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)

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

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

PRELIMINARY REPLY STATEMENT 1

REPLY POINTS 3

I. THE LIQUIDATORS EFFECTIVELY CONCEDE THAT QUINTERO CANNOT SUPPORT HIS OPINION ON INCENTIVE FEES 3

II. QUINTERO'S STRAIGHT-LINE DEVALUATION OF THE PPVA POSITIONS IS NOT AN ADMISSIBLE APPRAISAL METHODOLOGY UNDER *DAUBERT* 6

III. QUINTERO SHOULD NOT BE PERMITTED TO SPECULATE ABOUT REDEMPTIONS THAT NEVER OCCURRED 8

CONCLUSION 10

TABLE OF AUTHORITIES

Page

Cases

Amorgianos v. Amtrak,
303 F.3d 256, 266 (2d Cir. 2002) 2

Boucher v. U.S. Suzuki Motor Corp.,
73 F.3d 18, 21 (2d Cir. 1996) 9

Daubert v. Merrell Dow Pharm., Inc.,
509 U.S. 579 (1993)........ 1

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. Feb. 13, 2015)........ 2

In re Fosamax Prods. Liab. Litig.,
645 F.Supp.2d 164, 192 (S.D.N.Y. 2009) 6

In re PLX Tech. Stockholders Litigation, C.A. No. 9880 (JTL),
2018 Del. Ch. LEXIS 336, at *117 (Del. Ch. Oct. 16, 2018)........ 3

Kossoff v. Felderbaum,
281 F.Supp.3d 454, 465 (S.D.N.Y. 2017) 3

Kossoff v. Felderbaum, No. 14 Civ. 1144 (RWS),
2017 U.S. Dist. LEXIS 37211, at *3 (S.D.N.Y. March 15, 2017) 3

Lippe v. Bairnco Corp.,
288 B.R. 678, 686 (S.D.N.Y. 2003), *aff'd* 99 F. Appx. 274 (2d Cir. 2004)........ 9

Lippe v. Bairnco Corp.,
99 F. Appx. 274, 279 (2d Cir. 2004)........ 10

Louis Vuitton Malletier S.A. v. Sunny Merch. Corp.,
97 F.Supp.3d 485, 504 (S.D.N.Y. 2015) 6

Wilson v. Great Am. Industries, 746 F. Supp. 251, 259 (N.D.N.Y. 1990),
rev'd on other grounds, 979 F.2d 924 (2d Cir. 1992) 3

Rules

Fed. R. Evid. 403 1

Fed. R. Evid. 702 1

Other Authorities

ASC § 820........ 2

FAS § 157 2

IPEV Guidelines § 1.1 6

IPEV Guidelines § 2.1 6
IPEV Guidelines § 2.2 .... 6, 7

Defendant David Bodner respectfully submits this Reply Memorandum of Law in support of his Motion to Exclude the Quintero Report pursuant to Federal Rules of Evidence 702 and 403 and *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993) (ECF No. 632).[1]

PRELIMINARY REPLY STATEMENT

The Liquidators' Opposition confirms that Quintero is advancing a demonstrably false proposition concerning the purported payment by PPVA of inflated incentive fees. His opinion that PPVA suffered damages in the form of $55.1 million in incentive fee payments is entirely unsupported.

Bodner's opening memorandum challenged Quintero's opinion on incentive fee damages, as his report never connected the alleged inflation of assets with any actual payments of inflated incentive fees by PPVA during the Damages Period from December 2012 to March 2016. Quintero's report has many charts and numerous detailed chronologies, but no chart and no data showing the payment of the inflated incentive fees from PPVA.

The Opposition does not provide the data either. Instead, the Liquidators provide three "example" payments by PPVA, but none of them is connected to an inflated incentive fee payment. Furthermore, the Liquidators repeatedly try to switch the discussion from incentive fees to management fees, which are off the point. The Liquidators cannot escape the plain fact that incentive fees were *accrued* at the Feeder Funds by their General Partner, and not paid by PPVA, as Quintero tried to misleadingly contend in his report.

The Liquidators likewise fail to establish the admissibility of Quintero's value opinions. The Opposition offers no professional standard that could support Quintero's appraisal

[1] ECF citations refer to the *Trott* docket, 18 Civ. 10936. Capitalized terms not defined herein shall have the meanings ascribed to them in Bodner's opening memorandum ("Bodner Mem.") (ECF No. 633). Citations to the JOLs' opposition memorandum ("Opposition" or "Opp.") refer to ECF No. 640. Emphasis is supplied throughout this memorandum unless otherwise noted.

methodology: straight-line devaluation of an asset toward a later-realized or later-estimated outcome. No "expert in the … field" assessing fair value in real time would value an asset by linear depreciation toward a bankruptcy or fire sale occurring years in the future. *Amorgianos v. Amtrak*, 303 F.3d 256, 266 (2d Cir. 2002). If Quintero's opinion was that the fund portfolio was overvalued at a given measurement date he was obligated to offer the jury an opinion of 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. Feb. 13, 2015) (citing FAS § 157); *see also* ECF No. 634-2 (citing ASC § 820). He has not done that. The Liquidators seek to excuse this omission by claiming, remarkably, that this is not "a valuation case" (Opp. at 8), when as to Bodner in particular, valuation is all that is left of the Liquidators' case following this Court's decision on summary judgment ("the Court grants summary judgment in favor of Bodner on those portions of the claim for fiduciary duty that are <u>not</u> premised on the overvaluations of PPVA's NAVs"). (April 21 Op. at 29 (ECF No. 624) (emphasis in original)). It was therefore incumbent upon the Liquidators and their expert to establish through appropriate methodology that the NAV was in fact overstated at particular measurement dates in specified amounts.

Finally, the Liquidators have no basis to offer Quintero's pure speculation about what PPVA's investors might have done had they known earlier that—according to Quintero—Platinum Management's NAV figures were inflated. (Quintero Report Ex. 39 (ECF No. 639-1)). Quintero has no basis to suggest what investors might have done, and, in fact, he offers the jury no affirmative opinion—just a range of possible outcomes from which a jury, apparently, is supposed to choose one. There is no professional analysis, no data, and no expertise behind it.

In sum, Quintero's opinions based on incentive fee damage, historical inflation of asset value, and speculation regarding possible investor redemptions have no place in a federal jury trial of this action.[2]

REPLY POINTS

I. THE LIQUIDATORS EFFECTIVELY CONCEDE THAT QUINTERO CANNOT SUPPORT HIS OPINION ON INCENTIVE FEES

Quintero stated in the very first paragraph of his report that PPVA suffered damages in the form of inflated incentive fees "charged to the Fund." (Quintero Report ¶ 1 (ECF No. 639-1)). He calculated that damage at $55.1 million:

> **Damages** sustained by the Fund pertaining to **inflated Incentive Fees** were **at least** the full amount of Incentive Fees charged to the Fund during the Damages Period, which has currently been calculated in the amount of **$55.083 million (Exhibit 21)**,$ subject to further refinement.

(Quintero Report ¶ 33(b) (ECF No. 639-1)) (emphasis in original). Remarkably, the Liquidators never even *mention* that figure in the Opposition. They do not defend it. Nor do they offer a different figure in any lesser or greater amount.

This is not surprising, since what Quintero calls an "incentive fee" was never an obligation of PPVA. It was a book entry adjustment on the books of the Feeder Funds, called an "Incentive Allocation," and was a debit to the capital accounts of the limited partners (*i.e.*, the

[2] Quintero's opinions have been held inadmissible and unreliable by this Court and others. In *Kossoff v. Felderbaum*, No. 14 Civ. 1144 (RWS), 2017 U.S. Dist. LEXIS 37211, at *3 (S.D.N.Y. March 15, 2017), the district court excluded from trial two of his three proffered calculations, and with respect to the third, gave "no weight" to his conclusions at trial "because the hours and rate figures he employed [we]re unsupported." 281 F.Supp.3d 454, 465 (S.D.N.Y. 2017). *See also In re PLX Tech. Stockholders Litigation,* C.A. No. 9880 (JTL), 2018 Del. Ch. LEXIS 336, at *117 (Del. Ch. Oct. 16, 2018) ("Quintero's math supports his valuation conclusion, but the inputs driving that math were not sufficiently convincing"); *Wilson v. Great Am. Industries*, 746 F. Supp. 251, 259 (N.D.N.Y. 1990) (Quintero's analysis deserved "little weight" because it was "subject to substantial flaws" and "replete with assumptions and adjustments which the court found to be ill defined and explained"), *rev'd on other grounds*, 979 F.2d 924 (2d Cir. 1992).

fund investors) of the two Feeder Funds with a corresponding credit *accrued* (not paid) to the capital account of the General Partner. (Bodner Mem. at 20 & ECF No. 634-10). Because of liquidity constraints at PPVA, the General Partner was reluctant to make cash redemptions within the Damages Period. For this reason, Quintero was unable (or rather, unwilling) to quantify exactly how much PPVA *actually* paid in redemptions to the Feeder Funds on account of the incentive allocation to the General Partner. Quintero and the Liquidators know this—Quintero acknowledges it in the two schedules that support his report. (Quintero Report Appx. A at 1 ("we have confirmed $5.6m was paid to the GP in cash via the Master Fund in January 2012 [*i.e.*, a year *before* the Damages Period] but have not been able to tie any other withdrawals from the Intermediate GP account to cash payments") (ECF No. 639-1); *see also* ECF No. 634-6 at 1 (Quintero stating that "[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," where no such "further work" ever came)).

The Liquidators, unable to defend Quintero's opinion that PPVA suffered $55.1 million (or any other amount) in incentive fee damage, purport to support his opinion with reference to three random examples of PPVA payments. *First*, they point the Court to a payment in March 2014, in which they purport to trace $3.6 million from a PPVA operating account to "an account ending in 0527" then to the Mark Nordlicht Grantor Trust, but the Liquidators acknowledge twice in the relevant discussion that this was a payment of "*management fees*," which have nothing to do with incentive fees. (Opp. at 4 n.4).[3] The Liquidators confuse the discussion again in their Opposition where they write that PPVA's "own bank statements

[3] Quintero opined that $15.8 million in inflated management fees were paid to Platinum Management during the Damages Period. (Quintero Report ¶ 33(a) (ECF No. 639-1)). Unlike with respect to the incentive fees, Quintero claims he can actually show that PPVA *paid* the management fees. (ECF No. 634-6 at 1).

evidenc[e] the use of PPVA's funds to pay more than $40 million in *management fees* to Platinum Management during the Damages Period." (*Id*. at 22). Management fees are not the issue.

Second, the Liquidators refer to a payment in February 2014, allegedly tracing some $13.4 million in aggregate from PPVA to the Feeder Funds to the General Partner. (Opp. at 22). But again the Liquidators fail to connect the transaction to any incentive allocation-related payment, and neither the Liquidators nor Quintero (who never mentions the transaction in his report) opines as to what portion of it, if any, was based on an inflated asset value.

Third, the Liquidators point to a transaction in January 2013, just the second month of the Damages Period, where the General Partner allegedly transferred an accrual of incentive fees to capital accounts held by "family members of Platinum Management's owners." (Opp. at 23). These transactions, however, have nothing to do with Quintero's claim of inflated incentive fee payments, since a transfer from the General Partner in *January 2013* of earlier-accrued incentive fees necessarily means that the fees were based on *2012* performance. As reflected in Quintero's valuation opinions of the eight allegedly inflated positions (Quintero Report Exs. 23-30 (ECF No. 639-1)), the asset values were not inflated in 2012. Any incentive fees based on 2012 performance are outside of (*i.e.*, pre-date) the claim for damages. This is perhaps why, as with the prior two examples, Quintero never mentioned it in his report.

In sum, while the Liquidators state that it "is beyond cavil that PPVA in fact paid *the* cash for *the* fees" (Opp. at 22), neither they nor Quintero ever quantifies "*the* cash" or "*the* fees." There is a total failure of proof with respect to Quintero's opinion that PPVA was damaged by the payment of $55.1 million in incentive fees. The Liquidators' answer—that the Court should merely permit Quintero to be cross-examined and let the jury decide what the

amount is—is no answer. *Daubert* does not permit him to lob out a damages figure of *$55.1 million* that lacks any methodology or factual basis. The Court should exercise its discretion as gatekeeper and exclude his testimony with respect to incentive fee damage.[4]

II. QUINTERO'S STRAIGHT-LINE DEVALUATION OF THE PPVA POSITIONS IS NOT AN ADMISSIBLE APPRAISAL METHODOLOGY UNDER *DAUBERT*

The Liquidators define the relevant professional standard applicable to Quintero's work as follows: "the Valuer should apply a technique or techniques…appropriate in light of nature, facts and circumstances of the Investment and should use reasonable *current* market data and inputs combined with Market Participant assumptions." (Opp. at 7 n.7) (citing International Private Equity and Venture Capital Valuation Guidelines § 2.2) (the "IPEV Guidelines"). As also noted in the same IPEV Guidelines, one section before the one quoted by the Liquidators: "The Fair Value of each Investment should be assessed *at each Measurement Date*." (IPEV Guidelines § 2.1). In Section 1.1, the IPEV Guidelines define Fair Value as "the price that would be received to sell an asset in an Orderly Transaction between Market Participants *at the Measurement Date*." (*Accord* Bodner Mem. at 6).

---

[4] The Liquidators cite *Louis Vuitton Malletier S.A. v. Sunny Merch. Corp.*, 97 F.Supp.3d 485, 504 (S.D.N.Y. 2015) for the proposition that they may use Quintero's testimony to "synthesize[]" or "summarize[]" data to "streamline the presentation of [evidence] to the jury." (Opp. at 23). In *Louis Vuitton*, the expert created "summaries of the contents of voluminous data" by "comb[ing] through at least 100 pages of sales reports, compil[ing] and aggregate[ing] the data (which was provided on a transaction-by-transaction basis) and present[ing] it in a more readily understandable format." *Id.* Quintero, on the other hand, does not purport to synthesize or summarize any data with respect to incentive fee damages. He simply invents, without support. Also off the mark is the Liquidators' suggestion that Quintero's testimony "may offer commentary on documents if [his] 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." (Opp. at 23) (citing *In re Fosamax Prods. Liab. Litig.*, 645 F.Supp.2d 164, 192 (S.D.N.Y. 2009)). As *In re Fosamax* holds, expert opinions that "merely read, selectively quote, or 'regurgitate' the evidence" are not admissible. *Id.* at 191-192. Simply stated, the jury does not need Quintero's "commentary" to understand that PPVA *had no incentive fee damage* if it never *paid the fees*.

Quintero did not do this work when he concluded that eight PPVA positions were overvalued at different points in time. (Quintero Report at 17, Table 1 (ECF No. 639-1)). He used no "reasonable current market data" or inputs; the Liquidators took no discovery to ascertain "Market Participant assumptions" and Quintero did no work of his own to include any in his report or supporting materials. (IPEV Guidelines § 2.2).

Instead, with respect to each investment evaluated by Quintero, his starting point is some later-known outcome, either a bankruptcy (in the cases of Black Elk, Northstar, and Over Everything), a collapse in the business (China Horizon), or the Liquidators' own estimated values set in 2017 where they were unable to provide capital investment to the operating business (Golden Gate, PEDEVCO and Desert Hawk). Quintero chooses some earlier point in time, usually an acquisition price years earlier, and does a straight-line devaluation of the position over the 30-40 months that PPVA held the position during the Damages Period. As Quintero concedes, this is not valuation; it is *depreciation*, like (in the example the Liquidators provide) the devaluation of an automobile that drives off the lot. (Opp. at 10). The difference, of course, is that an automobile is *known to depreciate over time.* Operating companies and joint venture partnerships with the Chinese government are *not* known to devalue over time. Tellingly, nowhere in the IPEV Guidelines that the Liquidators cite as their professional lodestar is there *any* suggestion that fair value can be assessed via linear depreciation. The Liquidators cite not a scrap of accounting or appraisal literature that supports Quintero's methodology.

With respect to the sundry data points cited by Quintero and the Liquidators with respect to the eight positions (Opp. at 11-21), nothing prevents the Liquidators from introducing these at trial through appropriate fact witnesses in an effort to prove that Platinum Management's marks were knowingly overstated at measurement dates associated with the data points. But

they cannot do it through Quintero, because his linear devaluation model is not an acceptable method of establishing fair value under relevant professional standards, and his expert testimony is therefore inadmissible.

It is no answer that, as the Liquidators say, Quintero faced "practical and foundational challenges" in doing monthly or quarterly appraisals because "valuation entails the highest degree of subjectivity and difficulty." (Opp. at 7). Precisely because the valuation process was subjective and judgmental, PPVA's investors relied on the experts at Sterling and Alvarez, and CohnReznick and BDO (and the valuation firms they employed, like VRG), which *independently* valued PPVA's positions on a quarterly and annual basis, and where Platinum Management's marks were *always* within the independent firms' high-low ranges within the Damages Period.[5] In sum, *Daubert* offers no free passes to an expert who finds the use of professional valuation methods too difficult. Quintero's straight-line devaluation method should be excluded.

III. QUINTERO SHOULD NOT BE PERMITTED TO SPECULATE ABOUT REDEMPTIONS THAT NEVER OCCURRED

Separate and apart from his opinions regarding overvaluation and inflated fees, Quintero opines that some number of investors in the funds would have redeemed their interests in some amount had they be told the "true" values of PPVA's positions. He states: "a full and fair disclosure for losses and a proper valuation of the Fund's deficiencies would likely have

[5] Given the extensive contemporaneous work by the first-class valuators and auditors, the Liquidators' claim that "there are no reliable inputs upon which comprehensive valuations of these idiosyncratic investments could be constructed…no market data or market correlates, no reliable financial data, no verifiable information as to intervening developments" rings hollow. Quintero's first failing is that he never bothered to review the workpapers of these firms to ascertain what data *they* used to independently arrive at their valuations. (Quintero Dep. 12:4-13:4) (ECF No. 634-4). While the Liquidators claim generally in the Opposition that Platinum Management "concealed" data from the valuators and auditors (Opp. at 3), they can offer no concrete example.

resulted in a "run on the bank," leading to a radical reduction in assets under management or a dissolution of the Fund." (Quintero Report ¶ 70 (ECF No. 639-1)). Quintero offers five scenarios based on varying degrees of redemptions, and claims that the fund would have been spared later-paid fees had it shuttered its doors earlier in the Damages Period. (*Id*. Ex. 39).

This is precisely the sort of "speculative or conjectural" expert testimony forbidden in the Second Circuit. *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)). Quintero offers no affirmative opinion as to which of the five scenarios is likely, or why. He claims no relevant prior professional experience to support his hypothesized scenarios and offers no data to back them. The Liquidators argue that he merely "extrapolates" from the fact that some investors submitted redemptions in the first quarter of 2016 (Opp. at 25), but what investors did in 2016 without any knowledge of alleged overvaluation says nothing about what investors would have done in entirely different market conditions years earlier. And as noted in the Bodner Mem., Quintero never accounts for the fact that a quarter of the investor body was made up of insiders and their families. (*Id*. at 24).

Quintero's opinion that a "run on the bank" would have reduced assets under management (and thus the management fee) likewise ignores that the fund was mostly illiquid within the Damages Period and would not have had the ability to pay redemptions in significant amounts. And he ignores the obvious fact that even if redemptions would have forced a liquidation or change in management, some replacement fiduciary would have to unwind the fund's mostly illiquid positions, and that fiduciary would not work for free. Indeed, the Liquidators here have attempted to manage the PPVA assets since August 2016 and have charged the fund more than $30 million in professional fees in that four-year period.

In sum, Quintero's opinion that earlier redemptions would have spared later-paid management fees is conjecture, fails to consider obvious facts, and is inherently unreliable. *Lippe v. Bairnco Corp.*, 99 F. Appx. 274, 279 (2d Cir. 2004).

CONCLUSION

The Quintero Report must be excluded in its entirety.[6]

Dated: June 9, 2020
New York, NY

CURTIS, MALLET-PREVOST,
COLT & MOSLE LLP

By: */s/ Eliot Lauer*
Eliot Lauer
Gabriel Hertzberg
Abigail Johnston
101 Park Avenue
New York, New York 10178
Tel.: (212) 696-6000
Fax: (212) 697-1559
Email: elauer@curtis.com
ghertzberg@curtis.com
ajohnston@curtis.com

Attorneys for Defendant David Bodner

37631149

[6] Bodner joined in the *Daubert* motion filed by defendant Huberfeld to exclude the expert report of Bill Post (ECF No. 627) and further joins in the reply (ECF No. 642).