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City Trading Fund v Nye
2015 NY Slip Op 50008(U)
Decided on January 7, 2015
Supreme Court, New York County
Kornreich, J.
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Decided on January 7, 2015

Supreme Court, New York County

City Trading Fund, LAWRENCE BASS and ANDRES CARULLO as all of the Partners of City Trading Fund, a general partnership, suing on behalf of themselves and all others similarly situated, Plaintiffs,

against

C. Howard Nye, STEPHEN P. ZELNAK, JR., SUE W. COLE, DAVID G. MAFFUCCI, WILLIAM E. MCDONALD, FRANK H. MENAKER, JR., LAREE E. PEREZ, MICHAEL J. QUILLEN, DENNIS L. REDIKER, RICHARD A. VINROOT, MARTIN MARIETTA MATERIALS, INC., and TEXAS INDUSTRIES, INC., Defendants.

651668/2014

The Brualdi Law Firm, P.C., for plaintiffs.

Cravath, Swaine & Moore LLP and Wachtell, Lipton, Rosen & Katz, for defendants.

Shirley Werner Kornreich, J.

In this putative class action, plaintiffs City Trading Fund (CTF), Lawrence Bass, and Andres Carullo move for preliminary approval of the parties' settlement and preliminary certification of the class. Defendants do not oppose the motion. However, for the reasons that follow, plaintiffs' motion is denied.

Procedural History

On May 30, 2014, CTF commenced this action by filing a complaint asserting two causes of action alleging inadequacies in the disclosure provided by defendant Martin Marietta Materials, Inc. (MMM or the Company) to its shareholders in connection with its proposed acquisition of defendant Texas Industries, Inc. (TXI) (the Merger). On June 2, 2014, CTF moved by order to [*2]show cause (OSC) for a temporary restraining order (TRO) to enjoin the Merger, expedited discovery, and a preliminary injunction. The OSC was presented, *ex parte*, to the court on June 3. After reviewing the complaint and CTF's moving papers, the court refused to issue a TRO or order expedited discovery. *See* Dkt. 7 at 2.

Having denied the TRO and expedited discovery and believing the complaint did not warrant a preliminary injunction, the court scheduled a hearing on CTF's motion for a preliminary injunction for June 20. The Merger vote was scheduled for June 30. On June 16, one day before defendants' opposition papers were due, defendants [FN1] moved by

OSC to dismiss this action because of CTF's failure to comply with New York General Business Law (GBL) § 130. That statute prohibits general partnerships, such as CTF, from maintaining an action in this court if they do not file a certificate with the County Clerk attesting that the partnership is validly registered to do business in New York. The following day, on June 17, defendants filed their opposition to CTF's injunction motion. On June 19, plaintiffs filed an amended complaint (the AC). *See* Dkt. 74. The AC's allegations are virtually identical to those in the original complaint. However, the AC added Bass and Carullo, the owners of CTF, as plaintiffs. In their opposition to defendants' motion to dismiss, filed that same day, plaintiffs took the position that CTF "is not carrying on business in New York" and, hence, need not comply with GBL § 130. *See* Dkt. 75 at 7. However, CTF explained that it amended its complaint to add Bass and Carullo to resolve any questions regarding plaintiffs' capacity to maintain the action.[FN2]

After reviewing the parties' briefs, the court anticipated issuing a decision from the bench on June 20, denying plaintiffs' motion for a preliminary injunction so all uncertainty surrounding the Merger could be expeditiously eliminated. However, on the morning of June 20, the parties called the court to inform it that they would not be appearing for oral argument because the case settled in the middle of the night. Apparently, defendants' counsel reached out to plaintiffs' counsel to open settlement negotiations, fearing that if the court were to grant or defer decision by a few days, the costs to the Company — discussed in more detail below — would be significant and irreparable. The court was disturbed by the settlement, which presents significant public policy concerns and, therefore, held a telephone conference with the parties, noting its concerns. A conference was scheduled for July 2 to discuss the issues.

On July 2, the parties appeared and discussed the settlement agreement, the terms of which are set forth [*3]in detail below. The court informed the parties that it was hesitant to either certify the class or approve the settlement. Although defendants could not object to the settlement because doing so would violate their good faith obligations thereunder, nonetheless, the court felt it essential for defendants' counsel to weigh in on the important public policy issues at stake. The court was fully familiar with defendants' previous pre-settlement briefing. Again, to be clear — and despite plaintiffs' counsel's misrepresentations to the contrary — it was the court, not defendants' counsel, who insisted that defendants' counsel submit a brief.

Thereafter, on August 15, plaintiffs filed the instant motion for preliminary approval of the settlement. As ordered by the court, and without first having the benefit of reading plaintiffs' motion (that is, so the submission would not and could not be in opposition), defendants filed a brief discussing the policy concerns articulated by the court. *See* Dkt. 87. Plaintiffs filed a further brief in support of their motion on August 29. Oral argument was held on November 13, after which the court reserved decision on the motion and directed plaintiffs to submit further information about CTF and its partners. On November 20, plaintiffs submitted that information along with the oral argument transcript. *See* Dkt. 102. The parties then submitted further unsolicited correspondence, which has not been considered by the court and is not part of the record on the instant motion.

Factual Background

To understand this case — and indeed, to understand the issues troubling this court — four categories of background information are required: (A) the details of the Merger and plaintiffs' allegations of inadequate disclosure; (B) an understanding of who plaintiffs and their counsel are and their allegiance (or lack thereof) to the shareholders they purport to represent; (C) the terms of the settlement agreement, namely, additional (immaterial) disclosure, no money for the shareholders, and attorneys' fees for plaintiffs' counsel; and (D) the current state of merger litigation in the United States and, particularly, the impact lawsuits such as this have on mergers, class actions, and the reputation of the court and the bar.

The Merger

On January 28, 2014, MMM and TXI announced they had entered into a merger agreement, which provided that MMM would acquire all of TXI's outstanding stock.[FN3] The Merger was subject to approval by the shareholders of both companies. On March 3, 2014, MMM filed a preliminary proxy with the SEC that contained disclosures about the

Merger. *See* Dkt. 93.[FN4] The preliminary proxy detailed the terms of the Merger and informed shareholders that the board of MMM and TXI unanimously approved the Merger. The definitive proxy (which, here, as is [*4]typically the case, is virtually identical to the preliminary proxy) was filed on May 30, 2014. *See* Dkt. 53. The definitive proxy included a copy of the notice sent to the shareholders of MMM and TXI, which notified them that meetings to vote on the Merger would be held on June 30, 2014. The notices further informed the shareholders that both companies had the right to terminate the Merger if it was not approved by the shareholders and consummated by July 27, 2014.

The very day the definitive proxy was filed, May 30, plaintiffs commenced this action. As defendants observe and plaintiffs admit, plaintiffs intended to sue and attempt to enjoin the Merger well beforehand. Indeed, plaintiffs were in a position to file their complaint shortly after the preliminary proxy was filed (which is usually done), a fact evidenced by the complaint quoting language from the preliminary proxy, rather than the slightly altered language of the definitive proxy. *See* Dkt. 87 at 17 n.15. Nonetheless, plaintiffs waited two months, until a month remained before the shareholder vote, and then filed their lawsuit and their request for injunctive relief and discovery. The injunction hearing was scheduled for June 20, a mere ten days before the vote.

As for what this lawsuit is about, plaintiffs aver that the definitive proxy suffers from ten categories of inadequate disclosures. Plaintiffs concede, as they must, that shareholders are only entitled to "material" disclosures. *See Arnold v Soc'y for Sav. Bancorp*, 650 A2d 1270, 1277 (Del 1994). The standard for determining whether an omission is material is well settled:

An omitted fact is material if there is a **substantial likelihood** that a **reasonable shareholder** would consider it **important in deciding how to vote** [The standard contemplates a] showing of a **substantial likelihood** that, under all the circumstances, the omitted fact would have assumed **actual significance** in the deliberations of the reasonable shareholder. Put another way, there must be 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.

In re Cogent, Inc. S'holder Lit., 7 A3d 487, 509 (Del Ch 2010), quoting *TSC Indus., Inc. v Northway, Inc.*, 426 US 438, 449 (1976) (emphasis added). Hence,

Directors do not need to disclose [] all information about a particular subject, or **even information that is simply helpful** if it does not meet the above standard. Furthermore, because the standard requires full disclosure of all **material** facts, courts should assess the **qualitative importance** of each particular disclosure item at issue.

In re Cogent, 7 A3d at 509-10 (emphasis added).[FN5] Simply put, "[w]hile directors must give stockholders an accurate, full, and fair characterization of the events leading up to a board's decision , Delaware law does not require a play-by-play description of every consideration or action taken by a Board, especially when such information would tend to confuse stockholders or inundate them with an overload of information." *Id.* at 511-12.

With these principles in minds, the court examines each of the ten categories of allegedly [*5]inadequate disclosures set forth in the AC.

First:

[C]ertain of [MMM's] executive officers may receive compensation under [MMM's] executive compensation programs attributable to additional responsibilities in connection with the Merger and subsequent integration process. The Prospectus is deficient because it fails to disclose the expected compensation under [MMM's] executive compensation programs attributable to additional responsibilities in connection with the Merger and subsequent integration process for Mr. Nye.

AC ¶ 30(i). In other words, the definitive proxy disclosed that MMM's executives may make more money after the Merger. Plaintiffs allege that the shareholders are entitled to know how much. Hence, plaintiffs aver, the shareholders cannot make an informed decision about the Merger without knowing *how much the executives' compensation may marginally increase.*

This is not material. As reasonable shareholders know, executives are highly compensated and that, after a merger (as disclosed), their compensation may increase. The exact amount does not and should not impact a shareholder's vote. Indeed, there is little a shareholder can do to object to the level of executive compensation, as the amount paid is usually subject to the business judgment rule. Even when shareholders vote on executive compensation, it is often in the form of a non-binding resolution. Executive compensation is not up to shareholders, nor is post-merger marginal compensation. If the Merger otherwise makes economic sense, it is hard to imagine a scenario, absent grossly egregious compensation increases amounting to waste, where an executive's marginal compensation increase would be reason to vote against the merger. Moreover, if waste occurs, a derivative action would be the proper means of redress.

In fact, one of the reasons for mergers is to achieve cost efficiency, often in the form of eliminating duplicative job functions. Paying the Company's executives more may cost the new enterprise less than the aggregate amount both companies had to pay each of its executives. In any event, the unremarkable disclosure in the definitive proxy of increased compensation is sufficient. The exact amount does not and should not matter.

Second:

J.P. Morgan's commercial banking affiliate provides treasury and securities services to NNS Holding, a significant stockholder of TXI, for which it has received *customary* compensation. The Prospectus is deficient because it fails to disclose the compensation that J.P. Morgan's commercial banking affiliate received *for providing treasury and securities services* to NNS Holding.

AC ¶ 30(ii) (emphasis added). According to plaintiffs, JPMorgan, one of *three* banks to advise the Company on the Merger (the other two, discussed below, are Deutsche Bank and Barclays), should have disclosed the *exact amount* of fees it charged one of TXI's institutional shareholders (not TXI) for providing banking services not related to the Merger. That is, even though the definitive proxy discloses this theoretical conflict of interest and the payment of customary fees, plaintiffs aver that the exact amount of the compensation, which, again, has *nothing to do with the merger*, should be disclosed for the shareholders to be in a position to cast an informed vote. As explained below, this disclosure is not remotely material.

Third:

[I]n the ordinary course of its businesses, J.P. Morgan and its affiliates may actively trade the debt and equity securities of TXI for their own account or for the accounts of customers and, accordingly, [*6]may at any time hold a long or short position in such securities. The Prospectus is deficient because it fails to disclose the value of J.P. Morgan and its affiliates' positions in the securities of TXI.

AC ¶ 30(iii). In other words, the definitive proxy explains that JPMorgan may own some TXI stock, which was traded on the New York Stock Exchange. This is obvious, since banks, particularly one of the world's largest banks, tend to have equity positions in most, if not all publicly traded companies, and the number of daily trades in common stock, options, swaps or otherwise, are countless. As a result, a bank's exact net position on a particular stock is constantly changing.[FN6]

Fourth:

According to the Prospectus, in the ordinary course of business, Deutsche Bank and its affiliates may actively trade in the securities and other instruments and obligations of TXI and its affiliates for their own accounts and for the accounts of their customers. Accordingly, Deutsche Bank and its affiliates may at any time hold a long or short position in such securities, instruments and obligations. The Prospectus is deficient because it fails to disclose the value of Deutsche Bank and its affiliates' positions in the securities, instruments, and obligations of TXI and its affiliates.

AC ¶ 30(iv). This is the same as the previous allegation, only with respect to Deutsche Bank's positions in TXI.

Fifth:

According to the Prospectus, in the ordinary course of its business, Barclays and its affiliates may actively trade and effect transactions in the equity, debt and/or other securities (and any derivatives thereof) and financial instruments (including loans and other obligations) of TXI and/or its affiliates for Barclays' own account and for the accounts of its customers and, accordingly, may at any time hold long or short positions and investments in such securities and financial instruments. The Prospectus is deficient because it fails to disclose the value of Barclays and its affiliates' positions and investments in the securities and financial instruments of TXI and/or its affiliates.

AC ¶ 30(v). Again, the AC complains that the definitive proxy did not reveal Barclays' positions in TXI.

Sixth:

According to the Prospectus, in performing their respective analyses of TXI, the [Company's] Financial Advisors relied upon, *inter alia*, financial estimates for TXI's [EBITDA] for the [2014 and 2015] based upon publicly available Wall Street research analyst estimates. Such estimates are [*7]collectively referred to in the joint proxy statement/prospectus as the "TXI Street Case." The Prospectus is deficient because it fails to disclose the TXI Street Case.

AC ¶ 30(vi). That is, the Company's advisors failed to show the work behind their analysis of their EBITDA projections. Plaintiffs claim that:

The criteria used by a financial advisor to render its fairness opinion is material to the public shareholders of the Company in determining how much weight to place on the fairness opinion and must therefore be disclosed. Specifically, when 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. Only providing some of that information is insufficient to fulfill the duty of providing a fair summary of the substantive work performed by the investment bankers upon whose advice the recommendation of the Board—that shareholders vote in favor of the Sale Agreement—relies.

Id.

This allegation is an unrealistic depiction of the importance of fairness opinions. EBITDA is but one method of ascertaining corporate value. In fact, for some businesses, or for certain accounting purposes, it is simply an inappropriate valuation metric. It is, however, the stereotypical metric used to signal that a serious valuation analysis was performed. EBITDA projections, moreover, are simply projections, and likely have more to do with justifying the sale price than foreseeing the future, which, of course, is impossible. Remembering that this is an action brought by a shareholder of the *acquiring* entity, the incentives of the advisors, who are hired by the Company, should be and indeed are likely aligned with both the shareholders and the board, who all do not want to pay too much for the company being acquired. Plaintiffs' counsel, who themselves are quite capable of challenging the price, do not even imply that the price the Company is paying is too high.

Additionally, plaintiffs do not bother to explain why or how the requested information would be used by a reasonable shareholder to decide whether the Merger makes sense. Instead, plaintiffs proffer the notion that based on the disclosures in the definitive proxy, a shareholder cannot form a reasonable fairness opinion, even knowing that three banks independently concluded that the projections supported the sale price. In fact, those shareholders who have the most to lose if the Company overpays are institutional shareholders, such as pension funds, who are not shy about suing if they have concerns. That no such shareholder sued is telling.

Moreover, the "tell me more about your analysis" complaint can be a never ending slippery slope. Should the backup demanded by plaintiffs be proffered in future proxies, a plaintiff can always demand further backup, such as, for instance, the banking analysts' internal emails to see what they really thought of the data and projections. Regardless, while conflicts of interest are material and must be disclosed, plaintiffs do not allege any real conflicts.[FN7] At bottom, plaintiffs' insinuations about the nefarious (let alone material) nature of the subject omissions are uncompelling.

Seventh:

According to the Prospectus, in performing their respective analyses of [the Company], [its] Advisors relied upon, *inter alia*, financial estimates for [the Company's 2014 and 2015] EBITDA based upon publicly available Wall Street research analyst estimates. Such estimates are collectively referred to in the joint proxy statement/prospectus as the "Martin Marietta Street Case." The Prospectus is deficient because it fails to disclose the Martin Marietta Street Case.

AC ¶ 30(vii). This is the same objection with respect to the analysis of the Company's value, as opposed to TXI's. It is similarly immaterial. Much of the analysis was based on "*publicly available* Wall Street research analyst estimates" (emphasis added). In fairness, as plaintiffs aver, such information requires pricey subscriptions to obtain. That such information is publicly obtainable, regardless of price, is, as plaintiffs further correctly contend, irrelevant to the inquiry of whether a proxy must disclose it. Nevertheless, the issue here is not how much legwork a reasonable shareholder must do to evaluate a merger. It is simply a matter of materiality, which, for the reasons explained above, is not present here.

Eighth:

According to the Prospectus, the [Company's] board believes the Merger will provide a number of significant strategic opportunities, including, *inter alia*, that the Merger is expected to deliver accretion to [the Company's] earnings per share in 2014, assuming refinancing of TXI's outstanding debt at or around the closing of the merger and excluding one-time costs, which will add value to [the Company's] shareholders. The Prospectus is deficient because it fails to disclose the extent to which the Merger is expected to deliver accretion to the [Company's] earnings per share in 2014 according to the Board.

AC ¶ 30(viii). Here, plaintiffs want to know how the so-called synergies will increase corporate value on a per-share basis. To be sure, synergies are one of the most commonly proffered justifications for mergers. Leaving aside the empirical merits of such claims, it is implausible to believe that anyone, even those with full access to the company's records, can reliably predict per share marginal synergistic benefits. Though synergy projections are often proffered both before the merger to justify it and afterward to take credit for its wisdom, the notion that a shareholder needs to know, even if he cared, how much of the post-merger bump in the stock can be expected to be attributable to synergies is implausible. Realistically, economic and strategic decisions underlie why a company merges with a competitor.[FN8] Reducing those benefits to precise arithmetic calculations is simply a guess that a reasonable shareholder ought to know is speculative puffery.

Ninth:

According to the Prospectus, on October 29, 2013, the [Company's] board met, together with [the Company's] management, to receive an update on the status of the preliminary conversations and analyses that had been undertaken in connection with the potential transaction with TXI. Mr. Nye reviewed the recent discussions regarding the potential transaction and members of [the Company's] management provided reports on business, financial and legal aspects of a transaction with TXI based on the due diligence review that had been conducted by [the Company]. Mr. Nye also [*8]discussed [] board's finance committee's review, on October 23, 2013, of the potential financial impact on [the Company] of a transaction with TXI. The Prospectus is deficient because it fails to disclose the substance of Mr. Nye's discussion regarding the [] board's finance committee's October 23, 2013 review of the potential financial impact on [the Company] of a transaction with TXI.

AC ¶ 30(ix). Again, plaintiffs are requesting more information on the thought processes that ultimately led to the Merger. But these requested disclosures are even less material than the backup for the banks' analysis, as they pertain to pre-merger agreement discussions. This requested level of detail is not legally required. *See In re Cogent*, 7 A3d at 509-10 ("Delaware law does not require a play-by-play description of every consideration or action taken by a Board"). However, plaintiffs contend:

This information is material to [the Company's] public shareholders in determining the extent to which the Individual Defendants complied with their duties of loyalty and care to protect the best interests of [the Company's] public shareholders and to put the interests of these shareholders before their own.

Id. This is the language of a fishing expedition. Plaintiffs do not claim the board did anything wrong or that it was improperly motivated. Rather, plaintiffs want more information about the board's thought processes to explore *if* the board acted disloyally.

Likewise, the same justification is proffered for the tenth and final alleged disclosure defect:

According to the Prospectus, on January 3, [4 and 5, 2014], Mr. Nye reviewed and discussed the TXI proposal with the other members of [the Company's] management, as well as [the Company's] directors and financial and legal advisors. As a result of these discussions, [the Company's] management determined that [the Company] would continue to require additional time to consider and review TXI's proposal in light of the additional information that had been provided. The Prospectus is deficient because it fails to disclose the substance of Mr. Nye's discussions of the TXI proposal with [the Company's] directors and financial advisors.

AC ¶ 30(x). These requested disclosures are similarly improper and immaterial.

CTF and the Brualdi Law Firm

Plaintiffs allege that CTF is a general partnership and that Bass and Carullo are its partners. CTF, however, is not a business, at least in the sense that it does not engage in commerce. It does not sell or manufacture products nor does it provide services. Rather, CTF is the name of an E*Trade brokerage account belonging to Bass and Carullo. Before the merger, CTF owned 10 shares of MMM, which was worth approximately $1,200 in April 2014. [FN9]

This is the modus operandi of Bass and the Brualdi Law Firm. They purchase nominal amounts of shares in publicly traded companies. Then, when one of the companies announces a merger, the partnership engages the Brualdi Law Firm to file a merger tax lawsuit. Since 2010, the Brualdi Law Firm has filed at least 13 lawsuits in this court in the name of different [*9]partnerships. Aside from this lawsuit, the Brualdi Law Firm has filed lawsuits on behalf of entities called RSD Capital (Index No. 651883/2010), Broadbased Equities (Index No. 652413/2011), Broadbased Fund (Index No. 653236/2011), Special Trading Fund (Index No. 653253/2012), Reliant Equities (Index No. 651230/2012), Sector Grid Trading Company (Index No. 650121/2013), Broadway Capital (Index No. 650143/2013), Gotham Investors (Index No. 651831/2013), Realistic Partners (Index No. 654468/2013), Rational Strategies Fund (Index Nos. 653566/2012 & 651625/2013), and Equity Trading (Index No. 650112/2014). The Brualdi Law Firm resists disclosure of the relationship between these partnerships unless, in the face of an objection, such as GBL § 130, it must disclose who is really behind the curtain.

The Brualdi Law Firm's recent wave of litigation in this court appears to be a continuation of a business strategy it previously carried out in the Delaware Court of Chancery, which went awry. *See In re SS & C Techs., Inc. S'holders Lit.*, 948 A2d 1140, 1150 (Del Ch 2008) ("those entities and that relationship raise very disturbing questions and may well disqualify those partnerships or the persons associated with them from serving in a representative capacity in the future"). The *SS & C* court sanctioned the Brualdi Law Firm in a merger lawsuit based on immaterial disclosures, which led to the court rejecting the settlement. *See id.* at 1142. Vice Chancellor Lamb held that "the record did not support a finding that plaintiffs' counsel adequately represented the interests of the class or that the settlement terms [were] fair and reasonable.'" *Id.* After the settlement was rejected, defendants discovered that the Brualdi Law Firm was filing lawsuits on behalf of "a web of small investment partnerships for the sole purpose of bringing stockholder lawsuits", similar to the CTF-like entities in this court. *See id.* at 1144. Sanctions were imposed for a pattern of unethical conduct, including making false statements to the court, which were compounded by further false statements made to hide the original inaccuracies. *See id.* at 1145.[FN10]

In sum, this litigation is "pernicious" for reasons best articulated by defendants' counsel:

First, permitting Mr. Brualdi's clients—fictitious entities with no purpose for existing and no economic interests apart from the generation of attorneys' fees—to act on behalf of classes of other, real investors with actual money staked on the financial health of public companies poses a stark conflict of interest. *Second*, that fundamental conflict causes the Brualdi Law Firm to adopt inequitable litigation tactics and to advance meritless claims directed not at vindicating the rights of real shareholders but at maximizing the chance Brualdi Brand litigation will settle, resulting in awards of attorneys' fees that are wholly out of proportion to any real benefit conferred on [*10]shareholders. Making this conflict even worse is the fact that ultimately, the shareholders themselves are (through their ownership of the companies Mr. Brualdi sues) responsible for paying fees awarded to Mr. Brualdi. Allowing the Brualdi Law Firm's tactics to succeed wastes judicial resources, undermines the public's faith and confidence in the courts of this State and impairs the State's reputation as a fair, welcoming place for companies to do business.

Dkt. 87 at 7-8. The court could not agree more.

The Settlement

The parties' settlement is memorialized in a Memorandum of Understanding entered into on June 20, 2014 (the MOU). *See* Dkt. 88. The MOU affirms that plaintiffs "challenge solely [the Company's] disclosures in the Definitive Proxy Statement, and allege that the Defendant Directors breached their fiduciary duties in connection therewith." *Id.* at 3. The MOU further explains that defendants deny all wrongdoing but "but wish to settle the litigation on the terms and conditions stated in [the MOU] in order to eliminate the burden, expense and uncertainty of further litigation." *Id.* at 3-4.

As for the terms of the settlement, defendants agreed to make certain supplemental disclosures to the shareholders in exchange for a limited release pertaining to claims regarding inadequate disclosure. *See id.* at 8-9.[FN11] Additionally, plaintiffs also agreed to be bound by a broader release covering all possible wrongdoing in connection with the Merger — that is, if such wrongdoing occurred, shareholders other than plaintiffs would have to file suit. *Id.* at 9. The MOU provides that, subject to court approval, the Company will pay $500,000 to the Brualdi Law Firm as its award of attorneys' fees. *Id.* at 12.

The supplemental disclosures are contained in a Form 8-K dated June 20, 2014. *See* Dkt. 89. There are four new disclosures.

The first is titled "Supplement to Background of the Merger'". This supplemental disclosure is meant "to be inserted after the first sentence in the twenty-fifth paragraph under the heading Background of the Merger' on page 42 of the Definitive Joint Proxy Statement/Prospectus." The original disclosure can be found at Dkt. 53 at 75 and the supplemental disclosure can be found at Dkt. 89 at 5. The complete disclosure is reproduced below, with the supplemental disclosure in bold:

On January 3, [4 and 5, 2014], Mr. Nye reviewed and discussed the TXI proposal with the other members of [the Company's] management, as well as [the Company's] directors and financial and legal advisors. **These discussions focused on the impact of TXI's revised forecast, and the additional diligence that was provided by TXI to [the Company] as a result of such revised forecast, on [the Company's] value assessment and TXI's proposed exchange ratio of 0.70, as well as TXI's position on the resolution of the other open issues under negotiation noted above.** As a result of these discussions, [the Company's] management determined that [the Company] would continue to require additional time to consider and review TXI's proposal in light of the additional information that had been provided.

This supplemental disclosure purports to remedy the tenth alleged deficient disclosure. *See* AC § 30(x). As noted above, this level of detail is not material. Regardless, the supplemental disclosure provided is both vague and general in nature. Nothing in this supplemental disclosure explains to the shareholders why this information is material, nor have plaintiffs provided such an explanation to the court.

The second supplemental disclosure is titled "Supplement to Summary of Material Joint Analyses—Estimates'". This disclosure is two sentences meant to be inserted at the end of the first two paragraphs "under the heading Summary of Material Joint Analyses—Estimates' on page 58 of the Definitive Joint Proxy Statement/Prospectus." The original disclosure can be found at Dkt. 53 at 91 and the supplemental disclosure can be found at Dkt. 89 at 5. The two paragraphs in the original disclosure generally discussed certain data used to produce financial forecasts for the Company. The supplemental disclosure provides:

The publicly available consensus estimates of TXI's CY2014E and CY2015E EBITDA from I/B/E/S used by the [Company's] Financial Advisors in their analyses were $165 million and $228 million, respectively The publicly available consensus estimates of [the Company's] CY2014E and CY2015E EBITDA from I/B/E/S used by the [Company's] Financial Advisors in their analyses were $476 million and $589 million, respectively.

These are the "publicly available Wall Street research analyst estimates" regarding EBITDA at issue in the sixth and seventh alleged deficient disclosures. *See* AC ¶¶ 30(vi)-(vii). Aside from the reasons discussed earlier, this information is immaterial because the law "does not mandate the disclosure of every conceivable valuation datum, method, or alternative." *In re Novell, Inc. S'holder Lit.*, 2013 WL 322560, at *13 (Del Ch 2012), citing *In re General Motors (Hughes) S'holder Lit.*, 2005 WL 1089021, at *16 (Del Ch 2005) ("A disclosure that does not include all financial data needed to make an independent determination of fair value is not ... *per se* misleading or omitting a material fact. The fact that the financial advisors may have considered certain nondisclosed information does not alter this analysis."), *aff'd* 897 A2d 162 (Del 2006). Rather, "[a]ll that is required is a "fair summary" of a financial advisor's work." *In re Novell,* 2013 WL 322560, at *13, citing *In re CheckFree Corp. S'holder Lit.*, 2007 WL 3262188, at *2-3 (Del Ch 2007) (directors have no duty to provide a specific "checklist" of items when drafting proxy statements). Here, as set forth below, such information was provided.

In that regard, there is even more reason to be cynical about plaintiffs' claim that the supplemental EBITDA disclosures are material. Such disclosures were added to a general discussion of the projections on page 58 of the definitive proxy. The actual projections begin on page 83. *See* Dkt. 53 at 119. On page 82, before the projections are provided, the definitive proxy discusses why these forecasts are being disclosed:

The internal financial forecasts **were not prepared for the purpose of public disclosur**e, nor were they prepared in compliance with published guidelines of the SEC The summary of these internal financial forecasts **is not being included in this joint proxy statement/prospectus to influence your decision whether to vote for the merger** proposal or the share issuance proposal, but because these internal financial forecasts were provided by Martin Marietta to TXI, as well as to Martin Marietta's and TXI's respective advisors and board of directors These internal financial forecasts were based on numerous variables and assumptions that are inherently uncertain and may be beyond the control of Martin Marietta's management [and, a]s a result, actual results may differ materially from these internal financial forecasts. Accordingly, **there can be no assurance that the forecasts [*11]will be realized**.

Dkt. 53 at 118 (emphasis added). In other words, management does not believe these forecasts are material to the shareholders (i.e., they should not influence their vote). The forecasts, which, as most know and the proxy implies, are not worth the paper they are written on. The forecasts exist because when there is a merger, there are forecasts. That is simply a realty of banking and consulting. The junior analysts responsible for the forecasts are not prescient. Hence, the supplemental EBITDA disclosures are not the stuff of materiality. Likewise, their procurement does not warrant an award of attorneys' fees.

The third supplemental disclosure is titled "Supplement to Opinions of Martin Marietta's Financial Advisors'". These are disclosures of positions in TXI held by JPMorgan, Deutsche Bank, and Barclays, as reported in their quarterly SEC filings of December 31, 2013 and March 31, 2014. *See* Dkt. 89 at 5-6. Unsurprisingly, all three banks owned common shares of TXI. Barclays also held put and call options.

No reasonable shareholder should care about these positions in deciding whether to vote in favor of the Merger. Yet, the third, fourth, and fifth alleged disclosure deficiencies claimed these banks' exact positions mattered. *See* AC ¶¶ 30(iii)-(v). They do not. No one is asserting a claim for illegal insider trading, nor is there any reason to think the banks' advice was rendered to profit from the merger, as opposed to generally curry favor from the corporate world for the purpose of procuring future engagements. Though the latter issue is an incentive concern raised by many, it is a broader issue that is not relevant to or remedied by the subject disclosures.

The Company also disclosed the exact amount of fees (approximately $1.8 million) that one of TXI's institutional shareholders paid to JPMorgan for basic corporate treasury and securities services. The Company originally disclosed that customary fees were paid. *See* AC ¶ 30(ii). This was sufficient. *See Globis Partners, L.P. v Plumtree Software, Inc.*, 2007 WL 4292024, at *13 (Del Ch 2007) (holding that where proxy disclosed that fees were " customary' and partially contingent, but did not provide further details", "[w]ithout a well-pled allegation of exorbitant or otherwise improper fees, there is no basis to conclude [that disclosure of exact amount] of compensation, *per se*, would significantly alter the total mix of information available to stockholders"). In any event, these fees have nothing to do with the Merger. If this shareholder did not pay JPMorgan for these services, it would have had to pay another bank a comparable amount for them. Plaintiffs' insinuation that these services or fees are somehow relevant to the propriety of the Merger is frivolous.

Finally, the fourth supplemental disclosure is titled "Supplement to Financial Interests of Martin Marietta Directors and Officers in the Merger'". This disclosure "supplements and replaces the first two sentences in the second paragraph under the heading Financial Interests of Martin Marietta Directors and Officers in the Merger' on page 72 of the Definitive Joint Proxy

Statement/Prospectus." The original disclosure stated:

Martin Marietta's directors and executive officers will not receive any special compensation the payment of which is contingent upon completion of the merger. Certain of Martin Marietta's executive officers may receive compensation under Martin Marietta's executive compensation programs attributable to additional responsibilities in connection with the merger and subsequent integration process.

Dkt. 53 at 108. This is the first category of disclosure plaintiffs complained about. *See* AC ¶ [*12]30(i). The replacement language in the supplemental disclosure states:

Martin Marietta's directors and executive officers will not receive any special compensation the payment of which is payable upon completion of the merger. Certain of Martin Marietta's executive officers, including Chief Executive Officer Nye, may receive compensation under Martin Marietta's executive compensation programs attributable to additional responsibilities in connection with the merger and subsequent integration process.

Dkt. 89 at 6. All this discloses is that Mr. Nye is one of the directors whose compensation might increase after the merger. The supplemental disclosure adds nothing further. Without this disclosure, this was an obvious assumption since Mr. Nye is the Company's President and CEO. One would imagine that those shareholders (if any) who actually bother to read until page 72 are likely to know who Mr. Nye is, and, likewise, are savvy enough to know that the CEO of the acquiring company will probably make more money after the merger.

In sum, when the original alleged omissions and supplemental disclosures are closely scrutinized, it is clear that they are not only immaterial, they are grossly immaterial. None of the supplemental disclosures "significantly altered the total mix' of information made available." *See In re Cogent*, 7 A3d at 509. Plaintiffs' counsel wants $500,000 for bringing this lawsuit. This lawsuit has already cost the shareholders tens of (or possibly hundreds of) thousands of dollars to defend.[FN12] This is a problem.

The Current State of Merger Litigation

It is no secret that when a public company announces a merger, lawsuits follow. There is nothing inherently wrong with this phenomenon. If the merger price is woefully unjustifiable or if shareholders are not given adequate disclosure to cast an informed vote, a lawsuit is very much the proper way to redress these matters. However, the ubiquity and multiplicity of merger lawsuits, colloquially known as a "merger tax", has caused many to view such lawsuits with a certain degree of skepticism. The lawsuits are filed only a relatively short time before the shareholder vote, and all it takes is a remote threat of injunction or delay to rationally incentivize settlement, even if defendants firmly and rightfully believe the lawsuit has no merit and would be disposed on a motion to dismiss or at the summary judgment stage. Most commonly, the lawsuits are brought on behalf of the company being acquired, and the claim is that the shareholders are not being bought-out at a high enough price. This court is well acquainted with such lawsuits. *See, e.g., In re NYSE Euronext S'holders/ICE Lit.*, 39 Misc 3d 619 (Sup Ct, NY County 2013) (discussing duplicative merger litigation in multiple jurisdictions and (then [*13]Chancellor, now) Chief Justice Shrine's writings on the issue [FN13]);[FN14] *see also In re Cybex Int'l S'holders Lit.*, Index No. 653794/2012, Dkt. 91 at 7-130 (transcript of hearing on motion to enjoin merger). Likewise, this court, and presumably all counsel in this action, are aware of the proposed reforms to corporate bylaws aimed at addressing the concerns many have with the way in which this litigation occurs.[FN15] The wisdom of these reforms and their legality are hotly contested issues. Compelling arguments have been made by a variety of stakeholders. Aside from what one thinks of the proposed reforms, that such reforms are such a hot topic suggests a growing frustration with the current realties of merger taxes.

No one, not even plaintiffs, disputes this reality. The defendant corporation's cost-benefit calculus almost always leads the company to settle. Even a slight change of an adverse outcome will induce a company to rationally settle given the costs. Here, defendants provide countless examples of such costs, none of which are contested by plaintiffs. *See* Dkt. 87 at 23-24 (discussing impact on information technology, human resources, sales and marketing, finance, accounting, tax, and regulatory matters); *see also In re Delphi Fin. Group S'holder Lit.*, 2012 WL 729232, at *19 (Del Ch 2012) ("if the merger is enjoined, the deal may be lost forever"); *In re CheckFree*, 2007 WL 3262188, at *4 ("The theoretical harm to plaintiffs here is not particularly substantial" and "the public interest requires an especially strong showing where a plaintiff seeks to enjoin a premium transaction in the absence of a competing bid"). The very nature of this lawsuit incentivizes settlement, regardless of its frivolity.

Yet, notwithstanding the current climate of merger litigation, this case still stands out. It stands out for its downright frivolity for the reasons discussed earlier, and it stands out due to the Brualdi Law Firm's use of CTF-like E*Trade accounts to file lawsuits, but it particularly stands out because this lawsuit has two atypical features: (1) the acquiring company sued (instead of the selling [*14]company), and only for disclosure;[FN16] and (2) the lawsuit is based on the definitive proxy, as opposed to the preliminary proxy.

As defendants correctly observe, merger tax suits are usually brought by the shareholders of the company being acquired. One reason is that directors of the selling company have direct fiduciary duties to their shareholders with respect to the terms of the merger [*see*

Gatz v Ponsoldt, 925 A2d 1265, 1273 (Del 2007), accord *Revlon, Inc. v MacAndrews & Forbes Holdings, Inc.*, 506 A2d 173 (Del 1986)], while the fiduciary relationship between the board of the acquiring company is derivative in nature. *See Gentile v Rossette*, 906 A2d 91, 100 (Del 2006) ("Because the means used to achieve that result is an overpayment [] of shares to the controlling stockholder, the corporation is harmed and has a claim to compel the restoration of the value of the overpayment. That claim, by definition, is derivative."). [FN17] Derivative claims have extra procedural hurdles making them relatively more difficult to maintain.[FN18] However, these requirements can be eschewed by shareholders of the acquiring company by challenging the sufficiency of the disclosure, rather than the price, because it is well settled that the board has a direct duty to the shareholders to make adequate disclosures. *Stroud v Grace*, 606 A2d 75, 84 (Del 1992) (it is a "well-recognized proposition that directors of Delaware corporations are under a fiduciary duty to disclose fully and fairly all material information within the board's control when it seeks shareholder action.").

The second, and far more troubling, aspect of this case is that it is based on the definitive proxy. As noted earlier, and as plaintiffs concede, the definitive proxy is virtually identical to the preliminary proxy. Plaintiffs could have commenced their lawsuit after the preliminary proxy was filed, which would have given shareholders and the court an extra two months to consider the disclosures. Doing so would have drastically reduced the risk that the lawsuit would impact the Merger. This also would have drastically reduced the Company's incentive to settle if, as it firmly believes (for good reason), the lawsuit should be dismissed because it is frivolous.

Perhaps, then, it should come as no surprise that plaintiffs waited until June, less than one month before the shareholder vote, to file a motion to enjoin the Merger. Plaintiffs excuse their delay by [*15]claiming a lawsuit based on the preliminary proxy would have been subject to removal to federal court, where harsher pleading standards and federal statutory restrictions limiting the scope of discovery would apply. Assuming, *arguendo*, that removal was a possibility, plaintiffs are absolutely correct that the judges in the Southern District would have been able to dismiss the complaint for lack of particularity or plausibility and, likewise, would have been able to impose discovery limitations more restrictive than the CPLR permits. Of course, based on this lawsuit's frivolity, that would not necessarily have been a bad thing, and such concerns may well be why plaintiffs seek to avoid federal court.

That being said, the notion that plaintiffs could not have maintained this action in this court if they had sued based on the preliminary proxy is simply wrong as a matter of law. Aside from the obvious fact, of which the court takes judicial notice, that countless merger tax lawsuits based on preliminary proxies are filed and properly remain in this court, the argument that this lawsuit would have been removable if it was commenced before the filing of the definitive proxy is uncompelling.

The Securities Litigation Uniform Standards Act (SLUSA), 15 USC § 78bb(f)(2), provides federal subject matter jurisdiction in class actions involving allegations "(A) [that defendant made] a misrepresentation or omission of a material fact in connection with the purchase or sale of a covered security; or (B) that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security." Once removed, the class action is subject to dismissal under § 78bb(f)(1).

§ 78bb(f)(3),[FN19] known as the "Delaware carve-out", is a savings clause that allows for classic merger tax litigation to be brought in state court. Basically, SLUSA sought to prevent securities fraud class actions from being litigated in state court where class action plaintiffs could avoid the reforms enacted in the Private Securities Litigation Reform Act of 1995. Merger litigation, however, which has traditionally been litigated in state court, and particularly in Delaware (hence the name "Delaware carve-out"), was expressly exempt from the SLUSA. *See generally Alessi v Beracha*, 244 FSupp2d 354, 356-58 (D Del 2003); *see also Ind. Elec. Workers Pension Trust Fund v Millard*, 2007 WL 2141697, at *2-3 (SDNY 2007).

Notwithstanding, plaintiffs point to *Drulias v Ade Corp.*, 2006 WL 1766502 (D Mass 2006). There, the court held a preliminary proxy, which is filed with the SEC, but not mailed to shareholders (as opposed to the definitive proxy, which is mailed to shareholders), is not "a recommendation, position, or other communication with respect to the sale of securities of an issuer' because it was not sent out to the shareholders, or otherwise intentionally communicated to them." *Id.* at *2. Therefore, the court held, the

Delaware carve-out does not apply. The implication of this ruling, plaintiffs argue, is that state court merger litigation based on a preliminary proxy is no longer viable.

This court disagrees. Aside from the terrible incentives such a ruling creates (i.e., [*16]requiring plaintiffs to wait for the definitive proxy to be filed, causing a time crunch), other courts have disagreed with *Drulias*' holding as to what type of documents are covered by the Delaware carve-out. In *Alessi*, for instance, the court held that a breach of fiduciary duty claim based on insufficient disclosure in a press release was covered. *See Alessi*, 244 FSupp2d at 359.

In any event, this court believes *Drulias* was wrongly decided. As persuasively explained by another federal court:

Preliminary proxy statements filed with the SEC, however, are "communications." A communication" as used in § 78bb(f)(3) (B)(ii) is not defined by SLUSA. *See* 15 U.S.C. § 78bb(f)(5). Nevertheless, other sources provide ample guidance for concluding that preliminary proxies are in fact communications. Rules promulgated under the 1934 Act dictate that "[a]ll copies of preliminary proxy statements and forms of proxy filed [in accord with SEC requirements] ... shall be deemed immediately available for public inspection." In addition, **Delaware cases encourage parties to file lawsuits based on preliminary proxies made available on the SEC website to facilitate adjudication prior to the filing of a definitive proxy statement.** *See In re HCA Inc. Sharholders Litig.*, C.A. No. 2307-N, at 2-3 (Del.Ch. Oct.26, 2006) (quoting *Turner v. Bernstein*, 776 A.2d 530, 549 (Del.Ch.2000) ("**Undoubtedly, this court prefers that stockholder plaintiffs bring disclosure claims promptly, particularly in situations where the plaintiffs have access to preliminary proxy materials from the Securities and Exchange Commission in advance of the company's final materials**.")). In this day and age, the act of posting information on the internet, making the data available to the public, is tantamount to "communication." Posters should expect the public to receive information that is made widely available to everyone via the internet. Merely because a copy of the preliminary proxy statement is not physically mailed to shareholders does not exclude it from being a "communication." To distinguish between preliminary and definitive proxies on this basis would ignore post-internet reality. Today, a posting on a well-known government website accessible to shareholders and others is a "communication."

Superior Partners v Chang, 471 FSupp2d 750, 754-55 (SD Tex 2007) (emphasis added). Another federal court has indicated agreement with this line of reasoning. *See Rubery v Radian Group, Inc.*, 2007 WL 1575211, at *6 (ED Pa 2007).

Indeed, Mr. Brualdi was personally involved in the *Superior Partners* case, yet he chose to only cite to *Drulias*. *See* Dkt. 82 at 12 n.7. An explanation for why one case was better reasoned or is more likely to be followed by the Southern District would have been more persuasive than simply justifying plaintiffs' litigation strategy based solely on a citation to *Drulias*. Additionally, in *Rational Strategies Fund v Hill*, 40 Misc 3d 1214(A) (Sup Ct, NY County 2013), the case plaintiffs most heavily relied on to justify the legitimacy of their injunction motion,[FN20] plaintiffs filed their complaint on May 3, 2013, shortly after the preliminary proxy was filed with the SEC on April 23, 2013. *See* Index No. 651625/2013, Dkt. 1 at 8, ¶ 27; *see also id.* at 4, ¶ 6 ("This action challenges the internal affairs or governance of SCBT and hence is not removable to Federal Court under the Class Action Fairness Act of 2005 or [SLUSA], 15 U.S.C. § 78bb(f)."). A proxy in *Rational Strategies* was not mailed to the shareholders until June 19, 2013. *See* Index No. 651625/2013, Dkt. 30 at 7. This undercuts the notion that Mr. Brualdi has a genuine fear of removal. Rather, the court believes the timing of [*17]this lawsuit was all about settlement pressure.

It also should be noted that the court's decision in *Rational Strategies* cannot be used to justify the injunction demanded in this action, not only because of the difference in allegations, but also because that court's decision on the preliminary injunction did not contain any substantive discussion as to why the alleged disclosure deficiencies were material. *See Rational Strategies*, 40 Misc 3d 1214(A), at *1 (noting that "[c]ourts have acknowledged the materiality of disclosure deficiencies that are similar to the deficiencies alleged by the plaintiff" and citing three Delaware cases). Regardless, even if the omissions in that case were material, for the reasons discussed herein, the alleged omissions in this case are not.

Denial of Preliminary Approval of the Class Settlement

The court now turns to the actual question presented on this motion, namely, whether preliminary approval should be granted to the settlement. While the tenor of this decision and common sense might indicate that the answer is clearly no — and that is indeed the answer — the court must discuss why Article 9 of the CPLR requires this result.

Before the court may grant preliminary approval of a class settlement, the court must first preliminarily approve the class. CPLR 901(a) sets forth five prerequisites to class certification:

1. the class is so numerous that joinder of all members, whether otherwise required or permitted, is impracticable;

2. there are questions of law or fact common to the class which predominate over any questions affecting only individual members;

3. the claims or defenses of the representative parties are typical of the claims or defenses of the class;

4. the representative parties will fairly and adequately protect the interests of the class; and

5. a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

City of New York v Maul, 14 NY3d 499, 508 (2010) (quotation marks omitted). "These factors are commonly referred to as the requirements of numerosity, commonality, typicality, adequacy of representation and superiority." *Id.* "The determination of whether a lawsuit qualifies as a class action under the statutory criteria ordinarily rests within the sound discretion of the trial court.'" *Id.* at 509, quoting *Small v Lorillard Tobacco Co.*, 94 NY2d 43, 52 (1999).

The elements of numerosity, commonality, typicality, and superiority are clearly present. It is well settled that, in a non-frivolous disclosure-only settlement of a merger lawsuit, a class action is the appropriate vehicle for resolving the claims. *See W. Palm Beach Police Pension Fund v Gottdiener*, 2014 WL 5454671, at *2-3 (Sup Ct, NY County 2014) (Friedman, J.) (collecting cases, mostly from Delaware, where most merger litigation occurs). Given the total number of shareholders and identical questions of law and fact, it does not make sense, nor is it desirable, to require each shareholder to file an individual lawsuit. This is uncontroversial.

However, the court will not certify the class nor will it approve the settlement because it [*18]is not in the best interest of the class. Concerns regarding the best interests of the class are relevant for two separate, but related reasons. First, the fourth factor, recited above (whether "the representative parties will fairly and adequately protect the interests of the class") is not present here. Second, the court should not approve a class action settlement unless it is "fair, adequate and in the best interests of the class." *Gottdiener*, 2014 WL 5454671, at *3, quoting *Rosenfeld v Bear Stearns & Co.,* 237 AD2d 199 (1st Dept 1997), and citing *Klein v Robert's Am. Gourmet Food, Inc.*, 28 AD3d 63, 70 (2d Dept 2006). "Where, as here, a class is certified for settlement purposes only, these prerequisites—and particularly those designed to protect absentee class members—must still be met and, indeed, **demand undiluted, even heightened, attention**.'" *Klein*, 28 AD3d at 70 (emphasis added), quoting *Amchem Prods., Inc. v Windsor*, 521 US 591, 620 (1997). Hence, "[i]n determining whether to approve the settlement, the court should weigh the likelihood of success at trial against the settlement offered." *Gottdiener*, 2014 WL 5454671, at *4, citing *In re Colt Indus. S'holder Lit.*, 155 AD2d 154, 160 (1st Dept 1990), *mod on other grounds*, 77 NY2d 185 (1991); *see Pressner v MortgageIT Holdings, Inc.*, 16 Misc 3d 1103(A), at *3 (Sup Ct, NY County 2007) (Cahn, J.) ("At bottom, as the United States Supreme Court noted, Courts judge the fairness of a proposed compromise by weighing the plaintiff's likelihood of success on the merits against the amount and form of the relief offered in the settlement.'"), quoting *Carson v Am. Brands, Inc.*, 450 US 79, 88 n.14 (1981).

While these judge-made standards are well established, as this court has previously observed, though "CPLR § 908 requires the court to approve any compromise of a class action[,] the statute does not define the criteria for such approval." *Fiala v Met. Life Ins. Co.*, 27 Misc 3d 599, 607 (Sup Ct, NY County 2010). But, since the Court of Appeals has long recognized the similarities between Article 9 of the CPLR and Rule 23 of the Federal Rules of Civil Procedure, New York courts look to federal case law for guidance in the area of preliminary approval. *See id.* (collecting cases); *see S.E.C. v Beacon Hill Asset Mgmt., LLC*, 2008 WL 2229845, at *3 (SDNY 2008) ("the fairness of the settlement has to be assessed against the likely rewards of litigation").

Gottdiener, 2014 WL 5454671, which was decided after the instant motion was fully briefed and, therefore, not cited by the parties, is instructive. There, Justice Friedman approved a disclosure-only settlement where "[it was] undisputed that plaintiff d[id] not have a strong likelihood of success on the merits of its claim for money damages." *Id.* at *4. "In fact, [in *Gottdiener*], plaintiff represent[ed] that it had no compelling evidence to suggest it could have overcome the presumptions of the Business Judgment Rule.'" *Id.* (quoting admission from plaintiff's brief). However, in approving the settlement, Justice Freidman explicitly noted that "the supplemental disclosures provide benefit to the shareholders." *Id.*

Even more instructive is Justice Schweitzer's highly persuasive opinion in *Gordon v Verizon Communications, Inc.*, 2014 WL 7250212 (Sup Ct, NY County Dec. 19, 2014). In *Gordon*, Justice Schweitzer rejected a disclosure only class action settlement because, as in this case, "the Supplemental Disclosures that are included in the Settlement [] are so trivial or obviously redundant as to add nothing of material value from a disclosure standpoint." *Id.* at 3. "Merely providing additional information - unless the additional information offers a contrary perspective on what has previously been disclosed - does not constitute material disclosure Even when the additional information goes to the sensitive details of a financial advisor's fairness analysis, the information becomes material only when it corrects a valuation parameter or uncovers a conflict." *Id.* (citations omitted).

Here, had plaintiffs alleged *material* omissions or settled for *material* supplemental disclosures, the court would have approved the settlement. Even if the court did not think the supplemental disclosures were worth much, if they were legally material, the court would have withheld any criticism of plaintiffs' counsel until the final approval stage, when the court, as guardian of the best interests of the class,[FN21] would have limited the attorneys' fees award to an amount commensurate with the value of the disclosures. However, in this case, the supplemental disclosures are utterly immaterial for the reasons discussed earlier. The settlement, therefore, should not be approved. *See In re Sauer-Danfoss Inc. S'holders Lit.*, 65 A3d 1116, 1127 (Del Ch 2011) ("Remedying an immaterial omission through supplemental disclosure does not benefit stockholders and will not support a fee award").

Approving the settlement in this case would both undermine the public interest and the interests of MMM's shareholders. It would incentivize plaintiffs to file frivolous disclosure lawsuits shortly before a merger, knowing they will always procure a settlement and attorneys' fees under conditions of duress — that is, where it is rational to settle obviously frivolous claims.[FN22] Without the court serving as a gatekeeper, plaintiffs who file such ligation will continue to unjustifiably extract money from shareholders, who get no benefit from the litigation but nonetheless end up paying two sets of attorneys, both plaintiffs' and defendants'. This is a perverse result.

As Justice Schweitzer aptly noted:

An increasing body of commentary has decried the tsunami of litigation, and attendant suspect disclosure-only settlements, associated with public acquisitions today. Anyone objectively analyzing this phenomenon will find its root cause in the judicial precedents of the last twenty-five years dealing with corporate governance in connection with mergers. A body of law meant to protect shareholder interests from the absence of due care by the corporation's managers has been turned on its head to diminish shareholder value by divesting them of valuable rights and imposing additional gratuitous costs, i.e. attorneys' legal fees on the corporation.

Gordon, 2014 WL 7250212, at *8 (citations omitted).

Finally, a word about the Brualdi Law Firm and CTF and why they are ill suited to be [*19]class counsel and class representative. But first, it is essential for the court to make clear that it does not mean to suggest that a small shareholder should lack access to courts or an ability to receive justice simply because he is the little guy. Individuals in this country have every right to seek redress, even if the nominal amount of monetary harm they suffer is far less than the amounts in dispute in large corporate litigation or lawsuits between the 1%. If harmed, particularly where the individual loss is small, the class action is the proper means to hold to account those that have wronged all people similarly situated. *See Butler v Sears, Roebuck & Co.*, 727 F3d 796, 801 (7th Cir 2013) (Posner, J.) (" It would hardly be an improvement to have in lieu of this single class 17 million suits each seeking damages of $15 to $30.... The realistic alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30' []. The present case is less extreme: tens of thousands of class members, each seeking damages of a few hundred dollars. But few members of such a class, considering the costs and distraction of litigation, would think so meager a prospect made suing worthwhile."), quoting *Carnegie v Household Int'l, Inc.*, 376 F3d 656, 661 (7th Cir 2004) (Posner, J.) ("a class action has to be unwieldy indeed before it can be pronounced an inferior alternative—no matter how massive the fraud or other wrongdoing that will go unpunished if class treatment is denied —to no litigation at all."); *see also Stolt-Nielsen S.A. v AnimalFeeds Int'l Corp.*, 559 US 662, 699 (2010) (Ginsburg, J., dissenting) ("When adjudication is costly and individual claims are no more than modest in size, class proceedings may be the thing,' i.e., **without them, potential claimants will have little, if any, incentive to seek vindication of their rights**.") (emphasis added).

That being said, even if the claims in this case were meritorious, CTF and its principals are not the right class representatives. Contrary to their stated motivations, the court does believe they filed this class action because they had a genuine concern for the Company's corporate governance. Rather, they are simply trying to make money from litigation. They and their counsel have accurately identified a massive inefficiency in the way in which courts adjudicate merger litigation, and have capitalized accordingly. They are, in a word, shrewd investors. Their investment, unfortunately, is in litigation.

More than 30 years ago, the First Department criticized an eerily similar litigation strategy:

These same plaintiffs have brought at least thirteen class action lawsuits: in virtually all of them they have been represented by the same attorneys. There is no indication that their interest as stockholders, in any of those cases was any greater than it is in the present case. Plaintiff [] has testified that after study of the situation he decided that these companies might be candidates for a possible merger, with a possibility of profit to the stockholders and that was why they bought the stock. But all they bought was 25 shares in each company, thus acquiring a possibility of only a few hundred dollars profit in each company if they were fortunate.

I am led to conclude that **plaintiffs have made a regular practice of seeking out companies [w]here there is a likelihood of merger and then making a very small investment in the company precisely to position themselves to bring a class action lawsuit if there were a merger in circumstances where it appeared auspicious to bring such a lawsuit.**

Tanzer v Turbodyne Corp., 68 AD2d 614, 618-19 (1st Dept 1979) (emphasis added). After discussing the tradeoffs of permitting this sort of litigation strategy, the First Department decided [*20]to prohibit those plaintiffs from maintaining a class action. *See id.* at 619-25. The same result is warranted here.

In merger litigation — unlike other class action litigation (e.g., securities fraud) where, if the case is frivolous, the court can dispose of it on a motion to dismiss — the time crunch incentivizes a payout to plaintiffs to settle all cases, even frivolous ones. Thus, extra scrutiny is warranted when it appears that the incentives of the purported class representatives diverge from those of the shareholders. Such a divergence of incentives may exist, as is the case here, where it appears that the original plaintiff, CTF — essentially a fictitious entity — seeks to obfuscate what it really is. When a proposed class representative appears to be a fiction, there is the concern that it has no accountability, either to the class or to the court. As noted earlier, such entities have a troubling history of litigating deceptively. *See SS & C*, 948 A2d 1140; *see also AF Holdings, LLC v Does 1-1058,* 752 F3d 990 (DC Cir 2014). Additionally, when a plaintiff and its counsel have identical incentives, that is, litigation to obtain attorneys' fees, such plaintiffs are improper class representatives because "[i]t is the function of the class action representative to act as a check on the attorneys in order to provide an additional assurance that in any settlement or other disposition the interests of the members of the class will take precedence over those of the attorneys." *Nawrocki v Proto Const. & Dev. Corp.*, 82 AD3d 534, 535 (1st Dept 2011), citing *Tanzer*, 68 AD2d at 620-21.

Simply put, the secretive nature in which plaintiffs and their counsel choose to litigate, both here and in Delaware, along with the frivolity of their claims, is a strong indication that they are ill suited to represent the class. Given the inability of plaintiffs to identify any actual material omission in the definitive proxy, perhaps the only reasonable inference is that the defendant directors have, to their credit, lived up to the very aspirational fiduciary duties merger class actions are supposed to incentivize. It, therefore, is somewhat unfortunate that they still find themselves as defendants in a lawsuit. If all mergers will spawn disclosure lawsuits, regardless of the sufficiency of the actual disclosures, a board may well be incentivized not to care so much if the initial disclosures are adequate. This would be unfortunate. As some commentators have observed,[FN23] if directors worry that plaintiffs will not settle unless they can proffer some additional, material disclosure, an even more perverse incentive may exist to intentionally withhold some material disclosure so the directors have a bone to throw plaintiffs' counsel when it comes time to settle.

That being said, the incentives surrounding mergers can never be fully perfected, and mergers taxes may simply be a reality, an inevitable cost of doing business. However, even if that is the case, this court sees no reason to countenance frivolous litigation. Accordingly, it is

ORDERED that the motion by plaintiffs City Trading Fund, Lawrence Bass, and Andres Carullo for preliminary approval of their settlement with defendants is denied; and it is further

ORDERED that defendants shall file an answer or move to dismiss within 30 days of the entry of this order on the NYSCEF system.

Dated: January 7, 2015ENTER:

____

J.S.C.

Footnotes

Footnote 1:MMM and the individual defendants, MMM's directors, are represented by Cravath, Swaine & Moore LLP (Cravath). TXI is represented by Wachtell, Lipton, Rosen & Katz (Wachtell). All of defendants' briefs were jointly submitted by Cravath and Wachtell on behalf of all defendants.

Footnote 2: Plaintiffs' counsel informed the court that the Queens County Clerk "advised

[him] that it would accept a Certificate of Partnership for City Trading Fund' [and] further confirm[ed] that the New York County Clerk's determination [not to do so] is in error." Dkt. 75 at 26, citing Dkt. 76 at 145 (email from Audrey Pheffer, the Queens County Clerk, sent from her personal Gmail account, in which she responds to plaintiffs' counsel, approving of him telling this Justice that she would accept CTF's GBL certificate); *see* Dkt. 87 at 13 (noting that plaintiffs' counsel and Ms. Pheffer "appear to be personal friends who own adjacent beach homes"), citing Dkt. 91 at 4-5 (property records). The Hon. Norman Goodman, the recently retired and longtime New York County Clerk, is the Clerk Mr. Brualdi claims wrongfully refused to accept his certificate.

Footnote 3:MMM and TXI (before the merger) were public companies traded on the New York Stock Exchange. They produced products used in the construction industry. MMM is a North Carolina corporation. TXI was a Delaware corporation located in Texas. The parties agree that the fiduciary duties at issue in this case are governed by North Carolina law, which is virtually identical to Delaware law. *See Gusinsky v Flanders Corp.*, 2013 WL 5435788, at *7-8 (NC Super Ct 2013).

Footnote 4: The Form S-4, like all of MMM's SEC filings, is publicly available on EDGAR. *See* http://www.sec.gov/Archives/edgar/data/916076/000119312514080654/d682927ds4.htm.

Footnote 5:*Cf. Amgen Inc. v Conn. Ret. Plans & Trust Funds*, 133 SCt 1184, 1197 (2013) ("No doubt a clever mind could conjure up fantastic scenarios in which an individual investor might rely on immaterial information (think of the superstitious investor who sells her securities based on a CEO's statement that a black cat crossed the CEO's path that morning). But such objectively unreasonable reliance does not give rise to a Rule 10b-5 claim.").

Footnote 6: It should be noted, though it is far afield from this decision, that under the new Voelker rule, banks are not supposed to engage in what is colloquially known as "proprietary" trading — that is, trading on their own account. Nonetheless, banks still have a need and are legally entitled to trade on their own account for various permitted purposes, such as hedging. Distinguishing (legally or conceptually) between proprietary and non-proprietary trading is quite difficult and the subject of much debate. Thus, an analysis of a bank's Voelker rule complaint balance sheet might still reveal nominally proprietary positions on equities (i.e., not just on their clients' account). The point of all this is that disclosure of a bank's nominal holdings of a stock, as was later disclosed in this case, is a disclosure without context and reveals nothing meaningful about the bank's incentives.

Footnote 7:*See In re TriQuint Semiconductor, Inc. Stockholders Lit.*, 2014 WL 2700964, at *3 (Del Ch 2014) (examples of seeming conflicts, such as "a director's interest in maintaining his office" after the merger, which are not legally considered conflicts).

Footnote 8:*Cf.* Jeff Sommer, *Merger Fever Can Be a Menace for Shareholders*, NY Times (Jun. 21, 2014), available at http://www.nytimes.com/2014/06/22/your-money/merger-fever-can-be-a-menace-for-shareholders.html?_r=0.

Footnote 9:The stock currently trades slightly lower than before the Merger, which has resulted in CTF suffering a loss of approximately $100. Regardless, even if the stock price increased tenfold, CTF's profit would be dwarfed by the cost of a single brief filed in this action.

Footnote 10:Sanctions were also warranted because of the Brualdi Law Firm's bad faith arguments about the necessity of providing notice to the class. *See id.* at 1151 ("This position makes clear that the plaintiffs' motion to withdraw on notice was not based on a good faith belief that notice was required-or even likely to advance the best interests of the [class]. Instead, the decision was simply part of an effort to maintain the confidentiality of the discovery record relating to [] the partnerships [represented by the Brualdi Law Firm]. Not only is the plaintiffs' willingness to completely change their legal argument to further their interests in concealing the record of dubious propriety, **their motion was not meritorious and served only to advance their selfish motives. That conduct amounted to an abuse of the judicial process and clearly evidences bad faith**.") (emphasis added). For this unethical conduct, Vice Chancellor Lamb imposed a sanction of $250,000. *See In re SS & C Techs., Inc. S'holders Litig.*, 2008 WL 3271242 (Del Ch 2008).

Footnote 11:The releases had to be limited because the court made clear it would not have approved the settlement if *all* claims arising from the merger were released, such as breaches of fiduciary duty impacting the sale price. A disclosure-only lawsuit merits disclosure-only releases. Other shareholders should not be precluded from later suing the board if real misconduct occurred.

Footnote 12:Even if the Company's fees are paid for by an insurance company, the costs of the premium due to the existence and viability of this sort of disclosure suit also imposes a cost onto the Company. Regardless of who funds these lawsuits, they no doubt impose very real uncertainty and risks, discussed further below, on the involved companies.

Footnote 13:*See generally* Leo E. Strine, Jr., et al., *Putting Stockholders First, Not the First-Filed Complaint*, 69 Bus Law 1 (2013).

Footnote 14:*See* Index No. 654496/2012, Dkt. 1 at 4-5, ¶ 3 ("the hopelessly flawed process resulted in the Offer Price for NYSE Euronext stockholders far below the true value of the NYSE Euronext stock"); *see also* Index No. 654496/2012, Dkt. 20 (consolidated class action complaint).

Footnote 15:*See, e.g.*, Alison Frankel, *The Latest in Restrictive Corporate Bylaws: Small Shareholders Can't Sue*, On the Case (Nov. 13, 2014), available at http://blogs.reuters.com/alison-frankel/2014/11/13/the-latest-in-restrictive-corporate-bylaws-small-shareholders-cant-sue/ (discussing proposed bylaw to obtain written consent of certain percentage of shareholders before filing lawsuit), quoting *In re Gen-Probe Inc. S'holders Lit.*, No. 7495, at *8 (Del Ch Apr. 10, 2013) (Laster, V.C.), available at http://blogs.reuters.com/alison-frankel/files/2014/11/gen-probeshareholder-transcript.pdf ("THE COURT: And what was his rationale for wanting to litigate the transaction while holding two shares? Did you suggest you might toss him a fiver, since, basically, the value of his stake was $160 at the deal price and that if he was that frustrated about it, you could probably, you know, throw in some lunch money for him and take care of his concerns?").

Footnote 16: It should be noted that the Merger only appears to have generated one seller-side lawsuit, which apparently settled. *See Phillips v Texas Indus., Inc.*, No. 14-cv-0740, Dkt. 7 (ND Tex Aug. 18, 2014); *see also id.* Dkt. 4 at 2 (Mar. 18, 2014) (amended class action complaint, alleging, *inter alia*, that "[t]he merger consideration is inadequate in light of TXI's solid financial performance and potential for significant future growth").

Footnote 17:*See generally Tooley v Donaldson, Lufkin & Jenrette, Inc.*, 845 A2d 1031, 1035 (Del 2004) (establishing standard for determining if a claim is direct or derivative).

Footnote 18:*See generally Weiss v Swanson*, 948 A2d 433, 440 (Del Ch 2008), accord *Aronson v Lewis*, 473 A2d 805 (Del 1984); *see In re Crimson Exploration Inc. Stockholder Lit.*, 2014 WL 5449419, at *9 (Del Ch 2014) ("Practically, the business judgment rule means that litigants challenging a board's decision face an uphill battle. Rather than question the wisdom of the decision itself, under the business judgment rule, the court instead will examine the process by which the board of directors reached its decision and, if the process is reasonable, the court will defer to the decisions of the board").

Footnote 19: The Delaware carve-out applies to class actions involving: "(I) the purchase or sale of securities by the issuer or an affiliate of the issuer exclusively from or to holders of equity securities of the issuer; or (II) any recommendation, position, or other communication with respect to the sale of securities of an issuer that— (aa) is made by or on behalf of the issuer or an affiliate of the issuer to holders of equity securities of the issuer; and (bb) concerns decisions of such equity holders with respect to voting their securities, acting in response to a tender or exchange offer, or exercising dissenters' or appraisal rights."

Footnote 20:*See* Dkt. 3 at 3-5 (*Rational Strategies* is the only case cited in the table of authorities that is referenced by "*passim*" instead of a page number).

Footnote 21: Judge Pauley's recent decision in *Fujiwara v Sushi Yasuda Ltd.*, 2014 WL 5840700 (SDNY Nov. 12, 2014) is a worthwhile read when considering how much a court should award plaintiffs' counsel in class actions settlements. Though FLSA cases are different than merger cases and involve unique considerations discussed by Judge Pauley, the concerns articulated in *Fujiwara* — namely, that plaintiffs' counsel wants the largest possible fee and defendants are indifferent to how much plaintiffs get paid — are equally applicable to merger cases. That is why it is the job of the court, and not the parties' counsel, to effectively represent the interest of shareholders in determining the amount of attorneys' fees plaintiff's counsel deserves based on the nature of the case and the terms of the settlement.

Footnote 22: Of course, that such frivolous lawsuits are filed has the unfortunate effect of sullying the reputation of the plaintiffs' class action bar and may cause the public to look upon meritorious merger lawsuits with unwarranted suspicion. In other words, disincentivizing frivolous lawsuits actually bolsters the credibility of legitimate merger cases, which, in turn, leads to the better sort of governance and disclosure that corporate class action lawsuits are supposed to incentivize.

Footnote 23: *See* Stephen Bainbridge, *How to Deal with Alleged Williams Act Section 13(d) Disclosure Violations*, Stephen Bainbridge's Journal of Law, Politics, and Culture (Aug. 7, 2014) (discussing why a rational board may want "err on the side of non-disclosure"), available at http://www.professorbainbridge.com/professorbainbridgecom/2014/08/how-to-deal-with-alleged-williams-act-section-13d-disclosure-violations.html.

Return to Decision List