

Greenberg v Spitzer
2020 NY Slip Op 30867(U)
March 6, 2020
Supreme Court, Putnam County
Docket Number: 800004/2018
Judge: Victor G. Grossman
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF PUTNAM**

-----X
MAURICE R. GREENBERG,

Plaintiff,

-against -

ELIOT L. SPITZER,

Defendant.
-----X

GROSSMAN, J.S.C.

DECISION & ORDER

Index No. 800004/2018

Sequence Nos. 12-13

Motion Date: 1/17/2020

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INTRODUCTION

Plaintiff Maurice R. Greenberg (“Greenberg”), the former Chairman and Chief Executive Officer (“CEO”) of American International Group, Inc. (“AIG”), a multinational insurance firm, brings this defamation action against Defendant Eliot L. Spitzer (“Spitzer”), the former Governor and Attorney General of New York State, in response to a series of public statements made by Spitzer in relation to Greenberg’s tenure at, and management of, AIG. Greenberg’s Amended Complaint alleges that Spitzer made defamatory statements on two occasions – July 13, 2012, and July 16, 2012. Greenberg also alleges that Spitzer’s book, “Protecting Capitalism Case by Case” (“Protecting Capitalism”), contains defamatory statements.

The instant defamation action was commenced on July 12, 2013, immediately before the statute of limitations expired. The events that are the subject of the allegations concerning AIG took place years earlier, between 2000 and 2005, at a time when Defendant, in his capacity as New York Attorney General, pursued claims against members of the financial services industry, including banks; brokerage firms; and others, including AIG. The claims, in certain instances, gave rise to overlapping judicial proceedings in state and federal courts, as well as administrative enforcement actions, involving the Securities and Exchange Commission (“SEC”). During this period, Defendant was nicknamed “the Sheriff of Wall Street.” Not surprisingly, his efforts found supporters and detractors. In this climate, the national economy crashed in 2007-2008, which was followed by a lengthy economic recession. Demonstrations, in the form of an “Occupy Wall Street Movement,” took place, promoting an end to economic inequality and injustice at the hands of the world’s financial giants. Responsibility, or blame, for the nation’s

economic woes was the subject of numerous discussions in print and electronic media, as well as local, and national, political campaigns. In October 2004, Defendant Spitzer, as Attorney General, announced that his office was investigating fraud and anti-competitive practices in the insurance industry.

In this climate, Plaintiff and Defendant clashed. In May 2005, Defendant, as Attorney General of the State of New York, commenced an action against Plaintiff under General Business Law Article 23-A (hereinafter the “Martin Act”), alleging, *inter alia*, that Plaintiff, in his capacity as Chairman and CEO of AIG, initiated at least two “sham” or improper reinsurance transactions with General Reinsurance Corporation, Inc. (“GenRe”), which misled the investing public about AIG’s true financial condition. Also at this time, AIG was involved in lawsuits filed by the SEC, the United States Department of Justice (“DOJ”), and the Office of the New York Attorney General.

This Court (Lubell, J.) granted a motion to dismiss, in part, and the Decision and Order was the subject of appeals and cross-appeals. The Appellate Division affirmed that Decision and Order in part and reversed it in part (*Greenberg v Spitzer*, 155 AD3d 27 [2nd Dept 2017]). The Appellate Division decision recites the basic facts underlying the defamation claim. In addition, the Decision of the Hon. Charles E. Ramos in *People v. Greenburg*, 2010 NY Slip Op 33216[U] (Sup Ct, NY County 2010), sets forth at length the background and context of the issues raised by the motions before this Court and the defamation claim.

Discovery ensued, supervised by a Referee. The parties retained experts to proffer opinions on the accounting practices, the reinsurance arena, and corporate governance, as well as the effect of a CEO’s reputation on a large corporation’s vitality.

Now, Plaintiff moves to preclude, or limit, the testimony of Defendant's expert, Professor Douglas Carmichael. Defendant cross moves to preclude, or limit, the testimony of Defendant's five expert witnesses: John Degnan; Professor Jonathan R. Macey; John Salomon; Professor David Teece; and Debra J. Roberts. The parties' submissions include the experts' reports, portions of deposition testimony, and related materials.

On January 17, 2020, the Court heard oral argument, and now deems the motions fully submitted.

The factual issues outlined above have prompted the parties to pursue expert testimony that opines on the financial transactions to support their respective positions. Notably, neither of the parties have tied the expert testimony to the issue of defamation. For example, the fact that a restatement was made does not make the statements attributed to Defendant more or less culpable nor are they connected to the issue of actual malice. How does the restatement show that Plaintiff did, or did not, commit fraud? The Court is troubled by the lack of connection. A threshold question for all potential evidence asks, "For what purpose is the evidence offered?" This question, and additional questions about the financial transaction, remain unanswered and may have little bearing on the defamation issues before the Court.¹ The Court expects the relevance to be established to a greater degree than the proffered reports have shown.

EXPERT TESTIMONY

¹ For example, the restatement includes numerous transactions other than the GenRe transaction. How those other transactions relate to the defamation claim has not been clearly established.

Expert testimony is an incursion upon the exclusive province of jurors to draw conclusions from the facts presented to them. Jurors are expected to draw conclusions based on their experience, observations, and knowledge. Yet, there are circumstances where professional or technical expertise is required, and beyond the training of most jurors. Expert testimony has evolved from the point where it is “necessary,” to testimony that would properly “help to clarify” an issue beyond the understanding of an ordinary juror (*De Long v County of Erie*, 60 NY2d 296, 307 [1983]). Expert testimony requires an assessment of whether jurors can draw conclusions based on their knowledge and experience or whether they would benefit by an expert witness’ specialized knowledge (*People v Cronin*, 60 NY2d 430, 433 [1983]). The subject matter’s complexity may necessitate the use of expert testimony. But simultaneously, testimony that might help clarify an issue can invite confusion, or unnecessarily usurp the role and function of the jury.

It may be said there are experts available for every subject under the sun, and perhaps beyond the moon and the stars. Directories exist in published and electronic formats identifying experts and their areas of expertise by the thousands, if not tens of thousands. Still, not every subject requires expert testimony. The common knowledge and experience of jurors have prevailed long before experts opined on matters allegedly “helpful” to jurors (*White v Mhatre*, 283 AD2d 573 [2nd Dept 2002]; *Ciancio v Cirincione*, 273 AD2d 431 [2nd Dept 2000]). Modern juries are capable of making sensible decisions using their common sense and “practical experience” (*Seward Park Housing Corp. v Greater N.Y. Mut. Ins. Co.*, 25 Misc.3d 772, 775 [Sup Ct, N.Y. County 2009], citing *Havas v Victory Paper Stock Co.*, 49 NY2d 381, 386 [1980]). The issue returns to whether the jury can decide an issue without the expert opinion (*Berger v*

Tarry Fuel Oil Co., 32 AD3d 409 [2nd Dept 2006] [“where the Defendant’s expert was permitted to testify on the ultimate issue as to whether or not the Defendant was negligent, and the expert’s testimony did not exceed the scope of common knowledge, the admission of such proof constituted reversible error”]).

The dividing line between that which is “helpful” and/or that which is “within the common knowledge of jurors” is not clearly defined. Decisions, on a case-by-case basis, do not lend themselves to uniformity. In addition, expert testimony often involves mixed questions of law and fact, and is properly invoked in matters concerning the application of accepted professional standards (*Selkowitz v County of Nassau*, 45 NY2d 97, 101-102 [1978]). Indeed, the issue may be framed as partially within the common knowledge of jurors, and partially within an area of professional expertise (*Sitaras v Ricciardi & Sons*, 154 AD2d 451 [2nd Dept 1989]). Under such circumstances, the invasion of the jurors’ province is permitted (*Dougherty v Milliken*, 163 NY 527, 533 [1900]).

Even when expert testimony is admitted, the scope and extent of that testimony must be determined by the court (*People v Brown*, 97 NY2d 500, 505-506 [2002]). The limitations may be dependent upon the purpose for which the testimony is offered. So too, the number of expert witnesses is subject to limitation within the court’s discretion, especially if such testimony is cumulative (*Abbott v New Rochelle Hosp. Med. Center*, 141 AD2d 589 [2nd Dept 1988]).

The issues before the Court involve allegations of defamation. The truth, falsity, or meaning of the statements made in 2012 and the 2013 publication concern events that occurred between 2000 and 2005. Those events were also the subject of prior proceedings involving the parties when Defendant served as Attorney General of the State of New York. Those prior

proceedings before the Hon. Charles E. Ramos consumed numerous days before the parties turned to mediation, and resolution. The parties may desire to finish their battle in this action. Effectively, they are asking the Court to conduct a “trial within a trial” and re-visit the years of prior battles. The Court is not inclined to replay the courtroom battle the parties brought to a close, nor does the Court desire to impose a repetitive trial, complete with transcripts and exhibits to be displayed, or read, to jurors. A further balance must be struck that provides for relevant, but not repetitive, testimony, including redundant expert testimony. With these criteria, the Court will address each of the proffered experts. At the outset, there is no dispute as to the qualifications of the individuals, whether by training or experience, although in some cases the sufficiency of those qualifications may affect areas of proffered testimony. There is, in some instances, an issue about whether the proffered testimony is “helpful” to the jurors. Given the nature of some of the proffered testimony, there also may be issues with respect to foundations.

Douglas Carmichael

Defendant intends to call Douglas Carmichael to provide opinions in rebuttal of the reports of three of Defendant’s experts “related to the appropriate accounting for and materiality of certain transactions that were included in the 2005 restatement of financial statements for American International Group, Inc. (AIG).” Among his qualifications, Professor Carmichael teaches at Baruch College of the City University of New York. He holds a Ph.D. in Accountancy, and he is a licensed Certified Public Accountant in the State of New York. From 2003-2006, he served as first Chief Auditor of the Public Company Accounting Oversight Board (“Board”) created by the Sarbanes-Oxley Act of 2002 (SOX). In that capacity, he was the

primary advisor to the Board on technical issues related to audits of public companies, including accounting standards, auditing standards and internal control over financial reporting.

Plaintiff, without disputing Professor Carmichael's qualifications, seeks to preclude or limit his testimony and strike certain sections of his report. Specifically, Plaintiff desires to: (1) preclude Professor Carmichael from testifying about Plaintiff's knowledge or conduct because he was not asked to and he did not form any opinion about Plaintiff's knowledge and conduct; (2) preclude Professor Carmichael from rebutting the reports of two of Plaintiff's experts, John Salomon and Debra Roberts, asserting he lacked any relevant experience or expertise related to the substance of the opinions offered by Mr. Salomon and Ms. Roberts; and (3) limit his opinions about AIG's loss portfolio transfer ("LPT") transaction with General Reinsurance Corporation ("GenRe" and the "GenRe Transaction"), as they exceed the scope of his assignment. Plaintiff concedes Professor Carmichael's Report is in rebuttal to the reports of Charles Lundelius², John Salomon and Debra Roberts. Consequently, the Court must consider those reports in evaluating Plaintiff's request for relief.

This defamation action will succeed or fail, in part, on whether fraudulent conduct occurred in the context of reporting financial information and transactions. Plaintiff's role in the reporting and the transactions is the basis of his claim against Defendant – i.e., notwithstanding his appropriate conduct, he is being defamed. By filing suit, Plaintiff placed his conduct and knowledge, as well as his degree of involvement, before the Court. To the extent that expert

² Although the testimony and report of Charles Lundelius is not the subject of the instant motions, the Court has reviewed the report and it is concerned about discussion of other matters and transactions that are not relevant to this action. His opinions numbered 5, 6, and part of 7, fall into this category. The relevance of these opinions to the issues in this case must be established before the finder of fact will entertain them.

testimony by Lundelius and others support Plaintiff's conduct and knowledge, expert testimony by Professor Carmichael is available to challenge his conduct and knowledge. The weight accorded to Professor Carmichael's testimony may be affected by the degree to which he strays from his report, or from the facts in the record known to him. Any attempt to narrow the scope of his testimony, in advance, without a full factual knowledge of the basis for his opinions, is predestined to confusion, especially in light of the conceded complexities of the transactions at issue. Professor Carmichael's report is ninety (90) pages long, with relatively few specific references to Plaintiff, but it contains a substantial discussion of transactions and reporting requirements which would likely involve Plaintiff's participation and/or approval. Whether the testimony offered by Professor Carmichael exceeds the acceptable bases for expert opinion cannot be determined in advance, but will be addressed at trial as the testimony unfolds (*People v Jones*, 73 NY2d 427, 430 [1989]; *Hambusch v New York City Tr. Auth.*, 63 NY2d 723 [1984]; *People v Sugden*, 35 NY2d 453, 461 [1974]).

David Teece

David Teece was retained by Plaintiff to opine on "the importance and value of a CEO's reputation and the consequences for CEO's when their reputation is harmed." He examined Defendant's remarks about Plaintiff and reviewed the record "to determine whether such remarks caused economic harm" to Plaintiff. He also was asked "to address the issue of punitive damages." Professor Teece teaches in the field of Global Business at the University of California at Berkeley. He received a Ph.D. in Economics from the University of Pennsylvania in 1975, and has taught at the college level since that time. He is the author of more than 200 articles and

books in business and economics, and he has received four (4) honorary doctorate degrees. He is a co-founder and chairman of a global professional services firm, and he advises large and small companies on strategy and organization.

Defendant seeks to exclude the testimony as “unreliable” on three bases. First, the analysis is novel and does not rely on a method generally accepted as reliable among economists (*Frye v United States*, 293 F 1013 [DC Cir 1923]; *Cornell v 360 W. 51 St. Realty, LLC*, 22 NY3d 762 [2014]). Second, the testimony and report lack the necessary foundation. Third, the report is irrelevant. Plaintiff asserts that Professor Teece’s testimony is relevant and the underlying facts support the conclusions set forth in economic literature. His scholarship includes valuation of intangible assets, such as reputation. In addition, Plaintiff argues Professor Teece properly considered his “personal experience” based on what he “observed, heard, and read about particular cases” (*People v Oddone*, 22 NY3d 369, 376 [2013]). Plaintiff also asserts the value of his reputation within the business and insurance communities is “beyond the ken of the typical juror.”

With due respect to Professor Teece, his report and opinion read like Plaintiff’s biography prepared by a public relations expert. The footnotes indicate a multitude of sources, and consequently, numerous levels of hearsay, without any showing that it is a type of material commonly relied on in the profession (*Hambusch, supra* at 726; *People v Inoa*, 25 NY3d 466 [2015]). The factual information contained in Professor Teece’s Report does not require presentation by an expert; it may be offered by Plaintiff or others. These facts, as they compose Plaintiff’s biography, are fully within the jurors’ ability to understand. So too, jurors can determine the scope and impact of events on a person’s reputation. The fact that the combatants

here are people of extreme wealth, with a record of success and accomplishment, does not alter the alleged impact on the reputation of a person who was defamed. Certainly, jurors can make that assessment.³ Moreover, reliance on one's "personal experience" based on particular cases, is devoid of objective standards, and may lead to the bolstering of testimony of another witness (*People v Major*, 154 AD2d 225-226 [1st Dept 1989]). Additionally, Professor Teece's opinion relies in part on Plaintiff's rebuilding of his reputation following his departure from AIG, but the alleged defamatory statements took place years later in July 2012. Proof of "damages for defamation is only admissible if the proof is the 'direct and well connected result' of a defamatory statement at issue" (*Macy v New York World-Tel Corp.*, 2 NY2d 416, 422 [1957]). In short, the proffered testimony will neither assist nor aid the jury in their fact finding function, and the Court will not allow it.

Jonathan R. Macey

Jonathan R. Macey was retained to opine on certain issues of corporate governance and policy as they relate to certain AIG transactions that occurred during the time that Maurice R. Greenberg was AIG's Chairman of the Board of Directors and Chief Executive Officer ("CEO"). Professor Macey teaches Corporate Law, Corporate Finance and Securities Law at Yale Law School and the Yale School of Management. He is also a Member of the Board of Directors of the Yale Law School Center for the Study of Corporate Governance. Professor Macey summarized his opinions as follows:

³ When the salary demand of Yankee slugger Babe Ruth was challenged by a reporter as being higher than President Hoover's, Ruth replied, "I had a better year than he did", a statement with which many Yankee fans could agree.

1. The transactions and accounting entries discussed in the Restatement are consistent with proper corporate objectives.
2. It is proper for the CEO of a large complex organization like AIG to delegate the implementation of, and accounting for, transactions to subordinates and subject matter experts.
3. Greenberg's level of involvement in the examined transactions was consistent with customary expected best practices as a matter of corporate management and policy.
4. The circumstances surrounding Greenberg's departure from AIG are inconsistent with an assertion that Greenberg engaged in fraud.

The essence of Professor Macey's report is addressed to issues of corporate governance and the hierarchal operating structure. The operating structure and decision-making structure of large organizations are relevant to the instant circumstances.⁴ Defendant opposes Professor Macey's testimony on several grounds: (1) Professor Macey's opinions on AIG's accounting entries and transactions are beyond his expertise; and (2) his testimony is not a proper subject of expert testimony, and he lacks sufficient foundation to support his testimony about whether Defendant's actions were justified. Plaintiff responds that Professor Macey has not offered accounting or insurance opinions, but rather, he would testify on the decision-making structure. Such information may be generally known to jurors – i.e., that large corporations utilize a decision-making structure – but the mechanisms affecting decision making and regulatory compliance are a more refined subject area (*De Long v County of Erie*, 60 NY2d 296, *supra*).

There is a concern that Professor Macey's testimony may extend beyond that which is "helpful" to the jurors with respect to corporate governance and decision making, and diverge

⁴ There is some indication of an overlap in the testimony of Professor Macey and Charles Lundelius (*see* Lundelius Report at 4, ¶7). It is expected that any overlap or duplication will be kept to a minimum.

into opining on issues that are for the jurors to determine. Although expert testimony is permitted on the so-called “ultimate questions,” as well as issues “of lesser significance” (*Sanders v Otis El. Co.*, 232 AD2d 327, 328 [1st Dept 1996]), the jury’s function as finders of fact should be preserved. This is especially true with respect to the allegations of fraud and fraudulent conduct that permeate the facts underlying the defamation claim – that testimony should come from witnesses with personal knowledge of the facts. Professor Macey speaks of fraud as “intentionally trying to mislead.” Fraud is defined in a variety of ways that may, or may not, include a scienter requirement. Professor Macey’s definition is one of several that will likely be the subject of testimony. This issue is significant because it is likely the Martin Act prosecution may be the subject of trial testimony. The Court will instruct the jury on the meaning of fraud. That very subject calls for a factual determination that should be made by the finder of fact, not by Professor Macey.

Accordingly, based on his background, training, and experience in the field, Professor Macey will be permitted to testify about issues of corporate governance and decision-making. Such information could be helpful to the jury panel to provide a context for the events that underlie the defamation claim. His testimony and opinions should not extend into Plaintiff’s specific acts or business decisions. Essentially, Professor Macey may testify as to his opinions numbered 1 and 2, *supra*, but not opinions numbered 3 and 4.

John Degnan

John Degnan was asked by Plaintiff’s counsel “to provide expert testimony about (a) the role of a Chief Executive Officer (“CEO”) in a large global insurance company and (b) certain

features of large publicly-traded insurance companies.” Until 2012, Mr. Degnan spent two decades with Chubb & Son, Inc., and the Chubb Corporation (“Chubb”), a group of property and casualty insurance companies, in senior level management positions, including, but not limited to: Senior Vice President and General Counsel of Chubb and Son; President of Chubb Corp.; Chief Ethics and Legal Compliance Officer of Chubb Corp.; and Vice-Chairman and Chief Operating Officer of Chubb Corp. He also served as Attorney General of the State of New Jersey, and Chairman of the Port Authority of New York and New Jersey. He summarized his opinions as follows:

1. The role of a CEO of a large insurance company is to develop and nurture a company’s culture, set its general direction, and develop its strategy, goals and targets. A CEO’s responsibility is to focus on achieving strategic and financial results for the company. It should not be the role of the CEO to assume operational control for those accomplishments.
2. The practice of corporate-level adjustments to reserves is not *per se* improper;
3. The profitability of property and casualty insurance companies depends on the results of both underwriting and investment operations, and analysts and investors do focus on investment results in analyzing an insurance company’s overall financial performance;
4. An insurance company’s use of any off-shore subsidiary is, standing alone, neither improper nor cause for suspicion;
5. Greenberg’s communications with the CEO of GenRe were consistent with the types of communications senior executives of primary insurers and reinsurers commonly had in the insurance industry; and
6. It is appropriate for senior management to consider balance sheet objectives in undertaking a transaction, so long as the transactions are structured properly.

Defendant opposes the testimony of Mr. Degnan as being without foundation, and not a proper subject of expert testimony. Defendant asserts that Mr. Degnan is “simply vouching for

Greenberg.” Plaintiff claims that Mr. Degnan’s two decades with Chubb provides the requisite foundation for the operation of an insurance company, and the customary degree of CEO involvement in the types of transactions at issue. In addition, Plaintiff asserts Mr. Degnan’s years as Attorney General – albeit forty (40) years ago – and his more recent position with the Port Authority of New York and New Jersey provides a basis for opinions regarding the management of large organizations.

Mr. Degnan’s qualifications are not in dispute, but his proffered testimony is an invitation to vouch for, and bolster, Plaintiff’s testimony. His experience may be similar to Plaintiff’s, but that alone is not a basis for expert testimony. In addition, it is duplicative of Professor Macey’s testimony, who can explain “the role of a Chief Executive Officer” and “features and practices of large, publicly traded insurance companies.” As to the remainder of his opinions, they appear to repeat those other witnesses’, such as Mr. Lundelius⁵, Ms. Roberts, and Plaintiff. The Court is also mindful of the projected length of the trial, and the need to avoid unnecessary imposition on the jury by limiting duplicative testimony. Under these circumstances, Mr. Degnan’s testimony is excluded.

Debra J. Roberts

Debra J. Roberts is an expert in the field of finite reinsurance, based on her work in the reinsurance industry for more than 35 years. She defined the purpose of finite reinsurance as to achieve certain effects on the financial statements of one or both parties to a finite reinsurance

⁵ On page 16 of his report, Mr. Degnan acknowledged that he relied on Mr. Lundelius’ report, and he reviewed Plaintiff’s testimony.

transaction.⁶ She was retained to provide opinions related to factual issues concerning certain transactions entered into in late 2000 and early 2001, referred to as the “GenRe Transaction.” This subject is one that requires expert testimony. Her report combines factual assertions with opinions and suppositions, which may or may not be supported by the trial testimony. She is not an accountant, and her accounting background is limited to finite reinsurance transactions.

Defendant opposes Ms. Roberts’ testimony to the extent she seeks to offer evidence as to the meaning of relevant accounting authorities. There is no objection to her testimony about industry standards that derive from custom and practice. Plaintiff notes the two areas overlap, and Ms. Roberts’ background and familiarity with the transactions necessarily requires exposure to accounting authorities as well as industry practice, but the Court finds that does not make her an expert about accounting issues. The Court will not limit her testimony in advance. There is some concern about the foundation for some of her opinions, but those issues can await trial.

John I. Salomon

John I. Salomon was retained to analyze the process involved in conducting the internal accounting review of AIG during the period February 2005 through May 2005, which resulted in the restatement of previously-issued financial statements. Specifically, he was asked to “identify whether such conduct was consistent with best practices, and relevant standards for conducting investigations.” Mr. Salomon is a Managing Director of Berkeley Research Group, LLC, an advisory and expert consulting firm created by Professor David Teece. He has been a Certified

⁶ She based this definition on the testimony of Jay Morrow, an AIG Senior Vice-President and Actuary, in *People v Maurice Greenberg, et. al.* (see Roberts Report at 12).

Public Accountant, licensed in New York and elsewhere, for more than forty years, and, among his other qualifications, he has provided accounting analysis on numerous occasions. He rendered the following opinions:

1. The AIG Accounting Review was fundamentally flawed in part because the law firm that conducted the investigation exercised excessive and disproportionate influence over certain accounting decisions relevant to the restated transactions.
2. The AIG 2005 Accounting Review process was completed in an unusually short period of time.⁷
3. The AIG 2005 Accounting Review was compromised by its reliance upon the work of PwC [Price Waterhouse Coopers] and AIG's Chief Financial Officer, who were not independent.
4. The AIG Accounting Review was conducted under extreme pressure of credible threats from Eliot Spitzer, in his capacity as New York State Attorney General ("NYAG").

Mr. Salomon focused on the process of the 2005 Accounting Review which resulted in the restatement. Although Mr. Salomon did not focus on the substance of the review, the Lundelius report did. The parties may pursue arguments about the restatement. For Defendant, the restatement provides a partial justification, or defense, for his position. For Plaintiff, the 2005 Accounting Review that led to the restatement was deficient in a variety of ways that negated Defendant's reliance on it; in other words, for Plaintiff, Defendant's reliance on a flawed report is misplaced. Plaintiff has conceded that the portion of the restatement that addressed the GenRe transaction on its face was correct, but such corrections do not mean the original filings were culpably wrong. Indeed, both parties agree that there are "non-fraud" reasons for doing a

⁷But, Mr. Salomon also concedes "Facts and circumstances make each investigation unique, and accordingly, there is no single trial frame within which an investigation should be complete."

restatement.

In addition, relying generally on his personal experience, Mr. Salomon suggests there is a “custom and practice” in doing a restatement. Such reliance on personal experience is permissible (*McLamb v Metropolitan Suburban Bus Auth.*, 139 AD2d 572, 573 [2nd Dept 1988]). He neither cites any accounting or industry standards, nor any other methodology. That “custom and practice” may entail independent counsel and auditors, or a time period for completion, but it is not required by SEC Rules. Mr. Salomon also relies on Lundelius’ report in several instances.

Both parties rely on *Parker v Mobil Oil Corp.* (7 NY3d 434 [2006]), to support their respective positions. In *Parker*, the Court of Appeals advised and cautioned:

Here, there is a question as to whether the methodologies employed by Parker’s experts lead to a reliable result – specifically, whether they provided a reliable causation opinion without using a dose-response relationship and without quantifying Parker’s exposure. There is no particular novel methodology at issue for which the Court needs to determine whether there is general acceptance. Thus, the inquiry here is more akin to whether there is an appropriate foundation for the experts’ opinions, rather than whether the opinions are admissible under *Frye*.

As with any other type of expert evidence, we recognize the danger in allowing unreliable or speculative information (or “junk science”) to go before the jury with the weight of an impressively credentialed expert behind it. But, it is similarly inappropriate to set an insurmountable standard that would effectively deprive toxic tort plaintiffs of their day in court. It is necessary to find a balance between these two extremes.

(*id* at 447).

Unlike the methodologies employed in *Parker*, here, Mr. Salomon frames the issue as “whether such conduct was consistent with best practices and relevant standards for conducting investigations and issuing statements.” He subsequently offers opinions on the flawed process

based on “best practices and my personal experiences” (Salomon Report at 6).⁸ Those opinions are set forth on pages 6 - 9, and amplified on pages 27 - 56. In those pages, no standards are identified that explain the content, purpose, structure, or methodology of a restatement. References that support the claimed conflict between the legal issues and the financial issues affecting the restatement are devoid of statutory guidelines, or industry or professional ethical standards. Other opinions are factually supported, but remain as individual observations.

Beyond the issues of qualification, foundation and methodology, the Court fails to see the relevancy of the restatement process to the defamation action. Plaintiff has not made any connection. It bears repeating that the issues in a defamation action involve the truth or falsity of statements made about Plaintiff to a third party, the presence or absence of actual malice of the making of the statement with a reckless disregard for the truth, and causing damage to Plaintiff. Defendant’s statements regarding Plaintiff’s or AIG’s actions do not depend on their truth or falsity, or how the restatement was prepared. Whether Defendant’s statements are false does not depend on whether the restatement was flawed. Plaintiff must prove that Defendant’s statements were false, and that Defendant knew they were false, or they were made with a reckless disregard of whether the statements were false or not (*Kipper v NYP Holdings*, 12 NY3d 348, 353-354 [2009]).

Suozzi v Parente (202 AD2d 94, 102 [1st Dept 1994]) is instructive.

[A]ctual malice cannot be established merely because reliance on a source’s information is negligent (*St. Amant v Thompson*, 390 US 727, 731-733); the mere failure to conduct further investigation is insufficient to establish actual

⁸ To the extent Mr. Salomon relied on Best Practices in Internal Investigations (2013 ed.), by D. Jan Duffy, to confirm his conclusions, this source is of little or no value (*see* Salomon Report at 44).

malice (*supra*, at 731; *see also*, *Time, Inc. v Hill*, 385 US 374, 387-388). Nor can actual malice be founded on the misinterpretation of a source or the resolution of an ambiguity adversely to the plaintiff or in accordance with a particular political view. (*Time, Inc. v Pape*, 401 US 279.) The focus of inquiry is on the subjective state of mind of the defendant. (*Herbert v Lando*, 441 US 153, 170.)

In that regard, both DeRiggi and Reilly testified that they believed the article to be true, relying upon the research and investigation of Plump and others in arriving at this conclusion. While plaintiff argues that these defendants should have independently verified the work prepared by Plump and Griffin, he offers no evidence that they had reason to believe that Plump and Griffin were not dependable. In the absence of substantial reasons to question the accuracy of their work, a good-faith reliance on the activities of others cannot give rise to a finding of actual malice. (*St. Amant v Thompson*, 390 US, *supra*, at 731.)

The failure to investigate does not constitute actual malice (*Gertz v Robert Welch, Inc.*, 418 US 323, 331-32 [1974]). A misstatement that is false and defamatory must still meet the actual malice standard (*Khan v New York Times Co. Inc.*, 269 AD2d 74 [1st Dept 2000]). At a minimum, there must be that a defendant “entertained serious doubts” as to the truth of the published statement (*St. Amant v Thompson*, 390 US 727, 731 [1968]).

The “flaws” in the restatement as identified by Mr. Salomon do not negate the filing of the document as a reflection of AIG’s financial condition, and which contain changes from the original filing. Such information is of interest to investors and the public. Rightly or wrongly, it is a source of information on which people, including Defendant, rely. Whatever the deficiencies in the document may be, such flaws neither alter the reliance thereon, nor serve to establish an element of defamation.

The nexus between the flawed process identified by Mr. Salomon and the defamation claim has not been established. Assuming Mr. Salomon’s opinions might serve to negate allegations of fraud in other contexts, in the absence of Defendant’s knowledge of the flawed

process prior to the making of the statements, it is difficult to see how this aspect of the issues support the defamation claim.

Accordingly, it is hereby

ORDERED that Plaintiff's motion is denied and that Douglas Carmichael may testify in accordance with his Report; and it is further

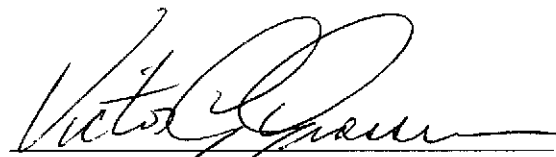
ORDERED that Defendant's motion is granted to the extent that Douglas Teece, John Degnan and John I. Salomon may not testify at trial; and it is further

ORDERED that Defendant's motion is granted in part to the extent Jonathan R. Macey may testify in accordance with the limitations set forth herein; and it is further

ORDERED that Defendant's motion is denied in part to the extent Debra J. Roberts may testify in accordance with her Report.

The foregoing constitutes the Decision and Order of the Court.

Dated: Carmel, New York
March 6, 2020


HON. VICTOR G. GROSSMAN, J.S.C.

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