IN THE SUPREME COURT
OF THE STATE OF DELAWARE

FRANK D. SEINFELD,	)	No. 624, 2005
	)	
Plaintiff Below,	)	
Appellant	)	Court Below:
	)	Court of Chancery of the
v.	)	State of Delaware in and
	)	For New Castle County
VERIZON COMMUNICATIONS, INC.,	)	C.A. No. 1100-N
	)	
Defendant Below,	)	
Appellee	)	

PLAINTIFF-APPELLANT'S SUPPLEMENTAL REPLY BRIEF

BIGGS AND BATTAGLIA

Robert D. Goldberg (ID # 631)
Biggs and Battaglia
921 North Orange Street
P.O. Box 1489
Wilmington, DE 19899
(302) 655-9677
Attorney for Defendant

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Of Counsel:

A. Arnold Gershon, P.C.
Irving Bizar, Esq.
Gloria Kui, Esq.
Ballon Stoll Bader & Nadler, P.C.
1450 Broadway - 14th Floor
New York, New York
T: (212) 575-7900
F: (212) 764-5060

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NATURE AND STAGE OF PROCEEDINGS

This is an appeal from a Chancery Court decision dismissing Plaintiff's §220 demand for corporate information relating to the compensation of three Verizon executives. After initial briefing and argument before a panel of three justices on May 3, 2006, the Court issued its Order of May 17, 2006, calling for an *En Banc* hearing after supplemental briefing on two issues, raised by the Court and submitted for briefing in the form of questions to be answered by the parties. Consistent with the Court's Order of May 17, 2006, the parties submitted their opening supplemental briefs on June 2, 2006. This is Plaintiff's Supplemental Reply Brief in response to defendant's opening supplemental brief. [1]

1.Defendant's Supplemental Brief will be referred to as "DSB, p. ____".

ARGUMENT

I. §220 BOOKS & RECORDS REQUEST SHOULD BE GRANTED IF IT MEETS THE RATIONAL BASIS TEST.

Defendant argues that the standard should be "credible basis" rather than "rational basis." It correctly observes that the "credible basis" standard requires a stockholder to produce evidence that, in most cases, he will not have. Such a standard protects neither stockholders nor corporations, but only "a torpid and unfaithful management," *Rales v. Blasband*, 634 A.2d 927, 933 (Del. Supr. 1993), and those that are secretive as well. Moreover, defendant's position penalizes the shareholder of a public company. That shareholder has no access to corporate records, documents or contacts to ascertain whether credible evidence of wrongdoing would be present, unless those materials are filed in publicly available records, like the SEC's or FASB's or otherwise reach the internet. Thus, that shareholder would be unable to offer "a credible basis" that possible wrongdoing took place unless such shareholder had a whistle blower or video cassette. That shareholder would have to wait until there is a governmental investigation or suit, or a valid securities class action or the public company confesses publicly to a vast misconduct. By that time, substantial damage would have been done.

Plaintiff submits that such a shareholder, who otherwise meets the statutory criteria in a summary proceeding authorized

by that statute, based on common law, should not have to produce some evidence of a credible basis that possible misconduct occurred to justify the proceeding before an inspection can be ordered. The statute has no such provision, and the common law has no such requirement.

Indeed, no other civil action requires a plaintiff to introduce such evidence to justify the commencement of a litigation. Even shareholder derivative litigation only requires allegations sufficient to enable the plaintiff shareholder to prove any set of facts. Detailed allegations are required only for demonstration of demand futility or fraud. And even as to those allegations, there is no requirement that plaintiff produce some evidence to support the claims.

In no civil action is the shareholder plaintiff required to submit some evidence before he or she can commence discovery.

The defendant's supplemental brief focuses principally on evidence. (*See, e.g.*, DSB, p. 2, 5 et seq.) As we have noted, such a requirement is a non-starter. The common law noted that the shareholders' right of inspection

> . . . is necessary to their protection. To say that they have the right, but that it can be enforced only when they have ascertained, in some way without the books, that their affairs have been mismanaged, or that their interests are in danger, is practically to deny the right in the majority of cases. Oftentimes frauds are discoverable only by examination of the books by an expert accountant. The books are not the private property of the directors or managers, but

> are the records of their transactions as trustees for the stockholders.

J.W. Guthrie et al v. Harkness, 199 U.S. 148, 154-55 (1905), reiterated by this Court in *State ex rel Brumley v. Jessup & Moore Paper Co.*, 77 A. 16, 22 (Del. Supr. 1910).

Defendant claims that "scores of Section 220 suits have been filed since *Security First*", and the instant suit "is one of only two cases in which a plaintiff's demand to investigate wrongdoing was found to be entirely lacking a credible basis" (DSB, p.12), but there is no citation or supporting evidence for such claim, and it is misleading. Defendant does not disclose how many of those cases involved closely held, non-public companies. In such companies there are different dynamics and it is often easier for shareholders in those entities to produce evidence of wrongdoing. Unlike shareholders in a public company, shareholders in closely held, non-public companies frequently have access to documents, corporate records and/or participate in, or are close to, management and thus would be more likely to have some credible evidence of possible wrongdoing.[2] In contrast, Plaintiff's research discloses that there were approximately ten §220 cases involving public companies. Three were denied. Of those, seven involved press releases, governmental investigations, lawsuits, and the company's restating its financials. Clearly then,

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2.*See*, for example, *Southerland v. Dardanelle Timber Co.*, 2006 WL 145153 (Del. Ch. 2006); *Everett v. Hollywood Park*, 1996 WL 32171 (Del. Ch. 1996).

Defendant's conclusion about the "scores" of Section 220 suits filed and the discovery presumably granted, does not reflect the difficulties posed when a shareholder of a public company seeks information about the management of his company.

II. §220 REQUIRES THAT THE SHAREHOLDER MAKING A REQUEST FOR CORPORATE INFORMATION NEED ONLY HAVE A "PROPER PURPOSE."

Defendant relies upon cases which are patently distinguishable from the case at bar. (DSB, p.9)

In *Deephaven Risk v. United Global Com.*, 2005 WL 1713067 (Del.C. 2005), there were inconsistent press releases; in *Freund v. Lucent Technologies*, 2003 WL 139766(Del. Ch. 2003) and *Carapico v. Phila Stock Exch., Inc.*, 791 A.2d 787 (Del. Ch. 2001), there were governmental investigations. In *Saito v. McKesson HBOC*, 2001 WL 818173 (Del. Ch. 2004), the company publicly restated its financials, admitted irregularities, and criminal proceedings were instituted. In *Cohen v. El Paso Corp.*, 2004 WL 2340046 (Del. Ch. 2004), there was a whistle blower; in *Khanna v. Covad Communications*, 2004 WL 187274 (Del. Ch. 2005), the former general counsel complained of certain insider transactions, and there is nothing to indicate that there was more submitted than his claims and testimony. *Dobler v. Montgomery Cellular*, 2001 WL 1334182 (Del. Ch. 2001) involved a non-public company.

Moreover, in *Haywood v. Ambase Corp.*, 2005 WL 2130614 (Del. Ch. 2005) (D.B. p.9), the Court permitted inspection relating to compensation and benefits based solely on plaintiff's claims that the compensation "stuck out like a sore thumb".

Norman v. U.S. Mobil Comm., Inc., 2006 WL 1229115 (Del. Ch. 2006) (DSB, p.9) involved a non-public company and the issue of attorneys fees. *Forsythe v. CIB Employee Private Equity Fund*, 2005 WL 1653963 (Del. Ch. 2005) (DSB p.9) dealt with a non-public company.

This Court foresaw that "some credible evidence of wrongdoing" should not be the only criteria to justify inspection. In *Security First Corp. v. U.S. Diecasting & Development Co.*, 687 A.2d 563 (Del. Supr. 1997), this Court held that a showing can also be had by "documents, logic or otherwise". It has also pointed to public documents as a source of details of corporate acts to justify application to the Court and to a public shareholder's use of public documents to support his application. *Rales v. Blasband, supra*, 634 A.2d at 934 n.10; *Grimes v. Donald*, 675 A.2d 12307 (Del. Supr. 1996); *Scattered Corp. v. Chicago Stock Exchange, Inc.*, 701 A.2d 70 (Del. Supr. 1997).

In *Brehm v. Eisner*, 746 A.2d 244 (Del. Supr. 2000), there was no evidence introduced when this Court held that §220 could be used by the plaintiff in that case.

In sum, Plaintiff submits the "rational basis" test should be one that requires a plaintiff to substantiate the §220 application by detailed allegations justifying the claims and corroborating same by reference to public documents.

Defendant points to those cases which hold that a mere purpose of inspection is not enough, but that argument misses the point. Mere statement of a purpose is not the basis of this case or plaintiff's position. We submit that compliance with §220 in a public company is met by a statement of a proper purpose supported by detailed allegations taken from and corroborated by public documents and that should be enough.

The Chancery Court's reference (also relied on by defendant) to "a difference of business judgment" is a non-sequitur. (Op. p.8; DSB, p.15) That issue may be the one that decides a derivative litigation, but should not be the one that determines a §220 application. *See, Khanna.* The issue on the §220 application is not whether there is a difference of judgment between plaintiff and the directors, but rather whether there was any judgment at all, and what the directors considered and whether they ran the numbers.

Defendant's fears of public companies being inundated with §220 requests is a false issue. Defendant offers no evidence to support that claim. Plaintiff's position for detailed allegations corroborated by public documents fully protects defendant. Indeed at bar, only a limited inspection is sought, and thus, there is "no fishing expedition". In fact, Plaintiff respectfully submits that the "tightened standards" for §220 demands noted by defendant have resulted in, and can only result in safeguarding fiduciaries and not the corporation and its stockholders. The

fears that public companies will be inundated with requests for disclosure can surely be protected by the response that the requests would be adequately justifiable in detailed allegations and corroborated by reference to public documents. There is no production by directors, officers, and any non-party witnesses. The requests would be limited and not broadly sweeping and cannot interfere with corporate operations. No depositions are taken and only limited historical records are requested to be produced. The costs are borne by the petitioner. There can thus be no interference with corporate operations.

CONCLUSION

For all the foregoing reasons, and those set forth in plaintiff's briefs, it is respectfully submitted that the Chancery Court's decision denying Plaintiff access to limited corporate records be reversed.

BIGGS & BATTAGLIA

By: /s/ Robert D. Goldberg
Robert D. Goldberg (I.D. No. 631)
921 N. Orange Street
P.O. Box 1489
Wilmington, Delaware 19899-1489
Attorneys for Plaintiff
T: (302) 655-9677
F: (302) 655-7924

Dated: June 20, 2006

Of Counsel:

A. Arnold Gershon, P.C.
Irving Bizar, Esq.
Gloria Kui, Esq.
Ballon Stoll Bader & Nadler, P.C.
1450 Broadway - 14th Floor
New York, New York
T: (212) 575-7900
F: (212) 764-5060

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