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Case No. 6287-VCN

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

CENTRAL LABORERS PENSION FUND, Plaintiff, v. NEWS CORPORATION, Defendant.	)	C.A. No. 6287-VCN

BRIEF OF PLAINTIFF CENTRAL LABORERS PENSION FUND IN OPPOSITION TO DEFENDANT NEWS CORPORATION'S MOTION TO DISMISS

DATED: May 19, 2011

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

PRELIMINARY STATEMENT

Plaintiff Central Laborers Pension Fund ("Plaintiff" or "Central Laborers") seeks to inspect books and records of Defendant News Corporation ("News Corp," the "Company" or "Defendant") that relate to a highly questionable self-interested corporate transaction that has no benefit to News Corp or its shareholders, but which serves the personal and private interests of News Corp's Chairman and Chief Executive Officer, Rupert Murdoch ("Murdoch"). As discussed in more detail below, News Corp, with the blessing of News Corp's Board of Directors (the "Board"), has agreed to purchase, at an exorbitant price, Shine Group Ltd. ("Shine"), an entertainment company whose chairman, CEO, and majority shareholder is Elisabeth Murdoch, one of Murdoch's daughters (the "Transaction"). One of the primary purposes Murdoch was seeking to achieve through this transaction was, according to Murdoch himself, to have his daughter return to the family business.[1] Thus, in connection with the deal, the Board apparently is willing to permit Murdoch to put Elisabeth on the Board.

In an effort to investigate potential breaches of fiduciary duty by Murdoch and the Board in connection with the Shine Transaction and the Board's role in approving the Transaction, Central Laborers requested the opportunity to inspect a narrowly-tailored set of documents pursuant to its statutory rights as a shareholder of News Corp. After having received no response from News Corp, Plaintiff filed this action to compel News Corp to

[1] According to Michael Wolff, author of "The Man Who Owns The News: Inside The Secret World of Rupert Murdoch" and the editorial director of AdWeek Media, "Murdoch told me if he had to buy his daughter's company to get her to come back to News Corp. he certainly would…." *See* Cons. Verified Deriv. and Class Action Compl, *In re News Corp. S'holder Deriv. Litig.*, Cons. C.A. No. 6285-VCN, Transaction No. 37591598 at ¶69.

comply with its duty to allow Plaintiff to inspect these records. Plaintiff also filed a separate action challenging the Board's conduct in deciding to approve the Transaction.

News Corp has filed a motion to dismiss this proceeding (the "Motion"). The Motion asserts three grounds for dismissal: (1) there can be never be a proper purpose for a plaintiff's request to inspect documents regarding a board's role in approving a corporate transaction if the plaintiff simultaneously files a derivative action challenging the Board's approval of that same transaction; (2) Plaintiff's Demand Letter does not comply with statutory requirements; and (3) the scope of Plaintiff's request is overbroad. As demonstrated below, each of these arguments is flawed. Plaintiff's Demand Letter complies with the statute, the filing of a Section 220 action and a derivative action does not render the purpose of the demand improper, and the documents Plaintiff seeks to inspect are narrowly tailored and necessary. These highly factual sorts of challenges—the facts underlying the purpose for the demand and the appropriate scope of the documents requested—are issues that will be at the heart of the hearing in this summary proceeding. They should not be resolved on motion practice, which injects a delay in a proceeding that should otherwise be resolved expeditiously. Examination of Defendant's arguments reveals the Motion for what it truly is: a mere tactic intended to forstall revelation of the details about the Transaction—facts that would reveal the inner workings at News Corp and how Murdoch reigns supreme with unfettered control over the Company and with complete domination over News Corp's Board.

STATEMENT OF FACTS

A. The Parties

Plaintiff Central Laborers Pension Fund is an Illinois-based Taft-Hartley pension fund. *See* Complaint Pursuant to 8 *Del. C.* § 220 to Compel Inspection of Books and Records ("Complaint" or "Compl.") ¶3. Central Laborers is, and at all relevant times has been, a shareholder of News Corp, beneficially owning 14,110 shares of News Corp common stock. *See* Affidavit of Dan Koeppel, sworn to May 16, 2011 ("Koeppel Affidavit"), filed herewith.

Defendant News Corp is a Delaware corporation. It is the world's largest and most influential media company, and at its helm is Rupert Murdoch ("Murdoch"), a man driven to maintain his family's control over News Corp even if it means causing harm to News Corp. *See* Compl. ¶¶4, 6, 17. News Corp's Board is comprised of individuals with divided loyalties, conflicting financial and professional interests or who are simply incapable of standing up to Murdoch in his pursuit of his own, selfish agenda. Compl. ¶¶14-16.

B. News Corp Agrees To Acquire Shine At An Exorbitant Price

On February 21, 2011, News Corp announced a transaction that will further cement the Murdoch family's continuing, multi-generational control over News Corp's affairs. Compl. ¶2. In a press release issued that day, News Corp announced that it had agreed in principle with Shine to acquire 100 percent of Shine for an enterprise value of

£415 million. *See* Compl. ¶¶1, 6.[2] Elisabeth Murdoch, Murdoch's daughter, owns 53% of Shine and would therefore receive approximately $320 million of News Corp money from the Transaction. *See* Compl. ¶7. Given Murdoch's control over the Board and the Company (Compl. ¶¶15-16), unsurprisingly, members of News Corp's Board preliminarily blessed the Transaction. Compl. ¶15. Importantly, the pliant Board also has agreed to let Murdoch put his daughter on the Board where she will sit with her father and her two brothers, both of whom Murdoch planted on the Board. *See* Compl. ¶¶6-7.

As alleged in the Complaint, by many measures, including enterprise value to EBITDA multiples relative to peers and based on comparable transactions, News Corp agreed to pay too much for Shine. *See* Compl. ¶9. Not surprisingly, analysts have extensively criticized this deal – for both its high cost to News Corp and its not-so-veiled elements of nepotism. *See* Compl. ¶¶8, 10-12. Further, the Transaction is a drain on the Company's cash position. Compl. ¶12. Moreover, there is no business justification for News Corp to purchase Shine as compared to any other television production company.

[2] The facts described herein are as alleged in the Complaint. In considering this Motion, the Court may take judicial notice of News Corp's subsequent public filings. *In re Gen. Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 170-171 (Del. 2006). After Plaintiff filed its Complaint, the Company issued a press release stating that News Corp had completed the acquisition of Shine, but instead of revealing the purchase price or the "enterprise value," it merely stated that Shine's shareholders received approximately £290 million in "aggregate proceeds." *See* Exhibit A attached hereto. Then on May 5, 2011, the Company filed a Form 10-Q in which it stated that the "total consideration" for the Shine acquisition "included: (i) approximately $480 million for the acquisition of the equity, of which approximately $60 million has been set aside in escrow to satisfy any indemnification obligations, (ii) the repayment of Shine Group's outstanding debt of approximately $135 million and (iii) net liabilities assumed." *See* relevant pages attached hereto as Exhibit B. The vague and varying descriptions by the Company of the Transaction, its terms and its value only serve to highlight the necessity and appropriateness of Plaintiff's requested records concerning the Transaction, which seek to shed light on the true facts underlying this self-interested deal.

The only apparent reason is to reward Murdoch's family member and to perpetuate his family's involvement at the highest echelons of the Company management. Compl. ¶13.

C. Plaintiff Sends News Corp a Narrowly Tailored Demand Letter Seeking Inspection of Books and Records Related to the Transaction

On March 7, 2011, counsel for Plaintiff sent a letter ("Demand Letter") to Lawrence Jacobs, General Counsel of News Corp, asking to inspect certain records related to the Shine transaction pursuant to 8 *Del. C.* § 220. *See* Compl. ¶19. The Demand Letter succinctly identified the Transaction at issue, listing twenty narrowly-tailored categories of documents to be inspected. The letter asserted seven purposes for the request. *See* Compl., Ex. A. Attached to the Demand Letter were: (a) a sworn-to affidavit from an Executive Director of Central Laborers attesting to the fact that Plaintiff is the beneficial owner of 14,110 shares of News Corp common stock (and identifying the custodian and account number under which those securities are held) and (b) a Power of Attorney from Central Laborers granting Grant & Eisenhofer P.A. authority to pursue a request for certain News Corp records on its behalf. *See* Compl., Ex. A.

The Demand Letter was sent to Mr. Jacobs by overnight mail and delivered to News Corp on March 8, 2011, at 10:09 a.m. *See* Compl. 19. In conformity with 8 *Del. C.* § 220, the Demand Letter advised News Corp to respond "as soon as possible, and in any event on or prior to the expiration of five business days after the date this demand is received by [News Corp]." *See* Compl., Ex. A, at 4. As of March 15, 2011 (five business days after it had received the Demand Letter), News Corp had failed to respond to the Demand Letter. *See* Compl. ¶25.

D. After Receiving No Response From News Corp, Plaintiff Initiated This Action To Assert Its Section 220 Inspection Rights

On March 16, 2011, more than five business days after News Corp received the Demand Letter, it became patently clear to Plaintiff that its request was rebuffed – although News Corp never bothered to respond to Plaintiff to say as much. Therefore, pursuant to its statutory rights under 8 *Del. C.* §220, Plaintiff filed its Complaint seeking to compel News Corp to comply with its statutory duties to permit Plaintiff to inspect News Corp's records pursuant to the Demand Letter. The Complaint delineated the documents requested in the Demand Letter, as well as the seven well-stated purposes for the request. *See* Compl. ¶¶ 20-21.

E. Plaintiff Also Initiated a Separate Action Against the Board Challenging The Transaction

On March 16, 2011, after reasonable investigation and research, Plaintiff, together with another major institutional investor, filed a derivative action against the Board alleging that it had breached its fiduciary duties owed to News Corp in agreeing to the Transaction, including by allowing Murdoch to place his daughter on the Board. On March 25, 2011, another plaintiff filed a derivative action also challenging the Board's conduct in approving the Transaction. The derivative actions were consolidated, and on May 13, 2011, the plaintiffs filed a consolidated complaint alleging both derivative counts and a direct claim on behalf of a class. The underpinning of the derivative aspect of the action is that the Board will not be able to demonstrate that the Transaction satisfies the entire fairness doctrine enunciated in *Weinberger v. UOP, Inc.*, 457 A.2d 701, 710 (Del. 1983). The direct claim alleges that the Board breached its duty to News

Corp's shareholders by agreeing to expand the Board to allow Elisabeth to join it for no justifiable purpose. The schedule in the derivative/direct action provides that briefing on the defendants' motions to dismiss will commence in June 2011.

ARGUMENT

F. Section 220 Actions, Being Summary Proceedings, Should Be Decided After a Hearing and Not Through Dispositive Motions Practice

As stated by this Court, "Under our law, books and records actions are summary proceedings. What that means is that they are to be promptly tried. Rarely is dispositive motion practice efficient when the case can be tried within two months of filing." *Lavi v. Wideawake Deathrow Entertainment, LLC*, 2011 WL 284986, *1 (Del. Ch. Jan. 18, 2011) (citations omitted). Given that News Corp's motion is predicated on fact-intensive questions of proper purpose and scope which are, at their core, *the* ultimate issues to be decided at the trial, they should await trial. Defendant should not be allowed to use this motion to dismiss device to delay expeditious resolution of the proceeding.

G. The Alleged Procedural Defects in the Demand Letter Do Not Warrant Dismissal of the Action

News Corp claims that the Demand Letter failed to contain "documentary evidence of beneficial ownership" as required by 8 *Del*. C. § 220(b) and that as a result Central Laborers' Section 220 action must be dismissed. *See* Defendant News Corporation's Brief in Support of Its Motion To Dismiss ("Def. Br.") at 6. Its position is not supported by the case law.

Defendant concedes that the statute does not prescribe the form that the documentary evidence must take. Def. Br. at 6-8. In the instant case, the Demand Letter

contained an affidavit, attested to under oath by an executive of an institutional investor, identifying the nature of the securities owned by Central Laborers ("News Corporation common stock"); the number of shares ("14110"); the custodian ("Rhumbline S&P 500"); and the account number in which the shares were held ("#060006257910"). It further stated that those shares are beneficially owned by Plaintiff. While Plaintiff believes that this original sworn affidavit identifies all of the same information that any other form of evidence would contain regarding its share ownership the Company, and despite the fact that there is no statutory prescription as to what constitutes documentary evidence of ownership, to dispel any further questions about Plaintiff's shareholdings in News Corp, Plaintiff is filing simultaneously herewith the Koeppel Affidavit that attests to the accuracy of a statement of account #060006257910 from the records of the custodian of the shares Plaintiff held in that account as of March 4, 2011 (with information about Plaintiff's other share holdings redacted).

Even if the Court finds that the Demand Letter fails to satisfy some procedural requirement of the statute, the proper remedy is not dismissal of this action, but rather to allow Plaintiff to cure the defect. News Corp cites, for example, *Smith v. Horizon Lines, Inc.*, 2009 WL 2913887 (Del. Ch., Aug. 31, 2009) for the proposition that a technical defect in a demand letter requires dismissal of the Section 220 action. Def. Br. at 6-8. However, in that case the Court held that it would dismiss the complaint only if plaintiff failed to cure the defect in the demand letter within 30 days. *Horizon Lines*, at *3; *see also Gay v. Cordon Int'l Corp.*, 1978 WL 2491, at *2 (Del. Ch. Mar. 31, 1978) (allowing plaintiff to cure defect and file a supplemental pleading rather than dismissing case). As

Plaintiff has cured any purported defect in the Demand Letter, the Motion to dismiss on that basis should be denied.

H. Central Laborers' Filing of a Derivative Action Did Not Extinguish Its Statutory Inspection Rights

News Corp devotes the majority of its Motion to the contention that by filing a derivative action arising out of the same set of operative facts as the allegations in the Section 220 action, Plaintiff automatically forfeited its statutory right to inspect documents related to the Transaction. Def. Br. at 8-13. This argument misconstrues applicable Delaware case law; it also ignores the fact that News Corp failed to provide any response whatsoever to the Demand Letter during the five-day statutory response period (or at any time thereafter) and is using that silence as a sword for dismissal.

Tellingly, News Corp does not contest that absent the filing of its derivative action, Plaintiff has stated a proper purpose for seeking inspection of News Corp's records related to the Transaction. Investigating wrongdoing or mismanagement undoubtedly is a "proper purpose." *See King v. Verifone Holdings, Inc.*, 12 A.3d 1140, 1145 (Del. 2011). Investigating facts that may support a derivative plaintiff's claim of demand futility is also a "proper purpose." *Id.* at 1148. News Corp only argues that these proper purposes are extinguished by the sheer fact that Central Laborers filed a derivative complaint almost simultaneously with commencing its Section 220 proceeding. Def. Br. at 8-9.

In support of dismissal, News Corp attempts to explain why *Verifone* supports its position. Def. Br. at 10-12. But a closer reading of the case actually demonstrates that the bright-line rule that Defendant advocates is not the law. In *Verifone*, the Supreme

Court overturned this Court's decision denying a shareholder the right to a Section 220 inspection, finding that the shareholder's prior filing of a derivative action in California federal court did not constitute an "election" that precluded him from seeking relief in the later filed Section 220 books and records proceeding. The Court concluded that a "bright-line rule barring stockholder-plaintiffs from pursuing inspection relief under 8 Del. C. § 220 solely because they filed a derivative action first, does not comport with existing Delaware law or with sound policy." *Verifone*, 12 A.3d at 1145. The Court further instructed: "[A] rule that would automatically bar a stockholder-plaintiff from bringing a Section 220 action *solely* because the plaintiff previously filed a plenary derivative suit, is a remedy that is overbroad and unsupported by the text of, and the policy underlying, Section 220." *Id.* at 1151 (emphasis in original); s*ee also Kaufman v. Computer Assoc. Int'l.*, 2005 WL 3470589, *3 (Del. Ch. Dec. 21, 2005) ("Fundamentally, the right to proceed under Section 220 to inspect books and records exists independently of any claim the stockholder might ultimately choose to bring").

In reaching its decision, the Supreme Court analyzed Section 220 cases that were allowed to go forward despite an earlier-filed derivative proceeding and those that were not. *Verifone* at 1146-51. A common factual thread running through all of the cases the Court examined (indeed in *Verifone* itself) is that the Section 220 actions were initiated ***long after the related derivative cases, often after the derivative actions had been tested by multiple motions to dismiss.*** Here, in contrast, Plaintiff's derivative action had not, for all intents and purposes, ***even begun*** when Plaintiff commenced its Section 220 proceeding, and certainly had not begun before Plaintiff sent its Demand Letter. Thus,

the procedural posture of the case at bar is vastly different than *Verifone* and the cases discussed therein, especially those in which the request for Section 220 relief was held to not have a proper purpose in light of the existence of a long pending derivative action.[3] Nevertheless, the principle set forth by the Supreme Court in *Verifone* remains apt: the Court should not impose a bright-line that would cut off a shareholder's statutory rights to inspect books and records merely because the plaintiff commenced a derivative suit. That is particularly so here, where the derivative action is in its most nascent stage.

Nor do the other cases News Corp relies upon—all of which pre-date *Verifone*—support its contention that this Section 220 action should be dismissed with prejudice merely because Plaintiff also filed a derivative action. Like *Verifone*, the cases involved a significant temporal gap between the filing first of a derivative action and the subsequent filing of Section 220 action. For example, in *Taubenfeld v. Marriott Int'l, Inc.*, Letter Opinion, C.A. No. 20122-NC (Del. Ch. July 29, 2003), the court addressed the plaintiff's request to impose a stay in its own derivative action while the plaintiff pursued a Section 220 inspection demand that was sent to the defendant corporation more than five months *after* the plaintiff had filed his derivative complaint and almost five

[3] The *Verifone* Court included in the latter category *Beiser v. PMC-Sierra, Inc.*, 2009 WL 483321 (Del. Ch. Feb. 26, 2009), relied upon by News Corp (Def. Br. at 12), in which the plaintiff filed an amended complaint that was dismissed for failure to adequately plead demand futility, was granted leave to amend "one final time," filed a second amended complaint, and only thereafter filed a Section 220 action, an inapposite fact scenario. This Court dismissed that Section 220 action because it smacked of gamesmanship as it appeared to have been filed for the purpose of circumventing the automatic stay of discovery that was in effect under the federal Private Securities Litigation Reform Act of 1995. *Beiser*, 2009 WL 483321 at *4. Hard as News Corp tries to shoehorn this case into the facts of *Beiser*, it cannot be gainsaid that Plaintiff has tried to end-run anything, as there was no stay in effect of any sort at the time it filed its Section 220 action, or that Plaintiff filed the derivative action in some sort of "race to the courthouse" to secure a lead plaintiff position. *See id*. at *3.

months *after* the defendants filed their motion to dismiss it. *Id*. at 1-2. (Def. Br. at Ex. A). The court denied the plaintiff's request for a stay. If anything, *Taubenfeld* stands for the unremarkable proposition that a derivative case will not be put on hold while a plaintiff pursues its late-in-the-game Section 220 action. It is noteworthy that the Court emphasized that its decision did not affect the plaintiff's Section 220 rights: "Plaintiff may still seek books and records under § 220 through its status as a shareholder. Rule 15(aaa) does not interfere with plaintiff's § 220 rights." *Id.*, at 2. Similarly, in *Baca v. Insight Enters., Inc.*, 2010 WL 2219715, *2 (Del. Ch. June 3, 2010) (Def. Br. at 10) the plaintiff sought Section 220 relief only after he had served is *amended* derivative complaint. And in *Parfi Hldg., AB v. Mirror Image Internet, Inc.,* C.A. No. 18457 (Del. Ch. Mar. 23, 2001) (TRANSCRIPT) (Def. Br. at 10 and Def. Br. Ex. B), the plaintiff commenced a Section 220 proceeding well after litigation, including a separate arbitration in another jurisdiction were well underway.

That is hardly the sequence of events here. In the instant case, Plaintiff sent its demand more than five business days before filing the derivative action. Defendants did not respond to the Demand Letter in any fashion, not even with a phone call, email or letter. A shareholder should not have to wait indefinitely to take action in the interests of the corporation and its shareholders until a corporation decides to respond to a request for inspection. Here, had Plaintiff not been proactive, it is altogether likely that it would still to this day be waiting for a response from News Corp. "When the overlap in suits results from a defendant's failure to comply with its Section 220 obligations, the filing of a derivative complaint will not make an otherwise proper purpose improper." *Romero v.*

Career Education Corp., 2005 WL 3112001 *2 (Del. Ch. Nov. 5, 2005). Where a Section 220 demand letter is served first and the Section 220 and derivative actions then overlap, the defendant should not be allowed to benefit from its dilatory conduct. *See Khanna v. Covad Comm. Group, Inc.* 2004 WL 187274 *4 (Del. Ch. Jan. 23, 2004) ("[Defendant] overlooks the simple reality that the overlap of the Section 220 action and the Derivative Action is attributable to [Defendant's] failure to comply with its obligations under Section 220 when the Demand was made.").

Furthermore, because Plaintiff's response to the Board's anticipated motions to dismiss the derivative/direct action is not due until July 1, 2011, if Plaintiff is provided the documents it has requested in a timely manner, it may use information from that Section 220 inspection to defend against the yet-to-be filed briefs in support of the motions to dismiss. *See id.* at *4 (stating that even though it was too late to use information learned from a Section 220 inspection in drafting a complaint, it could "bolster [plaintiff's] response to a motion under Court of Chancery Rules 12(b)(6) or 23.1"). News Corp should not benefit from its dilatory conduct in failing to respond to Central Laborers' Demand Letter nor be rewarded for having sat on a response and using that silence as leverage to seek dismissal.[4]

[4] In support of its argument that a shareholder can never state a proper purpose if it files a derivative action and a Section 220 proceeding, News Corp also makes the blanket assertion that defending Plaintiff's derivative/direct action and a Section 220 summary proceeding is a burden. Def. Br. at 12. Not surprisingly, News Corp—a company with a market capitalization of approximately $40 billion—provides no factual support whatever to show that burden because, in fact, there would be none. *See* Point D, *infra*. Like the other issues News Corp raises in its Motion, whether News Corp will be burdened by providing the requested documents and litigating the plenary derivative/direct action is an issue that should await proof at trial.

I. Plaintiff's Requests Are Narrowly-Tailored and Appropriate for a Section 220 Action

News Corp baldly asserts that Plaintiff's requests are overly broad and that, as a result, this action should be dismissed. Def. Br. at 13-15. Other than simply restating the legal standard that a Section 220 plaintiff is only entitled to documents that are "necessary, essential, and sufficient" to a proper purpose and making the conclusory allegation that many of the requests are overbroad, News Corp does not explain *why* it believes that any particular category of documents is not necessary to Plaintiff's proper purposes. Simply throwing in boilerplate arguments without *any* specific support for why these requests are overbroad demonstrates the opposite: there is no merit to the claim that the requests are too broad. Indeed, each category of documents identified in the Demand Letter goes to the heart of the investigation into any potential beach of fiduciary duty by the News Corp Board and thus are narrowly tailored. The first fourteen requests each specifically target documents necessary to understand the Transaction and the Board's investigation into potentially acquiring Shine. Compl., Ex. A, 1-3. Requests 15 through 17 are necessary to understand issues related to an important – and questionable – aspect partially driving this deal: Elisabeth Murdoch's gaining a seat on the News Corp Board. Compl., Ex. A, 3. Requests 18 through 20 are necessary to determine whether demand of the Board would be futile. Compl., Ex. A, 3.

Although News Corp seizes on the "all documents" language of several of these requests as "evidence" of their overbreadth (Def. Br. at 14), this argument ignores the fact that the shelf life of the Transaction itself was likely very, very short. The period covering the events leading up to the Transaction, the Board's consideration of it and its

closing most likely all transpired over a very finite and recent time period – amounting to no more than a few months. As to the other categories of documents demanded, they are indisputably related to the Transaction and to the Board's ability to fairly consider it and to consider a demand to take action under Rule 23.1 of the Rules of this Court. Even if they cover time periods before and after the actual events surrounding the Transaction, given that the requests are sufficiently narrow in scope, they presumably will only necessitate a search by News Corp of a discrete set of files and locations.

News Corp also alleges that e-mails are not within the proper scope of a Section 220 demand. Def. Br. at 14. But in today's business world, the vast majority of communication is conducted through email (if not also telephonic and/or electronic text messages, short message service text messages, multimedia message service text messages, instant messages, messages posted on social media websites and the like), and it would be impossible to have any meaningful picture of any transaction without at least some email. Such a request is not unduly burdensome because the Company could, in the first instance, identify a reasonable group of individuals as custodians who would likely have relevant e-mails and perform a reasonable search for responsive emails using certain search terms, subject to further searches depending on the results. Companies have provided emails in response to Section 220 demands in the past. *See, e.g.*, *Disney v. The Walt Disney Company*, 2005 WL 1538336 (Del. Ch. June 20, 2005) (addressing the confidentiality of documents provided in response to a Section 220 demand, including several emails). In any event, whether to require the production of emails is an ultimate issue that should be decided at trial and not on a motion to dismiss, as the very case cited

by News Corp suggests. *See Highland Select Equity Fund, L.P. v. Motient Corp.*, C.A. No. 2092-N, at 56 (Del. Ch. June 1, 2006) (TRANSCRIPT) (Def. Br. at Ex. C) (denying plaintiff access to email under Section 220 in trial ruling).

Even if the Court were to give credence to News Corp's unsubstantiated fact-based assertion that the scope of the documents requested in the Demand Letter is overbroad, the proper remedy is not to dismiss the action but to limit the scope of the documents that News Corp must produce. *See Geher v. Proquest Co.*, C.A. No. 2421-VCS, at 7 (Del. Ch., July 19, 2007) (TRANSCRIPT) (Def. Br. at Ex. D) ("[T]he way I do books and records cases … resemble[s] a discovery conference").

CONCLUSION

For the foregoing reasons, News Corp's motion to dismiss should be denied, and this matter should proceed to a hearing on the merits.

DATED: May 19, 2011

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