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)

MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO EXCLUDE THE EXPERT REPORT OF BILL POST

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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 Murray Huberfeld to Exclude the Expert Report of Bill Post ("**Mr. Post**").[1] Given that Defendants David Bodner and Bernard Fuchs have both indicated their intent to join in the aforementioned motion, this opposition addresses the moving party as "Defendants" to include Huberfeld, Bodner, and Fuchs.[2]

INTRODUCTION

Bill Post — Senior Managing Director at the global consulting firm FTI Consulting — is a qualified expert with more than 29 years of experience as a portfolio manager, and as a senior executive with direct responsibility for the investment management process. In particular, Mr. Post has expertise in analyzing and monitoring the performance of other fund managers who invested in distressed equity and debt issuances similar to those of Black Elk. He will offer testimony that will help a jury understand the complex financial structures and machinations that enabled Defendants' fraudulent conduct, and compare their conduct with what is ordinarily expected in the investment management industry. Specifically, Mr. Post will provide expert

[1] The November 14, 2019 Expert Report of Bill Post ("**Post Report**") is attached at Exhibit 2 to the June 2, 2020 Declaration of Richard A. Bixter, Jr. ("**Bixter Decl.**").

[2] On May 19, 2020, Defendant David Bodner filed a motion to exclude the expert report of Ronald G. Quintero and stated in his accompanying memorandum of law: "Bodner joins in the *Daubert* motion filed by defendant Huberfeld to exclude the expert report of Bill Post (ECF No. 627), and reserves the right to file a reply memorandum and offer oral argument in support thereof." (ECF No. 872 at n.25). That same day, counsel for Defendant Bernard Fuchs submitted a Declaration in Support of Motion by Murray Huberfeld to Exclude Expert Report, which states, in relevant part: "I make this declaration to join in the motion by defendant Murray Huberfeld dated May 19, 2022 [sic] to exclude the expert report of plaintiff's expert, Bill Post, and his concomitant testimony thereof at trial." (ECF No. 630 at 1).

testimony 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 structural organization of the Master Fund and Feeder Funds;
- The roles and responsibilities of Platinum Management as the sole investment manager to and general partner of the Master Fund, with reference to common industry standards for investment managers of hedge funds similar to Platinum;
- The incentive fees and management fees paid by PPVA and how this payment structure compares to others utilized by investment managers in the same industry;
- The regulations applicable to investment advisors pursuant to the U.S. Investment Advisers Act of 1940;
- The illiquid investments held by the Master Fund, while providing context to how "Level 3" assets are held and valued in this particular industry, and how actual knowledge of an asset's problems can and must be incorporated into establishing valuation;
- The ownership structure of the Beechwood reinsurance and investment management companies (collectively, "Beechwood"), one of the major mechanisms of the fraud and breach of duty, including a streamlined explanation of the connections and interactions between Beechwood and Platinum Management;
- The ownership structure of the Black Elk Opportunity Fund entities (collectively, "BEOF"), including a streamlined explanation of the connections and interactions between BEOF and Platinum Management based on the available evidence;
- The mechanisms and practices by which the Black Elk Bonds were subordinated and traded by and between Platinum and Beechwood to the detriment of PPVA.

Defendants' preliminary statement purports to set forth "obvious improprieties" that warrant the exclusion of Mr. Post's expert opinion, but this is nothing more than a laundry list of common objections to expert reports, which are inapplicable to Mr. Post's proffered testimony. As explained below, given Mr. Post's specialized knowledge in the field of investment management, his testimony easily clears the threshold of reliability under Rule 702 and will aid the trier of fact

by providing context to the professional standards, roles, and responsibilities of those engaged in the investment management industry. Mr. Post makes this clear in his report:

> [T]he opinions outlined in this report are my own opinions based on: (i) my investment management and advisory experience described in the previous section; and (ii) the review and analysis (performed or directed by me) of the documents, transcripts of deposition testimony, and industry research cited in the footnotes of this report and listed on Appendix B. ***My opinions do not and are not intended to represent legal opinions regarding findings of fraud or other statutory violations***.

Post Report at ¶ 10. (emphasis added).

Similarly, Defendants' argument that Mr. Post improperly opines on "lay matters" demonstrates their misguided understanding of what constitutes accepted expert testimony. In several places throughout the instant motion, Defendants argue that "non-scientific matters . . . do not require expert testimony," as though experts are limited to traditional scientific fields. But the case Defendants rely upon for this proposition makes clear that "[a]n intelligent evaluation of facts is often difficult or impossible without the application of some scientific, technical, ***or other specialized knowledge.***" *Andrews v. Metro North Commuter R. Co.*, 882 F.2d 705, 707 (2d Cir. 1989) (citing Fed. R. Evid. 702, Advisory Committee Note) (emphasis added).

It is no mistake that the categories of expert testimony set forth in *Andrews* are stated in the disjunctive, as experts who are experienced in fields other than traditional "science" are regularly permitted to testify in order to aid the trier of fact in their evaluation of evidence when a particular industry, such as investment management, is uncommon to a lay juror's experience.[3]

[3] *See, e.g.*, *Chill v. Calamos Advisors LLC*, 417 F.Supp.2d 208, 236-37 (S.D.N.Y. 2019) (witness with twenty five years of experience in the asset management industry qualified as an expert with "specialized knowledge" in action brought by mutual fund shareholders under the Investment Company Act, alleging that advisors breached fiduciary duties with respect to receipt of compensation for services); *DiFelice v. U.S. Airways, Inc.*, 436 F.Supp.2d 756, 758 n.2 (E.D. Va. 2006) (allowing testimony from two expert witnesses in the field of "investment management" during a six day trial where the issue was whether U.S. Airways breached its fiduciary duty under ERISA); *Williams v. Security Nat'l Bank of Sioux City*, 358 F.Supp.2d 782, 807 (N.D. Iowa 2005)

In following *Daubert* and its progeny, federal courts recognize that litigants who are unhappy with an opposing expert's testimony often "cloak[] that unhappiness in challenges to 'reasoning and methodology.'" *Engineered Prods. Co, v. Donaldson Co., Inc.*, 313 F.Supp.2d 951, 1011 (N.D. Iowa 2004). Excluding expert testimony in those instances ultimately "invade[s] the province of the jury, whose job it is to decide issues of credibility and to determine the weight that should be accorded evidence." *United States v. Vesey*, 338 F.3d 913, 916-17 (8th Cir. 2003). Defendants' self-serving disagreement with Mr. Post's testimony does not serve as a valid basis for exclusion when the opinions rendered are both relevant and reliable and will aid the jury in their evaluation of the facts.

Defendants also argue that Mr. Post's lack of "personal knowledge" of the facts somehow renders his expert testimony inadmissible. However, expert testimony is admissible where it "synthesizes" or "summarizes" data in a manner that "streamline[s] the presentation of that data 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). Rarely is an expert witness engaged to provide support in litigation where the witness himself was also a party to the underlying events and conduct at issue. Accordingly, "[a]n expert 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 v. Chipotle*

("Mr. Borton's evidence is plainly relevant to the question of whether or not [defendant] made appropriate investment management decisions and whether those decisions had an impact on the value of the Trust, that such evidence will serve to aid the trier of fact, and that Mr. Borton's extensive training and experience in trust investment management . . . qualify him as an expert in trust investment management.").

Mexican Grill, Inc., 315 F.R.D. 33, 45 (S.D.N.Y. 2016) (quoting *In re Fosamax Prods. Liab. Litig.*, 645 F.Supp.2d 164, 173 (S.D.N.Y. 2009)).

Here, Mr. Post's specialized knowledge of the investment management industry will help synthesize and summarize the labyrinth of affiliated entities associated with Platinum Management and its owners, including Beechwood and BEOF, as well as the series of related party transactions among them. The principal transactions opined on by Mr. Post — Black Elk (Post Report at ¶¶ 70-84), the Agera Transactions (*id.* at ¶¶ 85-95), the Nordlicht Side Letter (*id.* at ¶¶ 96-101) and the overvaluation scheme (*id.* at ¶¶ 102-111) — were purposefully complex and designed to obfuscate the ultimate goal of dissipating PPVA's assets for the benefit of entities affiliated with Platinum Management and their common owners.

In summary, Defendants improperly move to preclude the jury's consideration of Mr. Post's expert testimony, as his specialized knowledge and experience in investment management provides context that elucidates the improper conduct Defendants will seek to obscure at trial. The jury should be permitted consider relevant and reliable expert testimony and draw their own conclusions as to its weight and credibility.

STANDARD OF REVIEW

Defendants' instant motion includes a section entitled "Legal Standards Governing this Motion," which sets forth a misguided standard of review and argues that "the Post Report is quintessential improper expert testimony, which courts in this Circuit have repeatedly ruled is *per se* inadmissible." (ECF No. 870 at 11). The controlling case law rejects this "*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 Co. v. Carmichael*, 526 U.S. 137, 152 (1999); *Amorgianos v. Nat'l R.R. Passenger Corp.*, 303 F.3d 256, 267 (2d Cir. 2002)).[4]

This Court has recognized "the Federal Rules of Evidence favor the admissibility of expert testimony, and [the court's] role as gatekeeper is not intended to serve as a replacement for the adversary system." *Louis Vuitton Malletier S.A. v. Dooney & Bourke, Inc.*, 525 F.Supp.2d 558, 562 (S.D.N.Y. 2007). As the Supreme Court stated in *Daubert*: "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 Pharmaceuticals, Inc.*, 509 U.S. 579, 595-96 (1993). Mr. Post's testimony will undoubtedly be subject to cross examination at trial, and it is the jury's responsibility to determine his credibility and assign weight to the testimony presented.

Lastly, Defendants' claim that Mr. Post's testimony should be excluded under Federal Rule of Evidence 403 is baseless in that they fail to offer any specific arguments as to how Mr. Post's expert testimony will be cumulative or otherwise waste the jury's time. As detailed below, Mr. Post's testimony is far from cumulative and his specialized knowledge with respect to the

[4] This Court has also 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). However, there are certain "indicia of reliability" under Rule 702, which include: "(1) that the testimony is grounded on sufficient facts or data; (2) that the testimony is the product of reliable principles and methods; and (3) that the witness has applied the principles and methods reliably to the facts of the case." *Amorgianos*, 303 F.3d at 265 (quoting Fed. R. Evid. 702).

complexities inherent in investment management will streamline the facts and issues the jury must consider. Similarly, Defendants rely on conclusory statements in arguing the probative value of Mr. Post's testimony is outweighed by unfair prejudice. Conclusory arguments that simply recite Rule 403's provisions and argue 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) ("K&S also seeks to exclude [the expert]'s testimony pursuant to Rule 403, but that section of its brief does nothing but recite the rule and make a conclusory statement about [the expert]'s reliability.").

ARGUMENT

I. Mr. Post is qualified to render expert testimony on issues in this case that are directly related to his experience in the field of investment management, and Mr. Post's lack of "personal knowledge" is not a basis to exclude his expert testimony in this matter.

Throughout the instant motion, Defendants challenge Mr. Post's qualification as an expert in this case due to his lack of "personal knowledge" regarding Platinum Management and its managers. Defendants' argument is without basis in the Federal Rules of Evidence.

Rule 702 provides that in order for a witness to render opinion testimony at trial, he or she must be "qualified as an expert by knowledge, skill, experience, training, or education." Fed. R. Evid. 702. As Defendants acknowledge, prior to joining a consulting practice, Mr. Post "held various senior investment management and advisory roles at a variety of financial and investment firms." (ECF No. 870 at 6). Specifically, Mr. Post "held various senior investment management and advisory roles including Chief Investment Officer 'CIO' for the alternative assets business of a multi-billion dollar public investment management company. In this business, focused on private equity and hedge fund investing, [Mr. Post] served as chairman of the investment committee and oversaw all portfolio functions on a day-to-day basis." Post Report at ¶ 1. Mr. Post also served as the Chief Compliance Officer of an investment advisor registered with the Securities and Exchange

Commission. In that capacity, Mr. Post "oversaw the establishment of all compliance rules and policies and the monitoring and enforcement of all compliance matter." *Id.* Mr. Post also served in numerous roles as a fiduciary for investment firms and, as a result of serving in those roles, is familiar with the responsibilities of a fiduciary in the investment management industry. As an expert witness, Mr. Post has provided testimony related to the following:

> Fraudulent investment schemes (including Ponzi schemes), fiduciary duty, conflicts of interest, duty of care and loyalty, investment fund management, due diligence in the investment process, corporate and board governance and control, investment strategies, mutual funds, private placements, adequacy of investment disclosures, investment diversification, investment staff supervision, investor activism, compliance with SEC and FINRA rules, investment-related guidelines and statutes, financial industry regulations, asset management and incentive fees, [and] hedge fund administration.

Id. at ¶ 5.

Mr. Post is a Senior Managing Director at FTI Consulting and works in the Dispute Advisory Services practice within the Forensic & Litigation Consulting segment. He has twenty-nine years of experience as an investment management professional, including roles as CEO, CIO, chief compliance officer, and portfolio manager. Mr. Post is an expert in the management of equity, fixed income and alternative assets, including hedge funds, venture capital, and private equity. In addition to advising investment organizations on board governance, operational, administration, marketing, fund raising, and investment entity structures, Mr. Post provides expert witness testimony related to fiduciary duty, investment methodologies, the Uniform Fraudulent Transfer Act, compliance (SEC, FINRA, and the banking industry), fees, performance compliance, hedge fund administration, private placements and the documentation associated with fund raising, corporate governance, board of directors duties and responsibilities, and transactions related to the sale or purchase of businesses. Mr. Post has been employed as an expert witness by SEC-appointed receivers in several high-profile matters, including the Allen Stanford/Stanford Financial Group

Ponzi scheme. He also provided expert testimony for the receiver in the U.S. District Court for the Eastern District of Pennsylvania in a case involving a hedge fund Ponzi scheme, which resulted in a successful outcome for the government.

The "threshold question" of qualification is important "because an expert witness is permitted substantially more leeway than lay witnesses in testifying as to opinions ***that are not rationally based on [his or her] perception.***" *Nimely v. City of New York*, 414 F.3d 381, 396 n.11 (2d Cir. 2005) (emphasis added). Instead, the Court looks to whether the expert is analyzing evidence and providing testimony on "issues or subject matter within his or her area of expertise." *Haimdas v. Haimdas*, 2010 WL 652823, at *2 (E.D.N.Y. Feb. 22, 2010) (citing *Stagl v. Delta Air Lines, Inc.*, 117 F.3d 76, 80 (2d Cir. 1997)). To the extent Defendants' "personal knowledge" argument is an attempt to challenge Mr. Post's qualifications as an expert witness, that argument is categorically rejected by the above case law. The totality of Mr. Post's background, as set forth in his expert report, makes clear that he possesses knowledge, skill, experience, training, and education in the field of investment management and the professional standards in the industry.

Additionally, the subject matter of Mr. Post's testimony will draw directly from his experience in "various senior investment management and advisory roles at a variety of financial and investment firms," and will remain properly confined to that area during trial. And while the proponent of an expert witness must "demonstrate his qualifications as an expert, courts in the Second Circuit liberally construe expert-qualification requirements in consideration of the 'thrust' of the Federal Rules and their general relaxation of traditional barriers to opinion testimony." *Washington v. Kellwood Co.*, 105 F.Supp.3d 293, 305 (S.D.N.Y. 2015) (quoting *United States v. Ulbricht*, 2015 WL 413318, at *7 (S.D.N.Y. Feb. 1, 2015)). Therefore, "[i]f the expert has educational and experiential qualifications in a general field closely related to the subject matter

in question, the court will not exclude the testimony solely on the ground that the witness lacks expertise in the specialized areas that are directly pertinent." *Arista Records LLC v. Lime Grp. LLC*, 2011 WL 1674796, *3 (S.D.N.Y. May 2, 2011).

For these reasons, Mr. Post's lack of "personal knowledge" is not a basis to exclude his expert testimony in this matter, as he is well qualified to opine on matters unique to the investment management industry that are beyond the common experience of the lay juror and will assist the trier of fact in arriving at the truth.

II. Mr. Post's specialized knowledge in the field of investment management and his analysis of the facts and data provided in discovery render his opinions set forth in Section IV of the Post Report both relevant and reliable.

"Once a court has determined that a witness is qualified as an expert, it must next ensure that the expert's testimony both 'rests on a reliable foundation and is relevant to the task at hand.'" *523 IP LLC v. CureMD.Com*, 48 F.Supp.3d 600, 641 (S.D.N.Y. 2014) (quoting *Daubert*, 509 U.S. at 597). Importantly, "district courts at least start with the presumption that 'expert evidence is reliable' . . . [and] 'a review of the case law after *Daubert* shows that the rejection of expert testimony is the exception rather than the rule.'" *Washington*, 105 F.Supp.3d at 305-06 (quoting *Arista Records*, 2011 WL 1674796 at *3; Fed. R. Evid. 702 Advisory Committee Note).

Defendants ignore these well-settled principles, and, while pointing to Section IV of the Post Report, which provides a general factual background, argue that Mr. Post will be presented to the jury "***solely*** for the purpose of constructing a factual narrative based upon record evidence." (ECF No. 870 at 12).[5] Defendants are incorrect.

[5] Defendants cite *Highland Capital Mgmt., L.P. v. Schneider*, 379 F.Supp.2d 461 (S.D.N.Y. 2005), for this proposition along with a string cite of cases lifted from the Court's opinion. Notably, in all of those cases, there were fact witnesses familiar with the various documents and correspondence who remained available at trial to present that information to the jury. While the Joint Official Liquidators will be testifying concerning a great deal of factual matter in this case, the various depositions of Platinum managers and officers has revealed these fact witnesses will not provide

First, it is well established that an expert must lay a factual foundation for his or her opinion. *See Amorgianos*, 303 F.3d at 266-67. As this Court noted in *Highland Capital*, "[o]ne of the fundamental requirements of Rule 702 is that the proposed testimony 'assist the trier of fact to understand the evidence or to determine a fact in issue.'" *Id.* at 468 (quoting *In re Rezulin Products Liab. Litig.*, 309 F.Supp.2d 531, 540 (S.D.N.Y. 2004)). In order to assist the trier of fact in understanding the evidence, the Second Circuit has held that "an expert may opine on an issue of fact within the jury's province" so long as they do not "give testimony stating ultimate legal conclusions based on those facts." *United States v. Bilzerian*, 926 F.2d 1285, 1294 (2d Cir. 1991).[6] It is only where the expert solely presents a factual narrative of uncomplicated facts, which the jury is capable of understanding on their own, that courts find expert testimony to be inadmissible. *See, e.g.*, *In re Longtop Fin. Techs. Ltd. Sec. Litig.*, 32 F.Supp.3d 453, 462 (S.D.N.Y. 2014). Thus, 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

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the jury with the context needed to evaluate that evidence, and in the instance of Platinum Management CIO Mark Nordlicht, will assert the Fifth Amendment and remain silent.

[6] The district court in *Bilzerian* found that the expert at issue properly provided general background on federal securities regulation and provided a limiting instruction to ensure the jury understood that the expert was not rendering an opinion as to what the law required. *Id.* at 1295. On appeal, the Second Circuit found that the trial court's ruling on the admissibility of this expert testimony was not clearly wrong and held that "testimony concerning the ordinary practices in the security industry may be received to enable the jury to evaluate a defendant's conduct against the standards of accepted practice." *Id.*

benefit of experience or specialized knowledge.'" *Scott v. Chipotle Mexican Grill, Inc.*, 315 F.R.D. 33, 45 (S.D.N.Y. 2016) (quoting *In re Fosamax Prods. Liab. Litig.*, 645 F.Supp.2d at 192).

Mr. Post is an expert with extensive experience in the highly regulated industry of investment management and will present background facts to provide context to Defendants' conduct and the various investment decisions made by Platinum Management and its owners and control persons. Mr. Post will also summarize and synthesize the common ownership among Platinum Management, Beechwood and BEOF, as ownership of these entities were masked behind a complex mix of trusts, entities and family members. *See* Post Report at Ex. 1.[7] Notably, in cases involving allegations of fraudulent valuations and transfers, federal courts permit expert testimony "on the ultimate issue of fraud where the witness seeks to testify as to the 'badges of fraud.'" *Grayiel v. AIO Holdings, LLC*, 2019 WL 2372901, at *3 (W.D. Ky. Mar. 15, 2019) (citing *Sierra Enterprises Inc. v. SWO & ISM, LLC*, 264 F.Supp.3d 826, 841 (W.D. Ky. 2017)). Plaintiff's expert witness in *Grayiel* was a CPA with "extensive experience working with clients on accounting fraud, as well as with clients in the oil and gas industry." *Id.* at *2. The lawsuit alleged that Defendants conspired with an individual — Martin Twist – "to fraudulently transfer his assets, including multiple natural gas assets, at a significant discount, to shield them from Mr. Twist's creditors, including Plaintiff." *Id.* at *1. Despite having no "personal knowledge" with respect to the fraudulent scheme, Plaintiff's expert was permitted to provide testimony on the actions taken

[7] It should also be noted that if Defendants were truly concerned about Mr. Post's qualifications and experience in this area, Mr. Post could have been noticed for a deposition and questioned on both his background and methodologies. As the Court is aware, there were no shortage of depositions in this matter and Mr. Post remained available for a deposition throughout the entire discovery period. Defendants' failure to notice Mr. Post for a deposition speaks volumes with respect to the validity of their challenge to Mr. Post's ability to satisfy the standards under Rule 702 and *Daubert*.

by Defendants and Mr. Twist that evidenced fraud. In permitting this testimony, the Court explained:

> Given the complications a lay person would face in understanding the complex nature of financial fraud, the Court finds that the testimony of Mr. Meadors is admissible. Mr. Meadors' expert opinions are admissible for establishing the factual elements of fraud, not the fraud itself. Mr. Meadors may testify as to how the actions at issue could constitute fraud, with specific reference to the "badges of fraud." Defendants are free to cross-examine Mr. Meadors to challenge his factual interpretations, and they are free to object to his testimony if they believe it veers too far from establishing facts. However, they may not exclude his testimony simply because it touches upon legal issues. Plaintiff is entitled to the assistance of his expert witness in establishing his case.

Id. at *4; *see also Grayiel v. AIO Holdings, LLC*, 2019 WL 2372899 (W.D. Ky. Apr. 29, 2019) (Order adopting Report and Recommendation). As in *Grayiel*, this case is far afield from those matters involving "uncomplicated facts, which a lay jury is capable of understanding on their own." *In re Longtop,* 32 F.Supp.3d at 462. Mr. Post's understanding of how the Master Fund and various feeder funds are structured will streamline the presentation of evidence in this matter and assist the jury in understanding Platinum Management's role in the management of PPVA. Recognizing the complex nature of this case and the intentionally obscure ways in which Platinum Management operated, Defendants have a vested interest in injecting confusion into this case. However, the jury is entitled to a clear presentation of important background facts to contextualize the key issues to be determined.

III. Mr. Post's expert opinion in Sections III, VI, VII, VIII and IX, addressing the standards and duties applicable to Platinum Management and its owners, serve the jury's fact finding function by providing context to the available evidence, and it will be for the jury to reach its own conclusions as to whether each defendant violated those standards and duties.

"[E]xpert testimony is *not* objectionable because it embraces an ultimate issue to be decided by the trier of fact." *Pretter v. Metro-North Commuter R. Co.*, 2002 WL 31163876, at *1 (S.D.N.Y. Sept. 30, 2002) (citing Fed. R. Evid. 704(a)). Here, Mr. Post utilizes his experience in

investment management — including his service as a Chief Investment Officer and member of a valuation committee — to contextualize the evidence that will be available to the jury so they will understand the standards Platinum Management and its managers were operating under with respect to management of PPVA's assets, as well as standard industry practices by investment managers in order to meet such standards.

Mr. Post's own assessment of this evidence leads to his opinion that Platinum Management and its executives engaged in improper, non-arms' length transactions, including Black Elk, the Agera Transactions, the Nordlicht Side Letter and the overvaluation of PPVA's net asset value, which financially damaged the Master Fund. However, the jury will draw its own conclusion as to whether the actions taken by Platinum Management and its managers constitute a breach of fiduciary duty and/or fraud. The Defendants will advance their own arguments at trial that their conduct with respect to the management of PPVA through Platinum Management was entirely proper. Mr. Post's evaluation of the same evidence, informed by his own experience as a Chief Investment Officer and member of a valuation committee, will counter those arguments in a manner that is entirely proper under the adversarial system.

As acknowledged by Defendants, expert testimony can be "carefully circumscribed to assure that the expert does not usurp either the role of the trial judge in instructing the jury as to the applicable law or the role of the jury in applying that law to the facts before it." *Bilzerian*, 926 F.2d at 1294. The Court also has broad discretion in admitting expert testimony and can guard against any improper weight the jury may assign to Mr. Post's testimony through limiting instructions. Courts in the Second Circuit have noted that "in a complex action regarding corporate or securities law, expert testimony may help a jury understand unfamiliar terms and concepts" and expert testimony that embraces an ultimate issue to be decided by the jury is permitted, as long as

those opinions do not "merely tell the jury what result to reach." *SLSJ, LLC v. Kleban*, 277 F.Supp.3d 258, 270 (D. Conn. 2017); *Kidder, Peabody & Co., Inc. v. IAG Intern. Acceptance Grp., N.V.*, 14 F.Supp.2d 391 (S.D.N.Y. 1998).

Here, the flexible standards of admissibility for expert testimony should permit Mr. Post to present testimony on the ordinary practices, standards, and duties that are applicable in the investment management industry in order to "enable the jury to evaluate a defendant's conduct against the standards of accepted practice." *Bilzerian*, 926 F.2d at 1295.

To combat this flexible standard, Defendants cherry pick quotes from the Post Report to argue that Mr. Post is offering conclusory legal opinion as testimony. A full reading of the Post Report outside of the summaries provided in Sections III and VI, however, clearly indicates that Mr. Post will not offer legal conclusions, but will instead testify on the failure of Platinum Management and its owners and control persons to comply with industry standards in connection with management of PPVA, and a failure to implement necessary safeguards in connection with related party transactions:

Section VII – In this section, Mr. Post sets forth the opinion that "[b]ased on the foregoing factual analysis, Beechwood and BEOF had the indicia of being alter egos of PM, which itself was an entity controlled by Nordlicht, Landesman, Levy, Bodner, Huberfeld, and Fuchs and owned by all of the same individuals, apart from Levy." Post Report at ¶ 66. Mr. Post did not reach this opinion through guidance by Plaintiffs' counsel (as suggested by Defendants), but through application of his specialized knowledge to the facts of this case indicating common ownership and control of Platinum Management, Beechwood and BEOF among the Platinum Management principals. *See id.* at ¶¶ 55-56, Ex. 1 (outlining common ownership of Platinum Management, Beechwood and BEOF); *Id*. at ¶¶ 57-63 (evidence relied upon by Mr. Post leading to opinion of

common control among Platinum Management, BEOF and Beechwood and the conceal of David Bodner and Huberfeld as control persons). While Mr. Post is well aware that he cannot offer a legal conclusion regarding the alter ego issue, he is permitted to testify, based on his industry experience and specialized knowledge, whether Platinum Management, Beechwood and BEOF had the *indicia* of an alter ego relationship and whether they were affiliated.

Section VIII – Next, Mr. Post analyzed transactions in connection with Black Elk, Agera and the Nordlicht Side Letter in reaching the opinion that Platinum Management "had a clear conflict of interest, and yet failed to put in place safeguards to ensure the transactions were completed at arms-length. Such safeguards should have included mechanisms of independent review on behalf of [PPVA], e.g., fairness opinions, separate legal representation, competitive bidding, etc." Post Report at ¶ 68. Mr. Post is well qualified to offer an opinion on the lack of independent safeguards in connection with these related party transactions, as well as the manner, and extent, to which PPVA was harmed by Defendants' conduct.

Section IX – Mr. Post's Report concludes with a discussion of the importance of net asset value to a hedge fund: "[a]n investment fund's NAV is a foundational metric of upmost importance to the marketplace - as it is routinely relied upon by fund investors, creditors, counterparties, and regulators, and is used as the basis of calculating a fund manager's compensation." Post Report at ¶ 102. Mr. Post further opines that related party transactions effectuated by Platinum Management and Beechwood – Mr. Post specifically references the January 2015 Black Elk Bond Buyback and the sale of Golden Gate Oil debt to Beechwood – as an effort to "buy and sell the securities of their oil holdings at above market rates in order to justify [Platinum Management's] inflated valuations." Post Report at ¶ 109.

These opinions are all well-grounded in Mr. Post's stated expertise and will assist the jury in understanding the context and complex machinations that comprised the Defendants' fraudulent schemes. Accordingly, Mr. Post should be permitted to testify to the opinions set forth in his Report and Defendants' attempt to deprive the jury of Mr. Post's testimony should be denied.

IV. Section V of the Post Report does not improperly invade the province of the Court and Mr. Post will not instruct the jury on applicable law at trial.

Mr. Post's testimony will not usurp the role of the trial judge in instructing the jury, as Defendants suggest. Mr. Post does not opine on the elements of breach of fiduciary duty, fraud, or civil conspiracy; rather, Mr. Post applies his specialized knowledge to the available evidence to provide helpful context to the jury as it analyzes the evidence and reaches its own conclusions as to liability. Mr. Post's expert report does not — and Mr. Post will not at trial — instruct the jury on the applicable law, as there is no dispute such instructions are solely the responsibility of the Court. However, Mr. Post should not be precluded from contextualizing the evidence based on his specialized knowledge of investment management, as his prior experience as a fiduciary for investments in the same industry provides helpful insight into the facts and issues the jury will consider. Further, Mr. Post should not be precluded from opining on industry standards in the investment management industry in connection with investment managers' fiduciary duties. *See* Post Report at ¶¶ 42-47.

CONCLUSION

For the foregoing reasons, the JOLs respectfully request the Court: (i) deny the Motion to Exclude the Expert Report of Bill Post; and (ii) grant any additional relief that this Court deems just and proper.

Dated: New York, New York
June 2, 2020

HOLLAND & KNIGHT LLP

By: /s Warren E. Gluck

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