STATE OF MAINE
CUMBERLAND, ss.

BUSINESS & CONSUMER DOCKET
LOCATION: PORTLAND
DOCKET NO. BCD-CV-17-37

BRIAN J. FOURNIER,)
)
Plaintiff,)
)
v.)
)
FLATS INDUSTRIAL, INC.,)
f/k/a FLATS INDUSTRIAL)
RAILROAD CORPORATION,)
)
Defendant.)

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

This matter involves a single count for inspection of documents under Delaware corporation law, 8 *Del. C.* § 220. Plaintiff Brian J. Fournier ("Fournier") is a shareholder in Defendant Flats Industrial Railroad Corporation ("Flats"). Flats is a Delaware corporation. In order to value his shares in Flats, Fournier seeks inspection of information and documents described in forty-seven separately enumerated requests. In response to Fournier's Motion for Summary Judgment, Flats indicated it does not object to providing inspection in response to forty of the forty-seven requests. Accordingly, on October 12, 2018, the Court issued a prior order governing disclosure of information and documents responsive to the uncontested forty requests. Flats does object to providing disclosures in response to seven of the forty-seven requests, on the grounds that information and documents responsive to those seven requests are not essential to valuing Fournier' shares.

Oral argument on Fournier's Motion for Summary Judgment was held on October 11, 2018. Fournier was represented by Brendan Rielly, Esq. Flats was represented by Brett Leland, Esq. For the reasons set forth below, the Court finds there is no genuine issue of material fact, and concludes that Fournier is entitled as a matter of law to disclosure of information and documents responsive to the remaining seven requests.

FACTS

Apart from what it maintains is a factual dispute between the parties' experts regarding the necessary scope of disclosure for the purpose of valuing shares, Flats does not contest the material facts. Although there is no dispute about these facts, the Court recites them briefly for the purpose of establishing the background against which the scope-of-disclosure issue is decided.

Flats is a closely held a Delaware corporation that owns railroad track in Cleveland, Ohio and provides commercial and industrial switching service primarily for the Norfolk Southern Railway. On or about March 23, 2016, Flats' stock was conveyed out of the Estate of Arthur J. Fournier in the following manner: (a) 50% to Arthur's widow Beth Fournier; (b) 12.5% each to Arthur's four children: Brian Fournier, Douglas Fournier, Patrick Fournier, and Catherine McClarity. Thus, Fournier is a stockholder of Flats.

On December 8, 2016, acting through his attorney, Fournier sent a written demand under oath to Flats' representative demanding to "inspect copies of the Corporation's stock ledger reflecting the shareholders of the Corporation, including the number of shares owned by each shareholder, and the Corporation's books and

records." Fournier seeks the information in order to determine the status and financial health of Flats, and the value of the shares he owns. Fournier's reasons for valuing his shares include possibly selling them and extricating himself from further relationships with his family members who own the remaining shares.

Since December 2016, Fournier has on more than one occasion reiterated his demand for disclosure. Flats has provided some minimal information in response to Fournier's demand, but has by-and-large failed to provide the information and documents Fournier seeks.

Fournier retained Vanessa Brown Claiborne ("Claiborne") to provide an expert opinion of the value of Flats (and thus the value of Fournier's shares in Flats). Flats does not dispute Claiborne is a qualified expert in business evaluation. In her affidavit, Claiborne enumerated forty-seven requests for information and documents that are typical and essential to valuing a business. In addition to reviewing documents, Claiborne typically requests a site visit, during which she interviews the management, directors, and officers of the company for information relating to operations and finances. In this case, Claiborne has not had the opportunity to interview the management, directors, and officers of Flats for information relating to the operations and finances of the company.[1]

[1] Claiborne says she did not ask to interview the management, directors and officers of Flats, because based on the same individuals' refusal to meet with her in the litigation concerning Penobscot Bay Tractor Tug Co., Inc. ("Pen Bay"), such a request would have been futile. Defendant argues that Pen Bay is a separate matter, and whatever occurred in Pen Bay cannot be used in the present case. Defendant is incorrect. By Court order dated October 25, 2017, the Pen Bay case (BCD-CV-17-38) was consolidated with this case (BCD-CV-17-37). The original two cases are thus one case, and Plaintiff and Claiborne can properly seek to draw on events from the Pen Bay side of this litigation to support its Motion for Summary Judgment on the Flats side of this litigation. The Court is nevertheless mindful that the pertinent issues relating to Pen Bay primarily involved discovery disputes, and the issues relating to Flats solely relate to inspection under 8 *Del. C.* § 220. Defendant is correct that discovery

Flats retained Seth Webster ("Webster"), not to value Flats, but rather to review the forty-seven requests for information and documents Claiborne asserts are essential to value Fournier's shares in Flats. In his opposition affidavit, Webster agrees (by his silence) that forty of the forty-seven requests enumerated by Claiborne are essential to value Fournier's shares in flats.[2] However, Webster asserts seven of the forty-seven requests are not essential to value Fournier's shares in Flats. Following Claiborne's numbering, the seven categories are as follows:

> Request No. 7: Detailed general ledgers, all account statements and credit card statements for the past four fiscal years and 2018 YTD.
>
> Request No. 27: Any documents reflecting how services are priced.
>
> Request No. 29: Any documents reflecting Flats' safety program and the recent experience/workers' compensation modifier.
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> Request No. 36: A list of each customer 2014 to present, with a description of the services provided, where the services were provided, and the revenue received by Flats from each customer.
>
> Request No. 39: All customer contracts 2014 to present.

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and Section 220 inspection are not coterminous. *See Highland Select Equity Fund, L.P. v. Motient Corp.*, 906 A.2d 156, 165 (Del. Ch. 2006) (Section 220 and discovery are entirely different procedures). However, when Claiborne's inability to interview management on the Pen Bay side of the litigation is coupled with (1) Flats emphasis in this case, *see infra*, that Section 220 does not allow for an interview of management, and (2) Flats' counsel's inability at oral argument to confirm Flats would agree to such an interview, it is fair to state as a matter of undisputed fact that it would have been futile for Claiborne to ask to interview the management of Flats. But the Court's Summary Judgment ruling does not turn on the futility of such a request, and the outcome is the same even if there is a genuine dispute of fact regarding futility. Limiting the Court's field of vision to only the Flats side of this litigation, Fournier has established without dispute that Claiborne did not have an opportunity to interview the management, directors, and officers of Flats.

[2] As discussed earlier, the Court has issued a separate Order governing disclosure of information and documents responsive to the forty undisputed requests.

Request No. 40: All documents reflecting revenue from customers 2014 to present.

Request No. 41: Flats' operating metrics (number of cars moved, fee/car) in each of the last four years and interim periods.

According to Webster, it is not the role of business evaluators to verify or audit financial statements or other financial documents; business valuators rely on aggregated financial information, and the granular financial information requested by Claiborne in these seven requests is unnecessary for a reliable business valuation. Webster does not dispute that it is appropriate for a business evaluator such as Claiborne to conduct a site visit to interview management for information relating to the operation and finances of the company.

In her supplemental reply affidavit, Claiborne explained that the seven requests for information are necessary because she has not had an opportunity to interview the management, directors, and officers of Flats. Claiborne reiterated that such interviews are an essential part of valuing the company. Without the opportunity to interview management, directors, and officers, Claiborne has no other option to gather the necessary information than through the seven inspection requests.[3]

Accordingly, the Court concludes there is no genuine dispute between the affidavits of Claiborne and Webster; the affidavits speak to two different situations.

[3] At oral argument, Defendant's counsel argued that M.R. Civ. P. 56 prevented him from supplying the Court with a supplemental sur-reply affidavit of Webster, which purportedly would dispute Claiborne's reply affidavit. But that is not what Rule 56 provides. According to Rule 56, "[t]he court may permit affidavits to be supplemented or opposed by . . . further affidavits." M.R. Civ. P. 56(e). Defendant neither provided, nor asked to provide, a sur-reply affidavit of Webster, and so the Court decides this matter based on the affidavits that were provided.

Where a business evaluator has the opportunity to interview management, directors, and officers, a somewhat more modest inspection request is sufficient to provide the information necessary to reliably value a company. However, where a business evaluator does not have the opportunity to interview management, directors, and officers, an inspection request including the seven challenged categories is necessary to provide the information necessary to reliably value a company.

The Court thus finds the following undisputed facts have been established. Claiborne is a qualified expert in the field of business evaluation. Interviewing management, directors, and officers of a company is a typical and essential part of valuing a company. If interviewing management, directors, and officers of a company is not an option, then a business evaluator must have the kinds of information and documents responsive to the seven requests described above. In this case, Claiborne has not had the opportunity to interview the management, directors, and officers of Flats.

Hence, information and documents responsive to Request No. 7 (detailed ledgers and statements) are necessary for a business evaluator to understand why expenses were higher or lower in a particular year and to see trends in operating expenses. Information and documents responsive to Request No. 27 (how services are priced) are necessary for a business evaluator to understand the security of the revenue stream and the resulting nature of the risk for the company. Information and documents responsive to Request No. 29 (safety program information) are necessary because they show the operating risk inherent in the company. The safety record of a company like Flats is important because safety problems may affect the company's

bottom line. Information and documents responsive to Request Nos. 36, 39, and 40 (customer information) are necessary because customer contracts and revenue are crucial to predicting revenue stream and risk. This information would ordinarily be the primary focus of a management interview, and without the opportunity for an interview, the information is essential. Finally, information and documents responsive to Request No. 41 (operating metrics) are necessary for a business evaluator to understand risk and future revenue by reflecting the volume of business and fees charged.

ANALYSIS

Section 220 of the Delaware corporations code empowers the Court to "summarily order" a corporation to permit a stockholder to inspect the corporation's books and records when certain conditions have been satisfied. 8 *Del. C.* § 220(c). Pursuant to this language, "[s]ummary judgment is an appropriate way to proceed . . . ." *Loew's Theatres, Inc. v. Commercial Credit Co.,* 243 A.2d 78, 81 (Del. Ch. 1968). Granting summary judgment is appropriate when there is no genuine issue as to any material fact, and a party is entitled to judgment as a matter of law. M.R. Civ. P. 56(c). As the moving party in this case, Fournier has the burden to prove the summary judgment record establishes each element of his claim without dispute as to material fact. *Cach, LLC v. Kulas*, 2011 ME 70, ¶ 8, 21 A.3d 1015. Fournier has met his burden.

In this case, Flats does not dispute that Fournier has satisfied the three statutory prerequisites for inspection under Section 220: Fournier is a shareholder, he submitted the required shareholder demand for inspection, and he has a proper

purpose for inspecting Flats' books and records.[4] The Court also finds that the three statutory prerequisites have been established. The only dispute in this case involves the scope of the required inspection under Section 220. And even with regard to scope, Flats agrees that Fournier is entitled to inspection of the information and documents responsive to the uncontested forty requests. This case all comes down to whether Fournier is entitled to inspect information and documents responsive to the seven contested requests. The question of whether documents are essential for a stockholder to value his or her shares is "fact specific," *Amalgamated Bank v. Yahoo! Inc.*, 132 A.3d 752, 788 (Del. Ch. 2018), and the trial court's determination will be overturned only if "clearly wrong." *CM & M Group, Inc. v. Carroll*, 453 A.2d 788, 793 (Del. 1982).

In determining the scope of inspection relief under Section 220, "the overriding principle is that only those records that are 'essential and sufficient' to the shareholder's purpose will be included in the court-ordered inspection." *Helmsman Management Servs., Inc. v. A & S Consultants, Inc.*, 525 A.2d 160, 167 (Del. Ch. 1987) (citation omitted). Flats argues there is a factual dispute about whether the information and documents sought by the seven requests is essential to value Fournier's shares in Flats, and thus summary judgment cannot be granted. Flats

[4] At oral argument, Flats' counsel hedged somewhat with regard to proper purpose, saying that Flats had "qualified" the Statement of Material Facts with regard to proper purpose. Defendant's Memorandum of Law in Opposition, however, does not challenge Fournier's proper purpose, and limits its attack to the permissible scope of inspection. Moreover, Flats' attempted "qualification" by questioning whether Fournier's desire to value his shares is bona fide, neither qualifies nor controverts Fournier's proper purpose. It is well established that a stockholder's desire to value his or her shares in a corporation is a proper purpose, regardless of the reasons. *CM & M Group, Inc. v. Carroll*, 453 A.2d 788, 792-793 (Del. 1982); *Macklowe v. Planet Hollywood*, 1994 Del. Ch. LEXIS 182, *12-14 (Sep. 29, 1994).

predicates its claim of a factual dispute on what it characterizes as the competing affidavits of Claiborne and Webster. However, as explained above, the Court finds there is no conflict between the affidavits. It is an undisputed fact that interviewing management, directors, and officers about a company's finances and operations is important to a business evaluation, and without the opportunity to interview management, directors, and officers, a business evaluator needs the information responsive to the seven requests in order to prepare an opinion of the company's value.

At oral argument, Defendant's counsel emphasized that Section 220 does not provide for an interview of management. The Court agrees, but that reality only underscores the need for Fournier's business evaluator to have the information and documents she seeks in response to the seven requests. Claiborne has not had an opportunity to interview the management, directors, and officers of Flats; Section 220 does not allow the Court to order such an interview; and at oral argument Defendant's counsel declined to say whether Flats would agree to such an interview. Under the circumstances, Claiborne has no option but to request information responsive to the seven requests. The seven requests are not being pursued as "a way to circumvent discovery proceedings." *See Highland Select Equity Fund, Ltd. P'ship v. Motient Corp.*, 906 A.2d 156, 165 (Del. Ch. 2006). The seven requests do not constitute an audit, and are "narrowly tailor[ed]" to Fournier's need to value his shares in Flats, while balancing the interests of the shareholder and the corporation. *See Thomas & Betts Corp. v. Leviton Mfg. Co., Inc.*, 681 A.2d 1026, 1035 (Del. 1996). The seven requests are not exceptionally broad, as were the twenty-five pages of rambling requests

denied in *Highlands Select*, 906 A.2d at 160-162. To the contrary, the seven requests have the "rifled precision" appropriate to a Section 220 inspection request.[5] *See Security First Corp. v. U.S. Die Casting & Dev. Co.*, 687 A.2d 563, 570 (Del. 1997). As a result, the Court finds inspection of the information and documents sought in response to the seven requests is essential and necessary to Claiborne's ability to reliably value Flats, and within the permissible scope of a Section 220 inspection.

Section 220 provides that the Court in its discretion can prescribe conditions with reference to inspection. 8 *Del. C.* § 220(c). Having found that Fournier is legally entitled to inspection pursuant to Request Nos. 7, 27, 29, 36, 39, 40 and 41 as numbered in Ms. Claiborne's affidavit, and given the length of time Fournier has been waiting to inspect the information and documents, the Court in its discretion further orders as follows:

1. Flats shall prepare, ready, assemble, and make available for inspection by Fournier and/or his counsel all records responsive to Request Nos. 7, 27, 29, 36, 39, 40, and 41 by the close of business on November 30, 2018.

2. The records produced shall be organized in a readily accessible fashion—in particular, the records shall be tabbed to respond to each individual request as numbered in Ms. Claiborne's affidavit. For example, all records responsive to Request No. 7 shall be organized and tabbed as responsive to Request No. 7.

[5] Indeed, Flats' objection that the seven requests are too "granular" runs directly counter to the Section 220 case law which emphasizes that Section 220 requests should be targeted and not sweeping.

3. Flats shall take all measures to ensure that it meets the Court's deadline including retaining additional staff if necessary. No extension of the Court's deadline shall be permitted except under extraordinary circumstances.

4. After reviewing the records produced by Flats, Fournier, though his counsel or other designated representative, shall inform Flat's counsel which record he wishes to have copied, including that he wishes all records to be copied. Flats is to make such copies without any further request or delay.

5. Flats shall bear all costs of complying with this Order and shall not pass any costs, including, but not limited to, any copying costs, along to Fournier.

6. The Court will not entertain any further objection from Flats to producing the records responsive to Request Nos. 7, 27, 29, 36, 39, 40, and 41.

7. Flats may not designate any of the records produced as confidential without Fournier's consent.

8. Failure to strictly comply with this Order will expose Flats and its officers, managers, and directors personally to being held in contempt by this Court and to the full exercise of this Court's contempt powers.

Should Flats fail to comply with this Order in any respect, Fournier is directed to notify the Court of that fact promptly, in response to which the Court will promptly schedule a show cause hearing.

Fournier seeks an award of attorney fees. Attorney fees are available under Section 220, but are not ordinarily awarded without a showing of bad faith. Fournier's wait has been unreasonably long in this case, but Fournier has not established bad faith. The Court declines to make an award of attorney fees.

Finally, the Court notes the mediator has filed a Report of ADR Conference, indicating that the issues in the consolidated Pen Bay case (originally BCD-CV-17-38) have been fully resolved. Accordingly, all aspects of this consolidated case are now fully resolved.

The Clerk shall incorporate this Order on the docket by reference pursuant to M.R. Civ. P. 79(a).

SO ORDERED.

October 15, 2018.

_____/s_____
Michael A. Duddy
Judge, Business and Consumer Docket