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),	:	No. 18 Civ. 10936 (JSR)
Plaintiffs,	:	
v.	:	
PLATINUM MANAGEMENT (NY) LLC, *et al.*,	:	
Defendants.	:	

REPLY MEMORANDUM OF LAW OF DEFENDANT MURRAY HUBERFELD IN FURTHER SUPPORT OF HIS MOTION TO EXCLUDE THE EXPERT REPORT OF BILL POST

HOROWITZ AND RUBENSTEIN, LLC
4 Carren Circle
Huntington, NY 11743
(516) 745-5430

Attorneys for Defendant Murray Huberfeld.

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Defendant Murray Huberfeld ("Huberfeld") respectfully submits this Reply Memorandum of Law in support of his motion (the "Motion") to exclude from trial the expert report (and corresponding testimony) of Bill Post, dated November 14, 2019 (the "Post Report"[1]) pursuant to Federal Rule of Evidence 702 and 403, and *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993).[2]

PRELIMINARY STATEMENT

Reading Plaintiffs' Opposition to the Motion ("Opposition" or "Opp."), one could easily be forgiven for thinking that it was addressing an expert report other than that offered by Mr. Post. Plaintiffs understate – to say the least – the impropriety of Post's opinions and strain belatedly to cleanse and recast the content of the Post Report. Plaintiffs suggest, for instance, that Post "will offer testimony that will help a jury understand the complex financial structures and machinations that enabled Defendants' fraudulent conduct." (Opp. at 1.) They also state that he will just "compare [defendants'] conduct with what is ordinarily expected in the investment management industry" (Opp. at 1) and merely "provide[] context that elucidates the improper conduct Defendants will seek to obscure at trial." (Opp. at 5.) They also point to Post's own (self-serving) statement that his "opinions do not and are not intended to represent legal opinions regarding findings of fraud or other statutory violations." (Opp. at 3 (citing Post Report ¶ 10.) Yet, Plaintiffs' elegant arguments aside, the actual content of the Post Report speaks otherwise and supports none of those modest things, but rather proffers quintessentially improper expert testimony that is indistinguishable from the type that the Second Circuit has routinely excluded for decades.

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[1] A true and correct copy of the Post Report is annexed as Exhibit A to the Declaration of Jeffrey C. Daniels, dated May 19, 2020 (18-cv-6658, Doc. No. 869-1).

[2] Capitalized terms not otherwise defined herein refer to the definitions set forth in the Memorandum Of Law Of Defendant Murray Huberfeld In Support Of Motion To Exclude The Expert Report Of Bill Post (18-cv-6658, Doc. No. 870 ("Def. Mem.")).

As set forth in Huberfeld's moving brief, what Post actually does in his Report is opine on the factual and legal *merits* of Plaintiffs' claims. To make matters worse, he does so based on excerpts of record evidence, much of which is inadmissible hearsay, chosen for his review by Plaintiffs' counsel. (*See* Post Report ¶ 10, Appendix B.) There can be no serious dispute about what Post intends to testify because it is expressly and unabashedly set forth in the Post Report. He would instruct the jury that Platinum "was required to comply with all statutory and regulatory requirements of the Investment Advisors Act of 1940 – including the requirement to act as a fiduciary," conclude that "Platinum Management engaged in fraudulent transactions that irreparably harmed the Master Fund and caused its collapse," opine that "to perpetrate fraud against the Master Fund, Platinum Management utilized its alter egos, Beechwood and BEOF," and tell the jury that Platinum Management "failed to meet its fiduciary duty" when it "conducted fraudulent transactions with related parties in ways specifically proscribed by the applicable statutes" and "inflate[d] the net asset value calculation" for PPVA. (Post Report at 2.) This testimony obviously does not, as Plaintiffs claim, just "streamline the presentation of [] data to the jury." (Opp. at 4.) Rather, Plaintiffs improperly seek to use Post to make their case for them, allowing Post to apply his own recitation of the law (Post Report, Section V) to his own factual narrative (Post Report, Section IV) – which is comprised of laundered hearsay, drawn from record evidence filtered by Plaintiffs' counsel – and then render legal conclusions that go to the ultimate factual and legal issues in the case (Post Report, Sections III, VI, VII, VIII, and IX). The Post Report is unadulterated lawyer advocacy cloaked in an expert veneer that would unduly prejudice Huberfeld's case. It is patently out of bounds of well-settled Second Circuit law. Huberfeld respectfully requests that it be excluded from trial.

ARGUMENT

I. The Amount Of Post's Experience In Investment Management Is Irrelevant

Plaintiffs devote the first four pages of their Argument to deflect from the issues raised by citing to Post's extensive experience in the field of investment management – a point that Huberfeld did contest or even raise. (Opp. at 7-10.) Post's education and experience in various senior investment management and advisory roles at a variety of financial and investment firms is simply not the issue at hand. (*See* Post Report ¶¶ 1-7.) Rather, it is the *substance* and *content* of the Post Report that is excludable. Put differently, it is not deficiencies in Post's experience that render his testimony improper; what makes it improper is his (i) secondhand narrative reflecting fact-finding and unfounded inferences drawn from inadmissible evidence filtered by Plaintiffs' counsel; (ii) instruction to the jury on the applicable law; (iii) and application of his own law to his own facts to testify about legal conclusions that invade the province of the jury (*see* Def. Mem. at 8-13; *infra* Sections II-IV).[3] *See Primavera Familienstiftung v. Askin*, 130 F. Supp. 2d 450, 529 (S.D.N.Y. 2001) ("Malkiel's report illustrates how vital it is that judges not be deceived by assertions of experts who offer credentials rather than analysis.") (internal quotations and citation omitted); *Highland Capital Mgt., L.P. v. Schneider*, 379 F. Supp. 2d 461, 473 (S.D.N.Y. 2005) (rejecting opinion that was based solely on experience without further explanation, and concluding that "Courts have held that an expert basing his opinion solely on experience must do more than aver conclusorily that his experiences led to his opinion").

[3] Plaintiffs suggest that Huberfeld's failure to take Post's deposition tacitly admits "Mr. Post's ability to satisfy the standards under Rule 702 and *Daubert*." (Opp. at 12 n.7.) Although neither here nor there, the true reason that Huberfeld declined to depose Post was the obvious *impropriety* of the Post Report and a genuine desire to conserve resources during a condensed discovery period.

II. Section IV Of The Post Report Improperly Constructs A Factual Narrative Based Upon Record Evidence, Including Hearsay

Plaintiffs admit that it is improper for a purported expert to "present[] a factual narrative of uncomplicated facts, which the jury is capable of understanding on their own . . . ." (Opp. at 11 (citing *In re Longtop Fin. Techs. Ltd. Sec. Litig.*, 32 F. Supp. 3d 453, 462 (S.D.N.Y. 2014)).) Plaintiffs also do not dispute that it is improper for an expert to provide a narrative based on his review of "documents, computer documents, deposition transcripts, and exhibits," where "testimony by fact witnesses familiar with those documents would 'be far more appropriate . . . and renders [the expert witness'] secondhand knowledge unnecessary for the edification of the jury.'" *See LinkCo, Inc. v. Fujitsu Ltd.*, No. 00 Civ. 7242 (SAS), 2002 U.S. Dist. LEXIS 12975, at *4-6 (S.D.N.Y. July 16, 2002) (citation omitted). Yet, such an improper, one-sided, and prejudicial secondhand statement of facts is exactly what Section IV of the Post Report offers. (*See* Def. Mem. at 8-10.)

In this respect, footnote 5 of the Opposition is telling. There, Plaintiffs attempt to distinguish *Highland Capital Mgmt., L.P. v. Schneider*, 379 F. Supp. 2d 461 (S.D.N.Y. 2005) and the additional cases cited by Huberfeld based on their disturbing admission that, unlike the claimants in the case law, Plaintiffs here lack any witnesses with knowledge of the "factual matter in this case." (Opp. at 10 n.5.) On page 13 of the Opposition, as well, Plaintiffs admit that the true, but improper, purpose of Section IV of the Post Report is to "streamline the presentation of evidence in this matter."[4] (Opp. at 13.) But the bait-and-switch that Plaintiffs propose – substituting their burden to proffer admissible evidence in support of their case with otherwise

[4] The narrative that Post offers Section IV of the Post Report is also an end-run around the evidentiary rules. A substantial portion of Post's narrative is based on inadmissible hearsay or objectionable evidence. (*See, e.g.*, Post Report at 11 n.25 (relying on three emails from Angela Albanese, a non-party to the case and an available witness who was deposed during discovery).)

inadmissible hearsay testimony of a purported expert with no first-hand knowledge of the events at issue – is squarely prohibited in the Second Circuit and routinely excluded. *See, e.g.*, *Media Sport & Arts S.r.l. v. Kinney Shoe Corp*., No. 95 Civ. 3901 (PKL), 1999 U.S. Dist. LEXIS 16035, at *10-11 (S.D.N.Y. Oct. 19, 1999) (where expert's testimony "is not based on personal knowledge, but instead on his review of documents and depositions produced by the parties," the expert's testimony "may not take the place of that of the individuals who actually negotiated the deal").

Additionally, the Post Report does not – as Plaintiffs claim – merely "present background facts to provide context . . . ." (Opp. at 12.) Rather, the Post Report plainly conveys a narrative to support their theory of the case and as a substitute for introducing admissible evidence. As Post admits, Part IV of the Post Report is based on selective documents and testimony provided to Post by Plaintiffs' counsel. (Post Report ¶ 10, Appendix B.) He also makes inferences, interprets, and jumps to conclusions based on the same materials. (*See, e.g.*, Post Report ¶ 23, 24, 31.) Post even proposes to testify about what the parties did, said, knew, believed, assumed, and understood. (*See, e.g.*, Post Report ¶¶ 24, 31.) The content of the Post Report belies Plaintiffs' assertion that Section IV reflects an innocuous statement of background facts. Post's factual narrative – proffered as a substitute for their evidentiary burden and to sway the jury under the banner of Post's stature – should be excluded. *See Kidder, Peabody & Co. v. IAG Int'l Acceptance Grp., N.V.*, 14 F. Supp. 2d 391, 396 (S.D.N.Y. 1998) (excluding expert report where expert attempted to describe "what these witnesses were thinking at the time" and "contributes his own evaluation of the events").

In support of their argument, Plaintiffs rely almost exclusively upon a Western District of Kentucky decision, which itself relies upon Sixth Circuit law. (Opp. at 12 (citing *Grayiel v. AIO Holdings, LLC*, No. 3:15-CV-00821-CHB-LLK, 2019 U.S. Dist. LEXIS 97113, 2019 WL

2372901 (W.D. Ky. Mar. 15, 2019).) In *Grayiel*, the court did not rule – one way or the other – on the admission of a factual narrative presented by an expert based on record evidence filtered by Plaintiffs' counsel. Rather, that court's decision merely permitted expert testimony concerning the "*factual elements of fraud*, not the fraud itself." 2019 U.S. Dist. LEXIS 97113, at *11 (emphasis added). Here, in contrast, Section IV of the Post Report (and additional Sections, too) contain Post's opinions on mere "lay matters which a jury is capable of understanding," such as his description of the relevant companies and their structures, the rights and obligations related to the companies, and other matters that are not scientific or in any way beyond the jury's ken. Post's "background" also restates selective evidence, plucked from context and filtered by Plaintiffs' counsel, and makes inferences, interprets, and jumps to conclusions based on the same evidence. Courts in the Second Circuit routinely exclude such evidence. Section IV of the Post Report should similarly be excluded.[5] *See, e.g.*, *Highland Capital Mgmt., L.P.*, 379 F. Supp. 2d at 469 ("Because the 'Facts' section of the O'Shea Report contains a factual narrative of the case and addresses 'lay matters which a jury is capable of understanding and deciding without the expert's help,' it is inadmissible.") (citation omitted); *LinkCo, Inc.*, 2002 U.S. Dist. LEXIS 12975, at *4-6 (where expert's report was based on a review of, inter alia, "documents, computer documents, computer files, deposition transcripts and exhibits," the "testimony by fact witnesses familiar with those documents would 'be far more appropriate... and renders [the expert witness'] secondhand knowledge unnecessary for the edification of the jury'") (citation omitted); *Media Sport & Arts S.r.l.*, 1999 U.S. Dist. LEXIS 16035, at *10-11 (where expert's testimony "is not based on personal knowledge, but instead on his review of documents and depositions produced by the parties," the

[5] In their Opposition, Plaintiffs did not event attempt to dispute that Paragraph 24 of the Post Report alone contains at least seven unfounded inferences or conclusions about significant factual and legal issues in the case. (*Compare* Def. Mem. at 9 n.4 *with* Opp. at 10-13.) That paragraph is the paradigm of the impropriety of Section IV of the Post Report.

expert's testimony "may not take the place of that of the individuals who actually negotiated the deal"); *Taylor v. Evans*, No. 94 Civ. 8425 (CSH), 1997 U.S. Dist. LEXIS 3907, at *5 (S.D.N.Y. Apr. 1, 1997) (rejecting portions of expert report on the ground that the testimony consisted of "a narrative of the case which a lay juror is equally capable of constructing").

III. Sections III, VI, VII, VIII, And IX Of The Post Report Render Conclusory And Impermissible Legal Opinions

In their Opposition, Plaintiffs do not – because they cannot – dispute that experts are not permitted to present testimony in the form of legal conclusions. *See United States v. Articles of Banned Hazardous Substances*, 34 F.3d 91, 96 (2d Cir. 1994). Nor do they distinguish the litany of decisions in the Second Circuit barring expert testimony (just like Post's) that states ultimate legal conclusions based on disputed issues of fact. (*See* Def. Mem. at 10-11 (collecting cases).) Rather, Plaintiffs seek to recast the Post Report as limited to something innocuous or acceptable, and in doing so, ignore its plain content. (*Compare* Opp. at 14 (claiming the Post Report merely "contextualize[s] the evidence that will be available to the jury") *with* Post Report ¶ 48 ("PM and its executive engaged in fraudulent transactions . . . ."), ¶ 54 ("Beechwood and BEOF were operated as the alter ego of PM in the execution of the described fraudulent schemes"); ¶ 69 (Platinum Management "put its own interests (and those of its alter egos) above those of the Master Fund, in direct contravention of its fiduciary duty, and consistently engaged in conduct that was deceptive, fraudulent, and manipulative"); ¶ 111 ("breached its fiduciary duty in multiple ways").

Courts look at the substance of the expert's opinions, not just the specific language the expert has used to convey them. *See United States v. Bronston*, 658 F.2d 920, 930 (2d Cir. 1981) (precluding expert testimony as "clearly inadmissible" where the expert stated that the defendant's conduct "amounted to a breach of fiduciary [duties]" because, among other things, "his testimony would in substance have conveyed nothing more to the jury than his general belief as to how the

case should be decided.") (internal quotations and citation omitted). Post's legal conclusions are just like those that have been routinely precluded in the Second Circuit. *See, e.g.*, *Snyder v. Wells Fargo Bank, NA.*, 594 Fed. App'x 710, 714 (2d Cir. 2014) (expert testimony stating that financial institution breached contractual and fiduciary duties "went to ultimate issues for jury resolution" and was not admissible); *United States v. Scop*, 846 F.2d 135, 139-43 (2d. Cir. 1988) (district court erred in allowing an expert in securities trading to state repeatedly that the defendants were active and material participants in the manipulation of stock and had engaged in a manipulative and fraudulent scheme in furtherance of their goals); *Highland Capital Mgmt., L.P.*, 379 F. Supp. 2d at 471 (excluding expert testimony that defendant violated fiduciary duties because such testimony "runs afoul of case law providing that, while 'an expert may opine on an issue of fact within the jury's province, he may not give testimony stating ultimate legal conclusions based on those facts'") (citation omitted).

Plaintiffs also accuse Defendants of "cherry pick[ing] quotes from the Post Report to argue that Mr. Post is offering conclusory legal opinion as testimony," and that a "full reading of the Post Report outside of the Summary provides in Sections III and VI, however, clearly indicates that Mr. Post will not offer legal conclusions . . . ." (Opp. at 15.) Plaintiffs' assertions are baffling,[6] particularly in the face of the substance of the Post Report which is hardly subtle about its intent. For instance, in Section VI, Post renders the legal conclusion that "PM and its executives engaged in fraudulent transactions…." (Post Report ¶ 48.) In Section VII, he concludes that "Beechwood and BEOF were operated as the alter ego of PM in the execution of the described fraudulent

[6] Plaintiffs' statement that Post "will not offer legal conclusions" is even more perplexing in view of the legal conclusions contained in the *table of contents* of the Post Report. The titles of Sections V-IX of the Post Report alone illustrate the inadmissibility of Post's testimony, as each summarizes Post's legal conclusion that defendants committed fraud, or owed and breached fiduciary duties. (*See* Post Report at 2.)

schemes." (Post Report ¶ 54.) In the next section, Section VIII, Post opines that Platinum Management breached "its fiduciary duty, and consistently engaged in conduct that was deceptive, fraudulent, and manipulative." (Post Report ¶ 69.) And in Section IX, Post, again, explicitly concludes that Platinum Management "breached its fiduciary duty in multiple ways." (Post Report ¶ 111.) Plaintiffs' attempt to sugarcoat the improprieties of the Post Report by coupling it with an acute case of tunnel vision should be thoroughly rejected. *Nimely v. City of New York*, 414 F.3d 381, 397 (2d Cir. 2005) ("We have consistently held, in that respect, that expert testimony that 'usurp[s] 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, by definition does not aid the jury in making a decision; rather, it undertakes to tell the jury what result to reach, and thus attempts to substitute the expert's judgment for the jury's.") (internal citations and quotation marks excluded).

IV. Section V Of The Post Report Improperly Instructs The Jury On The Law

Again, Plaintiffs do not dispute the black-letter law that "[i]t is not for witnesses to instruct the jury as to applicable principles of law, but for the judge." *Marx & Co., Inc. v. Diner's Club. Inc.*, 550 F.2d 505, 509-10 (2d Cir. 1977). But yet again, that is exactly what Post does in Section V of the Post Report. There, Post opines on the existence and contours of the "fiduciary duties of care and loyalty" owed by defendants to PPVA (Post Report ¶¶ 34-37) and instructs the jury about the controlling law's "legal prohibitions against fraud and deceit" (Post Report ¶¶ 38-41). And contrary to Plaintiff's arguments (Opp. at 17), ¶¶ 42-47 of the Post Report do not contain Post's mere opinion on "industry standards in the investment management industry in connection with investment managers' fiduciary duties." (Opp. at 17.) Instead, Post obviously seeks to instruct the jury how, *under the law*, investment managers *must* perform their duties to be in accordance with the law. (Post Report ¶¶ 42-47.) Even more problematically, Post *presupposes* the existence

of a fiduciary duty owed by Huberfeld (or any of the defendants) to Platinum Management in the first place. (*See* Post Report ¶ 34.) Huberfeld has denied even owing a fiduciary duty to PPVA in this case, and hence the existence of such duties is a contested issue of mixed fact and law to be determined by the jury and Your Honor.[7]

Post's proposed testimony about the law and the legal duties potentially applicable to Huberfeld impermissibly invades the Court's charge to instruct the jury on the law, as well as the Court's exclusive province to discern whether a cause of action is even cognizable. *See Hygh v. Jacob*s, 961 F.2d 359, 363-64 (2d Cir. 1992) (stating that expert testimony that even implicitly communicates a legal standard is objectionable); *Marx & Co., Inc.*, 550 F.2d at 508 (barring expert legal opinions "as to the legal obligations of the parties under the contract").

CONCLUSION

For all the foregoing reasons, as well as those previously set forth in our initial moving papers, the Post Report, as well as Post's prospective testimony about the topics set forth in the Post Report, are impermissible and should be excluded from the trial.

Dated: New York, New York
June 9, 2020

/s/ Jeffrey C. Daniels
Jeffrey C. Daniels, Esq.
Of Counsel to Horowitz and Rubenstein, LLC
4 Carren Circle
Huntington, NY 11743
Tel: (516) 745-5430
jdaniels@jcdpc.com

Attorneys for Murray Huberfeld

[7] Additionally, PPVA's relationship with Platinum Management was governed by its own unique operating policies, procedures, and agreements. (*See, e.g.*, Post Report ¶¶ 17-18.) Post's generalized testimony about the law and legal duties applicable to investment managers in general is irrelevant, and will only serve to confuse the jury as to the law applicable to the defendants in this case.