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), Plaintiffs, - against - PLATINUM MANAGEMENT (NY) LLC, *et al.,* Defendants.	Civil Action No. 18-cv-10936 (JSR)

JOLS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO EXCLUDE THE EXPERT REPORT OF RONALD G. QUINTERO

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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 "**Joint Official Liquidators**") and Platinum Partners Value Arbitrage Fund L.P. (in Official Liquidation) ("**PPVA**" and collectively with the Joint Official Liquidators, the "**JOLs**") submit this memorandum of law in opposition to the Motion of Defendant David Bodner ("**Bodner**"), as joined by Defendants Bernard Fuchs ("**Fuchs**") and Murray Huberfeld ("**Huberfeld**" and collectively with Bodner and Fuchs, the "**Defendants**") to Exclude the Expert Report of Ronald G. Quintero ("**Quintero**").[1]

INTRODUCTION

Quintero has more than "40 years of experience as a financial professional, with specific expertise in mergers & acquisitions ("M&A"), valuations of businesses and securities, financial restructuring, bankruptcy & insolvency, and forensic accounting." Quintero Report at p. 2. The discipline of forensic accounting involves the application of specialized knowledge and investigative skills possessed by CPAs to collect, analyze, and evaluate evidential matter and to interpret and communicate findings in the courtroom, boardroom, or other legal or administrative venue.[2] Experts with those skills, like Quintero, routinely testify to help explain how complex financial frauds operate. Quintero is uniquely qualified to do so because he also has expertise in the valuation of businesses. His testimony is all the more appropriate here given that the fraud at issue was effectuated by means designed to appear legitimate and involves transactions that are outside the scope of an ordinary juror's experience. Specifically, Quintero will provide testimony

[1] The Corrected November 15, 2019 Expert Report of Ronald G. Quintero ("**Quintero Report**") is attached as Exhibit 1 to the June 2, 2020 Declaration of Richard A. Bixter, Jr. ("**Bixter Decl.**").

[2] *See, e.g.,* Characteristics and Skills of the Forensic Accountant, *available at* https://competency.aicpa.org/media_resources/209049-characteristics-and-skills-of-the-forensic-accounta.

on the following issues, none of which invade either the province of the jury or the Court's responsibility to instruct the jury on applicable law:

- The overvaluation of PPVA's net asset value ("**NAV**") by Platinum Management (NY) LLC and its owners and executives ("**Platinum Management**");
- The payment of unearned management and incentive fees to Platinum Management and its owners, and the process by which those payments were made through cash derived from PPVA;
- The damages incurred by PPVA due to various asset diversion schemes, including, without limitation, transactions in connection with PPVA's interests in Black Elk Energy Offshore Operations LLC ("**Black Elk**") and Agera Energy LLC ("**Agera**"); and
- The damages incurred by PPVA that could have been avoided if a full, accurate and fair disclosure of PPVA's financial distress and the distress of its investment positions had been made by Defendants.

In their Motion, Defendants cherry pick statements from Quintero's 194 page report to concoct an argument that Quintero improperly valued PPVA's assets, relied solely on 2016/2017 liquidation amounts as valuation inputs and found no evidence of payment of fees to Platinum Management and its principals. This is pure fiction. The plain text of the Quintero Report, along with Quintero's statements on the record at his December 23, 2019 Deposition ("**Quintero Deposition**")[3], utterly defeat these arguments. Defendants' motion should be denied in its entirety.

First, Defendants seek to exclude Quintero's report alleging that Quintero did not rely upon any established methodology in valuing PPVA's assets and that he relied solely on "Monday morning quarterbacking" in determining the stated valuations. To the contrary, Quintero was guided by contemporaneous information concerning the eight illiquid PPVA positions that he reviewed, such as (i) public disclosures of financial information and third party valuation reports for Black Elk, (ii) the financial performance of Golden Gate Oil LLC ("**Golden Gate**") and

[3] Excerpts from the Quintero Deposition are attached as Exhibit 3 to the Bixter Declaration.

Platinum Management's internal acknowledgement that the Golden Gate wells were underperforming and pumping water and that Golden Gate was in danger of losing its lease rights, which indeed occurred in 2015; and (iii) the creation of Northstar Offshore Group LLC ("**Northstar**") through the remnant and underperforming assets of Black Elk.

The fact that these concealed problems only became known to the world subsequent to PPVA's liquidation does not amount to "Monday morning quarterbacking." The problems with PPVA's portfolio, and its overconcentration in failing oil and gas investments, were known to Defendants and other Platinum Management executives long before PPVA's liquidation. Nevertheless, Quintero gives Platinum Management and its principals the benefit of the doubt as to entry price for various investments, and takes a conservative approach by largely honoring Platinum Management's stated valuations at the beginning of the damages period. The damages stated in the Quintero Report would be significantly higher if Quintero had chosen to forego opining on the precipitous decline of PPVA's portfolio in favor of focusing on significant intervening events: *to wit*, Quintero's Report does not contest Platinum Management's December 2012 valuation of PPVA's Black Elk investment, although the problems with Black Elk were readily apparent immediately in the wake of the November 2012 Black Elk explosion. Quintero Report at Ex. 23.1.

Second, Defendants attempt to exclude Quintero's testimony, even though it will undoubtedly assist the jury in understanding PPVA's payment of management and incentive fees to Defendants with cash derived from PPVA. While Defendants are correct that the agreements *provide* for fees to accrue at the feeder fund level, Plaintiffs will demonstrate, and Quintero will help explain, that it was PPVA that *actually paid* the cash portions of the fees in question from PPVA's bank account. The bank statements show that the cash for the fees came from PPVA's

bank account when payments were made to Defendants. Often Defendants' accrued incentive fees were transferred to other limited partner accounts in the name of Platinum Management's owners and their family members. Payments of the incentive fees thereafter were taken by the individual owners in the form of "redemptions" from these other limited partner accounts. Quintero's Appendix A, the corresponding workbooks and bank account statement summaries, and the hundreds of pages of SS&C reports attached to the Quintero Report evidence these facts.[4]

Third, Defendants object to Quintero's opinion that a wave of redemptions would have been submitted by investors if PPVA's NAV had been accurately reported by Platinum Management. Defendants accuse Quintero of engaging in speculation, but it is Defendants who are speculating. Quintero relies on the historical evidence of increasing PPVA redemptions in the years leading up to liquidation, which undoubtedly would have increased if Platinum Management had admitted that its oil and gas positions were near worthless. The Defendants' argument is that redemptions would not have increased because Platinum insiders made up a portion of PPVA's investor class. The jury deserves to hear both sides.

"Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 596 (1993); *see also Dover v.*

[4] Defendants allege that "PPVA paid no incentive fees at all" and that a feeder fund, rather than PPVA, was actually harmed by Defendants' fraudulent conduct. Defendants' Mem. at p. 18. This is nonsense. Solely by way of example, as the Court is aware, in March 2014, the Correctional Officers Benevolent Association ("**COBA**") invested $10 million in PPVA as a result of a bribe paid by Huberfeld. The evidence is uncontested that COBA's $10 million was wired directly to a PPVA Feeder Fund account (PPVF ending in -0463), and then transferred to the Master Fund account ending in 0500. The funds were then transferred to PPVA Master Fund operating accounts ending in 0148. After this, the Master Fund then directly paid the management fees to an account ending in 0527 which then transferred the money to the Mark Nordlicht Grantor Trust, which collected the Management fees on behalf of its beneficiaries, Bodner and Huberfeld. ($1.8 million each, sent to Bodner entity Grosser Lane Management LLC and Huberfeld entity Manor Lane Management LLC). *See* ECF No. 817 at ¶¶ 567-574. The bank records confirm that in each and every instance during the damages period where incentive and management fees were paid, PPVA Master Fund made and originated the payment. Bodner later admitted to receiving this $1.8 million distribution – leaving no doubt that these defendants received their distributions for management and incentive fees from PPVA. See ECF No. 838 at 2 n.3.

British Airways, PLC (UK) 254 F.Supp.3d 455, 462 (E.D.N.Y. 2017) ("the complaint that [expert's] damages models are based on an unrealistic ex post view … is an argument for the jury to assess with the aid of cross-examination and the presentation of contrary evidence"); *Allen v. Dairy Marketing Services, LLC*, 2013 WL 6909953, *18 (D. Vt. Dec. 31, 2013) ("Cross-examination and impeachment at trial, and the conflicting of opinions … are sufficient to expose any weaknesses in [the expert's] regression analysis.").

In summary, Defendants improperly seek to preclude the jury's consideration of Quintero's testimony as to the overvaluation of PPVA's net asset value and the damages to PPVA resulting therefrom. The jury should be permitted to consider relevant and reliable expert testimony and draw their own conclusions as to its weight and credibility. Defendants' motion should be denied in its entirety.

STANDARD OF REVIEW

As a threshold matter, Rule 702 requires expert qualification by "knowledge, skill, experience, training, or education." Fed. R. Evid. 702. Rule 702 permits testimony from a qualified expert if: (1) the expert's knowledge will assist the trier of fact to understand the evidence or determine a fact in issue; (2) the expert bases the testimony on "sufficient facts or data"; (3) the expert's testimony "is the product of reliable principles and methods"; and (4) "the expert has reliably applied the principles and methods to the facts of the case." *Id.*

Rule 702 incorporates the principles the Supreme Court set out in *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993) and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999). Rule 702 embodies a "liberal standard" of admissibility for expert testimony. *See, e.g., Grand River Enter. Six Nations, Ltd. v. King*, 783 F. Supp. 2d 516, 526 (S.D.N.Y. 2011) (quoting *Nimely v. City of New York*, 414 F.3d 381, 395 (2d Cir. 2005)). "[T]he rejection of expert testimony is the

exception rather than the rule." *Cedar Petrochems., Inc. v. Dongbu Hannong Chem. Co.*, 769 F. Supp. 2d 269, 282 (S.D.N.Y. 2011) (quoting Rule 702 advisory committee's note).

The controlling case law rejects a "*per se* inadmissible" standard and makes clear that the Court's inquiry is both fact specific and flexible:

> The Court's task is to make certain than an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field. . . . Important here, [a] minor flaw in an expert's reasoning or a slight modification of an otherwise reliable method will not render an expert's opinion per se inadmissible. The judge should only exclude the evidence if the flaw is large enough that the expert lacks good grounds for his or her conclusions. This limitation on when evidence should be excluded accords with the liberal admissibility standards of the federal rules and recognizes that our adversary system provides the necessary tools for challenging reliable, albeit debatable, expert testimony.

Beastie Boys v. Monster Energy Co., 983 F.Supp.2d 354, 363 (S.D.N.Y. 2014) (quoting *Kumho Tire*, 526 U.S. at 152).[5]

Federal Rule of Evidence 403 provides an independent basis to exclude testimony that wastes the jury's time or presents cumulative evidence. However, conclusory arguments that simply recite Rule 403's provisions and assert that the proffered testimony is prejudicial are insufficient to strike an expert's testimony. *See, e.g.*, *Joffe v. King & Spalding LLP*, 2019 WL 4673554, at *n.4 (S.D.N.Y. Sept. 24, 2019).

ARGUMENT

I. QUINTERO'S VALUATION OF PPVA'S PORTFOLIO SATISFIES THE REQUIREMENTS OF *DAUBERT*

In his analysis to estimate the quantum of damages derived from Defendants' excessive management and incentive fees, Quintero faced a number of significant challenges:

[5] This Court also has noted that "[t]here is no rote list of factors to be considered when evaluating a *Daubert* motion, and the inquiry is designed to be flexible and respond to the context and circumstances of each case." *Buchwald v. Renco Grp.*, 539 B.R. 31, 42-43 (S.D.N.Y. 2005).

- Fees were determined based on underlying portfolio values on a monthly basis. Even as to the few portfolio companies on which Quintero focused his fees damages analysis, there were well over 100 collective monthly periods for which fees payable on underlying asset values would need to be assessed.

- The assets - both the portfolio companies on which Quintero focused his fees analysis and the businesses and assets of those companies - were all "Level 3" assets, reflecting an absence of observable and verifiable market and financial inputs. *See* Quintero Report at p. 9. These were investments in early-stage or speculative companies, which themselves were operating in speculative businesses, many of which were in substantial distress. *Id.* at p. 11. Assets such as these represent the greatest risk of financial misstatement, and their valuation entails the highest degree of subjectivity and difficulty. *Id.* at p. 9.

- These inherent challenges were exacerbated by the lack of reliable financial information from Platinum Management. Throughout his report, Quintero identifies Platinum-maintained financial data with respect to these entities that was wholly unreliable, unachievable, and not credible in light of contemporaneous market and business conditions. *See, e.g.,* Quintero Report Exhs. 24, 25. And, for these "Level 3" assets, there was no market or independent financial data on which more credible data-based valuation calculations could be premised. *Id.*

In their opening brief, Defendants ignore all of these practical and foundational challenges, and instead argue categorically that only a "straightforward appraisal report" could be admissible here. Defendants claim that a sound damages calculation of inflated monthly management and incentive fees would require a full-scale appraisal of all of the assets on which those fees were to be calculated, made at each of the monthly fee calculation points and using one of the three standard valuation methods. (Def. Mem. p. 8). This argument misperceives the nature and substance of Quintero's analysis, for several reasons:

First, the "straightforward" valuation methods suggested by Defendants as a *sine qua non*[6] were of no utility with respect to the assets at issue in this facet of Defendants' motion. Defendants accuse Quintero of being "arbitrary" and "unprofessional" for purportedly ignoring the traditional

[6] "In estimating Fair Value for an Investment, the Valuer should apply a technique or techniques that is/are appropriate in light of the nature, facts and circumstances of the Investment and should use reasonable current market data and inputs combined with Market Participant assumptions." International Private Equity and Venture Capital Valuation Guidelines at Sec. 2.2, *available at* http://www.privateequityvaluation.com/Portals/0/Documents/Guidelines/IPEV%20Valuation%20Guidelines%20-%20December%202018.pdf?ver=2018-12-21-085233-863&timestamp=1545382360113.

valuation methods: cost, income, and market. But even a cursory review of Quintero's report shows Quintero's careful consideration of the possibility that these traditional valuation measures might be useful or reliable here.

For example, in his analysis of fee overpayment damages with respect to Golden Gate (Quintero Report Ex. 24) and Northstar (Quintero Report Ex. 25), Quintero demonstrated that he considered and rejected each of the three traditional valuation methods as they had previously been employed by Platinum Management (and by third parties that had purportedly validated Platinum's valuations). Cost was not a viable measure of value for these speculative investments, particularly where Platinum Management was stating valuations for these assets many multiples in excess of its acquisition cost. Market value comparisons made in Platinum Management's purported valuations were invalid due to the wholesale lack of comparability in reference to assets in Platinum's highly idiosyncratic investments. Quintero Report Ex. 24. And an income approach requires reliable financial data from which a discounted cash flow stream can be determined, a task rendered impossible by the absence of independent financial data and by Platinum Management's discredited financial data regarding these assets. *See* Quintero Deposition at 217:8 through 221:18 (discussing "garbage in, garbage out").[7] Accordingly, after consideration, Quintero properly concluded that none of the "straightforward" valuation methods urged by Defendants as necessary for admissibility would produce reliable and defensible results.

Second, Defendants' argument proceeds from the misbranded premise that "this is a valuation case," for which the absence of a full-scale "appraisal report" – or, more accurately, hundreds of them – should be fatal to Quintero's analysis. In fact, this is a fraud and breach of duty case – Quintero was asked to reasonably calculate damages to PPVA by virtue of the

[7] Indeed, arguing that the Liquidators must present an analysis of fraud damages that derives from the very same fictitious financial data concocted by Defendants to execute and conceal their schemes is both illogical and inequitable.

overpayment of Management and Incentive fees. Quintero provides Defendants the benefit of the doubt as to how fast Platinum Management should reasonably have marked down the assets for purposes of calculating management fees. In fact, Quintero based his analysis in part on a series of important catalysts such as the discovery that Golden Gate was producing water instead of oil. The analysis could self-servingly assume that Platinum Management's reduction should have been immediate, but he chose the more *conservative approach*. In sum, the red herring is that Defendants portend that this is purely an asset valuation exercise akin to a failed acquisition – it is not, the damages exercise is to determine how much PPVA was harmed by Defendants' conduct.

Preparation of full-blown "appraisal report[s]" for each of 100+ monthly fee calculation periods would – even if one or more of the traditional valuation methods were reliable here – be both impractical and unnecessary for purposes of Quintero's fee damages estimates. Simply put, there are no reliable inputs upon which comprehensive valuations of these idiosyncratic investments could be constructed on a monthly basis over the course of several years: there are no market data or market correlates, no reliable financial data, no verifiable information as to intervening developments in the businesses or assets of these underlying companies, and no meaningful access to former Platinum personnel from which even directional indicators of financial values could be estimated. There are only the bookends of the actual values, if any, ultimately achieved for these assets, and Platinum Management's stated valuation (which itself is unverifiable and almost certainly inflated) as a starting point.

Accordingly, for purposes of preparing a defensible estimate of fee overpayment damages over the course of these many months, it was reasonable, and most accurate, for Quintero to assume a linear decline in underlying asset value between these two stated points in time. Such a technique is hardly unconventional in value accounting (for example, "straight-line" depreciation) as

reflecting a reasonable estimate of declining value between two points in time. And here – as discussed specifically in the sections below – Quintero did not just draw a straight downward line and finish the job there: rather, he validated his proposition of value decline with reference to the contemporaneous and reliable value indicators available for these assets. Given the many practical and foundational hurdles, this is a sound methodology for Quintero's fee damages estimates.

Third, Defendants' argument for exclusion of Quintero's damages analysis proceeds from the implicit assumption that Quintero's linear value decline produced damages estimates that understated value, and therefore overstated damages. This is not so. It is true that application of a linear rate of value decline smooths interim variations: for example, an automobile may be accounted for as depreciating in linear fashion, while the actual diminution in value may occur at discrete points in time (as the car drives off the lot, after a hard winter, etc.). But this smoothing works in both directions.

Defendants argue that "[a]ssets may decline in some roughly consistent way or they may decline precipitously in a short period of time prior to a collapse." This may be so, but Defendants omit another, just as likely, possibility, if not more so: that asset values decline substantially, or even precipitously, shortly after the analytical start date, and remain flat-lined or declining toward negligible value thereafter. Indeed, based upon the reliable contemporaneous indicators of value available (as discussed in the specific sections below), this is precisely what happened with several of the assets at issue. For example, there are numerous indicators of Black Elk's and Golden Gate's rapidly collapsing value early in the damages period as discussed below, which indicates that the gradual value decline suggested by Quintero's straight line overstates value (and understates the extent of fee overpayment) for much of the damages period.

To account for the fact that full-scale valuations of underlying assets on a monthly basis would be impossible and impractical, Quintero's fee damages estimates proceed from dual conservative assumptions: he uses Platinum Management's stated overvaluation as his starting point, and he projects a steady rate of value decline throughout the damages period despite factual indications that the decline in value of many assets was front-loaded. These conservative assumptions have the effect of understating damages, not overstating them. This buttresses the reasonableness of Quintero's damages estimates as they were presented. Of course, if Defendants would prefer – or if the Court should require – Quintero to adjust these assumptions by adjusting Platinum Management's starting asset value downward, and/or by varying the rate of value decline to account for the available contemporaneous indicators of rapidly-declining value, Quintero will do so. It is clear, however, that such adjustments would cause Quintero's damages estimates to increase, not decrease.

A. Black Elk

PPVA held various debt and equity interests in Black Elk, an offshore oil and gas exploration company based in Houston, Texas. Quintero Report at Ex. 23. The general thrust of Quintero's opinion is that from the time of the November 2012 explosion on Black Elk's West Delta 32 platform ("**Black Elk Explosion**") until the August 2014 sale of substantially all of Black Elk's assets to Renaissance Offshore LLC ("**Renaissance Sale**"), Black Elk suffered a steady deterioration in its financial condition that rendered Black Elk insolvent and unable to pay its creditors, let alone the common equity positions held by PPVA that were being valued as high as approximately $312 million during the Damages Period. Quintero Report at Ex. 23.2.

Defendants first attack Quintero's opinion by arguing that Quintero's sole basis for opining that PPVA's interests in senior secured Black Elk bonds were overvalued is a comparison between Platinum Management's valuation and that of Platinum Management's valuation firms. This is

incorrect. As stated in Quintero Report Exhibit 23: "13.75% corporate bonds, which were publicly traded, eroded to 2% of par value by 3/16 (Exhibit 23.2, p. 2), whereas Platinum reported them at more than 80% of par value at 3/16 (Exhibit 23.2, p. 1); after the bankruptcy filing, the bonds fell in price that were generally below 25% of par value, and as low as 1% of par value; Platinum did not begin to take significant markdowns until May 2015 (Exhibit 23.2)." This is a clear example of Platinum Management wildly overstating the value of publicly traded securities, at a time when Black Elk had been thrust into bankruptcy and there was no ability for PPVA to collect on the bonds held by PPVA.

As to PPVA's equity interests in Black Elk, the Quintero Report relies on contemporaneous events around the time of the Black Elk Explosion and up to the Renaissance Sale to reach his opinion that PPVA's equity interests in Black Elk suffered a steady loss in value during this time period. These events included, among other things:

- In September 2012, S&P lowered its corporate credit rating on Black Elk to CCC+ with a negative outlook for reasons including: (1) vulnerable business risk; (2) highly-levered financial risk; (3) small reserve and production base; (4) high operating costs; (5) weak sources of liquidity; and (6) insufficient cash flow to cover anticipated capital expenditures.

- Black Elk's public financial disclosures, evidencing a steady deterioration of its financial condition throughout 2013-2014, including (1) deficit discretionary cash flows during every quarter; (2) a net working capital deficit that swelled to $150 MM by the 3rd quarter of 2013, and only began to diminish once the Company began to sell off its assets; (3) the Company sold off its natural resource gross assets during the fourth quarter of 2013 (Exhibit 23.6); (4) average daily oil sales dropped by almost 85% from the 3rd quarter of 2012 to the 3rd quarter of 2014; and (5) realized oil price per barrel dropped by approximately $40 from the 3rd quarter of 2012 to the 3rd quarter of 2014, while lease operating expenses per barrel of oil equivalent increased by $14. *See* Quintero Report at Exhibit 23.4.

- The October 2013 independent due diligence report of Asiasons Capital Ltd. that outlined significant problems with Black Elk and opined that the common equity in Black Elk was worthless.

- Asset sales throughout 2013 and 2014 used to pay off senior secured debt (including that held by Beechwood) without making a significant dent in Black Elk's substantial trade debt, preferred equity or senior secured bonds.

- The Renaissance Sale, which left Black Elk with insufficient assets to pay down the remainder of its senior secured bonds and trade debt, let alone provide any value for PPVA's equity interests. As stated in Black Elk's September 2014 financial disclosures: "The Company currently faces significant challenges with our cash flow and our need to pay for operating expenses, including our debt service obligations. The Company's cash position raises substantial doubt about the Company's ability to continue as a going concern."

Quintero Report Ex. 23.

As set forth in Quintero's Report, the financial condition of Black Elk suffered a steady and significant decline in the wake of the Black Elk Explosion, culminating in the Renaissance Sale orchestrated by Platinum Management and its principals. The facts of this decline were publicly reported by Black Elk in its quarterly and annual filings with the SEC at the time. Quintero Report at Ex. 23.4. Quintero's opinion as to decrease in value of PPVA's Black Elk position is based off of this information and his review of contemporaneous emails of Platinum Management representatives, which confirmed what was readily apparent: Black Elk was insolvent and unable to pay its creditors. Quintero Deposition at 190:22 to 192:4.

All of these problems were readily apparent to Defendants, who had placed two Platinum Management employees on the Black Elk board of managers and were making all critical decisions concerning Black Elk. In a memo prepared by Defendant Daniel Small, he described Black Elk's operational issues in the wake of the Black Elk explosion, stating that the Black Elk Explosion created "headwinds" that "negatively impacted performance." (Bixter Decl. at Ex. 4)

As Black Elk's condition worsened, Platinum Management took drastic steps to pay off the preferred investors in the BEOF Funds through the fraudulent consent solicitation and Renaissance Sale, knowing the effect that these acts would have on the collectability of Black Elk Bonds, let alone the value of PPVA's substantial common equity position. In June 2014, Mark Nordlicht implored Defendants David Levy and Daniel Small to resist Black Elk officer's efforts to use the proceeds from the upcoming Renaissance Sale for anything other than Platinum

Management's initiative: "Use of proceeds from money coming in- there will be money grab and thy will want to pay payables, WE NEED TO RESIST THIS. [G]et preferred paid off as quickly as possible." (Bixter Decl. at Ex. 5)

Quintero will testify that these data points necessarily and inherently lower the value of the Black Elk position. Hence Platinum Management's valuation of PPVA's Black Elk position was knowingly overstated in the wake of the Black Elk Explosion, and due to Black Elk's insolvency due to the mismanagement of Black Elk by Platinum Management and its executives and owners. If Defendants wish to contest this opinion, the proper avenue is cross-examination, not exclusion of Quintero's opinion. *Daubert*, 509 U.S. at 596.

B. Golden Gate

Golden Gate Oil had oil drilling rights on a 2,000-acre plot in the Santa Maria Valley in South Central California. The fields had been drilled extensively by a prior oil and gas exploration company in the 1980s, when they were abandoned as they ceased to be economically viable. Although reports by DeGolyer and MacNaughton indicated evidence of significant proven undeveloped reserves, Golden Gate's oil production was significantly below estimates, according to records from California oil regulators and internal emails circulated among Platinum Management and Beechwood executives. Golden Gate attempted several alternative approaches to extract the oil, such as drilling horizontally and attempting J-shaped wells, but none were successful. Declining oil prices since drilling began in late 2012 (Quintero Report at Exhibit 17) created an additional impediment to achieving economic viability. Quintero Report at Ex. 24.

Defendants' argument against Quintero's valuation opinion for Golden Gate is to point to the valuation work of Platinum Management's auditors and valuation agents, and Quintero's refusal to place greater weight on PV-10 estimates than the actual, and contemporaneous, results of Platinum Management's attempts to revive Golden Gate's California oil and gas wells. This is

an improper basis for excluding expert testimony. *See Scott v. Chipotle Mexican Grill, Inc*., 315 F.R.D. 33, 43 (S.D.N.Y. 2016) ("The duty of determining the weight and sufficiency of the evidence on which the expert relied lies with the jury, rather than the trial court.") (*citing Kumho Tire*, 526 U.S. at 153).

Defendants also argue that Quintero ignores FAS 157 and "the price the holder would receive from selling the asset in an orderly transaction at the measurement date." *Fed. Housing Fin. Agency v. Nomura Holding Am., Inc.*, 2015 U.S. Dist. LEXIS 18386 at *8 (S.D.N.Y. Feb. 13, 2015). To the contrary, Quintero appears to be the only valuation specialist who took into consideration the ***actual evidence of*** the market price for Golden Gate Oil's equity, PPVA's arms' length buyout of a third-party's 50% equity interest in Golden Gate for less than $3 million:

> Both Platinum and Third-Party Valuators failed to consider arms-length negotiated transaction price for 50% membership purchase for $2.7 MM, reflecting an implied value for a 100% membership interest of $5.4 MM. The transaction constitutes the best-available evidence of fair value, as it was the result of two contemporaneous arm's-length transactions involving the sale of a 50% membership interest that, in addition to the 48% membership interest already owned by PPVA, resulted in obtaining control. It is not credible that a 50% membership interest would be sold at an implied 100% equity value of $5.4 MM if the equity was worth $181 MM during the 4th quarter of 2014, as indicated in Platinum's valuation (Exhibit 24.2).

Quintero Report at Ex. 24.

At his deposition, Quintero stated the following in connection with PPVA's purchase of the remaining Golden Gate Oil equity:

> A: There was contemporaneously available information that this asset was not likely to produce the sort of values that were reflected in the Platinum marks-to-market.
>
> So as I previously testified, valuation doesn't just rely on one single factor in isolation. It's the mix of information that goes into a proper valuation, and the mix of information was abundantly available to be able to see as of the dates where these various marks-to-market were created, that these values did not exist.

Quintero Deposition at 236:19 to 237:7.

One of the key factors relied upon by Quintero was Platinum Management's acknowledgement of overreliance on PV-10, Platinum Management's knowledge of Golden Gate's operational failures and Platinum Management's inability, or unwillingness, to finance those operations.

In an April 3, 2012 email, Mark Nordlicht told Ari Hirt ("**Hirt**"), Platinum Management's Golden Gate portfolio manager: "I cringe at the 1 billion pv10 number as it doesn't mean anything. Our pv 10 in black elk of 1 billion is a number u can work off of but **when u have billion pv 10 on fields that are worth 15 in sale now, it doesnt really mean much**...but hopefully what we are saying is upside exists." (Bixter Declaration at Ex. 6) (emphasis added)

By the following year, Mark Nordlicht was proven right, as the DeGolyer and MacNaughton pv-10 estimate had proven to be wildly overstated. On April 5, 2013, Art Garza of Black Elk circulated to Mark Nordlicht and David Levy a copy of a NSAI preliminary reserve report assessing Golden Gate's total proven, probable and possible reserves at approximately **$160 million**, substantially lower than the greater than $1 billion pv-10 ascribed to the exact same reserves in the report prepared in the prior year. In response, Mark Nordlicht responds: "How can there be such a big discrepancy between d and m and nsai, I just don't understand it?" (Bixter Decl., Ex. 7) (emphasis added)

An August 7, 2013 email exchange between Nordlicht and Hirt confirms that as of that date, Golden Gate was in "limbo" as Platinum Management had called a halt to all drilling efforts and activities. (Bixter Decl. at Ex. 8)

On January 14, 2014, Nordlicht forwarded a spreadsheet of Golden Gate comparable companies with the following statement:

> There is definitely room for Bracha to be Chal. 1.2 billion value based on comps for golden gate. I think they are all overvalued and it's somewhat capital intensive but if oil stays in upper 80's (something I personally don't think will happen) shd throw off hundreds of millions 2015-2018 and continue in the tens of millions for several years.

Bixter Decl. at Ex. 9.

In weekly updates in 2014 to the internal Platinum/Beechwood valuation team, Hirt outlined the significant operational difficulties faced by Golden Gate, involving well closures and wells pumping primarily water: "[s]wabbing of the well recovered 15 bbl oil + 110 bbl water in one day of swabbing indicating some permeability. The well is shut in waiting on decision to acidize or sidetrack the well." Bixter Decl. at Ex. 10.

In his opinion, for the "sake of conservatism," Quintero granted Platinum Management its $37 million valuation of 50% of Golden Gate Oil in December 2012, and then gradually reduces the value once Golden Gate's operational failures had become evident to Platinum Management and the Golden Gate equity buyout for $2.7 million had occurred. Quintero Report at Ex. 24, p. 2; Ex. 24.2.

C. Northstar

Northstar was an oil and gas exploration company based in Texas, formed through the combination of oil and gas assets in a Platinum legacy position and the remnant Black Elk assets in the wake of the Renaissance Sale. Quintero Report at Ex. 25. At various times, PPVA held common and preferred equity positions as well as debt interests in Northstar. *Id*.

Defendants argue that Quintero's valuation opinion for PPVA's Northstar position is based solely on Northstar's bankruptcy filing and the fact that Northstar's assets were sold in bankruptcy for approximately $13 million only a few months after Platinum Management had valued PPVA's Northstar investment at almost $200 million. Quintero Report Ex. 25.

Defendants are just choosing to ignore entire sections of Quintero's report and testimony.

As an initial matter, Quintero's consideration of the Northstar bankruptcy and the shocking sale price for Northstar's assets is not improper valuation based on subsequent events, but simply the subsequent recognition of Northstar's financial condition that had been evident to Platinum Management from the outset. Quintero relies on contemporaneous evidence throughout 2015, including emails with Mark Nordlicht where Northstar's cash crisis, pending well shutdowns, and insolvency all are discussed and its perilous financial condition acknowledged. *Id.*

In terms of materials and evidence relied upon, Defendants could not be more wrong in their characterization:

- Quintero relies on partial December 2014 and April 2015 financial statements (the partial April 2015 financial statement was the final one completed for Northstar). Quintero Report at Ex. 25; (Bixter Decl. at Ex. 11)

- Quintero relies on a declaration submitted by Northstar CFO Avery Alcorn in Northstar's bankruptcy, where he states under penalty of perjury that "the lack of capital and high repair costs on the properties have handicapped Debtor's ability to significantly enhance the production and cash flow of the Black Elk assets." Quintero Report at Ex. 25, p. 2; (Bixter Declaration at Ex. 12) In other words, Quintero bases his Northstar valuation opinion on the significant evidence during the damages period that Northstar had no ability to fund its operations and Platinum Management, which dominated the creditor and equity positions through the Platinum funds under its management, was unable to finance Northstar's capital expenditures. Quintero Report Ex. 25 at p. 2.

- An August 12, 2015 email from a Northstar employee to Platinum executives, pleading for $2.2 million in funding required within the week, and an additional $1.2 million needed within 20 days, to avoid well shutdowns. (Bixter Decl. at Ex. 13)

- A December 28, 2015 email from Mark Nordlicht to Platinum employee Zachary Weiner summarizing that Northstar at that time was insolvent, losing at least $1 million a month with $10 million payables 90 days past due. (Bixter Decl. at Ex. 14)

D. PEDEVCO CORP.

PEDEVCO Corp. was another Texas oil and gas position for which PPVA held equity and debt positions. Quintero Report at Ex. 27. Once again, Defendants attempt to argue that Quintero's sole input for valuation purposes was post-liquidation value. This is incorrect. As stated in Quintero's Report: "During the 4 quarters ending 6/16, PEDEVCO had: (1) minimal and

declining revenues; (2) consistent deficits in cash flow from operating activities, discretionary, and EBITDA; (3) declining cash, net working capital, and stockholders' equity; and (4) its debt balance grew. Also, during this time period its market capitalization declined from $19.89MM to $8.69MM (Exhibit 27.3). Thus, Quintero based his analysis on the steady decline of PEDEVCO's operational performance and market capitalization, as set forth in the publicly disclosed financials for the company. The expected liquidation recovery cited by Quintero was only used to provide Platinum Management with the benefit of the doubt and submit a conservative analysis: Quintero generously valued PPVA's debt positions in March 2016 at twice the amount of the expected liquidation recovery.

E. Desert Hawk

Desert Hawk Gold Corp. ("**Desert Hawk**") was a mineral exploration company engaged in the exploration and development of mineral properties in the United States. At various times during the Damages Period, PPVA held debt and equity interests in Desert Hawk. Quintero Ex. 28. As stated in his report, Quintero reviewed internal Platinum Management emails discussing the operational difficulties during the Damage Period as well as the possibility that Platinum Management would cause PPVA to foreclose on its equity interest, which would have the effect of reducing the value of PPVA's equity interest to zero. *Id*. Once again, Quintero is engaged in an extensive review of the actual financial performance of these companies and Platinum Management's knowledge of the same, factoring in several inputs into his analysis.

F. Over Everything

Over Everything, LLC ("**Over Everything**") was one of the apparel entities owned and controlled by defendant Seth Gerszberg. Quintero Report at Ex. 29. Defendants once again claim that Quintero only looked at subsequent events rather than a review of contemporaneous data in forming his opinion. To the contrary, Quintero specifically points to the following: (i) Over

Everything's May 2015 balance sheet indicating that Over Everything was insolvent; (ii) Over Everything's weekly cash burn rate of $263,000 in September 2015; and (iii) the senior debt held by Rosenthal would result in no funds remaining for PPVA's equity position once Over Everything's assets were sold. *Id*. Further, Quintero reviewed a (i) March 7, 2016 Email from Seth Gerszberg to Platinum Management executives that his company's credit card was shut down and that it could no longer borrow money from its senior lender; and (ii) a March 21, 2016 e-mail from Seth Gerszberg requesting $500,000 from Platinum Management as Over Everything was unable to meet financial commitments. (Bixter Decl. at Exs. 15 and 16)

G. Michael Goldberg

Exhibit 30 to the Quintero Report places a value on PPVA's collection rights under an alleged term note, as evidenced by nothing more than a term sheet. Quintero opines that the fair value of this receivable would be significantly diminished by the apparent lack of any executed note by Michael Goldberg. Defendants appear to argue that a note issued by Michael Goldberg may exist, but the evidence does not support this assertion.[8] In any case, he is entitled to cross-examine Quintero a trial, and let the jury decide. *See Scott*, 315 F.R.D. at 43.

H. China Horizon

PPVA invested in China Horizon Investment Group ("**China Horizon**"), a speculative investment in a start-up retail company in China that failed to materialize. China Horizon was a party to a joint venture with China Post, the postal service of the People's Republic of China, in connection with a plan to stock and operate convenience stores throughout the country. Quintero Report at Ex. 26.

[8] In fact, the lack of documentation is an issue in pending litigation, *PPVA v. Goldberg*, Adv. No. 18-01650 (SCC) (Bankr. S.D.N.Y.), where Goldberg has been unable to produce valid notes and fact discovery is complete.

As stated in Quintero's Report: "Once the Chinese government ceased to be willing to work with CH on or about December 2015 and actually went into competition with CH, it effectively terminated the joint venture, thereby rendering it to be worthless, other than speculative value. The government cooperation was critical to the success of the business. It lacked the ability to service debt, causing the debt to be worthless from the standpoint of the price at which it could be sold on an arm's length basis to a third-party buyer—the essence of fair value." Quintero Report at Ex. 26. In connection with his valuation work, Quintero reviewed contemporaneous documents regarding the detrimental effect that China Post's withdrawal from the joint venture had on the ability of China Horizon to continue as a going concern. (Bixter Decl. at Exs. 17 through 19)

II. QUINTERO SHOULD NOT BE EXCLUDED FROM TESTIFYING CONCERNING PAYMENT OF MANAGEMENT AND INCENTIVE FEES

Defendants next argue that Quintero should be precluded from testifying as to PPVA's payment of incentive and management fees because those fees contractually accrued at the Feeder Fund Level. This argument ignores common sense and is an effort by Defendants to preclude the Plaintiffs' expert witness based upon an issue of fact.

Despite Defendants' baseless charge that Quintero is attempting to confuse the issue, the Quintero Report makes clear that incentive fees were "charged" at the feeder fund level. But Defendants miss the following: "The Feeder Funds did not have access to free cash flow other than via the Master Fund. We are aware that the Feeder Funds looked to recharge fees and expenses to the Master Fund which in turn transferred cash to the Feeder Funds to discharge operational expenses. Redemptions were similarly back to back transferred from the Master Fund to the Feeder Funds." Quintero Report at Appendix A (p. 160).

This is common sense. No one invests in a hedge fund so that an investment can sit in a feeder fund bank account. All funds invested at the feeder fund level are expected to be transferred

to the master fund for investments. In turn, the master fund would transfer cash back to the feeder fund to discharge the feeder fund's obligations if, *and only when,* necessary. It is beyond cavil that PPVA in fact paid the cash for the fees.

As but one example, in February 2014 Platinum's onshore and offshore Feeder Funds made cash payments to the general partner account totaling approximately $13.4 million, and these payments were funded by cash transfers from PPVA (the Master Fund). This is evidenced by the attached bank statements which highlight the relevant transactions and money flows:

- $11,473,970 paid from Master Fund to PPVA Intermediate on Feb 21, 2014
- $11,473,970 received by PPVA Intermediate on Feb 21, 2014
- $11,473,970 paid out of the PPVA Intermediate on Feb 21, 2014 under the narrative "to PPVA THE GP"
- $1,926,029 paid from the Master Fund to PPVA USA on Feb 21, 2014
- $1,926,029 received by PPVA USA on Feb 21, 2014
- $1,926,029 paid out of the PPVA USA on Feb 21, 2014 under the narrative "to PPVA THE GP"[9]

The February 2014 Cash Reconciliations for PPVA's feeder funds produced by SS&C (Platinum's fund administrator) and approved by Platinum Management picked up the above receipts and payments in February and clearly flag these as "GP Payment[s]" with the source of funds coming from the Master Fund. (Bixter Declaration at Ex. 21) These withdrawals are also clearly shown in the monthly NAV packs produced by SS&C and approved by Platinum Management. (Bixter Declaration at. Exs. 22 and 23).

Quintero also reviewed a significant amount of data and reports compiled by the JOLs – pursuant to PPVA Master Fund's own bank statements – evidencing the use of PPVA's funds to pay more than $40 million in management fees to Platinum Management during the damages period. (Bixter Decl. at Ex. 24)

[9] *See* Bixter Declaration at Ex. 20 for copies of applicable bank statements.

Quintero will testify as to the use of PPVA funds to pay management and incentive fees. Expert testimony is admissible where it "synthesizes" or "summarizes" data in a manner that "streamline[s] the presentation of [evidence] to the jury, saving the jury time and avoiding unnecessary confusion." *Louis Vuitton Malletier S.A. v. Sunny Merch. Corp.*, 97 F.Supp.3d 485, 504 (S.D.N.Y. 2015). "An expert also may offer commentary on documents in evidence if the expert's testimony relates to the 'context in which [documents] were created, defining any complex or specialized terminology, or drawing inferences that would not be apparent without the benefit of experience or specialized knowledge.'" *Scott*, 315 F.R.D. at 45 (quoting *In re Fosamax Prods. Liab. Litig.*, 645 F.Supp.2d 164, 192 (S.D.N.Y. 2009)).

The jury also will need Quintero's assistance in streamlining the evidence concerning Platinum Management's treatment of accrued incentive fees not paid directly to the general partner. What Defendants fail to mention is that the incentive fees that accrued to the general partner account with the Feeder Funds were regularly transferred to personal accounts controlled by family members of Platinum Management's owners, including Huberfeld, Bodner and Fuchs.

For example, in January 2013, there was a withdrawal from the general partner account at the Onshore Feeder Fund of $18,530,000. Quintero Report at p. 165. In the same month, $18,460,000 was invested into personal accounts controlled by Platinum Management's owners and their family members in the Onshore Feeder Fund. These transfers are all highlighted in the SS&C statements for January 2013 that were approved by Platinum Management. Quintero Report at pp. 165, 402-407. Quintero will testify at trial that, in 2013 alone, $15.5 million of "redemptions" were paid to these individual accounts, which were, in fact, payments on account of incentive fees, with all such cash payments originating from PPVA's bank account. In other words, leaving out the intermediate transfers, the incentive fees were transferred from PPVA to

the individual owners of Platinum Management, including the Defendants Fuchs, Nordlicht, Bodner and Huberfeld.

Finally, if the jury decides at trial that Defendants are fiduciaries of PPVA, then all amounts they personally received (via their family structures) from PPVA are subject to clawback by way of disgorgement. *See e*.g. *Stanley v. Skowron*, 989 F.Supp.2d 356, 363 (S.D.N.Y. 2013) (concluding that faithless servant who was not paid on a task-by-task basis must forfeit one hundred percent of the compensation he received during period of disloyalty).

Hence, there are three bases for remedy arising from the overvaluation. First, there are *damages* in the amount of management fees and incentive fees wrongfully paid by the PPVA Master Fund. Second, the amount of disguised redemptions and LP interest grants paid to Defendants Fuchs, Nordlicht, Bodner and Huberfeld. Third, in the event that the moving Defendants are fiduciaries, the precise amount of money paid to Defendants via the Mark Nordlicht Grantor Trust or otherwise since the inception of PPVA (of course subject to appropriate foundation concerning the bank statements). Quintero is qualified to opine on all three of these points and the jury should hear his testimony.

III. QUINTERO SHOULD BE PERMITTED TO TESTIFY AS TO THE DAMAGES CONCERNING A WAVE OF REDEMPTIONS

Quintero's Report sets forth four plausible scenarios that could have resulted from a full and fair disclosure of PPVA's true NAV and the financial distress at PPVA. *See* Quintero Report, ¶¶ 65-73 and Ex. 39.

Defendants seek to exclude Quintero's testimony as speculative, particularly as to the threat of mass redemptions, because 25% of PPVA investors were Platinum insiders and the majority of PPVA's assets were tied up in illiquid positions.

Indeed, it is the Defendants who are engaging in speculation. Quintero's Report relies on hard evidence of a significant increase in redemptions over the Damages Period, directly contradicting Defendants' claim that PPVA's investors would have remained with the fund through thick and thin. Quintero Report at Ex. 37. As stated in Quintero's Report:

> Even without having a scintilla of knowledge of the improper conduct of the Defendants or the degree to which the NAVs were overstated, resulting in excessive management fees and incentive fees charged to the Fund, there was a growing amount of redemption requests (**Exhibit 37**). The month-end redemption request balances for the three months ended March 31, 2016 averaged approximately $75 million (**Exhibit 37**). Assuming that Platinum exercised the contractual right to take up to 90 days to honor the redemption requests, a $75 million month-end balance represents an annualized level of redemption requests of $300 million. This would represent more than a third of the Fund's purported net asset value of $884 million as of March 31, 2016.

Quintero Report at ¶ 70.

"'Although an expert's analysis [must] be reliable at every step,' analogy, inference and extrapolation can be sufficiently reliable steps to warrant admissibility so long as the gaps between the steps are not too great." *In re Ephedra Products Liability Litig.*, 393 F.Supp.2d 181, 188 (S.D.N.Y. 2005). Indeed, the Second Circuit has stated that "gaps or inconsistencies in the reasoning leading to [the] opinion . . . go to the weight of the evidence, not its admissibility." *Campbell v. Metropolitan Property and Casualty Ins. Co.*, 239 F.3d 179, 186 (2d Cir. 2001).

Defendants are entitled to cross-examine Quintero and make the argument that PPVA's illiquid positions would somehow have convinced PPVA's investors to remain with the fund, if a full and accurate accounting of PPVA's net asset value had been accomplished. But exclusion of Quintero's testimony on such a basis is improper.[10]

[10] To be sure, the damages due to the overvaluation scheme perpetrated by Defendants is not limited to excessive fees and redemptions, but also the foreseeable damage of the asset diversion schemes to Beechwood and PPCO – also owned and operated by Defendants, culminating with the Agera Transactions.

CONCLUSION

For the foregoing reasons, the PPVA Plaintiffs respectfully request the Court: (i) deny Defendants' Motion to Exclude the Expert Report of Ronald G. Quintero; and (ii) grant any additional relief that this Court deems just and proper.

Dated: New York, New York
June 2, 2020

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