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Case No. 4578-VCL

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE REVLON, INC. SHAREHOLDERS LITIGATION	))	CONSOLIDATED C.A. No. 4578-VCL

MOTION TO ENFORCE SETTLEMENT AGREEMENT

Revlon, Inc. ("Revlon"), Ronald O. Perelman, Barry F. Schwartz, David L. Kennedy, Alan T. Ennis, Alan S. Bernikow, Paul J. Bohan, Meyer Feldberg, Ann D. Jordan, Debra L. Lee, Tamara Mellon, Kathi P. Seifert, Kenneth K. Wolfe, and MacAndrews & Forbes Holdings Inc. (collectively, "Defendants") hereby move to enforce the settlement agreement entered into among the parties to four actions consolidated under the above-captioned matter. As explained below, the parties bargained hard to reach a binding Memorandum of Understanding ("MOU"), and Defendants have performed in full as required under, and in reliance on, that agreement. Plaintiffs have in turn failed entirely to honor their contractual obligations, first refusing to undertake confirmatory discovery, then failing to seek to stay or dismiss new and amended actions initiated since the settlement, and now filing an amended complaint – all violations of the MOU. Plaintiffs should not be permitted to further breach the terms of their agreement, or to treat an enforceable settlement as a one-way option. Settling parties enter into agreements like the MOU "for a reason. They don't enter into them because they are gossamer and can be disregarded whenever situations change. They enter into them because they create rights." *Global Asset Capital LLC v. Rubicon US REIT, Inc.*, C.A. No. 5071, trans. at 5 (Del. Ch. Nov. 16, 2009). Accordingly, Defendants move the Court to enforce the rights created under the parties' settlement agreement.

Background

1. On April 24, 2009, plaintiff Vern Mercier filed a verified complaint against Defendants on behalf of a putative class of Revlon's stockholders in the Court of Chancery captioned *Mercier v. Perelman, et al.*, C.A. No. 4532-CC (Del. Ch.). Thereafter, three additional lawsuits captioned *Jurkowitz v. Perelman, et al.*, C.A. No. 4557-CC (Del. Ch.); *Lefkowitz v. Revlon, et al.*, C.A. No. 4563-CC (Del. Ch.); and *Heiser v. Revlon, et al.*, C.A. No. 4578-CC (Del. Ch.) were filed in the Court of Chancery. All four suits stem from Revlon's April 20, 2009 announcement that MacAndrews & Forbes Holdings, Inc. ("MacAndrews") proposed a merger transaction with Revlon (the "Proposal").

2. On June 24, 2009, all four suits were consolidated under this action. (D.I. 13).

3. After lengthy arm's-length negotiations concerning a potential resolution, the parties reached an agreement to settle the litigations. As part of the settlement, it was agreed that instead of the merger transaction contemplated in the Proposal, Revlon stockholders would have the opportunity (but would not be required) to participate in an exchange offer whereby Revlon offered to exchange shares of newly issued Series A Preferred Stock for shares of its Class A Common Stock (the "Exchange Offer"). The Exchange Offer was intended to (and ultimately did) significantly improve Revlon's capital structure by, among other things, extending by three years the maturity date of a $107 million Senior Subordinated Term Loan from MacAndrews to Revlon Consumer Products Corporation ("RCPC"), Revlon's wholly-owned operating subsidiary, thus providing Revlon with valuable additional time to refinance the indebtedness.

4. In addition to providing that the proposed transaction would proceed as a voluntary offer, rather than as a mandatory merger as originally proposed, the terms of the settlement also provide for enhancements to the economic value of the Series A Preferred Stock

for the benefit of those Revlon stockholders who chose to tender their shares and certain additional protections for the benefit of those Revlon stockholders who chose not to tender their shares.

5. On August 10, 2009, the parties entered into the MOU memorializing the settlement. A copy of the MOU is attached hereto as Exhibit A. The MOU is 20 pages long and comprehensively details, among other things, the agreed-upon terms of the Exchange Offer, the scope of the claims released, and the process for obtaining Court approval of the settlement. By its express terms, the MOU is "binding upon and shall inure to the benefit of the parties . . . ." MOU at ¶ 19.

6. In addition, the MOU provides that the actions, "except for Settlement-related proceedings . . . shall be stayed and suspended pending the negotiation and execution of the Stipulation . . . ." *Id.* at ¶ 5. The parties further agreed to "use their individual and collective best efforts to obtain Final Court Approval of the Settlement and the dismissal of the [actions] with prejudice as to all claims asserted or which could have been asserted against the Defendants . . . ." *Id.* at ¶ 8. The contract thus specifically anticipated the situation that has arisen – that plaintiffs may identify claims after the execution of the MOU that they had not recognized before – and specifically provides that plaintiffs are obligated to seek the dismissal of any such claims.

7. Importantly, plaintiffs also promised to use their best efforts to seek a stay or dismissal of any related action brought in the future by any member of the proposed class:

> Pending negotiation, execution and Delaware Chancery Court approval of the Stipulation and the Settlement, the parties agree to use their best efforts to prevent, stay, seek dismissal of, or oppose entry of any interim or final relief in favor of any member of the Class in any other litigation against any of the parties to this MOU, which challenges the Settlement, the Revised Transaction or the Exchange Offer, or otherwise involves any of the Settled Claims.

Id. at ¶ 9.

8. The binding settlement was subject to only four conditions:

(a) the prompt completion of confirmatory discovery by plaintiffs (*id.* at ¶ 10(b));

(b) execution of a formal Stipulation (which the parties bound themselves to prepare in good faith) (*id.* at ¶ 10(a));

(c) consummation of the Exchange Offer (which, as noted below, occurred on October 8, 2009) (*id.* at ¶ 10(c)); and

(d) approval of the Settlement by this Court (*id.* at ¶ 10(d)).

9. On August 14, 2009, plaintiffs reported to the Court that the parties had entered into the MOU (D.I. 14), and on September 11, 2009, the Court granted the parties' proposed Stipulation and Order Governing the Production and Exchange of Confidential and Highly Confidential Information for confirmatory discovery (D.I. 16).

10. On September 23, 2009, the parties executed Amendment No. 1 to the MOU (the "MOU Amendment"). A copy of the MOU Amendment is attached hereto as Exhibit B. Among other things, the MOU Amendment reflected modifications to the Exchange Offer that were intended to enhance the terms of the consideration offered to tendering Revlon stockholders, while maintaining the protections previously negotiated for non-tendering Revlon stockholders. For example, the modifications to the Exchange Offer provided for in the MOU Amendment: (a) increased the liquidation preference of the Series A Preferred Stock from $3.71 to $5.21 per share; and (b) extended from two to three years following completion of the Exchange Offer the right of the holders of the Series A Preferred Stock to share in the proceeds of certain specified change in control transactions. The MOU Amendment also: (a) allowed Revlon to restructure its

debt on even more favorable terms by extending further the maturity date of a portion of the Senior Subordinated Term Loan to 2014; (b) reduced the interest rate on a portion of the Senior Subordinated Term Loan; and (c) relaxed the minimum condition in the Exchange Offer.

11. As part of the settlement negotiations leading up to the MOU Amendment, plaintiffs conducted substantial additional factual and legal research so they could negotiate improved terms for the Exchange Offer, including receiving answers from Revlon senior management to questions about proposed revisions to the Exchange Offer.

12. On October 8, 2009, the Exchange Offer closed on the terms provided under the MOU, as amended.

13. Having thus induced Defendants to enter into the MOU, and having received the full benefit of their bargain, plaintiffs now refuse to comply with their own contractual obligations under the MOU. Specifically, plaintiffs have refused to conduct good faith confirmatory discovery and instead have engaged in months of intentional delay, watching with intense interest as Revlon's stock price rose following the improvement in its capital structure that the Exchange Offer was specifically intended to effect and facilitate. Now, plaintiffs propose to renege on the settlement agreement, and launch new claims precluded under that agreement, based on the mere fact that Revlon's stock price went up after the MOU was signed.

14. Plaintiffs' new "disclosure" claims, set forth in the amended complaint filed on January 6, 2010, are factually and legally baseless – as plaintiffs would have known had they complied with their contractual obligation to conduct good faith confirmatory discovery.

15. Specifically, plaintiffs now allege that the September 24, 2009 Exchange Offer documents – which they reviewed and contributed to as part of the settlement – should have disclosed information about Revlon's 2009 third quarter results, which were not announced until

October 29, 2009. Remarkably, plaintiffs ***concede*** in the amended complaint that Revlon's third quarter results were consistent with the projections set forth in the Exchange Offer filings, but nonetheless allege that Revlon somehow had an affirmative duty to "disclose" that a third-party securities analyst who had published her own pessimistic third quarter projections was wrong. (Am. Compl. ¶ 73).[1] That claim is frivolous, and it makes clear that the sole and transparent motivation for and basis of the amended complaint is the simple fact that Revlon's stock price has risen since the Exchange Offer closed on October 8, 2009. Notably, the claims asserted in the amended complaint are brought by a newly added plaintiff and only on behalf of those stockholders who exchanged their shares. The original plaintiffs, who apparently still hold Revlon common stock, bring no claims and seek to hold on to the gains they have received from the increased stock price.

16. Moreover, had it been pursued, confirmatory discovery would have demonstrated to plaintiffs that the increase in Revlon's stock price could be attributable to a variety of factors, including matters that were fully known to the marketplace and were in many instances direct results of the terms of the Exchange Offer. For example, as discussed above, the Exchange Offer was intended to – and did – improve Revlon's capital structure by, among other things, extending the maturity date of its nearest term debt maturity, the Senior Subordinated Term Loan, which was due on August 1, 2010. This was a critical factor in RCPC's ability, on November 6, 2009, to amend its bank loan agreement. This amendment permitted the company to streamline its capital structure and seek far more favorable financing options, all of which became known to

[1] Significantly, Revlon did not provide guidance to the public or to analysts regarding its expected full year 2009 or third quarter 2009 results. Revlon included annual projections in its Exchange Offer filings solely because the staff of the Securities and Exchange Commission required that it do so.

the market and following which Revlon's stock price increased. A copy of Revlon's November 6, 2009 press release describing some of these developments is attached at Exhibit C hereto.

17. In the thousands of pages of documents that Defendants have produced in this action, not a single page indicates that any material fact relating to Revlon's future performance was improperly excluded from Revlon's public disclosures. And plaintiffs have failed to identify any such facts, because none exist. To the contrary, the evidence plaintiffs have been provided conclusively rebuts their newly minted "disclosure" claims by demonstrating that Revlon's performance has closely tracked the projections and information disclosed to stockholders in connection with the Exchange Offer. But plaintiffs have willfully chosen to remain ignorant, repeatedly refusing Defendants' offers to provide interviews with Revlon employees knowledgeable about the projections and Revlon's actual financial performance, and declining to schedule confirmatory depositions.

18. By refusing to conduct confirmatory discovery in good faith, and by filing the amended complaint without even taking up Defendants' invitation to provide interviews with senior Revlon management knowledgeable about the Company's projections, its third quarter earnings, and the relationship between the two, plaintiffs have repudiated and breached the express terms of the MOU. Further, plaintiffs have failed to act in good faith to negotiate and execute a formal Stipulation of Settlement as required by the MOU – all after Defendants have, in good faith reliance upon the MOU, fulfilled all of their obligations and proceeded with consummating the Exchange Offer on the amended and enhanced terms negotiated by plaintiffs' counsel.

19. In addition, the allegations in the amended complaint echo those raised in two lawsuits filed on December 21, 2009 in the Court of Chancery captioned *Gutman v. Perelman, et*

al., C.A. No. 5158-VCL, and *Corneck v. Perelman, et al.*, C.A. No. 5160-VCL.[2] Plaintiffs have failed to seek to stay or dismiss these actions as required by the terms of the settlement, in further breach of the MOU.

Argument

20. The MOU is a binding contract. *See, e.g.*, MOU at ¶ 19 (the MOU is "binding upon and shall inure to the benefit of the parties . . . ."). In exchange for making material changes to the terms of the proposed original transaction that significantly benefited plaintiffs – and going forward with the transaction as substantially changed – Defendants bargained for the opportunity to present the settlement to this Court and to have the Court consider whether, in the exercise of its business judgment, the proposed settlement was fair to the class. *See* MOU at ¶ 8 (agreeing to "use their individual and collective best efforts to obtain Final Court Approval of the Settlement and the dismissal of the [actions] with prejudice as to all claims asserted or which could have been asserted against the Defendants . . . "); *see also id.* at ¶ 10(a) (noting the parties' duty to "comply with their obligation to act in good faith to negotiate and execute such a formal Stipulation"). As memorialized in the MOU, this agreement is subject to limited conditions, none of which is remotely implicated here, and was thereafter reaffirmed in the MOU Amendment.

21. Where, as here, parties have entered a binding agreement to settle a lawsuit, this Court has not hesitated to enforce the terms of the contract. *Loppert v. WindsorTech, Inc.*, 865

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[2] In addition to *Gutman* and *Corneck*, on December 31, 2009, a lawsuit was filed in the United States District Court for the District of Delaware captioned *Garofalo v. Revlon, Inc., et al.*, C.A. No. 09-1008 (D. Del.). *Garofalo* alleges federal and state law claims stemming from the same alleged failure to disclose information. An amended complaint was also filed in the Supreme Court of New York, New York County: *Sullivan v. Perelman, et al.*, No. 650257/2009 (NY Supreme), raising similar disclosure claims.

A.2d 1282, 1285 (Del. Ch. 2004), *aff'd mem.*, 867 A.2d 903 (Del. 2005); *Rowe v. Rowe*, C.A. No. 16119, 2002 WL 127169, at *3 (Del. Ch. May 28, 2002); *Clark v. Ryan*, C.A. No. 628, 1992 WL 163443, at *5 (Del. Ch. June 17, 1992).[3] While plaintiffs seek to devalue the MOU as a "settlement-in-principle," this Court has recently reaffirmed that so-called agreements-in-principle are ***not*** "gossamer," and ***cannot*** "be disregarded whenever situations change," and ***do*** "create rights," including the obligation to proceed in "good faith" to bring a preliminary agreement to the contractually anticipated conclusion. *See Global Asset*, trans. at 5. Had plaintiffs wished the MOU to be non-binding, they could have – and would have – "readily do[ne] that by expressly saying that the [agreement] is nonbinding." *Id.* Here they said exactly the opposite.

22. Although the MOU provides that the parties could terminate the settlement in certain limited circumstances, a change of heart by plaintiffs was not one of them. Indeed, Delaware law is clear that "[a] unilateral change of heart by a party to a settlement agreement is ***not*** ground to set the settlement aside." *Rowe*, 2002 WL 1271679, at *4 (emphasis added) (granting motion to enforce); *see also In re Appraisal of Enstar Corp.*, 593 A.2d 543, 548 (Del. Ch. 1991), *rev'd on other grounds*, 604 A.2d 404 (Del. 1992) ("It should therefore come as no surprise that sometimes the subsequent learning of additional facts may indicate that the settlement terms, in retrospect, unduly favored one side or the other, but this is not grounds to set aside the settlement.").

23. Plaintiffs have not stated that they cannot go forward with the settlement because of concerns raised in confirmatory discovery. To the contrary, plaintiffs have ***refused*** to engage

[3] All unreported opinions and the *Global Asset* transcript are attached alphabetically at Exhibit D hereto.

in confirmatory discovery. Only after Revlon's stock price rose following events subsequent to the Exchange Offer, including refinancing transactions that were facilitated in part by the improved capital structure resulting from the Exchange Offer, did plaintiffs vocalize concerns about the settlement. Rather than attempting to alleviate their unfounded concerns through confirmatory discovery, as required by the terms of the settlement, plaintiffs filed an amended complaint. Moreover, plaintiffs have refused to exert any efforts to seek a stay or dismissal of the *Gutman*, *Corneck*, *Garofalo* and *Sullivan* actions, as the MOU requires. Instead, they have jumped on the litigation bandwagon. In short, plaintiffs are treating the MOU as a one-way option that they are free to abandon without regard to the promise they made to use good-faith efforts to confirm the fairness of the settlement. This is not the law.

24. Plaintiffs' conduct here not only violates the terms of the parties' contract, it also raises important concerns about the proper administration of settlements in this Court. Plaintiffs specifically negotiated for a purely voluntary exchange transaction in which they and the members of their class would have the opportunity, depending on their views about Revlon's future and their appetite for risk, either to keep their common stock or exchange it for preferred stock. Through these negotiations, plaintiffs procured important benefits for themselves and other Revlon stockholders (both those who exchanged shares and those who did not), and promised, in response, to present a settlement to this Court. Then they delayed proceeding with their negotiated and binding settlement until they could see with the benefit of 20/20 hindsight which subset of their class might have made the worse bet, and now have sought to renegotiate the parties' agreement. Even more egregiously, the original plaintiffs, who did not exchange their shares, seek to retain the benefits of the Exchange Offer and the stock price increase, while a newly added plaintiff pursues claims on behalf of only a subset of the original class (comprised

only of tendering shareholders). Plaintiffs have made no effort to confirm the fairness of the settlement they reached and have not identified a single fact that justifies their decision to abandon the settlement. This Court should not tolerate such behavior; "[e]quity respects the freedom to contract, and dictates that both parties to the settlement should receive the benefit of their bargain . . . ." *Loppert*, 865 A.2d at 1290 (*quoting Asten, Inc. v. Wanger Sys. Corp.*, C.A. No. 15617, 1999 WL 803965, at *6 (Del. Ch. Sept. 23, 1999)). If plaintiffs' unfair conduct is permitted to stand, it risks significantly undermining established settlement practice in this Court.

25. Based on plaintiffs' improper repudiation, Defendants request that the Court enforce the settlement agreement, specifically allowing Defendants to present the settlement to the Court for approval in the exercise of its independent business judgment. To the extent that some members of the originally proposed class are unhappy with the investment decisions they made, they should proceed by filing objections to the settlement – rather than ignoring the binding obligations under the MOU and filing collateral litigation.

Conclusion

26. For all of the foregoing reasons, the MOU should be enforced, and Defendants should be afforded the opportunity to present the settlement to the Court for its approval.

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