UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE PLATINUM-BEECHWOOD LITIGATION	No. 18 Civ. 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, v. PLATINUM MANAGEMENT (NY) LLC, *et al.*, Defendants.	No. 18 Civ. 10936 (JSR)

MEMORANDUM OF LAW OF DEFENDANT DAVID BODNER IN SUPPORT OF HIS MOTION TO EXCLUDE THE EXPERT REPORT OF RONALD G. QUINTERO

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Defendant David Bodner respectfully submits this Memorandum of Law in support of his Motion to Exclude the Export Report of Ronald G. Quintero, dated November 14, 2019 (the "Quintero Report") pursuant to Federal Rules of Evidence 702 and 403 and *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993). The Quintero Report is offered by plaintiffs, the Joint Official Liquidators (the "Liquidators") of Platinum Partners Value Arbitrage Fund L.P. ("PPVA") and is annexed as Exhibit A to the Declaration of Abigail B. Johnston, dated May 19, 2020 ("Johnston Decl.").

PRELIMINARY STATEMENT

In what little remains of this action, the Liquidators fault Bodner for not disclosing that he had allegedly come to learn in or about January 2015 that the net asset value ("NAV") statements prepared by Platinum Management (NY) LLC ("Platinum Management") were fraudulently inflated.[1] (Apr. 21, 2020 Opinion and Order, ECF No. 624, at 29).[2] .

The Liquidators offer the Quintero Report to support and quantify their claim that PPVA suffered damage in the form of payments of inflated management and incentive fees as a result of overstated NAV statements during the period from December 2012 to March 31, 2016 (the so-called "Damages Period"). (Quintero Report ¶ 1(a)). With that defined mandate, one would have expected Quintero to provide a professional valuation of the assets and liabilities in PPVA during the Damages Period, identify any claimed inflated values at relevant times, and establish through the records of PPVA and Platinum Management the excessive payments from PPVA.

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[1] Not for this motion, but the Liquidators have yet to explain exactly to whom disclosure should have been made or what standard of definitiveness was required before an alleged fiduciary would be expected to publicly disclose opinions or information of which disclosure might substantially injure the company to whom the fiduciary owed his duty.

[2] ECF citations refer to the *Trott* docket, 18 Civ. 10936. Capitalized terms not defined herein shall have the meanings ascribed to them in the SAC.

<u>Quintero Did No Valuation Work</u>. Remarkably, Quintero does not perform a valuation of the PPVA portfolio at any time (and certainly not during the Damages Period). What he does provide is a survey of various factors affecting the business of seven portfolio positions in PPVA that he claims were overvalued. (Quintero Report at 17, Table 1). This is a valuation case, for which Quintero does not employ any valuation method even remotely resembling an accepted valuation as used in the appraisal community.

<u>No Payments Are Documented</u>. Quintero claims that PPVA "was charged" $55.1 million in incentive fees based on overstated valuations, but acknowledges that incentive fees are not PPVA's obligations—incentive fees are charged to the limited partners of the Feeder Funds (*i.e.*, the Feeder Funds' investors), not PPVA. Quintero cannot demonstrate that PPVA ever paid these sums. Instead, Quintero simply calculates what *could have been* the payments by multiplying the 2% and 20% fee terms to his claim of inflated values.[3] But damages are not based on what *might have been* paid from PPVA or what *could have been* accrued by the Feeder Funds to be paid by PPVA at a later date, but only on what was *actually* paid from PPVA. Quintero admits that he did not do this work, but pretends to have calculated a damages figure as if he did do the work.

Quintero claims that the Liquidators were able to trace fees paid by PPVA to "bank statements, general ledgers and other records." (Quintero Report ¶ 24). But Quintero provides as support a spreadsheet that purports to set forth fees that were "*[a]ccrued by Feeder Funds* 2012-2016." (Quintero Report Ex. 21) (emphasis supplied). But the Liquidators are not acting on behalf of the Feeder Funds, which were the limited partners of PPVA, and are separate

[3] Quintero calculated Management Fees at an annual rate of 2% of net assets under management, payable on a monthly basis, and Incentive Fees of 20% of net realized and unrealized monthly gains on AUM and other income on net AUM, subject to adjustments. (Quintero Report ¶ 23).

legal entities from PPVA. Accrual of fees at the Feeder Fund level says ***nothing*** about what, if any, cash or other payments were taken from PPVA. Quintero's Report has a complete failure of proof as to whether or when the alleged $55.1 million in incentive fees were paid.

During the Damages Period, as reflected in the Feeder Funds' audited financial statements, the owners and beneficial owners of the Feeder Funds' general partner (*i.e.*, Nordlicht, Huberfeld, Bodner, Landesman and Fuchs) received their incentive allocation from the general partner in the form of a book entry credit to their limited partnership accounts at the Feeder Fund level. In other words, instead of having PPVA pay cash—thus reducing its assets under management—all the limited partners in the Feeder Funds were proportionally diluted to allow for increase in the general partners' capital accounts. But as a result, the incentive fees were not paid ***by PPVA,*** and this reallocation of limited partnership interests at the Feeder Funds had no balance sheet (*i.e.*, cash) impact on PPVA whatsoever.

Pure Speculation. Finally, in his Exhibit 39, Quintero offers a wide array of speculative possibilities as to what might have occurred if PPVA had entered liquidation earlier than it did. There is neither expertise nor basis in this cavalier attempt to inflate potential damages and inject a completely speculative discussion. Exhibit 39 adds no useful analysis to the central claims: (i) whether the portfolio was inflated, if so when and by how much; and (ii) whether PPVA paid inflated fees, if so when and how much.

Quintero's failure to proffer a straightforward expert appraisal report is not inadvertent or the product of inexperience. There are no valuations by Quintero during the relevant Damages Period because of the timing of the Liquidator's involvement with PPVA. Until the government's sweeping and highly-publicized raid on Platinum Management's offices, PPVA was a highly illiquid fund that had promising investments with the potential to produce tremendous values. The government raid and the almost immediate collapse of the Fund resulted in low returns on these assets in the later part of 2016 and in 2017, ***after*** the Liquidators had taken control of PPVA. Quintero would like to use these negligible returns as the basis for valuing the assets in the preceding five years, but there is no professional basis for that. Similarly, there is no acceptable methodology to support Quintero's assumption—replete through his opinions of the assets—that assets devalue in a linear fashion toward a later-learned outcome. What was realized at the end of 2016 or in 2017 says little about previous asset values, such as in January 2015 when the Liquidators contend that Bodner should have disclosed his opinions regarding valuation.

In sum, the Quintero Report is based on lawyer-type arguments and simple, unskilled data compilations. It reflects no professional expertise, and takes a cavalier approach to data. This is precisely the type of unsupported report that cannot be called "expert" and that, when coupled with its prejudicial and speculative commentary, compels exclusion under *Daubert*. Quintero's "opinions are merely a restatement" of the Liquidators' "views and are not the product of independent analysis." *Arista Records LLC v. Usenet.com, Inc*., 608 F. Supp. 2d 409, 428 (S.D.N.Y. 2009).

LEGAL STANDARD

Under Federal Rule of Evidence 702, the party offering expert testimony must establish its admissibility by a preponderance of evidence. *See Daubert,* 509 U.S. 579, 593 n.10 (1993). The trial court serves a "gatekeeping function" to determine whether an expert's testimony is admissible under Rule 702; it must ensure that the expert's testimony "both rests on a reliable foundation and is relevant to the task at hand." *Amorgianos v. Amtrak*, 303 F.3d 256, 265 (2d Cir. 2002); *see also Daubert,* 509 U.S. at 597.

"In short, the district court must make certain that 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." *Amorgianos*, 303 F.3d at 265-266 (internal quotations and citation omitted). If the proffered testimony is based on data, methodology or studies that are "simply inadequate to support the conclusions reached," the Court "may conclude that there is simply too great an analytical gap between the data and the opinion proffered." *Id.* at 266 (internal quotations and citation omitted).

"To warrant admissibility … it is critical that an expert's analysis be reliable at every step." *Amorgianos*, 303 F.3d at 267. Further, while it is true that any one "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," multiple "indicia of unreliability" will. *Lippe v. Bairnco Corp.*, 99 F. Appx. 274, 279 (2d Cir. 2004) (affirming district court exclusion of plaintiffs' experts' evidence where the experts failed to "offer a meaningful explanation" about their method for relying at valuations) (internal quotations and citation omitted). With respect to a valuation report like Quintero's, such indicia of unreliability may include (i) an expert's "inability to explain a number of variables and assumptions used in his analysis;" (ii) his "failure to adjust his calculations to account for variances" between the subject company and the comparison companies, (iii) any glaring or admitted errors in his analysis and (iv) his failure to independently verify information provided to him by counsel. *Id.*

Finally, even testimony that is strictly admissible under Rule 702 may be excluded under Rule 403. *See Nimely v. City of New York,* 414 F.3d 381, 397 (2d Cir. 2005); *see also* Fed. R Evid. 403. Rule 403 is "uniquely important" to the determination of whether expert testimony is admissible, because a jury may give "unique weight" to testimony of a putative expert in the field. *Id.*

ARGUMENT

I. QUINTERO'S VALUATION OPINIONS FAIL TO SATISFY THE REQUIREMENTS OF *DAUBERT*

As the Second Circuit has observed, "valuing illiquid assets is an important (and routine) activity for asset managers, an activity typically guided by Statement 157 of the Financial Accounting Standards Board ('FAS 157')." *NECA-IBEW Health & Welfare Fund v. Goldman Sachs & Co.,* 693 F.3d 145, 167 (2d Cir. 2012). FAS 157 "defines the fair value of an asset as the price the holder would receive from selling the asset *in an orderly transaction at the measurement date*." *Federal Housing Financial Agency v. Nomura Holding Am. Inc.*, No. 11 Civ. 6201 (DLC), 2015 U.S. Dist. LEXIS 18386, at *8 (S.D.N.Y. February 13, 2015) (emphasis supplied, internal quotations and citation omitted).[4]

In Table 1 (Quintero Report at 17), Quintero purports to summarize his analysis of seven largely illiquid positions in the PPVA portfolio that he claims were fraudulently overvalued within the Damages Period. Quintero's opinion with respect to each of the Table 1 positions should be excluded because he does not even attempt to ascertain fair value as of any particular measurement date; nor does he offer a methodology by which a fact finder could conclude that Platinum Management's assessment of fair value was fraudulently inflated as of any particular measurement date. *See In re Methyl Tertiary Butyl Ether Prods. Liab. Litig*., No.

[4] FAS 157 has been replaced in the financial accounting literature with Accounting Standards Code Topic 820 (ASC 820), though the standard remains the same. For example, PPVA's third party valuation firm, Alvarez & Marsal ("Alvarez"), stated in its 2015 review of PPVA's portfolio that, "Our conclusions will be based on the definition of fair value ("Fair Value") provided within ASC § 820, defined as 'the price that would be received to sell an asset or paid to transfer a liability in an orderly transaction between market participants at the measurement date.'" *See* Johnston Decl. Ex. B; *see also* Quintero Report n.9.

1:00 Civ. 01898 (SAS), 2008 U.S. Dist. LEXIS 44216, at *13 (S.D.N.Y. June 4, 2008) (rejecting expert valuation that "fails to identify any methodology and thereby prevents the Court any means by which to assess the reliability of his opinions….. nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the ipse dixit of the expert.") (Internal quotations and citation omitted).

A. Overview: Quintero's Flawed Method of Valuation

The single consistent methodology employed throughout Quintero's analysis of the seven positions in Table 1 is one that accounting standards do not permit: Monday morning quarterbacking. (Quintero Report at 17). In Paragraph 28 and in Exhibit 31, Quintero freely admits that the most significant input in his assessment of fair value at earlier measurement dates within the Damages Period is what ultimately happened to the asset at later measurement dates, either at the end of or after the Damages Period. If an asset was sold by the Liquidators at a fire sale price in 2017, Quintero picks some earlier date where he does not quibble with the valuation, and draws a "straight-line" reduction in value to that later fire sale price. (*See, e.g.,* Quintero Report Exs. 23, 24 and 25). If a position failed in 2016 due to market forces (the collapse of oil prices, for example), Quintero again draws his "straight-line" reduction from some earlier point in time that he arbitrarily accepts as fairly stated.

Putting aside entirely the question of whether fire sale liquidation prices reflect true market value of the assets—given that fair market value assumes an "orderly transaction" where a buyer does not have to buy and a seller does not have to sell—the use of the Liquidator-obtained fire sale prices does not provide a reasonable or accepted basis for valuing the same assets years earlier. (Quintero Report Ex. 30). The markets were different, the businesses were different, and there is no basis to rely on the 2016 or 2017 fire sale prices as a substitute for a traditional appraisal of the assets at the times that the Liquidators claim they were grossly inflated.

Moreover, Quintero makes the entirely unsubstantiated and illogical assumption that the supposed decline in value would occur consistently and predictably over the course of multiple years. Recognizing the arbitrariness of this assumption, Quintero hedges by stating in paragraph 28 that "[a]dditional information may impact the rate at which they declined in value." Of course, had he done an appraisal of the assets at one of the earlier periods using accepted valuation methods, he would have had a reliable basis to compare the then-stated value to the later fire sale prices. His decision to rely on a linear rate of decline is baseless. There is no rule of valuation or logic that says investments decline at a constant rate. Nor is using liquidation fire sale prices accepted as a substitute for market value determined through appropriate appraisal methods. Assets may decline in some roughly consistent way or they may decline precipitously in a short period of time prior to a collapse. That is why, to obtain the values of the assets in January 2015, for example, the Liquidators and Quintero were obliged to appraise the fund or its key assets as of January 2015.[5]

Quintero offers no basis for relying on the fire sale prices as the starting point. He offers no basis for using a constant rate of alleged decline. He offers no justification for valuing the assets using the fires sale prices while avoiding an appraisal at earlier relevant measurement dates. For all these reasons, Quintero's opinions on value are arbitrary, unsupported, and

[5] In contemporary terms, Quintero's reliance on the Liquidators' estimated realizable values as his starting point is no more logical than taking the share prices of the U.S. airlines in March 2020 after the COVID-19 lockdown and using those prices to determine the fair value of those shares in 2019.

unprofessional, precisely the type that *Daubert* is designed to exclude so as not to confuse the jury into thinking there is some real authenticity and reliability to these numbers.

B. Golden Gate

PPVA held membership interests and debt instruments in Golden Gate Oil LLC ("Golden Gate") throughout the Damages Period (initially, a minority interest, and ultimately, a controlling interest). Golden Gate owned oil field leases in California. (Quintero Report Ex. 24). An independent oil and gas valuation firm, DeGolyer & MacNaughton ("D&M")—"a leading petroleum consulting company" per Quintero (*id.*)—performed industry-standard geochemical analyses of the Golden Gate fields in each year of the Damages Period, and produced written reports that provided detailed figures of proven and probable reserves, and a standard industry metric called "PV-10." (*See, e.g.*, SAC Exhibit 28 (ECF No. 285-3 at 24-26)). Platinum Management used D&M's reports and its PV-10 metric as one among several inputs in its fair value determination of its interests. It also used other data, like comparable company analyses. As explained by PPVA's independent third-party valuation firm, Sterling Valuation Group ("Sterling") in its valuation report for the first quarter of 2014: "To value its investment in the Company at March 31, 2014, the Fund performed an analysis of seventeen comparable companies and, based on this analysis, applied a range of Enterprise Value/PV-10 of reserves multiples to an adjusted PV-10 value of reserves of the Company." (ECF No. 529-2 at 184). As with every Level 3 investment in the PPVA portfolio, Sterling performed an independent valuation, and arrived at low range and high range values. Platinum Management's fair value calculation *always*—for each quarter of the Damages Period—fell within Sterling's independently calculated range. In 2015, Platinum Management retained Alvarez to perform the independent valuation function. Again, Platinum Management's fair value determinations were always stated within the Alvarez range. PPVA's auditors at BDO (2012-2013) and CohnReznick

LLP ("CRZ") (2014-2015) also examined the Golden Gate position, and CRZ even retained yet another independent valuation firm, VRC, to independently review Platinum Management's analysis. (Johnston Decl. Ex. C).[6] Like Sterling, Alvarez, BDO and CRZ before it, VRC's assessment of fair value was in line with Platinum Management's. (*Id.*)

Neither the Liquidators nor Quintero suggest that Platinum Management, at any point in time, concealed a fact from any of these service providers, or misled them as to any fact regarding Golden Gate. Yet, Quintero claims in Table 1 and Exhibit 24 that PPVA's interests in Golden Gate was overstated by over $139 million over the course of the Damages Period, causing damage of $35 million to PPVA in the form of excessive fees. (Quintero Report at p. 17 and Ex. 24). His opinion is based on no reliable methodology.

The sum of Quintero's "analysis" is contained in a few bullets in Exhibit 24 with the heading "fair value opinions." First, he opines that "[t] he large disparities of almost $200MM between the values reported by Platinum and cost (Exs. 24.2 and 24.3) are not credible considering Golden Gate never achieved a meaningful level of production." This is nothing more than speaking with the benefit of hindsight. An oil field with the proven reserves established by D&M has value in the market notwithstanding a lack of production by its current operator. The question required by FAS 157 of Platinum Management was the "price the holder would receive from selling the asset in an orderly transaction at the measurement date," *Nomura Holding Am. Inc.*, 2015 U.S. Dist. LEXIS 18386 at *8, not whether at any current period the operators had active wells. Quintero fails to deal with the relevant professional standard.

[6] Quintero was unaware of these reviews by BDO, CRZ and VRC because he never bothered to examine the auditors' workpapers (although, in his Report, he represents falsely that he did review them). (Quintero Dep. 12:4-13:3) (Johnston Decl. Ex. D).

Next, Quintero offers that "[a]s both equity holder and lender, debt instruments of Golden Gate were subject to equitable subordination risks." (Quintero Report Ex. 24). Quintero never suggests how this alleged risk should have impacted fair value at any particular measurement date, or in what magnitude. Nor is the bankruptcy remedy of equitable subordination within Quintero's areas of expertise. It is an unsupported supposition, useless to a jury, yet sounding important—exactly the kind of evidence *Daubert* excludes.

Third, Quintero offers that "Golden Gate was in a shutdown mode by 2016; the Liquidator has not realized any proceeds from Golden Gate debt or equity investments as of the date of this report." (Quintero Report Ex. 24). This too is meaningless and illogically relies on hindsight. The market for oil reserves in November 2019 says nothing about the price that an orderly transaction would have produced, for example, in January 2015.

Finally, Quintero reaches his conclusion where, based on these alleged "fair value opinions," he purports to assign values to the Golden Gate equity position over the Damages Period by drawing a "straight-line" reduction starting from the $37 million starting point in December 2012 until November 2014. (Quintero Report Ex. 24). Quintero does not even attempt to provide professional support under FAS 157/ASC 820 (or any other valuation principle) for his "straight-line" reduction in value over that 23-month period based on what he contends is "decline in value associated with…inability to achieve economic viability." Nor does he bother to explain in any respect his approach with respect to the period after November 2014, yet continues to charge defendants "damages" for that period. *See In re Methyl Tertiary Butyl Ether Prods. Liab. Litig*., 2008 U.S. Dist. LEXIS 44216, at *13 (rejecting expert valuation that "fails to identify any methodology and thereby prevents the Court any means by which to assess the reliability of his opinions.")

C. Northstar

Exhibit 25 sets forth Quintero's declaration of inflated values for the Northstar investment. His work here is a simple comparison between the values attributed by participants in the eventual bankruptcy at or near zero and the stated value closer to the acquisition of the assets in 2014. Quintero then mechanically reduces the value in the period from 2014 to end of the 2016 on a straight-line basis. But Quintero never supports the straight-line decline with any empirical evidence that would make that appropriate for this high risk high-return investment. Nor does Quintero provide any appraisal evidence to demonstrate that the values listed by doing his straight-line decline actually equate to the fair value of the assets in, for example, January 2015.

The parties can litigate another day whether the Liquidators at trial will be permitted to use the Northstar bankruptcy filing to argue that August 2016 value has some relevance to, for example, January 2015 values. That says nothing about whether Quintero, as a purported expert, can suggest to a jury that the later event can be used to measure fair value at earlier points in time, or that the jury should rely upon a linear and constant rate of decline. No opinion he offers with respect to Northstar requires expertise in valuations, and even if some piece showed expertise, his work is so biased and arbitrary in favor of showing inflated value that it fails under *Daubert*.[7]

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[7] We will not repeat it each time, but Northstar and every other Level 3 position of PPVA was reviewed by the independent valuators, auditors, and (as in the case of Golden Gate) by valuators retained by the auditors. In his highly misleading Exhibit 20, Quintero suggests that Platinum Management's valuations were greater than the range of values assigned by the independent valuators. At his deposition, Quintero walked this back and conceded that his Exhibit 20 does not account for Level 1 and 2 positions that the valuators were not tasked to review (but which were confirmed by the auditors using market inputs like stock prices quoted on national exchanges). (Quintero Dep. 152:5-155:23) (Johnston Decl. Ex. D). In short, the comparison is "apples and oranges." *Lippe*, 288 B.R. at 686.

D. Black Elk

Over the course of the Damages Period PPVA held a number of different interests and securities in Black Elk, an oil and gas exploration firm with publicly-traded senior notes. Quintero claims that PPVA overvalued its Black Elk interests by $21 million in aggregate, allegedly causing damage of $8.5 million. (Quintero Report at 17, Table 1).

Quintero's principal attack with respect to Black Elk is the alleged disparity between the "reported fair value" by Platinum Management and the values assigned by the "3rd Party Valuators," i.e., Sterling and Alvarez. (Quintero Report Ex. 23.5). Quintero claims that Platinum Management valued the position substantially higher than the valuators.

Quintero is simply wrong. He ignores that the valuators are tasked only to value Level 3 assets, and therefore were not tasked to value PPVA's Black Elk senior notes for which there was a readily available market price ascertainable on any Bloomberg terminal. The simple reason the reported fair value of the Black Elk position as a whole exceeded the valuator's stated range of values was that the valuators were working on only a subset of the position: the *non*-publicly traded portion of PPVA's Black Elk securities. (*See* Johnston Decl. Ex. E). Quintero's amateurish Exhibit 23.5 is false, prejudicial and should be excluded.

Otherwise, with respect to the securities other than the senior notes, Quintero simply reduces their value from December 2012 on his "straight-line" basis to August 2014, when Black Elk sold certain oil-producing assets to Renaissance for approximately $100 million. After that point, Quintero assigns zero value to Black Elk's equity securities, notwithstanding that Black Elk's senior notes traded publicly at or near par for months. (Quintero Dep. 140:14-141:22) (Johnston Decl. Ex. D). He writes: "Due to lack of specific events impacting value, and since FV is a function of production capability, oil prices, and cost structure rather than changes in equity investment, reported FV at 12/12 was reduced on a straight-line basis to $0 upon the

Renaissance Sale, which deprived the Company of any remaining potential to meet its financial obligations." (Quintero Report Ex. 23). Again, Quintero's straight-line methodology lacks any support in professional accounting or literature. It should not be permitted by *Daubert*.

E. <u>PEDEVCO</u>

For PEDEVCO, Quintero starts with the post-Damages Period Liquidators' estimates of potential sale of PEDEVCO for $5.6 million. But Quintero fails to provide any justification for taking an estimate of an estimated fire sale price—when liquidators were instructed to sell and not manage assets to try to realize value. Quintero then compounds the bias by then applying a straight-line decline in the value of the assets because he could not identify any benchmarks that might affect the rate of decline. Again he admits he did no affirmative work to substitute his arbitrary linear reduction with a professional appraisal of PEDEVCO.

F. <u>Desert Hawk</u>

In Exhibit 28 Quintero offers his "opinion" that during the 39 months that PPVA owned interests in Desert Hawk, a mineral exploration firm, the reported values "exceeded adjusted fair values by as much as $23.63 MM." (*Id.*at 1). Again, his predominant methodology is hindsight, using as his starting point the Liquidators' realized value in 2016 or later. And again Quintero uses a "straight-line" reduction in the value, starting in March 2013 to the date in 2016 or later that the Liquidators sold the asset. (*Id.* at 2).

Finally Quintero's comments or so-called methodology address his evaluation of the work done by Sterling and Alvarez. While perhaps relevant in a case involving their level of professionalism, his comments on their work says nothing about the actual fair values of the Desert Hawk asset, and if he intended to be heard as an expert on that issue it was incumbent on him to do a professional appraisal using accepted valuation methods.

G. Over Everything

In Exhibit 29, once again Quintero packages some comments on the valuation work done by Sterling and Alvarez, describing three individual methods of valuation used by the respective firms: asset value, discounted cash flow and market comparable. Quintero then pretends his comments on these third party companies is his fair value calculation methodology. In fact, he has no viable fair value calculation—he did no calculations, no appraisal work and never explained any methodology.

Quintero relies on the post-Damages Period bankruptcy of Over Everything to proclaim that as of March 31, 2016, the stated value of this asset was overstated by $22 million. He then proceeds without any explanation to assert that at the beginning of the investment the value as stated was only inflated by $263,000. Quintero provides no basis for this assertion and no basis for his declining set of values between September 2014 and March 31, 2016. Nor does he offer any basis for failing to do an appraisal of the investment at a relevant period in the Damages Period.

H. The Curious Goldberg Receivable

Quintero purports to provide an expert view of the value of the Goldberg Receivable, but his truncated description of the Receivable and his rush to value it as worthless raises some basic questions as to what Quintero and the Liquidators were doing.

The story told by Quintero is that Platinum gave a portfolio of assets to a departing employee and, according to a term sheet in Platinum's files, the transfer of the portfolio was co-terminus with Goldberg executing a non recourse note backed by the collateral. According to Quintero, the Liquidators never found a signed note by Goldberg and apparently, for reasons that Quintero doesn't indicate, the Liquidators never contacted Goldberg to see if he intended to honor the note or take discovery from Goldberg to see if he had a copy of the note or if he maintained he never signed a note then to seek recovery of the portfolio as a fraudulent conveyance or to prevent unjust enrichment.

Whatever a reasonable liquidator may have done to find out the status of the receivable and to attempt to obtain payment of the note or return of the portfolio is outside the Quintero summary. But his starting point that the Notes and the Receivable were worthless in 2016 and therefore were worthless at earlier measurement dates is not permissible under *Daubert*.[8]

II. QUINTERO'S DAMAGES OPINION BASED ON EXCESSIVE FEES IS INADMISSIBLE UNDER *DAUBERT*

Quintero states in the introduction to his report that he "was asked to render … expert opinions about damages sustained" as a result of "[e]xcessive management fees" and "[e]xcessive incentive fees charged to the Fund during the Damages Period as a result inflated realized and unrealized Fund investment gains reported by the Defendants." (Quintero Report ¶ 1). In the summary of his opinions, he claims "[t]he damages due to inflated management and incentive fees are at least $70.9 million." (Id. ¶ 11(a)). In the analysis section, Quintero opines that his $70.9 million damages figure is comprised of two components: $15.8 million in excessive management fees, and $55.1 million in excessive incentive fees. (Id. ¶ 33(a), (b)).

[8] In Exhibit 26, Quintero offers an opinion regarding the value of China Horizon, and concludes in Exhibit 26.1 that the overvaluation cost PPVA $5.5 million in fees, including $1.1 million in incentive fees. That damages figure is not included in Quintero's Table 1 or his conclusions regarding damages based on overstated management and incentive fees. In any event, it should be excluded. Quintero bases his approach to fair value on estimated values in mid- to late 2016 after the collapse of the joint venture. He also points to events "in or about December 2015" when the joint venture partner—the People's Republic of China—pulled out of the venture. This was a mere three and a half months before the end of the Damages Period. If Quintero intended to provide a professional fair value opinion in, for example, January 2015, when he claims the asset was overvalued by $62 million, he was obliged to do a professional appraisal based on the business model, the licenses provided by the joint venture with the State, and the potential for value in this developing market controlled by the joint venture partner.

There are (at least) two fundamental flaws with Quintero's work. *First*, he has no data to support his assertion that PPVA paid \$55.1 million in incentive fees. He concedes this. *Second*, the \$55.1 million figure is untethered to any analysis of overstated asset values. It is a made up number.

A. <u>Incentive Fees Were Accrued By the Feeder Funds, Not Paid By PPVA</u>

The Court will note that Quintero never opines that PPVA *actually paid any* incentive fees. To avoid an outright misrepresentation, he chooses his words carefully, never stating in the affirmative that PPVA paid such fees. In paragraph 11, he states that "[t]he damages *due to* inflated management and incentive fees are at least \$70.9 million." The heading of Table 1 is "Damages *from* Excessive Fees During the Damages Period." In paragraph 32, he gets closer to the line, stating "all of the Incentive Fees *charged to* Platinum during the Damages Period constitute damages sustained by Platinum." Again he does not say that PPVA *paid* the fees, only that they were "charged." Further, he swaps in the generic term "Platinum" for PPVA—a necessary sleight of hand because he *knows* that he cannot opine that PPVA actually paid the incentive fees. He does the same trick in paragraph 23, where he writes that "*Platinum charged fees* that ultimately were funded by the Fund on a monthly basis, based on reported net AUM." Again, he carefully opines that the generic actor "*Platinum* charged" the fees, not that PPVA paid the fees. And, although he says here that the fees "*ultimately were funded* by the Fund," he *concedes* that he cannot offer an opinion on whether, when, or in what amount PPVA paid them.

This is illustrated in Exhibit 21 to the Report. That table purports to identify *all* incentive fees charged in the period from January 2012 through March 2016, on account of both legitimately earned and allegedly unearned gains. The incentive fee total is the \$55.1 million figure that Quintero claims is a damage to PPVA in the Damages Period.[9] (Quintero Report ¶ 32). The purported authority for Exhibit 21 is identified as: "bank statements *and/or* general partner's capital account records (191015 Management Fees and Other Fees Accrued by Feeder Funds 2012-2016 (R790).xlsx)." The referenced spreadsheet states in a "Background" section that Quintero was unable to do the work to determine whether, or in what amount, the incentive fees were ever paid, or in what amount, *by PPVA*: "[f]urther work is being undertaken to reconcile the incentive fee which *accrued at the Feeder Funds* and to link this to cash leakage from the Master Fund [*i.e.* PPVA]." (Johnston Decl. Ex. F).[10] No such "further work" came before the expert disclosure deadline.

Similarly, in paragraph 25 of the Report, Quintero states, "I have just begun to receive information that will enable me to ascertain how funds were transferred from PPVA to individuals and outside entities to the detriment of the Fund. I reserve the right to amend and supplement my report as more information becomes available through discovery and depositions." Again, no update and no supplement came by the expert disclosure cut-off.

That is because—and this is the gaping hole in both Quintero's Report and in the Liquidators' case—***PPVA paid no incentive fees at all***.

What Quintero calls an "incentive fee" was a contractual obligation by the limited partners of two Feeder Funds of PPVA: an on-shore fund for US taxpayers, Platinum Partners

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[9] Exhibit 21 purports to include incentive fees from *January 2012* through March 2016 whereas the Damages Period is *December 2012* through March 2016. In other words, Quintero has slipped an additional year of purported fees into his total—yet another example of how his report fails to meet *Daubert*-required standards of professionalism and reliability.

[10] In support of this statement, Quintero references another spreadsheet, called "USA Capital Accounts Review and Intermediate Review," which is reproduced in part at Appendix A to the Quintero Report. There too, he concedes that he is unable to demonstrate that PPVA paid the incentive fees, and promised that further analysis would be forthcoming "upon the completion of fact discovery." (Johnston Decl. Ex. A at Appx. A). No update was or could be provided.

Value Arbitrage (USA) L.P., a Delaware limited partnership (the "Onshore Feeder Fund"), and an off-shore fund for tax-exempt persons and entities, Platinum Partners Value Arbitrage (Intermediate) Ltd., a Cayman Islands exempted limited partnership (the "Intermediate Fund"). The limited partners of the Onshore Feeder Fund and the Intermediate Fund—not PPVA—were each contractually responsible to allocate the 20% incentive fees to their general partner, an entity called Platinum Partners Value Arbitrage LP, a Delaware limited partnership (the "General Partner"), on the terms stated in their respective partnership agreements.[11]

The treatment of the incentive fees is set forth in detail in the audited financial statements of PPVA, the Onshore Feeder Fund, and the Intermediate Fund, respectively. PPVA's audited consolidated financial statements for 2012,[12] 2013,[13] and 2014[14] each stated: "Any incentive allocations or management fees are charged at the Feeder Funds' level." Likewise, the Onshore Feeder Fund and Intermediate Fund financial statements for each year explicitly identify each year's incentive allocation as a line item in the "change in partners' capital," showing a reduction in capital to the limited partners (i.e., the investors) and an increase in capital to the General Partner (PPVALP). For example, the 2014 financial statements for the Onshore Feeder Fund show the annual incentive allocation from the limited partners to the General Partner in the amount of $6,268,435:

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[11] The General Partner was the "Class M" shareholder and not the general partner of the Intermediate Fund. That technical distinction is not material to the analysis here.
[12] Johnston Decl. Ex. G.
[13] Johnston Decl. Ex. H.
[14] Johnston Decl. Ex. I.

Year ended December 31, 2014

	General Partner	Limited Partners	Total
Balance, January 1, 2014	$ 5,331,431	$249,744,077	**$255,075,508**
Capital contributions	-	36,096,634	**36,096,634**
Capital withdrawals	(1,926,030)	(55,685,668)	**(57,611,698)**
Transfer in (out)	(5,465,387)	5,465,387	-
Net increase (decrease) in partners' capital resulting from operations:			
Pro rata allocation	31,510	33,764,925	**33,796,435**
Incentive allocation	6,268,435	(6,268,435)	-
Balance, December 31, 2014	**$ 4,239,959**	**$263,116,920**	**$267,356,879**

(Johnston Decl. Ex. J).

The allocation is further explained in the notes section, where the exact amount of the allocation is identified for the year. For example, from the same 2014 financial statements:

Incentive Allocation

At the end of each year or upon a Limited Partners' withdrawal of all or any portion of their capital from the Partnership, 20% of the net increase in partners' capital resulting from operations, in excess of a cumulative loss, is reallocated to the capital account of the General Partner from the capital account of each limited partner as an incentive allocation. The General Partner may, at its discretion, waive all or a portion of this allocation. For the year ended December 31, 2014, $6,268,435 was allocated to the General Partner.

(*Id.*). In other words, the allocation is a book entry at the Feeder Fund Level: the individual limited partner accounts are debited (resulting in a reduction in their capital) and the General Partner account is credited (resulting in increased capital). ***The entry has no impact on PPVA***. Assets under management at PPVA remained unaffected.

The bottom line is that while Quintero claims that PPVA suffered damage in the form of inflated incentive fees, PPVA never did pay such fees during the Damages Period. If Quintero is purporting to claim that PPVA suffered a recoverable *damage* because perhaps some fees were paid by PPVA in cash, it was incumbent upon Quintero to identity the transaction and to state without speculation when it was paid, in what amount. He has not done any of that. He has not even tried. There is a total failure of proof.

The failure of proof is not for lack of data. Quintero, unlike Bodner, had available to him the entire general ledger for the Platinum enterprise. (Quintero Report ¶ 32).[15] The Liquidators took the deposition of a Platinum Management corporate representative pursuant to Fed. R. Civ. P. 30(b)(6), and failed to take any meaningful discovery on the accrual or payment of fees, notwithstanding that Platinum Management offered its former chief financial officer, who could have provided detailed testimony, as its representative. The Liquidators then had an opportunity to depose the CFO in his personal capacity, and again failed to take any meaningful discovery on the accrual and payment of fees. This is not a coincidence: the Liquidators elected not to develop the record because they *knew* that tightening liquidity and mounting redemptions among the Platinum funds meant that incentive fees were not paid in cash. That fact is inconvenient for the Liquidators, so they propose instead to mislead the jury with purported expert testimony about fees that were never paid by PPVA.

B. Quintero's Opinion that PPVA Overpaid Incentive Fees by $55.1 Million Lacks Reliable Methodology

To calculate overpaid incentive fees, Quintero simply takes his opinions of overstated asset values of the seven PPVA positions addressed in Section I, multiplies the purported overstatement of $435.5 million by 2% and 20% for each year of the Damages Period for the management fees and incentive fees, respectively, and sums the totals. (Quintero Report Table 1 and ¶ 32) ("If assets are overstated by $400 million…then approximately 20% of the $400 million, or $80 million, would constitute damages from inflated Incentive Fees.").

Yet, because this formula produces an incentive fee damage calculation of $88.9 million, Quintero has a problem: that figure *exceeds the total incentive fees* Quintero claims were charged to PPVA during the Damages Period as a whole ($55.1 million), for both

[15] The Liquidators never made the general ledger available to defendants, yet Quintero purports to rely upon it.

legitimately-earned gains *and* allegedly illegitimate gains. (Quintero Report ¶ 32). Quintero cannot plausibly opine that 20% of the overstated valuations constitutes a damage to PPVA where that figure exceeds by $34 million the total incentive fees in the same period. To solve his problem, Quintero simply concludes that the *entire* amount of incentive fees charged during the damages period—the entire $55.1 million, which even according to Quintero is partially based on legitimate gains—is a damage recoverable by the Liquidators. (*Id.* ¶ 32).

This makes no sense. It was incumbent upon Quintero, in identifying a non-speculative basis for damages, to identify unearned incentive fees that were *actually paid* by PPVA—not incentive fees that could have been paid, or might have been paid had there not been some never-identified "realized and unrealized losses [that] *may* be offset against realized and unrealized gains." (*Id.*) Quintero offers no opinion of what these offsets were or might have been. Quintero should not be permitted to lob out for the jury his "opinion" that the entire $55.1 million ***accrued by the Feeder Funds*** for the benefit of the General Partner is a damage to PPVA. That opinion is meaningless as Quintero has not opined that the accrual was reduced to a payment out of PPVA, is based on no reliable methodology, is contradicted by the available data, and violates *Daubert* in innumerable respects. It should be excluded in its entirety.

III. QUINTERO'S SPECULATIVE THEORIES ABOUT POSSIBLE EARLIER REDEMPTIONS SHOULD BE EXCLUDED

This Court has warned that "expert testimony should be excluded if it is 'speculative or conjectural,' or if it is based on assumptions that are 'so unrealistic and contradictory as to suggest bad faith' or to be in essence an 'apples and oranges comparison.'" *Lippe v. Bairnco Corp.*, 288 B.R. 678, 686 (S.D.N.Y. 2003), *aff'd* 99 F. Appx. 274 (2d Cir. 2004) (quoting *Boucher v. U.S. Suzuki Motor Corp.*, 73 F.3d 18, 21 (2d Cir. 1996)).

In paragraphs 68 to 70 and in Exhibit 39, Quintero, not content with his arbitrary approach to calculating what he opines were actual damages to PPVA, launches an entirely speculative and untethered claim that, had Platinum Management made what he claims would be a "full and fair disclosure," there would have been a proverbial run on the bank with the termination of the fund and thus the cessation of management and incentive fees. Quintero then proceeds to provide four possible scenarios that, if they had occurred at various times, the result might have seen reduced fees for a diminished or terminated fund. This entire exercise is conjecture and bears no connection to PPVA, the nature of its holdings or the unique makeup of its limited partner investors. In short, the assertions are purely speculative and self serving, backed by no empirical data and entirely outside the realm of acceptable evidence and professional appraisal testimony.

To the extent cash or assets were moved from PPVA, and to the extent those assets or cash were a product of inflated calculations, then PPVA has been harmed. But, Quintero is not content to rely on actual damages because they will be well below his aspirations. So, he tries to fictionalize what might have occurred without any empirical support. His primary assumption is there would be a run on the fund and redemptions would reduce the fund or lead to its demise. But he does not consider at all that with 90% or more of PPVA's capital invested in illiquid positions, much of which was in securities of closely held companies that Platinum Management did not control, investors would have wanted to hold their interests while Platinum Management managed these illiquid assets in hope of realizing the intrinsic value that many of them had or were thought to have. Moreover, given the absence of cash or saleable assets, the only way to make redemptions would have been "in kind"—with distributions of assets and not cash—and there is no indication that the underlying assets would have permitted the Platinum holdings to be divided into hundreds of individual parts. Hence, with or without redemption requests, there is no basis to conclude that the assets would have been substantially diminished either, because investors would appreciate the wisdom of being part of a large minority position. Even if they wanted their fractional interest, there was no way Platinum could distribute what was not in its control.

Finally, and perhaps most dispositive of the cavalier thinking by Quintero, about a quarter of the PPVA limited partner interests were held by families of the General Partner members. So while PPVA is able to assert claims on behalf of the entire fund, the truth is more than a quarter of the fund was held by insiders who had no reason to terminate the fund. In addition, a considerable additional percentage of the fund was owned by investors with close business, social and other relationships with the Platinum executives and who would also have followed the General lead whether to continue the fund.

The opinions in Paragraphs 68 to 70 and Exhibit 39 are speculative not supported by evidence or appropriate methodology and have no place in this report or in the trial. PPVA is entitled to prove its actual damages based on inflated valuations and inflated fees to the extent those fees were paid out of PPVA. PPVA is not entitled to confuse the jury with utter speculation without any factual basis.

CONCLUSION

The Quintero Report must be excluded in its entirety.[16]

Dated: May 19, 2020
New York, New York

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[16] 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.