UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, vs. PLATINUM MANAGEMENT (NY) LLC; PLATINUM CREDIT MANAGEMENT, L.P.; MARK NORDLICHT; DAVID LEVY; DANIEL SMALL; URI LANDESMAN; JOSEPH MANN; JOSEPH SANFILIPPO; and JEFFREY SHULSE, Defendants.	§	Civil Action No. 16-cv-6848 (DLI)(VMS) **DECLARATION OF CRAIG SMYSER** Date of Service: January 19, 2017

I, Craig Smyser, declare as follows:

1. Although I am not a member of this Court, I am licensed to practice law in the state and federal courts of the State of Texas. I have been admitted to practice pro hac vice in the Courts of the Southern District of New York and have sought permission to practice pro hac vice before this Court.

2. The Trustee of the Black Elk Litigation Trust, former bankruptcy judge Richard Schmidt, selected me and my firm as counsel for the Litigation Trust. On October 26, 2016 the Trustee filed an Original Complaint and Application for Emergency Relief against Platinum Partners Arbitrage Fund, LP, Platinum Partners Credit Opportunities Master Fund, LP ("PPCO"), Platinum Partners Liquid Opportunities Master Fund LP ("PPLO"), and PPVA Black Elk (Equity) LLC (collectively, "Platinum") in the United States Bankruptcy Court for the Southern District of Texas (the "Adversary Proceeding").

3. On October 26, 2016, United States Bankruptcy Judge Marvin Isgur granted a Temporary Restraining Order, finding that a TRO was needed because the evidence submitted

"demonstrate[d] that the distribution of . . . funds [secured by Black Elk Energy Offshore Operations, LLC in the sale of its prime oil and gas assets] was illegally siphoned off to allow various Platinum entities to be paid preferentially." The bankruptcy court found that the Platinum entities had "engaged in a scheme to illegally control the vote by the bondholders, resulting in an artificial and impermissible vote to authorize the transaction [transferring funds illegally obtained to the Platinum entities]."

4. The bankruptcy court's TRO further barred PPCO from transferring funds from its accounts "if, after giving effect to such transfer, the total unencumbered funds held by [PPCO] is less than $24,600,584.31" and barred PPLO from transferring funds if it left the total unencumbered funds after transfer at less than $5,000,000.

5. The bankruptcy court set a hearing on the Trustee's application for a preliminary injunction for November 2, 2016.

6. PPCO and PPLO disclosed that neither had in accounts the amount of money the Court's TRO demanded remain in the accounts. Instead, PPCO and PPLO disclosed that their access to capital depended entirely on "liquidity events" wherein the companies sold investments or otherwise obtained returns on investments.

7. In order to satisfy the Court's freezing TRO, PPCO and PPLO both requested forbearance from the Trustee while PPCO and PPLO worked to obtain security in an amount equal to the amount the bankruptcy court required the entities to keep in their accounts, which security would be placed in escrow until a hearing on the preliminary injunction was held or until a final judgment was rendered.

8. Thus, in the week following that initial TRO, the Trustee began the process of reviewing and approving expenses for PPCO and PPLO with the goal of obtaining the promised security. As counsel for the Trustee, I participated in every one of these conferences.

9. The TRO provided that should PPCO or PPLO (or any defendant) request it, the bankruptcy court "will consider motions to amend or vacate this order on an emergency basis."

10. Although on occasion counsel for PPCO or PPLO threatened to apply to the bankruptcy court for relief from a decision by the Trustee, neither company has ever made an application to the Court and in every instance, the Trustee and the Platinum entities have resolved any issues regarding expense approval.

11. In the week following the TRO, I spoke with Mr. Bart Schwartz, now the Receiver but then a paid "oversight advisor" of PPCO and PPLO. When I reviewed the expense requests with him made by PPCO and PPLO, he admitted he was unfamiliar with the requests and that instead his oversight primarily involved approving gross amounts as requested rather than a detailed analysis of what, if any, factual basis justified the expense. After that call, Mr. Schwartz never spoke again with me and never, insofar as the Trustee was aware, ever had a complaint with any of the Trustee's decisions on expenses.

12. Beginning on October 31, 2016, the Trustee, at PPCO and PPLO's request, entered into a series of Agreed Orders postponing the hearing on the Trustee's Application for a Preliminary Injunction. The reason for the Agreed Orders was to permit the parties, again at PPCO and PPLO's request, to negotiate acceptable security to obviate the need for a preliminary injunction hearing.

13. At PPCO and PPLO's insistence, the Trustee agreed to the inclusion of the following language in the Agreed Orders:

> During the period before the hearing on the preliminary injunction, the parties named in this order agree to make a good faith effort to reach an agreement regarding the provision by Defendants [PPCO] and [PPLO] of security acceptable to the Trustee in order to obviate the need for the Temporary Restraining Order and a preliminary injunction as to these Defendants.

14. The bankruptcy court entered four of these Agreed Orders, the latest of which the court signed on December 14, 2016 and which continued the hearing on the Trustee's preliminary injunction application to January 26, 2017.

15. **Cooperation with the SEC and the DOJ.** Since the filing of the Original Complaint and entry of the TRO in the Adversary Proceeding, the Trustee has conferred on a non-infrequent basis with agencies of the United States Government, including the Securities and Exchange Commission and the Department of Justice.

16. Lawyers with each of these agencies asked and obtained information regarding the factual basis for the Trustee's allegations against the Platinum entities.

17. On November 3, 2016, I spoke with Jess Velona, Senior Attorney with the SEC Division of Enforcement, regarding the Trustee's Complaint. At his request, on November 18, 2016 the Trustee provided Mr. Velona with a copy of requested documents. Then, on November 22, 2016 the Trustee provided Mr. Velona with additional documents, including transcripts of depositions taken in Black Elk's bankruptcy proceedings. The conversations with Mr. Velona, and subsequently with Mr. Kenneth Byrne, Senior Counsel with the SEC, were always cordial and in the spirit of free exchange.

18. On December 9, 2016, Mr. Byrne requested that I call him. The ensuing conversation concerned a request from the SEC that the Trustee waive the attorney-client privilege with respect to certain documents.

19. On December 19, 2016, the Trustee confirmed by email to Mr. Byrne and Mr. Velona that the Trustee of the Black Elk Litigation Trust waived the privilege as requested

by the SEC. The Trustee had agreed to a similar waiver at the request of the Department of Justice.

20. The Trustee has never refused a request from the SEC.

21. **Conversation with Mr. Schwartz and Mr. Burstein**. On December 21, 2016, counsel for PPCO and PPLO, Mr. Chris Lindstrom, advised me that Mr. Schwartz, now Receiver, and his associate Mr. Dan Burstein, "would like to set up an introductory call with you to discuss their role moving forward. Please let me know your availability."

22. On December 23, I indicated I would be available on Tuesday, December 26, for the requested call to discuss the Receiver's role going forward. A call was then scheduled for December 26, 2016.

23. On December 26, without explanation, PPCO and PPLO's counsel, Mr. Lindstrom, cancelled the call and asked to reschedule because "an urgent matter come [sic] up." When I asked if one of Mr. Lindstrom's co-counsel could substitute for him, no response was forthcoming. The next day, I sent an email to Mr. Lindstrom asking him "to let me know what time/date the call will be rescheduled for." When again no response came, I repeated the request on December 28, 2016.

24. On December 29, a Thursday, I sent an email quoted in Paragraph 19 of Mr. Schwartz's Declaration, that the Trustee did not feel comfortable acting on PPCO/PPLO expense requests without first conferring with the Receiver – who had requested this conference – about the Receiver's role going forward. Mr. Lindstrom responded with an inquiry as to whether Wednesday of the following week would suffice.

25. Thus, for expense reimbursement requests that the Receiver now characterizes as "time-sensitive," neither the Receiver nor PPCO/PPLO's counsel could schedule a call to discuss them for nearly two weeks.

26. On that January 4 call, attended by counsel for the Receiver, Mr. Schwartz, Mr. Burstein, counsel for PPCO/PPLO, and counsel for the Trustee, Mr. Schwartz indicated that the call was "my" call, even though counsel had indicated that the Receiver had initiated the request for a discussion of his role going forward.

27. Regardless, I proceeded to provide a summary of the Trustee's dealings with PPCO/PPLO since the TRO of October 26, which included observations regarding PPCO/PPLO's failure to take any steps to set aside any funds to comply with the bankruptcy court's freezing TRO and that the Trustee had made a proposal to PPCO/PPLO several weeks earlier on an orderly plan to find substitute security, a plan that resulted from a lengthy meeting with PPCO representatives in Houston.

28. Mr. Schwartz, while saying that he was "drinking from a fire hose" since his appointment, acknowledged that he was aware of the settlement proposal but that he had not yet read it. Mr. Schwartz indicated that after he read it and had been advised about it by his counsel, he would get back to the Trustee "in a couple of days."

29. At no time during the conversation did Mr. Schwartz, or indeed anyone else on the call, indicate that critical expenses needed immediate action by the Trustee. Mr. Schwartz made no request as to any specific expense. Nor did Mr. Schwartz indicate he or Mr. Burstein had any problem with the Trustee's review and decisions on expense requests to that time.

30. Mr. Schwartz made no request to speak with the Trustee, a former bankruptcy judge in the Southern District of Texas, to discuss the path forward. Mr. Schwartz made no

statement that the Trustee or his representatives were "interfering with" or "preventing" him from performing the Receiver's duties. Neither Mr. Schwartz nor anyone else on the call indicated that, absent the Trustee's action in some regard, the SEC, with the Receiver's support and blessing, would seek emergency relief.

31. Contrary to the statement in Paragraph 14 of Mr. Schwartz's Declaration, the Bankruptcy Trustee has *never* maintained that Mr. Schwartz "must seek his permission in order to make expenditures using PPCO or PPLO funds that are necessary to preserve the value of the Receivership Entities." Nor is there any exhibit or writing supporting that assertion.

32. Contrary to the somewhat ambiguous statement in Paragraph 15 of Mr. Schwartz's Declaration, neither I nor the Trustee said or maintain that "the Bankruptcy Litigation Trustee will no longer approve *any* expenditures (other than expenditures needed to preserve life insurance assets that the Bankruptcy Litigation Trustee wants as part of a security package) unless I agree to provide security for Black Elk's claims." That understanding—or statement of the Trustee's intent with regard to future requests for expenditure, should they be submitted to the Trustee—is incorrect.

33. Instead, I said to the Receiver that before approving any further expenses, the Trustee wanted a response from PPCO/PPLO—now overseen by the Receiver—to the Trustee's request for security, a response Mr. Schwartz acknowledged he owed me.

34. I explained that the reason for requesting the response, as stated in my email quoted in Mr. Schwartz's Declaration at paragraph 19, is that in the three and a half months since the TRO, PPCO/PPLO had "not set aside *one penny*" in escrow to satisfy the TRO.

35. This statement was and is consistent with the email quoted in Mr. Schwartz's Declaration at Paragraph 20, which stated, "At his point, the Trustee does not feel comfortable

acting on and will not act on this or other requests without first conferring with the Receiver(s) regarding the path and their role going forward."

36. The Trustee thus anticipated that the January 4, 2016 call would illuminate the Receiver's and the Trustee's "path and their role going forward" in connection with dealing with PPCO/PPLO's request for expenses. Mr. Schwartz offered no insight and no request of the Trustee—including that the Receiver be excused from seeking expense approval from the Trustee or otherwise complying with the bankruptcy court's TRO.

37. **PPCO/PPLO expense requests.** For instance, the Receiver did not discuss or raise issues about any of the expense requests set out in Paragraph 24 of his Declaration, many of which had never been submitted to the Trustee.

38. As an example, however, one expense the Receiver now desires to approve and as to which the Trustee has voiced significant concerns is the "Patent Litigation Funding" request for $600,000 to pay a law firm handling a non-operating entity's (also known in the popular literature as a "patent troll") suit on a number of patents. The Receiver maintains "it is imperative to make this payment to preserve the value of [PPCO/PPLO's] interest in the patent litigation."

39. Data reviewed by the Trustee indicates that this litigation is years—many years—away from completion. At least some of the patents at issue are involved in *inter partes* review at the U.S. Patent and Trademark Office, reviews that typically take years in themselves and may result in the patents being invalidated.

40. Regardless, the records PPCO provided the Trustee indicate that it has not paid this law firm any significant money in many months, and there is no indication the firm is intending to withdraw. It appears last year the court dismissed the case for lack of standing and

currently has before it another motion to dismiss on constitutional grounds. The case will cost millions of dollars in expenses going forward.

41. The Trustee believes that a hard look should be taken at this patent case, especially in view of the Receiver's acknowledged duty to wind down PPCO. It seems at least incompatible with the Receiver's instruction to wind down PPCO to spend millions of dollars on a long-term contingent patent case recovery.

42. Nevertheless, at the Receiver's request, the Trustee has expressly consented to the Receiver's payment of all expenses identified in Paragraph 24 of Mr. Schwartz's Declaration.

43. On January 16, 2017, counsel for PPCO and PPLO sent me an email stating the following:

> Under Janvey v. Alguire, 647 F.3d 585 (5th Cir. 2011), the Black Elk Trustee has the burden of establishing the following four elements in order to obtain a preliminary injunction: (1) a substantial likelihood that the movant will prevail on the merits; (2) a substantial threat that the movant will suffer irreparable injury if the injunction is not granted; (3) that the threatened injury to the movant outweighs the threatened harm an injunction may cause the party opposing the injunction; and (4) that the granting of the injunction will not disserve the public interest.
>
> In order to streamline the January 26, 2017 hearing, and for the purposes only of that hearing, PPCO and PPLO are willing to agree that the Black Elk Trustee does not need to establish element 1.
>
> By agreeing to this, PPCO and PPLO are not making any admission regarding the merits of the case, are not waiving any right to challenge any and all allegations made by the Black Elk Trustee, and are not waiving any legal or equitable defenses.
>
> This agreement is solely to narrow the factual issues before the Court on January 26, 2017

I declare under Penalty of Perjury that this foregoing is true and correct.

Executed on January 19, 2017.
Houston, Texas

Craig Smyser