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Order on Defendants' Motion to Exclude Certain Opinions and Findings of John Finnerty and Defendants' Motion to Exclude Certain Portions of the "Supplemental Report" of John Finnerty (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 DEFENDANTS' MOTION TO EXCLUDE CERTAIN OPINIONS AND FINDINGS OF JOHN FINNERTY AND DEFENDANTS' MOTION TO EXCLUDE CERTAIN PORTIONS OF THE "SUPPLEMENTAL REPORT" OF JOHN FINNERTY

On June 24, 2010, counsel appeared before the Court to present oral argument on Defendants' motions to exclude certain opinions and findings of Plaintiffs' expert, Dr. John Finnerty. After reviewing the briefs submitted on the motions, Dr. Finnerty's Report and Supplemental 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. Defendants have moved to exclude certain opinions and findings of Plaintiffs' expert Dr. John Finnerty.

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).

Defendants do not contest Dr. Finnerty's qualifications to serve as an expert witness. Rather, they seek to exclude certain opinions and findings of Dr. Finnerty as unreliable or the result of an improper methodology. Dr. Finnerty is the managing principal of Finnerty Economic Consulting, LLC. Dr. Finnerty is also a professor of finance and the former director of the master of science program in quantitative finance at Fordham University's Graduate School of Business. Dr. Finnerty has published extensively in the fields of corporate finance and business valuation, and he has more than twenty years of experience as an investment banker. Accordingly, the Court finds that Dr. Finnerty possesses proper qualifications to allow him to serve as an expert witness in this case.

In support of their motion to exclude certain findings and opinions by Dr. Finnerty, Defendants first argue that Dr. Finnerty's causation opinion is "nothing more than a mere conduit" for the views of others. "Not even an expert can give an opinion based entirely upon reports which have been prepared by others and which are not in evidence.... A testifying expert is not to serve as a conduit for the opinions of others." Webb v. Thomas Trucking, Inc., 255 Ga. App. 637, 642 (2002). The Court finds that it is clear from his report that Dr. Finnerty conducted his own analysis when forming his opinions in this case and that he did not rely on the opinions of others. It may be that Dr. Finnerty and Gwalia's administrators reached some of the same conclusions; however, that does not mean he is simply a conduit for their opinions.

Second, Defendants argue that Dr. Finnerty's damages calculations for Plaintiffs' fraud, negligent misrepresentation, and Georgia RICO claims are the result of an unreliable method because he used only a single comparable in conducting his analysis which is contrary to common practice. The Court finds that this argument goes to weight rather than admissibility. Defendants challenge Dr. Finnerty's explanations and choices. "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").

Third, Defendants argue that Dr. Finnerty's initial report must be excluded because it contains analysis and opinions that he admits are inaccurate. Defendants explain that Dr. Finnerty derived his opinions based on pro forma financial statements he developed. At his deposition, Defendants questioned Dr. Finnerty about his failure to account for an off-setting tax benefit in his pro forma financial statements. At that time, Dr. Finnerty admitted that an adjustment should be made, although he subsequently determined that the adjustment did not affect any of his conclusions. In his supplement report, Dr. Finnerty accounted for the tax benefit, but concluded that the adjustment was not significant enough to change his credit analysis. Despite this, Defendants argue that the error was so critical that it calls all of Dr. Finnerty's damages calculations into question. The Court does not find anything unreliable about Dr. Finnerty's

method and further finds that the issue over Dr. Finnerty's correction of his initial report goes to weight rather than admissibility.

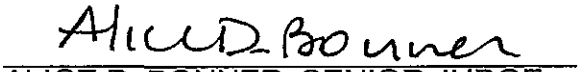
Fourth, Defendants argue that through his initial and supplemental reports, Dr. Finnerty invades the province of the jury by offering opinions which are nothing more than factual testimony. Whether testimony invades the province of the jury is a trial objection. It was not made clear to the Court whether Dr. Finnerty will testify in person at the trial of this case or by deposition, and thus the Court will defer ruling on this issue until the pretrial conference in this case. The Court finds that this argument does not go to whether Dr. Finnerty is qualified to testify as an expert witness.

In support of their motion to exclude certain portions of Dr. Finnerty's supplemental report, Defendants argue that Dr. Finnerty's supplemental report is untimely and unduly prejudicial. In response, Plaintiffs explain that Dr. Finnerty's initial report contained a mathematical error because his calculation reversed the order of two parts of the statutory formula for the rescission remedy provided in the Georgia Securities Act of 1973. In February 2010, Plaintiffs received payments from Gwalia's administrators that needed to be accounted for when calculating Plaintiffs' damages in this case. When taking steps to account for this payment, Plaintiffs' counsel noticed the error in Dr. Finnerty's original calculation. As a result, Dr. Finnerty issued a supplemental report to account for the administrators' payment and to correct the mathematical error in his original report. The Court finds that the calculation to be used by Dr. Finnerty is a matter of law prescribed by the Georgia Securities Act and that a mistake in making that

calculation does not vitiate Dr. Finnerty's entire opinion on that subject. The Court also finds that the error corrected by Dr. Finnerty's supplemental report came to light early enough in litigation so as not to unduly prejudice Defendants especially in light of several offers made by Plaintiffs to Defendants in what appears to the Court to be a good faith effort to mitigate any possible prejudice caused to Defendants because of the mathematical error contained in Dr. Finnerty's original report.

For the foregoing reasons, Defendants' Motion to Exclude Certain Opinions and Findings of John Finnerty and Defendants' Motion to Exclude Certain Portions of the "Supplemental Report" of John Finnerty are **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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