTIONS FOR RECEIVERS IN CIVIL ACTIONS COMMENCED BY THE U.S. SECURITIES AND EXCHANGE COMMISSION

Except where inconsistent with guidelines established by the applicable district or circuit court, the undersigned hereby represents that, if appointed receiver in a civil action commenced by the U.S. Securities and Exchange Commission (the "SEC" or the "Commission"), each application for professional fees and expenses (the "Application") submitted by the receiver, including all contractors and/or professionals retained by the receiver, will comply with these billing instructions (the "Billing Instructions"). Undersigned further represents that any deviation from the Billing Instructions will be described in writing and submitted to the SEC at least 30 days prior to the filing of the Application with the Receivership Court. Following its receipt and review of proposed applications, as described in section A.2 below, the SEC may object to deviations and charges with which it does not agree.

Undersigned acknowledges that all applications for compensation are interim and are subject to a cost benefit review and final review at the close of the receivership. At the close of the receivership, the receiver will file a final fee application, describing in detail the costs and benefits associated with all litigation and other actions pursued by the receiver during the course of the receivership.

Undersigned acknowledges that, to the extent requested by the SEC, interim fee applications may be subject to a holdback in the amount of 20% of the amount of fees and expenses for each application filed with the Court. The total amounts held back during the course of the receivership will be paid out at the discretion of the court as part of the final fee application submitted at the close of the receivership.

A. CERTIFICATION

1. Each Application must contain a Certification by the Applicant that:

   (a) the Certifying Professional has read the Application;

   (b) to the best of the Applicant's knowledge, information and belief formed after reasonable inquiry, the Application and all fees and expenses therein are true and accurate and comply with the Billing Instructions (with any exceptions specifically noted in the Certification and described in the Application);

   (c) all fees contained in the Application are based on the rates listed in the Applicant's fee schedule attached hereto and such fees are reasonable, necessary and commensurate with the skill and experience required for the activity performed;

   (d) the Applicant has not included in the amount for which reimbursement is sought the amortization of the cost of any investment, equipment, or capital outlay (except to the extent that any such amortization is included within the permitted allowable amounts set forth herein for photocopies and facsimile transmission); and,

   (e) in seeking reimbursement for a service which the Applicant justifiably purchased or contracted for from a third party (such as copying, imaging, bulk mail, messenger service, overnight courier, computerized research, or title and lien searches), the Applicant requests reimbursement only for the amount billed to the Applicant by the third-party vendor and paid by the Applicant to such vendor. If such services are performed by the receiver, the receiver will certify that it is not making a profit on such reimbursable service.

2. At least 30 days prior to the filing of the Application with the Court, the Applicant will provide to SEC Counsel a complete copy of the proposed Application, together with all exhibits and relevant billing information in a format to be provided by SEC staff.

B. ATTENDANCE AT HEARING ON APPLICATION

The Receiver or other Certifying Professional shall be present at any hearing to

consider the Application.

C. CONTENT OF APPLICATION

The following information must be provided in the Application:

1. Information about the Applicant and the Application.

(a) the time period covered by the Application;

(b) the date the receiver was appointed, the date of the order approving employment of the Applicant, and the date services commenced;

(c) the names and hourly rates of all Applicant's professionals and paraprofessionals (the "Fee Schedule"); and,

(d) whether the Application is interim or final, and the dates of previous orders on interim Applications along with amounts requested and the amounts allowed or disallowed, all amounts of previous payments, and amount of any allowed Applications which remain unpaid.

2. Case Status (Narrative).

(a) The amount of cash on hand, the amount and nature of accrued administrative expenses, and the amount of unencumbered funds in the estate;

(b) Summary of the administration of the case, including all funds received and disbursed, and when the case is expected to close;

(c) Summary of creditor claims proceedings, including a description of established or anticipated procedures for: (i) providing notice to known and unknown claimants; (ii) receipt and review of claims; (iii) making recommendations to court for payment or denial of claims; and, (iv) final disposition of claims. This summary should also include the status of such claims proceedings after they have been commenced;

(d) Description of assets in the receivership estate, including approximate or actual valuations, anticipated or proposed dispositions, and reasons for retaining assets where no disposition is intended; and,

(e) Description of liquidated and unliquidated claims held by the receiver, including the need for forensic and/or investigatory resources; approximate valuations of claims; and anticipated or proposed methods of enforcing such claims (including likelihood of success in: (i) reducing the claims to judgment; and, (ii) collecting such judgments).

3. Current and Previous Billings.

(a) Total compensation and expenses requested and any amount(s) previously requested;

(b) Total compensation and expenses previously awarded by the court; and,

(c) Total hours billed and total amount of billing for each person who billed time during the period for which fees are requested.

4. Standardized Fund Accounting Report.

The SEC's Standardized Fund Accounting Report ("SFAR") submitted by the Receiver for the most recent quarter shall be attached to any fee application as "Exhibit A".

D. TIME RECORDS REQUIRED TO SUPPORT FEE APPLICATIONS

1. Each professional and paraprofessional must record time in increments of tenths of an hour, and must keep contemporaneous time records on a daily basis.

2. Time records must set forth in reasonable detail an appropriate narrative description of the services rendered. Without limiting the foregoing, the description should include indications of the participants in, as well as the scope, identification and purpose of the activity that is reasonable in the circumstances.

3. The Application should separately describe each business enterprise or litigation matter (i.e., "Project") for which outside professionals have been employed. For example, separate litigation matters should be set out individually in the Application as

individual Projects and each such Project should contain Activity Categories as described in Sections D.4 and D.5 below. Each Project Category should contain a narrative summary of the following information:

(a) a description of the project, its necessity and benefit to the estate and the status of the project including pending litigation for which compensation and/or reimbursement of expenses is requested;

(b) identification of each person providing services on the project; and

(c) a statement of the number of hours spent and the amount of compensation requested by professionals and paraprofessionals on the project.

4. In recording time, each professional and paraprofessional may, subject to Section D.5 immediately below, describe in one entry the nature of the services rendered during that day and the aggregate time expended for that day in an "Activity Category" (as described in section D.5.a and D.5.b, below) without delineating the actual time spent on each discrete activity in an Activity Category, provided, however, single time entries of more than one hour in an Activity Category that include two or more activities must include a notation of the approximate time spent on each activity within the Activity Category.

5. Time records shall be in chronological order by Activity Category. Only one category should be used for any given activity and professionals and paraprofessionals should make their best effort to be consistent in their use of categories. This applies both within and across firms. Thus, it may be appropriate for all professionals to discuss the categories in advance and agree generally on how activities will be categorized. Every effort should be made to use the listed categories in the first instance and to coordinate the use of additional categories with other professionals in the case. Notwithstanding the above, all categories must correspond with the SEC's SFAR. The

time information reflected on the Application shall also be supplied to the SEC Counsel in an electronic format as directed by SEC staff.

(a) Legal Activities. The following categories are generally more applicable to attorneys but may be used by all professionals where appropriate.

ASSET ANALYSIS AND RECOVERY. Identification and review of potential assets including causes of action and non-litigation recoveries.

ASSET DISPOSITION. Sales, leases, abandonment and related transaction work. Where extended series of sales or other disposition of assets is contemplated, a separate category should be established for each major transaction.

BUSINESS OPERATIONS. Issues related to operation of an ongoing business.

CASE ADMINISTRATION. Coordination and compliance activities, including preparation of reports to the court, investor inquiries, etc.

CLAIMS ADMINISTRATION AND OBJECTIONS. Expenses in formulating, gaining approval of and administering any claims procedure.

EMPLOYEE BENEFITS/PENSIONS. Review issues such as severance, retention, 401K coverage and continuance of pension plan.

(b) Financial Activities. The following categories are generally more applicable to accountants and financial advisors, but may be used by all professionals where appropriate.

ACCOUNTING/AUDITING. Activities related to maintaining and auditing books of account, preparation of financial statements and account analysis.

BUSINESS ANALYSIS. Preparation and review of company business plan; development and review of strategies; preparation and review of cash flow forecasts and feasibility studies.

CORPORATE FINANCE. Review financial aspects of potential mergers, acquisitions and disposition of company or subsidiaries.

DATA ANALYSIS. Management information systems review, installation and

analysis, construction, maintenance and reporting of significant case financial data, lease rejection, claims, etc.

STATUS REPORTS. Preparation and review of periodic reports as may be required by the court.

LITIGATION CONSULTING. Providing consulting and expert witness services relating to forensic accounting; etc.

FORENSIC ACCOUNTING. Reconstructing books and records from past transactions and bringing accounting current; tracing and sourcing assets.

TAX ISSUES. Analysis of tax issues and preparation of state and federal tax returns.

VALUATION. Appraise or review appraisals of assets.

E. PAYMENT OF FEES AND EXPENSES

1. Presentation of Fees and Expenses in Application.

(a) All fees and expenses must be necessary and reasonable; excessive charges will not be paid. To the extent that an Applicant seeks reimbursement of expenses, the Application shall include a categorization of such expenses along with an exhibit summarizing the total expenses for the period covered by the Application.

(b) Charges for litigation will be paid only if the litigation is reasonably likely to produce a net economic benefit to the estate. With respect to each litigation matter, the Applicant shall certify that the Applicant determined that the action was likely to produce a net economic benefit to the estate, based on reviews of: (i) the legal theories upon which the action was based, including issues of standing; (ii) the likelihood of collection on any judgment which might be obtained; and, (iii) alternative methods of seeking the relief, such as the retention of counsel on a contingency basis. Retention of counsel on a contingency fee basis should be pursued where the Receiver (after consulting with SEC Counsel) concludes that retention of counsel under the approved fee schedule would produce a lesser economic benefit to the receivership estate. The receiver should memorialize these cost-benefit analyses, through communications with the receiver's counsel, as support for the engagement of such counsel.

(c) Invoices and/or bills for each expense item for which reimbursement

is sought must be kept for seven (7) years after the close of the receivership. Such support shall be provided on request to the court and the SEC, and in appropriate circumstances to any party in interest provided that, where applicable, privilege or confidentiality can be preserved.

(d) Time spent preparing fee applications, or any documentation in support thereof, may not be charged to the receivership estate.

2. Allowable and Non-Allowable Reimbursable Expenses.

(a) Filing Fees Process Service Fees, Witness Fees and Expert Witness Fees.

Filing fees (including for necessary adversaries), process service fees, witness fees, and expert witness fees (subject to court approval of the employment of any professionals and the reasonableness of such fees) shall be allowable to the extent of the actual cost incurred by the Applicant.

(b) Court Reporter Fees and Transcripts.

Court reporter fees and copies of transcripts shall be allowable to the extent of the actual cost incurred by the Applicant.

(c) Lien and Title Searches.

The cost for lien and title searches (whether done in-house or by an outside vendor) is allowable to the extent of the actual cost incurred by, or invoiced to, the Applicant.

(d) Photocopying.

Photocopying shall be allowable at a cost not to exceed $.15 per page. The Applicant shall set forth in its fee application the total number of copies. Outside vendor photocopying charges are allowable at the actual cost invoiced to the Applicant. Necessary copies obtained from the Clerk of the Court (including certified copies) or from the approved court copy service will be permitted at the actual cost incurred by the Applicant.

The Applicant shall not reflect on the Application any copies for which the Applicant has been, or expects to be, reimbursed (eg., payment from an opposing party for document production from which the Applicant has been reimbursed).

(e) Postage, Overnight Delivered Courier/Messenger Services.

The cost of postage, overnight delivery, and outside courier/messenger services are reimbursable for the actual cost incurred, if reasonably incurred. Charges should be minimized whenever possible. For example, couriers/messengers and overnight delivery service should be used only when first-class mail is impracticable.

(f) Telephone.

Long distance telephone charges are allowable to the Applicant for the actual cost invoiced from the telephone carrier. Charges for local telephone exchange service and cellular telephone service shall not be reimbursable.

(g) Facsimile Transmission.

A charge for outgoing facsimile transmission to long distance telephone numbers are reimbursable at the lower of (a) toll charges or (b) if such amount is not readily determinable, $1.00 per page for domestic and $2.00 per page for international transmissions. Charges for in-coming facsimiles are not reimbursable. The Application shall state the total number of pages of the outgoing transmissions.

(h) Computerized Research.

Computerized legal research services such as Lexis and Westlaw are reimbursable to the extent of the invoiced cost from the vendor, however if such service is provided on a monthly or other periodic rate, proportional usage shall not be reimbursable.

(i) Parking.

Reimbursement for parking is allowable, including parking by a professional to attend court proceedings, depositions or case conferences, parking at the airport, and client and third party parking (including validation).

(j) Travel Expenses and Meals.

Local travel time and related expenses for destinations within a twenty (20) mile radius of the Applicant's office including mileage, taxis, etc. and meals (including staff meals) will not be reimbursed. Mileage charges for out-of-town travel (outside a twenty (20) mile radius of the Applicant's office) with one's own car are reimbursable at the lesser of the amount customarily charged clients or the amount allowed by the Internal Revenue Service for per mile deductions. For purposes of the foregoing, the Applicant's office shall be the office in which the person incurring the travel expense is located.

Long distance travel time outside a twenty (20) mile radius of the Applicant's office is reimbursable at 50% of the Applicant's regular billing rate. The reimbursement of long distance travel expenses is subject to the following limitations: (1) the Applicant shall seek and use the lowest airfare or train fare available to Applicant; (2) luxury accommodations and deluxe meals are not reimbursable; (3) personal, incidental charges such as telephone and laundry are not reimbursable unless necessary as a result of a reasonably unforeseen extended stay not due to the fault of the traveler; and (4) each out-of-pocket travel and allowable miscellaneous administrative expense exceeding $75 requires a receipt that is to be attached to the invoice.

(k) Word Processing, Document Preparation, Data Processing, Proofreading, Secretarial and Other Staff Services.

Secretarial, library, word processing, document preparation (other than by professionals or paraprofessionals), data processing, and other staff services (exclusive of paraprofessional services), including overtime for the foregoing, are not reimbursable. Charges for proofreading for typographical or similar errors are not reimbursable whether the services are performed by a paralegal, secretary, or temporary staff.

(l) Communications with Investors.

Where appropriate, the estate should promptly create a website, and update the website as appropriate, to provide information as to the activities and condition of the estate to investors. In addition, any necessary basic communications with investors should be handled by clerical or paralegal staff (or comparatively paid staff) to the extent possible. Expenses stemming from a failure to comply with this policy will not be submitted.

Candidate for Appointment as Receiver in
Civil Action Commenced by the
U.S. Securities and Exchange Commission

Date: ______________

____
[Printed Name]
[Address 1]
[Address 2]
[Address 3]
[E-Mail Address]
[Phone Number]
[Fax Number]

McGrath, Kevin

From:	Barenholtz, Celia Goldwag <cbarenholtz@cooley.com>
Sent:	Monday, April 10, 2017 8:18 AM
To:	Jacobson, Neal; McGrath, Kevin
Cc:	Pohlman, Daniel J
Subject:	143959616_2
Attachments:	143959616_2.docx

Neal & Kevin, here is the draft letter application to the judge regarding the Arabella Settlement Agreement and related matters. It has not yet been reviewed by Bart, and is subject to change. As I told Neal, under the Arabella Settlement Agreement, this must be filed on Tuesday. Further complicating matters, Michael Baum, whose declaration I will be sending to you next, is an observant Jew, and will be going out of pocket for Passover sometime this afternoon. If you want copies of any of the exhibits mentioned in the papers I will be sending you, please ask Dan (copied above) as he has all of them. Many thanks, and once again, apologies for putting you under time pressure. Celia

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Draft
Confidential

Celia Goldwag Barenholtz
+1 212 479 6330
cbarenholtz@cooley.com

Via ECF

April __, 2017

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.*, Civil Case No. 16-cv-6848 (DLI)(VMS)

Dear Chief Judge Irizarry:

We are counsel to Bart M. Schwartz (the "Receiver"), the court-appointed receiver for Platinum Partners Credit Opportunities Master Fund, LP ("PPCO") and certain related entities (collectively, the "Receivership Entities"). We write on behalf of the Receiver to request your approval of a settlement agreement the Receiver entered into after a court-supervised mediation in Texas (the "Arabella Settlement Agreement"). If approved by this Court, and the Texas bankruptcy courts that must also approve the Agreement for it to become effective, the Arabella Settlement Agreement will resolve expensive, protracted litigation over PPCO's interest in property that secures a loan (the "Arabella Loan") that PPCO made to Arabella Exploration, Inc. ("AEI").[1] (AEI and its subsidiaries are referred to collectively herein as the "Arabella Entities").[2]

PPCO or property that secures the Arabella Loan are currently involved in the following proceedings:

- *In re Arabella Petroleum Company, LLC,* No. 15-70098-RBK (Bankr. W.D. Tex.) (the "APC Bankruptcy Case") and related adversary proceeding, Adv. Proc. No. 16-07002-RBK (the "APC Adversary Proceeding");

- *In the Matter of Arabella Exploration, Inc.*, Case No. FSD 72 of 2016, RMJ (Grand Court of the Cayman Islands) (the "AEI Liquidation");

- *In re Arabella Exploration Inc.*, No. 17-40119 (Bankr. N.D. Tex.) (the "AEI Bankruptcy Case");

- *In re Arabella Exploration, LLC*, No. 4:17-bk-40120 (Bankr. N.D. Tex.) (the "AEX Bankruptcy Case");

- *In re Arabella Operating, LLC*, No. 17-41479-RFN (Bankr. N.D. Tex.) (the "AO Bankruptcy Case"),

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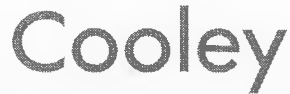
[1] PPCO acted through its subsidiary Platinum Long Term Growth VIII, LLC ("PLTG8"), who acted as PPCO's agent in connection with the Arabella Loan. As used in this application, "PPCO" refers collectively to PPCO and PLTG8.

[2] Capitalized terms not defined herein are defined in the accompanying Declarations of Bart M. Schwartz or Michael E. Baum.



- Multiple actions commenced in the 143rd Judicial District Court of Reese County, Texas by Founders Oil and Gas Operating LLC ("Founders") (the "Founders Litigation").

As discussed below, the Receiver considers the Arabella Settlement Agreement to be a very favorable resolution for the Receivership Estate as it resolves, or provides a means for resolving expensive, ongoing litigation challenging directly or indirectly the Receiver's interest in the property that secures the Arabella Loan. As a result of the Arabella Settlement Agreement, that property will be able to be sold, and the Receivership Estate will be entitled to obtain a portion of the sale proceeds. Prior to the Arabella Settlement Agreement, it was not clear that the Receivership Estate would realize *anything* from its collateral.

The Receiver also requests approval to retain and pay the law firms that represented PPCO in connection the Arabella cases *nunc pro tunc* to December 19, 2016, the date the Receiver was appointed (the "Appointment Date"), and to authorize an agreement entered into by the Receiver at the outset of the Receivership (the "Participation Agreement") that created emergency funding used to preserve the Receivership Estate's Arabella investment.

In support of this Application, the Receiver attaches the following Exhibits:

Exhibit 1 Declaration of Bart M. Schwartz, executed April __, 2017 (the "Schwartz Declaration"); and

Exhibit 2 Declaration of Michael E. Baum, executed April __, 2017 (the "Baum Declaration"); and

Exhibit 3 a proposed Order.

The SEC Staff consents to this Application.

Background

On December 19, 2016, the U.S. Attorney for the Eastern District of New York unsealed an eight-count indictment against Mark Nordlicht and six other individuals who were formerly affiliated with Platinum Partners ("Platinum"), a purported $1.7 billion hedge fund family based in New York that includes the corporate defendants named in this action (the "Indictment"). The Indictment alleges, among other things, that the defendants defrauded Platinum investors through, among other things, the overvaluation of assets, the concealment of severe cash flow problems, and the preferential payment of redemptions. That same day, the SEC filed a complaint against the same seven individuals, Platinum Management (NY) LLC, and Platinum Credit based on conduct similar to that alleged in the Indictment. The SEC simultaneously moved by order to show cause for a temporary restraining order and the appointment of a receiver. Judge Matsumoto entered an order pursuant to which Bart M. Schwartz was appointed Receiver of the Receivership Entities on December 19, 2016, which Your Honor amended on January 30, 2017 (the "Receiver Order") [Docket Nos. 6, 59-2]. On March 8, 2017, Your Honor entered a preliminary injunction, enjoining violation of the federal securities laws, and ordering that Bart M. Schwartz continue to act as Receiver pursuant to the Receiver Order [Docket Nos. 105, 106].

Under the Receiver Order, the Receiver was appointed to preserve the *status quo*, ascertain the extent of commingling of funds, ascertain the true financial condition of the Receivership Entities, prevent further dissipation of property and assets of those entities, prevent the encumbrance or disposal of property or assets of the Receivership Entities, preserve the books, records, and documents of the Receivership Entities, be available to respond to investors inquiries, protect investors' assets, conduct an orderly wind

down, including a responsible liquidation of assets and orderly and fair distribution of those assets to investors, and determine whether one or more of the Receivership Entities should undertake bankruptcy filings, among other things (Receiver Order at 2).

The Receiver is empowered to "take custody, control and possession of all Receivership Property," (Receiver Order ¶ 6.B), "manage, control, operate and maintain the Receivership Entities," (Receiver Order ¶ 6.C), transfer, compromise, or otherwise dispose of any Receivership Property, other than real estate, in the ordinary course of business" in the manner the Receiver deems "most beneficial" to the Receivership Entities (Receiver Order ¶ 28), and "manage [and] maintain" the business operations of the Receivership Entities (Receiver Order ¶ 31). In order to discharge his duties, the Receiver is empowered to "engage and employ" persons to assist him in carrying out his "duties and responsibilities," subject to the approval of this Court (Receiver Order ¶ 6.F, ¶ 49).

The Arabella Loan

Prior to the Receiver's appointment, PPCO made a $16,000,000 loan to AEI, a company involved in oil and gas operation in Texas through its subsidiaries (the "Arabella Loan"). The Arabella Loan was secured by all of AEI's assets, and was guaranteed and secured by the assets of AEI's subsidiaries, Arabella Exploration, LLC ("AEX") and Arabella Operating LLC ("AO"). AEX and AO also pledged their assets to secure the Arabella Loan. Jason Hoisager controlled the Arabella Entities as of the time of the Arabella Loan. The interests in the Arabella Entities that PPCO acquired as a result of the Arabella Loan are referred to collectively the "Arabella Interests."

AEI failed to make payments due to PPCO under the Arabella Loan, resulting in an event of default in mid-2016. *See* Baum Decl. ¶ __. PPCO notified AEI of the default and pursued its rights under the Arabella Loan documents, including appointing Charles L. Hoebeke II to manage AEX and AO. Mr. Hoebeke placed AEI into liquidation, initiating the AEI Liquidation. Baum Decl. ¶ __.

Although the Arabella Loan was secured, PPCO was unable to foreclose on its collateral because of the legal challenges described below. Baum Decl. ¶ __. If those challenges succeeded, the Arabella Interests would have been wiped out entirely. *Id.* __. Thus, as of the Receiver's appointment, it appeared that PPCO's Arabella investment could be a complete loss. Schwartz Decl. ¶ __.

The Challenges to PPCO's Arabella Interests

The APC Bankruptcy and Adversary Proceeding – The Arabella Interests include certain rights and working interests in oil wells that Arabella Petroleum Company, LLC ("APC"), transferred to AEX and AO prior to the Arabella Loan. APC was the managing company for the Arabella Entities. Through these transfers, AO was to hold the rights to operate the various oil wells owned by the Arabella Entities; AEX was to hold the working interests owned by the Arabella Entities. Baum Decl. ¶ __.

After APC declared bankruptcy, the APC Chapter 11 Trustee filed the APC Adversary Proceeding, alleging (a) that transfers from APC to AEX and AO were avoidable fraudulent conveyances, (b) that the security interests held by PPCO should be avoided because PPCO knew or should have known of the fraudulent conveyances, (c) that the APC bankruptcy estate is owed money for interests in receivables that were not paid by AEX, and (d) and that those unpaid expenses constitute a priority lien impressed on PPCO's collateral. Baum Decl. ¶ __. If the Chapter 11 Trustee prevailed in the Adversary Proceeding, substantially all of the Arabella Interests would have been lost. *Id.* ¶ __.

The Founders Litigation – During the APC Bankruptcy Case, Founders took over operation of the various wells located on the Arabella properties, including the properties that secured the Arabella Loan. Founders eventually claimed that AEX owed Founders operating expenses relating to those wells, and commenced the Founders Litigation, seeking to foreclose against the working interests owned by AEX. Had that foreclosure occurred, the most valuable of the Arabella Interests would have been destroyed. In order to protect its assets in the face of the Founders Litigation, AEX initiated the AEX Bankruptcy Case. As discussed below, funding obtained through the Participation Agreement was required in order for AEX to file in bankruptcy. Baum Decl. ¶¶ __; Schwartz Decl. ¶¶ __.

The Tag Along Rights – Tag along rights are contractual provisions which allow the owners of certain working interests (arising from a reversionary right) the opportunity to "tag along" with any sale of the underlying asset to a third party and receive a *pro rata* portion of the sale price. Both APC and AEX claimed ownership of the Arabella Entities' Tag-Along Rights. Unless AEX prevailed, PPCO would not be able to share in the Arabella Entities' potentially valuable Tag-Along Rights. Baum Decl. ¶¶ __.

The Retention of the Arabella Professionals and the Guaranty of Fees

PPCO retained Schafer and Weiner, PLLC ("S&W") to represent it in connection with the APC Bankruptcy Case and the APC Adversary Proceeding. Eventually, S&W was retained to represent PPCO in connection with all the Arabella matters described above. PPCO also retained Kessler Collins, P.C. ("Kessler Collins") as PPCO's local counsel, and O'Connell PLLC ("O'Connell") to provide counsel with respect to oil and gas issues. Baum Decl. ¶ __. S&W, Kessler Collins, and O'Connell are referred to herein collectively as the "Arabella Professionals."

In mid-2016, PPCO represented to the Arabella Professionals that it was unable to make ongoing payments to them. Baum Decl. ¶ __. In July 2016, PPCO, AEI, AEX, and AO entered into the Guaranty of Fees. Under the Guaranty of Fees, the Arabella Professionals received a first out participation in PPCO's interest under its secured loan to AEI, which would come due when PPCO foreclosed on its collateral, or when PPCO sold or assigned the notes it had received from AEI. Baum Decl. ¶ __& Ex. __.

The Receiver's Appointment and the Participation Agreement

The Receiver was appointed on December 19, 2016. At the time of his appointment, the Receiver faced multiple, complex disputes that threatened to destroy the Arabella Interests, resulting in a total loss of the Arabella investment. Schwartz Decl. ¶ __; Baum Decl. ¶ __. The threat posed by the Founders Litigation was particularly acute, as Founders was on the verge of foreclosing its claimed liens. Baum Decl. ¶ __. The Receiver was advised by the Arabella Professionals that immediate action was required to prevent the total loss of Arabella Interests, including defending the newly-filed Founders' Litigation and supporting an AEX bankruptcy filing. Schwartz Decl. ¶ __; Baum Decl. ¶ __.

The Receiver was further advised that taking these steps would required a bare minimum of $500,000, and they would cost even more over time. Schwartz Decl. ¶ __: Baum Decl. ¶ __. That sum of money was needed because the various professionals who were working for PPCO and the Arabella Entities were not willing to continue to do work unless they were paid a portion of their past-due receivables and received retainers for work going forward.[3] Baum Decl. ¶ __. However, the Receiver was under

[3] For example, S&W, a small bankruptcy firm, had last received payment from PPCO in March 2016. PPCO owed S&W over $400,000 as of December 2016. S&W was understandably unwilling to continue to work without payment based on only the Guaranty of Fees. Baum Decl. ¶ __.

significant cash constraints, and had been told that prospects of success were far from certain. Indeed, the Receiver was told that the costs of litigating the various Arabella matters might exceed the ultimate recovery. Schwartz Decl. ¶¶ __.

Given the uncertainty of recovery of the Arabella Interests and the need to use the Receivership Entities' limited cash to protect other, more valuable Receivership assets, the Receiver concluded that it would be imprudent to use his limited cash to support the Arabella litigations. Schwartz Decl. ¶ __.

In order to avoid the total loss of the Receivership Entities' Arabella Interests without spending any cash, the Receiver entered into an agreement with a funder called 30294 LLC in which the funder agreed to purchase 45% of Platinum's interest in and under its secured investment in AEI in exchange for providing $500,000 to pay the professional fees necessary for PPCO, AEX, AEI, and AO to defend the Arabella Interests (the "Participation Agreement"). The Receiver signed the Participation Agreement on December 30, 2016 (11 days after his appointment). Its effective date is December 28, 2016. Baum Decl. ¶ __ & Ex. __; Schwartz Decl. ¶ __. 30924 LLC's $500,000 was paid into a trust account controlled by S&W, and was used to pay the Arabella Professionals and professionals doing work for PPCO, AEX, AEI, and AO. Baum Decl. ¶ __.

The Receiver now seeks this Court's approval of the Participation Agreement effective *nunc pro tunc* to its effective date.

The Mediation and the Arabella Settlement Agreement

With the approval and encouragement of the APC Bankruptcy Case court, APC, AEX, AEI, AO, the Official Committee of Unsecured Creditors of APC, Mr. Hoebeke, Mr. Hoisager, and the Receiver agreed to enter into a mediation before the Honorable Christopher Mott, U.S. Bankruptcy Judge for the State of Texas, Western Division. The Mediation took place on March 27 and 28, 2017. Judge Mott does not preside over any of the Arabella Cases but agreed to serve as mediator for the parties. The Receiver attended in person, represented by the Arabella Professionals. Schwartz Decl. ¶ __; Baum Decl. ¶ __.

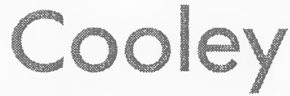
As a result of the Mediation, all parties other than Mr. Hoisager were able to reach an amicable resolution, memorialized in the Arabella Settlement Agreement. A copy of the Arabella Settlement Agreement is attached to the Baum Declaration as Exhibit __. The Arabella Settlement Agreement is subject to the approval of this Court, and the bankruptcy courts supervising the APC, AEX, and the AO Bankruptcy Cases. Baum Decl. Ex. A at __.

Under the Arabella Settlement Agreement:

- The parties to the Arabella Settlement Agreement will work together to sell the assets in the respective bankruptcy cases. The proceeds of the sale of the disputed oil and gas assets will be distributed 65% to AEX and 35% to APC. AEX and APC will divide any proceeds from a sale of the Tag-Along Rights 22.5% to 77.5%.

- APC will offer a debtor-in-possession loan to AEX so AEX can resolve the claims brought by Founders.

- Ongoing expenses owed to Founders will be divided 65% by AEX and 35% by APC.



- There will be a mutual release of the parties, including a release of the former owners, members, agents, and principals of PPCO, and the Receivership Entities will be released, while any potential causes of action against former owners, board members, and officers of APC, AEX, APO, and AEI are maintained.

Because AEX's assets secure the Arabella Loan, a portion of the recovery provided to AEX will flow to the Receivership Estate. The Arabella Settlement Agreement is a compromise: it splits the proceeds obtained from assets that were claimed by both AEX and APC. That said, it allows the entity with the stronger right to any asset to retain the majority of proceeds from a sale of that asset. Schwartz Decl. ¶ __. The Arabella Settlement Agreement avoids prolonged litigation over the ownership of the Tag-Along Rights, allows the Receivership Entities to retain their interest in AEX and AEI, and allows the parties to the Arabella Settlement Agreement to work together to monetize the assets of the various entities. Baum Decl. ¶ __; Schwartz Decl. ¶ __.

For the reasons set forth above and in the accompanying Schwartz Declaration and Baum Declaration, the Receiver asks this Court to approve the Arabella Settlement Agreement.

The Retention and Compensation of the Arabella Professionals for Post-Receivership Work

As of the Appointment Date, S&W was owed approximately $400,000 in fees it had incurred in representing PPCO. Through the Participation Agreement, S&W received $180,000 of its past-due fees. Since the Receiver's appointment, S&W has incurred more than $80,000 in fees. Baum Decl. ¶ __; Schwartz Decl. ¶ __.

The Receiver requests the Court's permission to retain S&W *nunc pro tunc* to the Appointment Date. It also seeks permission to pay S&W PPCO's share of the fees that S&W is entitled to for its post-receivership work out of the Receivership Entities' cash assets. Specifically, the Receiver seeks permission to pay S&W up to $ _____ (up to 100% of its fees from December 19, 2016-December 28, 2016 and up to 55% of its actual and anticipated fees from December 28, 2016 to the sale of property rights that that PPCO is entitled to share in as a result of the Arabella Settlement Agreement). The payment of post-receivership fees by the Receiver is without prejudice to any of S&W's rights, including its rights under the Participation Agreement and the Guaranty of Fees.[4] Baum Decl. ¶ __; Schwartz Decl. ¶ __.

The Receiver similarly requests authorization to retain Kessler Collins and O'Connell, effective *nunc pro tunc* to the Appointment Date, and approval make payment to Kessler Collins, and O'Connell in the same manner as S&W, paying up to $_____ to Kessler Collins and up to $_____ to O'Connell for PPCO's share of their post-receivership work, without prejudice to any of their rights, including their rights under the Participation Agreement and the Guaranty of Fees. Schwartz Decl. ¶ __.

The Receiver seeks authority to make these payments to the Arabella Professionals in the ordinary course of business, without the submission of fee applications to this Court. Given the relatively small amount of money involved, it would be inefficient and costly for the Receiver to have to submit fee applications for the Arabella Professionals. It is common in large receiverships for the Court to permit ordinary course professionals to receive fees without following the procedure outlined in the Receiver

[4] Under the Participation Agreement, fees due to professionals are to be paid first, with PPCO paying 55% and 30294 LLC paying 45% of the fees incurred from December 28, 2016 onward.

Order. The Arabella Professionals' invoices will be submitted to the SEC Staff for review before the Receiver makes any payment prior to making payment. In the event the sums requested herein are not sufficient to pay the Arabella Professionals for PPCO's share of their post-receivership work through the conclusion of their work on the Arabella matters, the Receiver will make a further application to this Court before paying them out of the Receivership Entities' cash assets. Schwartz Decl. ¶ __.

Consent

The SEC Staff consents to the relief requested in the instant application. [Cooley has solicited the positions of the named defendants in this action by email. Counsel for _________. The other defendants have not yet taken a position.]

Respectfully submitted,

DRAFT

Celia Goldwag Barenholtz
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1114 Avenue of the Americas
New York, NY 10036
(212) 479-6000
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Counsel to the Receiver

cc: All counsel of record (via ECF)

Enclosures

Jacobson, Neal

From: Barenholtz, Celia Goldwag <cbarenholtz@cooley.com>
Sent: Wednesday, April 12, 2017 3:09 PM
To: Jacobson, Neal; McGrath, Kevin
Subject: Arabella Settlement Agreement--Confidential; Joint Defense Material
Attachments: Guaranty for Professional Fees.pdf; Amendment to Guaranty for Professional Fees.pdf; Memo - JANUARY 3, 2017 MEETING RE PLATINUM RECEIVERSHIP (with EXHIBITS)....pdf; Mediation Settlement Agreement EXECUTED.pdf; PARTICIPATION AGREEMENT.pdf

Neal & Kevin, I write in partial response to your questions about Arabella. I expect to get you more information later today or tomorrow. My thought was that after I answer your questions, we can have a discussion about how much material needs to be added to the draft papers. Michael Baum returns to the office on Thursday, but will be out again Monday and Tuesday for the end of the Passover holiday. Given his limited availability, we will discuss with him whether we should attempt to secure a longer extension when he gets into the office tomorrow.

PPCO entered into a $45 million loan facility with the Arabella borrowers in September 2014. $16 million (including prepaid interest) was advanced in or about September 2014. Nothing was ever repaid. As of the first event of default declared by PPCO (July 2015), the unpaid obligations under the note were $16.5 million. By the second default notice (January 2016), those obligations had grown to $18.4 million. As of May 2016, they were $19.6 million. Let me know if you need a current calculation. If so, I will have one run.

PPCO was carrying the Arabella loan at $5 million at the time of the Receiver's appointment. Platinum prepared a precis of its assets to aid the Receiver with his work as the independent consultant. With respect to Arabella, Platinum said, "The company is in negotiations to settle litigation which could compromise the entirety of our collateral. With a settlement, the hard assets (acreage) will be sold to net us at least the $1.3mm number." Platinum apparently hoped to recover the rest of the $5 million by using the settlement proceeds to finance claims against third parties.

In September 2016, the APC Trustee made a written settlement offer to Platinum that called for the assets transferred from APC to AEX to be returned to APC and monetized, among other things. APC would give the first $500,000 recovered to AEX for the sole benefit of Platinum. The next $3,170,762.70 was to go to APC. The next $750,000 was to go to AEX for the sole benefit of Platinum. The rest was to go to APC until all of its claims had been satisfied in full with interest with any residual going to AEX. Thus, as of September 20, 2016, AEX and PPCO had a settlement offer from APC worth $1,250,000. Based on advice from S&W, Platinum did not respond to the offer.

The Participation Agreement was entered into at a time when the affairs of Platinum were in a state of extreme disarray, and the Receiver newly appointed. Michael Baum met with Bob Rittereiser in December 2016, and advised him that Platinum's Arabella investment was on the verge of being lost, and that the Receiver needed to make an immediate payment of $500,000 to S&W and the other lawyers representing PPCO (the "Arabella Professionals") and the professionals appointed by Platinum to run AEX and AO (*e.g.,* Charles (Chip) Hoebeke and his counsel) in order to save the investment. The Receiver was told that $500,000 was needed immediately, and that the long-term cost of defending the Arabella Interest would be more.

Notwithstanding that advice, the Receiver was unwilling to put more Receivership cash into Arabella given (i) the high cost of defending PPCO and the Arabella Entities (estimated at well over $500,000), (ii) the uncertain likelihood of success, (iii) the relatively low value placed by Platinum on the investment; (iv) the fact that

Platinum had other, more valuable assets that needed cash to preserve their value (*e.g.*, litigation funding, life insurance policies, Abdala, Desert Hawk, L.C. Energy, Northstar, Pea & Eigh), (v) the uncertainty as to how much cash the Receivership Entities would be receiving over the near term, and (vi) the early stage of the Receivership, and the limited knowledge the Receiver had of the Receivership Entities' value. Thus, in December 2016, it appeared that the Arabella investment would be a complete loss, and it made sense to the Receiver to give 45% of what would otherwise be nothing to an investor who was willing to take the risk of financing the defense of PPCO's Arabella Interests. In this regard, it should be noted that when the Receiver made this decision, he was not aware of the Tag Along Rights. The Arabella Professionals did not learn about the Tag Along Rights until after the Participation Agreement. A copy of the Participation Agreement is attached.

Craig Bush is the investor behind 30294, LLC. Bush is a former attorney who is now a private equity investor. From his LinkedIn profile, he has been the owner of Stone Williams, LLC since 2001. Prior to becoming an investor, Bush worked as an associate at Miller Canfield, was associate counsel for Gould Inc., and Assistant General Counsel for Loewen Group International, Inc. Bush has invested in a variety of fields, from plastics and concrete manufacturing and mortgage banking to waste transportation and tire recycling. Bush graduated from Michigan State University in 1983, and Wayne State University Law school in 1986. *See* https://www.linkedin.com/in/craig-bush-958a9651.

Bush was located by Hoebeke, the CRO of AEX. Both Baum and Hoebeke attempted to find an investor but Bush was the only investor willing to enter into the Participation Agreement, and did so with warning that he might not see a recovery on his investment. Bush attended the Arabella Mediation in Texas.

S&W was paid $180,000 because of the Participation Agreement. We understand from S&W that this sum went entirely to cover unpaid fees (*i.e.*, that none of this was a retainer for future work). S&W's security came from the Amendment to Guaranty. S&W reads the Guaranty to cover all of its unpaid fees, including fees incurred after the date of a Forbearance Agreement entered into with the Arabella borrowers on July 15, 2016. S&W's reading may well be what the parties intended. However, the text of the Amendment says, among other things, that the Amendment covers fees that accrued prior to the execution of the Forbearance Agreement. In any event, as of the Forbearance Agreement, S&W advises it had unpaid fees of $223,245. Thus, as I understand it, the payment made to S&W pursuant to the Participation Agreement was secured. The only issue is whether fees incurred by S&W and the other Arabella Professionals after the date of the Forbearance Agreement are secured. I am enclosing the Guaranty and the Amendment to the Guaranty. The most knowledgeable person about these arrangements are Michael Baum and David Steinberg, neither of whom are available to me until tomorrow. Accordingly, I may need to supplement or change this (and other) information in this email based on what they tell me when they return.

Stephen O'Connell, the oil and gas lawyer PPCO retained to represent it in the Arabella matters received payment of $20,000 because of the Participation Agreement, as did S&W's local counsel, Kessler Collins. At the time of the Participation Agreement, O'Connell was owed over $70,000 in outstanding fees ($60,000 of which was incurred prior to the Forbearance Agreement), and Kessler Collins was owed over $30,000 in outstanding fees (approximately $14,000 of which was incurred prior to the Forbearance Agreement).

The SEC was told about Arabella when we first met, but the description we gave you was focused on the impact of the Black Elk TRO on Arabella. The memo that I sent you on January 3, 2017 (copy attached) described the Arabella situation as follows:

Arabella Participation

- *Amount at issue:* nominally $1.5 million.

- *Background:* Platinum has an interest in this entity which is in liquidation. Platinum has also been sued in connection with this investment. A third party is willing to pay $500,000 to professionals to continue the process of trying to obtain a recovery in exchange for a portion of the proceeds obtained. The third party will pay $500,000 to Platinum which will use the funds to pay the professionals.
- *Approval:* Because money will be coming out of Platinum, the Trustee's approval will be required. Approval has not been sought given the current stalemate between the Trustee and the Receiver. This is an example of how the Trustee hampers the Receiver's ability to act. While Platinum does not think the third party is going to back out, it has not been able to finalize the arrangement.

I believe the $1.5 million value is based on Platinum's expectation that it would receive a $1.3 million settlement. Cooley was not involved in the Participation Agreement, and I do not think the SEC was given any other information about it besides the description quoted above. (Note: S&W received the Participation Agreement signed by Bob Rittereiser on behalf of the Receiver on December 30. However, S&W was told to hold the Agreement until the question of whether the Black Elk Trustee needed to approve it was resolved. S&W was allowed to release the Agreement on or about January 5. The first payments under the Participation Agreement were made on January 6.)

The releases provided under the Arabella Settlement Agreement do not release Platinum's claims. Paragraph 12(b) of the Arabella Settlement Agreement specifically affirms that the documents signed in connection with the Arabella Loan are valid and enforceable, and that all monies due under the Loan documents, and "all liens and security interests" under the Arabella Loan documents are valid and enforceable. A copy of the Arabella Settlement Agreement is attached; it is captioned "Mediation Settlement Agreement."

I think it is important to understand that in order for PPCO to recover anything from its Arabella investment it had to win the various pending lawsuits. PPCO did not have a strong positon in the fraudulent conveyance case. The underlying fraudulent conveyance almost certainly occurred. The real issue was whether PPCO could prevail on its defenses, *e.g.*, that PPCO was a good faith purchaser for value without knowledge of the underlying fraudulent transfer. The Platinum person most familiar with the transaction is Mark Nordlicht, so this defense turns on his credibility (assuming he testifies). Moreover, while there are facts that help PPCO's position, there are also harmful ones. Among other things, Platinum denies that an entity called Jett Capital was its agent in order not to be tagged with alleged Jett's knowledge of the alleged fraudulent conveyance. However, according to the APC Trustee's mediation statement, Chaim Nordlicht was listed as the Jett Capital contact person on a document relating to the transaction and Jett kicked back warrants that it received in connection with the deal to Platinum. With respect to the Tag Along Rights, APC had record title to the assets in question. PPCO was relying on unrecorded assignments, which, as I understand it, is a big problem. Based on what I have read and heard about the matters, PPCO's likelihood of success was a very uncertain proposition. The Receiver got as good a result as he did in large part because of the Receivership—the other parties realized that with a Receiver at the table, the Arabella litigations could go for a long time and prevent the sale of the property.

The uphill battle the Receiver faced to win these cases is powerful support of the Arabella Settlement Agreement. In a case where he could ultimately receive nothing, the Receiver obtained 22.5% of the proceeds of the Tag-Along Rights and 65 % of the proceeds from the sale of the bulk of the Arabella Entities' oil and gas assets. However, I am reluctant to say negative things about PPCO's litigation position in publicly filed papers, as PPCO will be back to litigation if one of the courts whose approval is required does not approve the Settlement Agreement.

Celia

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From: Barenholtz, Celia Goldwag [mailto:cbarenholtz@cooley.com]
Sent: Tuesday, January 03, 2017 12:35 PM
To: Jacobson, Neal
Cc: Bart M. Schwartz - Guidepost Solutions LLC (bschwartz@guidepostsolutions.com); Daniel Burstein - Guidepost Solutions LLC (dburstein@guidepostsolutions.com); Robert Rittereiser (rrittereiser@guidepostsolutions.com); Levine, Alan; Gottlieb, Lawrence
Subject: JANUARY 3, 2017 MEETING RE PLATINUM RECEIVERSHIP

Neal, we thought it would be helpful for you to have this outline in advance of your meeting with Bart. I will send you a copy with exhibits shortly, and will bring copies to the meeting. Best, Celia

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JANUARY 3, 2017 MEETING RE: PLATINUM RECEIVERSHIP

- The Receiver's Accomplishments to date
    - $215,000 payroll reduced to $115,000
    - Fired defendants (most were not on the payroll so that is not where cuts were made)
    - Receiver is sole signatory on bank accounts
    - Open discussions with auditors
    - Take control, etc.
- Trustee construes TRO (***Exhibit A***) as giving him power to approve any expenditure of Platinum funds. The TRO is therefore inconsistent with the authority granted to the Receiver under the Order, including:
    - Controlling all Receivership Property, using Receivership Property for the benefit of the Receivership Estate, engaging counsel and others to assist the Receiver, bringing legal actions, etc. *See, e.g.,* I.6.C., D., F., G., J.
    - Prohibiting self-help, liens, etc. *See* III.13.
    - Injunction Against Interference with Receiver. *See* VI.
    - Retention of personnel to assist Receiver, including counsel. *See* XIII.
    - Compensation of Receiver and Retained Personnel *See* XIII.
- TRO has been interfering with Receiver's basic operations:
    - Website—Receiver has not been able to put up the website the SEC requested because he does not have authority to spend the $2200 it will take.
    - Receiver did not want Mark Nordlicht in Platinum's new space, but did not have authority to rent new space for him. The Receiver was able to squeeze a small office into budget given by the Trustee to Platinum for its move and ensure access to Nordlicht without his being in Platinum's new offices.
    - Payroll company terminated contract with Platinum on Dec. 30. Receiver will need to find a new one and pay a deposit.
    - Receiver may need to make retention payments to keep key personnel.
    - The Receiver will need to pay himself and his staff and his counsel.
- TRO interferes with Receiver's ability to sell assets, invest cash in assets to increase their value. See detailed examples below.

- Black Elk does not have a judgment against Platinum, and is not a secured creditor.

- The Trustee is attempting to use its positon to (a) micro-manage Platinum's use of its liquid assets—assets that should be used to maximize value that can be obtained from Platinum's assets for all concerned parties and (b) obtain security for its unsecured claim. The Trustee's agenda with respect to (a) is clear from his counsel's comments with respect to the approval (or failure to approve) expenses. His agenda with respect to (b) been stated explicitly:

    - *See* ***Exhibit B*** (Dec. 15 settlement proposal) which outlined "a proposal of security to substitute for the cash retention obligations of $29,600,584.31 the Court imposed on [Platinum] in its Temporary Restraining Order."

    - *See* ***Exhibit C*** (Dec. 22 email):

        > "At this point, the Trustee's problem is larger than payments on investments in Acceleration Bay or on the Daybreak settlement. [Platinum] makes these and other requests to spend money against the backdrop that so far [Platinum] has not set aside *one penny* in escrow – has not even offered to set aside any money from any of its multi-million dollar liquidity events – to satisfy the Bankruptcy's Court's TRO or the Black Elk creditors."

- The Trustee has become significantly more difficult to deal with since the appointment of the Receiver.

    - The Trustee has not given approval for time-sensitive transactions the Receiver has determined should be made. *E.g.* Daybreak Settlement, Acceleration Bay/Kramer Levin.

    - The Trustee has not given approval for payments needed to retain or compensate counsel for Platinum. As a result, Platinum does not have adequate legal representation in connection with the North Star bankruptcy case, the Pea & Eigh lien litigation and LC Energy matters. North Star and Pea & Eigh are particularly critical—Platinum made a significant investment in North Star, and a deadline to file a notice of appeal is on the verge of expiring in Pea & Eigh.

    - The Trustee has suggested that transactions that he previously approved are no longer approved. The Receiver and Platinum have relied on approvals previously rendered (*E.g.*, Desert Hawk, Heartland).

- Receivership is currently at a stalemate because of the Trustee.

    - On Dec. 29, the Trustee said that he would not approve anything unless he meet with the Receiver and developed a comfort level with him: "At this point, the Trustee does not feel comfortable acting on and will not act on this [Desert Hawk] or other requests without first conferring with the Receiver(s) regarding the path and their role going forward." (*See* ***Exhibit D***, Dec. 29 email)

    - The Desert Hawk payment was made earlier on Dec. 29 based on the Trustee's prior approval subject to provision of documents.

  - On Dec. 30, the Receiver asked the Trustee to approve payment of a life insurance premium needed to preserve value of policy and a quarterly loan payment due on its secured loan from Heartland Bank, both due Jan. 2.

    - The Trustee has previously approved similar payments.

    - As of Jan. 3, the Trustee had not responded to request.

    - Both payments are necessary, and time sensitive. See below for more detail.

  - A conference call has been scheduled between the Receiver and the Trustee for Jan. 4.

- There are potentially significant transactions on the horizon for which the Receiver has not yet sought permission from the Trustee either because of the current status, or because the Receiver has not yet made a final determination of how to proceed. These transactions will be time-sensitive and will have a major effect on the Receiver's ability to maximize Platinum's assets.

- The uncertainty surrounding whether the Trustee has approved a transaction and the need to obtain approvals (often requiring multiple discussions and submission of documents) is a significant distraction for Platinum staff which has been significantly reduced in size.

- A TRO is not needed given the appointment of a Receiver.

  - Platinum has significant assets but they are not liquid.

  - By freezing Platinum's liquid assets, the TRO prevents Platinum from maximizing the value of its illiquid assets for the benefit of Black Elk and other parties in interest.

  - The appointment of a Receiver insures that there will be no dissipation of assets or use of assets for improper purposes.

  - Platinum is harmed by the TRO because it impairs the Receiver from protecting and maximizing Platinum's assets. The Trustee's argument in the TRO application was there would be no harm at all to Platinum because its funds were merely being frozen. The court was not told that Platinum's inability to use its funds would impair value of its assets for all claimants, including Black Elk.

  - The public interest is not served by a TRO now that a Receiver is in place. The Receiver protects *all* creditors and investors. The TRO application's discussion of the public interest factor did not acknowledge the interests of other Platinum creditors, or of Platinum investors.

- The Trustee has not offered legitimate reasons for withholding approval of payments.
    - In most cases, the Trustee has offered no reason other than its desire for security/payment of its claim.
    - In some cases, the Trustee seems to be willfully misunderstanding the reason for the payment (*e.g.*, Acceleration Bay).
    - The Trustee is now refusing to approve anything without meeting with the Receiver and getting a comfort level about his plans.
- The Adversary Proceeding should be stayed at least temporarily because it is placing burdens on the Receiver, *e.g.*, the need to respond to discovery requests.

Critical, Time-Sensitive Expenditures That Have Not Been Approved by the Trustee

Life Settlement Premium Payments

- *Amount at issue:* $23,568.88 due Jan. 4; more due Jan. 14.
- *Background:* Platinum has indirect ownership of a portfolio of life insurance policies. The portfolio is held by ALS which is owed almost entirely by Platinum subsidiary Credit Strategies. Platinum must pay the premiums on those policies to keep them in force and be paid when the insured dies. The minority owners of ALS have no obligation to fund premium payments. The amount of premiums varies from month to month depending on the policies (*e.g.*, Dec. 2016 premiums were approximately $1 million).
- *Approval:* The Trustee has previously approved all requests to pay premiums on these policies but has not yet rendered his approval to pay the premium due on Jan. 4 ($23,568.88). Request to pay that premium was made Dec. 30 (***Exhibit E***). The next premium payment comes due on Jan. 14.
- *Upcoming Issues:* Premium payments come due all the time.

Heartland Bank Loan

- *Amount at issue:* $130,000.
- *Background:* Platinum has a $7 million loan from Heartland Bank which is in default because Platinum has not been able to provide the required valuation statements. The loan is secured by all Platinum's assets. Because this loan and the loan Heartland made to PPVA are a significant, Heartland is under pressure from its regulators to address the liability. Platinum is attempting to work out a forbearance agreement with Heartland, and is close to documenting that deal.
- *Approval:* The Trustee previously approved a down payment on the forbearance agreement ($250,000) which was due on Dec. 31, and which was paid on Dec. 29

based on the Trustee's prior approval. In addition, Platinum must make regularly quarterly interest payments. The Trustee approved interest payments in the past. The next payment was due Jan. 2 (approximately $130,000). Platinum requested approval to make that payment on Dec. 30. *See **Exhibit E**.*

Daybreak Settlement

- *Amount at issue*: $215,000.[1]

- *Background*: In October 2016, Platinum agreed to allow liens held by Platinum subsidiary (Maximilian) on certain Daybreak assets to be removed in order to facilitate a Daybreak asset. As part of the transaction, Platinum committed to lending Daybreak $250,000, and the loan was amended accordingly (4th Amendment). Following the transaction, an investment bank purportedly retained by Daybreak sued Platinum, Maximilian, Daybreak and others for $1.2 million in fees. Daybreak negotiated a settlement that would require Daybreak to pay $215,000 in exchange for releases of all claims. The $215,000 would be funded by Platinum but would be credited against the commitments Platinum made to Daybreak in the 4th Amendment (*i.e.*, Platinum would not have to increase its investment in Daybreak beyond what it was already contractually committed to). Platinum has an equity positon in Daybreak, and therefore has an interest in seeing the Daybreak's liability removed. Although the claim against the Platinum parties is weak, Platinum also has an interest in avoiding the payment of attorneys' fees to defend the action. The Receiver has signed the settlement agreement.

- *Approval:* The Trustee has not approved this expenditure even though it does not oblige Platinum to pay anything more than it is already contractually obligated to pay.

Acceleration Bay (Kramer Levin Payments)

- *Amount at issue*: $600,000.

- *Background*: Hamilton, a Platinum entity, entered into a litigation funding arrangement with Acceleration Bay regarding patent litigation by Acceleration Bay. Hamilton agreed to fund 65% of Kramer Levin's fees. As a result of liquidity issues, Hamilton has fallen behind on its payments to Kramer Levin, and Kramer Levin has a receivable of $1.7 million. Hamilton believes the funding arrangement will ultimately yield a substantial amount of money for Platinum. Hamilton will lose its ability to share in the upside of the litigation if it defaults. Hamilton also has a contractual obligation to fund Kramer Levin's fees. Platinum agreed to pay Kramer Levin $600,000 by year end as a stop-gap measure.

  - *Trustee's Rationale*: Although Platinum explained the nature of the transaction to the Trustee, the Trustee persists in treating the payment as past due legal fees of Platinum, as opposed to an investment in an asset (*i.e.*, the right to participate in

[1] Note: all dollar figures are approximate.

litigation recoveries obtained by Acceleration Bay). The Trustee has not approved the payment.

- *Upcoming issues*: While somewhat less pressing, the Receiver will soon need to deal with the remaining $1.1 million owed to Kramer Levin, as well as legal fees to be incurred by Kramer Levin in order to preserve the value of this investment.

Retainer for North Star Bankruptcy Counsel

- *Amount at issue*: $75,000.
- *Background*: Platinum has a significant investment in North Star which is in bankruptcy in Houston. Platinum retained a law firm (Hoover) to represent it in the bankruptcy case. Hoover agreed to work without payment until the PI was determined. However, the PI was not heard on Dec. 15, and Hoover will not do any significant work without a $75,000 retainer. Counsel for Platinum is necessary to document and seek approval of the DIP transaction described below. But Platinum needs representation in the bankruptcy case even if the DIP does not materialize. There are matters occurring now (*e.g.*, the possible inclusion of secured creditors on the unsecured creditors committee) where Platinum has not been able to act because it does not have counsel.
- *Approval:* The Receiver has not approved the request to pay this retainer.

Retainer to Pay Counsel for Pea & Eigh Appeal

- *Amount at issue*: $55,000.
- *Background*: Platinum has a 75% interest in equipment worth approximately $1.3 million through a wholly owned Platinum subsidiary called Pea & Eigh. The equipment was used by Black Elk through an agreement with a company controlled by Black Elk. An entity owed $400,000 by the entity controlled by Black Elk obtained a lien on the equipment. Platinum litigated that lien and lost. The law firm that represented Platinum thinks there is a good chance Platinum will prevail on appeal, but will not represent Platinum further (including filing appeal papers, which have not yet been written, on or about Jan. 20) unless its $55,000 receivable is paid.
- *Approval*: The Receiver has approved payment of $55,000, and wants to prosecute the appeal. The Trustee was asked to approve the payment to counsel, but has not done so.

Payments to LC Energy Counsel

- *Amount at issue*: $40,000 to former counsel; $ 60,000 to new counsel.
- *Background*: Platinum owns LC Energy which owns a coal mine which is not currently operational. Platinum wants to make the capital investments necessary to put the mine back into operation. There is litigation against LC Energy for which

former counsel's file would be useful. However, former counsel will not release that file unless its bill is paid. Platinum also needs to make a retainer payment to new counsel (Benish) to represent it in ongoing litigation. Platinum has requested $40,000 to pay former counsel, and $60,000 to pay Benish (Benish requested $150,000).

- *Approval:* The Trustee has not approved these payments.
- *Upcoming issues*: If the Receiver decides to make LC Energy operational, capital investments will be necessary which will require the Trustee's approval. Negotiating with the Trustee over the amount to invest in LC Energy will hamper the Receiver's ability to maximize the value from this asset.

Upcoming Time-Sensitive Expenditures Where Approval Has Not Yet Been Sought

Jan. 2017 Budget. Basic operating expenses other than salary previously approved by the bankruptcy court. Will probably be around $70,000, not including the Receiver or his staff. Not yet submitted to Trustee given current situation.

Abdala Gold

- *Amount at issue*: $3 million.
- *Background*: Abdala is a gold mining operation in Brazil, in which Platinum owns a significant interest. Specialized machinery is required to extract the gold from the water and soil in which it is located. This special machinery has been acquired and is currently en route to the site. Further capital expenditures are required for site preparation, assembly of the equipment, and the initial stages of extraction. The operation is on target to produce meaningful cash flow starting in mid-year 2017.
- *Approval*: The Trustee has approved prior capital expenditures to date. The Receiver expects to seek the Trustee's approval for an additional $3 million expenditure in the next 90 days.

North Star DIP Financing

- *Amount at issue:* $3 million.
- *Background:* Platinum has an interest in North Star (bonds and preferred equity), an oil and gas company that is currently in bankruptcy in Houston. North Star is one of Platinum's largest positions ($55-$60 million face value). Platinum is endeavoring to put together a consortium of lenders to provide DIP financing to North Star. It contemplates a $25 million facility, of which PPVA will put up $15 million. It is possible that another lender will also participate; at most, Platinum's piece would be $10 million. Platinum believes that unless it provides the DIP financing, its North Star investment will be wiped out. If Platinum is to propose the DIP financing to the bankruptcy court it must have the deal in place before January 13, when the debtor's DIP package is slated to be considered by the bankruptcy court.

- *Approval:* Platinum sought approval for a $3 million tranche of DIP financing from the Trustee which was put on hold. The Receiver has not yet decided how to act with respect to DIP financing. If the Receiver decides to proceed with a DIP financing proposal, he will have to secure the Trustee's approval which may impair the Receiver's ability to maximize the value of this asset.

Arabella Participation

- *Amount at issue:* nominally $1.5 million.

- *Background:* Platinum has an interest in this entity which is in liquidation. Platinum has also been sued in connection with this investment. A third party is willing to pay $500,000 to professionals to continue the process of trying to obtain a recovery in exchange for a portion of the proceeds obtained. The third party will pay $500,000 to Platinum which will use the funds to pay the professionals.

- *Approval:* Because money will be coming out of Platinum, the Trustee's approval will be required. Approval has not been sought given the current stalemate between the Trustee and the Receiver. This is an example of how the Trustee hampers the Receiver's ability to act. While Platinum does not think the third party is going to back out, it has not been able to finalize the arrangement.

Desert Hawk

- *Amount at issue:* $2 million.

- *Background:* Desert Hawk is a gold mine in Utah on which Platinum has a secured debt instrument. Platinum sought approval to make a payment pay for fees for equipment which the Trustee granted subject to documentation being provided. Documentation was provided, and the Receiver then made the payment. A subsequent email from the Trustee seems to renege on this approval. *See **Exhibit C*** (12/29 email). The equipment was needed to do work that is required by the permit to operate the mine, and state and federal law. Failure to pay the fees to reclaim the equipment and do the work could have impaired the value of Platinum's investment in Desert Hawk.

- *Upcoming issues:* Platinum is considering a $2 million funding in January that would give Platinum more equity in Desert Hawk. If the Receiver decides to go forward with that funding, he will have to negotiate with the Trustee who may not agree to fund this investment. Platinum believes that Desert Hawk could be a significant monetization for Platinum if it is funded.

Urigen

- *Amount at issue*: $500,000.

- *Background*: Urigen is a pharma company that has a candidate for a bladder disease in Phase II testing. Platinum is an equity holder. Platinum regards the Urigen

candidate as less speculative than other Phase II candidates because it combines already approved substances to treat a new indication. Urigen will need to be funded if it is to proceed with Phase II testing.

- *Approval*: The Trustee approved payment of $500,000 subject to documentation. Documentation has not yet been prepared and so has not been submitted to the Trustee. The Trustee's Dec. 29 email (***Exhibit C***) puts that approval in question.

Jacobson, Neal

From: Barenholtz, Celia Goldwag <cbarenholtz@cooley.com>
Sent: Thursday, May 25, 2017 11:27 AM
To: Bambach, Alistaire
Cc: Jacobson, Neal; Grace, Adam S.; McGrath, Kevin; Levine, Alan
Subject: Arabella

Dear Alistaire,

I'm writing to respond to Neal's comment in his May 10 email that "Alistaire's interaction with Cooley on the Arabella matter in my absence, and the fact that Cooley proposed to obtain retroactive approval of the participation agreement and payment of additional post-receivership fees without any application did not give the team high confidence, especially when given one days' notice of the substance of the application." I was surprised to read this criticism, especially since you and I had no one-on-one interaction with respect to the Arabella application. You were on a few of the emails between Cooley and the SEC about the application, but you and I never spoke. In any event, I want to try to address your criticism, as I feel that it is unfair, and that you may not have the full context.

Cooley was not involved in the negotiation of the Participation Agreement. Nor was it involved with any of the Arabella-related litigations. Cooley did not participate in the court-supervised mediation that took place on March 27 and March 28, or the drafting of the Arabella Settlement Agreement. Our role began when we were given a copy of the Arabella Settlement Agreement in order to prepare an application to the Court seeking approval of that Agreement. Under the terms of the Arabella Settlement Agreement, that application had to be made by Tuesday, April 11.

Given our lack of familiarity with Arabella, Michael Baum suggested, and we readily agreed, that he draft a declaration in support of the application. My associate received that draft the evening of Wednesday, April 5. I began to work on the application on April 6. On April 6 or 7, I realized that the application would be much more involved than I had anticipated. I spoke to Neal, and told him about the application, and the Tuesday deadline. Neal told me that he was going to be out of the office but reachable, and that I should email the draft application to Kevin as well as him.

I had hoped to get a draft of the application to the SEC over the weekend. However, I continued to have questions for my associate, and issues I wanted to resolve, and I was not able to send draft papers to my client for review until Saturday, April 8. Given my lack of familiarity with Arabella, I did not think it would be appropriate for me to send drafts to the SEC without client review. In fact, my client had comments, which I received on Sunday, April 9. My associate and I did more information gathering and revising on Sunday. As a result, I was not able to get drafts of the papers to Neal and Kevin until very early Monday morning.

Based on my review of the materials supplied to us by Michael Baum, I decided that it would not be appropriate to seek approval of the Arabella Settlement Agreement without informing the Court of the Participation Agreement, and the payments that had been made to the Arabella Professionals as a result of the Participation Agreement. Accordingly, the draft Schwartz and Baum declarations that I sent to the SEC on Monday included a description of those facts. The draft letter application also discussed those facts, and asked the Court to approve the Participation Agreement:

> In order to avoid the total loss of the Receivership Entities' Arabella Interests without spending any cash, the Receiver entered into an agreement with a funder called 30294 LLC in which the funder agreed to purchase 45% of Platinum's interest in and under its secured investment in AEI in exchange for providing $500,000 to pay the professional fees necessary for PPCO, AEX, AEI, and AO to defend the Arabella Interests (the "Participation Agreement"). The Receiver signed the Participation Agreement on December 30, 2016 (11 days after his appointment). Its effective date is December 28, 2016. Baum Decl. ¶ __ & Ex. __; Schwartz Decl. ¶ __. 30924 LLC's $500,000 was paid into a trust account controlled

> by S&W, and was used to pay the Arabella Professionals and professionals doing work for PPCO, AEX, AEI, and AO. Baum Decl. ¶ __.
>
> The Receiver now seeks this Court's approval of the Participation Agreement effective *nunc pro tunc* to its effective date.

Cooley had been working with the Receiver's staff for some time on an application to approve the retention of ordinary course professionals. We had included the Arabella Professionals in that draft application. Given all the information the Court was being given about Arabella, I thought it made sense to ask the Court to approve the payment of post-Receivership fees to the Arabella Professionals in the Arabella Application. Accordingly, the draft Baum and Schwartz declarations described the fee arrangements. The draft letter application summarized that information, and the application the Receiver was making as follows:

> As of the Appointment Date, S&W was owed approximately $400,000 in fees it had incurred in representing PPCO. Through the Participation Agreement, S&W received $180,000 of its past-due fees. Since the Receiver's appointment, S&W has incurred more than $80,000 in fees. Baum Decl. ¶ __; Schwartz Decl. ¶ __.
>
> The Receiver requests the Court's permission to retain S&W *nunc pro tunc* to the Appointment Date. It also seeks permission to pay S&W PPCO's share of the fees that S&W is entitled to for its post-receivership work out of the Receivership Entities' cash assets. Specifically, the Receiver seeks permission to pay S&W up to $ _____ (up to 100% of its fees from December 19, 2016-December 28, 2016 and up to 55% of its actual and anticipated fees from December 28, 2016 to the sale of property rights that that PPCO is entitled to share in as a result of the Arabella Settlement Agreement). The payment of post-receivership fees by the Receiver is without prejudice to any of S&W's rights, including its rights under the Participation Agreement and the Guaranty of Fees. [FN] Baum Decl. ¶ __; Schwartz Decl. ¶ __.
>
> The Receiver similarly requests authorization to retain Kessler Collins and O'Connell, effective *nunc pro tunc* to the Appointment Date, and approval make payment to Kessler Collins, and O'Connell in the same manner as S&W, paying up to $_____ to Kessler Collins and up to $_____ to O'Connell for PPCO's share of their post-receivership work, without prejudice to any of their rights, including their rights under the Participation Agreement and the Guaranty of Fees. Schwartz Decl. ¶ __.
>
> [FN] Under the Participation Agreement, fees due to professionals are to be paid first, with PPCO paying 55% and 30294 LLC paying 45% of the fees incurred from December 28, 2016 onward.

I spoke to Kevin on April 10, and learned that he and Adam had a number of questions about the application, and would need more time to determine whether the SEC would consent. Given the Tuesday deadline, Kevin suggested that we file the application without SEC consent. I told Kevin that I did not want to file the application without knowing the SEC's position because the SEC might have objections that the Receiver would be able to address. If so, the Receiver wanted to be able to address them, and thus be able to inform the Court that the SEC's consent had been obtained. As a result, I decided to ask Michael Baum's partner to try to obtain an extension of time for us to file the application. We obtained a one week extension, and I informed Kevin of that mid-afternoon on Monday.

On April 12, 13, and 14, I sent Neal and Kevin long emails answering the SEC's questions about the application. I also asked Michael Baum's firm to try to get another one-week extension of the deadline to file the application, which they did on April 14.

My associate and I revised the Arabella application based on input we received from the SEC, and circulated revised papers on April 18 and 19.

On April 20, I spoke to Neal and Adam who advised me that the SEC would consent to the application to approve the Arabella Settlement Agreement, but not the Participation Agreement, and wanted the Receiver to file a separate application to retain the Arabella Professionals. However, because we thought the Court needed to know about the Participation Agreement and the payment of fees to the Arabella Professionals from the Participation Agreement we included that information in our application to the Court. I sent revised drafts to Neal the next day. On April 24, I received additional comments from Adam, which I addressed. The application was filed on April 25.

I light of the foregoing, I think you will agree that it is not correct to say that "Cooley proposed to obtain retroactive approval of the participation agreement and payment of additional post-receivership fees without any application." Cooley's draft application papers described the circumstances of the Participation Agreement and sought approval of the Participation Agreement and post-receivership fees. While Cooley did not supply draft papers to the SEC until April 10, that was due to the time-pressures faced by Cooley, and did not reflect any desire to limit the SEC's ability to review the application. As soon as it became clear that the SEC did not think it had enough time, I sought an extension of time to file the application to approve the Agreement. When it appeared that more time was desirable, I requested a second extension. The SEC asked a number of questions, and I provided detailed answers to all of them.

If you have any questions, I'd be happy to meet with you.

Celia

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