UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,	:	
Plaintiff,	:	No. 12 Civ. 7728 (GBD)
-against-	:	ECF CASE
YORKVILLE ADVISORS, LLC, MARK ANGELO and EDWARD SCHINIK,	:	
Defendants.	:	

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO PRECLUDE TESTIMONY OF THE SEC'S PROPOSED EXPERT, MARK L. BERENBLUT

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INTRODUCTION

Defendants Yorkville Advisors, LLC, Mark Angelo, and Edward Schinik move this Court to exclude the testimony of the SEC's proposed expert, Mark L. Berenblut. The SEC alleges that Yorkville, an investment manager, committed securities fraud by overstating the value of investments in a hedge fund it managed. The SEC offers Berenblut to opine that Yorkville overstated the value of 15 of its approximately 225 investments by hundreds of millions of dollars; for example, Berenblut claims a "minimum" overvaluation of $345.48 million in the fourth quarter of 2009. But as Berenblut repeatedly admitted, he did not do the work required under applicable professional standards to reach this kind of opinion. Worse, despite certifying in his report that he followed the Uniform Standards of Professional Appraisal Practice, Berenblut was forced to admit that his methodology *did not* follow USPAP's well-established standards, which are designed to ensure that appraisal opinions are not misleading. To comply with USPAP, Berenblut was required to develop his own appraisal of the assets before opining that Yorkville's valuations were overstated, or by how much. Berenblut did not do this for any of the 15 investment positions, thus flouting USPAP's established standards and contradicting his expert report's own certification. In this area characterized by well-established professional standards, Berenblut's failure to follow straightforward USPAP standards makes his testimony about any alleged overstatement especially ripe for exclusion.

Instead of following USPAP, Berenblut applied an unrecognized approach, seemingly of his own creation. He used Yorkville's valuations as a starting point and—rather than applying a consistent, established valuation methodology—discounted them as he saw fit by relying on whichever valuation inputs were least favorable to Yorkville, in each case predictably backing in to the conclusion that Yorkville overstated the investment's fair value. But neither Berenblut

nor the SEC (which bears the burden of proving the admissibility of Berenblut's testimony) has shown that this selective write-down approach—unmoored from GAAP's or USPAP's accepted professional standards—is a reliable methodology for reaching an opinion of value about an asset. This Court should thus exclude his testimony under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and Federal Rule of Evidence 702.

Berenblut should also be barred from testifying that Yorkville's valuations lacked a reasonable basis. First, that limited opinion rests on inadequate factual foundations. Second, any relevance it may have is substantially outweighed by the risk of unfair prejudice to Yorkville or misleading the jury, under Rule 403. Yorkville owned hard-to-value, "Level III" investments, whose valuations required substantial subjective judgment. Yet Berenblut often nit-picked Yorkville's reliance on certain third-party valuation reports over others. These half-baked criticisms improperly supplant the SEC's role of making arguments to the jury. Given the testimony's limited relevance and its danger of misleading the jury, this Court should exclude it.

Finally, Berenblut is not qualified to testify as an expert on Yorkville's oil-and-gas investments. Among other things, Berenblut could not identify a single instance where he performed his own valuation of an oil-and-gas asset, and by his own admission, he lacks expertise in technical aspects of oil-and-gas assessment. But many of Berenblut's opinions are based on industry-specific judgments about the value of oil-and-gas assets. Because he is unqualified, this Court should exclude his testimony about these six oil-and-gas companies.

BACKGROUND

I. Yorkville's Investment Strategy and Valuation Process

Yorkville's summary-judgment motion sets forth the relevant, undisputed facts in this case, including a description of Yorkville's investment strategy and valuation process. As relevant to this *Daubert* motion, Yorkville invested in convertible debentures of small, distressed

public companies. Yorkville could convert these debentures into the subject company's stock. Yorkville also often held security interests in these company's assets, which enabled Yorkville to foreclose on the assets or take over the company and run it privately.

Yorkville engaged independent third-party valuation consultants to assist in valuing its fund's positions. In 2009, for example, it engaged Valuation Research Corporation (VRC) to provide full, independent valuations of investments it had taken over a company or asset, including some that Berenblut reviewed here. VRC offered a low, mid, and high valuation for each position, and Yorkville adopted VRC's mid-point value in the vast majority of cases.

II. Relevant Professional Standards

A. Fair Value Under GAAP

Yorkville was required to carry its investments at their "fair value" in accordance with Generally Accepted Accounting Principles (GAAP). As one of Yorkville's experts explained, Statement of Financial Accounting Standards No. 157 (SFAS 157) provides guidance for determining fair value under GAAP.[1] SFAS 157 describes three valuation methods, which can be used alone or in combination: (i) the market approach, where fair value is determined based on market transactions involving the same or similar assets; (ii) the income approach, where fair value is determined by discounting the asset's expected future cash flows to a present value; and (iii) the cost approach, where fair value is determined based on the cost to replace the asset.[2] Yorkville's investments here were hard-to-value "Level III" assets under SFAS 157, meaning their valuations were based on unobservable inputs requiring significant judgment or estimation.[3]

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[1] *See* Decl. of Patrick J. Smith in Supp. of Defs' Mot. to Preclude Test. of the SEC's Proposed Expert, Mark L. Berenblut ("Smith Decl."), Ex. 5 ¶ 21 (Expert Report of Charles R. Lundelius, Jr., dated Dec. 16, 2016 ("Lundelius Report")). Since 2009, fair value under GAAP has been covered by Accounting Standards Codification 820, which keeps the same relevant fair value principles as SFAS 157. *See* Smith Decl. Ex. 5 ¶ 23 (Lundelius Report).

[2] Smith Decl. Ex. 5 ¶ 22 (Lundelius Report).

[3] Smith Decl. Ex. 5 ¶ 10 (Lundelius Report).

B. Uniform Standards of Professional Appraisal Practice

Berenblut certified that he prepared his expert report in accordance with USPAP Standard 3.[4] USPAP's standards are designed to ensure that appraisers develop and convey their work in a "manner that is meaningful and not misleading."[5] USPAP's standards are well-recognized.[6]

USPAP Standard 3 sets forth criteria for an appraiser to follow when reviewing another appraiser's work.[7] Under Standard 3, a reviewer can provide at least two types of opinions about the work under review: First, the reviewer can offer their "own opinion of value;" second, the reviewer can provide an "opinion of quality of the work."[8] If the reviewer provides an opinion of value, that opinion must comply with the substantive requirements for developing the reviewer's own appraisal of the particular asset at issue.[9] For valuations of interests in a business, the relevant substantive standard is USPAP Standard 9.

In a USPAP advisory opinion, the Appraisal Standards Board offers guidance for determining what language constitutes an "opinion of value" triggering the reviewer's obligation to develop their own appraisal. Intended to "prevent[] confusion," this advisory opinion—Advisory Opinion 20—advises reviewers to use care in choosing their language so as not to

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[4] Smith Decl. Ex 1 ¶ 4 and Certification (Expert Report of Mark L. Berenblut, dated Dec. 16, 2016 ("Berenblut Report")). Berenblut's "Certification" follows page 176 of his report.
[5] Smith Decl. Ex. 3, at 6 (Appraisal Standards Board, Uniform Standards of Professional Appraisal Practice, 2016-2017 Edition ("USPAP")).
[6] Under New York law, for example, compliance with USPAP is required for every appraisal assignment. *See* 19 N.Y.C.R.R. § 1106.1 ("Every appraisal assignment shall be conducted and communicated in accordance with the following provisions and standards set forth in the 2016-2017 edition of the Uniform Standards of Professional Appraisal Practice . . . .").
[7] *See* Smith Decl. Ex. 3, at 29-36 (USPAP Standard 3).
[8] *See* Smith Decl. Ex. 3, at 30 (USPAP Standard 3-2(c)).
[9] *See* Smith Decl. Ex. 3, at 32 (USPAP Standard 3-3(c)(i)) ("When the assignment includes the reviewer developing his or her own opinion of value or review opinion, the following apply: (i) The requirements of STANDARDS 1, 6, 7, or 9 [standards for developing appraisals of different assets] apply to the reviewer's opinion of value for the property that is the subject of the appraisal review assignment.").

mislead their readers about the scope of their review.[10] Where a reviewer intends (as Berenblut purports to here) to offer only an opinion of the quality of the work but not an opinion of value, Advisory Opinion 20 advises reviewers to use "extreme care" in choosing their language.[11]

Under Advisory Opinion 20, language that does not signify an opinion of value typically relates only to the general adequacy, reasonableness, or credibility of the work under review.[12] An opinion of value, by comparison, is expressed through a specific numeric value, a "direction in value (i.e. more than, less than)," or a concurrence with the value in the original work.[13] Advisory Opinion 20 provides examples of language signifying an opinion of value:

- "I concur (or do not concur) with the value."
- "I agree (or disagree) with the value."
- "In my opinion, the value is (the same)."
- "In my opinion, the value is incorrect and should be $XXX."
- "In my opinion, the value is too high (or too low)."[14]

Where a reviewer references a particular value or value range, Advisory Opinion 20 makes clear that the reviewer has expressed an opinion of value: "[I]f [a] rejection is stated in relation to a value or value range, such as indicating a direction in value (i.e., more than, less than) or to an established benchmark, that language indicates the appraisal review has taken on the 'opinion of value' characteristic of an appraisal."[15]

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[10] Smith Decl. Ex. 3, at 133, 136 (lines 151-54) (USPAP Advisory Opinion 20 ("Advisory Opinion 20")). The Advisory Opinions of the Appraisal Standards Board are included in the continuously paginated 2016-2017 Uniform Standards of Professional Appraisal Practice.
[11] Smith Decl. Ex. 3, at 137 (Advisory Opinion 20).
[12] Smith Decl. Ex. 3, at 137 (Advisory Opinion 20).
[13] Smith Decl. Ex. 3, at 138 (Advisory Opinion 20).
[14] Smith Decl. Ex. 3, at 138 (Advisory Opinion 20).
[15] Smith Decl. Ex. 3, at 138 (Advisory Opinion 20).

If a reviewer expresses an opinion of value about a business interest, the reviewer must develop their own appraisal under USPAP Standard 9.[16] Under Standard 9, the appraiser must "correctly employ those recognized approaches, methods and procedures that are necessary to produce a credible appraisal"; "identify any extraordinary assumptions necessary in the assignment"; "collect and analyze all information necessary for credible assignment results"; and "develop value opinion(s) and conclusion(s) by use of one or more approaches that are necessary for credible assignment results."[17] As Berenblut acknowledged, Standard 9 requires reviewers to develop their own value for the asset using either the cost approach, income approach, or the market approach.[18] In all events, USPAP Standard 3 mandates that any appraisal review "clearly and accurately set forth the appraisal review in a manner that will not be misleading."[19]

III. The SEC's Proposed Expert

Berenblut is an affiliated consultant of NERA Economic Consulting, a global economic consulting firm.[20] According to his report, Berenblut holds a variety of professional qualifications and certifications, including qualification as an Accredited Senior Appraiser by the American Society of Appraisers.[21] He has over 30 years of experience in securities and business valuation and has been qualified as a valuation expert in courts in the U.S. and Canada.[22]

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[16] *See* Smith Decl. Ex. 3, at 32 (USPAP Standard 3-3(c)(i)) (requiring compliance with Standards 1, 6, 7, or 9 when a reviewer offers an opinion of value).
[17] Smith Decl. Ex. 3, at 62-65 (USPAP Standards 9-1(a), 9-2(f), 9-4).
[18] Smith Decl. Ex. 2, at 158:15-159:3 (Tr. of Mark L. Berenblut Dep., dated Feb. 21 and 22, 2017 ("Berenblut Dep.")).
[19] Smith Decl. Ex. 3, at 33 (USPAP Standard 3-4(a)).
[20] Smith Decl. Ex. 1 ¶ 5 (Berenblut Report).
[21] Smith Decl. Ex. 1 ¶ 5 (Berenblut Report); Smith Decl. Ex. 2, at 12:20-13:20 (Berenblut Dep.).
[22] Smith Decl. Ex. 1 ¶ 5 (Berenblut Report).

A. Berenblut's Conclusions

Berenblut's 176-page report addresses 15 of Yorkville's approximately 225 investment positions.[23] These 15 positions accounted for approximately a third of Yorkville's total assets at year-end 2008 and half of Yorkville's total assets at year-end 2009.[24] The SEC asked Berenblut to opine on whether "the values at which Yorkville carried [these 15 investments] reflected [their] Fair Value . . . during the 2008 to 2010 period."[25] Berenblut concluded that Yorkville carried these investments "at amounts that were materially greater than their Fair Value."[26]

For each investment, Berenblut provided dollar values indicating what he considered the "minimum overstatement" and, for some investments, a "potential additional overstatement," for each quarter in the period he reviewed.[27] He illustrated his conclusions graphically, using bar charts showing the value at which Yorkville carried the investment, with a blue portion of each bar representing his view of "Fair Value," a red portion representing the "Minimum Overstatement," and, in some instances, a striped portion representing "Potential Additional Overstatement."[28] He described his conclusions about each company with language like, "This carrying amount overstates the Fair Value of Yorkville's investment at that date by at least [a specific dollar value], and possibly by as much as [another specific dollar value]."[29]

Summarizing his conclusions, he wrote, "Yorkville did not have a reasonable basis to support the amounts at which it carried these investments, and in many cases had information that indicated that the Fair Value . . . was significantly less than the carrying value."[30] At his

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[23] *See generally* Smith Decl. Ex. 1 (Berenblut Report); *see* Smith Decl. Ex. 2, at 194:7-14 (Berenblut Dep.).
[24] Smith Decl. Ex. 1 ¶ 18 (Berenblut Report).
[25] Smith Decl. Ex. 1 ¶ 1 (Berenblut Report).
[26] Smith Decl. Ex. 1 ¶ 11 (Berenblut Report).
[27] Smith Decl. Ex. 1, Table 1, at 4 (Berenblut Report).
[28] *See* Smith Decl. Ex. 1, Figures 9, 11, 12, 13, 15, 16, 18, 19, 21, 22, 23, 25, 28, 29, 31 (Berenblut Report).
[29] *E.g.*, Smith Decl. Ex. 1 ¶¶ 58, 96 (Berenblut Report).
[30] Smith Decl. Ex. 1 ¶ 16 (Berenblut Report).

deposition, Berenblut described his conclusions as opining not on the fair value of Yorkville's investments, but on what their fair values "likely" were, or on whether Yorkville's valuations "would appear" to be overstated "if you incorporate [certain] information."[31]

B. Berenblut's Methodology

1. Failure to Comply with USPAP

Although Berenblut certified that he prepared his report in accordance with USPAP Standard 3,[32] he could not say during his deposition what Standard 3 required without re-reading the rule.[33] He also opined on the direction of Yorkville's valuations (overstated) and the dollar amount of the alleged overstatements, yet he repeatedly testified that he was not purporting to express an opinion of value about Yorkville's assets and that he did not do his own valuation of the assets. He testified, for example:

- "I did not perform a separate valuation of the assets . . . ."[34]
- "I haven't done a fair value valuation."[35]
- "So let's be clear, as we've already discussed, I have not provided my own opinion of value for these assets."[36]

Berenblut attempted to disclaim the necessity of complying with USPAP on the ground that Yorkville was not an appraiser.[37] But his report—on its own terms—purports to have been

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[31] Smith Decl. Ex. 2, at 120:24-121:8, 151:7-152:7, 153:18-154:7 (Berenblut Dep.).
[32] Smith Decl. Ex. 1 ¶ 4 and Certification (Berenblut Report).
[33] *See* Smith Decl. Ex. 2, at 19:4-22:6, 123:11-124:2, 126:6-11 (Berenblut Dep.).
[34] Smith Decl. Ex. 2, at 117:25-118:9 (Berenblut Dep.).
[35] Smith Decl. Ex. 2, at 119:8-17 (Berenblut Dep.).
[36] Smith Decl. Ex. 2, at 144:15-145:3 (Berenblut Dep.); *see also id.* at 116:15-117:12 ("I have not done an independent evaluation."); 153:18-154:7 ("I haven't done an independent opinion."); 157:5-20 ("But I'm stating I haven't provided an independent opinion of value."); 179:3-14 ("[My report] doesn't express my opinion of that fair value per se. What it does do, it says based on the information that was available and used by Yorkville, what – which direction that pointed in in [sic] terms of fair value and whether it supported the fair value conclusion that Yorkville arrived at."); 245:2-9; 301:3-8 ("Well, as we spoke about before, that would presumably involve a full valuation of the property, which is not what I was doing.").
[37] Smith Decl. Ex. 2, at 169:22-171:9 (Berenblut Dep.).

prepared in accordance with USPAP,[38] and he testified earlier that it would have been inappropriate not to have complied with USPAP.[39] Individuals like Berenblut are subject to USPAP when, "either by choice or by requirement . . . [they] represent that they comply."[40] And while Yorkville may not technically be an "appraiser" under USPAP, Berenblut reviewed VRC's third-party valuation reports that Yorkville adopted,[41] and certified (falsely as it turns out) that he followed USPAP Standard 3 even for those positions where VRC was not involved.

2. Berenblut's Selective Write-Down Approach

Since Berenblut disclaimed offering an opinion of value under USPAP, he thus seemed to believe that he need not state his precise methodology.[42] And he in fact did not apply any overall methodology. Berenblut testified that "[t]here is no generally applicable overall valuation rule that can apply" to his work here, because his assignment was "so specific."[43] When asked if he had applied the income approach, cost approach, or market approach to each of the 15 investments, he acknowledged that he had done so only "implicitly."[44]

Instead of developing his own valuation by collecting all the necessary data and applying one of the approaches described above to build an opinion of value consistent with USPAP, Berenblut used Yorkville's valuations as a starting point.[45] He then used what he called the

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[38] Smith Decl. Ex. 1, ¶ 4 and Certification (Berenblut Report).
[39] Smith Decl. Ex. 2, at 159:20-160:9 (Berenblut Dep.) ("Q: . . . could you have taken on this assignment without making the USPAP certification and without stating in paragraph 4 that you did this in accordance with USPAP Standard 3? Could you have done that? A. It would not have been proper. . . .").
[40] Smith Decl. Ex. 3, at 1 (USPAP) (comment to definition of "Appraiser").
[41] *See, e.g.*, Smith Decl. Ex 1 ¶¶ 65-66, 77 (Berenblut Report) (noting that Yorkville's valuation was based on VRC's report and then criticizing VRC's report); Smith Decl. Ex. 2, at 369:22-370:6 (Berenblut Dep.) (acknowledging that he was identifying "shortcomings" in VRC's report); Smith Decl. Ex. 2, at 591:24-592:7 (Berenblut Dep.) ("Q: . . . [W]hat this boils down to is VRC did its valuation work . . . and one that you disagree with for the reasons stated? A: Yes.").
[42] Smith Decl. Ex. 2, at 177:18-178:2 (Berenblut Dep.) ("I haven't performed an independent opinion, so it's only if I'm performing my own opinion of value from the ground up that I have to state the methodology.").
[43] Smith Decl. Ex. 2, at 243:23-244:18 (Berenblut Dep.).
[44] Smith Decl. Ex. 2, at 176:16-177:2 (Berenblut Dep.).
[45] *See* Smith Decl. Ex. 2, at 245:2-25 (Berenblut Dep.).

"component parts" of valuation practice, applying them "as needed to each of the specific issues that makes up the fair value in any particular one of these assets" and using the "sum of those parts" to back into his conclusion.[46] When asked whether this was a generally accepted methodology, Berenblut answered that "I don't know if you can codify as a general practice."[47] Nothing in Berenblut's report or deposition testimony indicates that professionals in the field rely on this approach when expressing an opinion of value about an asset.

Berenblut's application of his "component parts," moreover, reflected little more than his selective reliance on whichever valuation inputs were least favorable to Yorkville. In that regard, Berenblut's conclusions were based on flawed factual assertions; reflected little more than disagreement with third-party valuation reports on which Yorkville relied; or were contradicted by his own prior declaration of how to value oil-and-gas assets. For example:

- Berenblut concluded that Yorkville overstated its investment in Falcon Natural Gas Corp. based in part on his belief that Falcon's oil and gas leases had expired.[48] That fact, however, is disputed, and Berenblut admittedly did no investigation to determine whether, as a legal matter, the leases had in fact expired, and did not know whether, under GAAP, the ability to control the asset, rather than legal ownership, mattered for purposes of accounting for the asset.[49]

- Berenblut suggested that Yorkville's year-end 2009 valuation of its investment in BlueCreek Energy, Inc. was overstated, in part because, according to Berenblut, a transaction that closed months later in April 2010 suggested that the value of BlueCreek in 2009 should have been lower.[50] At his deposition, however, Berenblut admitted that he not had seen any fact indicating that the April 2010 transaction was in play before year-end 2009, when the valuation was made.[51]

- Berenblut criticized Yorkville for valuing its interest in Global Outreach—a company that owned property in Costa Rica on which it planned to build a resort—in reliance on one appraisal of the Costa Rican property rather than another, lower appraisal, even

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[46] Smith Decl. Ex. 2, at 242:5-244:25 (Berenblut Dep.). Berenblut's report contains an appendix that appears to list certain valuation principles. *See* Smith Decl. Ex. 1, App'x D (Berenblut Report).
[47] Smith Decl. Ex. 2, at 242:13-243:13 (Berenblut Dep.).
[48] Smith Decl. Ex. 1 ¶ 61(a) (Berenblut Report).
[49] Smith Decl. Ex. 2, at 318:13-320:8 (Berenblut Dep.).
[50] *See* Smith Decl. Ex. 1 ¶ 79 (Berenblut Report).
[51] *See* Smith Decl. Ex. 2, at 407:3-408:9 (Berenblut Dep.).

though the lower appraisal intentionally ignored the planned resort development.[52] Berenblut also criticized Yorkville for appearing not to have discussed with the appraiser the appraisal report on which it relied.[53] But in a deposition transcript that Berenblut purported to have reviewed, a Yorkville employee stated that he did in fact have a discussion with the appraiser.[54]

- Berenblut rejected Yorkville's valuation of its investment in Compass Resources in part because he discounted a VRC report on which Yorkville relied, which assigned a 90 percent probability to Yorkville's plan to exchange its debt investment for an 80 percent equity stake in the company, which was going through an Australian insolvency proceeding called voluntary administration.[55] That proposal, however, ultimately was accepted and Yorkville became an equity holder,[56] a fact that Berenblut was not aware of during his deposition.[57]

- Berenblut criticized Yorkville for valuing its investments in oil-and-gas companies based on the companies' oil-and-gas reserves' "PV10" values, which reflect a calculation of the reserves' present value using a 10-percent discount rate.[58] Berenblut instead applied what he called "industry average" risk factors.[59] But in a prior sworn declaration in another matter, Berenblut opined that using an industry-standard discount rate was not a reliable way to value an oil-and-gas asset.[60]

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[52] *See* Smith Decl. Ex. 1 ¶ 206 (Berenblut Report) (basing his conclusion about fair value on an appraisal by Colliers valuing the land at less than Yorkville's carrying value); Smith Decl. Ex. 2, at 519:18-524:22 (Berenblut Dep.) (acknowledging that the Colliers report indicates that it "completed a vacant land valuation on an 'as is' basis" even though the report indicated that the requisite approvals had been obtained for development).
[53] *See* Smith Decl. Ex. 1 ¶ 204(b) (Berenblut Report).
[54] *See* Smith Decl. Ex. 2, at 499:23-501:14 (Berenblut Dep.).
[55] *See* Smith Decl. Ex. 1 ¶ 135 (Berenblut Report).
[56] *See* Smith Decl. Ex. 7, p. 59 & nn. 303, 306 (Reply Expert Report of Charles R. Lundelius, Jr., dated Jan. 27, 2017) (explaining that Yorkville's "DOCA"—a reorganization proposal—was ultimately approved by Compass's creditors and shareholders).
[57] *See* Smith Decl. Ex. 2, at 563:14-564:7 (Berenblut Dep.).
[58] *See* Smith Decl. Ex. 1 ¶¶ 61(c); 73(a), (d); 88(b); 101(a)-(b) (Berenblut Report).
[59] *See* Smith Decl. Ex. 1, ¶¶ 61(c); 73(a), (d); 88(b); 101(a)-(b) (Berenblut Report). Berenblut's "industry average" risk factors were based on a professional organization's survey of about 200 petroleum engineers, a small fraction of the total number of petroleum engineers in the industry. *See* Smith Decl. Ex. 6, at 5-6 (Gustavson Assocs., Rebuttal of Expert Report of Mark L. Berenblut ("Gustavson Rebuttal Report")). Berenblut's risk factors thus did not reflect an industry average.
[60] Smith Decl. Ex. 4, ¶¶ 8, 11 (Decl. of Mark L. Berenblut, *Frankel Offshore Energy, Inc. v. Texas Standard Oil & Gas, L.P.*, No. 2008-55176, 2006 WL 6839142, ¶¶ 8, 11 (Tex. Dist. 2006)) (explaining that "[t]here is no 'industry standard' discount rate used in valuing oil gas [sic] assets" and that another expert's valuation that purported to apply one "provides no reliable basis for valuing the assets in question"); *see also* Smith Decl. Ex. 2, at 282:14-286:16 (Berenblut Dep.).

C. Berenblut's Qualifications in Oil and Gas

Six of the 15 investments Berenblut reviewed were in companies in the oil-and-gas industry.[61] Berenblut does not have any formal educational training in the areas of metals, mining, or geology.[62] Nor has he ever worked full-time for an employer in the oil-and-gas industry.[63] He does not have any professional credentials from or memberships in any oil-and-gas organizations.[64] And other than addressing trends in Canadian securities class actions, he has not published articles or given speeches about valuation of oil-and-gas assets.[65]

Berenblut could not recall ever having developed his own opinion of value of an oil-and-gas asset. While he testified about an engagement where he looked at how oil-and-gas assets were valued in a securities class action against Enron, he could not recall the exact scope of his work and testified only that he "would have" expressed an opinion on "valuations that were done and activities that the company undertook."[66] He also testified about an engagement with Warburg Pincus related to litigation brought by Frankel Offshore Energy, but he did not recall what his final work product was and whether it involved his developing his own valuation for an oil-and-gas asset.[67] While his CV also mentioned an engagement analyzing "costs of extras in construction of cross Canada gas pipeline," Berenblut acknowledged that this engagement did not involve valuing any oil-and-gas asset where the oil or gas was "in the ground."[68]

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[61] The six oil-and-gas companies are Falcon Natural Gas Corp., BlueCreek Energy Inc., KD Resources LLC, Striker Oil & Gas Inc., Westport Energy LLC, and Wentworth Energy Inc.
[62] Smith Decl. Ex. 2, at 12:2-19 (Berenblut Dep.).
[63] Smith Decl. Ex. 2, at 75:11-14 (Berenblut Dep.).
[64] Smith Decl. Ex. 2, at 74:11-16 (Berenblut Dep.).
[65] Smith Decl. Ex. 2, at 75:11-78:22 (Berenblut Dep.).
[66] Smith Decl. Ex. 2, at 70:21-73:24 (Berenblut Dep.).
[67] Smith Decl. Ex. 2, at 364:16-367:13 (Berenblut Dep.).
[68] Smith Decl. Ex. 2, at 87:3-13 (Berenblut Dep.).

Berenblut admitted that he is not qualified as an expert to review certain technical portions of oil-and-gas reserve reports.[69] And he admitted that he was unqualified to make the individualized technical risk determinations needed to value an entity's oil and gas reserves.[70]

Yet Berenblut's conclusions about the value of Yorkville's oil-and-gas investments often relied on industry-specific analysis. To reach these conclusions, Berenblut examined the value of the collateral in which Yorkville held a security interest. That collateral typically consisted of interests in oil or gas reserves, whose value Berenblut assessed by opining on the appropriateness of Yorkville's reliance on certain third-party reserve reports over others. Here are some examples of Berenblut's industry-specific analysis (that he mistakenly applied in many cases):

- In rejecting Yorkville's valuation of its investment in Falcon Natural Gas Corp., he opined that the reclassification of some of Falcon's reserves from "proved" to "probable" reflected increased risk for those reserves and thus a lower value.[71] (The reclassification, however, was based only on the length of time the reserves had remained undeveloped and had nothing to do with the quality of the reserves.[72])

- In rejecting Yorkville's valuation of BlueCreek Energy Inc., he criticized a reserve report on which Yorkville relied because it used data from surrounding properties.[73] (Use of surrounding-property data is common in the industry.[74])

- Also in rejecting Yorkville's valuation of BlueCreek, he criticized a VRC valuation report that Yorkville relied on for supposedly using commodity prices for the prior 12 months instead of the spot price from a particular day.[75] (VRC, however, used futures price forecasts, which are more reflective of how industry participants value reserves.[76])

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[69] Smith Decl. Ex. 2, at 271:16-21 (Berenblut Dep.).
[70] Smith Decl. Ex. 2, at 288:19-289:25 (Berenblut Dep.).
[71] Smith Decl. Ex. 1 ¶ 61(c) (Berenblut Report).
[72] *See* Smith Decl. Ex. 2, at 336:20-338:25 (Berenblut Dep.).
[73] Smith Decl. Ex. 1 ¶ 73(b)(i) (Berenblut Report).
[74] Smith Decl. Ex. 6, at 14 (Gustavson Rebuttal Report).
[75] *See* Smith Decl. Ex. 1 ¶¶ 73, 77 (Berenblut Report).
[76] *See* Smith Decl. Ex. 6, at 13, 16 (Gustavson Rebuttal Report).

- In rejecting Yorkville's valuations for each of Falcon, BlueCreek, KD Resources LLC, and Westport Energy LLC, Berenblut criticized Yorkville for relying on some third-party reserve or valuation reports over others.[77]

ARGUMENT

To be admissible, expert testimony must be relevant and reliable, and the expert must be qualified. Berenblut's testimony fails each of these criteria. First, he failed to follow an accepted, reliable methodology in opining about the fact and amount of overstatement in Yorkville's valuations, because he flouted USPAP's established standards and failed to show that his selective write-down approach is reliable. Second, as to his more limited opinion that Yorkville's valuations lacked a reasonable basis, he based that opinion on inadequate factual foundations, thus rendering it unreliable; and any minimal relevance his opinion may have is substantially outweighed by the danger of unfair prejudice to Yorkville and misleading the jury. Third, Berenblut is unqualified to testify about Yorkville's oil-and-gas assets.

I. Berenblut should be barred from testifying about the fact or amount of any alleged overstatement because he failed to follow a reliable methodology.

Under Rule 702, expert testimony is admissible only if it is "based upon sufficient facts or data," "is the product of reliable principles and methods," and "the expert has reliably applied the principles and methods to the facts of the case."[78] The reliability requirement is designed to ensure that an expert "employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field."[79] Exclusion of an expert's testimony is particularly appropriate where, as here, "a field is characterized by established standards for arriving at expert conclusions and a proposed expert fails to engage with those

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[77] *See* Smith Decl. Ex. 1 (Berenblut Report) ¶¶ 61-66 (Falcon), ¶¶ 73, 77 (BlueCreek), ¶¶ 88-91 (KD Resources), ¶ 112 (Westport).
[78] Fed. R. Evid. 702.
[79] *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 152 (1999).

standards, departs from them in a report, or cannot cite published works in support of a position."[80] As the proponent of Berenblut's testimony, the SEC must prove by a preponderance of the evidence that it is admissible.[81] Courts can rule on expert testimony's admissibility at summary judgment.[82]

A. Berenblut flouted USPAP's established standards for offering an opinion of value.

USPAP provides well-accepted standards for conducting asset appraisals.[83] And Berenblut, of his own volition, purported to prepare his report in accordance with USPAP.[84] USPAP makes clear that if reviewers intend to offer opinions of value, they must perform their own appraisal in accordance with the applicable substantive standards for appraisal development.[85] Berenblut admittedly did not do this.[86] He accordingly is barred under USPAP from offering an opinion of value, and thus, in accordance with Advisory Opinion 20, he cannot reject the underlying valuations with language stated "in relation to a value or value range, such as indicating a direction in value (i.e., more than, less than)."[87]

Berenblut testified that he did not intend to cross the line into expressing an opinion of value.[88] But Berenblut—who purportedly holds a certification from the American Society of Appraisers—lacked familiarity with the requirements of USPAP's Standard 3.[89] And the

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[80] *Davis v. Carroll*, 937 F. Supp. 2d 390, 413 (S.D.N.Y. 2013).
[81] *Id.* at 413-14.
[82] *Id.* at 411.
[83] For instance, USPAP has been incorporated into New York law. *See* 19 N.Y.C.R.R. § 1106.1.
[84] *See* Smith Decl. Ex. 1 ¶ 4 and Certification (Berenblut Report).
[85] *See* section II.B above.
[86] *See* notes 34, 35, and 36 above.
[87] Smith Decl. Ex. 3, at 138 (Advisory Opinion 20).
[88] *See* Smith Decl. Ex. 2, at 148:11-159:19 (Berenblut Dep.).
[89] *See* Smith Decl. Ex. 2, at 19:4-22:6, 123:11-124:2, 126:6-11 (Berenblut Dep.).

language he used is exactly the type of language identified in Advisory Opinion 20 as expressing an opinion of value. Here are a few examples:

Language indicating an opinion of value, Advisory Opinion 20	**Language from Berenblut's report or testimony**
"In my opinion, the value is too high (or too low)"	"[I]t is my opinion that Yorkville carried each of its investments in the 15 companies . . . at amounts that were materially greater than their Fair Value . . . ." Report ¶ 11.
"In my opinion, the value is incorrect and should be $XXX."	"[Yorkville's] carrying amount overstates the Fair Value of Yorkville's investment at this date by at least $24 million, and possibly by as much as the full $32.9 million carrying value as at December 31, 2009." Report ¶ 58.
"[I]f such rejection is stated in relation to a value or value range, such as indicating a direction in value (i.e., more than, less than) . . . that language indicates the appraisal review has taken on the 'opinion of value' characteristic of an appraisal."	"[My report] doesn't express my opinion of that fair value per se. What it does do, it says based on the information that was available and used by Yorkville, what -- which direction that pointed in in terms of fair value and whether it supported the fair value conclusion that Yorkville arrived at." Berenblut Tr. 179:8-14.

No reasonable juror would understand Berenblut to be expressing anything less than the opinion that Yorkville overstated the value of its investments by a particular dollar amount. It is misleading for Berenblut to suggest that he is only opining on whether the available information supported Yorkville's valuations. He goes much further. For the 15 investments, Berenblut opines that Yorkville overstated their value, quantifying the amount of the alleged overstatement. This is an opinion of value under USPAP. But to offer an opinion of value, Berenblut was required to develop his own appraisal of the asset under USPAP Standard 9, which he did not do.

Berenblut cannot disclaim his obligation to comply with USPAP.[90] First, his report—on its own terms—purports to have been prepared in accordance with USPAP, and he previously

[90] *See* Smith Decl. Ex. 2, at 169:22-171:9 (Berenblut Dep.).

testified that it would have been inappropriate not to comply.[91] Second, even if, as Berenblut suggested, Yorkville is not an appraiser, Berenblut reviewed the reports underlying Yorkville's valuations, and some of those reports were full, independent valuations. Third, as discussed below, even if Berenblut were not obligated to comply with USPAP, he has not established that his selective write-down approach is a reliable method for opining on an asset's value.

While there is limited, non-binding authority indicating that non-compliance with USPAP goes to the weight, rather than admissibility, of an expert's testimony,[92] that authority does not counsel in favor of admitting Berenblut's testimony and the Court should decline to follow it here. Berenblut's flouting of USPAP goes to the heart of his methodology's reliability, and thus its admissibility. Instead of doing the work required under USPAP's well-established standards, Berenblut, as discussed below, seeks to offer a misleading opinion of value by applying an unrecognized methodology of his own creation, which he has not shown to be reliable. Berenblut's failure to reliably apply the USPAP standards he set for himself is reason enough to reject his testimony.[93] But at a minimum, his non-compliance is a serious indicator of the unreliability of his approach, making his testimony especially ripe for exclusion.[94]

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[91] *See* Smith Decl. Ex. 1 ¶ 4 and Certification (Berenblut Report); Smith Decl. Ex. 2, at 159:20-160:9 (Berenblut Dep.).
[92] *See, e.g.*, *Whitehouse Hotel Ltd. P'ship v. Comm'r*, 615 F.3d 321, 331-32 (5th Cir. 2010).
[93] *See Amorgianos v. Nat'l R.R. Passenger Corp.*, 303 F.3d 256, 268 (2d Cir. 2002) (upholding exclusion of expert testimony where the expert "failed to apply his own methodology reliably").
[94] The *Whitehouse* case, in any event, is distinguishable because the expert there, unlike Berenblut, did in fact apply an overall valuation methodology (the comparable-sales approach), 615 F.3d at 327, and, as importantly, the court's decision to uphold the admission of the expert's testimony relied on the fact that unlike here, the case involved a bench trial, where the court's gatekeeping role is "significantly diminished." *Id.* at 330, 332.

B. Berenblut's selective write-down approach is not a reliable methodology for reaching an opinion of value.

Berenblut's selective write-down approach is no cure for defying USPAP's requirements. Neither he nor the SEC, which bears the burden here, has shown that this approach is a reliable method applied by professionals in the field for reaching an opinion of value.

Berenblut called his assignment "so specific" that there was no "generally applicable overall valuation rule that can apply."[95] But that is not true. Established methodologies that Berenblut described, such as the cost approach, income approach, and market approach, were available. And, besides that he apparently was not asked to do so, there is no evidence that Berenblut could not have applied one or more of these approaches consistent with USPAP Standard 9 to develop his own appraisal of Yorkville's 15 investments. His approach instead involved him changing selected, isolated inputs to Yorkville's valuations and concluding that therefore the overall valuations were overstated by at least specific "minimum" amounts.

This is precisely a case where exclusion is appropriate because it involves "a field [that] is characterized by established standards for arriving at expert conclusions and a proposed expert fails to engage with those standards [and] departs from them in a report."[96] In *Davis v. Carroll*, Judge Oetken excluded the testimony of an art-appraisal expert (who held a USPAP certification) where the expert acknowledged that he did not apply any "well-established method," such as USPAP, to his valuation of art prices.[97] The court criticized the expert for not identifying the "full set of factors" relevant to his analysis, not explaining how those factors interacted, and not explaining how much weight each was assigned.[98] The court then discounted

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[95] Smith Decl. Ex. 2, at 243:23-244:18 (Berenblut Dep.).
[96] *Davis*, 937 F. Supp. 2d at 413.
[97] *Id.* at 414-17.
[98] *Id.* at 417.

even the expert's use of familiar techniques in light of the expert's choice to depart from established overall approaches: "Unmoored from standard appraisal techniques, even the portions of the Rosenberg report that draw upon such familiar tools as use of 'comparables' to ascertain values are suspect, since the discipline reflected in a certification of compliance with established appraisal standards cannot be imputed to these analyses."[99]

Like the expert's report in *Davis*, Berenblut's report is "[u]nmoored" from standard appraisal techniques: Berenblut seeks, contrary to the requirements of USPAP, to offer an opinion of value on Yorkville's investments without having done his own appraisal. He instead seeks to apply his selective write-down approach, but he has not established that such an approach is a reliable way of establishing an opinion of value about an asset. Indeed, the approach has serious flaws. For example, in rejecting Yorkville's valuations of some of its investments in oil-and-gas entities, Berenblut criticized Yorkville for relying on "PV10" values.[100] Berenblut instead applied "industry average" risk factors to quantify Yorkville's alleged overstatements.[101] But in a sworn declaration in another litigation, Berenblut stated that there was no such thing as an industry standard discount rate for oil-and-gas assets, and that purporting to apply one was not a reliable way to arrive at the asset's value.[102] According to Berenblut, the appropriate method—which he did not follow here—is to look at the

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[99] *Id.* Other courts in this district have excluded appraisal-expert testimony for failing to demonstrate compliance with USPAP or another established methodology. *See Hanna v. Motiva Enters., LLC*, 839 F. Supp. 2d 654, 677-78 (S.D.N.Y. 2012) (excluding appraisal expert testimony for failure to comply with USPAP or any other established methodology); *In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig.*, 03 Civ. 8284, 2008 WL 2324112, at *4 (S.D.N.Y. June 5, 2008) (same).

[100] *See* Smith Decl. Ex. 1, ¶¶ 61(c); 73(a), (d); 88(b); 101(a)-(b) (Berenblut Report).

[101] *See* Smith Decl. Ex. 1, ¶¶ 61(c); 73(a), (d); 88(b); 101(a)-(b) (Berenblut Report).

[102] Smith Decl. Ex. 4, ¶¶ 8, 11 (Decl. of Mark L. Berenblut in *Frankel Offshore Energy* litigation) (explaining that "[t]here is no 'industry standard' discount rate used in valuing oil gas [sic] assets" and that another expert's valuation that purported to apply one "provides no reliable basis for valuing the assets in question").

individualized risk factors applicable to each property.[103] And since nothing in his report or testimony shows that using industry-average risk factors is a reliable approach when offering an opinion of value about an oil-and-gas asset, his testimony should be excluded.[104]

To the extent that any of Berenblut's other "component parts" reflect familiar valuation principles, his failure to comply with USPAP renders even his use of those techniques suspect, "since the discipline reflected in a certification of compliance with established appraisal standards cannot be imputed to these analyses."[105]

The Supreme Court demands that expert testimony employ the "same level of intellectual rigor" applicable to experts working in the relevant field.[106] Berenblut flunks this test. He failed to comply with USPAP and has not shown that his selective write-down approach is a reliable way to arrive at an opinion of value about an asset. The Court should thus exclude his testimony.

II. Berenblut should be barred from testifying that Yorkville's valuations were unsupported or unreasonable.

A. Berenblut's opinions are based on inadequate factual foundations.

In addition to being precluded from testifying about the fact or amount of an overstatement, Berenblut should also be precluded from testifying that Yorkville's valuations were not adequately supported, because that conclusion rests on inadequate factual foundations.

"Where an appraisal or other expert testimony rests on inadequate factual foundations, problematic assumptions, or a misleading partial selection of relevant facts, it must be excluded under Rule 702."[107] Courts must conduct a "rigorous examination of the facts on which the

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[103] *See* Smith Decl. Ex. 2, at 285:22-286:16 (Berenblut Dep.).
[104] *See Cayuga Indian Nation of N.Y. v. Pataki*, 83 F. Supp. 2d 318, 326 (N.D.N.Y. 2000) (excluding expert's use of a discount rate for lacking a reliable basis).
[105] *Davis*, 937 F. Supp. 2d at 417.
[106] *Kumho Tire*, 526 U.S. at 152.
[107] *Davis*, 937 F. Supp. 2d at 418.

expert relies . . . and how the expert applies the facts and methods to the case at hand."[108] While minor flaws may not render the expert's testimony inadmissible, exclusion is appropriate where the "flaw is large enough that the expert lacks 'good grounds' for his or her conclusions."[109]

Berenblut routinely based his conclusions on inadequate factual foundations, problematic assumptions, or a misleading selection of partial facts. Tellingly, Berenblut's failures in this regard mirror the SEC's litigation positions, given that Berenblut's view of the relevant facts appears to be based in part on his direct discussions with SEC staff.[110] As outlined above, he relied on a property appraisal related to Yorkville's investment in Global Outreach even though that appraisal did not consider the resort planned for the property; he concluded that Falcon's oil and gas leases had expired without undertaking steps to determine if that were legally accurate; he relied on an after-the-fact transaction in rejecting Yorkville's prior valuation of BlueCreek; and he ignored the fact that Compass Resources' reorganization was approved and the company was not liquidated. Berenblut's factual shortcomings, taken together, undercut his analysis to the point of inadmissibility.[111]

B. The relevance of Berenblut's opinion is substantially outweighed by the danger of unfair prejudice to Yorkville or misleading the jury.

Berenblut's opinion that Yorkville's valuations lacked a reasonable basis is also inadmissible under Federal Rules of Evidence 702 and 403 because it will not help the jury determine whether Yorkville's valuations were fraudulent, and any relevance it may have is substantially outweighed by the risk of unfair prejudice to Yorkville or misleading the jury. As

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[108] *Amorgianos*, 303 F.3d at 267.
[109] *Amorgianos*, 303 F.3d at 267 (citation omitted).
[110] *See* Smith Decl. Ex. 2, at 233:22-235:22 (Berenblut Dep.) (noting that Berenblut discussed issues with the SEC staff and could use them as a "resource" in identifying relevant facts).
[111] *See Cayuga Indian Nation*, 83 F. Supp. 2d at 325 (excluding expert valuation testimony where errors, including reliance on after-the-fact transactions, "taken together seriously call into question the factual underpinnings of his appraisal").

explained in *Daubert*, expert testimony must be relevant to be admissible, and since it can be "both powerful and quite misleading because of the difficulty in evaluating it[] . . . the judge in weighing possible prejudice against probative force under Rule 403 . . . exercises more control over experts than over lay witnesses."[112] Experts also cannot "supplant the role of counsel in making argument at trial, and the role of the jury in interpreting the evidence."[113]

As explained in Yorkville's summary-judgment motion, Yorkville's valuations are statements of opinion or belief that the SEC must prove were objectively and subjectively false. While an expert opinion providing full valuations of the assets would be relevant to determining objective falsity, Berenblut has not done full valuations and, as explained above, should be barred from testifying about the fact or amount of any alleged overstatement. Without such an opinion, his testimony's relevance nearly vanishes. If allowed, this opinion would weasel its way to the jury with non-committal conclusions such as "it would appear" that Yorkville's valuations were unsupported. And even then, the opinion would be based in large part on insubstantial criticisms of third-party reports on which Yorkville relied. Berenblut takes issue with Yorkville's relying on one reserve report over another, or one property appraisal over another,[114] but in the context of valuing Yorkville's hard-to-value Level III assets, Berenblut's half-baked disagreements do little to demonstrate the objective falsity of Yorkville's inherently subjective valuations.[115]

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[112] *Daubert*, 509 U.S. at 595 (citation omitted); *see Nimely v. City of N.Y.*, 414 F.3d 381, 397-98 (2d Cir. 2005) (excluding expert testimony under Rule 403).
[113] *In re Rezulin Prods. Liab. Litig.*, 309 F. Supp. 2d 531, 541 (S.D.N.Y. 2004) (citation omitted).
[114] *See* notes 52 and 77, and accompanying text, above.
[115] *See Ridler v. Hutchinson Tech. Inc.*, 216 F. Supp. 3d 982, 989 (D. Minn. 2016) ("[B]ecause the valuation of a company is an inherently subjective exercise, plaintiffs must point to something more than mere disagreement in order to render the share price ranges misleading.").

But whatever relevance the testimony may have, it is substantially outweighed by the risk of unfair prejudice to Yorkville or misleading the jury. Berenblut's testimony would prejudice Yorkville by improperly supplanting the SEC's counsel's role of making arguments at trial.[116] The SEC may offer the relevant valuation materials into evidence and, if they're admitted, argue why Yorkville should or should not have relied on certain materials. The jury does not need Berenblut's testimony to understand, for example, the SEC's argument that Falcon's natural gas leases had expired, or its argument that certain appraisals of Global Outreach's Costa Rican property were more appropriate than others for containing more detailed explanations.

And more broadly, Berenblut's whole approach—misleadingly unmoored from USPAP or any other established methodology and couched in non-committal language that does little more than point out the existence of information purportedly contradicting Yorkville's valuations—is a way for the SEC to improperly present its litigation arguments through the mouth of an expert. Indeed, as noted, Berenblut's view of the relevant facts appears to be based in part on his discussions with SEC staff.[117] And while Berenblut, of course, has not offered an opinion on whether any defendant acted with scienter (nor could he), his testimony would provide the SEC a platform to argue scienter through an "expert" opinion that is, at bottom, a subjective disagreement with an inherently subjective conclusion. His testimony thus presents the serious "danger that the jury would accord too much weight to [his] opinions because they come from the mouth of" a valuation expert.[118] This Court should thus exclude his testimony.

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[116] *See In re Rezulin Prods. Liab. Litig.*, 309 F. Supp. 2d at 541.
[117] *See* Smith Decl. Ex. 2, at 233:22-235:22 (Berenblut Dep.).
[118] *Tchatat v. City of N.Y.*, 315 F.R.D. 441, 447 (S.D.N.Y. 2016) (excluding expert testimony under Rule 403); *see also Fed. Hous. Fin. Agency v. Nomura Hldg. Am., Inc.*, 11 Civ. 6201, 2015 WL 629336, at *10-11 (S.D.N.Y. Feb. 13, 2015) (excluding expert testimony about "fair value accounting" under Rule 403).

III. Berenblut is not qualified as an expert on oil-and-gas companies.

As discussed above, Berenblut should be precluded from offering any testimony in this matter. But if this Court allows Berenblut to testify at all, it should still preclude him from testifying about any of the six oil-and-gas companies discussed in his report because he is unqualified to offer an opinion on oil-and-gas assets.[119]

Under Rule 702, expert witnesses with the requisite "knowledge, skill, experience, training or education" may qualify to testify.[120] In determining whether an expert is qualified, courts "compare the area in which the witness has superior knowledge, education, experience, or skill with the subject matter of the proffered testimony."[121] A witness with expertise in one area does not automatically become an expert on all issues in a case.[122] While experts need not satisfy an "overly narrow test" of their qualifications,[123] even a qualified expert's testimony will be stricken when the expert "purports to offer opinions beyond the scope of his expertise."[124]

There is, to be sure, case law indicating that financial experts may testify on financial matters even if they lack industry-specific expertise.[125] But where the financial expert's opinion turns on industry-specific judgments, courts have excluded the testimony where the expert lacked expertise in the relevant industry. For example, one district court held a financial expert unqualified to perform a discounted cash-flow analysis where he lacked the industry-specific knowledge to make judgments about the appropriate inputs: "[The expert], though clearly

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[119] The six oil-and-gas companies are Falcon Natural Gas Corp., BlueCreek Energy Inc., KD Resources LLC, Striker Oil & Gas Inc., Westport Energy LLC, and Wentworth Energy Inc.
[120] Fed. R. Evid. 702.
[121] *United States v. Tin Yat Chin*, 371 F.3d 31, 40 (2d Cir. 2004).
[122] *523 IP LLC v. CureMD.com*, 48 F. Supp. 3d 600, 642 (S.D.N.Y. 2014).
[123] *Arista Records LLC v. Lime Group LLC*, 06 Civ. 5936, 2011 WL 1674796, at *3 (S.D.N.Y. May 2, 2011).
[124] *Davis*, 937 F. Supp. 2d at 413.
[125] *See, e.g., Johnson & Johnson Vision Care, Inc. v. CIBA Vision Corp.*, 04 Civ. 7369, 2006 WL 2128785, at *6 (S.D.N.Y. July 28, 2006); *TC Sys. Inc. v. Town of Colonie*, 213 F. Supp. 2d 171, 175 (N.D.N.Y. 2002); *Wechsler v. Hunt Health Sys., Ltd.*, 381 F. Supp. 2d 135, 142-44 (S.D.N.Y. 2003).

possessing the *general* qualifications required to perform a discounted cash flow analysis, does not possess the industry-specific expertise necessary to make the numerous judgments which had to be made in order to generate the inputs for a discounted cash flow analysis . . . ."[126]

Berenblut has no formal education in areas relevant to oil-and-gas, is not a member of any professional oil-and-gas organizations, could not recall ever having completed his own valuation of an oil-and-gas asset, and is admittedly not qualified to opine on technical aspects of the oil-and-gas valuation process. And in contrast to cases where financial experts without industry-specific expertise were permitted to testify about general economic matters, Berenblut is not simply offering financial testimony about "broader general economic principles."[127] He seeks instead to opine on the value of oil-and-gas reserves by, for example, assessing the risk to reserves indicated by their reclassification from "proved" to "probable," discounting a reserve report for relying on data from surrounding properties, predictably basing his conclusions on reserve reports less favorable to Yorkville, and making a judgment that application of "industry average" risk factors is more appropriate than the PV10 discount rate.[128] These are industry-specific judgments that go beyond his expertise as a business valuator. He thus should be barred from offering testimony about Yorkville's investments in oil-and-gas entities.

CONCLUSION

For the foregoing reasons, this Court should exclude Berenblut's testimony.

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[126] *In re Williams Sec. Litig.*, 496 F. Supp. 2d 1195, 1242-45 (N.D. Okla. 2007), *aff'd* 558 F.3d 1130 (10th Cir. 2009); *see also Arista Records*, 2011 WL 1674796 at *10 (excluding financial expert as unqualified on issues in music industry where he offered "only a summary of what other experts have said, without application of his own expertise").
[127] *TC Sys. Inc.*, 213 F. Supp. 2d at 175.
[128] See text accompanying notes 58-60 and 71-77 above.

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s/ Patrick J. Smith

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