IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE COLUMBIA PIPELINE GROUP, INC. MERGER LITIGATION	))	Cons. C.A. No. 2018-0484-JTL

ORDER GRANTING IN PART PLAINTIFFS' MOTION IN LIMINE TO PRECLUDE PROPOSED EXPERT TESTIMONY OF GUHAN SUBRAMANIAN

1. The plaintiffs have filed a motion in limine to preclude the expert testimony of Guhan Subramanian. This order grants the motion in part.

2. Rule 702 permits expert opinion testimony when the expert's "specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." D.R.E. 702(a).

3. An expert cannot displace the court's role by offering conclusions of law or purporting to make specific factual findings. "This court . . . has made it unmistakably clear that it is improper for witnesses to opine on legal issues governed by Delaware law. It is within the exclusive providence of this Court to determine such issues of domestic law." *United Rentals, Inc. v. RAM Hldgs., Inc.*, 2007 WL 4465520, at *1 (Del. Ch. Dec. 13, 2007) (footnotes omitted); *accord Itek Corp. v. Chi. Aerial Indus., Inc.*, 274 A.2d 141, 143 (Del. 1971) ("Testimony from an expert is inadmissible if it expresses the expert's opinion concerning applicable domestic law. The reason, of course, is that it is exclusively within the province of the trial judge to determine issues of domestic law and to instruct the jury concerning them.").

4. An expert also cannot propose factual findings based on his personal view of the evidence. Under this reasoning, courts have excluded "factual narratives and interpretations of conduct or views as to the motivation of the parties." *In re Rezulin Prods.*

Liab. Litig., 309 F. Supp. 2d 531, 541 (S.D.N.Y. 2004) (footnote omitted). "[A]n expert opinion as to a defendant's state of mind is not only unnecessary, but inadmissible." *Carter v. Principe*, 2019 WL 193138, at *2 (Del. Super. Jan. 15, 2019), *rev'd on other grounds sub nom. Christiana Care Health Servs. Inc. v. Carter*, 223 A.3d 428 (2019). Where an expert is "not qualified as a psychologist, corporate history expert or soothsayer," the expert's "subjective testimony regarding [a party's] subjective intent . . . is not admissible as expert testimony pursuant to Delaware Rule of Evidence 702." *Hoechst Celanese Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 1994 WL 721624, at *1 (Del. Super. Apr. 20, 1994); *see Ferrari v. Helsman Mgmt. Servs., LLC*, 2020 WL 3429988, at *1 (Del. Super. June 23, 2020) (ORDER) ("Whether [a party's] actions amounted to bad faith and unfair dealing are issues to be determined by the trier of fact . . . . The ultimate conclusion involves assessment of [the party's] state of mind. State of mind is not appropriate for expert opinion."); *see also AstraZeneca UK Ltd. v. Watson Lab'ys, Inc. (NV)*, 2012 WL 6043266, at *2 (D. Del. Nov. 14, 2012) (excluding testimony on what pharmaceutical inventors "knew or intended").

5. An expert can testify as to whether a party's actions (irrespective of the party's state of mind) complied with or were consistent with industry standards and procedures. *See Ferrari*, 2020 WL 3429988, at *1. It is therefore "proper for an expert to testify as to the customs and standards of an industry and to opine as to how a party's conduct measured up against some such standards." *Primavera Familienstiftung v. Askin*, 130 F. Supp. 2d 450, 529 (S.D.N.Y. 2001), *abrogated on other grounds by Casey v. Merck & Co., Inc.*, 653 F.3d 95 (2d Cir. 2011). When providing such an opinion, the expert must

articulate the standards that he is using. If he bases his opinion on his own experience, he "must do more than aver conclusorily that his experience led to his opinion." *Id.* at 530. If the trier of fact, "without the assistance of the expert, [is] as capable of answering a question as an expert, then the expert's opinion would not be helpful and is not admissible under D.R.E. 702." *Jolly v. State*, 670 A.2d 1338, 1995 WL 715868, at *1 (Del. Nov. 22, 1995) (TABLE).

6. An expert opinion cannot use testimony that purportedly addresses custom and practice as a backdoor way to express opinions on the law. *See Forsythe v. ESC Fund Mgmt. Co. (U.S.), Inc.*, 2010 WL 1676442, at *2 (Del. Ch. Apr. 21, 2010). In the *Forsythe* case, the expert claimed "to be testifying about custom and practice in the financial services business in the context of applicable industry standards, such as guidelines adopted by the Financial Industry Regulatory Association, the Chartered Financial Analyst Institute, and the Private Equity Council." *Id.* The court excluded the testimony because "[w]hat his report actually express[ed] [were] opinions concerning legal issues governed by Delaware law." *Id.* An expert opinion that reads like a post-trial opinion and tells the court how to view the evidence is neither helpful nor of assistance to the trier of fact within the meaning of Rules of Evidence 701 and 702. *Lazard Tech. P'rs LLC v. Qinetiq N. Am. Operations LLC*, 2014 WL 710114, at *1 (Del. Ch. Feb. 24, 2014) (ORDER). This court has excluded an expert opinion that sought to opine on whether the defendants breached their fiduciary duties. *In re The Walt Disney Co. Deriv. Litig.*, 2004 WL 550750, at *1 (Del. Ch. Mar. 9, 2004). A court has discretion about whether to preclude the expert or strike or disregard

the offending sections. *In re Appraisal of Columbia Pipeline Gp., Inc.*, 2018 WL 5044424, at *1 (Del. Ch. Oct. 16, 2018) (ORDER).

7. The plaintiffs are pursuing a claim against TC Energy Corporation ("TransCanada") for aiding and abetting alleged breaches of fiduciary duty by the officers of Columbia Pipeline Group, Inc. ("Columbia"). The plaintiffs maintain that the officers breached their duty of loyalty because their decisions were tainted with self-interest, that the officers misled the board of directors into approving a sale to TransCanada at too low a price, and that TransCanada knowingly took advantage of the officers' breaches during the negotiation process. The plaintiffs also maintain that the disclosures issued in connection with the sale omitted material information and that TransCanada knew of those omissions. Important questions for the court to decide include whether the officers made decisions that were tainted with self-interest, whether TransCanada knew about and took advantage of their conflicts, and whether the disclosure documents omitted material information.

8. TransCanada has submitted a report by Subramanian, who is a distinguished academic and an expert on M&A negotiations. Dkt. 399 Ex. A (the "Report"). This court has heard expert testimony from Subramanian in other cases, and he is certainly capable of providing expert analysis that is helpful to the court. The question is whether Subramanian has done so in this case.

9. According to TransCanada, Subramanian is applying his negotiation expertise to answer three questions: (1) Were TransCanada's negotiation tactics and strategy reasonable and consistent with negotiation best practices? (2) Were Columbia's

negotiation tactics and strategy reasonable and consistent with negotiation best practices? (3) Did the Proxy Statement omit facts that were significant to the overall negotiation? According to TransCanada, Subramanian is not opining as to legal issues or assessing the record to make findings of fact. During his deposition, Subramanian disavowed any desire to opine as to legal issues or make findings of fact.

10. Notwithstanding TransCanada and Subramanian's assertions, there are aspects of Subramanian's Report and opinions that go too far. The extent to which an expert report invades the province of the court always will be a matter of degree. In this case, Subramanian has crossed the line in several respects.

11. Taking the questions in reverse order, Subramanian's answer to the third question is really a legal opinion about materiality. The test for materiality is whether there is a substantial likelihood that the information "'would have assumed actual significance in the deliberations' of a person deciding whether to buy, sell, vote, or tender stock." *In re Oracle Corp. Deriv. Litig.*, 867 A.2d 904, 934 (Del. Ch. 2004) (quoting *Rosenblatt v. Getty Oil Co.*, 493 A.2d 929, 944 (Del. 1985)), *aff'd*, 872 A.2d 960 (Del. 2005) (TABLE). TransCanada and Subramanian have taken the key noun in the standard—significance—and used it to frame Subramanian's opinions.

12. TransCanada and Subramanian claim that Subramanian is not opining on significance in the sense of disclosure but rather addressing the significance of the undisclosed facts for purposes of the negotiations between Columbia and TransCanada. They say that Subramanian's opinions shed light on whether it can be inferred that TransCanada knew the information should have been included in the Proxy Statement. This

is a clever way to have Subramanian opine on materiality by claiming to address an adjacent area. But there is no daylight there. The omissions are from the section in the Proxy Statement that addresses the background of the merger. That section describes the negotiations between Columbia and TransCanada. Whether a fact is material in that context turns on whether it had actual significance in the context of the negotiations between Columbia and TransCanada. Subramanian is applying the *Rosenblatt* standard.

13. The question of materiality, whether framed as materiality or "significance," is an issue for the court. Subramanian is precluded from providing his opinions on the facts omitted from the Proxy Statement. He may not offer testimony on the matters covered in Part IV of his Report.

14. By contrast, Subramanian's answers to the first two questions contain a mix of proper and improper expert opinion. The clearest example of proper expert opinion appears in Part III.D.1 of the Report, where Subramanian compares the bump that Columbia's negotiators achieved with a broader market sample. Subramanian's assessment of the extent of the incentives created by Smith's and Skaggs' change-in-control payments is also helpful. In that section, Subramanian analyzes the incentives created from Smith's and Skaggs' change-in-control payments versus their underlying stock ownership and frames the analysis in terms of low-powered versus high-powered incentives. *See* Report Part III.A.

15. Other aspects of Subramanian's opinions fall into a gray area. Examples include his opinions on whether and to what degree the granting of exclusivity and the sharing of talking points during a meeting on January 7, 2016, affected the negotiation

process. They find support in his academic writings and experience, but Subramanian's Report does not provide a meaningful basis for evaluation. He largely offers his personal thinking and judgment. His opinions on the sale process in this case thus differ from the helpful analysis he offered about the management-led buyout in *Dell*, which rested not only on his thinking and judgment, but also on a data set of management buyouts that he collected and analyzed in 2008, plus an updated data set that he collected and analyzed for purposes of his opinion.[1] In the Report in this case, Subramanian did not undergird his opinions with similarly rigorous analysis. He simply offered views based on his thinking and judgment. Strikingly, for the concept of sharing the talking points, he cited his personal practice of sharing the slide decks for his lectures. That is a context facially distinct from an M&A negotiation. *See* Report ¶ 46.

16. Given the lack of a methodology to support his opinions, the court could exclude these aspects of the Report. But because this is a gray area, the court will err on the side of permitting Subramanian to express these opinions. Nevertheless, Subramanian only may frame his testimony in terms of whether the actions in question are consistent with best practices in negotiating M&A transactions. In his Report, Subramanian opines as to whether the actions are "reasonable and consistent with negotiation best practices." *See* Report ¶ 33. By introducing the concept of reasonableness, Subramanian and TransCanada

[1] *See In re Appraisal of Dell Inc.*, 2016 WL 3186538, at *39–44 (Del. Ch. May 31, 2016), *aff'd in part, rev'd in part sub nom. Dell, Inc. v. Magnetar Glob. Event Driven Master Fund Ltd*, 177 A.3d 1 (Del. 2017). The *Dell* case also differed from this one in that *Dell* was an appraisal proceeding where Subramanian's analysis of the sale process ultimately fed into the issue of valuation. There was not the same degree of overlap between the subjects of Subramanian's opinions and the legal issues in the case.

are doing the same thing they tried to do through Subramanian's opinions about significance—they are taking a key word that embodies an applicable legal standard, then having Subramanian frame his opinions using that standard while purporting to address an adjacent area. In this instance, the test for measuring a breach of fiduciary duty is whether the conduct of Columbia's fiduciaries "fell outside the range of reasonableness." *In re Columbia Pipeline Grp., Inc. Merger Litig.*, 2021 WL 772562, at *51 (Del. Ch. Mar. 1, 2021). By opining on reasonableness, Subramanian is expressing a backdoor legal opinion.

17. Another aspect of the Report that falls into a gray area is Subramanian's thoughts on intent or knowledge. For example, Subramanian opines that by sharing the talking points on January 7, 2016, Smith could have been intending to enhance the credibility of his statements, and Poirier could have interpreted it that way. Here too, the Report lacks any real expert analysis to support Subramanian's views. Once again, Subramanian seems to be looking at the record and drawing conclusions, as a court would do. Nevertheless, because Subramanian has expertise in negotiations, and because he offers explanations based on that experience, the court will permit him to offer opinion testimony on this subject. Subramanian cannot, however, testify as to whether Smith *was* seeking to enhance the credibility of his statements, and whether in fact Poirier *did* interpret them that way. The same is true for the aspects of the Report in which Subramanian expresses opinions about state of mind. Those factual determinations are for the court to make.

18. Other aspects of Subramanian's opinions plainly cross the line. In Part III.B of his Report, Subramanian opines that the Columbia board was independent, sophisticated, and involved. Most of that section of his Report reads like a Delaware

judicial opinion. He is effectively finding facts. He includes three paragraphs that are designed to make it seem like he is offering an opinion. In two of those paragraphs, he makes broad generalizations about the division of responsibility in an M&A process between boards and high-level executives and officers. He provides nothing in the nature of expert analysis to support his assertions. In the third paragraph, he describes an instance from his personal experience. These paragraphs are not enough to save the opinions in this section. Subramanian may not offer testimony on the opinions expressed in Part III.B of his Report.

19. The same is true for Part III.C of his Report, where Subramanian offers what is effectively a proposed factual finding that the Company hired sophisticated and experienced advisors. He also addresses the relationships between Company management and TransCanada's investment advisor, and he offers the following opinion: "In my opinion, these contacts are what one would expect of a senior banker in the industry. I see nothing in the record indicating that [the banker's] role on behalf of TransCanada went beyond a typical banker role in this kind of transaction." Report ¶ 117. He offers nothing in the way of expert methodology or analysis to support these opinions. Subramanian may not offer testimony on the opinions expressed in Part III.C of his Report.

20. Subramanian also offers impermissible opinions about the Standstill Agreement in Part II.C of his Report. Although he claims not to offer a legal opinion, he proceeds to analyze a sentence of the agreement and offer an opinion about its implications. He then cites a monograph on confidentiality agreements in support of his interpretation, just as a court or lawyer would do. He then opines about what the record shows about

whether the parties believed the Standstill Agreement was breached, effectively interpreting the agreement using extrinsic evidence. These aspects of his opinion invade the province of the court. Although Subramanian also makes the uncontroversial observation that confidentiality agreements and standstill agreements are widely used, that fig leaf does not cover the impropriety.

21. There are many ways in which Subramanian might have provided helpful expert opinions about standstill agreements. He could have analyzed the prevalence of Don't-Ask-Don't-Waive standstills in the marketplace. He might have collected data on and analyzed whether there are different formulations of Don't-Ask-Don't-Waive standstills, then evaluated how tight or loose the different formulations are. He might have provided a helpful opinion about how often bidders make approaches to targets notwithstanding the presence of a Don't-Ask-Don't-Waive provision. He might have collected other evidence of market practice to show whether M&A market participants generally regard Don't-Ask-Don't-Waive provisions as prohibiting any overture, or whether they only regard Don't-Ask-Don't-Waive provisions as barring approaches that rise to a higher level, such as an expression of interest.

22. Subramanian did not do any of these things. He simply looked at the language of the standstill agreement and considered evidence in the record, just like a court would do. Subramanian may not offer testimony on the topics in Part II.C of his Report.

23. Experts and pundits both express opinions. In litigation, an expert can help the court by providing well-supported opinions on matters suitable for expert testimony. That is what Subramanian did in *Dell*. He opinions were well-supported, and the court

found them persuasive and relied on them. The court is aware of other instances in which Subramanian has provided helpful and well-supported expert testimony. Indeed, that is what the court has come to expect from Subramanian and other high-caliber experts. It would have been helpful to have the benefit of a report of similar quality in this case. It is disappointing that this time, Subramanian mainly played the pundit. Perhaps that is what he was hired to do, and the real responsibility for framing the issues that he addressed lies elsewhere. Regardless, in doing so, he expressed opinions in sections of the Report that exceed his purview as an expert.

24. The court has called out the sections of the Report where Subramanian went astray. This order has not attempted to cite every point where Subramanian summarized or repeated his opinions. Subramanian may not testify on the subjects identified in this order, regardless of where they appear in the Report.

25. The motion in limine is therefore granted in part.

Vice Chancellor Laster
July 14, 2022