STATE OF NORTH CAROLINA	IN THE GENERAL COURT OF JUSTICE
	SUPERIOR COURT DIVISION
GUILFORD COUNTY	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.

PLAINTIFF'S REPLY IN FURTHER SUPPORT OF MOTIONS FOR FINAL APPROVAL OF PARTIAL SETTLEMENT, CERTIFICATION OF SETTLEMENT CLASS AND AWARD OF ATTORNEYS' FEES AND EXPENSES

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Plaintiff Dr. Robert Corwin, as Trustee for the Beatrice Corwin Living Irrevocable Trust ("Plaintiff"), respectfully submits this reply in further support of the pending motions for an order (1) granting final approval of the Partial Settlement, (2) certifying the Class for purposes of effectuating the Partial Settlement, and (3) approving the Fee and Expense Request.[1]

I. ARGUMENT

Reynolds has over 1.4 billion outstanding shares. To the best of undersigned counsel's knowledge, one person has filed an objection to the proposed Partial Settlement: a former Lorillard shareholder named James C. Snyder, Jr. (the "Objector").[2] Mr. Snyder's "Submmision [*sic*] of Objections and Notification to Appear at Settlement Hearing" (the "Objection") should be overruled.

A. The Objector Should Not Be Given More Time To File Additional Briefing

The Objector asserts that the objection deadline should be extended and he should be permitted to supplement the Objection because he did not receive the Notice until 19 January 2016. (Obj. at 2, 11.) It appears from the Objector's statement that he held the stock in "street name" (*i.e.*, his brokerage firm was the shareholder of record). (*See* Affidavit of Julie Swanson

[1] Capitalized terms used herein have the same meaning as those used in Plaintiff's Final Approval Brief (filed 31 December 2015). All emphases are added unless otherwise indicated.

[2] It appears from the Objector's exhibits that he was not a Reynolds stockholder prior to 12 June 2015, the effective date of the Transaction. Instead, he was a Lorillard shareholder who only came to own Reynolds stock by virtue of the closing of the Transaction. In the Transaction, Reynolds acquired Lorillard at a per-share price of $50.50 in cash and 0.2909 shares of Reynolds stock. (*See, e.g.*, Order of 4 Aug. 2014, ¶41.) Thus, when the Transaction closed on 12 June 2015, (*id.* ¶43), a single share of Lorillard stock would be automatically exchanged for 0.2909 of a share of Reynolds stock. Exhibit A-1 shows that Objector held 180 shares of Lorillard stock from 10 September 2012 until 12 June 2015. It recites, in connection with the Lorillard stock, "MANDATORY MERGER EFF[ECTIVE] 6/12/1[5]." (Obj., Ex. A-1.) It shows that on the same day the Transaction closed, Objector obtained 52.362 shares of Reynolds stock, or 0.2909 shares per each share of Lorillard stock he owned. The disposition of Lorillard stock and acquisition of Reynolds stock was caused by a "Cash/Stock Merger." (Obj., Ex. A-2.) Objector sold the newly-acquired Reynolds stock a few days later. (Obj., Ex. A-1.)

(filed January 29, 2016) ¶5 (explaining shares held in "street name").) Brokers received the Notice on 16 December 2015 and were asked to forward it to beneficial owners. (*Id.* ¶¶6-7.) Any delay thereafter was caused by the Objector's broker. Such delay is a risk assumed by shareholders like the Objector who hold in street name. *See, e.g.*, *In re Riverbed Tech., Inc. Stockholders Litig.*, 2015 Del. Ch. LEXIS 241, *4-7 n.5 (Del. Ch. Sept. 17, 2015) (overruling untimely objection by shareholder whose broker was untimely in forwarding notice; "those who hold stock through nominees do so at the risk of missing notice of corporate actions."); *In re Activision Blizzard, Inc. Stockholder Litig.*, 124 A.3d 1025, 1061 (Del. Ch. 2015) ("If an owner of stock chooses to register his shares in the name of a nominee, he takes the risks attendant upon such an arrangement, including the risk that he may not receive notice of corporate proceedings.").[3]

Moreover, although Mr. Snyder appears *pro se* and purports to be "in the process of retaining counsel" (Obj. at 4), he has not been prejudiced by the lack of counsel. According to a profile on the website of the Practising Law Institute, Mr. Snyder is an attorney who was General Counsel for Family Dollar Stores (a large, publicly traded company) from 2009 until the completion of the Dollar Tree merger in July of 2015.[4] Prior to joining Family Dollar, he oversaw litigation and risk management at Home Depot, with responsibility for all commercial

[3] *See also, e.g.*, *In re MCA, Inc.*, No. 11,740, 1993 Del. Ch. LEXIS 28, at *14-15 (Del. Ch. Feb. 12, 1993) ("A shareholder who holds her shares in a 'street name' assumes responsibility for any delays in notice that are attributable to the delay attendant in forwarding notice through the 'street name.'"); *Enstar Corp. v. Senouf*, 535 A.2d 1351, 1354 (Del. 1987) ("The legal and practical effects of having one's stock registered in street name [and] … [t]he attendant risks are those of the stockholder[.]"); *Am. Hardware Corp. v. Savage Arms Corp.*, 136 A.2d 690, 692 (Del. 1957) (street name owners "take[] the risks attendant upon such an arrangement, including the risk that [they] may not receive notice of corporate proceedings….").

[4] *See* Practising Law Institute, "Faculty Profile – James C. Snyder, Jr.," at http://pli.edu/Content/Faculty/James_C_Snyder_Jr_/_/N-4oZ1z11mvj?ID=PE258570.

and general liability litigation. Prior to working for Home Depot, Mr. Snyder was a litigation partner at King & Spalding in Atlanta.[5]

B. *Trulia* Supports Approval Of The Partial Settlement

Contrary to the Objector's suggestion, the recent decision by Chancellor Bouchard in *In re Trulia, Inc. Stockholder Litig.*, 2016 Del. Ch. LEXIS 8 (Del. Ch. Jan. 22, 2016) supports approval of the Partial Settlement.

The disclosure settlements that Chancellor Bouchard criticized in *Trulia* are those which provide disclosures of "marginal value and … grant broad releases to defendants." *Id.* at *23. The settlement that was rejected in *Trulia*, for example, would have released "'any claims arising under federal, state, statutory, regulatory, common law, or other law or rule' held by any member of the proposed class relating in any conceivable way to the transaction, with the exception of the carve-out for claims arising under state and federal antitrust law." *Id.* at *12. The disclosures offered in return were "trivialities" and "minutiae," *id.* at *50, 53, and the court found that "none of plaintiffs' Supplemental Disclosures were material or even helpful to Trulia's stockholders," *id.* at *59.

Trulia does not say that supplemental disclosures are always insufficient to support a settlement. To the contrary, Chancellor Bouchard stated, "disclosure settlements are likely to be met with continued disfavor in the future unless the supplemental disclosures address a plainly material misrepresentation or omission, and the subject matter of the proposed release is narrowly circumscribed to encompass nothing more than disclosure claims and fiduciary duty claims concerning the sale process, if the record shows that such claims have been investigated sufficiently." *Id.* at *34. Importantly, the court singled out financial projections as an example of

[5] The Objector remains an "Active Member in Good Standing" of the State Bar of Georgia. *See* State Bar of Georgia, "Member Search," at http://www.gabar.org /membership/membersearch.cfm.

the type of material disclosures that would support such a settlement. *Id.* at *40 n.57 (noting that Delaware courts have "placed special importance" on disclosure of "management projections and internal forecasts" because this information offers "unique insights into the value of the company that cannot be obtained elsewhere.").

The Partial Settlement presented here is exactly the type of settlement that will continue to be approved by Delaware courts under *Trulia*.

C. The Supplemental Disclosures Are Material

The Objector's analysis of the materiality of the Supplemental Disclosures ignores the extensive analysis presented in Plaintiff's opening briefs. (*Compare* Final Approval Brief at 14-16 *with* Obj. at 5-7.) Plaintiff will not restate that analysis here, but will respond briefly to the Objector's specific arguments.[6]

1. The Cash Flow Disclosures Were Material

As noted in *Trulia* and throughout Delaware jurisprudence, cash flow projections are uniquely important and material to shareholders. However, the Objector criticizes the materiality of the disclosure of all after-tax unlevered free cash flow projections prepared by Reynolds' management for both Reynolds and Lorillard from 2014 through 2023 (the "Cash Flow Disclosures"). (Obj. at 5-7.) He argues that the Proxy had already provided "projected Revenues (*i.e.*, Net Sales), EBITDA, and Operating Income for RAI from 2014 through 2019,"

[6] In addition to the specific disclosures discussed below, the Objector asserts generally that the Supplemental Disclosures "cannot have altered the total mix of information" because "shareholders had already received over 400 pages of detailed information." (Obj. at 7.) But as a federal court recently recognized in approving a disclosure-based settlement, "you can have 7,000 pages [of disclosures], and you can [still] have one page that's very significant and make[s] quite a difference." *Taxman v. Covidien plc*, 1:14-cv-12949, Dkt. 80 (D. Mass. Sept. 21, 2015).

that projections of Lorillard's revenue, EBITDA, and EBIT were disclosed for 2014 through 2018,[7] and that the Cash Flow Disclosures are, therefore, immaterial. (*Id.* at 6.) Not so.

First, the omission of free cash flow projections is material, even where revenue and EBITDA projections are disclosed. *See Gaines v. Narachi*, 2011 Del. Ch. LEXIS 157, at *3 (Del. Ch. Oct. 6, 2011) ("[I]n *Maric* this Court enjoined the proposed merger until free cash flow projections were disclosed, despite the fact that the proxy already disclosed projected revenues, EBIT, and a variation of EBITDA."); *Maric Capital Master Fund, Ltd. v. Plato Learning, Inc.*, 11 A.3d 1175, 1178 (Del. Ch. 2010) (enjoining merger vote where "the proxy statement selectively disclosed projections relating to … future performance. In particular, the proxy statement for some inexplicable reason excised the free cash flow estimates that had been made by … management and provided to [the financial advisor].").

These decisions are not surprising because revenue, net income, EBIT, and EBITDA projections can be used to estimate *operating* cash flows. But *free* cash flows—and thus, the value of the company[8]—cannot be derived from *operating* cash flows projections without projections of capital expenditures (which were not disclosed in the Proxy). *See* Brealey and Myers, PRINCIPLES OF CORPORATE FINANCE 78 (6th ed.) ("[F]ree cash flow equals operating cash flow minus gross investment…," where gross investment is represented by capital expenditures); Holthausen and Zmijewski, CORPORATE VALUATION 98 ("The unlevered cash flow from operations we measure using this method is the same as the unlevered cash flow from

[7] The Objector states that six years of Lorillard projections were disclosed in the preliminary proxy. In fact, only five years were provided. More importantly, the Objector ignores that these Lorillard projections were the projections prepared by *Lorillard*'s management. (*See* Ledwig Aff. (filed Jan. 2, 2015), Ex. C (Preliminary Proxy) at 148.) Only the Supplemental Disclosures revealed *Reynolds'* management's projections for Lorillard.

[8] As Defendants' expert, Dr. Zmijewski, has written, "[t]he cash flows that we discount are an important input into any discounted cash flow (DCF) valuation of a company." R. Holthausen, M. Zmijewski, CORPORATE VALUATION: THEORY, EVIDENCE & PRACTICE 82 (2014).

operations using the EBIT method. To calculate free cash flow we subtract the amount spent on acquisitions [] and capital expenditures [].").

In other words, as Plaintiff's experts opined in connection with the Preliminary Injunction motion, without the Cash Flow Disclosures it would not have been reasonable "to expect shareholders to attempt to reverse-engineer, with any degree of confidence, the missing free cash flows[.]" (*See* Supplemental Affidavit Of Edwards And Canessa (filed January 15, 2015) ¶ 41.)

Second, the omission of *any* projections—*i.e.*, the omission of free cash flows *and* revenue, net income, EBIT, and EBITDA—for later years (2020 through 2023 for Reynolds; 2019 through 2023 for Lorillard) was material. As Chancellor Bouchard noted—just a few months before *Trulia*—disclosing projections for only some of the years used in a discounted cash flow analysis makes it impossible for shareholders to determine how much of the overall valuation of the DCF analysis is attributable to the easily manipulated terminal period. *See In re TW Telecom, Inc. Stockholders Litig.*, No. 9485-CB (Del. Ch. Aug. 20, 2015) (Transcript) at 47:15-48:2 (approving disclosure-only settlement; holding that disclosure of one missing year of financial projections "has potential relevance … because, with the benefit of that number ... somebody could then ascertain how much of the DCF valuation was packed into the terminal value, as opposed to the discrete period. And that can have importance or relevance in getting some comfort about the quality of the numbers in the DCF."). Thus, the Cash Flow Projections alone are worthy of approving the settlement and fee request.

2. The Technology Agreement Disclosures Were Material

The Objector also asserts that the Supplemental Disclosures regarding the Technology Sharing Agreement were immaterial because "the potential new technology-sharing initiative ...

was not factored into the valuation of any of the transactions that are part of RAI's planned acquisition of Lorillard." (Obj. at 7.)

That is precisely backward. Reynolds' original press release described the Technology Sharing Agreement as a "Transaction Highlight" that would "certainly enhance value for all shareholders." (*See* Final Approval Brief at 2-3.) Unsurprisingly, journalists and analysts assumed that a value-enhancing Technology Sharing Agreement was part of the Transaction. (*See* Plaintiff's Preliminary Injunction Brief (filed Jan. 2, 2015) at 8-9; Plaintiff's Preliminary Injunction Reply Brief (filed Jan. 15, 2015) at 4-5.) Had it not been for this litigation and the Supplemental Disclosures, shareholders would have voted on the Transaction believing that the Technology Sharing Agreement would "certainly enhance shareholder value," which is demonstrably false.

3. The Menthol Disclosure Was Material

Finally, the Objector argues that the Supplemental Disclosure regarding menthol regulation is immaterial because "such theoretical regulatory actions would have no effect on the transaction." (Obj. at 5.) Again, this argument is backwards. Information about the risk of new menthol regulations was material to Reynolds shareholders because Reynolds would have been unable to back out of the Transaction, even if new menthol regulations drastically affected the value of Lorillard. Shareholders were entitled to additional disclosure of the risks that they were assuming by voting to approve the Transaction.

D. The Release Is Narrowly Tailed and Not Overly Broad

The Objector is also incorrect in arguing that the release is "trading away potentially valuate [*sic*] shareholder rights in overbroad releases." (Obj. at 4; *see also* Obj. at 8 (describing release as "overly broad").) The release (i) does not release any claims against BAT; (ii) does not apply to the Fairness Claims; (iii) does not apply to "Other Claims" as defined in the MOU;

(iv) expressly preserves Plaintiff's ability to argue that misstatements or omissions in the proxy defeat an acquiescence argument; and (v) deliberately preserves any claims that Lorillard shareholders could have stemming from their Delaware litigation. (*See* Final Approval Brief at 13-14.)

The scope of the release here is the inverse of the release in *Trulia*. There, the proposed release covered all claims related to the transaction except a narrow set of potential claims under antitrust law. *Trulia*, 2016 Del. Ch. LEXIS 8, at *12. Here, the release covers only the narrowly-defined Settled Claims, *i.e.*, the Disclosure Claims. (*See* MOU ¶3(e) (limiting "Settled Claims" to claims "that are based upon or arise out of, in whole or in part … (A) any disclosures or non-disclosures … and/or (B) any fiduciary obligations of any of the Defendants in connection with any disclosures or non-disclosures in the Registration Statement and any amendments thereto"). The release explicitly excludes the Fairness Claims (defined on page 3 of the MOU as claims "alleging … that the Director Defendants breached their fiduciary duties by approving the Subscription and Support Agreement and an alleged 'Technology Sharing Agreement'") and "Other Claims" (defined on page 5 of the MOU as "any claims, to the extent such claims exist, other than the Fairness Claims and the Settled Claims"). (*See* MOU ¶3(e) ("The Settled Claims shall not include … any of the Fairness Claims, or [] any of the Other Claims.").) Chancellor Bouchard suggested in *Trulia* that he would have approved the settlement if "the revised release was [] limited to disclosure claims and fiduciary duty claims concerning the decision to enter the merger." *Trulia*, 2016 Del. Ch. LEXIS 8, at *59 n.89. The release before this Court is even narrower than that, because other than the Disclosure Claims, all "fiduciary duty claims concerning the decision to enter the merger" have been preserved. Thus,

the instant release does not "threaten the loss of potentially valuable claims that have not been investigated with rigor," which was one of Chancellor Bouchard's principal concerns.[9] *Id.* at *4.

The agreement not to seek to unwind or rescind the Transaction[10]—the only purported overbreadth that the Objector identifies—was not a significant concession because it was never a realistic possibility. He has not identified any claim he would otherwise pursue that could not be remedied with money damages, or that would provide a basis to unwind the Transaction. As Delaware courts have repeatedly held, once a merger-related transaction has closed, the court cannot "unscramble the eggs." *See, e.g., Police & Fire Ret. Sys. v. Bernal*, 2009 Del. Ch. LEXIS 111, *6 (Del. Ch. June 26, 2009) ("it would be impossible to 'unscramble the eggs' by attempting to unwind the merger once it has been completed."); *Catamaran Acquisition Corp. v. Spherion Corp.*, 2001 Del. Super. LEXIS 227, at *15 (Del. Super. Ct. May 31, 2001) ("the Court of Chancery would find it impossible to 'unscramble the eggs' by rescinding" a stock purchase agreement); *In re Lukens Inc. S'holders Litig.*, 757 A.2d 720, 728 (Del. Ch. 1999) ("plaintiffs'

[9] There are other noteworthy differences between *Trulia* and this case. There, four plaintiffs and four sets of attorneys filed "essentially identical complaints," emblematic of the "flurry of class action lawsuits" often provoked by the announcement of a merger transaction. *Trulia*, 2016 Del. Ch. LEXIS 8, at *15. Here, only one plaintiff and undersigned counsel took the risk of bringing these claims against Reynolds and its Directors (as well as the claims against BAT). There, the parties "promptly agreed on an expedited schedule" for discovery of basic information that could support a disclosure settlement. *Id.* at *7. Chancellor Bouchard noted that "defendants are incentivized to settle quickly … to obtain broad releases as a form of 'deal insurance,'" and that "[t]hese incentives are so potent that many defendants self-expedite the litigation by volunteering to produce 'core documents' to plaintiffs' counsel, obviating the need for plaintiffs to seek the Court's permission to expedite the proceedings in aid of a preliminary injunction application …." *Id.* at *16-17. Here, by contrast, all Defendants moved to stay Plaintiff's discovery requests, and the Court ruled on contested discovery issues. There, "no motions were decided (not even a motion to expedite)," meaning that "there has been no significant discovery or meaningful motion practice to inform the Court's evaluation" of the settlement. *Id.* at *20-21. Here, there has been extensive motion practice and Court proceedings (telephonically and in-person), and the Court is well-informed about the case.

[10] Although Plaintiff challenges only the fairness of the BAT Share Purchase and not the Lorillard Acquisition, the latter was conditioned on the former and vice versa. (*See* Ledwig Aff. (filed Jan. 2, 2015), Ex. C (Preliminary Proxy) at 32, 35.)

demand for rescission of the transaction is plainly futile. … [A]t this juncture it is impossible to 'unscramble the eggs.'").

Even pre-closing, courts are reluctant to enjoin a merger on the basis of claims regarding unfair price because money damages provide an adequate remedy. *See, e.g.*, *Gradient OC Master, Ltd. v. NBC Universal, Inc.*, 930 A.2d 104, 132 (Del. Ch. 2007) ("What Plaintiffs have failed to do, however, is adequately explain why this Court cannot simply award them money damages in the event they ultimately prove successful on the merits of their claims. The loss of market value between two dates seems to be a classic example of the type of injury that is compensable with monetary damages. Plaintiffs have not shown that their monetary losses are of the type that warrant the extraordinary remedy of a preliminary injunction.").

Unsurprisingly, therefore, meritorious price or fairness claims are almost always litigated post-closing and regularly result in money damages after trial. *See, e.g.*, *RBC Capital Mkts., LLC v. Jervis*, 2015 Del. LEXIS 629, at *3 (Del. Nov. 30, 2015) (affirming post-closing judgment of $75.8 million for *Revlon* claim); *In re Dole Food Co.*, 2015 Del. Ch. LEXIS 223, at *7 (Del. Ch. Aug. 27, 2015) (after post-closing trial, defendants found liable for $148.2 million in damages on entire fairness claim); *Ams. Mining Corp. v. Theriault*, 51 A.3d 1213, 1218 (Del. 2012) (approving "a total judgment of $2.0316 billion" for entire fairness claim, after post-closing trial). So too here. In the event that Plaintiff succeeds on appeal and ultimately prevails on the Fairness Claims, money damages will be a sufficient remedy. [11]

[11] An award against Reynolds' directors would be satisfied by director's-and-officer's insurance. BAT could also satisfy any award. It is a $70 billion company and held over $2.5 billion in cash at the time of its last annual report.

E. The Court Should Act On the Pending Motions and Approve The Agreed-Upon Fee Award At the Hearing

Contrary to the Objector's suggestion, (Obj. at 9-10), the fact that Defendants agreed not to oppose a fee and expense request in the amount of $415,000.00 weighs in favor of approval of the Fee and Expense Request. The lengthy arm's-length negotiations with Defendants are powerful evidence that the amount requested is fair. *See, e.g.*, *In re Progress Energy S'holder Litig.*, 2011 NCBC 44, ¶52 (N.C. Super. Ct. 2011) ("While the Settlement Agreement does not bind the court to award attorneys' fees to Plaintiffs' attorneys in any specific amount, the arm's-length agreement between the parties supports a finding that the Proposed Fee Award is reasonable."); NEWBERG ON CLASS ACTIONS (4th ed. 2002) § 15:34 ("[A]n agreement by the defendant to pay such sum of reasonable fees as may be awarded by the court, and agreeing also not to object to a fee award up to a certain sum," is "a proper and ethical practice," which "serves to facilitate settlements and avoids a conflict, and yet it gives the defendant a predictable measure of exposure[.]").

The Objector concludes by arguing that the Court should reserve decision on any fee award "until such time as the appeal of the Fairness Claims has been resolved" because "Class Counsel do not deserve the payment of any fee award" unless "the class members receive an actual cash award." (Obj. at 10-11.) The North Carolina Court of Appeals disagrees. *See Ehrenhaus v. Baker*, — N.C. App. —, 776 S.E.2d 699, 708 (2015) (approving award of attorneys' fees pursuant to a class action settlement where sole consideration offered to class was additional disclosures).

II. CONCLUSION

For the foregoing reasons, as well as those set out in Plaintiff's opening papers and in the Stipulated Supplement to Plaintiff's Motion for an Award of Attorneys' Fees and Expenses, the Objection should be overruled.

This the 5th day of February, 2016.

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CERTIFICATE OF COMPLIANCE WITH RULE 15.8

The undersigned hereby certifies that the foregoing brief complies with Rule 15.8, in that the brief contains fewer than 3,750 words, as measured by the Word Count feature of Microsoft Word.

This the 5th day of February, 2016.

/s/ Alan W. Duncan
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing document 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:

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