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Order on Defendants' Motion for Summary Judgment (JAMES & JACKSON LLC)

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 DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

On April 13, 2009, counsel appeared before the Court to present oral argument on Defendants' Motion for Summary Judgment. After reviewing the briefs submitted on the Motion, the record of the case, and the arguments presented by counsel, the Court hereby finds as follows:

STATEMENT OF FACTS

In 1998, Alvin James and Marlon Jackson (operating as James & Jackson, L.L.C. "J&J"), [1] joined forces with investors led by Willie Gary, (operating under the umbrella of

[1] In April 1998, Plaintiffs Alvin James and Marlon Jackson, principles of J&J, and President and Chairman, respectively, of Minority Broadcasting Corporation of America, Inc., a Texas Corporation -- later "re-branded" as the Black Family Channel ("BFC") in 2004 -- approached Willie E. Gary ("Gary") with an offer to invest in an African American, religion-based, cable television network. Defendants' Mot. For SJ, Exh. 1; Plaintiff's Response in Opposition to Defendants' Mot. For SJ at 2.

"Willie Gary L.L.C."),[2] to form MBC Gospel Network, L.L.C ("MBC")[3] a religiously oriented cable television channel dedicated to serving the African American community.

Initially, J&J held a 25% interest in MBC to WGLLC's 75% interest, but that was modified a year later when WGLLC increased its interest to 80% while J&J's interest decreased to 20% under the terms of an Amended Operating Agreement ("AROA").[4] J&J invested no capital in the enterprise, though by July 2003, WGLLC claims to have contributed more than $31 million in capital.[5] Initially, shareholders of J&J were responsible for the day-to-day management of MBC, but by April 2000, all had been replaced by representatives of WGLLC, including Willie Gary, who served as CEO of

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[2] Gary recruited twenty six colleagues and friends who formed Willie Gary LLC ("WGLLC") for the sole purpose of investing in the cable network proposed by J&J. Defendants' Statement of Undisputed Material Facts, p. 3 at 12.

[3] On November 11, 1998, J&J and WGLLC entered into an Operating Agreement to form MBC Gospel Network LLC ("MBC"), a Delaware Limited Liability Company.

[4] J&J and WGLLC allocated 25% interest in MBC to J&J and 75% interest to WGLLC, contingent upon WGLLC funding the capital account of MBC in the amount of $2 million, which WGLLC did fund. Defendants' Mot. For SJ, Exh. 4, 9; Defendants' Deposition Excerpts in Support of Mot. For SJ, Exh. 9 at 56. The Board of directors of MBC as of November 24, 1998, consisted of seven persons: Gary (Chairman), Cecil Fielder, Evander Holyfield, Marlon Jackson (COO), Alvin James (CEO), Lorenzo Williams and Lori Metoyer-Brown. Id. Plaintiff's Response in Opposition to Defendants' Mot. For SJ, Exh. 25, Memo at p. 2.
On December 23, 1999, WGLLC and J&J entered into an Amended and Restated Operating Agreement for MBC under which WGLLC and J&J acquired an 80% and 20% interest, respectively, in MBC. Defendants' Motion for SJ, Exh. 14 at 8.
At the time of MBC's merger with Programming, Rick Newberger, CEO, held a 3% interest in the company.

[5] In addition to making an initial $2 million deposit to the MBC capital account in 1998, WGLLC solicited and received capital contributions from WGLLC members in the amount of approximately $2 million in September 1999, $1.7 million in November 1999, and $1.4 million in January 2000. Plaintiff's Response in Opposition to Defendants' Mot. For SJ at 6-7, Exh. 27 WGLLC claims it made a total of $31,025,376 in capital contributions to MBC through July 11, 2003. Defendants' Statement of Undisputed Material Facts, p. 10 at 65; Defendants' Mot for SJ, Exh. 25.

MBC until August 2004.[6] In 2004, Gary resigned as CEO and appointed Rick Newberger as the new CEO and Acting President while Gary retained his position as Chairman of the Board.[7]

In April 2004, the Management Board of MBC voted to change the name of MBC to the "Black Family Channel" ("BFC") and the change took effect in October 2004. The change was in name only, as the corporate entity remained MBC (referred to herein as "MBC").

As of November 2004, MBC had not realized its financial business goals and was a defendant in at least 10 lawsuits seeking payments on a range of financial obligations, including some in the amount of $500,000 and $1.35 million. MBC was consistently undercapitalized and never turned a profit. Additionally, members of J&J, as well as WGLLC, repeatedly tried to raise financing for MBC, but these arrangements never materialized.[8] During this time period, several MBC Board members loaned money to MBC.[9]

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[6] As of April 7, 2000, Gary (in his individual capacity) assumed the duties of MBC CEO, replacing James. Plaintiff's Response in Opposition to Defendants' Mot. For SJ at 7, Exh. 29. On October 15, 2000, Gary removed Jackson as President of MBC. Id. at 8, Exh. 30. On September 14, 2001, Gary removed Thorpe and Harden from their respective positions as MBC legal advisor and MBC treasurer. Id. at 8, Exhibt 32.

[7] Plaintiff's Response in Opposition to Defendants' Mot. For SJ, Exh. 37.

[8] For example, on August 22, 2003, MBC engaged the Gordian Group to raise capital for MBC. Defendants' Statement of Undisputed Facts, Exh. 32. On Nov. 5, 2004, WGLLC and J&J signed a Contingent Agreement to accept a $138 million structured debt transaction offer from the Structured Capital Group, Inc. ("SCG"). Plaintiff's Statement of Material Facts, p. 22, Exh. 39, 82. Defendants allege that the deal with SCG was not consummated because J&J could not pay the $400,000 fee required for due diligence and closing costs that J&J had committed to fund. Defendants' Deposition Excerpts in Support of Mot. For SJ, Newberger Dep. At 220-225; Defendants' Memorandum in Support of Mot. For SJ at 13-14. J&J alleges that Defendants "did not attempt to close the deal that J&J had negotiated" with SCG, but that Defendants instead pursued private negotiations with SCG. Plaintiff's Response in Opposition to

The inability of the parties to agree[10] on various aspects of a proposed restructuring deal with SCG led WGLLC to file suit against J&J in Delaware Chancery Court in November 2005, alleging that J&J's refusal to agree to a pro-rata dilution[11] as part of a proposed restructuring deal had terminated the deal. WGLLC charged that the refusal by J&J to agree to any pro-rata dilution had the effect of "extorting Willie Gary to reduce its ownership to less than a majority (49%) in order to secure" the necessary financing from SCG.[12] The lawsuit sought a preliminary injunction requiring J&J to

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Defendants' Mot for SJ, p. 11. Defendants assert that J&J's plan was an overtly hostile takeover and that after the original financing deal with SCG collapsed, that they were approached by SCG to "do a straight deal" for a $56 million transaction. That proposed deal was memorialized on May 31, 2005. Defendants' Deposition Excerpts in Support of Mot. For SJ, Newberger Dep. At 222. On October 27, 2005, the MBC management Board met to consider the proposed $56 financing deal through SCG. J&J voted to admit the arranger but only on the condition that J&J would not be subject to any dilution as a result of the addition of new members. Exhibits to Defendants' Mot for SJ, Exh. 44,

[9] Of those MBC Board members who loaned money to MBC from July 1, 2003 to August 31, 2004, the following also were officers of MBC: Gary (Chairman and CEO); Lorenzo Williams, Evander Holyfield, and Chan Abney. Plaintiff's Response in Opposition to Defendants' Mot. For SJ, Exh. 34, 25. According to Plaintiffs, from July 1, 2003, to August 31, 2004, MBC borrowed $8.58 million from WGLLC and individual investors. Plaintiff's Response in Opposition to Defendants' Mot. For SJ at 9, Exh. 34. Gary personally loaned MBC approximately $3 million at 25% interest, as of April 9, 2004. Id. at 9, Exh. 35. According to Defendants, however, this interest rate was later retroactively reduced in August 2005 to "a reasonable 'arms length' interest rate" of six percent per annum. Defendants' Statement of Undisputed Facts at 80, p. 12, Exh. 27. By July 31, 2005, the loans totaled $15.4 million. Plaintiff's Statement of Material Facts, p. 19, Exh. 38.

[10] Plaintiff's Statement of Material Facts, Exh. 83, Transcript of Delaware Court Office Conference. On December 2, 2005, WGLLC filed a Second Amended Complaint, adding a claim for judicial dissolution pursuant to 6 Dec. C. § 18-202. Plaintiff's Statement of Material Facts, p. 25; Exhibits to Defendants' Mot for SJ, Exh. 48.

[11] According to the AROA, no additional capital contributions were permitted without majority agreement of the Members. Additionally, WGLLC was given "the sole responsibility for all additional capital contributions . . . ." Plaintiff's Statement of Material Facts, Exh. 26.

[12] Second Amended Complaint for Injunctive Relief, p. 3, para. 14 (emphasis in the original).

agree to the dilution, but the Chancery Court declined to grant the injunction. Instead, the Court urged the parties to negotiate or face dissolution.

On January 26, 2006, WGLLC hired Shannon Pratt Valuations, LLC ("Shannon Pratt") to provide a valuation of MBC "as of December 31, 2005, for the purpose of dissolution under Delaware State Statutes."[13] On March 15, 2006, counsel for WGLLC wrote to counsel for J&J exploring agreement on a "proposed procedure for the dissolution/auction of the company as a going concern."[14] A letter from WGLLC counsel to Vice Chancellor Strine that same day informed the Delaware Court that the J&J no longer opposed the WGLLC "request for dissolution," and that counsel for WGLLC was "endeavor[ing] to coordinate with defense counsel to determine . . .at least a proposed procedure to allow for an auction of the company. . . . "[15]

In March 2006, as J&J pressed for dissolution of the company under the auspices of the Delaware Court, WGLLC pursued the alternative strategy of a corporate freeze-out merger which would remove J&J as a member of MBC.[16] On March 16, 2006, counsel for WGLLC in the Delaware litigation emailed WGLLC legal counsel Tom Weiksnar ("Weiksnar") reporting a conversation with Shannon Pratt and noting "we may also need his opinion for use in a 'freeze out merger."[17] A separate email sent by

[13] Plaintiff's Response in Opposition to Defendants' Mot for SJ, Exh. 42.
[14] Plaintiff's Response in Opposition to Defendants' Mot for SJ, Exh. 84.
[15] Plaintiff's Statement of Material Facts, Exh. 87. (Note: The Delaware Litigation was dismissed by agreement of the parties in August 2006). Defendant's Statement of Material Facts, Exh. 59.
[16] Defendants assert that on April 4, 2006, during a status conference with Chancellor Strine, WGLLC first learning of the possibility of a freeze-out merger. Defendant's Deposition Excerpts in Support of Mot. for SJ, Deposition of Willie E. Gary, p. 179-81. This notwithstanding, the record reflects March emails between counsel for WGLLC discussing the option of a freeze-out merger.
[17] Plaintiff's Statement of Material Facts, Exh. 92.

WGLLC member and MBC Board member Maria Sperando to WGLLC counsel on March 16, 2006, requested that the issue of the "squeeze [out] merger" be added to the agenda for a conference call scheduled for later that day to discuss the Delaware litigation.[18] Another email from WGLLC counsel Francis Pileggi to Weiksnar sent March 16th and marked "confidential" disclosed that Pileggi had asked Shannon Pratt to have his report ready "between April 15 and April 30 [as] we may need his opinion for use in a 'freeze out merger.'"

On April 12, 2006, Weiksnar prepared a draft agenda for an April 18, 2006 MBC Board meeting, which omitted any reference to a merger. MBC CEO Newberger replied to Weiksnar the same day by email, commenting that the agenda "reads very mild and unalarming," and observing that the agenda was prepared "[p]robably the right way in case it were to 'leak' to the press or employees." Newberger also observed that they could probably provide a more detailed agenda immediately prior to the start of the meeting.

On April 13, 2006, Thomas Martin provided WGLLC counsel, Francis Pileggi and Bernard Conaway, with a "Memorandum to File" detailing the possible remedy of a freeze out merger, including the duties owed by Gary and other members of WGUC to MBC and J&J.[19] That memo expressly anticipated that Gary's duty of loyalty as a majority member and manager of MBC would be challenged in the proposed freeze out merger where WGLLC "would have to vote its 80% MBC interest in favor of the merger.[20] This memo also stated that because Gary was an interested

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[18] Plaintiff's Statement of Material Facts, Exh. 94.
[19] Plaintiff's Response in Opposition to Defendants' Mot. for SJ, Exh. 61.
[20] Id. at p. 3.

member/manager in the merger transaction, the presumptions of Delaware's business judgment rule would not apply and Gary would have the burden of proving the entire fairness of the transaction.[21]

On April 13, 2006, WGLLC sent notification of a special meeting of the MBC Board of Directors scheduled for April 18, 2006. The notice listed "[p]otential merger into a new entity to operate without James & Jackson," along with "[b]ankruptcy" and "[s]hut down of operations," among the items on the agenda.[22] This meeting notice was the first time J&J learned of WGLLC's merger plans. The following day, on April 14th, Matthew Hardin Jr. on behalf of J&J requested full disclosure of information about the proposed merger. Although a detailed opinion letter had been issued on April 13, 2006, to Willie Gary individually, that letter, as well as other related information about the merger that also was requested, was not provided to J&J.[23] Instead, Rick Newberger responded by email to Harden and other MBC Board members saying, among other things, "There is no merger proposal. Item 5 is a theory that was advanced by a Board member _yesterday_ about how the company could possibly be saved. No merger target has been identified and no work has been undertaken on planning related thereto. The idea was raised. . . this week (emphasis added)."[24]

[21] Id.
[22] Plaintiff's Response in Opposition to Defendants' Mot. for SJ, Exh. 45.
[23] On April 14, 2006, in response to an email sent by Weiksnar notifying the MBC Board that MBC chairman Newberger had called for a Board meeting on April 18, J&J, by way of a letter from Harden (of J&J) to Newberger, requested "full and complete information concerning the proposed merger." Plaintiff's Response in Opposition to Defendants' Mot. for SJ, Exh. 46.
[24] Plaintiff's Response in Opposition to Defendants' Mot. for SJ, Exh. 47 (emphasis added).

On April 16th, WGLLC called a meeting of its members to discuss the future of MBC. Although individual members of WGLLC had been planning the merger for as long as a month, J&J was provided with only five days advance notice of the merger discussion. Additionally, the April 18th Board meeting, was the first time that the MBC Board discussed the merger plan. At that meeting, the MBC Board voted to form a special strategy committee to discuss the possibility of bankruptcy, a freeze-out merger, and the shutdown of MBC.[25] The five-member committee included two members of WGLLC (one of whom did not participate in subsequent committee deliberations), two members of J&J, and Tom Weiksnar, a lawyer with the Willie Gary law firm who did legal work for WGLLC, but who was not a member of WGLLC.[26] The April 18th meeting was continued to April 20th. On April 19, Matthew Hardin again contacted Rick Newberger requesting information about the proposed merger and requesting WGLLC to proceed with an auction of MBC as originally planned.[27]

After two days of investigation by the special committee, Weiksnar provided a "summary of the Strategy Meeting" to the MBC Board, which approved the freeze out merger. All members of J&J voted "no," and all members of WGLLC voted "yes," including those allegedly "interested directors" who had also served on the special

[25] During the April 18, 2006, Board meeting of MBC, the Board voted to form a special strategy committee to meet on April 19 and April 20 to discuss, among other things, the possibility of bankruptcy of MBC, potential merger without J&J "giving J&J fair value for its 20% interest," and shutdown of MBC operations. Plaintiff's Response in Opposition to Defendants' Mot. for SJ, Exh. 51.

[26] The following individuals (listed with their affiliations) were appointed to the Committee by unanimous approval: Harden (J&J), James (J&J), Weiksnar, Mr. Williams (WGLLC), Ms. Abney (WGLLC). Plaintiff's Response in Opposition to Defendants' Mot. for SJ, Exh. 51.

[27] Plaintiffs' Response in Opposition to Defendant's Motion for Summary Judgment Exh. 52.

committee. The following members of WGLLC who served on the Board of MBC, voted to approve the merger of MBC into Programming Acquisitions, a company wholly owned by WGLLC: Chan Bryant Abney, Lori Metoyer Brown, Willie Gary, and Lorenzo Williams. Maria P. Sperando, a member of WGLLC, voted "present, but not participating" during the merger vote. Rick Newberger, CEO of MBC and member of WGLLC, did not vote on the merger. Weiksnar also voted yes.

The MBC Board also voted to accept the Shannon Pratt valuation, which, according to WGLLC, assigned a nominal value of $1 to the company. As a result, J&J received $.20 for its 20% interest in MBC. However, a May 3, 2006, email from WGLLC counsel Pileggi to Shannon Pratt revealed that Shannon Pratt was still "working towards providing a letter of opinion" and that he had not provided a final, official valuation of MBC at the time of the merger. More than ten days after the merger vote, Pileggi's email to Shannon Pratt emphasized that:

> [I]t is imperative to remember that we did the recent merger based on our understanding from conversations with your colleagues that the 'current' value of J and J's interest in the company is 'not more than zero', [sic] and we have indicated as much to them. Thus, we need your formal report as soon as possible in the even that they contest that position – and to support our position."[28]

On May 9, Shannon Pratt valued the company on an "as is" basis as of December 31, 2005, at a median value of <u>negative</u> $10.2 million.[29]

On April 25, MBC (doing business as the Black Family Channel or "BFC") was merged into Programming Acquisitions ("Programming"). MBC's voting interests were valued at one dollar and 100 shares of Programming were issued in exchange. The

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[28] Plaintiff's Response in Opposition to Defendants' Mot. for SJ, Exh. 14, 15, 16.
[29] Plaintiff's Response in Opposition to Defendants' Mot. for SJ, Exh. 17, 18.

merger was effectuated on April 26, 2006, with Programming, a Delaware limited liability corporation, which had been formed by WGLLC just six days earlier, as the surviving corporate entity. Programming retained the dba BFC.

On December 11, 2006, Gary circulated a "Summary of Terms for Proposed Investment" in Programming/BFC by the investment group InterMedia Partners VII, L.P. ("InterMedia").[30] Under the terms of the proposed investment, InterMedia would invest up to $30 into Programming/BFC, or a new LLC, with an initial investment at closing not to exceed $10 million.[31] Documents provided by Defendants describe, "as a first step," a $10 million payment to BFC, "which would be used to fully satisfy outstanding indebtedness to the trades, IRS and all other creditors."[32] Cecil Fielder, Willie Gary, Evander Holyfield, Maria Sperando (whose signature is missing) and Lorenzo Williams executed the Merger Agreement as "shareholders." All had previously been shareholders of WGLLC.

One year after the MBC Board voted to approve the merger, on April 30, 2007, Gospel Music Channel purchased Programming/BFC for $10 million, plus 2.943 million shares, and other consideration (the "GMC/Programming Merger"). Under the terms of that deal, Programming assigned its interest in a satellite distribution agreement with a Colorado company that carried the BFC cable signal.[33] That distribution agreement had been an asset of MBC since 2000.

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[30] Plaintiff's Response in Opposition to Defendants' Mot. for SJ, Exh. 57.
[31] Id.
[32] Defendant's Mot. for SJ, Exh. 62.
[33] The Service Transmission Agreement between HITS and MBC was dated April 25, 2000, and originally provided for satellite distribution of the MBC signal. Plaintiff's Response in Opposition to Defendants' Mot. for S.J.Exh. 20, 58.

According to Defendants, in order to renegotiate MBC's original agreements for the benefit of GMC, including MBC's original MSO agreements, it was necessary for MBC's carriage and satellite debts, as well as its vendor debt, to be paid.[34] Undated documents provided by Defendants, but which appear to confirm these disbursements, list approximately $12 million paid to numerous entities, including loan repayments to Gary, and other members of WGLLC. Ten million of this $12 million is listed as "paid," while $2 million is listed as "loan proceeds."[35] Defendants assert that Programming still holds a loan due from GMC, a note from the Florida News Channel, which is being paid monthly, and the majority of third party loans that were made to MBC prior to the merger.[36] Defendants assert that WGLLC has not been reimbursed for all of its capital contributions to MBC and that individual members of WGLLC and Gary, and others who made loans to MBC have not been repaid "those loans in full nor any interest."[37]

Defendants represent that WGLLC was and remains the sole shareholder of Programming.[38] The record, however, contains references to 3% individual interests to be granted to Rick Newberger and Willie Gary. [39] Additionally, Programming's subsequent 2007 Merger Agreement is signed by WGLLC for Programming as well as by "shareholders" including Cecil Feilder, Willie Gary, Evander Holyfield, Lorenzo Williams, and Maria Sperando (whose signature block is listed, but not executed).[40]

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[34] Defendant's Statement of Material Facts, at 185-90.
[35] Defendant's Mot. for SJ, Exh. 62.
[36] Defendant's Statement of Material Facts at 191.
[37] Id. at 191-194.
[38] See e.g. Defendant Interrogatory Responses dated Nov. 21, 2007.
[39] Plaintiff's Response in Opposition to Defendant's Motion for Summary Judgment, Exh. 56.
[40] Plaintiff's Response in Opposition to Defendant's Motion for Summary Judgment, Exh. 58

WGLLC members are indirect owners of Programming by virtue of the majority interest in Programming of WGLLC.

A central issue of contest between the parties is the value of MBC at the time of the merger. In addition to the Shannon Pratt valuation, the record contains the following facts regarding the value of MBC. During the April 18, 2006, Board meeting of MBC, J&J offered to buy MBC, or WGLLC's share of MBC, for $17 million. WGLLC member and MBC Board member, Evander Holyfield, counter-offered that WGLLC would "buy J&J's interest [in MBC] for $17 million."[41] Additionally, several months earlier, on January 31, 2006, MBC CEO Newberger had represented in an email to a potential investor that a valuation of MBC in the "range of $100 million can easily be established and defended" even given MBC's "negative-cash-flow condition."[42] Two years earlier, in 2004, Newberger had represented to the Gordian Group his estimate of MBC's value at between $35 million and $63 million ("pre-money"/before investor funding) and between $82 million and $110 million post-investor funding.[43] Plaintiffs also point to the GMC/Programming Merger valued at approximately $25 million and based in part on the HITS Agreement originally held by MBC as evidence that the $1.00 merger price was unfair to J&J. Additionally, In January 2009, J&J submitted the affidavit of its financial expert, Robert P. Gray, estimating the value of J&J's 20% interest in MBC as of December 31, 2005 at $43.31 million and as of April 30, 2006, at $57.94 million.[44]

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[41] Plaintiff's Response in Opposition to Defendants' Mot. for SJ, Exh. 51.
[42] Plaintiff's Response in Opposition to Defendants' Mot. for SJ, Exh. 55.
[43] Plaintiff's Response in Opposition to Defendants' Mot. for SJ, Exh. 33.
[44] Plaintiff's Response in Opposition to Defendants' Mot. for SJ, Exh. 23(B).

Defendants, however, maintain that by October, 2005, MBC had entered the "zone of insolvency" and was not able to meet its obligations as they came due.[45] Therefore, notwithstanding the other indicators of MBC's value, Defendants contend that MBC was properly valued at the nominal sum of $1.00 at the time of the merger.[46]

Defendants also allege a series of facts in support of their unclean hands argument including that J&J, in violation of the AROA, tried to advance cable television business interests separate from MBC beginning in 2001.[47] Among J&J's activities during this time was the circulation of a private placement memorandum and business plan to raise capital for J&J Media business opportunities.[48] Additionally, Gary claims that he was notified on November 20, 1998, that Pacific Family Entertainment LLC (aka TLC Communications, Inc., a California Corporation) was in possession of a "half-a-million dollar judgment" against James and the Minority Broadcasting Corporation of America, Inc.[49] According to Gary, "at the time of [his] inducement to invest in" MBC, James had failed to inform him of this outstanding judgment.[50]

On the following page, the Court has represented the affiliations and relevant actions of the key parties involved in this suit.

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[45] Pratt Depo. At 32, 35, 36; Gary Affd. ¶ 21; Newberger Affd. ¶ 11.
[46] Plaintiff's Response in Opposition to Defendants' Mot. for SJ, Exh.
[47] In the first quarter of 2001, J&J members organized J&J Media Group, Inc., "in an effort to move ahead with its business objectives separately from MBC as it was obvious that [Gary] had taken control of MBC and was looking to diminish J&J's involvement." Defendants' Motion for SJ, Exh. 14 at Section 1.8.
[48] Id.
[49] Defendants' Mot. For SJ, Exh. 5, 6.
[50] Defendants' Statement of Undisputed Material Facts, p. 2 at 9.

	James & Jackson Member	WGLLC Member	MBC Board Member	MBC Special Committee Member	MBC Merger Vote	Approve Sale of Programming
Chan Bryan Abney		X	X	X	X (Yes)	
Lori Metoyer Brown		X	X (Mgt. T.)		X (Yes)	
Cecil Fielder		X	X (Vice Chair)		(Not Present)	X
Willie Gary		X	X (CEO from 2000- 2004; Chairman of Bd)		X (Yes)	X
Matthew Harden Jr.	X		X CFO)	X	X (No)	
Evander Holyfield		X	X (Mgt. T.)		(Not Present)	X
Marlon Jackson	X		X (COO)		X (No)	
Alvin James	X		X (CEO from 1998- 2000)	X	X (No)	
Rick Newberger		X	X (CEO from 2004-2006)			[CEO, but no signature on Merger Agreement]
Maria Sperando		X	X		X ("Present but not participating")	X
Gregory Thorpe	X		X		X (No)	
Tom Weiksnar		Provided Legal Services.	X	X	X (Yes)	[Secretary, but no signature on Merger Agreement]
Lorenzo Williams		X	X (Mgt. T.)	X	X (Yes)	X

STANDARD OF LAW

To prevail on a motion for summary judgment, the moving party must demonstrate that "there is no genuine issue of material facts, viewed in the light most favorable to the non-moving party, to warrant judgment as a matter of law.[51]

The internal affairs of a corporation, such as actions involving officers and directions, shall be regulated by the law of the state of incorporation.[52] Therefore, Delaware law applies.

ARGUMENTS

Defendants assert that Plaintiff has no standing to bring the derivative claims, and seek summary judgment on the direct claims arguing that Defendants breached no fiduciary duties arising under statute, the Amended Operating Agreement ("AORA"), or common law.

Derivative Claims

Defendants argue that as a result of the cash-out merger that extinguished MBC, Plaintiff lacks the standing to bring derivative claims on MBC's behalf in Count Two (Breach of Fiduciary Duty), Count Three (Aiding and Abetting Breach of Fiduciary Duty), and Count Four (Conspiracy to Breach Fiduciary Duties). The Court agrees. The effect of a merger is normally to deprive a plaintiff, a member of the merged company, the standing to bring a derivative suit.[53] Two exceptions, however, are recognized to the post-merger derivative claim standing rule which allows the plaintiff to bring a derivative suit on behalf of a merged company: (1) if the merger itself is the subject of a claim of fraud, or (2) if the merger is in reality "merely a reorganization" that does not affect plaintiff's ownership in the business.[54] The fraud exception that the underlying merger was fraudulent and

[51] Lau's Corp. v. Haskins, 261 Ga. 491 (1991). See also, Danforth v. Bullman, 276 Ga. 531, 532 (2005).
[52] Diedrich v. Miller & Meier & Assoc., Architects & Planners, Inc., 254 Ga. 734, 735 (1985).
[53] Lewis v. Ward, 852 A.2d 896, 899 (Del. 2004); see also, Lewis v. Anderson, 477 A.2d 1040 (Del. 1984).
[54] Kramer v. Western Pacific Industries, Inc., 546 A.2d 348, 354 (Del. 1988), citing, Lewis v. Anderson, 477 A.2d at 1046.

done to eliminate derivative claims must be pled with particularity. [55] Having failed to sufficiently plead either exception, the Court finds that Plaintiff lacks standing to bring the derivative claims. Defendants' Motion for Summary Judgment on the derivative claims is hereby **GRANTED**.

Direct Claims

Defendants urge the Court to grant Summary Judgment on the direct claims on the grounds that Defendants breached no fiduciary duties owed to Plaintiffs because the AROA excuses compliance with certain fiduciary duties and because they had competing duties to creditors. Defendants also argue that Plaintiff is only entitled to an appraisal remedy post merger, or, in the alternative, if the merger is reviewed under the entire fairness test that it satisfies both the fair dealing and the fair price requirements of Delaware law.

Fiduciary Duties

As Defendants emphasize to the Court, the Delaware Limited Liability Act (the "Act") is grounded in principles of freedom of contract. Delaware Code Chapter 6 Section 18-1101 authorizes the members of a limited liability company to restrict or expand duties, provided that the duty of good faith and fair dealing may not be eliminated. Section 5.1(b) of the MBC AROA provides that the "Management Board and Members shall have the powers, duties and authority described in this Section 5.1(b) and under the Act...." Section 5.7 of the MBC AROA is a exculpation provision that eliminated individual director liability to MBC or other members for "any acts or omissions performed or omitted in good faith and in a manner reasonably believed by the Member, Manager, or Officer to be within the scope of the authority conferred upon him/her or it by the Agreement and in the best interests of the Company."

Defendants argue that the combined effect of Sections 5.1 and 5.7 of the AROA and §18-1101[56] is to only create the duty of the implied contractual covenant of good faith and fair dealing.

[55] Lewis v. Ward, 852 A.2d at 905.
[56] Delaware Code Section 18-1101(e) which provides for the elimination or limitation of any and all liabilities for breach of contract and breach of duties (including fiduciary duties) of a member,

Defendants' interpretation is overly broad. First, Section 18-1101 allows for members to restrict fiduciary duties by a provision in the operating agreement, but this statute requires express language in order to eliminate such duties. The default rule is that such duties exist, although they can be limited. Second, Section 5.1 of the AROA frames the members/managers' duties in the context of the Act and therefore, fiduciary duties exist except for such express limitations or restrictions. In the AROA, such limitations are found in the exculpation provision of Section 5.7 which only exculpates breaches of the duty of care. Liability is retained for acts done in the absence of "good faith" outside the scope of their authority and not reasonably believed to be in the best interest of the company. Accordingly, the Court finds that the Director Defendants owed fiduciary duties of good faith and loyalty to MBC and to its members.

Squeeze Out Merger

Plaintiff alleges that the Director Defendants' approval of the Programming merger was a self-interested merger transaction that breached fiduciary duties owed to them. Defendants, on the other hand, counter that the approval of the merger was within the authority of the Board, and that the merger was approved by a vote of members who owned more than 50% of the company, and therefore, was permissible.

Self-Interested Transaction:

The facts of the case as outlined above demonstrate that a majority of the MBC Directors that approved the Programming merger were self-interested or not independent. Interest "requires an analysis of whether the director is disinterested in the underlying transaction and, even if disinterested, whether the director is otherwise independent."[57] The common connection between all of the Defendants is Willie Gary, the former CEO and Chairman of the MBC Board at the time of

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manager or other person to a limited liability company...provided, that a limited liability company agreement may not limit or eliminate liability for any act or omission that constitutes a bad faith violation of the implied contractual covenant of good faith and fair dealing."

[57] Beam ex rel. Martha Stewart Living Omnimedia, Inc., v. Stewart, 845 A.2d 1040, 1049 (Del. 2004).

the Merger.[58] Defendants Willie Gary, Lorenzo Williams and Maria Sperando held ownership interests in WGLLC, were Directors of MBC (and indirect members through WGLLC), and were listed as consenting shareholders to the GMC/Programming Merger. Both Gary and Williams voted in favor of the merger. Tom Weiksnar, a Board member of MBC, was also legal counsel for WGLLC, a Board member of MBC and would later serve as the secretary of Programming. Chan Bryant Abney and Lori Metoyer-Brown were members of WGLLC and Board members of MBC. Chan Bryan Abney also serves as General Counsel in Willie Gary's law firm. Lorenzo Williams, Maria Sperando and Tom Weiksnar are all attorneys at Gary's law firm. Additionally, although they did not vote to approve the merger, Cecil Fielder and Evander Holyfield were members of WGLLC, Officers of MBC (and indirect members through WGLLC), and signed the GMC/Programming Merger as consenting shareholders.

The Programming Merger was not approved by a majority of disinterested Directors. Mathew Hardin, Jr., Marlon Jackson, Alvin James and Gregory Thorpe, the individual members of J&J, all voted against the merger. The remaining Directors either abstained from the vote (Feilder, Holyfield & Sperando) or voted to approve the merger with either an indirect interest in Programming (Abney, Gary, Williams) or had a relationship with Willie Gary such that their independence is questioned by this Court (Weiksnar and Metoyer-Brown).[59]

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[58] Willie Gary spearheaded the formation of WGLLC and is a founding partner of Gary, Williams, Finney, Lewis, Watson & Sperando. Maria Sperando and Lorenzo Williams are both partners. Tom Weiksnar and Chan Abney are both lawyers with the firm. Additionally, Lori Metoyer-Brown ran an independent business that produced settlement videos for the law firm. Evander Holyfield and Cecil Feilder are personal friends with Mr. Gary.

[59] Aronson v. Lewis, 473 A.2d 805, 814-815 (Del. 1984). Guth v. Loft, Inc., 5 A.2d 503, 510 (Del. 1939) ("Corporate officers and directors are not permitted to use their position of trust and confidence to further their private interests. While technically not trustees, they stand in a fiduciary relation to the corporation and its stockholders. A public policy, existing through the years, and derived from a profound knowledge of human characteristics and motives, has established a rule that demands of a corporate officer or director, peremptorily and inexorably, the most scrupulous observance of his duty, not only affirmatively to protect the interests of the corporation committed to his charge, but also to refrain from doing anything that would work injury to the corporation, or to deprive it of profit or advantage which his skill and ability might properly bring to it, or to enable it to make in the reasonable and lawful exercise of its powers. The rule that requires an undivided and unselfish loyalty

Absent approval by a majority of the minority shareholders, "the ultimate burden of proof is on the majority shareholder to show by a preponderance of the evidence that the transaction is fair."[60] Where directors of a Delaware corporation stand on both sides of a merger transaction, "[t]here is no 'safe harbor' for such divided loyalties . . . . [Directors] are required to demonstrate their utmost good faith and the most scrupulous inherent fairness of the bargain."[61] This requirement of entire fairness is "unflinching in its demand that where one stands on both sides of a transaction, he has the burden of establishing its entire fairness, sufficient to pass the test of careful scrutiny by the courts."[62] Here, WGLLC stood on both sides of the transaction, as it was the 80% majority shareholder of MBC[63] as well as the incorporator of Programming Acquisitions,[64] the entity which survived the merger. Of the five members of the management Board of MBC who voted for the merger, all were members of WGLLC.[65] Therefore, the Court shall review the Programming Merger under the entire fairness standard.

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to the corporation demands that there shall be no conflict between duty and self-interest."). See, e.g., *In re* LNR Property Corp. Shareholders Litig., 896 A.2d 169, 179 (Del. Ch. 2005) (finding that allegations of lack of director independence under an entire fairness review required denial of the corporate defendant's motion to dismiss). Cf., Brehm v. Eisner, 746 A.2d 244, 258 (Del. 2000) (affirming dismissal of breach of loyalty claims based upon evidence of lack of personal benefit).

[60] Weinberger v. UOP, Inc., 457 A.2d 701, 703 (Del. 1983).

[61] Id. at 710 (citing Gottlieb v. Heyden Chemical Corp., Del. Supr., 91 A.2d 57, 57-58 (1952)).

[62] Id. at 710 (citing Sterling v. Mayflower Hotel Corp., Del. Supr., 93 A.2d 107, 110 (1952); Bastian v. Bourns, Inc., Del.Ch., 256 A.2d 680, 681 (1969), *aff'd,* Del. Supr., 278 A.2d 467 (1970); David J. Greene & Co. v. Dunhill International Inc., Del.Ch., 249 A.2d 427, 431 (1968).

[63] Defendant's Statement of Material Facts at 29.

[64] Defendant's Statement of Material Facts at 166.

[65] Willie E. Gary, Lorenzo Williams, Chan Abney and Lori-Metoyer Brown voted for merger, were members of the management Board of MBC, and were members of both WGLLC and Programming Acquisitions. *See* Defendants' Statement of Material Facts at 163. Making matters slightly more confusing, Plaintiff's First Amended Complaint and Demand for Jury Trial at 4,6,7,8 asserts that Weiksnar also was a member of WGLLC, along with Abney, Williams and Gary, but not necessarily Metoyer-Brown, who is simply identified as an "individual." Note, also, that according to Defendant's Memorandum in Support of Their Motion for Summary Judgment at 21, Weiksnar "was not a member of either J&J or WGLLC." Id. citing Weiksnar Affd. ¶¶ 5 and 6.

Entire Fairness: Fair Dealing & Fair Price

The "entire fairness" requirement established in Weinberger is composed of two elements: "fair price" and "fair dealing."[66] Fair dealing concerns the following: "questions of when the transaction was timed, how it was initiated, structured, negotiated, disclosed to the directors, and how the approvals of the directors and the stockholders were obtained," as well as "the obvious duty of candor." [67] In dictum, the Weinberger court noted that the appointment of an "independent, negotiating committee of outside directors" to negotiate with minority shareholders can provide "strong evidence that the transaction meets the test of fairness."[68]

The timing and the disclosures associated with the merger raise concerns regarding the process of merger approval. The Agenda for a Special Board Meeting, distributed on April 13th, disclosed that a potential merger was one of three planning agenda items. On April 14th, Matthew Hardin, on behalf of J&J, inquired with Newberger about the potential merger. Despite the March emails from WGLLC's counsel discussing a freeze out merger and the Newberger/Weiksnar emails on the 12th regarding the file memo on fiduciary duties in freeze out mergers, Newberger responded to Hardin stating that there was no merger proposal. Newberger feigned ignorance and communicated that the merger idea had just been floated "earlier that week" despite evidence to the contrary. The less than forthcoming disclosures by Newberger to J&J coupled with the condensed consideration of the merger proposal raise serious red flags, and create jury questions in this case.

When the MBC Board met on the 18th and discussed planning options for the company, they voted to form a committee to make a recommendation on which planning option to pursue.[69] Of the five named to serve, two (Chan Abney and Lorenzo Williams) were indirect owners of Programming

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[66] Weinberger, 457 A.2d at 711.
[67] Id.at 712.
[68] Id.at 709 n.7. See also Jackson v. Turnbull, 1994 WL 174668 (Del. Ch., 1989) (discussing statutory violation as ground for invalidating merger as a "threshold issue" for determining fairness in a merger transaction).
[69] Defendant's Statement of Material Facts at 155, 156.

Acquisitions through their ownership in WGLLE.[70] However, according to the Defendants, Williams "was not present for the discussions."[71] Weiksnar, as counsel for WGLLC, had been involved in the merger discussions for over a month at the time of his appointment to the committee. The fourth and fifth members of this committee, Alvin James & Matthew Harden Jr., were indirect minority shareholders of MBC through their ownership interest in J&J. They both favored the bankruptcy option over the proposed merger. After a two-day investigation, the committee reconvened at the continued Special Board meeting on April 20th and recommended the proposed merger with Programming. Thereafter, the merger closed on April 26, 2006.

The fast pace of the Programming merger alone is insufficient grounds for the Court to find questions of fact regarding the fairness of the merger. The record, however, is also devoid of evidence of negotiations between Programming and MBC. Programming, was formed on April 19th, which was the day after the MBC Board first discussed the merger with Programming by WGLLC. Second, there is no evidence of price or transaction term negotiations between the two parties. Third, the valuation appraisal by Shannon Pratt was the basis for concluding that MBC had a negative value for purposes of establishing the cash out price of $1.00. The Shannon Pratt valuation, was originally commissioned by WGLLC, the majority shareholder of MBC, and whose members formed Programming.[72] Additionally, the written valuation report prepared by Shannon Pratt was not completed until May, <u>after</u> the committee or the Board's vote on the proposed merger. While Defendants' counsel represented that the Board received oral reports on the value of MBC, an oral report is not subject to review, evaluation or independent analysis. Additionally, where as here there was no opportunity for a market check, no record of price/term negotiation, and where the merger was an interested-director transactions quickly pushed through before an uninformed and dissenting minority shareholder, the Court cannot hold as Defendants urge it to that the merger was the result of

[70] Order on Motion to Dismiss at 1. Lorenzo Williams also signed the GMC/Programming Merger as a consenting shareholder.
[71] Defendant's Statement of Material Facts at 156.
[72] Defendants' Statement of Material Facts at 160, 161, 168.

fair dealings. Finally, the special committee was not comprised of a majority of independent directors, but rather of WGLLC members or affiliates, and therefore is not strong evidence of "fairness" as contemplated in Weinberger.

Fair price, the corollary to fair dealing, "relates to the economic and financial considerations of the proposed merger, including all relevant factors: assets, market value, earnings, future prospects, and any other elements that affect the intrinsic or inherent value of a company's stock."[73] A significant result of Weinberger was that the Court explicitly broadened the approach to determining price by declaring that "[f]air price obviously requires consideration of **all** relevant factors."[74] Although speculative elements of value arising from the "accomplishment or expectation of the merger" are excluded from the determination of price, "all relevant factors" does include "***elements of future value***, including the nature of the enterprise, which are known or susceptible of proof as of the date of the merger and not the product of speculation."[75]

Defendants' argument on the fair price element is best summarized as a contention that the Court has no authority to review the price outside of an appraisal remedy, which is not the action before this Court, nor is it authorized by the AROA. Such an argument, however, does not take into consideration the full panoply of Delaware law discussing post-merger remedies.

Defendants incorrectly rely upon Weinberger v. UOP, Inc.,[76] for the proposition that appraisal remedies are the exclusive remedy in freeze-out cases. Weinberger also preserved the equity powers of courts in cases of fraud, misrepresentation, self-dealing, waste, and over-reaching."[77] In addition, Weinberger allowed a shareholder who dissents from a merger to seek rescissionary

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[73] Id. at 712.
[74] Id. at 713 (emphasis added).
[75] Id. For a short but incisive discussion of the limits of the appraisal remedy from the point of view of minority stockholders, see Helen M. Richards, Comment, Cede & Co. v. Technicolor, Inc.: *A Whole New Ball Game for Dissenting Shareholders*, 14 DEL. J. CORP. L. 999, 1003–06 (1989) ("It is, in short, a remedy of desperation.").
[76] 457 A.2d 701 (Del. 1983).
[77] Weinberger, 457 A.2d at 714.

damages.[78] Such damages are available at the discretion of the Court or in appraisal proceedings.[79] Rescissionary damages are measured "by the equivalent value of corporate stock at the time of the judgment."[80]

Two years after Weinberger, the Delaware Supreme Court decided Rabkin v. Philip A. Hunt Chemical Corp.,[81] which highlighted the rule that "in cases of procedural unfairness the standard of entire fairness entitles [a plaintiff] to relief that is broader than an appraisal." [82] Rabkin further held that "Weinberger's mandate of fair dealing does not turn solely on issues of deception."[83]

In Cede & Co. v. Technicolor, Inc.,[84] decided in 1985, the Delaware Supreme Court addressed for the first time the question of whether a shareholder who had dissented from a cash-out merger and begun an appraisal proceeding may pursue a subsequently discovered individual claim of fraud in the merger. Cede & Co. summarized the distinction between a section 262 appraisal action[85] and a fraud breach of fiduciary action asserting fair dealing and fair price claims, such as are in the instant case.

In a section 262 appraisal action, "the only litigable issue is the determination of the value of the appraisal petitioners' shares on the date of the merger, the only party defendant is the surviving

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[78] Weinberger, 457 A.2d at 714. "The value of the stock under a recessionary damages formula is calculated at the time of trial. As a result, it reflects upswings in the market, turns for the better in the fortunes of the company, and changes in the business wrought by the acquiring company." Booth
[79] Weinberger, 457 A.2d at 703–04, 714 (overruling Lynch v. Vickers Energy Corp. 429 A.2d 497 (Del. Ch. 1981), to hold that there is no requirement to impose a recessionary damages formula when unfairness is found but that such authority lies under the discretion of the Chancellor)).
[80] 19 Am. Jur. 2d Corporations § 2215 n. 2 (citing Harman v. Masoneilan Intern., Inc., 442 A.2d 487 (1982) and Weinberger v. UOP, Inc., 457 A.2d 701 (1983)). "Rescissory damages," are those "contemplated to restore a plaintiff to the position occupied before the defendant's wrongful acts." Black's Law Dictionary (8th ed., 2004).
[81] 498 A.2d 1099 (1985). Note, Rabkin was before the court on a motion to dismiss.
[82] Rabkin, 498 A.2d at 1103.
[83] Id. at 1104-05.
[84] 542 A.2d 1182 (1988).
[85] 8 Del.C. § 262. An appraisal remedy under Delaware law gives a shareholder the right to dissent from a corporate merger or consolidation, and instead obtain "the fair value of the stockholder's shares of stock" from the corporation under certain circumstances. Id. at subd (a). Subdivision (d) sets out a detailed procedure for how those rights shall be perfected and subdivision (h) details how the court shall determine the fair value of the shares.

corporation, and the only relief available is a judgment against the surviving corporation for the fair value of the dissenters' shares."[86]

In contrast, a fraud breach of fiduciary duty action "affords an expansive remedy and is brought against the alleged wrongdoers to provide whatever relief the facts of a particular case may require."[87] Under Delaware law, "the scope of recovery for a breach of the duty of loyalty is not to be determined narrowly . . . . The strict imposition of penalties . . . [is] designed to discourage disloyalty."[88] Additionally, "[o]nce shareholders prove that the merger was wrongfully accomplished, they may also receive compensatory and punitive damages, including the ability to litigate the value of the merged corporation's stock."[89] Relief may further include: "any damages sustained by the shareholders,[90] as well as "rescissionary damages if the [trier of fact] considers them susceptible of proof and a remedy appropriate to all issues of fairness before him."[91]

In this matter, Plaintiffs have opposed the Shannon Pratt report by submitting their own expert valuation report. Additionally, Plaintiffs point to post-merger events as evidence that the $1.00 purchase price was not a "fair price". Specifically, Plaintiffs highlight the Gospel Music Channel merger in April 2007 which was valued at approximately $25 million and included assets such as certain distribution agreements that were assets of MBC at the time of the Programming merger.

The Court finds that Plaintiffs are not limited to an appraisal action in this case. Additionally, without making any determination as to the actual fairness of the MBC/Programming merger price, the Court finds that Defendants have failed to meet their burden of demonstrating that the price of the merger was entirely fair, and thus they are not entitled to summary judgment on this issue.

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[86] Cede, 542 A.2d at 1187.
[87] Id.
[88] International Telecharge, Inc. v. Bomarko, Inc., 766 A.2d 437, 441 (Del. Sup., 2000) (citing Thorpe by Castleman v. CERBCO, Inc., 676 A.2d 436, 445 (Del.1996).
[89] Cohen v. Mirage Resorts, Inc., 62 P.3d 720 (Nev., 2003) (citing Cede, 542 A.2d at 1191).
[90] Cede, 542 A.2d at 1187 (citing Rabkin, 498 A.2d at 1107; Weinberger, 457 A.2d at 713).
[91] Id. at 1187-88 (citing Weinberger, 457 A.2d at 714); see also International Telecharge, 766 A.2d at 440 (observing that the powers of the trial court are "very broad in fashioning equitable and monetary relief under the entire fairness standard as may be appropriate, including rescissory damages"). ."

Duties to Creditors

Defendants finally argue, citing Geyer v. Ingersoll Publications Co.,[92] and Blackmore Partners, L.P. v. Link Energy LLC, [93] that they, as directors of MBC, owed a special duty to the company's creditors because MBC was operating in the "zone of insolvency"[94] at the time of the merger decision. Defendants argue that their fiduciary duties "shift[ed] from the owners to the creditors."[95]

First, as discussed above, whether MBC was operating in the zone of insolvency is a disputed question of fact , as there is conflicting evidence in the record on the value of MBC at the time of the merger. Second, the theory upon which Defendants base their argument is distinguishable from the instant case. Defendants cite Blackmore for the authority that MBC's Board had a fiduciary duty to "take into account the interest of creditors at the apparent expense of stockholders if, in doing so, the Board meets its fiduciary duties to all relevant constituencies."[96] In Blackmore, the transaction at issue was approved by an independent board majority and a special committee made up entirely of independent directors.[97] In the instant case, the committee contained a majority of interested directors, and the transaction was approved only by interested, not independent, directors. Additionally, the duties to creditors theory is a mechanism to protect the contractual rights of third parties, not a legal mechanism to expand directorial duties beyond the terms of the contracts at issue.[98] The Court therefore rejects Defendants' argument that the Director Defendants' approval of the merger was a valid exercise of their fiduciary duty owed to creditors.

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[92] 621 A2d 784 (1992).
[93] 2005 WL 2709639 (2005).
[94] Defendants' Memorandum at 38.
[95] Id. At 38.
[96] Id. Quoting Blackmore, 2005 WL 2709639
[97] Blackmore, 2005 WL 2709639 at 7.
[98] See e.g., Laura Linn, *Shift of Fiduciary Duty upon Corporate Insolvency: Proper Scope of Directors Duty to Creditors* 46 VAND. L. REV. 1485, 1487-88 (1993).

UNCLEAN HANDS

In light of the foregoing discussion, the Court is not persuaded that the allegations of unclean hands asserted against the Plaintiffs are a basis for granting summary judgment to Defendants in this case.

CONCLUSION

Defendants' Motion for Summary Judgment is hereby **GRANTED** as to all Derivative Claims and hereby **DENIED** as to all Direct Claims.

SO ORDERED this 7 day of May, 2009.

Alice D. Bonner
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Superior Court of Fulton County
Atlanta Judicial Circuit

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