IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

RGC INTERNATIONAL INVESTORS, LDC	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 17674
	)	
GREKA ENERGY CORPORATION, SABA PETROLEUM COMPANY f/k/a HVI ACQUISITION CORPORATION, RANDEEP S. GREWAL, WILLIAM N. HAGLER, DR. CHARLES A. KOHLHAAS, ALEX S. CATHCART AND DR. JAN F. HOLTROP,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION

Date Submitted: October 13, 2000
Date Decided: November 6, 2000

Martin S. Lessner, James P. Hughes, Jr., and John J. Paschetto, Esquires, of YOUNG CONAWAY STARGATT & TAYLOR, Wilmington, Delaware; OF COUNSEL: Michael R. Klein, Robert F. Hoyt, and Christopher A. Wilber, Esquires, of WILMER, CUTLER & PICKERING, Washington, D.C., Attorneys for Plaintiff.

Edward P. Welch, Andrew J. Turezyn, and Rosemary S. Goodier, Esquires, of SKADDEN, ARPS, SLATE MEAGHER & FLOM, Wilmington, Delaware; OF COUNSEL: Marco E. Schnabl, William J. Hine, and William J. O'Brien, Esquires, of SKADDEN, ARPS, SLATE, MEAGHER & FLOM, New York, New York; Attorneys for Defendants Greka Energy Corporation, Saba Petroleum Company, Randeep S. Grewal, William N. Hagler, Alex S. Cathcart and Dr. Jan F. Holtrop.

Dr. Charles A. Kohlhaas, *Pro Se* Defendant.

STRINE, Vice Chancellor

This case involves a dispute between an owner of preferred stock, plaintiff RGC International Investors, LDC ("RGC"), and certain defendants affiliated with defendant Greka Energy Corporation. Through an acquisition subsidiary, Greka purchased the former Saba Petroleum Corporation ("Old Saba") in a March 22, 1999 merger (the "Merger"). Before the Merger, RGC owned "Series A Preferred" stock in Old Saba. To address RGC's Series A Preferred, Greka, Old Saba, and RGC executed a term sheet (the "Term Sheet") detailing the basis upon which RGC's Series A Preferred Stock was to be converted into a note (the "Note") from Greka (the "Note Exchange"). The Note Exchange was conditioned on final documentation and the closing of the Merger.

The Term Sheet required the parties to negotiate promptly to agree to the necessary final language. Nonetheless, the Merger closed and nearly nine months passed without an agreement that would permit the Note Exchange to transpire. Having lost patience, RGC brought this suit to rescind the Merger and enforce its rights under the Old Saba instruments that governed its Series A Preferred Stock before the Merger.

In this opinion, I conclude that RGC's complaint states a claim for breach of the Term Sheet and for relief under the doctrine of promissory

estoppel (collectively, the "Term Sheet Claims").[1] It is clear that RGC and Greka materially altered their positions in reliance upon the accord outlined in the Term Sheet. As a result, this litigation must focus on the legal consequences of that agreement and the parties' subsequent conduct under it.

Thus, I dismiss those aspects of RGC's complaint that rely directly upon RGC's prior rights as an Old Saba preferred stockholder. RGC relinquished those rights for the hope of the Note Exchange contemplated in the Term Sheet. While RGC's prior contractual and stockholder rights might be relevant to shaping relief on the Term Sheet Claims, those rights do not provide a direct basis for recovery.

In this opinion, I also deny RGC's motion for summary judgment on the Term Sheet Claims. There are an abundance of contested factual issues that bear on which party is responsible for the fact that RGC has yet to receive any consideration for its Series A Preferred Stock. Indeed, the record does not rule out the possibility that it was RGC's demands for the

[1] The amended complaint does not refer to promissory estoppel but the parties have fully briefed this motion on this point. As there is no prejudice to the defendants, I treat Count IX of the amended complaint as implicitly raising such a claim for purposes of this motion. At this stage of the litigation, I could not dismiss the complaint without permitting RGC to amend to add such a claim because the facts pled in the complaint clearly support such a theory of relief. *Cf. Brehm v. Eisner*, Del. Supr., 746 A.2d 244, 267 (2000). RGC, however, shall promptly submit an amended complaint explicitly stating a promissory estoppel claim.

addition of material terms not contained in the Term Sheet that led to the failure of the Note Exchange to occur.

I. The Parties

Plaintiff RGC is a Cayman Islands limited duration company that owned 7,310 Series A Preferred shares of Old Saba before Old Saba was merged out of existence. Old Saba was an energy company engaged in the acquisition, development, and exploration of oil and gas properties in the United States and internationally. Old Saba used horizontal drilling at some of its reservoirs to enhance production.

Defendant Greka was known as Horizontal Ventures, Inc. before its then-subsidiary HVI Acquisition Corporation ("HVAC") merged with Old Saba. Greka is an energy company that uses a proprietary horizontal drilling technology to maximize the production of proven oil and gas reservoirs.

Defendant Saba Petroleum Corporation ("New Saba") is the company that was known as HVAC before the Merger. HVAC took the "Saba" name after the Merger even though it and not Old Saba was the surviving corporation in the Merger.

Defendant Randeep S. Grewal was at all relevant times Greka's Chairman of the Board, Chief Executive Officer, and controlling stockholder. On October 8, 1998, Grewal became a director of Old Saba

and by the time of the March 22, 1999 Merger Grewal had assumed the duties of Chairman and CEO of Old Saba. Since the Merger, Grewal has served as the Chairman and CEO of New Saba.

The other defendants were all directors of Old Saba as of the time of the Merger.

II. Factual Background

A. RGC Invests In Old Saba

On December 31, 1997, RGC purchased 10,000 shares of a newly created series of Series A Preferred Stock from Old Saba for $10,000,000 pursuant to a "Securities Purchase Agreement."[2] The same day Old Saba filed a Certificate of Designations as an amendment to its certificate of incorporation. The Certificate of Designations outlined in detail the features and rights attaching to the Series A Preferred.

Before the events at issue in this lawsuit, Old Saba redeemed 2,000 of the Series A Preferred shares owned by RGC in exchange for $2.15 million. Thus, at the time the events that give rise to this dispute began, RGC owned

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[2] RGC also obtained warrants to purchase 224,719 shares of Old Saba common stock at the same time. The parties have not devoted their attention to the distinct issues, if there are any, involving the warrants.

Similarly, RGC also had certain rights under a registration rights agreement. The effect of these rights on this case are essentially subsumed within the arguments regarding the other agreements.

8,000 Series A Preferred Shares, which constituted *all* of the shares of that Series.

B. RGC's Rights As A Preferred Stockholder Of Old Saba

The Securities Purchase Agreement and the Certificate of Designations articulated a number of rights and protections belonging to Old Saba's Series A Preferred. In this section, I outline in serial fashion the rights of the Series A Preferred that RGC contends are at issue in this case.

First, the Certificate of Designations had a provision (the "Mandatory Redemption Provision") requiring Old Saba to redeem the Series A Preferred at a price fixed by formula at the option of RGC in the event that Old Saba failed to obtain timely "effectiveness with the Securities and Exchange Commission (the "SEC") of the Registration Statement [for the Series A Preferred]."[3] It is undisputed that Old Saba failed to obtain the required SEC approval within the required time. Thus, from September 30, 1998 until at least the date the Term Sheet was signed, RGC had the right to demand consideration from Old Saba in accordance with the formula provided in the Provision.

Second, the Certificate of Designations contained a provision that provided the Series A Preferred with certain rights in the event of a merger.

[3] Cert. of Desig. Art. V.A(ii).

The primary protection was that the Series A Preferred would receive the same consideration in any merger as would have been the case had the Series A Preferred in fact been converted into Old Saba common stock before the merger.[4] An additional and related protection Old Saba granted to RGC was contained in a separate Securities Purchase Agreement also dated December 31, 1997. So long as RGC held its Series A Preferred, the Securities Purchase Agreement barred Old Saba from consummating a merger unless the surviving corporation in the merger: i) assumed the obligations Old Saba owed to RGC under the Certificate of Designations and the Securities Purchase Agreement; and ii) was "a publicly traded corporation whose Common Stock is listed for trading on the Nasdaq, Nasdaq SmallCap, NYSE, or AMEX."[5]

Finally, the Certificate of Designations states generally that the "holders of the Series A Preferred Stock have no voting power whatsoever, except as otherwise provided by the Delaware General Corporation Law ("DGCL"), [or] in . . .Article[s] VIII . . . and . . . IX [of the Certificate of Designations]. . . ."[6] Article IX of the Certificate of Designations sets forth certain circumstances in which the approval — "by vote or written consent"

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[4] Cert. of Desig. Art. VI.B(b).

[5] Securities Purchase Agreement § 4(j).

[6] Cert. of Desig. Art. VIII.

— of the holders of a majority of the Series A Preferred was required.[7] Those circumstances included action by Old Saba that would "alter or change the rights, preferences or privileges of the Series A Preferred Stock or any Senior Securities so as to affect adversely the Series A Preferred Stock."[8]

C. Greka Secures A Substantial Stake In Old Saba And Begins Discussions Of A Merger

As of the end of summer 1998, Old Saba's financial condition was not ideal. According to the proxy statement filed in connection with the Merger (the "Proxy Statement"), Old Saba then had a working capital deficit of nearly $30 million and was in default on $20 million of its $30.5 million debt.[9] Old Saba's auditors had qualified its financial statement with the provision that the company's ability to continue as a going concern was in substantial doubt.[10] The stock market reflected these troubles[11] as Old Saba common shares were then trading at around a dollar a piece.[12] The

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[7] *Id.* Art. IX.

[8] *Id.* Art. IX(a).

[9] Proxy Statement at 20, 26.

[10] *Id.* at 20.

[11] *Weiss v. Samsonite Corp.*, Del. Ch., 741 A.2d 366, 375 n.26, *aff'd mem.*, Del. Supr., 746 A.2d 277 (1999) (taking judicial notice of trading price of listed stock in ruling on a motion to dismiss).

[12] Goodier Aff. Ex. 10.

cumulative effect of these problems led the AMEX to initiate discussions regarding Old Saba's continued eligibility for listing.[13]

Old Saba's troubles did not emerge unexpectedly in September 1998. At the beginning of 1998, Old Saba had hired an investment banker to seek out merger partners in order to "enhance shareholder values."[14] This initiative resulted in a merger agreement with a company called Omimex Resources, Inc. In August 1998, however, Omimex walked away and that strategic option disappeared.

When the Omimex transaction went south, Old Saba focussed on Greka as a strategic partner. This change in direction was a natural one because Greka had earlier broached the possibility of entering a strategic partnership with Old Saba that might be compatible with the Omimex merger. Aside from Old Saba's obvious need to stabilize its finances, the merger was also intuitively sensible because there was a logical fit between Old Saba's and Greka's businesses. Old Saba owned a number of energy producing reservoirs, whose production could possibly be increased through use of Greka's horizontal drilling technology.

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[13] Proxy Statement at 22.

[14] *Id.* at 19.

In the autumn of 1998, Greka therefore began talks with Old Saba about a merger between Old Saba and Greka's wholly-owned acquisition subsidiary, HVAC. As part of that process, Greka reached an initial accommodation with RGC, which at that time already possessed the right to trigger a Mandatory Redemption of the Series A Preferred. The real world value of that right was, of course, limited by Old Saba's financial straits.

The accord between RGC and Greka (the "Option Agreement") involved the purchase by Greka of 690 of RGC's 8,000 Series A Preferred shares for $750,000. In addition, Greka was granted an exclusive option to purchase up to 6,310 of RGC's remaining Series A shares for nearly $6.9 million through November 5, 1998, with the right to extend that option for another month for $500,000. The parties also worked out a formula by which Greka could buy out the remaining 1,000 Series A Preferred shares held by RGC. In the event that Greka actually exercised its option, RGC agreed to waive its rights under the Mandatory Redemption Provision.

Having addressed the Series A Preferred in this preliminary manner, Greka then reached an agreement with Old Saba on October 8, 1999 (the "Common Stock Purchase Agreement") to purchase 2.5 million newly issued Old Saba common shares in two unequal installments. The purchase of the first installment of 333,000 shares in exchange for $1 million was to

close on or before November 6, 1998. The purchase of the second installment of 2,166,667 shares in exchange for a total of $6.5 million was to occur on or before December 4, 1998.

At the time of the Common Stock Purchase Agreement, Greka's CEO, defendant Grewal, was added to the Old Saba board in place of a director who resigned. According to that same Agreement, a second Greka-designated director was to join the Old Saba board in place of another sitting director when the second installment was paid. Greka also obtained a separate agreement that another Old Saba director would resign and be replaced by a Greka designee at the time Greka completed its purchase of 7,000 of RGC's Series A Preferred shares under the Option Agreement and converted those shares into Old Saba common stock. If the three Greka members were added as contemplated, Greka would control a majority of Old Saba's five person board.

In concert with its initial purchases under the Option and Common Stock Purchase Agreements, Greka entered into another significant transaction in Old Saba shares. On November 23, 1998, Greka purchased nearly 3,000,000 Old Saba shares (or approximately 29% of Saba's then outstanding common stock) at a substantial premium to market from Saba's

former Chairman of the Board, Ilyas Chaudhary. That purchase increased Greka's ownership interest to 34.7% of Old Saba's common stock.

D. Greka Fails To Complete The Purchases Contemplated By The Option And Common Stock Purchase Agreements, But Secures An Agreement To Merge With Old Saba

By the time December 1998 came, Greka was unable or unwilling to complete the second-stage purchases contemplated by the Option and Common Stock Purchase Agreements. As of December 6, 1998, Greka had neither exercised its option to purchase the second installment of 6,310 Series A Preferred shares from RGC nor its option to purchase the second installment of 2,166,667 common shares from Old Saba itself.

On December 7, 1998 — the day after Greka's Option Agreement with RGC expired — Greka and Old Saba announced that they had reached an agreement whereby Old Saba would merge with HVAC in a stock for stock merger. Old Saba stockholders other than Greka were to receive one Greka common share for each six shares of Old Saba they owned. This ratio was apparently chosen based on the assumption the Series A Preferred would not convert. On that basis, the premium to Old Saba common stockholders over market price was over 50%.[15] At the same time, Greka and Old Saba indicated that negotiations with RGC would be commenced to

[15] *Id.* at 26.

extend Greka's now-expired Option Agreement with RGC or to reach another accommodation with RGC regarding the Series A Preferred.

E. A Merger Agreement Is Finalized And The Term Sheet Is Executed

On December 18, 1998, Old Saba, Greka and HVAC entered into a formal merger agreement (the "Merger Agreement"). The Merger Agreement provided that HVAC would be the surviving company in the Merger and would operate under the Saba name. Within a month, Grewal became Old Saba's CEO.

On February 16, 1999, the Merger Agreement's exchange ratio was amended in a material way. Rather than providing for an uncapped six to one exchange ratio, the Agreement was amended to provide Old Saba common stockholders other than Greka with their pro rata share of 1,240,000 Greka shares in exchange for the shares of Old Saba they owned (the "Merger Consideration").[16] That is, the total number of Greka shares that would be paid in the Merger would be constant regardless of whether the Series A Preferred was deemed converted and treated equally with the other Old Saba stockholders. Put simply, if RGC's Series A Preferred was

[16] Merger Agreement at I-28; Proxy Statement at c, 8.

deemed converted that eventuality would "be extremely dilutive to the holders of [Old] Saba common stock."[17]

The Merger Agreement contained several provisions designed to limit the risk that such a dilution would occur. For example, the Merger was subject to the conditions that RGC not have exercised either: (1) its right to convert its Series A Preferred into Old Saba common stock without Greka's written consent; or (2) its Mandatory Redemption Rights unless Old Saba redeemed the shares out of its available cash, which was at that time impossible.[18]

In further recognition of RGC's rights, the Merger Agreement provided:

> Provisions for the Series A Convertible Preferred Stock. Prior to the Effective Time, [Greka] shall have notified each Holder of Series A Convertible shares of [Old] Saba . . . of the provisions it has made for the conversion of said Saba Preferred Shares into Common of [Greka] in accordance with the Saba Preferred Shares designation.[19]

But no agreement had been reached about the Series A Preferred owned by RGC as of the time the February 19, 1999 Proxy Statement was mailed to the stockholders of Greka and Old Saba. The Proxy Statement

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[17] Compl. ¶ 29 (quoting Proxy Statement at 7).

[18] Merger Agreement § 5.2.

[19] Merger Agreement § 2.1(f).

warned Old Saba stockholders that the Merger could be derailed or seriously altered in economic terms depending on how the Series A Preferred were dealt with:

> "[T]he conversion of the Series A Preferred Stock could be extremely dilutive to the holders of Saba common stock.
>
> * * *
>
> Horizontal Ventures is required to provide for the conversion of the Series A preferred either by way of conversion into Horizontal Ventures shares or by agreement, by redemption. The merger provides for a set number of Horizontal Venture shares to be issued based on the number of Saba shares outstanding at the time of the original contract. Additionally, the merger allows Horizontal Ventures to terminate the contract if the Series A Preferred convert without its approval.[20]

Indeed, the Proxy Statement contained a chart showing that the conversion of the Series A Preferred could diminish the number of Greka shares received by the other Old Saba stockholders in the Merger by 50% or more.[21]

As of the time the Proxy Statement was mailed, Greka, Old Saba, and RGC had yet to come to terms regarding the treatment of the Series A Preferred. The parties were cutting things close because the stockholder

[20] Proxy Statement at 7-8; *see also id.* at 32-33.

[21] *Id.*

votes on the Merger were set for March 19, 1999, and the Merger was to close the second business day after a successful vote.[22]

Four days before the stockholder meeting, RGC, Old Saba, and Greka reached agreement on the detailed Term Sheet. That agreement required RGC to exchange all of its Series A Preferred for a Secured Convertible Note issued by Greka[23] (the previously defined "Note Exchange"). The Note was to have a value equal to the "aggregate Stated Value of the Series A Preferred Stock owned by RGC plus all accrued and unpaid interest, dividends and registration payments up to the closing date of the exchange. . . ."[24] Although the Term Sheet does not precisely define the closing date, RGC's complaint alleges — without a textual basis in the Term Sheet — that the closing date was to be the same day as the Merger closed. The Term Sheet provided that the Note was due to be paid in cash six months after the closing date for 120% of "the then outstanding principal

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[22] Merger Agreement at I-2; Proxy Statement at 37.

[23] The Term Sheet can arguably be read as referring to HVAC rather than GREKA in this respect and in certain other respects. The Term Sheet's definition of GREKA includes "any successor entity" to GREKA which survives the Merger between GREKA and Old Saba. Term Sheet at 1. But the Merger was not between GREKA and Old Saba; it was between HVAC and Old Saba. HVAC was the survivor in that merger but was not a "successor entity" to GREKA, which maintained its corporate existence. Hence, for purposes of this motion, I have assumed that the Term Sheet's references to "Horizontal" — the defined term for GREKA or its successor entity in the Merger — mean GREKA, not HVAC.

[24] Term Sheet at 1.

amount thereof, plus all accrued and unpaid interest thereon . . . ."[25] Greka was to pledge all of its collateral to secure the Note.

The closing of the Note Exchange was subject to certain conditions, which included "[m]utual agreement on definitive documentation," "completion of the merger between [Old] Saba and [Greka]" and "cancellation of the [Series A] Preferred Stock owned by [Greka]."[26] The parties expressly "acknowledge[d] their mutual agreement in the . . . terms and their intention to negotiate in good faith the contemplated transaction in an expedited manner."[27] By its own plain words, the Term Sheet also required Greka and Old Saba to keep the Term Sheet "confidential and not to distribute it to, or discuss it with, any third party."[28]

The Term Sheet contains other quite elaborate provisions that are not relevant here, except to note that they support the inference that the Term Sheet is a highly specific document that was negotiated by sophisticated parties.

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[25] *Id.*

[26] *Id.* at 3-4.

[27] *Id.* at 4.

[28] *Id.*

F. The Merger Closes But The Parties To The Term Sheet Never Reach A Final Agreement Regarding RGC's Series A Preferred

RGC circulated a draft of the documentation contemplated by the Term Sheet to Greka and Old Saba on the day of the stockholder votes on the Merger. While the votes necessary to approve the Merger were secured, the parties to the Term Sheet made less progress. On March 22, 1999, the certificate of merger was filed with the Secretary of State's office and the Merger Consideration was paid out without any comments on the documentation yet having been made by Greka or Old Saba.

As filed, the certificate of merger made no provision for the Series A Preferred. Instead, the certificate of merger simply referenced the Merger Agreement, which had only indicated that the Series A Preferred would be informed of how their shares were being converted. Likewise, the certificate of incorporation of the surviving corporation in the Merger, HVAC, which had changed its name to New Saba, made no provision for RGC's Series A Preferred.

In its public disclosures following the Merger, Greka has acknowledged the need for it to address RGC's Series A Preferred. Typical of its disclosures is this excerpt from one of its quarterly reports:

> [A]t June 30, 1999, there remained 7,160 shares of preferred stock outstanding. On March 15, 1999, the Company and RGC entered into a term sheet that provided for the conversion of the

> preferred stock to a subordinated convertible note obligation of the Company. Negotiations relating to the final documentation of the agreement are ongoing.[29]

RGC and Greka[30] did in fact undertake negotiations to definitively document the transaction contemplated by the Term Sheet. But those negotiations were unsuccessful. According to RGC, the problem was that Greka sought to modify in a material way the terms contained in the Term Sheet. Unsurprisingly, Greka claims that it was RGC's insistence on new material terms that led to impasse.

At the point of impasse, RGC contends that Grewal orally assured it that Greka would raise funds sufficient to redeem the Series A Preferred on September 30, 1999 at a price consistent with the earlier Option Agreement price. In exchange, RGC agreed to hold off on exercising its rights under the Certificate of Designations until that date. When September 30, 1999 came and went without redemption, RGC tried to communicate with Grewal. In late October 1999 Grewal finally got back to RGC and committed to redeem the Series A Preferred by November 30, 1999.

When that date came and went without redemption, RGC sought to exercise its Mandatory Redemption Rights by presenting a redemption

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[29] Lessner Aff. Ex. E.

[30] I suppose that New Saba was also a party to these discussions as a technical matter.

notice to Greka, and not to Old or New Saba, through correspondence sent to Grewal at Greka:

> This letter shall serve as a Mandatory Redemption Notice pursuant to Article V.A(ii) of the Certificate of Designations, Preferences and Rights of a Series A Convertible Preferred Stock (the "Certificate") with respect to 7,159.3 shares of Series A Convertible Preferred Stock which we own. The Mandatory Redemption Event giving rise to our right to submit this Notice is the failure to obtain effectiveness with the Securities and Exchange Commission of the Registration Statement on or before June 28, 1998. *The Mandatory Redemption Amount shall be $3,693.81 per share of Series A Convertible Preferred Stock or an aggregate of $26,445,083.50 for all shares of Series A Convertible Preferred Stock hereby submitted for redemption (based on the calculations attached hereto and made in accordance with the provisions of the Certificate).* Capitalized terms used herein shall have the meanings ascribed thereto in the Certificate.[31]

The $3,693.81 per share RGC demanded substantially exceeded the $1,087 per share price placed on RGC's Series A Preferred in the prior Option Agreement and the value of the Note described in the Term Sheet. In fact, the total Mandatory Redemption price of $26 million exceeded all of Greka's other Merger acquisition costs.

Greka reacted to RGC's demand predictably:

> We received your letter to us dated December 1, 1999, which you claim served as a Mandatory Redemption Notice. We are not required to pay to you the amount set forth in that letter.

[31] Goodier Aff. Ex. 9 (emphasis added).

> As you are aware, Saba Petroleum Company merged with and into HVI Acquisition Corporation effective March 24, 1999. The Certificate of Incorporation of HVI Acquisition Corporation became the Certificate of Incorporation of the surviving corporation in that merger. Under Delaware law, the Certificate of Incorporation of Saba Petroleum Company, which included the Certificate of Designations, Preferences, and Rights of the Series A Convertible Preferred Stock of that corporation, disappeared and became a legal nullity at the effective time of the merger. Therefore, you currently are unable to exercise any mandatory redemption rights you may had had under that certificate of designations.
>
> As you are further aware, the Term Sheet we entered into with you on March 15, 1999 prior to the effective time of the merger provides that your Series A Preferred Stock of Saba Petroleum Company would be convertible into shares of our common stock in accordance with the terms of the convertible note described in the Term Sheet and for which the Series A Preferred Stock would be exchanged. We should arrange a time to discuss the manner in which we may proceed with the Term Sheet.[32]

Thereafter, this lawsuit ensued.

III. RGC's Claims

RGC has pled a myriad of claims in its amended complaint. As will be seen, these claims have a surreal quality that results from RGC's failure to acknowledge the critical role of the Term Sheet.

For example, Count One of the amended complaint alleges that the Merger violated 8 Del. C. § 251(b) because the Merger Agreement did not

[32] Lessner Reply Aff. Ex. B.

state how the Series A Preferred would be treated in the Merger. Of course, Section 2(f) of the Merger Agreement did state that Greka would inform each Series A holder of the provisions made for conversion before the Merger closed. RGC executed the Term Sheet before the Merger closed specifying the manner in which the Series A Preferred shares were to be addressed.

The complaint also contains a number of contract-based claims, one of which, Count I, also alleges that the failure of the Merger Agreement to specify the treatment of the Series A Preferred violates the Certificate of Designations as well as § 251(b). Most of RGC's other contract claims center on the proposition that RGC is now entitled to exercise all the rights it possessed as an Old Saba Series A Preferred stockholder before the Merger because the Note Exchange contemplated by the Term Sheet did not occur. Thus, Count II contends that the failure of the Merger Agreement to require a publicly traded corporation to succeed to Old Saba's obligations to RGC violated the Securities Purchase Agreement. In Count V, RGC alleges that it was entitled to vote on the Merger pursuant to the Certificate of Designations. Count VI contends that Greka and New Saba breached their contractual duties by failing to pay RGC over $26 million when RGC purported to exercise its Mandatory Redemption Rights on December 1,

1999. Count VII simply accuses Greka of inducing Old Saba to disregard RGC's contractual rights, conduct which is said to constitute tortious interference with contractual relations.

In Count III RGC also alleges that the directors of Old Saba breached their fiduciary duties in connection with the Merger. Count VIII alleges that Greka and HVAC aided and abetted the breaches by the Old Saba directors. Essentially, RGC claims that the Old Saba board had a duty to treat RGC "with entire fairness," which the Old Saba board could have done simply by honoring the contract rights RGC claims were breached. Although RGC attempts to argue in its brief that its fiduciary duty claim is centered on the Old Saba board's failure to allocate the consideration to be received from Greka in the Merger fairly between the Old Saba common stockholders and RGC, that argument is supported by only one sentence of the complaint which simply indicates that because RGC did not receive any of the Merger Consideration "the Merger effectively delivered a return to the holders of [Old] Saba common stock" including two of the defendant directors.[33] Of course, all of the Merger Consideration went to the Old Saba common stockholders because RGC had entered into the Term Sheet which

[33] Compl. ¶ 44.

contemplated that RGC would receive the Note in exchange for its Series A Preferred.

RGC also pleads an odd disclosure claim that is based on the failure of the Proxy Statement to disclose precisely how RGC's Series A Preferred would be treated in the Merger. RGC does so even though RGC was fully aware of the Term Sheet, which Greka and Old Saba were forbidden to disclose to the other Old Saba stockholders by virtue of a provision of the Term Sheet clearly sought by RGC itself. Even though the Term Sheet was confidential, the complaint alleges that the Proxy Statement was deficient because it failed to disclose that Greka was manipulatively using the Term Sheet to induce RGC not to exercise its contractual rights as a Series A stockholders and thereby permit Greka to obtain control of Old Saba.

Finally, in Count IX RGC alleges that Greka breached its duties under the Term Sheet as a matter of contract law or promissory estoppel.[34]

The remedies the amended complaint seeks for the injuries RGC has allegedly suffered at the hands of the defendants include rescission of the Merger and a disgorgement of any profits made by the defendants in that transaction; rescissory damages; specific performance of the Mandatory

[34] *See supra* note 1.

Redemption Rights; and/or specific performance of the Note Exchange contemplated by the Term Sheet.

IV. The Procedural Posture Of The Case

The current motions come before me in an inefficient posture. The defendants have sought to dismiss the complaint for failure to state a claim under Court of Chancery Rule 12(b)(6). At the court's urging, the defendants stripped down their original brief to remove references to evidence that was not incorporated into and integral to the amended complaint.

But having played a role in encouraging me to regard the defendants' initial motion as delving too far into matters outside the complaint for me to fairly consider that motion under Rule 12(b)(6) rather than Rule 56, RGC responded to the defendants' revised brief with an answering brief *and a summary judgment motion.* The summary judgment motion overlaps to a large extent with the defendants' Rule 12(b)(6) motion and is supported by evidence that was not incorporated into the amended complaint. RGC's opening brief in support of that motion is the same brief that contains RGC's answer to the defendants' opening brief in support of dismissal.

While I am familiar with that all too frequently used word of the 1990s — compartmentalization — I confess to having had some difficulty

actualizing that word in analyzing the motions before me. Nonetheless, after flirting with the possibility of treating both motions under Rule 56, I have eschewed that approach and will attempt to ignore what I am not supposed to know in ruling on the defendants' Rule 12(b)(6) motion.

In so doing, I will apply the familiar standard that requires me to accept the non-conclusory facts pled in the complaint as true.[35] In ruling on the defendants' dismissal motion, I cannot consider documents that are not incorporated and integral to RGC's complaint. Happily, virtually all of the documents relied upon by RGC and the defendants were expressly referenced and relied upon in the complaint, and I may consider their plain terms.[36] After examining the complaint's allegations and the incorporated documents in the light most favorable to RGC, I may dismiss the complaint if I am reasonably certain that it fails to state a claim upon which relief may be granted.[37]

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[35] *Grimes v. Donald*, Del. Supr., 673 A.2d 1207, 1213-14 (1996); *In re Lukens, Inc. Shareholders Litig.*, Del. Ch., 757 A.2d 720, 727, *aff'd sub. nom. Walker v. Lukens, Inc.*, Del. Supr., 757 A.2d 1278 (ORDER) (2000).

[36] *Vanderbilt Income Growth Associates L.L.C. v. Arvida/JMB Managers, Inc.*, Del. Supr., 691 A.2d 609, 613 (1996). The documents referred to in the complaint include: the Merger Agreement; the Securities Purchase Agreement; the Common Stock Purchase Agreement; a registration rights agreement; and the Proxy Statement. The most important documents are the very contracts RGC relies upon as the basis for its claim and I rely upon their unambiguous terms. I have relied substantively upon the Proxy Statement only for purposes of examining RCG's disclosure claim. I also have used the Proxy Statement as an aid to developing a coherent factual narrative, as the complaint's drafters themselves obviously also did.

[37] *Arvida/JMB Managers*, 691 A.2d at 612.

RGC's summary judgment motion will be examined under the equally familiar Rule 56 standard. That standard requires me to draw all factual inferences from the record evidence in favor of the non-moving parties, the defendants. After reading the record through that prism, I may grant summary judgment if RGC persuades me that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law based on the undisputed facts in the record.[38]

V. Legal Analysis

A. The Allegations Of RGC And The Defendants Regarding The Term Sheet

RGC and the defendants dispute the legal implications of just about everything. Nonetheless, they are in basic agreement about most of the key facts relevant to determining this motion. For example, the parties do not dispute that the Term Sheet was entered into among Greka, Old Saba, and RGC in order to establish a basis for addressing the Series A Preferred Stock held by RGC that would permit the Merger to be consummated.

Thus, the complaint filed by RGC states:

> [T]he merger agreement, in direct contravention of 8 Del. C. § 251(b), contains no provision addressing the manner of converting plaintiff's shares. Nevertheless, in an effort to keep plaintiff from jeopardizing the merger by asserting its various conversion, redemption and voting rights, Greka induced

[38] *E.g., Emmert v. Prade*, Del. Ch., 711 A.2d 1217, 1219 (1997).

> plaintiff to enter into a "term sheet" that set forth the terms of a note that plaintiff would be given for its shares simultaneously with the closing of the merger. The note was to mature six months from the closing date of the merger. The transaction contemplated by the term sheet was subject to mutual agreement on definitive documentation. Instead, without prior notice to plaintiff, Greka consummated the merger on March 22, 1999 and then steadfastly refused to negotiate in good faith to contemplate the transactions pursuant to the term sheet.[39]

Meanwhile, the defendants' briefs state in pertinent part:

> [T]his case is not unique, as Plaintiff asserts, because it purportedly received "nothing" as a result of the merger. Rather, this action presents a unique form of overreaching by a plaintiff that negotiated a Term Sheet whereby it would have received substantial consideration for its preferred shares and thereafter rejected the arrangement contemplated in that Term Sheet hoping that it could pressure Greka into making further concessions by bringing a lawsuit threatening to unwind the year old merger at issue here.
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> * * *
>
> [The Merger] was structured in which a fixed number of Greka shares were offered in exchange for all Old Saba's outstanding equity on a fully diluted basis (i.e., including all Old Saba shares in Plaintiff's hands after the exercise of its preferred stock conversion rights). But Plaintiff, rather than converting its preferred shares into Old Saba common and then exchanging it for Greka shares, induced Greka to accept the Term Sheet at issue here to create the possibility of Plaintiff receiving something other than Greka shares in the purchase of Old Saba, the very purchase Plaintiff now seek to rescind. At no time did Plaintiff try to prevent or enjoin the shareholder vote or the transaction despite the fact that it had been informed of the merger both well before it took place and that the merger would be consummated promptly after a favorable vote.

[39] Compl. ¶ 2.

* * *

> As explained in the Moving Defendants' prior submission (the "Opening Brief"), RGC deliberately waived the contractual rights (including those for redemption) it had enjoyed as a holder of preferred shares in Old Saba hoping to secure some other payment (instead of accepting the consideration offered to holders of common and preferred shares of Old Saba, namely, conversion into shares of Greka). That alternative was described in a term sheet between and among RGC, Greka and Old Saba (the "Term Sheet"). *This Term Sheet, once executed, gave rise to an enforceable obligation on the part of the signatories to negotiate in good faith the definitive documentation required to give effect to the terms of the transaction described therein.* While Greka tried to negotiate in good faith toward that end, RGC apparently felt that the Term Sheet was a floor from which it could try to extract additional material terms that were never agreed to by the parties. RGC's attempt to rewrite this agreement in principle constituted a rejection of the Term Sheet as written and a breach of RGC's obligation to negotiate in good faith, resulting in the loss of its right to the consideration described in the Term Sheet.[40]

At various times in this litigation, the defendants have taken divergent positions regarding the validity of the Term Sheet as a contract. In their original brief in support of dismissal, the defendants argued that the Term Sheet "is a detailed document expressly describing the agreement reached between Greka and RGC with respect to the Old Saba Preferred."[41] They argued for dismissal of the then-operative complaint on the ground that

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[40] Def.'s Op. Br. at 1-3; Def.'s Reply Br. at 2-3 (emphasis added).

[41] Def.'s 2/17/00 Op. Br. at 17.

RGC's only rights could arise out of the Term Sheet. This position was consistent with that articulated by Grewal in his response to RGC's attempt to exercise its Mandatory Redemption Rights.

When the complaint was amended to add a count relying on the Term Sheet, the defendants changed course and argued that RGC had no enforceable rights under the Term Sheet because the Term Sheet is not an "enforceable contract."[42] In contrast to their earlier litigation and negotiating position, which had emphasized the completeness of the Term Sheet and the need for the parties to adhere to its terms without material additions, the defendants now contend that the Term is an unenforceable "agreement to agree." The defendants bolster that argument with citations to decisions that stand for the proposition that an agreement to negotiate in good faith will not be enforced unless all the material terms of the contract to be negotiated had already been agreed to by the parties.[43]

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[42] Def.'s Op. Br. at 43.

[43] *Internat'l Equity Capital Growth Fund, L.P. v. Clegg*, Del. Ch., C.A. No. 14995, mem. op. at 19, Allen, C. (Apr. 21, 1996) (*citing VS & A Communications Partners, L.P. v. Palmer Broadcasting L.P.*, Del. Ch., C.A. No. 12521, mem. op. at 6, Allen, C. (July 14, 1992)); *Hammond & Taylor, Inc. v. Duffy Tingue Co.*, Del. Ch., 161 A.2d 238, 239-40 (1960) ("the classic example of a legally unenforceable provision [] is nothing but an agreement to agree in the future without any reasonably objective controlling standards provided."); *Hindes v. Wilmington Poetry Soc'y*, Del. Ch., 138 A.2d 501, 504 (1958) (concluding "that the provision with respect to the payment of royalties is legally indefinite because it is nothing more than an agreement to agree at a later time and no agreed or implied standards are operative to make such future action definite."); *Raisler Sprinkler Co. v. Automatic Sprinkler Co. of Am.*, Del. Super., 171 A. 214, 219 (1934) ("to be enforceable, a contract to enter into a future contract must specify all its material

A critical linchpin of the defendants' argument, however, is that the Term Sheet is unenforceable simply because RGC asked for material additions in the subsequent negotiations. That is, the defendants have not identified a material provision they believe is missing from the Term Sheet, they simply claim that RGC's request for material additions requires this conclusion. The defendants also argue that RGC's demands for additional concessions constituted a rejection of the contract contemplated by the Term Sheet and vitiated any rights RGC possessed as a result of that agreement.

Although the defendants now refuse to concede that the Term Sheet is an enforceable contract,[44] they continue to assert that the Term Sheet does have the binding effect of limiting RGC's rights. Thus, the defendants argue that the Term Sheet did constitute a binding agreement by RGC to bargain away or waive its prior contractual rights in exchange for the possibility of

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and essential terms, and leave none to be agreed upon as the result of future negotiations") (quotations omitted).

[44] At oral argument, counsel for Greka took a more supple and sophisticated position. At that time, counsel stressed that the Term Sheet at most constitutes a binding contract to negotiate in good faith the Note Exchange contemplated therein. The defendants read the complaint as merely alleging that the Term Sheet bound the parties to consummate the Note Exchange. Because the parties had conditioned the Note Exchange on final documentation, the defendants reasonably argue that the parties had not yet contracted for the Note Exchange. *Transamerican Steamship Corp. v. Murphy*, Del. Ch., C.A. 10511, 1989 WL 12181 at *1, Allen, C. (Feb. 14, 1989) (holding that where one party reserved the right to not be bound until final execution in writing, a contract had not been formed even though the parties had agreed to the substantive terms). As such, they argue that the complaint fails to state a viable claim. I, however, read the complaint under our liberal notice pleading standards as alleging that Greka breached its obligation to negotiate the required final documentation in good faith.

the Note Exchange outlined in the Term Sheet. Similarly, the defendants argue that the Term Sheet was a sufficiently detailed agreement regarding the treatment of the Series A Preferred as to satisfy the requirement of 8 Del. C. § 251(b) that the Merger Agreement provide for the "manner" in which those shares would be converted:

> The Term Sheet provided for the exchange of (i) all the outstanding shares of Old Saba Preferred for a secured convertible note issued by Greka (the "Note") and (ii) all RGC's Old Saba Warrants for warrants on Greka common stock. The principal amount of the Note would "equal the aggregate Stated Value of the [Old Saba Preferred] owned by RGC plus all accrued interest, dividends and registration payments up to the closing date of the exchange." The Term Sheet stated that the Note was to bear interest at 6% per annum and become due and payable in 180 days, and it also provided that, prior to the due date, RGC could convert the principal and unpaid interest on the Note into Greka common stock at a specified conversion rate. In short, the Term Sheet expressly described the way in which the Old Saba Preferred (and Old Saba Warrants) would be treated — i.e., the "manner" in which the Preferred would be exchanged for the "rights" set out in the Term Sheet.[45]

For its part, RGC takes the position that the Term Sheet did create an enforceable contract between the parties. It claims that Greka was the one that injected new material terms into the negotiations which had the effect of

[45] Def.'s Op. Br. at 31 (citations omitted).

altering the Note Exchange detailed in the Term Sheet.[46]

The odd twist on RGC's argument, however, is that it is not seeking solely a remedy that redresses this alleged breach of contract. Instead, RGC appears to be believe that the breach of the Term Sheet should be rectified by pretending that the Term Sheet did not have any effect on how the Merger was structured and on Greka's decision to close the Merger and release all the Merger Consideration to the non-Greka Old Saba common stockholders. Because the Term Sheet did not expressly state that RGC was waiving its then-existing rights in exchange for the opportunity to negotiate the transaction the Term Sheet contemplated, RGC argues that it still possesses all the same rights it had before that Term Sheet was executed. In accordance with the great tradition of alternative pleading, however, RGC has also argued that Greka and New Saba are barred by contract law or the doctrine of promissory estoppel to deny RGC the value of the Note Exchange outlined in the Term Sheet.

[46] The defendants argue that the amended complaint does not allege what Greka did that constituted a failure to negotiate in good faith and that Count IX simply refers to a breach of the Term Sheet in general terms. Given the fulsome briefing of this motion, the defendants are on fair notice of RGC's claim, which clearly includes Greka's alleged insistence on material terms (e.g., non-assignability) not described in the Term Sheet.

B. Greka's And RGC's Failure To Dispute The Significance Of The Term Sheet On Their Conduct Requires That This Case Be Resolved By Reference To Their Conduct Pursuant To That Document

This rather slippery case becomes more manageable when one recognizes that the Term Sheet had important, if not unlimited, legal implications.

On the current record, I incline towards the conclusion that the Term Sheet was an enforceable contract that required the parties to negotiate in good faith toward a final contract, which is all that is necessary to dispose of the defendants' motion to dismiss RGC's Term Sheet-based breach of contract claim.[47] As the defendants themselves acknowledge, the "Term Sheet, once executed, gave rise to an enforceable obligation on the part of the signatories to negotiate in good faith the definitive documentation required to give effect to the terms of the transaction described therein."[48] And by its plain words, the Term Sheet set forth a detailed framework by which RGC would exchange the rights attached to its Series A Preferred for something different: a note containing the material features described in the

[47] *Diamond Electric, Inc. v. Delaware Solid Waste Authority*, Del. Ch., C.A. No. 1395, let. op., Strine, V.C. (March 15, 1999) (where a general contract incorporated plaintiff's subcontract bid in its winning general contract bid and then selected a different subcontractor, plaintiff stated a breach of contract claim based on the allegation that the general contractor had breached its duty to negotiate a timely reasonable subcontract by demanding additional concessions from the plaintiff).

[48] Def.'s Reply Br. at 2; *see also id.* at 17.

Term Sheet. Or, as the defendants put it earlier in this case, "[a]lthough the Term Sheet speaks of 'definitive documentation,' it is a detailed document outlining its terms fully without any suggestion that any material or additional terms remain to be negotiated."[49] Equally clear from the Term Sheet is the fact that the Note was to be accepted by RGC in lieu of any other consideration that might have been available in the Merger. Indeed, the closing of the Merger was a condition to the issuance of the Note to RGC.

Nonetheless, even if the Term Sheet is ultimately found not to be an enforceable contract because it does not contain all the material terms necessary to the Note Exchange, the Term Sheet still has independent legal significance under the doctrine of promissory estoppel. Under that doctrine, a plaintiff may obtain relief if: "i) a promise was made; ii) it was the reasonable expectation of the promisor to induce action or forebearance on the part of the promisee; (iii) the promisee reasonably relied on the promise and took action to his detriment; and (iv) such promise is binding because injustice can be avoided only by enforcement of the promise."[50]

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[49] Def.'s 2/17/00 Op. Br. at 18.

[50] *Lord v. Souder*, Del. Supr., 748 A.2d 393, 399 (2000).

In this case, RGC and Greka both argue convincingly that they reasonably relied to their detriment on the Term Sheet. For its part, RGC refrained from exercising any of its rights as a Series A Preferred stockholder before the Merger. Before the Merger was consummated, RGC could have exercised its Mandatory Redemption Rights or its Conversion Rights. In either instance, this would have imposed important obligations on Old Saba (but not Greka). RGC did not attempt to exercise any of these rights nor to enjoin the closing of the Merger. It was only after the negotiations over the Term Sheet transaction finally broke down that RGC brought this suit to rescind the Merger.

For its part, Greka notes that had the Term Sheet not been executed, the Merger would not have been consummated in the manner it was. Greka had the right to withdraw from the Merger if RGC converted or sought Mandatory Redemption. Greka did not exercise that right because it reasonably believed that it had secured a basis for addressing the Series A Preferred that was compatible with closing the merger. It is absurd to think that Greka would have purchased Old Saba if the price of purchase was equal to the Merger Consideration *plus* the cost of meeting Old Saba's obligation to RGC under the Mandatory Redemption Provision. Rather, Greka argues that it closed the Merger believing that its total acquisition cost

was equal to the Merger Consideration *plus* the value of the Note detailed in the Term Sheet.

Although they are not parties to this action, I am not unmindful that the other stockholders of Old Saba received the Merger Consideration on March 22, 1999. Since that time, many of the Old Greka stockholders have likely sold their Merger Consideration shares to others. A remedy involving rescission would necessarily affect the interests of the former Old Saba stockholders and their successors in a material way.

Thus, it is quite plain that all the constituencies affected by the Merger changed positions as a result of the Term Sheet. Neither Greka nor RGC would have behaved in the same manner without that agreement.

As a result, neither may avoid the effects the Term Sheet has on this case and the motions before the court. I turn to those effects now.

C. As A Result Of The Term Sheet, RGC Is Limited To Its Claims For Breach Of The Term Sheet And Promissory Estoppel

Having executed a Term Sheet that contemplated the closing of the very Merger it now seeks to rescind, RGC cannot now press any of its claims that do not arise directly out of Greka's allegedly wrongful failure to consummate the Note Exchange. RGC gave up its prior rights as a Series A Preferred Stockholder. It relinquished those rights in exchange for the opportunity to consummate the Note Exchange contemplated by the Term

Sheet. Thus RGC's claims based on alleged breaches of the Certificate of Designations and the Securities Purchase Agreement must be dismissed.

This does not, of course, mean that RGC's prior contractual rights are irrelevant. If RGC can ultimately prove that Greka breached its obligation to negotiate in good faith as required by the Term Sheet or that Greka is liable under the doctrine of promissory estoppel, RGC's former rights may be relevant to determining the appropriate remedy, which could involve a remedy placing it in a position akin to its position before the Merger.[51] But RGC may not assert those prior contractual rights directly.

Similarly, RGC has no right to argue that the Merger is invalid under 8 Del. C. § 251(b) on the grounds that the Merger Agreement itself did not specify how the Series A Preferred was to be treated. RGC knew about the Term Sheet, demanded that it be kept confidential, and cannot have been injured in any manner by the failure of the Merger Agreement itself to describe the Term Sheet. Given this reality and RGC's own failure to take any steps to enjoin or promptly rescind the Merger, I decline RGC's request that I decide the novel question under the Delaware General Corporation

[51] *See Sheehan v. Hepburn*, Del. Ch., 138 A.2d 810, 812 (1958) (restoring a party to its position *status quo ante* after the other party repudiated the contract between them). Perhaps the most interesting potential issue in the case would arise if the evidence ultimately supports the conclusion that both RGC and Greka negotiated in good faith but simply could not reach agreement. At that point, there would have to be a sensitive analysis of contract and/or promissory estoppel doctrine to fix a basis for treating RGC's Series A Preferred.

Law it has raised.[52] If there was any technical violation of § 251(b), it did not injure RGC.

Likewise, RGC's disclosure count fails to state a claim. RGC alleges that the Merger Proxy Statement was deficient because it did not disclose: i) the Term Sheet; or ii) the fact that Greka used it as a fraudulent inducement to get RGC to give up its rights. As to the first non-disclosure, RGC obviously knew about the Term Sheet that it signed and insisted be treated as a state secret. As to the second non-disclosure, RGC's claim that Greka had a duty to self-flagellate is contrary to Delaware law.[53]

It is also obvious that RGC's disclosure claim is not really a disclosure claim at all. It is a fraudulent inducement claim. Unless RGC

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[52] RGC argues that the Merger Agreement's reference to the fact that each Series A Preferred holder would be informed before the Merger how the Series A Preferred would be converted is an inadequate method by which to set forth for the manner of converting the Series A Preferred. The defendants contend that it was adequate because § 251 permits a merger agreement to contain terms "dependent on facts ascertainable outside of such agreement." 8 Del. C. § 251(b). The parties' debate is centered on whether the Merger Agreement "clearly and expressly set forth" the manner in which the "fact" (the Term Sheet) would "operate upon the terms of the agreement." 8 Del. C. § 251(b). Coming from the mouths of Old Saba common stockholders who wanted to know how the Series A Preferred would be addressed before voting on the Merger, RGC's argument that the Merger Agreement was deficient under § 251(b) might have been weighty. Coming out of the mouth of a party to the Term Sheet who insisted that the Term Sheet be kept confidential from the other Old Saba stockholders, the argument fails the straight-face test. If there were to be any remedy to be awarded to RGC on this aspect of its claim, it would consist of no more than a retroactive amendment to the Merger Agreement and certificate of merger to incorporate the Term Sheet as the basis upon which conversion of the Series A Preferred was to occur.

Because I resolve this issue on different grounds, I also do not reach the defendants' argument that RGC has no standing to assert a claim based on § 251(b).

[53] *Loudon v. Archer-Daniels-Midland Co.*, Del. Supr., 700 A.2d 135, 143 (1997).

can prove that Greka and Old Saba fraudulently induced RGC to sign the Term Sheet, there will be no basis for its assertion that Greka and Old Saba had a duty to disclose their fraudulent intent. When a disclosure claim rests entirely on a party's ability to prevail on an underlying substantive claim and there is no distinct harm caused by the alleged omission or misstatement, this court has refused to examine the claim independently under the disclosure rubric.[54] Such a refusal is especially proper here because RGC's fraudulent inducement claim does not draw its essence from any omission in the Merger Proxy Statement. Instead, that claim derives from RGC's contention that Greka never intended to negotiate a final transaction promptly as it affirmatively pledged to do in the Term Sheet. That is, RGC's real complaint is about a false promise in the Term Sheet, not the omission of a disclosure that the promise was false in the Proxy Statement.

RGC's voting rights and fiduciary duty claims are equally flawed by their failure to take into account the effect of the Term Sheet. I need not decide the hypothetical question of whether the Series A Preferred had a

[54] *Brown v. Perette*, Del. Ch., C.A. No. 13531, mem. op. at 14, Chandler, C. (May 14, 1999) ("Where the plaintiff fails to plead *prima facie* facts that the nondisclosure created a cognizable harm discrete from the underlying wrongdoing, the nondisclosure claim is susceptible to dismissal for failure to plead an essential requirement of a disclosure claim . . . ."). I note that it may be necessary in some cases to deal with the non-disclosure of the underlying misconduct by the defendants if the defendants contend that stockholders, for example, ratified the transaction the underlying misconduct influenced and thereby are barred from attacking that transaction.

right to vote on the Merger in the absence of the Term Sheet. RGC held all of the Series A Preferred. It specifically negotiated the Term Sheet with Greka and Old Saba to establish the terms on which its Series A Preferred would be converted in connection with the Merger. It consented to that conversion by executing a Term Sheet that expressly required the closing of the Merger as a condition to the closing of the Note Exchange outlined in the Term Sheet.[55] Therefore, RGC waived any contractual right, if any, it had to vote on the Merger.

RGC's fiduciary duty claim is also fatally wounded by its foundation in an unreal premise. RGC recognizes that the rights of preferred stockholders are largely governed by contract law and that corporate directors do not owe preferred stockholders the broad fiduciary duties belonging to common stockholders.[56] Thus, it has premised its fiduciary duty claim on an exception to those general principles that permits a preferred stockholder to bring a suit for breach of fiduciary duty alleging that the directors unfairly apportioned merger consideration between the

[55] *See* Cert. of Desig. Art. IX (permitting alteration of the rights of the Series A Preferred with the written consent of a majority of the holders).

[56] *See Moore Bus. Forms, Inc. v. Cordant Holdings Corp.* Del. Ch., C.A. No. 13911, mem. op. at 11, Jacobs, V.C. (Nov. 2, 1995).

common and preferred stockholders.[57] Here, RGC argues that the Old Saba board breached its duty of fair apportionment because RGC has to date received nothing in connection with the Merger and because the Old Saba common stockholders got all of the Merger Consideration.

This argument is wholly devoid of force, however, if the Term Sheet is taken into account, as it must be. The Old Saba board did not approve the Merger on the premise that the Old Saba common stockholders would get the Merger Consideration and RGC would get nothing. Rather, the Old Saba board approved the Merger knowing that Greka and RGC would have to work out a basis for providing RGC with consideration for its Series A Preferred.[58] RGC does not argue that the Note Exchange would not have fairly compensated it for its Series A Preferred. To the contrary, RGC's complaint is that it never received the Note because Greka breached its duty to negotiate in good faith the final documentation that was a precondition to the Note Exchange. That is, RGC admits that the injury it suffered was the result of Greka's alleged failure to live up to the obligations it had assumed

[57] *See, e.g., In re General Motors Class H Shareholders Litig.*, Del. Supr., 734 A.2d 611, 619 (1999); *Jedwab v. MGM Grand Hotels, Inc.*, Del. Ch., 509 A.2d 584, 594 (1986); *In re FLS Holdings, Inc. Shareholders Litig.*, Del. Ch., C.A. No. 12623, mem. op. at 7-9, Allen, C. (Apr. 2, 1993).

[58] Compl. ¶ 26-32.

under the Term Sheet, either as a matter of contract law or promissory estoppel.[59]

For these reasons, the defendants' motion to dismiss Counts I, II, III, IV, V, VI, VII, and VIII is granted. But the defendants' motion to dismiss Count IX is denied.

D. Genuine Issues Of Material Fact Preclude An Award Of Summary Judgment To RGC

RGC's motion for summary judgment is based on an appeal to logic. RGC notes that the defendants cannot have it both ways and that one of two

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[59] The defendants have also moved to dismiss that part of RGC's complaint that seeks rescission of the Merger. In support of that argument, they note that RGC failed to move to enjoin the Merger before it closed and failed to file this suit seeking rescission until nearly nine months after consummation had passed. Even then, RGC never sought expedited treatment of this action, with the result being that this case remains at a fairly preliminary state over a year and half after all the Merger Consideration was paid out to the common stockholders of Old Saba. *Ryan v. Tad's Enterprises, Inc.*, Del. Ch., 709 A.2d 682, 699 (1996) (excessive delay by plaintiff may bar her from receiving rescissory relief), *aff'd mem.*, Del. Supr., 693 A.2d 1082 (1997). Given RGC's languid litigation strategy, its own indications that monetary damages will be sufficient to accord it full relief, and the reality that Greka and Old Saba have now been merged for over eighteen months, I can conceive of no possible circumstance in which I would rescind the Merger and deviate from the general rule that it is impractical to unwind a consummated merger involving publicly traded corporations whose shares were held by numerous stockholders. *E.g., Goodwin v. Live Entertainment, Inc.*, Del. Ch., C.A. No. 15765, mem. op., 1999 Del. Ch. LEXIS 5, at *16 n.3, Strine, V.C. (Jan. 22, 1999) (reiterating this general rule). Hence, I grant this aspect of the defendants' motion to dismiss. *Winston v. Mandor*, Del. Ch., 710 A.2d 831, 833-34 (1997) (dismissing a merger rescission claim where the merger had been consummated a year earlier, rescission would have involved disrupting good faith transactions involving public stockholders, and a monetary award would adequately compensate the plaintiffs).

In so ruling, I in no way preclude RGC from arguing for a remedy influenced by the rights RGC enjoyed as a Series A Preferred stockholder of Old Saba. If RGC can show that Greka in effect repudiated the Note Exchange contemplated by the Term Sheet, it may be appropriate to shape a monetary or equitable remedy that would put RGC as near as possible to the position it had occupied before the Merger. Even though such relief would not require a rescission of the Merger itself, it would still require careful crafting to avoid any undue burden on innocent third parties (such as the former common stockholders of Old Saba).

alternatives must be the reality. The first alternative is that the Term Sheet is unenforceable and that it had no effect on RGC's prior contractual rights. Because those prior contractual rights included the requirement that any merger result in the assumption of the obligations under the Securities Purchase Agreement and the Certificate of Designations by a publicly traded company, the Merger is invalid unless Greka assumes those obligations and honors RGC's Mandatory Redemption Rights. The other alternative is that the Term Sheet is a legally enforceable agreement under which RGC must be awarded the value of the Note. According to RGC, the court must choose one of the alternatives. "The result cannot be both, and it cannot be none."[60]

Although I agree with RGC's view that it cannot be both, I do not believe that the choice that must be made between the alternatives produces an immediate judgment for RGC. As outlined above, the Term Sheet does have legally important implications. RGC and Greka each relied to their detriment on that agreement in ways that fundamentally altered their relationship and legal rights. As a result, I have already concluded that RGC may not press direct claims under the Certificate of Designations and the Securities Purchase Agreement. This conclusion disposes of that aspect of RGC's summary judgment motion that is premised on Greka's failure to

[60] Pl.'s Op. Br. at 2.

assume Old Saba's duties under those contracts. That leaves RGC's summary judgment motion on its Term Sheet Claims.

In addressing that aspect of RGC's motion, I have no doubt that RGC is correct in saying that Greka could not consummate the Merger and then blithely walk away from the negotiations with RGC without compensating it for its Series A Preferred. Nor could Greka condition consummation of the Note Exchange on RGC's consent to material conditions that were not reasonably contemplated by the Term Sheet or the parties' prior discussions. Under either a contract or promissory estoppel theory, the law would call Greka to account for such behavior and demand that RGC receive an appropriate remedy. Greka essentially concedes that this is so.

What RGC ignores, however, is that Greka had no duty to overcompensate RGC by providing RGC with more value than was inherent in the Note Exchange. RGC changed position to receive the Note Exchange and nothing more. If RGC demanded more than that from Greka in the negotiations following the execution of the Term Sheet, it may well have to bear the adverse consequences of its own tactics.

RGC's request that I grant summary judgment for it is therefore premature. The record is too undeveloped to permit a responsible determination regarding which party was responsible for the breakdown in

negotiations. Read in the light most favorable to the defendants, as it must be, the record does not preclude the possibility that RGC helped the negotiations get side-tracked over material issues extraneous to the seemingly straightforward Note Exchange contemplated by the Term Sheet. The correspondence presented by RGC in support of its motion highlights the large number of disputed factual issues that are potentially relevant to RGC's contract and promissory estoppel claims. As a result, its motion for summary judgment is denied.[61]

VI. Conclusion

For the foregoing reasons, the defendants' motion to dismiss is GRANTED as to Counts I, II, III, IV, V, VI, VII and VIII but DENIED as to Counts IX. RGC's motion for summary judgment is DENIED. IT IS SO ORDERED. Because this ruling has the effect of focussing the issues in this case and because this unresolved commercial dispute is overdue for a rational resolution, the parties shall set up a scheduling conference with the court promptly at which a discovery and trial schedule can be set.

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[61] In its reply brief, RGC cites to a sworn interrogatory response in which it avers that Grewal promised that Greka would pay a sum certain for the Series A Preferred by September 30, 1999 and that RGC accepted that promise as a resolution to their dispute. Because the defendants did not have a fair opportunity to meet this evidence in their answering papers, I decline to award summary judgment on that basis. I also note that if RGC intends to rely upon this alleged compromise as creating an enforceable contract, it should amend its complaint to state this claim clearly.