COURT OF CHANCERY
OF THE
STATE OF DELAWARE

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Re: *In re Nat'l City Corp. S'holders Litig.*
Civil Action No. 4123-CC

Dear Counsel:

This opinion addresses (1) a proposed settlement of the *In re National City Corporation Shareholders Litigation* pursuant to a stipulation of settlement, and (2) an award of attorneys' fees and expenses for services rendered by plaintiffs' counsel in the prosecution of this litigation. Shareholders of National City Corporation ("NCC" or the "Company"), a then-Delaware corporation, brought this action following the October 24, 2008, announcement of NCC's proposed merger with PNC Financial Services Group, Inc. ("PNC"). Plaintiffs sought to enjoin the merger, alleging that the members of NCC's board of directors breached the fiduciary duties they owed to NCC's shareholders. Plaintiffs also alleged that PNC aided and abetted those breaches.

Plaintiffs and defendants eventually negotiated a settlement agreement, subject to Court approval, by which the claims relating to the merger would be released. In exchange, the defendants provided additional disclosures in connection with the merger, but no changes were made to the merger's financial terms. On December 23, 2008, NCC's shareholders voted to approve the merger. On February 2, 2009, plaintiffs and defendants signed a memorandum of understanding confirming the terms of the settlement.

The parties stipulated to provisional certification of a non-opt-out class pursuant to Court of Chancery Rules 23(a), 23(b)(1), and 23(b)(2). They have also

submitted for the Court's review the memorandum of understanding. For reasons set forth below, I approve the settlement, certify the class, and award attorneys' fees in the amount of $400,000, inclusive of expenses.

I. BACKGROUND

By September 2008, NCC, like many large financial institutions at that time, faced capital and liquidity challenges arising from disruptions in the credit and housing markets. The NCC board actively considered a variety of strategic options to deal with the growing crisis. After the events of September 2008, however, which included the failures of several large financial institutions, NCC was on the brink of failure. NCC faced concerns from depositors and counterparties, with many believing that NCC would be the next bank to fail.

Against this backdrop, NCC considered its strategic alternatives. The board met with its legal and financial advisors eight times during the month of October, and had informal, nightly status calls on other days. As a result of that process, only U.S. Bancorp ("USB") emerged as a potential merger partner, but it proposed a transaction at only a fraction of NCC's then-current market capitalization of $6.3 billion. The Office of the Comptroller of the Currency ("OCC") nonetheless encouraged a merger between NCC and USB, and actively monitored negotiations. USB offered an aggregate price of $2.545 billion, less than half of NCC's then-current market capitalization of $6.3 billion. To complicate the situation, the OCC

also advised NCC that it was "very possible" that NCC would not receive government assistance under the Troubled Asset Relief Program/Capital Purchase Program and added that the OCC had begun discussing with the Federal Deposit Insurance Corporation a potential downgrade of NCC's CAMEL ratings.[1] Indeed, NCC was faced with the prospect that the OCC was going to disclose the names of the banks slated to receive Treasury Department investments under the newly announced Capital Purchase Program and that NCC was not going to be one of them, which would have had a devastating effect on NCC's financial outlook.

Before the board could approve the USB transaction, PNC submitted a significantly higher competing offer of $5.45 billion. USB refused to counter-bid and withdrew entirely from the bidding process. Nevertheless, NCC negotiated a further price increase from PNC. With no superior alternatives available, NCC's board approved the PNC transaction. On October 24, 2008, PNC announced an agreement to acquire NCC in an all-stock transaction valued at approximately $5.58 billion. Pursuant to the merger's terms, NCC shareholders would receive 0.0392 shares of PNC common stock for each share of NCC common stock. NCC and PNC sought to close the merger by December 31, 2008.

[1] Defs.' Br. 12. CAMEL is a confidential bank-rating system designed to assess financial institution soundness, based upon a bank's financial statements and on site regulatory examinations. CAMEL ratings affect, among other things, a bank's access to credit.

On October 27, 2008, a class action complaint was filed in this Court alleging that the director defendants breached their fiduciary duties in connection with the merger, and that PNC aided and abetted those breaches. Specifically, it alleged that the NCC board agreed to sell NCC without securing "fair and maximum consideration" for NCC's shareholders. The complaint sought, among other things, to enjoin the merger. Numerous other class action complaints were filed in the Court of Chancery between October 27, 2008 and November 7, 2008. Each complaint alleged similar "unfair price" claims and sought similar injunctive relief.

On November 12, 2008, all of the class actions pending in this Court were consolidated and the law firm of Rigrodsky & Long, P.A. was appointed lead counsel. On November 19, 2008, plaintiffs filed a consolidated class action complaint. The consolidated complaint added allegations that the preliminary proxy issued to NCC's public shareholders was materially misleading and failed to disclose material information to NCC's shareholders. In fact, the November 19 complaint set forth over *thirty* separate purported disclosure violations.[2]

In late November, the parties engaged in settlement discussions. Eventually, they agreed on settlement terms and, on December 12, 2008, completed the memorandum of understanding, which provided (among other things) that

[2] Consol. Compl. ¶¶ 17-25.

plaintiffs would take additional discovery before presenting the settlement to this Court for approval. NCC promptly filed a current report on form 8-K, informing NCC shareholders of the terms of the settlement. Plaintiffs then completed their discovery by taking the depositions of John Mahoney, a partner at Goldman Sachs, and Peter Raskind, NCC's Chairman, President and Chief Executive Officer. On December 23, 2008, shareholders of NCC voted to approve the merger, and shareholders of PNC voted to approve the issuance of PNC stock required to complete the merger. On February 2, 2009, the memorandum of understanding was signed and the parties agreed to plaintiffs' counsel's fee and expense request in the amount of $1.2 million. The parties stipulated that any fee and expense award will be paid by the Company or its successor, PNC.

After notice of the proposed settlement was disseminated to the more than 61,000 NCC record shareholders, numerous NCC shareholders filed objections including Fiduciary Counselors, Inc., the Dispatch Printing Company, RadiOhio, Incorporated, Wolfe Associates, Inc., Julien J. McCall, Jr., Leon Atayan, Thomas O'Rourke, William Manby, Peter Vadas, and Dr. Daniel Rocker.

II. ANALYSIS

A. Settlement Approval

Plaintiffs properly instituted a class action for purposes of this complex litigation.[3] Although this Court generally favors settlement of litigation, "the settlement of a class action is unique because the fiduciary nature of the class action requires the Court of Chancery to participate in the consummation of the settlement to the extent of determining its intrinsic fairness."[4] Ultimately, this Court applies its own sound judgment in deciding whether to approve a class action settlement as fair and reasonable.[5] In doing so, the Court weighs and considers "the nature of the claim, the possible defenses to it, [and] the legal and factual obstacles facing the plaintiff in the event of a trial."[6]

In exchange for a release of their claims, plaintiffs were able to cause NCC to issue additional disclosures to its shareholders. Although minor, the disclosures obtained by plaintiffs did provide a benefit, albeit a meager benefit, to NCC's shareholders. The disclosures included:

- The potential conflict of NCC's financial advisor, Goldman Sachs, which advised both PNC and NCC at various times.
- NCC's potential participation in the troubled asset purchase arrangements.

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[3] The class action in this case meets the factors of Rule 23 and is properly certified as a class.
[4] *Rome v. Archer*, 197 A.2d 49, 53 (Del. 1964); *Nottingham Partners*, 564 A.2d at 1102.
[5] *Rome*, 197 A.2d at 53.
[6] *Id.*

- A review of the alternative transactions available to NCC.
- NCC's plan to grow the company in the future had it remained an independent entity.
- More detailed information about the investment agreements and warrants found in reports filed with the SEC.
- Information about how the NCC board had searched for other transaction partners, all of which were inferior to the option presented by PNC.

It is clear that by September and October of 2008 NCC faced extraordinary circumstances as it was roiled by the economic crisis that engulfed the entire financial industry. Plaintiffs' claims centered on the alleged breach of fiduciary duties that NCC's board committed while it attempted to sell NCC during the financial crisis. In particular, plaintiffs alleged that NCC's board had failed to maximize the sale price and had allowed PNC to buy NCC "on the cheap." Later, plaintiffs' amended their complaint to add disclosure claims regarding NCC's preliminary proxy.

Plaintiffs faced an uphill battle in proving their fiduciary duty claims. The merger NCC negotiated with PNC was a strategic, stock-for-stock merger of two unaffiliated, widely held corporations. After the merger, control of the combined entity remained in a "large, fluid, changeable and changing market."[7] Thus, absent evidence of interestedness or disloyalty to the corporation, decisions by NCC's

[7] *Arnold v. Soc'y for Sav. Bancorp., Inc.*, 650 A.2d 1270, 1290 (Del. 1994) (quoting *Paramount Commc'ns. Inc. v. QVC Network, Inc.*, 637 A.2d 34, 47 (Del. 1994)).

board would be entitled to the protections of the business judgment rule, which would prevent this Court from second guessing director decisions if they were the product of a rational process and the directors availed themselves of all material and reasonably available information. The plaintiffs' complaint offered nothing to rebut the presumption of the business judgment rule. Furthermore, NCC had adopted a provision in its certificate of incorporation pursuant to 8 *Del. C.* § 102(b)(7), which would cause plaintiffs to have to demonstrate that NCC's directors acted, among other things, in bad faith.[8]

The objectors contend that NCC's management acted in its own self interest in approving the merger because fourteen officers of the Company received change-in-control payments at the completion of the merger. But NCC's board, not its management, approved the merger, and only one member of the board, Peter Raskind, was also an officer of NCC. There are no allegations that any of the other board members received change-of-control or unique payments as a result of the merger. The Delaware Supreme Court has "never held that one director's colorable interest in a challenged transaction is sufficient, without more, to deprive a *board* of the protection of the business judgment rule presumption of loyalty."[9] Indeed, "self-interest, alone, is not a disqualifying factor even for a director. To disqualify a director, for rule rebuttal purposes, there must be evidence of

[8] *Lyondell Chem. Co. v. Ryan*, 970 A.2d 235 (Del. 2009).
[9] *Cede & Co. v. Technicolor*, *Inc.*, 634 A.2d 345, 363 (Del. 1993).

disloyalty."[10] The objectors fail to point to any evidence that NCC's board acted with disloyalty. If anything, the NCC directors' interests were consistent with NCC shareholders. The eleven outside directors held over 1,000,000 shares of NCC stock, aligning their interests with that of shareholders—to obtain the highest possible value for their shares.

Ultimately, the probability that plaintiffs would have been successful on the merits of their fiduciary duty claims is remote. Plaintiffs were able to cause NCC to make additional disclosures, which provided NCC's shareholders with further information concerning the potential conflicts of NCC's financial advisor, Goldman Sachs, as well as further insight into the strengths and weaknesses of the Company. These disclosures, in my opinion, amount to an exceedingly modest benefit to the shareholder class. Since plaintiffs' fiduciary duty claims lacked any probability of success on the merits, the additional disclosures plaintiffs' obtained constituted a reasonable, though meager, benefit to the class. Therefore, I conclude that the settlement represents a fair and reasonable compromise and should be approved.

[10] *Id.*

B. Plaintiffs' Counsel Fee Application

Although the additional disclosures constitute a benefit of sufficient weight to justify approval of the settlement in light of the difficulty of the substantive claims plaintiffs raised, the disclosures do not justify a substantial fee. As a result of plaintiffs' counsel's prosecution and ultimate settlement of this litigation, the shareholder class received the benefit of a few additional disclosures filed on NCC's form 8-K. For this non-monetary, therapeutic and modest achievement in a case where counsel bitterly complained that NCC shareholders were being shortchanged, plaintiffs' counsel seeks the princely sum of $1.2 million as their fees and expenses. NCC or its successor agreed to pay any fee approved by the Court up to $1.2 million and, according to the parties, the fee was negotiated after the settlement negotiations had concluded, but was included in the memorandum of understanding entered into by the parties and submitted to the Court.

It has long been the policy of Delaware to "insure[] that, even without a favorable adjudication, counsel will be compensated for the *beneficial results* they produced."[11] This policy exists to "prevent frustration of the remedial policy of providing professional compensation for such suits when meritorious."[12] The Delaware Supreme Court has unequivocally held that, where plaintiffs and defendants agree upon fees in settlement of a class action lawsuit, a trial court

[11] *Allied Artists Pictures Corp. v. Baron*, 413 A.2d 876, 878 (Del. 1980) (emphasis added).
[12] *Id.*

"must make an independent determination of reasonableness" of the agreed to fees.[13] In arriving at the specific amount for the award, *Sugarland Industries Inc. v. Thomas*[14] rejected a more mechanical approach, establishing that the Court must exercise its sound discretion to determine fee awards.[15] In assessing whether a fee is reasonable the Court typically considers a number of factors, including: "(1) the results accomplished for the benefit of the shareholders; (2) the efforts of counsel and the time spent in connection with the case; (3) the contingent nature of the fee; (4) the difficulty of the litigation; and (5) the standing and ability of counsel involved."[16] This Court has consistently noted that the most important factor in determining a fee award is the size of the benefit achieved.[17]

Plaintiffs' counsel emphasizes that the $1.2 million fee was the result of an arm's length negotiation with defendant NCC that resulted in a fee that represents the reasonable value of counsel's contribution to the litigation. The fact that a fee is negotiated, however, does not obviate the need for independent judicial scrutiny of the fee because of the omnipresent threat that plaintiffs would trade off settlement benefits for an agreement that the defendant will not contest a

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[13] *Goodrich v. E.F. Hutton Group, Inc.*, 681 A.2d 1039, 1045-46 (Del. 1996).
[14] *Sugarland Indus. Inc. v. Thomas*, 420 A.2d 142 (Del. 1980).
[15] *See id.* at 149.
[16] *In re Abercrombie & Fitch Co. S'holders Derivative Litig.*, 886 A.2d 1271, 1273 (Del. 2005) (quoting *In re Infinity Broad. Corp. S'holders Litig.*, 802 A.2d 285, 293 (Del. 2002).
[17] *See, e.g., Seinfeld v. Coker*, 847 A.2d 330, 336 (Del. Ch. 2000).

substantial fee award.[18] A negotiated fee arrangement "by its nature deprives the court of the advantages of the adversary process . . . [and] makes heightened judicial oversight of this type of agreement highly desirable."[19]

Additionally, skepticism of negotiated fee agreements is justified by the classic agency problem inherent in class action litigation. In class actions, the principals, the claim-holding members of the shareholder class, have little or no role in negotiating the settlement of the action or the fees their agents, the attorneys, will receive in conjunction with the settlement of the claims that belong to them. At most, the principals (the class members) possess the opportunity to object to a proposed award of attorney fees. This Court is required to be vigilant, so that counsel's fee requests do not take advantage of the agent-principal relationship between class action plaintiffs and their attorneys.

A policy of awarding fees based on the benefit obtained for shareholders should induce board members to remain vigilant regarding potential liability to stockholders or to the corporation when they are acting. The fee award should also encourage plaintiffs' attorneys to remain alert in identifying and filing claims that will allow courts to catch the occasional instance of overreaching board conduct. This latter incentive must be balanced with the proper awareness by the Court that an appropriate fee should also help both to deter frivolous lawsuits against

[18] *See Weinberger v. Great Neekosa Corp.*, 925 F.2d 518, 524 (1st Cir. 1991).
[19] *Id.* at 525.

defendants, and to avoid financial windfalls to plaintiffs' attorneys. Mindful of this twin incentive structure, I apply the *Sugarland* factors.[20]

Objector Fiduciary Counselors, Inc. ("FCI") contends that fee awards in recent corrective disclosure cases have ranged from $225,000 to $400,000 when the disclosures have been relatively minor and an objector has opposed the fee.[21] Considering the *Sugarland* factors and the amount of fees this Court has typically awarded in modest disclosure cases, I conclude that an award commensurate with the benefit obtained for the shareholder class and the amount of effort plaintiffs' counsel actually expended in connection with this litigation is $400,000. Plaintiffs' counsel only achieved meager additional disclosures that failed to be significant enough to warrant placement as an amendment to the proxy statement and were only reported on NCC's form 8-K. No evidence exists that the additional disclosures significantly affected the outcome of the shareholder vote. Indeed, NCC's shareholders overwhelmingly voted in favor of the merger. Moreover, plaintiffs' counsel, after winning an early motion to expedite, did not press any subsequent motion and only deposed two witnesses. This effort, regardless of the amount of hours spent, does not justify a fee award of $1.2 million, especially since the benefit obtained for the shareholder class was miniscule. Thus, I will not

[20] *Sugarland*, 420 A.2d at 149-51.
[21] *See, e.g., In re Golden State Bancorp, Inc. S'holders Litig.*, 2000 WL 62964 (Del. Ch. Jan. 7, 2000); *In re Diamond Shamrock Corp.*, 1988 WL 94752 (Del. Ch. Sept. 14, 1988).

defer to the negotiated fee in this case. Instead, in the exercise of my discretion, I award $400,000 in attorney fees and expenses, consistent with this Court's earlier decisions in similar circumstances.

III. CONCLUSION

For the foregoing reasons, I will approve the settlement, certify the class, and award attorneys' fees in the amount of $400,000 inclusive of expenses. Class counsel should submit a conforming Order within ten days from this date.

Very truly yours,

William B. Chandler III

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