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Order on Plaintiffs' Motion In Limine to Exclude Rebuttal Expert Testimony of Robert Daines (ING USA ANNUITY AND LIFE INSURANCE COMPANY)

Alice D. Bonner
Superior Court of Fulton County

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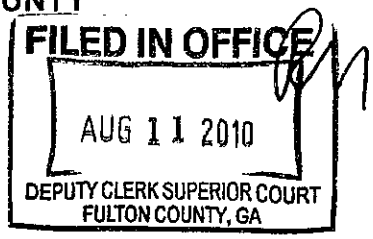
IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA



ING USA ANNUITY AND LIFE INSURANCE COMPANY and ING INVESTMENT MANAGEMENT, LLC,	)(	
Plaintiffs,	)(	Civil Action No. 2007CV134590
v.	)(	
J.P. MORGAN SECURITIES INC. and DAMIAN BERRY,	)(	
Defendants.	)(	

ORDER ON PLAINTIFFS' MOTION IN LIMINE TO EXCLUDE REBUTTAL EXPERT TESTIMONY OF ROBERT DAINES

On June 24, 2010, counsel appeared before the Court to present oral argument on Plaintiffs' motion to exclude the rebuttal expert testimony of Defendants' expert Professor Robert Daines. After reviewing the briefs submitted on the motions, Professor Daines's Report, the record in the case, and the arguments presented by counsel, the Court finds as follows:

Defendant J.P. Morgan Securities Inc. ("JPMSI") provided investment banking services to an Australian mining company named Sons of Gwalia Limited ("Gwalia"). Defendant Damian Berry ("Berry") was an employee of JPMSI between 1998 and 2002 and was JPMSI's relationship manager for Gwalia during that time. Starting in 2000, Gwalia decided to raise capital through the private placement of debt securities. This private placement strategy occurred over the course of two offerings—the first in the fall of 2000 ("2000 Private

Placement") and the second in early 2002 ("2002 Private Placement"). Plaintiffs ING-USA Annuity and Life Insurance ("ING-USA") and ING Investment Management LLC ("ING-IM") participated in the 2002 Private Placement. ING-USA, a life insurance company, ultimately purchased $32 million of the notes offered by Gwalia in the 2002 Private Placement. JPMSI acted as Gwalia's broker for both the 2000 Private Placement and the 2002 Private Placement and, among other things, assisted Gwalia in preparing a private placement memorandum for each offering. In 2004, Gwalia entered into voluntary administration which is the Australian equivalent of bankruptcy.

Plaintiffs allege that during the 2002 Private Placement, Defendants misrepresented and concealed Gwalia's true financial picture. In particular, Plaintiffs allege that Defendants misrepresented and concealed: (1) Gwalia's investments in derivatives called Indexed Gold Put Options ("IGPOs"), (2) Gwalia's liquidity crisis following an unauthorized trading spree by Gwalia's director of finance, and (3) problems with Gwalia's acquisition of another gold mining company, Pacific Mining Corporation Limited ("Pac Min"). Based on these allegations, Plaintiffs assert claims for violations of the Georgia Securities Act of 1973 ("GSA"), common law fraud, negligent misrepresentation, and violations of the Georgia RICO Act. Plaintiffs have moved to exclude the testimony of Defendants' rebuttal expert Professor Robert Daines.

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. Mason v. Home Depot U.S.A., 283 Ga. 271, 279 (2008) (holding that it is "proper to consider and give weight to constructions placed on the federal rules by federal courts when applying or construing" O.C.G.A. § 24-7-67.1 because the Georgia statute was based upon Federal Rule of Evidence 702 and Daubert). 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."). 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).

Plaintiffs move to exclude the rebuttal expert testimony of Professor Robert Daines. Professor Daines is, among other things, a former investment banker with Goldman Sachs and a professor of corporate and securities law at Stanford. Defendants retained Professor Daines to rebut three opinions of Plaintiffs' expert Dr. John Finnerty. Plaintiffs seek to exclude one of the three rebuttal opinions offered by Professor Daines—whether the disclosures made by J.P. Morgan Securities, Inc. during the Gwalia note offerings were accurate, complete and consistent with industry custom and practice.

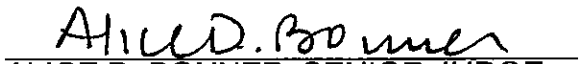
Defendants do not contest Professor Daines's qualifications to serve as an expert witness. Based on his education and experience, the Court finds that Professor Daines possesses proper qualifications to allow him to serve as an expert witness in this case.

In an effort to exclude certain testimony by Professor Daines, Plaintiffs argue that he is not offering an opinion as to whether Defendants made material misrepresentations or omissions in the offering materials for the Gwalia Private Placements. Rather, Plaintiffs argue that Professor Daines is giving his opinion on what other witnesses meant by their testimony and his opinion is not based on sufficient facts in the record. The Court does not agree that Professor Daines's expert opinion is merely his interpretation of the testimony of other witnesses. The Court finds that Professor Daines reviewed the evidence in this case and that there is some evidence in the record to support Professor Daines's assumptions and opinions. The Court further finds that much of Plaintiffs' arguments go to weight rather than admissibility. Plaintiffs raise significant

challenges to the facts, assumptions, explanations, and choices Professor Daines 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").

Plaintiffs' Motion in Limine to Exclude Rebuttal Expert Testimony of Robert Daines is **DENIED**.

SO ORDERED this 11th day of August, 2010.



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

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