**IN THE UNITED STATES DISTRICT COURT**
**FOR THE SOUTHERN DISTRICT OF ILLINOIS**

**MARK HALE, TODD SHADLE, LAURIE LOGER, and MARK COVINGTON, on behalf of themselves and all others similarly situated,**

**Plaintiffs,**

**v.**

**STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, EDWARD MURNANE, and WILLIAM G. SHEPHERD,**

**Defendants.** **No. 12-0660-DRH**

**MEMORANDUM and ORDER**

**HERNDON, District Judge:**

## I. Introduction and Background

Now before the Court are five motions to exclude expert testimony filed by the parties in relation to the pending motion for class certification: (1) defendants' motion to exclude the testimony of and report of Charles G. Geyh (Doc. 469); defendants' motion to exclude the testimony and report of Thomas A. Myers (Doc. 471); plaintiffs' motion to exclude expert report of Lauren J. Stiroh (Doc. 487); plaintiffs' motion to exclude expert report and testimony of Richard W. Painter (Doc. 489) and plaintiffs' motion to exclude

report of Ronald D. Michaelson, Ph.D. (Doc. 490).[1] The Court must decide the motions to exclude prior to determining the motion for class certification. *See Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 812 (7th Cir. 2012)(quotation omitted)("When an expert's report or testimony is 'critical to class certification,' … a district court must make a conclusive [*Daubert*] ruling on any challenge to that expert's qualifications or submissions before it may rule on the a motion for class certification."). Further, the Court finds that a hearing on the motions to exclude is not necessary as the record is adequate to decide the motions. *See Niam v.* Ashcroft, 354 F.3d 652, 600 (7th Cir. 2004)("[A] *Daubert* hearing is [not] always required."); *Kirstein v. Parks Corp.*, 159 F.3d 1065, 1067 (7th Cir. 1998)(no automatic entitlement to a *Daubert* hearing because the Seventh Circuit has "not required the *Daubert* inquiry to take any specific form"). As the motions are fully briefed, the Court turns to address the merits.[2]

## II. Standard

"A district court's decision to exclude expert testimony is governed by Federal Rules of Evidence 702 and 703, as construed by the Supreme Court in *Daubert v. Merrell Dow Pharms., Inc.,* 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993)." *Brown v. Burlington Northern Santa Fe*

[1] State Farm filed the motions to exclude, the responses in opposition to the motions to exclude and the replies to its motions to exclude and defendants Murnane and Shepherd joined in all these pleadings as reflected by the docket sheet.
[2] The Court will issue a separate order regarding class certification.

*Ry. Co.,* 765 F.3d 765, 771 (7th Cir. 2014); *see also Lewis v. Citgo Petroleum Corp.,* 561 F.3d 698, 705 (7th Cir. 2009). Federal Rule of Evidence 702, governing the admissibility of expert testimony, provides:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.

"In short, the rule requires that the trial judge ensure that any and all expert testimony or evidence admitted "is not only relevant, but reliable." *Manpower, Inc. v. Ins. Co. of Pa.* 732 F.3d 796, 806 (7th Cir. 2013) *(citing Daubert,* 509 U.S. at 589); *see also Bielskis v. Louisville Ladder, Inc.,* 663 F.3d 887, 894 (7th Cir. 2011) (explaining that ultimately, the expert's opinion "must be reasoned and founded on data [and] must also utilize the methods of the relevant discipline"); *Lees v. Carthage College,* 714 F.3d 516, 521 (7th Cir. 2013) (explaining the current version of Rule 702 essentially codified *Daubert* and "remains the gold standard for evaluating the reliability of expert testimony"). The *Daubert* principles apply equally to scientific and non-scientific expert testimony. *See Manpower, Inc.,* 732 F.3d at 806 (citing *Kumho Tire Co., Ltd. v. Carmichael,* 526 U.S. 137, 147–49, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999)).

Under the expert-testimony framework, courts perform the gatekeeping function of determining whether the expert testimony is both relevant and reliable prior to its admission at trial. *See Manpower, Inc.,* 732 F.3d at 806; *Lees,* 714 F.3d at 521; *United States v. Pansier,* 576 F.3d 726, 737 (7th Cir. 2009) ("To determine reliability, the court should consider the proposed expert's full range of experience and training, as well as the methodology used to arrive [at] a particular conclusion."). In doing so, courts "make the following inquiries before admitting expert testimony: first, the expert must be qualified as an expert by knowledge, skill, experience, training, or education; second, the proposed expert must assist the trier of fact in determining a relevant fact at issue in the case; third, the expert's testimony must be based on sufficient facts or data and reliable principles and methods; and fourth, the expert must have reliably applied the principles and methods to the facts of the case." *Lees,* 714 F.3d at 521–22; *see also Stollings v. Ryobi Techs., Inc.,* 725 F.3d 753, 765 (7th Cir. 2013); *Pansier,* 576 F.3d at 737. In determining relevance and reliability, the party offering the expert testimony bears the burden of proof. *Brown*, 765 F.3d at 772. Once it is determined that "the proposed expert testimony meets the *Daubert* threshold of relevance and reliability, the accuracy of the actual evidence is to be tested before the jury with the familiar tools of 'vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof.'" *Id.*

District judges possess considerable discretion in dealing with expert testimony. *Carroll v. Otis Elevator Co.,* 896 F.2d 210, 212 (7th Cir. 1990); *see also Gen. Elec. Co. v. Joiner,* 522 U.S. 136, 141–43, 118 S.Ct. 512, 139 L.Ed.2d 508 (1997) (holding that abuse of discretion standard applies in reviewing district court rulings on admissibility of proposed Rule 702 opinion testimony). In addition, as the Seventh Circuit teaches:

> Where the gatekeeper and the factfinder are one and the same—that is, the judge—the need to make such decisions prior to hearing testimony is lessened. *See United States v. Brown,* 415 F.3d 1257, 1268–69 (11th Cir.2005). That is not to say that the scientific reliability requirement is lessened in such situations; the point is only that the court can hear the evidence and make its reliability determination during, rather than in advance of, trial. Thus, where the factfinder and the gatekeeper are the same, the court does not err in admitting the evidence subject to the ability later to exclude it or disregard it if it turns out not to meet the standard of reliability established by Rule 702.

*In re Salem,* 465 F.3d 767, 777 (7th Cir. 2006); *Brown,* 415 F.3d at 1269 ("There is less need for the gatekeeper to keep the gate when the gatekeeper is keeping the gate only for himself").

Under the Federal Rules of Evidence, testimony is relevant as long as it "has any tendency to make a fact more or less probable" than it would otherwise be. *See* Fed.R.Evid. 401. The evaluation of relevance for expert testimony under *Daubert* is a "liberal relevance standard." *Stollings,* 725 F.3d at 768 (finding expert testimony relevant under *Daubert's* "liberal relevance standard"); *see also U.S. v. Bowling,* 770 F.3d 1168, 1175 (7th

Cir. 2014) (citing *Daubert,* 509 U.S. at 587) (holding that the basic standard of relevance under Rule 401 is "a liberal one"). "Expert testimony which does not relate to any issue in the case is not relevant and, ergo, non-helpful." *Daubert,* 509 U.S. at 591.

Furthermore, Rule 403 states:

> The Court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

**Analysis**

Charles G. Geyh

Charles G. Geyh is the John F. Kimberling Professor of Law and the immediate past associate dean of research at the Indiana University Maurer School of Law. He researches, writes and teaches on issues relating to judicial elections among other areas of the law. Professor Geyh is the lead co-author of the treatise *Judicial Conduct and Ethics* (Lexis Law Publishing, 5th ed. 2013) and the author of *Judicial Disqualification An Analysis of Federal Law* (Federal Judicial Center 2010), and *Counting Peril, the Political Transformation of the American Judiciary* (forthcoming, Oxford University Press). He has written more than seventy books, chapters in books, articles and reports, including at least fifteen works dedicated entirely or in part to judicial selection. In addition, Professor Geyh has served as Reporter to the American Bar Association Commission on the Separation of Powers and Judicial Independence; the American Bar

Association Commission on Public Financing of Judicial Campaigns; and the American Bar Association Commission on the 21st Century Judiciary. Further, he has served as Co-Reporter to the American Bar Association Joint Commission to Evaluate the Model Code of Judicial Conduct; Director of and Consultant to the American Bar Association Judicial Disqualification Project; and Director of the American Judicature Society Center for Judicial Independence. Reviewing Professor Geyh's qualifications, obviously he has extensive experience in the area of judicial ethics and judicial elections. Defendants do not seem to contest his qualifications.

In preparing his report, plaintiffs asked Geyh "for the purpose of contextualizing and summarizing the relevant literature on judicial campaign finance and situation this case in that context. … summarize the empirical research relevant to judicial campaign finance in the modern era, before concluding with some observations on the relationship between that research and the pending case."

Defendants argue that his opinions represent legal opinions and are based on entirely unsupported factual allegations contained in the First Amended Complaint. Specifically, defendants assert that plaintiffs in support of the motion for class certification rely on the following of Geyh's opinions: (1) "the nature and extent of … [State Farm's] financial support in questions created a substantial risk of actual bias that triggered the need

for [Justice Karmer's] disqualification in *Avery v. State Farm Mutual Automobile Insurance Co.*, 835 N.E.2d 801 (Ill. 2005) and (2) State Farm's efforts to hide its contributions by using intermediaries" meant that its involvement here [i]s even more troubling that the due process violations described in *Caperton* [ *v. A.T. Massey Coal Co., Inc.*, 566 U.S. 868 (2009)]." Specifically, Geyh opines the following as to State Farm's conduct: "something exceptional and far more disturbing" … "the nature and extent of financial support in question created a substantial risk of actual bias that triggered the need for disqualification." Defendants argue that Geyh's specific opinions about State Farm lack reliability because, as Geyh admitted, they are based solely on unsupported allegations in the Amended Complaint provided to him by plaintiffs, that Geyh's opinions are unreliable as they are based on flawed methodology and that they will not assist the Court in deciding class certification. Plaintiffs oppose the motion arguing that Geyh was asked what conclusions he could draw about State Farm's role in the 2004 election based on his expertise in judicial ethics and judicial selection, assuming the allegations of the First Amended Complaint to be true. Further, plaintiffs maintain that Geyh was not asked to research State Farm's economic contributions relating to the 2004 election. Plaintiffs contend that Geyh's expert report and opinions are based on a reliable methodology, that experts can and often do rely on assumptions and that he does not make impermissible legal conclusions as

the opinions do not purport to answer the ultimate issue in the case as to whether there has been a RICO violation. The Court agrees with plaintiffs' reasoning.

Here, the Court rejects defendants' arguments and finds that pursuant to Rule 702 Professor Geyh's opinions are both relevant and reliable. Geyh's extensive experience and expansive research in this field provides sufficient basis for him to offer his opinions. Further, the Court does not perceive anything in Professor Geyh's expert report as an attempt to offer legal conclusions. It is clear that Proffessor Geyh is not serving as an expert to determine where State Farm contributed funds and how those funds were funneled to the Karemeier campaign. His testimony relates to judicial selection and judicial ethics issues.

In his lengthy report, Professor Geyh recounts the history of judicial elections in this country, describes that a significant majority of studies have found a correlation between a judge's decision-making and the campaign contributions and other financial support the judges receives, and that a majority of the public thinks that the judges are influenced by their contributors (Doc. 438; Exhibit 87). Further, the report compared the facts of *Caperton*, to the alleged facts surrounding the 2004 Illinois Supreme Court campaign. Specifically, Professor Geyh opined:

> *Avery* traditional status as *Caperton's* little brother is attributable in part to long-held assumption that State Farm's support for Karmeier's election campaign was significantly less than the support Justice Benjamin received from his

> benefactor in *Caperton*, whether expressed in terms of dollar values ($3500,00 versus $3 million) or as a percentage of the candidate's total spending. But the complaint in this case alleges that State Farm's support was not limited to the $350,000 originally suspected, but was in millions of dollars, representing a much more significant percentage of Karmeier's total spending. If true, *Avery* may eclipse *Caperton* as the flagship case in the campaign finance armada.

(Doc. 438; Exhibit 87, ¶ 25). Professor Geyh's report concludes by offering the opinions that defendants seek to exclude. (Doc. 438; Exhibit 87, ¶¶ 22-30). The Court finds that these matters, however, go to the weight and/or credibility that the Court should give to Geyh's opinions, not to their admissibility. In fact, Federal Rule of Evidence 703 provides that "[a]n expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted." Fed.R.Evid. 703. "Unless the Court orders otherwise, an expert may state an opinion –and give the reasons for it – without-out first testifying to the underlying facts or data. But the expert may be required to disclose those facts or data on cross-examination." Fed.R.Evid. 705. Accordingly, the Court denies the motion to exclude the testimony and report of Charles G. Geyh (Doc. 469).

Thomas A. Myers

Thomas A. Myers is a Certified Public Accountant ("CPA") with over thirty years of training and experience in forensic accounting and

investigations into complex money-laundering, fraudulent and disguised financial activities and the application of commonly accepted principles in the field of forensic accounting to the analysis of financial records and related documents. Myers has testified extensively as an expert on false and misleading disclosures relating to complex financial transactions, including as serving as a testifying expert for the SEC. Defendants do not appear to question Myers' qualifications.

Plaintiffs' counsel asked Myers to issue opinions regarding the following:

> "[T]o examine the existing evidence and form an expert report on the extent of State Farm's activities with respect to the election of Illinois Supreme Court Justice Karmeier ("Justice Karmeier"), and the pattern of any concealment that State Farm may have employed to disguise its involvement. … [T]o form an opinion with respect to whether the evidence relating to the actions of State Farm in supporting the Karmeier campaign through a series of disguised transfers, and of concealing and misrepresenting its support, are common to all members of the proposed class. … [T]o calculate damages sustained by the Plaintiff class-members."

(Doc. 438; Exhibit 102). Myers' offered the following conclusion in his report:

> "The results of my research and analysis in this matter overwhelmingly support the allegation that Defendants played a critical, albeit clandestine, part in nearly every facet of Justice Karmeier's Campaign. There is considerable factual material to indicate that State Farm performed a major role in selecting Justice Karmeier as a candidate, managing his campaign, and providing it with robust financial support. Despite this, State Farm, was so confident that it had hidden its extensive involvement in the Karmeier campaign that it

> brazenly remonstrated to the Illinois Supreme Court, "State Farm, itself, made no contribution to the campaign.
>
> My analysis of the record strongly supports the Plaintiffs' allegation that State Farm solicited cooperation from the Affiliated Organizations in order to accomplish its objective. The evidence strongly indicates that such participants took State Farm's undisclosed contributions and converted them to campaign dollars for Justice Karmeier. It does not appear to be a coincidence that State Farm enlisted the Affiliated Organizations because they could convert ostensibly random dues and contributions from State Farm into solid campaign dollars for Justice Karmeier, without disclosing State Farm's involvement.
>
> My review of the record establishes that the relevant evidence regarding State Farm's support for Justice Karmeier's campaign, the money trail of transactions between State Farm and other organizations supporting the Karmeier campaign, and State Farm's concealment and misleading statements regarding its support for the Karmeier campaign, is in fact common to all members of the proposed class.
>
> Even though State Farm was heavily invested in maintaining a low profile in the election campaign of Justice Karmeier, its pattern of activity and robust interaction with the Affiliated Organizations supports the assertion that State Farm was a prime contributor and supporter in electing Justice Karmeier to the Illinois Supreme Court bench. Based on my examination of the record, and as discussed herein, State Farm dramatically, understated its involvement with the Karmeier Campaign, and concealed material information in the representations it made to the Illinois Supreme Court through its 2005 and 2011 filings.
>
> The results of my analysis, as presented in this report, also affirm my opinion that Defendants enlisted the Affiliated Organizations in order to disguise their role in supporting, both financially and otherwise, the campaign to elect Justice Karmeier to the Illinois Supreme Court.

(Doc. 438; Exhibit 102, pgs. 66-67).

Specifically, defendants take issue with the following three opinions: (1) State Farm funneled money through various organizations, which used State Farm's funds for Justice Karmeier's campaign; (2) State Farm made

certain misstatements in its legal filings in the Illinois state case; and (3) plaintiffs' damages are $7,612,643,917. Defendants maintain that Myers' opinion that State Farm "funneled" money is speculative, unsupported and unreliable as he used no methodology to reach it; that he cannot opine about State Farms' misleading statements in legal briefs and that the damages calculation is unsupported and does not apply any expertise. Obviously, plaintiffs oppose the motion.

Here, the Court disagrees with defendants' arguments and finds that pursuant to Rule 702 Myers' opinions are both relevant and reliable. The report will help the factfinder assess the extent of State Farm's involvement, if any, in Karmeier's candidacy, campaign and election. Myers' extensive experience and expansive research in his field provides sufficient basis for him to offer his opinions. After reviewing the report, it is clear that Myers is not making up his conclusions. His opinions are based on generally accepted and reliable forensic accounting methodology.[3] The list and the numerous photocopies of what he examined in rendering his report and opinions are quite extensive. In fact, Myers' report contains over 250 references and footnotes and applies generally accepted accounting principles in reaching his conclusions. He provides explicit references to

[3] Forensic accounting is a specialized subset of knowledge within the accounting field that utilizes and deploys sophisticated financial analysis and applies rigorous methodology taken from other financial and business disciplines, including auditing and financial investigation, as well as from the knowledge of accounting precepts. It is used to investigate fraud or embezzlement and to analyze financial information for use in legal proceedings.

documentation of payments and transfers. Furthermore, Myers' opinion about State Farm's false or misleading filings was derived from a review of the filings and from an analysis of State Farm's associations with affiliated groups and the complex and multi-layered financial transactions involved. Myers appears to offer an assessment of the facts discovered and based on his analysis of data as a forensic accountant. It is within the scope of a forensic accountant to opine on inconsistencies between fraudulent or disguised transactions, and the manner in which these transactions are accounted for and explained are outlined in the report. The Court finds that the same reasoning applies to the damages calculations. Myers performed the calculation based on the formula supplied by plaintiffs' counsel which is not out of the realm in litigation no matter how simple or how complex the formula. Ultimately, the Court finds that these matters go to the weight and/or credibility that the Court/jury should give to Myers' opinions, not to their admissibility. Further, defendants' specific disputes with Myers' analysis are appropriate subject matter for cross-examination. Accordingly, the Court denies the motion to exclude the testimony and report of Tomas A. Myers (Doc. 471).

Lauren J Stiroh, PH. D.

Lauren J. Stiroh, PH.D., is an economist and a Senior President of NERA Economic Consulting. NERA provides research and analysis in the field of applied microeconomics, including the economics of competition,

regulation, and finance. A substantial part of her work and NERA's work is in the determination of economic damages. She holds a Ph.D. in economics from Harvard University, a M.A. in economics from the University of British Columbia and a B.A. in economics from the University of Western Ontario. Dr. Stiroh specializes in the economics of antitrust, intellectual property, and commercial damages. She has conducted research, prepared expert reports, and testified in court on a variety of issues arising from antitrust allegations such as monopolization, exclusionary conduct, tying, vertical restrictions, price fixing, predatory pricing, price discrimination, and abuse of standard setting. She has also written expert reports and consulted on matters related to assessing impact and damages in class action litigation. She has published numerous articles on economic issues in litigation and has given numerous presentations for the American Bar Association and law schools. She has presented her research before the FTC, the DOJ and the Canadian Competition Bureau. Clearly, Dr. Stiroh has extensive experience evaluating damages and injury from an economic perspective.

Specifically, State Farm asked Dr. Stiroh:

> "[T]o assess Plaintiffs' proposed measure of class-wide and individual damages in connection with …. I have also been asked to assess whether the existence and magnitude of impact to proposed class members can be determined reliably and predominately on the basis of class-wide evidence, without considering substantial evidence relating to individual members of the alleged class, and whether membership in the

> class can be ascertained with information common to the class, or indeed with any available information."

(Doc. 467-6, p. 4)(footnote omitted).

Dr. Stiroh concluded:

> "Based on the foregoing analysis, I have concluded that there is no basis for Plaintiffs' claim that all purported class members suffered injury in the amount of an equal share of the fill amount of the Illinois Appellate Court verdict. There is no basis to assert that that verdict would have been upheld on appeal, or that outcomes would have been any different absent State Farm conduct complained of in this case. Even if the lower court verdict had been upheld, economic injury, if any, cannot be determined with information common to the class. Individual issues predominate in determining both the fact of injury and the amount of injury to each purported class member."

(Doc. 467-6, p. 19).

Plaintiffs argue that Stiroh is not qualified to offer her opinions, that her opinions are beyond her area of expertise as an economist, and that her testimony is confusing and irrelevant to the issues in this case. Defendants oppose the motion arguing that Stiroh is qualified, that her methods are reliable, that her opinions are economic, not legal and that they are relevant to show the lack of economic basis for plaintiffs' assertion that common issues predominate.

Here, the Court finds that pursuant to Rule 702 certain portions of Stiroh's report are both relevant and reliable while other portions invade the province of the Court. The Court concludes that Stiroh has explained her analysis in her report and the analysis is verifiable. Her report is based

upon accepted principles of economy and accepted methodology. She based her opinions on her review of the materials and data regarding the underlying *Avery* case and this case. Her principles and methods are reflected in the Federal Judicial Center's *Reference Manual for Scientific Evidence* (3d ed. 2011). She began her analysis with the economic principle that the "damage suffered by an injured party is equal to the difference between the economic circumstances that party would have experienced absent the alleged misconduct and its actual economic damages." (Doc. 467-6, p. 8). A majority of what she opines is based on the information she was provided with and therefore is subject to cross examination and to scrutiny by the finder of fact.[4] However, as to the

[4] These opinions are contained in paragraphs 20 through 23 of her report:
"20. Information I have reviewed suggests that even absent Justice Karmeier's participation in the appeal of the *Avery* action, the Illinois Supreme Court would not have fully affirmed the Appellate Court findings. The votes of the other Illinois Supreme Court Justices in the *Avery* appeal indicate that if Justice Karmeier recused himself:

a. The Justices would have unanimously decided not to affirm the nationwide class certification decision for breach of contract damages, citing differences in the language of the State Farm policies and issues regarding the application of Illinois contract law to non-Illinois policyholders.
b. The Justices would have unanimously decided not to affirm the breach of contract specification damages, finding that those damages have 'no basis in the law' and noting that Dr. Iqbal Mathur, Plaintiffs' expert in the *Avery* litigation, testified at trial that his theory of specification damages did not make 'economic sense.'
c. The Justices would have unanimously decided not to affirm the consumer fraud award. The Justices unanimously agreed that the Consumer Fraud Act could not be applied to policyholders outside Illinois, and the lone class representative from Illinois, Sammy DeFrank, did not suffer any cognizable harm as a result of State Farm's alleged actions.

21. Thus, there is no basis in the record of the Illinois Supreme Court votes for asserting that Plaintiffs suffered injury equal to the full magnitude of the Appellate decision as a result of State Farm's allegedly unlawful actions. **Exhibit 3** shows the rulings of the Illinois Supreme Court on various issues from the *Avery* litigation, with and without the vote of Justice Karmeier. As can be seen in the exhibit, there does not appear to be any basis to assert that the Supreme Court rulings would have been any different on the

opinions contained at paragraphs 24-35, the Court finds that these opinions certainly invade the province of the Court and do nothing to aid the Court's understanding of the issues and must be stricken.[5] Accordingly, the Court denies in part and grants in part the report of Lauren J. Stiroh (Doc. 487). The Court grants the motion as her opinions contained in paragraphs 24 through 35 of the report and strikes those opinions as invading the province of the Court and failing to aid the Court in understanding the issues with which the opinions deal.

Ricard W. Painter

Richard W. Painter is the S. Walter Richey Professor of Corporate Law at the University of Minnesota Law School. In addition to other subjects, he teaches professional responsibility courses that addresses lawyers' ethics and judicial ethics at the University of Minnesota Law School. Professor Painter received a B.A. from Harvard University in 1984 and a J.D. from Yale Law School in 1987. He served as the chief ethics

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majority of the issues without Justice Karmeier's votes, and Plaintiffs have not provided any analysis or reasoning to suggest otherwise.
22. Plaintiffs make no definitive allegations as to whether Justice Karmeier would or would not have occupied a seat on the Illinois Supreme Court absent State Farm's allegedly wrongful conduct, nor have they suggested that the Illinois Supreme Court reached an erroneous decision. Thus, they have not, in any way, articulated what they believe to be the but-for world. Without a full description of the but-for world, there is no basis for Plaintiffs to claim that outcomes would have been different absent the allegedly wrongful behavior, and therefore no basis for their claim of economic damages.
23. As stated above, economic damages are the difference in the economic outcomes the Plaintiffs actually experienced and those they would have experienced absent the allegedly wrongful conduct. Plaintiffs have not shown any reason why outcomes would have been any different absent the alleged wrongful conduct or even made an attempt to describe what those outcomes would be. As such, they have not established that the proposed class suffered any economic damage as a result of State Farm's allegedly wrongful conduct." (Doc. 467-6, ps. 10-11)(footnotes omitted).

[5] These opinions are contained in the section entitled "IV. Analysis of the Proposed Class Necessitates Individualized Inquiry" of her report. (Doc. 467-6, ps. 12-16).

lawyer for President George W. Bush and White House staff from February 2005 to July 2007. He has written extensively on the subjects of lawyers' ethics, judicial ethics and government ethics. He is an advisor to the American Law Institute project on government ethics. From 1998 to 2005, he served as a full time law professor at the University of Chicago College of Law, teaching legal ethics and other courses. From 2014 to 2015, Professor Painter was a Fellow at Harvard University's Safra Center for Ethics where he wrote a book on campaign finance reform to be published by the Oxford University Press. Unmistakably, Painter has the credentials to offer his opinions.

The issues defendants asked Painter to offer opinions about the following:

> "The issues upon which I opine below are (i) whether a RICO class action is a superior or even appropriate remedy as compared with other available methods, for fairly and efficiently adjudicating the propriety of advocacy in a prior underlying litigation; (ii) whether a RICO class action is a superior or even appropriate remedy as compared with other available methods, for fairly and efficiently adjudicating standards of judicial ethics and due process claims grounded in the Supreme Court's opinion in *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009), upon which Plaintiffs purport to ground their RICO claims; (iii) whether plaintiffs' counsel in this case can adequately represent the class when there are conflicting positions between the arguments they are making here and their own conduct in making and not disclosing substantial campaign contributions in 2004 and 20014 to organizations opposing the election and retention of Justice Karmeier; as well as their own substantial contributions to other Illinois Supreme Court election and retention campaigns; and (iv) whether plaintiffs' counsel in this case can adequately represent the class after they submitted to the Illinois Supreme

> Court an affidavit from an expert investigator even though the same investigator had already made conflicting factual representations to lawyers representing plaintiffs in a different case and that fact was not disclosed to the Illinois Supreme Court."

(Doc. 467-7; p. 3). Painter, in his report, concluded the following:

> "This RICO Class Action is not a superior method for adjudicating the propriety of advocacy by State Farm and its counsel. This Class Action is also not a superior method for adjudicating whether Justice Karmeier adhered to standards of judicial ethics or whether the Illinois Supreme Court adhered to due process standards set forth by the United States Supreme Court in *Caperton*. Furthermore, plaintiffs' counsel's campaign contributions against Justice Karmeier create an insurmountable conflict of interest that prevents class counsel from adequately representing the class in advancing the argument that contributions require recusal and must be disclosed by all parties to a recusal motion. Plaintiffs' counsel's expert investigators' undisclosed conflicting factual accounts also create serious questions about the candor of plaintiffs' counsel."

(Doc. 467-7 p. 28).

Plaintiffs argue that Professor Painter's testimony and opinions are irrelevant and unreliable; that he is not qualified to opine on whether superiority and adequacy are satisfied and that his opinions usurp the factfinder's role. Defendants oppose the motion arguing that "[p]laintiffs' objections to Professor Painters' opinions boil down to disagreement with his analysis and conclusions. They have proffered no cognizable reasons to exclude his Report and testimony." The Court agrees with defendants.

The Court finds that pursuant to Rule 702 Professor Painter's opinions are admissible. As stated above, Professor Painter is qualified to opine on the issues of judicial and lawyers' ethics. His opinions in this case

are within the scope of his expertise. Professor Painter explained his analysis based on the professional rules of conduct. Certainly, like Geyh, Myers, and Stiroh (in part), Painter's report is subject to scrutiny and to a test of the weight and the credibility by the fact finder on the whole and even as to relevance as to part. Accordingly, the Court denies the motion to exclude the expert report and testimony of Richard W. Painter (Doc. 489).

Ronald D. Michaelson

Dr. Ronald D. Michaelson was the Executive Director of the Illinois State Board of Elections for 27 years. While he was the Executive Director, he was also a member of the Council of Governmental Ethics Laws and served on its Board of Directors for several years and was the Chairmain for one year. Prior to working at the Illinois State Board of Elections, Michaelson was a top assistant to Governor Richard B. Ogilive. Michaelson earned a doctorate degree in Government from Southern Illinois University-Carbondale. Michaelson has served on the Advisory Committee of the Federal Election Commission and the Board of Trustees of the Campaign Finance Institute (Washinton, D.C.). He also has served as an Adjunct Professor of Political Science at the University of Illinois – Springfield and at Wheaton College and as a full time professor. During the past thirty years, he has written and published numerous articles on elections and campaign finance.

Defendants asked Doctor Michaelson to issue opinions on the following:

> "[T]o assess and evaluate contributions made in the 2004 race for the Illinois Supreme Court seat for the Fifth Judicial District. The candidates were Gordon Maag and Lloyd Karmeier. This report presents my analysis of the contributions made in the aforementioned race. I have also been asked to evaluate contributions made by certain plaintiffs' counsel in this case to the Illinois Supreme Court candidates, both in respect to the 2004 election and other judicial elections. The materials I have reviewed and considered in connection with this report are listed in Exhibit B. I am being compensated at a rate of $225 per hour for my work on this matter."

(Doc. 467-8, p. 6).

Michaelson provided the following "observations" at the conclusion of his report:

(1) "Both State political parties undertook major roles in supporting their respective candidates. Combined they contributed, either directly or in-kind, almost $4.75 million.
(2) Two PAC's were also major contributors, combining for about $2.5 million.
(3) For the Maag campaign, the trial bar firms and its attorneys were very significant contributors. Their contributions to the campaign and to the Democratic Party were especially significant and substantial in the final two weeks of the general election campaign.
(4) Plaintiff's counsel in *Avery* and *Hale* were significant contributors not only in the Maag/Karmeier race but in other contests for the Illinois Supreme Court, including both initial partisan elections as well as retention elections.
(5) As compared to Maag, the Karmeier campaign had a much broader contribution base. It had more individual contributors, relying far less on in-kind contributions. Hundreds of business interests certainly played a major role, but there was not concentration of influence as there was in the Maag campaign.
(6) Illustrative of the former point is Karmeier had 111 contributors to his retention campaign in 2014 (Illinoisans for Karmeier), while the anti-retention campaign (The Campaign for 2016) had but 16 contributors. The 111 Karmeir contributors gave $309 K; the 16 anti-Karmeier contributors, all trial bar interests, gave $2.7 million.
(7) Disclosure filings do not reflect that State Farm contributed any money to Karmeier or JUSTPAC. Some State Farm employees contributed individually, but the aggregate totals were just $5,700."

(Doc. 476-8, p. 20).

Specifically, plaintiffs seek to exclude Michaelson's "observations." Plaintiffs argue that his observations are irrelevant, without support and they do not rise to the level of expert opinion. Defendants counter that the report is based on sufficient facts, it is admissible as a summary, and his reasoning and methodology are reliable and based on his experience. The Court agrees with plaintiffs' reasoning.

The Court finds that Michaelson's report and testimony do not survive a Rule 702 analysis as the Court finds that his report and testimony do not assist the fact finder. A review of the report indicates that it is nothing more than a summary and Michaelson's "observations" state what appears on the surface to come from what he has gleaned from the records. Clearly, his "observations" are a recitation of publically available campaign contribution information with an editorial. It appears to the Court that he has done no probing, he has not compared those records with the discovery in the case and he has not done any independent analysis. In fact, Michaelson concedes that he was not supplied with, nor did he have, seek or use more information than the summary of contributions maintained by the Illinois State Board of Elections in formulating his opinions. Simply, he has performed a rudimentary analysis/report that contains bias that can be associated with the consulting fee paid to him. His observations do not rise to the level of expert testimony and will not help the factfinder.

Accordingly, the Court grants plaintiffs' motion to exclude expert report of Ronald D. Michaelson (Doc. 490). The Court bars the expert report and testimony of Ronald D. Michaelson.

**Conclusion**

Accordingly, the Court **DENIES** the motion to exclude the testimony and report of Charles G. Geyh (Doc. 469); the motion to exclude the testimony of Thomas A. Myers (Doc. 471) and the motion to exclude expert report and testimony of Richard W. Painter (Doc. 489). Further, the Court **GRANTS in part** and **DENIES in part** the motion to exclude expert report of Lauren J. Stiroh, Ph.D. (Doc. 487). Lastly, the Court **GRANTS** the motion to exclude expert report of Ronald D. Michaelson, Ph.D. (Doc. 490).

**IT IS SO ORDERED.**

Signed this 2nd day of June, 2016.

David R. Herndon

Digitally signed by Judge David R. Herndon
Date: 2016.06.02 15:31:45 -05'00'

**United States District Judge**