EFiled: May 27 2005 4:03PM EDT
Filing ID 5910236

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

MAE JEAN ROSSER, individually and on behalf of all others similarly situated,

Plaintiff,

v.

NEW VALLEY CORPORATION, BROOKE GROUP LTD., BENNETT S. LEBOW, HOWARD M. LORBER, RICHARD J. LAMPEN, J. BRYANT KIRKLAND III, HENRY C. BEINSTEIN, BARRY W. RIDINGS and ARNOLD I. BURNS,

Defendants.

C.A. No. 17272-NC

MEMORANDUM OPINION

Date Submitted: February 1, 2005
Date Decided: May 27, 2005

R. Bruce McNew, Esquire of Taylor & McNew LLP, Greenville, Delaware, and Francis J. Farina, Esquire, Devon, Pennsylvania, Peter A. Lennon, Esquire, Broomall, Pennsylvania, and Frederic S. Fox, Esquire of Kaplan Fox & Kilsheimer LLP, New York, New York, Attorneys for Plaintiff Mae Jean Rosser.

Michael D. Goldman, Esquire, Peter J. Walsh, Jr., Esquire, and Brian C. Ralston, Esquire of Potter Anderson & Corroon LLP, Wilmington, Delaware, and Michael L. Hirschfeld, Esquire, and Stacey J. Rappaport, Esquire of Milbank, Tweed, Hadley & McCloy LLP, New York, New York, Attorneys for Defendants New Valley Corporation, Brooke Group Ltd., Bennett S. Lebow, Howard M. Lorber, Richard J. Lampen, J. Bryant Kirkland III, Henry C. Beinstein, Barry W. Ridings, and Arnold I. Burns.

NOBLE, Vice Chancellor

Defendants' motion for summary judgment raises the question of whether adequate disclosure was provided to holders of Class B Preferred stock of Nominal Defendant New Valley Corporation ("New Valley") when they were solicited to approve an internal recapitalization. According to Plaintiff Mae Jean Rosser, the recapitalization unfairly benefited New Valley directors to the detriment of the Class B Preferred shareholders. Each class of New Valley stock, by a majority of the shares voted by disinterested shareholders, approved the recapitalization. That approval, if made on a fairly and fully informed basis, either would restore the business judgment rule's presumptions or would shift the burden to the Plaintiff to show that the recapitalization was unfair to Class B Preferred shareholders. Of concern to the Plaintiff are New Valley's disclosures in its Proxy Statement regarding (1) whether the fairness opinion provided by Pennsylvania Merchant Group ("PMG") was misleading in its representation that the reorganization was "fair," if, in fact, fairness with respect to each class of New Valley stock was never evaluated; (2) whether the Proxy Statement was inadequate because it failed to disclose the identity of the shareholders who initially suggested the recapitalization; and (3) whether the Proxy Statement was insufficient because it failed to disclose separate valuations of New Valley's various assets and lines of business.[1] For the reasons set forth below, the Defendants' motion for summary judgment will be granted.

I. PARTIES

The Plaintiff, purporting to act on behalf of herself and other former New Valley Class B Preferred shareholders, brought this action against New Valley, a Delaware corporation, and its directors: Defendants Bennett S. Lebow, Howard M. Lorber, Richard J. Lampen, J. Bryant Kirkland III, Henry C. Beinstein, Barry W. Ridings, and Arnold I. Burns. Additionally, the Plaintiff named Brooke Group Ltd., controlled by director defendant Lebow, as a defendant. New Valley's officers and directors and Brooke Group, at the time of the recapitalization, collectively owned 43.1% of New Valley's common shares, 61.1% of the Class A Preferred shares, and 11.3% of the Class B Preferred shares.[2]

II. FACTUAL BACKGROUND

New Valley concluded that its stock traded at a substantial discount due to its complex capital structure.[3] Thus, it proposed an internal recapitalization plan (the "Plan") on May 21, 1999, with the purpose of converting all equity holdings to

---

[1] In her complaint, the Plaintiff identified six other shortcomings in the Proxy Statement. Claims based on those allegations were dismissed under Court of Chancery Rule 12(b)(6). *See Rosser v. New Valley Corp.*, 2000 WL 1206677 (Del. Ch. Aug. 15, 2000) [hereinafter "*Rosser I*"].
[2] The Defendants contend that they held only 10.2% of the Class B Preferred shares. The discrepancy, which traces back to the Plaintiff's treatment of certain options, is immaterial.
[3] Revising the capital structure was first suggested by Steven G. Lampe, a large Class B Preferred shareholder not affiliated with New Valley, and by Anthony Tedeschi and Scott Williams, who were registered representatives of PMG and communicating on behalf of a few of their PMG brokerage account customers.

one class of common stock (and warrants for that common stock). Before the recapitalization, New Valley had the following capital structure: Class A Preferred, which was the most senior stock, had dividend and liquidation preferences and was entitled to dividend arrearages; Class B Preferred, which was junior to the Class A Preferred, had liquidation and dividend preferences and was also entitled to dividend arrearages; and common shares, which were junior to the Class A and B Preferred shares.

Under the Plan, New Valley's old shares were exchanged for new shares in the following manner: each Class A Preferred share lost its dividend and liquidation preferences and was converted into twenty new common shares and one warrant to purchase an additional share; each Class B Preferred share lost its dividend and liquidation preferences and was converted into one-third of a new common share and warrants to purchase five additional new common shares; each old common share was converted into one-tenth of a new common share and three-tenths of a warrant for an additional new common share. The warrants had an exercise price of $12.50—substantially more than New Valley common stock traded following implementation of the Plan—and were exercisable for five years.

A somewhat quantitative description of the methodology behind the recapitalization may be helpful in understanding the dispute.[4] As of March 31, 1999, the total dividend arrearage due Class A Preferred shareholders was $234.6 million. On January 1, 2003, in the absence of the Plan or other arrangement, each Class A Preferred share would have been subject to mandatory redemption at a price of $100 per share (for a total of $107.1 million), plus accrued dividends. The total dividend arrearage for Class B Preferred shares, as of March 31, 1999, was $172.9 million. Those shares were entitled, in the event of liquidation, to $25 per share (for a total of approximately $69.8 million), plus accrued dividends. Of course, those sums due (or which might have become due) the Class B Preferred shareholders were all subordinate to the obligations owed to the Class A Preferred shareholders.[5]

PMG determined that the fair value of New Valley, at the time of the recapitalization, was $184.4 million.[6] Thus, before the recapitalization, the Class A Preferred shareholders were owed dividend arrearages in excess of the fair value of the New Valley enterprise.

---

[4] The Proxy Statement appears at Hirschfeld Aff., Ex. A. PMG's fairness opinion is Appendix A to the Proxy Statement. The background to the fairness opinion, which contains materials prepared by PMG to support that opinion, can be found at Hirschfeld Aff., Ex. B.

[5] Proxy Statement, at 58-59.

[6] This would equate to $7.91 for each new common share following recapitalization.

Ameliorating this difficult capital structure was a purported goal of the recapitalization.[7] In the Defendants' view, the Plan sought to simulate the relative pre-recapitalization economic positions of the various classes of New Valley stock. Because the Class A Preferred shares had the most senior position, a large percentage of the post-recapitalization common stock was assigned to their shareholders. The relatively small number of shares available to the Class B Preferred shareholders was designed to reflect the likelihood that, if no recapitalization or significant corporate performance changes occurred before the Class A Preferred shares' mandatory redemption occurred and dividend arrearages were paid, the Class B Preferred shareholders had little positive value to expect from their holdings in New Valley. On the other hand, the relatively large number of warrants issued to the Class B Preferred shareholders was designed to replicate the Class B Preferred shareholders' then-current upside potential in New Valley in the event that the enterprise value ever significantly exceeded the dividend arrearages and other rights accruing to the Class A Preferred stockholders. Because the status of the Class B Preferred shares was unfavorable in relation to the obligations owed to the Class A Preferred shareholders, the warrants were exercisable at a high, perhaps unlikely to be obtained, price. In short, a drastic

[7] The market capitalization of New Valley at this time was approximately $81.1 million, thus reflecting a market discount of approximately 56%. Hirschfeld Aff., Ex. B, at NV 00563.

spike in New Valley's economic fortunes would have to occur before their shares would have appreciable value. Since the pre-recapitalization common shares had little claim to New Valley (because they were junior to both the Class A Preferred and Class B Preferred shares, both of which were entitled to substantial dividend arrearages), they also would convert into a relatively small number of post-recapitalization common shares and warrants.

In addition, by converting the equity to one class of new common stock and by allocating to Class A Preferred shareholders relatively more new common stock than to Class B Preferred shareholders and common shareholders, the Brooke Group and the defendant directors gained voting control of New Valley.[8]

New Valley's shareholders were induced, in part, to approve the recapitalization through a fairness opinion prepared by PMG and supplied to them with the Proxy Statement.[9] The fairness opinion concluded "that the consideration to be received by the shareholders in the Recapitalization is, from a financial point of view, fair."[10] According to the PMG banker principally responsible for the fairness opinion, PMG, in the course of developing the fairness opinion, examined

[8] Upon implementation of the Plan, the former Class A Preferred shareholders held 91.9% of the new common shares; the former Class B Preferred shareholders held 4.0%; and the former common shareholders held 4.1%. Before the recapitalization, the Class A Preferred shareholders held 4.87% of the shareholder voting power. The Defendants received 55% of the new common shares.

[9] Following public announcement of the Plan, the Class A Preferred shares traded higher and the Class B Preferred shares traded lower.

[10] Proxy Statement, App. A, at 2.

and determined that the restructuring was fair to the shareholders of each class of New Valley stock.[11]

At a special shareholders' meeting on May 21, 1999, 82.7% of the Class A Preferred shares, 68.6% (approximately 58% if the shares controlled by Brooke Group and New Valley's officers and directors are not counted) of the Class B Preferred shares, and 53.2% of the old common shares voted in favor of the Plan. Of the Class B Preferred shares which were not held by the Defendants but were voted, approximately 89% voted in favor of the Plan.[12]

III. CONTENTIONS

The Plaintiff claims that the Plan was unfair to Class B Preferred shareholders because it stripped away most of those shares' value for the benefit of Class A Preferred shareholders and constituted self-dealing because Brooke Group and New Valley's officers and directors were substantial holders of Class A

---

[11] Parke Dep. at 138-39:

> Q: In performing the analysis, the fairness analysis that you did, did PMG examine the fairness to the holders of the Class A preferred securities viewed just by themselves? In other words, did PMG determine as part of its fairness analysis that the proposed transaction was fair to the holders of the Class A preferred shares?
>
> A: Yes.
>
> Q: And did PMG separately determine as part of its fairness analysis that the proposed recapitalization was fair to the holders of the Class B preferred shares?
>
> A: Yes
>
> Q: And did PMG as part of its fairness analysis separately examine and determine whether the proposed recapitalization was fair to the holders of the old common stock of New Valley?
>
> A: Yes.

[12] Hirschfeld Aff., Ex. C, at 24.

Preferred stock. The Defendants assert that the recapitalization was approved and, thus, ratified by a vote of disinterested and informed shareholders representing a majority of each of the three classes of stock. In response to the ratification argument, the Plaintiff asserts that the vote was tainted because New Valley's Proxy Statement failed to disclose all material information regarding the proposed transaction.

The Defendants, relying upon the defense of shareholder ratification, now seek summary judgment with respect to both the Plaintiff's challenge to the Plan and her challenges to the disclosures which survived their motion to dismiss: (1) the Proxy Statement failed to disclose that PMG's opinion did not evaluate the fairness of the Plan as it related to each individual class of stock;[13] (2) the Proxy Statement failed to disclose the identity of the shareholders who first suggested the recapitalization to New Valley; and (3) the Proxy Statement failed to disclose the value of New Valley's various assets or lines of business. The Plaintiff contends that the presence of disputed material facts precludes the relief sought by the Defendants.

[13] The fairness opinion stated "that the consideration to be received by the shareholders in the Recapitalization is, from a financial point of view, fair." Proxy Statement, App. A, at 2. The opinion did not expressly set forth that the Plan was fair to each class of shareholders and, if PMG did not make this distinction, the opinion "is likely irrelevant and perhaps even misleading." *Rosser I*, at *6.

IV. ANALYSIS

A. *The Standard for Summary Judgment*

To prevail on their motion for summary judgment, the Defendants must show "that there are no material, disputed issues of fact and that they are entitled to judgment as a matter of law."[14] All rational inferences are to be drawn in favor of the nonmoving party.[15]

While the moving party has certain burdens when pursuing summary judgment, the opposing party may carry burdens as well. For example, the moving party need not operate in a factual vacuum and, thus, the party opposing summary judgment must put forth *some* evidence to support her case. In other words,

> [I]n order to withstand a motion for summary judgment, the plaintiff is required to present some evidence, either direct or circumstantial, to support all of the elements of the claim. A motion for summary judgment is properly granted against a plaintiff who fails to make a showing sufficient to establish the existence of an element essential to the plaintiff's case, and on which the plaintiff will bear the burden of proof at trial.[16]

---

[14] *In re Oracle Corp. Deriv. Litig*., 867 A.2d 904, 926 (Del. Ch. 2004).

[15] *The Greylag 4 Maintenance Corp. v. Lynch-James*, 2004 WL 2694905, at *4 (Del. Ch. Nov. 18, 2004) ("When deciding a motion for summary judgment, the Court must view the facts in the light most favorable to the nonmoving party and the moving party has the burden of demonstrating that no material question of fact exists.").

[16] *Watson v. Taylor*, 2003 WL 21810822, at *2 (Del. Aug. 4, 2003), 829 A.2d 936 (TABLE).

Also, "[o]nce the moving party presents evidence that if undisputed would entitle it to summary judgment, the burden then shifts to the opposing party to dispute the facts by affidavit or proof of similar weight."[17]

B. *The Standard for Determining Adequacy of Disclosure*

The Plaintiff asserts fiduciary duty claims challenging the fairness of the Plan and the Defendants' candor in soliciting approval of the Plan by New Valley's shareholders. The outcome of this case, because of the potential consequences of a valid ratification, turns on whether the fiduciaries met their disclosure obligations.

As set forth in *Rosser I*:

> Whether shareholders are "fully informed" turns upon whether directors have complied with their duty "when seeking the affirmative vote of stockholders . . . to disclose all material information." A "fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote." Therefore, in order to allege a proper breach of a duty of disclosure claim, plaintiffs must establish "a substantial likelihood, that under all the circumstances, the omitted fact would have assumed actual significance in the deliberations of the reasonable stockholder."[18]

C. *The Consequences of Adequate Disclosure*

If the Class B Preferred shareholders were not fully informed through the Proxy Statement that solicited their approval of the recapatilization, "the vote itself may be rendered meaningless."[19] In that event, since it is not disputed that this was

---

[17] *Fleet Fin. Group, Inc. v. Advanta Corp.*, 2001 WL 1360119, at *1 n.4 (Del. Ch. Nov. 2, 2001).
[18] *Rosser I*, at *3 (footnotes omitted).
[19] *Id*. at *7.

an interested transaction, the Defendants would have the burden of proving that the Plan was entirely fair.[20]

If the disinterested holders of Class B Preferred stock were fully and fairly informed, the consequences of their approval of the recapitalization must be ascertained. In this context, the effect of shareholder ratification depends upon whether the recapitalization is merely perceived as the product of self-dealing by conflicted directors or whether the Defendants, because of *de facto* control of New Valley, are collectively to be treated as holding the status of a controlling shareholder group. *Rosser I* adopted the view that the Plan was an interested transaction and predicted that an informed shareholder approval would ratify the transaction and transform the issue for judicial consideration into one for business judgment rule analysis.[21] While that approach does not necessarily result in the dismissal of fiduciary duty claims,[22] "approval by fully-informed . . . disinterested stockholders under Section 144(a)(2) [of the Delaware General Corporation Law], permits invocation of the business judgment rule and limits judicial review to issues of gift or waste with the burden of proof upon the party attacking the

---

[20] *See, e.g., Kahn v. Lynch Communications Sys., Inc.*, 638 A.2d 1110, 1117 (Del. 1994) ("The initial burden of establishing entire fairness rests upon the party who stands on both sides of the transaction.") (citations and footnotes omitted).

[21] *Solomon v. Armstrong*, 747 A.2d 1098, 1115 (Del. Ch. 1999) ("[I]n a classic self-dealing transaction the effect of a fully-informed shareholder vote in favor of that particular transaction is to maintain the business judgment rule's presumptions.").

[22] *Rosser I*, at *7.

transaction."[23] As Plaintiff's counsel conceded, "[I]f in fact there were no disclosure violations, I think that would be a very big problem for the case."[24]

On the other hand, if implementation of the Plan is considered to be the result of actions taken by a controlling shareholder group, the effect of approval by fully informed and disinterested shareholders may simply be to shift to the Plaintiff the burden of demonstrating that the transaction was not entirely fair. As summarized in *In re Best Lock Corp. Shareholder Litigation*:

> Under *Kahn v. Lynch*, a ratifying vote by a majority of the minority shareholders of a transaction with the majority shareholder does not extinguish equitable claims, but only switches the burden of proving fairness to the plaintiffs. This is presumably true even if *all* of the minority shareholders vote in favor of the transaction. Thus, in a cash-out merger conditioned on a vote of approval by a majority of the minority shareholders, self-dealing fiduciaries obtain only limited benefits by using the protective mechanism of shareholder ratification: the transaction is still subject to entire fairness review, but the burden shifts to the plaintiffs to prove that the transaction was *not* entirely fair. The rationale for this doctrine is that minority shareholders might be coerced into voting in favor of the transaction out of fear of retribution by the majority shareholder.[25]

---

[23] *Marciano v. Nakash*, 535 A.2d 400, 405 n.3 (Del. 1987).

[24] Tr. of Oral Arg. at 65.

[25] 845 A.2d 1057, 1081-82 (Del. Ch. 2001) (footnote omitted) (emphasis in original); *see also In re Emerging Communications, Inc. S'holders Litig.*, 2004 WL 1305745, at *31 (Del. Ch. June 4, 2004); 1 R. FRANKLIN BALOTTI & JESSE A. FINKELSTEIN, THE DELAWARE LAW OF CORPORATIONS AND BUSINESS ORGANIZATIONS §4.35, 4-251 (2004) ("Thus, under [*Kahn v. Lynch Communications Sys., Inc.*], 'compliance with the terms of Section 144 does not restore to the board the presumption of the business judgment rule; it simply shifts the burden to plaintiff to prove unfairness.'") (quoting *Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1134, 1154 (Del. Ch. 1994), *aff'd*, 663 A.2d 1156 (Del. 1995)). *See generally In re Prime Hospitality, Inc. S'holders Litig.*, 2005 WL 1138738, at *8 (Del. Ch. May 4, 2005).

Accordingly, whether shareholder ratification cloaks the Defendants with the presumptions of the business judgment rule or shifts to the Plaintiff the burden of proving that the Plan was unfair requires evaluation of both the control held by the Defendants and the nature of the transaction.[26] The Plan, supported by the Defendants, worked a fundamental change in capital structure of New Valley. Although the Defendants acquired voting control of New Valley as a result of the recapitalization, they did not hold the controlling stock interest before then.[27] Moreover, the Defendants held less than 12% of the Class B Preferred shares, and the Plan was dependent upon approval by the holders of that class of shares. Thus, there was "no controlling shareholder, control group or dominating force"[28] that could have compelled approval of the Plan without approval of the Class B Preferred shareholders.[29] Yet, the Defendants, at least in the summary judgment context which requires the Court to draw its inferences in favor of the Plaintiff, could be viewed as exercising pre-recapitalization control in fact over New Valley. In short, although *Solomon* suggests that, in this instance, the business judgment rule standard should apply, the Court, at this stage of the proceeding and on the

[26] *See Solomon*, 747 A.2d at 1116 (reflecting on "fundamental changes of corporate policy sponsored by a controlling shareholder").

[27] Before the recapitalization, the Defendants held approximately 42% of New Valley's voting power. Afterward, they held 55%.

[28] *Solomon*, 747 A.2d at 1117.

[29] The Plaintiff has not alleged that the Class B Preferred shareholders were "coerced" into approving the Plan.

record before it, is unable to resolve the debate. More importantly, as will be seen, it is not necessary to do so.

D. *Adequacy of Disclosure*[30]

1. <u>Did the Fairness Opinion Distinguish Among Classes</u>?

In *Rosser I*, the Plaintiff's claim withstood the Defendants' motion to dismiss because, "if the fairness opinion failed to distinguish between the classes, it is likely irrelevant and perhaps even misleading."[31] The Defendants have brought forth evidence showing that the fairness opinion's analysis of "fair" applied to each of the three classes of New Valley stock. The Plaintiff attempts to refute this evidence in four different ways, none of which is persuasive.

First, the Plaintiff argues that it is the law of the case that PMG did not conduct a fairness opinion with respect to each class of New Valley stock. In support of this argument, the Plaintiff cites language from *Rosser I*[32] and the briefing leading up to *Rosser I*[33] for the proposition that the PMG opinion did not evaluate the effects of the recapitalization on each class of New Valley stock. The

---

[30] Because the Defendants rely on the defense of shareholder ratification, it is their burden to demonstrate that the disclosures inducing shareholder approval were legally sufficient. *Solomon*, 747 A.2d 1117 n.58.

[31] *Rosser I*, at *6.

[32] *Id.* ("Defendants respond by noting that the opinion did not purport to compute the 'relative fairness' of the Plan as applied to each class.").

[33] Op. Br. in Sup. of Def. Mot. to Dis. the Com., at 15 ("The opinion, on its face, did not purport to compute the 'relative fairness' of the different classes of stockholders, and defendants did not suggest otherwise."); Def. Rep. Br. in Sup. of Their Mot. to Dis. the Com., at 7 ("The PMG opinion did not purport to compute the relative fairness as among the different classes of stockholders, and this was readily discernable to the reader.").

Plaintiff's argument, however, fails to acknowledge that the Defendants, in the context of their motion to dismiss, were required to argue strictly from the allegations of the Complaint. Additionally, the Plaintiff mischaracterizes the Defendants' argument. If the fairness opinion did not purport to evaluate fairness by class, it does not mean that, in preparing its opinion, PMG did not actually evaluate fairness by class. The Defendants simply asserted, for purposes of *Rosser I*, that the opinion could not have been misleading because a reasonable shareholder would not have read it to reflect an evaluation with respect to all three classes.

Second, the Plaintiff attempts to discredit the Defendants' evidence—Mr. Parke's deposition answers that establish that PMG considered fairness with respect to each class in particular[34]—by arguing that Mr. Parke's deposition consisted of "[a] series of softball questions proffered to a friendly witness undoubtedly coached to answer."[35] Of course, the Plaintiff's counsel was present at the deposition and could have objected to the questions if appropriate or cross-examined Mr. Parke with "hardball" questions, but he chose not to take those steps. Additionally, the Plaintiff asserts that Mr. Parke's answers "are clearly contradicted by the preceding 136 pages of testimony and supporting exhibits and fall woefully short of establishing the absence of any genuine issue of material

[34] *See supra* note 11.
[35] Pl. Op. to Def. Mot. for Summ. J., at 7.

fact."[36] The Plaintiff, however, does not cite to a single material inconsistency in Mr. Parke's testimony on this topic.[37]

Third, in her attempt to present some evidence that PMG's fairness opinion did not consider fairness with respect to all three classes of the New Valley's stock, the Plaintiff complains about the inadequacy of the opinion. These arguments include the set of assumptions and limitations under which the opinion was to be conducted, PMG's lack of experience with internal recapitalizations, and the pricing of warrants. Additionally, the Plaintiff argues from PMG's draft calculations that the Class A Preferred shareholders and the common shareholders received enhanced value from the recapitalization, even if the recapitalization did not add any additional market value to New Valley, but the Class B Preferred shareholders were adversely affected. However, assuming that the warrants the Class B Preferred shareholders were issued had the value that PMG attributed to them,[38] PMG's final calculations that include the value of the post-recapitalization

---

[36] *Id*.

[37] Instead, the Plaintiff only discusses the inconsistency in the Defendants' argument: first arguing in the motion to dismiss that the fairness opinion did not purport to claim to evaluate each class of New Valley stock and now arguing in the motion for summary judgment that the record shows that PMG did evaluate the fairness of the recapitalization by class of New Valley stock. *Id*. at 7 n.5. I have already explained why this argument does not carry any weight. I mention it now to emphasize that the Plaintiff, while claiming that Mr. Parke's testimony is inconsistent, only cites to what is essentially her "law of the case" argument.

[38] There may be reason to be skeptical about PMG's view of the warrants' value, as it seems unlikely that, in the absence of a marked improvement in New Valley's operations, they ever would have been exercised. Ignoring the value of the warrants, the Class A Preferred and the common shareholders' post-recapitalization stock holdings gained value, while the Class B Preferred shareholders' post-capitalization stock holdings lost value. *See* Hirschfeld Aff., Ex. B,

shares and warrants showed that the Class B Preferred shareholders, on a percentage basis, benefited more than the common or Class A Preferred shareholders.[39]

The Plaintiff also refers to a draft version of the fairness opinion—which assigned a lower valuation to the warrants—as evidence that PMG did not consider fairness with respect to all three classes of New Valley Stock.[40] While differences between draft opinions and the final opinion perhaps hint that the numbers behind the fairness opinion were being tinkered with,[41] the Plaintiff has not brought forth any authority to show that draft fairness opinions must be disclosed to shareholders. Unexplained, material differences between drafts and the final version of a fairness opinion may raise concerns about its adequacy and a board's reliance on that opinion; however, the case at hand is about disclosure and does not directly concern the adequacy of PMG's fairness opinion or how it projected a value for the warrants. In her Complaint, the Plaintiff asserted: "The Proxy Statement failed to disclose that the so-called 'fairness opinion' of defendants' investment banker, PMG, did not compare or analyze fairness individually to each

---

at NV 00563. Thus, what the Plaintiff is really challenging is that the warrants issued by New Valley were overvalued in PMG's fairness opinion or that the recapitalization resulted in collateral, additional value, primarily for the benefit of the Defendants. However, the Plaintiff's pleadings did not challenge the reasonableness of PMG's fairness opinion or the New Valley Board's reliance on that opinion.

[39] *Id.*

[40] *See, e.g.*, Farina Aff., Ex. K, at PMG 000007.

[41] Warrants are not easy to value and, thus, revising the calculations may have been prudent.

of the various classes of shares, particularly the Preferred B shareholders."[42] Thus, the issue, as framed by the Plaintiff, is not the adequacy of the fairness opinion; it is the narrow issue of whether PMG analyzed "fairness individually to each of the various classes of shares."[43]

Fourth, the Plaintiff questions the wording of the fairness opinion. A draft of the fairness opinion had recited that the recapitalization was fair "strictly from a financial point of view."[44] The word "strictly" was omitted from the final fairness opinion.[45] It is sufficient to note that the question before the Court is whether PMG considered the fairness of the recapitalization with respect to each class of stock. Moreover, the Plaintiff has not offered any plausible explanation as to why there is a material difference in this context between "from a financial point of view" and "strictly from a financial point of view."

---

[42] Complaint, at ¶ 45(d).

[43] *Id.* Perhaps, although not articulated in the Plaintiff's brief or at oral argument, if the fairness opinion was so bad that it showed that PMG could not have possibly evaluated fairness with respect to each class of shareholders and come to its conclusions, the adequacy of the opinion might be relevant. However, while PMG's analysis supporting its fairness opinion could perhaps have been better, the record before the Court, after taking all inferences from these facts in the favor of the Plaintiff, would not support a finding that PMG's opinion was outside the realm of reasonableness. While the Plaintiff asserts that at trial she plans to introduce expert testimony that further discredits the validity of PMG's opinion, see, for example, Pl. Op. to Def. Mot. for Summ. J., at 8, it is unacceptable to contest a motion for summary judgment by simply arguing that one plans to cross-examine a witness or present expert testimony at trial.

[44] Farina Aff., Ex. H, at PMG 000283.

[45] Proxy Statement, at App. A, at 2.

2. Identity and Holdings of the Shareholders who Recommended Recapitalization

In *Rosser I*, this Court denied the Defendants' motion to dismiss, in part, because: "[A] shareholder could plausibly want to know: whether [the shareholders who recommended the recapitalization plan to New Valley] were also directors, what class of shares those shareholders owned and how much, and why those shareholders thought recapitalization was a good idea (at least for them)."[46] Subsequently, the following people were identified as having approached the New Valley management about recapitalization: (1) Steven G. Lampe—who indicated that he had large Class B Preferred holdings and had no affiliation with New Valley—raised with New Valley the idea of a recapitalization because New Valley's former capital structure was convoluted and difficult for the market to understand;[47] and (2) Anthony Tedeschi and Scott Williams, registered representatives at PMG, who indicated they were acting on the behalf of PMG brokerage account customers who held Class B Preferred shares, also proposed a recapitalization.[48] The Plaintiff does not focus on a potential conflict of interest within PMG, whose brokers recommended the recapitalization and whose bankers prepared the fairness opinion.[49] Instead, the Plaintiff has asserted that it would

46 *Rosser I*, at *6.
47 Lorber Aff. ¶¶ 3-4.
48 *Id*. at ¶ 6.
49 This position was articulated at oral argument:

have been material to the Class B Preferred shareholders to have known that a PMG broker had approached New Valley about this transaction. However, Plaintiff has not offered why this is material[50] nor can this Court ascertain in the absence of concerns about the investment banker's potential conflicts, the materiality of this disclosure to the Class B Preferred shareholders.[51] Thus, the Defendants have successfully argued that summary judgment is appropriate as to this allegedly inadequate disclosure because they have shown that the identity of

---

> THE COURT: You are suggesting, I think, that there had to be some kind of incestuous relationship between the PMG brokers and Mr. Parke. Isn't that the implicit theme you are trying to develop?
> MR. FARINA [counsel for the Plaintiff]: No. No. I think my asking Mr. Parke initially at his deposition—was to find out if those people were a source off—I deposed him. I said, "Did you talk to these people in doing your work?" He said no. I didn't take their depositions. He didn't talk to them with respect to his work. . . .
> THE COURT: As far as you are concerned, the fact that this recapitalization may have been instigated by PMG brokers is not something that relates to Mr. Parke's fairness opinion? It is simply shareholders might want to know what the source of the idea was?
> MR. FARINA: Right. There is no direct correlation between his work, which we believe was inadequate, and that disclosure. They are two separate violations, two separate disclosure issues.

Oral Arg. Tr. 57-58.

[50] The Plaintiff has not even deposed the two PMG brokers in question.

[51] Any argument based upon a conflict of interest within PMG may have been abandoned. The Plaintiff's brief stated: "The ramifications of disclosure are palpable—if Series B shareholders had known that the recapitalization had been instigated by PMG, they would have been in a better position to view the fairness opinion with a suspect eye." Pl. Opp. to Def. Mot. for Summ. J., at 12. Even assuming that this argument was not abandoned by Plaintiff's counsel's comments at oral argument, *see supra* note 49, New Valley has successfully rebutted this argument by showing that (1) it was Mr. Lampe, who had no affiliation to PMG, who first approached New Valley about the recapitalization; (2) the Plaintiff has produced no evidence to show how the conflict of interest within PMG, if any, was material; and (3) Mr. Parke testified, and the Plaintiff is unable to refute, that he did not speak or obtain information from anyone in the sales division of PMG. Parke Dep. at 14:9-15, 25:3-26:22.

the shareholders who approached New Valley with the recapitalization proposal was not material and, accordingly, need not have been disclosed.

3. <u>The Separate Values of New Valley's Lines of Business or Assets</u>

In *Rosser I*, this Court held that "if plaintiffs are claiming, which they appear to be, that the Board intentionally or carelessly omitted financial information about New Valley's worth as an entity, they state a plausible claim."[52] Subsequently, the Defendants produced evidence that no internal estimates, appraisals, or evaluations of its lines of business or assets existed and, thus, there was nothing to disclose.[53] The only evidence cited by the Plaintiff to show that internal valuations or appraisals existed was that PMG's analysis, in a draft calculation, determined "that New Valley's total asset value of $163.9 million was 2 ½ times higher than its current total market capitalization."[54] However, New Valley's aggregate valuation was disclosed in its Proxy Statement.[55] The Plaintiff has failed to show why, in an internal recapitalization, a line-by-line valuation of New Valley's major assets or

---

[52] *Rosser I*, at *6.

[53] Lorber Aff. ¶¶ 8, 9.

[54] Pl. Opp. to Def. Mot. for Summ. J., at 13; Farina Aff. Ex. H, at PMG 000276-278. The Plaintiff derives this number from a draft calculation. The valuation of New Valley disclosed in the Proxy Statement was $184.4 million. When asked at oral argument to give a specific example of an internal appraisal or valuation that existed but was not disclosed, the Plaintiff's counsel spoke of certain properties in Russia, when he said, "The fact in [the properties in Russia]—the fact that there is uncertainty, they don't know are these worth more or are they worth less—maybe they are worth more, but there is uncertainty. This would be an example of a kind of item to be disclosed." Oral Arg. Tr. at 64. The Court asked: "The disclosure you are seeking is more of what PMG did and how it went about valuing the various components to get to the $184 million sum?" Counsel for the Plaintiff replied: "Yes." *Id*.

[55] Proxy Statement, at 21.

lines of businesses would be material. In a different context, for example, where certain assets are transferred for the benefit of a certain class of stockholders, then valuation of those separate assets would be material. However, under the Plan, the value of each asset or line of business of New Valley was immaterial because the internal recapitalization redefined the New Valley's shareholders positions vis-à-vis each other. For purposes of the Plan and the reordering of rights among New Valley's shareholders, the total enterprise value, and not the valuations of the segments separately, was material.[56]

The Plaintiff presents an additional argument. The Plaintiff argues that New Valley should have disclosed that:

> [T]he recap value substantially exceeded the book value . . . . This information resulted in the computation of New Valleys' net asset value which was 2½ times higher than the company's current market capitalization. This information was utilized by [PMG] to calculate a range of potential values for the post-recapitalization securities, based on the percentage of fair value achieved. Unquestionably, this information was available to defendants, exchanged between defendants and PMG, was integral to PMG's analysis, and should have been made available to the Class B Preferred shareholders.[57]

The Plaintiff is correct that knowing that the market was discounting New Valley's shares was material to New Valley shareholders and should have been disclosed.

---

[56] Additionally, I question the materiality of the valuations of the New Valley's particular assets and lines of businesses for another reason. PMG estimated the total value of New Valley's assets to be $184.4 million. Proxy Statement, at 21. The Class A Preferred shares' dividend arrearage was $234.6 million. *Id.* at 18. In light of this significant gap, one wonders whether a reasonable investor would be concerned about the line-by-line asset valuation of the company, as opposed to focusing on the net asset value to determine the value of her stake in New Valley.

[57] Pl. Opp. to Def. Mot. for Summ. J., at 14-15 (citation omitted).

However, it was disclosed qualitatively.[58] While perhaps disclosing the specific ratio would have been better, the Plaintiff has failed to articulate why disclosing a qualitative summary of the findings was inadequate in these circumstances.

Finally, the Plaintiff seems to be trying to reach the methodology that PMG used to calculate New Valley's total value and not the actual value of New Valley's individual assets or lines of businesses.[59] However, the Complaint states: "The Proxy Statement failed to disclose the value of the Company's assets or lines of business, despite the fact that the Company had such estimates."[60] Since PMG's methodology employed in calculating New Valley's individual assets or lines of businesses was not challenged in the Complaint, it is outside the scope of this action.

In sum, the Defendants have demonstrated, in accordance with the requirements of Court of Chancery Rule 56, that the disclosures made in securing approval of the Plan by the Class B Preferred shareholders were sufficient.

---

[58] Proxy Statement, at 21 ("[PMG] determined that the combined market value of [New Valley's] securities before the recapitalization is less than fair value and believed that the Common Shares outstanding after the recapitalization will likely be valued at less of a discount to fair value due to, among others, the factors discussed above."). The Proxy Statement, at 61, provided trading prices for the various classes of New Valley stock and, thus, the number which the Plaintiff claims was so important was readily calculable.

[59] *See supra* note 54; *see also* Pl. Opp. to Def. Mot. for Summ. J., at 13 ("The net asset value, which was developed by PMG based on internal analyses provided by New Valley, was not a simple extrapolation of book value but was an estimate of the current value of New Valley's assets and lines of business.").

[60] Complaint, at ¶ 45.

E. *The Consequences of Adequate Disclosure—Revisited*

If ratification of the Plan by informed and disinterested Class B Preferred shareholders puts the transaction within the ambit of the business judgment rule, the Defendants are entitled to summary judgment. They have demonstrated—from the record assessed in the light most favorable to the Plaintiff—that there are no material facts in dispute and that the Plaintiff has not shown and cannot show that the recapitalization constituted waste or was otherwise actionable under the governing standard.

If, on the other hand, ratification of the Plan by informed and disinterested Class B Preferred shareholders merely shifts the burden to the Plaintiff to demonstrate its unfairness, the Defendants are also entitled to summary judgment. The terms of the recapitalization, especially when one accepts the valuation of the corporate enterprise and the outstanding (and projected) obligations to the Class A Preferred stockholders,[61] are not inherently or obviously "unfair." Something more—such as expert opinion—is necessary to put into play an argument that a complex transaction is "unfair" to a class of stockholders. The Plaintiff has proposed to provide expert testimony at trial.[62] Apparently, she expects the Court

[61] The Plaintiff, although seeking greater disclosure about the various businesses contributing to the value of the enterprise, has not contested the numbers (*i.e.*, value of the enterprise as a whole and the superior rights accruing to the holders of Class A Preferred stock).

[62] For example, the Plaintiff has asserted that she "plan[s] to introduce expert testimony to the effect that the warrants could not have possibly traded at this high level [referring to the warrant exercise of $12.50 per share]." Pl. Opp. to Def. Mot. for Summ. J., at 8.

to speculate at the summary judgment stage about what that opinion evidence at trial might be. The Court, of course, may not do that. The Plaintiff has had her chance to make that showing of "some evidence" to support her claim; she chose not to take advantage of it.[63] In sum, the Plaintiff has not come forward with a sufficient factual basis that would allow the Court to draw any inference that the recapitalization was unfair to the Class B Preferred stockholders. Thus, on the present record, there is no issue of fact requiring trial; no inference can rationally be drawn from the record that would support the Plaintiff's claim for relief; and the Defendants are entitled to summary judgment.

V. CONCLUSION

For the foregoing reasons, an order granting the Defendants' motion for summary judgment will be entered.

[63] Indeed, the Plaintiff devoted virtually all of her argument in her briefing to the question of whether the disclosures were adequate; little effort was devoted to the consequences of what, from her perspective, would be an adverse determination as to the sufficiency of the disclosures.