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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Chancery of Delaware.

In re DR. PEPPER/SEVEN UP COMPANIES, INC. SHAREHOLDERS LITIGATION.

Civil Action No. 13109.
|
Feb. 9, 1996.
|
As Corrected Feb. 27, 1996.

Attorneys and Law Firms

Norman Monhait, Rosenthal, Monhait, Gross & Goddess, P.A., Wilmington.

Matthew J. Ferretti, Richards, Layton & Finger, Wilmington.

Diane and Philip Olsson, Washington, DC.

Robert J. Kriner, Jr., Chimicles, Jacobsen & Tikellis, Wilmington.

Thomas R. Hunt, Jr., Morris, Nichols, Arsht & Tunnell, Wilmington.

Opinion

CHANDLER, Vice-Chancellor.

***1** This is my decision on the pending application to approve the settlement of this class action litigation and to award plaintiffs' counsel an attorneys fee of $690,000. Defendant corporations have agreed to pay any fee that is awarded up to $690,000. Both applications, however, are opposed by several objectors. The Olsson objectors are the only objectors who appeared at the settlement hearing and filed briefs in opposition to both the settlement and the award of attorneys fees.

I.

In January 1995, Cadbury Schweppes PLC, a United Kingdom based holding company, offered to purchase all outstanding shares of Dr. Pepper/Seven Up Companies for $33 per share. Dr. Pepper is a Delaware corporation. Dr. Pepper's board unanimously voted to approve Cadbury's offer and entered into a merger agreement. In approving Cadbury's proposed transaction, Dr. Pepper's board unanimously determined that the $33 share price was fair and in the best interest of Dr. Pepper shareholders. The board recommended that the company's shareholders tender all shares to Cadbury.

The same day that the Dr. Pepper board recommended the transaction to its shareholders (January 25, 1995), several individual Dr. Pepper shareholders brought six class action lawsuits in this Court against Dr. Pepper and its directors. On February 7, 1995, the Court consolidated the six lawsuits under the caption of this action, along with two other lawsuits against Dr. Pepper that had been filed in 1993 in an effort to challenge Dr. Pepper's recently adopted shareholder rights plan. The initial complaints against Dr. Pepper's board charged, among other things, that the board had breached its fiduciary duties to the shareholders by entering into a merger agreement without exploring other opportunities to sell the company and by recommending that stockholders accept inadequate consideration for their stock.

On February 10, 1995, plaintiffs filed an amended complaint that incorporated most of the earlier claims against Dr. Pepper's board, but added claims based on the board's failure to fully disclose in the Schedule 14D-9 sent to shareholders material facts concerning the proposed transaction with Cadbury. In particular, the amended complaint alleged that the 14D-9 failed to disclose valuation ranges derived by Dr. Pepper's investment advisers under the comparable companies analysis, the comparable acquisition multiple analysis, the discounted cash flow analysis and the acquisition premiums analysis.

Discovery followed on an expedited basis. Counsel for plaintiffs and for defendants began negotiations to resolve the litigation. On February 21, 1995, the parties entered into a memorandum of understanding. Dr. Pepper's board agreed to make additional disclosures in a “settlement supplement” which they filed with the Securities & Exchange Commission and disseminated to stockholders. Because plaintiffs' counsel viewed the disclosure allegations as the strongest claims in the complaint, they agreed to settle the litigation in return for the supplemental disclosures. Specifically, Dr. Pepper's board supplemented the Schedule 14D-9 with information that disclosed the range of per share value for the company as yielded by each discrete valuation technique used by

Dr. Pepper's financial advisers to determine the fairness of Cadbury's $33 offering price. Although the original Schedule 14D-9 stated that Dr. Pepper's financial advisers, based on four separate analyses, had projected a range of per share values for the company between $26.02 and $36.19, this statement did not identify the ranges of value yielded by *each* valuation method. The supplemental disclosure did include this information, in the following form:

> ***2** A comparable company's analysis described in the Schedule 14D-9 indicated a hypothetical range of per share values for the company of between $28.51 and $35.64. The comparable acquisitions multiples analysis described in the Schedule 14D-9 indicated a hypothetical range of per share values for the company of between $26.02 and $35.60. The discounted cash flow analysis described in the Schedule 14D-9 indicated a hypothetical range of per share values for the company of between $26.88 and $36.19. The acquisition premiums analysis described in the Schedule 14D-9 indicated a hypothetical range of per share values for the company of between $29 and $35.

In addition, the supplemental disclosure included other valuation estimates provided to Dr. Pepper's board. For example, the supplemental disclosures noted that Cadbury's $33 offering price suggested a valuation of 13.7 times Dr. Pepper's 1994 earnings before interest, taxes, depreciation and amortization ("EBITDA"). The supplemental disclosure then compared this valuation with valuation ranges for other selected beverage company transactions, suggesting that Cadbury's offer approximated the average value range in relation to EBITDA as other beverage or consumer product companies. Finally, the supplemental settlement disclosures mention that Cadbury will capture "substantial operating synergies" as a result of its acquisition of Dr. Pepper, thereby resulting in significant cost savings for the combined companies. It also noted that Cadbury would probably benefit from the ability to use Dr. Pepper's federal income tax loss carry forwards of about $270 million.

Cadbury's tender offer ended on March 2, and the merger became effective on June 6, 1995, when approved by Dr. Pepper's stockholders. Dr. Pepper's board advised stockholders who did not favor the merger of their right under Delaware law to seek appraisal of the fair value of their shares. Plaintiffs and defendants then sought a hearing on the pending application to approve the settlement and the fee award.

II.

Plaintiffs seek approval of the settlement and the fee request as fair, reasonable and in the best interests of the class. Plaintiffs recognize that they had little chance of succeeding on claims that the tender offer price was unfair or claims attacking the process by which Dr. Pepper's board recommended the transaction to Dr. Pepper's shareholders. Nevertheless, plaintiffs point to the supplemental disclosures as the basis for recommending approval of the settlement of these consolidated actions. They insist that the shareholders benefitted from the additional information regarding the range of values generated by each valuation methodology, the EBITDA earnings multiple information, the "synergy value" information, and the tax loss benefit information. Each of these additional disclosures, plaintiffs say, significantly assisted shareholders in deciding whether to tender their shares to Cadbury or to seek an appraisal remedy.

***3** The Olsson objectors contend the settlement is worthless and only enriches the attorneys who filed these lawsuits.[1] They point out that the disclosure claims were not even alleged in any of the original nine separate complaints that were later consolidated. The objectors also argue that the supplemental disclosures were immaterial fragments of information that plaintiffs have failed to demonstrate were important to any of the named representative plaintiffs or to the class of stockholders at large. Considering the insignificance of the additional disclosures, objectors characterize the benefit as a flyspeck that does not justify the release of possible future claims as provided in the settlement agreement. Finally, citing *Prezant v. DeAngelis,* Del. Supr., 636 A.2d 915 (1994), objectors contend that the named representatives, as well as class counsel, have not adequately and fairly represented the interests of Dr. Pepper's stockholders. Objectors point to the dearth of information in the record concerning the named representative plaintiffs other than they were Dr. Pepper stockholders who retained counsel experienced in class action litigation. According to objectors, the record suggests that the representative plaintiffs merely reached an agreement with counsel to initiate the litigation and then "dropped out of sight." Objectors also

charge plaintiffs' counsel with “built-in conflicts with the class they purport to represent” which make it in their interest to settle the case and collect fees, rather than run the risk of defeat at trial. The settlement's paltry benefit is direct evidence, argue objectors, that plaintiffs' counsel were eager to throw in the towel in return for legal fees. In effect, objectors accuse plaintiffs' counsel of having agreed to a worthless settlement in exchange for early and certain legal fees.

Interestingly, objectors do not complain that the substantive claims against Dr. Pepper, or the disclosures claims, are valuable claims that plaintiffs' counsel want to compromise too cheaply. Instead, they argue that the claims asserted in the lawsuits, including the disclosure claims, are too insignificant to merit settlement and that the case should never have been brought in the first place. That being so, objectors do not understand how an illusory benefit can possibly support the release of potential future claims against defendants.

III.

No one disputes that the disclosure claims are the only viable claims alleged in this action. Focusing on the disclosure claims, the essential inquiry is whether the alleged omissions or misrepresentations are material. *See, e.g., Stroud v. Grace,* Del. Supr., 606 A.2d 75, 84 (1992). The materiality standard is too well known to restate at length. Simply stated, materiality turns on whether “there is a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the total mix of information made available.”*Rosenblatt v. Getty Oil Co.,* Del. Supr., 493 A.2d 929, 944 (1985), *citing TSC Industries, Inc. v. Northway, Inc.,* 426 U.S. 438, 449 (1976).*See also Arnold v. Society for Savings Bancorp., Inc.,* Del. Supr., 650 A.2d 1270, 1277 (1994).

***4** I have reviewed all of the disclosure information appearing in the record of this case. I am unable to say, on this record, how I would have ruled were the disclosure claims presented on a motion for summary judgment or at trial where the background circumstances would have been more fully developed. Objectors insist that specific ranges of hypothetical per share value in each of the four valuation methods employed by Dr. Pepper's two independent financial analysts would not be considered material to the average invester. If it was important, say objectors, a stockholder could have called the company and requested it. Dr. Pepper's initial Schedule 14D-9 clearly stated that their financial analysts completed four analyses which generated a range of value for Dr. Pepper between $26.02 and $36.19. It also cautioned stockholders that fairness analyses are not mathematical, but involve complex judgments. *See Barkan v. Amsted Industries, Inc.,* Del. Supr., 567 A.2d 1279, 1289 (1989) (noting difficulty in basing claims of incomplete disclosure upon failure to disclose a given estimate of value because “even the best estimate constitutes an exercise in enlightened speculation”). Even if one assumes these disclosures are not material, however, a reasonable stockholder might have considered two other facts in the supplemental disclosure significant in deliberating over whether to sell his shares. First, the settlement supplement informed Dr. Pepper's stockholders that Cadbury would realize substantial operating synergies as a result of the proposed combination. Second, the supplement disclosed that Cadbury would benefit from significant federal income tax loss carry forwards available to Dr. Pepper and certain of its subsidiaries. Although I intimate no view about how I would have ruled on a motion for summary judgment or at trial on claims that nondisclosures of this sort were material, I am able to conclude, for purposes of the pending motions only, that the settlement provided Dr. Pepper shareholders with additional information that might have been material in deciding whether to tender their stock. Plaintiffs' counsel were able to obtain additional information for Dr. Pepper's stockholders as a result of the disclosure violations alleged in this action.

A more serious question is the significance of the benefit. The settlement did not improve the price paid to Dr. Pepper stockholders or provide any other tangible benefit to those stockholders. The only benefit, arguably therapeutic in nature, was the additional disclosure of two or three possibly material facts. But the substantive claims (attacking the fairness of the tender offer price and the process which led to the merger) were, by plaintiffs' own admission, very weak. Nonetheless, even a meager settlement that affords some benefit for stockholders is adequate to support its approval. Accordingly, I grant plaintiffs' application to approve the proposed settlement.

IV.

Turning to the request for attorneys fees, objectors question whether it is appropriate to award plaintiffs' counsel a substantial fee in a case where the benefit is negligible or

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nonexistent. Most of the objectors' arguments appear directed to the reasonableness of the fees requested by class counsel. However, in approving the fees, the Court must consider several factors, including the benefits achieved in the action, the complexities of the litigation, the skills applied to the resolution by counsel, the contingent nature of the fee and the standing and ability of counsel. *Sugarland Industries, Inc. v. Thomas,* Del. Supr., 420 A.2d 142 (1980). It is not necessary, of course, for the benefit conferred to be monetary in nature, provided there is a specific benefit to the class. *Tandycrafts, Inc. v. Initio Partners,* Del. Supr., 562 A.2d 1162, 1165 (1989).

***5** Objectors insist that the disclosures in this case have not been shown to be relevant to any class member and were immaterial for purposes of shareholder decisionmaking. They also point out that class counsel were conducting negotiations with Dr. Pepper during the short two-week period of expedited discovery, which culminated in a settlement agreement. The only difficulty in prosecuting this litigation, argue objectors, was class counsel's struggle to find actionable misconduct. Additionally, they challenge the actual contingency nature of the fee arrangement, noting that class actions alleging violations of fiduciary duties to shareholders seem to be settled with remarkable consistency. Successful settlement of so many class actions, with the resulting award of attorneys fees, makes the contingency of the fee arrangement appear illusory. *See* Logan and Moore, Attorney Fee Awards in Common Fund Securities and Antitrust Class Actions, 13 Class Action Rpts., 249 at 546 (1990). Finally, objectors argue that approval of the requested fees violates public policy by promoting the abuse of class action litigation.

I believe the objectors are genuinely concerned about the long range effect on corporate decisionmaking, and the public policy implications, of increasing numbers of class action lawsuits filed and later settled for marginal benefits. In this case, however, nothing in the record supports objectors' broad brush accusations regarding the settlement or the fees requested in connection with it. All I can say based on this record is that, in response to this lawsuit, Dr. Pepper issued supplemental disclosures providing additional information as to the fairness of the tender offer price and certain financial reasons for Cadbury's interest in acquiring the company. This information might have been material to some Dr. Pepper stockholders. Looking at the benefit achieved, I have tried to exercise carefully the discretion vested in this Court with regard to fee applications. Delaware courts have traditionally considered as most important the benefit that the litigation produced in determining the appropriate amount of attorneys fees to award. In contrast with other jurisdictions, Delaware courts avoid the tendency to make hours expended the essential inquiry. Fee applications in class actions resulting in nonquantifiable, nonmonetary benefits have generated decisions from this Court that provide guidance for the exercise of this discretion. *See Polk v. Good,* Del. Supr., 507 A.2d 531 (1986); *Gilmartin v. Adobe Resources,* Del. Ch., C.A. No. 12467, Jacobs, V.C. (June 29, 1992); *In re Maxus Energy Corp. Shareholder Litig.,* Del. Ch., Consol. C.A. No. 14079, Chandler, V.C. (Sept. 12, 1995); *In re Chicago and Northwestern Transportation Co. Shareholders Litig.,* Del. Ch., Consol. C.A. No. 14109, Chandler, V.C. (June 26, 1995). In my opinion, an award of $300,000 is appropriate in these circumstances. This reflects a modest premium over the pay that plaintiffs' attorneys command in a noncontingency undertaking. A premium is justified because of the intense effort required over a short period of time by skilled attorneys that produced some benefit for the class. This premium is not as significant as plaintiffs' attorneys have requested because the benefit, nonmonetary and nonquantifiable, is not as substantial as the benefit achieved in those cases where the full attorneys fee request has been granted. *See, e.g., Polk v. Good, supra; Gilmartin v. Adobe Resources, supra; In re Maxus Energy Corp., supra.*Rather, the benefit here approximates the benefit achieved in *In re Chicago and Northwestern Transportation Co. Shareholders Litig., supra.*As in that case, I consider the fees and expenses requested in the present case disproportionate to the benefit obtained for the class. *Compare Tandycrafts, Inc. v. Initio Partners,* Del. Supr., 562 A.2d 1162 (1989) (affirming award of $180,000); *Eisenberg, supra,* awarding $200,000; *In re Vitalink Communication Corp.,* Del. Ch., C.A. No. 12085, Chandler, V.C. (Nov. 8, 1991) (awarding $275,000); *In re Chicago and Northwestern Transportation Co. Shareholders Litig., supra* (awarding $300,000). Accordingly, I award class counsel $300,000. At the hearing, plaintiffs' counsel urged the Court not to change the fees that were negotiated between plaintiffs and defendants. Defendants agreed to pay the full fee. Reducing the fee benefits Cadbury, the acquiring company, not Dr. Pepper's stockholders. Counsel also suggested that changing the fee amount upsets the rational product of a negotiated issue between plaintiffs' counsel and defendants' counsel. But these arguments ignore the institutional role of the Court, which is obliged under our law to determine whether a fee award is fair and reasonable. Although it would be much easier for the Court to defer to the fee request that has been negotiated between

plaintiffs' counsel and defendants' counsel, it would also be an abdication of the Court's responsibility to the stockholder class.

***6** I have entered a Final Order and Judgment consistent with this decision.

FINAL ORDER AND JUDGMENT

A hearing having been held before this Court on Nov. 29, 1995, pursuant to the Court's Order of Sept. 5, 1995 (the "Scheduling Order"), upon a Stipulation and Agreement of Compromise, Settlement & Release, dated Sept. 5, 1995 (the "Stipulation"), of the above-captioned action (the "Consolidated Action"), which is incorporated herein by reference; it appearing that due and proper notice of said hearing has been given in accordance with the aforesaid Scheduling Order; the respective parties having appeared by their attorneys of record; the Court having heard and considered evidence in support of the proposed Settlement (as defined in the Stipulation); the attorneys for the respective parties having been heard; an opportunity to be heard having been given to all other persons requesting to be heard in accordance with the Scheduling Order; the Court having determined that notice to the Class preliminarily certified in the Consolidated Action, pursuant to the aforesaid Scheduling Order was adequate and sufficient; and the entire matter of the proposed Settlement having been heard and considered by the Court;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED this 9 day of February, 1996, that:

1. Based on the record of the Consolidated Action, each of the provisions of Court of Chancery Rule 23(a) has been satisfied. Specifically, this Court finds that (1) the Class contemplated in the Class Action is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the Class, (3) the claims of the representative plaintiffs are typical of the claims of the Class, and (4) plaintiffs have fairly and adequately protected the interests of the Class. The Consolidated Action is certified as a class action, pursuant to Court of Chancery Rules 23(b)(1) and (b)(2), on behalf of a class composed of all record and beneficial owners of shares of common stock, par value $.01 per share, of Dr Pepper/Seven-Up Companies, Inc. ("Dr Pepper") on and between September 1, 1993 and the effective date of the proposed merger of Dr Pepper and DP/SU Acquisition Inc., including their successors in interest, legal representatives, heirs, assigns or transferees, immediate and remote (other than defendants in the Consolidated Action) (the "Class").

2. The form and manner of notice given to the members of the Class is hereby determined to have been the best practicable notice under the circumstances and to have been given in full compliance with the requirements of due process and Court of Chancery Rule 23.

3. The Settlement is approved as fair, reasonable, adequate and in the best interests of the Class and shall be consummated by the parties in accordance with its terms and conditions.

4. The Consolidated Action is dismissed with prejudice against plaintiffs and each member of the Class on the merits, each party to bear its own costs, except as provided herein, and any and all claims, rights, causes of action, suits, matters and issues, whether known or unknown, that have been, could have been, or in the future might be asserted in the Consolidated Action or in any court or proceeding (including but not limited to any claims arising under federal or state law relating to alleged fraud, breach of any duty, negligence or otherwise) by or on behalf of plaintiffs or any members of the Class, whether individual, class, derivative, representative, legal, equitable or any other type or in any other capacity against defendants or any of their associates, affiliates, subsidiaries, present or former officers, directors, employees, attorneys, accountants, financial advisors or other advisors or agents, heirs, executors, personal representatives, estates, administrators, and successors and assigns (in each case, in each and every capacity) which have arisen, arise now or hereafter arise out of or relate in any way to the Tender Offer, the Merger, the Merger Agreement, the Rights Agreement, the Stockholders Agreement (all as defined in the Stipulation) or any of the transactions or events described in the complaints in the Consolidated Action or any disclosures related thereto (collectively, the "Settled Claims") shall be fully, finally and forever compromised, settled, released and dismissed with prejudice; *provided, however,* that the Settled Claims shall not include (a) the right of Dr Pepper stockholders to receive the merger consideration as provided in the Merger Agreement, (b) any properly perfected appraisal rights under 8 *Del. C.* § 262 in connection with the Merger, and (c) the right to enforce the terms of the Stipulation and orders of the Court in connection therewith.

***7** 5. The plaintiffs and all members of the Class, either directly, representatively, derivatively or in any

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other capacity, are permanently barred and enjoined from instigating, instituting, commencing, asserting, prosecuting, continuing or participating in any way in the maintenance of any of the Settled Claims in any court or tribunal of this or any other jurisdiction.

6. The attorneys for the plaintiffs and the Class are awarded attorneys' fees and reimbursement of expenses in the amount of $300,000, which sum the Court finds to be fair and reasonable, to be paid by Dr Pepper in accordance with the terms of the Stipulation.

7. Without affecting the finality of this Final Order and Judgment in any way, this Court reserves jurisdiction of all matters relating to the administration and consummation of the Settlement.

All Citations

Not Reported in A.2d, 1996 WL 74214

Footnotes

1 The other objectors, Peter Millham (Docket Item No. 32) and Jimmie R. Keel, Esquire, make similar arguments.

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