E-FILED
11/21/2016 1:30:40 PM
David H. Yamasaki
Chief Executive Officer/Clerk
Superior Court of CA,
County of Santa Clara
16CV294673
Reviewed By:R. Walker

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SANTA CLARA

DEAN DRULIAS, on behalf of himself and all others similarly situated, Plaintiff, vs. 1ST CENTURY BANCSHARES, INC.; ALAN I. ROTHENBERG; WILLIAM W. BRIEN, M.D.; DAVE BROOKES; JASON P. DINAPOLI; ERIC M. GEORGE; ALAN D. LEVY; BARRY D. PRESSMAN; ROBERT A. MOORE; LEWIS N. WOLFF; NADINE WATT; and STANLEY R. ZAX, Defendants.	Case No.: 16CV294673 **ORDER AFTER HEARING ON NOVEMBER 18, 2016** **Motion by Plaintiff Dean Drulias for Preliminary Approval of Class Action Settlement**

The above-entitled matter came on regularly for hearing on Friday, November 18, 2016 at 9:00 a.m. in Department 1 (Complex Civil Litigation), the Honorable Peter H. Kirwan presiding. A tentative ruling was issued by the Court on November 17, 2016. The appearances are as stated in the record. The Court, having reviewed and considered the written submission of all parties, having heard and considered the oral argument of counsel, and being fully advised, orders that the tentative ruling, attached as Exhibit A, shall be adopted and incorporated herein as the Order of the Court.

IT IS SO ORDERED.

Dated: 11/21/16

Peter H. Kirwan

Honorable Peter H. Kirwan
Judge of the Superior Court

EXHIBIT A

Calendar Line 3

Case Name: *Dean Drulias v. 1st Century Bancshares, Inc., et al.*
Case No.: 16-CV-294673

This putative shareholder class action arises from the agreed sale of defendant 1st Century Bancshares, Inc. to Midland Financial Co., a transaction which plaintiff claims advances the interests of 1st Century's directors at the expense of its public shareholders. (Complaint, ¶ 1.) Before the Court is the parties' motion for preliminary approval of a settlement.

I. Factual and Procedural Background

Plaintiff alleges that 1st Century's directors (the individual defendants), are conflicted with respect to the sale, particularly Chairman and CEO Alan I. Rothenberg and President and COO Jason P. DiNapoli, who dominated and controlled the sale process. (Complaint, ¶ 2.) Rothenberg and DiNapoli simultaneously negotiated lucrative employment agreements for themselves with Midland, at a time when they faced pressure respecting their positions at 1st Century from an activist shareholder. (*Id.* at ¶ 2.) The conflicted directors caused the company to be sold for inadequate consideration, following a flawed sales process in which Midland was granted exceptions to its confidentiality agreement that were not granted to other potential buyers; negotiations were pursed with Midland over other buyers even though it did not have the highest preliminary indication of interest; and Midland was permitted to lower its offer to $11.13 per share after it had agreed to offer $12 per share in exchange for a 60-day exclusivity period. (*Id.* at ¶¶ 36-37.) Plaintiff further alleges that defendants failed to disclose material information in the proxy statement filed with the SEC in connection with the sale, including information regarding: (1) the conflicts of interest of 1st Century's directors; (2) the conflicts of the company's financial advisor, Sandler O'Neill & Partners, L.P., which issued a fairness opinion; (3) the sale process; and (4) Sandler's fairness opinion. (*Id.* at ¶ 24.)

Based on these allegations, the complaint asserts claims for (1) breach of the fiduciary duties of care, good faith, and loyalty and (2) breach of the fiduciary duty of disclosure.

The parties have now reached a settlement. They jointly move for an order preliminarily approving the settlement, provisionally certifying the settlement class and appointing the class representative, designating class counsel, approving the form and method for providing notice to the class, and scheduling a final fairness hearing.[1]

I. Legal Standard for Approval of a Class Action Settlement

Generally, "questions whether a settlement was fair and reasonable, whether notice to the class was adequate, … and whether the attorney fee award was proper are matters

[1] While the motion at issue is made on behalf of all of the parties, plaintiff indicates that the accompanying memorandum is submitted on behalf of himself alone "and does not necessarily represent the views of Defendants with respect to each and every statement herein." (Memorandum at p. 1, fn. 2.)

addressed to the trial court's broad discretion." (*Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 234-235, citing *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794.)

> In determining whether a class settlement is fair, adequate and reasonable, the trial court should consider relevant factors, such as the strength of plaintiffs' case, the risk, expense, complexity and likely duration of further litigation, ... the amount offered in settlement, the extent of discovery completed and the stage of the proceedings, the experience and views of counsel, the presence of a governmental participant, and the reaction of the class members to the proposed settlement.

(*Wershba v. Apple Computer, Inc., supra*, 91 Cal.App.4th at pp. 244-245, internal citations and quotations omitted.)

The list of factors is not exclusive and the court is free to engage in a balancing and weighing of factors depending on the circumstances of each case. (*Wershba v. Apple Computer, Inc., supra*, 91 Cal.App.4th at p. 245.) The court must examine the "proposed settlement agreement to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned." (*Ibid.*, quoting *Dunk v. Ford Motor Co., supra*, 48 Cal.App.4th at p. 1801, internal quotation marks omitted.)

> The burden is on the proponent of the settlement to show that it is fair and reasonable. However "a presumption of fairness exists where: (1) the settlement is reached through arm's-length bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors is small."

(*Wershba v. Apple Computer, Inc., supra*, 91 Cal.App.4th at p. 245, citing *Dunk v. Ford Motor Co., supra*, 48 Cal.App.4th at p. 1802.) The presumption does not permit the Court to "give rubber-stamp approval" to a settlement; in all cases, it must "independently and objectively analyze the evidence and circumstances before it in order to determine whether the settlement is in the best interests of those whose claims will be extinguished," based on a sufficiently developed factual record. (*Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 130.)

II. Settlement Process and Considerations

Plaintiff filed this action on May 3, 2016. On May 18, 1st Century filed a definitive proxy statement with the SEC in connection with a shareholders' vote on the merger agreement. The parties discussed conducting expedited discovery and, on May 25, defendants produced documents including minutes of meetings of the board and special committee formed to evaluate strategic alternatives for the company; Sandler O'Neill presentations to the board, including its fairness opinion presentations; Sandler O'Neill's fairness opinion and engagement letter; and the various indications of interest received from Midland. Also on May 25, plaintiff filed an application for a preliminary injunction, which was scheduled to be heard on June 17. Defendants filed their opposition on June 6.

Between May 16 and June 10, counsel negotiated a settlement contingent upon the since-completed depositions of Eric George, the chair of the special transaction committee, and Peter Buck, a managing director in the investment banking group at Sandler O'Neill, who advised 1st Century on the merger agreement and sale process. The settlement required defendants to make certain supplemental disclosures in a Form 8-K that was filed on June 10, in exchange for a release of all claims related to the merger. The settlement also provides that defendants will not oppose plaintiff's request for $400,000 in attorney fees. Presumably, the shareholder vote has now been conducted with the benefit of the supplemental disclosures and the merger has been approved.

III. Analysis

As summarized in plaintiff's memorandum, the supplemental disclosures pertain to: (1) information regarding the potential conflicts of Rothenberg, DiNapoli, and the other board members; (2) information about the potential conflicts of Sandler O'Neill; and (3) information regarding "don't ask, don't waive" conditions to the confidentiality agreements executed by potential buyers. (Memorandum at pp. 4-5.) Notably, plaintiff did not provide the Court with a comparison of the actual supplemental disclosures to the disclosures set forth in the original proxy statement—in fact, the original proxy is nowhere to be found among the moving papers. It was, however, previously filed in support of plaintiff's application for a preliminary injunction. The Court has undertaken its own comparison of the supplemental and original disclosures, and finds the summary provided by plaintiff to be misleading in that many of the disclosures that plaintiff suggests were newly-made had in fact already been provided in the original proxy.[2]

The Court also finds it very troubling that—despite urging that Delaware law governs the materiality of the disclosures in this case (Memorandum, p. 3, fn. 3)—plaintiff does not discuss or even acknowledge a crucial new published opinion by the Delaware Court of Chancery on this subject, *In re Trulia, Inc. Stockholder Litigation* (Del. Ch. 2016) 129 A.3d 884. *Trulia* was filed in January 2016 and has been the subject of much commentary ever since. The Court doubts that practitioners of deal litigation like plaintiff's counsel would be unaware of this opinion, and counsel should be prepared to discuss their failure to address *Trulia* at the hearing on this matter.

In the absence of briefing on the issue, the Court will discuss *Trulia* and its impact on this case in some detail.

---

[2] For example, plaintiff indicates that the supplemental disclosures reflected that Sandler O'Neill received $500,000 in fees for providing investment banking services to Midland in connection with its acquisition of Steele Street Bank & Trust. (Memorandum, p. 4.) But this disclosure was already included in the original proxy statement. (Decl. of Blake Muir Harper ISO Application for Preliminary Injunction, Ex. A, Proxy Statement, p. 56.) Similarly, plaintiff indicates that the supplemental filing disclosed that Rothenberg and DiNapoli would be employed by Midland following the merger. (Memorandum, p.. 4.) However, the original proxy stated that Rothernberg and DiNapoli would be employed by Midland pursuant to employment agreements "generally consistent … with the compensation and benefits arrangements that currently apply to [their] employment with 1st Century." (Proxy Statement, p. 61.) It is only the specific job titles that the executives will hold that were newly disclosed.

A. The Opinion in *Trulia*

Trulia announced the Chancery Court's repudiation of its past approach to disclosure settlements such as this one, the routine approval of which the court found to "have caused deal litigation to explode in the United States beyond the realm of reason." (*In re Trulia, Inc. Stockholder Litigation*, *supra*, 129 A.3d at p. 894.) The Court explained that disclosure settlements have "become the most common method for quickly resolving stockholder lawsuits that are filed routinely in response to the announcement of virtually every transaction involving the acquisition of a public corporation." (*Id.* at p. 887.) "[F]ar too often[,] such litigation serves no useful purpose for stockholders" and "serves only to generate fees for certain lawyers who are regular players in the enterprise…." (*Id.* at pp. 891-892.)

The court provided a detailed analysis of the worrisome dynamics at play in these cases:

> In such lawsuits, plaintiffs' leverage is the threat of an injunction to prevent a transaction from closing. Faced with that threat, defendants are incentivized to settle quickly in order to mitigate the considerable expense of litigation and the distraction it entails, to achieve closing certainty, and to obtain broad releases as a form of "deal insurance." These incentives are so potent that many defendants self-expedite the litigation by volunteering to produce "core documents" to plaintiffs' counsel….
>
> Once the litigation is on an expedited track and the prospect of an injunction hearing looms, the most common currency used to procure a settlement is the issuance of supplemental disclosures…. Given the Court's historical practice of approving disclosure settlements when the additional information is not material, and indeed may be of only minor value to the stockholders, providing supplemental disclosures is a particularly easy "give" for defendants to make in exchange for a release.
>
> Once an agreement-in-principle is struck to settle for supplemental disclosures, the litigation takes on an entirely different, non-adversarial character. … Significantly, in advance of [settlement fairness] hearings, the Court receives briefs and affidavits from plaintiffs extolling the value of the supplemental disclosures and advocating for approval of the proposed settlement, but rarely receives any submissions expressing an opposing viewpoint.

(*Id.* at pp. 891-893.) This description encompasses the circumstances in this case. To address the potential for abuse arising in cases like these, the *Trulia* court indicated that

> practitioners 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*.

(*Id.* at p. 898, italics added.)

Although *Trulia* is a relatively recent decision, it has already been endorsed by Judge Posner of the United States Court of Appeals for the Seventh Circuit in a published opinion, *In re Walgreen Co. Stockholder Litigation* (7th Cir. 2016) 832 F.3d 718. In adopting the *Trulia* standard for disclosure settlements, Judge Posner also cited "recent empirical work which shows that there is little reason to believe that disclosure-only settlements *ever* affect shareholder voting." (At p. 723, italics original.) While no California opinion has yet addressed the impact of *Trulia*, the Court finds its reasoning and the reasoning of *Walgreen* to be compelling. Notably, deal practitioners should not be encouraged to file strike suits in California in order to avoid *Trulia*, a possibility which *Trulia* itself recognized. (See *In re Trulia, Inc. Stockholder Litigation*, *supra*, 129 A.3d at p. 899 ["[S]ome have expressed concern that enhanced judicial scrutiny of disclosure settlements could lead plaintiffs to sue fiduciaries of Delaware corporations in other jurisdictions in the hope of finding a forum more hospitable to signing off on settlements of no genuine value. … We hope and trust that our sister courts will reach the same conclusion [as ours] if confronted with the issue."].)

The Court will consequently analyze the settlement before it with these authorities in mind.

B. The Merits of the Settlement

Having compared the supplemental disclosures at issue to the disclosures in the original proxy statement, the Court finds that they do not "address a plainly material misrepresentation or omission." (*In re Trulia, Inc. Stockholder Litigation*, *supra*, 129 A.3d at p. 898.) The fundamental issues to which the disclosures pertain—primarily, Rothenberg and DiNapoli's future employment with Midland, Sandler O'Neill's potential conflicts, and the structure of confidentiality agreements with potential buyers—could potentially rise to this level of materiality had the issues themselves not been disclosed in the original proxy statement. But these issues were disclosed. The additional details included in the supplemental disclosures are akin to those at issue in *Trulia* and *Walgreen* and are not plainly material. (See *In re Walgreen Co. Stockholder Litigation*, *supra,* 832 F.3d at pp. 722-723 [supplemental disclosures including timing of conversations with potentially conflicted individual and reasons why individuals were appointed to various positions were not plainly material where the underlying circumstances had already been disclosed]; *In re Trulia, Inc. Stockholder Litigation*, *supra,* 129 A.3d at pp. 900-907 [extraneous details regarding fairness opinion that had already been fairly summarized were not plainly material].)

Another issue with the settlement is the scope of the release, which encompasses all claims related to the merger, not just disclosure-related claims. (Stipulation, §§ B(p), D(4).) Plaintiff barely addresses his other claims for breach of fiduciary duty in his memorandum, relying on general argument regarding the difficulties of overcoming the presumption of the business judgment rule and the protections of a Delaware exculpatory provision. (Memorandum, pp. 6-7.) There is no indication that non-disclosure-related fiduciary duty claims concerning the sale process "have been investigated sufficiently." (*In re Trulia, Inc. Stockholder Litigation*, *supra*, 129 A.3d at p. 898; see also *In re Walgreen Co. Stockholder Litigation*, *supra,* 832 F.3d at p. 721 [disapproving a settlement involving non-material disclosures even where the "narrow" release was limited to disclosure-related claims].)

Given these very fundamental problems, the Court finds that the settlement is not fair and reasonable to the putative class. The supplemental disclosures are of minimal value to the class and do not justify the release of all claims associated with the merger. As there was no substantial benefit to the class, an award of attorney fees is not justified.

IV. Conclusion and Order

The motion for preliminary approval is DENIED.

- oo0oo -