UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

EBRAHIM SHANEHCHIAN, Individually and on behalf of all others similarly situated,	:	NO. 1:07-CV-00828
Plaintiff,	:	
v.	:	**OPINION AND ORDER**
MACY'S, INC. et al.,	:	
Defendants.	:	

Oral arguments on Plaintiffs' motion for class certification (doc. 65) are scheduled for January 12, 2011. Subsequent to filing the motion for class certification, Plaintiffs filed a motion to strike the expert report of Defendants' expert Lassaad Turki (doc. 84). The motion is ripe for the Court's consideration, and because the Court finds that Plaintiffs' issues with Defendants' expert go to the weight, not the admissibility, of his opinions, the Court DENIES Plaintiffs' Motion to Strike (doc. 84).

I. Plaintiffs' Motion to Strike

By way of background, on August 30, 2005, Defendant Macy's completed a merger with The May Department Stores, acquiring nearly 500 May department stores (doc. 27). According to Plaintiffs' complaint, after the acquisition Macy's "made a series of material representations and omissions regarding [Macy's] declining sales growth and its failures in converting the newly

acquired May stores into Macy's brand stores...which caused Macy's common stock to trade at artificially inflated levels" (Id.). Plaintiffs filed this class action, asserting claims under Section 502 of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1132 (Id.). Plaintiffs claim that Defendants were fiduciaries of certain ERISA plans and that they breached their fiduciary duties under ERISA by allowing the plans to invest in Macy's stock and by encouraging plan participants to invest in Macy's stock (Id.). Plaintiffs allege that as a result of Defendants' ERISA violations, Plaintiffs and members of the proposed class suffered substantial losses of retirement savings and anticipated retirement income (Id.).

Defendants and Plaintiffs have each submitted expert reports to support their respective positions regarding the propriety of class certification. Plaintiffs have moved to strike Defendants' expert's report from the record on the bases that it is irrelevant; his opinions are based on improper damages methodology; and he is not qualified as an ERISA expert (doc. 84).

Plaintiffs' motion essentially centers on Plaintiffs' contention that Dr. Turki's opinion that intra-class conflicts should preclude class certification is premised on a "failure to recognize that any recovery on Plaintiffs' claims will inure to the benefit of the [p]lans as a whole" (Id.). First, Plaintiffs contend that Dr. Turki's assertion that there are intra-class

conflicts is speculative, and speculative conflicts should be disregarded at the class-certification stage and dealt with, if necessary, at the relief stage (Id., citing, inter alia, Walsh v. Northrup-Grumman Corp., 162 F.R.D. 440, 447-48 (E.D. N.Y. 1995)). In any event, no intra-class conflicts exist, according to Plaintiffs, because Plaintiffs claim plan-wide misconduct and seek plan-wide relief, and to the extent Dr. Turki sees intra-class conflicts it is because he has erroneously cast this case as being individual actions to recover individual damages based on the date on which each individual suffered losses in their investment account (Id.). That is not the posture of this case, Plaintiffs contend; instead, the case is brought pursuant to ERISA sections 409 and 502(a)(2) which allow for actions on behalf of the plan as a whole, not as individual beneficiaries (Id.). In addition, Plaintiffs point the Court to other cases that they contend support their assertion that courts have rejected Dr. Turki's intra-class-conflict theory (Id., citing, e.g., DiFelice v. U.S. Airways, Inc., 235 F.R.D. 70, 79 (E.D. Va. 2006)).

Plaintiffs also assert that Dr. Turki employed an improper method for calculating damages, and therefore Plaintiffs argue that the Court should strike his report (Id.). Specifically, Plaintiffs contend that the proper measure of damages under ERISA must account for what a prudent person would have done and not merely, as Dr. Turki determined, whether any given plan participant

had out-of-pocket monetary losses (Id.).

As the final basis for their motion to strike, Plaintiffs argue that Dr. Turki is not qualified as an expert in the field of ERISA because he is a statistical analysis economist and not an ERISA expert, and he could not identify any ERISA cases where the court accepted his intra-class-conflicts theory (Id.).

Defendants argue that Plaintiffs' motion to strike raises issues that go beyond the limited inquiry permitted by the Court when faced with a challenge to expert testimony (doc. 94). Defendants contend that a full Daubert analysis is not necessary at the class certification stage, and that relevance is the only question the Court need answer (Id., citing Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993)). Defendants further note that relevance is a fairly low standard and that the Court need only find that the challenged report tends to make a fact of consequence to the certification of class more or less probable (Id., citing Fed. R. Evid. 401). Further, Defendants argue that Plaintiffs' "plan-as-a-whole" approach has been foreclosed by the Supreme Court's decision in LaRue v. DeWolff, Boberg & Associates, Inc., 552 U.S. 248 (2008), which was decided subsequent to the authorities cited by Plaintiffs and which, according to Defendants, rejects the plan-as-a-whole approach in the defined contribution context, such as is the case here (Id.).

In addition, Defendants contend that Dr. Turki's

methodology is not flawed because the "opportunity cost" method Plaintiffs endorse is inappropriate in the circumstances present in this case (Id., citing Donovan v. Bierwith, 754 F.2d 1049 (2d Cir. 1985)). Indeed, Defendants assert that Dr. Turki's methods prove that Plaintiff Snyder suffered no losses and therefore cannot represent the class (Id.). Finally, Defendants note that Plaintiffs offered no authority for their proposition that Dr. Turki is unqualified and note that the only requirement for qualification is whether the calculations at issue are within the scope of the witness' expertise, a requirement Plaintiffs do not actually dispute (Id.).

II. Discussion and Conclusion

As an initial matter, questions about whether, as Defendants contend, Plaintiffs' "plan-as-a-whole" approach has been foreclosed by the Supreme Court's decision in LaRue and whether an individual plaintiff who suffered no out-of-pocket loss to his account may, nonetheless, represent the class are better resolved either at the class certification or dispositive motion stages. The Court need not address them to resolve the pending motion to strike as they do not go to the issue of admissibility of Dr. Turki's report.

At base, Plaintiffs' motion is fundamentally an argument meant to persuade the Court not to give credence to Dr. Turki's position, which is an argument about the amount of weight the Court

should give his position, not whether it should be considered at all. Indeed, virtually all of the cases Plaintiffs cite for their assertion that many courts have rejected Dr. Turki's intra-class-conflicts theory actually rejected his theory at the class certification stage not on a motion to strike. See, e.g., DiFelice, 235 F.R.D. 70 (class certification granted despite company's argument that plaintiffs had not satisfied typicality requirement because each plan participant had an "optimal imprudence date"). Courts, when presented with Dr. Turki's theory have, as Plaintiffs assert, often rejected it, but they considered and weighed it first. Plaintiffs have offered no convincing reason why this Court should not enjoy that same opportunity.

Similarly, the cases cited by Plaintiffs for their assertion that intra-class conflicts are irrelevant for class certification purposes were decisions made at the class certification stage. See, e.g., County of Suffolk v. Long Island Lighting Co., 710 F.Supp. 1407 (E.D.N.Y. 1989)(stating, in an opinion certifying class, that "the possibility of intra-class conflicts does not warrant a denial of certification" because the court "has considerable discretion to create subclasses in order to manage intra-class conflicts if and when they should arise"); Walsh v. Northrup Grumman Corp., 162 F.R.D. 440, 448 (E.D.N.Y. 1995)(certifying class and rejecting as speculative a supposed intra-class conflict).

Further, the Court is not persuaded by Plaintiffs' attempts to cast Dr. Turki as unqualified. Dr. Turki has a Ph.D. in Industrial Engineering with a focus on finance and, since 1995, has served as an expert witness and consultant specializing in cases involving derivatives, securities and valuation issues (doc. 77). Dr. Turki's expertise permits him to opine on the issues presented by this case, even if no court has embraced his intra-class-conflicts theory. As Defendants note, the operative inquiry is whether the calculations at issue in the case are within the scope of his expertise, and Plaintiffs have presented nothing to prove they are not.

Plaintiffs' motion to strike is, at base, a platform Plaintiffs use to argue that the Court should not embrace Dr. Turki's intra-class-conflicts theory and should, therefore, certify class. The Court is happy to entertain such arguments at the oral arguments on class certification scheduled for January 12, 2011, because that is the proper venue for arguments relating to how much weight the Court should give either side's expert. Plaintiffs' motion is DENIED (doc. 84).

SO ORDERED.

Dated: November 16, 2010

s/S. Arthur Spiegel
S. Arthur Spiegel
United States Senior District Judge