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Order on Plaintiffs' Motion to Exclude Testimony on Defendants' Expert Andrew Metrick (AMANA I SA)

Alice D. Bonner
Superior Court of Fulton County

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IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

AMANA I SA and SHEIK MOHAMMED AL-AMOUDI Plaintiffs, v. CAIRNWOOD GROUP, LLC, CAIRNWOOD CAPITAL MANAGEMENT, LLC, LANE P. PENDLETON, LAIRD P. PENDLETON, KIRK P. PENDLETON, and THAYER B. PENDLETON. Defendants,	*	Civil Action File No. 2006-CV-114931

FILED IN OFFICE
SEP 25 2009
DEPUTY CLERK SUPERIOR COURT
FULTON COUNTY, GA

ORDER ON PLAINTIFFS' MOTION TO EXCLUDE TESTIMONY OF DEFENDANTS' EXPERT ANDREW METRICK

On August 26, 2009, the parties appeared before this Court on Plaintiffs' motion to exclude Defendants' expert Andrew Metrick. After reviewing the briefs of the parties, Mr. Metrick's reports, the record in the case, and the arguments presented by counsel, the Court finds as follows:

I. Facts

This case arises out of Plaintiffs' investment in the Cairnwood Global Technology Fund ("CGTF"), a fund created by the individual defendants, sponsored by Cairnwood Group, LLC, and managed by Cairnwood Capital Management, LLC. Plaintiffs allege that they were fraudulently induced to invest in CGTF. On April 13, 2009, Plaintiffs' filed a Third Amended Complaint asserting counts for fraud, civil conspiracy to defraud,

negligent misrepresentation and violation of the Georgia RICO Act. On June 22, 2009, Plaintiffs filed a motion to exclude the testimony of Defendants' expert Andrew Metrick.

II. The Daubert Standard

In 2005, the Georgia General Assembly adopted O.C.G.A. § 24-9-67.1, which requires a trial court to apply the federal Daubert rule in assessing the admissibility of expert testimony. Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993). Therefore, federal authority, as well as Georgia law, is relevant to the question of admissibility. See, Mason v. Home Depot U.S.A., 283 Ga. 271 (2008). Pursuant to both O.C.G.A. § 24-9-67.1 and Daubert, once a court determines that "scientific, technical, or other specialized knowledge will assist the trier of fact," an expert may give opinion testimony so long as such testimony is reliable and relevant. O.C.G.A. §24-9-67.1; Daubert, 509 U.S. at 589-595 (1993). O.C.G.A § 24-9-67.1 defines reliable and relevant testimony as testimony that is based upon sufficient facts or data, is the product of reliable methods, and is the product of a reliable application of the methods to the facts of the case.

The Daubert standard is liberal and favors admissibility. See, e.g., KSP Investments, Inc. v. U.S., 2008 WL 182260 (N.D. OH 2008) ("As commentators have noted, Rule 702 evinces a liberal approach regarding admissibility of expert testimony. Under this liberal approach, expert testimony is presumptively admissible."); In re Scrap Metal Antitrust Litigation, 527 F.3d 517, 530 (2008) ("[R]ejection of expert testimony is the exception, rather than the rule.").

The burden to establish admissibility falls upon the proffering party. Netquote, Inc. v. Byrd, 2008WL 2442048, at *6 (D. Colo. 2008). In a Daubert inquiry, the trial court acts as a "gatekeeper" in determining whether the expert is qualified to testify. See, e.g., CSX Transp., Inc. v. McDowell, 294 Ga. App. 871, 872 (2008).

III. The Daubert Analysis

a. Qualifications of Mr. Metrick

Plaintiffs do not contest Mr. Metrick's qualifications to serve as an expert witness. Rather, Plaintiffs seek to exclude Mr. Metrick's testimony on grounds that it is irrelevant and unreliable. The Court finds that Mr. Metrick possesses proper qualifications to allow him to serve as an expert witness on damages in this case.

b. Reliability and Relevance of Mr. Metrick's Opinion

Plaintiffs argue that Mr. Metrick's expert opinion should be excluded because it rests on (1) incorrect legal conclusions and (2) insufficient facts and is, therefore, unreliable and legally irrelevant.

First, Plaintiffs argue that Mr. Metrick used an incorrect measure of damages based on an incorrect view of the proper standard of causation required in this case. To the extent Mr. Metrick's testimony is based on a requirement that Plaintiffs show loss causation—that Defendants alleged misrepresentations were the reason the investment turned out to be a losing one—such testimony shall be excluded. In its Order on Defendants' Motions for Summary Judgment, the Court addressed at length the Parties'

differing views of causation in this case, and rejected the argument that Plaintiffs can only show proximate causation in one narrow way which is akin to the requirement of "loss causation" under federal securities law.

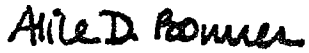
Second, Plaintiffs argue that Mr. Metrick's opinion is based on the incorrect assumption that even if Plaintiffs did not invest in CGTF they would have invested in a similar fund. The Court finds that this issue goes to weight rather than admissibility. Plaintiffs raise significant challenges to the facts, assumptions, explanations, and choices Mr. Metrick made in conducting his evaluation and rendering his expert opinion. "Whether those explanations will withstand rigorous cross-examination, or challenges based on alternative assumptions or data choices, is not the issue now before the Court." In re Scrap metal Antitrust Litigation, 527 F.3d 517, 527 (2008) ("a determination that proffered expert testimony is reliable does not indicate, in any way, the correctness or truthfulness of such an opinion").

IV. Conclusion

Plaintiffs' motion to exclude the expert testimony of Andrew Metrick is granted in part and denied in part. Mr. Metrick's testimony regarding damages that must be proven based on a "loss causation" standard has been rejected by the Court and, thus, he may not opine based on that standard. However, all of Mr. Metrick's opinions that are not based on a requirement that Plaintiffs establish "loss causation" shall be permitted including Mr. Metrick's opinion as to (1) the proper offset amount, (2) a reduction in damages based on a lack of justifiable reliance, (3) whether Plaintiffs damages are

wholly attributable to Defendants alleged misconduct, etc.

SO ORDERED this 25th day of September, 2009.



ALICE D. BONNER, SENIOR JUDGE
Superior Court of Fulton County
Atlanta Judicial Circuit

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