IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA
BUSINESS COURT DIVISION

LEWIS CLARK TIERNEY, III, et al.

Plaintiffs,

v.

Civil Action No. 18-C-90
Presiding: Judge Farrell
Resolution: Judge Lorensen

ANN TIERNEY SMITH, et al.

Defendants.

ORDER GRANTING PRELIMINARY SETTLEMENT APPROVAL

Pending before this Court is the *Motion of The Tierney Corporation and The Leatherwood Company to Approve Settlement*, requesting that the Court approve a settlement agreement between The Tierney Corporation and The Leatherwood Company and the Defendants Ann Tierney Smith, C. Matthew S. Tierney, Douglas Woloshin, and Duane Morris LLP. After due and proper review of the parties' written submissions and the arguments presented by the parties, the Court **GRANTS** preliminary approval of the Settlement Agreement. In doing so, the Court makes the following findings and conclusions:

Background and Procedural History

1. This shareholder derivative suit was initiated by a group of minority shareholders, asserting claims on behalf of The Tierney Corporation and The Leatherwood Company (collectively, the "Companies"). This is the second of those derivative lawsuits involving substantially similar parties and claims.

2. Plaintiffs filed their first shareholder derivative action on behalf of the Companies on March 10, 2017. *See Tierney, et al. v. Tierney, et al.*, No. 17-C-346 (Cir. Ct. Kanawha Cnty.) (the "First Civil Action"). The case was transferred to this Court and, on December 9, 2017, was

123-124

dismissed for, among other reasons, failure to comply with the demand requirements of West Virginia Rule of Civil Procedure 23.1.

3. On January 29, 2018, Plaintiffs filed this lawsuit (the "Second Civil Action"), which arises from the same set of facts as the First Civil Action and alleges many of the same claims from the First Civil Action.

4. In response to Plaintiffs' demand and subsequent lawsuit, the Companies hired the law firm of Dinsmore & Shohl LLP as independent counsel. Dinsmore & Shohl was instructed to investigate Plaintiffs' allegations, produce a report, and make an independent recommendation as to whether the Companies should pursue the claims urged by Plaintiffs.

5. At the conclusion of its investigation, Dinsmore & Shohl produced a detailed, 73-page report (the "Dinsmore Report"). For reasons explained in greater detail therein, the Dinsmore Report concluded that pursuing Plaintiffs' claims were not in the Companies' best interest and therefore recommended dismissal.

6. Plaintiffs have presented no evidence impeaching the credibility or independence of independent counsel.

7. Thereafter, a special shareholder meeting was convened to discuss and take action on the Dinsmore Report. At that meeting, the shareholders voted overwhelmingly to adopt the independent counsel's recommendations—i.e., that the Companies seek dismissal of Plaintiffs' derivative claims. At the special director meeting, which was convened immediately after the shareholder vote, the directors adopted the shareholder resolution and directed President deWet to take all steps necessary, in consultation with litigation counsel, to obtain dismissal of the claims.

8. On July 13, 2020, in keeping with the shareholders' clear directive, the Companies moved to dismiss Plaintiffs' lawsuit. That motion remains pending.

9. However, because Plaintiffs had raised the specter of a third lawsuit—on substantively similar but procedurally different grounds—the Companies and Defendants engaged in settlement discussions. Although they view dismissal as appropriate, the Companies and Defendants agree that settlement provides additional finality which may not be otherwise afforded by dismissal.

10. As a product of the parties' negotiations, the Companies and the Defendants executed that certain Settlement Agreement, which is attached to the Companies' motion as Exhibit A. Plaintiffs object to the Settlement Agreement and oppose efforts for approval.

11. The principal terms of the Settlement Agreement are as follows:

a. The Companies shall release any and all claims against Defendants arising from or in any way related to the claims asserted in the Civil Actions;

b. Defendants Doug Woloshin and Duane Morris shall release all indemnity claims against the Companies for legal fees and expenses associated with the Civil Actions (more than $500,000);

c. Duane Morris shall contribute $123,000 to a Settlement Fund, at least fifty percent (50%) of which shall be used by the Companies to pay a portion of the indemnity obligations of the Companies to Defendants Ann Tierney Smith and C. Matthew S. Tierney. Subject to acceptance and Court approval, the remaining fifty percent (50%) of the Settlement Fund shall be used to pay the Plaintiffs' attorneys fees.

d. Defendants Ann Tierney Smith and C. Matthew S. Tierney shall release the Companies from a nominal amount ($100) of their valid and accrued indemnification claims against the Companies.

e. The Parties shall release all claims in any way arising from or related to the Civil Actions.

f. Duane Morris shall forgive all outstanding legal fees owed by the Companies (over $167,000);

g. Doug Woloshin shall resign from the Companies' boards of directors;

12. On June 28, 2021, many of the same plaintiffs here filed a third lawsuit in the United States District Court of the District of Columbia. *Lewis Clark Tierney, III, et al. v. Barclay DeWet, et al.*, No. 21-cv-1714 (D.D.C.) (the "Third Civil Action"). The Third Civil Action appears to be based on many of the same facts and claims alleged in the First and Second Civil Actions. The First, Second, and Third Civil Actions are collectively referred to as the Civil Actions.

13. On August 5, 2021, this case was referred to this Court from the Circuit Court of Kanawha County. In addition to the present motion for settlement approval, the following motions remain pending: (i) a motion to dismiss by the Companies; (ii) motions to dismiss by various defendants; and (iii) an application for corporate records by the Plaintiffs. Approval of the Settlement Agreement would render all other pending motions in this case moot.

Legal Standard

14. Rule 23.1 provides that a derivative action "shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to shareholders or members in such manner as the court directs." W. Va. R. Civ. P. 23.1.

15. Approval of a settlement in a derivative action typically proceeds in two steps. At the preliminary approval stage, the court makes a preliminary determination that the settlement is "within the range of possible approval." *In re Wells Fargo & Co. S'holder Derivative Litig.*, 445 F. Supp. 3d 508, 516 (N.D. Cal. 2020). If the court preliminarily approves the settlement, the court

then directs notice of the proposed settlement to shareholders and provides shareholders the opportunity to object. *Id.* Following notice to the shareholders, the court holds a final fairness hearing to consider final approval of the settlement. *See In re NVIDIA Corp. Derivative Litig.*, 2008 WL 5382544, at *2 (N.D. Cal. Dec. 22, 2008).

16. The role of the Court in passing upon the propriety of a settlement in a derivative action is to determine whether the proponents of the settlement have shown that it "fairly and adequately serves the interests of the corporation" on whose behalf the derivative action was instituted. *Zimmerman v. Bell*, 800 F.2d 386, 391 (4th Cir. 1986).

17. In applying this standard, courts commonly inquire into "whether the compromise is fair, reasonable and adequate." *In re AOL Time Warner S'holder Derivative Litig.*, 2006 WL 2572114, at *2 (S.D.N.Y. Sept. 6, 2006).

18. Factors that shall be considered are as follows: (1) the reasonableness of the benefits achieved by the settlement in light of the potential recovery at trial; (2) the likelihood of success in light of the risks posed by continued litigation; (3) the likely duration and cost of continued litigation; and (4) any shareholder objections to the proposed settlement. *Id.* (*citing City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 462 (2d Cir.1974)). Each of these considerations—and others discussed herein—counsel in favor of approval.

Findings and Conclusions

19. First, because the independent investigator concluded that there was little prospect of success, the Companies' decision to resolve the claims is "fair, reasonable and adequate."

20. Having considered the strengths and weaknesses of Plaintiffs' claims, the Dinsmore Report concluded that the claims are both procedurally and substantively flawed. As detailed in the Dinsmore Report, even if Plaintiffs could prevail on some narrow basis, the amount they stand

to recover would be far outweighed by the attendant costs of obtaining a judgment. Based on these conclusions, independent counsel, which was hired for the express purpose of assessing the merits of Plaintiffs' claims, recommended dismissal.

21. Second, because the Companies' growing indemnity obligations threaten their viability, the Companies' decision to resolve the claims is "fair, reasonable and adequate."

22. Both the Business Corporation Act and the Companies' bylaws afford mandatory indemnification to directors who are successful, on the merits or otherwise, in the defense of such claims. *See* W. Va. Code § 31D-8-852; BYLAWS, ARTICLE VII. Because all four defendants were successful in their defense of the First Civil Action, they are already entitled to indemnity for related defense costs. These expenditures, however, will pale in comparison to the indemnity obligations possibly created by the Second and Third Civil Actions. Should any one or more Defendants succeed in their defense of the Second and Third Civil Actions, the Companies will be made to indemnify each such Defendant for their costs of defense. These contingent indemnity obligations are already substantial and continue to grow by the day. Weighing the prospect of success against the hopeful recovery, it is reasonable for the Companies to conclude that the economic risk of continued litigation is disproportionate to any potential benefit. The proposed settlement would largely absolve the Companies of most of their accrued and unaccrued indemnity obligations relating to the Civil Actions. The Companies can then refocus their energies and resources toward more productive pursuits.

23. Third, because the shareholders have overwhelmingly rejected Plaintiffs' claims, the Companies' decision to resolve the claims is "fair, reasonable and adequate."

24. Rule 23.1 provides that a "derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members

similarly situated in enforcing the right of the corporation or association." W. Va. R. Civ. P. 23.1. The shareholders have already spoken on this issue, and this shareholder directive must be respected. Plaintiffs' continued defiance of the shareholder mandate further suggests that they cannot "fairly and adequately" represent the interests of those they purport to serve—the shareholders.

25. Fourth, because Plaintiffs' economic interests are antagonistic to the other shareholders, Plaintiffs are not "adequate" representatives.

26. In passing on the adequacy of Plaintiffs' representation, courts will also consider whether the pecuniary interests of the derivative plaintiffs are antagonistic to the interests of the company and its shareholders. *See South v. Baker*, 62 A.3d 1, 21 (Del. Ch. 2012). As evidenced by a recent settlement demand, Plaintiffs appear to have acted in furtherance of their own personal interests at the potential expense of the other shareholders.

27. The principal terms of Plaintiffs' demand were as follows: (i) Duane Morris pays $250,000, which would be used first to pay Plaintiffs' legal fees with any remaining paid to the Companies; (ii) an independent third-party appraiser would be hired to value the Companies as of January 1 of 2018, 2019, and 2020; (iii) the Companies would purchase Plaintiffs' shares based on the blended appraisal value; (iv) Defendants would surrender their claims for indemnification against the Companies; and (v) Mr. Woloshin would resign from the Companies' Boards of Directors. Neither the Companies nor any of the Defendants have accepted Plaintiffs' proposed terms. Nor could they.

28. Under the terms of their proposed settlement, the Plaintiffs would have the Companies fund personal buyouts of their shares. Plaintiffs would also propose that they be fully reimbursed for their legal expenses. Plaintiffs' demand affords no benefit to the Companies and

would disadvantage other shareholders. Plaintiffs' proposal suggests that they have elevated their economic interests over the interests of the Companies, and that they therefore cannot satisfy Rule 23.1's adequacy requirement.

For these reasons, the Court **GRANTS** preliminary approval of the Settlement Agreement. The Court defers ruling on the *Motion of The Tierney Corporation and The Leatherwood Company to Approve Settlement* insofar as the parties seek final settlement approval.

The Court **ORDERS** that

(1) a final approval hearing will be held on January 11, 2022 at 11:00 (am)/pm via TEAMS for the following purposes: (i) to finally determine whether the requirements of West Virginia Rule of Civil Procedure 23.1 have been satisfied; (ii) to finally determine whether the Settlement is fair, reasonable, and adequate, and should be approved by the Court; and (iii) to rule upon such other matters as the Court may deem appropriate;

(2) all discovery and other pretrial proceedings and deadlines in this case are stayed and suspended until further order of the Court except such actions as may be necessary to implement the Settlement Agreement and this Order;

(3) the Companies shall, within 21 days after entry of this Order, provide notice of the Settlement to the shareholders;

(4) the notice shall alert shareholders that a final approval hearing has been scheduled and shall include, at a minimum, a copy of the Settlement Agreement and this Order;

(5) notice to the shareholders may be accomplished via email and/or United States Postal Service First Class Mail, whichever is best suited to effectuate proper service; and

(6) the parties and their counsel are authorized to use all reasonable procedures in connection with approval and administration of the Settlement that are not materially inconsistent with this Order or the Settlement Agreement, including making, without further approval of the Court, minor changes to the form or content of the Settlement Agreement and notice thereof.

Dated: November 4, 2021

JUDGE PAUL T. FARRELL
Judge of the West Virginia
Business Court Division

Tendered by:

Robert B. Allen (WVSB # 110
Pamela C. Deem (WVSB # 976)
KAY CASTO & CHANEY PLLC
707 Virginia Street East, Suite 1500
Charleston, WV 25301
Counsel for the Companies

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE COPY FROM THE RECORDS OF SAID COURT.
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 18 DAY OF NOV 2021
Cathy S. Gatson
CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

Approved by:

Isaac R. Forman by PCD w/permission
Isaac R. Forman (WVSB # 11668)
J. Zak Ritchie (WVSB #11705)
HISSAM FORMAN DONOVAN RITCHIE PLLC
P.O. Box 3983
Charleston, WV 25339
Counsel for Duane Morris LLP and Douglas Woloshin

Date:
Certified copies sent to:
___ counsel of record
___ parties
___ other
(please indicate)
By:
___ certified/1st class mail
___ fax
___ hand delivery
___ interdepartmental
Other directives accomplished:
Deputy Circuit Clerk

J. Mark Adkins by PCD w/permission

J. Mark Adkins (WVSB # 7114)
BOWLES RICE LLP
600 Quarrier Street
Charleston, WV 25301
Counsel for Defendant C. Matthew S. Tierney

Philip W. Collier by PCD w/permission

Philip W. Collier, Esq.
Stites & Harbison PLLC
400 West Market Street, Suite 1800
Louisville, KY 40202-3353
Counsel for Defendant C. Matthew S. Tierney

Joseph Ward by PCD w/permission

Joseph Ward (WVSB # 9733)
FROST BROWN TODD LLC
500 Virginia Street East, Suite 1100
Charleston, WV 25301
Counsel for Ann Tierney Smith

Copy provided to:
M. Shane Harvey
Jackson Kelly PLLC
500 Lee Street East, Suite 1600
Charleston, WV 25301
Counsel for Plaintiffs