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Order on Defendants' Motion to Exclude Expert (Greenwald v. Odom)

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Fulton County Superior Court

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IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

COPY

E.K. GREENWALD,

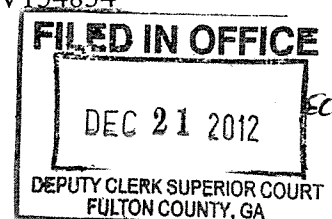
Plaintiff,

v.

STEVEN A. ODOM, MARTIN KIDDER,
AND MARK DUNAWAY

Defendants.

Civil Action File No. 2008CV154834



**ORDER ON DEFENDANTS' MOTION TO EXCLUDE DR. SANJAI BHAGAT AND
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AS TO THE ISSUE OF LOSS
CAUSATION**

This matter is before the Court on remand from the Georgia Court of Appeals to “determine in the first instance whether [Plaintiff]’s expert causation testimony was admissible and, if so, whether it established a genuine issue of material fact on the issue of loss causation.” Greenwald v. Odom, 314 Ga. App. 46 (2012).

On February 9, 2011, this Court entered summary judgment in favor of Defendants Steven A. Odom (“Odom”) and Mark Dunaway (“Dunaway”) on Plaintiff E.K. Greenwald’s claims for common law fraud, negligent misrepresentation and securities fraud under Georgia law. On February 9, 2012, the Georgia Court of Appeals reversed, in part, finding that Plaintiff had alleged two actionable misrepresentations in connection with his purchase of Verso Technologies, Inc. (“Verso”) stock through a private placement in August 2007: 1) An oral misrepresentation by Dunaway about a 2008 revenue forecast that was projected to be \$75 million based on “contracts in hand;” and 2) An oral misrepresentation by Odom regarding the future sale of Verso’s NetPerformer division in the Fourth Quarter of 2007 for \$20-25 million, which would purportedly cover Verso’s long-term debt obligations coming due in 2008.

The Court of Appeals asked this Court to consider Defendants' Motion to Exclude Plaintiff's Expert Witness Dr. Sanjai Bhagat and to determine if Plaintiff's or Dr. Bhagat's testimony establishes a genuine issue of material fact on the issue of loss causation.

1. Defendants' Motion to Exclude Plaintiff's Expert Witness Dr. Sanjai Bhagat

On December 14, 2010, Plaintiff submitted the first affidavit of Dr. Bhagat, attached to his response to Defendants' Motion for Summary Judgment. Defendants moved to exclude Dr. Bhagat's testimony, but this Court found the motion to be moot since it granted Defendants' dispositive motion. Following the decision of the Court of Appeals, Plaintiff sought from this Court, and was granted, leave to file an addendum to Dr. Bhagat's first affidavit. In response, Defendants filed an objection to the substance of Dr. Bhagat's new testimony. At this time, the Court will consider both Defendants' original motion to exclude Dr. Bhagat's testimony, as well as Defendants' objections to the recently filed addendum to the affidavit.

The standard for admissibility of expert testimony is codified at O.C.G.A. § 24-9-67.1:

- 1) The expert must have sufficient "knowledge, skill, experience, training, or education" with regard to the particular subject matter at hand;
- 2) The testimony must assist the trier of fact in understanding the evidence or determining a fact at issue;
- 3) The testimony must be based on "sufficient facts or data" which are admitted into evidence, or if not admissible, are "of a type reasonably relied upon" by experts in the field; and
- 4) The testimony must be "the product of reliable principles and methods," which have been reliably applied to the facts of the case.

The Court must ensure that an expert is sufficiently qualified on two-levels: First, an expert must be generally qualified in the relevant field by education, training or experience, and second, his qualifications must be "specific to the matters he proposes to address[.]" In re Williams Sec. Litig., 496 F. Supp. 2d 1195, 1232 (N.D. Okla. 2007).

As a threshold issue, Defendants move the Court to exclude Dr. Bhagat's testimony because he lacks qualifications to render expert opinions about the value of telecommunications companies or legal matters. In his deposition, Dr. Bhagat testifies to his belief that Defendants misrepresented Verso's technologies as "next generation" when they were instead "behind the curve." He also criticizes certain acquisitions made by Verso, although he concedes he is not qualified to render valuation opinion about the targets. Because Plaintiff agrees that Dr. Bhagat will not offer opinion on the value of telecommunications companies and their products, the Court **GRANTS** Defendants' motion as to this issue. Dr. Bhagat is precluded from testifying about the relative merits of Verso's technology products or the advisability or value of the specific acquisitions of technology companies made by Verso.¹

Turning to Dr. Bhagat's testimony regarding what Defendants' characterize as "legal matters," Dr. Bhagat testifies in his deposition and his affidavits about Defendants' alleged breaches of fiduciary duty and failure to exercise best practices of corporate governance in connection with certain acquisitions made by Verso in 2006 and 2007. Defendants argue that this testimony is improper because Dr. Bhagat is not a legal expert and that this testimony is irrelevant given that Plaintiff has not asserted any claims for breach of fiduciary duty. The Court agrees and **GRANTS** Defendants' motion in this respect. Dr. Bhagat is not permitted to offer testimony regarding Defendants' alleged negligence or failure to follow best corporate practices in pursuing an alleged acquisition strategy.

Next, Defendants criticize Dr. Bhagat's opinions on the subject of Plaintiff's reliance on the purported misrepresentations made by Defendants. Specifically, Dr. Bhagat opines that "a

¹ As explained in more detail below, the Court will not prevent Plaintiff from soliciting Dr. Bhagat's general opinion about Verso's purported "acquisitions strategy," in general. Defendants may point out on cross examination what they believe to be Dr. Bhagat's limited review and consideration of documents and records needed to support his opinion on this issue.

reasonable sophisticated investor would have placed substantial reliance” on statements made by Defendants regarding the sale of Verso’s NetPerformer unit and Verso’s expected revenue for calendar year 2008. The Court **GRANTS** Defendants’ motion as to Dr. Bhagat’s testimony regarding Plaintiff’s reliance. Whether or not it is reasonable for an investor to rely on the alleged misrepresentations at issue in the case is not the appropriate subject of expert opinion. See Raines v. Maughan, 312 Ga. App. 303, 307 (2011) (“where the path from evidence to conclusion is not shrouded in the mystery of professional skill or knowledge and the conclusion determines the ultimate issues of fact in a case, the jury must make the journey from evidence to conclusion without the aid of expert testimony”).

Similarly, the Court likewise finds inappropriate Dr. Bhagat’s testimony regarding whether or not Plaintiff would have invested in Verso had the alleged misrepresentations not been made. Plaintiff is the individual with direct knowledge of the reasons why he chose to make the investment, and he can offer his own testimony on this subject. Testimony from Dr. Bhagat would be speculative. Accordingly, the Court **GRANTS** Defendants’ motion as to this issue.

Defendants also move the Court to exclude Dr. Bhagat’s opinions about whether or not Defendants’ statements to Plaintiff were, in fact, misrepresentations and the degree to which they would have been misleading. In his deposition, Dr. Bhagat opines that Odom misrepresented the existence of a potential buyer for Verso’s NetPerformer division based on the fact that a sale was never achieved. Dr. Bhagat also testifies that the statements regarding the sale of NetPerformer and the 2008 revenue projection “attributed a high likelihood of success to future prospects that were, in fact highly improbable.” The Court finds that the facts necessary to formulate a conclusion regarding whether the statements about the sale of NetPerformer or the 2008 revenue

forecasts amounted to misrepresentations falls outside of Dr. Bhagat's knowledge. Dr. Bhagat can only speculate as to whether or not a buyer was in place to purchase NetPerformer at the time Odom allegedly discussed this matter with Plaintiff and to what extent the 2008 revenue forecast was based on actual contracts. Moreover, expert opinion on these subjects is unnecessary—the jury is capable of drawing such conclusions themselves. Purcell v. Kelly, 286 Ga. App. 117 (2007). Therefore, Defendants' motion is **GRANTED**, and Dr. Bhagat is precluded from testifying about whether or not Defendants' statements were true or untrue and the degree to which they may have been misleading.

Defendants also take issue with portions of Dr. Bhagat's testimony that focus on the materiality of the alleged misrepresentations. Specifically, Dr. Bhagat opines that "the representations made regarding the sale of NetPerformer and the 2008 revenue forecast...would have been material to a reasonable investor." Defendants argue that Dr. Bhagat is not qualified to render a legal opinion on the topic of "materiality." While the Court agrees that Dr. Bhagat is not qualified to opine on "materiality" in the legal sense, the Court overrules this objection to the extent that Dr. Bhagat offers testimony on the overall significance of these statements in the context of an investment decision. Defendants do not dispute that Dr. Bhagat is an expert in the field of corporate finance, with a doctorate in finance and a masters degree in business administration, who is currently employed as a Professor of Finance at the University of Colorado at Boulder. The Court finds that he is qualified to render an opinion on the significance of certain business prospects and the associated impact on the company's financial condition to a reasonable investor in considering an investment.

Defendants next take issue with Dr. Bhagat's criticisms of what he characterizes as Verso's "acquisition strategy," which refers to Verso's acquisition of several technology

companies in 2006 and 2007. Defendants complain that Dr. Bhagat failed to consider sufficient information specific to Verso in order to provide reliable conclusions about any so-called “acquisition strategy” or that such strategy was the cause of Verso’s financial struggles. The Court finds this challenge more appropriate for cross-examination, rather than a basis to exclude testimony. See Green v. Eastland Homes, Inc., 284 Ga. App. 643 (2007). Accordingly, Defendants’ objection is overruled.

Defendants object to Dr. Bhagat’s testimony on the issue of loss causation. Specifically, Defendants argue that Dr. Bhagat’s testimony is not reliable because he failed to perform a calculated financial analysis showing mathematically how Plaintiff’s damages are linked to the alleged misrepresentations. In its opinion, the Court of Appeals noted that this case, which involves a private placement transaction, “differs from the usual securities action involving the sale of publicly traded securities, and so the factual predicates of loss causation fall into less of a rigid pattern.” Greenwald v. Odom, 314 Ga. App. 46 (2012). Accordingly, this objection is overruled.

Finally, Defendants challenge Dr. Bhagat’s analysis regarding the impact of the sale of Verso’s NetPerformer division and the realization of 2008 revenue forecasts on Verso’s overall financial condition. Upon review of Verso’s 2007 Annual Report, the Court finds that the errors identified by Defendants in Dr. Bhagat’s analysis are not fatal to his conclusions. If Defendants believe that Dr. Bhagat’s calculations simplistic or otherwise misleading by his failure to present his findings within the larger context of Verso’s overall financial condition, the Court finds this appropriate subject matter for cross-examination.

In short, the Court finds that Dr. Bhagat is qualified to testify on the limited issues identified above and that Defendants' objections as to Dr. Bhagat's reliability should be the subject of cross-examination.

2. Defendants' Motion for Summary Judgment

Defendants move for summary judgment on the basis that Plaintiff has failed to create a material issue of fact on the elements of "loss causation."

A court should grant a motion for summary judgment pursuant to O.C.G.A. § 9-11-56 when the moving party shows that no genuine issue of material fact remains to be tried and that the undisputed facts, viewed in the light most favorable to the non-movant, warrant summary judgment as a matter of law. Lau's Corp., Inc. v. Haskins, 261 Ga. 491, 491 (1991).

The Georgia Supreme Court has adopted the principle of "loss causation" as a required element of a securities fraud claim, "be it statutory or based in the common law." See Holmes v. Grubman, 286 Ga. 636, 641 (2010).

Loss causation describes the link between the defendant's misconduct and the plaintiff's economic loss.... This causal link is necessary because the securities laws are not intended to provide investors with broad insurance against market losses, but to protect them against those economic losses that misrepresentations actually cause.... [Because] the present case differs from the usual securities action involving the sale of publicly traded securities,...the factual predicates of loss causation fall into less of a rigid pattern.

Here, Greenwald's allegation essentially is that the defendants made fraudulent misrepresentations to him about the future business prospects of Verso that induced him to purchase the restricted stock and stock warrants. In this context, loss causation would be established by Greenwald demonstrating that the failure of those specific business prospects to materialize was a substantial factor in causing his subsequent economic loss.

Greenwald v. Odom, 314 Ga. App. 46 (2012) (emphasis added).


Federal courts construing the burden of a plaintiff to show causation in a securities case require a plaintiff to show both that “(1) the plaintiff entered the transaction at issue in reliance on the claimed misrepresentation or omission (transaction causation) and (2) the defendant misrepresented or omitted the very facts that were a substantial factor in causing the plaintiff’s economic loss (loss causation).” McCabe v. Ernst & Young, LLP, 494 F.3d 418 at 425 (3d Cir. 2007).

For Plaintiff to defeat summary judgment, “it is not necessary for the plaintiff to produce sufficient evidence to show that he is entitled to the relief sought.” Wall v. Georgia Farm Bureau Mut. Ins. Co., 238 Ga. 275 (1977). Rather, Plaintiff must point to some evidence in the record sufficient to raise a fact issue that the failure of Verso to sell NetPerformer or to realize on 2008 sales projections was a substantial factor in causing Verso’s bankruptcy, which ultimately caused Plaintiff’s economic loss.

Considering the totality of the record, including what the Court found to be the admissible testimony of Dr. Bhagat, the Court finds that Plaintiff has met this burden. In his deposition, Plaintiff testifies to his belief that the sale of NetPerformer would have paid off Verso’s outstanding long-term debts, which has been identified by Plaintiff as a reason for Verso’s failure. Moreover, Dr. Bhagat opines that the sale of NetPerformer would have generated the liquidity necessary to keep Verso out of bankruptcy and allowed Verso’s managers to focus on growing the company’s revenue in 2008. Additionally, Dr. Bhagat explains that the 2008 sales, as projected, would have amounted to a “50% increase over Verso’s revenue for 2007” and potentially left Verso in an EBITDA positive position in 2008. With this evidence in the record, the Court finds a triable issue as to whether the failure of the misrepresented facts

could be substantial factors in causing Plaintiff's loss. Accordingly, summary judgment is **DENIED.**

SO ORDERED this 21st day of December, 2012.


ELIZABETH E. LONG, SENIOR JUDGE
Superior Court of Fulton County
Atlanta Judicial Circuit

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