IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IAN BEISER, Plaintiff, vs. PMC-SIERRA, INC., a Delaware corporation, Defendant.	:	Civil Action No. 3893-VCL

PLAINTIFF'S ANSWERING BRIEF IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

ROSENTHAL MONHAIT & GODDESS, P.A.
Norman M. Monhait (#1040)
919 Market Street, Suite 1401
Citizens Bank Center
Wilmington, Delaware 19899-1070
(302) 656-4433
Attorneys for Plaintiff

OF COUNSEL:

THE WEISER LAW FIRM, P.C.
Robert B. Weiser
Brett D. Stecker
Jeffrey J. Cirlanto
121 N. Wayne Avenue, Suite 100
Wayne, PA 19087

COUGHLIN STOIA GELLER
RUDMAN & ROBBINS LLP
Shawn A. Williams
100 Pine Street, Suite 2600
San Francisco, CA 94111

COUGHLIN STOIA GELLER
RUDMAN & ROBBINS LLP
Travis E. Downs III
655 West Broadway, Suite 1900
San Diego, CA 92101

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NATURE AND STAGE OF PROCEEDINGS

Plaintiff Ian Beiser ("Beiser"), as a shareholder of defendant PMC-Sierra, Inc. ("PMC" or the "Company"), continuously since April 19, 1999, seeks to inspect and copy certain books and records of PMC pursuant to 8 Del. Code §220 ("§220" or "Section 220") concerning the Company's admitted stock option backdating scheme that resulted in an $89.6 million restatement. That admission alone clearly provides plaintiff with a *per se* proper purpose for reviewing defendant's corporate records: to investigate the scope and extent of PMC's officers' and directors' involvement in this misconduct. *See, e.g.*, *Melzer v. CNET Networks, Inc.*, 934 A.2d 912, 916-17 (Del. Ch. 2007) ("Investigation of admitted stock option backdating constitutes a proper purpose under Section 220."). In addition, plaintiff's demand states other proper purposes for his inspection, including seeking information to meet the particularity requirements for pleading demand futility in a related federal derivative action, and otherwise satisfies §220's procedural requirements.

As recently as November 21, 2007, the Court ruled, under virtually identical circumstances in a backdating case, that the type of information which plaintiff seeks here is entirely appropriate and should be produced pursuant to §220. *Id.* at 913. Indeed, the Court noted, "This should have been a very easy case." *Id*. In *CNET*, plaintiffs sought, *inter alia*, books and records related to "the stock-option grants alleged in the complaint and exercise prices and grant dates associated therewith." *Id*. at 915. The Court held that "***[a] stockholder must be given sufficient access to books and records to effectively address the problem of backdating through derivative litigation***" and that the documents should be produced "***in order to allow [him] to explore a potential lapse in the good faith of the CNET board that would excuse demand in the California derivative suit***." *Id*. at 918, 920.[1] Here too, the Court should allow plaintiff to obtain the documents related to the Company's

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[1] All emphasis is added and citations omitted unless otherwise noted.

historical stock option grants, and admitted backdating, so he may explore the current Board of Director's ("Board") lack of independence and disinterestedness that would excuse demand.

Defendant's motion provides no basis to reject the long-standing principle that §220 is properly used, as it is here, as an "'information-gathering tool in the derivative context.'" *Grimes v. Donald*, 673 A.2d 1207, 1216 n.11 (Del. 1996). Defendant argues that Beiser should not be permitted to seek production of books and records through §220 after related derivative litigation has commenced. *See* Defendant PMC-Sierra, Inc.'s Opening Brief in Support of Its Motion to Dismiss ("Def's Brf.") at 6-7. Most of the string of cases defendant cites, however, simply do not stand for the proposition that "plaintiffs with claims already in litigation are not permitted to seek books and records under Section 220." *Id.*[2]

Moreover, several of defendant's arguments (including those centered on the timing of plaintiff's demand, application of the Private Securities Litigation Reform Act of 1995 ("PSLRA"), and the utility of plaintiff's demand), have been substantially undermined by an intervening ruling by United States Magistrate Judge Richard Seeborg in related derivative litigation currently pending in the United States District Court for the Northern District of California (the "Federal Court"), *In re PMC-Sierra, Inc. Derivative Litig.*, Master File No. C-06-05330-RS (the "Derivative Action").

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[2] For example, in *Beam v. Stewart*, 845 A.2d 1040 (Del. 2004), the Delaware Supreme Court did not hold that the plaintiffs were barred from pursuing a §220 action after filing a shareholder derivative complaint. In fact, the Court held that "this Court and the Court of Chancery have continually advised plaintiffs who seek to plead facts establishing demand futility that the plaintiffs might successfully have used a Section 220 books and records inspection to uncover such facts." *Id.* at 1056. In fact, in explicit reference to §220, the Court went on to state that "the general unavailability of discovery to assist plaintiffs [in a derivative proceeding] with pleading demand futility does not leave plaintiffs without means of gathering information to support their allegations of demand futility." *Id.* By way of further example, *White v. Panic*, 783 A.2d 543 (Del. 2001), simply deals with an unremarkable situation where the Court refused to "'give a broad reading to the facts alleged in the complaint'" because the plaintiff did not "conduct a sufficient investigation before filing the derivative action." *Id.* at 549.

Following an opinion in which he suggested plaintiff seek documents from PMC in Delaware, Judge Seeborg granted plaintiff's request for a stay of the Derivative Action on August 13, 2008, six days after PMC filed its motion to dismiss this §220 proceeding, finding that "good cause" existed to allow plaintiff the opportunity to seek documents from the Company through this §220 action. *See* August 13, 2008 Order Granting Plaintiff's Motion to Stay, attached hereto as Exhibit A. In 2007, this Court ordered production of books and records in substantially analogous circumstances. *CNET*, 934 A.2d at 913. The Federal Court has approved plaintiff's efforts to obtain documents through these proceedings. Defendant's arguments that plaintiff's §220 inspection demand is somehow improper rings hollow.

STATEMENT OF FACTS

Defendant is a Delaware corporation with its principal executive offices located in Santa Clara, California. ¶4.[3] According to its public filings, PMC provides broadband communications equipment and data-storage devices for commercial and residential customers. For many years, PMC's executives and non-employee directors were compensated in large part through the issuance of stock options under the Company's shareholder-approved stock option plans. Significantly, those plans provided that stock options must be issued "at not less than 100% of the fair market value of the PMC-Sierra's common stock on the date of the grant." ¶10.

In mid-August 2006, PMC issued a series of disclosures announcing that it had initiated and completed a purported internal inquiry into its historical stock option grant processes. ¶¶7-9. PMC revealed that this inquiry, conducted by its Audit Committee, had uncovered numerous instances of misdated stock option grants and that the Company would thus be forced to make accounting adjustments to all of its balance sheets from December 31, 2002 and thereafter. *Id.*

Specifically, on August 14, 2006, contrary to the Company's prior representations, PMC revealed that "***for certain option grants the allocations to individual recipients and/or the proper documentation of corporate approvals had not been completed as of the original accounting measurement dates***." ¶7. Two days later, on August 16, 2006, PMC disclosed that, based upon the Company's purported internal review, "***the accounting measurement dates for certain stock option grants awarded primarily during the years 1998-2001, differ from the measurement dates previously used to determine any stock-based compensation expense for the years 1998-2002***." ¶8.

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[3] All paragraph ("¶") references are to plaintiff's Complaint Under 8 Delaware Code Section 220, filed July 15, 2008 ("Complaint").

In PMC's August 16, 2006 disclosures, the Company admitted the following with respect to its historical option grants:

> The Company has concluded that a number of written consents were not fully executed or effective on the stated dates and thus that using the stated date as the measurement date was incorrect. . . .
>
> - ***we treated unanimous written consents approving stock option grants as effective on the date stated on the consent, instead of the date upon which we received the consent form containing the last signature required for unanimity***;
>
> - ***we treated option grants to multiple employees as effective prior to the date upon which we had determined the exact number of options that would be granted to each individual employee, or we failed to assure that lists of grantees and amounts of stock option grants could not be changed following the date of grant***;
>
> - ***we failed to assure that there were written minutes*** for all meetings of the compensation committee or board of directors that documented the grant of stock options;
>
> * * *
>
> - ***we failed to assure that there was proper delegation of authority to grant stock options and that documents*** evidencing delegation of authority and selection of dates for stock grants ***were completed*** on a ***timely basis***.

¶9. On the following day, August 17, 2006, PMC announced that the U.S. Securities and Exchange Commission ("SEC") had commenced an investigation regarding the Company's historical stock option grant practices.[4]

In light of these events, on August 29, 2006, plaintiff initiated the Derivative Action on behalf of PMC in the Federal Court, alleging violations of federal and Delaware law for participation in an unlawful fraudulent backdating scheme. On December 6, 2006, the Federal Court consolidated

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[4] *See* Second Amended Consolidated Verified Shareholder Derivative Complaint for Violation of the Federal Securities Laws and State Law Claims for Breach of Fiduciary Duty, Abuse of Control, Constructive Fraud, Corporate Waste, Unjust Enrichment, Gross Mismanagement, Action for Accounting and Violations of California Corporations Code ("SAC"), filed May 28, 2008, attached hereto as Ex. B, at 15 n.10.

Beiser's derivative action with a similar derivative action brought by another PMC shareholder, and appointed Beiser lead plaintiff. On January 29, 2007, plaintiff filed a consolidated complaint with the Federal Court.

On March 1, 2007, PMC filed a Form 10-K for the fiscal year ended December 31, 2006 which further discussed the findings of its purported "internal investigation." *Id.* at 15. Therein, PMC for the first time identified groups of ***manipulated stock options***,[5] including nine grants to senior officers between 1998-2001, some of which were authorized by unanimous written consent ("UWC") forms signed by PMC directors ***that effectively approved stock option issuances with "grant dates" that had already passed and where PMC's stock price was lower***.[6] *Id*. at 15-16. Stated plainly, PMC admitted backdating. PMC's restated compensation expense for these option grants was $44.7 million. *Id*.

In addition, PMC's March 1, 2007 disclosures also revealed that stock option recipient lists and individual stock option recipient allocations ***were altered after*** stock options had been approved, but used the exercise price or "grant date" of the earlier approval when PMC's stock price was lower. *Id*. The Company's restated compensation costs associated with this ***admittedly intentional conduct*** amounted to an additional $20.6 million. *Id*. Finally, PMC stated on March 1, 2007 that with respect to other stock option grants, the Company could not "***locate sufficient documentation***

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[5] Notably, PMC did not disclose what specific options suffered from infirmities. To date, PMC still has not issued any such disclosures.

[6] "Stock-based compensation expense of $44.7 million was recorded with respect to nine stock option grants to Section 16 officers (executives) and non-executives that were approved by unanimous written consents ("UWC's") or other delegation documents, ***where the last approval of the grants . . . was received after the dates for which we set the exercise price of the options***." *See id.* at 16.

that confirmed the selection of the grant date" and recorded another $24.3 million in compensation expense with respect to such grants. *Id*.

On August 22, 2007, in the Derivative Action, the Federal Court dismissed plaintiff's consolidated complaint for failure to adequately allege demand futility, but granted plaintiff leave to amend. *See* August 22, 2007 Order Granting Motion to Dismiss with Leave to Amend, attached hereto as Ex. C. Accordingly, Plaintiff's First Amended Consolidated Verified Shareholder Derivative Complaint ("FAC") was filed in the Derivative Action on October 2, 2007, and defendants subsequently moved to dismiss. *See* Nominal Defendant PMC-Sierra, Inc's Motion to Dismiss First Amended Consolidated Shareholder Derivative Complaint for Failure to Make Litigation Demand, attached hereto as Ex. D. In so moving, defendants relied heavily on the purported "findings" of the Audit Committee that the "errors" in PMC's historical option grant practices were not the product of any deliberate misconduct. *Id*.

Therefore, on December 26, 2007, plaintiff in the Derivative Action filed a Motion to Compel the Production of Documents Related to PMC-Sierra's Historical Stock Option Granting Practices ("Motion to Compel"). *See* Motion to Compel, attached hereto as Ex. E. Specifically, plaintiff sought production of the full Audit Committee report and the documents underlying that report and its findings. *Id.* In the Motion to Compel, plaintiff argued that he was entitled to the production sought under Delaware law, and that to the extent that discovery was stayed in the Derivative Action pursuant to the PSLRA, any such stay should be lifted. *Id*.

In accordance with §220, Beiser served upon PMC by the Chairman of its Board, a written demand under oath and power of attorney (the "Inspection Demand").[7] Complaint, Ex. A. The

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[7] The original submission inadvertently omitted the verification and power of attorney, which was provided promptly. *See* Affidavit of Elizabeth Sudderth, Ex. 5. Defendants have asserted that Beiser's service of demand on the Chairman of the Board's attorney of record is a fatal procedural

Inspection Demand specifically demanded that Beiser be permitted to inspect and make copies and extracts of all books and records of the Company relating to: (i) establishing the specific chronology and events leading to the stock option grants challenged in the Derivative Action and exercise prices and grant dates associated therewith; (ii) the extent to which the Company's Compensation Committee delegated or did not delegate to PMC's management, either expressly or by custom and practice, the authority to select the exercise price or grant date of stock options and, if such delegation occurred, the extent to which the Compensation Committee was aware of the exercise prices and dates selected; (iii) whether members of the Board or committee thereof received stock options that were backdated, misdated, mispriced, or incorrectly dated; (iv) the extent to which any minutes or unanimous written consents for the Compensation Committee or other committees were backdated, at least as to those minutes involving or relating to stock option grants; and (v) the written report and finding of the Audit Committee. *Id*. Further, plaintiff demanded to inspect and make copies and of any and all documents provided by PMC to the SEC in connection with the SEC's investigation into the Company's historical stock option granting practices and procedures. *Id.*

The Inspection Demand states the purposes for inspection as: (i) investigating possible violations of law by the officers and directors of the Company in connection with the Company's historical option granting practices and procedures and internal controls; and (ii) determining whether the Company's officers and directors are independent and/or disinterested and whether they have acted in good faith. *Id*. Although these stated purposes are undeniably proper for inspecting and making copies and extracts of the books and records of the Company pursuant to §220 (*see*

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defect. Beiser disagrees but will nevertheless promptly serve the Chairman of the Company's registered agent.

CNET, 934 A.2d at 916), PMC nevertheless subsequently indicated its refusal to comply with the Inspection Demand.

On May 8, 2008, Judge Seeborg issued an order in the Derivative Action granting defendants' motions to dismiss the FAC, denying the Motion to Compel, and granting plaintiff leave to amend within 20 days. *See* Complaint, Ex. B at 7. Although he had denied plaintiff the right to seek discovery in the Derivative Action, Judge Seeborg specifically noted that plaintiff was free to pursue documents from the Company in Delaware to support its federal pleadings: "[w]hatever rights plaintiffs may have under Delaware law to seek corporate records are matters that plaintiffs must pursue, if at all, in the Delaware courts." *Id*. Because defendants then refused to stipulate to an extension of time, pursuant to the terms of Judge Seeborg's May 8, 2008 Order, plaintiff in the Derivative Action filed the SAC.

On July 15, 2008, plaintiff filed the Complaint pursuant to Section 220 initiating this litigation ("Section 220 Action") to enforce his statutory right to inspect and make copies and extracts of certain books and records of PMC. On August 5, 2008, plaintiff moved the Federal Court to stay the Derivative Action for the sole purpose of permitting plaintiff to complete litigation of his §220 demand prior to any adjudication of defendants' pending motions to dismiss the SAC. *See* Motion to Stay Consolidated Derivative Action Pending the Resolution of an Action Under Section 220 of Title 8 of the Delaware Code or in the Alternative to Enlarge Time, attached hereto as Ex. F. Plaintiff argued that information obtained through inspection "will support plaintiff's allegations in this action." *Id*. at 2. On August 13, 2008, the Federal Court agreed with plaintiff and, following the logic of other courts to reach the issue, stayed the Derivative Action pending the outcome of this Section 220 Action. *See* Ex. A. The Federal Court specifically found that "[p]laintiffs have shown good cause for a stay in the instant action," noting that its previous order held that "plaintiffs retained the option to pursue corporate records in the Delaware courts." *Id*. at 2.

On August 7, 2008, defendant filed a Motion to Dismiss the Section 220 Action ("Motion"). Therein, defendant contends that the Section 220 Action should be dismissed because plaintiff: (a) does not have a proper purpose; (b) is "not permitted" to pursue a Section 220 demand after filing the Derivative Action; and (c) has not complied with the procedural requirements of §220. Each of these contentions is demonstrably incorrect, as discussed herein. Plaintiff's Inspection Demand is proper, meets the requirements of §220, and is brought with the Federal Court's consent. This Court should accordingly reject defendant's gamesmanship, and put this case on a prompt schedule toward trial. *Rales v. Blasband*, 634 A.2d 927, 931 n.4 (Del. 1993) (Section 220 "permits a stockholder, upon complying with the procedural requirements of the statute and upon showing a specific proper purpose, to obtain in a summary proceeding an order permitting inspection of specific books and records.").

ARGUMENT

I. Legal Standard

"A motion to dismiss under Rule 12(b)(6) will be granted where it appears with reasonable certainty that the plaintiff cannot prevail on any set of facts that can be inferred from the pleadings." *Romero v. Career Educ. Corp.*, 2005 WL 1798042, at *2 (Del. Ch.). While it is the plaintiff's burden to prove a proper purpose for seeking to inspect books and records, the plaintiff is entitled to all reasonable inferences in support of the complaint. *Id.* "A Section 220 action is not the proper forum for litigating a breach of fiduciary duty case. All that the Section 220 plaintiff must show is a credible basis for claiming that 'there are legitimate issues of wrongdoing.'" *Khanna v. Covad Commc'ns Group, Inc.*, 2004 WL 187274, at *6 (Del. Ch.).

In fact, this Court has recognized that §220 books and records requests are summary proceedings in which specificity can best be addressed after the factual record is developed at trial, as opposed to the motion to dismiss stage. *Christie v. CBA Int'l, Inc.*, 1995 Del. Ch. LEXIS 60, at *5 ("I will deal . . . with . . . the Plaintiffs' purported proper purpose at trial with the benefit of an actual factual record."); *Khanna*, 2004 WL 187274, at *6 ("To engage in the detailed analysis . . . under Court of Chancery Rules 23.1 or 12(b)(6) . . . would defeat the purposes of this summary proceeding."). Accordingly, PMC's Motion is improper at this stage of the proceedings and should be denied.

II. Plaintiff Has Stated a *Per Se* Proper Purpose Under Section 220

Section 220 provides a statutory right for a stockholder to inspect the books and records of a Delaware corporation, so long as the form and manner requirements for making a demand are met, and the inspection is for a "proper purpose." *Highland Select Equity Fund, L.P. v. Motient Corp.*, 906 A.2d 156, 164 (Del. Ch. 2006), *aff'd*, 922 A.2d 415 (Del. 2007); *Compaq Computer Corp. v. Horton*, 631 A.2d 1, 3 (Del. 1993). Section 220 defines a "proper purpose" as ***any*** purpose

"***reasonably related to such person's interest as a stockholder***." *Compaq*, 631 A.2d at 3 (emphasis in original). Simply put, an investigation of admitted stock option backdating constitutes a *per se* proper purpose under Section 220. *CNET*, 934 A.2d at 918. Each of plaintiff's stated purposes alone are *prima facie* proper: (1) investigating possible waste, mismanagement and breaches of fiduciary duties; (2) investigating violations of law by the officers and directors of the Company in connection with the Company's stock option granting practices and procedures and internal controls; and (3) determining whether the Company's officers and directors are independent and/or disinterested and whether they have acted in good faith. Complaint, Ex. A at 2; *see also CNET*, 934 A.2d at 918-20.

Although PMC crafted a heading to read "Plaintiff Does Not Have A Proper Purpose," nothing in PMC's Motion so much as references plaintiff's stated purposes, let alone attempts to argue that these purposes are improper. Def's Brf. at 6. Instead, defendant turns to misplaced technical arguments that wholly ignore the central requirement of §220 – that demand be brought with a proper purpose. *See CM & M Group, Inc. v. Carroll*, 453 A.2d 788, 792 (Del. 1982) ("***The paramount factor in determining whether a stockholder is entitled to inspection of corporate books and records is the propriety of the stockholder's purpose in seeking such inspection***."). It is unsurprising that PMC fails to address plaintiff's stated purposes, as it is well-settled under controlling Delaware law that each purpose plaintiff advanced, by itself, is proper and alone enough to satisfy §220. *Catalano v. TWA*, 1977 WL 5199, at *2 (Del. Ch.) ("[I]f plaintiff establishes a proper purpose, then all else is irrelevant.").

The Court has already found that the "***[i]nvestigation of admitted stock option backdating constitutes a proper purpose under Section 220***." *CNET*, 934 A.2d at 916 (emphasis in original). Indeed, this Court has repeatedly held investigation of possible breaches of fiduciary duty and violations of law by directors and officers are proper purposes for a §220 demand. *See, e.g.*,

Khanna, 2004 WL 187274, at *5 ("investigating self-dealing by members of Covad's board is undoubtedly a proper purpose"); *Carapico v. Phila. Stock Exch., Inc.*, 791 A.2d 787, 792 (Del. Ch. 2000) ("'the investigation of . . . breach of fiduciary duty has been recognized as a purpose proper to warrant the inspection of corporate books and records'"). Moreover, "it is clearly proper for a stockholder to ask leave to examine corporate books and records to follow up his suspicions of corporate [waste and] mismanagement" in a §220 records request. *Skouras v. Admiralty Enter., Inc.*, 386 A.2d 674, 678 (Del. Ch. 1978); *Seinfeld v. Verizon Commc'ns, Inc.*, 2005 WL 3272365, at *2 (Del. Ch.), *aff'd*, 909 A.2d 117 (Del. 2006) ("*Seinfeld I*") ("it is well established that an investigation into corporate waste and mismanagement is a proper purpose for books and records inspection under Section 220"); *Thomas & Betts Corp. v. Leviton Mfg. Co.*, 681 A.2d 1026, 1031 (Del. 1996) ("investigation of waste and mismanagement is a proper purpose").

Finally, determining whether officers and directors are independent and/or disinterested has been repeatedly recognized as a proper purpose for a §220 demand. *See, e.g., Guttman v. Huang*, 823 A.2d 492, 504 (Del. Ch. 2003) (holding that demand under §220 for books and records "could have provided the basis for the pleading of particularized facts – *i.e.*, for the filing of a complaint that meets the legally required standard" for demand futility); *Beam*, 845 A.2d at 1056 (plaintiff should have made a §220 demand to establish interestedness); *In re J.P. Morgan Chase & Co. S'holder Litig.*, 906 A.2d 808, 819 (Del. Ch. 2005) (same); *White*, 783 A.2d at 557 n.54 (same); *Rales*, 634 A.2d at 934 n.10 (same). Thus, it cannot be reasonably disputed that plaintiff has advanced at least three proper purposes for his demand, any one of which alone is enough to satisfy §220's requirements.

III. Plaintiff Easily Satisfies the "Credible Basis" Test

Not only are plaintiff's stated purposes *per se* proper, but the Complaint also provides detailed facts that, taken as true (as this Court must on a motion to dismiss), provide a "credible

basis" for the Inspection Demand. Significantly, to demonstrate a proper purpose under §220 when seeking to investigate possible mismanagement, a stockholder is "***not required*** to prove by a preponderance of the evidence that waste and [mis]management are actually occurring." *Thomas & Betts*, 681 A.2d at 1031. A stockholder must simply "present some ***credible basis*** from which the court can infer that waste or mismanagement may have occurred." *Id.*; *see also Seinfeld v. Verizon Commc'ns, Inc*., 909 A.2d 117, 123 (Del. 2006) ("*Seinfeld II*") (stating that when seeking to investigate corporate mismanagement and waste, stockholders need only show "a credible basis from which the Court of Chancery can infer there is possible mismanagement that would warrant further investigation").

As the Delaware Supreme Court stated in *Seinfeld II*, "***the 'credible basis' standard sets the lowest possible burden of proof***." 909 A.2d at 12; *see also CNET*, 934 A.2d at 917 n.19 ("this can hardly be characterized as an excessive pleading standard"). Thus, Delaware courts have consistently held that the "credible basis" test was met where stockholders sought to investigate corporate mismanagement or waste by alleging, for example, that a corporation: (i) was subject to a probe by governmental authorities, including the SEC,[8] and/or (ii) had been forced to restate its historical financial results.[9] *See, e.g.*, *Freund v. Lucent Techs, Inc.*, 2003 WL 139766, at *3 (Del. Ch.); *Cohen v. El Paso Corp.*, 2004 WL 2340046, at *2 (Del. Ch.); *Saito v. McKesson HBOC, Inc.*,

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[8] As noted above, in August 2006, PMC became the subject of an SEC investigation regarding its historical option grant practices. While the SEC ultimately terminated its investigation of PMC in November 2007 without taking any enforcement action, this is irrelevant here. *See, e.g.*, *Weiss v. Swanson*, 948 A.2d 433, 444 n.32 (Del. Ch. 2008) ("[T]he allegations in this case involve whether the directors have violated their fiduciary duties. . . . [I]t is immaterial to this case that the SEC has ceased its investigation.").

[9] Defendant has been forced to restate its historical financial results by ***$89.6 million*** as a result of stock option grant manipulation.

2001 WL 818173, at *4 (Del. Ch.), *aff'd in part, rev'd in part on other grounds*, 806 A.2d 113 (Del. 2002); *Carapico*, 791 A.2d, at 787.[10]

Plaintiff alleges that PMC's directors and officers breached their fiduciary duties, violated the law, caused substantial waste and mismanagement, and are interested for purposes of Del. Ch. Ct. R.23.1 ("Rule 23.1") because of their direct participation in a fraudulent scheme to backdate stock options. ¶¶5-10, 14-18. Specifically, plaintiff sets forth numerous admissions by the Company that: (1) measurement dates for stock options were incorrect; (2) the Company's financial results would have to be restated to the tune of $89.6 million due to stock option manipulation; and (3) material accounting errors occurred in relation to stock option grants. ¶¶7-9. Where, as here, defendant has admitted that backdating occurred, a credible basis certainly exists to conduct an investigation under §220. *See CNET*, 934 A.2d at 918 n.20 ("By virtue of CNET's admission of backdating, there is sufficient evidence to support a credible basis of wrongdoing."); *Seinfeld II*, 909 A.2d, at 123 ("***[T]he 'credible basis' standard sets the lowest possible burden of proof*** . . . [t]he only way to reduce the burden of proof further would be to eliminate any requirement that a stockholder show some evidence of possible wrongdoing."). In any event, the Court has held that the basis for a plaintiff's suspicions "'can be best addressed after the factual record is developed at trial,'" and is inappropriate at the pleading stage. *Romero*, 2005 WL 1798042, at *2. Given (1) PMC's admissions that backdating occurred, (2) that all inferences must be drawn in plaintiff's favor, (3) the

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[10] The Delaware Supreme Court recently noted that while countless Section 220 proceedings regarding possible corporate mismanagement and waste have been filed by shareholders since the creation of the "credible basis" test, ***there have been only two Section 220 proceedings in which a plaintiff's demand to investigate corporate wrongdoing was found to be entirely without a credible basis***. *See Seinfeld II*, 909 A.2d at 124. However, unlike the instant Section 220 Action, neither of those cases involved a corporation that: (i) had admitted misconduct; (ii) was subject to any inquiry by a governmental authority, or (iii) had been forced to restate its historical financial results. *See Seinfeld I*, 2005 WL 3272365, at *3; *Mattes v. Checkers Drive-In Restaurants, Inc.*, 2001 WL 337865, at *5 (Del. Ch.).

extremely low credible basis standard, and (4) that such determinations are best left for trial, defendant cannot meaningfully dispute at this stage that a credible basis exists for plaintiff's Inspection Demand.

Of course, defendant now contends that there has not been any admission of "intentional backdating" by PMC. Def's Brf. at 11. This is absurd. As this Court has discussed, stock option "backdating" occurs where a company issues stock options to directors and/or executives on one date, while providing fraudulent documentation asserting that the options were actually issued on an earlier, more advantageous date. *See Ryan v. Gifford*, 918 A.2d 341, 345 (Del. Ch. 2007). Whether or not PMC actually used the word "backdating" in its disclosures is irrelevant – PMC's March 2007 revelations (i) of directors signing UWCs approving stock option grants with grant dates that had already passed and; (ii) of stock option recipient lists and allocations which "were revised after the grant date" are undeniably admissions of backdating, which is inherently intentional. SAC, ¶35; *see also Conrad v. Blank*, 940 A.2d 28, 40 (Del. Ch. 2007).

However, even assuming, *arguendo*, that PMC never admitted backdating, plaintiff nonetheless has easily met the "credible basis" standard. *See La. Mun. Police Employees' Ret. Sys. v. Countrywide Fin. Corp*., 2007 WL 2896540, at *1 (Del. Ch.). In *Countrywide*, a stockholder-plaintiff (LAMPERS) initiated a §220 proceeding where its stated purpose for seeking inspection of records of defendant Countrywide Financial Corporation ("Countrywide") was to investigate the possibility of backdated or otherwise manipulated stock options. *Id.* LAMPERS' books and records request was based ***solely*** on its own analysis of empirical data which suggested that stock option backdating ***might*** have occurred at Countrywide. *Id*. Notably, Countrywide (unlike PMC) had ***never*** conducted an internal review of its historical option grants, had ***never*** even suggested publicly (much less confirmed) that its historical option grants might have been "misdated," and had never informed its shareholders that its historical financial results could not be relied on and required

restatement in light of misdated option grants. *Id.* However, after concluding that LAMPERS' proffered statistical analysis suggested that option grants at Countrywide ***may*** have been backdated, Vice Chancellor Noble ordered the production of books and records. *Id.* at *2.[11]

In *Countrywide*, while this Court was "far from convinced on the basis of this record that any wrongdoing actually did occur at Countrywide with respect to the granting of executive stock options," the plaintiff had nonetheless made "an adequate showing of a 'credible basis' from which the Court can infer possible corporate misconduct." *Countrywide*, 2007 WL 2896540, at *15. Here, the Inspection Demand is based ***upon PMC's own disclosures of manipulated and misdated stock option grants***. Thus, plaintiff undoubtedly has a "proper purpose" for issuing the Inspection Demand. Indeed, in light of PMC's disclosures, none of which were at issue in *Countrywide*, plaintiff has easily satisfied the "credible basis" standard.

In short, because plaintiff has advanced multiple proper purposes and a credible basis for demand, defendant's motion to dismiss must be denied.

IV. A Section 220 Claim Can Be Proper Even When Derivative Litigation Is Pending

Unable to challenge plaintiff's proper purposes, defendant instead relies upon the misguided argument that a §220 demand cannot be brought after derivative litigation has been initiated. Def's Brf. at 6-9. Defendant is wrong. Delaware courts have repeatedly rejected this very argument and

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[11] Significantly, in their various complaints filed in the Derivative Action, including the most recent operative complaint, plaintiffs have supported their allegations of backdated options at PMC with the use of a statistical model identical to the model employed by Merrill Lynch & Co. This statistical model was specifically endorsed by this Court in *Ryan*, 918 A.2d at 346, and *Conrad*, 940 A.2d at 40 n.30, for purposes of supporting the inference of backdating under the exacting pleading standards imposed by Rule 23.1. Plaintiff respectfully submits that if a "Merrill-Lynch" style statistical analysis of stock option grants satisfies the pleading standards of Rule 23.1, it also (easily) satisfies the "credible basis" test applicable to §220 proceedings. Although plaintiff does not think it necessary here in light of PMC's admissions, plaintiff would be pleased to submit a "Merrill Lynch" style statistical analysis of PMC's historical option grants to this Court in connection with its analysis of the instant Motion.

considered §220 demands intended to uncover evidence to be used in derivative litigation already initiated in another jurisdiction. *See, e.g.*, *CNET*, 934 A.2d at 920 (granting §220 demand and stating "***[p]laintiffs should have access to books and records . . . in order to allow them to explore a potential lapse in the good faith of the CNET board that would excuse demand in the California derivative suit***"); *Saito*, 2001 WL 818173, at *1 (granting §220 demand "to develop additional particularized facts in order to allege properly an oversight claim that will meet the demand futility standard" in related pending derivative litigation); *Brehm v. Eisner*, 746 A.2d 244, 248, 266 (Del. 2000) (Delaware Supreme Court remanded derivative case to provide plaintiffs a reasonable opportunity to file a further amended complaint, noting that "[p]laintiffs may well have the 'tools at hand' to develop the necessary facts for pleading purposes. For example, plaintiffs may seek relevant books and records of the corporation under Section 220 of the Delaware General Corporation Law.") (footnote omitted).[12]

Delaware courts have consistently recognized that plaintiffs are entitled to use §220 as an "information-gathering tool in the derivative context." *Grimes*, 673 A.2d at 1216 n.11 (quoting

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[12] Any attempt by PMC to draw a distinction (for purposes of the propriety of §220 demands) between (1) cases where a derivative action has been initiated, and the complaint was dismissed with leave to amend, and (2) the instant situation where an amended complaint is active, is illusory. First, here – as in *CNET* – the Federal Court consented to plaintiff's request to seek documents in Delaware at the same time it dismissed the second amended consolidated complaint with leave to amend. Complaint, Ex. B at 7. It is of no moment that plaintiff filed an amended complaint in the Derivative Action prior to filing the §220 Complaint, as plaintiff was given only 20 days to amend its operative complaint in the Derivative Action and, in any event, plaintiff issued the Inspection Demand on April 15, 2008, over a month before filing its amended federal complaint. Second, there is no difference between permitting a plaintiff to seek books and records before filing an amended complaint, and permitting a plaintiff to seek books and records to amend an active complaint or otherwise introduce information obtained through a §220 demand. In both circumstances, the parties are seeking books and records ***after the filing of an initial complaint***, which according to Delaware courts is proper, but according to defendant is not. *Compare* Def's Brf. at 7 (arguing that a plaintiff is barred from bringing a §220 demand after derivative action is initiated), *with CNET*, 934 A.2d 912; *Brehm*, 746 A.2d at 248.

Rales, 634 A.2d at 934-35 n.10). The fact that a motion to dismiss was previously granted in the Derivative Action "does not necessarily bar a later action for books and records by a stockholder under Section 220." *White*, 783 A.2d at 557 n.54. This is especially true where, as here, the Derivative Action has been stayed for the express purpose of allowing a §220 demand to be litigated. *CNET*, 934 A.2d at 915; *In re CNET Networks, Inc. S'holder Derivative Litig.*, No. C 06-03817 WHA, (N.D. Cal. May 9, 2007) (attached hereto as Ex. G).

Despite arguing that it has been the law of Delaware "for nearly twenty years" that plaintiffs are "not permitted" to seek books and records under Section 220 after filing a shareholder derivative action, PMC ignores decisions that clearly do not fit the paradigm it espouses. While it may be true that a plaintiff is "encouraged" to utilize §220 prior to commencing litigation, there is no authority that requires a plaintiff to do so. This makes good sense as a well-meaning plaintiff may, despite having a good faith belief in the veracity of his claims, be subsequently informed by the court of deficiencies in his pleading that may then be remedied by §220. *See, e.g.*, *Grimes*, 673 A.2d at 1216 n.11 (Section 220 is an "information-gathering tool"). The Delaware courts have expressed no intent to foreclose such a plaintiff from utilizing §220 solely because litigation had previously been initiated. Indeed, several decisions squarely permit a plaintiff to utilize §220 after related litigation has been initiated, the parties have dedicated substantial resources to the related litigation,[13] and the complaint has been dismissed one or more times with leave to amend. *See CNET, supra; Brehm*, 746 A.2d at 248, 266 (providing plaintiffs leave to amend complaint, noting that "plaintiffs may seek relevant books and records of the corporation under Section 220 of the Delaware General Corporation Law"); *Saito, supra; White*, 783 A.2d at 557 n.54 (previous dismissal does not "bar a

[13] Defendant's complaints about the costs associated with having to defend against plaintiff's "meritless complaints" are disingenuous as the Company's directors and officers have admitted to a backdating scheme that cost PMC ***$89.6 million***. Def's Brf. at 7-9; ¶8.

later action for books and records by a stockholder under Section 220"); *In re Walt Disney Co. Derivative Litig*., 825 A.2d 275, 279 n.5 (Del. Ch. 2003) (noting the use of information derived from §220 demand in pending derivative litigation was a "perfect illustration of the benefit of such an approach"). Defendant's suggestion that plaintiff should now be precluded from seeking the Company's books and records because he did not do so prior to initiating the Derivative Action, and two of his complaints have since been dismissed in Federal Court, flies in the face of these precedents. Delaware courts have consistently demonstrated that where, as here, a plaintiff in good faith initiates a shareholder derivative action, only to later see a complaint dismissed on demand futility grounds,[14] §220 is available to assist that plaintiff in preparing a new complaint that can meet the exacting standards of Rule 23.1, particularly where a books and records request is suggested by the same court that has dismissed the complaint. *See, e.g.*, *CNET*, 934 A.2d 912; *Disney*, 825 A.2d 275; *Saito*, 806 A.2d at 113.

Finally, although PMC claims that the utility of the Inspection Demand is "completely thwarted" by its timing, all evidence is to the contrary. Def's Brf. at 8. Essentially, defendant claims that because plaintiff seeks the Company's books and records after the Derivative Action was filed, any information derived therefrom could not be employed in the Derivative Action and is thus immaterial. This claim is belied by the fact that the federal plaintiffs argued that good cause existed for a stay of the Derivative Action to pursue the Company's documents because "the books and records being sought in Delaware will support their allegations in this action," and the Federal Court subsequently agreed, ruling that "***[p]laintiffs have shown good cause for a stay in the instant***

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[14] Beiser respectfully submits that in light of the Company's admissions, the statistical analysis of the Company's historical option grants, and the Delaware authority on point (*see, e.g.*, *Ryan*, 918 A.2d at 341; *Conrad*, 940 A.2d at 28), that the federal plaintiffs brought the Derivative Action and alleged demand futility in good faith.

action." *See* Ex. A at 2. Indeed, if the Federal Court did not believe that any documents obtained in this §220 action could be used to support the federal plaintiffs' claims, it would not have found "good cause" to stay the litigation.[15] Any notion that the utility of documents obtained through these proceedings is somehow "thwarted" is in direct conflict with the record.[16]

V. The PSLRA Does Not Bar This Court from Considering the Inspection Demand

In the Motion, PMC asserts that by making the Inspection Demand and bringing the instant Section 220 Action, plaintiff is "improper[ly] attempt[ing] to circumvent the PSLRA's discovery stay" in the Federal Action. Def's Brf. at 9. Plaintiff categorically denies defendant's characterization of the instant Section 220 Action as an "end-run" around the PSLRA discovery stay. To the contrary, in December 2007, in response to defendants' motions to dismiss relying upon the "conclusions" of the Audit Committee, plaintiff sought to compel defendants to the Derivative Action to produce documents in the Federal Court,[17] and then in April 2008 issued the Inspection

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[15] Defendant makes much of Judge Seeborg's May 8, 2008 ruling that plaintiff would be given only one more chance to amend his complaint. Def's Brf. at 10, n.4. However, much has changed since that ruling as Beiser has since brought this §220 action with Judge Seeborg's approval. Although plaintiff is unsure of the manner in which Judge Seeborg would permit introduction of any information obtained through these proceedings in the Derivative Action, it is clear given his finding of good cause that plaintiffs would be afforded some opportunity to rely on any information obtained here to support his pleadings – including quite possibly through another amended complaint.

[16] *Taubenfeld v. Marriott Int'l, Inc*., 2003 WL 22682323 (Del. Ch.), is inapposite. Def's Brf. at 8. There, the plaintiff sought to voluntarily dismiss the complaint and the issue before the court was the effect of Chancery Rule 15 on plaintiff's ability to dismiss the complaint with prejudice in conformity with Rule 41(a). *Taubenfeld*, 2003 WL 22682323, at *1. *Taubenfeld* does not reach the issues present here. *Cf.*, *CNET*, 934 A.2d at 912.

[17] In connection therewith, plaintiffs relied on Delaware law, most notably this Court's holding in *Fleischman v. Huang*, 2007 WL 2410386, at *2 (Del. Ch.), ordering production to the plaintiff of the underlying report(s) on which the defendants' public summary of the purported internal investigation of NVIDIA, Inc.'s Audit Committee was based:

> None of [defendants' proffered] conclusions can be reached solely by recognizing that the company released a summary of a report in public filings. For

Demand on PMC, ***before*** Judge Seeborg denied plaintiffs discovery in the Federal Action. Beiser subsequently filed the instant Section 220 Action ***at the suggestion of, and with the approval of, Judge Seeborg*** – not to "evade" Judge Seeborg. *See* Ex. A. Beiser has made no "secret" of the sequence of these events, either here in this Court or in the Federal Court. *See* Complaint; *see also* Ex. A.

In addition, defendant ignores that the PSLRA simply does not apply to derivative actions.[18] 15 U.S.C. §77p(f)(2)(B); *Romero*, 2005 WL 1798042, at *3 ("The PSLRA, however, does not apply to individual or derivative suits . . . ."). Indeed, the PSLRA is not intended to obstruct discovery relating to the technical derivative pleading requirement of demand futility under Rule 23.1. *See CNET*, 934 A.2d at 912 (granting books and records request in aid of demand futility pleading requirements in related federal derivative securities action). Thus, defendant's argument is without merit as the Inspection Demand cannot logically be an "attempt to circumvent" a rule that does not even apply.

Nevertheless, even assuming, *arguendo*, the PSLRA's discovery stay applied to all of the claims in the Derivative Action, the Inspection Demand would still be proper. Indeed, "[n]either the PSLRA nor SLUSA prevents a state court from considering a books and records demand, or similar

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> the Court to make the inferences defendants demand in their brief, I must assume that the Report and subsequent summary contained fair descriptions of the scope and nature of the Audit Committee' investigation, and that the conclusions reached were reasonable, as opposed to a litigation-inspired whitewash.

[18] Although plaintiff did move to lift the discovery stay in the Derivative Action, he did so under the assumption that "[d]efendants will likely assert that discovery is stayed pursuant to the Private Securities Litigation Reform Act of 1995." Ex. E at 3. Thus, that motion cannot be construed by PMC as an admission by plaintiff that the PSLRA applies, particularly as plaintiff unequivocally stated in that motion "the PSLRA is inapplicable to this shareholder derivative action." *Id*. To the extent the Federal Court's May 8, 2008 opinion holds that the PSLRA is applicable, plaintiff submits such holding was in error.

state corporate law claims, merely because one of the parties to the state action is protected by a PSLRA automatic discovery stay . . . ." *Romero*, 2005 WL 1798042, at *3. Delaware courts have rejected arguments similar to those PMC advances here, and have granted §220 demands for the express purpose of using documents produced to satisfy demand futility pleading requirements in related pending federal securities proceedings. *See, e.g.*, *CNET*, 934 A.2d at 920 (granting §220 demand and stating "[p]laintiffs should have access to books and records . . . in order to allow them to explore a potential lapse in the good faith of the CNET board that would excuse demand in the California derivative suit").

"Whether a particular §220 action should be dismissed [pursuant to the PSLRA] will depend on the circumstances of that case." *Romero*, 2005 WL 1798042, at *4. ***Here, the Federal Court has expressly approved plaintiff's efforts to obtain documents in Delaware and has stayed the Derivative Action for the sole purpose of allowing plaintiff to obtain documents from PMC under Delaware law.*** Complaint, Ex. B at 7; Ex. A. Notably, defendants in the Derivative Action did not oppose the stay on the basis of the PSLRA. *See* Defendants' Opposition to Plaintiff's Motion to Stay Consolidated Derivative Action Pending the Resolution of an Action Under Section 220 of Title 8 of the Delaware Code or in the Alternative to Enlarge Time, attached as Ex. H hereto. If the Federal Court, which is charged with interpreting and applying the PSLRA, were concerned about supposed violations of the PSLRA, it would not have granted a stay to allow plaintiff to obtain books and records in Delaware – let alone found that "[p]laintiffs have shown good cause for a stay." Ex. A at 2. Further, under the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"), PMC had the right to move the Federal Court to "stay discovery proceedings" in this Section 220 Action if it reasonably believed the Inspection Demand violated the PSLRA's discovery stay. 15 U.S.C. §77z-1(b)(4). ***Defendant chose not to do so***, presumably because it knew that, given the Federal Court's approval of plaintiff's effort to obtain books and records in Delaware, any such

motion likely would have been rejected. Under the circumstances present here, where (1) the Federal Court imposed a stay and has permitted plaintiff to seek documents from PMC in Delaware, and (2) PMC has tellingly not bothered to enforce its purported rights under SLUSA, it is difficult to imagine that the Inspection Demand is anything but proper – particularly as, at this stage, all inferences must be drawn in plaintiff's favor. *See Romero*, 2005 WL 1798042, at *4 ("At the motion to dismiss stage where all inferences must be drawn in plaintiff's favor, I am not convinced that Romero's purpose is to circumvent the PSLRA's proscriptions.").

Defendant's characterizations of *Romero*, 2005 WL 1798042, and of *Cohen*, 2004 WL 2340046, are misguided. Def's Brf. at 9-10. In both cases, the Court ***denied*** motions to dismiss §220 complaints, categorically rejecting similar arguments as to that made by defendant here – that §220 is somehow preempted by the PSLRA. *Romero*, 2005 WL 1798042, at *3-*5 ("This argument is a non-starter."); *Cohen*, 2004 WL 2340046, at *3-*4. Neither case comes close to holding what PMC advocates here, *i.e.*, that pursuit of documents through §220 in support of technical derivative demand futility pleading requirements somehow invokes the PSLRA's protections. Instead, these cases simply find that where a party uses a §220 demand to acquire discovery in support of pending federal securities law claims, a conflict between §220 and the PSLRA may "***potentially*** arise." *Cohen*, 2004 WL 2340046, at *3. In any event, neither case addresses an analogous situation to that present here, where (1) the Federal Court has approved plaintiff's efforts to obtain documents through state court proceedings, and (2) plaintiff seeks documents in support of technical derivative pleading requirements. *Cf.*, *CNET*, 934 A.2d at 912.[19]

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[19] Defendant's contention that the scope of plaintiff's requests is overbroad is wrong. Def's Brf. at 9 n.3. Plaintiff's requests virtually mirror those requested by plaintiffs, and approved by this Court, in *CNET*, 934 A.2d at 915-16. Plaintiff, as in *CNET*, requested books and records narrowly tailored to PMC's admitted backdating scheme. There is nothing inappropriate about the scope of plaintiff's requests.

Finally, PMC's contention in this regard should be seen for the red herring that it is – even assuming, *arguendo*, that plaintiff has reasons other than those already stated for requesting books and records from PMC, this is irrelevant because a *per se* proper purpose has already been stated**.** *See, e.g.*, *W. Air Lines, Inc. v. Kerkorian*, 254 A.2d 240 (Del. 1969); *Gen. Time Corp. v. Talley Indus., Inc.*, 240 A.2d 755 (Del. 1968); *Skouras*, 386 A.2d at 674. Simply put, in a Section 220 proceeding, "***[o]nce a proper purpose is established, it becomes irrelevant that a stockholder may have a secondary and perhaps questionable ulterior purpose behind his primary purpose***." *Carroll v. CM&M Group, Inc.*, 1981 WL 7626, at *2 (Del. Ch.) (citing *W. Air Lines, Inc. v. Kerkorian*, *supra*; *Gen. Time Corp. v. Talley Indus., Inc.*, *supra*; and *Skoglund v. Ormand Indus., Inc.*, 372 A.2d 204 (Del. Ch. 1976)); *see also Catalano*, 1977 WL 2576, at *2 (holding that "if a plaintiff establishes a proper purpose, then all else is irrelevant").

VI. Failure to Comply with Section 220's Technical Requirements Does Not Warrant Dismissal

Finally, defendant argues that plaintiff has not complied "with the procedural requirements of Section 220" and that the instant Section 220 proceeding must therefore be dismissed. Def's Brf. at 11-13.[20] PMC is as misguided in this regard as it is with respect to its other claimed bases for dismissal. As a threshold matter, plaintiff believes he satisfied the procedural requirements of Section 220.[21] More importantly, however, and contrary to PMC's assertions, it is well-settled that

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[20] Specifically, PMC claims that plaintiff did not direct the Inspection Demand to PMC's registered office or principal place of business, and that Beiser's Power of Attorney which accompanied the Inspection Demand does not authorize his counsel to make the Inspection Demand. *Id.*

[21] Demand was properly directed to PMC's Chairman in compliance with Section 220. Defendant's counsel's practice in the Derivative Action was to accept service on the Company's behalf, and thus the Inspection Demand was properly delivered to PMC in the care of its counsel, Patrick E. Gibbs, Esquire of Latham & Watkins LLP. *See* Complaint, Ex. A. Moreover, as Chairman of PMC and a defendant in the Derivative Action, ethical rules could have prohibited

to the extent that a Section 220 inspection demand suffers from any technical infirmities, ***such infirmities do not render a stockholder's purpose improper, and the plaintiff is permitted to cure any technical defect up to and including the date of trial***. *See, e.g.*, *Skouras*, 386 A.2d at 678; *see also Thomas & Betts*, 681 A.2d at 1026. In *Skouras,* the defendant corporation argued that the plaintiff's inspection demand was deficient in that it was served in the form of two different letters on two different dates, one of which was submitted under oath and one of which was not. 386 A.2d at 677. This Court, however, found that while the plaintiff "did not completely comply with the strict requirements of [Section 220]," the separate letters "served fully to inform defendant of the specific nature of plaintiff's purpose, thereby causing such demand to be given an 'expanded reading,'" and that defendant's position was "hypertechnical." *Id.* at 677-78.

Defendant relies on *Seinfeld v. Verizon Commc'ns, Inc.*, 873 A.2d 316 (Del. Ch. 2005) ("*Seinfeld III*"), in arguing that this instant Section 220 Action must be dismissed based on technical infirmities in the Inspection Demand. Def's Brf. at 12. However, in *Seinfeld III*, unlike the instant

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plaintiff's counsel from contacting Robert L. Bailey directly. *See* Cal. Rules of Prof'l Conduct 2-100(A) ("a member shall not communicate directly or indirectly about the subject of the representation with a party the member knows to be represented by another lawyer in the matter, unless the member has the consent of the other lawyer"). Thus, it was not only prudent, but necessary that PMC be served through its counsel. Defendant cannot now argue that this Section 220 Action should be dismissed because the Inspection Demand was delivered to counsel instead of PMC's registered office, when the Company's own practice was to accept service through its counsel and ethical rules prohibited direct service upon the Chairman. In any event, however, plaintiff will promptly re-serve the Inspection Demand upon PMC's registered agent for service of process in Delaware, thus negating this issue. Moreover, any argument that Beiser's Power of Attorney did not empower counsel to make the Inspection Demand is nonsense. PMC complains that the Power of Attorney is limited to "examination," and therefore does not include the right to make the Inspection Demand. *Id.* PMC simply cherry-picks words from the executed Power of Attorney document and ignores that it empowers counsel "to do and perform all any every act and thing" in connection with inspection, which necessarily includes making a demand, conducting an examination, and making copies. Affidavit of Elizabeth T. Sudderth, Ex. 5. In any event, plaintiff's verification of the Inspection Demand leaves no doubt that counsel was empowered to act on his behalf.

Section 220 Action, the plaintiff stockholder failed to provide documentary evidence of his beneficial stock ownership in connection with his inspection demand. 873 A.2d at 317. The Court expressly held that this was a specific requirement that was "not a formalistic or unimportant provision of the statute." *Id.* Plaintiff has provided this information. *See* Complaint, Ex. A.

As stated previously, plaintiff has up until the date of trial to cure any defects in the Inspection Demand and plans to promptly re-serve the Inspection Demand upon PMC's registered agent in Delaware to alleviate the issue of proper service. Although plaintiff does not believe that there are any further defects in the Inspection Demand, to the extent that this Court disagrees, plaintiff will cure them promptly. Regardless, there is no basis for the dismissal of the instant Section 220 Action. *See Skouras*, 386 A.2d at 378.

CONCLUSION

For the reasons stated herein, defendant's motion to dismiss should be denied. Accordingly, plaintiff respectfully requests that this Court set an expedited discovery and trial schedule.

ROSENTHAL MONHAIT & GODDESS, P.A.

/s/ Norman M. Monhait
Norman M. Monhait (#1040)
919 Market Street, Suite 1401
Citizens Bank Center
Wilmington, Delaware 19899-1070
(302) 656-4433
Attorneys for Plaintiff

OF COUNSEL:

THE WEISER LAW FIRM, P.C.
Robert B. Weiser
Brett D. Stecker
Jeffrey J. Cirlanto
121 N. Wayne Avenue, Suite 100
Wayne, PA 19087
(610) 225-2677

COUGHLIN STOIA GELLER
RUDMAN & ROBBINS LLP
Shawn A. Williams
100 Pine Street, Suite 2600
San Francisco, CA 94111
(415) 288-4545

COUGHLIN STOIA GELLER
RUDMAN & ROBBINS LLP
Travis E. Downs III
655 West Broadway, Suite 1900
San Diego, CA 92101
(619) 231-1058

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