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Order on Motion to Exclude (BARTON PROTECTIVE SERVICES, LLC)

Elizabeth E. Long
Superior Court of Fulton County

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IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

BARTON PROTECTIVE SERVICES, LLC And SPECTAGUARD ACQUISITION, LLC,	**Civil Action No.: 2006CV115190**
Plaintiffs,	
v.	
CHARLES BARTON RICE, SR., CHARLES BARTON RICE, JR. TRUST, KIMBERLY ANN RICKEY TRUST, KATHRYN PROULX, and THE BANK OF NEW YORK TRUST COMPANY, N.A.	
Defendants.	

DEC 10 2008

ORDER ON MOTION TO EXCLUDE

On November 24, 2008, the parties appeared before this Court on Shareholder Defendants' Motion to Exclude the Testimony of Chelton E. Tanger, Plaintiffs' damages expert. After reviewing the briefs of the parties, Mr. Tanger'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 arises from a 2004 merger between Barton Protective Services LLC ("Barton"), which was owned by Defendants Charles Barton Rice, Sr., Charles Barton Rice, Jr. Trust, Kimberly Ann Rickey Trust, and Kathryn Proulx (collectively "Shareholder Defendants") and Spectaguard Acquisitions, LLC (after the merger, doing business as "AlliedBarton"). The merger agreement between the parties (the "Merger Agreement") contained a series of representations, warranties, and covenants, as well as certain indemnification obligations.

Pursuant to the terms of the Merger Agreement, Plaintiffs notified Shareholder Defendants of certain alleged breaches and requested that damages be paid from an escrow account created at the closing. After Shareholder Defendants disputed the alleged breaches, Plaintiffs brought this action.

On March 10, 2008, the Court issued an order denying Plaintiffs' Motion for Summary Judgment and granting in part and denying in part Shareholder Defendants' Motion for Summary Judgment. Plaintiffs retained Mr. Tanger to provide damage valuations on two claimed breaches of warranty arising from Barton's obligations pursuant to the California Uniform Maintenance Allowance ("CUMA") and its contract with the Army & Air Force Exchange Service ("AAFES"). After Mr. Tanger submitted his expert report and sat for a deposition, Shareholder Defendants filed a Motion to Exclude the testimony of Mr. Tanger.

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 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).

III. The Daubert Analysis

A. Qualification of Mr. Tanger

Shareholder Defendants do not contend that Mr. Tanger is not qualified to serve as a damage expert in this case. They do challenge his use of a market multiple approach and claim that he did not address the fair market value of Barton as conveyed and as warranted.

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

Shareholder Defendants' challenges to the admissibility of Mr. Tanger's testimony can be summarized under two broad categories (1) the utilization of inaccurate data and underlying assumptions in calculating the estimated damages, and (2) the applicability, as well as the methodology, of the market multiple approach to calculate the estimated damages.

1. Challenges to the Data and Underlying Assumptions

Shareholder Defendants challenge the admissibility of Mr. Tanger's testimony on the grounds that he based his calculations on inaccurate data and improper assumptions. For example, Shareholder Defendants challenge Mr. Tanger's reliance upon a chart prepared by Betty Ritts, a BartonAllied employee, in calculating the number of employees who allegedly did not receive the CUMA allowance. Shareholder Defendants assert that even after amending the chart, which was prepared from payroll records, it incorrectly includes at least nine employees as requiring CUMA allowance. Shareholder Defendants challenge the accuracy of the chart, as

well as Mr. Tanger's reliance upon it, rather than conducting his own investigation and calculations.

In addition, Shareholder Defendants challenge certain assumptions Mr. Tanger made in calculating his damage estimates which were based upon the sum of the number of employees identified by Ms. Ritts' chart multiplied by the amount of the weekly CUMA payment (assumed to be $6.75), times 52 (representing 52 weeks in a year), and the multiple (to be discussed below). Shareholder Defendants assert that Mr. Tanger incorrectly assumed that a CUMA payment was required. Citing a California Supreme Court case, Gattuso v. Harte-Hanks Shoppers, Inc., 169 P.3d 889 (Cal. 2007), Shareholder Defendants argue that there is a no-cost way to comply with the regulations because Plaintiffs pay above market-rates and therefore could notify the employees that a certain amount of their wages would be designated to cover CUMA. In addition, Shareholder Defendants assert that employee turn-over rates would allow Plaintiffs to cure any CUMA liabilities by hiring new employees at a reduced rate and designating an additional amount as a CUMA payment. Shareholder Defendants assert that customer turn-over rates and the ability to pass along "compliance costs" to customers, neither of which were factored into Mr. Tanger's analysis, render his damage estimates unreliable. Shareholder Defendants also contest Mr. Tanger's assumption that the contracts existing at the time of the merger would continue forever.

Plaintiffs ask the Court to distinguish between challenges that address admissibility and challenges that address credibility alone. 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).

In In re Scrap Metal Antitrust Litigation, 527 F.3d 517 (6th Cir. 2008), the Sixth Circuit affirmed the admissibility of expert testimony despite defendants' challenges that the expert utilized an inaccurate price index and erroneous data. The Sixth Circuit stated that defendants' challenges confused the issues of "credibility and accuracy." Id. at 529. "The task for the [trial] court in deciding whether an expert's opinion is reliable is not to determine whether it is correct, but rather to determine whether it rests upon a reliable foundation, as opposed to, say, unsupported speculation." Id. at 529-530; see also KSP Investments, Inc., v. U.S., 2008WL 182260, at *7 (finding expert testimony admissible despite challenges that the valuation was based upon an estimated EBITDA rather than actual EBITDA because cross examination could properly resolve any discrepancy).

Shareholder Defendants cite to Hawkins v. OB-GYN Assoc., P.A., 290 Ga. App. 892 (2008), in which the Georgia Supreme Court affirmed the exclusion of expert testimony. In Hawkins, the expert's opinion was excluded as speculation and conjecture because the Court found that the expert assumed the source of injuries at issue without reviewing the medical records related to the incident, did not practice in a related field, and had no experience with the type of injury involved in the case. Id. at 896-897. In the instant case, Mr. Tanger's report established that he based his calculations on data provided by Plaintiffs, much of which is included in the record of this case, as well as from interviews he conducted, depositions he reviewed, employee lists generated from a central payroll system, and other historical company data.

Shareholder Defendants' basis for their characterization of the expert opinion as "speculation," addresses issues of credibility, not of admissibility. Vigorous cross examination is the proper forum for Shareholder Defendants to raise these issues such as the "non-uniform" employees included in the Ritts chart, the assumed amount of the CUMA payment, the effect of

employee/customer turn-over rates, and no-cost compliance methods available to Plaintiffs. See, e.g., Freeland v. Iridium World Communication, Ltd., 545 F. Supp. 2d 59, 87-89 (D. D.C. 2008) (finding that defendants' "factual" challenges to plaintiffs' expert's opinion including failure to perform an independent investigation, failure to conduct a comprehensive market review, and assumptions about how to cure the underlying fraud goes to "weight, not credibility").

2. Challenges to the Market Multiple

Shareholder Defendants attack the reliability of Mr. Tanger's testimony on the grounds of the inappropriateness of the market multiple method, Mr. Tanger's reliance upon the sale price of Barton, and the wide range of damages (from approximately $4.5 million to $8.3million) under the two multiples presented.

Mr. Tanger's expert report details the two market valuation methods he used to value Plaintiffs' damages in this case: (i) the acquisition multiples approach—using an EBITDA multiple, and (ii) the value of actual and unrecorded liabilities approach. Mr. Tanger determined that the most appropriate measure of damages is reached by applying an EBITDA multiple to the expenses not paid by Barton. Under this approach, he used the sale price of Barton and its 2003 EBITDA as one market comparable (creating a multiple of 17.03) and the McAndrews/Forbes 2003 acquisition of Allied Security Services (creating a multiple of 9.3) as a second comparable.

Shareholder Defendants assert that either a discounted cash flow or an unrecorded liabilities valuation should have been used rather than the market multiple approach selected by Mr. Tanger. Shareholder Defendants do not challenge the market multiple method, just its application to the facts of this case. See Lippe v. Bairnco Corp., 99 Fed. Appx. 274, *3 (2nd Cir. 2004) (affirming a district court's exclusion of expert testimony in part because the expert did not utilize a discounted cash flow analysis and provided no explanation for his decision.). Mr. Tanger did, however, consider an estimation utilizing the value of unrecorded liabilities, but

found that it was "not the most appropriate" calculation of damages because the future expenses under CUMA and AAFES were not limited to a finite number of years. Additionally, Mr. Tanger declined to utilize the discounted cash flow valuation model ("DCF") because Plaintiffs did not utilize the DCF model in determining the purchase price of Barton. While Mr. Tanger's report may be incomplete in the eyes of Shareholder Defendants, or even to a jury's eyes, his reliance upon and the selection of a market multiple to calculate the damages in this case, does not, by itself, make the testimony inadmissible. Shareholder Defendants will have sufficient opportunity on cross examination to question Mr. Tanger's rejection of the unrecorded liabilities and DCF valuation models as well as an opportunity to offer their own valuations utilizing whichever of the models their expert selects. See e.g., Celebrity Cruise Inc., v. Essef Corp., 478 F. Supp. 2d 440, 446-452 (2007) (affirming the admissibility of challenged expert testimony despite reliability challenges associated with its use of an EBITDA approach to calculating damages).

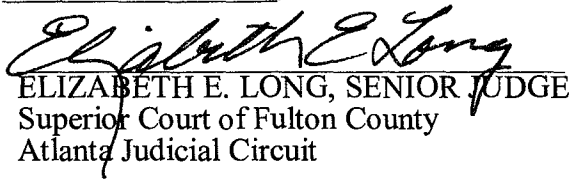
Shareholder Defendants also challenge the two sale prices he uses because they generate a range of possible damages, from $4.5 million to $8.3 million. In Netquote, Inc. v. Byrd, 2008WL 2442048, at *6 (D. Colo 2008), defendants challenged the admissibility of plaintiff's expert because he calculated the damages estimate by using a discount range of 50%-75% of all local accounts to represent lost profits attributable to defendant's fraud. In denying defendant's motion to exclude, the Magistrate Judge, writing for the District Court, stated that the discrepancy in the damages range raised credibility, not an admissibility, issues. Id. at *10 ("Certainly, an expert who claims to be either 50% right or 50% wrong raises significant uncertainty as to the credibility of his analysis. However, such doubts are properly brought before a jury.").

Finally, Shareholder Defendants assert that Mr. Tanger's testimony should be excluded because he utilized the Barton purchase as a "market comparable" and relied upon financial data from 2003 rather than more contemporaneous financial statements. In Biddiscombe International LLC, v. Gayheart, 392 B.R. 909 (M.D. Fla. 2008), the admission of expert testimony was affirmed where the damages calculation was based upon an EBITDA multiple, derived in part from the purchase price of the manufacturing plant at issue in the case. Id. at 918-920. In this case Mr. Tanger utilized the 2004 purchase price of Barton to determine a possible multiple for damages which is relevant in light of the stated damages calculation here: the difference between Barton as warranted and Barton as sold. Similarly, Mr. Tanger relied upon the 2003 financial information to generate the EBITDA multiple because the purchase price of Barton was calculated by utilizing Barton's 2003 audited financial statements.

Conclusion

Shareholder Defendants raise significant challenges to the facts, assumptions, explanations, and choices Mr. Tanger 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 Mr. Tanger 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 Chelton E. Tanger is hereby **DENIED**.

SO ORDERED this 10th day of December, 2008.



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