5-7-2009

Order on Motion to Exclude Testimony of Robert Gray (JAMES & JACKSON LLC)

Alice D. Bonner
Superior Court of Fulton County

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

JAMES & JACKSON LLC, individually and derivatively on behalf of MBC, GOSPEL NETWORK, LLC., Plaintiffs, v. EVANDER HOLYFIELD, JR., WILLIE E. GARY, CECIL FIELDER, LORENZO WILLIAMS, THOMAS WEIKSNAR, CHAN ABNEY, LORI METOYER-BROWN, and RICK NEWBERGER, Defendants.	Civil Action No.: 2006CV124372

ORDER ON MOTION TO EXCLUDE TESTIMONY OF ROBERT GRAY

On April 13, 2009, the parties appeared before this Court on Defendants' Motion in Limine to Exclude the Testimony of Robert Gray ("Gray"), Plaintiff's damages and valuation expert prepared to testify about the value of MBC, as well as to provide a critique of the Shannon Pratt valuation relied upon by Defendants. After reviewing the briefs of the parties, Gray's report and his deposition, the record of the case, and the arguments presented by counsel, the Court finds as follows:

FACTS

This case involves a dispute arising from an April 2006, cash-out merger of MBC Gospel Network, LLC ("MBC"), a Delaware limited liability company, into Programming Acquisitions ("Programming"), also a Delaware limited liability company.

Plaintiff James and Jackson LLC ("J&J") was a founding member and twenty percent (20%) member of MBC. Willie Gary, LLC ("WGLLC") was the controlling, and only other member of MBC, with eighty percent (80%) interest.[1]

In 2005, WGLLC filed suit in Delaware Chancery Court to compel J&J's consent to the addition of a third member, or, in the alternative, to dissolve MBC. Chancellor Strine found that the MBC Operating Agreement did not condition the withholding of consent on reasonableness, and thus, the Delaware Court could not compel J&J's consent. Thereafter, the parties discussed dissolution of MBC. WGLLC, however, withdrew the petition prior to a final order or other action in the case.

In April 2006, WGLLC formed Programming, the entity into which MBC merged. WGLLC has several members including Defendants Evander Holyfield, Jr., Willie E. Gary, Cecil Fielder, Lorenzo Williams, Chan Abney, and Lori Metoyer Brown, all of whom were on the Management Board of MBC. In addition, Defendant Rick Newberger was the CEO of MBC and became the CEO of Programming. Defendant Thomas Weiksnar was on the Management Board of MBC, served as counsel for WGLLC, and became the Secretary of Programming. On April 26, 2006, Programming and MBC finalized a $1 cash-out merger.

On April 30, 2007, Gospel Music Channel LLC ("GMC") purchased Programming for $10 million, plus 2.943 million shares, as well as an equity bonus contingent upon a certain liquidity event, in exchange for the assignment by Programming to GMC of all of Programming's right, title and interest under Programming's (formerly MBC's) satellite

[1] The parties represent that J&J held a 20% interest and WGLLC held an 80% interest in MBC, although careful review of the record shows that WGLLC granted MBC CEO Rick Newberger a 3% interest in MBC, which Newberger held at the time of the merger. After the merger, Newberger became CEO of Programming, but held no interest in Programming.

distribution agreement with HITS (a Colorado corporation). The shareholders of Programming executing that transaction were Cecil Fielder, Willie Gary, Evander Holyfield, Lorenzo Williams and Maria Sperando (who was listed, but did not execute the agreement). All had previously been shareholders of WGLLC.

Plaintiff complains that the merger was a self-interested transaction and raises several direct and derivative claims of breach of fiduciary duty, aiding and abetting, and conspiracy of breach of fiduciary duty.

THE DAUBERT STANDARD

In 2005, the Georgia General Assembly adopted O.C.G.A. § 24-9-67.1, which requires a trial court to apply the federal Daubert rule in assessing the admissibility of expert testimony; therefore federal authority, as well as Georgia law, is relevant to the question of admissibility. See, Mason v. Home Depot U.S.A., 283 Ga. 271 (2008). Pursuant to both O.C.G.A. § 24-9-67.1 and Daubert, once a court determines that "scientific, technical, or other specialized knowledge will assist the trier of fact," an expert may give opinion testimony so long as such testimony is reliable and relevant. O.C.G.A. §24-9-67.1; Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 589-595 (1993). O.C.G.A § 24-9-67.1 defines reliable and relevant factors as testimony that is based upon sufficient facts or data, is the product of reliable methods, and is the product of a reliable application of the methods to the facts of the case.

The Daubert standard is liberal and favors admissibility. See, e.g., KSP Investments, Inc. v. U.S., 2008 WL 182260 (N.D. OH 2008) ("As commentators have noted, Rule 702 evinces a liberal approach regarding admissibility of expert testimony. Under this liberal approach, expert testimony is presumptively admissible."); In re Scrap Metal Antitrust Litigation, 527 F.3d 517, 530 (2008) ("[R]ejection of expert testimony is

the exception, rather than the rule."); see also, Mason, 283 Ga. at 279 (holding that it is "proper to consider and give weight to constructions placed on the federal rules by federal courts when applying or construing" O.C.G.A. § 24-7-67.1 because the Georgia statute was based upon Rule 702 and Daubert). The burden to establish admissibility falls upon Plaintiffs as the proffering parties. Netquote, Inc. v. Byrd, 2008WL 2442048, at *6 (D. Colo. 2008). In a Daubert inquiry, the trial court acts as a "gatekeeper" in determining whether the expert is qualified to testify. See, e.g., CSX Transp., Inc. v. McDowell, 2008 WL 5050020 (Ga. App. 2008).

THE DAUBERT ANALYSIS

A. Qualification of Mr. Gray

Defendants do not contend that Gray is not qualified to serve as a damages and valuation expert in this case. They do, however, challenge his use of a calculation engagement rather than a valuation engagement to value the minority shareholder's interest here, and they allege that Gray, contrary to Delaware law, also employed reductions for lack of control or marketability of shares in calculating the value of the minority shareholder interest. Defendants also argue that Gray improperly raised the level of valuation service he provided from a calculation engagement to a valuation engagement, thus generating new opinions for J&J's 20% interest after the expert's deposition.

Defendants further contend that: 1) Gray's reclassification of $28.76 million in liabilities to equity was not permitted under the AROA; 2) certain of Gray's disclaimers demonstrate the unreliability of the valuation he performed; 3) Gray he did not consider bankruptcy as one of his valuation scenarios, and 4) Gray failed to perform a truly independent analysis to ascertain the fair value of MBC.

B. Reliability and Relevance of Mr. Gray's Opinion

1. Calculation Engagement

Defendants challenge the admissibility of Gray's testimony on the grounds that he based his opinion of the value of MBC on a calculation engagement which is only a subjective engagement to estimate value and, as such, is subjective, speculative and imprecise. Thus, Defendants argue that the calculation value method does not provide a conclusive estimate of value upon which jurors can rely. However, Defendants also argue that it was improper for Gray to raise the level of valuation service he provided from a calculation engagement to a valuation engagement in a supplemental valuation filed via affidavit on January 20, 2009.

In Weinberger, the Delaware Supreme Court "broadened the process for determining the 'fair value' of the company's outstanding shares by including all generally accepted techniques of valuation used in the financial community." Paskill Corp. v. Alcoma Corp., 747 A.2d 549, 556 (Del. 2000). The Court took "a more liberal approach [relying on] proof of value by any techniques or methods which are generally considered acceptable in the financial community and otherwise admissible in court," subject only to its interpretation. Weinberger v. U.O.P., 457 A.2d 701, 713 (Del. 1983). Choices about valuation methodology have not been restricted by the Delaware legislature or Delaware courts, with such choices made on a case-by-case basis by the fact-finder, although discounts and control premiums are not allowed.

Pretermitting any discussion of whether a calculation value method is reliable in this case, Gary has submitted Supplemental Estimated Conclusions of Fair Value for J&J's Subject Interest, pursuant to his performance of a valuation engagement, which yielded a higher company value. Defendants point to the discrepancy between the

calculation engagement and the valuation as evidence that the calculation engagement method is unreliable in this case. Mr. Gray's use of the calculation engagement method alone is not sufficient grounds to bar his testimony regarding the value of MBC at the time of the Programming merger. The price discrepancy between the two estimates is best addressed through cross examination.

2. Recalculated Opinions Pursuant to a Valuation Engagement

Defendants also challenge Gray's valuation engagement because they say he lacked critical information, such as a solvency analysis of MBC, or whether MBC would have qualified for bankruptcy reorganization.

MBC, however, was not in bankruptcy. In fact, bankruptcy is an option that Defendants refused to take preferring instead to pursue the merger with Programming. Additionally, under Delaware law post-merger valuations, although often performed in the context of a statutory appraisal, are performed as a "going concern." See, e.g., Highfields Capital, Ltd., v. AXA Financial, 939 A.3d 34 (Del. Ch. 2007); Mercier v. Inter-Tel (Delaware), Inc., 929 A.2d 786 (Del. Ch. 2007). Finally, such concerns are best addressed via cross examination rather than a bar to testimony.

3. Minority Shareholder Discount

Defendants attack the reliability of Gray's testimony on the grounds that Gray used reductions for lack of control or marketability of shares in calculating the value of the minority shareholder interest, which is forbidden. "In Bancorporation, [the Delaware Supreme Court] once again held that, after the entire corporation has been valued as a going concern by applying an appraisal methodology that passes judicial muster, there can be no discounting at the shareholder level." Paskill, 747 A.2d 549, 557. Mr. Gray,

however, provided two numbers: one with the discount and another without. Prior to the start of the trial, Defendants may move the court in limine to exclude Mr. Gray's testimony regarding the value that reflects the minority discount, as such discounts are contrary to Delaware law. The inclusion of such a discount does not warrant the exclusion of Mr. Gray's testimony under the Daubert standard.

4. Specific Elements of the Valuation

a) Reclassification of MBC loans as equity

Defendants challenge the admissibility of Mr. Gray's testimony on the grounds that he improperly classified MBC's loans as equity in MBC. This is a question of law to be determined by the Court at a later time. Since this issue is not yet resolved in favor of either Plaintiffs or Defendants, it is appropriate that Mr. Gray's valuation included an estimate based upon the classification of the money under one scenario as a loan and under another as equity.

b) Gray's disclaimers and independent

Defendants challenge the admissibility of Mr. Gray's testimony on the grounds that he is not independent and provided disclaimers which undermine the reliability of his valuation. The Court finds nothing in the record to suggest that these issues are not best dealt with through cross examination.

C. Assisting the Trier of Fact.

Defendants assert that Gray's opinions will not assist the trier of fact because Gray does not profess to have performed a valuation to determine the fair value of those holding interest in MBC at the time of the merger. The valuations performed by

Gray as of the time of oral argument on this motion, including the valuation engagement, are sufficiently assistive and shall not be excluded.

CONCLUSION

Defendants raise significant challenges to the facts, assumptions, explanations, and choices Gray made in conducting his evaluation and rendering his expert opinion. "Whether those explanations will withstand rigorous cross-examination, or challenges based on alternative assumptions or data choices, is not the issue now before the Court." In re Scrap metal Antitrust Litigation, 527 F.3d 517, 527 (2008). Accordingly, the Court finds that Gray is qualified as an expert and that his opinion testimony is both reliable and relevant. See, e.g., id. at 529 ("[A] determination that proffered expert testimony is reliable does not indicate, in any way, the correctness or truthfulness of such an opinion."). Defendants' Motion to Exclude the Testimony of Robert Gray is hereby **DENIED**.

SO ORDERED this 7 day of May, 2009.

Alice D. Bonner

ALICE D. BONNER, SENIOR JUDGE
Superior Court of Fulton County
Atlanta Judicial Circuit

Copies to:

Jerry A. Landers, Jr.
GREEN JOHNSON & LANDERS LLP
166 Anderson Street
Suite 200
Marietta, Georgia 30060
770.795.1299 office
770.206.2323 facsimile
www.jerrylanderslaw.com
jallaw@earthlink.net

Of Counsel
William Brewer III, Esq.
Michael Collins, Esq.
Eric Haas, Esq.
Andrew L. Poplinger, Esq.
Daniel C. Skinner, Esq.
C. Dunham Biles, Esq.
BICKEL & BREWER
4800 Bank One Center
1717 Main Street
Dallas, Texas 75201
(214) 653-4000/ (214) 653 1015 (*fax*)

Mary Ann Diaz, Esq.
Chanthina Bryant Abney, Esq.
Maria P. Sperando, Esq.
GARY WILLIAMS PARENTI FINNEY LEWIS MCCANUS WATSON & SPERANDO PL
221 East Osceola Street
Stuart, Florida 34994
(772) 283-8260/ (772-283-4996 *(fax)*

Of Counsel:
Anthony L. Cochran, Esq.
John K. Larkins, Esq.
CHILIVIS, COCHRAN, LARKINS & BEVER, LLP
3127 Maple Drive
Atlanta, Georgia 30047
(404) 233-4171/(404) 261-2842 *fax*