**IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE**

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| ANASTASIA WOLST,<br><br>Plaintiff,<br><br>v.<br><br>MONSTER BEVERAGE CORPORATION F/K/A HANSEN NATURAL CORPORATION, a Delaware Corporation,<br><br>Defendant. | ) | C.A. No. 9154-VCN<br><br>REDACTED VERSION -- FILED: JUNE 5, 2014 |

**DEFENDANT MONSTER BEVERAGE CORPORATION'S PRE-TRIAL ANSWERING BRIEF**

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Dated: May 29, 2014

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## PRELIMINARY STATEMENT[1]

The perfunctory and conclusory arguments in Ms. Wolst's pre-trial opening brief ("Pl. Br.") confirm what Monster demonstrated in its opening brief ("Monster Br."): Ms. Wolst is completely unable to meet her burden of showing either (i) that she has a proper purpose for her Section 220 demand or (ii) that the records she seeks are necessary or essential for her stated purpose.

As demonstrated in the Company's opening brief, and previously described in its Answer and discovery responses, Ms. Wolst lacks a proper purpose to inspect the Company's books and records because the derivative claims set forth in her Litigation Demand are barred by the applicable limitations periods. (Monster Br. at 25-39.) Yet rather than even attempt to address that issue, Plaintiff opts instead to ignore it, offering not a word of argument – let alone any authority or a shred of evidence – to the contrary.

Similarly, Plaintiff makes no serious attempt to prove that she is entitled to any additional documents even if she could show a proper purpose. Substituting rhetoric for any relevant authority or supporting evidence, Ms. Wolst instead baldly argues that without additional information there is "no way" for her

[1] Unless otherwise stated, capitalized terms used herein have the meaning ascribed to them in the Company's opening pre-trial brief, filed on May 27, 2014.

to know what the Special Committee did, whether her Litigation Demand was taken seriously or the reasons why ultimately it was refused. (Pl. Br. at 2, 11, 15-16.) But that is simply untrue. Ms. Wolst already has the documents providing precisely that information, and has pointed to nothing even remotely suggesting that she is entitled to more.

## ARGUMENT

### I. PLAINTIFF FAILS TO ARGUE THAT HER UNDERLYING DERIVATIVE CLAIMS WOULD BE TIMELY AND, THUS, CANNOT SHOW A PROPER PURPOSE FOR HER DEMAND

Remarkably, even though the Company specifically raised this issue in its Answer and again in its responses to Plaintiff's Interrogatories,[2] Ms. Wolst's pre-trial brief *completely ignores* the most glaring defect in her Section 220 demand: the underlying derivative claims she wishes to assert, which accrued in 2006 and 2007, are time-barred under the applicable statute of limitations and

[2] *See* JX 64, Def's Answer, dated Jan. 27, 2014, at 13 ("any claim brought against any of Monster's officers or directors based on such alleged wrongdoing is barred by operation of the applicable statute of limitations and the doctrine of laches, and Plaintiff therefore lacks a proper purpose to demand inspection of Monster' s books and records"); JX 66, Def's Interrogatory Response No. 15, dated March 24, 2014 ("Plaintiff does not have a proper purpose . . . because the underlying derivative claims for which Plaintiff purports to seek relief are barred by operation of the applicable statute of limitation and the doctrine of laches"); *see also* Def's Interrogatory Responses No. 17 and 20.

doctrine of laches. As a result, Ms. Wolst lacks a "proper purpose" under Section 220. (*See* Monster Br. at 26-39.)

The only place in which Ms. Wolst has ever attempted to claim that her underlying derivative claims would not be time-barred is in her responses to the Company's Interrogatories, where she asserted that the limitations period was "tolled" by the pendency of the Securities Action, pursuant to *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), and by the filing of this Section 220 action. For the reasons set forth in Monster's opening brief, those tolling arguments are wholly without merit. (*See* Monster Br. at 30-35.) And, having consciously failed to address the issue in her opening brief, it is too late for Ms. Wolst to advance any further arguments in her answering brief. *See, e.g., Kuroda v. SPJS Hldgs., L.L.C.*, NO. CIV.A. 4030-CC, 2010 WL 4880659, at *3 n.23 (Del. Ch. Nov. 30, 2010) (noting that a "failure to raise a legal issue or argument in an opening brief generally constitutes a waiver of the ability to raise that argument in connection with the matter under submission to the court"); *In re IBP, Inc. S'holders Litig.*, 789 A.2d 14, 62 (Del. Ch. 2001) (holding that party waived argument not raised in its opening post-trial brief).

For this reason alone, judgment should be entered in the Company's favor. *See Graulich v. Dell Inc.*, NO. CIV.A. 5846-CC, 2011 WL 1843813, at *1 (Del. Ch. May 16, 2011) (if plaintiff's stated purpose is to assert derivative claims

and those claims would be time-barred, plaintiff lacks a proper purpose under Section 220 ); Monster Br. at 26-28 (collecting cases).

## II. PLAINTIFF CANNOT SATISFY HER BURDEN OF SHOWING THAT SHE IS ENTITLED TO ANY ADDITIONAL DOCUMENTS

As demonstrated in the Company's opening brief (Monster Br. at 46-51), the documents already provided to Ms. Wolst, which properly focus on "the committee process itself," *Grimes v. DSC Commc'ns Corp.*, 724 A.2d 561, 567 (Del. Ch. 1998), are sufficient for the purpose of determining whether demand was properly refused and Ms. Wolst is not entitled to anything further under applicable case law. Ms. Wolst's opening brief does nothing to alter that conclusion.

Ms. Wolst argues that, absent a formal written report from the Special Committee, there is "no way to determine whether the Board or the Special Litigation Committee took [her] Litigation Demand seriously," such as "what, specifically, was done in response" and whether the Special Committee and Scheper Kim "performed an independent and thorough investigation." (Pl. Br. at 2, 11, 15-16.) But this argument overlooks the information contained in the minutes already produced by the Company, including the minutes of the October 9, 2012 Board meeting, which set forth with specificity how the Special Committee was constituted, what the Special Committee did, the issues it considered, and its suggested resolution to each.

For example, with respect to the Special Committee's independence, the documents already in Ms. Wolst's possession identify who the Special Committee members were and the powers and authority bestowed upon them (JX. 24 at MBC-AW0000001), identify Mr. Harris from Scheper Kim as independent outside counsel retained to advise and assist the Special Committee with its investigation (JX. 31 at MBC-AW0000015) and describe the process by which the Special Committee selected Scheper Kim, including other candidates considered (JX. 30 at MBC-AW0000013-14; JX. 31 at MBC-AW0000015). Similarly, regarding the work performed as part of the investigation, the documents already given to Ms. Wolst explain [redacted]

Likewise, Plaintiff's assertion that the documents provided "give zero insight into the reasons underlying" the refusal of her Litigation Demand is simply false. (Pl. Br. at 11.) [redacted]

[redacted]

In short, even in her pre-trial brief, Ms. Wolst has made *no* showing that *any* "reasonable grounds for suspicion about the [Special Committee's] independence, good faith, or due care, or the reasonableness of its processes or

[3] By contrast, the Amended Derivative Complaint purportedly identified only *one* AB distributor who reported having excess inventory of the Company's products (whose identity Ms. Wolst repeatedly refused to provide to the Special Committee). (JX. 12 ¶¶ 46, 47, 49, 60, 81, 83, 154; *see also* JXs. 26, 27, 29, 35, 36.)

conclusions" exist such that she is entitled to receive any additional documents.[4] *Grimes*, 724 A.2d at 567; *Norfolk Cnty. Ret. Sys. v. Jos. A. Bank Clothiers, Inc.*, NO. CIV. A. 3443-VCP, 2009 WL 353746, at *8 (Del. Ch. Feb. 12, 2009), *aff'd*, 977 A.2d 899 (Del. 2009) (TABLE).

## CONCLUSION

For the reasons stated herein and in Monster's opening brief, and the reasons to be adduced at trial, Plaintiff's demand for inspection of books and records pursuant to Section 220 should be denied.

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[4] Far from being "instructive" (Pl. Br. at 15), Plaintiff's heavy reliance on *Sutherland v. Sutherland*, 958 A.2d 235 (Del. Ch. 2008) is misguided. *Sutherland* is distinguishable for several reasons, not the least of which is that it deals with a *Zapata*-based motion to dismiss under which "the *corporation* has the burden of proof under Rule 56 standards" rather than a shareholder books and records request under Section 220. *Sutherland*, 958 A.2d at 239 (emphasis added). And in any event, unlike here, the Special Committee report in *Sutherland* failed to so much as mention conduct going "to the very heart of [the shareholder's] complaint." *Id.* at 242-43. The other cases Ms. Wolst cites are equally inapposite: none of them addresses a Section 220 request in the context of seeking to evaluate whether a litigation demand was wrongfully refused. *See Saito v. McKesson HBOC, Inc.*, 806 A.2d 113, 116, 118 (Del. 2002); *Wynnefield Partners Small Cap Value L.P. v. Niagara Corp.*, C.A. No. 1261-VCP, 2006 Del. Ch. LEXIS 144, at *6-7 (Del. Ch. Aug. 9, 2006); *Carapico v. Philadelphia Stock Exchange, Inc.*, 791 A.2d 787, 793 & n.13 (Del. Ch. 2000); *Deephaven Risk Arb Trading, Ltd. v. UnitedGlobalCom, Inc.*, C.A. No. 379-VCP, 2005 Del. Ch. LEXIS 107, at *16, *39-40 (Del. Ch. July 13, 2005).

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Dated: May 29, 2014

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 5, 2014, a copy of the foregoing was served by File & Serve*Xpress* on the following counsel of record:

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