

15-2100
In re Puda Coal Securities Inc. Litigation

1 UNITED STATES COURT OF APPEALS
2 FOR THE SECOND CIRCUIT
3

4 **SUMMARY ORDER**
5

6 RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER
7 FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF
8 APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY
9 ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX
10 OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY
11 ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.
12

13 At a stated term of the United States Court of Appeals for
14 the Second Circuit, held at the Thurgood Marshall United States
15 Courthouse, 40 Foley Square, in the City of New York, on the
16 20th day of May, two thousand sixteen.
17

18 PRESENT: DENNIS JACOBS,
19 BARRINGTON D. PARKER,
20 REENA RAGGI,
21 Circuit Judges.
22

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24 SALOMON QUERUB, HOTEL VENTURES, HOWARD
25 PRITCHARD, HARRIET GOLDSTEIN,
26 individually and on behalf of all
27 others similarly situated, THOMAS
28 ROSENBERGER, STEVEN WEISSMANN, TRELUS
29 MGMT. CO. LLC,
30 Plaintiffs-Appellants,
31

32 -v.- 15-2100
33

34 MOORE STEPHENS HONG KONG,
35 Defendant-Appellee.
36

37 PUDA COAL, INC., MING ZHAO, LIPING ZHU,
38 QIONG LABY WU, YAO ZHAO, CARRET & CO.,
39 LLC, MACQUARIE CAPITAL (USA) INC.,

1 JIANFEI NI, C. MARK TANG, LAWRENCE
2 WIZEL, BREAN MURRAY, CARRT & CO., LLC,
3 MOORE STEPHENS INT'L LTD., MOORE
4 STEPHENS, P.C.,
5 Defendants.
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9 **FOR APPELLANTS:** LAURENCE M. ROSEN, The Rosen Law
10 Firm, P.A., New York, NY; Glancy
11 Prongay & Murray LLP, Los Angeles,
12 CA; Pomerantz LLP, Chicago, IL;
13 Kirby McInerney LLP, New York, NY.
14

15 **FOR APPELLEE:** BRIAN J. MASSENGILL (James C.
16 Schroeder, Dana Douglas, Justin A.
17 McCarty, on the brief), Mayer
18 Brown LLP, Chicago, IL.
19

20 Appeal from a judgment of the United States District Court
21 for the Southern District of New York (Forrest, J.).
22

23 **UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND**
24 **DECREED** that the judgment of the district court be **AFFIRMED**.
25

26 Plaintiffs-appellants, investors in Puda Coal, Inc.
27 ("Puda"), appeal from the judgment of the United States District
28 Court for the Southern District of New York (Forrest, J.)
29 dismissing on summary judgment their securities class action
30 against defendant-appellee Moore Stephens Hong Kong ("Moore
31 Stephens"). We assume the parties' familiarity with the
32 underlying facts, the procedural history, and the issues
33 presented for review.

34 Until April 2011, Puda was a publicly-traded, U.S.-listed
35 company headquartered in China, which purportedly held, as its
36 sole asset, a 90% ownership stake in Shanxi Puda Coal Group Co.,
37 Ltd. ("Shanxi Coal"), a coal supplier for steel manufacturing.
38 In fact, in September 2009, Puda's chairman transferred Puda's
39 entire interest in Shanxi Coal to himself, leaving Puda a shell
40 company. This transfer was reflected in shareholder meeting
41 minutes for Shanxi Coal and in various documents filed in

1 China's State Administration of Industry and Commerce. But
2 Puda's financial statements for 2009 and 2010 included all of
3 the assets, liabilities, revenues, expenses, and net income for
4 Shanxi Coal.

5 Moore Stephens is a Hong Kong-based audit firm that issued
6 "clean opinions" for Puda's 2009 and 2010 financial statements
7 pursuant to Public Company Accounting Oversight Board ("PCAOB")
8 standards. After April 2011, when the Shanxi Coal transfer
9 became public, Moore Stephens resigned as Puda's auditor and
10 announced that its 2009 and 2010 audit opinions could no longer
11 be relied upon.

12 Puda's investors filed a securities class action shortly
13 after news broke of the Shanxi Coal transfer, alleging that
14 Moore Stephens (and others) violated Section 11 of the
15 Securities Act of 1933 and Section 10(b) of the Securities
16 Exchange Act of 1934 (and Rule 10b-5). In support, plaintiffs-
17 appellants proffered Anita C.M. Hou as an expert who testified
18 that Moore Stephens failed to comply with the auditing standards
19 of Hong Kong and/or the People's Republic of China. However,
20 she admitted that she was not an expert on PCAOB and could not
21 opine on whether the audits complied with PCAOB standards.
22 Moore Stephens proffered Alexander H. Mackintosh as an expert
23 in PCAOB standards who opined that Moore Stephens's 2009 and
24 2010 audits fully complied with PCAOB standards.

25 At summary judgment, the district court struck
26 plaintiffs-appellants' sole accounting expert, Hou, and
27 granted summary judgment in favor of Moore Stephens. The
28 district court reasoned that Hou did not have the requisite
29 expertise to offer opinions on any matters relevant to the case
30 because she had no experience or expertise in PCAOB audits and
31 because PCAOB provides the standard of conduct that Moore
32 Stephens allegedly failed to satisfy. Without competent
33 evidence on PCAOB auditing standards, plaintiffs-appellants
34 could not raise a triable issue of fact regarding whether Moore
35 Stephens egregiously departed from applicable professional
36 standards of care. The district court further concluded that
37 plaintiffs-appellants failed to proffer any evidence that Moore
38 Stephens issued subjectively false opinions. This appeal
39 followed.

1 We review for abuse of discretion the admission or
2 exclusion of expert testimony. Major League Baseball Props.,
3 Inc. v. Salvino, Inc., 542 F.3d 290, 311 (2d Cir. 2008). We
4 review de novo a district court's grant of summary judgment.
5 Noll v. Int'l Bus. Machs. Corp., 787 F.3d 89, 93 (2d Cir. 2015).

6 1. An expert witness is "permitted wide latitude to offer
7 opinions, including those that are not based on firsthand
8 knowledge or observation," but only after a trial judge has
9 determined "whether the expert is proposing to testify to (1)
10 scientific knowledge that (2) will assist the trier of fact to
11 understand or determine a fact in issue"; "[e]xpert testimony
12 which does not relate to any issue in the case is not relevant
13 and, ergo, non-helpful." Daubert v. Merrell Dow Pharm., Inc.,
14 509 U.S. 579, 591-92 (1993). In other words, the expert must
15 be qualified to testify as to a certain issue; the expert must
16 offer an opinion on that issue that is informed by reliable
17 information and methodology; and the probative value of the
18 expert testimony must not be substantially outweighed by the
19 danger of, inter alia, confusion of the issues or misleading
20 the jury. Nimely v. City of New York, 414 F.3d 381, 397 (2d
21 Cir. 2005).

22 The district court appropriately struck Hou as an expert
23 witness. As she admitted, Hou lacks experience and expertise
24 in conducting or reviewing audits done according to PCAOB
25 standards and is therefore not qualified to opine on PCAOB
26 auditing standards. Because Puda was a U.S.-listed company,
27 the only auditing standards in question are those promulgated
28 by PCAOB - not those of Hong Kong or PRC - so Hou is not qualified
29 as an expert on the sole relevant auditing standard. Opinions
30 on Hong Kong and/or PRC auditing standards would not be helpful
31 to the jury on any relevant issue, and would risk muddling the
32 issue of the applicable standard of care. Finally, Hou's
33 testimony that auditing standards in Hong Kong or PRC do not
34 materially differ from PCAOB standards is speculative.
35 Because she is not qualified to opine on PCAOB standards, she
36 has no basis for comparing them with other standards.

37 2. A violation of Section 10(b) requires "scienter, a
38 mental state embracing intent to deceive, manipulate, or
39 defraud." Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551

1 U.S. 308, 319 (2007) (internal quotation marks omitted).
2 Recklessness satisfies the scienter requirement when the
3 conduct is "highly unreasonable, representing an extreme
4 departure from the standards of ordinary care." Rothman v.
5 Gregor, 220 F.3d 81, 98 (2d Cir. 2000) (internal quotation marks
6 omitted). For an auditor, the conduct "must, in fact,
7 approximate an actual intent to aid in the fraud being
8 perpetrated by the audited company." Id. In essence,
9 recklessness requires a showing that the "audit [was] so
10 deficient as to amount to no audit at all." In re Advanced
11 Battery Techs., Inc., 781 F.3d 638, 644 (2d Cir. 2015).

12 Plaintiffs-appellants cannot raise a triable issue of fact
13 as to whether Moore Stephens was sufficiently reckless to be
14 liable under Section 10(b). They fall short regardless of
15 whether they are required to proffer expert testimony to
16 establish scienter for this claim. If expert testimony is
17 necessary, plaintiffs-appellants have no factual basis for
18 alleging that the 2009 and 2010 audits were "extreme
19 departure[s]" from PCAOB standards "amounting to no audit at
20 all" because they cannot establish the PCAOB standard of
21 ordinary care. The uncontested expert testimony is that Moore
22 Stephens fully complied with PCAOB standards. If expert
23 testimony is not required, plaintiffs-appellants still fail to
24 show Moore Stephens conducted the audits recklessly. The
25 purported "red flags" were not obvious signs of fraud; at its
26 core the complaint alleges "fraud by hindsight," which is
27 inadequate. See Advanced Battery, 781 F.3d at 645-46; see also
28 Special Situations Fund III QP, L.P. v. Deloitte Touche Tohmatsu
29 CPA, Ltd., 2016 WL 1392280, at *2 (2d Cir. Apr. 8, 2016).

30 **3.** Statements of opinion are actionable under Section 11
31 as false or misleading only if (i) "the issuer of the opinion
32 held a subjective belief inconsistent with the opinion," or (ii)
33 the "opinion 'omits material facts about the issuer's inquiry
34 into or knowledge concerning a statement of opinion, . . . if
35 those facts conflict with what a reasonable investor would take
36 from the statements [of opinion] itself." Special Situations
37 Fund, 2016 WL 1392280, at *3 (quoting Omnicare, Inc. v. Laborers
38 Dist. Council Constr. Indus. Pension Fund, 135 S. Ct. 1318, 1329
39 (2015)). Audit reports, labeled "opinions" and involving
40 considerable subjective judgment, are statements of opinion

1 subject to the Omnicare standard for Section 11 claims. Id.

2 There is no evidence that Moore Stephens did not believe
3 its "clean audit opinions" for Puda's 2009 or 2010 financial
4 statements. Nor is there evidence that Moore Stephens omitted
5 material facts about the basis for its audit reports.
6 Plaintiffs-appellants cannot sustain their Section 11 claim.

7 Accordingly, and finding no merit in plaintiff-appellants'
8 other arguments, we hereby **AFFIRM** the judgment of the district
9 court.

10 FOR THE COURT:
11 CATHERINE O'HAGAN WOLFE, CLERK


The signature is written in black ink over a circular official seal. The seal is pink and blue, with the text "UNITED STATES" at the top, "SECOND CIRCUIT" in the center, and "COURT OF APPEALS" at the bottom. The signature "Catherine O'Hagan Wolfe" is written across the seal.