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Case No. 11580-VCL

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE GOOD TECHNOLOGY CORPORATION STOCKHOLDER LITIGATION	C.A. No. 11580-VCL

ORDER APPROVING THE SETTLEMENT DISTRIBUTION LIST

1. The plaintiffs asserted claims against the directors of Good Technology Corporation ("Good"), certain of their affiliates, and J.P. Morgan Securities LLC ("JP Morgan"). The named defendants initially included former Good director Russell E. Planitzer and LTP Fund II, LP ("LTP"), an investment fund that Planitzer managed.

2. On March 10, 2017, the plaintiffs dismissed their claims against Planitzer and LTP with prejudice as to the named plaintiffs and without prejudice as to all other members of the putative class. Dkt. 290.

3. On August 21, 2017, Plaintiffs and defendant entered into a Stipulation and Agreement of Compromise and Settlement (the "Stipulation") with JP Morgan. The Stipulation defined the Class as follows:

> "Class" means the Class certified by the Court on May 12, 2017, of all holders of Good Technology Corporation common stock on October 30, 2015, whether beneficial or of record, including their legal representatives, heirs, successors in interests, transferees and assignees of all such foregoing holders, *but excluding the defendants in the Action and their associates, affiliates, legal representatives, heirs, successors in interest, transferees and assignees*. For the avoidance of doubt and notwithstanding the foregoing exclusions, no beneficial or record holder of Good common stock on October 30, 2015 shall be excluded from the Class solely on the basis that JP Morgan or JP Morgan affiliates managed, advised or held a non-proprietary position in such common stock on behalf of such holder whether through an investment company, separately managed account or some pooled investment fund, or some other investment vehicle.

Dkt. 396 ¶ 1.D (emphasis added).

4. The settlement contemplates that JP Morgan will make a payment of $35 million for distribution to the Class.

5. Paragraph 7 of the Stipulation stated: "Following the Effective Date, the Administrator shall distribute the Net Settlement Amount to the Settlement Payment Recipients as approved by the Court." The Notice of Pendency and Proposed Settlement of Class Action attached to the Stipulation described a plan of allocation whereby Plaintiffs' Counsel would work with an administrator "to oversee the administration of the Settlement . . . and to identify the Settlement Payment Recipients from the list of potential Class Members provided by Good." Dkt. 396 at B-10.

6. The court entered an Order and Final Judgment on April 5, 2018, approving the settlement and directing the settling partners to consummate the settlement pursuant to the terms of the Stipulation. Dkt. 439.

7. Good provided the plaintiffs with a list of the recipients of the merger proceeds at closing. The designated class administrator issued exclusion notices to fifteen stockholders on the closing list, including Planitzer and LTP. Planitzer and LTP objected to their exclusion. Another investment fund also objected but has since withdrawn its objection. The plaintiffs moved for approval of the settlement distribution list.

8. When interpreting the class definition in a settlement agreement, "the role of a court is to effectuate the parties' intent." *In re Jefferies Gp., Inc. S'holders Litig.*, 2015 WL 151618, at *2 (Del. Ch. Jan. 13, 2015) (quoting *Lorillard Tobacco Co. v. Am. Legacy*

Found., 903 A.2d 728, 739 (Del. 2006)). "In doing so, [the court is] constrained by a combination of the parties' words and the plain meaning of those words where no special meaning is intended." *Lorillard Tobacco*, 903 A.2d at 739. "Clear and unambiguous language . . . should be given its ordinary and usual meaning." *Id.* (quoting *Rhone-Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1195 (Del. 1992)).

9. Here, the Class definition excludes the defendants and their associates and affiliates. In my view, whether Planitzer and LTP fall within the exclusion must be measured at the time the order approving the settlement was entered. *Cf. In re Celera Corp. S'holder Litig.*, 59 A.3d 418, 436 (Del. 2012) (calling for judicial assessments of settlements to be made "at the time of the settlement . . . hearing").

10. Under this temporal test, Planitzer and LTP are not excluded as defendants, because they were not defendants at the time of settlement approval. To my mind, this textual result makes sense. Developments happen over the course of a case. A plaintiff may believe it has claims against particular defendants, and those claims might even survive a motion to dismiss, but a plaintiff might later for a variety of reasons dismiss those defendants. Perhaps for tactical reasons, the plaintiffs wished to focus on other defendants. Perhaps the plaintiffs decided that the evidence did not support the claims. Perhaps the evidence supported a claim for breach of duty, but not a non-exculpated claim for which liability could be imposed. Consequently, absent contractual language specifying otherwise, the defendants for purposes of a settlement should be those at the time of court approval.

11. The Class definition also excludes parties who are affiliates or associates of the defendants. In my experience, when sophisticated parties in corporate litigation use these terms, they base their understanding on the widely used definitions adopted by the federal securities laws.

12. The implementing regulations for the Securities Act of 1933 define the term "affiliate" as follows: "An *affiliate* of, or a person *affiliated* with, a specified person, is a person that directly, or indirectly through one or more intermediaries, controls or is controlled by, or is under common control with, the person specified." 17 C.F.R. § 230.405; *accord* 17 C.F.R. § 240.12b-2. The term "control" means "the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise." 17 C.F.R. § 230.405; *accord* 17 C.F.R. § 240.12b-2. The plaintiffs have not shown that Planitzer or LTP was controlled by or under common control with the defendants.

13. The implementing regulations define the term "associate" as follows:

> The term associate, when used to indicate a relationship with any person, means
>
> (1) a corporation or organization (other than the registrant or a majority-owned subsidiary of the registrant) of which such person is an officer or partner or is, directly or indirectly, the beneficial owner of 10 percent or more of any class of equity securities,
>
> (2) any trust or other estate in which such person has a substantial beneficial interest or as to which such person serves as trustee or in a similar capacity, and
>
> (3) any relative or spouse of such person, or any relative of such spouse, who has the same home as such person or who is a director or officer of the registrant or any of its parents or subsidiaries.

Id. (formatting added); *accord* 17 C.F.R. § 240.14a-1(a). The plaintiffs have not shown that Planitzer and LTP fall within this definition either.

13. The plaintiffs finally argue that Planitzer and LTP waived their right to participate in the settlement by actively opposing the plaintiffs' litigation efforts. During this litigation, before their dismissal, Planitzer and LTP defended the case as part of a united front with the other defendants. After being dismissed, Planitzer gave testimony that the plaintiffs regard as favorable to the defendants. But Planitzer did more. He also voted in favor of amending a voting agreement that the defendants sought to use to bar the entire litigation. He also approved Good's filing of an action against the named plaintiffs which sought to enjoin them from bringing this litigation.

14. "Waiver is the voluntary and intentional relinquishment of a known right." *Realty Growth Inv'rs v. Council of Unit Owners*, 453 A.2d 450, 456 (Del. 1982). If Planitzer had only defended against the plaintiffs' claims in this litigation and then subsequently testified by deposition, then I would not view him as having waived his right to participate in the recovery. By voting to amend the voting agreement, however, Planitzer demonstrated that he did not want this action to go forward at all, making obvious his view that there should not be any recovery. By later authorizing Good's lawsuit against the plaintiffs, Planitzer again made his position clear. As the manager of LTP, Planitzer's actions are attributed to LTP. To my mind, it would be incongruous and inconsistent with Planitzer's actions to allow Planitzer and LTP to participate in a Class-wide recovery when Planitzer took extrajudicial steps in an effort to prevent the lawsuit from happening in the

first place. Conduct that runs so contrary to the interests of the Class amounts to clear indication of waiver.

19. The motion is GRANTED.

Vice Chancellor Laster
Dated: July 31, 2018