



In re Wm. Wrigley Jr. Co. S'holders. Litig., C.A. No. 3750-VCL (Del. Ch. Jan. 22, 2009) (Lamb, V.C.)

In this case, Vice Chancellor Lamb approved a settlement effecting changes to a merger agreement between the Wm. Wrigley Jr. Company and Mars, Inc. The merger announcement triggered several lawsuits alleging various breaches of fiduciary duty by the Mars board of directors, including 1) breach of the directors' duty to secure the best available price; 2) a claim that the merger agreement contained improper lock-up provisions such as a \$690 million termination fee; and 3) a claim that the proxy materials the board prepared for the stockholders were false and misleading. After the lawsuits were consolidated into a single class action suit and plaintiffs' financial expert concluded that the merger price was fair, the plaintiffs focused on achieving a settlement creating changes to the lock-up provisions (a reduction in the termination fee by 10% and shortening the "tail" period for payment of the fee) and enhanced disclosures contained in the proxy materials. The Court was asked to approve the settlement as well as address timely objections to the settlement, challenging, among other things, the lack of an opt-out provision in the proposed class structure. The objectors argued that the Due Process Clause of the Fourteenth Amendment to the United States Constitution prohibited the certification of a non-opt-out class. Vice Chancellor Lamb found that argument was based on a misunderstanding of well-settled U.S. Supreme Court precedent, which was limited only to those class actions concerning claims for monetary judgments. The Vice Chancellor stated that since nearly all of the remedies sought were equitable in nature, including demands for injunctive relief and additional disclosures, the case fell within the reach of Court of Chancery Rules 23(b)(1) and (b)(2), which apply to class actions for class-wide injunctive or declaratory relief. In further support for his conclusion, the Vice Chancellor cited a previous Court of Chancery decision, allowing a "properly administered" class action without affording opt-out rights to be used to bind all absent shareholder/plaintiffs to a final judgment in an action seeking either equitable or monetary damages so long as there is notice and an opportunity to be heard. The Court found that the requirement of notice and an opportunity to be heard was satisfied in this case, and as such, the Court held that the U.S. Supreme Court and Delaware precedent did not prevent certification of the non-opt-out clause at issue. The Court ultimately overruled the objections because "traditional notions of fair play and substantial justice" were satisfied by giving notice and an opportunity to be heard when the class action was used as a mechanism to bind all absent stockholders to a final judgment in such an action. In so doing, the Vice Chancellor also agreed to certify the action as a class action and to approve the settlement as proposed.

The full opinion is available [here](#).



1313 North Market Street
P.O. Box 951
Wilmington DE 19899-0951
(302) 984-6000

The announcement of a large cash acquisition of a publicly-owned corporation by a competitor triggered a series of lawsuits alleging various breaches of fiduciary duty by the target corporation directors. These ranged from a claim that the directors had not acted in accordance with their duty to secure the best available price in the transaction, to a claim that the merger agreement included improper lock-up provisions, to a claim that the proxy materials the directors were preparing to disseminate to stockholders were false and misleading. After consulting with a financial expert who advised that the merger price was fair, the plaintiffs and their counsel focused their efforts on achieving a settlement to effect both changes to the lock ups and enhanced disclosures. The court is now asked to approve the settlement they reached. That function entails, among other things, weighing the likelihood of success on the merits of the claims against the benefits achieved in the settlement.

The court must also address objections to the settlement that relate, among other things, to the certification of the class on terms that do not permit class members the right to opt out. Those objections must be overruled, in accordance with well established precedent. Simply put, traditional notions of fair play and substantial justice are fully satisfied by giving notice and an opportunity to be heard where the class action mechanism is used to bind all absent stockholders to a final judgment in an action arising out of the decision of a board of directors to

authorize a merger agreement and to solicit votes or proxies from stockholders in favor of its approval.

I.

On April 28, 2008, the Wm. Wrigley Jr. Company announced that its board of directors had approved an agreement and plan of merger with Mars, Incorporated. Wrigley manufactures and markets chewing gum and other confectionery products. Mars is a privately owned company that manufactures and markets various chocolates, candies, and other food products under various brand names. As announced, the merger contemplated that each share of Wrigley common stock would be converted into the right to receive \$80 in cash, a price that represented a 28% premium over the closing price of Wrigley's common stock on the last trading day before the announcement of the merger and a 34% premium over the weighted average closing price of the stock over the previous three months. The transaction was valued in excess of \$23 billion.

In early May 2008, Wrigley stockholders filed two actions in this court challenging the proposed merger.¹ The cases were consolidated and, on June 6, 2008, the plaintiffs filed a verified consolidated class action complaint. That

¹ *Insulators and Asbestos Workers Local No. 14 v. William Wrigley, Jr., et al.*, No. 3750-VCL; and *Cora E. Bennett v. William Wrigley, Jr., et al.*, No. 3756-VCL.

complaint alleges that the members of the Wrigley board of directors,² aided and abetted by Mars, failed to exercise properly their fiduciary duties in connection with the merger by: (i) agreeing to the merger agreement at an unfair and inadequate price that resulted from a flawed negotiation process that did not include any auction to obtain the best available price for the company but was instead predicated on the Wrigley family's desire to sell to a buyer that would maintain a management philosophy consistent with their family's values; (ii) inappropriately limiting Wrigley's ability to consider alternative transactions through improper contractual lock-up provisions such as a \$690 million termination fee ; and (iii) attempting to solicit stockholder approval of the merger through incomplete and materially misleading disclosures found at that time in a preliminary proxy statement filed with the SEC. ³

² The Wrigley board of directors, all of whom are named as defendants, consists of William Wrigley, Jr., William D. Perez, John F. Bard, Howard B. Bernick, Thomas A. Knowlton, John Rau, Steven B. Sample, Alex Shumate, Richard K. Smucker, and Melinda R. Rich.

³ Litigation challenging the merger was also filed in Illinois. On April 29, 2008, a purported Wrigley stockholder brought a putative class and derivative action in the United States District Court for the Northern District of Illinois. That case was stayed in favor of this action. On June 9, 2008, another purported Wrigley stockholder brought a putative class action in the Chancery Division of the Circuit Court of Cook County, Illinois (the "Young Action"). The Young Action was dismissed by court order in favor of this action. The Young Action plaintiff filed a notice of appeal, which is currently pending. The Young Action plaintiff also brought a separate Illinois state court suit, in the summer of 2008 and after his notice of appeal was filed, against Goldman Sachs in connection with its role as Wrigley's financial advisor. *See* Stip. at 1-5. Should the proposed settlement be approved by this court, it is expected that the defendants in the Illinois action will move to dismiss those actions pursuant to the terms of the settlement release. Further, according to the terms of the stipulation, the payment by the defendants of any fee awarded by this court to the plaintiffs' counsel is conditioned on, among other things, dismissal of the other related cases. Stip. ¶ 6.

At some point early in the litigation, the plaintiffs' counsel retained Financial Markets Analysis ("FMA"), a financial consulting firm reportedly specializing in the analysis of proposed corporate transactions, to assist in their analysis. According to the plaintiffs' counsel, at some point before early July, FMA advised them that the \$80 per share merger price "appeared to fall within a range of fairness and reasonableness and that Mars was unlikely to offer, and the Court was unlikely to order, and increase in that price."⁴

After some initial legal skirmishing, including the filing of a motion for preliminary injunction, and armed with the FMA analysis, the plaintiffs' counsel made a formal settlement demand that did not include any change in the price term of the proposed transaction. Instead, the proposal focused on modifications to other non-price terms of the merger agreement and disclosures. The parties then entered into talks aimed at reaching a settlement of the consolidated action.⁵ After a few weeks of back and forth negotiations, they reached an agreement in principle to settle, subject to, among other things, further investigation and discovery (to be

⁴ Joint Affidavit of Jeffrey W. Golan and Ronen Saffaf dated November 20 and 21, 2008 (hereinafter "Jt. Aff."), at ¶ 18.

⁵ On July 1, 2008, after filing an answer, Wrigley and the individual defendants moved for judgment on the pleadings with respect to all of the plaintiffs' claims and to stay discovery pending a resolution of the first motion. Mars separately moved for judgment on the pleadings and joined in the motion to stay discovery. The next day, the plaintiffs responded to the motion to stay, and further moved to expedite proceedings and for preliminary injunctive relief. In their motions, the plaintiffs argued that a prompt hearing on their motion for a preliminary injunction was essential because Wrigley stockholders would suffer irreparable harm without complete and accurate information to enable them to make an informed vote on the merger.

conducted in advance of the anticipated stockholder vote on the proposed merger) in order to confirm the fairness and reasonableness of the settlement.

In the settlement, the defendants agreed to modify the terms of the merger agreement by reducing the termination fee by 10% and shortening by three months the “tail” period for payment of a termination fee by Wrigley, and also by modifying and supplementing the disclosures contained in the proxy materials. The agreement was formalized in a memorandum of understanding executed on August 1, 2008, which was sent to the court the next business day. The parties advised the court that a settlement had been reached and sought the court’s agreement that the formal settlement hearing might be held shortly after the effective date of the merger. Due to the exigencies of the situation and the impracticality of delaying consummation of the \$23 billion merger to accommodate a hearing before the closing, the court agreed. Later, after the completion of confirmatory document and deposition discovery, the parties entered into a stipulation of settlement dated September 18, 2008.

Wrigley stockholders approved the merger at a special meeting of stockholders held on September 25, 2008, and the merger was completed on October 6, 2008.

On October 2, 2008, the court entered a scheduling order that conditionally certified the class pursuant to Court of Chancery Rules 23(b)(1) and (b)(2) as a

non-opt-out class, and directed that a court-approved notice be provided to class members. The scheduling order further provided that any objection to the settlement by a member of the class needed to be submitted by November 20, 2008.

Two objections to the settlement were timely filed. The first objection is a one-page letter post-marked October 30, 2008, that simply objects to the \$80 merger consideration, claiming that the stock would have been worth far more in the future. This letter does not raise any substantial issue relating to the fairness or adequacy of the proposed settlement and will not be considered further. The second objection was filed by Robert L. Weinberg and Patricia W. Weinberg on November 17, 2008. The objection challenges the proposed certification of the class for settlement purposes and complains about the lack of an opt-out provision in the proposed class structure. The Weinbergs also object to the settlement because, if approved, class members will be required to release their claims relating to the merger but will not be receiving any monetary payment as the result of the settlement. Robert L. Weinberg, acting *pro se*, appeared at the hearing to argue the objection. Neither objector takes issue with (a) the adequacy of the notice sent to class members (b) the adequacy of the final proxy materials, which included the additional disclosures achieved through the settlement, or (c) the fee application that has been made by the plaintiffs' counsel. In this opinion, the court

considers the merits of the Weinberg objection and, ultimately, overrules it. In doing so, the court also agrees to certify the action as a class action and to approve the settlement as proposed.

II.

Delaware law favors the voluntary settlement of corporate disputes.⁶

Moreover, in considering whether or not to approve a proposed settlement, the court must evaluate “whether [it] is fair and reasonable in light of all relevant factors.”⁷

When the action being settled is brought as a class action, the court must also satisfy itself that the action is one that may be maintained as a class action. In such a case, “the appropriate course is for the Court of Chancery to make an explicit finding on the record that the action satisfies the criteria of Rule 23 and is thus properly maintainable as a class action.”⁸

As already noted, the court agreed in the scheduling order, preliminarily and for settlement purposes only, to permit the action to proceed as a class action pursuant to Court of Chancery Rules 23(a), 23(b)(1), and 23(b)(2), without opt-out rights. The court did so with the understanding that the ultimate determination whether the action should be so certified would occur after the notice period, at the

⁶ *Kahn v. Sullivan*, 594 A.2d 48, 58 (Del. 1991); *In re Triarc Cos., Inc. Class & Deriv. Litig.*, 791 A.2d 872, 876 (Del. Ch. 2001).

⁷ *In re Caremark Intern'l Inc. Deriv. Litig.*, 698 A.2d 959, 966 (Del. Ch. 1996).

⁸ *Prezant v. DeAngelis*, 636 A.2d 915, 925 (Del. 1994).

time the court decided whether or not to approve the settlement. The decision to employ a temporary settlement class is in keeping with the common practice in this court when dealing with proposed settlements of corporate disputes, a practice specifically approved by the Delaware Supreme Court in *Prezant*.⁹ To the extent the Weinberg objection takes issues with this practice, the objection is overruled.¹⁰

The question of final certification is multifaceted. The court must first consider whether the action satisfies all four elements of Rule 23(a). These are: (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy of representation. If these elements are satisfied, the court must then determine whether the action should be maintained pursuant to one or more of the subparts of Rule 23(b) that “divide class actions into three categories based upon the wrongs alleged and/or the relief sought.”¹¹

Subsection (b)(1) applies to class actions that are necessary to protect the party opposing the class or the members of the class from inconsistent adjudications in separate actions. Subdivision (b)(2) applies

⁹ *Id.* at 923 (approving “the use of temporary settlement classes generally . . . so long as the strictures of Rule 23 are ultimately satisfied.”).

¹⁰ The utility and practical necessity of using temporary settlement classes in fast paced litigation seeking injunctive relief is easily seen in the history of this case. Only three months passed from the time the deal was announced to the time the parties signed the MOU. Two months later, the court entered the scheduling order temporarily certifying the action as a class action in order to give notice of the proposed settlement. Within days, the transaction closed. Obviously, the ability of putative class counsel to affect a settlement altering the terms of the transaction and its related disclosures depended significantly on the court’s willingness to put off final class certification issues until the final settlement hearing. In this case, as is often the case in litigation of this kind, there was simply no opportunity for the parties to engage in motion practice regarding the issue of class certification before the proposed settlement was reached.

¹¹ *Prezant*, 636 A.2d at 921.

to class actions for class-wide injunctive or declaratory relief. Subdivision (b)(3) applies when common questions of law or fact predominate and a class action would be superior to other means of adjudication.¹²

In accordance with Rule 23(c)(2), in any action maintained under subpart (b)(3), class members must be afforded an opportunity to opt out of the class.

In this case, the court is satisfied from a review of the record that the action satisfies all four elements of Rule 23(a). First, there is no question that the numerosity requirement of subpart (a)(1) is satisfied. At the time the action was commenced there were over 270 million shares of Wrigley common stock outstanding, held by many tens of thousands of persons located throughout the country and, indeed, the world. It is obviously impracticable to join all those persons in one action. Similarly, the action easily satisfies the commonality requirement of subpart (a)(2). Indeed, the claims of all Wrigley stockholders other than the defendants are identical in challenging the process by which the merger was approved and the proxy materials used to solicit the stockholders to vote in favor of it. For substantially the same reason, the typicality requirement of subpart (a)(3) is also met. The named plaintiffs were stockholders at the time of the announcement and continued to own their shares until the time the merger was completed. Thus, they

¹² *Nottingham Partners v. Dana*, 564 A.2d 1089, 1095 (Del. 1989) (footnotes, citations, and quotation marks omitted.).

were effected in the same way as all other members of the class.¹³ Finally, subject to further analysis and discussion in connection with the court's evaluation of the fairness and adequacy of the terms of the proposed settlement, the court is also satisfied that the named plaintiffs are adequate class representatives. They were stockholders of Wrigley during the class period. They engaged as their counsel lawyers who are experienced in litigation of this sort. Nothing in the record suggests that either the named plaintiffs or their counsel were conflicted or otherwise disabled from prosecuting this action fully and adequately.

The court next concludes that the action challenging the exercise of fiduciary responsibility in a corporate merger is one that is properly maintainable pursuant to Rules 23(b)(1) and (b)(2). Relatedly, in the exercise of its discretion, the court will not require that class members be afforded the right to opt out.

The Weinberg objection takes the position that the due process clause of the Fourteenth Amendment to the Constitution of the United States, as interpreted by the United States Supreme Court in *Phillips Petroleum Co. v. Shutts*,¹⁴ prohibits the certification of a non-opt-out class in this case. This argument misapprehends the rule announced in *Phillips Petroleum* and ignores later decisions of the Delaware

¹³ *In re Talley Indus., Inc. S'holders Litig.*, 1998 WL 191939, at *9 (Del. Ch.) (finding the typicality requirement of Rule 23(a)(3) satisfied where all class members face the same injury flowing from the defendants' conduct in regard to a proposed merger).

¹⁴ 474 U.S. 797 (1985).

Supreme Court and this court holding that the constitutional principles announced in *Phillips Petroleum* do not prevent certification of non-opt-out classes in actions falling within the reach of Rules 23(b)(1) and (b)(2).¹⁵ As has been recognized in those later cases, the decision of the Supreme Court in *Phillips Petroleum* was limited to “those class actions which seek to bind known plaintiffs concerning claims wholly or predominantly for money judgments.”¹⁶ The Supreme Court specifically did not extend this holding to claims for equitable relief.¹⁷

In this case, the claims asserted were not “wholly or predominantly” for a money judgment. To the contrary, nearly all of the remedies sought in the complaint are equitable in nature, including demands for injunctive relief and for additional disclosures. Thus, under established law, this action is one that is suitable for certification under Rule 23(b)(2). As the Delaware Supreme Court held in *Nottingham Partners*, a decision by this court to deny an opt-out right in certifying a class pursuant to Rule 23(b)(2) is discretionary and will be reversed only for abuse of discretion.¹⁸ This case involves corporate stockholders challenging actions taken by corporate directors in authorizing a merger—action that affected all stockholders the

¹⁵ *In re Philadelphia Stock Exchange*, 945 A.2d 1123, 1137 (Del. 2008); *Nottingham Partners*, 564 A.2d at 1094-1101; *Hynson v. Drummond Coal Co., Inc.*, 601 A.2d 570, 575 (Del. Ch. 1991).

¹⁶ 474 U.S. at 81, n.3.

¹⁷ *Id.*

¹⁸ *Id.* at 1101.

same way and made classwide injunctive or declaratory relief appropriate. There being no countervailing consideration, it is entirely sensible that all claims belonging to the class that arise out of this challenged activity should be resolved in the same forum. As Chancellor Allen observed in *Hyson v. Drummand Coal Co., Inc.*:

[T]he device of a properly administered class action may be employed, without affording opt-out rights, to bind all absent shareholder/plaintiffs to a final judgment in an action seeking to vindicate rights attaching to corporate stock, whether by injunction or compensated by an award of money damages. To do so is fully in accord with traditional notions of fair play and substantial justice.¹⁹

What due process requires in such a case is notice and an opportunity to be heard.²⁰

This important requirement is satisfied in this case.

With these conclusions in mind, the court turns to a consideration of the merits of the proposed settlement.

III.

The Weinberg objection asserts repeatedly that the settlement should be rejected because it does not result in any monetary compensation and, thus, provides no benefit to the class. This objection overlooks the non-monetary benefits provided by the settlement that include supplemental disclosures in the merger proxy statement and certain modifications to the terms of the merger agreement designed to induce

¹⁹ 601 A.2d at 575.

²⁰ *Nottingham Partners*, 564 A.2d at 1101 (concluding that when a portion of the relief sought is monetary, due process requires that class members receive notice of the settlement and an opportunity to raise objections).

other bidders to come forward. Delaware courts have often approved settlements of merger class litigation that entail only non-monetary relief.²¹ Thus, it is not adequate grounds for objection to complain that potential monetary claims are being compromised on terms that do not afford any monetary relief to the class.

The proper analysis is to examine whether the benefits achieved by the proposed settlement fairly and adequately compensate the class for the dismissal with prejudice of the claims that were asserted in this case. In conducting that analysis, the court must examine the strength (or weakness) of those claims.²² “The strength of claims raised in a class action lawsuit helps to determine whether the consideration received for their settlement is adequate and whether dismissal with prejudice is appropriate.”²³

It is implicit in the full scope of the presentation made by the plaintiffs’ counsel that they came to regard the price-related claims asserted in this case as weak. Although the complaints that were filed all contain allegations challenging the process by which the \$80 merger price was negotiated and claiming that the stock was worth more, it is clear that the advice plaintiffs’ counsel received from FMA, their financial consultant, was to the contrary. Indeed, by normal objective criteria, it

²¹ See, e.g., *In re Chips & Techs., Inc. S’holders Litig.*, 1998 WL 409155, at *3 (Del. Ch. June 24, 1998); *Talley Indus.*, 1998 WL 191939 at *14.

²² See *Barkan v. Amsted Indus., Inc.*, 567 A.2d 1279, 1285 (Del. 1989).

²³ *Id.*

seems that the \$80 merger price was a very attractive price, representing a substantial premium to market and a substantially higher multiple of earnings than comparable transactions over the previous ten years. Indeed, the evidence gathered during confirmatory discovery suggested to the plaintiffs' counsel that the transaction had maximized the value of Wrigley.²⁴ Considering also the later stockholder vote in favor of the transaction after full and fair disclosure, there is even less reason to think that the objectors' challenge to the price negotiations was meritorious.²⁵ Notably, the Weinberg objection does not advance any argument about the strength or weakness of the underlying claim relating to the merger price and does not consider whether the failure of the settlement to include any monetary relief is the result of the weakness of that claim. The Weinberg objection is defective in that regard.

There is also little reason to think that the claims relating to the so-called deal protection devices were particularly strong. For example, while the termination fee of \$690 million was certainly large in dollar terms, it represented less than 3% of the deal value. In any case, the settlement secured a substantial (10%) reduction in this fee to \$621 million. Likewise, the settlement secured a shortening of the time during which that fee might become payable in the event Wrigley consummated a

²⁴ Jt. Aff. at ¶ 25.

²⁵ See *In re Lukens Inc. S'holders Litig.*, 77 A.2d 720, 736-37 (Del. Ch. 1999), *aff'd sub nom. Walker v. Lukens, Inc.*, 757 A.2d 1278 (Del. 2000).

transaction with someone other than Mars, from 12 months to 9 months. The Weinberg objection does not address these claims or this aspect of the settlement.

Finally, the record reflects that the disclosure claims advanced in the complaint were fully and fairly addressed in the settlement. In part, these claims were dealt with in the supplemental disclosures that were included in the final proxy materials as a result of the settlement. In part, the plaintiffs' counsel became satisfied from the discovery they undertook that the original disclosures were adequate. In particular, they satisfied themselves that "the failure to conduct an auction of Wrigley did not inhibit Wrigley and its financial advisor from maximizing the value of the transaction for Wrigley's shareholders."²⁶ The discovery also confirmed the accuracy of many other aspects of the proxy materials, including the sections describing, *inter alia*, the background of the transaction, the compensation of Wrigley's financial advisor, Goldman Sachs, the synergies that Mars might be able to achieve in the transaction, the negotiation of the termination fees, and other matters. Again, the Weinberg objection does not address the disclosure aspects of either the complaint or the settlement.

Taking all of these matters into account, the court is satisfied that the terms of the proposed settlement are fair and reasonable and that the benefits secured in the settlement in both modifying the terms of the merger agreement and supplementing

²⁶ Jt. Aff. at ¶ 25.

the merger proxy disclosures are adequate to support the dismissal with prejudice of the claims asserted. The court recognizes that the settlement provides no monetary benefit to the class, but that is not the sole touchstone of reasonableness when reviewing the settlement of claims for equitable and injunctive relief challenging a corporate merger. Where the transaction challenged is or appears to be fully and fairly priced, it is not the case that a settlement must include a monetary element in order to pass muster as fair and reasonable. This is such a case. In exercising its broad discretion, the court concludes that it is fair and reasonable to settle this case for the benefits achieved.

IV.

There is no challenge to the plaintiffs' attorneys' fee application. For their work on this matter, including the devotion of more than 820 hours of attorney time, they seek an award of \$690,000 in fees and expenses, inclusive. The defendants have agreed to pay this award.

In weighing this application, the court has taken into account the factors that generally govern decisions of this kind: (1) the benefits achieved in the action, (2) the efforts of counsel and the time spent, (3) the contingent nature of the fee, (4) the difficulty of the litigation, and (5) the standing and ability of counsel.²⁷ It is apparent that the fee application itself reflects the rather modest benefits achieved in the

²⁷ *Sugarland Indus. v. Thomas*, 420 A.2d 142 (Del. 1980).

settlement and the absence of any monetary component to it. Still, it is apparent that the plaintiffs' counsel devoted substantial effort to this case and agreed to do so on a fully contingent basis. While the litigation did not present novel or unusual issues, any litigation of this sort moves at a fast pace, carries very large stakes, and is bound to make substantial demands on all counsel. Considering all of these circumstances, the court will award the full amount of fees and expenses sought.

V.

For the reasons set forth herein, the Weinberg objection is **OVERRULED**, and the full amount of the plaintiffs' counsel's fees and expenses are awarded. The plaintiffs' counsel is directed to submit a form of final order in conformity with this opinion by January 30, 2009.