UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

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

RECEIVER'S RESPONSE TO DEFENDANTS' MOTION TO STRIKE SAUL SOLOMON'S OPINIONS AND EXCLUDE HIS TESTIMONY FROM TRIAL

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Plaintiff Thomas L. Taylor III ("Receiver"), solely in his capacity as temporary Receiver for the Breitling group of companies, files this Response to Defendants' Motion to Strike Saul Solomon's Opinions and Exclude his Testimony from Trial (the "Motion") [Docket No. 103] and supporting Memorandum [ECF No. 104], and states as follows:

I. PRELIMINARY STATEMENT

Saul Solomon ("Solomon") is the Receiver's liability, causation and damages expert witness. Solomon, who is a licensed CPA since 1978, a Certified Fraud Examiner and Certified Valuation Analyst and currently a Managing Director at Berkeley Research Group in Houston,[1] has been qualified as an expert witness in these fields by multiple state and federal courts in dozens of cases.[2] While Defendants ask the Court to strike Solomon entirely as an expert witness in this case, their motion and briefing focus almost exclusively on his opinions regarding causation -- which is only relevant to one of the Receiver's two claims -- and not on his opinions regarding liability. Indeed, Defendants' motion is a thinly veiled attempt to "try" the factual and legal merits of the Receiver's causation theories which is not the proper subject of a motion to exclude an expert witness.

Solomon's methodology and opinions are reliable and relevant to the jury's determination of the amount of damages caused by Defendants' negligence as well as caused by the Breitling officers' breaches of fiduciary duties. Therefore, Solomon's opinions are admissible under the well-established standards governing admissibility of exert testimony. Solomon's opinions regarding the damages caused by Faulkner's breaches of fiduciary duty -- for which Defendants

[1] Solomon C.V., attached to Solomon's Original Report (as hereinafter defined) at App. 84. APP84-97.
[2] See e.g., *Wellshire Fin. Servs., LLC v. TMX Fin.*, 2019 U.S. Dist. LEXIS 45568 (S.D. Tex. 2019). See also Solomon C.V., App. 84. APP84-97.

are jointly and severally liable to the extent the jury finds they participated in such breaches[3] -- are ***not even challenged*** by Defendants and as such all of Solomon's damages opinions should be admitted and presented to the jury as to that claim. Defendants' other complaints about Solomon's damages calculations themselves are relatively minor and, as demonstrated below, entirely meritless.

II. ARGUMENT & AUTHORITIES

A. Legal Standards Applicable to Motions to Exclude or Limit Expert Testimony

The exclusion of expert testimony is the exception, not the rule. *See Puga v. RCX Solutions, Inc.*, 922 F.3d 285, 293-94 (5th Cir. 2019). "As a general rule, questions relating to the bases and sources of an expert's opinion affect the weight to be assigned that opinion rather than its admissibility." *Id.* at 294 (citing *Rock v. Arkansas*, 483 U.S. 44, 61 (1987)). "Particularly in a jury trial setting, the court's role under Rule 702 is not to weigh the expert testimony to the point of supplanting the jury's fact-finding role – the court's role is limited to ensuring that the evidence in dispute is at least sufficiently reliable and relevant to the issue so that it is appropriate for the jury's consideration." *Id.* "At no point should the trial court replace 'the adversary system.'" *Id.* (quoting *Pipitone v. Biomatrix, Inc.*, 288 F.3d 239, 249-50 (5th Cir. 2002). "Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Id.* (quoting *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 597, 596 (1993)).

[3] *See, e.g., Meadows v. Hartford Life Ins. Co.*, 492 F.3d 634, 639 (5th Cir. 2007). Proximate cause is not an element of the Receiver's knowing participation claim because the causation and damages run from the fiduciary breach by, *e.g.*, Faulkner. *Id.*, at 639. The relevant inquiry is whether the breaches of fiduciary duty caused the damages, *not* whether the participant caused damages. *See Heat Shrink Innovs., LLC v. Medical Extrusion Tech.-Texas, Inc.*, 2014 WL 5307191, at *8, 12 (Tex. App.—Fort Worth, Oct. 16, 2014, pet. denied) (defendant who knowingly participates in a breach of fiduciary duty is jointly and severally liable for damages *caused by the breach* because "the knowing participant has not committed a separate tort but has participated in the underlying tort; he is a joint tortfeasor and steps into the shoes of the one who committed the tort").

"When evaluating expert testimony, the overarching concern is generally whether the testimony is relevant and reliable." *Id.* at 293. "When performing this analysis, the court's main focus should be on determining whether the expert's opinion will assist the trier of fact." *Id.* The "helpfulness threshold is low: it is principally ... a matter of relevance." *Id* at 294.[4] The trial judge has wide latitude in determining the admissibility of expert testimony, and the discretion of the judge will not be disturbed on appeal unless manifestly erroneous. *Id*. at 293. Based upon these standards for admissibility of expert testimony, Defendants' Motion should be denied.

B. Solomon's Opinions

Solomon issued his original expert witness report on August 14, 2020 ("Original Report") and his supplemental report ("Supplemental Report") on November 16, 2020. Solomon's Original Report addresses liability, damages and causation, while the Supplemental Report addresses causation and damages based on the deposition testimony of the former members of the Breitling Audit Committee (which testimony Solomon did not have prior to issuing his Original Report).

In Solomon's Original Report, he opined as to the economic damages suffered by the Breitling Receivership entities in the form of the increased liabilities they incurred at different points in time beginning in December 2013, which is the date by which Solomon opines that Defendants had sufficient information regarding Faulkner's fraud, illegal acts and breaches of fiduciary duty that Defendants should have resigned from the audit and reported the fraud to Breitling's Audit Committee and/or to the SEC (the "Increased Liabilities Damages Model).[5] In the alternative, Solomon also calculated "misappropriation" damages incurred by the Breitling

[4] The Fifth Circuit has held that with respect to admission of expert testimony, "[t]he standard for relevance is a liberal one". *EEOC v. Manville Sales Corp.*, 27 F. 3d 1089, 1093 (5th Cir. 1994).

[5] *See* Original Report at pps. 1-69; App. 15-83. See also, Solomon Depo., at 121:8-122:24, App. 265-266; 132:3-137:3, App. 276-281; 245:13-249:2, App. 389-393; 319:24-325:10, App. 463-469 (discussion of Misappropriation Damages Model).

entities at different points in time beginning also in December 2013, consisting of funds stolen by Faulkner or misused by the Breitling entities to pay *e.g.*, unlawful securities sales commissions to unlicensed sales personnel (the "Misappropriation Damages Model).[6]

In terms of the Receiver's professional negligence claim, the time periods chosen by Solomon for both of his damages models are based on his "but for" assumptions that (1) Defendants complied with their obligations under applicable audit standards as well as Section 10A(b) of the Securities Exchange Act by reporting Faulkner/Breitling's fraud and illegal acts to the SEC in December 2013;[7] and (2) upon receiving the fraud/illegal acts disclosure from Defendants the SEC would have taken immediate action to shut down the Breitling fraud and prevent additional investor losses. Solomon has taken a conservative approach to his negligence damages models by employing different dates by which, in his "but for" world, the SEC would have taken action to shut down Breitling prior to the time that it actually did.[8]

Thus Solomon opines that *had* Defendants complied with their obligations and reported Breitling's fraud and illegal acts to the SEC shortly after they discovered the extent of the fraud in December 2013 (which they did not do), and *had* the SEC taken immediate action to shut down the Breitling fraud (which it did not do because it did not receive any such report from Defendants), then the Breitling Receivership Entities would not have incurred over $25.5 million in increased

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[6] Original Report, at pps. 56-59, App. 70-73 (explaining bases for time periods) and 67-68, App. 81-82 (tables showing misappropriation damages calculations based on time periods).

[7] See, e.g., *In re Cendant Corp. Sec. Litig*., 139 F. Supp. 2d. 585, 597, 607 (D.N.J. 2001) (describing auditors' duty under Section 10A(b) to report fraud and illegal acts discovered during an audit directly to the SEC); *SEC v. KPMG LLP*, 412 F. Supp. 2d. 349, 376, 385-391 (S.D.N.Y. 2006) (describing auditors' and corporate Boards' duties under Section 10A(b) when auditors uncover fraud and illegal acts occurring at the company under audit).

[8] While Defendants complain that Solomon is not qualified to testify about SEC enforcement actions, Solomon has been involved in multiple SEC enforcement actions and has even been retained by the SEC as an expert witness. Solomon Depo., at 26:5-28:3, App. 170-172; 30:19-31:14, App. 174-175; 34:17-35:3, App. 178-179; 109:16-112:9, App. 253-256. Moreover, a proposed expert does not have to be "highly qualified in order to testify about a given issue. Differences in expertise bear chiefly on the weight to be assigned to the testimony by the trier of fact, not its admissibility." *Huss v. Gayden*, 571 F. 3d 442, 452 (5th Cir. 2009).

liabilities damages and, alternatively, $12.8 million in misappropriation damages between December 2013 and August 1, 2014, which is the date the SEC arguably had obtained sufficient information to shut Breitling down based on the SEC's receipt of Defendants' work papers pursuant to a subpoena served on them by the SEC.[9]

Similarly, Solomon calculated $38.4 million in increased liabilities and $22.8 million in misappropriation damages incurred by the Breitling Entities between December 2013 (based again on the above "but for" assumptions) and January 2015, which is the date by which the SEC arguably had sufficient information to take action against Breitling based in significant part on Defendants' "CIM Review Memo" that the SEC included in its PowerPoint presentation to Breitling's SEC defense counsel at Vinson & Elkins.[10] Finally, Solomon calculated $50.2 million in increased liabilities and $31.4 million in misappropriation damages incurred by the Breitling Entities between December 2013 and September 4, 2015, which is the date that Breitling filed an 8-K with the SEC announcing that its prior financial statements audited by Defendants and included in its 10-K filing with the SEC could no longer be relied upon.[11]

Solomon also opines that both of his damages models are causally linked to the Defendants' conduct that forms the basis of the Receiver's claims for negligence and knowing participation in breaches of fiduciary duty because Defendants had a duty under Section 10A(b) of the Securities Exchange Act to report their findings of fraud and illegal acts directly to Breitling's management and/or to the Breitling Board and Audit Committee, and if management

[9] Original Report, at pps. 56-59, App. 70-73 (explaining bases for time periods) and 67-68, App. 81-82 (tables showing increased liabilities and misappropriation damages calculations based on time periods). Solomon Depo., at 37:20-41:9, App. 181-185; 245:13-249:2, App. 389-393.

[10] *Id.* For a discussion of the "CIM Review Memo", and how it differed from the original Nymeyer Memo (which it appears the SEC never received or discovered until sometime after the filing of the SEC enforcement action since it was not included or mentioned in the SEC's January 2015 PowerPoint presentation), see the Receiver's Response to Defendants' Motion for Summary Judgment and Brief, ECF No. 100, at pps. 16-20.

[11] Original Report, at pps. 56-59, App. 70-73 (explaining basis for time periods) and 67-68, App. 81-82 (tables showing increased liabilities and misappropriation damages calculations).

or the Board failed to act, then Defendants were required to report their findings directly to the SEC.[12] As the record evidence cited in the Receiver's Response to Defendants Motion for Summary Judgment[13] demonstrates, Defendants not only violated their duties under Section 10A(b) of the Exchange Act, they instead actively helped Breitling's corrupt management conceal the fraud and securities law violations from the BECC Board and Audit Committee, from the SEC, and even from their own supervisory partners.[14]

Specifically, Solomon has opined that Defendants' conduct enabled Faulkner to continue the fraud,[15] and that the damages he calculated for the Breitling entities "*are the result of [Defendants'] audit failures, professional negligence and violations of audit standards*."[16] Solomon further opines that Defendants were obligated to withdraw from the Breitling engagement and to notify the SEC of the reasons for their withdrawal, including reporting Breitling's fraud and illegal acts to the SEC, and that had Defendants taken such required actions it would have prevented the completion of the SEC filings for the reverse merger (and concomitant creation of BECC) and would have provided the SEC with compelling evidence to shut down the Breitling fraud by the end of December 2013, thereby avoiding all of the damages to the Breitling entities that were incurred thereafter.[17] Such causation theory is consistent with this Court's findings that formed the basis for its denial of the state court *Jinsun* plaintiffs' motion to vacate

[12] Original Report, at 42-44, App. 56-58. *See SEC v. KPMG LLP*, 412 F. Supp. 2d. 349, 376, 388-390 (S.D.N.Y. 2006); *In re Cendant Corp. Sec. Litig*., 139 F. Supp. 2d. 585, 597-598, 607 (D.N.J. 2001) .

[13] Given the fact-intensive nature of the arguments made by Defendants in their Motion and by the Receiver herein, the Receiver hereby incorporates by reference as if fully set forth herein his Response to Defendants' Motion for Summary Judgment and Brief [ECF No. 100] (the "MSJ Response") as well as the record evidence cited in the accompanying Appendix thereto [ECF No. 101].

[14] See MSJ Response at pps 16-27 and Appendix evidence cited therein.

[15] Original Report at 36-37, App. 50-51.

[16] Original Report at 67-68, App. 81-82.

[17] Original Report at ps. 40-41, App. 54-55.

the Court's Clarification Order which stayed the *Jinsun* case in favor of the instant Receivership case.[18]

Defendants do *not* challenge Solomon's damages and causation opinions supporting the Receiver's claim for knowing participation in breach of fiduciary duties. Specifically, in his Original Report Solomon calculated increased liability damages ranging from $25.5 million to $52.4 million and misappropriation damages ranging between $12.8 million and $34.1 million that Solomon opines ***were caused by Faulkner*** and other Breitling officers' alleged breaches of fiduciary duty (and for which Defendants are jointly and severally liable if the jury determines that they knowingly participated in such breaches).[19] Thus the jury will hear from Solomon about both of his damages models as to that claim.

Solomon was examined at length about his opinions in his October 27, 2020 deposition, during which Solomon supplemented his opinions (based on the deposition testimony of one of the former members of the Breitling Audit Committee) that Defendants' failure to disclose Faulkner's fraud and illegal acts to Breitling's Audit Committee prevented the members of the Audit Committee from taking action (as they were required by law to do) to stop the fraud.[20] He also opined that, connecting all the dots based on the 4 different facets of fraud that Defendants had uncovered at Breitling, it was clear that Faulkner was operating a Ponzi scheme through the

[18] *SEC v. Faulkner*, 2019 U.S. Dist. LEXIS 34367 (N.D. Tex. 2019) (finding that the claim that "*but for [Defendants'] acts and omissions*" BECC never would "*have fallen into Faulkner's hands, and the scale of the overall fraud scheme – and its resulting harm to a number of receivership entities would have been reduced*" belongs to the Receiver and not the *Jinsun* plaintiffs).

[19] Original Report, at pps. 56-59, App.70-73 (explaining basis for time periods) and 67-68, App. 81-82 (tables showing increased liabilities and misappropriation damages calculations). If the jury determines that Defendants knowingly participated in the breaches of fiduciary duty by Faulkner and other Breitling officers, Defendants are jointly and severally liable for the damages caused by the officers' breaches of fiduciary duty. *Meadows v. Hartford Life Ins. Co.*, 492 F.3d 634, 639 (5th Cir. 2007); *Kinzbach Tool Co. v. Corbett-Wallace Corp.*, 160 S.W.2d 509, 514 (Tex. 1942); *CBIF, Ltd. P'ship v. TGI Fridays Inc.*, 2017 WL 1455407, at *16 (Tex. App.—Dallas Apr. 21, 2017, pet. denied); *Heat Shrink Innovations, LLC v. Med. Extrusion Technologies-Tex., Inc.*, No. 02-12-00512-CV, 2014 WL 5307191, at *8 (Tex. App.—Fort Worth Oct. 16, 2014, pet. denied).

[20] Solomon Depo., at 37:20-41:9, App. 181-185; 142:4-145:16, App. 286-289.

Breitling entities and that the Ponzi scheme was "staring [Defendants] in the face and they didn't notice it".[21]

Shortly after the other 2 former members of the Breitling Audit Committee were deposed following the issuance of Solomon's Original Report and his deposition, Solomon issued his November 16, 2020 Supplemental Report, in which he opined that *had* Defendants complied with their obligations and formally reported Breitling's fraud and illegal acts to the Breitling Audit Committee following its formation in February 2014 (which is after Defendants discovered the extent of the fraud in December 2013), and *had* the Audit Committee taken "timely and appropriate remedial action" to shut down the Breitling fraud as required by Section 10A(b)(2)(B) of the Securities Exchange Act, then the Breitling Receivership Entities would not have incurred over $49.1 million in increased liabilities damages and, alternatively, $31 million in misappropriation damages between February 2014 and December 3, 2015, which is the date when the outside accounting consultant retained by Breitling to assist with its 2014 10-K audit, Steve Plumb, reported his findings of Breitling's fraud and illegal acts to the Audit Committee.[22]

Solomon also opines in his Supplemental Report that Defendants' failures to inform the Board and Audit Committee of their findings contained in the Nymeyer Memo[23] caused damages to the Breitling entities because, as the Receiver testified, had the Board been aware of the fraud and illegal acts occurring at Breitling it would have been legally bound to put a stop to such activity.[24]

Solomon's damages calculations are based, in part, on work performed by Rodney Sowards, the SEC's forensic accountant on whose work this Court has relied in previously

[21] Solomon Depo., at 138:11-141:25, App. 282-285; 173:12-174:15, App. 317-318; 186:25-187:17, App. 330-331; 197:5-19, App. 341; 207:15-208:12, App. 351-352; 215:24-222:20, App. 359-366.
[22] Supplemental Report, at pps. 1-5, App. 114-118.
[23] For discussion of the Nymeyer Memo, see MSJ Response, at pps.16-18 and Appendix evidence cited therein.
[24] Supplemental Report, at ps. 1-5, App. 114-118. Taylor Depo., at 122:17-127:16, App. 504-509.

Breitling-related rulings.[25] Solomon has independently verified both sets of damages models he has calculated using the Breitling entities financial records, bank account statements and electronic databases, records that are extremely reliable and which Defendants do not challenge.[26]

C. Solomon's Opinions Regarding the Increased Liabilities Damages Model are Relevant.

Defendants argue that Solomon's opinions regarding his Increased Liabilities Damages Model are irrelevant because they contend that Solomon has calculated investor losses that are not recoverable by the Receiver. The Receiver has already addressed this argument in his Response to Defendants' Motion for Summary Judgment but will nevertheless repeat them here for the Court's convenience.

The Fifth Circuit has recognized the validity of the increased liability measure of damages in three opinions in the Stanford receivership cases. First, in *Janvey v. Alguire,* the court stated that "[e]xpanding the number of defrauded investors in the Bank . . . *expanded the Bank's ultimate liabilities and increased the injury to the Bank* . . . ." *Janvey v. Alguire*, 847 F.3d 231, 243 (5th Cir. 2017) (emphasis added). More recently, the Fifth Circuit acknowledged that an SEC receiver may sue third parties for "increased liabilities" incurred by the receivership entities that were used as part of a fraud scheme, stating:

> There is no dispute that the receiver and Investors' Committee had standing to bring their claims against the Willis Defendants and BMB. **They bring only the claims of the Stanford entities—not of their creditors—alleging injuries only to the Stanford entities, including from the increase in their unsustainable liabilities resulting from the Ponzi scheme.** The receiver and Investors' Committee "allege that Defendants' participation in a fraudulent marketing scheme increased the sale of Stanford's CDs, ultimately resulting in greater liability for the Receivership Estate," and that defendants' "harmed the Stanford Entities' ability to repay their creditor investors." The receiver and Investors' Committee sought to recover for the Stanford entities' Ponzi-scheme harms, monies the receiver will distribute to investor-claimants.

[25] *SEC v. Faulkner*, 2020 WL 2042339 (N.D. Tex. 2020) (order approving Receiver's plan of distribution).
[26] *See* Original Report, at pps. 56-66, App. 70-80 (describing in detail his methodology in calculating the damages numbers in reliance on and following his verification of Sowards' calculations).

Zacarias v. Stanford Int'l Bank, Ltd., 945 F. 3d 883, 899 (5th Cir. 2019), *cert. denied sub nom. Zacarias v. Janvey,* No. 19-1402, 2020 WL 7327837 (U.S. Dec. 14, 2020) *and cert. denied sub nom. Rupert v. Janvey*, No. 19-1411, 2020 WL 7327838 (U.S. Dec. 14, 2020) The Fifth Circuit went on to explicitly reject the argument that the Stanford Receiver could not sue third party aiders for investor liability damages, holding to the contrary that any such investor claims were "***derivative of and dependent on the receiver's claims***". *Zacarias*, 45 F. 3d at 900.

On February 3, 2021, the Fifth Circuit reaffirmed its position that investor claims for their investment losses against third parties alleged to have aided a securities fraud scheme are derivative of and dependent on an SEC receiver's claims against the same third parties for increased liabilities incurred by the receivership entities, such that the receiver's claims take precedence over the individual investors claims. See *Rotstain et al. v. Mendez et al.*, Case No. 19-11131 at pps. 12-14 (5th Cir., Feb. 3, 2021) (courtesy copy attached hereto as App. 531-548). Therefore, any doubts concerning whether an SEC receiver can sue third parties alleged to have participated in securities fraud for increased liability damages to the receivership entities that are equivalent to investor damages have been erased and put to bed by the Fifth Circuit.

D. Solomon's Opinions Are Supported by the Evidence

Despite couching it as an attack on the reliability of Solomon's Increased Liability and Misappropriation Damages Models, Defendants' next argument is in reality an attack on Solomon's causation opinions which, as described *supra*, are only relevant to the Receiver's professional negligence claim because Defendants do not challenge Solomon's opinions that the damages he calculated in each of his damages models were caused by Faulkner (and other officers of Breitling's breaches of fiduciary duty.

Defendants ask this Court to strike and/or exclude Solomon's opinions on causation because they argue said opinions are unsupported by, and in fact contradicted by, the evidence.

Defendants do not dispute Solomon's actual methodology or how he calculated the damages figures for the different time periods included in either his Increased Liability Damages Model or his Misappropriation Damages Model; instead they challenge Solomon's assumptions and argue that he is wrong to assume that ***had*** Defendants disclosed Faulkner's fraud and illegal acts to the SEC in December 2013 as they were required to do by law and relevant auditing standards, that the SEC would have taken immediate action to prevent the continuation of the fraud. Similarly, Defendants argue that Solomon is wrong to assume that ***had*** Defendants disclosed Faulkner's fraud and illegal acts to the Audit Committee in February 2014 as they were required to do by law and relevant auditing standards, that the Audit Committee would have taken immediate action to prevent the continuation of the fraud (as they were required to do by law).[27]

Texas law is clear that causation is a fact issue for the jury. *See, e.g., Flock v. Scripto-Tokai Corp.*, 319 F.3d 231, 237 (5th Cir. 2003) ("Under Texas law, causation generally is a question of fact for the jury."). Furthermore, the law is clear that disputes concerning assumptions made by expert witnesses, or questions relating to the bases and sources of an expert's opinion, affect the weight to be assigned that opinion rather than its admissibility.[28] Such assumptions generally relate to the sources and bases of the expert's opinions and affect the weight to be assigned such opinion, not its admissibility.[29] Courts are <u>*not*</u> to judge the conclusions generated by an expert's methodology, but rather the reasonableness of the expert's use of such an approach together with

[27] Solomon does not address foreseeability *per se* as part of his causation opinions because Nymeyer admitted to foreseeability in his deposition. See MSJ Response at pps. 53-54 and Appendix evidence cited therein.
[28] *Viterbo v. Dow Chem. Co*., 826 F. 2d. 420, 422 (5th Cir. 1987); *Nova Consulting Grp., Inc. v. End'g Consulting Servs., Ltd.*, 290 F. App'x 727, 732-33 (5th Cir. 2008) (expert opinion not unreliable merely because he made a number of assumptions); *see also Protradenet LLC v. Predictive Profiles, Inc*., 2019 U.S. Dist. LEXIS 210737 at *8-11 (W.D. Tex. 2019).
[29] *United States v. 14.3 Acres of Land More or Less Situated in Lefore County, Ms*., 80 F. 3d 1074, 1077 (5th Cir. 1996).

his method of analyzing the data so obtained.[30] The proponent of the expert opinion "need not prove to the judge that the expert's testimony is correct", only that it is reliable.[31] Similarly, "[c]ertainty is not required as a precondition to expert admissibility", and under Texas law a plaintiff need only prove that his theory of causation is "more likely than not correct".[32]

Defendants' objection to Solomon's causation opinion is nothing more than an attempt to improperly try the causation issue through a *Daubert* motion.[33] Solomon has issued a "but for" causation opinion, but Defendants unfairly seek to hamstring said opinion by arguing that Solomon's "but for" opinions don't match up with the facts as they actually unfolded.[34] That is only logical because Solomon's "but for" assumptions are all premised on *Defendants actually complying with the applicable audit and legal standards*, which they *did not do* in reality. Thus, Defendants improperly mix "but for world" apples with "real world" oranges in their attempt to exclude Solomon's causation and damages opinions. What happened in the "real world" would only be relevant to Solomon's causation and damages theories if Defendants had actually complied with their obligations and timely reported the fraud.

Defendants argue that Solomon has no basis to assume that, in a "but for world", the SEC would have acted immediately to shut down Breitling *if* Defendants had reported Breitling's fraud and illegal acts to the SEC in December 2013 because, as the facts played out in the real world, it took the SEC over 2 years to appoint the Receiver after the SEC had presented Vinson & Elkins

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[30] *Guy v. Crown Equip. Corp*., 394 F. 3d 320, 325 (5th Cir. 2004); *Larson v. Matter*, 2008 U.S. Dist. LEXIS 63432 at *7 (N.D. Tex. 2008) (Fitzwater, J.).

[31] *Moore v. Ashland Chem. Inc.*, 151 F. 3d 269, 276 (5th Cir. 1998) (*en banc*); *see also Hess v. Biomet, Inc.*, 2019 U.S. Dist. LEXIS 196278 at *29 (N.D. Ind. 2019) (courts should not assess the ultimate correctness of an expert's opinion).

[32] *Larson*, 2008 U.S. Dist. LEXIS 63432 at *17 (citing *Kramer v. Lewisville Mem'l Hosp.*, 858 S.W. 2d. 397, 299-400 (Tex. 1993).

[33] *Mathis v. Exxon Corp*., 302 F. 3d 448, 461 (5th Cir. 2002) (district court's *Daubert* analysis should not supplant trial on the merits); *Hall Arts Ctr. Office LLC v. Hanover Ins. Co*., 327 F. Supp. 3d 979 (N.D. Tex. 2018) (Fitzwater, J.) (a trial court must take care not to transform a *Daubert* hearing into a trial on the merits).

[34] Defendants' position is akin to a defendant in a breach of contract case arguing to exclude an expert witness opinion on future "but for" lost profits because those profits never happened in the "real world".

with a PowerPoint presentation in January 2015 that threatened legal action against Breitling for securities fraud. But Defendants' argument ignores other contextual evidence, including: (1) at the time that Defendants discovered Breitling's fraud and illegal acts in November-December 2013, the SEC was already investigating Breitling and was keenly awaiting the outcome of Defendants' audit;[35] (2) instead of resigning and disclosing Breitling's fraud and illegal acts to the SEC in December 2013, Defendants issued two "clean" audit opinions in February and March 2014;[36] (3) instead of receiving evidence of Breitling's fraud and illegal acts from Defendants and/or the Breitling Audit Committee in December 2013, the SEC had to spend years investigating and issuing subpoenas and reviewing thousands of pages of documents to build a case against Breitling;[37] and (4) instead of receiving a fraud disclosure report from Defendants, the SEC was forced to issue a subpoena to Defendants for their Breitling audit work papers;[38] and (5) based in significant part on documents received via the SEC's subpoena, the SEC put together its January 2015 PowerPoint presentation to Vinson & Elkins that included a very prominently embedded reference to Matlock's CIM Review Memorandum; but (6) shortly after that January 2015 PowerPoint presentation, the lead SEC lawyer on the Breitling investigation left the SEC and (according to V&E partner Wander) the SEC investigation of Breitling thereafter "went dark" for a period of time.[39]

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[35] John Wander Depo., at 115:5-25, App. 482 (SEC was looking for audited financial statements from Breitling); 197:4-25, App. 483 (V&E believed having audited financial statements from Defendants would better "posture" Breitling to resolve the SEC's investigatory concerns).

[36] Solomon Depo., at 261:22-262:13, App. 405-406 (testifying that during its investigation of Breitling the SEC was presented with 2 clean audit opinions issued by Defendants when the SEC should have received a resignation and a fraud and illegal acts disclosure report from Defendants); 312:13-316:3, App. 456-460 (testifying that in his opinion having Breitling's external auditor report Breitling' fraud and illegal acts to the SEC, instead of issuing clean audit opinions, would have made a difference in the SEC's analysis of the case against Breitling).

[37] Wander Depo., at 200:18-202:18, App. 484-486. Wander testified that when he and his V&E team were presented with the SEC's PowerPoint presentation in January 2015 they had no idea about Defendants' prior findings concerning Breitling's fraud and illegal acts and had never seen the CIM Review Memorandum before that day. *Id*., at 207:24-209:22, App. 487-489.

[38] Solomon Depo. at 243:2-17, App. 387.

[39] Wander Depo., at 209-23-212:8, App. 489-492.

Moreover, Solomon is not inventing his assumptions from whole cloth because the SEC *did* eventually shut down Breitling. Therefore, it is merely an issue of timing as to whether the SEC could or would have shut down Breitling at an earlier stage, and the question Solomon seeks to answer is whether or not Defendants' negligence and violations of applicable audit standards played a role in the SEC's delay and, conversely, whether the SEC would have acted sooner if it had received full disclosure of Breitling's fraud directly from Defendants, as the external auditors, or indirectly via the Breitling Audit Committee as required under Section 10A(b) of the Exchange Act.[40] In Solomon's "but for" world, he assumes that the SEC, consistent with its mandate to protect investors, would have acted immediately to shut down the Breitling fraud if it had received the required disclosures directly from Defendants or from the Breitling Audit Committee.[41] Such an assumption is entirely reasonable given the circumstances.

Indeed, Solomon's causation and damages model is similar to models approved by other federal courts. In *Thabault v. Chait*, the Third Circuit upheld a $182 million jury verdict against an audit firm (PwC) based on a damage model of "avoidable losses" incurred as a result of the entity's continuation of business operations beyond the date of PwC's negligent audit.[42] The court rejected PwC's argument on appeal that its audits were not a substantial factor in the regulator's failure to intervene earlier to stop the losses.[43]

In *Grant Thornton LLP v. FDIC*, the court endorsed the FDIC's causation and damages expert's theory that *had* the audit firm reported the fraud to the FDIC, the losses incurred thereafter

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[40] See, e.g., *In re Cendant Corp. Sec. Litig*., 139 F. Supp. 2d. 585, 597, 607 (D.N.J. 2001) (describing auditors' duty under Section 10A(b) to report fraud and illegal acts directly to the SEC); *SEC v. KPMG LLP*, 412 F. Supp. 2d. 349, 376, 385-391 (S.D.N.Y. 2006) (describing auditors' and corporate Boards' duties under Section 10A(b) when auditors uncover fraud and illegal acts occurring at the company under audit).

[41] Solomon Depo. at 246:7-247:10, App. 390-391 (testifying that in his opinion having the external audit firm report the fraud and illegal acts directly to the SEC "would have given the SEC a lot more information a lot sooner"); 312:13-313:18, App. 456-457.

[42] *Thabault v. Chait*, 541 F. 3d 512, 519-20 (3rd Cir. 2008).

[43] *Id.*, at 524.

would have been avoided because the FDIC would have shut the bank down.[44] Similar to the fact pattern in the instant case (in terms of the SEC investigating Breitling and awaiting the results of Defendants' audits), the district court in *Grant Thornton* noted that the bank in question "*was being carefully scrutinized by federal regulators*" during the time period that Grant Thornton was auditing the bank, and the court went on to find that "*it is indisputable that had Grant Thornton's audit report reflected [the bank's] true financial position, the Bank would have been closed in a matter of days*."[45] The court distinguished *Grant Thornton* from the Fifth Circuit's opinion in *Askanase v. Fatjo*, 130 F. 3d 657 (5th Cir. 1997) by noting "the unique position" the bank was in during the time period in question, "*with federal regulators carefully watching the Bank's actions and waiting for assurances from the outside auditor that the Bank's financial statements were accurate*". *Id.*

Whether the SEC would have immediately shut down Breitling had Defendants complied with their legal obligation to report the fraud to the Audit Committee or to the SEC is a question for the jury to consider precisely *because Defendants failed in their obligations to report Breitling's fraud and instead issued two clean audit opinions* at a time when the SEC was investigating Breitling,[46] and consequently Defendants' objections to Solomon's causation opinions go the weight of his opinions and not their admissibility.[47] Defendants' challenges to

[44] *Grant Thornton LLP v. FDIC*, 535 F. 2d 676, 710-713 (S.D. W. Va. 2007) (holding that "but for" the auditors' gross negligence the FDIC would have avoided over $25 million in losses).
[45] *Id.*, at 712 (emphasis added).
[46] See *In re Loestrin 24 FE Antitrust Litig.*, 2019 U.S. Dist. 118308 at *25 (D.R.I. 2019) (finding defendants' criticisms of plaintiff's expert's "but for" opinions go to the weight of his testimony and not admissibility because "***the jury is free to accept…that the actual world was too tainted by Defendants' unlawful conduct*** *to give credence*" to defendants' theory of the case).
[47] See *Floyd v. Hefner*, 556 F. Supp. 2d 617, 648 (S.D. Tex. 2008) (critiques of expert' opinion that are based on disputed facts go to the weight of the expert's testimony and not its admissibility); *Viterbo*, 826 F. 2d. 420, 422 (5th Cir. 1987) (issues regarding the bases and sources of an expert's opinion that affect the weight of the opinion "should be left for the trier of fact's consideration").

Solomon's assumptions based on alleged miscalculations, erroneous assumptions and inconsistencies are also matters best left to the jury.[48]

The same is true for Solomon's "but for" causation opinion contained in his Supplemental Report that the Audit Committee would have taken action to shut down the fraud ***if*** Defendants had complied with their legal obligation to report the fraud and illegal acts they had uncovered to the Audit Committee.[49] Solomon opines that, had the Audit Committee received a report from Defendants concerning fraud and illegal acts at Breitling, then the Audit Committee would have had a duty to further investigate and take immediate action to stop such activities,[50] which is consistent with Section 10A(b) of the Exchange Act which obligates a corporate Board to report fraud or illegal acts to the SEC **within 1 day** of receiving a report from the external auditors describing such conduct.[51] Solomon assumes that *had* Defendants reported the fraud to the Audit Committee upon its formation in February 2014 (which is around the time Defendants issued their first "clean" audit opinion), then the Audit Committee would have taken the legally required appropriate actions.[52] This is a perfectly logical assumption.

Because Defendants did <u>*not*</u> report the fraud and illegal acts to the Audit Committee, Solomon created a separate Increased Liabilities and Misappropriation damages model that runs from February 2014 (the date of formation of the Board and Audit Committee) to December 3, 2015, which is the date that accounting consultant Steve Plumb ("Plumb") reported the fraud to the Audit Committee.[53] Solomon cuts off his damages calculations after that date, and the Receiver

[48] *Nkansah v. Martinez*, 2017 U.S. Dist. LEXIS 100080 at *9-10 (M.D. La. 2017); *see also Smith v. Ford Motor Co.*, 215 F. 3d 713, 718 (7th Cir. 2000) (the "soundness of the factual underpinnings of the expert's analysis and the correctness of the expert's conclusions based on that analysis are factual matters to be determined by the trier of fact.").
[49] Supplemental Report at pps. 1-5, App. 114-118.
[50] *Id.*, at p. 3, App. 116.
[51] *SEC v. KPMG LLP*, 412 F. Supp. 2d. 349, 376, 386 (S.D.N.Y. 2006).
[52] Supplemental Report, at p. 3, App. 116.
[53] *Id.*, at pps. 2-4, App. 115-117.

does not seek any damages incurred after December 3, 2015 for his professional negligence claim.[54]

Defendants attack Solomon's causation opinions centered on the Audit Committee by pointing to evidence that, instead of taking the legally required actions under Section 10A(b) of the Exchange Act, the entire Board resigned in December 2015 after receiving Plumb's report of all of the fraud occurring at Breitling. But Defendants' argument once again ignores the central component of Solomon's "but for" causation opinion – that *Defendants* as Breitling's external auditors (not a consultant like Plumb) *should have* provided their report outlining Breitling's fraud to the Board and Audit Committee much earlier -- in February 2014 -- a time when the Audit Committee was headed by Chris Williford. Defendants never made any such report and therefore what happened in December 2015 following Plumb's report to the Board is largely irrelevant (particularly since the Receiver does not seek damages after that date) and/or creates a fact question that needs to be resolved by the jury at trial.

Moreover, there is plenty of evidence that supports Solomon's opinions that had Defendants reported their findings to the Breitling Board or Audit Committee and/or to some of the other executive members of management of Breitling in late 2013 or early 2014, those individuals would have taken action that would have had an impact on Faulkner's ability to continue the fraud. For example Williford, who was the Chair of the Audit Committee in early 2014, testified that the representations Defendants made in their letter to the Audit Committee gave him comfort that everything was fine with Breitling,[55] but that if Defendants had informed him

[54] At any rate, the increases in liability after December 3, 2015 were minimal. According to Solomon's calculations, there was an increase of a little over $2 million in liabilities to the Breitling entities between September 5, 2015 and the date of the filing of the SEC Complaint in June 2016. See Original Report, at p. 67, Table 6, App. 81. While Solomon was not asked to calculate increases in liability between December 3, 2015 and the filing of the SEC Complaint in June 2016, it would be easy for him to make such a calculation. It will be a very small number.

[55] Williford Depo. at 99:3-100:20, 107:10-20, 114:16-115:2, App. 494-498.

that they considered Breitling was engaged in fraud it would have caused him concern and prompted him to make further inquiries.[56] Breitling's General Counsel Jeremy Wagers testified that since Defendants didn't inform him of their findings and concerns surrounding Breitling's fraud and violations of law, it prevented him from fulfilling his duties as General Counsel to report that information "up" to the Breitling Board or Audit Committee,[57] and that if Defendants had informed him of the information contained in the Nymeyer Memo[58] he would have reported it to the Board and/or the Audit Committee.[59] He further testified that he found the contents of the Nymeyer Memo "unsettling",[60] but since he never saw it until years later in his deposition and Defendants never informed him about Nymeyer's findings, the fact that RK issued two clean audit opinions for Breitling gave him comfort that Breitling was operating in a legitimate manner.[61] Breitling's CFO Rick Hoover ("Hoover") testified that if he had known of all the fraud and illegal acts occurring at Breitling, he would never have signed off on Breitling's 8-K/A or the 10-K and would have instead resigned from Breitling.[62]

Finally, Parker Hallam, who was the Chief Operating Officer of Breitling and, later, the President of Crude has testified that he took great comfort in the fact that Defendants issued clean audit opinions for Breitling because he had begun to identify some "red flags" with respect to Faulkner prior to the issuance of Defendants' audit opinions but his concerns were assuaged by Defendants' clean audits.[63] After reading the Nymeyer Memo for the first time, Hallam testified that if he had had access to the Nymeyer Memo when he was still an officer of Breitling back in

[56] Williford Depo. at 121:17-124:3, App. 499-502.
[57] Wagers Depo., at 104:5-20, App. 511.
[58] For a discussion of the Nymeyer Memo, see the Receiver's MSJ Response at pps. 16-18.
[59] Wagers Depo. at 133:4-136:5, App. 512-515.
[60] Wagers Depo. at 138:2-13; App. 516.
[61] Wagers Depo. at 138:14-23, App. 516.
[62] Hoover 9/17/19 Depo at ps. 118:15-122:15, App. 518-519.
[63] Hallam Depo. at 164:11-165:20, App. 521-522.

late 2103/early 2014 it "***would have definitely changed the outcome of everything***" because "**things would not have progressed any further**" because Hallam "***would have done the right thing***" and "***confronted it in one way or another***".[64] He also testified that if he had known the information contained in the Nymeyer Memo at or around the time it was prepared in late 2013, he believes that **all of the investor losses thereafter could have been avoided**,[65] and that he never would have agreed to continue on with Breitling or to be named as the President of Crude.[66]

The jury should be allowed to evaluate the above evidence in conjunction with Solomon's causation and damages opinions in deciding this case. Defendants will have the ability to cross examine Solomon and obviously have their own version of the story and contrary evidence to present to the jury.[67] Indeed, Defendants have retained a former high ranking SEC lawyer from the SEC's Los Angeles office who Defendants will attempt to present as an expert witness in this case to testify that, in his opinion, the SEC basically "dropped the ball" and took way too long to shut down the Breitling fraud.[68] As such, it is clear that Defendants are improperly attempting to "try" the Receiver's causation theories via a *Daubert* challenge and that Defendants' objections to

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[64] Hallam Depo. at 181:14-182:12, App. 523-524.
[65] Hallam Depo. at 227:2-228:18, App. 525-526.
[66] Hallam Depo. at 182:13-20, App. 524.
[67] *Primrose Operating Co. v. National Am. Ins. Co*., 382 F. 3d 546, 562 (5th Cir. 2004); *Rolls-Royce Corp. v. Heros Inc*., 2010 U.S. Dist. LEXIS 3716 at *31 (N.D. Tex. 2010) (expert opinion does not lack foundation just because opposing party argues it is inaccurate; "if it is inaccurate [Defendants] can counter it by offering competing testimony on the subject at trial.").
[68] Based on their retention of an SEC expert and their Motion to Designate Responsible Third Parties and accompanying Brief [ECF Nos. 107 and 108], it appears that Defendants intend to put the SEC on trial for negligence for failing to shut down Breitling earlier than it did. If so, Solomon's opinions are still relevant and his methodology reliable because it has long been the rule in Texas that *where the negligence of two or more persons concur in producing a single, indivisible injury, then such persons are jointly and severally liable, although there was no common duty, common design, or concerted action. See Landers v. E. Tex. Salt Water Disposal Co.*, 151 Tex. 251, 248 S.W.2d 731, 734 (Tex. 1952); *Austin Road Co. v. Pope*, 147 Tex. 430, 435, 216 S.W.2d 563, 565 (Tex. 1949) The Fifth Circuit has applied the indivisible injury rule to hold two joint tortfeasors who committed negligence jointly and severally liable for a single indivisible injury. *See Borg Warner Corp. v. White Motor Co.*, 344 F.2d 412, 415 (5th Cir. 1965). The enactment of Chapter 33 of the Texas Civil Practice & Remedies Code did not abrogate this rule. *See Lakes of Rosehill Homeowners Assn., Inc. v. Jones*, 552 S.W.3d 414, 417-422 (Tex. App.—Houston [14th Dist.] 2018, no pet.); *PHI, Inc. v. LeBlanc*, 2016 WL 747930, at *3-6 (Tex. App. – Corpus Christi 2016, pet. denied). Importantly, courts have applied this rule in professional malpractice cases. *See, e.g. Loughman v. Consol-Pennsylvania Coal Co.*, 6 F.3d 88, 107 (3d Cir. 1993).

Solomon's causation opinions go to "the weight to be assigned that opinion rather than its admissibility." *Puga*, 922 F.3d 285, 293-94 (5th Cir. 2019).

E. Defendants' Other Complaints about Solomon's Damages Opinions Lack Merit

Defendants' remaining arguments involve mostly meritless quibbling about items Defendants believe Solomon should have taken into account in his damages calculations. For example, Defendants complain that Solomon calculated his Increased Liabilities Damages Model without waiting for the Receiver to finalize his claims process even though Solomon produced his expert report in conformity with the deadline established in this Court's Scheduling Order. Moreover, the Receiver agrees that Solomon's numbers are valid, and indeed the Receiver' team relies in large part on Solomon's work product in calculating the "notional amounts" of claims the Receiver is considering as part of the claims determination process.[69]

Defendants point to a hypothetical they presented to Solomon and the Receiver in their respective depositions as somehow being illustrative of Solomon's flawed methodologies. But Defendants' arguments are flawed because they once again attempt to mix apples and oranges by improperly contrasting Solomon's "but for" causation assumptions with what happened in the "real world" of the Receiver's ongoing claims and distribution process.

As described above, Solomon has created damage models based on "but for" assumptions, one of which is that ***if*** the SEC had shut down Breitling on August 1, 2014 then any funds invested with Breitling prior to that date would be "trapped" at Breitling and therefore Solomon does not take into account what happened in the "real world" after that date, i.e., he does not count any return of funds by Breitling to any investors after August 1, 2014. Solomon explained his

[69] Taylor Decl., at ¶ 6, App. 528-529.

reasoning in his deposition.[70] In essence, Solomon is not counting returns of funds occurring after August 1, 2014 because his "but for world" *closes* on August 1, 2014, the date by which he assumes the SEC would have shut down Breitling thereby preventing any funds from "escaping".[71] Solomon's assumptions are grounded in reality because, to date, no investors have received any return of funds from Breitling since the SEC filed suit against Breitling and appointed the Receiver.[72] All Solomon did was move the goal post forward in time in his "but for" analysis. In contrast, obviously the Receiver has not created a "but for" world as part of his distribution process and therefore the Receiver *is* counting funds returned to the investors *en toto* as part of his "real world" claims process.

Next, Defendants complain that Solomon has not discounted or offset his damages calculations by the Receiver's recovery of assets. Defendants' arguments suffer from multiple infirmities. *First*, they cite to purported recoveries of assets by the Receiver that occurred *after* Solomon issued his expert report in this case, without explaining how Solomon was supposed to have included them in his report.[73] *Second*, to date the Receiver still has not actually received some of the assets Defendants' argue he has received, *e.g.*, the Receiver still has not received the $3.5 million of royalty interest payments currently held in suspense by well operators.[74] And when he does receive the conveyance of said royalty payments the Receiver will still need to pay roughly $500,000 in taxes on them, such that the net benefit to the Receivership Estate will be less than Defendants allege.[75] *Third*, Defendants mistakenly argue that Solomon should adjust his damages

[70] Solomon Depo. at pps. 294:7-295:14, App. 438-439; 299:8-300:23, App. 443-444.
[71] *Id.*
[72] Taylor Decl., at ¶ 7, App. 529.
[73] See Defendants' Motion at footnotes 51 and 53 and accompanying text citing to pleadings in the *SEC v. Faulkner* action filed on October 7, 2020 [ECF No. 573] and December 21, 2020 [ECF No. 577], respectively, both of which are *after* Solomon issued his Original expert report on August 14, 2020.
[74] Taylor Decl., at ¶ 8, App. 529.
[75] Taylor Decl., at ¶ 8, App. 529.

calculations to account for the net benefit (net of attorneys' fees and expenses) to the Receivership estate derived from the Receiver's recent litigation settlement with Scheef & Stone. It is the role of the Court, not an expert or the jury, to determine how to apply settlement credits prior to entering a judgment on the jury's verdict. *Utts v. Short*, 81 S.W.3d 822, 829 (Tex. 2002).

Defendants also complain that Solomon has failed to account for certain tax benefits that some Breitling investors may be entitled to receive. Solomon explained in his deposition why he didn't take tax benefits to individual investors into account in rendering his opinions on the Increased Liabilities Damages Model,[76] but the main reason is because he was not trying to measure investor damages, but rather was attempting to measure the fraud and rescission liabilities incurred by the Breitling entities. To the extent that Defendants can adduce evidence to support that certain Breitling investors took tax benefits that somehow offset their rescission claims against the Breitling entities, then Defendants can present that evidence to the jury through their own witnesses or through cross examination of Solomon at trial.

Finally, Defendants seek to offset Solomon's damages calculations with the value of <u>all</u> assets recovered by the Receiver, despite the fact that Solomon only calculated increased liabilities incurred during specific time periods, which calculations do not capture the entirety of the losses suffered by the Breitling entities throughout the duration of the fraud. For example, at this time the Receiver believes the total amount of approved claims on the Breitling entities and their assets will be much larger than any of Solomon's damages calculations,[77] the largest of which is $52.4 million in increased liabilities for the time period spanning December 19, 2013 through June 24, 2016.[78] It would be inappropriate to offset total net recoveries against *less than* total Breitling

[76] Solomon Depo., at pps. 307:10-309:5, App. 451-453.
[77] Taylor Decl., at ¶ 9, App. 529-530.
[78] Solomon Original Report at p. 67, Table 6, App. 81.

entity liabilities; any offsets or credits for recoveries should be proportional to the *total* net liabilities of the Breitling entities.

Defendants' complaints about the above cited potential offsets and credits do not make Solomon's opinion unreliable or inadmissible, and Defendants offer no controlling authority to the contrary. In fact, the reverse is true as federal courts do not "require experts to know every conceivable relevant fact in order to testify". *Curlee v. United Parcel Serv. Inc.*, 2014 U.S. Dist. LEXIS 199314 at *6 (N.D. Tex. 2014 (Solis, C.J.). Defendants' challenges once again go to the weight of Solomon's testimony, not its admissibility. *See Puga*, 925 F.3d at 293-94.

Defendants ask the Court to strike Solomon's Misappropriation Damages Model in its entirety because, they contend, he relies on speculative assumptions regarding when the SEC and/or the Breitling Audit Committee would have intervened to shut down the fraud if Defendants had complied with their obligations as auditors (discussed in detail *supra*) and also because Solomon failed to consider causation as part of his Misappropriation Damages Model. The Receiver has addressed causation at length above, but will further respond that Solomon only included in his Misappropriation Damages Model illegal securities commission payments made to Breitling's unlicensed securities brokers during the relevant time periods, and also only included payments to law firms that defended Breitling in the SEC investigation made *after* the time when Solomon assumes that the SEC would have already shut down Breitling (thereby obviating the need to make such defense payments). Solomon explained his rationale in his deposition.[79]

F. Solomon is not Testifying as to Matlock's State of Mind and is Entitled to Testify as to Defendants' Violations of Audit Standards and Laws Governing Auditors

While expert witnesses typically cannot testify concerning a third party's state of mind, expert witnesses are permitted to testify concerning the facts and information that were available

[79] Solomon Depo. at 322:8-329:18, App. 466-473.

to Defendants and to explain what that information means to the jury, particularly given the complex, document-intensive nature of this case.[80] Moreover, and because this is, in part, a professional malpractice case, the Receiver is required by Texas law to provide expert testimony regarding (1) the standard of care applicable to accountants; (2) whether the accountants violated the standard of care; and (3) whether the malpractice caused damages.[81]

One of the Receiver's primary malpractice allegations against Defendants is that they violated audit standards and Section 10A(b) of the Exchange Act by failing to report Breitling's fraud and illegal acts, including violations of securities laws. This portion of the Receiver's negligence claim thus requires the Receiver to prove that Defendants *knew* that Faulkner was violating laws, and since the Receiver is required by Texas law to support each of the elements of his malpractice claim with expert witness testimony, Solomon has provided opinion testimony – based entirely on the evidentiary record – that Defendants knew about but intentionally assisted Faulkner to cover up the violations of securities laws. Such expert testimony is proper.[82] Solomon has evaluated the available documentary and testimonial evidence – virtually all of which came from Defendants' own files or witnesses – and will offer opinions to the jury at trial as to the "purpose, importance or content" of the documents and testimony and consequently the information that was available to Defendants when they engaged in the audit work for Breitling.

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[80] *Huawei Techs. Co. v. Huang*, 2019 U.S. Dist. LEXIS 78765 at *13 (E.D. Tex. 2019) (citing *Romero v. Wyeth Pharms., Inc*., No. 1:03-CV-1367, 2012 U.S. Dist. LEXIS 190845, 2012 WL 12905978, at *6 (E.D. Tex. Apr. 26, 2012) (expert witnesses are permitted to offer opinions concerning the purpose, importance, or content of documents in order to assist the jury's understanding of such documents).

[81] *See, e.g., Bd. of Trs. of the Fire & Police Retiree Health Fund v. Towers, Perrin, Forster & Crosby, Inc*., 191 S.W. 3d. 185, 190 (Tex. App. – San Antonio 2005); *Greenstein, Logan & Co. v. Burgess Mktg. Inc.*, 744 S.W. 2d. 170 (Texas App. – Waco 1987, writ denied).

[82] See *U.S. v. Augustin*, 661 F. 3d 1105, 1123 (11th Cir. 2011) (expert evidence that supports an obvious inference as to the defendants' intent or state of mind is not barred as long as it leaves the inference to the jury to draw); see also *Scott v. Chipotle Mexican Grill, Inc*., 315 F.R.D. 33, 45 (S.D.N.Y. 2016) ("An expert also may offer commentary on documents in evidence if the expert's 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").

Solomon has also drawn inferences from the evidence and provides opinions on the ultimate issues in the case (violation of the standard of care), which is entirely permissible. Fed R. Evid. 704; *U.S. v. Izydore*, 167 F. 3d 213, 218 (5th Cir. 1999).

Therefore, where Solomon concludes that "Matlock buried" the Nymeyer Memo in the Permanent file or "Matlock sought to downplay" the seriousness of the fraud and illegal acts Defendants' discovered, those are merely the inferences he has drawn from, and which are supported by, the evidentiary record. Accordingly, the inclusion of inferences made by Solomon regarding what Defendants "knew or should have known" based on the objective evidence in the record does not justify the exclusion of his testimony. Defendants' remedy is not to exclude such testimony but to counter it with "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof". *Puga*, 922 F.3d at 293-94 (quoting *Daubert*, 509 U.S. at 596).[83]

Solomon is also permitted to testify regarding Defendants' violation of Section 10A(b) of the Exchange Act because such statute governs the conduct of auditors of public companies like Defendants, and as discussed above, expert testimony is required to prove the standard of care applicable to the professional and whether the professionals violated the standard of care (i.e., were negligent).[84] Experts cannot offer testimony regarding ***what law governs a dispute*** or what the applicable law means, because that is a function of the Court.[85] But it is permissible for Solomon

[83] To the extent necessary, the Court can provide a cautionary instruction to the jury regarding the inferences drawn by the Receiver's expert such that the members of the jury understand that they are free to draw their own independent inferences from the record. *Augustin*, 661 F. 3d at 1123. And the Receiver's counsel can propound questions to Solomon at trial in the form of hypotheticals. *See e.g., U.S. v. Mann*, 712 F. 2d 941 (4th Cir. 1983).

[84] *See, e.g., Air Measurement Tech., Inc. v. Hamilton*, 2005 WL 525411, at *3 (W.D. Tex. 2005) ("In order to establish legal malpractice, a plaintiff must have expert testimony regarding violations of the applicable standard of care."); *Streber v. Hunter*, 221 F. 3d 701, 724 (5th Cir. 2000); *Geiserman v. MacDonald*, 893 F.2d. 787, 791, 793 (5th Cir. 1990).

[85] *Fisher v. Halliburton, No*. 2009 U.S. Dist. LEXIS 118486, 2009 WL 5216949, at *2 (S.D. Tex. Dec. 21, 2009) (citing *Askanase v. Fatjo*, 130 F.3d 657, 673 (5th Cir. 1997)).

to offer an opinion concerning Defendants' violations of the auditing standards incorporated in the securities laws, and courts routinely allow experts to testify regarding complex areas of the law such as securities law, *even where the legal issues embrace the ultimate issues to be decided by a jury against a defendant at trial*.[86]

Here, Solomon's opinion testimony about Section 10A(b) does not embrace an ultimate legal issue in the case because the Receiver is not suing Defendants for violating Section 10A(b) of the Exchange Act and no such questions will be presented to the jury. Rather he will testify regarding the applicable standards for audits of public companies like Breitling as embodied, in part, in Section 10A(b) of the Exchange Act. Because the Receiver is required to prove through expert testimony that Defendants violated the standard of care, Solomon must be allowed to testify as to Defendants' violations of said law.[87]

G. Solomon's Supplemental Report is not Untimely and Should not be Stricken

As described in Solomon's Supplemental Report,[88] and due to difficulties securing non-party "virtual" depositions amidst the global Covid pandemic, crucial depositions of the 3 former members of the Breitling Audit Committee (Williford, Thornock and Mourglia) were not taken

[86] *See U.S. v. Offill*, 666 F. 3d 168, 175-177 (4th Cir. 2011) ("courts and commentators have consistently concluded that expert testimony that ordinarily might be excluded on the grounds that it gives legal conclusions may nonetheless be admitted in cases that involve highly technical legal issues"; "[w]e conclude that the specialized nature of the legal regimes involved in this case and the complex concepts involving securities registration, registration exemptions, and specific regulatory practices make it a typical case for allowing expert testimony that arguably states a legal conclusion in order to assist the jury"); *U.S. v. Bilzerian*, 926 F.2d 1285, 1294 (2d Cir. 1991) ("Particularly in complex cases involving the securities industry, expert testimony may help a jury understand unfamiliar terms and concepts"); *Goldenson v. Steffens*, 2013 U.S. Dist. LEXIS 25083 at *37-38 (D. Maine 2013) (expert on securities laws may opine on how the facts of the case tie into the legal framework and relevant securities industry); *Floyd v. Hefner*, 556 F. Supp. 2d 617, 641 (S.D. Tex. 2008).

[87] *Waco Int'l Inc. v. KHK Scaffolding Houston Inc.*, 278 F. 3d 523, 533 (5th Cir. 2002) (finding no error in district court's denial of motion to strike expert testimony on the law "*because the standard of care is defined in part by the law*").

[88] Supplemental Report at pps. 1-2, App. 114-115.

until *after* Solomon issued his Original Report on August 14, 2020.[89] As a result, Solomon issued his Supplemental Report on November 16, 2020 – just a few days after the Thornock and Mourglia depositions were completed and well in advance of the April 2021 trial date. The purpose of the supplementation was to refine Solomon's causation and damages opinions to adjust and correct his damages models by including the date by which Solomon believes Defendants should have disclosed the fraud and illegal acts to the Audit Committee (by February 2014, which is when the Audit Committee was formed) as well as to adjust and correct his damages model as to the date (December 3, 2015) when the Audit Committee was finally informed by independent accounting contractor Plumb of the extent and scope of the fraud and illegal acts that had occurred at Breitling.[90]

Solomon gave notice to Defendants' counsel during his October 27, 2020 deposition that, based on Williford's testimony in his deposition taken on September 30, 2020, he had formed supplemental opinions regarding the Board and/or Audit Committee's ability to have taken action to stop the continuation of the fraud at Breitling if Defendants had complied with their obligations under the audit standards.[91] Following the depositions of Plumb, Thornock and Mourglia, Solomon completed his analysis and formed his opinions as reflected in his Supplemental Report -- including the supplemental damages calculations that are a subset of the damages calculations included in his Original Report and which are based on the exact ***same*** data and information that Receiver disclosed and produced to Defendants with Solomon's Original Report.

As such, Solomon's Supplemental Report is permissible under FRCP 26(e) and complies

[89] Williford was deposed on September 30, 2020, Thornock on November 11, 2020 and Mourglia on November 12, 2020. Snyder Declaration at ¶ 2, App. 5.
[90] Supplemental Report at 1-5, App. 114-118. Plumb was similarly not deposed until ***after*** Solomon's Original Report had been issued, on September 23, 2020. Snyder Declaration at ¶ 2, App. 5.
[91] Solomon Depo., at 40:8-41:9, App. 184-185.

with this Court's standard for admissibility of supplemental expert reports.[92] Pursuant to the *Jacobs* factors, (1) the supplementation was occasioned by new evidence that came to light after the issuance of Solomon's Original Report, being the testimonies of Audit Committee members Williford, Thornock and Mourglia, as well as independent accounting consultant Plumb;[93] (2) because the supplemental opinions relate to and support the Receiver's causation and damages theories, which are fundamental elements of his cause of action for professional negligence and require expert testimony, Solomon's supplemental opinions are important if not crucial to the Receiver's case; (3) there is little to no prejudice to Defendants, particularly since the Receiver's counsel offered to re-produce Solomon for additional deposition examination on his Supplemental Report in exchange for Defendants not seeking to strike same (which Defendants rejected);[94] and (4) the Supplemental Report was produced to Defendants within five months of the scheduled trial date, and the parties have discussed and verbally agreed to seek a continuance of the currently scheduled April trial date in order to allow this Court time to rule on the Defendants' various motions and so conserve resources in trial preparation.

Taken together, and given the complexity of this case, there is no sound basis for this Court to strike Solomon's Supplemental Report as it only modifies and refines Solomon's opinions on causation and damages based on the same underlying data.[95]

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[92] *Nunn v. State Farm Mut. Auto Ins. Co.*, 2010 U.S. Dist. LEXIS 61740 at *37-41 (N.D. Tex. 2010) (Fitzwater, C.J.) (citing *Jacobs v. Tapscott*, 2006 U.S. Dist. LEXIS 68619 at *12 (N.D. Tex. 2006) (Fitzwater, J.).

[93] *Nunn*, 2010 U.S. Dist. LEXIS 61740 at *40-41 (denying motion to exclude supplemental expert report that was based on new deposition evidence).

[94] Snyder Declaration at ¶3, App. 6.

[95] *Brennan's Inc. v. Dickie Brennan & Co. Inc*., 376 F. 3d 356, 374-376 (5th Cir. 2004) (affirming district court's allowance of supplemental expert opinions on damages) (citing *Woodworker's Supply Inc. v. Principal Mut. Life Ins. Co.*, 170 F. 3d 985, 993 (10th Cir. 1999) (upholding district court's decision to allow the presentation of evidence of a previously undisclosed damages theory where, inter alia, the defendant already knew the numbers on which the calculation were based).

CONCLUSION & PRAYER

For the reasons set forth above, Defendants' Motion to Strike Saul Solomon's Opinions and Exclude his Testimony from Trial should be denied.

Dated February 9, 2021

Respectfully submitted,

CASTILLO SNYDER

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CERTIFICATE OF SERVICE

On February 9, 2021, I electronically filed the foregoing document with the clerk of the court of the U.S. District Court, Northern District of Texas, using the electronic case filing system of the Court, which served all counsel of record electronically as authorized by the Court pursuant to the Federal Rules of Civil Procedure.

/s/ Edward C. Snyder
Edward C. Snyder