

**IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE**

PUBLIC EMPLOYEES’ RETIREMENT )  
SYSTEM OF MISSISSIPPI, Individually )  
and on Behalf of All Others Similarly )  
Situating, ) C. A. No. 2018-0484-JTL  
Plaintiff, )  
v. )  
ROBERT C. SKAGGS, JR., STEPHEN P. )  
SMITH, and TRANSCANADA )  
CORPORATION, )  
Defendants. )

**PLAINTIFF’S MOTION FOR PARTIAL SUMMARY JUDGMENT**

Under Court of Chancery Rule 56, Plaintiff Public Employees’ Retirement System of Mississippi (“Plaintiff”) hereby moves for partial summary judgment on: (i) Count I of Plaintiff’s Verified Amended Stockholder Class Action Complaint (the “Complaint”) against Defendants Robert C. Skaggs, Jr. (“Skaggs”) and Stephen P. Smith (“Smith”) and (ii) Count IV against Defendant TransCanada Corporation (“TransCanada”). In support of its motion, Plaintiff states as follows.

**FACTUAL BACKGROUND**

1. This action challenges the 2016 sale of Columbia Pipeline Group, Inc. (“Columbia”) to TransCanada (the “Merger”).
2. Plaintiff alleges that Skaggs (who was Columbia’s Chairman and CEO at the time of the Merger) and Smith (who was Columbia’s CFO at the time of the Merger) committed breaches of fiduciary duty in connection with the

Merger. Plaintiff further alleges that Skaggs's and Smith's breaches of fiduciary duty were aided-and-abetted by TransCanada.

3. Count I of the Complaint asserts claims against Skaggs and Smith for breaching their fiduciary duty of candor in connection with the Merger. Specifically, Plaintiff alleges that Skaggs and Smith caused Columbia to issue, and secure stockholder approval for the Merger based on, a materially false and misleading proxy statement (the "Proxy"). Count IV of the Complaint asserts claims against TransCanada for aiding and abetting Skaggs's and Smith's breaches of fiduciary duty, including their breaches of the duty of candor.

4. This Court previously adjudicated appraisal claims concerning the Merger in *In re Appraisal of Columbia Pipeline Group, Inc.*, C.A. No. 12736-VCL (the "Appraisal Action"). The Court held a five-day trial in the Appraisal Action from October 29 through November 2, 2018. Following extensive post-trial briefing, the Court issued a post-trial Memorandum Opinion on August 12, 2019. *In re Appraisal of Columbia Pipeline Grp. Inc.*, 2019 WL 3778370 (Del. Ch. Aug. 12, 2019) (the "Appraisal Opinion").

5. In its Appraisal Opinion, the Court unambiguously ruled: "The petitioners proved that the Proxy contained material misstatements and omissions." *Appraisal Opinion*, 2019 WL 3778370, at \*36. The Court identified three specific categories of material misstatements and omissions: (i) the Proxy's failure to

disclose Skaggs's and Smith's plans to retire in 2016 (*id.*); (ii) the Proxy's materially incomplete disclosure regarding Smith's January 7, 2016 meeting with TransCanada executive Francois Poirier ("Poirier") (*id.*); and (iii) the Proxy's incomplete and misleading disclosures concerning Columbia's NDAs, including its failure to disclose that TransCanada had breached its standstill agreement (*id.* at \*35–36).

6. The misstatements and omissions identified by the Court in the Appraisal Opinion are precisely the same misstatements and omissions on which Plaintiff's duty of candor claims against Skaggs and Smith are based (*see* Amended Complaint at ¶159).

### **ARGUMENT**

7. Summary judgment is appropriate when there is "no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Ct. Ch. R. 56(c). Partial summary judgment should be granted when a portion of the action can be resolved on the existing record. Ct. Ch. R. 56(d). *See also Dieckman v. Regency GP LP*, 2019 WL 5576886 (Del. Ch. Oct. 29, 2019). The party opposing summary judgment may not rest on mere denials and instead must "demonstrate that there are genuine issues of material fact that must be resolved at trial." *Paul v. Deloitte & Touche LLP*, 974 A.2d 140, 145 (Del. 2009).

8. Here, there is no genuine issue of material fact that Skaggs and Smith are liable for breach of the fiduciary duty of candor. “To establish liability for the breach of a fiduciary duty, a plaintiff must demonstrate that the defendant owed her a fiduciary duty and that the defendant breached it.” *Estate of Eller v. Bartron*, 31 A.3d 895, 897 (Del. 2011).

9. Smith and Skaggs were officers or directors of Columbia at the time of the Merger. They therefore owed “identical fiduciary duties”<sup>1</sup> to Columbia stockholders, including a duty to “disclose to shareholders all material facts bearing upon a merger vote[.]”<sup>2</sup>

10. The Appraisal Opinion establishes conclusively that Skaggs and Smith breached that duty. On the basis of a “vast” evidentiary record concerning the Merger (*see Appraisal Opinion*, 2019 WL 3778370, at \*1)—including deposition and trial testimony of both Skaggs and Smith—this Court found that “the Proxy contained material misstatements and omissions” of information known by Skaggs or Smith. *Id.* at \*36.

11. As noted above, this Court found “material” the “Proxy’s failure to disclose that Skaggs and Smith were planning to retire in 2016.” *Id.* The Court likewise found “material” that the “Proxy failed to mention” the “most troubling

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<sup>1</sup> *Gantler v. Stephens*, 965 A.2d 695, 709 n.36 (Del. 2009).

<sup>2</sup> *Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1156, 1163 (Del. 1995) (internal quotations omitted).

event in the deal timeline”: that “Smith invited a bid and told Poirier that TransCanada did not face competition.” *Id.* at \*29, 36. Finally, the Court found “material” that the Proxy did not disclose that “all four parties” pursuing Columbia “were subject to standstills with DADWs, that TransCanada breached its standstill, and that Columbia opted to ignore TransCanada’s breach.” *Id.* at \*35.

12. In light of this Court’s findings, neither Smith nor Skaggs, who signed the Proxy cover letter (*see* Ex. A hereto (Proxy cover letter)), can credibly argue that they disclosed all material information in connection with the Merger. Summary judgment as to Count I of the Complaint should therefore be entered in Plaintiff’s favor.

13. Partial summary judgment as to Count IV of the Complaint (aiding and abetting against TransCanada) should likewise be entered in Plaintiff’s favor. A defendant is liable for aiding-and-abetting another party’s breach of fiduciary duty where it “knowingly participated in the fiduciary’s breach of duty[,]” *i.e.*, acted “with the knowledge that the conduct advocated or assisted constitutes” a breach of duty *Gatz v. Ponsoldt*, 925 A.2d 1265, 1275-76 (Del. 2007) (citation and internal quotations omitted).

14. TransCanada participated in the preparation and dissemination of the Proxy. Under the Merger agreement, TransCanada was permitted to “review and comment” on the Proxy and was explicitly obligated to correct any information in

the Proxy that TransCanada knew was incorrect or incomplete. Ex. B hereto (Merger Agreement excerpts) at §§ 5.01-02. As a result, TransCanada knew that Skaggs and Smith had not disclosed TransCanada's breach of its standstill in the Proxy and yet allowed the Proxy to remain materially incomplete.

15. TransCanada also knew that the Proxy did not disclose highly material information concerning Poirier's meeting with Smith<sup>3</sup> and yet failed to correct the Proxy. Accordingly, partial summary judgment as to Count IV of the Complaint should also be entered in Plaintiff's favor.

### **CONCLUSION**

For the foregoing reasons, Plaintiff respectfully requests that its motion for partial summary judgment be granted.

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<sup>3</sup> As an executive of TransCanada, Poirier's knowledge is "imputed to" TransCanada "for purposes of the knowing participation element of a claim for aiding and abetting." *In re PLX Tech. Inc. S'holders Litig.*, 2018 WL 5018535, at \*2 (Del. Ch. Oct. 16, 2018).

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Dated: March 24, 2020

Words: 1,150

**CERTIFICATE OF SERVICE**

I, Ned Weinberger, hereby certify that, on March 24, 2020, I caused a true and correct copy of Plaintiff's Motion for Partial Summary Judgment to be served on the following counsel of record by File and ServeXpress:

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