

STATE OF NORTH CAROLINA  
CATAWBA COUNTY

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
21 CVS 3135

WINNER'S MARKETING, INC., a  
North Carolina corporation n/k/a  
WINNER'S MARKETING, INC., a  
Delaware corporation,

Plaintiff,

v.

ROBERT CAVAZOS,

Defendant.

**ORDER ON DEFENDANT'S MOTION  
TO EXCLUDE PAUL T. JENSON AS  
AN EXPERT WITNESS<sup>1</sup>  
[PUBLIC]**

1. **THIS MATTER** is before the Court upon Defendant Robert Cavazos's ("Cavazos") Motion to Exclude Paul T. Jenson as an Expert and Paul T. Jenson's Expert Report and Testimony, (ECF No. 39).

I.

FACTUAL AND PROCEDURAL BACKGROUND

2. On 17 June 2021, Plaintiff Winner's Marketing, Inc ("Winner's Marketing" or "Plaintiff"), a corporation then organized under the laws of North Carolina, merged with another corporation with an identical name, which was organized under the laws of Delaware.<sup>2</sup> The Delaware-organized Winner's Marketing was the surviving

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<sup>1</sup> Recognizing that this Order cites and discusses information that Plaintiff Winner's Marketing, Inc. ("Winner's Marketing") maintains should remain filed under seal in this action, and out of an abundance of caution, the Court elected to file this Order under seal on 6 January 2023. The Court then permitted the parties an opportunity to propose redactions to the public version of this document. No redactions were proposed by the parties.

<sup>2</sup> (Compl. ¶ 10, ECF No. 5.)

entity of the merger, which became effective on 31 July 2021.<sup>3</sup> Before the merger became effective, the North Carolina-organized Winner's Marketing had a single class of outstanding common stock consisting of 1000 shares, 250 of which were issued to Cavazos.<sup>4</sup>

3. Pursuant to N.C.G.S. § 55-13-22, Cavazos dissented to the merger of the two Winners Marketing entities before the merger's effective date and provided written notice of his intent to exercise his right to a judicial appraisal.<sup>5</sup> After the merger became effective, Plaintiff sent a written appraisal notice to Cavazos, which stated that Plaintiff estimated the fair value of Cavazos's shares to be \$2,000,000.<sup>6</sup> On 15 October 2021, Plaintiff paid Cavazos that sum, plus \$33,753.72 in interest, in cash.<sup>7</sup> On 5 November 2021, Cavazos notified Plaintiff that he was dissatisfied with the amount paid, informed Plaintiff that he estimated the fair value of his shares at \$51,897,149, and demanded payment of the difference between that sum and the amount already paid.<sup>8</sup> On 28 December 2021, Plaintiff filed the above-captioned action seeking judicial appraisal of Cavazos's shares.<sup>9</sup>

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<sup>3</sup> (Compl. ¶ 10.)

<sup>4</sup> (Compl. ¶ 11.)

<sup>5</sup> (Compl. ¶ 13.)

<sup>6</sup> (Compl. ¶ 15.)

<sup>7</sup> (Compl. ¶ 17.)

<sup>8</sup> (Compl. ¶ 18.)

<sup>9</sup> (*See generally* Compl.)

4. Although never discussed in the complaint, answer, or prior proceedings before this Court, the parties describe Plaintiff's business and operations at length in their respective briefs on the Motion.<sup>10</sup> Plaintiff operates two wholly-owned subsidiaries, Funambulist Gaming LLC ("Funambulist") and J&A Solutions LLC ("J&A").<sup>11</sup> Through its subsidiaries, Plaintiff produces and leases gaming devices that it contends require some degree of skill and therefore comply with laws proscribing chance-based games in the states in which Plaintiff does business.<sup>12</sup>

5. While these skill-based games are legal and regulated in some states, such as Nebraska, they are unregulated and of unsettled legality in other states, including North Carolina.<sup>13</sup> These skill-based games are therefore known as "grey games" in unregulated markets.<sup>14</sup> Funambulist does business in Nebraska, while J&A operates

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<sup>10</sup> (*See generally* Def./Countercl. Pls. Robert Cavazos's *Daubert* Mot. Exclude Paul T. Jenson as an Expert and Paul T. Jenson's Expert Rep. and Test. [hereinafter "Br. Supp. Exclude"], ECF No. 39; Pl.'s Resp. Opp'n Def. Robert Cavazos's *Daubert* Mot. Exclude Paul T. Jenson as an Expert and Paul T. Jenson's Expert Report and Test. [hereinafter "Pl.'s Resp."], ECF No. 46.)

<sup>11</sup> (*See* Pl.'s Resp. 2–3.) The particulars of Plaintiff's corporate structure are relevant only to which subsidiary does business in which markets, so at all other points in this order the Court refers to Plaintiff generally, rather than to the pertinent subsidiary.

<sup>12</sup> (*See* Pl.'s Resp. 2–3.)

<sup>13</sup> (*See* Pl.'s Resp. 2–3.)

<sup>14</sup> (Pl.'s Resp. 3.)

in unregulated markets.<sup>15</sup> Nearly 80% of Plaintiff's revenue comes from two unregulated markets: North Carolina and Texas.<sup>16</sup>

6. Plaintiff retained Paul T. Jenson ("Jenson") as an expert witness to opine upon industry risk to grey games, which Plaintiff contends is relevant to a valuation of Cavazos's shares as of the merger date.<sup>17</sup>

7. On 1 November 2022, Cavazos moved to exclude Jenson as an expert witness and to strike his expert report and testimony.<sup>18</sup> The Court received briefing on the Motion under Business Court Rule 7 and held a hearing on 21 December 2022 (the "Hearing"), at which all parties were represented by counsel. The Court issued several oral rulings on the Motion at the Hearing, and now issues this order to memorialize those decisions.

## II.

### LEGAL STANDARD

8. The Court evaluates a motion to exclude an expert's testimony under Rule 702 of the North Carolina Rules of Evidence. The Supreme Court of North Carolina has held that our state's Rule 702 incorporates the standard set by Federal Rule of Evidence 702. *State v. McGrady*, 368 N.C. 880, 888 (2016). Federal Rule 702 incorporates the standard for expert testimony established by *Daubert v. Merrell Dow*

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<sup>15</sup> (Pl.'s Resp. 2–3.)

<sup>16</sup> (See Br. Supp. Exclude Ex. 2, Lash Report 15 [hereinafter "Lash Report"], ECF No. 40.2 (noting that 78.3% of J&A's revenue comes from North Carolina and Texas).)

<sup>17</sup> (See Br. Supp. Exclude 2; Pl.'s Resp. 4–6.)

<sup>18</sup> (See Br. Supp. Exclude.)

*Pharms., Inc.*, 509 U.S. 579 (1993). See, e.g., *Earnest v. Sanofi U.S. Servs.*, 26 F.4th 256, 268 (5th Cir. 2022) (noting that *Daubert* is “effectively codified” in Rule 702); *United States v. Brown*, 973 F.3d 667, 704 (7th Cir. 2017) (stating that Rule 702 “largely reflects” the *Daubert* standard). In turn, *Daubert* established a three-element test for the admission of expert testimony: first, the area of proposed testimony must be based on specialized knowledge that will assist the trier of fact to understand the evidence or determine a factual issue; second, the witness must be qualified as an expert by knowledge, skill, experience, training, or education; third, the testimony must be reliable, through a foundation in sufficient facts or data, and the application of reliable principles and methods to the facts of the case. See *McGrady*, 368 N.C. at 889–90 (summarizing the *Daubert* standard and its application under North Carolina law). Within this framework, the disposition of a motion in limine seeking to exclude an expert witness is within the discretion of the trial court. See *Crocker v. Roethling*, 363 N.C. 140, 143 (2009).

### III.

#### ANALYSIS

9. Cavazos first challenges Jenson’s testimony and opinions on the basis that they flout the *Daubert* standard as applied by the North Carolina courts.

10. As an initial matter, Cavazos contends that Jenson’s testimony is irrelevant because it is not based on specialized knowledge that will assist the trier of fact to

understand the evidence or determine a fact at issue.<sup>19</sup> He argues that Jenson’s report instead offers speculative pronouncements about possible legal risks to the gaming industry that have yet to occur, which are unmoored from any real danger revealed by the record evidence.<sup>20</sup>

11. In *Reynolds Am. Inc. v. Third Motion Equities Master Fund Ltd.*, 2020 NCBC LEXIS 56 (N.C. Super Ct. Apr. 27, 2020), *aff’d*, 379 N.C. 524 (2021), this Court examined and rejected a similar contention that the *possibility* that the FDA might ban a particular tobacco product was insufficient to permit expert testimony on the effect of that risk on valuation. *See Reynolds Am. Inc.*, 2020 NCBC LEXIS 56, at \*29–37, 141–60. As here, the structural risk in *Reynolds* was difficult to predict and quantify. *Id.* at \*69. This Court nevertheless recognized that if the risk *did* materialize, it would wreak significant damage upon the company, so that an expert opinion that ignored those risks was “simply not credible or reliable.” *Id.* at \*142–43.

12. Plaintiff and Jenson argue that the same is true of the litigation and regulatory risk that faced Plaintiff at the time of the Winners Marketing merger. For example, Jenson’s report posits that North Carolina’s criminal prohibition on electronic gambling machines and recent decisions of the Supreme Court of North

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<sup>19</sup> (*See* Br. Supp. Exclude 5.) Because this is a judicial appraisal action, the Court will serve as the trier of fact at trial. *See* N.C.G.S. § 55-13-30(d) (providing that in a judicial appraisal action, “[t]here is no right to a trial by jury”).

<sup>20</sup> (*See* Br. Supp. Exclude 9.)

Carolina have led some law enforcement agencies in this state to issue cease and desist letters to establishments that host grey games.<sup>21</sup>

13. Jenson's report also notes several judicial decisions from other states that have held grey games to be illegal under applicable state law,<sup>22</sup> vigorous enforcement action from state executive-branch regulators,<sup>23</sup> and hostile lobbying from the casino industry.<sup>24</sup> While these actions arose in other states, Jenson's report suggests that Plaintiff faces significant risk to its unregulated business from North Carolina's judicial and regulatory authorities. Jenson's report also raises several points about the inability of Winner's Marketing to respond to market trends or enforce its contracts.<sup>25</sup>

14. Defendant vigorously disputes Jenson's testimony and opinions and argues that they are irrelevant under Rule 702. But if Jenson is correct that Plaintiff faced substantial risk at the time of the merger that its unregulated business line could become illegal in North Carolina, the Court agrees with Plaintiff that Jenson's

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<sup>21</sup> (See Br. Supp. Exclude Ex. 1, Jenson Report 5 [hereinafter "Jenson Report"], ECF No. 40.1 (citing N.C.G.S. § 14-306.4 and *Gift Surplus, LLC v. State ex rel. Cooper*, 380 N.C. 1 (2022)).)

<sup>22</sup> (See Jenson Report 5–6 (discussing holdings from Texas, Wisconsin, Ohio, and Florida).)

<sup>23</sup> (See Jenson Report 7–8 (discussing executive enforcement actions in Pennsylvania, Illinois, and Missouri).)

<sup>24</sup> (See Jenson Report 8–10 (noting that the American Gaming Association, whose members are casino owners and operators, have lobbied the United States Attorney General and the National Council of Legislators from Gaming States to outlaw grey games).)

<sup>25</sup> (See Jenson Report 10–11 (noting that Winner's Marketing lacks any intellectual property rights in its games, and the de facto impossibility of pursuing a breach of contract action against its Taiwan-based manufacturer).)

testimony and opinions bear directly on the value of Defendant's shares at the time of the merger and thus would assist the Court in valuing those shares. As a result, the Court concludes that Jenson's testimony and opinions are relevant under the first prong of Rule 702.

15. Because Jenson's report reflects that he has extensive industry experience, including as co-chair of a gaming law practice group at his law firm, a testifying industry expert before three state legislatures,<sup>26</sup> and a speaker and author of numerous presentations and articles on gaming law,<sup>27</sup> the Court also concludes that Jenson has sufficient training and experience to satisfy the second element of the Rule 702 standard.

16. As to Rule 702's third prong, however—whether Jenson's testimony and opinions are reliable—the Court concludes that a determination of that issue is best left for the presentation of evidence at trial. As a result, the Court, in the exercise of its discretion, shall defer further ruling on Cavazos's *Daubert* or Rule 704 legal conclusion objections and permit Jenson to testify at trial, subject to the Court's subsequent determination of the reliability and admissibility of Jenson's testimony and opinions. *See Bizzell v. Bizzell*, 247 N.C. 590, 604–05 (1958) (noting that in a bench trial, the court presumably disregards inadmissible evidence); *see also Hilb*

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<sup>26</sup> Jenson has testified before a Georgia legislative study committee, before a committee of the Missouri Senate, and before a committee of the Pennsylvania House of Representatives. (Jenson Report 14–15.)

<sup>27</sup> (*See* Jenson Report 14–15.)



*Rogal & Hobbs Co. v. Sellars*, 2010 NCBC LEXIS 79 (N.C. Super. Ct. Jan. 15, 2010) (“the Court will identify what evidence it has relied upon and admitted [after trial].”).

17. Finally, Cavazos also challenges Jenson’s testimony and report on the grounds that another of Plaintiff’s experts, Dale Lash, contradicts Jenson’s testimony.<sup>28</sup> Cavazos does not precisely identify the basis in the rules of evidence for this challenge, but the Court understands this objection to be under North Carolina Rules of Evidence 401, 402, and 403, which govern relevance.<sup>29</sup> *See* N.C. R. Evid. 401; N.C. R. Evid. 402; N.C. R. Evid. 403. To the extent that Cavazos challenges Jenson’s report as irrelevant under Rules 401 and 402, the Court rejects that argument for the same reasons it rejected this contention under Rule 702.

18. Rule 403 provides that evidence may be excluded, even if relevant, if it would be confusing or duplicative. *See* N.C. R. Evid. 403. The admittance or exclusion of evidence under Rule 403 is within the discretion of the trial court. *See, e.g., State v. Triplett*, 368 N.C. 172, 178 (2015).

19. Contrary to Plaintiff’s contention, Lash’s report is largely in accord with Jenson’s. Like Jenson, Lash notes the unsettled status of grey games, states that this situation poses significant risks for Plaintiff, and posits a pessimistic long-term outlook for Plaintiff’s business.<sup>30</sup> There is little, if any, contradiction between the

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<sup>28</sup> (Br. Supp. Exclude 7–8.)

<sup>29</sup> (*See* Br. Supp. Exclude 7–8 (arguing that Lash’s report renders Jenson’s testimony irrelevant); Def./Countercl. Pl. Robert Cavazos’s Reply Supp. *Daubert* Mot. Exclude Paul T. Jenson as an Expert and Paul T. Jenson’s Expert Report and Test. 5–6 [hereinafter “Reply Br.”], ECF No. 53 (arguing that Jenson’s report provides no additional probative value).)

<sup>30</sup> (*See* Lash Report 14–15, 20, 22.)

reports.<sup>31</sup> The Court rejects in particular Cavazos’s argument that the two experts offer clashing visions of possible future regulation:<sup>32</sup> on the contrary, each expert discusses regulatory risks and, of course, neither is able to predict dates or details of possible future regulatory action with certainty.<sup>33</sup> That neither expert is clairvoyant does not justify excluding the testimony of either or both.

20. Furthermore, Jenson’s report is not simply a duplicative rehash of Jenson’s. Lash’s report provides a highly focused, quantitative analysis of Plaintiff’s financial health.<sup>34</sup> Jenson’s report is broader, and explores several areas that Lash’s report does not examine, such as the additional risks created by hostile lobbying from the casino industry and the status of grey games in Texas.<sup>35</sup> The Court therefore concludes that Jenson’s report is not duplicative of Lash’s within the meaning of Rule 403, and therefore declines to exclude Jenson’s report on that basis or any claimed clash with Lash’s.

21. Finally, because the Court will allow Jenson to testify at trial, the Court will exercise its discretion to grant Defendant’s alternative request for relief<sup>36</sup> and allow Defendant to designate one additional expert witness to rebut Jenson’s testimony and

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<sup>31</sup> (*See generally* Jenson Report (discussing regulatory risks and market volatility).)

<sup>32</sup> (Reply Br. 5–6.)

<sup>33</sup> (*See* Lash Report 14–15; Jenson Report 5, 10–11.)

<sup>34</sup> (*See generally* Lash Report.)

<sup>35</sup> (*See* Lash Report 5, 8–10.)

<sup>36</sup> (*See* Br. Supp. Exclude 11–12.)

opinions, subject to the Court's determination of the admissibility of Defendant's rebuttal expert's testimony and opinions at or after trial. The Court's ruling is without prejudice to Plaintiff's right to object to Defendant's rebuttal expert designation, including on timeliness grounds.<sup>37</sup>

#### IV.

#### CONCLUSION

22. **WHEREFORE**, the Court, in the exercise of its discretion, hereby **ORDERS** as follows:

- a. Jenson shall be permitted to testify at trial, subject to the Court's subsequent determination of the reliability and admissibility of Jenson's testimony and opinions;
- b. Defendant shall be permitted to designate and offer testimony and opinions from one additional rebuttal expert witness at trial, subject to the Court's subsequent determination of the admissibility of the rebuttal expert's testimony and opinions, as follows:
  - (1) Defendant shall designate the rebuttal expert and produce his or her expert report by 6 February 2023, and
  - (2) Defendant shall make the rebuttal expert available to Plaintiff for deposition no later than 6 March 2023;
- c. The Court hereby **DEFERS** further ruling on the Motion until at or after trial.

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<sup>37</sup> (See Case Management Order 5, ECF No. 29 (providing that rebuttal experts must be disclosed by 14 October 2022).)

**SO ORDERED**, this the 6th day of January, 2023.<sup>38</sup>

/s/ Louis A. Bledsoe, III  
Louis A. Bledsoe, III  
Chief Business Court Judge

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<sup>38</sup> This Order was originally filed under seal on 6 January 2023. This public version of the Order was filed on 12 January 2023. To avoid confusion in the event of an appeal, the Court has elected to state the filing date of the public version of the Order as 6 January 2023.