STATE OF NORTH CAROLINA

GUILFORD COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
14-CvS-8130

DR. ROBERT CORWIN, AS TRUSTEE FOR THE BEATRICE CORWIN LIVING IRREVOCABLE TRUST, on Behalf of a Class of those Similarly Situated,

Plaintiff,

v.

BRITISH AMERICAN TOBACCO PLC, REYNOLDS AMERICAN, INC., SUSAN M. CAMERON, JOHN P. DALY, NEIL R. WITHINGTON, LUC JOBIN, NICHOLAS SCHEELE, MARTIN D. FEINSTEIN, RONALD S. ROLFE, RICHARD E. THORNBURGH, HOLLY K. KOEPPEL, NANA MENSAH, LIONEL L. NOWELL, III, JOHN J. ZILLMER and THOMAS C. WAJNERT,

Defendants.

AFFIDAVIT OF SEAN J. GRIFFITH IN SUPPORT OF JAMES C. SNYDER'S OBJECTION TO THE PROPOSED SETTLEMENT

Sean J. Griffith, after being duly sworn, deposes and says as follows:

1. I am the T.J. Maloney Chair and a Professor of Law as well as the Director of the Corporate Law Center at Fordham Law School and I make this affidavit upon personal knowledge.

I. PRELIMINARY STATEMENT

2. James C. Snyder (the "Objector") has asked me to evaluate the proposed settlement terms of the captioned matter (the "Settlement") in order to opine on whether these terms benefit Reynolds American, Inc. (the "Company") or the class and on whether the Settlement should be approved by the Court.

3. This Settlement proposes to trade a release of claims in exchange for supplemental disclosures. Although the release in this case does carve out Fairness Claims, the release goes beyond the scope of fiduciary duty disclosure claims to include the customarily broad release of all claims "known or unknown," etc., arising out of "any disclosures or non-disclosures" made in connection with the merger, the various transaction agreements, and the public statements and filings related thereto. The language of the release expressly includes securities law claims, including claims under Section 11 of the Securities Act and Exchange Act Rule 10b-5. Such claims can be extremely valuable, and courts have been wary of releasing them in connection with disclosure settlements.[1] For example, in the Bank of America/ Merrill Lynch merger, the subsequent revelation of losses concealed from shareholders gave rise to a federal claim under Rule 14a-9 that settled not for trivial disclosures but for $2.4 billion.[2] Because these potentially valuable rights are being released in this Settlement, it is extremely important that the class receive valuable consideration in exchange.

4. In exchange for the release in this Settlement, the class has received three discrete line item disclosures. This trade could only take place as a result of the break-down of the adversary process and the distortion of incentives created by disclosure settlements.[3] Although the adversarial process did work at earlier stages in these proceedings, it is no longer operational now that both sides support the Settlement and defendants have agreed not to oppose plaintiff's

---

[1] *See e.g., In re Wilmington Trust Shareholders Litigation*, C.A. No. 5958-VCL, transcript ruling, at 13-19 (Del. Ch. June 7, 2012) (emphasizing the importance of preserving federal securities law claims).

[2] Halah Touryalai, *Bank of America Will Pony Up $2.4 Billion to Investors over Merrill Lynch Merger*, FORBES (Sept. 28, 2012).

[3] *See generally* Joel Edan Friedlander, *How* Rural/Metro *Exposes the Systemic Problem of Disclosure Settlements* (U of Penn, Inst for Law & Econ Research Paper No. 15-40, forthcoming Del. J. Corp. L., January 23, 2016), available at http://ssrn.com/abstract=2689877.

fee request.[4] As this Court has previously emphasized, the plaintiffs' briefs and affidavits extolling the value of the supplemental disclosures and the silence of the defendants in the face of these assertions cannot be taken at face value.[5]

5. As described in further detail below, it is my opinion that the supplemental disclosures are immaterial and provide no benefit to the Company or the class. Because the Settlement provides no material benefit to the Company or the class yet proposes to release potentially valuable shareholder rights, it is not a fair, adequate and reasonable trade. The Settlement must therefore be rejected, and attorneys' fees cannot be awarded.

II. PERSONAL BACKGROUND AND QUALIFICATIONS

6. I am the T.J. Maloney Professor of Law at the Fordham University School of Law, where I am also the Director of the Corporate Law Center. I have taught at Fordham since 2006 and have also taught at Columbia Law School, New York University School of Law, the University of Connecticut School of Law, and the University of Pennsylvania Law School. Before becoming an academic, I practiced law at Wachtell, Lipton, Rosen & Katz in New York City. A copy of my curriculum vitae is attached hereto as Appendix A.

7. My specialty is corporate law with a particular focus on mergers & acquisitions and shareholder litigation. I have numerous publications in these areas, including several recent

---

[4] For example, The Director Defendants and Reynolds American Inc.'s Brief in Opposition to Plaintiff's Motion to Enjoin Shareholder Meeting and Vote makes arguments against the materiality of the plaintiff's claims and, by implication, the materiality of the relief awarded in this Settlement that are unlikely to be offered at the fairness hearing.

[5] *Raul v. Burke*, 2016 NCBC 8, 15 CVS 16703 (order and opinion, Jan. 28, 2016), at n. 2 (acknowledging the problems posed by disclosure settlements and the need for close judicial supervision).

articles directly addressing settlement dynamics in merger litigation.[6] In connection with my research I have closely analyzed many settlements. I have served as an expert witness in connection with the settlement of merger class actions.[7] I have entered an objection myself.[8] And, most recently, I filed an *amicus* brief in the *In re Trulia* litigation.[9]

III. THE DISCLOSURES IN THIS CASE ARE NOT MATERIAL

8. In order for disclosures to provide the basis either for settlement consideration or for an award of attorneys' fees, they must be material.[10] North Carolina's standard of materiality is the same as the one adopted by the U.S. Supreme Court: in order for a piece of information to be material, "there must be a substantial likelihood that a reasonable purchaser would consider it

---

[6] *See e.g.*, Jill E. Fisch, Sean J. Griffith, and Steven Davidoff Solomon, *Confronting the Peppercorn Settlement in Merger Litigation: An Empirical Analysis and a Proposal for Reform,* 93 Texas Law Review 557 (2015); Sean J. Griffith, *Correcting Corporate Benefit: How to Fix Shareholder Litigation by Shifting the Doctrine on Fees,* 56 Boston College Law Review 1 (2015); Sean J. Griffith & Alexandra D. Lahav, *The Market for Preclusion in Merger Litigation*, 66 Vanderbilt L. Rev. 1053 (2013).

[7] *See Gordon v. Verizon Commc'ns, Inc.*, No. 653084/13, 2014 WL 7250212, at *8 (N.Y. Sup. Ct. Dec. 19, 2014) (refusing to approve a disclosure settlement because doing so would make the court "an enabler of an unwarranted divestiture of shareholder rights by virtue of plaintiff's release, as well as a misuse of corporate assets were plaintiff's legal fees to be awarded").

[8] *See In re Riverbed Technology, Inc. Stockholders Litigation*, 2015 WL 5458041, at *6 (Del. Ch. Sept. 17, 2015) (noting that a serious objection had been raised "in light of the rather meager benefit achieved by the Settlement for the Class, as well as the broad release bargained for" that "[i]n another factual scenario it might well carry the day").

[9] *In re Trulia, Inc. Stockholder Litigation*, 2016 WL 325008 (Del. Ch. Jan. 22, 2016).

[10] *Chrysler* v. *Dann,* 223 A.2d 384 (Del. 1966); *Hoffman* v. *Dann*, 205 A.2d 343, 345 (Del. 1964), *cert. denied* 380 U.S. 973 (1965). *Accord In re Trulia*, 2016 WL 325008, at *10 ("[D]isclosure settlements are likely to be met with continued disfavor in the future unless the supplemental disclosures address a plainly material misrepresentation or omission.... In using the term 'plainly material,' I mean that it should not be a close call that the supplemental information is material....").

important in deciding whether or not to purchase."[11] In other words, the disclosure must have "significantly altered the 'total mix' of information" available to the investor.[12] The supplemental disclosures in this Settlement do not meet this standard.

9. There are three supplemental disclosures in this Settlement. Each is immaterial. The first provides management's unlevered free cash flow projections for Reynolds and Lorillard (the "Free Cash Flow Disclosure"). The second states that a technology sharing agreement between Reynolds and BAT has not been agreed (the "Technology Agreement Disclosure"). The third states that the Company cannot predict FDA policy with regard to the regulation of menthol (the "Menthol Disclosure"). I will discuss each in turn.

10. The Free Cash Flow Disclosure is immaterial because the proxy statement contained a full and fair summary of the financial advisor's analysis. This summary is neither incomplete nor misleading. Ample information was provided to enable investors to assess the future cash flows of the business. In light of this, the additional disclosure of free cash flows adds nothing material.

11. There is no requirement that merging parties release sufficient information to allow investors to duplicate the financial advisors' analysis.[13] As emphasized in *Trulia*, all that

---

[11] *Associated Packaging, Inc. v. Jackson Paper Mfg. Co.*, No. 10 CVS 745, 2012 WL 707038, at *9 (N.C. Super. Mar. 1, 2012) (quoting *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976).

[12] *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976).

[13] *In re Plains Exploration & Prod. Co. S'holder Litig.*, 2013 WL 1909124, at *8 (Del. Ch. May 9, 2013) ("The duty to disclose financial information … does not require that stockholders have sufficient information to make an independent determination of fair value.") (internal quotations omitted). See also *Globis P'rs, L.P. v. Plumtree Software, Inc.*, 2007 WL 4292024, at *12-14 (Del. Ch. Nov. 30, 2007) ("Delaware law does not require disclosure of all the data underlying a fairness opinion such that a shareholder can make an independent determination of value.").

is required is a summary of how the financial advisors performed their analysis.[14] Adding further granular detail does not establish materiality.[15]

12. Some estimate of future cash flows is important for shareholders in deciding how to vote in a merger, but free cash flow projections are not *per se* material. Although there is a Delaware case that suggests the failure to provide unlevered free cash flow projections may constitute a material omission,[16] there is also a litany of Delaware decisions that plainly hold that free cash flow projections are *not* necessarily material.[17] The best way to approach the question

---

[14] In *Trulia*, Chancellor Bouchard emphasized:

> A fair summary, however, is a *summary*. By definition, it need not contain all information underlying the financial advisor's opinion or contained in its report to the board. Indeed, this Court has held that the summary does not need to provide sufficient data to allow the stockholders to perform their own independent valuation. The essence of a fair summary is not a cornucopia of financial data, but rather an accurate description of the advisor's methodology and key assumptions.

In re Trulia, 2016 WL 325008, at *12 (emphasis in original, citations omitted).

[15] *In re Amylin Pharmaceuticals S'holders Litig.*, C.A. 7673-CS, transcript ruling, at 9 (Del. Ch., Feb. 5, 2013) ("You don't have to disclose details. You have to disclose the material information relevant to understanding the banker's thing."). *See also In re Theragenics Corp. Stockholders Litigation*, C.A. No. 8790-VCL, transcript ruling, at 22 (Del. Ch. May 5, 2014) (rejecting supplemental disclosures that "add nothing more than further granular detail").

[16] 11 A.3d 1175, 1178-79 (2010).

[17] *See e.g., Skeen v. Jo-Ann Stores, Inc.*, 750 A.2d 1170, 1174 (Del. 2000) (rejecting claim that failure to disclosure financial projections, although "they might be helpful" are not actionable, unless "the undisclosed information would significantly alter the total mix of information already provided"); *Steamfitters Local Union 447 v. Walter*, No. 5492-CC, slip op. at 9 (Del. Ch. June 21, 2010) (holding that when shareholders were already given projections including net revenue, net income, EPS and EBITDA, free cash flow projections would not be material because they would not meaningfully alter the total mix of information); *In re Checkfree Corp. S'holders Litig.*, 2007 WL 3262188 (Del. Ch. Nov. 1, 2007) (rejecting claim that failure to include cash flow projections constituted material omission because "[a] disclosure that does not include all financial data needed to make an independent determination of fair value is not ...per se misleading or omitting a material fact. The fact that the financial advisors may have considered certain non-disclosed information does not alter this analysis.") (*quoting In re Gen. Motors (Hughes) S'holder Litig.*, C.A. No. 20269, 2005 WL 1089021, at *16 (Del.Ch. May 4, 2005), aff'd,897 A.2d 162 (Del.2006)); *Globis Partners, L.P. v. Plumtree Software, Inc.*, No. 1577-

is by asking, simply, did the addition of free cash flow projections materially alter the total mix of information in this case.

13. Free cash flow projections provide an estimate of the future cash flows of a business.[18] In a merger, future cash flows are important because shareholders must decide whether to accept the merger consideration or to decline it in favor of anticipated future cash flows. In addition to free cash flow projections, future cash flows are also indicated by estimates of revenue, net income, EBIT, and EBITDA.[19]

14. In this transaction, shareholders were given estimates of future cash flows broken down in several ways. In the original joint proxy statement/ prospectus, shareholders were given six years of Revenue, EBITDA, and Operating Income for Reynolds and essentially the same information with regard to Lorillard.[20] In addition to these non-GAAP projections and the

---

VCP, slip op. at 32-34 (Del. Ch. Nov. 30, 2007) (holding that when the proxy statement contains a "fair summary" of the bankers' analysis, the disclosure of additional information to confirm the accuracy of that analysis is not material); *In re PNB Holding Co. S'holders Litig.*, 2006 WL 2403999, at *16 (Del. Ch. Aug. 18, 2006 ("Even in the cash-out merger context, though, it is not our law that every extant estimate of a company's future results, however stale or however prepared, is material."); *In re Best Lock Corp. S'holders Litig.*, 845 A.2d 1057, 1070 (Del. Ch. 2001) (failure to disclose projections provided to investment bank for fairness opinion not material unless the omitted information "would have assumed actual significance in the deliberations of reasonable shareholders").

[18] Free cash flow consists of operating cash flow minus capital expenditures. The resulting figure represents the cash a company can be expected to generate after making the payments necessary to maintain its asset base. *See* RICHARD A. BREALEY, STEWART C. MYERS & FRANKLIN ALLEN, PRINCIPLES OF CORPORATE FINANCE, at 102 (9th ed., 2008).

[19] Both EBIT and EBITDA are measures of revenue minus expenses. EBIT measures earnings net of interest and taxes. EBITDA measures earnings minus interest, taxes, depreciation and amortization. BREALEY, MYERS & ALLEN, at G-4.

[20] *See* Joint Proxy Statement/ Prospectus, filed with the SEC on Form 424B on Dec. 22, 2014, at pages 146-148. Operating income, a synonym for EBIT, is a financial variable that focuses on the ability of a business to generate earnings from operations, ignoring tax and capital structure variables. EBITDA dilates further on the raw ability of a business to generate cash by removing accounting variables—depreciation and amortization—that can be manipulated by management.

extensive non-tabular disclosures describing how each was derived, the original proxy statement/ prospectus provided shareholders with a table reconciling EBIT and EBITDA to the closest GAAP financial measure, income before income taxes.[21]

15. Shareholders were thus provided with extensive information to estimate the future cash flows of the business as well as ample information to understand how the financial advisors performed their analysis. As a result, and in light of the relevant standard for the disclosure of financial information,[22] the addition of free cash flow projections did not materially alter the total mix of information. There is no claim that the addition of free cash flow projections corrected a previously erroneous valuation estimate or that they threw existing valuation projections into doubt. Rather, the crux of plaintiffs' claim is merely that the additional disclosure might be helpful, but the law is clear that merely being helpful does not render a disclosure material.

16. Second, the Technology Agreement Disclosure was immaterial because it merely added words and no substance to the pre-existing disclosure. The Company's July 15, 2014 press release, filed with the July 16, 2014 8-K included the sentence "In addition, RAI and BAT have agreed in principle to pursue an ongoing technology-sharing initiative...." It also included the sentence, in a quotation from Company's President and CEO, that "our agreement with BAT to jointly pursue development of new products... holds great promise...." The new disclosure adds that "at the time of the Press Release, RAI and BAT had not entered into an agreement...

As a result, EBITDA is a particularly important variable in comparing profitability between companies and is commonly used in M&A transactions.

[21] Joint Proxy Statement/ Prospectus, filed with the SEC on Form 424B on Dec. 22, 2014, at pages 149.

[22] *See supra* paragraph 11.

(but had only agreed in principle to pursue such an agreement), and since the Press Release, RAI and BAT have not entered into such an agreement."

17. However, the absence of an agreement is plain from the original disclosure. The original press release referred to an *agreement in principle* to *pursue* a further initiative. An agreement in principle to pursue a further initiative is not the same thing as agreeing to the initiative itself. This is the plain meaning of the words themselves. The CEO's quotation concerning an agreement can be understood to relate back to the agreement in principle, not the initiative. In any event, the quotation must be understood in light of the prior language concerning an agreement in principle to *pursue* a further initiative. The press release never says there is an agreement on the further initiative. The supplemental disclosure merely adds words to what the press release had already said. It does not materially alter the total mix of information.

18. Moreover, the agreement to pursue a relationship with BAT was not the subject of shareholder action. Reynolds shareholders were being asked to approve the issuance of Reynolds stock to Lorillard pursuant to the merger and the issuance of Reynolds stock to BAT under the Share Purchase Agreement to fund the merger. Neither of these matters was contingent upon the technology sharing agreement. Moreover, the potential for a technology-sharing initiative with BAT was not factored into any valuation of the proposed transaction by either the financial advisors or the Reynolds board. As pointed out by defendants at a point in this litigation when the adversarial process still functioned:

> There are no statements or discussions in either Reynolds' board meeting minutes or the bankers' books provided to the Director Defendants by Lazard reflecting a value being placed on the agreement in principle to pursue a new technology-sharing initiative. … Lazard's analysis of the Proposed Transaction did not place

> any value on a potential new technology-sharing initiative between Reynolds and BAT. ... Indeed, even Plaintiff has never argued that Reynolds factored the potential for a new technology-sharing agreement into its valuation of the transaction.[23]

18. The Technology Agreement Disclosure makes all of this explicit. But there is no basis in the Company's existing disclosure for shareholder confusion on these points. The supplemental disclosure does not correct contrary statements nor does it clarify a misleading statement. It merely adds words to previously disclosed information.[24] It therefore does not materially alter the total mix of information.

19. Third, the Menthol Disclosure has two aspects, neither of which is material. The first aspect of the Menthol Disclosure is a statement that the Company could not predict future regulatory action with regard to menthol. This is immaterial first because it is obvious that the Company was in no position to predict future regulatory action. The statement that a person cannot foresee the future can only be material if it corrects a belief that perhaps that person does have oracular powers. There was no reason for any investor to believe the Company had these powers.

20. The second aspect of the Menthol Disclosure is a statement that any further regulatory action with regard to menthol would not give rise to a right of Company directors to modify their recommendation in favor of the share issuance. This aspect of the Menthol Disclosure is immaterial because the situations that would have given rise to such a right were already fully disclosed in the original proxy statement/ prospectus. Moreover, it is crystal clear

---

[23] The Director Defendants and Reynolds American Inc.'s Brief in Opposition to Plaintiff's Motion to Enjoin Shareholder Meeting and Vote, at 9.

[24] *Abrons v. Maree*, 911 A.2d 805, 813 (Del Ch 2006) ("Consistent and redundant facts do not alter the total mix of information, nor are insignificant details and reasonable assumptions material.").

from the pre-existing disclosure that further regulatory actions do not give rise to such a right. For example, on page 179 of the original proxy statement/ prospectus in the section entitled "Recommendation of the RAI Board of Directors," "any menthol regulatory action" is expressly excluded as a basis for Company directors to change their recommendation in favor of the share issuance.[25] Moreover, the risks of government regulation of menthol are amply described elsewhere in the proxy statement/ prospectus.[26] The repetition of information already fully disclosed does not materially alter the total mix of information. The Menthol Disclosure is therefore not material.

21. As a result of the foregoing analysis, I conclude that the supplemental disclosures neither individually nor collectively alter the total mix of information available to a reasonable investor. Because they thus fail to meet the standard of materiality, they provide no legally cognizable benefit to the Company or the class and therefore cannot serve as a basis for the release, nor can they serve as a basis for the award of attorneys' fees.

IV. CONCLUSION: THE SETTLEMENT MUST BE REJECTED

22. I have evaluated the terms of the Settlement in order to determine whether they benefit the Company or the class. I have concluded that they do not. It is my view, therefore, that this Settlement must be rejected and attorneys' fees cannot be awarded.

---

[25] Joint Proxy Statement/ Prospectus, filed with the SEC on Form 424B on Dec. 22, 2014.
[26] *See id.* at 59 ("Risk Factors Relating to the Merger and Divestiture") and 68 ("Risk Factors Relating to the Combined Company").

This the 10th day of February, 2016.

Sean J. Griffith

Sworn to and subscribed before me

this the 10th day of February, 2016.

Notary Public

My Commission expires: 6/20/2019

JENNY DUMET
Notary Public, State of New York
No. 01DU6243489
Qualified in New York County
Commission Expires June 20, 2019

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing **AFFIDAVIT OF SEAN J. GRIFFITH IN SUPPORT OF JAMES C. SNYDER'S OBJECTION TO THE PROPOSED SETTLEMENT** has been electronically filed with the North Carolina Business Court, which will provide notice of filing to counsel of record, and has been served by electronic mail pursuant to the Joint Stipulation and Scheduling Order:

Alan W. Duncan, Esq.
Email: aduncan@mullinsduncan.com
Stephen M. Russell, Esq.
Email: srussell@mullinsduncan.com
Jason M. Leviton, Esq.
Email: Jason@blockesq.com
Joel A. Fleming, Esq.
Email: Joel@blockesq.com

Michael L. Robinson, Esq.
Email: mrobinson@robinsonlawing.com
Gary A. Bornstein, Esq.
Email: gbornstein@cravath.com
M. Brent Byars, Esq.
Email: mbyars@cravath.com
Micaela R.H. McMurrough
Email: mmcmurrough@cravath.com

Ronald R. Davis, Esq.
Email: rdavis@wcsr.com
W. Andrew Copenhaver, Esq.
Email: acopenhaver@wcsr.com
James A. Dean, Esq.
Email: jdean@wcsr.com
Robert C. Micheletto, Esq.
Email: rmicheletto@jonesday.com
Thomas E. Lynch, Esq.
Email telynch@jonesday.com
Andrew S. Kleinfeld, Esq.
Email: askleinfeld@jonesday.com

James P. McLoughlin, Jr., Esq.
Email: jimmcloughlin@mvalaw.com
Mark A. Nebrig, Esq.
Email: marknebrig@mvalaw.com
Jonathan M. Watkins, Esq.
Email: jonathanwatkins@mvalaw.com

This the 10th day of February, 2016.

/s/ Amiel J. Rossabi
North Carolina State Bar No. 16984
Attorney for James Snyder
ROSSABI BLACK SLAUGHTER, P.A.
3623 North Elm Street, Suite 200
Post Office Box 41027
Greensboro, North Carolina 27404-1027
Telephone: (336) 378-1899
Email: arossabi@lawfirmrbs.com