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| STATE OF MAINE<br>CUMBERLAND, ss. | BUSINESS & COUNSUMER<br>DOCKET NO. BCD-CV-17-39 |
| RONALD F. BARRIAULT,<br><br>Plaintiff,<br><br>v.<br><br>DENNIS A. BARRIAULT, et al.,<br><br>Defendants. | ORDER ON DENNIS BARRIAULT'S MOTION FOR COURT-APPOINTED EXPERT |

Pending before the Court is Defendant Dennis A. Barriault's motion for court appointed expert brought pursuant to M.R. Evid. 706. Defendant Central Distributors, Inc. ("CDI") joins the motion in part.[1] Plaintiff Ronald Barriault and Counterclaim-Defendant Denron, Inc. oppose the motion. The Court heard oral argument on the motion on August 6, 2018. Ronald Lebel, Esq. appeared on behalf of Dennis;[2] Kurt Olafsen, Esq. appeared for Plaintiff Ronald; Daniel Nuzzi, Esq. appeared for CDI; and Timothy Bryant, Esq. appeared for Denron.

## BACKGROUND

This case arises out of the ongoing dispute between Dennis and Ronald over the management and directorship of two corporations. CDI is a Maine corporation with its principal place of business at 15 Foss Road, Lewiston, Maine. (Pl's Compl ¶ 3.) CDI is a wholesale distributor of beer, wine, and nonalcoholic drinks. (Pl's Compl. ¶ 4.) Denron was incorporated by Dennis and Ronald on May 22, 1986 and is a Maine business corporation with a principal place of business in Lewiston, Maine. (Def's Countercl. ¶¶ 3-4.) Denron owns the Foss Road property and

[1] CDI joins the motion, provided that it is not asked to contribute to the cost of such an expert. (CDI Resp. to Mot. 4.)
[2] Because the two individual parties share the same last name, the Court refers to them both by their first names throughout this Order.

leases it to CDI. (Pl's Compl. ¶ 7.) Ronald and Dennis each own 50% of the voting stock of Denron. (Pl's Compl. ¶ 8.)

In this case, *Barriault v. Barriault et al.*, original docket number BCD-CV-17-54,[3] Ronald is suing for, *inter alia*, judicial dissolution of CDI. (Pl's Compl. ¶¶ 43-47.) Dennis has counterclaimed for, *inter alia*, relief other than dissolution of CDI under 13-C M.R.S. § 1434. (Def's Countercl. ¶¶ 37-41.) William Howell conducted an expert valuation of CDI on behalf of CDI and produced a valuation report on April 6, 2018 in which he concludes that the fair value of the 100% shareholder interest in CDI was $10,295,000 as of December 31, 2017. (Def's Mot. for Ct. App. Exp. Witness ¶ 4.) Mark Filler conducted an expert valuation of CDI on behalf of Ronald and produced a valuation report in which he concludes that the value of a 100% shareholder interest in CDI as of December 31, 2017 was $30,207,200. (Def's Mot. for Ct. App. Exp. Witness ¶ 6.) Accordingly, the two experts engaged by the parties are $19,912,200 apart in their valuations of CDI. (Def's Mot. for Ct. App. Exp. Witness ¶ 8.)

## STANDARD OF REVIEW

"On a party's motion or on its own, the court may order the parties to show cause why expert witnesses should not be appointed and may ask the parties to submit nominations. The court may appoint any expert that the parties agree on and any of its own choosing." M.R. Civ. P. 706(a). "Although [M.R. Evid. 706] recognizes that the power of the trial judge to appoint an expert of his own choosing should exist, . . . that exercise of power in civil cases should be resorted to only in exceptional situations." M.R. Evid. 706 advisers' note to former rule 706, Feb. 1976. The trial court's authority to appoint an independent expert witness is discretionary. *See In re Irene W.*, 561 A.2d 1009, 1012 (Me. 1989); *Villa v. Smith*, 534 A.2d 1310, 1312 (Me. 1987).

[3] Dennis's motion is captioned under BCD-CV-17-39 consistent with the June 1, 2018 order consolidating this action with BCD-CV-17-54. CDI's valuation is at issue in the pleadings originally filed in BCD-CV-17-54.

## DISCUSSION

Dennis argues that given the $19,912,200 disparity in the valuation between CDI's expert and Ronald's expert, the Court should exercise its discretionary authority and appoint its own expert to determine the fair value of a 100% shareholder interest in CDI. (Def's Mot. for Ct. App. Exp. Witness ¶ 9.) Ronald responds that the fact that the two experts have a substantial disagreement is not unusual in civil litigation and that the disagreement can be resolved by the factfinder without the need for an additional, independent expert. (Pl's Opp. Mot. for Ct. App. Exp. Witness 1.) Ronald further suggests that the difference in valuation in this case relates to primarily one issue—what type of potential buyer should be considered for purposes of determining value. (Pl's Opp. Mot. for Ct. App. Exp. Witness 1-2.) At the oral argument, Ronald explained that while one valuation assumes a "hypothetical buyer," *i.e.* a "financial buyer or investor," the other valuation assumes a "synergistic" or "strategic buyer" who is already in the industry and seeks a larger market share.

The Court agrees with Ronald that this case does not present an exceptional circumstance warranting the court-appointment of an independent expert. *See* M.R. Evid. 706 advisers' note to former rule 706, Feb. 1976. The "dueling expert" situation is not uncommon, particularly with respect to valuations of a business in the context of dissolution or buyouts. "Granting the evils in the practice of shopping for experts and the partisanship or venality of some of them, there are serious questions about whether a court appointment is the wise remedy. It has the effect of leaving little of the traditional adversary system . . . ." Field & Murray, *Maine Evidence* § 706.3 at 419 (6th ed. 2007). To the extent that the experts offer inconsistent versions of the truth, it is the role of the factfinder to determine which version is better supported and more credible. As the Adviser's Note to M.R. Evid. 706 explains, the appointment of a court-appointed expert runs the risk of

abdicating that responsibility to the expert: "In any jury case the opinion of an expert known to be court appointed . . . would almost surely be given decisive weight. In a case tried without jury the judge who selected the expert could scarcely be expected by the parties not to adopt his opinion." M.R. Evid. 706 advisers' note to former rule 706, Feb. 1976.

Furthermore, at the oral argument, Ronald suggested that the determination of which expert's opinion is correct may turn on a question of law. As noted above, the difference between the two valuations can apparently be explained by the valuation method used by the expert. Ronald argued at the oral argument that the issue of which valuation method is consistent with Maine's Business Corporation Act's requirement that a shareholder's shares be appraised at "fair value" is a legal question within the purview of the Court. *See* 13-C M.R.S. §§ 1302, 1434(2)(A). Moreover, Dennis has suggested that the valuation method of Ronald's stock is dictated by a contract, the "CDI buy-sell agreement." (Def's Mot. for Ct. App. Exp. Witness ¶¶ 2-3, 9.) Ronald disagrees that the price for his stock must be determined under the CDI buy-sell agreement. (Pl's Opp. Mot. for Ct. App. Exp. Witness 2.) The factual and legal issues presented in contract construction are not issues which an independent business-valuation expert would be helpful in resolving. *See, e.g. Am. Prot. Ins. Co. v. Acadia Ins. Co*., 2003 ME 6, ¶ 11, 814 A.2d 989 (contract construction may present questions of both law and fact).

In sum, the experts' dispute as to the valuation of CDI presents both factual and legal issues within the purview of the factfinder or the Court, respectively. The court appointment of an independent expert would not be helpful in resolving them.

## CONCLUSION

Based on the forgoing it is hereby ORDERED:

That Defendant Dennis A. Barriault's motion for court appointed expert is DENIED.

The Clerk is requested to enter this Order on the docket for this case by incorporating it by reference. M.R. Civ. P. 79(a).

Dated: September 4, 2018

_____**/s**_____
M. Michaela Murphy
Justice, Business and Consumer Court