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.	:	

MEMORANDUM OF LAW OF DEFENDANT MURRAY HUBERFELD IN 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 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. Morrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).[2]

PRELIMINARY STATEMENT

The Post Report is replete with obvious improprieties that warrant its complete exclusion from trial. Among other things, Post opines on pure questions of law; opines on matters that the jury is capable of understanding without the aid of an expert; self-servingly restates potential evidence; makes inferences from documents and testimony that invade the fact-finding role of the jury; makes statements or opinions that are pure speculation or contradicted by the record and/or based on limited documents and testimony curated by Plaintiffs' counsel to support their narrative; attempts to substitute opinion for fact; engages in completely subjective analysis; and more. Even a cursory review of the Post Report makes these errors evident. Taken together, however, the content of the Post Report adds up to the same impermissible narrative that courts in this Circuit have barred parties from introducing at trial time and time again.

Plaintiffs have asserted claims against Huberfeld for breach of fiduciary duty (SAC Counts 1-2), aiding-and-abetting fraud and breach of fiduciary duty (Counts 3, 6-8), fraud and constructive

[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.

[2] The Post Report is submitted by Plaintiffs Martin Trott and Christopher Smith, as Joint Official Liquidators and Foreign Representatives of Platinum Partners Value Arbitrage Fund L.P. (in Official Liquidation)'s (the "JOLs") and Platinum Partners Value Arbitrage Fund L.P. (in Official Liquidation's ("PPVA," together with the JOLs, "Plaintiffs"). Defendant Huberfeld also joins in the *Daubert* motions to exclude the testimony of any other expert witness filed by any of the other remaining defendants in this action.

fraud (Counts 4-5), and civil conspiracy (Count 16). Generally, Plaintiffs allege that Huberfeld (and others) fraudulently caused PPVA to (i) falsely inflate the net value ascribed to PPVA's assets, thereby enabling PMNY to collect unearned fees, and (ii) engage in non-commercial transactions for the benefit of others' interests over PPVA's. (SAC ¶¶ 9-11.)

Plaintiffs offer the Post Report in support of their claims. Post is a Senior Managing Director at FTI Consulting's Forensic and Litigation Consulting practice. (Post Report ¶ 1.) Prior to joining FTI, he held "various senior investment management and advisory roles" at a variety of financial and investment firms. (*Id.*) His report is an apparent effort by Plaintiffs to have Mr. Post offer testimony as to their version of the facts to the jury at trial under the guise of *expert* testimony despite his lack of personal knowledge of the same, and then also have him substitute for the Court's role on applicable law by offering his application of the law to the facts.

Mr. Post's opinions are summarized in five bullet points addressed to the alleged actions of Platinum Management and its principals (Post Report at ¶ 13), concluding that they:

- "As an SEC Registered Investment Advisor, had a fiduciary duty to put the Master Fund's . . . interests above the interests of Platinum Management and its principals";

  This is clearly a question of law alone and is not necessary or appropriate for an expert opinion.

- "Created and utilized Beechwood and BEOF entities . . . as alter egos to engage in fraudulent non-arms-transactions with the Master Fund that lacked statutorily required and appropriate safeguards and mechanisms to mitigate conflicts."

  This is clearly offering factual and legal conclusions and is again not necessary or appropriate for expert opinion.

- "Orchestrated these fraudulent transactions to inflate the Master Funds's NAV . . . and strip its assets for the benefit of themselves and their families and associates."

  Once again, Mr. Post is substituting himself for the Judge and Jury and offering factual and legal conclusions that are not necessary or appropriate for expert testimony; he is also making valuation judgments when he has no valuation expertise and has not performed any valuation.

- "Paid themselves millions in unearned management an [sic] incentive fees based on inflated NAV at times when the Master Fund was starved of liquidity; and"

  This is again offering factual conclusions that are not necessary or appropriate for expert testimony, and again offers valuation judgments without valuation expertise or a valuation having been performed.[3]

- "Intentionally engaged in sham transactions and self-dealing causing harm to the Master Fund resulting in the collapse of the fund."

  Here, again, he is offering factual and legal conclusions that are not necessary or appropriate for his expert testimony and simply usurp the jury's role. He is also engaging in pure speculation as to intent and causation unrelated to his expertise.

Of course, all of his "opinions" are extremely prejudicial to Huberfeld, and address directly the factual and legal merits of Plaintiffs' claims, based on a summary of facts and documents filtered through Plaintiffs' counsel. (*Id.*) Indeed, the Post Report largely reads like a lawyer advocacy piece that might as well have been written by Plaintiffs' counsel.

Even the titles of Sections V-IX of the Post Report illustrate the inadmissibility of Post's testimony. In Section V, Post 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." (*Id.* (capitalization removed).) Post provocatively entitled Section VI, "Platinum Management engaged in fraudulent transactions that irreparably harmed the Master Fund and caused its collapse." (*Id.* (capitalization removed).) In Section VII, Post opines that "to perpetrate fraud against the Master Fund, Platinum Management utilized its alter egos, Beechwood and BEOF." (*Id.* (capitalization removed).) And in Sections VIII and IX, Post would testify that Platinum Management "failed to meet its fiduciary duty" when it "conducted fraudulent transactions with related parties in ways

[3] Insofar as Post purports to opine that PPVA suffered damage in the form of incentive fees—a conclusion for which he apparently relies on the Liquidators' other expert, Ronald G. Quintero, and did no work of his own—we respectfully refer the Court to the *Daubert* motion of defendant David Bodner.

specifically proscribed by the applicable statutes" and "inflate[d] the net asset value calculation" for PPVA. (*Id.* (capitalization removed).) In sum, Post brazenly applies his own recitation of the law to his own factual narrative to bolster legal conclusions that go to the ultimate issues in the case – all under the prejudicial banner of "expertise."

In the balance of his report, Post opines on, *inter alia*, Huberfeld's (and certain other defendants') role in respect of PPVA, the existence of legal duties that arise from that role, findings of fact as to both the existence of fraudulent schemes and Huberfeld's involvement in them, Huberfeld's state of mind in connection with his alleged conduct, and legal conclusions that Huberfeld breached his purported duties to PPVA. (*Id.*) Post also makes statements on lay matters within the jury's ken. For example,, he proposes to educate the jury on materials he reviewed, such as about the corporate organization of PPVA and its affiliated funds and investment advisors, and the relative roles and responsibilities of individuals related to those companies. (Post Report ¶¶ 14-21). Post similarly seeks to invade the province of the Court by instructing the jury on the applicable law, including the contours of the "mandatory" "duty of care and a duty of loyalty" allegedly owed by Huberfeld and others to PPVA (Post Report ¶¶ 34-37); the law's prohibitions against "fraud and deceit and making untrue statements" (Post Report ¶¶ 38-41); and how fiduciaries must comply with these duties and prohibitions (Post Report ¶¶ 42-47).

Under the guise of "background," Post presents a narrative of facts, about which he has no personal knowledge. Post's "background" essentially restates information drawn from Plaintiffs' selection of testimony and documents. (Post Report ¶¶ 14-32.) Post then presents this "background" in a manner that impermissibly promotes Plaintiffs' theory of the case, interprets and draws inferences from facts, and makes factual findings that advance Plaintiffs' theory of liability. (*Id.*; *see, e.g.*, Post Report ¶ 23 (stating that Huberfeld was a "concealed owner[] of PM"

who "exerted significant control and authority" and "had knowledge of and a/or controlled PM and its engagement in fraudulent activities"); Post Report ¶ 24 ("it is clear from the evidence with regard to the investment management functions at PM, ultimate authority and control resided with . . . Huberfeld"); Post Report ¶ 25 ("PM and its executives exercised their collective position of power to substantially overvalue PPVA's interests . . . ."); Post Report ¶ 29 ("PM and its executives [stripped an asset] by way of an insider sale . . . at a significant discount."); Post Report ¶ 31 ("These PM individuals used the Beechwood enterprise as a fraudulent tool . . . ."); Post Report ¶ 32 (a "fraudulent consent solicitation orchestrated by PM and its executives").)

Finally, Post applies his own view of the law to his own factual narrative to offer legal conclusions that go to the ultimate issues in the case. Among many other impermissible legal conclusions, Post opines that Huberfeld "exerted significant control and authority" over management (Post Report ¶ 23), states that Huberfeld "had knowledge of and/or controlled [Platinum Management] and its engagement in fraudulent activities" (Post Report ¶ 23), describes how Huberfeld engaged in "fraudulent transactions" (Post Report ¶¶ 48-52), concludes that Huberfeld wrongly utilized alter egos for the purpose of "perpetrat[ing] fraud" (Post Report ¶¶ 53-66), states that Huberfeld "failed to meet [his] fiduciary duty and caused harm" to PPVA (Post Report ¶¶ 67-101), and concludes he fraudulently inflated PPVA's net asset value (Post Report ¶¶ 102-111).

In sum, Post intends to: (i) present a one-sided narrative of facts, teeming with his own findings of fact and inferences drawn from testimony and documents, all of which were cordinated through Plaintiffs' counsel and about which he has no personal knowledge; (ii) instruct the jury on the applicable law; (iii) apply his own law to his own facts, and testify about legal conclusions that Huberfeld committed fraud and breached legal duties owed to PPVA; and (iv) address other non-

scientific matters that do not require expert testimony. The Second Circuit has made it abundantly clear that each and every facet of Post's proffered testimony is inadmissible under the Federal Rules of Evidence.

LEGAL STANDARDS GOVERNING THIS MOTION

The admissibility of evidence must be established by a preponderance of the proof. *See Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 592 n.10 (1993). The burden of demonstrating that prospective "testimony is competent, relevant, and reliable rests with the proponent of the testimony." *See Koppell v. New York State Bd. Of Elections*, 97 F. Supp. 2d 477, 479 (S.D.N.Y. 2000).

To be admissible, expert testimony must be both helpful and reliable. *See* Fed. R. Evid. 702; *Koppell*, 97 F. Supp. 2d at 480. This Court has the "gatekeeping" function under Rule 702; it is charged with the task of "ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand." *Daubert*, 509 U.S. at 589 n.7. In serving its gatekeeping function, the court's focus must be on the principles and methodologies underlying the expert's conclusions. *Id.* at 595.

Although the admissibility of expert testimony is case-specific and fact-specific, *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 150-51 (1999), certain categories of expert testimony can never be helpful or reliable under Rule 702 and are thus inadmissible. Namely, expert testimony on "lay matters" that are "neither scientific nor in any way beyond the jury's ken" is not admissible. *Andrews v. Metro North Commuter R. Co.*, 882 F.2d 705, 708 (2d Cir. 1989). Additionally, "expert testimony that 'usurps 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.'" *See Nimely v. City of New York*, 414 F.3d 381, 397 (2d Cir. 2005) (citations omitted); *see also Hygh v. Jacobs*, 961 F.2d 359, 363-64 (2d Cir. 1992) (stating that expert testimony that even implicitly communicates a legal standard is objectionable). Similarly, "experts are not permitted to present testimony in the form of legal conclusions." *U.S. v. Articles of Banned Hazardous Substances Consisting Of An Undetermined No. of Cans of Rainbow Foam Paint*, 34 F.3d 91, 96 (2d Cir. 1994). Finally, expert testimony about someone else's state of mind will never assist the trier of fact. *See, e.g., Marvel Worldwide, Inc. v. Kirby*, 777 F. Supp. 2d 720, 729-30 (S.D.N.Y. 2011) (excluding expert testimony about what others thought or understood), *aff'd in part and vacated in part*, 726 F.3d 119 (2d Cir. 2013); *In re Rezulin Prods. Liab. Litig.*, 309 F. Supp. 2d 531, 547 (S.D.N.Y. 2004) ("Inferences about the intent or motive of parties or others lie outside the bounds of expert testimony.").

In addition to the requirements of Rule 702, expert testimony is subject to relevancy requirements. Fed. R. Evid. 401, 403. Hence, expert testimony may be independently excluded under Rule 403 if it "wastes" the jury's "time" or "present[s] cumulative evidence." *Hygh*, 961 F.2d at 363-64; Fed. R. Evid. 403. Rule 403 also provides for the exclusion of evidence that creates "danger of unfair prejudice, confusion of the issues, or misleading the jury." *Nimely*, 414 F.3d at 397 (citation omitted). "Expert evidence can be both powerful and quite misleading because of the difficulty in evaluating it. Because of this risk, the judge in weighing possible prejudice against probative force under Rule 403 . . . exercises more control over experts than over lay witnesses. *Daubert*, 509 U.S. at 595 (citation omitted).

As explained further below, the Post Report is quintessential improper expert testimony, which courts in this Circuit have repeatedly ruled is *per se* inadmissible. Furthermore, the certain prejudice from the admission of the Post Report outweighs any possible probative value that Post's

opinions may have (which is none, since it is neither reliable nor helpful). The Post Report, and Post's prospective testimony about the topics in the Post Report, should be excluded from the trial.

ARGUMENT

THE POST REPORT SHOULD BE EXCLUDED

I. Section IV Of The Post Report Is Inadmissible Because It Filters Evidence And Addresses Lay Matters That The Jury Is Capable Of Understanding And Deciding Without An Expert's Help

The Post Report should be excluded insofar as Post makes statements about the "background" of the case that unfairly promote Plaintiffs' theories and opines on lay matters that do not require expert testimony.

"[A]n expert cannot be presented to the jury solely for the purpose of constructing a factual narrative based upon record evidence." *Highland Capital Mgmt., L.P. v. Schneider*, 379 F. Supp. 2d 461, 469 (S.D.N.Y. 2005) ("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.") (internal citation omitted); *LinkCo, Inc. v. Fujutsu Ltd.*, No. 00 Civ. 7242 (SAS), 2002 U.S. Dist. LEXIS 12975, at *4-6 (S.D.N.Y. July 16, 2002) (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. 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"); *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").

Here, it is apparent from the Post Report that Plaintiffs intend to use Post's testimony to convey a narrative – under the banner of expertise – to support their theory of the case. Part IV of the Post Report, entitled "Background", is based on selective documents and testimony provided to Post by Plaintiffs' counsel. (Post Report ¶ 10.) In it, Post restates the evidence preferred by Plaintiffs, and also makes inferences, interprets, and jumps to conclusions based on the same materials. (*See, e.g.*, Post Report ¶ 23 ("[Bodner, Huberfeld, and Fuchs], concealed owners of PM, exerted significant control and authority over PM's management of the Master Fund . . . [they] engage[d] in fraudulent activities with the Master Fund."); Post Report ¶ 24 ("These owners and executives of PM regularly met for partner dinners and at their shared offices at PM and Beechwood to discuss and direct investment and asset allocation strategy for the Master Fund and the other funds under their control."[4]). Additionally, Post proposes to testify about what the parties did, said, knew, believed, assumed, and understood. *See, e.g.* Post Report ¶¶ 24, 31 ("These PM individuals used the Beechwood enterprise as a fraudulent tool . . . ."). Testimony of this nature should clearly not be admitted at trial. *See Kidder, Peabody & Co. v. IAG Int'l Acceptance Grp., N.V.*, 14 F. Supp. 2d 391, 404 (S.D.N.Y. 1998).

[4] Remarkably, in this one sentence alone, Post makes at least seven unfounded inferences or conclusions about significant factual and legal issues in the case. Each of these issues lie within the jury's province: whether (1) Huberfeld is an "owner or executive"; (2) whether he "regularly" met for (3) "partner" dinner parties; whether he had an office at relevant times at (4) "PM" or (5) "Beechwood"; whether (6) "investment and allocation strategies" were discussed, and whether (7) PPVA or any other fund was "under their control".

Post's "background" section in the Post Report should also be excluded because it addresses "lay matters which a jury is capable of understanding and deciding without the expert's help." *Andrews*, 882 F.2d at 708. Post's proffered testimony about the relevant companies and their structures, the rights and obligations related to the companies, and other matters (*see* Post Report ¶¶ 14-21) are topics that are "neither scientific nor in any way beyond the jury's ken." *Id.* Hence, it is also superfluous evidence that will waste the jury's time and should be excluded.[5]

II. Sections III, VI, VII, VIII, And IX Of The Post Report Should Be Excluded Because The Proffered Testimony Is Conclusory Legal Opinion That Invades The Province Of The Jury

Post's proffered testimony expressing his view that Huberfeld acted wrongfully, acted fraudulently, breached duties of care to PPVA, or acted inconsistently with the law are inadmissible legal conclusions. "It is a well-established rule in this Circuit that experts are not permitted to present testimony in the form of legal conclusions." *Articles of Banned Hazardous Substances*, 34 F.3d at 96; *see United States v. Bilzerian*, 926 F.2d 1285, 1294 (2d Cir. 1991) ("As a general rule an expert's testimony on issues of law is inadmissible."). To allow such opinions would "trespass[] on the province of the jury and the trial court" by imposing the expert's view on the parameters of the law and whether or not it has been violated. *Fiataruolo v. United States*, 8 F.3d 930, 941 (2d Cir. 1993). Therefore, expert testimony must be excluded or "carefully circumscribed to assure that the expert does not usurp either the role of the trial judge in instructing the jury as to the applicable law or the role of the jury in applying that law to the facts before it." *Bilzerian*, 926 F.2d at 1294.

Relying on these principles, the Second Circuit has consistently barred testimony stating ultimate legal conclusions based on disputed issues of fact. *See, e.g, Snyder v. Wells Fargo Bank,*

[5] For the same reasons set forth in this Point I above, other sections of the Post Report that likewise reference factual matters within the jury's purview should also be excluded.

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); *Marx & Co., Inc. v. Diners' Club, Inc.* 550 F.2d 505, 509-10 (2d Cir. 1997) (trial court erred in permitting expert's legal opinion on the meaning of certain contract terms as such opinion was outside the witness's area of expertise and was also an invasion of the court's authority to instruct the jury on the applicable law); *Articles of Banned Hazardous Substances*, 34 F.3d at 96 (opinion of expert that test for flammability in federal regulations should not apply to foam based product was a legal conclusion and thus not admissible); *In re Air Disaster at Lockerbie Scotland on Dec. 21, 1988*, 37 F.3d 804, 827-28 (2d Cir. 1994) (excluding expert opinion that the defendant violated federal regulations as "an impermissible legal conclusion"); *Hygh*, 961 F.2d at 362-64 (expert testimony in excessive force case that police officer's conduct was not "justified under the circumstances" and "totally improper" amounted to "conclusory condemnations" and was not permissible); *Andrews*, 882 F.2d at 708-09 (district court abused its discretion when it permitted expert to testify in train accident suit that railroad was negligent in its operation of the train); *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).

Here, the Post Report proffers impermissible legal conclusions about the ultimate issues in the case. Namely, *inter alia*:

- In Section VI, Post boasts that "PM and its executives engaged in fraudulent transactions involving self-dealing, conveyance, subordination, and encumbrance of fund assets, and blatant misrepresentation of asset values – all of which financially damaged the Master Fund for the person [sic] benefit of PM's owners." (Post Report ¶¶ 48, 49-52.)
- In Section VII, Post states that "based on [his] review of the evidence in this matter, Beechwood and BEOF were operated as the alter ego of PM in the execution of the described fraudulent schemes." He reached this conclusion after he was "informed by Holland & Knight [Plaintiffs' counsel] that the following indicia in particular are among those used for determining alter ego in this matter . . . ." (Post Report ¶¶ 54, 53-65.)
- In Section VIII, Post concludes that 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." (Post Report ¶¶ 69, 67-101.)
- In Section IX, Post opined that Platinum Management "inflat[ed] the Master Fund's NAV," and "breached its fiduciary duty in multiple ways which damaged the Master Fund," which "permitted PM and its executives to receive unearned fees before the fund collapsed." (Post Report ¶¶ 111, 102-111.)
- Finally, in Section III, Post merely restates these same impermissible opinions. (Post Report ¶ 13.)

Because this testimony both encompasses ultimate issues and would serve only to cause "unfair prejudice, confus[e] the issues, [and] mislead[] the jury," it is therefore inadmissible. Fed.

R. Evid. 403; *Nimely*, 414 F.3d at 397. *See also Snyder*, 594 Fed. App'x at 714 (expert testimony stating that financial institution breached contractual and fiduciary duties "went to ultimate issues for jury resolution" and was not admissible).

III. Section V Of The Post Report Improperly Invades The Province Of The Court By Instructing The Jury On The Law

The remainder of the Post Report, in Section V, improperly invades the function of the Court to instruct the jury on the applicable law. It is axiomatic that "[i]t is not for a witness to instruct the jury as to applicable principles of law, but for the judge." *Marx & Co., Inc.*, 550 F.2d at 509-10. Therefore, in deciding whether expert testimony will be helpful to the fact-finder, the Court must determine whether the testimony "usurp[s] the role of the trial judge in instructing the jury as to the applicable law." *United States v. Lumpkin*, 192 F.3d 280, 289 (2d Cir. 1999) (citation omitted). The Second Circuit has cautioned that trial judges are "not to allow trials before juries to become battles of paid advocates posing as experts on the respective sides concerning matters of domestic law." *Marx & Co., Inc.*, 550 F.2d at 508 (barring expert legal opinions "as to the legal obligations of the parties under the contract").

Post's proffered testimony should be excluded insofar as he instructs the jury on the law. For example, in Section V of the Post Report, Post opines on the existence and contours of the "fiduciary duties of care and loyalty" owed by defendants to PPVA (Post Report ¶¶ 34-37), explains to the jury the law's "legal prohibitions against fraud and deceit" (Post Report ¶¶ 38-41), and describes how investment managers must perform their duties in accordance with the law (Post Report ¶¶ 42-47). Post's opinions – essentially amounting to jury instructions – even improperly presume whether Huberfeld owed fiduciary duties in the first place, a question that is squarely a question of law to be determined in this case. (*See* Post Report ¶ 34.) Post's proposed testimony on 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.

CONCLUSION

For all the foregoing reasons, 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
May 19, 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