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

Alice D. Bonner
Superior Court of Fulton County

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FULTON COUNTY, GA
COPY

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 THE EXPERT TESTIMONY OF MICHAEL SKALIY

On June 24, 2010, counsel appeared before the Court to present oral argument on Plaintiffs' motion to exclude the expert testimony of Defendants' expert Dr. Michael Skaliy. After reviewing the briefs submitted on the motions, 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' expert Dr. Michael Skaliy. 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.

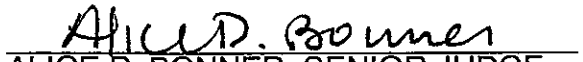
The Daubert standard is liberal and favors admissibility. See, e.g., KSP Investments, Inc. v. U.S., 2008 WL 182260 (N.D. OH 2008) ("As commentators have noted, Rule 702 evinces a liberal approach regarding admissibility of expert testimony. Under this liberal approach, expert testimony is presumptively 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).

Dr. Skaliy is a double-board-certified anesthesiologist and pain management physician whom Defendants plan to call to give testimony regarding the cognitive abilities and memory of Mr. Eardley Ross-Adjie, a fact witness who has a long history of taking prescription drugs. Dr. Skaliy has opined that Mr. Ross-Adjie was not competent to testify when he gave his deposition in this case. Plaintiffs seek to exclude Dr. Skality's testimony in its entirety arguing that it is (1) irrelevant, (2) unreliable, and (3) that Dr. Skaliy is not qualified to provide expert testimony on competency.

The Court finds that, given his background, Dr. Skaliy is qualified to give testimony on the effects various drugs have on people in general. However, whether Mr. Ross-Adjie is competent to testify is a question for the Court to be determined after examination by the Court. O.C.G.A. § 24-9-7(a). While Dr. Skaliy's testimony may be helpful to the Court in making this determination, and the Court will consider it, his testimony as to Mr. Ross-Adjie's competence may not be presented to the jury. The Court will make a determination as to Mr. Ross-Adjie's competence shortly before the trial of this case. Should the Court decide that the jury may hear Mr. Ross-Adjie's testimony, Dr. Skaliy may testify as to the effects various drugs have, in general, on the people who take them.

For the foregoing reasons, Plaintiffs' Motion In Limine to Exclude the Expert Testimony of Michael Skaliy is **GRANTED IN PART AND DENIED IN PART**.

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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