IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

PEGGY H. OFF, on behalf of herself and all others similarly situated, and derivatively on behalf of Centerline Holding Company, Plaintiff, v. STEPHEN M. ROSS, MARC D. SCHNITZER, LEONARD W. COTTON, JEFF T. BLAU, ROBERT J. DOLAN, ROBERT A. MEISTER, NATHAN GANTCHER, JEROME Y. HALPERIN, ROBERT L. LOVERD, JANICE COOK ROBERTS, THOMAS W. WHITE and THE RELATED COMPANIES, L.P., Defendants, and CENTERLINE HOLDING COMPANY, a Delaware Statutory Trust, Nominal Defendant.	)	Civil Action No. 3468-VCP

MEMORANDUM OPINION

Submitted: July 15, 2008
Decided: November 26, 2008

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Stephen F. Guthmann, DeWitt, New York, *Pro Se Objector*

PARSONS, Vice Chancellor.

This is a derivative and putative class action for breach of fiduciary duty by the Board of Trustees of a Delaware statutory trust. The Complaint sought to prevent Centerline Holding Company ("Centerline" or the "Company") from entering into an interested transaction that benefited only a few significant Centerline stockholders, and to have the terms of that transaction extended to all Centerline stockholders. Plaintiff entered into a settlement agreement with Defendants under which she obtained much of this relief. Plaintiff now seeks (1) approval of the proposed settlement ("Settlement") of this action (the "Delaware Action") as set forth in the Amended Stipulation of Settlement, dated May 1, 2008 (the "May 1 Stipulation"), (2) certification of the class for Settlement purposes, and (3) an award of attorneys' fees and costs to Plaintiff's counsel, Grant & Eisenhofer P.A. and Gardy & Notis, LLP. Two stockholders objected to the Settlement. For the reasons stated in this opinion, I deny Plaintiff's motion for approval of the Settlement.

I. BACKGROUND

A. The Parties

The named Plaintiff, Peggy H. Off, is an individual who has owned shares of stock of Centerline since March 19, 1987. Plaintiff filed the Delaware Action as a class action on behalf of herself and all other Centerline stockholders similarly situated and derivatively on behalf of Centerline, against the individual members of the Board of Trustees of Centerline and against The Related Companies, L.P. ("TRCLP").

Defendant Stephen M. Ross is a Managing Trustee and the Chairman of the Board of Centerline, and, at the time of filing, owned or controlled 13.9% of its securities. In

1972, Ross founded Defendant TRCLP, a real estate firm headquartered in New York, New York. Ross owns 92% of TRCLP and serves as its Chairman, Chief Executive Officer, and Managing General Partner.

Defendant Jeff T. Blau is a Managing Trustee of Centerline and a Trustee and President of TRCLP. Blau owns the remaining 8% of TRCLP stock.

Nominal Defendant, Centerline, is a Delaware statutory trust with its headquarters in New York, New York. Centerline is an alternative asset manager with a core focus on real estate funds and financing, which primarily operates through and by its subsidiaries. One Centerline subsidiary is Centerline Capital Group, a diversified real estate fund manager whose largest stockholder is TRCLP.

The remaining Defendants are Managing Trustees and officers of Centerline.[1]

One Objector, John Carfagno, is a stockholder of Centerline who has owned shares of Centerline stock since June 2004; currently, he holds 9,475 shares. In addition to objecting to the Settlement and to Plaintiff's request for attorneys' fees, Carfagno also is a plaintiff in the stockholder derivative and federal securities fraud class action captioned, *Carfagno v. Schnitzer*, No. 08-CV-00912-SAS (S.D.N.Y. Jan. 25, 2008) (the

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[1] Those Defendants are: Marc D. Schnitzer, a Managing Trustee, CEO, and President of Centerline; Leonard W. Cotton, the Vice Chairman of the Board of Centerline; Thomas W. White, a Managing Trustee of and former consultant to Centerline; Robert J. Dolan, a Managing Trustee of Centerline, the Dean of the Stephen M. Ross School of Business and the Stephen M. Ross Professor of Business Administration at the University of Michigan; and Nathan Gantcher, Jerome Y. Halperin, Robert L. Loverd, Janice Cook Roberts, and Robert A. Meister, all of whom are Managing Trustees of Centerline.

"New York Action"). A second stockholder, Stephen F. Guthmann, who owns approximately 6,000 shares of Centerline, also objects to the Settlement.

B. The Facts

1. Events before the TRCLP Transaction announcement

Before the events leading to this litigation, Centerline operated a real estate finance and investment business and directly owned tax-exempt municipal bonds that yielded steady dividend income for its investors. Consequently, retail investors dominated Centerline's ownership. Sometime during the second half of 2007, Centerline's Board of Trustees resolved to transform Centerline from an income-oriented company into a growth-oriented company that would attract an institutional investor base. As part of this plan, the Board engineered the securitization of Centerline's $2.8 billion tax-exempt affordable housing bond portfolio with Freddie Mac. In December 2007, Bear Stearns, the Company's financial advisor, counseled the Board that the securitization would decrease the Company's asset base and cause concern about its liquidity among its bank lenders. Bear Stearns recommended a convertible preferred stock offering to boost the Company's liquidity and assuage the banks' concerns. In response, the Board attempted to negotiate separate sales of convertible preferred stock to Morgan Stanley and Goldman Sachs. Those attempts ultimately proved unsuccessful.

2. The TRCLP Transaction and the Rights Offering

On December 28, 2007, Centerline announced the securitization of the affordable housing bond portfolio with Freddie Mac. It also announced a transaction under which an affiliate of TRCLP would purchase over $131 million in Centerline Convertible

Preferred Stock (the "TRCLP Transaction"). Under that transaction, TRCLP would acquire Preferred Stock that has an 11% dividend rate and is convertible into 12.2 million shares of Centerline common stock at a $10.75 per share conversion rate. If TRCLP exercised the conversion rights, it would own 20% of Centerline's common stock. Combined with Ross's 13.9% ownership or control of Centerline common stock, conversion of the Preferred Stock sold to TRCLP would have given Ross and Blau, through TRCLP, a 33.9% ownership stake in Centerline. When Centerline announced the TRCLP Transaction, it had not offered the Preferred Stock involved to Plaintiff or any of Centerline's other public stockholders.

Centerline held a conference call with investors, brokers, analysts, and stockholders on December 28, 2007 to discuss the TRCLP Transaction and other Centerline issues and announcements. When Defendant Schnitzer discussed the Transaction, certain investors and stockholders reacted negatively and questioned the Preferred Stock sale as a method for raising capital for Centerline. This presented a potential problem for Centerline, because, as initially proposed, the TRCLP Transaction required stockholder approval to comply with Section 312.03 of the New York Stock Exchange ("NYSE") Listed Company Manual.[2]

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[2] According to the NYSE, the Listed Company Manual is "the comprehensive rulebook for listed companies," which sets forth the NYSE's listing requirements, rules, and policies for corporate governance and stockholder communications and approval. NYSE, Inc., Listed Company Manual Introduction (2007), *available at* http://www.nyse.com/regulation/nyse/1182508124422.html. Section 312.03 provides, in relevant part:

In an apparent effort to address this problem, Defendants initiated discussions shortly after the investor call regarding the extension of a rights offering to Centerline's other stockholders on the same terms as the TRCLP Transaction. By January 9, 2008, Centerline's attorneys determined that no stockholder vote would be required under

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> Shareholder approval is a prerequisite to issuing securities in the following situations:
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> . . . .
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> (b) Shareholder approval is required prior to the issuance of common stock, or of securities convertible into or exercisable for common stock, in any transaction or series of related transactions, to:
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> (1) a director, officer or substantial security holder of the company (each a "Related Party");
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> (2) a subsidiary, affiliate or other closely-related person of a Related Party; or
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> (3) any company or entity in which a Related Party has a substantial direct or indirect interest; if the number of shares of common stock to be issued, or if the number of shares of common stock into which the securities may be convertible or exercisable, exceeds either one percent of the number of shares of common stock or one percent of the voting power outstanding before the issuance.
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> However, if the Related Party involved in the transaction is classified as such solely because such person is a substantial security holder, and if the issuance relates to a sale of stock for cash at a price at least as great as each of the book and market value of the issuer's common stock, then shareholder approval will not be required unless the number of shares of common stock to be issued, or unless the number of shares of common stock into which the securities may be convertible or exercisable, exceeds either five percent of the number of shares of common stock or five percent of the voting power outstanding before the issuance.

Id. § 312.03.

Section 312.03 if the Company executed either of two alternative transactions encompassing a rights offering to all other Centerline stockholders on the same terms offered to TRCLP: (1) a backstopped rights offering with TRCLP purchasing all Preferred Stock not purchased by Centerline's other stockholders; or (2) the TRCLP Transaction followed by a rights offering with TRCLP obligated to sell back to Centerline the amount of Preferred Stock purchased by other Centerline stockholders. On January 11, Centerline received confirmation from NYSE general counsel that, under the NYSE rules, it would not need stockholder approval of the TRCLP Transaction if Centerline conducted either alternative transaction.

Plaintiff filed her Verified Derivative and Class Action Complaint (the "Complaint") in the Delaware Action on January 15, 2008 to prevent consummation of the TRCLP Transaction and to recover damages suffered by the Company and the class. The six-count Complaint alleged breaches of fiduciary duty by members of the Board of Trustees, mainly because the TRCLP Transaction would benefit only two substantial stockholders of Centerline, Defendants Ross and Blau. Counts I-II of the Complaint are individual and class claims alleging breaches of the fiduciary duties of care and loyalty by the individual Defendants, as well as breaches of the duty of disclosure, related to the TRCLP Transaction. Count III is an individual and class claim alleging that TRCLP aided and abetted breaches of fiduciary duties by the individual Defendants. Counts IV-VI are derivative claims for the same alleged wrongs related to the TRCLP Transaction.

On January 17, 2008, the Centerline Board held a special meeting to discuss a rights offering to all Centerline stockholders and the lawsuits filed against the Company and the individual Defendants. The Board adopted a resolution authorizing the TRCLP Transaction and, subject to the closing of that transaction, a subsequent rights offering of the Convertible Preferred Stock to all stockholders of Centerline on equivalent terms. During the meeting, Centerline counsel John D'Amico asserted that the Company began discussing extending a rights offering to all Centerline stockholders in response to the negative stockholder reaction on the December 28, 2007 conference call, and not as a result of the Delaware Action.[3]

On January 18, Plaintiff moved in the Delaware Action for expedited proceedings and a preliminary injunction prohibiting Centerline and Defendants from consummating the TRCLP Transaction. On January 22, however, Plaintiff and Defendants reached a tentative agreement that the Company would offer all Centerline stockholders the opportunity to purchase the Preferred Stock on the same terms as TRCLP (the "Rights Offering") and that Plaintiff would not attempt to enjoin the TRCLP Transaction. Also on January 22, counsel for the parties disclosed the general terms of their tentative agreement to this Court.[4]

Over the next few days, Centerline announced the closing of the TRCLP Transaction and the Board of Trustees' authorization of the Rights Offering. Consistent

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3 Kaswan Decl. Ex. 90, Jan. 17, 2008 Board Meeting Minutes, at 2.

4 Pl.'s Mem. of Law in Supp. of Mot. for Approval of Derivative and Class Action Settlement, Certification of the Class for Settlement Purposes and for an Award of Att'ys' Fees and Expenses, Grant Decl. at 4.

with the parties' agreement, Plaintiff's counsel also reviewed the Prospectus for the Rights Offering before its delivery to stockholders.

On January 25, 2008, Objector Carfagno filed his original complaint in the New York Action challenging not only the TRCLP Transaction and the Board's actions in connection with it, but the decision to transform the nature of Centerline, as well. In particular, Carfagno alleges members of Centerline's Board breached their fiduciary duties by acting without stockholder knowledge or approval to transform Centerline from an income-oriented company that pays substantial dividends to its investors into a growth-oriented company that retains and reinvests most of its earnings. According to Carfagno's Complaint, the alleged plan to rotate out retail investors for institutional investors included a series of interrelated and improper acts, including the concealment of the transformation plan, the TRCLP Transaction, the Rights Offering, withholding information related to the TRCLP Transaction and the Rights Offering, subjecting Centerline to adverse publicity, and causing Centerline to violate federal securities laws.

In the original Stipulation of Settlement, dated March 3, 2008 (the "March 3 Stipulation"), Centerline agreed to make the Rights Offering to all Centerline stockholders,[5] affording them the opportunity to purchase shares of Preferred Stock on

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5 The Centerline stockholders entitled to participate in the Rights Offering were those stockholders owning shares of common stock or shares of the equivalent of common stock, including but not limited to owners of "special preferred shares," "vested options exercisable for common shares," and "convertible community reinvestment act preferred shares." Centerline Holding Co., Prospectus Supplement to Prospectus dated March 1, 2005 (Form 424(b)(5)) ("Prospectus"), at S-13, S-34 (Mar. 7, 2008), *available at* http://www.sec.gov/Archives/edgar/

the same economic terms as TRCLP. Centerline also agreed that it would buy back from TRCLP the number of shares of Preferred Stock that were purchased in the Rights Offering, so that it could transfer those shares to participating stockholders. In turn, TRCLP would retain any shares of Preferred Stock not purchased in the Rights Offering. The March 3 Stipulation also provided for the release of any and all claims arising out of or related to the TRCLP Transaction and the Rights Offering:

> Plaintiff, on behalf of herself and all members of the Settlement Class, . . . shall have, each fully, finally and forever released . . . any and all claims . . . that have been or could have been asserted in the Action or in any court, tribunal or proceeding by or on behalf of any member of the Settlement Class . . . which arise out of or relate to the allegations, facts, events, transactions, acts, occurrences, statements, representations, misrepresentations or omissions that were or could have been alleged in the Action, including: (1) the TRCLP Transaction, including, without limitation, the sale of the Preferred Stock to TRCLP that closed on or about January 25, 2008, and (2) the Rights Offering (collectively, the "Settled Claims").[6]

The March 3 Stipulation also preserved Defendants' right to move for dismissal of the New York Action and other pending actions based on the release: "Nothing in this

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data/1043325/000104746908002330/a2183419z424b5.htm. The Prospectus defines common share equivalents as "the number of whole common shares that are issuable upon the conversion, exercise or exchange of eligible securities as of the record date." *Id.* at S-15. Although the record does not contain the Prospectus for the Rights Offering, the parties referred to it in the briefing, and Delaware courts may take judicial notice of facts publicly available in filings with the Securities and Exchange Commission ("SEC") where those facts are not in dispute. *Solomon v. Armstrong*, 747 A.2d 1098, 1121 n.72 (Del. Ch. 1999).

6 March 3 Stip. at 13.

Stipulation shall be construed to preclude defendants from moving to dismiss *Carfagno* and *Broy*[7] on any ground, including, without limitation, that the actions are barred, in whole or in part, by the Release and Final Order in this Action."[8]

On March 7, 2008, Centerline filed the Prospectus for and commenced the Rights Offering, which remained open until April 4. The Rights Offering was not contingent upon the Court's approval of the parties' Settlement. Ultimately, only 337,316 of the available 11 million shares of Preferred Stock were purchased by Centerline's other stockholders during the Rights Offering. Therefore, TRCLP retained virtually all of the Preferred Stock.

3. The proceedings regarding the proposed Settlement of the Delaware Action

In early March 2008, after entering into the March 3 Stipulation of Settlement, the parties moved for approval of the proposed Settlement, certification of the putative class, and an award of attorneys' fees and expenses. The Court set a hearing date of May 23, 2008, for any objections, and notice of the Settlement and hearing was given to all stockholders.

On or about May 1, 2008, Plaintiff and Defendants amended the March 3 Stipulation to narrow the scope of the release in an effort to address the concerns of certain stockholders about the impact of the Settlement on the New York Action and

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7 *Broy* refers to another pending federal securities fraud action, entitled *Broy v. Blau*, No. 08-CV-01971-SAS (S.D.N.Y. Feb. 27, 2008).

8 March 3 Stip. at 20.

other potential stockholder class or derivative actions. While the original release encompassed all claims that could have been alleged in the Delaware Action, the amended release focused on the TRCLP Transaction and the Rights Offering. Specifically, the amended May 1 Stipulation provided for the release of any and all claims:

> that have been or could have been asserted in the [Delaware] Action by or on behalf of any member of the Settlement Class . . . that arise out of or relate to: (1) the TRCLP Transaction, including, without limitation, the sale of the Preferred Stock to TRCLP that closed on or about January 25, 2008, and (2) the Rights Offering (collectively, the "Settled Claims").[9]

The May 1 Stipulation also carved out of the release any claims for violations of any federal securities or other federal laws for any breaches of fiduciary duties by Centerline's Board of Trustees by failing to prevent such violations or by selling its revenue bond portfolio to Freddie Mac.[10] Nevertheless, the language preserving Defendants' right to move for dismissal based on the release remained unchanged.

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9 May 1 Stip. at 13.

10 The relevant language of the May 1 Stipulation states:

> It is expressly understood that this Release does not release, relinquish, discharge, or enjoin the prosecution of any claims, demands, rights, actions, or causes of action arising under the federal securities laws or any other federal statute, whether known or unknown, contingent or absolute, suspected or unsuspected, disclosed or undisclosed, hidden or concealed, matured or unmatured, that have been or could be asserted in the consolidated securities class actions pending in *In re Centerline Holding Company Securities Litigation*, C.A. No. 08CV-00505 (SAS) (S.D.N.Y.). It is further understood that this Release does not

On May 9, 2008, Carfagno filed his objections to the proposed Settlement of the Delaware Action. Apart from the second Objector, Guthmann, no other Centerline stockholder objected to the Settlement. The two Objectors hold less than .03% of the Centerline stock. Objector Carfagno challenged the proposed Settlement as inadequate and adverse to the concurrent New York Action. Guthmann objected because, without a requirement for Ross, Blau, and TRCLP to buy out Centerline stockholders, the Settlement did not remedy an alleged decrease in the earning power of Centerline stock.

At the May 23 hearing, Carfagno appeared, through counsel, and argued strenuously for an opportunity to take certain discovery before responding fully to the proposed Settlement. In part because Plaintiff had not taken any confirmatory discovery and because no immediate monetary benefit accrued to the class, I granted Carfagno's request over opposition from both Plaintiff and Defendants.[11] After additional discovery

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> release, relinquish, discharge, or enjoin the prosecution of: (1) any claims that Centerline's board of directors breached a fiduciary duty by failing to prevent violations of the federal securities laws, as asserted in *Carfagno v. Schnitzer*, *et al.*, No. CV-00912 and *Broy v. Blau*, *et al.*, No. CV-09171 (SAS) (S.D.N.Y.); (2) any claims that Centerline's board of directors breached a fiduciary duty by selling its revenue bond portfolio to Freddie Mac.

May 1 Stip. at 13-14.

[11] Tr. of May 23, 2008 Oral Argument at 105-07. Guthmann did not present any separate argument at the hearing, and the Court took his objection under advisement without leave for any supplementation of the record. *Id.* at 107.

and supplemental briefing by all interested parties,[12] I conducted a further hearing on Carfagno's objections on July 15, 2008.

C. Parties' Contentions

Objector Carfagno challenges the proposed Settlement on several grounds. He avers, for example, that the proffered consideration for the Settlement, the Rights Offering, would have occurred notwithstanding the Settlement, or even the Delaware Action. Carfagno also contends that Plaintiff has not shown that any input by counsel on the Prospectus is substantial enough to outweigh the costs of the Settlement. In addition, Carfagno asserts that the release contained in the Settlement will adversely impact the

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12 On July 3, 2008, during the supplemental briefing on his objection, Carfagno moved to intervene in this action and to be appointed as lead plaintiff. Briefing on that motion was held in abeyance pending the Court's disposition of Carfagno's objections to the Settlement. Having decided not to approve the Settlement, I will deny Carfagno's motion to intervene without prejudice on the ground that it is moot or, at least, not ripe for consideration at this time. Because Carfagno contends Off's claims in this action are subsumed in the broader claims asserted in the New York Action, Carfagno presumably can pursue those claims in New York. There is no need to address his motion to intervene in the Delaware Action, unless Plaintiff Off decides to press this action in the near term. Assuming Off does not seek to resume her prosecution immediately, this case effectively will be stayed pending the resolution of the New York Action. Thus, Carfagno has no need to intervene here to preserve his rights.

Depending on the federal court's disposition of the New York Action, Plaintiff Off conceivably still might have a claim for attorneys' fees and expenses in this action based on Centerline's Rights Offering under a mootness theory. Although Defendants and others might oppose such a claim for a variety of reasons, I would consider such a claim premature until the New York Action has been completed.

ongoing New York Action by precluding him from making claims or presenting evidence related to the TRCLP Transaction or the Rights Offering.[13]

Plaintiff and Defendants counter that the Settlement is a fair and reasonable agreement that adequately protects the interests of the putative class of Centerline stockholders. Specifically, the proponents argue that the Settlement provides a fair, reasonable, and adequate resolution because of the complexity of the claims and the benefits accruing to the Company and the class from the Rights Offering and the drafting of the Prospectus. They also assert that the Rights Offering directly resulted from the efforts of Plaintiff and her counsel. In response to Objector's averments that the release will adversely affect the New York Action, the proponents contend that it is sufficiently narrow to preclude only claims related to the TRCLP Transaction and the Rights Offering and to allow the New York Action to proceed on a host of other claims and theories.

II. ANALYSIS

A. Standard of Review for Settlements

Under Court of Chancery Rules 23(e) and 23.1, class actions and derivative actions may not be dismissed or compromised without the approval of the Court.[14]

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[13] The objections raised by Objector Guthmann relate more to the substance of the sale of Centerline's revenue bond portfolio to Freddie Mac, which is not directly implicated in the Delaware Action. Guthmann also alleges that the TRCLP Transaction constitutes the first step in a scheme to merge TRCLP and Centerline. Because I have determined not to approve the Settlement based on the objections of Carfagno, I consider it unnecessary to address Guthmann's objections any further, and have not done so.

[14] Ct. Ch. R. 23(e), 23.1.

"Rules 23 and 23.1 are intended to guard against surreptitious buy-outs of representative plaintiffs, leaving other class members without recourse."[15] Thus, the Court has a duty to protect the interests of absent class members who will be barred from future litigation of claims released by a proposed settlement.[16]

Delaware law favors the voluntary settlement of controversies.[17] Still, because of the fiduciary character of a class action, it is incumbent upon the Court to determine the intrinsic fairness of a settlement.[18] As the Delaware Supreme Court explained in *Polk v. Good*, "the court's function is to consider the nature of the claim, the possible defenses thereto, the legal and factual circumstances of the case, and then to apply its own business judgment in deciding whether the settlement is reasonable in light of these factors."[19]

The considerations applicable to the review of a settlement of a representative action include:

> (1) the probable validity of the claims, (2) the apparent difficulties in enforcing the claims through the courts, (3) the collectibility of any judgment recovered, (4) the delay, expense and trouble of litigation, (5) the amount of the compromise as compared with the amount and collectibility

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15 *Wied v. Valhi, Inc.*, 466 A.2d 9, 15 (Del. 1983) (citing *Jaeger v. Muscat*, 221 A.2d 607 (Del. Ch. 1966)); *Chickering v. Giles*, 270 A.2d 373, 375 (Del. Ch. 1970)).

16 *In re Coleman Co. S'holders Litig.*, 750 A.2d 1202, 1204 (Del. Ch. 1999).

17 *Polk v. Good*, 507 A.2d 531, 535 (Del. 1986).

18 *Rome v. Archer*, 197 A.2d 49, 53 (Del. 1964).

19 *Polk*, 507 A.2d at 535.

> of a judgment, and (6) the views of the parties involved, pro and con.[20]

Delaware courts may consider additional factors, such as the diligence of plaintiff in investigating the claims,[21] and whether the proposed settlement is supported by mutual consideration.[22] Our courts have held, for example, that the "strength of claims raised in a class action lawsuit helps to determine whether the consideration received for their settlement is adequate and whether dismissal with prejudice is appropriate."[23] Further, the proponents of a proposed settlement bear the burden of proving that the settlement is fair and reasonable.[24]

As presented, this dispute has not involved serious questions about the second through fourth factors identified in *Polk*, *i.e.*, apparent difficulties in enforcing the claims through the courts, the collectibility of any judgment obtained, and the delay, expense, and trouble of litigation. Rather, in determining whether to approve the proposed Settlement of this Delaware Action, the Court must act as guardian of the interests of the class, especially the unnamed plaintiffs, by keeping in mind the probability of success of the claims, what the class has gained, and what the class would lose under the terms of

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[20] *Id.* at 536.

[21] *See Lewis v. Hirsch*, 1994 WL 263551, at *5-8 (Del. Ch. June 1, 1994).

[22] *See In re Cellular Commc'ns Int'l, Inc. S'holders Litig.*, 752 A.2d 1185, 1186 (Del. Ch. 2000).

[23] *Barkan v. Amsted Indus., Inc.*, 567 A.2d 1279, 1285 (Del. 1989).

[24] *Id.* at 1285-86.

the Settlement. Thus, I must identify and balance the benefits received against the costs exacted by the Settlement in the context of the claims asserted here and in the New York Action, and exercise my business judgment to ascertain whether the proposed resolution is fair and reasonable.

B. Benefits of the Settlement to the Stockholders

Plaintiff primarily relies on two benefits she contends the Settlement confers on the stockholders. First, Plaintiff asserts that the Rights Offering conducted from March 7 to April 4, 2008 constitutes a benefit sufficient to merit approval of the Settlement. Second, Plaintiff maintains that her counsel's input on the Prospectus reinforces the value received by the stockholders. Objector Carfagno, on the other hand, alleges that the Rights Offering does not justify the release of claims in either the Delaware or New York Actions because Defendants did not condition the Rights Offering on approval of the Settlement and the stockholders would have received this benefit even if there had been no Settlement. Carfagno also challenges the value of the Prospectus input, suggesting that any changes made in response to Plaintiff's counsel's efforts were *de minimis*.

1. The Rights Offering

The TRCLP Transaction, by which TRCLP purchased approximately 11 million shares of newly-issued Preferred Stock, was scheduled to close in January 2008. As part of the Settlement, Plaintiff agreed not to oppose the execution of the TRCLP Transaction on January 25 in exchange for the consummation of the Rights Offering, which constitutes the primary benefit to stockholders offered by the Settlement. After the TRCLP Transaction closed, Centerline conducted the Rights Offering from March 7 to

April 4, 2008, which enabled all Centerline stockholders, except TRCLP, Ross, and Blau, to subscribe for and purchase shares of Preferred Stock on the same terms offered to TRCLP. In fact, however, less than 4% of the available Preferred Stock was purchased in the Rights Offering. Defendant TRCLP, therefore, retained the rest of the Preferred Stock pursuant to the backstop provisions of the Rights Offering.

Plaintiff contends the Rights Offering represented a material benefit to the Centerline stockholders because it ensured them the opportunity to take full advantage of the terms of the TRCLP Transaction to the extent they considered it a "sweetheart deal," but did not require them to participate. In addition, the Rights Offering required TRCLP to retain all of the Preferred Stock the other stockholders elected not to purchase, and thereby assured that Centerline would receive the benefit of the capital infusion it sought.

Based on the evidence presented, however, I consider the economic benefit of the Rights Offering to the stockholders to be only marginal for a few reasons. First, Carfagno presents at least a colorable argument that the Centerline Board of Trustees would have proceeded with the Rights Offering whether or not Plaintiff or any other stockholder filed suit challenging that transaction or entered into the Settlement at issue here. Centerline's Board began considering a rights offering to stockholders on the same terms as the TRCLP Transaction promptly after the December 28, 2007 conference call and before Plaintiff filed the Delaware Action on January 15, 2008. The impetus for considering such an offering came from the negative reaction of the stockholders to the announcement of the TRCLP Transaction, not from the claims brought by Plaintiff. The NYSE rules required stockholder approval before Centerline could effect the TRCLP

Transaction. Yet, by conducting a rights offering on the same terms as the TRCLP Transaction, Centerline could avoid the need for such stockholder approval. Thus, the Company had an incentive for doing the Rights Offering independent of Plaintiff's claims.[25] Moreover, the evidence shows the Board already had begun actively exploring that option when the Delaware Action was filed.

The fact that Defendants did not condition the Rights Offering on the release of the claims arising out of or related to either the TRCLP Transaction or the Rights Offering casts more doubt on the value of the benefit of the Settlement conferred upon the class. Defendants concluded the Rights Offering, which constitutes the primary consideration and settlement benefit to Plaintiff, before the scheduled hearing on the Settlement and without regard to whether the Settlement ultimately received Court approval. Because any settlement or compromise of a class or derivative action requires court approval under Rules 23.1 and 23(e), Defendants' ability to obtain a release of the claims against them depends on receipt of such approval. The failure to condition the Rights Offering on court approval of the related Settlement, therefore, suggests that the relative value of the Rights Offering was marginal or, alternatively, that Centerline would have gone forward with that Offering whether or not it reached a settlement in the Delaware Action.

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[25] The minutes of the Centerline Board of Trustees' meeting at which the Rights Offering was approved further support this proposition. The minutes report the approval of the Rights Offering and state: "the rights offering was not initiated in response to the lawsuit filed in Delaware [C]hancery [C]ourt . . . ." Jan. 17, 2008 Board Meeting Minutes at 2.

The benefit derived from the Rights Offering seems marginal for other reasons, as well. Although the Rights Offering allowed stockholders to purchase Preferred Stock at the same price as TRCLP, it does not necessarily follow that it constituted sufficiently valuable consideration to warrant the stockholders' releasing their claims as to the TRCLP Transaction and the Rights Offering in the Delaware and New York Actions. Most of Centerline's stockholders are retail investors interested in dividend income who may not have had the inclination to purchase the Preferred Stock being offered.[26] The TRCLP Transaction and the Rights Offering both were part of a broader integrated transaction designed to change the character of Centerline from a real estate finance and investment company to more of an alternative asset manager. The New York Action challenges that broader, allegedly integrated transaction, and the evidence suggests a number of the putative class members here and in New York would not have been interested in continuing to participate in Centerline after its transformation. In addition, the market for asset-backed securities declined markedly between January and early April 2008. Thus, the fact that stockholders purchased only 373,316 of approximately 11 million available shares of Preferred Stock may stem from other factors having nothing to do with whether or not the TRCLP Transaction represented a sweetheart deal.

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[26] The Rights Offering granted Centerline stockholders a single right to purchase Preferred Stock for every common share or common share equivalent they owned. One share of Preferred Stock could be purchased at a price of $11.70 per share by redeeming six rights. Prospectus, at S-9, S-15.

Moreover, the offering of the Preferred Stock probably had greater intrinsic value to TRCLP because, by executing the TRCLP Transaction, TRCLP and Ross increased their percentage of ownership significantly and gained the opportunity to transform their holdings into a controlling interest in Centerline.[27] There is no evidence the Rights Offering provided a similar opportunity to any other investor. Thus, the purchase of the Preferred Stock arguably benefited TRCLP and the insider Ross in a unique way, making it susceptible to closer scrutiny.

For their part, Plaintiff and Defendants aver the Rights Offering constitutes adequate consideration for the Settlement. They contend the mere possibility that Centerline might have pursued a rights offering on the same terms as the TRCLP Transaction does not make the eventual Rights Offering a *fait accompli*. The Court of Chancery has held that, in the settlement context, an event that is a *fait accompli*, *i.e.*, one that would have occurred notwithstanding the settlement, cannot serve as valid consideration for the release of class claims.[28] Here, Carfagno argues that Defendants would have commenced the Rights Offering whether or not Plaintiff filed her lawsuit because it eliminated the requirement for a stockholder vote on the TRCLP Transaction

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[27] Ross, the founder and 92% owner of TRCLP, owns 13.9% of Centerline's common stock. If converted, the Preferred Stock retained by TRCLP from the TRCLP Transaction would amount to approximately 20% of Centerline's common stock. Thus, Ross and TRCLP effectively would control almost 34% of Centerline's common stock.

[28] *In re TD Banknorth S'holders Litig.*, 938 A.2d 654, 669 (Del. Ch. 2007) (citing *In re Cellular Commc'ns Int'l.*, 752 A.2d at 1186-87).

under NYSE rules. Although there is some force to Carfagno's argument, I am not convinced the Rights Offering constituted a *fait accompli*.[29] The possibility that it may have been, however, causes me to assign less value to the benefit the Settlement conferred on the stockholders by way of the Rights Offering.

2. The input on the Rights Offering Prospectus

The Prospectus for the Rights Offering, distributed to Centerline stockholders and filed with the SEC on March 7, 2008, contains the terms and procedures for subscribing to purchase Preferred Stock in that Offering. Plaintiff contends that her counsel reviewed the draft Prospectus and negotiated several provisions, including the exclusion of TRCLP, Ross, and Blau from participation, and the extension of the Offering from 14 days to 30 days.[30] Plaintiff maintains her counsel's input on the Prospectus conferred a secondary, yet substantial, benefit on the Centerline stockholders by potentially increasing the stockholders' proportionate share of the Preferred Stock to 125% and by providing more time for stockholders to decide whether to participate in the Rights Offering during a time of general market instability.

The Prospectus input is tied inextricably to the Rights Offering and cannot stand alone as a benefit of the Settlement, absent a showing that Plaintiff or her counsel caused

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[29] The record suggests, for example, that Plaintiff's efforts may have contributed to obtaining better backstopping provisions and more favorable timing of the Rights Offering than Centerline otherwise would have provided.

[30] Pl.'s Reply Mem. of Law in Supp. of Mot. for Approval of Derivative and Class Action Settlement, Certification of the Class for Settlement Purposes and for an Award of Att'ys' Fees and Expenses at 7.

improvements in the disclosures made in the Prospectus that would have assisted the stockholders in making an informed decision about the Rights Offering. Plaintiff Off has not made such a showing. In addition, as discussed above, the stockholders arguably already received the benefit of the Rights Offering and, by extension, the Prospectus without regard to whether this Court approves the Settlement. As for Plaintiff's specific averments that her counsel procured the exclusion of TRCLP, Ross, and Blau, the evidence indicates that Centerline may have offered the Rights Offering under such conditions regardless of the Settlement. For example, the Board received guidance from the NYSE on January 11, 2008 that TRCLP, Ross, and Blau could not participate in the Rights Offering unless it contained an oversubscription provision allowing Centerline stockholders to subscribe for more than their pro rata portion by purchasing shares not taken up by other stockholders.[31] Similarly, the extension of the Rights Offering to 30 days seems more a facet of the Offering itself, for which I have already accounted, than of the Prospectus. Thus, even assuming Plaintiff's counsel's efforts resulted in revisions to the Prospectus, those revisions provide only a slight incremental value to stockholders beyond that provided by the Rights Offering.

The lack of evidence showing the specific nature of any other contribution by Plaintiff's counsel to the Prospectus further undercuts the argument that it provided a material benefit to the stockholders. Plaintiff produced scant, if any, evidence in this limited record that the review and negotiation of the Prospectus actually resulted in any

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[31] Kaswan Decl. Ex. 88, Jan. 11, 2008 Email from Keith D. Pisani, at 1.

supplemental disclosures to the stockholders.[32] Without evidence beyond Plaintiff's conclusory assertions in her briefs that additions and changes to the Prospectus are the fruits of Plaintiff's counsel's labor, I assign minimal value to the benefit from the Prospectus input.

C. Costs of the Settlement to the Stockholders

The cost imposed by the Settlement comes in the form of a release of all claims arising out of or related to either the TRCLP Transaction or the Rights Offering. This release will affect stockholders' remedies in the New York Action, as well as the Delaware Action. First, it releases all claims in and dismisses the Delaware Action. Second, and perhaps more problematically, the release allegedly weakens the claims brought by Carfagno in the New York Action. According to Plaintiff, the release in the May 1 Stipulation carves out a narrow set of claims and affects only those New York claims that mirror those claims in the Delaware Action, while leaving the remainder of the New York Action intact. Objector Carfagno disagrees, and argues that the release undermines all claims relating to the fiduciary duties of Ross, Blau, and the other Centerline Managing Trustees and seriously jeopardizes the viability of the New York Action.

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[32] *See In re TD Banknorth*, 938 A.2d at 669 (holding that class action plaintiff must present evidence that supplemental proxy disclosures directly resulted from plaintiff's efforts and negotiating posture when proffered as adequate consideration for a settlement).

1. The release of claims in the Delaware Action

On the heels of the December 28, 2007 announcement of the TRCLP Transaction, Plaintiff filed the Delaware Action on January 15, 2008, seeking to enjoin Centerline from privately placing the Preferred Stock with TRCLP. Days later, on January 22, Plaintiff and Defendants reached a tentative Settlement. In exchange for the Rights Offering, Plaintiff ultimately agreed to release all legal claims, past, present, or future, "that arise out of or relate to" the TRCLP Transaction or the Rights Offering, and to use her best efforts to achieve dismissal of the Delaware Action.[33]

Plaintiff's Complaint avers that Defendants Ross, Blau, and the other Centerline Managing Trustees breached their fiduciary duties of care and loyalty to the Centerline stockholders. Specifically, they allege that Defendants breached their duties by formulating and approving the TRCLP Transaction, which would have allowed Defendant TRCLP, owned and controlled by Ross and Blau, to purchase $131 million of Preferred Stock in Centerline. In addition, Plaintiff Off complained that Centerline had not offered its other stockholders an opportunity to purchase the Preferred Stock on the same terms.

In the settlement approval context, the Court of Chancery considers the strength of the underlying claims, among other factors, when evaluating the adequacy of the proffered consideration for a proposed settlement in exchange for the release or dismissal

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[33] May 1 Stip. at 13, 19.

with prejudice of those claims.[34] If the court finds that the stockholder class would receive small or inadequate consideration in exchange for surrendering a facially credible claim, it may reject the proposed settlement.[35] Thus, I must examine the strength of Plaintiff's claims and balance the surrender of those claims against the benefits provided by the Rights Offering and Plaintiff's input on the Prospectus. Due to the limited discovery in this case, I must rely on the facts and circumstances known at the time the Settlement was negotiated and any additional facts developed through Carfagno's discovery.[36] Rather than attempt to make definitive findings on the merits of the claims in this or the New York Action, this opinion focuses instead on the apparent strength or weakness and facial credibility of the claims.

The Court of Chancery generally affords conduct and decisions of the board of a Delaware business entity the protection of the business judgment rule. Under the business judgment rule, the court presumes that the board acted independently, with due care, in good faith, and in the honest belief that its actions were in the best interests of the

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34 *Barkan*, 567 A.2d at 1285.

35 *Id.*

36 While settlements may be approved with little or no discovery, the absence of any discovery by Plaintiff regarding the merit of the claims in the Delaware Action makes it more difficult for this Court to be confident that dismissing those claims under the proposed Settlement adequately will protect the interests of the unnamed stockholders. *See Lewis*, 1994 WL 263551, at *7 (rejecting proposed settlement because court was "unable to adequately evaluate the value of the . . . claims as compared to the value of the somewhat speculative benefits conferred by the settlement" based on the plaintiff's failure to adequately investigate the claims).

stockholders.[37] When a director has a financial interest in the transaction, however, the business judgment rule will not apply.[38] Still, even where a director transacts business with the corporation, the transaction is not void or voidable solely for that reason if one of the conditions of 8 *Del. C.* § 144(a) is satisfied.[39]

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[37] *McMullin v. Beran*, 765 A.2d 910, 916 (Del. 2007) (citations omitted).

[38] *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984).

[39] Section 144(a) of the Delaware General Corporation Law provides in relevant part:

> (a) No contract or transaction . . . between a corporation and any other corporation, partnership, association, or other organization in which 1 or more of its directors or officers, are directors or officers, or have a financial interest, shall be void or voidable solely for this reason, or solely because the director or officer is present at or participates in the meeting of the board or committee which authorizes the contract or transaction, or solely because any such director's or officer's votes are counted for such purpose, if:
>
> > (1) The material facts as to the director's or officer's relationship or interest and as to the contract or transaction are disclosed or are known to the board of directors or the committee, and the board or committee in good faith authorizes the contract or transaction by the affirmative votes of a majority of the disinterested directors, even though the disinterested directors be less than a quorum; or
> >
> > (2) The material facts as to the director's or officer's relationship or interest and as to the contract or transaction are disclosed or are known to the shareholders entitled to vote thereon, and the contract or transaction is specifically approved in good faith by vote of the shareholders; or
> >
> > (3) The contract or transaction is fair as to the corporation as of the time it is authorized, approved or ratified, by the board of directors, a committee or the shareholders.

8 *Del C.* § 144(a).

Application of the business judgment rule to the Centerline Board's decision to execute the TRCLP Transaction and conduct the Rights Offering would severely diminish the strength of the claims in the Delaware Action. Based on the limited record before me, however, it is not clear the business judgment rule would apply, because at least the TRCLP Transaction may involve the type of self-dealing that must be judged under the entire fairness standard. The TRCLP Transaction undoubtedly is an interested transaction as to Ross and Blau, who together own 100% of TRCLP. According to the Proxy Statement Centerline filed with the SEC on April 23, 2007, five members of Centerline's eleven member Board, Defendants Ross, Blau, Schnitzer, Cotton, and White, are "Non-Independent" Trustees.[40] In addition, the independence of a sixth Trustee, Defendant Dolan, is subject to question. Dolan served as Dean of the University of Michigan School of Business in 2004 when Ross donated $100 million, prompting the school to change its moniker to the Stephen M. Ross School of Business at the University of Michigan. On this abbreviated record, Ross's substantial donation raises considerable doubt as to the independence of Dolan.[41] Although there is no bright line test for gauging

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40 Centerline Holding Co., Proxy Statement (Form DEF 14A), at 16 (Apr. 23, 2007), *available at* http://www.sec.gov/Archives/edgar/data/1043325/000111667907001286/proxy.htm.

41 This Court has found that serious issues of director independence can exist where interested directors have made charitable contributions to an organization to which other directors have significant ties. *See In re Limited, Inc.*, 2002 WL 537692, at *6-7 (Del. Ch. Mar. 27, 2002) (finding reasonable doubt as to director's independence where director served as president of university receiving significant contribution from controlling defendant). *See also In re Freeport-McMoRan Sulphur, Inc. S'holder Litig.*, 2005 WL 1653923, at *3, 13 (Del. Ch. June 30,

director nonindependence, a director "may feel beholden to someone for past acts" in the context of an interested transaction.[42] Accordingly, the donation of such a prodigious sum coupled with the fact that Ross became the eponym of the benefiting institution calls into question the independence of Defendant Dolan. Thus, six of the eleven, or a majority, of the Centerline Managing Trustees involved in approving the TRCLP Transaction appear to have been interested or nonindependent. That Ross presided over the December 13, 2007 meeting at which the Board resolved to sell in excess of $100 million of convertible preferred shares to a company he controlled, TRCLP, also casts doubt on whether the business judgment rule protections would apply.

Because Defendants TRCLP, Ross, and Blau had a direct financial interest in the TRCLP Transaction, the conditions of § 144 must be satisfied. Based on an examination of the limited record, it is not clear that those conditions were met even assuming the Board was fully informed of the interests of Ross and Blau in TRCLP. First, no stockholder vote occurred as set forth in § 144(a)(2); instead, the Rights Offering made a

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2005) (denying motion for summary judgment in stockholder class action based, in part, on issues of director independence where directors and entities made charitable contributions to university); *In re Oracle Corp. Derivative Litig.*, 824 A.2d 917, 920-21, 943 (Del. Ch. 2003) (finding directors on special litigation committee were not independent where other directors directly and indirectly contributed millions of dollars to a university with which the special committee members were affiliated). *But see In re J.P. Morgan Chase & Co. S'holder Litig.*, 906 A.2d 808, 822-23 (Del. Ch. 2005) (finding no substantial question of director independence despite allegations that director was trustee of institution receiving contributions from defendant corporation).

42 *In re Limited*, 2002 WL 537692, at *7 (internal quotation marks and citation omitted).

stockholder vote unnecessary under § 312.03 of the NYSE Listed Company Manual. Second, there is no evidence that the Transaction was approved by a majority of disinterested directors as required by 8 *Del. C.* § 144(a)(1).[43] Nor does the record indicate the amount of involvement, if any, Ross and Blau had in setting the terms of the TRCLP Transaction, or provide any basis for believing they did not participate in the meetings concerning it or that they abstained from the vote approving it. Indeed it appears that Ross presided over the meeting at which the Board authorized the sale of $100 million in convertible preferred stock to TRCLP.[44] The limited record also prevents a well-informed consideration of whether the TRCLP Transaction was the product of fair

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[43] Section 144(a) protects against the invalidation of a transaction solely because it is an interested one. Satisfying its requirements alone, however, does not automatically trigger application of the protections of the business judgment rule. "Nothing in the statute sanctions unfairness to [the Company] or removes the transaction from judicial scrutiny." *Fliegler v. Lawrence*, 361 A.2d 218, 222 (Del. 1976). As this Court explained in *Benihana of Tokyo, Inc. v. Benihana, Inc.*, § 144 is best seen as establishing a floor for board conduct, but not a ceiling. 891 A.2d 150, 185 (Del. Ch. 2005), *aff'd*, 906 A.2d 114 (Del. 2006). Because the parties have not shown that they are likely to succeed in proving they have satisfied the requirements of § 144(a), it follows that they also have failed to demonstrate that the TRCLP Transaction and the Rights Offering are likely to qualify for business judgment rule protection in light of the interestedness or nonindependence of a majority of the Board. *See Mills Acq. Co. v. Macmillan, Inc.*, 559 A.2d 1261, 1279 (Del. 1988) (holding that "when a court reviews a board action, challenged as a breach of duty, it should decline to evaluate the wisdom and merits of a business decision unless sufficient facts are alleged with particularity, or the record otherwise demonstrates, that the decision was not the product of an informed, disinterested, and independent board").

[44] Kaswan Decl. Ex. 49, Dec. 13, 2007 Board Meeting Minutes, at 1.

dealing.[45] Because the TRCLP Transaction might not qualify for the protections of the business judgment rule, I find the claims in the Delaware Action to be, at a minimum, facially credible. Thus, I find that the cost of releasing those claims would be substantial.

2. The effect of the proposed release on the New York Action

On January 25, 2008, Objector Carfagno filed his original complaint in the New York Action. Broadly, Carfagno alleges that Defendants[46] breached their fiduciary duties of loyalty, due care, and fair dealing, and are liable for waste of corporate assets and unjust enrichment in connection with the TRCLP Transaction, the Rights Offering, and the alleged scheme to rotate out the dividend-dependent retail stockholders and replace them with institutional investors. A trial in the New York Action is scheduled to commence in early 2009, with the discovery period ending this month, November 2008. As with the underlying Delaware claims, this Court's role in viewing the Settlement is not to determine the merits of the New York Action, but to evaluate the credibility of the

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45 *See* 8 *Del. C.* § 144(a)(3). The evidence does show that Centerline had communications with at least two other potential purchasers of the Preferred Stock, Goldman Sachs and Morgan Stanley. Moreover, although Carfagno initially contended that those entities had offered to buy the stock on more favorable terms to Centerline than those in the TRCLP Transaction, he effectively dropped that argument in the supplemental briefing he filed after taking some discovery. Furthermore, Defendants assert that TRCLP did not become a potential purchaser of the Preferred Stock until December 13, 2007, when it became apparent Morgan Stanley would not agree to terms acceptable to Centerline. Defs.' Supplemental Resp. to Objection to Settlement at 27.

46 Because the individual defendants in the New York Action are the same as the individual Defendants in the Delaware Action, I refer to them as Defendants in this opinion.

claims in that action and the effect of the proposed release on those claims in relation to the benefits of the Settlement to the stockholders and to the protection of absent stockholders' interests.

The Settlement releases all claims arising out of or related to the TRCLP Transaction and Rights Offering, whether derivative, class action, or individual.[47] Carfagno contends that the release as written may preclude some of the claims in the New York Action. Carfagno further asserts that the release may remove from the New York court's consideration certain factual allegations regarding the Rights Offering and the TRCLP Transaction, thereby decimating the remaining claims in that case. Plaintiff Off maintains that the release narrowly carves out only those claims directly attacking the TRCLP Transaction and the Rights Offering, leaving a host of other claims unaffected, including federal securities claims alleging misrepresentations by Defendants in connection with the Transaction or the Offering.

The New York complaint alleges that the Managing Trustees devised and implemented a scheme to transform Centerline from a real estate finance and investing institution with an income-oriented investor base into an alternative asset manager with a growth-oriented investor base. As part of the scheme, Carfagno avers that Defendants approved the TRCLP Transaction in an effort to depress the stock price of Centerline and encourage the retail stockholders to sell their shares. He also challenges on similar grounds the Board's decision to cut the dividend of the common stock from $1.68 per

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[47] May 1 Stip. at 13.

share to $0.60 per share. Taken together, with the TRCLP Transaction representing an integral piece of the puzzle, Carfagno complains of an overarching breach of fiduciary duty inherent in the plan for transforming the character of Centerline.

Because the claims in the New York Action involve broad allegations of breach of fiduciary duty by Defendants, the release may detract from the overall ability of Carfagno to prove his case. Importantly, the evidence shows, consistent with Carfagno's argument, that the TRCLP Transaction and the Rights Offering reasonably can be viewed as integral parts of Defendants' broader plan to transform the nature of Centerline's investment portfolio and future strategy. Unlike the more limited Delaware Action, the New York Action challenges the propriety of that entire course of action. Although there has been at least one motion to dismiss, the United States district judge handling the New York Action thus far has declined to do so, and trial now appears imminent. Indeed, the presiding judge, the Honorable Shira A. Scheindlin, advised the Defendants that "your chances to dismiss this complaint in its entirety as a matter of law, I would say low, low percentage. Single digits."[48] Thus, at this point, I find it likely that the facts regarding the TRCLP Transaction and the Rights Offering may assist Carfagno in his effort to demonstrate that they are part of a series of interrelated actions, which individually or collectively amount to breaches of fiduciary duty.

Plaintiff Off took a much narrower approach in Delaware, attacking only the TRCLP Transaction. A possible explanation is that she concluded the prospects of

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[48] Kaswan Decl. Ex. 3, Tr. dated May 2, 2008, at 17.

successfully challenging the propriety of the transformation of Centerline's portfolio too risky to be worth pursuing. Another possibility is that, in an attempt to maximize the likelihood of a positive outcome in her case, Off and her counsel decided to limit her claims to the proverbial low-hanging fruit. By challenging only the TRCLP Transaction, Plaintiff attacked the Board action most likely to raise the ire of the stockholders and to represent a breach of the duty of loyalty in that it clearly represented an interested transaction. There is nothing inherently wrong with that approach or the settlement of such cases on terms that narrowly circumscribe the scope of the attendant release. In each case, however, the court must consider the surrounding circumstances and the feasibility of effecting such a settlement without undermining other claims of the putative class to such an extent as to outweigh the anticipated benefit to the class from settling the narrower action. Approval of the Settlement at issue here, may force the class to sacrifice the effectiveness of a broader and integrally related case against Ross, Blau, and the Centerline Board. In short, I find that the release of claims arising out of or related to the TRCLP Transaction and the Rights Offering has the potential of substantially weakening the consolidated class action brought by Carfagno and others in New York, in which the plaintiffs seek a more comprehensive remedy.

In arguing for approval of the Settlement, Plaintiff and Defendants emphasize the narrow scope of the proposed release and deny it will hamper the New York Action. Nevertheless, Defendants explicitly preserved their right in the release and in their arguments to this Court to move for dismissal of the New York Action, in whole or in part, on grounds of issue or claim preclusion. At a minimum, the approval of this

Settlement may adversely impact the New York Action by forcing the New York court to interpret the effect of the release on the broad claims brought by Carfagno there. If the TRCLP Transaction and the Rights Offering were not so closely interrelated with the other transactions in issue in the New York Action and the alleged pattern of wrongdoing, the prospect that the release of stockholder class and derivative claims for breaches of fiduciary duty in this Court might preclude claims in other forums would not be cause for concern.[49] In the circumstances of this case, however, Plaintiff has not demonstrated that the claims in the different actions are sufficiently segregable that the proposed release in the Settlement would not materially undermine and complicate the ability of the class to pursue their claims in the New York Action. When I balance that possibility against the relatively marginal benefit obtained by the class as a result of the Settlement, I conclude that Plaintiff has not met her burden of demonstrating that the Settlement constitutes a fair and reasonable resolution of this controversy in light of the cost to the absent stockholders.

III. CONCLUSION

For the reasons stated and in the exercise of my business judgment, I decline to approve the Settlement. In particular, I find that the Settlement would force the putative

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[49] *See, e.g.*, *Nottingham Partners v. Dana*, 564 A.2d 1089, 1105 (Del. 1989) (recognizing that the "Court of Chancery has a history of approving settlements that have implicitly or explicitly included a general release, which would also release federal claims"); *Tabas v. Crosby*, 1982 WL 17835, at *1-2 (Del. Ch. June 24, 1982) (approving settlement where there were competing claims in federal court which would be released), *aff'd sub nom. Geller v. Tabas*, 462 A.2d 1078 (Del. 1983).

class to sacrifice facially credible claims in this and the New York Action in exchange for consideration that is not commensurate with the attendant cost. Therefore, I deny the Plaintiff's motion for approval of the Settlement.[50]

In addition, I hereby stay any further proceedings in this action, including any proceedings on Carfagno's Motion to Intervene and for Appointment as Lead Plaintiff, pending resolution of the New York Action. To the extent any party objects to the stay, they may seek relief from it as they see fit.

IT IS SO ORDERED.

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[50] In so ruling, I do not question the good faith of the parties or their counsel in seeking approval of the Settlement. I further note that, although my refusal to approve the Settlement necessarily includes denial of Plaintiff's related application for an award of $800,000 in attorneys' fees and expenses, I have made no findings on the reasonableness of that request or whether Plaintiff might be entitled to some amount of attorneys' fees or expenses on a mootness or other theory. This opinion is without prejudice to any such claim or to Defendants' right to oppose it.