

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

_____)	
In re RAIL FREIGHT FUEL SURCHARGE)	
ANTITRUST LITIGATION)	
_____)	MDL Docket No. 1869
This document relates to:)	Misc. No. 07-0489 (PLF)
_____)	
ALL CASES)	
_____)	

OPINION AND ORDER

This case has been there and back again — through one round of class certification, an appeal to the D.C. Circuit, and now a second round of class certification briefing after the court of appeals vacated the Court’s prior decision certifying the class and remanded for further consideration. Through it all, the plaintiffs have principally relied on Dr. Gordon Rausser’s expert reports and testimony. But on the eve of a second class certification hearing, plaintiffs were blindsided by evidence that indicates that Rausser has, for years, consulted with and invested in companies that buy out class action claims for profit — including a claim or claims in this case — while serving as an expert witness in class action cases around the country.

Because Rausser’s credibility has been drawn into serious question, plaintiffs have moved for leave to file a supplemental expert report, limited in scope, to attest to the integrity and reliability of Rausser’s expert analysis and methodologies. Defendants argue that Rausser’s tarnished credibility does not warrant allowing an additional expert witness and that they would be prejudiced by further delaying the already costly proceedings. After careful



CEAD Exhibit 1087

consideration of the parties' briefs, exhibits, and the relevant legal authorities, the Court grants plaintiffs' motion for leave to file a supplemental expert report.¹

I. BACKGROUND

The history of this case is recounted in detail in prior opinions of this Court and of the U.S. Court of Appeals for the District of Columbia Circuit. See In re Rail Freight Fuel Surcharge Antitrust Litig., 287 F.R.D. 1 (D.D.C. 2012); In re Rail Freight Fuel Surcharge Antitrust Litig., 725 F.3d 244 (D.C. Cir. 2013). Only the facts relevant to plaintiffs' motion are summarized here.

On March 10, 2014, defendants' counsel received an email from an employee of Cascade Settlement Services ("Cascade") named Rod Montgomery.² That email stated, in part:

I fear the company's involvement with Gordon Rausser, majority owner of OnPoint Analytics, could be a serious conflict of interest Mr. Rausser holds a non-voting percentage ownership in our company, specifically Cascade, LLC. I believe he has a 10% interest in the company. As a result, he stands to gain directly from any purchases of claims made in the Rail case. He has been able to keep the company apprised of all developments in the case given he has "insider" information. His [damages] model [] also might have indirect or direct benefit to him financially.

¹ The papers reviewed in connection with the pending motion include the following: plaintiffs' motion for leave to file a supplemental expert report ("Mot.") and exhibits [Dkt. No. 742]; defendants' opposition to plaintiffs' motion ("Opp.") and exhibits [Dkt. No. 748]; transcript of October 2, 2014 hearing ("Oct. 2 Hrg.") [Dkt. No. 751]; transcript of October 21, 2014 hearing ("Oct. 21 Hrg.") [Dkt. No. 752]; and transcript of November 13, 2014 hearing ("Nov. 13 Hrg.") [Dkt. No. 754].

² Cascade invests in class action lawsuits by buying out the claims of potential class plaintiffs. Cascade Settlement Services, <http://www.cascadesettlement.com> (last visited Nov. 26, 2014). It also "provides comprehensive filing services to maximize settlement proceeds for institutional investors and corporations." *Id.*

Mot. Ex. 1. After receiving this email, “[d]efendants tried to confirm or refute Mr. Montgomery’s claim using publicly available information,” but were “unable to find any evidence corroborating the allegations.” Opp. at 6-7. Defendants, however, did not share Mr. Montgomery’s accusations with plaintiffs’ counsel or the Court.

On July 31, 2014, defendants deposed Dr. Rausser and asked whether “there [is] any formal relationship between OnPoint Analytics and Cascade Settlement Services.” Opp. at 7. Dr. Rausser answered “no,” but stated that OnPoint Analytics “has done work for [Cascade] in the past.” *Id.* He denied that he or OnPoint had any ownership or other financial interest in Cascade. *Id.* After the deposition, “[d]efendants assumed that was the end of the matter.” *Id.* at 8. But on August 29, 2014, plaintiffs produced an errata sheet for Dr. Rausser’s deposition that, in effect, changed his answer regarding a financial interest in Cascade from a “no” to a “yes.” *Id.* The errata stated that Dr. Rausser does “have the right to share in distributions from certain claims [Cascade] manage[s], but those do not include claims in this case or any other case in which [he is] a testifying expert or OnPoint has performed any services.” *Id.*

Defendants responded to Dr. Rausser’s errata by issuing a series of subpoenas to Dr. Rausser, OnPoint Analytics, Cascade, and Rod Montgomery. Mot. at 8; Opp. at 8. Plaintiffs produced responsive documents from Dr. Rausser and OnPoint on October 1, 2014. Additional discovery followed. *See, e.g.*, Oct. 21 Hrg. at 7-8; Nov. 13 Hrg. at 5-6. In summary, the parties agree that the documents produced appear to show that both OnPoint Analytics and Dr. Rausser

entered into agreements with Cascade to provide consulting and other services shortly after the completion of the initial class certification hearing in this case. Opp. Exs. 8-9.³

The evidence shows that, since at least 2010, Cascade has actively sought to purchase the claims of potential class members in this case through marketing efforts. Mot. at 10-11. In July 2010, after completion of Dr. Rausser's first class certification report but before the class certification briefing was completed, Dr. Rausser and OnPoint each began negotiations to enter business relationships with Cascade. Nov. 13 Hrg. at 41. The class certification hearing took place on October 6 and 7, 2010. *Id.* OnPoint entered into a written agreement with Cascade on October 24, 2010; Rausser entered into such an agreement on December 16, 2010. Mot. at 9; Nov. 13 Hrg. at 41. The Rausser-Cascade agreement provided that Rausser would receive, "among other compensation, a base fee equal to 10% of 'the amount of any Distribution received by Cascade from any Fund during that quarter which is attributable to any Contract entered into during the Term.'" Mot. at 9-10 (quoting Mot. Ex. 17). On December 28, 2012, Dr. Rausser also invested approximately \$1.15 million into Cascade's "Fund 1," which is made up of class action claim purchases. Opp. at 10; Opp. Exs. 11-15; Oct. 2 Hrg. at 12.

Documents produced during discovery on this matter also indicate that, between 2011 and 2013, Cascade consulted with Dr. Rausser "about various facets of this litigation." Opp. at 10. In June 2012, Cascade purchased a claim in this litigation from class member Sturgis Iron & Metal Co. *Id.* at 12. This claim was placed in Cascade's "Fund 1," the same fund in

³ Through his personal attorney, Dr. Rausser has denied that he has or has had any conflict of interest in this case. Letter from Jonathan R. Bass, Esq. to Honorable Paul L. Friedman (Nov. 12, 2014) [Dkt. No. 755].

which Dr. Rausser had invested. Id.⁴ Cascade also entered into agreements with five other class members to administer the filing of their claims in this litigation. Mot. Ex. 34. Since defendants issued their subpoenas, both OnPoint and Dr. Rausser have terminated their agreements with Cascade. Mot. Exs. 38, 39.

The Court held closed hearings on October 2, 2014 and October 21, 2014 to discuss Dr. Rausser's potential conflicts of interest. The Court then ordered the parties to submit memoranda of law as to: (1) how this case should proceed, i.e. whether plaintiffs should be permitted to submit a supplemental expert report over defendants' objection; and (2) whether these proceedings should be unsealed. In response, plaintiffs filed this motion for leave to file a supplemental expert report. On November 7, 2014, the Court ordered the unsealing of the transcripts of the prior hearings, the parties' briefs filed on October 31, 2014 and November 7, 2014, and all further proceedings on this issue. Memorandum Opinion and Order, In re Rail Freight Fuel Surcharge Antitrust Litig., 2014 WL 5803136 (D.D.C. Nov. 12, 2014) [Dkt. No. 745]. Soon after, the Court issued a Memorandum Opinion and Order directing the parties to discuss at the November 13, 2014 status conference and motions hearing whether, as an alternative to plaintiffs' proposal for a supplemental expert, the Court should simply order class certification to be re-briefed ab initio with entirely new expert reports. Memorandum Opinion and Order, In re Rail Freight Fuel Surcharge Antitrust Litig., 2014 U.S. Dist. LEXIS 158981 (D.D.C. Nov. 12, 2014) [Dkt. No. 750].

⁴ After Dr. Rausser's deposition on July 31, 2014, OnPoint Analytics President Laura Craft contacted Cascade about whether any claims in this litigation had been placed in Fund 1. Cascade removed Sturgis' claim from that fund on August 14, 2014. Mot. at 12.

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