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Order on Plaintiffs' Motion In Limine to Exclude Portions of the Expert Testimony of Andrew Miller (ING USA ANNUITY AND LIFE INSURANCE COMPANY)

Alice D. Bonner
Superior Court of Fulton County

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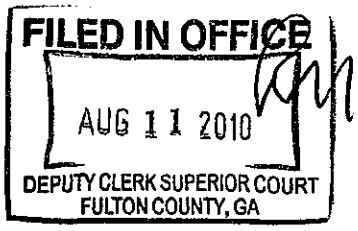
IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA



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 PORTIONS OF THE EXPERT TESTIMONY OF ANDREW MILLER

On June 24, 2010, counsel appeared before the Court to present oral argument on Plaintiffs' motion to exclude certain portions of testimony by Defendants' expert witness, Dr. Andrew Miller. After reviewing the briefs submitted on the motions, Dr. Miller's expert 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 certain portions of the testimony of Defendants' expert Dr. Andrew Miller.

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 have moved to exclude certain portions of the testimony of Defendants' expert Dr. Andrew Miller. Dr. Miller is, among other things, an adjunct professor of economics at NYU and a principal at Chicago Partners where he provides consulting services to attorneys and companies on financial and economic matters. Dr. Miller was retained by Defendants to give expert testimony on complex issues underlying this case, namely: hedging, derivatives, loss causation, damages, and related economic issues. Plaintiffs do not contest Dr. Miller's general qualifications to serve as an expert witness. Based on his background and experience, the Court finds that Dr. Miller possesses proper qualifications to allow him to serve as an expert witness on the topics listed above.

In an effort to exclude certain portions of Dr. Miller's testimony, Plaintiffs argue that he has offered testimony on three topics for which he is not qualified to testify: (1) whether the relevant securities offering document authored by Defendants included misrepresentations or omissions, (2) the materiality of the alleged misrepresentations and omissions, and (3) the adequacy of Plaintiffs' due diligence in their evaluation the investment at issue. Specifically, Plaintiffs accuse Dr. Miller of giving a "stealth" analysis of disclosure and materiality in paragraph 112 of his Initial Report. The Court disagrees. The Court finds that paragraph 112 is a part of Dr. Miller's damages analysis in which he reviews the omissions alleged in Plaintiffs' Complaint and provides his assessment of the relevance of those alleged omissions to the 2002 Notes interest rate. Plaintiffs argue that this relevance analysis is in reality a disguise through which Dr. Miller

offers an opinion on materiality—the importance a reasonable person would attach to a particular fact in determining his or her course of action in a particular transaction. However, the Court finds that Dr. Miller is not offering a materiality opinion and that he may be permitted to testify to his analysis in paragraph 112 of his Initial Report as a part of his analysis of damages in this case. Likewise, the Court finds that Dr. Miller may testify to his analysis in paragraphs 113-116 as it goes to his damages opinions.

Plaintiffs conclude their argument by asserting that Dr. Miller has engaged in speculation rather than employing any methodology at all in conducting part of his damages analysis. The Court disagrees and finds that in the sections of Dr. Miller's report with which Plaintiffs take issue, Dr. Miller has offered a comprehensive and reasoned expert opinion on damages in this case.

Accordingly, Plaintiffs' Motion in Limine to Exclude Portions of the Expert Testimony of Andrew Miller is **DENIED**.

SO ORDERED this 11th day of August 2010.

Alice D. Bonner

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

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