IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE COLUMBIA PIPELINE GROUP, INC. STOCKHOLDER LITIGATION	))	C.A. No. 12152-VCL

ORDER GRANTING MOTION TO DISMISS

WHEREAS:

A. This putative class action challenges a merger in which Columbia Pipeline Group, Inc. ("CPG" or the "Company") was acquired by TransCanada Corporation ("TransCanada" or the "Buyer").

B. The transaction was governed by an agreement and plan of merger dated March 17, 2016 (the "Merger Agreement"). Pursuant to its terms, each publicly held share of Company common stock was converted into the right to receive $25.50 per share, subject to the stockholder's right to seek appraisal. The price represented a premium of 32% over the average closing price during the month before the announcement of the transaction.

C. The Merger Agreement was approved and recommended to the stockholders by the Company's board of directors (the "Board"). The Board comprised defendants Robert C. Skaggs, Jr., Sigmund L. Cornelius, Marty R. Kittrell, W. Lee Nutter, Deborah S. Parker, Lester P. Silverman, and Teresa A. Taylor. Skaggs was the Company's President and CEO. Defendant Stephen P. Smith was the Company's CFO.

D. In connection with the transaction, the Board was advised by two financial advisors: Goldman, Sachs & Co. ("Goldman") and Lazard Frères & Co. LLC ("Lazard").

E. On April 8, 2016, the Company filed its preliminary proxy statement with the SEC. On May 17, 2016, the Company filed its definitive proxy statement with the SEC. This order refers to the Company's disclosures as the "Proxy."

F. On June 22, 2016, the Company's stockholders voted in favor of the merger. Of the Company's total outstanding shares entitled to vote, more than 95% were cast in favor of the merger. The merger closed on July 1, 2016.

G. The plaintiffs allege that the Company's directors breached their fiduciary duties in connection with the merger. The defendants have moved to dismiss the complaint for failing to state a claim on which relief can be granted.

IT IS HEREBY ORDERED:

1. The motion is GRANTED. This action is DISMISSED WITH PREJUDICE.

2. On a motion to dismiss for failure to state a claim, "(i) all well-pleaded factual allegations are accepted as true; (ii) even vague allegations are well-pleaded if they give the opposing party notice of the claim; (iii) the Court must draw all reasonable inferences in favor of the non-moving party; and ([iv]) dismissal is inappropriate unless the plaintiff would not be entitled to recover under any reasonably conceivable set of circumstances susceptible of proof."

Savor, Inc. v. FMR Corp., 812 A.2d 894, 896–97 (Del. 2002) (footnotes and internal quotation marks omitted).

3. When a transaction has been approved by a majority of the disinterested stockholders in a fully informed and uncoerced vote, the business judgment rule applies and "insulates the transaction from all attacks other than on the grounds of waste[.]" *In re KKR Fin. Hldgs. LLC S'holder Litig.*, 101 A.3d 980, 1001 (Del. Ch. 2014), *aff'd sub nom. Corwin v. KKR Fin. Hldgs. LLC*, 125 A.3d 304 (Del. 2015). "When the business judgment rule standard of review is invoked because of a vote, dismissal is typically the result." *Singh v. Attenborough*, 137 A.3d 151, 151–52 (Del. 2016).

4. "In the absence of a controlling stockholder that extracted personal benefits, the effect of disinterested stockholder approval of the merger is review under the . . . business judgment rule, even if the transaction might otherwise have been subject to the entire fairness standard due to conflicts faced by individual directors." *Larkin v. Shah*, 2016 WL 4485447, at *1 (Del. Ch. Aug. 25, 2016).

> [E]ven if [the] plaintiffs had pled facts from which it was reasonably inferable that a majority of [the company's] directors were not independent, the business judgment standard of review still would apply to the merger because it was approved by a majority of the shares held by disinterested stockholders of [the company] in a vote that was fully informed.

In re KKR, 101 A.3d at 1003.

5. Because the merger received disinterested stockholder approval, the business judgment rule will apply and dismissal will result unless the plaintiff has

"allege[d] that facts are missing from the [Proxy], identif[ied] those facts, [and] state[d] why they meet the materiality standard and how the omission caused injury." *Malpiede v. Townson*, 780 A.2d 1075, 1087 (Del. 2001). A post-closing claim for monetary damages stemming from a failure to disclose information in the proxy materials "survives only to the extent that material omissions continued to exist when the [stockholders] voted." *In re Alloy, Inc. S'holder Litig.*, 2011 WL 4863716, at *13 (Del. Ch. Oct. 13, 2011). An omission is material only if 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." *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976); *see Rosenblatt v. Getty Oil Co.*, 493 A.2d 929, 944 (Del. 1985) (adopting *TSC* standard).

6. The plaintiffs allege that the defendants breached their duty of loyalty by engineering a spinoff and sale of the Company as part of a self-interested plan to cash in on lucrative change-in-control benefits. The plaintiffs observe that the Company previously was a wholly owned subsidiary of NiSource, Inc., and they allege that NiSource received expressions of interest from prospective buyers who wanted to acquire the Company. The plaintiffs allege that because the Company comprised a relatively small percentage of NiSource's assets, a sale of the Company by NiSource would not trigger change-of-control benefits for the defendants. The plaintiffs observe that on July 1, 2015, NiSource completed a spinoff of the Company, that NiSource's two senior officers and a

number of its directors joined the Company, and that the officers' and directors' change-of-control benefits transferred over to the Company on a dollar-for-dollar basis, even though the Company was much smaller than NiSource. Once the change-of-control benefits were transferred to the post-spinoff Company, a sale of the Company would trigger them. The plaintiffs allege that the defendants planned all along to sell the Company and trigger the payments from their change-of-control benefits that they otherwise could not have received, thereby diverting consideration from the public stockholders.

7. The allegations of the complaint in support of this theory are sufficiently detailed to state a pleadings-stage claim for breach of the duty of loyalty against the defendants. But if stockholders approved the conflict of interest after full disclosure, then the business judgment rule applies. *KKR*, 101 A.3d at 1003. Consequently, the operative question is whether the stockholder vote was fully informed.

8. Framed as a disclosure claim, the plaintiffs contend that the Proxy failed to disclose that the defendants engineered the spinoff as part of a plan to generate change-in-control benefits. The plaintiffs also cite disclosures that the defendants made about the long-term value of the Company, and they allege that the directors also had an obligation to disclose that they had personal plans that conflicted with pursuing a long-term strategy.

a. The duty of disclosure demands that fiduciaries disclose facts. It does not demand that fiduciaries "engage in 'self-flagellation' and draw legal

conclusions" as to the inferences to be drawn from those facts. *Stroud v. Grace*, 606 A.2d 75, 84 n.1 (Del. 1992). When a proxy statement describes the facts that create differing incentives for fiduciaries, it need not explain how those differing incentives could produce a self-interested outcome. *See In re Solera Hldgs., Inc. S'holder Litig.*, 2017 WL 57839, at *11–12 (Del. Ch. Jan. 5, 2017); *Orman v. Cullman*, 794 A.2d 5, 34–35 (Del. Ch. 2002).

b. The Proxy disclosed that the Company took steps before the completion of the spinoff to prepare for potential acquisition offers. The Proxy disclosed that on September 17, 2014, the Company engaged Lazard, effective as of the completion of the spinoff, to provide financial advice. The Proxy also disclosed that the Company engaged Goldman pursuant to engagement letters dated March 19, 2015, and July 2, 2015. The Proxy disclosed that in July 2015, just after the completion of the spinoff, Party A and Party B approached the Company with expressions of interest. The Proxy described that on August 3 and 4, 2015, the Board engaged in a comprehensive review of the Company's strategic alternatives. The Proxy continued with a detailed description of the material steps in the process leading up to the Merger Agreement in March 2016.

c. The plaintiffs concede that the "basic terms of Defendants' compensation packages were publicly available." Dkt. 69, at 13. In addition, the Proxy disclosed that the total value of change-in-control benefits that Skaggs and Smith earned through the TransCanada merger was higher than the benefits those

individuals would have received if NiSource had sold the Company without a spinoff.

d. The plaintiffs do not allege that the Proxy failed to disclose any material facts regarding the sequence of events between the announcement of the spinoff in September 2014 and the merger vote in June 2016. Instead, they contend that the defendants were obligated to disclose that they acted for selfish and self-interested reasons.

e. In this case, the Company's stockholders had access to the same information as the plaintiffs. The plaintiffs' complaint demonstrates that a reader of the Proxy can readily stitch together the facts to draw the inference that former NiSource fiduciaries used the spinoff to benefit themselves. The stockholders could have evaluated the same disclosures and decided whether the defendants had incentives that caused them to favor a quick sale or which enabled them to divert consideration from the public stockholders that the defendants would not have received if NiSource had sold the Company without a spinoff. To require the defendants to aver that they acted for that purpose, assuming it were true, would be to force them to engage in self-flagellation. The material facts were disclosed. That is all Delaware law requires.

9. The plaintiffs separately allege that the Proxy failed to disclose that Goldman had a conflicting financial interest because Goldman and its affiliates collectively owned 870,188 shares in the Buyer, worth approximately $28.4 million.

a. "Because of the central role played by investment banks in the evaluation, exploration, selection, and implementation of strategic alternatives, this Court has required full disclosure of investment banker compensation and potential conflicts." *In re Del Monte Foods Co. S'holders Litig.*, 25 A.3d 813, 832 (Del. Ch. 2011); *accord In re Rural/Metro Corp. S'holders Litig.*, 88 A.3d 54, 105 (Del. Ch. 2014) ("'[I]t is imperative for the stockholders to be able to understand what factors might influence the financial advisor's analytical efforts.'" (quoting *David P. Simonetti Rollover IRA v. Margolis*, 2008 WL 5048692, at *8 (Del. Ch. June 27, 2008))), *aff'd sub nom. RBC Capital Mkts., LLC v. Jervis*, 129 A.3d 816 (Del. 2015). At the same time, this court has held that a financial advisor need not disclose positions that do not rise to the level of an actual conflict. *See In re Micromet, Inc. S'holders Litig.*, 2012 WL 681785, at *11–12 (Del. Ch. Feb. 29, 2012).

b. The plaintiffs gleaned the information about Goldman's holdings from its 319-page 2015 Form 13F, filed February 16, 2016, in which Goldman disclosed 11,194 separate equity positions collectively valued at $319 billion, including positions in the Company, the Buyer, and NiSource. According to the Form 13F, Goldman's stock position in the Buyer was worth $28.4 million, or about nine thousandths of a percent (0.009%) of its overall reported positions. The same Form 13F reveals, however, that 760,147 of Goldman's 870,188 shares in the Buyer (about $4.4 million) were held by Goldman Sachs Asset Management, L.P., an asset management affiliate of Goldman that manages third-

party funds. The Form 13F also reports ownership by Goldman Sachs affiliates of 2,521,737 Company shares worth about $50.4 million, plus 1,725,097 Columbia Pipeline Partners limited partnership units, worth about $30.1 million.

c. One cannot infer from these positions that Goldman's interests favored the Buyer. If anything, Goldman's holdings appear more heavily weighted towards the Company. Disclosure of those holdings therefore was not required. *See Micromet*, 2012 WL 681785, at *12 ("[A]ny investor who desired to know the size of Goldman's position in Micromet or Amgen as of the last reporting period could find this information in Goldman's publicly-filed Form 13F.").

d. I personally would favor a disclosure regime that required a proxy statement for a merger to disclose the positions that the sell-side investment advisor and its affiliates held in the sell-side entity, the acquirer, and any other participant in the sale process that was identified in the "Background to the Merger." In my view, it would be preferable to have these matters set out in a table in the proxy statement, rather than expecting stockholders to uncover the information by mining other lengthy filings. It also would enable the proxy statement to explain the nature of the advisors' holdings. Such a regime would have the additional benefit of assisting boards in obtaining this type of information from their financial advisors. But *Micromet* holds that disclosure in a Schedule 13F is sufficient, particularly where the balance of the investment advisor's

ownership does not create an economic conflict. Absent contrary guidance from the Delaware Supreme Court, *Micromet* is dispositive.

10. The plaintiffs also allege that the Proxy provided a partial and misleading account about interest from a competing bidder. According to the plaintiffs, on March 10, 2016, when the Board was nearing an agreement with the Buyer and just days before the Merger Agreement was signed, *The Wall Street Journal* reported that the Buyer was in talks to acquire the Company. At that point, having previously discussed a possible transaction with the Company, Party A's CEO contacted Skaggs to express Party A's continued interest in an acquisition and that a formal bid was forthcoming. On March 16, 2016, Lazard presented preliminary illustrative financial analyses of a potential acquisition of the Company by Party A for a mix of cash and stock at prices ranging from $25.50 to $28.00 per share. Lazard presented this analysis to the Board during the same meeting at which the directors unanimously determined to proceed with the merger. The plaintiff asserts that the Proxy needed to disclose more information about the Lazard analysis than merely the indicated price range.

a. As a matter of Delaware law, a board does not have a fiduciary obligation to disclose preliminary discussions, much less an analysis of preliminary discussions. *See Bershad v. Curtiss-Wright Corp.*, 535 A.2d 840, 847 (Del. 1987) ("Efforts by public corporations to arrange mergers are immaterial under the *Rosenblatt v. Getty* standard, as a matter of law, until the firms have agreed on the price and structure of the transaction."); *Simonetti*, 2008 WL

5048692, at *12 ("[W]here a board has not received a firm offer . . . disclosure is not required."). Delaware decisions have held that fiduciaries need not summarize a financial adviser's analyses if the analyses do not relate to the fairness of the transaction that the stockholders are being asked to consider. *See In re Genentech, Inc. S'holders Litig.*, 1990 WL 78829, at *8 (Del. Ch. June 6, 1990) ("Plaintiffs first assert that those analyses produced by the financial advisors and given to the board must be given to the shareholders. Such a requirement is not, however, the law of Delaware."); *see also In re TriQuint Semiconductor, Inc. S'holders Litig.*, 2014 WL 2700964, at *4 (Del. Ch. June 13, 2014) ("[W]hen a banker's endorsement of the fairness of a transaction is touted to shareholders, the valuation methods used to arrive at that opinion as well as the key inputs and range of ultimate values generated by those analyses must also be fairly disclosed."). "Delaware law . . . does not mandate the disclosure of every conceivable valuation datum, method, or alternative." *In re Novell, Inc. S'holder Litig.*, 2013 WL 322560, at *13 (Del. Ch. Jan. 3, 2013).

b. The Proxy disclosed the financial analyses and valuation methods underlying Lazard's and Goldman's fairness opinions. Party A never made an offer. Lazard's analysis addressed a range of theoretical offers from Party A that were and were not made. The plaintiff has not pled a reasonably conceivable material omission by alleging that the defendants failed to describe Lazard's analysis.

11. In their complaint, the plaintiffs raised an additional issue regarding JP Morgan. The plaintiffs chose not to brief this issue. *See* Dkt. 69, at 12 n.5. It is waived. *Emerald P'rs v. Berlin*, 2003 WL 21003437, at *43 (Del. Ch. Apr. 28, 2003) ("It is settled Delaware law that a party waives an argument by not including it in its brief."), *aff'd*, 840 A.2d 641 (Del. 2003).

12. Because the plaintiff has not pled a viable disclosure claim, the business judgment rule applies. The plaintiff does not allege that the Board committed waste. In any event, "the vestigial waste exception has long had little real-world relevance, because it has been understood that stockholders would be unlikely to approve a transaction that is wasteful." *Singh*, 137 A.3d at 152 (footnote omitted). In light of the stockholders' approval, there is no rational argument that waste occurred here.

Vice Chancellor J. Travis Laster
Dated: March 7, 2017