**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF TEXAS**
**DALLAS DIVISION**

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| THOMAS L. TAYLOR, III, in his capacity as Court-appointed temporary receiver for Breitling Energy Corp. et al.,<br><br>Plaintiff<br><br>v.<br><br>ROTHSTEIN KASS P.A. d/b/a ROTHSTEIN KASS & CO. P.C., ROTHSTEIN KASS & COMPANY, PLLC and BRIAN MATLOCK,<br><br>Defendants. | §<br>§<br>§<br>§<br>§<br>§<br>§<br>§<br>§<br>§<br>§<br>§<br>§ | NO. 3:19-cv-01594-D |

**DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION TO STRIKE SAUL SOLOMON'S OPINIONS AND EXCLUDE HIS TESTIMONY FROM TRIAL**

**E. LEON CARTER**
State Bar No. 03914300
lcarter@carterarnett.com
**LINDA R. STAHL**
State Bar No. 00798525
lstahl@carterarnett.com
**COURTNEY BARKSDALE PEREZ**
State Bar No. 24061135
cperez@carterarnett.com
**CARTER ARNETT PLLC**
8150 N. Central Expy., Suite 500
Dallas, Texas 75206-1860
(214) 550-8188 (main)
(214) 550-8185 (facsimile)

**NICOLAS MORGAN** (admitted pro hac vice)
Cal. State Bar No. 166441
nicolasmorgan@paulhastings.com
**THOMAS A. ZACCARO** (admitted pro hac vice)
Cal. State Bar No. 183241
thomaszaccaro@paulhastings.com
**PAUL HASTINGS LLP**
515 South Flower Street, Twenty-Fifth Floor
Los Angeles, CA 90071
(213) 683-6000 (main)
(213) 627-0705 (facsimile)

**Attorneys for Defendants**
**ROTHSTEIN KASS P.A. d/b/a ROTHSTEIN KASS & CO. P.C., ROTHSTEIN KASS & COMPANY, PLLC and BRIAN MATLOCK**

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## I. INTRODUCTION

Defendants Rothstein Kass P.A. (d/b/a Rothstein Kass & Co. P.C.) ("Rothstein Kass PA"), Rothstein Kass & Company, PLLC (together and collectively with Rothstein Kass PA, "Rothstein Kass") and Brian Matlock ("Matlock" and collectively with Rothstein Kass, "Defendants") move to strike certain of Solomon's opinions stated in his Expert Report Dated August 14, 2020 ("Solomon Report") and Supplemental Expert Report dated November 16, 2020 ("Supplemental Report") and exclude from trial his proposed testimony regarding these opinions. The Court should exercise its role as "gatekeeper" over expert testimony and grant this Motion in its entirety. Doing so will prevent the jury from being exposed to irrelevant, speculative, and unreliable opinions from an expert who is unqualified to opine on core bases of his opinions. Any other result will cause irreparable prejudice to Defendants.

Each opinion at issue in this Motion suffers from specific infirmities that merit excluding and striking the opinions, but there are several common themes among Solomon's improper opinions that illustrate why this Motion should be granted. ***First***, Solomon oversteps his narrow qualifications as an accountant to opine on matters beyond his expertise, including hypothetical actions the U.S. Securities and Exchange Commission ("SEC") would have undertaken, legal conclusions as to whether Defendants violated the federal securities laws, and assessments of Mr. Matlock's state of mind. ***Second***, Solomon's opinion includes damage that Plaintiff lacks standing to recover. ***Third***, Solomon's damages theories are based on speculative and unreliable assumptions—specifically, what Breitling Energy Corporation's ("BECC") Audit Committee and the SEC would have done under hypothetical circumstances—that are flatly contradicted by the facts of this case. ***Fourth***, Solomon's methodology for calculating Plaintiff's purported

damages systemically inflates Plaintiff's damages because his methodology is irrevocably flawed and he fails to consider known assets of the Receivership.

In addition, the Supplemental Report is untimely and should be excluded on that basis.

## II. FACTUAL BACKGROUND

### A. Procedural History

This litigation stems from Rothstein Kass PA's audits of three companies—Breitling Oil and Gas Corporation ("BOG"), Breitling Royalties Corporation ("BRC") and BECC (collectively, the "Breitling Entities")—during a six-month period from October 2013 to March 2014 (the "Audits"). Rothstein Kass PA completed the audits and issued audit opinions on February 14, 2014 and March 31, 2014 (the "Audit Opinions").

Several years later, on June 24, 2016, the SEC filed its enforcement action against Chris Faulkner, BECC, BOG, and other individuals and entities alleging violations of the federal securities laws ("*Faulkner*").[1] More than a year later, on August 14, 2017, the Court appointed Plaintiff as the Receiver in *Faulkner*.[2] The Court expanded the scope of the Receivership when it added several entities (including BRC and Patriot Energy, Inc. ("Patriot")) into the "Receivership Entities" on September 18, 2018,[3] and Crude Energy LLC ("Crude Energy") and Crude Royalties LLC ("Crude Royalties" and, with Crude Energy, "Crude") on March 26, 2019.[4]

On July 1, 2019, Plaintiff filed his Original Complaint against Rothstein Kass & Company, PLLC and Mr. Matlock on behalf of the Receivership Entities. (Dkt. No. 1.) After this Court dismissed several counts in the original complaint, Dkt. No. 34 (*Taylor v. Rothstein*

[1] *SEC v. Faulkner, et al.*, No. 3:16-cv-01735-D, Dkt. No. 1.

[2] *Id.*, Dkt. No. 108 at 1.

[3] *Id.*, Dkt. No. 320 at 1.

[4] *Id.*, Dkt. No. 418 at 1.

*Kass & Co., PLLC*, No. 3:19-CV-1594-D, 2020 WL 554583, at *1 (N.D. Tex. Feb. 4, 2020)), Plaintiff filed its First Amended Complaint ("FAC") on February 4, 2020. (Dkt. No. 45.) The FAC contained two counts: professional negligence (Count I), and knowing participation in Mr. Faulkner's alleged breaches of fiduciary duties (Count II). (*Id.*)

**B. Expert Discovery**

The Court's Scheduling Order, as amended, required Plaintiff to designate expert witness(es) by August 14, 2020, and Defendants to designate rebuttal expert witness(es) by September 14, 2020. (*See* Dkt. Nos. 29, 33.) The Scheduling Order further required discovery to close on November 16, 2020. (*See id.*)

1. *Plaintiff's Expert Designation*

On August 14, 2020, Plaintiff served its Rule 26(a)(2) disclosures and designated Saul Solomon as its sole expert on accounting and damages issues.[5] As for the accounting issues, Solomon opined that Defendants had identified certain "highly significant material" accounting issues in November and December 2013 during the course of their audits, which should have informed Defendants that Mr. Faulkner and the Breitling Entities were engaging in "potential fraudulent and illegal acts" ("Accounting Issues").[6] According to Solomon, Defendants should have disclosed those Accounting Issues to management of the Breitling Entities charged with corporate governance, the BECC's Audit Committee or Board of Directors, or the SEC, but failed to do so.[7] Solomon further opined that Rothstein Kass PA should not have issued

[5] App. at 8.

[6] App. at 11. Notably, Solomon identified these acts by "focusing" on determinations of fraudulent activity made by the SEC years later and evaluating "what Rothstein Kass did in terms of addressing the issues" during the audits—*i.e.,* classic fraud by hindsight. App. at 127-28.

[7] App at 49-50, 134-36. At his deposition, however, Solomon conceded that Rothstein Kass *did* disclose the issues to BOG and BRC's General Counsel and Chief Compliance Officer (Jeremy

unqualified audit opinions, but instead either should have issued qualified opinions or withdrawn from the engagement altogether.[8]

According to Solomon, Defendants' purported failure to report the Accounting Issues, and its issuance of unqualified audit opinions, caused damage to certain Receivership Entities.[9] His damages model contains two alternative damage theories: (a) "Increased Liabilities Damages"; and (b) "Misappropriation Damages."[10] Solomon's Increased Liabilities Damages reflect the amounts the Breitling Entities raised from investors, less: (a) disbursements or returns those investors received; and (b) the value of current receivership assets (which Solomon concludes is zero).[11] Solomon's Misappropriation Damages reflect the amounts the Breitling Entities paid to Mr. Faulkner, other officers and employees of the Breitling Entities and certain third-party vendors (such as outside counsel).[12]

Next, Solomon calculated the Receivership's purported damages for each of his two damage theories for four separate time periods, which he calls "analysis periods" ("Analysis Periods"). Each Analysis Period in the Solomon Report starts on December 19, 2013, the date on which Solomon believes Rothstein Kass had sufficient information concerning the Accounting Issues to report them to either BECC's management charged with corporate

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Wagers), and to BECC's General Counsel, Chief Operations Officer, Director, and Secretary (Wagers), and Chief Financial Officer (Rick Hoover). *See* App at 140-42.

[8] App at 11.

[9] App at 11-12, 65-78.

[10] *Id.*

[11] App at 66-67.

[12] App at 67.

governance, BECC's Audit Committee, or the SEC.[13] The end dates for the four Analysis Periods are:

- ***Period 1*: August 1, 2014** (the date on which Solomon believes the SEC had sufficient information to file an enforcement action to prevent the Receivership Entities from selling additional oil-and-gas interests to investors).[14]
- ***Period 2*: January 27, 2015** (the date on which the SEC enforcement staff informed BECC's counsel that it intended to file an enforcement action against BECC, BOG, and other individuals and entities).[15]
- ***Period 3*: September 4, 2015** (the date on which BECC filed a Form 8-K with the SEC disavowing its prior financial statements).[16]
- ***Period 4*: June 24, 2016** (the date on which the SEC filed its enforcement action against BECC, BOG, Crude Energy, and several of their officers and employees).[17]

Each of these end dates was selected by Plaintiff and his counsel—not Solomon.[18]

2. *Plaintiff's Supplemental Expert Designation*

On November 16, 2020—*more than two months after Plaintiff's expert designations were due and on the last day of discovery*—Plaintiff served Defendants with the Supplemental Report. Relying on the same audit standards contained in his original opinion, Solomon repeated his

[13] App. at 67-68, 142-43.

[14] App. at 67-68, 141-42.

[15] App. at 67-68, 142.

[16] *Id*.

[17] *Id*.

[18] App. at 143. When Defendants questioned Plaintiff about the selection of these time periods, he invoked the attorney-client privilege and refused to answer, thereby denying Defendants discovery on this critical issue. App. at 117.

opinion that Defendants were required to communicate "Breitling's possible fraud and illegal acts" to BECC's Audit Committee.[19] Apparently recognizing the flaws in his original four Analysis Periods identified by Defendants' experts, however, Solomon came up with a *new* Analysis Period (also presumably provided to him by Plaintiff). Specifically, Solomon calculated Increased Liabilities Damages and Misappropriation Damages for the time period from February 4, 2014 (the date BECC's Audit Committee was formed) to December 3, 2015 (the date on which Steven Plumb, an accounting contractor working for BECC, purportedly informed members of the Audit Committee of certain of the Accounting Issues).[20]

Immediately after receiving the Supplemental Report, Defendants objected to the untimely report and requested, at minimum, the opportunity to depose Solomon concerning the Supplemental Report.[21] Plaintiff responded that he would agree to the deposition *only if* Defendants waived their right to file any motion to strike the Supplemental Report.[22] Defendants declined to waive their rights in this regard and ultimately were not permitted to take Solomon's deposition concerning the Supplemental Report.[23]

## III. LEGAL STANDARD

Rule 702 of the Federal Rules of Evidence governs the admissibility of expert witness testimony and reports. Rule 702, and the *Daubert* factors, also apply to non-scientific expert opinions. *Kumho Tire Co., Ltd v. Carmichael*, 526 U.S. 137, 152 (1999). Courts analyzing Rule 702 have concluded that expert testimony must satisfy three requirements to be admissible:

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[19] App. at 182-83.

[20] App. at 183.

[21] App. at 213-17.

[22] *Id*.

[23] *Id*.

(1) the expert is qualified, (2) the evidence is relevant to the suit, and (3) the evidence is reliable. *See Hall Arts Ctr. Office, LLC v. Hanover Ins. Co.*, 327 F. Supp. 3d 979, 1001 (N.D. Tex. 2018) (Fitzwater, J.) (citing *Kumho Tire*, 526 U.S. at 147).

Courts act as gatekeepers for expert testimony, including when evaluating motions to strike expert reports. *Johnson v. BAE Sys. Land & Armaments, L.P.*, No. 3:12-CV-1790-D-BH, 2014 WL 1714487, at *25 (N.D. Tex. Apr. 30, 2014) (Fitzwater, C.J.) ("*BAE Sys.*"). In fulfilling its gatekeeping role, the Court must make an objective, independent validation of the principles and methods the expert used to ensure that they have a sound and reliable basis in the knowledge and experience of the discipline at issue. *Librado v. M.S. Carriers, Inc.*, No. CIV.A.3:02-CV-2095-D, 2004 WL 1490304, at *8 (N.D. Tex. June 30, 2004) (Fitzwater, J.) The burden is on the proponent of the expert testimony to establish by a preponderance of the evidence that the testimony meets each of the three requirements for admissibility. *Moore v. Ashland Chem., Inc.*, 151 F.3d 269, 276 (5th Cir. 1998); *Dalton v. C. R. Bard, Inc.*, No. 3:19-CV-2484-D, 2020 WL 1307965, at *2 (N.D. Tex. Mar. 19, 2020) (Fitzwater, J.); *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 592 n.10, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993).

## IV. ARGUMENT

### A. Solomon's Opinions and Testimony Regarding Increased Liabilities Damages Should Be Stricken

#### 1. *Plaintiff Cannot Recover Investor Losses*

The proponent of expert testimony must show that the expert's testimony is relevant. "[E]xpert testimony [must] 'assist the trier of fact to understand the evidence or to determine a fact in issue'" to be relevant. *Pipitone v. Biomatrix, Inc.*, 288 F.3d 239, 245 (5th Cir. 2002) (quoting *Daubert*, 509 U.S. at 591). "Relevance depends upon 'whether [the expert's] reasoning

or methodology properly can be applied to the facts in issue.'" *EEOC v. S&B Indus., Inc.*, No. 3:15-CV-0641-D, 2017 WL 345641, at *2 (N.D. Tex. Jan. 24, 2017) (alteration in original) (*quoting Knight v. Kirby Inland Marine Inc.*, 482 F.3d 347, 352 (5th Cir. 2007)); *see also* Rule 702(d). "Testimony is irrelevant . . . when an expert offers a conclusion based on assumptions unsupported by the facts of the case." *Rolls-Royce Corp. v. Heros, Inc.*, No. 3:07-CV-0739-D, 2010 WL 184313, at *6 (N.D. Tex. Jan. 14, 2010) (Fitzwater, C.J.) (citation omitted); *see also* Rule 702(b).

Solomon's so-called "Increased Liabilities Damages" are not recoverable by the Plaintiff, which renders Solomon's proposed testimony on these damages irrelevant and prejudicial. Plaintiff's "Increased Liabilities Damages" theory is a thinly disguised effort to recover investor losses to satisfy potential liabilities to them.[24] It is well-settled, however, that Plaintiff lacks standing to recover investor losses as damages in this litigation. When attempting to do so under the guise of "Increased Liabilities," Plaintiff improperly seeks damages for claims that do not belong to the Receivership Entities.

"It is a well-known legal principle that a Receiver can bring only those claims belonging to the entit[ies] it represents, and cannot bring claims on behalf of third-parties, such as investors." *Reneker v. Offill*, No. 3:08-CV-1394-D, 2012 WL 2158733, at *5 (N.D. Tex. June 14, 2012) (Fitzwater, C.J.) ("*Reneker IV*") (alteration in original); *see also Reneker v. Offill*, No. 3:08-CV-1394-D, 2009 WL 804134, at *6 (N.D. Tex. Mar. 26, 2009) (Fitzwater, C.J.) ("The Receivership Estate's financial inability to satisfy liabilities owed to investors as a result of securities-laws violations harms the investors, not the AmeriFirst Clients.") ("*Reneker I*").

[24] *See* App. at 152-53.

This Court has already addressed this issue in *Reneker IV*, concluding that the Receiver lacked "standing to the extent it is based on liabilities incurred to defrauded investors or the increased amount of such liabilities." 2012 WL 2158733, at *6. In *Reneker IV*, as is the case here, the receiver sought damages for a professional negligence claim based on the entities "causing or increasing liabilities to third parties." *Id*. The defendant, however, argued the receiver was actually seeking "nothing more than investor losses." *Id*. The Court agreed, finding that the investor losses and increased liabilities were mathematically equivalent and indistinguishable. *Id.* Therefore the Court dismissed the claim "for lack of standing to the extent it is based on liabilities incurred to defrauded investors or the increased amount of such liabilities." *Id.*

Just as in *Reneker IV*, the Increased Liabilities Damages sought by Plaintiff are mathematically equivalent to investor losses. Solomon acknowledges that his Increased Liabilities Damages reflect his calculation of amounts "[Plaintiff] may have to pay to the investors to make them whole,"[25] which, according to him, is the amount received from investors less refunds or disbursements made to investors—*i.e*., the investors' net out-of-pocket loss.[26] Without question, Solomon's "Increased Liabilities" are equal to each investor's damages which the Receiver lacks standing to recover.[27] Accordingly, Solomon's opinions do not satisfy the "relevancy" prong of FRE 702 and *Daubert* and must be excluded.

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[25] App. at 153.

[26] App. at 66-67. The Receiver confirmed that investors' claims will be determined by their net out-of-pocket loss. App. at 114-15.

[27] *See Faulkner*, Dkt. No. 541 ("An Investor Claimant's 'net out-of-pocket loss' would be calculated as the total amount invested in or through the Offering Entities less any amounts, or the value of any assets, received—and retained—with respect to the investment . . . ."); Dkt. No. 542 at 2 ("[T]he Receiver shall establish a 'Final Claim Amount' for all Potential Claimants (equal to the greater of zero (0) or the net-out-of-pocket loss of each).").

2. *Solomon's Proposed Analysis Periods are Speculative and Unreliable*

In addition to demonstrating the relevance of her opinions, the proponent of expert testimony must show that the expert's testimony is reliable. "Reliability is determined by assessing 'whether the reasoning or methodology underlying the testimony is scientifically valid.'" *Knight*, 482 F.3d at 352 (quoting *Daubert*, 509 U.S. at 592-93); *see also* Rule 702(c). Expert testimony "must constitute 'more than subjective belief or unsupported speculation.'" *Nunn v. State Farm Mut. Auto. Ins. Co.*, No. 3:08-CV-1486-D, 2010 WL 2540754, at *2 (N.D. Tex. June 22, 2010) (Fitzwater, C.J.) (quoting *Daubert*, 509 U.S. at 590).

Even if Plaintiff could somehow recover investor losses as Increased Liabilities Damages, Solomon's opinion regarding these damages should still be stricken because it is speculative and unreliable. While the determination of reliability often turns on whether an expert employs an accepted methodology, these factors "may or may not be pertinent in assessing reliability, depending on the nature of the issue, the expert's particular expertise, and the subject of the testimony." *Larson v. Matter*, No. 3:06-CV-1496-D, 2008 WL 3876015, at *2 (N.D. Tex. Aug. 18, 2008) (Fitzwater, C.J.) (quoting *Kumho Tire*, 526 U.S. at 150). Here, Solomon's Analysis Periods are based on the unfounded assumption that, had Defendants reported the potentially illegal acts they identified during the audit to BECC's Audit Committee or the SEC, the SEC and/or the Audit Committee would have taken *immediate action* to halt all further investments. He has no factual basis for this assumption (it is, in fact, contradicted by what actually occurred), which renders his opinions wholly unreliable.

Generally, challenges "to the bases and sources of an expert's opinion affect the weight to be assigned that opinion rather than its admissibility and should be left for the jury's consideration." *SEC v. Cuban*, No. 3:08-CV-2050-D, 2013 WL 3809654, at *8 (N.D. Tex. July

23, 2013) (Fitzwater, C.J.) (quoting *Viterbo v. Dow Chem. Co.*, 826 F.2d 420, 422 (5th Cir. 1987)). This rule does not apply, however, when the bases are "'of such little weight that the jury should not be permitted to receive that opinion,'" which occurs when "'that testimony would not actually assist the jury in arriving at an intelligent and sound verdict.'" *Fair v. Allen*, 669 F.3d 601, 607 (5th Cir. 2012) (quoting *Viterbo*, 826 F.2d at 422). "Even a credentialed expert . . . must have reliable support for his opinions; a bare, subjective opinion is inadmissible." *Cuban*, 2013 WL 3809654, at *8.

Solomon's Reports purport to calculate both Increased Liabilities Damages and Misappropriation Damages supposedly incurred during five Analysis Periods, four of which start on December 19, 2013, and the last one beginning on February 4, 2014. According to Solomon, Rothstein Kass should have advised BECC corporate management, the Audit Committee of the Board of Directors, or the SEC by December 19, 2013 or February 4, 2014 of potential illegal acts it purportedly discovered during the Audits. Solomon assumes that, had Rothstein Kass done so, either the Audit Committee or the SEC "would have stopped new money from coming in almost immediately."[28] This assumption is critical to both Solomon's Increased Liabilities Damages and Misappropriation Damage theories because it forms the basis for the starting dates of his five Analysis Periods and, thus, the date on which damages began to accrue. Without these assumptions, Solomon lacks any basis to define the starting point for his Analysis Periods.

Solomon's assumptions as to when the SEC or the Audit Committee would have taken action to stop investor money, however, are complete speculation. He concedes that he lacks any expertise regarding SEC enforcement procedures.[29] When asked whether the SEC had enough

[28] App. at 126, 136, 145, 183-85.

[29] App. at 124-25, 130-33.

information concerning the Breitling Entities' purported illegal acts prior to December 19, 2013 (which would eliminate all of his Analysis Periods and negate all damages), Solomon testified that he did not conduct that analysis.[30] He also testified that he does not know how long it would have taken the SEC to obtain the appointment of a receiver for the Breitling Entities and that, in fact, Plaintiff was not appointed receiver in *Faulkner* until September 2017—approximately 14 months after it filed its case and two-and-a-half years after the January 27, 2015 meeting where SEC staff identified evidence sufficient to file an enforcement action against BECC and others.[31]

Plaintiff (who has extensive SEC enforcement experience) eliminated any doubt about the reliability—*i.e.*, the lack thereof—of Solomon's opinion as to when the SEC could have undertaken certain conduct had Rothstein Kass reported possible illegal acts. He testified that what when the SEC would take action is not "a knowable fact" and that he would not "try to invent" an answer:

> Q: Did you provide Mr. Solomon with information concerning how long it would have taken the SEC to bring an enforcement case after being informed of the potential fraud?
>
> A: *That is not a knowable fact*. There is no discernible time within which the SEC acts or doesn't act on a given enforcement action.
>
> Q: Okay.
>
> A: And *I said we wouldn't try to invent one*.[32]

[30] App. at 149-51 (admitting he did not review what information the SEC obtained prior to December 2013, including depositions, the Breitling Entities' CIMs, subscription agreements, bank records, and Quickbooks files).

[31] App. at 159.

[32] App. at 118 (emphasis added).

Solomon's opinion regarding the date by which the Audit Committee would have taken action to stop the Receivership Entities from accepting investor money is also pure speculation. As with the SEC, Mr. Taylor testified that he did not provide Solomon with information about how long it would have taken the Audit Committee to stop the purported fraud by the Breitling Entities,[33] and would be unable to know this information:

> Q: Going back to the start period, December 19th, [2013]. Is it possible to know how long it would have taken the audit committee to have stopped any offerings had they been informed of the purported fraud?
>
> A: No, I don't think so. I mean, I don't have enough information to do that myself.[34]

The undisputed facts of this case illuminate the speculative nature and unreliability of Solomon's opinion that require it to be stricken. *Rolls-Royce Corp.*, 2010 WL 184313, at *6 (Fitzwater, J.) ("Testimony is irrelevant, however, when an expert offers a conclusion based on assumptions unsupported by the facts of the case.") (citing *Elclock v. Kmart Corp*., 233 F.3d 734, 756 (3d Cir. 2000) (holding that economist's damages model used to show plaintiff's damages was inadmissible because it relied on assumptions that were contradicted by facts in the record)). For example, Solomon concedes that the SEC likely had enough information to file an enforcement action to prevent sales of additional securities to investors by August 2014 and, further, that the SEC staff actually informed BECC's outside counsel that it intended to file an action accusing Mr. Faulkner, BECC and BOG (among others) of securities fraud by January 2015. Yet, rather than taking immediate action, *the SEC did not in fact file such an action until*

[33] App. at 117-18.

[34] App. at 118.

*June 2016*. Worse for Solomon's theories, the SEC did not seek the appointment of a receiver until over a year later.[35] Similarly, when members of the Audit Committee were informed of the alleged fraud by an outside consultant in December 2015, they promptly resigned rather than take any steps to prevent any Receivership Entity from receiving additional investments.[36] The Receivership Entities continued to raise funds from investors after these resignations.[37]

Solomon's opinions are even more speculative and unreliable as to offerings performed by Patriot and Crude.[38] Solomon included the monies these entities raised in private offerings in his damages opinion and opined that BECC's Audit Committee would have stopped these entities from raising money in private offerings had Defendants disclosed potential illegal acts to BECC's Audit Committee.[39] But neither Patriot nor Crude was a corporate subsidiary of any Breitling Entity.[40] Indeed, two of BECC's three independent directors and Audit Committee Members were deposed (Richard Mourglia and Trenton Thornock) and both testified that they did not believe they had the authority to control Crude or Patriot or to stop their fundraising activities.[41] And when they were informed of certain of the Accounting Issues by Mr. Plumb,

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[35] App. at 146, 155.

[36] App. at 165, 169, 175.

[37] App. at 21, 76, 147; *see also* Plaintiff's Response to [Defendants'] Motion for Summary Judgment and Brief in Support (Dkt. No. 100) at 44 ("Based on the Plumb report in December 2015 . . . all the independent Board members resigned that same month.").

[38] As discussed in Defendants' Summary Judgment briefing (Dkt. No. 95), Crude and Patriot's damages are irrelevant. Plaintiff's professional negligence claims on behalf of these entities fail because neither Crude nor Patriot contracted with Defendants. Likewise, Plaintiff's knowing participation claim lacks necessary evidence regarding any duties Mr. Faulkner owed to these entities and Defendants' knowledge of—and knowing participation in breaches of—said duties.

[39] App. at 101, 157, 182-85.

[40] App. at 166-68, 176-78.

[41] App. at 166-68, 177-78.

they abruptly resigned rather than stopping the offerings. These opinions are too speculative to survive a *Daubert* challenge. *See Reneker v. Offill*, No. 3:08-CV-1394-D, 2009 WL 3365616, at *6 (N.D. Tex. Oct. 20, 2009) (dismissing complaint because it failed "to plead sufficient facts to support a claim that [the defendant's] alleged failure to notify the Amerifirst clients of the illegality of their activities proximately caused their damages.").

3. *Solomon Miscalculates Increased Liabilities to the Receivership*

To analyze reliability, courts focus on the expert's methodology, not the conclusions it generates. *BAE Sys*., 2014 WL 1714487, at *25-26. If, however, "there is simply too great an analytical gap between the [basis for the expert opinion] and the opinion proffered," the court may exclude the testimony as unreliable. *S&B Indus., Inc*., 2017 WL 345641, at *2 (alteration in original) (quoting *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997)); *see also Johnson v. Arkema, Inc*., 685 F.3d 452, 460-61 (5th Cir. 2012) (per curiam).

Beyond the fatal infirmities discussed above, Solomon's methodology for calculating Increased Liabilities Damages is unreliable because it contradicts the methodology adopted by the Plaintiff and this Court in *Faulkner* for calculating investor losses. In particular, Solomon does not fully offset returns received by investors. As a result, Solomon's calculations overstate investor losses (*i.e.*, Plaintiff's claimed Increased Liabilities Damages) for each Analysis Period.

The Court has already decided how investor claims against the Receivership will be determined. The Court accepted the Receiver's recommendation and determined that each investor's net loss would be calculated by the amount each investor paid less any returns the investor received. *See Faulkner*, Dkt. Nos. 541 and 542. Plaintiff has confirmed that investors' claims against the Receivership will be determined by the investors' "net out-of-pocket loss"—

*i.e.*, amount invested less any disbursements to those investors.[42] According to Plaintiff, those amounts are still being calculated and are unknown at this time.[43]

Solomon issued his Increased Liabilities Damages theory without waiting for Plaintiff's actual determination of investor losses. Rather, for each of his five Analysis Periods, Solomon calculated *all* investor inflows and deducted *all* investor outflows for that particular Analysis Period without regard to which investors made investments and which ones received returns.[44] Significantly, if an investor made an investment during one Analysis Period and received a payment after the conclusion of that Analysis Period, Solomon did not deduct the subsequent payment from the investor losses for that Analysis Period.[45] No investor returns or payments made after June 16, 2016 (the end of his last Analysis Period) are deducted at all. As a result, Solomon's methodology to calculate Increased Liabilities Damages is flawed and systematically overstates investor losses.

This defect is aptly demonstrated by a hypothetical posed to both Plaintiff and Solomon during their respective depositions. Defendants asked each how to calculate damages for a hypothetical investor who made a $100 investment during Solomon's first Analysis Period and received a $100 return after the conclusion of that Analysis Period. They provided different answers. Plaintiff testified unequivocally that the investor suffered no damages, so the Receivership would have no liability to him.[46] Solomon, on the other hand, testified that his damages analysis would not have offset the $100 return because the return occurred outside the

[42] App. at 114-15.

[43] *See Faulkner*, Dkt. No. 579 at 3-5.

[44] App. at 150.

[45] *Id.*

[46] App. at 119.

Analysis Period and, as a result, the investor's purported loss would be $100 even though she had ultimately been made whole.[47] Indeed, Solomon conceded this his opinion results in different investor losses than those that would be allowed under the Court's Plan of Distribution.[48]

Solomon overstated Increased Liabilities Damages in other, equally fatal ways. For example, Solomon states that those damages should be reduced by the "value of any remaining assets held by the Receivership Estate," which Solomon determined to be "zero or negligible."[49] Yet, Solomon did not consider valuable assets held by the Receivership Estate that should offset his proposed Increased Liabilities Damages, including (i) ***$691,000*** in net income that Plaintiff has received since his appointment;[50] (ii) ***$3.5 million*** (less applicable taxes) that the Receiver expects from well operators upon the Court's granting of his motion in *Faulkner* to invalidate certain royalty conveyances;[51] (iii) ***an unknown amount of future distributions*** that Plaintiff has received, and expects to continue to receive, in oil-and-gas production and royalty income from well operators;[52] and (iv) ***$3 million*** from Plaintiff's settlement with Scheef & Stone.[53]

As another example, the Receiver has informed the Court that he plans to reduce the notional amount of each investor's claim by a fixed percentage to reflect tax benefits the investor

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[47] App. at 153-55.

[48] App. at 155.

[49] App. at 66-67.

[50] *Faulkner*, Dkt No. 579, Ex. A.

[51] App. at 112-13; *Faulkner*, Dkt. No. 573 at 9.

[52] *Faulkner*, Dkt No. 579 at 8-9, Ex. A ($76,638 in distributions during the last reporting period and expected to increase once Plaintiff starts receiving distributions from royalty interests).

[53] *See Faulkner*, Dkt. No. 577.

may have received.[54] Solomon, however, did not consider or offset from his Increased Liabilities Damages any amounts for tax benefits based on his mistaken and irrelevant legal opinion (that he does not have the expertise to render) that an investor's losses should not be offset by tax benefits the investor received.[55]

Solomon's many errors in determining the Increased Liabilities Damages transcend the weight of his opinions or his credibility to a jury. Accordingly, for all of the reasons stated above, Solomon's opinions regarding Increased Liabilities Damages theory are unreliable and speculative, and should be stricken in their entirety.

### B. Solomon's Opinions and Testimony Regarding Misappropriation Damages Should Be Stricken

#### 1. *Solomon's Misappropriation Damages Rely on the Same Speculative Time Periods as His Increased Liabilities Damages*

Solomon's Misappropriation Damages theory purports to calculate various expenses the Breitling Entities paid during his five Analysis Periods. These expenses include: (1) payments to Mr. Faulkner and other defendants in *Faulkner* (including for payroll and personal expenses); (2) bonus and payroll distributions to sales and marketing personnel of the Breitling Entities; (3) personal expenses charged to American Express credit cards or identified in other bank records; and (4) legal expenses incurred in the SEC investigation of the Breitling Entities.[56] As with his opinion on Increased Liabilities Damages, Solomon's Misappropriation Damages opinion rests on the same unsupported and speculative assumption that on December 19, 2013

[54] App. at 115-16.

[55] App. at 156.

[56] App. at 67.

(or February 4, 2014 in his Supplemental Opinion), the SEC or the Audit Committee *immediately* would have stopped new investments *and* obtained the appointment of a receiver to stop payments to third parties.[57] Without this assumption, all of Solomon's opinions collapse. For all of the reasons discussed above, however, Solomon's opinion as to when the SEC would have obtained a receiver, or when the Audit Committee would have acted to stop offerings (even assuming it had the power to stop Crude and Patriot offerings), is speculative, unreliable, and contrary to the evidence.

2. *Solomon's Methodology to Calculate Misappropriation Damages is Unreliable Because He Does Not Consider Causation*

Solomon's Misappropriation Damages theory should also be stricken because it fails to consider whether Defendants caused the damages that he includes within "Misappropriation Damages." For example, Solomon includes fees paid to outside counsel for representing the Breitling Entities in the SEC investigation in his Misappropriation Damages.[58] But Solomon fails to consider whether Defendants actually caused the Breitling Entities to incur these fees. The SEC began its formal investigation of the Breitling Entities in January 2013—several months before BOG and BRC even hired Rothstein Kass PA and more than a year before Rothstein Kass PA issued its first audit opinion.[59] The Breitling Entities hired counsel even before the formal investigation started.[60] Even the Plaintiff has conceded that he cannot recover

[57] *See* App. at 158-59.

[58] App. at 67.

[59] App. at 255-58.

[60] App. at 273-74.

legal expenses incurred before Solomon's proposed Analysis Periods, even if they were paid after December 19, 2013.[61]

**C. Solomon's Opinions Regarding Mr. Matlock's State of Mind are Inadmissible**

Solomon's opinions on Mr. Matlock's state of mind are inadmissible. In both the Solomon Report and his deposition, Solomon stated that Mr. Matlock attempted to "bury" the Accounting Issues Rothstein Kass PA supposedly identified during the Audits by placing one of the workpapers describing these issues into a section of Rothstein Kass PA's workpaper index that he supposedly believed would not be reviewed.[62] Solomon also stated that Mr. Matlock attempted to "downplay" the Accounting Issues by altering a draft workpaper.[63] In short, Solomon purports to opine on Mr. Matlock's state of mind by concluding that he attempted to hide certain accounting issues in internal, nonpublic workpapers even though such workpapers are typically not provided to an audit client.[64]

Experts are not permitted to testify on an individual's state of mind because doing so trespasses on the jury's role as the trier of fact. "[T]he Fifth Circuit's stance [is] that an expert's conclusory assertions regarding a defendant's state of mind are not helpful or admissible." *Marlin v. Moody Nat'l Bank, N.A.*, 248 F. App'x 534, 541 (5th Cir. 2007) (per curiam) (district court did not abuse its discretion in striking expert opinions regarding defendant's state of mind); *see also Salas v. Carpenter*, 980 F.2d 299, 305 (5th Cir. 1992) (hostage negotiation expert's opinions regarding mental state of defendant sheriff's state of mind were inadmissible). This Court has previously recognized that experts should not be "permitted to draw conclusions about

[61] App. at 260-62.

[62] App. at 30-31, 138-39.

[63] App. at 30-31, 137.

[64] *See* App. at 267.

another's state of mind." *See Charalambopoulos*, 2017 WL 930819, at *12 (excluding expert's opinions as to why a grand jury made certain decisions because "such expert testimony goes beyond the proper role of an expert and invades the province of the jury").

Here, Solomon's opinions regarding Mr. Matlock's state of mind must be stricken because they "invade[] the province of the jury." These opinions are no different from other expert opinions regarding a defendant's intent or state of mind that district courts in the Fifth Circuit have ruled inadmissible. *See, e.g.*, *Charalambopoulos*, 2017 WL 930819, at *12; *United States ex rel. Ruscher v. Omnicare, Inc.*, No. 4:08-cv-3396, 2015 WL 5178074, at *10-11 (S.D. Tex. Sept. 3, 2015) (professor of health care policy not permitted to testify on defendant's "intent, motive, or state of mind" in health care fraud case), *aff'd*, 663 F. App'x 368 (5th Cir. 2016) (per curiam). Solomon, furthermore, conceded that he lacked factual support for his opinions, which provides an independent basis to exclude these opinions regarding Mr. Matlock's state of mind.[65]

**D. Solomon is Not Qualified to Opine that Defendants Broke the Law**

The proponent of expert testimony must also show that the expert is qualified. "Before a district court may allow a witness to testify as an expert, it must be assured that the proffered witness is qualified to testify by virtue of his 'knowledge, skill, experience, training, or education.'" *Charalambopoulos v. Grammer*, No. 3:14-CV-2424-D, 2017 WL 930819, at *9 (N.D. Tex. Mar. 8, 2017) (Fitzwater, J.) (quoting *United States v. Cooks*, 589 F.3d 173, 179 (5th Cir. 2009)). "A district court should refuse to allow an expert witness to testify if it finds that the witness is not qualified to testify in a particular field or on a given subject." *EEOC v. S&B Indus., Inc.*, 2017 WL 345641, at *2 (quoting *Cooks*, 589 F.3d at 179).

[65] App. at 138-39.

Plaintiff cannot meet this burden for Solomon's opinion that Defendants violated Section 10A of the Securities Exchange Act of 1934.[66] But, Solomon is not qualified to render any opinion on how a federal statute should be interpreted and applied. He concedes that he is neither an SEC expert nor an attorney.[67] This opinion must, therefore, be stricken.[68]

**E. Solomon's Supplemental Report is Untimely and Should Be Stricken**

Solomon's Supplemental Report suffers from many of the same reliability flaws that plague the Solomon Report (as discussed above). Solomon still lacks any basis to opine on what BECC's Audit Committee would have done at the end of the sole Analysis Period proposed in the Supplemental Report. Indeed, Solomon's opinion on what the Audit Committee would have done—and the effect its action would have had on the ability of BECC, Crude or Patriot to raise money from purchasers of oil and gas interests—is contradicted by the record. In addition, Solomon's opinions regarding Increased Liabilities Damages still amount to an improper attempt to recover investor losses, still fail to consider any set-offs to investors' net losses that occur outside of the Analysis Period presented in the Supplemental Report, and still ignore the value of the Receivership's assets. As a result, the opinion in Solomon's Supplemental Report must be stricken and any testimony on this opinion must be excluded because it fails to satisfy the requirements for reliability under FRE 702 and *Daubert*.

Solomon's Supplemental Report is also untimely and should also be excluded on that basis. Rule 26(e)(1) states that "A party who has made a disclosure under Rule 26(a) [such as an expert report under Rule 26(a)(2)(B)] . . . must supplement or correct its disclosure or response

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[66] App. at 51-52, 129, 182.

[67] App. at 124-25, 130-33.

[68] This argument does not even address whether Solomon could, if he were qualified, offer this opinion. *See Rolls-Royce Corp.*, 2010 WL 184313, at *2.

in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect . . . ." Trial courts have substantial discretion on how they manage expert discovery, weighing the following four factors: "(1) the importance of the excluded testimony, (2) the explanation of the party for its failure to comply with the court's order, (3) the potential prejudice that would arise from allowing the testimony, and (4) the availability of a continuance to cure such prejudice." *Harmon v. Georgia Gulf Lake Charles LLC*, 476 F. App'x 31, 36 (5th Cir. 2012) (per curiam) (quoting *EEOC v. Gen. Dynamics Corp.*, 999 F.2d 113, 115 (5th Cir. 1993)); *see also In re Complaint of C.F. Bean L.L.C.*, 841 F.3d 365, 369 (5th Cir. 2016).

"Supplementary 'disclosures are not intended to provide an extension of the expert designation and report production deadline.'" *Eagle Railcar Services-Roscoe Inc. v. NGL Crude Logistics, LLC*, No. 1:16-cv-0153-BL, 2018 WL 2317696, at *7 (N.D. Tex. May 22, 2018) (quoting *Metro Ford Truck Sales, Inc. v. Ford Motor Co.*, 145 F.3d 320, 324 (5th Cir. 1998)). Nor are supplemental disclosures a means to fix earlier reports that were incomplete and failed to express all of the expert's opinions and his basis and reasons for such opinions. *See Harmon*, 476 F. App'x at 36 ("[W]e have previously noted that '[t]he purpose of supplementary disclosures is just that—to *supplement*. Such disclosures are *not* intended to provide an extension of the expert designation and report production deadline.'") (italics in original) (quoting *Metro Ford*, 145 F.3d at 324); *Guidry v. Georgia Gulf Lake Charles L.L.C.*, 479 F. App'x 642, 643 (5th Cir. 2012) (per curiam) (same). Supplemental reports comprised of "new, previously undisclosed opinions" or containing "entirely new opinions or . . . subject matter outside the scope" of the initial report are not proper supplements under Rule 26. *Eagle Railcar*, 2018 WL 2317696, at *7.

Solomon's Supplemental Report runs afoul of these rules. Solomon offers an opinion he could have reached in the Solomon Report: a new Analysis Period (February 4, 2014 – December 3, 2015) and new Increased Liabilities Damages and Misappropriation Damages calculations for that Analysis Period. Indeed, the report relies on the same conclusion that BECC's Audit Committee would have stopped any future offerings had Rothstein Kass informed it of the Accounting Issues.

All four of the *Harmon* factors weigh in favor of excluding the Supplemental Report. First, the opinion contained in the Supplemental Report (his fifth Analysis Period) is unnecessary because he has already presented four other Analysis Periods in the Solomon Report. Second, Plaintiff cannot have a persuasive explanation for its untimely report given the lack of any new evidence underlying the Supplemental Report.[69] Third, Defendants will be prejudiced by allowing the Supplemental Report without the opportunity to depose Solomon about the opinions contained in his Supplemental Report, and resume other depositions (particularly of Audit Committee members) to ask questions Defendants would have asked had they been aware of Solomon's untimely Supplemental Report. Fourth, a continuance is unlikely to completely cure this prejudice due to the short timeline between this Motion and the upcoming trial that is currently set for April 19, 2021. Accordingly, the Supplemental Report should be excluded because it is untimely.

[69] The core support for the Supplemental Report consists of two documents that were available to Plaintiff prior to the expert report deadline: the minutes of a February 4, 2014 meeting of BECC's Board of Directors and email communications between Mr. Plumb and members of BECC's Board of Directors on December 3, 2015. These are not new documents that Solomon could have accessed only after preparing the Solomon Report. Plaintiff himself provided each of these documents to Defendants in July and August 2019—well in advance of the August 14, 2020 deadline for Plaintiff's expert designations in this case. App. at 220-53.

## V. CONCLUSION

For the aforementioned reasons, Defendants respectfully request that the Court grant this Motion and strike Solomon's opinions regarding damages from his expert report and exclude his prospective testimony regarding damages.

Date: January 19, 2021

By: */s/ Nicolas Morgan*

**E. LEON CARTER**
State Bar No. 03914300
lcarter@carterarnett.com
**LINDA R. STAHL**
State Bar No. 00798525
lstahl@carterarnett.com
**COURTNEY BARKSDALE PEREZ**
State Bar No. 24061135
cperez@carterarnett.com
**CARTER ARNETT PLLC**
8150 N. Central Expy., Suite 500
Dallas, Texas 75206-1860
214.550.8188 (main)
(214) 550-8185 (facsimile)

**NICOLAS MORGAN** (admitted pro hac vice)
Cal. State Bar No. 166441
nicolasmorgan@paulhastings.com
**THOMAS A. ZACCARO** (admitted pro hac vice)
Cal. State Bar No. 183241
thomaszaccaro@paulhastings.com
**PAUL HASTINGS LLP**
515 South Flower Street
Twenty Fifth Floor
Los Angeles, CA 90071
213.683.6000 (main)
213.627.0705 (facsimile)

***Attorneys for Defendants Rothstein Kass P.A. d/b/a Rothstein Kass & Co. P.C., Rothstein, Kass & Company, PLLC, and Brian Matlock***

**CERTIFICATE OF SERVICE**

This is to certify that a true and correct copy of the foregoing document has been served to all counsel of record in accordance with the Federal Rules of Civil Procedure on January 19, 2021 via electronic mail.

*/s/ Nicolas Morgan*
**NICOLAS MORGAN**