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Alice D. Bonner
Superior Court of Fulton County

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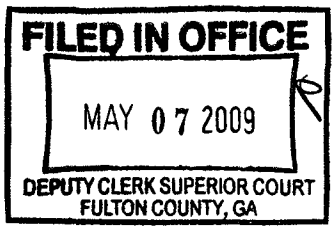
IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

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



ORDER ON MOTION TO EXCLUDE TESTIMONY OF DAVID A. DUFFUS

On April 13, 2009, the parties appeared before this Court on Defendants' Motion in Limine to Exclude the Testimony of David D. Duffus ("Duffus"), Plaintiff's expert prepared to testify regarding the reasonableness of the terms of the MSO affiliation agreements between MBC Gospel Network, LLC and its cable and satellite operators ("MSO Agreements"). After reviewing the briefs of the parties, Duffus's report and his deposition, the record of the case, and the arguments presented by counsel, the Court finds as follows:

I. 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 a 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.

II. 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 party. 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).

III. The Daubert Analysis

A. Overview of the Expert

Mr. Duffus holds a B.A. and MBA from the University of Pittsburgh (1989 and 1992 respectively). In addition, Mr. Duffus is a Certified Public Accountant, Certified Fraud Examiner, and Business Valuation expert. Mr. Duffus is a principal of the accounting firm, Parente Randolph, LLC, and a manager of the Forensic Accounting and Litigation Services. Mr. Duffus has served as an expert in many cases, typically regarding business valuations or damages calculations. In two previous cases, Mr. Duffus has dealt specifically with the cable industry and reviewed various MSO Agreements in order to calculate a damages estimate. In formulating his opinion, Mr. Duffus conducted research via public filings available through the SEC, reviewed MSO Agreements of cable stations including PBS Kids, Outdoor Channel, and American Voice, as well as conducted a review of the MBC MSO Agreements and relevant articles.

B. Qualification of Mr. Duffus

Defendants contend that Duffus is not qualified to serve as an expert regarding whether the MBC MSO Agreement terms were "standard" for the industry because he does not have education or professional experience in the cable industry. Additionally, Defendants assert that the testimony proffered by Mr. Duffus asks for a legal opinion which, as a non-attorney, Mr. Duffus is not qualified to give.

Pursuant to the gatekeeping function that the Court is charged with under Daubert, there is no requirement that the expert be educated "in a particular trade, science or profession. Formal education or training in an area of expertise is not necessary, provided, the witness possess the qualifications of such area of expertise through skill and experience." In the Interest of C.W.D., 232 Ga. App. 2000, 206 (1998).

The Court finds that the issues raised by Defendants go to weight, rather than admissibility. Daubert established that "[v]igorous cross examination, presentation of contrary evidence, and careful instructions on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." Daubert v. Merrell Dow Pharms., 509 U.S. 579, 596 (1993). Here, Mr. Duffus has an M.B.A. and well as other professional certifications relevant to business evaluations and reviews. Although limited in scope, Mr. Duffus also has previous experience with the cable industry and MSO agreements. The Court finds that Mr. Duffus is qualified as an expert, possessing the research and industry skills to engage in a professional study of MSO Agreements and terms.

C. Reliability and Relevance of Mr. Dufus' Opinion

Defendants also oppose the admission of Mr. Duffus' testimony on the grounds that his opinion is unreliable. Defendants highlight Mr. Duffus' lack of professional

experience in the cable industry, failure to review the MSO of certain cable networks such as BET, and the differences between MBC and the cable companies' MSO Agreements reviewed by Duffus. The Court finds that such issues go to weight rather than admissibility. Mr. Duffus is qualified as an expert to explain to the jury the study that he conducted and his conclusions arising therefrom.

IV. Conclusion

Defendants raise significant challenges to the facts, assumptions, explanations, and choices Duffus 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 Duffus 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 David D. Duffus 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

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