IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

ANASTASIA WOLST,	)	
	)	
Plaintiff	)	C.A. No. 9154-VCN
v.	)	
	)	
MONSTER BEVERAGE CORPORATION F/K/A HANSEN NATURAL CORPORATION, a Delaware Corporation,	)	
	)	
	)	
Defendant.	)	

PLAINTIFF'S OPENING PRE-TRIAL BRIEF

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Plaintiff Anastasia Wolst ("Plaintiff" or "Wolst"), a long time stockholder of Defendant Monster Beverage Corporation's ("Monster" or the "Company"), respectfully submits this Opening Pre-Trial Brief in connection with the June 2, 2014 trial in this action, which seeks books and records under 8 Del. C. § 220.

INTRODUCTION

Plaintiff seeks limited books and records concerning the refusal by Monster's board of directors (the "Board") and a special litigation committee of the Board (the "Special Litigation Committee") to commence litigation on behalf of the Company in response to Plaintiff's February 23, 2012 litigation demand (the "Litigation Demand").

After Plaintiff learned of the Board's and the Special Litigation Committee's refusal of her Litigation Demand, on March 29, 2013, Plaintiff made a demand to inspect certain books and records pursuant to 8 Del. C. § 220 (the "220 Demand"). Plaintiff's stated proper purpose in making her 220 Demand was to evaluate whether the Board or the Special Litigation Committee acted reasonably in refusing her Litigation Demand.

The Company responded to the 220 Demand by [redacted]

[redacted] Given the cursory and conclusory nature of the Board and Special Litigation Committee minutes produced, Plaintiff has no way of ascertaining what, specifically, was done in response to Plaintiff's Litigation Demand and whether the Board exercised its valid business judgment in refusing to act on the Litigation Demand.

STATEMENT OF FACTS

I. Plaintiff's Ownership of Monster Common Stock

Plaintiff purchased 200 shares of Monster (then named Hansen Natural Corp. ("Hansen")) in 1999.[1] She has continuously held shares of the Company's common stock and today owns 900 shares.[2]

II. The Underlying Misconduct[3]

Hansen was formed in 1935 and for most of its existence garnered only modest attention selling its fruit-flavored Hansen's Natural soda. As the energy

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[1] Wolst 1999 Detailed Income Statement, AW-000001, Trial Ex. 61.

[2] Wolst April 2014 Account Statement, AW-000022, Trial Ex. 61.

[3] The allegations of wrongdoing, summarized herein, come from Plaintiff's Verified Amended Consolidated Shareholder Derivative Complaint filed in *In re Hansen Derivative Shareholder Litigation*, No. 2:08-cv-06788 (C.D. Cal. Oct. 1, 2010) (the "Derivative Complaint"), Trial Ex. 12.

drink market took off in the early 2000s, Hansen developed the Monster Energy brand and renamed itself as Monster, and the Company's sales and stock price increased rapidly.

After several years of explosive growth, the Company suffered a slowdown. On August 7, 2006, the Company disclosed that it had missed analyst estimates by a penny. On this news, the Company's stock dropped 35% in two days. Based on the market's reaction, Monster's directors and officers then realized the importance (to the extent they didn't already know) of meeting analysts' estimates. Monster's Management vowed to prevent another stock collapse and devised a scheme to mislead shareholders about the Company's financial results and business outlook.

Monster's Management began to tout the Company's new distribution agreement with Anheuser-Busch by, among other things: (i) issuing a press release on November 9, 2006 stating that "the implementation of the distribution arrangements with selected Anheuser-Busch wholesalers is progressing well"; (ii) announcing in a press release issued on February 9, 2007 that a new agreement with Anheuser-Busch "opens a significant new and incremental sales channel for Monster Energy"; and (iii) claiming in the same press release that "Anheuser-Busch has been an outstanding business partner for the last eight months."

These statements were materially false and misleading because, in reality, the Company was experiencing difficulties in its relationship with Anheuser-

Busch. To conceal the truth, Monster's Management downplayed the Company's problems with Anheuser-Busch and described them as "initial hiccups" and problems with "initial execution," which had been resolved. However, these distribution problems included: (i) Anheuser-Busch's known lassitude in distributing the Company's products other than Monster Energy drinks; (ii) Anheuser-Busch's known legal issues with distributing in dry counties; and (iii) Anheuser-Busch's known inability to distribute the Company's products to segmented purchasers. These problems prevented the relationship from becoming successful for the Company and significantly impacted sales and earnings.

To prevent another stock collapse, Management caused the Company to announce extraordinary financial results for the second quarter of 2007 ("2Q07"). The Company stunned the market by reporting sales of $280 million and $0.47 earnings per share, beating estimates by as much as $33 million and $0.10 earnings per share. But the reported financials were false and misleading because the supposed "record sales" resulted from channel stuffing and violations of Generally Accepted Accounting Principles.

Knowing that the Anheuser-Busch relationship was problematic and that the Company's 2Q07 financial results were false, certain members of Management began unloading their stock. In a short three-month period, certain officers and directors dumped $94 million of their shares in the Company.

After these insider sellers got out with millions of dollars, on November 8, 2007 (only eight weeks after the stock dumps), the Company shocked the market by announcing that it would miss estimates by as much as $0.03 per share. On the earnings call with investors the same day, the Company's Chairman, President, and Chief Executive Officer, Rodney Sacks, revealed that, contrary to Monster's prior representations, Anheuser-Busch had not embraced the Company's brands and "there is a greatly challenging part of matching our distribution needs with the traditional Anheuser-Busch system." The market realized that the 2Q07 financial results were a mirage. On this news, Monster's stock collapsed 32.5%.

III. The Securities Class Action

On September 11, 2008, several of the Company's shareholders filed federal securities fraud class actions against the Company for the misconduct described above in the United States District Court for the Central District of California.[4] These cases were eventually consolidated and entitled: *Cunha v. Hansen Natural Corporation*, Case No. 5:08-CV-1249 (the "Securities Class Action"). For the next six years, the parties litigated the Securities Class Action vigorously. Despite the defendants' repeated attempts, the district court refused to dismiss the Securities Class Action. In February 2014, the parties announced that they had reached a

[4] *See, e.g.,* Class Action Summons and Complaint, *Marcelo Cunha et al., v. Hansen Natural Corporation, Rodney Sacks, and Hilton H. Scholosberg*, No. ED-Cv-08-01249 (C.D. Cal.), Trial Ex. 1.

$16.5 million settlement to resolve the case.[5] Preliminary approval of that settlement is currently pending.

IV. The Federal Derivative Litigation

On October 15, 2008, several shareholder derivative actions were filed against certain of Monster's officers and directors in the United States District Court for the Central District of California,[6] which were later consolidated under the caption: *In re Hansen Derivative Shareholder Litigation*, Lead Case No. 08-06788-SGL-JCx. Plaintiff subsequently sought to intervene in the derivative action,[7] which the district court granted,[8] and on October 1, 2010 Plaintiff filed her Verified Amended Consolidated Shareholder Derivative Complaint (the "Derivative Complaint").[9]

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[5] Kat Greene, $16M Settlement in Monster Beverage Securities Suit (Apr. 17, 2014), available at *http://www.law360.com/articles/529218/16m-settlement-in-monster-beverage-securities-suit.*

[6] *See, e.g.,* Verified Shareholder Derivative Complaint filed in *Raymond Merckel v. Rodney C. Sacks, et al.*, No. 2:08-cv-06788 (C.D. Cal. Oct. 15, 2008).

[7] *See* Memorandum of Points and Authorities in Support of Anastasia Brueckheimer's Motion to Intervene filed in *In re Hansen Derivative Shareholder Litigation*, No. 08-cv-06788 (C.D. Cal. July 20, 2010), Trial Ex. 8.

[8] Order on Stipulation re: Brueckheimer's Motion to Intervene filed in *In re Hansen Derivative Shareholder Litigation*, No. 2:08-cv-06788 (C.D. Cal. Aug. 9, 2010), Trial Ex. 10.

[9] Verified Amended Consolidated Shareholder Derivative Complaint filed in *In re Hansen Derivative Shareholder Litigation*, No. 2:08-cv-06788 (C.D. Cal. Oct. 1, 2010), Trial Ex. 12.

The Company moved to dismiss the Derivative Complaint under Rule 23.1 of the Federal Rules of Civil Procedure. The district court granted Monster's motion on May 12, 2011, explaining that Plaintiff had failed to make a pre-suit demand and had inadequately pled demand futility.[10] Plaintiff timely filed a notice of appeal on June 10, 2011 but voluntarily dismissed her appeal pursuant to a stipulation by the parties on February 14, 2012 in order to demand that the Board initiate the litigation.[11]

V. The Litigation Demand

On February 23, 2012, Plaintiff sent the Litigation Demand to Rodney Sacks, Monster's President, Chief Executive Officer, and Chairman of the Board.[12] The Litigation Demand described the wrongdoing set forth above and demanded that the Board:

> (i) undertake (or cause to be undertaken) an independent investigation into the possible violations of Delaware and federal law committed by Management during all times detailed [in the Litigation Demand]; and (ii) commence a civil action against each member of Management to recover for the benefit of the Company the amount of damages sustained by the Company as a result of the

[10] Civil Minutes and Tentative Ruling on Defendants' Motion to Dismiss the Consolidated Amended Class Action Complaint in *In re Hansen Derivative Shareholder Litigation*, No. 08-1249 (C.D. Cal. May 12, 2011), Trial Ex. 14.

[11] Order granting Stipulated Motion for Dismissal, No. 11-55938 (9th Cir. Feb. 15, 2012), Trial Ex. 20.

[12] Litigation Demand, Trial Ex. 21.

misconduct identified [in the Litigation Demand].[13]

Eight months later, on October 19, 2012, the Company's legal counsel notified Plaintiff that her Litigation Demand had been refused by the Special Litigation Committee and the Board.[14]

VI. The 220 Demand and Monster's Response

On March 29, 2013, Plaintiff sent the 220 Demand to the Board, seeking to inspect certain of the Company's books and records under Section 220, including:

a. The agenda and minutes for all meetings in which the [Board] or any of its members discussed Ms. Wolst's February 23, 2012 litigation demand letter or the claims described in that letter (the "Claims").

b. The agenda and minutes for all meetings in which any Board Committee, including the Special Committee, or any of those Committees' members discussed those Claims.

c. Any written materials provided to any Board Committee regarding the Claims or the investigation into the Claims.

d. Any materials distributed to, and presentations made to or by the Board or any Board Committee, between February 23, 2012, and the present, regarding the Claims.

e. The report describing the findings of the Special Committee.

f. Any other materials considered by any member of any Board Committee or the Board regarding the Claims.

g. The identity of each witness interviewed by the independent counsel.

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[13] *Id.*

[14] See Letter from P. Dechary to B. Weaver re: Anastasia Wolst Litigation Demand Letter, Trial Ex. 42.

h. Transcriptions of the interviews with such witnesses if these exist and any notes of such witness interviews.

i. The records reviewed by the independent counsel or by the Special Committee in the course of this investigation.[15]

Plaintiff's stated purpose for making the 220 Demand was "to enable Ms. Wolst and her legal counsel to evaluate the Board's refusal to pursue Ms. Wolst's litigation demand and determine whether that refusal constituted a reasonable and good-faith exercise of the Board's business judgment."[16]

Counsel for the Company responded to the 220 Demand on April 8, 2013, and agreed to provide certain documents provided that: (i) Plaintiff and Plaintiff's counsel entered into a confidentiality agreement with the Company; and (ii) Plaintiff confirmed her ownership of stock by executing a declaration under oath and providing documentary evidence. [17]

After Plaintiff fulfilled these conditions by letter dated April 17, 2013,[18] the Company's counsel responded on May 14, 2013,[19] and [redacted]

[15] *See* 220 Demand, Trial Ex. 44.

[16] *See id.*

[17] *See* Letter from M. Perschetz to B. Weaver re: Shareholder Inspection Demand Pursuant to Delaware G.C.L. § 220 and attaching proposed Confidentiality Agreement, dated Apr. 8, 2013, Trial Ex. 45.

[18] *See* Letter from B. Weaver to M. Perschetz re: Shareholder Inspection Demand Under Delaware G.C.L. § 220 attaching signed Confidentiality Agreement, Declaration of Anastasia Wolst and Brokerage Statement, dated Apr. 17, 2013, Trial Ex. 46.

[19] See Letter from M. Perschetz to B. Weaver re: Shareholder Inspection

[redacted]

On June 26, 2013, Plaintiff responded to the Company and asked for a copy of the Special Litigation Committee's written report and unredacted version of the minutes detailing its counsel's findings.[20] On July 16, 2013, Monster responded, explaining that [redacted]

Demand Pursuant to Delaware G.C.L. § 220 and attaching fully executed Confidentiality Agreement and Minutes bates stamped MBC-AW0000001-21, dated May 14, 2014, Trial Ex. 47.

[20] *See* Letter from B. Weaver to M. Perschetz re: Shareholder Inspection Demand Under Delaware G.C.L. § 220 requesting unredacted minutes, dated June 26, 2013, Trial Ex. 48.

[redacted] Plaintiff was forced to bring this action for books and records under 8 Del. C. § 220.

ARGUMENT

I. Plaintiff Has Complied with the Technical Requirements of Section 220

Plaintiff has complied with the technical requirements of 8 Del. C. § 220. The 220 Demand was made in writing under oath, was properly directed to Monster, affirmed that Plaintiff was a Monster shareholder, and stated the proper purposes for the inspection.

[21] *See* Letter from M. Perschetz to B. Weaver re: Shareholder Inspection Demand Pursuant to Delaware G.C.L. § 220 and attaching additional minutes bates stamped MBC-AW0000022-23, dated July 16, 2013, Trial Ex. 49.

II. Plaintiff Has a Proper Purpose in Making and Pursuing Her Demand

In Delaware, shareholders are permitted to inspect a corporation's books and records for "any proper purpose." 8 Del. C. § 220. "A proper purpose shall mean a purpose reasonably related to such person's interest as a stockholder." 8 Del. C. § 220(b)(2).

Here, Plaintiff seeks to investigate whether the Board wrongly refused her Litigation Demand. As stated in Plaintiff's 220 Demand, "[s]pecifically, the purpose of this demand is to enable Ms. Wolst and her legal counsel to evaluate the Board's refusal to pursue Ms. Wolst's litigation demand and determine whether that refusal constituted a reasonable and good-faith exercise of the Board's business judgment."

Courts have consistently and repeatedly found this to be a proper purpose. "Delaware precedents establish that a stockholder plaintiff who filed a demand-excused case and had its complaint dismissed under Rule 23.1 can subsequently make a litigation demand, then use Section 220 to explore whether the demand was wrongfully refused." *La. Mun. Police Emples. Ret. Sys. v. Morgan Stanley & Co.*, C.A. No. 5682-VCL, 2011 Del. Ch. LEXIS 42, at *10 (Del. Ch. Mar. 4, 2011) ("Exploring whether a litigation demand was wrongfully refused is a proper purpose for using Section 220." (at *12)). *See also Grimes v. DSC Commc'ns Corp.*, 724 A.2d 561 (Del. Ch. 1998) (permitting a shareholder to inspect books

and records to evaluate board's refusal of demand after a previous lawsuit alleging demand futility had been dismissed); *Spiegel v. Buntrock*, 571 A.2d 767, 777 (Del. 1990) (explaining that after the board refuses a litigation demand, the "good faith and reasonableness of its investigation" may still be examined).

III. Plaintiff's Demand Is Narrowly Tailored to the Purpose of Her Investigation

A stockholder is entitled to inspect documents which are necessary and essential for accomplishing the proper purpose asserted. *See Saito v. McKesson HBOC, Inc.*, 806 A.2d 113, 116 (Del. 2002). A demand for inspection must be made "with specific and discreet identification," but the shareholder is not required to demand documents with "pinpoint specificity." *Wynnefield Partners Small Cap Value L.P. v. Niagara Corp.*, C.A. No. 1261-VCP, 2006 Del. Ch. LEXIS 144, at *6 (Del. Ch. Aug. 9, 2006) (citations omitted). Thus, "a person making a § 220 demand is entitled to demand documents by category and will frequently not be in a position to demand specific documents." *Carapico v. Philadelphia Stock Exchange, Inc.*, 791 A.2d 787, 792 n.13 (Del. Ch. 2000).

With those caveats in mind, a shareholder is not limited to any one type of record (such as board materials) and, instead, is entitled to inspect "[a]ny records maintained by a corporation in the regular course of its business" whether kept in electronic format or otherwise. 8 Del C. § 224 (requiring corporations to convert records into paper form "upon the request of any person entitled to inspect such

records pursuant to any provision of this chapter"). Indeed, it makes no difference whether the documents were created by the corporation or a third-party so long as the corporation maintains the information sought by a shareholder as part of its records. *Accord Saito*, 806 A.2d at 118 ("The source of the documents and the manner in which they were obtained by the corporation have little or no bearing on a stockholder's inspection rights."). The overarching consideration is that "the stockholder should be given enough information to effectively address the problem . . . ." *Id.* at 115. Likewise, correspondence—such as emails—are not exempt from inspection, so long as they are essential for accomplishing the shareholder's proper purpose. *Accord Saito*, 806 A.2d at 118 ("correspondence would be critical to [plaintiff's] investigation"); *Deephaven Risk Arb Trading, Ltd. v. UnitedGlobalCom, Inc.*, C.A. No. 379-VCP, 2005 Del. Ch. LEXIS 107, at *39 (Del. Ch. July 13, 2005) (allowing inspection of written and electronic communications).

Having received [redacted] Plaintiff seeks, among other things, any written materials provided to the Special Litigation Committee or the Board regarding Plaintiff's Litigation Demand and the underlying alleged misconduct, any

materials presented to or distributed to the Special Litigation Committee or the Board, the identities of persons interviewed (and transcripts or notes thereof) regarding Plaintiff's Litigation Demand and the underlying alleged misconduct, and records reviewed by the independent counsel or by the Special Litigation Committee in the course of the alleged investigation. Plaintiff is entitled to these documents because, absent a written report from the Special Litigation Committee, there is no way to determine whether the Board or the Special Litigation Committee took Plaintiff's Litigation Demand seriously.

Sutherland v. Sutherland, 958 A.2d 235 (Del. Ch. 2008), is instructive. In that case, a closely-held corporation formed a special litigation committee in response to a shareholder's derivative lawsuit. After the committee completed its investigation, and memorialized its findings in a written report, the corporation moved to dismiss the shareholder's complaint. *Id.* at 36-237. The court denied the motion because it was not "satisfied" that the special litigation committee "acted in good faith and conducted a reasonable investigation." *Id.* at 237. Noting that the special committee's report "outlines an investigation that was, in many respects, exhaustive and time consuming," the court nevertheless lacked "confidence in the SLC's entire investigation." *Id.* at 242. Specifically, the special litigation committee failed to produce detailed summaries of the witnesses it interviewed, any notes of its investigation or any other written record of what it did. *Id.* at 243-

244. Without such information, the court was "unable to ascertain the reasonableness of the SLC's investigation." *Id.* at 243; *See also Grimes*, 724 A.2d at 567 (requiring corporation to produce a copy of its special litigation committee's written report and leaving the door open for plaintiff to later request copies of additional documents, including interview summaries, if that report did not provide sufficient evidence concerning the reasonableness of the special litigation committee's investigation).

Because [redacted] shed little light on what was actually done and what was actually considered before refusing Plaintiff's Litigation Demand, these documents are necessary in order for Plaintiff to evaluate whether the Board, the Special Litigation Committee, or the Special Litigation Committee's counsel performed an independent and thorough investigation and also whether the Special Litigation Committee and the Board reached an informed, impartial decision to refuse Plaintiff's Litigation Demand.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court enforce the 220 Demand and enter an Order directing Monster to produce the documents requested.

Dated: June 4, 2014

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By: /s/ Blake A. Bennett

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