IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

ANASTASIA WOLST,	:	
	:	
Plaintiff,	:	
	:	
vs.	:	Civil Action
	:	No. 9154-VCN
MONSTER BEVERAGE CORORATION F/K/A/ HANSEN NATURAL CORPORATION, a Delaware corporation,	:	
	:	
Defendant.	:	

- - -

Chancery Court
38 The Green
Dover, Delaware
Friday, June 13, 2014
10:00 a.m.

- - -

BEFORE: HON. JOHN W. NOBLE, Vice Chancellor

- - -

TRIAL

- - -

CHANCERY COURT REPORTERS
410 Federal Street
Dover, Delaware 19901
(302) 739-3934

APPEARANCES:

BLAKE A. BENNETT, ESQ.
Cooch & Taylor, P.A.
-and-
W. SCOTT HOLLEMAN, ESQ.
of the New York Bar
Johnson & Weaver, LLP
for Plaintiff

GREGORY V. VARALLO, ESQ.
Richards, Layton & Finger, P.A.
-and-
MARTIN L. PERSCHETZ, ESQ.
GARY STEIN, ESQ.
MICHAEL G. CUTINI, ESQ.
of the New York Bar
Schulte Roth & Zabel LLP
for Defendant Monster Beverage Corporation
f/k/a Hansen Natural Corporation

- - -

THE COURT: Good morning, everyone. Happy Friday the 13th.

MR. BENNETT: Good morning, Your Honor. Blake Bennett from Cooch & Taylor on behalf of the plaintiff Anastasia Wolst. I rise to introduce my co-counsel, Mr. Scott Holleman from Johnson & Weaver.

THE COURT: Good morning.

MR. HOLLEMAN: Good morning, Your Honor.

MR. BENNETT: Mr. Holleman will be presenting on behalf of the plaintiffs today. Thank you.

THE COURT: Mr. Varallo.

MR. VARALLO: Good morning, Your Honor. Gregory Varallo for defendant Monster Beverage Corporation. It's my pleasure to introduce to the Court my good friend from the State of New York, Martin Perschetz, a partner at Schulte Roth & Zabel and his partner Gary Stein, also from Schulte and Roth. Both have been admitted pro hac, and with Your Honor's permission, Mr. Perschetz will be making the presentation today.

THE COURT: Good morning, and welcome.

MR. PERSCHETZ: Good morning, Your

Honor. Mr. Stein will also make part of the presentation if that pleases the Court.

MR. STEIN: Good morning, Your Honor.

MR. HOLLEMAN: Good morning, Your Honor.

THE COURT: Good morning.

MR. HOLLEMAN: Again, my name is Scott Holleman from Johnson & Weaver, and we represent the plaintiff, Anastasia Wolst in this case. As Your Honor is aware, we are here for the trial in Miss Wolst's 220 action which seeks certain books and records from Monster. Miss Wolst originally purchased her shares of Monster, and then it was named Hansen in 1999.

She has continuously held her shares, and she is committed to pursuing this matter as evidenced not in the least but by her willingness to wake up at 3:00 a.m. a few weeks ago and travel to Delaware for a short deposition, and if she prevails on this 220 action, she is committed to continuing to act in the best interests of Monster.

Just a little bit of background about the case and the facts giving rise to this 220 action. First, Hansen was originally formed in 1935 and it

existed as a modest company that sold mainly natural sodas, interesting fruit-flavored blends of sodas. Hansen really took off in the early 2000s when it developed Monster Energy Drink. Hansen was then renamed Monster.

On August 7th, 2006, the company disclosed that it had missed analysts' estimates by a penny. After that disclosure, the stock price dropped 35 percent in just two days, and realizing what missing estimates would do, Monster management then set about to make sure it wouldn't happen again.

Unfortunately, in our view, this included engaging in questionable or wrongful conduct. As we alleged in our underlying derivative complaint, Monster's management began to tout the company's new distribution agreement with Anheuser-Busch, but to conceal the truth, management downplayed certain known problems and also resorted to atypical methods in order to be able to meet or beat analysts' expectations, and one of these things included allegations of channel stuffing.

During this time, and in our view, because Monster's management knew things weren't quite as rosy as was being conveyed to the market, certain

members of management began unloading their stock. In a short three-month period, certain officers and directors dumped $94 million worth of their shares in the company.

After these insiders got out with millions of dollars on November 8th, 2007 which is just eight weeks after the stock dumps, the company shocked the market by announcing that it would miss estimates. Also, president, chairman and CEO, 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 second quarter 2007 financial results were actually just a mirage, and on this news, Monster's stock collapsed 32.5 percent.

Shortly thereafter, on September 8th, 2008, certain Monster shareholders commenced securities fraud litigation. The securities litigation was litigated for several years, and just a few months ago, the parties announced a proposed settlement of $16.5 million. That's currently in the

approval process.

On October 18th, 2008, derivative litigation was filed. Plaintiff eventually intervened in that litigation, and on October 1st, 2010, filed her amended complaint. The Court dismissed her complaint on demand futility grounds on May 12th, 2011.

Miss Wolst initially pursued an appeal of that decision, but ultimately dismissed the appeal in order to make a litigation demand on the board. She made that litigation demand on February 23rd, 2012. The demand was refused on October 19th, 2012.

In essence, what we've learned from some of the minutes is that a special litigation committee was formed. That special litigation committee then hired outside counsel which then conducted an investigation -- purportedly conducted an investigation of the misconduct alleged in Miss Wolst's litigation demand letter.

There was no written report ever created by the special litigation committee or its outside counsel, and as far as we can tell from the minutes, the only substantive report was given to the board of directors just prior to Monster informing

plaintiffs' counsel that the demand was refused.

Shortly thereafter, the last meeting on March 29th, 2013, on behalf of Miss Wolst, we sent a 220 demand requesting certain books and records to evaluate why the board refused Miss Wolst's litigation demand. Some communications then took place, and the last communication was on July 16th, 2013, and shortly thereafter, we commenced this action.

Now, to review for the Court the overview of the issues for the Court to decide today, it is, in essence, whether plaintiff is entitled to those books and records. With respect to the technical requirements of Section 220, all the parties acknowledge that Miss Wolst has satisfied those.

With respect to the proper purpose, as stated in our 220 demand letter, Miss Wolst's purpose was, and in some substance, to enable Miss Wolst and her attorneys to evaluate the board's refusal of her litigation demand. And the scope of the 220 demand was to get certain books and records to accomplish that stated purpose, minutes, reports created by the special committee, documents reviewed by the special committee, interview notes that were made in connection with the investigation.

We received a handful of minutes of the special litigation committee and of the board and also the resolution of the board to form the special litigation committee. In short, as I'll explain shortly, we think that we're entitled to more.

With respect to the proper purpose, that seems to be where the parties have most of the disagreement. As outlined in our 220 demand letter, "Specifically, the purpose of this demand is to enable Miss Wolst and her counsel to evaluate the board's refusal to pursue Miss Wolst's litigation demand and determine whether that refusal constituted a reasonable and good faith exercise of the board's business judgment."

This is a proper purpose under Grimes and the LMPERS case against Morgan Stanley. Monster claims that our client has some other purpose which is to bring some derivative suit, and while our plaintiff might ultimately do that, the purpose, as stated in her demand, and which is recognized as acceptable by the Delaware courts, is for Miss Wolst to evaluate the board's refusal of her demand.

Indeed, we believe that the Morgan Stanley case is quite clear that our stated purpose is

enough.

THE COURT: Where does evaluating a demand go if it doesn't go to filing a derivative action?

MR. HOLLEMAN: That's a good question, and --

THE COURT: I try to ask one of them about once a week.

MR. HOLLEMAN: That's a good goal as well.

I think that -- defendants talked about this in their deposition of Miss Wolst, and they talked about it in the papers, and certain courts have talked about it as well; to what end. So your stated purpose is to investigate whether the board wrongfully refused your demand. Okay. Then what. It might possibly be to bring a derivative litigation. It might not be.

And I'll acknowledge this is somewhat of a gap in what I read the case law to be, because in the LMPERS versus Morgan Stanley case, there was no discussion of to what end. It was, in fact, Vice Chancellor Laster, in terms of explaining why the plaintiff didn't need to prove any sort of wrongdoing

in connection with the proper purpose of evaluating the possible wrongful refusal.

The Court said, and this is Vice Chancellor Laster in the LMPERS case, "There is no basis for recasting LMPERS purpose, however, because the stockholder who seeks books and records to evaluate demand refusal has identified a proper purpose."

And our position is that at least in the case law that we can find, that's a proper purpose, and that's enough, and the inquiry ends there.

THE COURT: I better be careful because I'm not sure I've got a handle on the facts that I should have. That demand was well within three years of the events, wasn't it?

MR. HOLLEMAN: That one was.

THE COURT: So there was no working time bar defense kicking around. That's what makes -- let's not forget about the pink elephant in the driveway. The time bar defense is the problem here.

MR. HOLLEMAN: Certainly.

THE COURT: And if there's no time bar defense out there, it very well could have been just

assumed sub silentio that it all went to a derivative action, and there was no reason to ask the question because everybody knew what the ultimately outcome might be.

MR. HOLLEMAN: So in the Morgan Stanley case, I think that the decision was rendered some -- I think the initial conduct began around 2008, and the decision was rendered a couple years later. So it was toward the end of the three-year statutory period, but it was still within it.

In the Grimes case, however, the initial misconduct arose in 1990, and then there was a little bit more misconduct that arose in 1994 and there was no mention of it in that opinion, so it's hard to tell the extent to which it was an issue.

But if you're gleaning from the facts of that case the time span when the Court awarded the ultimate relief of finding for the plaintiff on the 220 demand, the time issues there would seem to suggest otherwise. Again, it's hard to tell because the record on that case doesn't make any mention of a statute of limitations as far as I can tell from the reading of that case.

So I acknowledge that it is a gap in

what I read the law to be, and so Your Honor makes a valid point that to what end; that that wasn't an issue in LMPERS v. Morgan Stanley, but it is the elephant in the room here. In fact, Your Honor forecast where I was about to take this discussion.

The defendants have raised the statute of limitations laches issue, and given that the initial wrongdoing occurred possibly in 2006, 2007, securities litigation began in 2008. Derivative litigation began in 2008. This is 2014. To the extent that the inquiry is let's consider possible affirmative defenses that might be raised down the road in a possible derivative litigation, I'll touch on that.

But, first, as Your Honor acknowledged in the Amalgamated case, Your Honor acknowledged in the Amalgamated case that certain affirmative defenses could bar a 220 action.

From that decision, I'll just read a brief quote. "The potential availability of affirmative defenses to withstand fiduciary duty claims cannot solely act to bar a plaintiff under Section 220. First, these are summary proceedings. The factual development necessary to assess fairly the

merits of a time bar defense, for example, as to each potential claim is not consistent with the statutory purpose. Second, courts should not be called upon to evaluate the viability of affirmative defenses to causes of action that have not been, and more importantly, may not ever be asserted."

I think that the cases where courts have taken up the time limitation issue, those are pretty clearcut cases. Those are not cases that deal with a 220 demand for the purpose of inspecting books and records to see if the board wrongfully refused litigation demand. Those are, expressly, a plaintiff is seeking books and records to determine whether to bring a derivative action.

And in those cases, it was crystal clear, and there were no intervening facts based on my reading of those opinions, that could give rise to a possible tolling defense. It was a clearcut issue. So, in a summary proceeding like a 220 action, there wasn't much complicated analysis that the Court or the parties had to go through to determine that issue conclusively.

THE COURT: You would agree that if the wrongful conduct occurred in 2006 and no basis,

arguable basis existed for tolling, that your 220 effort would be futile.

MR. HOLLEMAN: If it were 220 solely to uncover facts that might give rise to a derivative action, yes, because that's what the cases have said.

THE COURT: Part of the problem with the defense of laches -- not that it's a problem; it's inherent with laches -- it's not just how many days has it been. There's days and prejudice and is it fair. So there's a little bit of a factual overlay that always exists.

So the question becomes what grounds are there for tolling or some other equitable exception to the running of the clock. And, here, the key seems to be the federal securities action. If you add up the other derivative action and anything else, you don't get where you need to get without the federal securities action in terms of tolling.

Am I correct about that?

MR. HOLLEMAN: For the purpose of bringing a derivative action, if we were to file suit tomorrow, we would have to rely on the facts relating to the securities action to support the tolling argument.

THE COURT: So how often has a securities action been used as a basis for tolling the time bar defense against the underlying derivative action?

MR. HOLLEMAN: Just as defendants say in their papers, I haven't been able to find one, but I also haven't been able to find a case that says you can't do that.

THE COURT: So I have this wonderful Friday morning exercise of making new law. Is that what you're telling me?

MR. HOLLEMAN: I do, and I think Friday the 13th is a great day to do that.

So to the extent that we are going to discuss the tolling issue, and if the Court is of the belief that we need to address that issue, and that it goes beyond just the purpose of inspecting the books and records being an independent stand-alone purpose, I think that what the Supreme Court and American Pipe and the Crown decision have stated, established as principles that would support a tolling argument here, and I think that the Dubroff case provides language which we believe is the most helpful guidance.

Here, we believe the statute of

limitations should be tolled or laches should be disregarded to permit plaintiff to bring a derivative action following the resolution of this 220 action because the facts alleged in the original federal securities fraud case are analogous or closely related to the facts of a derivative action that Miss Wolst might presumptively bring.

In fact, that -- the facts that were alleged in the securities fraud case gave rise to the facts that were alleged in Miss Wolst's underlying derivative complaint.

In terms of the policy arguments of statutes of limitations and tolling, a lot of the courts have talked about unfairness or prejudice or surprise, and whether it's in regard to the derivative action or the securities fraud action, there is absolutely no prejudice or surprise.

The defendants have known about these derivative claims since 2008. They have known about the acts and circumstances giving rise to the derivative claims since 2008. And in fact, since 2010, Miss Wolst has been pursuing these claims herself.

So while defendants make certain

arguments about some intervening delay, the fact of the matter is that Miss Wolst has been pursuing these claims and has been taking steps to pursue these claims since basically 2010.

I don't need to regurgitate everything else that we said in our brief. I think that we'll stand on what we said in our answering brief. I was actually going to go on to talk about the scope of the demand unless Your Honor has any other questions with respect to the timing issues.

THE COURT: That's fine.

MR. HOLLEMAN: For the sake of order of the proceedings, would you prefer for defendants to speak to the timing issues or the purpose issues now or --

MR. PERSCHETZ: I'm sorry. I thought your entire argument was complete. That's the only reason that I rose, Your Honor.

THE COURT: I don't think his entire argument is complete. I think unless you all have talked about it, I think I would say let's just go ahead and get through your presentation.

MR. PERSCHETZ: Yes. Thank you, Your Honor.

MR. HOLLEMAN: Thank you, Your Honor.

THE COURT: Then we'll hear from the defendant.

MR. HOLLEMAN: As I said earlier, I believe we have stated a proper purpose, and with that proper purpose, now we're seeking books and records so we can fulfill that purpose. These are books and records so we can determine whether the board wrongfully refused Miss Wolst's litigation demand.

I won't bore the Court by restating everything that we stated in our answering brief, but that provides a pretty thorough discussion, in our view, of why the handful of minutes that we received are inadequate for that purpose.

Most of the minutes say nothing other than a special litigation was formed. We know that. And we don't dispute that. The special litigation committee retained independent counsel. We don't know a whole lot about why they chose that counsel or how they picked that counsel, but that's not really the argument.

We're not seeking extra documents concerning how they interviewed these different law firms. What we're more concerned about is the process

that the independent counsel undertook, because what's pretty apparent from the minutes is that the special litigation committee undertook no process on its own. It delegated the entire process to its outside counsel.

So, throughout the course of the summer following our litigation demand, the special litigation committee met a handful of times. Certain members were not at some meetings. Other members were not at other meetings. And there might have been intermittent updates, but there was nothing from those minutes that indicates what exactly happened during those meetings. No substance of the discussions about what the special committee talked about with its independent counsel were revealed by those minutes.

The only real picture into what was done in the investigation are the October 9th board minutes. These October 9th board minutes summarize what the special litigation committee's outside counsel had done, and it spanned four or five pages.

It said the special litigation committee's counsel discussed the investigation, including interviewing multiple Anheuser-Busch distributors who refuted plaintiff's allegations about

channel stuffing and other misconduct.

The special litigation committee reviewed sworn declarations previously obtained from more than 100 Anheuser-Busch distributors, interviewed a senior company sales manager.

Our position, as we stated in our papers, and as we alleged in our complaint, is that those minutes are not enough to tell us what exactly the board considered, what the board did. In our view, it's very summary. It's done in a very conclusory fashion.

And unlike a lot of cases that have been cited, and cited in the parties' briefs, there was no special litigation committee report. There was no report that was produced to the special litigation committee. There was no report produced to the board. At the final board meeting, there were no handouts given. There were no materials even displayed. It was a fairly brief meeting. I don't remember the exact time. It was about 40 minutes long where the special litigation committee's counsel discussed what it had done for the previous four or five months to evaluate plaintiff's litigation demand.

So given just what we term the

inadequacy of this production following plaintiff's 220 demand, that doesn't allow us to fulfill our purpose of evaluating whether the board wrongfully refused plaintiff's demand.

I have nothing else at this time, Your Honor, but I'd like to reserve some time to respond to what defendants might say.

THE COURT: That's fine. Thank you.

MR. PERSCHETZ: Good morning again, Your Honor. Marty Perschetz of Schulte, Roth & Zabel in New York.

There are two defenses that we'd like to address subject to whatever additional questions the Court might have. One is, indeed, that plaintiff has not set forth a proper purpose, and as Your Honor knows, that argument is principally predicated on our statute of limitations argument.

The other is that even if the plaintiff has set forth a proper purpose, we have already produced the requested documents that are required pursuant to Section 220. If it's all right with the Court, I'll address the first of those arguments and my partner Mr. Stein will address the second of those.

THE COURT: That's fine.

MR. PERSCHETZ: Thank you.

With regard to the proper purpose/statute of limitations issue, there are two questions or disputed issues, I think, very broadly speaking. One is if the possible derivative action would be time barred, does that mean that the plaintiff has failed to set forth a proper purpose.

The other is is a possible derivative action, indeed, time barred. Based on the plaintiff's answering pretrial brief, there seems to be a dispute as to both of those. We say, of course, that the answer to both questions is yes, and I'll take one of those at a time.

So, first, on the issue of whether, if the derivative action is time barred, that would mean necessarily that the Section 220 claim must fail because the plaintiff has failed to set forth a proper purpose, and I suppose, as has already been discussed in counsel's argument today, one has to analyze what the alleged proper purpose here is in order to come to a conclusion with regard to that.

Now, we heard today that somehow the possibility of bringing a derivative action is not

part of the purpose. Well, I'd suggest two things with regard to that. One, it contradicts what's in the plaintiff's papers. Second, if, in fact, that's not part of the plaintiff's purpose, and if the only purpose is in a vacuum, the general purpose of attempting to determine whether, as some academic exercise or otherwise, the independent investigation was adequate or sufficient or appropriate, then I do think the question one must ask is "toward what end." And I think that's what the law requires. Because if that's the only purpose, that, too, is a basis for concluding that there is no proper purpose.

So let's start with the litigation demand which was made on February 23rd, 2012. The litigation demand was that the board should 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 identified alleged misconduct. And that litigation demand was actually reiterated at page seven of the plaintiff's pretrial brief in this case, the 220 case, and indeed, the Section 220 inspection demand harkens back to that litigation demand.

The purpose of the 220 demand,

according to the inspection demand, which was received by letter, is "to enable Miss Wolst and her legal counsel to evaluate the board's refusal to pursue Miss Wolst's litigation demand and determine whether that refusal constituted a reasonable and good faith exercise of the board's business judgment."

Now, Vice Chancellor Lamb decided a case called West Coast Management & Capital LLC in 2006, and I think there's language in that case that hits it on the head with regard to the argument that we've heard this morning regarding whether it's enough to say it doesn't matter whether the statute of limitations would affect the derivative action because that's not part of our purpose.

What Vice Chancellor Lamb wrote is that a stockholder "must do more than state in a conclusory manner a generally accepted proper purpose. She must state a reason for the purpose, what she will do with the information, or an end to which that investigation may lead."

There are other cases with similar language. It is not enough to simply state a general purpose for academic reasons. The question is what will you do with that information once you have it

that's in the best interests, allegedly, of the corporation. And that precisely here tees up the issue of the statute of limitations question because the only purpose for examining the question of whether the independent investigation was adequate is, indeed, to determine whether a derivative action or some other action should be brought against the alleged wrongdoers.

And the case authority is clear that under those circumstances where the only alleged purpose, the only alleged purpose, is as stated here in the inspection demand, to evaluate the board's refusal to pursue the litigation demand, i.e. sue these people for damages on behalf of the company, that under those circumstances, if the derivative action would be time barred, then, indeed, the Section 220 claim or the Section 220 application should be denied.

There's obvious logic to that, which is if the derivative action is time barred, there is no purpose for ultimately getting the documents or getting to the point where you can evaluate the adequacy of the independent investigation.

I think the leading case right on

point is one by Chancellor Chandler in the Graulich decision which we cite in our brief and really is quite straightforward and to the point, which says essentially what I've I guess said several times today already, which is that if, in fact, under the circumstances where the sole purpose is to evaluate the board's action for purposes of determining whether a derivative action should be brought, if the derivative action would be time barred, there is no proper purpose.

There was mention this morning of a case cited by Chancellor Chandler in the Graulich decision, and that is Your Honor's decision in the Amalgamated Bank case. The fact of the matter is that what Your Honor held in that case is that in a specific factual setting, a time bar defense or a claim or issue preclusion defense would eviscerate any showing that might otherwise be made in an effort to establish a proper shareholder purpose.

So, obviously, what Your Honor was saying was those circumstances could exist. Indeed, Chancellor Chandler relied on that language in coming to the conclusion that he did in the Graulich case. The fact that Your Honor did not deny the 220

application in the Amalgamated case is beside the point because the rationale that Your Honor articulated with regard to that decision was that there were, indeed, claims that would not be barred by the statute of limitations.

The issue in Amalgamated was whether, as a result of the fact that some of the documents that were requested in the 220 application predated the date at which the cause of action accrued, whether the plaintiff was entitled to those documents. And what the Court said was the fact that the documents predated the date when the cause of action accrued and that there might be certain claims that are time barred doesn't mean that those documents are irrelevant to the claims that would be timely.

And therefore, the Court granted the 220 application. I think the degree to which -- to the degree that the plaintiff relies on Amalgamated for support here, it's simply not there.

Similar to the Graulich case was the West Coast Management case that I alluded to before because there the sole purpose for the derivative suit again was -- for the 220 application again was the derivative suit. And there the Court held that there

was a lack of a proper purpose because of principles of res judicata, which is to say that under principles of res judicata, the derivative suit could not be brought.

The same with regard to Polygon Global Opportunities Master Fund, another decision by Vice Chancellor Lamb in 2006 where the plaintiff would not have had standing to bring the ultimate claim derivatively, and therefore the 220 claim was denied.

And the consistent thread is that if there is a legal bar to the ultimate derivative claim, then there is a lack of proper purpose and the 220 claim should be denied.

The only distinction that plaintiff attempts to point out in her answering brief -- and I should say the answering brief is the only place where there's any argument on the part of the plaintiff with regard to the statute of limitations, it is not addressed in her opening brief.

In the answering brief, the only distinction that the plaintiff seeks to make with regard to the Graulich case is that according to the plaintiff, in the Graulich case it was obvious that the statute of limitations would bar the derivative

claim. I'll simply say that it's at least as obvious here that that's true. As a result, there is no proper purpose.

So I'll move to the question of whether, in fact, given that law would, indeed, the statute of limitations here result in the proposed or potential derivative action being time barred. The answer is that it definitely would.

I think Your Honor was correct in the premise of the Court's questions to counsel earlier with regard to focusing in on the tolling issue because in the absence of tolling, it certainly seems that the statute of limitations would have long ago expired, and the only tolling argument that's made here is the American Pipe argument which Your Honor also recognized earlier today relating to the pendency of the federal securities class action. So the plaintiff actually makes that argument with regard to tolling.

Second, the plaintiff argues in her answering papers that if the plaintiff ultimately seeks equitable relief in a derivative action rather than monetary relief or in addition to monetary relief, that somehow that would have an impact on

whether the statute of limitations applies.

And then last the plaintiff makes an argument, a third argument that would apply only to a portion of the plaintiff's potential claims, which is that somehow the statute of limitations would not apply to the proposed or possible insider trading claims against certain potential defendants.

None of those arguments has merit, we submit.

First of all, the American Pipe argument about which there was already some discussion today. To be clear about it, plaintiff acknowledges there is no precedent for the application of American Pipe tolling to a derivative action. What the plaintiff says in her brief about that, or answering brief, is this would be a matter of first impression. The plaintiff, indeed, asks this Court to be the first court in the country to so hold.

Plaintiff, I guess I should quickly mention, also says in her answering brief that the statute of limitations, recognizing that we're talking about the Delaware statute of limitations, should be decided ultimately by the California federal judge who would handle the derivative litigation.

I just want to say I don't think there's any authority for that. There's no reason that this Court shouldn't address the Delaware statute of limitations, and the Graulich decision obviously demonstrates that it's quite relevant to the question of whether a proper purpose has been stated and whether, as a result, the 220 application should be accepted or denied.

THE COURT: Well, that does raise something that has always troubled me about time bar defenses in this context. Wouldn't it make more sense, at least in the abstract, for the judge who is hearing the substantive claim, in this case the derivative claim, to deal with the affirmative defense of a time bar? Because that judge presumably would have a much better understanding of the entire derivative claim landscape and can better assess the equitable nuances that come with a laches defense.

MR. PERSCHETZ: I think I have two responses to that, Your Honor. The first is in order to state a proper purpose, they have to show that legally they could bring the derivative claim, given the nature of the purpose that has been expressed here.

Determining whether or not they have established a proper purpose is the responsibility of this Court, not the responsibility of the California court. Graulich would be rendered meaningless essentially any time the alleged purpose was to conduct a review of an independent investigation for purposes of determining whether a derivative action should be brought.

If, in fact, the issue of the statute of limitations was always deferred to the Court that would be hearing the underlying case, there would be no meaning to that decision, and the Court will not have evaluated whether or not there is a proper purpose.

The other point is, here, there really is no contention that in the absence of tolling, or if the statute of limitations doesn't apply to equitable claims, or with regard to one portion of the argument, if the statute of limitations doesn't apply to insider trading claims, there really is no argument that the action wouldn't be barred by the statute of limitations.

So there is nothing in response to Your Honor's question, in this particular case, that

would create a situation in which Judge Woo, who is the federal judge in California who handled the demand futility case, would be in any better position to analyze these issues than this Court. As a matter of fact, given the fact that these are purely legal issues under Delaware law, this Court is in a much better position to analyze those.

THE COURT: When we reflect back on why we have time bar defenses, and perhaps this concern doesn't work as well in this case as it might in other cases, but I'm trying to look a little bit around the corner, typically when the derivative claim that follows the federal securities class action is filed, it gets stayed while we wait to see what happens in the federal securities class action.

So presumably file the derivative action seven years, eight years ago, whatever the arithmetic is, it would just sit there stayed, and now we're almost through the federal securities case; it would be time to crank up the derivative action.

How are the defendants any worse off by sitting and waiting for the case to be filed as for waiting for the typical stay to run its course?

MR. PERSCHETZ: Well, first and

foremost, in this case, there is no pending derivative action. We might have had that circumstance, might have, if what had happened was the plaintiff had -- if the plaintiff had followed the course that the Delaware courts very strongly recommend, which is, in chronological order, first make your 220 demand so that it's meaningful and you can look at the documents and make a determination about whether or not you have a case. Then, make a demand on the board of directors, and if, in fact, the demand had been refused, we could have been litigating a demand refusal case.

That's not what Miss Wolst chose to do. What Miss Wolst chose to do was bypass 220, bring the litigation anyway, and if one wants to talk about what typically happens, what typically happens is that's simply a regurgitation of the allegations in the complaint that are part of the class action, and that was certainly true here, but bypass the 220, not make a demand on the board, take the position that making a demand on the board would have been futile when, in fact, there are seven independent board members at Monster and were at the time.

Judge Woo in California granted our

motion to dismiss for lack of demand futility, did so without prejudice to give them another bite at the apple if that's what they wanted. They came back with another complaint that essentially added nothing, and Judge Woo, this time, granted our demand futility motion with prejudice.

It was only, I think, five months after that -- longer than that actually, that we received the litigation demand. So one response is this is not the typical case, because in the typical case that Your Honor describes, whether it's based on demand futility or demand refusal, the case exists and is allowed and is, indeed, frequently stayed pending the outcome of the class action.

This is the commencement of an entirely new action. There's a case called Brocade decided in the Northern District of California that's cited in our briefs, in large part decided under Delaware law.

And in that case, the facts were a little complicated, but to try to simplify them, there was a derivative case being pursued against a particular group of defendants. The corporation actually decided to accept the demand while that case

was pending, and stepped into the shoes of the shareholder, and the corporation then sought to pursue the case against that original group plus another group.

That other group had plenty of notice about the existence of the claims. But because they hadn't previously been named, and because the statute of limitations had expired, the Court held that there was no tolling applicable since they hadn't been named as defendants earlier, and it didn't matter that the new defendants had notice of the claims.

As a matter of fact, the new defendants in the Brocade case were defendants in a state law claim separate from the derivative case, making similar allegations as in the derivative action.

So I take Your Honor's point, but the fact of the matter is that what Your Honor is really asking is would the prejudice be different. In the typical case where the derivative action is stayed and the class action goes on forever and you don't get to the derivative case until the end, and frankly, if one really wants to talk about practical terms, what happens there usually is that the derivative case

isn't tried and so there isn't any prejudice.

The outcome of the derivative case, in that instance, typically depends on what happens in the class action and some sort of a settlement or dismissal, depending on what happens in the class action.

But what Your Honor is asking is what about is there equivalence in prejudice. The point is whether there is prejudice or there isn't prejudice, if the statute of limitations is applicable, the action is time barred.

So, one, this isn't the typical case that Your Honor is describing for all the reasons that I mentioned. And second, while I recognize that this Court applies the statute of limitations on an analogous basis, it gets into the statute of limitations via the doctrine of laches, the fact of the matter is that the end result of that is that this Court applies the statute of limitations and makes determinations about whether the action is or isn't time barred.

I think the Brocade case applying Delaware law is an illustration of the kind of situation that we have here and that Your Honor is

describing.

As far as American Pipe is concerned, I think the reason that no court has ever held that American Pipe tolling is applicable to a derivative action is that we're really talking here about apples and oranges. The purpose of American Pipe tolling is to allow putative class members to avoid having direct claims time barred while they wait to see what happens in the class action; in particular whether or not the class will be certified and as a result, their claims would be pursued and protected.

Obviously, the whole notion is that it wouldn't be fair to those class members to require them to all rush to the courthouse and file individual claims while class certification is pending. And it wouldn't be fair to the courts either because they'd be besieged with claims.

And the idea is that class members can wait and see whether or not class cert will be granted, whether or not the class action will pursue, whether, as a result, their claims will be pursued, what the nature of the class is, do they want to opt out; all those things. The point being for good reason, it's only applicable to class members.

None of that applies at all obviously in derivative cases, and certainly that's true of this case in particular. So first of all, as to derivative actions generally, by their nature they're commenced on behalf of the corporation. The issue is whether, not the corporation here, Monster, would be prejudiced. As a matter of fact, plaintiff makes an argument in her answering brief that Monster would suffer no prejudice.

It doesn't matter whether Monster would suffer prejudice actually because the action is brought on behalf of Monster. The issue is whether there would be prejudice suffered by the officers and directors against whom the derivative action is commenced.

Monster is not a class member. Monster would be, if it accepts the demand, if it had accepted the demand, the plaintiff, or, in a derivative action, the party on whose behalf the litigation is commenced, and obviously, Monster is not a class member in the class action. Monster is a defendant in the class action.

So that's what I mean by apples and oranges. The whole notion of American Pipe tolling

couldn't possibly apply to a derivative case. And even if one wants to analyze this from a -- and it's hard to figure out exactly how courts would analyze it, because not only do I think that no court has ever held that American Pipe tolling is applicable in a derivative case, I don't think -- I haven't read any of the decisions in which anybody has ever even argued that.

But even if you don't analyze it in terms of Monster not being a member of the class, Miss Wolst is not a member of the class. As we heard today, her purchase of shares, and it's her only purchase of shares, was in December of 1999. The class period runs from November of 2006 to November of 2007. She couldn't possibly avail herself of American Pipe tolling when one analyzes what American Pipe tolling is all about; as I mentioned before, the protection of class members. She was never a class member, has never been within any definition of a putative class in the federal securities class action.

So, in the face of all this, what does the plaintiff argue as to why American Pipe should be applied? Well, first, in her responses to our interrogatories which are in the joint exhibits at 55,

and it's response number five, in answer to our question as to the legal basis for her contention that the derivative action would not be time barred, Miss Wolst said, "Delaware courts apply the tolling established in American Pipe to a derivative action that follows an earlier class action."

And she quoted that. The quote was: "Delaware courts apply the tolling rule established in American Pipe to," and then an internal quote, "a derivative action that follows an earlier class action," end internal quote.

That internal quote in her interrogatory response was attributed to a Delaware Superior Court decision called Blanco versus AMVAC Chemical Corp. Suffice it to say that that argument has now been abandoned by the plaintiff, and with good reason. There is no such quote. There's no such quote in Blanco, and as far as we can determine, there's no such quote anywhere.

Second, the plaintiff argues that this Court's decision, Your Honor's decision in Dubroff, as the plaintiff puts it, is instructive. I agree that Your Honor's decision is instructive. It just happens not to support the --

THE COURT: If you don't like Dubroff, you can talk to Miss Foster about it. I'm sure Mr. Varallo probably has.

MR. PERSCHETZ: I've talked to Mr. Varallo about many things, including every aspect of this case, Your Honor.

But the fact of the matter is that Dubroff has nothing to do with the idea that American Pipe tolling is applicable to derivative cases. It has nothing to do with it. Of course, Your Honor did not hold that.

The fact of the matter is Dubroff involved direct claims by shareholders, class members, and Your Honor recognized expressly in Dubroff that American Pipe tolling applies only to members of the putative class.

The quote from Dubroff that I'd like to highlight is: "Once the statute of limitations has been tolled, it remains tolled for all members of the putative class until class certification is denied."

Third, the plaintiff argues that somehow American Pipe tolling should apply because the subject matter of her potential derivative claim is similar, as she puts it, to the subject matter of the

securities class action. But there is nothing in American Pipe that hinges on whether the claims are similar. You have to be a member of the class. And that's an obstacle that the plaintiff just can't climb over here with regard to her request that Your Honor become the first judge in the country to hold that American Pipe tolling is applicable to a derivative case.

So the bottom line is American Pipe tolling doesn't apply, and it doesn't apply with good reason, taking into account all of the things that I mentioned, and in particular the fundamental requirement that in order to avail one's self of American Pipe tolling, one has to be a member of the class.

Unless Your Honor has questions about American Pipe, I'll move on to the next argument that the plaintiff has made with regard to the statute of limitations and proper purpose issue, which is she argues in her answering brief that if she seeks equitable relief in addition to the money damages on behalf of the corporation, that that would somehow mean that the statute of limitations doesn't apply. That argument is not correct, and it misstates

Delaware law.

Now, first of all, the argument is largely academic in light of the litigation demand which has been adopted in the inspection demand because the litigation demand is that the board should pursue an action for damages against the wrongdoers.

So I'm not sure -- and that's the only litigation demand. So I'm not sure how it is that the possibility of equitable relief, given the nature of the litigation demand, even comes into the picture. But let's assume that it does. And let's assume that Miss Wolst changes her mind and wants to pursue, or had demanded, an action that seeks equitable relief as well as money damages.

Kahn against Seaboard Corporation is a case that we cited in our brief. Chancellor Allen who said, "Whether the claim assert submitted legal in nature or equitable, whenever it seeks money in a derivative suit, her claim is subject to the statute of limitations." And I think that definitively answers that particular contention.

But even if, suddenly, not only is the demand modified so that in addition to money damages it includes equitable relief, let's suppose -- and

none of this has happened -- that the demand had been solely an action for equitable relief, that still wouldn't change the fact that under Delaware law, the statute of limitations would apply. And there are many examples of Delaware courts so holding, one of which is Your Honor's decision in Puig versus Seminole Night Club which is at 2011 Westlaw 3275948, a 2011 decision.

The Court recognized that the timeliness of equitable claims that seek no monetary relief is determined under a laches analysis that applies the analogous statute of limitations, just like all of the analyses in this Court pertaining to the statute of limitations.

Indeed, in Puig, the plaintiff argued before Your Honor that because his claims for rescission were equitable, the statute of limitations should not apply, and Your Honor said, "If the plaintiff seeks equitable relief, it is firmly established that this Court can and will apply the statute of limitations by analogy."

Your Honor also said, "Unless there are some unusual circumstances, a court of equity will deny a plaintiff relief when suit is brought after the

analogous statutory period."

It's also the Delaware Supreme Court in Whittington versus Dragon Group, 991, A. 2d, one, a quote: "Where the plaintiff seeks equitable relief, the Court of Chancery applies the statute of limitations by analogy."

This notion that if we pretend that the demand was not for money damages but was solely for equitable relief, that would change the equation with regard to the statute of limitations in Delaware is, I respectfully submit, simply wrong.

Last, insider trading claims. The plaintiff makes this argument that would only apply to the potential insider trading claims. And she asserts there is no statute of limitations applicable to those claims because, according to her, there's an exception to the statute of limitations in derivative cases where the allegation is insider trading or some other form of self dealing that either was concealed or did not put her on inquiry notice.

She cites, as the basis for this assertion, a case called Strougo versus Carroll, a Chancery Court opinion by Vice Chancellor Berger in 1991.

Now, Strougo, in turn, was predicated on a 1944 Delaware Supreme Court case called Bove, and other than in Strougo, that one instance, Bove has been held uniformly by every other court that has considered it simply to be a tolling case. Standing for the proposition of when a corporate insider's conduct is concealed or his breach of fiduciary duty is not known and could not have been known by the shareholder, the statute of limitations period will be tolled until the shareholder is on inquiry notice.

Bove, with all respect to the Strougo decision, does not stand for the proposition that the statute of limitations simply is inapplicable in such cases.

For example, the Delaware Supreme Court in 1970, in Bokat versus Getty Oil, 262 A. 2d 246, rejected the plaintiff's argument that under Bove, a corporate insider's self-dealing is somehow not subject to the SOL. That was the statute of limitations. My notes said "SOL." That was the square holding of that case, Your Honor.

I again refer to a case I talked about earlier, Kahn versus Seaboard. That was Chancellor Allen. A close reading of Bokat demonstrates the

soundness of the principle that the statute of limitations applies but is tolled in derivative actions charging actionable self-dealing until the shareholders knew or had reason to know of the facts constituting the wrongdoing.

So, give them the tolling. According to the allegations here, the truth with regard to Monster allegedly emerged in November of 2007. That's why it's the end of the class period. And Miss Wolst herself testified that she was on, leaving inquiry notice aside, actual notice of her claims in early 2008. And in fact, the demand futility case that was commenced here on a derivative basis was commenced in October of 2008.

So, at the latest I would say that plaintiff was on inquiry notice in November of 2007 when the truth was revealed, but at the latest, she was on actual notice when the very derivative case that was brought here on the demand futility basis was commenced in October of 2008, and we have a three-year statute of limitations. So this argument with regard to insider trading is purely a tolling argument, and it's of absolutely no use to Miss Wolst under the facts of this case.

If Your Honor has no questions, I have completed my argument.

THE COURT: Thank you very much.

MR. PERSCHETZ: Thank you.

And now Mr. Stein will address the other issue.

THE COURT: I was sitting here looking forward to his presentation.

MR. PERSCHETZ: I'm sure you were. Thank you, Your Honor.

MR. STEIN: Good morning, Your Honor.

THE COURT: Good morning.

MR. STEIN: May it please the Court, I'm addressing the scope issue as Your Honor knows; in other words, whether the plaintiff has met her burden of proof assuming for the sake of argument that she does have a proper purpose, that the additional documents she's seeking are necessary and essential and sufficient.

THE COURT: So you want me to reject your colleague's arguments just so your time will not have been wasted up here.

MR. STEIN: No. You could easily decide the case on both grounds as an alternative

holding. But I very much do want to convey, especially since I'm last on the program here, that I don't intend at all to rehash the arguments that we made in our briefs on this issue. I mainly want to respond to arguments that were made in plaintiff's answering brief and answer any questions that the Court may have.

I want to start with some things Mr. Holleman said this morning, although I had not planned to address these. He purported to give the Court some background about what this case is about. I don't want to get caught up on this because these relate to the merits fundamentally. But I can't let go unanswered some of the things that Mr. Holleman said, and I think it's revealing.

He said, first of all, that in August of 2006, Monster missed earnings and that realizing what missing estimates could do, Monster's management set out to make sure it wouldn't happen again.

What I would like the Court to understand is that there are absolutely no facts even alleged in the complaint that support that contention. It is pure surmise by counsel. There's no confidential witness. There's no document, anything

to support the notion that Monster management somehow got together in August of 2006 and hatched a plan. It is pure surmise.

Another thing that Mr. Holleman said; he created this picture of insider trading, as I call it, that the company management pumps up the stock based on alleged misstatements and then they unload their stock when it's up here, and then the truth comes out later and the stock price is down here. That is not what happened. That's irrefutable. It's completely misleading. This is in the materials before the Court.

The prices at which the insiders sold their shares were, for the most part -- were entirely within the same range that the stock was trading after November 8th, 2007, when they allege the truth came out. Most of those sales -- I think it's like two-thirds of them if you look at the numbers -- took place at prices lower than what the stock traded at on an average basis between November 9, 2007 and the end of the year.

A third thing that Mr. Holleman said is that on this November 8th, 2007, conference call when they allege the truth was revealed, Mr. Sacks

revealed that Anheuser-Busch had not embraced the company's brands, and there was a great challenge in matching our distribution needs with the Anheuser-Busch system.

That's not what he said. This is not in the record, Your Honor, so I don't want to spend much time on it, but if you look at the transcript, Mr. Sacks is clearly talking about one particular small sub-market that Anheuser-Busch sold to which were the so-called non-alcoholic small mom and pop stores which are traditionally not on the radar of their beer distributors. That's what he was saying where there were some challenges, these smaller non-alcoholic areas as he referred to them.

He wasn't saying that the Anheuser-Busch system was in any way, shape or form bad for the company. In fact, in the very same paragraph in the transcript, he reaffirms it. We would absolutely do it again. We think it was the right decision for the company, the right decision for the brand and the numbers; i.e. the company's performance, bears that out.

So with that somewhat diversion, let me get back to the law and the issue before the Court.

The legal framework, I think, is pretty well settled and not seriously in dispute. The basic principles are set forth in cases like Grimes, a Vice Chancellor Lamb decision and Vice Chancellor Parsons' decision in the Norfolk County case.

And what those cases make clear is that plaintiffs' right to inquire under Section 220 relates to the process followed by the special committee in responding to the demand. There are two central inquiries that I believe those cases set up.

One is are the additional documents that plaintiff is seeking necessary and essential for her to understand the process the special committee followed, and number two, has the plaintiff articulated any reasonable grounds for suspicion that the special committee's process was not what it should have been under Delaware law, thereby potentially entitling her to additional documents. And let me address those two in turn.

On the first issue, Grimes and Norfolk say that the company should give the shareholders the minutes of the special committee meetings, the minutes of the relevant board meetings and the special committee's report. And that's what Monster did here,

Your Honor.

Those documents set forth everything about the process that the board followed in responding to Miss Wolst's demand. They identify who the members of the special committee were, when the committee met, what the committee did at those meetings, who the committee hired as independent counsel, the process the committee went through in order to hire counsel, what counsel did as part of its investigation, what the special committee found, and the basis for those findings.

Now, the plaintiff's chief complaint is that even though we gave them the minutes, as Grimes and Norfolk county say we should, and even though they we gave them the document that reflects the substance of the special committee's report, as Grimes and Norfolk say we should do, we didn't give them a written report. But for at least three reasons, Your Honor, that is not a basis for plaintiff to seek additional documents here.

First, the form of the report should not matter. As I'm sure the Court is aware, we are certainly aware as practitioners, sometimes there's an oral report, sometimes there's a written report when a

special committee does an investigation. The minutes that we provided the plaintiff here give a detailed summary of the special committee's report.

For each of the different categories of allegations that plaintiff has, the minutes lay out what the special committee found and the reasons for that finding. That's what the plaintiff is entitled to, and that's what she asked for.

If you look at her inspection demand, which is Exhibit 44 in the record, when she lists the documents that she would like to receive, one of them is the report describing the findings of the special committee. That's exactly what these minutes do. They describe the findings of the special committee. The form shouldn't matter.

Secondly, Your Honor, the complaint that there's no written report, I submit, really is not a complaint that they lack information about the process, which is the inquiry that should be filed under Section 220. They know what the process was. They know. There was no written report. We can't give them a document that doesn't exist.

Now, plaintiff may think that's not the right process that should have been followed.

Maybe they want to argue that the absence of a written report somehow means the demand was wrongfully refused in and of itself. I don't think that would be a good argument. But the point, for present purposes in the Section 220 case, is that that is not a reason for them to get the underlying investigative materials that the courts have said they're not entitled to.

Make no mistake, the underlying investigation materials is precisely what this Section 220 action is all about. Plaintiff wants to know what witnesses were interviewed, what they said and what documents were reviewed, and that's specifically set forth in request numbers seven, eight and nine of the inspection demand which is Exhibit 44.

Plaintiff admitted this in her deposition. When asked what she was looking for, she said that she's looking for the backup documentation verifying the results of Scheper Kim's investigation that would prove that none of those things that she alleges actually occurred. And that's paragraph 67 of stipulated facts. That has nothing to do with the process, Your Honor; nothing to do with the independence of the special committee; nothing to do with understanding what the special committee found.

It has everything to do with the substance and the merits of her allegations, but she's not entitled to that.

The third point that I would make with regard to the written report is that there seems to be an underlying assumption that somehow it's improper if there's no written report. There are plenty of legitimate reasons why a special committee might decide not to have a written report. For example, the company could be simultaneously defending against a class action suit based on the same allegations which, of course, is precisely the situation here.

As another example, the special committee could decide that the nature of the shareholders' allegations are so flimsy that they don't justify the expense and burden of a written report, and in this case, as Mr. Perschetz just explained, and as the special committee found, and this is reflected in the October 9th minutes, the derivative claims that Miss Wolst seeks to assert here are clearly time barred. They were clearly time barred as of the time she made her demand in February 2012. It's not a question of making new law or an issue of first impression or anything like that.

The law is perfectly clear here.

Moreover, as the minutes reflect, the special committee's investigation here in this case found no merit to the allegations, no evidence to support them. Very strong conclusions, I submit. But those are the conclusions that were reached by an independent investigator whose qualifications and independence can't be and have not been disputed.

It's not the law, and shouldn't be the law, we submit, and we don't know of any case so holding, that every time a shareholder makes a litigation demand, no matter how untimely the claims are, or how meritless they are, the company not only has to form a special committee, not only has to hire independent counsel, but also has to incur the additional expense of a full-blown written report with all the bells and whistles, and the courts of Delaware, as Your Honor knows, recognize that this is very much a facts-and-circumstances mission, and that the amount of time and effort will vary in proportion to the complexity of the issues involved, and I'm paraphrasing from Baron v. Siff, 1997 Westlaw 666973, a 1997 decision.

Is so if I may, I'd like to turn to

the second issue, which is whether plaintiff has articulated any reasonable grounds for suspicion as to the special committee's independence or good faith or the reasonableness of its processes or conclusions.

We submit that she has not. In fact, Your Honor, nowhere, nowhere in their correspondence with the company after we provided the documents before this action was brought, nowhere in the complaint in this action, nowhere in plaintiff's interrogatory responses, and nowhere even in plaintiff's opening brief did plaintiff even attempt to set forth grounds for suspicion.

Finally, in her answering brief, she sprinkled in some allegations along these lines, and I would like to address those if the Court permits because none of them even comes close to establishing reasonable suspicion.

One thing that plaintiff says is some special committee members missed some of the meetings. Well, Your Honor, the record is clear that there were five meetings of the special committee. The special committee had four members, so there are, in effect, 20 attendance opportunities.

And what is the plaintiff complaining

about? That one member, Mr. Polk, missed one meeting on May 2nd. And one other special committee member, Mr. Vidergauz, missed one meeting on May 8th. That's a pretty good attendance record, I submit, and no cause for concern.

But beyond that, if you look at the meetings that they missed, the May 2nd and May 8th meetings, they were both about hiring independent counsel. That was the subject of them. And who from the special committee actually interviewed the candidates for independent counsel? Mr. Polk and Mr. Vidergauz. So the impression that is attempted to be created that they were somehow out of the loop on some issue is completely wrong.

Plaintiff also complains that Mr. Vidergauz missed part of the October 9th board meeting, but as the minutes reflect, the part of the meeting that he missed was basically the part in which the special committee counsel delivered his report.

Mr. Vidergauz had heard that report at the special committee meeting on September 28th. He was present on October 9th for the board's discussion and decision whether to adopt the special committee's recommendation.

Mr. Holleman said this morning that the special committee delegated the investigation to counsel. Not so. Paragraph 49 of the stipulated facts specifically sets forth that Mr. Harris provided the special committee with updates regarding the progress and direction of the investigation, and there were three separate meetings where that took place.

Mr. Holleman also this morning complained that the full board meeting only lasted 40 minutes. He says there were no written materials displayed. But, again, Your Honor, the test is what is appropriate under the facts and circumstances, and given the nature of the allegations here, the fact that they're time barred, the flimsiness of them, that was more than appropriate process for these claims.

In their answering brief, plaintiff said that Mr. Paul DeSherry, who they described as Monster's general counsel, attended the special committee's meetings. First of all, Your Honor, Mr. DeSherry is not Monster's general counsel. He is one of several in-house lawyers at Monster.

More importantly though, as the minutes reflect, Mr. DeSherry's role was to "act as secretary of the meeting." That's set forth in each

of the minutes, and that's all he did. There's nothing inappropriate about that. There's no allegation that he participated substantively in the investigation or the special committee's deliberations.

And in fact, the stipulated facts specifically provide that Mr. DeSherry was not present at the three meetings when Mr. Harris provided updates to Mr. Polk and Mr. Vidergauz as to the progress of the investigation. That's paragraph 49.

Plaintiff also criticizes Mr. Selati for participating in the full board vote on October 9th even though he was one of the alleged wrongful insider traders. First of all, Mr. Selati wasn't on the special committee. But the fact is that given the allegations against him and Judge Woo's rulings in this case, he could have been.

As Judge Woo found, there is no basis, based on the insider trading allegations, to question Mr. Selati's impartiality. That's because there's no basis for the allegations. No allegation that he was privy to any material non-public information. There is an allegation that the timing of his trades was suspicious, but we completely eviscerated that

argument in our briefing, as Judge Woo recognized when he dismissed the complaint a second time.

The fact is Mr. Selati was under various restrictions prohibiting him from selling his stock until he did. As I mentioned before, Mr. Selati sold his shares at an average price of $43.68, and the average closing price after the truth came out, according to them, was $44.80.

There's no damage to the company. There's no basis for any sort of insider trading allegation. And there's no basis for any argument that Selati's presence during the board vote in the full board meeting somehow taints the process here, especially because it's a seven-member board. The special committee consisted of four members, not including Mr. Selati. They had already unanimously determined to review the demand, so the reality is that Mr. Selati's participation was superfluous essentially.

The plaintiff's answering brief also has various arguments as to why the special committee's findings are, as they put it, far from conclusive on various issues like the channel stuffing claim. Again, that's not the issue here; whether the

special committee's findings are conclusive or whether they're right or wrong. It's whether the plaintiff has been given sufficient information about the process.

The allegations though, in any event, do not raise any questions about the process. I will, with the Court's permission, quickly go through them because we haven't had an opportunity to respond to these arguments, all made in the plaintiff's answering brief.

One thing that the plaintiff says is that the minutes of the special committee's report are silent on whether any A-B distributors supported plaintiff's allegations, but the minutes specifically say that Scheper Kim interviewed multiple distributors who refuted the allegation and also reviewed sworn declarations from more than 100 distributors who likewise denied that they were forced to accept commercially unreasonable quantities of Monster or Allied products.

There's no suggestion at all in any of this that any distributor supported the channel stuffing claim, and in fact, it's particularly ironic that Miss Wolst would complain about this because the

special committee asked Miss Wolst repeatedly through her counsel to identify any distributors who she was aware of, and there's one Continental witness, a guy in North Carolina who is a distributor, only one who claims he had unidentified amounts of excess inventory of unidentified company products, and Miss Wolst refused to do so. So she certainly can't complain that the special committee was unable to speak to that purported confidential witness.

Another thing that Miss Wolst says is that the minutes don't report on the interview of the senior company sales manager who was a likely target of plaintiff's litigation demand. Neither part of that formulation is true. First of all, the minutes do say that Scheper Kim interviewed the senior sales manager and did other things, and based on its investigation, found no evidence to support the channel stuffing allegations. So that was the finding.

Secondly, the litigation demand here identifies several individuals as targets, the CEO, the CFO, the five outside directors, the president of Monster Beverages, the vice-president of finance and a senior vice-president for juice and non-carbonated

products. None of them fit the description of a senior company sales manager with responsibility for the Anheuser-Busch relationship. And so there's no basis for an allegation that that sales manager is a target of the demand.

There are also claims that the minutes are conclusory in saying that there was no merit to the other allegations relating to alleged misstatements regarding the Allied brands and the A-B distribution relationship. That's not so. If you look at the minutes, there are specific findings. There's not just a conclusory statement that the claims are without merit.

And the other point that I want to emphasize in that regard is that the plaintiff knows, because there was years of litigation on these issues in the class action and in the derivative action, but chiefly in the class action, the nature of these claims and the reasons why they are fatally flawed.

The notion that the Allied brands -- that Mr. Sacks somehow committed fraud when he said he was positive about one of the Allied brands and hoped or thought that sales would improve was counter-balanced, and the minutes reflect the special

committee found that, by numerous disclosures by Mr. Sacks at the same time that the actual sales of those products were declining, and he candidly and fully disclosed all of that.

The notion that, similarly, that Mr. Sacks was lying when he said that the transition to Anheuser-Busch was progressing well and that the company, Monster, was happy with the transition, that that could be a misstatement is, with respect, ludicrous.

Judge Woo specifically found in his ruling dismissing the class action complaint that, as he put it, it is hard to understand how plaintiffs can characterize as false any statements about the general happiness or general success of the company. The company was generally successful, and the relationship with A-B was generally positive, and the numbers, as I said, spell that out.

Record sales each quarter after the transition and increase in Monster's market share in relation to its competitors such as Red Bull, and the bottom line, Your Honor, is that the plaintiff hasn't established any reasonable grounds for suspicion about the special committee's independence or process.

Monster has complied with its obligations under Section 220, and even if plaintiff could show a proper purpose, which she has not done, for the reasons any partner, Mr. Perschetz, explained, we ask that judgment be entered in Monster's favor.

Unless the Court has any questions, I will sit down.

THE COURT: I have no questions. Thank you very much.

MR. VARALLO: Your Honor, I rise to deal with two housekeeping issues, if I may. First of all, Your Honor and the clerk have a volume of jointly agreed-to exhibits. Because this is technically a trial, I think I should probably technically move their admission. There have been no objections lodged.

In addition, Your Honor, we have prepared, and I have served on opposing counsel, effectively, a key to those describing each and every one. It might be useful for Your Honor to have that, and with Your Honor's permission, I'll hand them to the clerk.

THE COURT: You anticipated where I was going next. I was going to talk about the

exhibits and the exhibit list, but it seems to me you have saved me the trouble, so thank you.

MR. VARALLO: Thank you, Your Honor.

THE COURT: Joint Exhibits 1 through 66 are admitted without objection.

Mr. Holleman, let's take a five-minute recess and then we'll hear your rebuttal.

(At this time a short recess was taken)

THE COURT: Mr. Holleman.

MR. HOLLEMAN: Thank you, Your Honor.

First, like my opposing counsel, I'd like to make a quick diversion. My recitation of the facts earlier was premised on the complaints that have been filed, the derivative complaint and the securities complaint. So if I misparaphrased or misquoted, or if -- I guess there was quite a substantial factual discussion of things that weren't actually in the record, and to the extent it departed from something like that, I apologize.

I am going to first try to address the arguments about purpose, and then I will move on to scope.

My opposing counsel said that in order for us to proceed, in order to show a proper purpose,

we have to show that we can bring a derivative claim. That's not the law as has been previously stated with respect to a 220 action seeking books and records to evaluate a board's refusal of a demand.

If the Court accepts that version, then that would not only eviscerate Grimes and the Morgan Stanley case to the extent that they say a proper purpose is seeking books and records to evaluate the refusal of the demand. Because that would negate that because that would remove that from being a stand-alone proper purpose.

And what it would also do, it would introduce an element of some showing of wrongdoing which has never before been required in the actions where the purpose for seeking the documents was to evaluate a board's refusal.

So while I acknowledge that there is a bit of a gap, if we accept defendants' contention that you have to prove that you're going to be able to bring a derivative action, I think that that would translate this, what Your Honor has in the previous case termed as a summary proceeding, into a whole other beast.

THE COURT: Well, is it a matter of

the plaintiff being able to prove that she can bring a derivative action, or of the defendant proving that the plaintiff could not bring a derivative action, even if she wanted to, because of the existence, for example, that there's a time bar.

MR. HOLLEMAN: I think in the ultimate derivative litigation, if it's brought, and like Your Honor stated in Amalgamated, the action might or might not be brought, but in that, certainly we would have to flesh out the defenses and affirmative defenses and prove that we can.

At this stage, given that it's a summary proceeding and given that plaintiffs can't affirmatively disprove every affirmative defense out there -- and defendants made numerous affirmative defenses in their answer. We didn't dedicate pages in our opening brief to affirmatively disprove all of those affirmative defenses. Maybe they were going to give some up. Maybe they were going to maintain some. I think that's an affirmative defense for the defendants to raise.

Now, if it's a clearcut issue, as was the case in West Management, as was the case in Polygon, as was the case in Tyson, then it doesn't

require complex analysis. But here we've already talked about four or five different possible theories for tolling.

Moreover, if a derivative case were brought, it could be brought in Delaware. It might possibly be brought in California state court or California federal court. While the law that would govern this case would be the exact same case, it would be Delaware substantive law because Monster is a Delaware corporation, there might or might not be different tolling practices or procedures or case law that a judge would refer to in that ultimate action.

And I don't think that right now is the opportunity and the time for plaintiff to have to show that, under any jurisdiction out there, that we might be able to bring an ultimate derivative action. We will be able to disprove any argument about standing, any argument about statute of limitations, any argument about laches that defendants might say down the road.

THE COURT: So what you're saying, and if I mischaracterize it, please correct me, I might be able to determine that the plaintiff couldn't bring a derivative action in Delaware, but I really am not in

a position to figure out whether she could or couldn't bring a derivative action, because of a time bar, in California, Montana, Texas, wherever she might choose to go or be able to go.

MR. HOLLEMAN: That's not exactly what I was saying. I'm saying that in the context of a 220 action, that's going to require exhaustive briefing.

Your Honor, certainly if we were to turn around and bring a derivative action here and fully brief the issue of statute of limitations or fully brief the issue of laches, then Your Honor would be more than equipped to handle that, and possibly even if we were raising certain issues with California, just as I wouldn't doubt a California federal judge's ability to adjudicate issues that might arise under Delaware law or California law or some other law. I just don't think that that's what Delaware law requires us to do in the context of showing a proper purpose.

THE COURT: But if I conclude the only plausible basis for tolling would be the pendency of the federal securities class action, and then I take the next step, and assume just for purposes of argument, I conclude that American Pipe doesn't allow

for a securities class action to toll a potential derivative action, that there's nothing left? We're not talking about some kind of a searching inquiry with lots and lots of issues, because the question of whether the federal securities class action tolls the derivative action has been fairly robustly debated in the papers before me, and not to mention what we've talked about this morning.

MR. HOLLEMAN: I think if the parties and the Court are all satisfied that these issues have been fully fleshed out, and there's no further briefing that needs to be done, and that this Court can adjudicate such a dispute, then that might be the case.

I just don't think that that's the appropriate line, the appropriate approach to take in a 220 action because in the cases like West Coast, Graulich, it was a clearcut issue. In Graulich, there was no standing because the shareholder didn't even own shares at the point in time that the misconduct was alleged.

In West Coast Management, I believe that the plaintiff was banned from relitigating demand futility. So even if the plaintiff had gotten

documents pursuant to the 220 action, the Court said you can't go back and relitigate demand futility, you can't even file a new derivative suit.

So all of those were issues where it did not appear from the opinions that there was much discourse amongst the parties or much of an issue for the Court to resolve. It was crystal clear what the issues were there.

THE COURT: One thing that we didn't discuss in our earlier colloquy, the plaintiff is not and could not be a member of the federal securities class, is that correct?

MR. HOLLEMAN: That is my understanding.

THE COURT: So if she can't be a member of the class, how can the pendency of the class action toll anything as to a claim that she might want to bring?

MR. HOLLEMAN: I think that understanding the difference between a class action and derivative action is helpful; that these actions, this derivative action -- Chancellor Strine once called this an indemnification action, if you will. Some people call it a tag-along action.

Now, whether the allegations of the derivative action are limited to that narrow type of derivative action remains to be seen because, again, there has not been a complaint drafted for the next step of this broader litigation.

But if we're just sticking on the notion that this might be an indemnification action, then the damages that might be awarded in the securities action, the resolution of the securities action, has an impact on Monster, and, therefore, has an impact on any kind of derivative action that that shareholder might be able to bring on Monster's behalf.

Which is why, as Your Honor suggested earlier, and defense counsel acknowledged, these things are often stayed pending the resolution of the securities action, because either the defendants don't want to be burdened with having to defend against two different litigations, or it just doesn't make practical sense to do it because there's so many things up in the air. We don't know how the securities action is going to be resolved. We don't know if the plaintiffs are going to lose on a motion to dismiss, lose a class cert, lose on summary

judgment, lose at trial, or win. All of a sudden, the company is damaged by $500 million, or in this case, $16.5 million.

And I understand from the stipulation that some of that settlement, maybe even all of it, is going to be funded by insurance carriers. But nonetheless, it gets to the principle of you don't know what the outcome is, and you don't know what the expected effect is of the securities case on the company, and thus, what that might give as far as a derivative action.

So I think in terms of practical sense, it makes sense to apply the reasoning of American Pipe to this case. And moreover, in terms of the reasons you have statutes of limitations, the prejudice, the surprise. This is no surprise. Monster has been involved in the securities litigation, and Monster has been involved in the derivative litigation.

So the reasons for applying that statute of limitations or that tolling defense because that might be applied in an eventual derivative action that plaintiffs might bring if they prevail on this 220 action, I think that that illustrates the

complexity of trying to deal with that today.

I have nothing else to say on the purpose. I think we stated what we needed to say in the papers and today.

Does Your Honor have any other questions with respect to the purpose?

THE COURT: I do not.

MR. HOLLEMAN: With respect to the scope, my adversary has, I think, at one point in time, said that they produced minutes and a report -- or he said the law requires a party to produce minutes and a report, and he said "we did that."

And this is one of the stumbling blocks of how we're going to be able to resolve this, because there was no report. There are a handful of meetings. And my adversary says "We didn't create a report," and then there is all kinds of reasons why that might not have happened, none of which are actually in the record. It's just idle speculation.

"We didn't do it because we didn't think that the case had any merit, so it didn't even have enough merit to warrant creating a report, and yet we're going to hire independent counsel to purportedly investigate the matter, come talk to the

special committee, come talk to the board, but no report."

Even though there are 100 interviews, even though there are numerous conversations with company insiders. And they also reviewed witness statements that were, I guess, compiled by somebody else. The independent counsel didn't even generate everything. But it was a conscious decision not to create a report.

THE COURT: So the fact there is not a report is sufficient indicium of suspiciousness?

MR. HOLLEMAN: Not necessarily. I think that taking it in the context of what other cases have required companies to produce and what has been produced in other cases, I think that that's the starting point about what Monster should produce.

In the Morgan Stanley case, it was a report, it was minutes, it was documents and other records that the board relied upon. It was also a report created by Skadden because I think Simpson was the special litigation committee's outside counsel. There was also a report created by Skadden, so that report. And also any documents in the record that Skadden relied upon in creating that report. In

Grimes, it was minutes and a report and --

THE COURT: So what do we need to do; ask for the lawyers' interview notes and every piece of paper that they generated as they went through their several months of investigation?

MR. HOLLEMAN: I think that that's part of the problem; is that we don't know what they generated. There are 23 pages produced. And whether it's an additional hundred pages, whether it's an additional thousand pages, we don't know. There's no way for us to tell actually how burdensome it would be until we have a dialogue understanding, well, how much is it, what is there out there. Because you certainly made the decision not to create a report, and yet you spoke about the investigation, but you didn't create a report. There is no way except the minutes of that very last board meeting to know what, if anything, the special litigation committee did.

One thing I'd like to note is my adversary says that Vidergauz didn't attend that portion of the October 9th meeting I believe because he was at the September 28th meeting.

Exhibit 41 is the copy of the October 9th meeting. It spans NBC AW 18 through AW

21. So it's in total about five pages if I can count right. Four pages. Three of those pages are dedicated to discussing or summarizing the special litigation committee's outside counsel's report, and that, based on the minutes, appears to have taken around an hour, and that was the portion that Mr. Vidergauz did not attend.

My adversary says he didn't need to be at that portion because he was at the meeting previously when the special litigation committee received the report directly from the independent counsel, the meeting of the special litigation committee.

Now, that is Exhibit Number 40. It's a different set of minutes. And you'll notice, if I can direct the Court's attention to the exhibit I am showing you right now, that is the extent of the presentation of the special litigation committee's counsel's report.

So except for that last bit of minutes, we just don't know what was done. I think that our opening papers and our answering papers raise some questions about that this leaves a lot of issues unsettled. It leaves a lot of questions about, well,

what else was there, did any -- who did you talk to? Because you didn't talk to the confidential witness apparently, or he changed his story. It sounds like they even identified him. He's an individual from North Carolina.

THE COURT: How do I decide this? "There are some issues unsettled; therefore"? I have to have something more to hang on to, don't I, than just unsettled issues.

MR. HOLLEMAN: If we go back to the purpose of did the board validly refuse Miss Wolst's demand. If that's the proper purpose that we have demonstrated, and I believe that we have, then we need to be able to ascertain whether the board exercised its business judgment, was it sufficiently informed. And without getting a report and just a handful of pages of summarizing an oral summary without any other information, without any backup, any exhibits, there's no PowerPoint presentation, there was nothing -- and then not even all of the board members attended that portion.

THE COURT: So are you looking for a black letter rule that says there must be a written report? If you're not looking for a black letter rule

that there must be a written report, what is the standard that says in some cases you need it and some cases you don't?

MR. HOLLEMAN: We believe that there should either be a report or some of the materials that went into it. Because the materials that went into it are objective. The interview notes are objective. They are what they are. That's the source of the ultimate recommendation.

If it's hundreds of thousands of pages, well, then that might be an unreasonable request in certain instances. But based on these minutes, it doesn't appear to be that much information. So that's what we believe we should be able to get in order to evaluate whether the board refused the demand on an informed and a disinterested basis.

With that, Your Honor, I have nothing else to add.

THE COURT: Thank you very much.

MR. PERSCHETZ: Unless Your Honor has questions of us, we have nothing to add.

THE COURT: I have no questions. Thank you very much. The record is complete.

Mr. Stein, did you have something?

MR. STEIN: No.

THE COURT: I thank you all very much. I am going to reserve decision. I think I need to think through the consequences of what I might decide, so I am better if I think on it. I wish you all safe travels. Again, thank you very much.

Recess court please.

(The Court adjourned at 11:55 a.m.)

CERTIFICATE

I, MAUREEN M. McCAFFERY, Official Court Reporter of the Chancery Court, State of Delaware, do hereby certify that the foregoing pages numbered 3 through 85 contain a true and correct transcription of the proceedings as stenographically reported by me at the hearing in the above cause before the Vice Chancellor of the State of Delaware, on the date therein indicated.

IN WITNESS WHEREOF, I have hereunto set my hand at Dover, this 26th day of June, 2014.

/s/Maureen M. McCaffery

Maureen M. McCaffery
Official Court Reporter
of the Chancery Court
State of Delaware