IN THE SUPREME COURT OF THE STATE OF DELAWARE

FRANK D. SEINFELD, Plaintiff-Below, Appellant, v. VERIZON COMMUNICATIONS INC., Defendant-Below, Appellee.	)	No. 624, 2005 On Appeal from Court of Chancery, C.A. No. 1100-N

DEFENDANT-BELOW, APPELLEE VERIZON COMMUNICATIONS INC.'S ANSWERING BRIEF

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NATURE OF THE PROCEEDINGS

Appellant, Plaintiff below, appeals from a November 23, 2005 Memorandum Opinion and Order of the Court of Chancery, by the Honorable Stephen P. Lamb (hereinafter, "Opinion" or "Op."), which granted the cross-motion for summary judgment filed by Appellee, Defendant below, Verizon Communications Inc. ("Verizon" or the "Company").

Plaintiff brought this suit to compel Verizon, pursuant to 8 *Del. C.* § 220, to produce to him a broad array of books and records related to Verizon's compensation of its three seniormost corporate officers from 2000 to 2002. Those persons, Charles R. Lee, Ivan G. Seidenberg and Lawrence T. Babbio, Jr., are referred to herein as the "Executives."

On September 25, 2003, Plaintiff served his first demand for books and records on Verizon. He then waited more than nine months before filing his suit and serving it on Verizon. (A-73-74 at 132-33.) By the time Plaintiff finally served his suit, the compensation agreements of two of the three Executives had expired by their own terms. (*Id.*) Plaintiff then refused to appear for a deposition and moved for summary judgment. Verizon cross-moved for summary judgment and the Court of Chancery granted Verizon's motion and dismissed Plaintiff's complaint for its failure to comply with Section 220's attestation requirements for beneficial stockholders. *Seinfeld v. Verizon Commc'ns Inc.*, 873 A.2d 316 (Del. Ch. 2005).

Following the dismissal of the first action, Plaintiff served an almost identical demand on Verizon and brought suit on the

new demand on February 15, 2005. Verizon answered the new complaint, sought limited document discovery and deposed Plaintiff. At his deposition, Plaintiff conceded that he had no evidence of wrongdoing or mismanagement. Among other things, Plaintiff admitted that Verizon never had three CEOs, that the Executives were contractually entitled to the stock options or other long-term incentive compensation they received, and that he had no reason to doubt that Verizon's Board of Directors was independent and acted with due care in determining that compensation. (*Infra* at 7-8, 10-15, 25-26.)

After his deposition, Plaintiff moved for summary judgment. (A-76.) In support of that motion, Plaintiff submitted an affidavit that ignored his own admissions and instead repeated allegations in his complaint inconsistent with his testimony. His affidavit also stated that "[t]here is no need for a trial, since all that I will rely on can be set forth herein." (A-88 at ¶ 2.) Verizon then cross-moved for summary judgment. (A-111.)

As set forth more fully in its Opinion, the Court of Chancery granted Verizon's motion for summary judgment because, even viewing the evidence in the light most favorable to Plaintiff, Plaintiff did not show a credible basis from which the court could infer probable wrongdoing or mismanagement in Verizon's compensation of the Executives. (Op. at 8.) Rather, the Court found Plaintiff's "Section 220 demand was made merely on the basis of suspicion or curiosity." (*Id.*)

In his Opening Brief, Plaintiff now admits that he "had no actual evidence that in fact wrongdoing had taken place." (Pl's. Br.

at 2.) Because of that admission and because the Court of Chancery correctly found no evidence that might support a credible basis of probable wrongdoing or mismanagement, the judgment of the court below should be affirmed in all respects.

SUMMARY OF THE ARGUMENT

1. Denied. The Court of Chancery correctly found that Plaintiff "has not met his evidentiary burden under Section 220 to demonstrate a proper purpose to justify the inspection." (Op. at 1.) First, the court correctly found that Plaintiff "was unable to provide any factual support" for his allegation that Verizon had three CEOs, and Plaintiff admitted that allegation was false. (*Infra* at 7-8.) Second, the court correctly found that Plaintiff introduced no evidence supporting his claim that the Executives received $205 million in compensation from 2000 to 2002, or that such compensation amounted to corporate waste. (Op. at 6-7 & n.24; *infra* at 8-10.) Third, the court correctly held Plaintiff to his admission that the Executives' employment agreements "provided for an award of stock options" and found that Plaintiff "did not submit any evidence showing that the executives were not entitled to these options." (Op. at 7 & n.26; *infra* at 10-15.)

2. Denied. The Court of Chancery correctly found Plaintiff's allegations that two of the Executives' employment agreements were amended to permit them to receive stock option grants were "conclusory" and "unsupported by evidence." (Op. at 7 n.25.) Plaintiff presented no evidence from which the court could infer that the employment agreements might have been amended "to provide the Executives with more valuable options," and instead Plaintiff relies on mere speculation unsupported by any evidence. (*Id.*)

3. Verizon agrees that "Plaintiff had no actual evidence that in fact wrongdoing had taken place," and the Court of Chancery's

judgment should be affirmed based on that basis alone. (Pl's. Br. at 2.) Verizon further agrees that "evidence of possible mismanagement" is a necessary showing for a Section 220 plaintiff whose purpose is to investigate mismanagement. *See Security First Corp. v. U.S. Die Casting & Dev. Co.*, 687 A.2d 563, 568 (Del. 1997) ("There must be some evidence of possible mismanagement as would warrant further investigation of the matter") (emphasis omitted). The court's judgment was entirely consistent with this well-established standard, and the court did not, as Plaintiff asserts, require Plaintiff to prove mismanagement.

4. Denied. Plaintiff wrongly asserts that the credible basis standard, as articulated by *Security First* and *Thomas & Betts Corp. v. Leviton Mfg. Co.*, 681 A.2d 1026, 1030 (Del. 1996), is a "non-starter." (Pl's. Br. at 3.) Contrary to Plaintiff's argument, the "credible basis" standard does not require that a stockholder produce whistleblower or video evidence; it requires only "a credible showing, through documents, logic, testimony or otherwise, that there are legitimate issues of wrongdoing." *Security First*, 687 A.2d at 568. Plaintiff's inability to meet this "not insubstantial" standard is no reason for this Court to overrule *Security First* and *Thomas & Betts*. *Id.* Because the court below correctly found that the "Seinfeld's Section 220 demand was made merely on the basis of suspicion or curiosity" (Op. at 8), it correctly granted Verizon's summary judgment motion and that ruling should be affirmed. *Security First*, 687 A.2d at 568 ("Mere curiosity or a desire for a fishing expedition will not suffice.").

STATEMENT OF FACTS

Plaintiff claims in his Opening Brief that the facts are "agreed upon," "not subject to dispute" and that "[t]here were no factual disputes in the Court below." (Pl's. Br. at 4, 6.) Those statements are false. To the contrary, the Court of Chancery found *no factual basis* for any of the allegations that Plaintiff now claims to be "not subject to dispute," and repeatedly rejected those allegations as wrong or factually unsupported. (Op. at 5-8.) Tellingly, Plaintiff's own "Statement of Facts" does not contain a single citation to evidence in the record, and instead repeatedly cites as support for his "facts" the *allegations* of his own complaint. (Pl's. Br. at 4 (citing A-6, A-18, A-7, A-8-9).) The evidence on the record in this matter is clear -- Plaintiff conceded in his deposition that he has no evidence that might show a credible basis of wrongdoing or mismanagement and conceded it again in his Opening Brief by stating he "had no actual evidence that in fact wrongdoing had taken place."[1] (Pl's. Br. at 2.) Plaintiff cannot escape these admissions by reciting his own unfounded allegations as "agreed upon" facts.

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[1] Because the admissions Plaintiff made at his deposition are fatal to his case, Plaintiff now claims that the court's reliance on that testimony was "misplaced." (Pl's. Br. at 9.) This argument is not only contrary to common sense, but flies in the face of well-established precedent that defendants in Section 220 cases may depose plaintiffs to "test the bona fides of the purpose stated in the demand letter." *Fink v. R.P. Scherer Corp.*, C.A. No. 9989, 1988 WL 69812, at *1 (Del. Ch. July 1, 1988); *Dedde v. Orrox Corp.*, C.A. No. 6409, 1981 WL 15121, at *1 (Del. Ch. Apr. 8, 1981) (noting that "defendant will be free to inquire as to the existence and identity of specific documents which might reflect upon the purpose for the inspection" at the plaintiff's deposition).

A. The Parties.

Plaintiff asserts that he is the beneficial stockholder of 3,884 shares of Verizon stock. (A-6 at ¶ 1; A-19.)

Verizon, which was formerly known as Bell Atlantic Corporation ("Bell Atlantic"), is a Delaware corporation. (B-90.) In 1997, Bell Atlantic acquired NYNEX Corporation. (A-56-57 at 64-65.) In 2000, Bell Atlantic acquired GTE Corporation, and, shortly following that acquisition, was renamed Verizon Communications Inc. (*Id.*) Verizon is one of the world's largest telecommunications companies, with operating revenues in 2002 of more than $67 billion. (A-67 at 105-08.)

B. The Executives.

Plaintiff's complaint seeks documents concerning the compensation of Verizon's three most senior corporate officers from 2000 through 2002: Charles R. Lee, former Chairman and Co-CEO, Ivan G. Seidenberg, current Chairman and CEO and former Co-CEO, and Lawrence T. Babbio, Jr., current Vice Chairman and President.

Contrary to Plaintiff's allegations in his Opening Brief (*see* Pl's. Br. at 2), Plaintiff admitted at his deposition that Verizon never had three CEOs. Plaintiff admitted that while Babbio has served as President and Vice Chairman of Verizon, he has never been the CEO. (A-66 at 102-04; Op. at 6 n.20.) Plaintiff's Opening Brief makes the same admission. (*See* Pl's. Br. at 10 ("As a result of the merger, Verizon had not one, but two CEO's (Seidenberg and Lee). Moreover, Babbio became Verizon's vice chairman and president.").)

For less than two years following Bell Atlantic's acquisition of GTE, Lee (who was previously Chairman and CEO of GTE) and Seidenberg (who was previously Chairman and CEO of Bell Atlantic) did serve as co-CEOs. But Plaintiff admitted that he had no reason to question the Board's business judgment on that point.

> Q: Okay. Now, Mr. Lee and Seidenberg were co-CEOs if [sic] a fairly short period, weren't they?
>
> A: Couple of years.
>
> . . . .
>
> Q: Okay. Well, thereafter, Mr. Lee was chair; Seidenberg was sole CEO; right?
>
> A: I believe so.
>
> . . . .
>
> Q: And as you sit here today, you have no reason to challenge the board's business judgment on the issue of having co-CEOs; right?
>
> A: I don't know. I don't think so.

(A-66 at 102-04; Op. at 6 n.20.) Plaintiff has thus admitted that Verizon never had three CEOs and that he has no evidence of mismanagement in the board's business judgment to have co-CEOs following the GTE acquisition.

C. The Executives' Compensation.

Plaintiff's constant refrain that the Executives received total compensation of $205 million from 2000 to 2002 is similarly baseless.[2] (Pl's. Br. at 2.) When asked about that allegation at his

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[2] Although Plaintiff claims that the "bulk of the compensation [in the years 2000 to 2002] came from option grants," it is an established fact that none of the Executives has ever realized any gain from those stock options. *(cont'd)*

deposition, Plaintiff testified that he did not know who created the compensation amounts in his demand, how they did so, or whether those figures were accurate.

> Q: All right. How did you come up with the grant date value of the stock options?
>
> A: It must be the - I don't know if it's something to do with the market value or - the grant date value of their options.
>
> Q: Yes, sir.
>
> A: Somebody must have valued the options on that particular date and came out with that figure.
>
> Q: But it wasn't you?
>
> A: I don't believe I did, no.
>
> Q: And you don't know how it was done?
>
> A: No.
>
> . . . .
>
> Q: With that in mind, it's possible that every one of the numbers on this, in this data that we're looking at are wrong; correct?
>
> . . . .
>
> A: There's always a possibility. I don't think so, but there is a possibility.

(A-72-73 at 128-31.)

Plaintiff offered no other support for his $205 million compensation figure until he submitted his reply brief on summary

(cont'd from previous page)

(Pl's. Br. at 4.) None of those stock options have been exercised, and they were all out-of-the-money (*i.e.*, the options had an exercise or strike price greater than the current stock price) and had been out-of-the-money for more than two years at the time of the summary judgment motions. (B-5 at ¶ 3.) Plaintiff admitted that he had no reason to disagree that the options were out-of-the-money and he admitted that the Executives' options could not be re-priced. (A-65 at 100; A-74 at 135.)

judgment. That reply included an affidavit of Plaintiff's *counsel* explaining that the $205 million amount was derived with the benefit of undisclosed calculations by an expert whom Plaintiff never previously identified and never sought to call in support of his case.[3] (A-154.) As the Court of Chancery recognized, the affidavit is the "only explanation for the derivation of the amounts of compensation alleged in the complaint," but it "does not disclose the expert's work or otherwise explain how Seinfeld or his counsel derived the $205 million figure for total compensation." (Op. at 7 n.24.) The Court of Chancery properly refused to credit Plaintiff's counsel's self-serving and late-filed Affidavit as evidence.[4]

D. The Executives' Employment Agreements.

Plaintiff's allegation that the Executives' employment contracts "contained no express authorization for option grants given subsequent to the contract" is also false, as Plaintiff admitted at his deposition. (Pl's. Br. at 2.)

The Executives' employment agreements challenged in this case were all entered in conjunction with Verizon's acquisition of GTE

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[3] Verizon noticed the deposition of "Any Other Witness Plaintiff Intends To Call At Trial," but no person other than Plaintiff was disclosed at any point. (B-1.)

[4] Affidavits opposing a motion for summary judgment "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Del. Ct. Ch. R. 56(e). The affidavit itself proves that it was not made on personal knowledge (but was instead made with the help of an expert), that the affiant is not competent to testify on the subject (but instead had to rely on the unexplained work of an expert), and, finally, does not contain any admissible facts because the claimed "expert" was never disclosed and could not be certified as an expert under Del. R. Evid. 702 on the record before the trial court.

in 2000. Those agreements all provide for participation in the Verizon Long-Term Incentive Plan (the "LTIP"), a bonus program administered by the Human Resources Committee of Verizon's board. (B-371, § 3.2.) The LTIP was approved by Verizon's stockholders in 2001 to amend and restate the Bell Atlantic 1985 Incentive Stock Option Plan. (B-337; B-400.) The LTIP expressly provides that participants may receive an award of stock options or other types of incentive compensation, as determined by the Human Resources Committee. (A-58-59 at 70-76; A-60-62 at 80-87; B-371-72).)

> Q: And the plan provides, in Article 6, for stock options; right?
>
> A: Grant of options, 6.1.
>
> Q: Yes, sir. The plan provides for stock options; right?
>
> A: As determined by the committee.
>
> Q: Yes. "The committee" would be the [Human Resources Committee]; right?
>
> A: Yes.

(A-62 at 85-86 (referencing B-372, § 6.1).)

Plaintiff further admitted that each of the Executives was contractually entitled to participate in the LTIP and to receive long-term incentive compensation, such as stock options, in minimum amounts under that plan. For example, with respect to the compensation of Seidenberg under his June 30, 2000 employment agreement, Plaintiff testified as follows:

> Q: All right. Now, there's no doubt in your mind that under this contract Mr. Seidenberg was entitled to receive stock options; right?
>
> A: Yeah.

Q: Right. And, and they were to have a value equal to or greater than 2.5 multiplied by the base salary; right?

A: Just a moment. Okay, you're there. I see. Yes.

. . . .

Q. It was minimum, not a maximum?

A: Right.

Q: So it could be more than that?

A: Yeah.

(A-53-54 at 52-53 (referencing B-253, § 2(c)).) Plaintiff further admitted that Seidenberg's August 14, 1997 employment agreement also entitled him to stock options pursuant to the predecessor Bell Atlantic plan.

Q: All right. And do you see where there's a reference, just right before the page break there in the middle of the paragraph, to long-term incentive compensation?

A: Yes.

Q: And to Mr. Seidenberg's right to receive that -

A: Uh-huh.

Q: - in an amount at least equal to the aggregate amounts that he had the opportunity to earn under the ordinary . . . annual grants under the comparable plans of NYNEX in effect immediately before the effective time. Do you see that?

A: Yes.

. . . .

Q: See where it says "at least equal to" those amounts?

. . . .

Q: I, I think you've spotted it. If it's helpful, I'm happy to restate my question.

A. You're pointing out that he's entitled to it.

Q: Well, he's entitled to at least the amounts designated in that paragraph; right?

A: Yes.

Q: And because it says "at least," he can be entitled to more, depending upon the decision the board or the committee makes; right?

A: Yeah.

(A-54-55 at 56-58 (referencing B-296 at § 3(b)).)

The employment agreements of Lee and Babbio are no different: both provide for an "annual long-term bonus opportunity," which can include stock options, of a multiple of their respective base salaries. (B-94, § 7 (Lee); B-164, § 7 (Babbio).) For example, Plaintiff admitted that Babbio's November 2, 2000 employment agreement entitled him to an annual minimum amount of long-term bonus compensation.

Q: Sure. Now, paragraph No. 7 again speaks to bonus opportunities made available to Mr. Babbio; right?

A: Yes.

. . . .

Q: Okay. What I have in mind - let me just read that; then I'll ask you questions. Do you see where it says, "The value of your annual long-term bonus opportunity shall not be less than 500 percent of your then-current base salary"? Do you see that?

A: Yes.

. . . .

Q: And it could be more than that; right?

A. Yes.

(A-52 at 46-48 (referencing B-213, § 7).) Plaintiff also admitted that Babbio was similarly entitled to long-term incentive compensation

(including stock options) in a minimum amount under Babbio's June 1, 1998 Bell Atlantic employment agreement.

Q: Mr. Babbio was entitled to receive stock options under this agreement; right?

A: That's what the agreement says; yes.

. . . .

Q: -- under this, this agreement, Mr. Babbio was entitled to receive stock options with a value equal to or greater than 1.6 multiplied by his base, base salary; right?

A. I'm looking for . . . Yeah. I see that.

Q. Sure. So it could be equal to that amount, or it could be greater than that amount -

A: Yes.

(A-55-56 at 60-64 (referencing B-305 § 2(c)).)

Lastly, Plaintiff conceded that Lee was entitled to long-term incentive compensation pursuant to his December 5, 2000 employment agreement with Verizon.

Q: Okay. Let's take a look at, at the language of paragraph 7. It, it talks about the bonus opportunities being made available to Mr. Lee; right?

A: Yes.

. . . .

Q: And you understood that his long-term bonus opportunity should not be less than 800 percent of his current base salary -

A: Yes.

Q: -- right? And it could be more than that if the committee and the board thought that was appropriate; right?

A: Uh-huh. Yes.

(A-51 at 42-44 (referencing B-94, § 7).)[5]

Plaintiff thus admitted that he has no basis on which to claim that the Executives were not entitled to long-term incentive compensation, such as stock options. Plaintiff also conceded that Seidenberg's and Babbio's earlier Bell Atlantic employment agreements provided for stock options in a similar manner, and he offered no evidentiary support for his claim that any agreement was "amended to permit option grants as part of the long term bonus plan just prior to defendant seeking approval of the option and bonus plans from shareholders." (Pl.'s Br. at 2.)

Plaintiff also admitted that he has no facts to challenge whether the Executives provided appropriate service in exchange for their compensation (which they did).

Q: And is that what you're worried about here in making this demand?

A: Not that, specifically. I want to see what was done to earn all the benefits that come under the contract.

Q: Do you have any reason, as you sit here today, to believe that they didn't earn the benefits under the contract?

A: No, I don't have anything at this point.

(A-56 at 62-63.)

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[5] Lee's compensation by GTE prior to GTE's acquisition by Verizon in 2000 was not a subject of Plaintiff's demand and Plaintiff never introduced any evidence of that compensation. (A-8, A-12-13.)

E. Approval of the Long-Term Incentive Plan.

Finally, Plaintiff has no support for his allegation that "long term bonus plan, under which the 'option compensation' in options was paid, was amended in January 2001, to permit, *inter alia*, the participation in the plan by the chief executives." (Pl's. Br. at 11.) Not only did Plaintiff admit that Seidenberg and Babbio were entitled to stock options under their prior Bell Atlantic employment agreements (*supra* at 12-14), but Plaintiff never explained why or how the LTIP was amended to benefit them. Plaintiff conceded at his deposition that he had no support for his wholly speculative claim that the LTIP was "conveniently" amended to benefit the Executives. (Op. at 2.)

> Q. Let me, let me, let me try it again, if I could, sir. As you sit here today, do you have any reason to believe that the long-term incentive plan was somehow changed to make options more valuable?
>
> A. I don't know.
>
> Q. You have no reason to believe that that ever happened?
>
> A. I don't know.

(A-67 at 108.)

ARGUMENT

I. STANDARD AND SCOPE OF REVIEW.

"'The question of a "proper purpose" under Section 220(b) of our General Corporation Law is an issue of law and equity which this Court reviews de novo.'" *Thomas & Betts*, 681 A.2d at 1030 (quoting *Compaq Computer Corp. v. Horton*, 631 A.2d 1, 3 (Del. 1993)). However, because a stockholder does not need to prove actual wrongdoing or mismanagement to establish a proper purpose for a books and records inspection, but only a credible basis of probable wrongdoing, "the trial judge's determination of that credible basis after considering the totality of the evidence is entitled to considerable deference." *Security First*, 687 A.2d at 565; *see also Thomas & Betts*, 681 A.2d at 1032 ("[a]ccording appropriate deference to the factual findings of the Court of Chancery" in affirming that court's refusal to permit an inspection of certain corporate documents). Here, the Court of Chancery, after considering the totality of the evidence (or lack thereof), found that Plaintiff did not show a credible basis of probable wrongdoing in the compensation received by the Executives, and that judgment is entitled to considerable deference.

II. PLAINTIFF OFFERS NO REASON TO OVERTURN THIS COURT'S WELL-ESTABLISHED PRECEDENT REQUIRING SECTION 220 PLAINTIFFS TO SHOW A "CREDIBLE BASIS."

Plaintiff's Opening Brief demonstrates that he has failed to satisfy his burden to show, "by the preponderance of the evidence, that there exists a credible basis to find probable corporate wrongdoing" in Verizon's compensation of the Executives. *Security First*, 687 A.2d at 565; *see also Thomas & Betts*, 681 A.2d at 1031 ("In order to meet that burden of proof, a stockholder must present some credible basis from which the court can infer that waste or mismanagement may have occurred."). Plaintiff admits that he "had no actual evidence that in fact wrongdoing had taken place," thus reaffirming the correctness of the Court of Chancery's judgment. (Pl.'s Br. at 2.)

Because Plaintiff cannot show the necessary factual predicate to inspect Verizon's books and records, he now asks this Court to hold that a stockholder seeking to investigate corporate wrongdoing need not produce *any* evidence to establish a proper purpose under Section 220. Plaintiff argues that "[t]o require . . . evidence of wrongdoing, as the Chancery Court did, before allowing any sort of examination, is effectively a non-starter." (Pl's. Br. at 3.) Plaintiff also asserts that requiring evidence of wrongdoing prevents the shareholder from "using the tools at hand" (*id.*), and "makes a § 220 application a mirage." (Pl.'s Br. at 11.) Instead of having to show "evidence," Plaintiff asks this Court to permit his inspection based merely on "*suspicions* [that] seem reasonable and logical based on public filings." (Pl's. Br. at 11-12 (emphasis added).) Putting

aside that none of his suspicions are either "reasonable" or "logical," Plaintiff's argument that he should be permitted access to the Company's books and records without any *evidence* should be rejected for four reasons.

First, and most importantly, Plaintiff's argument -- that no evidence of wrongdoing should be required before permitting a plaintiff to investigate that wrongdoing by reviewing books and records -- is directly at odds with this Court's well-established holdings in *Security First*, 687 A.2d at 568, and *Thomas & Betts*, 681 A.2d at 1031, that Section 220 plaintiffs must present evidence supporting a "credible basis" of probable wrongdoing before a court will force a corporation to open its books and records for inspection.[6] As stated in *Security First*, this Court in *Thomas & Betts* "cited with approval" the proposition that "[t]here must be *some evidence* of probable mismanagement as would warrant further investigation of the matter." *Security First*, 687 A.2d at 568 (emphasis added) (citing *Thomas & Betts*, 681 A.2d at 1031, and *Helmsman Mgmt. Servs. v. A & S Consultants, Inc.*, 525 A.2d 160, 164 (Del. Ch. 1987)); *see also Everett v. Hollywood Park, Inc.*, C.A. No. 14556, 1996 Del. Ch. LEXIS 2, at *5 (Del. Ch. Jan. 19, 1996) ("Where, as here, the plaintiff's

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[6] The "credible basis" standard is undoubtedly a well-established part of Delaware's corporation law. *See, e.g.*, Donald J. Wolfe, Jr. & Michael A. Pittenger, CORPORATE AND COMMERCIAL PRACTICE IN THE DELAWARE COURT OF CHANCERY, at § 8-6[e] (2005) ("a plaintiff seeking inspection for these purposes must demonstrate some credible evidence of possible mismanagement sufficient to warrant further investigation to determine whether such activity is, in fact, afoot."); David A. Drexler, Lewis S. Black and A. Gilchrist Sparks, III, DELAWARE CORPORATION LAW AND PRACTICE, at § 27.04 at 27-11(2005) ("where the claimed purpose is to investigate waste or mismanagement, there must be an evidentiary showing of a credible possibility of the existence of such improprieties to authorize such an inspection").

purpose is to investigate possible waste or mismanagement, she must also adduce evidence of potential mismanagement sufficient to support her suspicions and to warrant going forward."). Further indicating that "evidence" is a necessary component of showing under Section 220, this Court also held in *Security First* that a stockholder plaintiff "must show the credible basis by a preponderance of the evidence." *Security First*, 687 A.2d at 567.[7]

Second, Plaintiff's proposal that the "credible basis" standard should be replaced by a standard permitting inspection based on unsupported suspicions has been repeatedly rejected. Plaintiff proposes that inspection should be permitted "if [a plaintiff's] *suspicions* seem reasonable and logical based on public filings."[8]

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[7] None of the cases cited by Plaintiff indicates that a stockholder plaintiff can inspect corporate books and records based solely on his suspicions. (Pl.'s Br. at 7.) *See Saito v. McKesson HBOC, Inc.*, 806 A.2d 113, 116 (Del. 2002) (addressing the scope of inspection permitted after plaintiff showed "credible evidence of possible wrongdoing"); *Nodana Petroleum Corp. v. State ex rel. Brennan*, 123 A.2d 243, 246 (Del. 1956) (affirming mandamus ordering inspection of books and records because Plaintiff stated a proper purpose); *Freund v. Lucent Techs., Inc.* C.A. No. 18893, 2003 WL 139766, at *3 (Del. Ch. Jan. 9, 2003) (granting inspection because the SEC's formal investigation, revisions of the company's financial statements, and shareholder lawsuits "adequately supplies 'some credible basis' to support an inference of waste or mismanagement"); *Dobler v. Montgomery Cellular Holding Co.*, C.A. Nos. 18105, 18499, 2001 WL 1334182, at *4 (Del. Ch. Oct. 19, 2001)(agreeing that "mere curiosity" was not adequate to justify inspection, but permitting inspection where the corporation made undisclosed and undocumented "advances to affiliates" in excess of its net income); *Skoglund v. Ormand Indus., Inc.*, 372 A.2d 204, 207-08 (Del. Ch. 1976) (granting inspection where plaintiff introduced evidence that the defendant was being "looted" and that there were "improper manipulations of corporate finances"); *Henshaw v. Am. Cement Corp.*, 252 A.2d 125, 128 (Del. Ch. 1969) (permitting a director inspection rights pursuant to the common law).

[8] The only precedent cited by Plaintiff for his theory that "only a suspicion" will entitle stockholders to documents is *Sutherland v. Dardanelle Timber Co.*, C.A. No. 671-N, 2005 WL 3272125 (Del. Ch. Nov. 18, 2005). (Pl's. Br. at 12.) But that opinion never even uses the word

(cont'd)

(Pl's. Br. at 11-12 (emphasis added).) Delaware courts have repeatedly rejected similar attempts to permit books and records inspections "based on wholly unsupported allegations or mere suspicions." *See* Op. at 8; *Deephaven Risk Arb Trading Ltd. v. UnitedGlobalCom, Inc.*, C.A. No. 379-N, 2005 WL 1713067, at *8 (Del. Ch. July 13, 2005) (stockholders "cannot satisfy [their] burden merely by expressing a suspicion of wrongdoing or a disagreement with a business decision.") (citations omitted); *Weiland v. Cent. & S.W. Corp.*, C.A. No. 9769, 1989 WL 48740, at *2 (Del. Ch. May 9, 1989) (dismissing § 220 action for plaintiff's failure to provide the "necessary factual support for plaintiff's suspicions.").[9]

Third, Plaintiff's arguments that requiring a plaintiff to produce evidence "makes a § 220 application a mirage" or "erects an insurmountable barrier for the minority shareholder[s] of a public company" ring hollow. (Pl's. Br. at 11.) Section 220 plaintiffs often prevail by showing evidence of probable mismanagement or

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"suspicion." Instead, the court notes that Section 220 could be used to investigate the compensation of two "self-dealing" directors who allegedly "set their own salaries and perquisites." *Id.* at *1. In the court's initial ruling on this point, it expressly invoked the "credible basis" standard, and did not purport to rely on mere suspicions. *Sutherland,* Tr. at 81 ("there's been a credible basis demonstrated to believe that, in using their powers as fiduciaries, [the brothers] set benefits and perquisites for themselves as employees, and that's self dealing."). Plaintiff has admitted here that Verizon's directors have no similar "conflict of interest" in considering the Executives' compensation. (*Infra* at 25-26.)

[9] While it is appropriate to show a credible basis based on "documents, logic, testimony or otherwise," there is no substance to Plaintiff's argument that his case is supported by "logic." *See Security First*, 687 A.2d at 565; Pl's. Br. at 8-9. For example, there is no "logic" behind Plaintiff's subjective belief that the compensation was "extraordinary" or the demonstrably false allegations that Verizon had three CEOs and that the Executives' employment contracts were amended to benefit them inappropriately. (*Infra* at 7-15.)

wrongdoing that satisfies the "credible basis" standard, as shown by many of the cases cited by Plaintiff. *See, e.g., Freund,* 2003 WL 139766, at *3 (granting inspection where plaintiff's evidentiary showing "adequately supplies 'some credible basis' to support an inference of waste or mismanagement"); *Dobler,* 2001 WL 1334182, at *4 (permitting inspection where the corporation made undisclosed "advances to affiliates" in excess of its net income). As these cases show, a "whistle blower or videocassette" is not necessary to put forth evidence of probable wrongdoing, but reliance on mere allegations and suspicions is not enough. (Pl's. Br. at 3, 11.)

Fourth, this Court recognized in *Security First* that permitting inspection based on anything less than the "not insubstantial" burden of showing a "credible basis" of probable wrongdoing or mismanagement is an invitation to use Section 220 as a fishing expedition. *Security First,* 687 A.2d at 568 ("The threshold for a plaintiff in a Section 220 case is not insubstantial. Mere curiosity or a desire for a fishing expedition will not suffice."). If this Court were to adopt Plaintiff's proposed standard, any Delaware corporation would be subject to a books and records inspection based solely on the unsubstantiated suspicions of a stockholder. Requiring so little to justify an intrusive books and records inspection would ignore the rights and legitimate interests of the corporation. *See CM & M Group, Inc. v. Carroll,* 453 A.2d 788, 793 (Del. 1982) ("Counterposed to the duty to protect the rights of the stockholder, the Court has the duty to safeguard the rights and legitimate interests of the corporation," (citing *State ex rel.*

Cochran v. Penn-Beaver Oil Co., 143 A. 257, 260 (Del. 1926) ("While it is the duty of the court to protect the rights of stockholders, it is equally their duty to safeguard the rights of the corporation as such.")). The burden of complying with a books and records inspection should not be forced on a company based on unsupported suspicions, but should instead only be imposed where the stockholder can show a "credible basis" of wrongdoing that warrants further investigation.

For the foregoing reasons, this Court should reject Plaintiff's invitation to overrule the "credible basis" standard set forth by this Court in *Security First* and *Thomas & Betts*, and should affirm the judgment of the Court of Chancery.

III. THE COURT OF CHANCERY CORRECTLY CONCLUDED THAT PLAINTIFF FAILED TO SHOW A CREDIBLE BASIS OF PROBABLE WRONGDOING IN VERIZON'S COMPENSATION OF THE EXECUTIVES.

Given Plaintiff's concession that he has "no actual evidence that in fact wrongdoing had taken place" (Pl.'s Br. at 2), the Court need not consider whether the Court of Chancery erred when it came to the same conclusion. Plaintiff has admitted that the Court of Chancery's judgment was correct.

Nonetheless, the record before the Court of Chancery unequivocally supports its holding that, even reviewing the evidence in the light most favorable to Plaintiff,[10] "he has not carried his burden of showing that there is a credible basis from which the court can infer that the Verizon board of directors committed waste or mismanagement in compensating these three executives during the relevant period of time." (Op. at 8 (citing *Security First*, 687 A.2d at 568; *Brehm v. Eisner*, 746 A.2d 244, 266-67 (Del. 2000); *Helmsman*, 525 A.2d at 166).)

That conclusion, which is entitled to "considerable deference" in this Court, is not disturbed by Plaintiff's continued practice of citing his own unsupported allegations as fact. *Security First*, 687 A.2d at 565. To the contrary, Plaintiff's deposition testimony and briefs demonstrate the lack of support for his allegations of a breach of fiduciary duty, waste or any other impropriety in the Executives' employment agreements or option compensation.

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[10] Plaintiff does not challenge the Court of Chancery's application of the summary judgment standard.

A. Plaintiff Admitted That He Has No Evidence That The Directors Breached Their Fiduciary Duties.

Plaintiff claimed below that the purpose of his Section 220 suit was to investigate, among other things, "self-dealing . . . disloyalty and breach of fiduciary duties." (A-92 at ¶ 17.) Yet Plaintiff admitted in his deposition that he was not claiming that Verizon's directors breached their fiduciary duties of loyalty, care or good faith in the approval of the Executives' compensation.

> Q: Mr. Seinfeld, you're not claiming here today that any particular director had any conflict of interest in making decisions with respect to either the Seinfeld [sic], Babbio, or Lee employment contracts or compensation issues?
>
> A: At this time I'm not making any such claim because I have no such knowledge of it - at this time.
>
> . . . .
>
> Q: I'm just inquiring as to whether or not, today, you're making any claim that there's any independence issue with respect to any Verizon director on these issues?
>
> A: I can't. I have no such knowledge at this point. . . .
>
> . . . .
>
> Q: All right. And you're not personally challenging the process through which compensation decisions were made?
>
> A: Not at this time.

(A-49 at 33-35; *see also* Op. at 5 n.18.)

Because Plaintiff has admitted that he has no basis to challenge the directors' loyalty and exercise of due care in making compensation decisions, he cannot show a credible basis for a breach of fiduciary duty. As this Court has said, "the size and structure of executive compensation are inherently matters of judgment." *Brehm*, 746 A.2d at 263 (footnote omitted). And "[w]hen a business judgment

forms the basis of a request for books and records, a stockholder must show a credible basis for an inference that management suffered from self-interest or failed to exercise due care in a particular decision." *Marathon Partners L.P. v. M&F Worldwide Corp.*, C.A. No. 018-N, 2004 WL 1728604, at *4 (Del. Ch. July 30, 2004) (footnote omitted). Because Plaintiff admitted that he had no evidence of self-interest or that the directors failed to exercise due care, Plaintiff has no credible basis on which to challenge the directors' business judgment and the Court of Chancery correctly granted Verizon summary judgment.

B. Plaintiff Admitted That He Has No Evidence That The Executives' Compensation Rose To The Level Of Waste.

Plaintiff similarly admitted that he had no evidence to support his desire to investigate whether there was "waste" in the compensation of the Executives. (A-92 at ¶ 17.) To establish that compensation is wasteful, Plaintiff must show "an exchange that is so one sided that no business person . . . could conclude that the corporation has received adequate consideration." *Brehm*, 746 A.2d at 263 (quotation omitted); *see also Lewis v. Vogelstein*, 699 A.2d 327, 336 (Del. Ch. 1997) (noting there is no waste when "any substantial consideration" is received by the corporation). This Court has made clear that compensation is wasteful only in "unconscionable cases where directors irrationally squander or give away corporate assets." *Brehm*, 746 A.2d at 263.

Plaintiff did not introduce any evidence that could support a waste claim, and thus the Court of Chancery correctly concluded that there was no "evidence from which the court could evaluate whether

there is a reasonable ground for suspicion that the executives' compensation rises to the level of waste." (Op. at 6-7.)

First, Plaintiff's "colorful" claim that the Executives were all paid to do the same job was obviously baseless. (Op. at 6 n.20.) Plaintiff admitted at both his deposition and in the Opening Brief that Verizon did not have three CEOs. (*Supra* at 7-8; Pl's. Br. at 10.) Plaintiff also admitted that he had "no reason to challenge the board's business judgment on the issue of having co-CEOs." (A-66 at 104.) Finally, Plaintiff admitted that he had no "evidence that Mr. Lee or Mr. Seidenberg did identical or duplicative work." (*Id.* at 103.) Thus, Plaintiff introduced no facts to support his "colorful" allegation that Verizon had three CEOs or that it was wasteful to have co-CEOs.

Second, Plaintiff introduced no evidence in support of his theory that the three Executives collectively received $205 million over three years, or that said amount was "excessive compensation." (Pl's. Br. at 4.) Plaintiff never introduced *any evidence* in support of his $205 million allegation other than his own counsel's affidavit, which is not evidence. (*Supra* at 8-10.) Moreover, even if the Executives collectively earned $205 million over three years, his theory that such compensation was extraordinary was solely his own *opinion* and was supported by no evidence whatsoever. (Pl's. Br. at 2.) In fact, Plaintiff admitted at his deposition that "he ha[d] no basis in fact to allege the executives 'did not earn' the amounts paid to them under their employment agreements." (Op. at 6.)

Q. Do you have any reason, as you sit here today, to believe that [the Executives] didn't earn the benefits under the contract?

A. No. I don't have anything at this point.

(A-56 at 63; Op. at 6 n.21.) By conceding that he has no reason to believe that the Executives did not earn their compensation, Plaintiff has admitted he has no evidence of "an exchange that is so one sided that no business person . . . could conclude that the corporation has received adequate consideration." *Brehm*, 746 A.2d at 263 (quotation omitted). This is particularly true with respect to stock option compensation, for the General Corporation Law expressly provides that the "judgment of the directors" on the issuance of stock options "shall be conclusive" unless Plaintiff pleads "actual fraud," which appears nowhere in Plaintiff's allegations or the record. 8 *Del. C.* § 157(b).

In short, Plaintiff's factually unsupported complaints about the compensation earned by the Executives amounts to no more than his own "subjective belief" that such compensation must have resulted from wrongdoing. As this Court has explained, a stockholder's "subjective belief that wrongdoing has occurred is insufficient to meet the evidentiary burden required to compel inspection." *Thomas & Betts Corp.*, 681 A.2d at 1032. Accordingly, the Court of Chancery's holding that Plaintiff failed to satisfy his burden to show a credible basis of waste should be affirmed.

C. Plaintiff Failed To Show Mismanagement Or Wrongdoing With Respect To The Employment Agreements.

Nor can Plaintiff show a credible basis that Verizon compensated the Executives in violation of their employment agreements

or that there was any impropriety in the fact that the Executives entered new employment agreements in 2000 in conjunction with Bell Atlantic's acquisition of GTE. (A-57 at 65.)

Plaintiff's allegation that "the contracts with Seidenberg, Babbio and Lee contained no express authorization for option grants given subsequent to the contract" (Pl's. Br. at 2) is unsupported and false. Plaintiff admitted at his deposition that all of the 2000 employment agreements entitled the Executives to annual long-term incentive compensation, which can include stock options. (*Supra* at 10-15; *see also* Pl's. Br. at 10-11 (admitting that the employment contracts provide for long-term opportunities, which include options).) Plaintiff's admission, coupled with his lack of evidence "showing that the executives were not entitled to these options," demonstrate that Plaintiff has failed to establish a credible basis of wrongdoing. (Op. at 7.) *See Mattes v. Checkers Drive-In Rests., Inc.*, C.A. No. 17775, 2001 WL 337865, at *1 (Del. Ch. Mar. 28, 2001) (denying inspection because of "the paucity of evidence suggesting any wrongdoing or waste of corporate assets"); *Weiland*, 1989 WL 48740, at *2 (dismissing Section 220 complaint because plaintiff did "not provide the necessary factual basis for a books and records inspection").

Nor is there any evidence supporting Plaintiff's claims that the Executives' compensation was "far in excess of the minimum requirements to be paid [to] the three executives." (Pl's. Br. at 4.) Plaintiff introduced no evidence in support of that allegation. He never once compared the amount of compensation in the employment agreements to the amount Plaintiff claims that the Executives were

paid. Plaintiff presented the trial court with no evidence that the Executives were paid in excess of the minimum amounts in their employment agreements.

Similarly deficient is Plaintiff's allegation that "the [Executives'] employment contracts were amended to permit Lee, Babbio, and Seidenburg [sic] to participate in the Long Term Bonus Option Plan on the eve of the amendments of those plans." (Pl's. Br. at 8; *see also id.* at 2.) This allegation is, again, demonstrably false. Plaintiff never identifies even one provision in the employment agreements intended to have this effect. Nor could he. Seidenberg and Babbio's prior Bell Atlantic employment agreements both provided for long-term incentive compensation under the Bell Atlantic 1985 Incentive Stock Option Plan. Plaintiff's allegation that those agreements were amended to let the Executives receive stock options for the first time is pure fantasy.

Finally, even if Plaintiff could establish that Verizon altered the agreements to entitle the Executives to more valuable stock options, Plaintiff cannot explain why doing so would be wrongdoing or mismanagement. Those decisions would have been the protected business judgment of the Board of Directors, and Plaintiff concedes he has no evidence otherwise. (*Supra* at 25.) Plaintiff has offered no reason why an ordinary course and unconflicted business judgment to increase the Executives' compensation would be "wrongdoing" sufficient to warrant investigation under Section 220.

D. Plaintiff Provided No Evidence Of Mismanagement Or Wrongdoing With Respect To The LTIP.

Plaintiff set forth no evidence supporting any credible basis of wrongdoing in the approval of Verizon's LTIP in 2001. Contrary to Plaintiff's allegation, the LTIP was not "amended . . . to permit, *inter alia*, the participation in the plan by the chief executives," and Plaintiff has no evidence that it was. (Pl's. Br. at 11.) The LTIP never even mentions the Executives, and it has no provision directed to them specifically. Rather, the LTIP was approved by stockholders at the first annual meeting following the acquisition of GTE as "an amendment and restatement of the Bell Atlantic 1985 Incentive Stock Option Plan" that "replace[d] all prior long-term incentive plans of predecessor companies." (B-337.) There is nothing indicative of wrongdoing or mismanagement in amending a compensation plan following a major corporate transaction.

Plaintiff himself admitted he has no basis to suspect wrongdoing in the 2001 approval of the LTIP. He was asked at this deposition if he had "any reason to believe that the long-term incentive plan was somehow changed to make options more valuable." (A-67 at 108.) His response: "I don't know." (*Id.*) As such, the Court of Chancery correctly concluded that Plaintiff's claim that the LTIP was "conveniently" amended to benefit the Executives was "purely speculative." (Op. at 7.) In the court's words, "Seinfeld did not submit any evidence showing that . . . any amendments to the [LTIP] were intended to improperly benefit [the Executives]." (*Id.*)

Finally, even if Verizon had amended the LTIP to benefit the Executives (which it did not), Plaintiff introduced no theory by which such an amendment amounted to wrongdoing or mismanagement.

E. Plaintiff's Disagreement With Verizon's Compensation Decisions Does Not Satisfy His Burden.

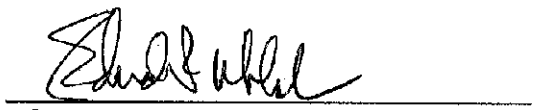
Because Plaintiff has failed to "present some credible basis from which the court can infer waste or mismanagement may have occurred," *Thomas & Betts*, 681 A.2d at 1031, the most that can be said of the record he made before the trial court is that Plaintiff disagrees with the compensation decisions made by Verizon's board of directors. But Plaintiff's disagreement with a business decision does not supply the credible evidence of waste or mismanagement that he is missing. (Op. at 8); *Marathon Partners*, 2004 WL 1728604, at *4 ("When a business judgment forms the basis of a request for books and records, a stockholder must show a credible basis for an inference that management suffered from some self-interest or failed to exercise due care in a particular decision.")(footnote omitted); *Mattes*, 2001 WL 337865, at *6-*7 (disagreement with a business decision is not credible evidence of wrongdoing under § 220); *Everett*, 1996 WL 32171, at *6 (same); *cf. Brehm*, 746 A.2d at 266 (citing with approval the Court of Chancery's holding that plaintiffs' disagreement "with the course of action taken by the Board regarding" an executive's severance "will not suffice to create a reasonable doubt that the Board's decision . . . was the product of an exercise of business judgment.") (citation omitted).

In the absence of any actual evidence of wrongdoing (which Plaintiff now admits) the Court of Chancery thus correctly held that

Plaintiff "has not carried his burden of showing that there is a credible basis from which the court can infer that the Verizon board of directors committed waste or mismanagement in compensating [the Executives] during the relevant period of time." (Op. at 8.) Thus, the Court of Chancery's ruling should be affirmed.

CONCLUSION

For the foregoing reasons, the Court of Chancery's November 23, 2005 Opinion denying Plaintiff's motion for summary judgment and granting Verizon's cross-motion for summary judgment should be affirmed.



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