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 other similarly situated,	)
Plaintiff,	)
v.	) C.A. No. 17272
NEW VALLEY CORPORATION, BROOKE GROUP, LTD., BENNETT'S. LEBOW, HOWARD M. LORBER, RICHARD J. LAMPEN, J. BRYANT KIRKLAND, III, HENRY C. BEINTEIN, BARRY W. RIDINGS and ARNOLD I. BURNS,	)
Defendants.	)

Submitted: May 1, 2000
Decided: August 15, 2000

MEMORANDUM OPINION

R. Bruce McNew of Taylor & McNew LLP, Greenville, Delaware. OF COUNSEL: Francis J. Farina of Devon, Pennsylvania; Peter A. Lennon of Broornall, Pennsylvania; and, Frederic S. Fox of Kaplan, Kilsheimer & Fox LLP, New York, New York. Attorneys for Plaintiff.

Michael D. Goldman, Peter J. Walsh, Jr. and Brian C. Ralston of Potter Anderson & Corroon LLP, Wilmington, Delaware. OF COUNSEL: Michael L. Hirshfeld, Teresa A. Consalves, Anne Kerr DeSimone and David Mollow of Milbank, Tweed, Hadley & McCloy LLP, New York, New York. Attorneys for Defendants.

STEELE, V.C.

Before 1999, New Valley Corporation had three separate classes of stock. In early 1999, New Valley's Board of Directors proposed a recapitalization plan ("Plan") that would merge all New Valley shares into a single class of common stock. Defendants maintain that the Board proposed the Plan in order to simplify New Valley's capital structure. The purported plaintiff class (former holders of New Valley's Class B Preferred Shares) argues that the Board intended to use the Plan to shift Class B holders' equity to the self-interested defendant directors and controlling shareholders.

Bennett Lebow, a named defendant, apparently controls New Valley. Lebow, however, did not control a majority of Class B shares. In fact, he and other defendants are only alleged to have controlled 11.3% of the Class B votes. The Plan was put to a vote which required that a simple majority of all three classes approve it. The vote attracted approval by a majority of all three classes of shares. Even if the defendants' Class B votes are not counted, a majority of Class B shares still voted in favor of the Plan.

Plaintiffs contend that defendants breached their fiduciary duties of loyalty and care by formulating and promoting the Plan. They also contend that the alleged ratifying class vote on the Plan could not have been fully informed because the Proxy Statement urging Plan approval contained numerous material omissions and misstatements.

This opinion addresses defendants' recently submitted Motion to Dismiss which suggests that plaintiffs' complaint fails to state any claim upon which relief could be granted. I find that plaintiffs have stated a proper claim regarding several of the alleged disclosure violations. If plaintiff can eventually show that the vote was not fully informed, defendants are *not* entitled to the protection of the business judgment rule. If it turns out that the New Valley shareholders voted while possessing all material facts, the defendants' actions proposing the Plan *will* receive the benefit of the business judgment rule because the defendants controlled only a small percentage of the Class B votes and the vote on the proposed Plan could not have been considered a foregone conclusion.

I. Parties

The purported plaintiff class consists of holders of New Valley Class 13 Preferred shares. New Valley and the directors who allegedly control New Valley are named defendants. Brooke Group Ltd., the controlling shareholder of New Valley, is also named as a defendant. Defendant Bennett S. Lebow is Chairman of the Board of Directors and Chief Executive Officer of New Valley, and also allegedly controls Brooke Group. Plaintiffs contend that New Valley's officers, directors and Brooke Group beneficially own 43.1% of the Company's common shares, 61.1% of the Class A Senior Preferred shares and 11.3% of the Class B Preferred shares.

II. Facts

For many years, New Valley operated under the name "Western Union Corporation." In 199 1, an involuntary petition under Chapter 11 of the Bankruptcy Code was filed against what was then called Western Union. A bankruptcy plan was eventually devised, and on November 1, 1994, the bankruptcy court entered an order confirming that plan. Certain assets were sold under the bankruptcy plan, most notably the money transfer business that continues to operate under the Western Union name.

Lebow and entities controlled by him have operated New Valley since its emergence from bankruptcy in 1995. On May 2 1, 1999, New Valley announced a proposed recapitalization plan ("Plan"). The Board of Directors purportedly believed the recapitalization would make it easier for market analysts to discern New Valley's true value. The implied hope was that recapitalization would boost New Valley's stock price making it possible for New Valley to use its stock to effect acquisitions or to raise capital.

When the Plan was proposed, New Valley had three classes of shares – Class A Preferred, Class B Preferred, and Common. On February 2, 1999, New Valley filed a preliminary proxy statement with the SEC that outlined the Plan. Under the Plan, each Class A share would be reclassified and changed into 20 common shares and one warrant to purchase an additional share, each Class B

share would be reclassified and changed into one-third of a common share and warrants to purchase five additional shares, and each common share would be converted to one-tenth of a common share and three-tenths of a warrant.

Under the Plan, Class A and Class B shares also lost their dividend and liquidation preferences. This was particularly significant for the Class A holders because Class A had a liquidation preference four times that of Class B and because the unpaid dividend arrearage "owed" to Class A holders was $234.6 million (compared to $172.9 million in dividend arrearage "owed" to Class B holders). The warrants have an exercise price of $12.50 and are exercisable for five years. Post-recapitalization, New Valley's common stock has consistently traded. for less than one dollar per share.

Class A shares traded up drastically while Class B shares lost half of their value immediately after the public learned of the Plan through the SEC tiling. Plaintiffs cite the market reaction as evidence that the Plan unfairly favored Class A holders over Class B holders. Plaintiffs state that defendants structured the recapitalization to favor Class A holders because the Brooke Group and Lebow own more than 60% of the Class A shares.

After the proposed Plan was publicly announced, New Valley prepared a Proxy statement urging all New Valley shareholders to vote for the Plan. The Proxy Statement stated that a special committee of directors not associated with

Lebow recommended the Plan. At a special shareholders meeting held on May 21, 1999, each voting class approved the Plan. Specifically, 82.7% of the outstanding Class A shares, 68.6% of the outstanding Class B shares, and 53.2% of the old common shares voted in favor of the Plan.

III. Parties Contentions

Plaintiffs contend that defendants orchestrated a fundamentally unfair and self-dealing recapitalization of New Valley. Specifically, plaintiffs allege the Plan stripped much of the value and voting rights of the Class B shares, and wiped out $172.9 rnillion of accrued and unpaid dividends and $69.8 million of fixed liquidation value. Plaintiffs also contend that the warrants that the Class I3 shareholders received are essentially worthless, leaving Class B holders worse off relative to Class A holders after the recapitalization than they were before. Although the Plan was approved by a majority of the Class B shareholders, plaintiffs allege this vote was tainted because the defendants failed to disclose all material information regarding the plan and its effect. Moreover, other unexplored alternatives were available that could have simplified New Valley's capital structure without unfair harm to the Class B shareholders, according to plaintiffs.

Defendants counter by claiming that the recapitalization was fair to the Class B holders, and that the warrants are potentially very valuable. Defendants contend that, in any event, the Class B holders approved the Plan in a fully informed vote.

They assert that plaintiffs' allegation fhat the Proxy Statement contained material omissions and misstatements is unfounded.

IV. Analysis

A. Standard of Review for Motion to Dismiss

In considering this motion to dismiss under Court of Chancery Rule 12(b)(6), I must assume the truthfulness of all well-pleaded allegations of the cornplaint.' In doing so, I am required to extend to plaintiffs the benefit of all reasonable inferences that can be drawn from the complaint.[2] Plaintiffs' complaint "need only give general notice of the claim asserted and will not be dismissed unless it is clearly without merit, either as a matter of law or fact."[3] Notwithstanding Delaware's permissive pleading standard, I am free to disregard mere conclusory allegations made without specific allegations of fact to support them.[4]

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[1] ***Weinberger v. LJOP, Inc.,*** Del. Ch., 409 A.2d 1262, 1264 (1979).

[2] ***In re USA Cafes, L.P. Litig.,*** Del. Ch., 600 A.2d 43, 47 (1991).

[3] ***Rabkin v. Phillip A. Hunt Chemical Corp.,*** Del. Supr., 498 A.2d 1099, 1104 (1985).

[4] ***Wolf v. Assaf,*** Del. Ch., C.A. No. 15339, mem. op. , 1998 Del. Ch. LEXIS 101, at *3-4, Steele, V.C. (June 16, 1998),.

B. The debate over how to compute "before" and "after" recapitalization figures

Plaintiff contends the warrants are "essentially worthless."[5] In contrast, defendants point out that in the 45-day period following their issuance, the warrants traded at an average price of $.50 a warrant.[6] Defendants then present calculations that purport to show that the Class A/Class B ratio is essentially the same after recapitalization as it was before. Defendants contend that the stock-plus-warrants structure was implemented to best duplicate the effects of the dividend and liquidation preferences that favored Class A before the recapitalization. Perhaps there is some sense in defendants' explanation. But, I now view this case in the context of a motion to dismiss. Therefore, I need not evaluate the merits of the competing valuations. Expert testimony, unavailable at this point, may eventually be needed in order for the Court to separate the well founded from the incorrect position But for now, I must accept plaintiffs' plausible: calculations to be true for the purposes of this motion.

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[5] Compl., ¶ 2.

[6] Defs.' Reply Br. at 5. Since this argument was first made in defendants' reply brief plaintiffs have not had the opportunity to respond to it.

C. Were the shareholders adequately informed when they purportedly "ratified" the challenged Board action?

Whether shareholders are "fully informed" turns upon whether directors have complied with their duty "[w]hen seeking the affirmative vote of stockholders . . . to disclose all material information."[7] A "fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote."[8] 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."[9]

Plaintiffs have alleged that the relevant Proxy Statement contained the following material omissions or misrepresentations:

1. it failed to disclose the projected value of the new common stock despite the fact that the Board had that projection;

2. it failed to estimate the value of the warrants, despite the fact that the Board had that estimate:

3. it failed to disclose the increased equity interest given to the controlling shareholders under the proposed Plan;

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[7] ***In re Santa Fe Pacific Shareholder Litig.,*** Del. Supr., 669 A.2d 59, 66 (1995).

[8] ***Loudon v. Archer-Daniels-Midland,*** Co., Del. Supr., 700 A.2d 135, ***143*** (1997); ***Rosenblatt v. Getty Oil*** Co., Del. Supr., 493 A.2d 929, 944 (1985).

[9] ***Loudon***, ***700*** A.2d at 144.

4. it failed to disclose that the investment banker's fairness opinion did not compare the fairness of the Plan as it related to each individual class;

5. it failed to disclose that the investment banker who gave the fairness opinion anticipates getting further work from Lebow-related entities;

6. it claimed that members of the "special committee" were "not associated with New Valley's controlling shareholder" despite the fact that each has long-standing business relations with Lebow;

7. it failed to disclose the identity of the shareholders whose suggestion initiated the Plan:

8. it failed to disclose the current status of the controlling shareholders' ongoing effort to engage in extraordinary transactions involving RJR Nabisco;

9. It failed to disclose the value of New Valley's assets or lines of business.

Dismissed disclosure claims

While the complaint alleges a duty to disclose post-recapitalization price estimates for the stock and warrants, "Delaware law does not require disclosure of inherently unreliable or speculative information."[10] The proxy statement armed plaintiffs with the information needed to make their own estimates, however. The proxy materials disclosed the liquidation preferences of the Class A Shares and Class B shares, and explained how the recapitalization would cause the surrender of dividend arrearages and liquidation preferences of both classes. It is quite

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[10] ***Arnold v. Society for Sav. Bancorp.,*** Del. Supr., 650 A.2d 1270, 1282 (1994). See ***also Goodwin v. Live Enter., Inc.,*** Del. Ch., C.A. No. 15765, 1999 WL 64265, at *12, Strine, V.C. (Jan. 25, 1999).

likely, however, that a reasonable shareholder would consider management's estimates very important in deciding how to vote on the Plan. Nonetheless, corporate management need not disclose ruminations regarding uncertain future value because their estirnates could be as misleading as helpful.' [1]

Plaintiffs also allege that while the Proxy Statement noted that New Valley "believes the Common Shares will trade as a minimum bid price sufficient to meet the requirements to be quoted on the NASDAQ Small Cap Market or the NASDAQ National Market System," it fails to state what that minimum bid price is.[12] The information plaintiffs seek is publicly available since it is set forth in NASDAQ Rule 4310(c)(4) tiled with the SEC. A proxy statement need not disclose facts that are generally known.[13]

Likewise, the Complaint fails to state a claim that the Proxy Statement inadequately disclosed that the Brooke Group's increased equity interest will allow it to control New Valley. The Proxy Statement states that "[a]s holder of an absolute majority of the Common Shares, [Brooke Group] will be able to elect all of the [New Valley's] directors and control the management of [New Valley]."[14] It

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[11] ***See Van de Walle v. Unimation, Inc.,*** Del. Ch., C.A. No. 7046, 1991 WL 29303, at *17, Jacobs, V.C. (March 6, 1991) ("To be the subject of a disclosure obligation, information relating to value must be considered reliable").

[12] Cornpl., ¶ 3 1; Proxy Statement at 19.

[13] ***Kahn v. Lynch Communications Sys., Inc.,*** Del. Supr., 669 A.2d 79, 89 (1995).

[14] Proxy Statement at 6, 22.

further adds "the increase in [Brooke Group's] ownership of Common Shares will make it impossible for a third party to acquire control of [New Valley] without the consent of [Brooke Group]."[15] There are other references to Brooke Group's equity interests post-recapitalization in the Proxy Statement, but the quoted language by itself was sufficient to inform plaintiffs of the additional leverage Brooke Group stood to gain if they approved the Plan.

Plaintiffs make much of the disparate values of the former Class A and former Class B shares after recapitalization. They maintain this end-result should have been disclosed. But how could defendants have known the eventual actual price to be set by the marketplace? Apparently, the marketplace does not highly value the warrants (at least according to plaintiffs' calculations). But, if plaintiffs knew what they were getting when they voted, they can not reasonably ask to have the recapitalization undone solely because defendants did not tell them that the marketplace would not regard their equity interest as highly as it had before.

Plaintiffs argue that PMG's potential conflict of interest was not disclosed. The Proxy Statement explained that PMG "may have a conflict of interest because certain associated persons and customers of Pennsylvania Merchant Group hold a substantial number of Class A Senior Preferred Shares and Class B Preferred

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[15] *Id.* at 6.

Shares."[16] Plaintiffs note the reason for the conflict was undisclosed, and apparently contend that they were owed a more detailed explanation. I find the conflict to be as obvious as it was stated in the Proxy Statement, and that any reasonable shareholder needed no further explanation in order to evaluate its significance. Plaintiffs also complain that the Proxy Statement should have explamed that PMG expects to do future work for Lebow-related entities. This is mere speculation. Plaintiffs offer no specific nonconclusory facts to support that naked allegation. But even if true, that fact would hardly be noteworthy since investment bankers, like most rational business people, seek repeat business. Because shareholders can reasonably be expected to possess basic common business sense, plaintiffs fail to state a claim on this issue.

Plaintiffs also contend that the assertion in the Proxy Statement that the members of the special committee were not associated with Lebow or the Brooke Group is untrue. Plaintiff alleges that the Proxy Statement should have disclosed that three members of the special committee were former partners at the Proskauer Rose LLP law firm. Defendants contend that plaintiffs' allegation is patently false because only one of three members is even an attorney. In any event, plaintiffs fail to explain in the Complaint why affiliation with Proskauer Rose is relevant. In other words, plaintiffs fail to explain why affiliation with Proskauer Rose equates

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[16] Proxy Staternent at 6-7, 22.

to association with Lebow or the Brooke Group. This allegation therefore fails to state a. claim.

Plaintiffs also contend that disclosure should have been made regarding New Valley's efforts to "engage in extraordinary transactions involving RJR Nabisco."[17] Plaintiffs allege that two of the director-defendants "have served as Brooke [Group] nominees at at least one recent stockholders meeting of RJR Nabisco."[18] The Complaint never explains why any of this would have mattered to a reasonable New Valley shareholder asked to vote on the recapitalization Plan. A careful reading of plaintiffs' answering brief makes it clear that plaintiffs themselves have abandoned this particular claim. Accordingly, it is dismissed.

Disclosure claims that survive the Motion to Dismiss

Plaintiffs allege that the fact that the fairness opinion did not cover fairness to each individual class should have been expressly disclosed. The fairness opinion from New Valley's financial advisor, Pennsylvania Merchant Group ("PMG"), states only that the Plan "is fair from a financial point of view to the current holders of the Company's shares."" Plaintiffs argue that is that disclosure is insufficient and misleading.

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[17] Compl., ¶ 45(i).
[18] Compl., ¶ 35.
[19] Compl., ¶ 32.

Defendants respond by noting that the opinion did not purport to compute the "relative fairness" of the Plan as applied to each class. If that is true, of what possible relevance is the fairness opinion? This was a recapitalization, involving only *internal* equity realignment. It was not a case where a third party bought-out New Valley shareholders for a sum certain. In that hypothetical case, a fairness opinion regarding the consideration to be paid as a whole could be relevant even if it failed to examine how the consideration was to be allocated among the three classes. But here, if the fairness opinion failed to distinguish between the classes, it is likely irrelevant and perhaps even misleading. Plaintiffs have adequately stated a claim on this issue.

The Proxy Statement asserted that the Plan was initiated in late 1996 when "[New Valley] was approached by certain holders of Preferred Shares who asked [New Valley] to consider a recapitalization." The identity of the shareholders who suggested recapitalization and their respective holdings broken down by share class was not disclosed. Plaintiffs allege this was a material omission. It is true that "mere mention" in a proxy statement does not necessarily require disclosure of "the details of the Board's decision making process or the factual or legal basis behind the determination."[20] In this case, however, the identity of shareholders

[20] ***In re Walt Disney Co. Derivative Litig.***, Del. Ch., 731 A.2d 342, 378 (1998), *aff'd in part, rev'd in part, and remanded by* ***Brehm v. Eisner***, Del. Supr., 746 A.2d 244 (2000).

whose suggestion initiated the Plan could be significant. The Proxy Statement told New Valley's shareholders that it was some of their own who first suggested the idea -- irnplying that the recapitalization must be good for the shareholders. Once a reasonable shareholder thinks more deeply, however, that shareholder could plausibly want to know: whether those shareholders 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). Presumably, plaintiffs will atternpt to argue that this partial disclosure was materially misleading. They are entitled to the opportunity to do so as they have adequately stated a claim for breach of the duty of disclosure on this issue.

Finally, plaintiffs allege that the disclosure in the Proxy Statement was inadequate because it did not reveal the value of New Valley's lines of business or its assets,. Neither party has presented much argument on this issue. But, 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. In the absence of any truly substantive opposing argument, the motion to dismiss this disclosure claim is denied.

D. Effect of fully informed shareholder ratification

Plaintiffs have adequately pleaded that defendants breached their duty of disclosure. Therefore, their claim, at least in part, survives defendants' motion to

dismiss. But if plaintiffs ultimately fail to prove that they were not fully informed when asked to vote on the Plan, their claim is very likely to fail. The "settled rule is that where a majority of fully informed stockholders ratify an action of even interested directors, an attack on the ratified transaction normally must fail."[21]

This Court has previously cited that same language in dismissing a claim that alleged that directors breached their duty of loyalty by submitting a proposed charter amendment for shareholder approval that shifted voting control to a corporate: savings plan controlled by defendants notwithstanding the fact that the majority of the shareholders approved the proposal.[22] In that case, Vice Chancellor Jacobs stated that "the only claim that may properly be considered on this motion concerns the validity of the ratification itself, i.e., the alleged proxy disclosures."[23]

It is my belief that these early decisions were well reasoned, but since 1990 the law in this area has changed, albeit only slightly. "Not only has the Delaware Supreme Court never endorsed the view adopted in those cases," their later decisions; "persuasively indicate that the Supreme Court would not hold that shareholder approval of board action claimed to violate the fiduciary duty of

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[21] ***Smith v. Van Gorkom,*** Del. Supr., 488 A.2d 8.58, 890 (1985) (making this statement as an aside while resolving a different issue).

[22] ***Weiss v. Rockwell Int'l Corp.,*** Del. Ch., C.A. No. 8811, 15 Del. J. Corp. L. 777, 1989 WL 80345, at *3, Jacobs, V.C. (July 19, 1989), *aff'd per curiam*, Del. Supr., 574 A.2d 264 (1990).

[23] *Id.* at *3.

loyalty would operate automatically to extinguish a duty of loyalty claim."[24] In practice, however, the difference between the pre-1990 and the post-1990 cases is quite minor. The current law provides that fully informed majority shareholder ratification revives the powerful business judgment rule presumptions.[25] So while fully informed shareholder ratification may not be tantamount to the death penalty for breach of fiduciary duty claims, application of the business judgment rule will lead to the same end result in virtually every case.[26]

It is also important to distinguish the facts of this case from cases in which shareholder approval is a foregone conclusion by virtue of the controlling shareholder's dominance. Here, even plaintiffs acknowledge that the Class B class vote was not a foregone conclusion. At most, defendants controlled only 11.3% of the Class B votes. Without Class B approval the Plan could not have been implemented. Also significant is the fact that a majority of the disinterested Class B shares voted for the Plan. Of course, the vote itself may be rendered

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[24] ***In re Wheelabrator Tech. Shareholders Litig.,*** Del. Ch., 663 A.2d 1194, 1201 (1995). The intervening Supreme Court decisions to which Vice Chancellor Jacobs referred ***are Kahn v. Lynch Communications Sys.,*** Del. Supr., 638 A.2d 1110 (1994), and ***Stroud v. Grace,*** Del. Supr., 606 A.2d 75 (1992).

[25] ***In re Wheelabrator Tech. Shareholders Litig.***, Del. Ch., 663 A.2d at 1205.

[26] One commentator has suggested that "[b]usiness judgment rule protection should have no role in describing the effect of shareholder ratification, as defined. Rather, that action should be described as valid in the absence of waste." Charles Hansen, *Solomon v. Armstrong: Is It the Last Word on Shaveholder Ratification?,* Corporation (Aspen Law & Business), Vol. 70, No. 23, Sec. 2, (Dec. 1, 1999). That suggestion may be a baleful siren song particularly in Delaware where substantial judicial deference is given to the shareholder franchise.

meaningless if plaintiffs ultimately show that it resulted from the exercise of a franchise tainted by misdisclosures.

On the other hand, if the Class B vote was indeed a foregone conclusion by reason of defendants' control of each class, the business judgment rule could never apply. An informed vote in that situation would only shift the burden to plaintiffs to show the transaction was not entirely fair.[27] Here, however, the Class B shareholders had blocking power. This case therefore turns on whether the Class B shareholders were fully informed when they gave their consent and opted not to block the: Plan. If they were fully informed, should not the Court conclude that they fully understood the Plan, were content with the Plan as it applied to them and never expected the Court to step in and save them from themselves?

E. Effect of 102(b)(7) provision in New Valley's Charter

A charter provision pursuant to 8 Del. C. § 102(b)(7) can eliminate or limit personal liability of a corporate director for breaches of the duty of care. Liability for duty of loyalty breaches can not be eliminated or limited, however. Therefore, if plaintiffs adequately plead "that the alleged misrepresentations and omissions

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[27] ***Weinberger*** v. ***UOP, Inc.***, Del. Supr., 457 A.2d 701, 703 (1983) (stating that when directors are on both sides of a transaction, and "where corporate action has been approved by an informed vote of a majority of the minority shareholders, we conclude that the burden entirely shifts to the plaintiff to show that the transaction was unfair to the minority").

were the product of self dealing, not good faith errors in judgment," a § 102(b)(7) provision will not protect its directors.[28]

Plaintiffs have adequately alleged that the defendants proposed the recapitalization in order to shift equity from the former Class B holders, thereby diluting the value of their investment and to funnel that equity to the former Class A holders. Plaintiffs allege that the misleading partial disclosures and omissions in the Proxy Statement were intended to effectuate defendants' self-interested objectives. Accordingly, New Valley's #102(b)(7) charter provision will not protect defendants against plaintiffs' remaining disclosure claims if plaintiffs can continue to tie those allegations to a claim that defendants' breached their duty of loyalty.

V. Conclusion

For the foregoing reasons, defendants' Motion to Dismiss is denied as to plaintiffs' allegations that the defendants breached their duty to disclose: (1) that PMG's fairness opinion was not class specific, (2) the identity of the shareholders who suggested the Plan, and (c) the value of New Valley's assets and lines of business. The motion to dismiss plaintiffs' other disclosure allegations is granted.

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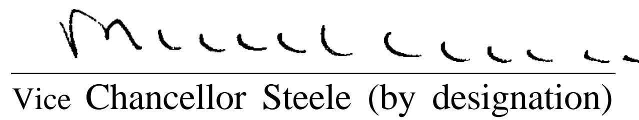
[28] ***Oliver v. Boston University,*** Del. Ch., C.A. No. 16570, 2000 WL 1038197, at *8, Steele, V.C. (July 18, ***2000); See also O'Reilly v. Transworld Healthcare, Inc.,*** Del. Ch., 745 A.2d 902, 91.5 (1999) (stating that if alleged disclosure violations implicated the duty of loyalty, as

Plaintiffs' fiduciary duty claims survive pending resolution of the breach of duty of disclosure claims.

IT IS SO ORDERED.



Vice Chancellor Steele (by designation)

opposed to the duty of care, a § 102(b)(7) charter provision is not grounds for dismissal of the complaint).