

**COURT OF CHANCERY
OF THE
STATE OF DELAWARE**

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Submitted: September 14, 2010

Decided: September 16, 2010

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Re: *S. Muoio & Co. LLC v. Hallmark Entm't Invs. Co., et al.*
Civil Action No. 4729-CC

Dear Counsel:

Plaintiff has filed a motion *in limine* to exclude the rebuttal submissions and expert testimony of Christopher R. Lee of Morgan Stanley & Co. Incorporated (“Morgan Stanley”) and Richard De Rose of Houlihan Lokey Howard & Zukin Financial Advisors, Inc. (“Houlihan”), submitted in response to the expert report of Daniel Schechter of L.E.K. Consulting (the “Schechter report”).¹ At the same time, Special Committee defendants have filed a motion *in limine* to exclude the rebuttal expert report and testimony of Robert S. Hamada, the Edward Eagle

¹ Plaintiff puts the terms “rebuttal” and “expert” in quotation marks throughout its briefs, perhaps to highlight its arguments as to why these reports should be excluded. I address plaintiff’s arguments but do not find it necessary to use quotation marks.

Brown Distinguished Service Professor Emeritus at The University of Chicago Booth School of Business, submitted in response to the expert report of Jerry A. Hausman, the MacDonald Professor of Economics at the Massachusetts Institute of Technology (the “Hausman report”).

I have reviewed the parties’ submissions as well as the expert reports prepared by Messrs. Lee, De Rose, Schechter, Hamada and Hauser. For reasons explained below, I deny plaintiff’s motion to exclude the rebuttal reports and expert testimony of Messrs. Lee and De Rose, and I deny the Special Committee defendants’ motion to exclude the rebuttal report and testimony of Professor Hamada.

BACKGROUND

On May 28, 2009, Crown Media Holdings, Inc. (“Crown”) received a recapitalization proposal from its controlling stockholders, Hallmark Cards, Inc., Hallmark Entertainment Investments Co., Hallmark Entertainment Holdings, Inc., HC Crown Corp., and H.A., Inc. (collectively “Hallmark”). In order to erase a large portion of Crown’s debt, the proposal would essentially convert outstanding Crown debt owed to Hallmark into preferred stock and additional equity to Hallmark, which would have the effect of increasing Hallmark’s equity stake in Crown. The Crown board appointed a Special Committee to review and make a recommendation on the proposal. The Special Committee retained Morgan Stanley for financial advice and a recommendation. Morgan Stanley performed a valuation analysis of Crown and ultimately recommended approving the recapitalization. The Special Committee hired Houlihan to provide a fairness opinion that the recapitalization was fair to Crown from a financial point of view, which it delivered.

On July 16, 2010, plaintiff filed the expert report of Mr. Schechter, who provided his opinion as to the fair value of Crown as of June 29, 2010, the day the recapitalization was completed. Also on July 16, 2010, the Hallmark defendants submitted the expert report of Professor Hausman, who provided his opinion as to the fair value of Crown before the recapitalization closed. The Special Committee defendants did not submit an expert report.

On August 9, 2010, plaintiff submitted the expert report of Professor Hamada to rebut the Hausman report. That same day, the Special Committee defendants submitted three reports to rebut the Schechter report—one from Mr. Hausman, one from Mr. Lee, and one from Mr. De Rose. Mr. Lee was one of the members of the Morgan Stanley team that valued Crown and negotiated for the

Special Committee; Mr. De Rose was a member of the Houlihan team that gave the fairness opinion to the Special Committee.

A four-day trial in this action is scheduled to begin on September 21, 2010.

The rebuttal reports of Messrs. Lee and De Rose

Plaintiff argues that the expert reports and testimony of Messrs. Lee and De Rose should be excluded under Rule 403 of the Delaware Rules of Evidence because the submissions are cumulative of Messrs. Lee and De Rose's fact testimony and lack probative value beyond that fact testimony.² Plaintiff argues further that Messrs. Lee and De Rose are not impartial witnesses, and that these submissions are inherently biased defenses of their own work.³ Special Committee defendants, on the other hand, maintain that witnesses can testify in both fact and expert capacities, and that Messrs. Lee and De Rose's submissions are only cumulative—if at all—because of plaintiff's deposition tactics.

In certain circumstances, witnesses may provide both fact and expert testimony.⁴ Messrs. Lee and De Rose were intimately involved in performing the valuations of Crown, determining whether the recapitalization would be fair to Crown, and ultimately recommending the recapitalization. They will both have ample opportunity to testify as fact witnesses at trial to the work they performed. As part of that testimony, they will likely testify regarding the advice that they gave to the Special Committee, the terms of their engagement, and an explanation

² Rule 403 provides that “[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by . . . considerations of undue delay, waste of time or needless presentation of cumulative evidence.” DEL. R. EVID. 403.

³ Plaintiff also generally challenges Messrs. Lee and De Rose's qualifications to serve as expert witnesses, suggesting that they lack the requisite expertise because, among other reasons, they are both first-time expert witnesses, they titled their submissions as “comments” instead of “expert reports,” Mr. Lee is unpublished and is not certified by any organization, and Mr. De Rose served an addendum to his expert report admitting certain mistakes and testified that portions of his rebuttal report were incorrect and should be stricken. Meanwhile, Special Committee defendants counter that plaintiff's expert Daniel Schechter is also a first-timer (expert, that is) who is similarly unpublished and holds no professional certifications. These criticisms are not dispositive. I will give appropriate weight to reports and testimony of experts based on their experience, reliability of data, and credibility at trial, but the fact that someone is providing expert testimony for the first time or is not widely published does not automatically disqualify him or her as an expert witness.

⁴ For example, an investigating police officer may testify as both a fact and expert witness. *See, e.g., Hudson v. State*, 956 A.2d 1233, 1242 (Del. 2008). A treating physician may also testify in both capacities.

of the work they performed, including the factual description of how they performed their valuation of Crown.

They may also provide expert testimony regarding their valuation methodology. The fact that Messrs. Lee and De Rose are the same financial advisors who advised Crown in this case on the value of the company and whether it should go forward with the recapitalization will obviously affect the weight accorded their testimony as “experts.” It does not, however, mean they are disqualified as such.⁵

Accordingly, plaintiff’s motion to exclude Lee and De Rose’s rebuttal reports and expert testimony is denied.

The rebuttal report of Mr. Hamada

In an April 6, 2010 stipulated scheduling order in this matter, the Court instructed the parties to limit their rebuttal expert reports to “rebutting positions taken in an opposing party’s Opening Expert Report,” and warned that “no party may submit a Rebuttal Expert Report on a topic not addressed by another party in its Opening Expert Report.”⁶ Special Committee defendants argue that Professor Hamada’s rebuttal report does not actually rebut any “position[] taken” in the Hausman report.

In order to provide his opinion as to the fair value of Crown, Professor Hausman relied in part on Morgan Stanley’s valuation in his expert analysis—his conclusions were based on “Crown’s projections, Morgan Stanley’s analysis, and the absence of observed market offers in excess of the debt even when economic times were good,” and his conclusions were also “consistent with the Evercore [Hallmark’s financial advisor] valuation of Crown as of December 2009.”⁷ Very little of the Hausman report discusses or even refers to Morgan Stanley’s financial analysis. Moreover, Professor Hausman’s reliance on Morgan Stanley was based less on Morgan Stanley’s analysis itself and more on the use of the DCF approach in general.

Professor Hamada’s rebuttal report is largely a report identifying flaws in Morgan Stanley’s DCF analysis. While it is true that Professor Hausman accepted

⁵ There is also a question as to whether Morgan Stanley’s compensation for the Crown engagement is contingent on the outcome of this litigation, which would also affect weight and credibility.

⁶ Stipulated Scheduling Order ¶ 1(i).

⁷ Hausman Report at ¶ 16 & n.9.

Morgan Stanley's analysis in his report, Professor Hamada does nothing to rebut Professor Hausman's opinions or findings, other than to suggest that because there are flaws in Morgan Stanley's analysis and Professor Hausman used those numbers, his opinions and analyses are therefore flawed.

Moreover, a large portion of the Hausman report was spent rebutting the "Private Market Value" model used by Mr. Muoio—a model that Professor Hamada does not so much as mention in his rebuttal, let alone respond to Professor Hausman's opinions on it.

I agree with defendants that Professor Hamada's rebuttal report probably could have been submitted as an Opening Expert Report analyzing the Morgan Stanley valuation. Nevertheless, I decline to exclude the report or Professor Hamada's testimony. Instead, I will give it whatever weight it deserves.

CONCLUSION

For the foregoing reasons, the rebuttal reports and expert testimony of Messrs. Lee and De Rose and Professor Hamada will be admitted subject to the Court's discretion to limit testimony as cumulative or repetitive.

IT IS SO ORDERED.

Very truly yours,

A handwritten signature in cursive script that reads "William B. Chandler III". The signature is written in black ink and includes a horizontal line at the end.

William B. Chandler III

WBCIII:slu