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Re: *Rock Solid Gelt Limited v. The SmartPill Corporation*
C.A. No. 7100-VCN
Date Submitted: June 15, 2012

Dear Counsel:

Plaintiff Rock Solid Gelt, Ltd. ("Rock Solid"), a shareholder of Defendant The SmartPill Corporation ("SmartPill"), a Delaware corporation, has brought a books and records action under § 220 of the Delaware General Corporation Law. This is the Court's decision after trial.

* * *

In November 2006, Rock Solid purchased 374,531 shares and 74,906 warrants of SmartPill, for \$999,997.77, as part of SmartPill's Series F Preferred

financing.¹ As a holder of Series F Preferred stock, Rock Solid had certain rights and preferences, including dividends, liquidation preferences, voting rights, protective provisions, conversion rights, anti-dilution provisions, and redemption rights.²

In March 2008, SmartPill conducted another round of financing (the “Series 2 Preferred financing”).³ It proposed to issue 37,486,886 newly authorized shares of Series 2 Preferred stock at a price of \$0.6352903 cents per share, or up to an aggregate of \$20 million.⁴ Further, existing Series F Preferred stock would be converted into newly authorized shares of Series 1 Preferred stock. Rock Solid’s existing rights and preferences remained intact, and it was not diluted relative to its position before the financing.⁵

In 2010, SmartPill conducted yet another round of financing (the “Series B financing”).⁶ At the time, Psilos Group Partners III, L.P. (“Psilos”), Oxford Bioscience Partners V L.P. (“Oxford”), Kimberly Clark Ventures LLC (“Kimberly

¹ JX 6, Schedule A.

² JX 3 at 2-5.

³ JX 66 at 4-5.

⁴ *Id.* at 1.

⁵ Trial Tr. 12.

⁶ JX 39.

Clark”), High Peaks Ventures L.P., and High Peaks Ventures NY L.P. (collectively, “High Peaks”) were SmartPill’s Controlling Stockholders.

On April 6, 2010, Psilos presented to SmartPill’s board a proposed initial term sheet for a preferred stock financing in which Psilos would be the lead investor.⁷ The pre-financing valuation of SmartPill in the Series B financing was \$16.8 million, in contrast with the pre-financing valuation of \$30 million and post-financing valuation of \$50 million in the Series 2 Preferred financing.⁸ The proposed term sheet provided for the automatic conversion of all outstanding shares of Series 1 Preferred and Series 2 Preferred into common stock, “eliminating the preferences and many of the other rights enjoyed by holders of those shares.”⁹

The proposed term sheet also acknowledged that six out of the seven members of SmartPill’s Board of Directors (the “Board”) had potential conflicts of

⁷ *Id.* at 52.

⁸ *Id.*

⁹ *Id.* Rock Solid does not contest that SmartPill had the power to accomplish this.

interest with respect to this round of financing.¹⁰ The Board then established a Special Committee, consisting of Austin Broadhurst, Jr., the sole remaining member of the Board, whom the Board determined to be independent and without any personal interest in the proposed financing.¹¹

The Board authorized the Special Committee to negotiate with Psilos on behalf of SmartPill with respect to the Psilos term sheet and the proposed financing, to engage its own independent legal counsel and independent financial advisor, and to seek alternative financing on more attractive terms than the terms of the financing described in the Psilos term sheet. It also delegated to the Special Committee the full power and authority of the Board with respect to such matters.¹²

¹⁰ *Id.* (“ . . . the significant fairness concerns raised by the financing transaction described in the proposed term sheet, including, among other things, that: [t]he proposed term sheet only contemplated participation by . . . holders of our Series 2 Preferred and not by our other existing stockholder; [m]ost of the holders of the Series 2 Preferred entitled to participate in the financing under the proposed term sheet had representatives serving on our Board of Directors (i.e. Psilos, Oxford, High Peaks, and Kimberly Clark), so those directors may be deemed to have a conflict of interest with respect to the approval of such financing; and [David] Barthel [SmartPill’s chief executive officer] also may be deemed to have a conflict of interest with respect to the approval of such financing as we would be unable to continue Mr. Barthel’s employment unless we were able to obtain additional financing”).

¹¹ *Id.* at 53.

¹² *Id.*

On May 19, 2010, following the Special Committee's approval of the preferred stock financing contemplated in Psilos's revised term sheet, SmartPill circulated an information statement and subscription documents to its stockholders.¹³ SmartPill then realized that the preferred stockholders who had expressed their intention to consent to the conversion of all of the outstanding existing preferred stock to common stock did not own sufficient shares to effect such conversion.¹⁴

On June 18, 2010, SmartPill issued 11,000,000 additional shares of Series 2 Preferred stock to be purchased by the Controlling Stockholders.¹⁵ The sale of such shares was contingent on the receipt by SmartPill of sufficient shareholder consents to effect the automatic conversion of all shares of existing preferred stock, and the Controlling Stockholders consented to the conversion.¹⁶ SmartPill amended its Certificate of Incorporation to increase total authorized common and

¹³ JX 21. Several factors combine to make this financing particularly annoying to Rock Solid: "unconscionably" low valuation and loss of rights and preferences as a holder of preferred stock.

¹⁴ Trial Tr. 221-23.

¹⁵ JX 36.

¹⁶ Trial Tr. 222-23

preferred stock in order to facilitate the Series B financing.¹⁷ The Controlling Stockholders increased their pro rata ownership of SmartPill's stock.¹⁸

On July 2, 2010, SmartPill circulated a Confidential Information Statement (the "July Information Statement") in which it provided a detailed account of the background and approval of the transactions described therein, including a discussion of the April 6, 2010 term sheet proposed by Psilos and of the results of negotiations by the Special Committee.¹⁹

On January 7, 2011, SmartPill sent a notice to shareholders pursuant to 8 *Del. C.* § 228,²⁰ which described the Stock Purchase Agreement it had entered into with Alan Fox (the "Fox SPA"),²¹ a minority stockholder with whom Rock Solid was similarly situated. Fox, like Rock Solid, had initially refused to participate in the Series B financing. Fox directed a demand to SmartPill for books and records concerning the valuation of his interest in SmartPill and the valuation

¹⁷ JX 16.

¹⁸ *Id.*

¹⁹ JX 14 at 1-2.

²⁰ JX 15.

²¹ *Id.*

of SmartPill generally. That request was granted,²² and, soon thereafter, the Fox SPA was executed.

Under the Fox SPA, SmartPill (i) issued to Fox 1,190,140 shares of Series B Preferred stock for \$0.0263 per share, (ii) issued to him warrants to purchase up to an additional 11,406,844 shares of Series B Preferred stock for \$0.0263 per share, and (iii) exchanged Fox's common stock for Series A Preferred stock.²³ This was at a significant discount to previous financings. Instead of being required to invest \$281,877 to maintain his pro rata ownership, Fox only had to invest approximately \$50,000.²⁴ Fox also received a commitment from SmartPill that he would be able to participate in the next round of financing, regardless of whether the Controlling Stockholders allowed the minority stockholders to participate in the subsequent offering.²⁵

On October 26, 2011, Rock Solid sent SmartPill a formal written demand (the "Demand"), requesting access to twenty-two categories of SmartPill's books

²² JX 40.

²³ JX 15.

²⁴ Trial Tr. 84-85.

²⁵ Trial Tr. 242, 86.

and records.²⁶ On October 31, 2011, SmartPill rejected the Demand.²⁷ On November 14, 2011, Rock Solid sent a follow-up letter to SmartPill (the “Supplemental Demand”).²⁸ On November 21, 2011, SmartPill again refused to allow Rock Solid to inspect the demanded documents.²⁹

* * *

The Delaware General Corporation Law expressly provides shareholders with the right to inspect the books and records of the corporations in which they have an ownership interest.³⁰ This right, however, is not absolute. A shareholder seeking access to a corporation’s books and records must demonstrate that “(1) he, she, or it is a stockholder, (2) he, she, or it has complied with the section respecting

²⁶ JX 56.

²⁷ JX 57.

²⁸ JX 58.

²⁹ JX 59.

³⁰ 8 *Del. C.* § 220(b) provides in pertinent part:

Any stockholder . . . shall, upon written demand under oath and stating the purpose thereof, have the right during the usual hours for business to inspect for any proper purpose . . . [t]he corporation’s . . . other books and records, A proper purpose shall mean a purpose reasonably related to such person’s interest as a stockholder.

the form and manner of making demand for inspection of such documents, and (3) the inspection such stockholder seeks is for a proper purpose.”³¹

In this case, SmartPill has not disputed that Rock Solid’s demands, both in October and in November, were proper both as to form and manner. Instead, SmartPill disputes the propriety of the purposes advanced by Rock Solid and the ultimate scope of any court-ordered inspection of its books and records.

Proper Purpose

As noted above, shareholders seeking to inspect a corporation’s books and records pursuant to § 220 must articulate a proper purpose for demanding an inspection. A “proper purpose” means “a purpose reasonably related to such person’s interest as a stockholder.”³² The shareholder “has the burden of showing, by a preponderance of the evidence, a proper purpose entitling the stockholder to an inspection of every item sought.”³³ In addition to stating a proper purpose, the

³¹ *Seinfeld v. Verizon Commc’ns, Inc.*, 2005 WL 3272365, at *2 (Del. Ch. Nov. 23, 2005), *aff’d*, 909 A.2d 117 (Del. 2006); *Kaufman v. CA, Inc.*, 905 A.2d 749, 753 (Del. Ch. 2006) (“Delaware law allows a stockholder a statutory right to inspect the books and records of a corporation so long as certain formal requirements are met, and the inspection is for a proper purpose.”).

³² 8 *Del. C.* § 220(b).

³³ *Thomas & Betts Corp. v. Leviton Mfg. Co.*, 681 A.2d 1026, 1028 (Del. 1996); *see also Seinfeld v. Verizon Commc’ns, Inc.*, 909 A.2d 117, 121 (Del. 2006) (“In a Section 220 action, a

shareholder must also “state a reason for the [proper] purpose, i.e. what it will do with the information, or an end to which that investigation may lead.”³⁴

In the Supplemental Demand—elaborating on the Demand—SmartPill advanced the following purposes:

1. to investigate whether the Board committed breaches of its fiduciary duties with respect to the Series B financing and the conversion of preferred stock to common stock;
2. to investigate the independence of the Special Committee that approved the Series B financing and the automatic conversion of preferred stock to common stock;
3. to value its shares in SmartPill; and

stockholder has the burden of proof to demonstrate a proper purpose by a preponderance of the evidence.”); *W. Coast Mgmt. & Capital, LLC v. Carrier Access Corp.*, 914 A.2d 636, 641-42 (Del. Ch. 2006) (“at trial, the plaintiff must prove that it has some credible evidence of wrongdoing sufficient to warrant continued investigation”); *Deephaven Risk Arb. Trading Ltd. v. UnitedGlobalCom, Inc.*, 2004 WL 1945546, at *4 (Del. Ch. Aug. 30, 2004) (“it is the stockholder’s burden to establish that she has a proper purpose for seeking to inspect books and records”); *Grimes v. DSC Commc’ns Corp.*, 724 A.2d 561, 565 (Del. Ch. 1998) (“It is the stockholder’s burden to establish by a preponderance of the evidence that his purpose is proper.”).

³⁴ *W. Coast Mgmt.*, 914 A.2d at 646.

4. to investigate whether the Board breached its fiduciary duties with respect to the Fox SPA.

These purposes roughly map the four categories of books and records requested by Rock Solid in its post-trial papers.³⁵

* * *

Valuation

First, valuation of one's shares is a proper purpose for the inspection of corporate books and records.³⁶ Thus, Rock Solid may legitimately request books and records relating to the valuation of Rock Solid's shares before and after the Series B financing.

Series B and the Special Committee

Series B Financing

Second, because Rock Solid must show a proper purpose for every item sought, it is necessary to turn to its requests for books and records to investigate whether the Board committed breaches of fiduciary duties and whether the Special

³⁵ Pl.'s Post-Trial Letter in Supp. of its Req. for J. ("Pl.'s Letter") 11-13.

³⁶ *CM & M Group, Inc. v. Carroll*, 453 A.2d 788, 792 (Del. 1982).

Committee was indeed independent with regard to the Series B financing. To meet its burden of proving a proper purpose, “a stockholder must present some credible basis from which the court can infer that waste or mismanagement may have occurred”³⁷ and that “[t]here must be some evidence of possible mismanagement as would warrant further investigation of the matter.”³⁸ Rock Solid therefore has the burden of presenting some credible basis—some evidence that would warrant further investigation of the Series B financing.

Rock Solid, however, does not have to conclusively establish wrongdoing on the part of the Board or the Special Committee with regard to the Series B financing. “While stockholders have the burden of coming forward with specific and credible allegations sufficient to warrant a suspicion of waste and mismanagement, they are not required to prove by a preponderance of the evidence

³⁷ *Thomas & Betts Corp.*, 681 A.2d at 1031; *see also Brehm v. Eisner*, 746 A.2d 244, 267 n.75 (Del. 2000) (“a party needs to show, by a preponderance of the evidence, that there is a legitimate chance that their reason for suspecting mismanagement is credible”); *Sutherland v. Dardanelle Timber Co.*, 2006 WL 1451531, at *8 (Del. Ch. May 16, 2006) (“A plaintiff seeking inspection . . . must demonstrate some credible evidence of possible mismanagement sufficient to warrant further investigation.”).

³⁸ *Security First Corp. v. U.S. Die Casting & Dev. Co.*, 687 A.2d 563, 568 (Del. 1997).

that waste and mismanagement are actually occurring.”³⁹ “[A]ctual wrongdoing itself need not be proved.”⁴⁰ “Stockholders need only show, by a preponderance of the evidence, a credible basis from which the Court of Chancery can infer that there is possible mismanagement that would warrant further investigation.”⁴¹ This showing “may ultimately fall well short of demonstrating that anything wrong occurred.”⁴²

Rock Solid has questioned whether there was mismanagement on the part of the Board and Special Committee in terms of the valuation regarding the Series B financing. The pre-financing valuation was \$16.8 million, almost two-thirds lower

³⁹ *Thomas & Betts Corp.*, 681 A.2d at 1031.

⁴⁰ *Security First*, 687 A.2d at 567; *see also Seinfeld*, 2005 WL 3272365, at *2 (“the plaintiff does not have to prove actual wrongdoing”); *Haywood v. AmBase Corp.*, 2005 WL 2130614, at *4 (Del. Ch. Aug. 22, 2005); *Sahagen Satellite Tech. Group, LLC v. Ellipso, Inc.*, 791 A.2d 794, 796 (Del. Ch. 2000).

⁴¹ *Seinfeld*, 909 A.2d at 123; *see also Khanna v. Covad Commc’ns Group, Inc.*, 2004 WL 187274, at *6 (“All that the Section 220 plaintiff must show is a credible basis for claiming that ‘there are legitimate issues of wrongdoing.’”) (quoting *Security First*, 687 A.2d at 568); *Cohen v. El Paso Corp.*, 2004 WL 2340046, at *2 (Del. Ch. Oct. 18, 2004) (“the shareholder must make a credible showing of purpose ‘. . . that there are legitimate issues of wrongdoing’”) (quoting *Sec. First*, 687 A.2d at 568); *Marmon v. Arbinet-Thexchange, Inc.*, 2004 WL 936512, at *4 (“A stockholder may satisfy his burden by providing credible testimony that issues of wrongdoing exist within the company.”).

⁴² *Seinfeld*, 909 A.2d at 123 (quoting *Khanna*, 2004 WL 187274, at *6 n.25); *see also Forsythe*, 2005 WL 1653963, at *5 (finding that facts that “fall well short of actually proving wrongdoing . . . do provide a credible basis for inferring mismanagement”).

than the \$50 million post-financing valuation in 2008.⁴³ This was highly dilutive of Rock Solid's equity interest. Although the Special Committee's financial advisor, Stonebridge Associates, LLC ("Stonebridge"), prepared a fairness opinion regarding the Series B financing, SmartPill refused to share it with Rock Solid or other minority shareholders.⁴⁴ Rock Solid has also raised the question as to whether there was any business justification for eliminating the rights and preferences of the preferred stock in the Series B financing.⁴⁵

Special Committee

Third, with respect to the independence of the Special Committee and its sole member Broadhurst, Rock Solid has stated that its purpose is to investigate the independence of the Special Committee that approved the Series B financing and the conversion of preferred stock to common stock. In *Grimes v. DSC Communications Corp.*,⁴⁶ the Court held that a plaintiff stating such a purpose, without more, is at least "entitled to receive copies of the special committee report,

⁴³ JX 39 at 52.

⁴⁴ Trial Tr. 238.

⁴⁵ Trial Tr. 142.

⁴⁶ 724 A.2d 561 (Del. Ch. 1998).

minutes of the meetings of the special committee, and minutes of any meeting of the board of directors relating to the creation or the recommendations of the special committee.”⁴⁷

As the Court in *Grimes* noted, these documents ordinarily “should suffice for the purposes of establishing or raising reasonable grounds for suspicions about a special committee’s independence, good faith, and due care.”⁴⁸ In addition, the Court concluded that those were the documents necessary to the plaintiff’s proper purpose. Thus, the Court held that it would “require a further showing of need before requiring” the company to produce additional documents.⁴⁹ Except for documents related to the “market check” addressed below, Rock Solid has not made the requisite showing for the production of additional documents.⁵⁰

The Special Committee performed a “market check” on Psilos’s term sheet. According to the July Information Statement, the Special Committee and Barthel

⁴⁷ *Id.* at 567.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ Mere allegations that Broadhurst’s membership on SmartPill’s Board is dependent on the Controlling Stockholders, or that Broadhurst had a relationship with Psilos outside of his association with them on the SmartPill Board, or that the minority stockholders communicated directly with Psilos and the SmartPill CEO instead of Broadhurst are insufficient to call Broadhurst’s independence into doubt.

continued to seek alternate financing on more favorable terms. Barthel, because of his status as an executive officer and likely dependence upon the Controlling Stockholders, cannot readily be deemed independent for this purpose. It is not possible to determine how much of the market check effort was performed by Broadhurst and how much was performed by Barthel, although the better inference is that Barthel was deeply involved. Because the market check was important and Barthel was one of only two apparently involved, Rock Solid has stated a proper purpose to inspect documents relating to the market check.

SmartPill's assertions in response, that Barthel's involvement did not affect the independence of the Special Committee, are unhelpful with regard to Rock Solid's showing of a credible basis for a proper purpose.⁵¹ Once Rock Solid has shown the credible basis for a proper purpose, it is entitled to examine the relevant books and records. "A Section 220 action is not the proper forum for litigating a breach of fiduciary duty case."⁵² Rather, "the issue is whether the evidentiary

⁵¹ Def.'s Post-Trial Letter Mem. 10-11.

⁵² *Khanna*, 2004 WL 187274, at *6.

showing is sufficient to justify a court-ordered books and records inspection to uncover evidence (if any exists) of such mismanagement.”⁵³

The Fox SPA

Fourth, Rock Solid ties its claim of a proper purpose for inspecting the Fox SPA to its questioning of why Fox was offered much better terms than had been granted in any previous financing.⁵⁴ As compared to the terms SmartPill offered the minority stockholders, including Rock Solid, in the Series B financing, Fox only had to invest approximately \$50,000 instead of \$281,877 to maintain his pro rata ownership.⁵⁵ Fox was given Stonebridge’s fairness opinion, but Rock Solid was not.⁵⁶ The Fox SPA has also not been released to any of the minority stockholders. Although Rock Solid’s frustration with the favorable deal offered to

⁵³ *Marmon*, 2004 WL 936512, at *6; *see also Norman v. US MobilComm, Inc.*, 2006 WL 1229115, at *5 (Del. Ch. Apr. 28, 2006).

⁵⁴ SmartPill insists that Rock Solid has an ulterior motive for its books and records request. It claims that Rock Solid’s real objective is to obtain an investment opportunity similar to that given to Fox. SmartPill has correctly identified one of Rock Solid’s purposes, even though it is not its primary purpose. More importantly, “[o]nce a stockholder establishes a proper purpose under Section 220, the right to relief will not be defeated by the fact that the stockholder may have secondary purposes that are improper.” *Saito v. McKesson HBOC, Inc.*, 806 A.2d 113, 116 (Del. 2002). Thus, “once a proper purpose has been established, it is irrelevant whether any secondary purpose or ulterior motive exists for the request.” *Wynnefield Partners Small Cap Value LP v. Niagara Corp.*, 2006 WL 1737862, at *7 (Del. Ch. June 19, 2006).

⁵⁵ Trial Tr. 84-85.

⁵⁶ Trial Tr. 40, 42.

Fox is understandable, a stockholder's perception that a fellow shareholder was able to acquire additional shares on favorable terms does not, without more, support a conclusion that mismanagement or other improper conduct was a foundation for the Fox SPA. In short, Rock Solid has not demonstrated a proper purpose for investigating the Fox SPA.⁵⁷

* * *

Scope of Relief

With its conclusion that Rock Solid has set forth proper purposes for inspecting SmartPill's books and records, the Court must determine the scope of the relief to be granted. "In determining the scope of inspection relief, 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."⁵⁸

⁵⁷ This conclusion may not be as significant as it first appears. The Court concludes, *infra*, that Rock Solid is entitled to the Fox SPA as part of the books and records it needs to value its holdings in SmartPill.

⁵⁸ *Helmsman Mgmt. Servs., Inc. v. A & S Consultants, Inc.*, 525 A.2d 160, 167 (Del. Ch. 1987); *see also Security First*, 687 A.2d at 570; *Kortum v. Webasto Sunroofs, Inc.*, 769 A.2d 113, 119-20 (Del. Ch. 2000) ("Once the shareholder demonstrates its entitlement to inspection, it must also show that the scope of the requested inspection is proper, i.e., that the books and records sought are "essential and sufficient" to the shareholder's stated purpose.").

Rock Solid bears the burden of meeting this standard.⁵⁹ A primary objective of a § 220 proceeding is developing a list of documents to be reviewed that is “circumscribed with rifled precision.”⁶⁰

In its demands, Rock Solid’s listing of the books and records for which it sought access was overly broad and read as if it were pursuing voluminous document discovery under Court of Chancery Rule 34 and had forgotten the limitations under 8 *Del. C.* § 220. Although Rock Solid narrowed somewhat the scope of its requests in its post-trial papers,⁶¹ it made only minor progress in tailoring its listings of desired books and records for the purposes of 8 *Del. C.* § 220. A broad rejection of its requests, simply because the requests are so broad, remains tempting. The Court should not be burdened with clearing away the clutter that an unjustifiably broad request produces.⁶² It is the plaintiff in a books and records case who bears the burden of justifying the documents that it wants.

⁵⁹ *Thomas & Betts Corp.*, 681 A.2d at 1035.

⁶⁰ *Sec. First*, 687 A.2d at 570.

⁶¹ Pl.’s Letter 11-13.

⁶² *See Highland Select Equity Fund L.P. v. Motient Corp.*, 906 A.2d 156, 158 (Del. Ch. 2006) (“[I]t is not the court’s responsibility to pick through the debris of a Section 220 demand in this state of disarray and to find the few documents that might be justified as necessary and essential to the plaintiff’s demand.”).

In this instance, Rock Solid has minimally satisfied its burden in demonstrating a proper purpose, but it has done very little to justify why certain documents are “essential and sufficient” for its purposes. Despite the Court’s reservations about the unduly broad scope of Rock Solid’s demand, certain documents which Rock Solid has requested do seem, by their very nature, appropriate for and responsive to its proper purposes. Rock Solid will be entitled to gain access to those documents, but the Court is not inclined to search out, on its own, what might be a proper justification for some of the other documents which might conveniently fall within the broad scope defined by Rock Solid.

Rock Solid identifies four categories of documents that it seeks in order to advance the purposes identified in its demands. The first two categories directly relate to the Series B financing and the Special Committee established for that purpose. The third category seeks records to facilitate the calculation of the value of SmartPill’s minority shares. The fourth category seeks to investigate the Fox

SPA. These categories, and the specific documents within each category, will be discussed in the order presented by Rock Solid.⁶³

Documents relating to the Series B financing

All Board minutes from November 2009 through July 2010, including the minutes establishing the Special Committee.

All correspondence regarding the term sheets that Psilos submitted in the April to July 2010 time frame.

All documents from November 2009 through July 2010 related to Barthel's efforts to secure alternative financing.

All communications with the investors that Barthel approached.

All documents and communications from any and all shareholders who refused to participate in the Series B financing.

All documents and communications related to Karen Brenner.

Because no proper purpose for inspection of books and records regarding these matters was established, Rock Solid has no inspection rights under 8 *Del. C.* § 220 with respect to these documents.

Documents relating to the Special Committee

All communications among the Board regarding Broadhurst's independence.

All minutes of the Special Committee.

All communications with Psilos.

All communications with Stoneridge.

Any documents regarding the scope of authority granted to the Committee.

The conflict questionnaire, if any.

⁶³ Pl.'s Letter 11-13.

Any reports by the Special Committee.

Any documents reflecting negotiations with third parties, including when those negotiations took place.

The Fairness Opinion of Stonebridge, including all exhibits, projections and budgets.

As discussed above, Rock Solid has stated that its purpose is to investigate the independence of the Special Committee that approved the Series B financing and the conversion of preferred stock to common stock. Under *Grimes*, a plaintiff stating such a purpose is “entitled to receive copies of the special committee report, minutes of the meetings of the special committee, and minutes of any meeting of the board of directors relating to the creation or the recommendations of the special committee.”⁶⁴

Two categories of documents identified by Rock Solid are properly linked to its purpose of investigating the efforts of Broadhurst, as the Special Committee, and Barthel to perform a market check on the transaction framed by the Psilos term sheet. Those documents (pertaining to the Series B financing and generally) are all documents from November 2009 through July 2010 related to Barthel’s efforts to secure alternative financing and (pertaining to the actions of the Special

⁶⁴ *Grimes*, 724 A.2d at 567.

Committee) any documents reflecting any negotiations with third parties, including when those negotiations took place.

As Rock Solid has not provided a credible basis for anything more, these are the only documents to which it is entitled to under this category of its § 220 request.

Documents relating to the valuation of SmartPill

All documents regarding the valuation of SmartPill from March to July 2010.
All Proformas, projections, and budgets from 2008-2010.

The engagement letter with Stonebridge.

All documents that Stonebridge was provided by Barthel, Psilos or Broadhurst to conduct its valuation.

As addressed above, the valuation of one's shares is a proper purpose for the inspection of corporate books and records.⁶⁵ That, however, is not an authorization for unlimited inspection. "In determining the scope of inspection relief, 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."⁶⁶

⁶⁵ *CM & M Group, Inc. v. Carroll*, 453 A.2d 788, 792 (Del. 1982).

⁶⁶ *Helmsman Mgmt. Servs.*, 525 A.2d at 167; *see also Security First*, 687 A.2d at 570; *Kortum*, 769 A.2d at 119-20 ("Once the shareholder demonstrates its entitlement to inspection, it must also show that the scope of the requested inspection is proper, i.e., that the books and records sought are "essential and sufficient" to the shareholder's stated purpose.").

Stonebridge, the Special Committee's financial advisor, prepared a fairness opinion regarding the Series B financing,⁶⁷ a transaction which diluted the value of Rock Solid's holdings and eliminated its rights and preferences as a holder of preferred stock.⁶⁸ SmartPill, however, refused to produce this opinion to Rock Solid, purportedly because of its "confidentiality."⁶⁹

The following documents listed by Rock Solid are "essential and sufficient": all valuations of SmartPill from March through July 2010; all pro-formas, projections, and budgets during 2008-10; the Fox SPA and the Stonebridge fairness opinion relating to the Series B financing.⁷⁰ The balance are not.

Documents relating to the Fox SPA

The Fox SPA.
All documents regarding the Fox SPA.
All documents provided to Alan Fox.

Rock Solid's stated purpose is to determine whether the Board breached its fiduciary duties under the Fox SPA. As the Court has determined that Rock Solid

⁶⁷ Trial Tr. 236.

⁶⁸ JX 39 at 52.

⁶⁹ Trial Tr. 238. The reasoning behind the assertion of confidentiality is not clear.

⁷⁰ Although nominally sought for a different purpose, the Fox SPA and the Southbridge fairness opinion are essential for Rock Solid's valuation purposes.

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has not made the necessary showing to support its stated purpose, no documents must be produced for that purpose.⁷¹

* * *

For the foregoing reasons, Rock Solid has demonstrated a proper purpose for some of its books and records requests and has demonstrated that it is entitled to inspect some of those books and records in aid of its proper purposes. Those documents are identified above. Otherwise, Rock Solid's application under 8 *Del. C.* § 220 is denied.

IT IS SO ORDERED.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Register in Chancery-K

⁷¹ Rock Solid is entitled to the Fox SPA as one of its valuation documents.