

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re

PLATINUM-BEECHWOOD LITIGATION

Civil Action No. 18-cv-6658 (JSR)

MARTIN TROTT and CHRISTOPHER SMITH, as
Joint Official Liquidators and Foreign
Representatives of PLATINUM PARTNERS
VALUE ARBITRAGE FUND L.P. (in Official
Liquidation) and PLATINUM PARTNERS VALUE
ARBITRAGE FUND L.P. (in Official Liquidation),

Civil Action No. 18-cv-10936 (JSR)

Plaintiffs,

- against -

PLATINUM MANAGEMENT (NY) LLC, *et al.*,

Defendants.

**PPVA PLAINTIFFS' RESPONSE AND COUNTER-STATEMENT TO
DEFENDANT HUBERFELD FAMILY FOUNDATION, INC.'S RULE 56.1
STATEMENT OF UNDISPUTED MATERIAL FACTS IN SUPPORT
OF MOTION FOR SUMMARY JUDGMENT**

Local Rule 56.1 requires that motions for summary judgment be accompanied by a “short and concise statement, in numbered paragraphs, of the material facts as to which the moving party contends there is no genuine issue to be tried.” Local Civil Rule 56.1(a). On February 14, 2020, Defendant Huberfeld Family Foundation, Inc. (the “**Huberfeld Family Foundation**”) filed a Local Rule 56.1 statement. *See Trott, et ano. v. Platinum Mgmt., et al.*, No. 1:18-cv-10936-JSR (S.D.N.Y.) (ECF No. 528) (“**Trott Action**”). Plaintiffs Martin Trott and Christopher Smith, as Joint Official Liquidators and Foreign Representatives of Platinum Partners Value Arbitrage Fund L.P. (in Official Liquidation) (the “**JOLs**”) and Platinum Partners Value Arbitrage Fund L.P. (in Official Liquidation) (“**PPVA**” and collectively with the JOLs, the “**PPVA Plaintiffs**”) by and through their attorneys Holland & Knight LLP, hereby respond to the Huberfeld Family Foundation’s proffered Local Rule 56.1 statement of purportedly undisputed facts, as follows:

PRELIMINARY STATEMENT

By responding to the Huberfeld Family Foundation’s proffered Local Rule 56.1 statement, PPVA Plaintiffs do not concede that any of the Huberfeld Family Foundation’s assertions of fact are either relevant or material, and PPVA Plaintiffs reserve any and all objections to each of the Huberfeld Family Foundation’s statements on those bases. PPVA Plaintiffs also expressly reserve and do not waive any and all objections to the use or admissibility of such statements, or the evidence cited in support, during trial in this manner. To the extent that any of PPVA Plaintiffs’ responses are deemed to admit any of the paragraphs of the Huberfeld Family Foundation’s proffered Local Rule 56.1 statement, in whole or in part, such response is made solely in connection with PPVA Plaintiffs’ opposition to the Huberfeld Family Foundation’s motion for summary judgment. (ECF No. 527).

RESPONSE TO LOCAL RULE 56.1 STATEMENT OF FACTS

I. The Release Agreement Benefiting HFF

RESPONSE: The PPVA Plaintiffs object to all headings as improper for purposes of a Rule 56.1 Statement. The PPVA Plaintiffs further object to this proffered “fact” to the extent that it contains legal conclusions, unsubstantiated opinions, and argumentative statements that are improper in a Local Civil Rule 56.1 statement, including but not limited to the unsubstantiated opinion that the Release Agreement benefited the Huberfeld Family Foundation. *See Olin Corp. v. Lamorak Ins. Co.*, 332 F. Supp. 3d 818, 838-39 (S.D.N.Y. 2018) (Rakoff, J.) (disregarding legal conclusions and argumentative statements included in statement of facts as improper under Local Rule 56.1).

A. Murray Huberfeld’s Interest In Platinum Management (NY) LLC

1. Platinum Management (NY) LLC (“PMNY”) is a limited liability company organized under the laws of Delaware. (Chase Dec. Ex. 2 (Second Amended and Restated Operating Agreement of Platinum Management (NY) LLC).)

RESPONSE: Undisputed.

2. Pursuant to the Second Amended and Restated Operating Agreement of Platinum Management (NY) LLC, dated as of January 1, 2011, the members of PMNY are the Mark Nordlicht Grantor Trust (listed as a “Passive Member” and holding a 65% Voting Company Percentage), Mark Nordlicht (listed as a “Passive Member” and holding a 10% Voting Company Percentage), and Uri Landesman (listed as a “Manager; Member” with a 25% Voting Company Percentage). (*Id.*)

RESPONSE: Undisputed.

3. The beneficiaries of the Mark Nordlicht Grantor Trust are Nordlicht Management III LLC, Grosser Lane Management LLC, and Manor Lane Management LLC (“Manor Lane”). (Chase Dec. Ex. 3 (The Trust Agreement for the Mark Nordlicht Grantor Trust).)

RESPONSE: Undisputed.

4. Huberfeld, through Manor Lane, seeded Mark Nordlicht in connection with the formation of PPVA. (Chase Dec. Ex. 4 (Murray Huberfeld Deposition Transcript Excerpts) at Tr. 49:11-12, 56:19-23.)

RESPONSE: Undisputed.

5. The Mark Nordlicht Grantor Trust provided Manor Lane with a 24.999% Economically Equivalent Membership Interest, as that term is defined in the Mark Nordlicht Grantor Trust, in PMNY. (Chase Dec. Ex. 3 (The Trust Agreement for the Mark Nordlicht Grantor Trust).)

RESPONSE: Undisputed.

6. The only member of Manor Lane is Murray Huberfeld. (Chase Dec. Ex. 4 (Murray Huberfeld Deposition Transcript Excerpts) at Tr. 15:18-20.)

RESPONSE: Undisputed.

7. Manor Lane received payments from the Mark Nordlicht Grantor Trust on account of its Economically Equivalent Membership Interest, as that term is defined in the Mark Nordlicht Grantor Trust, in PMNY in 2012 (to account for fees earned in 2011), 2013 (to account for fees earned in 2012), and 2014 (to account for fees earned in 2013). Manor Lane did not receive any payments from the Mark Nordlicht Grantor Trust thereafter. (Chase Dec. Ex. 5 (Murray Huberfeld’s Responses and Objections to Plaintiffs’ Requests for Admissions) at No. 12.)

RESPONSE: Disputed, for the reasons set forth in paragraphs ¶¶ 48-50 of PPVA Plaintiffs’ Statement of Material Facts. The PPVA Plaintiffs further object to this proffered “fact” to the extent that it contains legal conclusions, unsubstantiated opinions, and argumentative statements that are improper in a Local Civil Rule 56.1 statement, including but not limited to the unsubstantiated opinion that Manor Lane “earned” any fees paid to it by the Mark Nordlicht Grantor Trust. *See Olin Corp. v. Lamorak Ins. Co.*, 332 F. Supp. 3d 818, 838-39 (S.D.N.Y. 2018) (Rakoff, J.) (disregarding legal conclusions and argumentative statements included in statement of facts as improper under Local Rule 56.1).

B. Management of PPVA

8. Plaintiff Platinum Partners Value Arbitrage Fund L.P. (“PPVA”) operated pursuant to a Second Amended and Restated Limited Partnership Agreement, dated July 1, 2008 (the “PPVA Partnership Agreement”). (Chase Dec. Ex. 6 (Second Amended and Restated Limited Partnership Agreement of Platinum Partners Value Arbitrage Fund L.P.))

RESPONSE: Undisputed.

9. Section 2.02 of the PPVA Partnership Agreement provides that “management of the Partnership shall be vested exclusively in the General Partner.” (*Id.*)

RESPONSE: Undisputed.

10. The PPVA Partnership Agreement provides that PMNY is the general partner of PPVA. (*Id.*)

RESPONSE: Undisputed.

11. PMNY and PPVA were also parties to the Fourth Amended and Restated Investment Management Agreement, dated March 9, 2007, pursuant to which PPVA (and its feeder funds) appointed PMNY as its investment manager. (Chase Dec. Ex. 7 (Fourth Amended and Restated Investment Management Agreement).)

RESPONSE: Undisputed.

12. In 2016, Mark Nordlicht was the chief investment officer of PPVA and managing member of PMNY, which was in turn the General Partner of PPVA. (Chase Dec. Ex. 8 (Joseph SanFilippo Deposition Transcript Excerpts) at Tr. 29:20-30:1.)

RESPONSE: Undisputed that Mark Nordlicht was the chief investment officer of PPVA and that PMNY was the General Partner. All other facts are disputed, including and not limited whether Mark Nordlicht was the managing member of Platinum Management. *See* Bixter Decl., Ex. 20.

C. The Release Agreement

13. In 2016, a “Release Agreement” was executed by and among the following parties:

- i PMNY, Platinum Credit Management LP, Platinum Liquid Opportunity Management (NY) LLC, and Centurion Credit Management LLC;
- ii Mark Nordlicht, as Trustee of The Mark Nordlicht Grantor Trust, the Mark Nordlicht Grantor Trust I, and the Mark Nordlicht Grantor Trust II (the “Trusts”);
- iii Mark Nordlicht, individually;
- iv Murray Huberfeld;
- v David Bodner;
- vi Bernard Fuchs; and
- vii Uri Landesman.

(Chase Dec. Ex. 9 (Release Agreement).)

RESPONSE: Disputed. Centurion Credit Management did not execute the Release Agreement. *See* Chase Dec. Ex. 9.

14. PMNY, Platinum Credit Management LP, Platinum Liquid Opportunity Management (NY) LLC, and Centurion Structured Growth LLC (collectively the “Platinum Management Entities”) were responsible for the management of the following Platinum-affiliated funds, respectively: PPVA, Platinum Partners Credit Opportunities Fund LP, Platinum Liquid Opportunity Fund LP, and Centurion Credit Management, LLC (together, the “Platinum Funds”). (Chase Dec., Ex. 9 (Release Agreement).)

RESPONSE: Disputed, for the reasons set forth in paragraphs ¶¶ 71-242 of Plaintiffs’ Statement of Material Facts. The PPVA Plaintiffs further object to this proffered “fact” to the extent that it contains legal conclusions, unsubstantiated opinions, and argumentative statements that are improper in a Local Civil Rule 56.1 statement, including but not limited to the legal conclusion that PMNY was “responsible” for PPVA. *See Olin Corp.*, 332 F. Supp. 3d at 838-39 (disregarding legal conclusions and argumentative statements included in statement of facts as improper under Local Rule 56.1).

15. As stated, as of March 2016, Huberfeld, through Manor Lane, was a beneficiary of the Mark Nordlicht Grantor Trust (Huberfeld’s “Beneficiary Interest”); the Mark Nordlicht Grantor Trust, in turn, owned a membership interest in PMNY. PMNY was responsible for the management of PPVA. (*See supra.*)

RESPONSE: Disputed, for the reasons set forth in paragraphs ¶¶ 71-242 of Plaintiffs’ Statement of Material Facts. The PPVA Plaintiffs further object to this proffered “fact” to the extent that it contains legal conclusions, unsubstantiated opinions, and argumentative statements that are improper in a Local Civil Rule 56.1 statement, including but not limited to the legal

conclusion that PMNY was “responsible” for PPVA. *See Olin Corp.*, 332 F. Supp. 3d at 838-39 (disregarding legal conclusions and argumentative statements included in statement of facts as improper under Local Rule 56.1).

16. The Beneficiary Interest was valuable. (Chase Dec. Ex. 8 (Joseph SanFilippo Deposition Transcript Excerpts) at Tr. 83:11-17.)

RESPONSE: Disputed, for the reasons set forth in paragraphs ¶¶ 652-664 of Plaintiffs’ Statement of Material Facts. The PPVA Plaintiffs further object to this proffered “fact” to the extent that it contains legal conclusions, unsubstantiated opinions, and argumentative statements that are improper in a Local Civil Rule 56.1 statement, including but not limited to the legal conclusion that the Beneficiary Interest was “valuable.” *See Olin Corp.*, 332 F. Supp. 3d at 838-39 (disregarding legal conclusions and argumentative statements included in statement of facts as improper under Local Rule 56.1).

17. In 2016, Huberfeld and his family members or their affiliated entities (including HFF), were beneficial owners of limited partnership interests in PPVA and other Platinum Funds (a “Funds Interest”). (Chase Dec. Ex. 9 (Release Agreement).)

RESPONSE: Undisputed.

18. The Funds Interest belonging to Huberfeld and his family members or their affiliated entities, was valuable. (*See, e.g.*, Chase Dec. Ex. 10.)

RESPONSE: Disputed, for the reasons set forth in paragraphs ¶¶ 652-664 of Plaintiffs’ Statement of Material Facts. The PPVA Plaintiffs further object to this proffered “fact” to the extent that it contains legal conclusions, unsubstantiated opinions, and argumentative statements that are improper in a Local Civil Rule 56.1 statement, including but not limited to the legal conclusion that the “funds [*sic*] Interest” was “valuable.” *See Olin Corp.*, 332 F. Supp. 3d at 838-

39 (disregarding legal conclusions and argumentative statements included in statement of facts as improper under Local Rule 56.1).

19. The list of limited partnership accounts at PPVA affiliated with Huberfeld, directly or indirectly, is included as part of Exhibit A annexed to the Release Agreement (the “Huberfeld Entities”). (Chase Dec. Ex. 9 (Release Agreement) at Ex. A.)

RESPONSE: Undisputed.

20. The Huberfeld Entities included, *inter alia*, the Huberfeld Family Foundation, Inc. (“HFF”). (Chase Dec. Ex. 9 (Release Agreement) at Ex. A.)

RESPONSE: Disputed, as HFF is mentioned nowhere on the face of the Release Agreement.

21. HFF was a long-time investor in PPVA, having made its initial investment in PPVA in 2008 (or earlier). (Chase Dec. Ex. 10 (HFF’s Investment Records in PPVA).)

RESPONSE: Disputed. Exhibit 10 to the Chase Declaration does not specify the date in which the Huberfeld Family Foundation alleges it made its initial investment in PPVA. The PPVA Plaintiffs further object on grounds that Exhibit 10 to the Chase Declaration is inscrutable.

22. As of December 31, 2015, the value of HFF’s investment in PPVA was \$13,784,853.48. (*Id.*)

RESPONSE: Disputed. Exhibit 10 to the Chase Declaration does not specify the value of the Huberfeld Family Foundation’s investment in PPVA as of December 31, 2015. The PPVA Plaintiffs further object on grounds that Exhibit 10 to the Chase Declaration is inscrutable.

23. Pursuant to the Release Agreement, Huberfeld gave certain good and valuable consideration (the “Huberfeld Consideration”), including the following:

- i Huberfeld relinquished his Beneficiary Interest in the Mark Nordlicht Grantor Trust as of March 20, 2016. (Chase Dec. Ex. 9 (Release Agreement) at Section 1.)
- ii Huberfeld, on behalf of himself, his successors, assigns, personal representatives and his “affiliated entities,” provided a broad, unconditional general release to “Platinum,” defined to include all of the Platinum Management Entities (including PMNY), and all the Platinum Funds (including PPVA), releasing forever all known and unknown claims and actions. (Chase Dec. Ex. 9 (Release Agreement) at Section 3(a).)
- iii Huberfeld, on behalf of himself and certain affiliated persons and entities identified in an attachment to the Release Agreement, also agreed not to redeem any of their Funds Interest (including their substantial Funds Interest in PPVA), or to withdraw any of their funds from the Platinum Management Entities (including any and all monies from earnings in 2015, which would be paid in 2016), for a period of two (2) years from the effective date of the Release Agreement (considerably longer than otherwise required), absent certain limited exceptions (irrelevant for purposes of this motion). (Chase Dec. Ex. 9 (Release Agreement) at Section 4(c).)

RESPONSE: Disputed, for the reasons set forth in paragraphs ¶¶ 652-664 of Plaintiffs’ Statement of Material Facts. The PPVA Plaintiffs further object to this proffered “fact” to the extent that it contains legal conclusions, unsubstantiated opinions, and argumentative statements

that are improper in a Local Civil Rule 56.1 statement, including but not limited to the legal conclusion that “Pursuant to the Release Agreement, Huberfeld gave certain good and valuable consideration.” *See Olin Corp.*, 332 F. Supp. 3d at 838-39 (disregarding legal conclusions and argumentative statements included in statement of facts as improper under Local Rule 56.1).

24. In return for the Huberfeld Consideration, “Platinum” (defined in Recital of the Release Agreement to include the Platinum Management Entities and the Platinum Funds, including PPVA) provided a similarly broad unconditional general release of Huberfeld and HFF. The release provided to Huberfeld (and HFF) by Platinum (including PPVA) expressly states in pertinent part as follows:

For good and valuable consideration, receipt and sufficiency of which is hereby acknowledged, each of Platinum, the Nordlicht Parties, Fuchs, and Landesman, on behalf of himself or itself, and his or its respective successors, assigns, personal representatives and affiliated entities, hereby fully, finally, forever and unconditionally waives, releases, and discharges each of Bodner and Huberfeld and each of their respective predecessors, successors, assignors or assignees, heirs, executors and administrators (as applicable), and any entity controlled by any of them, and with respect to each such entity, each of their respective present and former directors, officers, employees, agents, attorneys, representatives and direct or indirect shareholders, each in their capacities as such (collectively, the “Released Parties”), each of whom is an intended third-party beneficiary of this Section 3, of and from any and all manner of actions, causes of action, suits, debts, liabilities, sums of money, accounts, reckonings, bonds, bills, covenants, contracts, controversies, agreements, promises, variances, trespasses, judgments, executions, claims and demands whatsoever, whether in law or in equity, whether known, unknown, or hereafter becoming known, foreseen or unforeseen, suspected or unsuspected, liquidated or unliquidated, contingent or noncontingent, asserted or unasserted, matured or unmatured, whether direct or indirect, individual, class, derivative, representative or other capacity, existing or hereafter arising, in law or in equity or otherwise that have been or could have been or in the future could be or might be asserted (whether directly or derivatively) that are based in whole or in part on any act or omission, transaction, or event in connection with any manner

whatsoever with Platinum, from the beginning of the world to the Effective Date.

(The “Platinum Consideration”). (Chase Dec. Ex. 9 (Release Agreement) at Section 3(b).)

RESPONSE: Undisputed as to the text of Section 3(b) of the Release Agreement, but all other facts are disputed, for the reasons set forth in paragraphs ¶¶ 652-664 of Plaintiffs’ Statement of Material Facts. The PPVA Plaintiffs further object to this proffered “fact” to the extent that it contains legal conclusions, unsubstantiated opinions, and argumentative statements that are improper in a Local Civil Rule 56.1 statement, including but not limited to the legal conclusion that “Platinum (defined in Recital A of the Release Agreement to include the Platinum Management Entities and the Platinum Funds, including PPVA) provided a similarly broad unconditional general release of Huberfeld.” *See Olin Corp.*, 332 F. Supp. 3d at 838-39 (disregarding legal conclusions and argumentative statements included in statement of facts as improper under Local Rule 56.1).

25. The Release Agreement was fully executed by all relevant parties. (Chase Dec. Ex. 9 (Release Agreement).)

RESPONSE: Disputed. The Statement does not explain its assertion that Centurion Credit Management, which did not execute the Release Agreement, is not considered a “relevant” party. *See Daniels Dec. Ex. 9.* The PPVA Plaintiffs further object to this proffered “fact” to the extent that it contains legal conclusions, unsubstantiated opinions, and argumentative statements that are improper in a Local Civil Rule 56.1 statement, including but not limited to the legal conclusion that “The Release Agreement was fully executed by all *relevant* parties.” *See Olin Corp.*, 332 F. Supp. 3d at 838-39 (disregarding legal conclusions and argumentative statements included in statement of facts as improper under Local Rule 56.1).

26. The Release Agreement was reviewed by attorneys for PMNY, who approved PMNY entering into the Release Agreement on behalf of all Platinum parties, including PPVA. (Chase Dec. Ex. 11 (Memorandum).)

RESPONSE: Disputed, for the reasons set forth in paragraphs ¶¶ 654-655 of Plaintiffs' Statement of Material Facts. The PPVA Plaintiffs further object to this proffered "fact" to the extent that it contains legal conclusions, unsubstantiated opinions, and argumentative statements that are improper in a Local Civil Rule 56.1 statement, including but not limited to the unsubstantiated opinion that the Release Agreement was "reviewed by attorneys for PMNY, who approved PMNY entering into the Release Agreement." *See Olin Corp.*, 332 F. Supp. 3d at 838-39 (disregarding legal conclusions and argumentative statements included in statement of facts as improper under Local Rule 56.1).

27. Platinum performed under the Release Agreement. (Chase Dec. Ex. 8 (Joseph SanFilippo Deposition Transcript Excerpts) at Tr. 75:2-78:16.)

RESPONSE: Disputed, for the reasons set forth in paragraphs ¶¶ 652-664 of Plaintiffs' Statement of Material Facts. The PPVA Plaintiffs further object to this proffered "fact" to the extent that it contains legal conclusions, unsubstantiated opinions, and argumentative statements that are improper in a Local Civil Rule 56.1 statement, including but not limited to the legal conclusion that "Platinum performed under the Release Agreement." *See Olin Corp.*, 332 F. Supp. 3d at 838-39 (disregarding legal conclusions and argumentative statements included in statement of facts as improper under Local Rule 56.1).

28. Huberfeld performed under the Release Agreement. (Chase Dec. Ex. 4 (Murray Huberfeld Deposition Transcript Excerpts) at Tr. 73:9-75:5.)

RESPONSE: Disputed, for the reasons set forth in paragraphs ¶¶ 652-664 of Plaintiffs’ Statement of Material Facts. The PPVA Plaintiffs further object to this proffered “fact” to the extent that it contains legal conclusions, unsubstantiated opinions, and argumentative statements that are improper in a Local Civil Rule 56.1 statement, including but not limited to the legal conclusion that “Huberfeld performed under the Release Agreement.” *See Olin Corp.*, 332 F. Supp. 3d at 838-39 (disregarding legal conclusions and argumentative statements included in statement of facts as improper under Local Rule 56.1).

29. The Release Agreement is governed by the laws of the State of New York. (Chase Dec. Ex. 9 (Release Agreement) at Section 5(e).)

RESPONSE: Undisputed.

II. HFF’s Operating History

RESPONSE: The PPVA Plaintiffs object to all headings as improper for purposes of a Rule 56.1 Statement.

30. HFF is a New York State not-for-profit corporation that was established in August 1998. (Chase Dec. Ex. 12 (HFF’s Certificate of Incorporation).)

RESPONSE: Undisputed.

31. HFF has made many millions of dollars in charitable donations to a variety of charitable, religious, and education organizations and needy individuals. (Chase Dec. Exs. 13-21 (HFF tax returns from 2008 until 2016) at p. 1 line 25 (“Contributions, gifts, grants paid”).)

RESPONSE: Undisputed.

32. From time to time, HFF has also made interest-free loans to needy individuals or entities for charitable purposes. (Chase Dec. Exs. 13-21 (HFF tax returns from 2008 until 2016).)

RESPONSE: Disputed, for the reasons set forth in paragraphs ¶¶ 160-177 of Plaintiffs' Statement of Material Facts.

33. HFF has, and continues to, regularly make investments for the purpose of maintaining and growing its corpus, which in turn is used to make charitable donations. (Chase Dec. Exs. 13-21 (HFF tax returns from 2008 until 2016).)

RESPONSE: Disputed, for the reasons set forth in paragraphs ¶¶ 160-177 of Plaintiffs' Statement of Material Facts.

34. All of HFF's investments (made to maintain and grow its corpus) and charitable donations were disclosed in its federal tax returns on Form 990, which are publicly available. (Chase Dec. Exs. 13-21 (HFF tax returns from 2008 until 2016).)

RESPONSE: Disputed, for the reasons set forth in paragraphs ¶ 162-177 of PPVA Plaintiffs' Statement of Material Facts. PPVA Plaintiffs further object to this proffered "fact" to the extent that it contains legal conclusions, unsubstantiated opinions, and argumentative statements that are improper in a Local Civil Rule 56.1 statement, including but not limited to the legal conclusion that the purpose of the investments made by the Huberfeld Family Foundation is "maintaining and growing its corpus." *See Olin Corp.*, 332 F. Supp. 3d at 838-39 (disregarding legal conclusions and argumentative statements included in statement of facts as improper under Local Rule 56.1).

35. HFF's investments include, among others, an investment in PPVA and interest-bearing loans to individuals and entities. (Chase Dec. Exs. 13-21 (HFF tax returns from 2008 until 2016).)

RESPONSE: Undisputed.

36. HFF's investment in PPVA was valued at over \$13 million at the end of 2015. (Chase Dec. Ex. 20 (HFF's 2015 tax return) at PDF p. 14 (reporting fair market value of HFF's investment in PPVA to be \$13.7 million).)

RESPONSE: Undisputed.

37. HFF had various directors and officers throughout the years. (Chase Dec. Exs. 13-21 (HFF tax returns from 2008 until 2016).)

RESPONSE: Disputed, for the reasons set forth in paragraphs ¶¶ 160-165 of Plaintiffs' Statement of Material Facts.

38. Murray Huberfeld was a director and president of HFF throughout 2013 and 2014. (Chase Dec. Ex. 18 (HFF's 2013 tax return) at PDF p. 2); Ex. 19 (HFF's 2014 tax return) at PDF p. 2.)

RESPONSE: Undisputed.

39. Murray Huberfeld shares decision-making authority for HFF with, among others, the other directors of HFF. (Chase Dec. Exs. 13-21 (HFF Tax Returns); Ex. 22 (HFF Deposition Transcript Excerpts) at Tr. 17:6-18.)

RESPONSE: Disputed, for the reasons set forth in paragraphs ¶¶ 162-177 of PPVA Plaintiffs' Statement of Material Facts.

III. HFF's Investment In Black Elk Opportunities Fund International, LLC

RESPONSE: The PPVA Plaintiffs object to all headings as improper for purposes of a Rule 56.1 Statement.

40. On February 8, 2013, HFF invested approximately \$1 million in Black Elk Opportunities Fund International, Ltd (the "BEOF Fund". (Chase Dec. Ex. 23 (HFF Investor Account Statement).)

RESPONSE: Undisputed.

41. On or about August 21, 2014, HFF received a \$1,026,677 distribution from the BEOF Fund. (Chase Dec. Ex. 24 (HFF Investor Account Statement).)

RESPONSE: Undisputed.

42. HFF was a mere investor in the BEOF Fund; it had no management authority or ownership stake in the BEOF Fund. (Chase Dec. Exs. 23-24 (HFF Investor Account Statements); Chase Dec. Ex. 36 (HFF's Responses and Objections to JOLs' Requests for Admission) at Nos. 107-108.)

RESPONSE: Disputed, for the reasons set forth in paragraphs ¶¶ 162-169, 492-543 of Plaintiffs' Statement of Material Facts.

The PPVA Plaintiffs further object to this proffered "fact" to the extent that it contains legal conclusions, unsubstantiated opinions, and argumentative statements that are improper in a Local Civil Rule 56.1 statement, including but not limited to the legal conclusion that the Huberfeld Family Foundation had "no management authority or ownership stake in the BEOF Fund." *See Olin Corp.*, 332 F. Supp. 3d at 838-39 (disregarding legal conclusions and argumentative statements included in statement of facts as improper under Local Rule 56.1).

IV. HFF Had Nothing To Do With The Consent Solicitation, Which Is The Sole Focus Of The Fraud And Breach Of Fiduciary Claims That Plaintiffs Allege HFF Aided-And-Abetted

RESPONSE: The PPVA Plaintiffs object to all headings as improper for purposes of a Rule 56.1 Statement. The PPVA Plaintiffs further object to this proffered "fact" to the extent that it contains legal conclusions, unsubstantiated opinions, and argumentative statements that are improper in a Local Civil Rule 56.1 statement, including but not limited to the unsubstantiated opinion that the Huberfeld Family Foundation had "nothing to do with the Consent Solicitation" and its legal conclusion that the Consent Solicitation is the "sole focus" of certain of the PPVA Plaintiffs' causes of action against the Huberfeld Family Foundation. *See Olin Corp.*, 332 F.

Supp. 3d at 838-39 (disregarding legal conclusions and argumentative statements included in statement of facts as improper under Local Rule 56.1).

43. Black Elk had previously issued certain notes, known as the “13.75% Senior Secured Notes” (or “Notes”), which were governed by an indenture dated November 23, 2010 (the “Notes Indenture”). (Chase Dec. Ex. 28 (Indenture).)

RESPONSE: Undisputed.

44. The Notes Indenture permitted Black Elk to use the proceeds from an asset sale for only one or more of the following purposes, (1) to repay indebtedness, including to the holders of the Notes; (2) to acquire assets of an oil and gas business; (3) to acquire the majority of the voting stock of an oil and gas business; or (4) to make capital expenditures or acquire long term assets for purposes of its oil and gas businesses. (Chase Dec. Ex. 28 (Indenture) at 64.)

RESPONSE: Undisputed.

45. The Notes Indenture also included a mechanism by which this provision of the Notes Indenture could be modified. Namely, Section 9.02(a) permitted any provision of the Notes Indenture to be amended “with the consent of the Holders of a majority in aggregate principal amount of the Notes affected thereby then outstanding (including, without limitation, consents obtained in connection with a purchase of, or tender offer or exchange offer for, Notes)” (Chase Dec. Ex. 28 (Indenture) at 86.)

RESPONSE: Undisputed, to the extent that the Huberfeld Family Foundation directly quotes Section 9.02(a) of the Notes Indenture. Otherwise, disputed on grounds that “mechanism” is ambiguous and paraphrases Section 9.02 of the Notes Indenture. *See* Chase Dec. Ex. 28 at 85-86).

46. In July 2014, Black Elk circulated an “Offer to Purchase and Consent Solicitation” (the “Consent Solicitation”) to holders of the Notes (the “Noteholders”). (Chase Dec. Ex. 29 (Consent Solicitation).)

RESPONSE: Undisputed.

47. The purpose of the Consent Solicitation was to solicit the Noteholders’ votes concerning the use of the proceeds of an asset sale conducted by Black Elk (the “Renaissance Sale”). (Chase Dec. Ex. 30 (Form 8-K).)

RESPONSE: Undisputed.

48. Specifically, the Consent Solicitation offered to buy back the Notes at par and sought consents from the Noteholders to authorize certain proposed amendments to the Notes Indenture. (Chase Dec. Exs. 29 (Consent Solicitation) and 30 (Form 8-K).)

RESPONSE: Undisputed

49. The proposed amendments included the addition of a fifth use of asset sale proceeds to the list of four uses already permitted by Section 4.10 of the Indenture. This proposed amendment, Section 4.10(b)(5), permitted Black Elk to use the proceeds of an asset sale to purchase at par any Notes that Noteholders elected to tender and then to use any remaining asset sale proceeds to “repurchase or redeem preferred equity of [Black Elk].” (Chase Dec. Ex. 29 (Consent Solicitation) at 18.)

RESPONSE: Undisputed.

50. Only the holders of the Notes were permitted to participate in the Consent Solicitation. (Chase Dec. Ex. 29 (Consent Solicitation).)

RESPONSE: Undisputed.

51. HFF was not a Noteholder. (*See, e.g.*, Chase Dec. Exs. 13-21 (HFF tax returns from 2008 to 2016).)

RESPONSE: Undisputed.

52. Because HFF was not a Noteholder, it could not and did not participate in the Consent Solicitation. (*See* Chase Dec. Ex. 29 (Consent Solicitation).)

RESPONSE: Disputed, for the reasons set forth in paragraphs ¶¶ 162-169, 492-543 of Plaintiffs' Statement of Material Facts.

53. On August 21, 2014, Black Elk issued a Form 8-K announcing that it had received the requisite consents of Noteholders to, among other things, apply the proceeds from the Renaissance Sale to, among other things, repurchase preferred equity issued by Black Elk. (Chase Dec. Ex. 30 (Form 8-K).)

RESPONSE: Undisputed.

V. HFF's Settlement With Black Elk

RESPONSE: The PPVA Plaintiffs object to all headings as improper for purposes of a Rule 56.1 Statement.

54. In August 2015, an involuntary bankruptcy petition was filed against Black Elk, styled as *In re Black Elk Energy Offshore Operations, LLC*, Case No. 15-34287 (the "Black Elk Bankruptcy Case"), in the United States Bankruptcy Court for the Southern District of Texas, which subsequently was converted to a voluntary chapter 11 case in September 2015. (Chase Dec. Ex. 31 (Default Judgment Order and Motion attaching Settlement Agreement) at p. 7.)

RESPONSE: Undisputed.

55. As part of the Black Elk Bankruptcy Case, the post-confirmation litigation trustee (the "Black Elk Trustee") commenced litigation against PPVA seeking, among other

things, to avoid and recover all transfers by Black Elk to PPVA, and to equitably subordinate PPVA's claims in connection with its secured debt. (*Id.* at pp. 7-8.)

RESPONSE: Undisputed.

56. Black Elk and PPVA thereafter entered into a Settlement Agreement wherein PPVA agreed not to oppose Black Elk's motion for default judgment based on the funds that were allegedly transferred fraudulently to PPVA and the Bankruptcy Court thereafter granted Black Elk's motion for Default Judgment on September 20, 2018. (*Id.*, Order and Default Judgment Motion at pp. 1, 7-15.)

RESPONSE: Undisputed.

57. In connection with the Black Elk Bankruptcy Case, the Black Elk Trustee also commenced an adversary proceeding against HFF (the "Black Elk-HFF Lawsuit"). In the Black Elk-HFF Lawsuit, the Black Elk Trustee asserted a claim against HFF for repayment of the \$1,026,676.83 that was transmitted from Black Elk to the BEOF Fund, which was in turn transmitted in the same amount to HFF. (Chase Dec. Ex. 32 (Black Elk-HFF Lawsuit Complaint) at ¶ 158.)

RESPONSE: Undisputed.

58. This payment is one and the same as the Black Elk Proceeds Payment alleged as the sole basis for the remaining claims against HFF set forth in the SAC. (*Compare* Chase Dec., Ex. 5 (Black Elk-HFF Lawsuit Complaint) at ¶ 158 *with* Chase Dec., Ex. 1 (SAC) at ¶ 506.)

RESPONSE: Disputed, for the reasons set forth in paragraphs ¶¶ 160-177 of Plaintiffs' Statement of Material Facts.

59. On January 31, 2019, HFF resolved its dispute with the Black Elk Trustee. As part of that resolution, the Black Elk Trustee dismissed with prejudice all of its claims against HFF, and broadly released HFF from any claims relating to the \$1,026,676.83 Black Elk Proceeds Payment. (Chase Dec. Ex. 33 (Order of Dismissal).)

RESPONSE: Disputed. The Huberfeld Family Foundation does not provide documentation evidencing that it has “resolved its dispute with the Black Elk Trustee.” (*See* Chase Dec. Ex. 33). Moreover, the Order of Dismissal does not reference a release to the Huberfeld Family Foundation, much less that the Black Elk Trustee “broadly released HFF from any claims.” (*See id.*).

60. On February 6, 2019, the Court entered a formal Order of Dismissal with Prejudice of Huberfeld Family Foundation, Inc. As a result, any outstanding or potential liability of HFF to Black Elk has been released, including any liability related to the Black Elk Proceeds Payment. (*Id.*)

RESPONSE: Disputed. The Order of Dismissal does not reference a release to the Huberfeld Family Foundation. (*See* Chase Dec. Ex. 33). The PPVA Plaintiffs further object to this proffered “fact” to the extent that it contains legal conclusions, unsubstantiated opinions, and argumentative statements that are improper in a Local Civil Rule 56.1 statement. *See Olin Corp.*, 332 F. Supp. 3d at 838-39 (disregarding legal conclusions and argumentative statements included in statement of facts as improper under Local Rule 56.1).

VI. Other Matters

61. Plaintiffs’ Fed. R. Civ. P. 30(b)(6) representative, plaintiff Martin Trott, testified that Plaintiffs’ claims against HFF are essentially limited to HFF’s investment in the BEOF Fund. (Chase Dec. Ex. 35 (Martin Trott Deposition Transcript Excerpts) at Tr. 788:11-789:8.)

RESPONSE: Disputed, as to the context of the testimony and for the reasons set forth in paragraphs ¶¶ 160-177 of Plaintiffs' Statement of Material Facts.

Dated: March 6, 2020
New York, New York

HOLLAND & KNIGHT LLP

By: /s/ Richard A. Bixter, Jr.

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