

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

2022 FEB 16 PM 12:00

LEWIS CLARK TIERNEY, III, et al.

CATHY S. CATSON, CLERK  
KANAWHA COUNTY CIRCUIT COURT

Plaintiffs,

v.

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

ANN TIERNEY SMITH, et al.

Defendants.

**ORDER GRANTING FINAL 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 in this derivative action between The Tierney Corporation and The Leatherwood Company, on the one hand, and Defendants Ann Tierney Smith, C. Matthew S. Tierney, Douglas Woloshin, and Duane Morris LLP, on the other hand. By Order dated November 9, 2021, this Court granted preliminary approval of the Settlement Agreement and directed the Companies to provide notice of the settlement to the shareholders. After a reasonable notice period, the Court held a final fairness hearing on January 11, 2022 to consider, among other things, whether final settlement approval should be granted. After careful review of the parties' written submissions and the arguments presented by counsel, the Court (i) **GRANTS** final approval of the Settlement Agreement and (ii) **ORDERS** that all claims in the above-styled civil action be dismissed with prejudice and this case stricken from the docket. In doing so, the Court makes the following findings of fact and conclusions of law:

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### **Background and Procedural History**

1. This shareholder derivative suit was initiated by a group of shareholders, asserting claims on behalf of The Tierney Corporation and The Leatherwood Company (collectively, the “Companies”). This is the second such derivative lawsuit involving the same 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 the Business Court, assigned to the undersigned presiding judge, and, on December 9, 2017, was dismissed for, among other reasons, Plaintiffs’ failure to make a proper shareholder demand as required by West Virginia law.

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 essentially 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 to investigate Plaintiffs’ derivative claims. 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 alleged by Plaintiffs.

5. As a result of its investigation, Dinsmore & Shohl generated a detailed, 73-page report (the “Dinsmore Report”). For reasons explained in greater detail therein, the Dinsmore Report concluded that pursuing Plaintiffs’ claims would not be in the Companies’ best interest and therefore recommended dismissal.

6. Thereafter, a special shareholder meeting was convened to discuss and take action on the Dinsmore Report. At that meeting, roughly 75% of the “independent shares” – shares not owned by one of the named parties to this litigation, their immediate family members, or trusts

held for their benefit - voted 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 management to take all steps necessary, in consultation with their litigation counsel, to obtain dismissal of the claims.

7. As a product of the parties' negotiations, the Companies and the Defendants reached that certain Settlement Agreement which was attached as an exhibit to the Companies' motion for settlement approval. Plaintiffs object to the Settlement Agreement and oppose approval of the Agreement.

8. 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 which were or could have been 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. Defendants Ann Tierney Smith and C. Matthew S. Tierney shall each release the Companies from the nominal amount of \$100 of their respective valid and accrued indemnification claims against the Companies stemming from the Civil Actions.
- d. The Parties shall release all claims in any way arising from or related to the Civil Actions.

- e. Duane Morris shall forgive all outstanding legal fees owed by the Companies (over \$167,000);
- f. Doug Woloshin shall resign from the Companies' boards of directors;
- g. The Companies will make payment to satisfy in full the Unpaid Indemnity Obligations of the Companies to Ann Tierney Smith and C. Matthew S. Tierney, less the amount of \$100 each.
- h. Duane Morris shall contribute \$123,000 to a Settlement Fund, at least fifty percent (50%) of which shall be applied by the Companies to pay a portion of the Unpaid Indemnity Obligations of the Companies as identified in subparagraph 10.g. above 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.

9. The Court notes that at the end of the Final Settlement Hearing held on January 11, 2022, after the Court had announced its ruling, the parties also proffered that on or about June 28, 2021, many of the plaintiffs involved in the instant civil action had also 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. 1-21-cv-01714-RC (D.C.C.). The parties proffered that this action is based on virtually the same set of facts and claims alleged in the First and Second Civil Actions. This Court references and recognizes this civil action filed in federal court in Washington, D.C., and notes and recognizes the parties' desires to bring finality to their disputes, but also recognizes that it does not, as it said at the January 11, 2022 hearing, have the authority to dismiss the federal action. This Court understands and recognizes that the Court in that litigation would have to dismiss that action in accordance with all proper procedures and relevant law in that jurisdiction..

10. On August 5, 2021, this case was referred to the Business Court Division. In addition to the pending 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. Granting the motion to approve the Settlement Agreement would render moot all other pending motions in this case.

#### **Legal Standard**

11. 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.

12. 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).

13. 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).

14. 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).

15. 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)).

#### **Preliminary Approval and Notice to Shareholders**

16. By Order dated November 9, 2021, this Court granted preliminary approval of the Settlement Agreement and directed the Companies to provide notice of the settlement and final fairness hearing to shareholders. The Court’s findings and conclusions in the order granting preliminary approval are incorporated and adopted herein by reference.

17. The Companies report that the *Notice of Settlement and Final Approval Hearing* was mailed to each of the Companies’ shareholders of record, including where appropriate, personal representatives, trustees, and/or heirs. Consistent with the Court’s directive, included therewith were copies of the *Order Granting Preliminary Settlement Approval* and the *Settlement Agreement and Release of Claims*. The notice was sent to 34 recipients via USPS certified mail, return receipt requested.

18. The Companies report that shareholders have received notice either by mail or through their respective counsel, except for four shareholders who collectively represent less than 6% of The Tierney Corporation’s outstanding shares. The Court is satisfied the Companies have provided adequate notice to shareholders. Plaintiffs have not contested the sufficiency of

shareholder notice and did not present any evidence challenging the substance or process used to notify shareholders of the proposed settlement.

19. Prior to the final fairness hearing, shareholders were given the opportunity to voice their objections. Other than the plaintiffs, no other shareholders objected to the Settlement or otherwise participated at the final fairness hearing. The Court has reviewed and considered the objections of the Plaintiffs, which were also addressed at the hearing before this Court on January 11, 2022.

### **Analysis**

20. Each of the considerations for settlement approval outlined above—and others discussed herein—counsel in favor of approval.

21. 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."

22. 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.

23. Despite Plaintiffs' assertions that there are "serious questions about the investigation conducted" by Dinsmore, Plaintiffs have presented no actual evidence challenging the independence of the Dinsmore investigation or the integrity of its report or its principal author, Arie Spitz, Esq. Mere speculation regarding the independence of the Dinsmore investigation and its subsequent report is not sufficient.

24. Second, because the Companies' growing indemnity obligations (which dwarf any likely recovery from the derivative claims) threaten the Companies' viability, the Companies' decision to resolve the claims is "fair, reasonable and adequate."

25. 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.

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

27. 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 do not "fairly and adequately" represent the interests of those they purport to serve—the shareholders.

28. Contrary to their assertions, Plaintiffs have presented no evidence that the Companies refused to provide the Dinsmore Report to any shareholder who requested it prior to the shareholder vote. This Court finds that Plaintiffs have presented no evidence disputing the propriety of the shareholder vote or the process that led to that vote.

29. Furthermore, no shareholders other than the Plaintiffs objected to the settlement or appeared at the final approval hearing. This means that even the small number of non-plaintiff shareholders who voted against the recommendations of the Dinsmore Report at the special shareholder meeting did not raise any timely objection to this Court's approval of the settlement here.

30. Fourth, consistent with this Court's findings in its order granting preliminary approval of the Settlement Agreement, Plaintiffs are not "adequate" representatives because Plaintiffs' economic interests are antagonistic to the other shareholders.

31. 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.

32. 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.

33. 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 indicates 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.

34. Accordingly, weighing the appropriate factors that should be considered, this Court concludes, based on the record presented, that the settlement is "fair, reasonable and adequate."

### **Conclusion**

For these reasons, the Court **GRANTS** the Motion of The Tierney Corporation and The Leatherwood Company to Approve Settlement and **ORDERS** that all claims in this civil action are **DISMISSED WITH PREJUDICE**. The parties and their counsel are authorized to take all reasonable steps in connection with the approval and effectuation of the settlement that are not materially inconsistent with this Order or the Settlement Agreement as has been presented, including by making, without further approval of the Court, changes to the form or content of the Settlement Agreement prior to its execution. Except as otherwise provided in the Settlement Agreement, each party shall bear their own fees and expenses.

The Plaintiffs' objections and exceptions are noted.

This civil action shall be stricken from the docket of the Court. The Clerk is directed to send a certified copy of this Order to counsel of record listed below.

Entered this 15th day of February 2022



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

STATE OF WEST VIRGINIA  
COUNTY OF KANAWHA, SC  
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 17<sup>th</sup>  
DAY OF February 2022  
Cathy S. Gatson CLERK  
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA  
Uddel

Date: 2/17/22  
Certified copies sent to:  
☒ counsel of record  
☒ parties Bus Ct  
☐ other (please indicate)  
By: ☒ certified/1st class mail  
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Other directives accomplished:  
Uddel  
Deputy Circuit Clerk

M. Shane Harvey  
C. Goodwin  
J. Mark Adkins  
M. Hixson  
P. Collier  
P. Deem