

COURT OF CHANCERY
OF THE
STATE OF DELAWARE

EFiled: Apr 21 2010 5:43PM EDT
Transaction ID 30708723
Case No. 1091-VCL



J. TRAVIS LASTER
VICE CHANCELLOR

New Castle County Courthouse
500 N. King Street, Suite 11400
Wilmington, Delaware 19801-3734

April 21, 2010

Seth D. Rigrodsky, Esquire
Brian D. Long, Esquire
Rigrodsky & Long, P.A.
919 North Market Street, Suite 980
Wilmington, DE 19801

Michael D. Goldman, Esquire
Steven C. Norman, Esquire
Timothy R. Dudderar, Esquire
Potter Anderson & Corroon LLP
1313 North Market Street
Wilmington, DE 19801

Kenneth J. Nachbar, Esquire
Megan Ward Cascio, Esquire
Kevin M. Coen, Esquire
Morris, Nichols, Arsht & Tunnell LLP
1201 North Market Street
P.O. Box 1347
Wilmington, DE 19899

Henry E. Gallagher, Jr., Esquire
Meredith L. Gaudio, Esquire
Connolly, Bove, Lodge & Hutz LLP
1007 North Orange Street
P.O. Box 2207
Wilmington, DE 19899

RE: Forsythe, *et al.* v. ESC Fund Management Co. (U.S.), Inc., *et al.*
C.A. No. 1091-VCL

Dear Counsel:

This is an action brought by employees of Canadian Imperial Bank of Commerce (“CIBC”) who invested as limited partners in a CIBC-sponsored fund that suffered heavy losses. The underlying dispute has given rise to four prior written decisions by Vice Chancellor Lamb.¹ Interested readers may refer to those decisions for background.

After Vice Chancellor Lamb denied the defendants’ motion to dismiss in significant part, the parties proceeded with fact and expert discovery. The plaintiffs

¹ See *Forsythe v. ESC Fund Mgmt. Co. (U.S.), Inc.*, 2007 WL 3262205 (Del. Ch. Oct. 31, 2007) (decision on motion for reargument on part of ruling on motion to dismiss); *Forsythe v. ESC Fund Mgmt. Co. (U.S.), Inc.*, 2007 WL 2982247 (Del. Ch. Oct. 9, 2007) (decision on motion to dismiss); *Forsythe v. CIBC Employee Private Equity Fund (U.S.) I, L.P.*, 2006 WL 846007 (Del. Ch. Mar. 22, 2006) (decision addressing redactions following merits ruling in related Section 220 proceeding); *Forsythe v. CIBC Employee Private Equity Fund (U.S.) I, L.P.*, 2005 WL 1653963 (Del. Ch. July 7, 2005) (post-trial decision in related Section 220 proceeding).

retained Harris L. Devor and Gary R. Rotenberg as their experts. The defendants retained Craig T. Elson as their expert. The defendants have now moved to strike Mr. Devor and Mr. Rotenberg's expert reports and to preclude their testimony. The plaintiffs responded with a similar motion directed at Mr. Elson.

As to Mr. Devor, the defendants contend that he offered only a hypothetical opinion conditioned on an underlying issue of fact that has not yet been established. Mr. Devor's opinion distills aspects of US and Canadian GAAP. Necessarily there are underlying issues of fact to which GAAP must be applied. Mr. Devor cannot make underlying factual findings; only the Court can. Mr. Devor's report is appropriate expert testimony that I will consider.

Turning to Mr. Rotenberg, the defendants challenge his experience and qualifications. The defendants narrowly restrict the requisite area of experience to work involving private equity or co-investment funds. I disagree. Mr. Rotenberg has sufficient experience in the investment banking industry to allow him to offer opinions on the fund at issue in this case. The defendants remain free to argue that Mr. Rotenberg's opinions should be given little weight because of the limits of his experience.

The defendants next attack Mr. Rotenberg for conflicts between his deposition testimony and his report and in light of communications between Mr. Rotenberg and plaintiffs' counsel and between Mr. Rotenberg and his support personnel. According to the defendants, these communications reveal Mr. Rotenberg as a ventriloquist's mannequin operated by counsel and the support team. The communications certainly raise questions about the sources and strength of Mr. Rotenberg's views, and if this case is ultimately tried, then Mr. Rotenberg can look forward to vigorous cross examination. At that point I will be able to judge his credibility and give his views appropriate weight. I will not exclude Mr. Rotenberg as an expert witness at this point.

The defendants further contend that Mr. Rotenberg's opinions on damages are not relevant. I disagree. The issue of damages is obviously part of the case. The defendants are free to challenge the persuasiveness of Mr. Rotenberg's opinions at trial, but relevance is not the appropriate avenue of attack. I also reject the defendants' contention that Mr. Rotenberg's methodologies fail the *Daubert* test. See *M.G. Bancorp., Inc. v. Le Beau*, 737 A.2d 513, 521-22 (Del. 1999) (incorporating *Daubert* into Delaware law). Mr. Rotenberg's methodologies are sufficiently reliable to merit my considering them, and Vice Chancellor Strine has used similar methodologies to determine an appropriate damages remedy. See *Venhill Ltd. P'ship v. Hillman*, 2008 WL 2270488, *31-32 (Del. Ch. June 3, 2008).

In contrast to the foregoing challenges, the defendants validly object to Mr. Rotenberg's opinions regarding whether the defendants fulfilled their fiduciary duties.

April 21, 2010

Page 3 of 3

Mr. Rotenberg claims to be testifying about custom and practice in the financial services business in the context of applicable industry standards, such as guidelines adopted by the Financial Industry Regulatory Association, the Chartered Financial Analyst Institute, and the Private Equity Council. What his report actually expresses are opinions concerning legal issues governed by Delaware law. I will disregard this aspect of his report and preclude him from providing testimony on this subject. *See United Rentals, Inc. v. RAM Holdings, Inc.*, 2007 WL 4465520, at *1 (Del. Ch. Dec. 13, 2007) (rejecting portion of expert opinion that attempted to opine on issues of Delaware law under guise of providing expert testimony about industry practice).

The plaintiffs make reciprocal attacks on Mr. Elson's qualifications and the reliability of his damages theory (which is actually a critique of Mr. Rotenberg's theory). Mr. Elson is sufficiently qualified to testify as an expert at trial. His damages analysis is sufficiently sound that it can be presented at trial for my consideration.

The plaintiffs also contend that Mr. Elson relied on inadmissible evidence. I will defer consideration of this issue. The plaintiffs have moved separately to strike the evidence and if I deny that motion, then the challenge to Mr. Elson's report will be moot. If I grant the motion, then there will still be an open issue about Mr. Elson's report, because an expert can rely on inadmissible evidence if "of a type reasonably relied upon by experts in the particular field." D.R.E. 703. The parties have not addressed the Rule 703 standard. If I determine that the evidence is inadmissible, then the plaintiffs may raise the Rule 703 issue if they wish.

All three motions are therefore denied except to the limited degree that Mr. Rotenberg may not offer his opinions about whether the defendants fulfilled their fiduciary duties in light of standards and practices in the financial services industry.

Very truly yours,

/s/ J. Travis Laster

J. Travis Laster
Vice Chancellor

JTL/krw