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.

SUBMMISION OF OBJECTIONS AND NOTIFICATION TO APPEAR AT SETTLEMENT HEARING BY CLASS MEMBER JAMES SNYDER

I, James Snyder, an individual member of the settlement class in the above-captioned action, hereby submit this notification to appear at the Settlement Hearing on February 12, either in person or through counsel, in order to object to the proposed settlement and application for attorneys' fees and expenses. Consistent with the requirements of Section VIII of the Notice of Proposed Settlement Hearing and Right To Appear (the "Notice"), attached hereto as Exhibit A are documents evidencing my membership in the class, as defined in the Notice.

This notification outlines the grounds for my objections. Simply stated, this is a paradigmatic "disclosure settlement" that seeks to trade a broad release in exchange for insubstantial supplemental disclosures. The trade cannot go through, however, unless the Court, in its role as a fiduciary for the class, determines that the bargain is "fair, reasonable, and adequate" to the class.[1] Because the supplemental disclosures offered here provide no benefit to the class and because the release offered to the defendants in exchange is overbroad and trades away potentially valuable shareholder rights, this settlement is not fair, reasonable, and adequate. Therefore, the settlement should be rejected and should not serve as the basis for an award of attorneys' fees and expenses.

This notification also requests additional time to provide supplemental written support for the arguments outlined herein. This is due to the lack of time provided to analyze the settlement, research the relevant issues, and draft and file this notification. I received my mailed copy of the Notice on or about January 19, leaving me with only 10 calendar days before the deadline for filing this notification. Because I believe the Court would benefit from a more thorough submission on the issues raised by my objection, I request that I be provided such time and that other class members also be allowed additional time to submit information to the Court.

Additional time is also warranted in light of a momentous opinion issued on January 22, 2016, by Chancellor Bouchard of the Delaware Court of Chancery. *In re: Trulia, Inc. Stockholder Litigation*, Del. Ct. Chancery, C.A. No. 10020-CB (C. Bouchard) (Del. Ct. Chancery) (Jan. 22, 2016), attached hereto as Exhibit B, elucidates the law on

[1] *Horton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 855 F. Supp. 825, 827 (E.D.N.C. 1994).

disclosure settlements. In *Trulia*, Chancellor Bouchard carefully outlined the dynamics that have led to the proliferation of disclosure settlements and outlined the problems of law and policy created by these dynamics. He also expressed in unequivocal terms that Delaware would no longer rubber-stamp these settlements.

> [P]ractitioners should expect that 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. In using the term "plainly material," I mean that it should not be a close call that the supplemental information is material…. *Trulia,* at 19.

While *Trulia* is not binding on this Court, it is powerful persuasive authority. Delaware is an important corporate law jurisdiction, and Delaware has been dealing with an epidemic of merger litigation—94.9% of mergers in 2014 were challenged in litigation.[2] It is the dynamics at settlement—where plaintiffs' attorneys receive fees, defendants get a broad release, and the class gets nothing but a worthless package of immaterial disclosures—that have fueled this epidemic.[3] Now that Delaware, in *Trulia*, has taken steps to implement a cure, we must stop the epidemic from spreading to North Carolina.

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[2] Matthew D. Cain & Stephen M. Davidoff, *Takeover Litigation in 2014* (Feb. 20, 2015), *available at* http://ssrn.com/abstract=2567902 (finding that 94.9% of mergers in 2014 attracted litigation).

[3] *Trulia*, at 16 (noting that it is "beyond doubt" that "the Court's willingness in the past to approve disclosure settlements of marginal value and to routinely grant broad releases to defendants and six-figure fees to plaintiffs' counsel in the process [has] caused deal litigation to explode in the United States….").

This case will likely be the first time after *Trulia* that a North Carolina court reviews a disclosure settlement. Indeed, it may be the first time that any court in the nation reviews a disclosure settlement after *Trulia*, rendering it a decision of national importance. If North Carolina establishes a standard that is less exacting than that announced in *Trulia*, it will encourage a flood of non-meritorious merger class actions to be filed against North Carolina corporations, burdening merger transactions, wasting corporate assets on attorneys' fees, and trading away potentially valuate shareholder rights in overbroad releases.

Given the importance of this decision, I am in the process of retaining counsel, but as a result of the time constraints described above, I have not yet had an opportunity to do so. To my knowledge, there are no deadlines compelling the Court to render a quick decision concerning the fee award. Therefore, I respectfully request that the Court allow 21 additional days for adequate briefing of these issues.

The specific basis for my objection is outlined below.

1. The Supplemental Disclosures Are Immaterial And Provide No Benefit To The Company Or Its Shareholders

Defendants agreed to a package of three discrete supplemental disclosures in connection with the Settlement. Supplemental disclosures create a legally cognizable benefit to shareholders only when they are material. The standard for materiality is well settled: did the supplemental disclosure alter the "total mix" of information available to

the reasonable investor?[4] Material disclosures uncover conflicts, go to the company's value, and correct material misstatements. Merely providing additional information—unless the additional information offers a contrary perspective on what has previously been disclosed—does not amount to material disclosure. Even when the additional information goes to the details of a financial advisor's fairness analysis, the information becomes material only when it corrects an important valuation parameter, uncovers a material omission, or reveals a conflict. Each of the additional disclosures in the settlement fails under this standard of materiality. As a result, none of the supplemental disclosures creates a legally cognizable benefit to shareholders, and the package of worthless disclosures cannot constitute reasonable or fair consideration for the release.

The additional disclosures at issue are contained in Exhibit A to the Memorandum of Understanding – Proposed Supplemental Disclosures of Reynolds American Inc. There are three items comprising 2 pages of text.

First, there is a one sentence disclosure about hypothetical actions the government might or might not take to regulate menthol. Hypotheticals and speculations do not constitute material disclosures, especially when, as conceded by the disclosure, such theoretical regulatory actions would have no effect on the transaction.

Second, there is the addition of a table of what at first glance looks like robust financial disclosure. However, on closer examination, the vast majority of

[4] *Associated Packaging, Inc. v. Jackson Paper Mfg. Co.*, No. 10 CVS 745, 2012 WL 707038, at *9 (N.C. Super. Mar. 1, 2012) ("North Carolina courts have adopted the materiality standard established by the United States Supreme Court in *TSC Industries, Inc. v. Northway,* which provides that a fact is material when 'there is a substantial likelihood that a reasonable purchaser would consider it important in deciding whether or not to purchase.'") (quoting TSC Indus., Inc. v. Northway, Inc. 426 U.S. 438, 449 (1976).

information in this table was already provided in the original joint proxy statement/ prospectus. The new table provides ***ten*** years of projected Net Sales, EBITDA, Operating Income, and After-Tax Unlevered Free Cash Flow for 2014 through 2023 for both RAI and Lorillard. However, the table on page 146 of the original joint proxy statement/ prospectus had already provided ***six*** years of projected Revenues (i.e., Net Sales), EBITDA, and Operating Income for RAI from 2014 through 2019. The only new line item is After-Tax Unlevered Free Cash Flows. With regard to Lorillard, the table on page 148 of the original joint proxy statement/ prospectus had already provided ***six*** years of Revenue (i.e., Net Sales), EBITDA, and EBIT (which is often used interchangeably with Operating Income). Again, the only new line item disclosure is After-Tax Unlevered Free Cash Flows.

Free cash flow projections are not automatically material. The question, as noted above is the "total mix" of information. Free cash flow projections provide an estimate of the future cash flows of a business, but so do estimates of revenue, net income, EBIT, and EBITDA. These alternative estimates had already been provided to shareholders in the original joint proxy statement/ prospectus. Because shareholders had already received significant information concerning future cash flows by means of these alternative measures, 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. The settlement proponents may argue that the additional disclosure might be helpful, but the law is clear that merely being helpful does not render a disclosure material. Nor are companies required to disclose sufficient information to

allow shareholders to check the financial advisor's math.[5] All that is required is a fair summary of the banker's analysis. *Trulia*, at 28 ("A fair summary, however, is a *summary*.") (emphasis in original). The addition of free cash flows projections, in this case, is not material.

Third and finally, the parties added a paragraph clarifying that two agreements between RAI and BAT that had been identified in earlier disclosures were tentative and might not take place. This addition cannot be material for the reason stated in the last sentence of the paragraph: "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." That is, it is not in any way relevant to the transaction shareholders were then considering. It was not material.

Not one of these disclosures, even standing alone, is material. Yet, these two pages of disclosures must be understood in context. Prior to receiving them, shareholders had already received over 400 pages of detailed information. The addition of this handful of insubstantial disclosures cannot have altered the total mix of information. Because these disclosures provided no material benefit to shareholders, they cannot serve as the basis of settlement or of an award of fees and expenses.

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[5] *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 material to [the financial analyst's] decision does not include information that is merely helpful; it also does not require that stockholders have sufficient information to make an independent determination of fair value.") (internal quotations omitted).

2. <u>The Release is Overly Broad</u>

Weighed against the insubstantial relief received by shareholders in the proposed settlement is the breadth of the release received by defendant. The release language contained in the class notice is consistent with the language negotiated between Class Counsel and counsel for the defendants on January 15, 2015. Curiously, this settlement was consummated just 13 days following the filing of a motion by Class Counsel on January 2 for a preliminary injunction to prevent the merger from taking place. As part of the settlement, Class Counsel, on behalf of the class, agreed that class members would give up any right to "seek to unwind or rescind the shareholder vote, the Merger, the Merger Agreement, the Subscription and Support Agreement, the Asset Purchase Agreement or the Alleged Technology Sharing Agreement." Notice of Proposed Partial Settlement at 7.

This concession was critical for Defendants. It allowed them to move forward and complete the merger without concern that Class Counsel would raise other issues or seek injunctive relief to block the merger from going forward. Further, Defendants were able to ensure that despite allegations by Class Counsel that Defendant Directors had breached their fiduciary duties by approving the Subscription and Support Agreement and the Alleged Technology Agreement, Class Counsel conceded that their clients would not take any action to rescind or unwind those agreements at a later date. Specifically, if Class Counsel is successful in winning the appeal of the Fairness issue claims, then they will have waived any rights that their clients may have had to unwind the very agreements that Class Counsel alleges were inappropriately entered into. This is a significant concession by Class Counsel on behalf of their clients.

At the time Class Counsel conceded these points as part of the negotiations that led to the January 15, MOU, they obtained in return an agreement by Defendants that Class Counsel would receive payment for legal fees related to Class Counsel's work on the disclosure claims. As stated below, absent an agreement with the Defendants, North Carolina law prevents Class Counsel from recovering their fees for these claims. It was a small price to pay by the Defendants to ensure the certainty of the closing of the merger and that the challenged agreements would not be later impacted.

So, in summary, what did Class Members obtain in the settlement bargain negotiated on January 15? They obtained two pages of worthless supplemental disclosures on top of more than 400 pages of exhaustive public disclosures previously been made by Defendants. In return, they are being asked to give up any power to unwind the very agreements that Class Counsel alleged were entered into by Defendant Directors in breach of their fiduciary responsibilities. This was a bad deal, explained only by the fact that it enabled Class Counsel to negotiate for themselves an assurance that they would be paid a six-figure fee.

In order to be fair to the class, the relief and the release must be proportional. Here the scope of the release vastly exceeds the value of the relief. It is in no way proportional and in no way fair. It cannot be approved.

3. The Court Should Defer a Decision on an Award of Class Counsel Fees Until Resolution of the Appeal of the Fairness Issue.

Prior to this week, the Defendants had reserved their right to object to the award of any legal fees in this matter. Had they maintained this position, the Court

would have had the benefit of an adversarial hearing concerning the materiality of the relief and whether an award of attorneys' fees and expenses would be appropriate and, if so, in what amount. On January 21, however, Class Counsel filed a stipulated notice to the Court that the parties had reached a "clear sailing agreement," a deal in which the plaintiffs' counsel promised to request no more than $430,000 in fees and expenses, and defense counsel promised not to object.

As a result of this agreement, "[b]oth sides of the caption … share the same interest in obtaining the Court's approval of the settlement." (*Trulia*, at 13). The former litigants have joined hands in an effort to get the settlement approved. These deals are typically unopposed because most shareholders do not own enough to make it worth their while to analyze the value of the supplemental disclosures or, if they do, they lack the sophistication to articulate their dissatisfaction in the form of cogent legal arguments. Or, considering the ten day window I had to file this notification, they may simply not open their mail in time. The result is predictable: the shareholders lose out in the bargain.

An alternative to deciding this settlement hearing now, while the dismissal of the Fairness Claims are under appeal, would be for the Court to reserve its decision until such time as the appeal of the Fairness Claims has been resolved. If Class Counsel is successful, and the class members receive an actual cash award, then the Court should consider an award to Class Counsel. Otherwise, Class Counsel do not deserve the payment of any fee award.

North Carolina law is settled that an award of attorneys' fees is not appropriate when there has not been a class fund. *In re Wachovia Shareholder*

Litigation, 168 N.C. App. 135, 607 S.E.2d 48 (2005). Here, Class Counsel argue that an award is only justified because Defendants negotiated a settlement with Class Counsel that included specifically that Class Counsel would receive a payment of some fees. Absent this agreement, Class Counsel would have been entitled to nothing – unless of course the class members actually receive some monetary benefit.

The Court should defer a decision on settlement and fees until such time as the resolution of the pending appeal of the Fairness Claims. If Class Counsel is successful in the appeal on behalf of their client and their clients actually receive a payment, then the Court should consider an appropriate award of fees to class counsel. Until such time, no award is warranted. If the Court determines that an award is appropriate, then the Court should review the time records of plaintiffs (or allow those parties objecting to class counsel fees to do so) to determine if the time they have allegedly spent on the disclosure issues are consistent with their time records.

CONCLUSION

For the foregoing reasons, I respectfully request that the Court:

1) Reject the settlement and deny any award of attorneys' fees and costs;

2) Grant me (and any other class members) an additional 21 days to supplement these materials given the limited time that class members had to respond;

3) Delay any decision on the award of legal fees to Class Counsel until the Court has had an opportunity to review such additional materials; and

4) Only award Class Counsel fees if they are successful in securing a monetary recovery for their clients.

Respectfully submitted,

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