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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Cahn Justice

PART 49m

James L. Melcher

INDEX NO. 600417/03

MOTION DATE

- v -

MOTION SEQ. NO. 021

Apollo Medical Fund

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION IN MOTION SEQUENCE . . . . .

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 12/16/08

J.S.C.

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 49

----------X

JAMES L. MELCHER,

Plaintiff,

-against-

Index No. 604047/03

APOLLO MEDICAL FUND MANAGEMENT L.L.C. and BRANDON FRADD,

Defendants.

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Herman Cahn, J.

Defendants Apollo Medical Fund Management L.L.C. ("Apollo Management") and Brandon Fradd move *in limine* for an order precluding Plaintiff James Melcher's expert Robert Malanga, P.E., from testifying at the trial and further seek to exclude a video of certain experiments performed by Malanga from being admitted at the trial.

BACKGROUND

The facts in this action have been previously addressed, familiarity with which is presumed. *See* 9/10/04 Decision; *see also Melcher v Apollo Med. Fund Mgmt LLC*, 52 AD3d 244 (1st Dep't 2008); *Melcher v Apollo Med. Fund Mgmt LLC*, 32 AD3d 217 (1st Dep't 2007); *Melcher v Apollo Med. Fund Mgmt LLC*, 25 AD3d 482 (1st Dep't 2006).

In pertinent part, Apollo Medical Fund Management L.L.C. was formed to act as the general partner of Apollo Medical Partners, L.P. ("Apollo Partners"), a hedge fund that invests in companies in the biotechnology and medical device industries. Fradd is the manager of Apollo Management.

On January 8, 1998, Melcher, Fradd and non-party Jeff Eliot Margolis entered into the Operating Agreement, whereby Margolis and Plaintiff became managers and members of Apollo Management. Pursuant to the Operating Agreement, Fradd would be compensated based on the percentage of Apollo Partners assets that existed at the time Melcher and Margolis became members, and the three of them would then be compensated equally on the percentage of the assets added thereafter. As of June 1998, the remaining members of Apollo Management were Melcher and Fradd.

Plaintiff alleges that, at some point in 2000, he discovered that he was being underpaid his share of net profits. He states that he was continuously entitled to be compensated as an equal partner of Apollo Management. He alleges that he first attempted to resolve this payment issue with Fradd amicably. However, when this approach failed, Plaintiff commenced this action.

Fradd contends that Plaintiff failed to fulfill his responsibilities to review research and perform technical analysis of the companies in which Apollo Partners was to invest. Fradd maintains that after he spoke to Plaintiff about his failure to participate, they orally agreed to amend the Operating Agreement to reflect each of their levels of participation and, in turn, their shares of net profits. He alleges that, as a result of their discussion, he contacted Apollo Management's law firm, Lowenthal, Landau, Fischer & Bring, P.C., to draft an amendment to the Operating Agreement ("Net Profit Amendment" or "amendment"). He claims that, pursuant to the oral agreement and the amendment, he was to receive 100% of the net profits of the assets he brought into Apollo Partners and that he and Plaintiff were each entitled to 50% of the net profits of the assets that Plaintiff brought in. Fradd asserts that he signed the amendment in May 1998

and that he assumed Plaintiff's approval of the Net Profit Amendment had been sought. However, Melcher denies that there was any amendment.

In October 2003, Fradd removed Plaintiff as a manager of Apollo Management, effective December 31, 2003. In December 2003, Fradd was contacted by a third party on behalf of Plaintiff with allegations that Fradd owed Plaintiff certain net profits, calculated pursuant to the original Operating Agreement. Fradd responded by faxing Plaintiff a copy of the Net Profit Amendment.

Plaintiff alleges that the day after this action was commenced, Fradd destroyed key evidence to prevent forensic ink-dating that would have shown that the amendment was a recent fabrication created by Fradd in December 2003 and backdated five and a half years. Fradd asserts that the document was burned accidentally, in his kitchen. Defendants argue that the burned document was genuine, but that Lowenthal, Landau, Fischer & Bring, P.C. had gone out of existence and the drafter of the document, James Beckwith, Esq., was retired and living in Vermont, and would not return phone calls.

On April 21, 2004, Fradd was deposed by Plaintiff's counsel. He testified that around noon on the day the document was burned, he put a tea kettle on his gas stove to make some tea. He acknowledged that while the kettle was cooking on the stove, he went downstairs to answer the door, after he had inadvertently placed the document near the stove. He stated that, when he returned to his kitchen a few minutes later, he discovered that the top page of the document had caught on fire. 11/6/08 Tr at 14-17. Further, he acknowledged that he did not save any portion of the top page that had been burned and that the second page received a brown spot as a result of the incident. *Id.* at 19-20.

Plaintiff retained an expert, Robert Malanga, P.E., a professional engineer and fire protection engineer, to determine the cause of the fire that burned the Net Profits Amendment. In November 2007, Malanga conducted a series of tests, in his own kitchen, involving various standard copy paper samples. He concluded that the document could not have been burned in the manner described by Fradd, but that the document was likely burned by being held over an open flame from a residential gas stove. He created a video record of the tests he conducted, which Plaintiff also seeks to admit at trial.

DISCUSSION

On several dates in October and November 2008, the Court conducted a *Frye* hearing to determine whether Malanga's testimony would be admissible evidence at trial. *Frye v United States*, 293 F 1013, 1014 (App DC 1923), which is followed in New York, introduced the standard in which to determine whether the tests conducted by an expert are generally accepted as reliable in the expert's particular scientific community. Specifically, the purpose of a *Frye* hearing is "to determine whether evidence derived from a new or novel scientific test or procedure should be admitted into evidence in court proceedings." *People v Roraback*, 174 Misc2d 641, 645 (Sup Ct Sullivan County 1997).

Defendants argue that Malanga's testimony should be precluded because the tests he conducted, to ascertain the cause of the burning of the Net Profits Amendment, were not conducted in accordance with National Fire Protection Association ("NFPA") methodology. NFPA has a standard, number 921, used as a guide for conducting fire and explosion investigations ("NFPA 921"). The standard includes a "six step process in which an investigator must: (1) recognize that a need exists to determine what caused the fire; (2) define the problem;

(3) collect data; (4) analyze the data; (5) develop a hypothesis based on the data; and (6) test the hypothesis." *Royal Ins. v Joseph Daniel Constr.*, 208 F Supp 2d 423, 426 (SDNY 2002); *see also Ficic v State Farm Fire & Casualty Co.*, 9 Misc 3d 793 (Sup Ct Richmond Co 2005) ("The NFPA codes, standards, recommended practices and guides . . . are developed through a consensus standards development process approved by the American National Standards Institute.").

Malanga testified that he followed NFPA 921 in the investigation that he conducted in connection with this case. 11/12/08 Tr at 123. He testified that, in preparation for determining whether the burning of the amendment could have occurred in the manner described by Fradd, he looked at documents, read the depositions and looked at a color copy of the amendment. 11/6/08 Tr at 93. He testified that he then developed a series of experiments. He first conducted "scoping/experimental" tests, the purpose of which is to ensure the testing runs smoothly so that the video is most effective and to allow for additional testing if anything unforeseen occurs. *Id.*, at 93-96.

Malanga testified that he burned different samples of paper in multiple scenarios and measured the temperature of the pieces of paper as they were exposed to the flame. *Id.* at 93-94. He then replicated the experiments he had conducted in the preliminary testing stage in front of a camera. Finally, he developed a hypothesis of what happened. *Id.* at 94-95.

Defendants contend that the content of the video is not substantially similar to the accident described by Fradd in which the document was burned. In *People v Laufer*, 275 AD2d 655, 655 (1st Dep't 2000), the court held that it must be established that a video presentation of experiments, must bear "substantial similarity between the conditions under which the

experiments were conducted and the conditions at the time of the event in question."

Defendants focused on an incident in which both Malanga's wife and daughter could be seen in the video entering his kitchen to speak with him, while he was conducting the experiments. 11/12/08 Tr at 135-49. They raised issue with Malanga's response when his four-year old daughter inquired as to what he was doing in the kitchen. He answered that "[s]omeone burned a piece of paper that's very, very valuable and we don't believe he's telling the truth in how it happened." 11/24/08 Tr at 220. Defendants argue that the answer Malanga provided to his daughter indicates that he had expectation bias, which is a phenomenon that occurs in scientific analysis when a premature conclusion is reached before a the examination of all of the relevant data. Defendants also argue that these incidents violate the NFPA 921 standards by conducting experiments, while allowing the presence of persons not involved in the case or investigation.

Further, Defendants raised an issue with regard to the air circulation in Malanga's kitchen at the time he conducted the experiments. 11/12/08 at 160. Defendants' counsel questioned Malanga as to whether, prior to and during the testing, the windows in his kitchen were open or closed or whether he was aware if Fradd had any windows open or used any heating or cooling system at the time of the incident. Malanga maintained that the windows in his kitchen were closed, but acknowledged that this was not documented, and his answer was based only on his intimate knowledge of his house. *Id.* at 160-62. Malanga also testified that he was not aware of any evidence indicating that Fradd had any windows open or used a fan. *Id.* at 168-69.

The video presentation of Malanga's testing should be excluded from evidence. The Court does not believe that it has been shown by a fair preponderance of the evidence, that the

conditions in the Malanga kitchen at the time Malanga did his experiment bore "substantial similarity" to the conditions described by Fradd, which led to the burning of the document. *Laufer*, 275 AD2d at 655. Malanga acknowledged that two burners were on his stove, at the time he conducted his tests because he performed "several experiments at the same time." 11/24/08 Tr at 270. It is not known whether having two burners on at once, rather than a single burner, has an impact on the air circulation or the replication of the incident in question. There is also a question of whether the air circulation in the experiments was the same as that at the time the amendment allegedly burned, and the impact of any difference.

In view of these factors, the showing of the video would be unduly prejudicial, and it is precluded. Of course, if in their cross-examination of Malanga, or otherwise, the Defendants "open the door" to showing the video, the presiding justice can review this decision.

As to the issue of permitting Malanga to testify, Defendants have failed to produce evidence that contradicts Malanga's professional credentials or the tests he conducted. To the contrary, Plaintiff has shown the witness' expertise in his field, and there is no reason why he should not be permitted to testify. *Frye v United States*, 293 F 1013, 1014 (App DC 1923). Additionally, he will be subject to cross-examination, as to his direct testimony, in a way that the impressions conveyed by a video cannot be cross-examined.

Accordingly, it is

ORDERED that the motion is denied to the extent that Malanga is permitted to testify as to his expertise, his conclusions and the basis for them, i.e. how he arrived at his conclusions; and it is further

ORDERED that the video prepared by Malanga is precluded and shall not be shown to the jury.

Dated: December 16, 2008

ENTER:

J.S.C.