IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

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| POLYGON GLOBAL OPPORTUNITIES MASTER FUND, | ) | |
| Plaintiff, | ) | |
| v. | ) | C.A. No. 2313-N |
| WEST CORPORATION, | ) | |
| Defendant. | ) | |

***MEMORANDUM OPINION AND ORDER***

**Submitted: September 21, 2006**
**Decided: October 12, 2006**

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LAMB, Vice Chancellor.

## I.

A hedge fund that invests in event arbitrage situations purchased a significant amount of the stock of a corporation following the announcement of the corporation's going private recapitalization transaction. The hedge fund seeks to inspect the company's books and records pursuant to 8 *Del. C.* § 220 for the purposes of valuing its stock to determine whether to seek appraisal, to investigate alleged breaches of fiduciary duty that occurred before its purchase of stock, and to communicate with other stockholders. As the court finds the hedge fund already has all necessary, essential, and sufficient information to determine whether or not to seek appraisal, does not have a proper purpose to investigate wrongdoing that allegedly occurred before it bought its shares (and, in fact, led to its decision to invest), and does not seek a stockholder list to communicate with other stockholders, the complaint will be dismissed.

## II.

### A. The Parties

The plaintiff, Polygon Global Opportunities Master Fund, is a global multi-strategy arbitrage fund with approximately $4.5 billion under management. Polygon is organized as a Cayman Islands exempted company. Polygon engages in and seeks to maximize fund value through merger and event arbitrage. The defendant, West Corporation ("West Corp." or "the company"), is a Delaware

corporation with its principal place of business in Omaha, Nebraska. West Corp. provides outsourced communication solutions. Gary and Mary West are the controlling stockholders of West Corp., but are not parties to this action.

B. The Facts

1. West Corp.'s Proposed Recapitalization

On May 31, 2006, West Corp. announced what is described as a leveraged recapitalization. The recapitalization–that will take the form of a squeeze-out merger–is sponsored by an investor group led by Thomas H. Lee Partners and Quadrangle Group, LLC. The controlling stockholders, Gary and Mary West, are participating in the recapitalization and exchanging part of their stock for equity in the resulting entity. The other stockholders will receive cash for all of their stock. A special committee of independent directors, with Morgan Stanley & Co. as its financial advisors and Potter Anderson & Corroon as its legal advisors, was created to negotiate the transaction with the buyout group. Gary and Mary West reportedly did not participate in the negotiations. Ultimately, the special committee recommended and approved the recapitalization.

Under the terms of the recapitalization, West Corp.'s minority stockholders will be entitled to receive $48.75 per share in cash. This amount represents a 13% premium over the company's closing stock price the day before the transaction, but is below the trading level of the stock a month prior. Gary and Mary West will sell

approximately 85% of their stock in the company for $42.83 in cash and will convert the remaining 15% into shares of the surviving corporation. According to the proxy materials, this 15% equity investment is based on the same $42.83 per share valuation. The company's press release states that the different treatment for the Wests was requested by the special committee and required by the investor group in order to deliver a higher cash price to the public stockholders.

The Wests have agreed to vote their shares in favor of the transaction, guaranteeing the approval of the recapitalization.[1] Polygon realizes this fact, and admits there is functionally nothing it can do to stop the deal. The merger agreement provides for a 21-day "go shop" period during which West Corp. actively shopped the company and solicited other acquisition proposals. After this go shop period, the merger agreement still permits the company to respond to unsolicited proposals or further proposals from persons solicited during the go shop period. The agreement also contains a fiduciary out that permits the special committee to change its recommendation and thereby terminate the Wests' voting agreement.

[1] The Wests' voting agreement would terminate if the special committee changes its recommendation on the transaction.

2. The History Of Polygon's Ownership Of West Corp. Stock

Polygon made its first purchase of West Corp. stock immediately after the announcement of the proposed recapitalization because it believed that the situation presented an attractive risk arbitrage opportunity. As of September 14, 2006, Polygon owned 3,268,300 shares of West Corp. common stock purchased at a total cost of $157,924,117.37.

3. The Demand Letters

On June 28, 2006, Polygon made a written demand on West Corp. seeking production of certain books and records. On July 6, 2006, West Corp.'s attorneys rejected Polygon's demand on the basis that it was not made under oath and, therefore, did not comply with the technical requirements of section 220, and also because it failed to state a proper purpose. On July 11, 2006, Polygon made another demand, this time under oath, again seeking production of certain books and records. West Corp. responded on July 18, 2006 and refused the demand. Polygon offered to narrow its request on July 26, 2006, an offer that West Corp. refused two days later. This lawsuit was filed on July 31, 2006. Following the initiation of this lawsuit, the court asked Polygon to produce a chart linking the categories of documents it continued to seek with a proper purpose asserted in the demand. In connection with the submission of the chart, Polygon pared down its request, eliminating several categories of demands.

## III.

Polygon claims three purposes it contends are proper under section 220. First, it states it has a proper purpose in valuing its shares to determine whether to seek appraisal.[2] Second, it argues it has a proper purpose in investigating mismanagement and potential breaches of fiduciary duties by the Wests and West Corp.'s directors, pointing out that the Wests are being treated differently than the other stockholders. In this connection, Polygon argues that the 21-day go shop period was too short and may have acted as an obstacle to other potential bidders, and that the financial terms of the recapitalization fail to offer what Polygon considers a "meaningful premium."[3] Polygon also argues that West Corp. management gave conservative earnings guidance prior to the announcement of the transaction. Third, Polygon maintains it has a proper purpose in communicating with other stockholders to provide them with information they may consider of interest and to encourage them to seek appraisal. Polygon also notes that the transaction is subject to an "appraisal out" pursuant to which the investor group can abandon the deal if a sufficient number of stockholders seek appraisal.[4] It presumably mentions this fact to counter the assertion that it cannot prevent the transaction from going forward as planned.

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[2] Pl.'s Pretrial Br. at 6-8.
[3] *Id.* at 9.
[4] *Id.* at 12-13. The appraisal out can be waived.

West Corp. responds that none of Polygon's purposes are proper because it is an "interloper," a greenmailer, and seeks to benefit itself at the expense of other stockholders.[5] West Corp. further contends that Polygon does not need any additional information to value its stock and, therefore, valuation for determining whether to seek appraisal is not a proper purpose under the circumstances because all necessary and essential information is publicly available.[6] With regard to communicating with other stockholders, the company argues that doing so is adverse to the interests of the corporation and does not meet the compelling circumstance standard for a section 220 demand to communicate with other stockholders in this context.[7] Finally, West Corp. maintains that Polygon does not have a proper purpose to investigate wrongdoing because the alleged wrongdoing occurred before its purchase of the stock, and, in any event, Polygon cannot demonstrate any credible basis of wrongdoing.[8]

## IV.

Delaware law provides a statutory right for a stockholder to inspect the books and records of a corporation under 8 *Del. C.* § 220. This statutory right is

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[5] Def.'s Pretrial Br. at 15-16
[6] *Id.* at 18.
[7] *Id.* at 31, 34 (citing *Highland Select Equity Fund, L.P. v. Motient Corp.*, 2006 WL 2589410, at *9 (Del. Ch. July 6, 2006) (requiring "the kind of compelling circumstance this court described in *Disney*, that would authorize the use of Section 220 as a way of publicizing concerns about mismanagement").
[8] *Id.* at 25-31.

conditioned on form and manner requirements and on the stockholder's purpose for inspection being a proper one.[9] The parties have stipulated that Polygon has complied with the requirements of section 220 with respect to the form and manner of making its demand.[10] The statute defines "proper purpose" as any purpose "reasonably related to such person's interest as a stockholder."[11] If a books and records demand is to investigate wrongdoing that occurred prior to the purchase of stock, the plaintiff must have a proper purpose "reasonably related to his interest as a stockholder" and must further prove that he has some credible evidence of wrongdoing sufficient to warrant continued investigation.[12] It is not enough for a section 220 claim, however, merely to satisfy the proper purpose and credible evidence prongs of the test. Even if the technical requirements of section 220 are met and the plaintiff's purpose is proper, "[t]he scope of inspection should be circumscribed with precision and limited to those documents that are necessary, essential and sufficient to the stockholder's purpose."[13] The court will limit or

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[9] *Highland*, 2006 WL 2589410, at *6.
[10] Joint Pretrial Stipulation and Order III ¶ 2.
[11] 8 *Del. C.* § 220(b).
[12] *See Seinfeld v. Verizon Commc'ns, Inc.*, 2006 WL 2771558, at *5 (Del. Sept. 25, 2006) ("We remain convinced that the rights of stockholders and the interests of the corporation in a section 220 proceeding are properly balanced by requiring a stockholder to show 'some evidence of *possible* mismanagement as would warrant further investigation.'") (emphasis in original) (citing *Security First Corp. v. U.S. Die Casting & Dev. Co.*, 687 A.2d 563, 568 (Del. 1997)); *Saito v. McKesson HBOC, Inc.*, 806 A.2d 113, 117 (Del. 2002) ("If activities that occurred before the purchase date are 'reasonably related' to the stockholder's interest as a stockholder, then the stockholder should be given access to records necessary to an understanding of those activities.") (citations omitted).
[13] *Marathon Partners, L.P. v. M&F Worldwide Corp.*, 2004 WL 1728604, at *4 (Del. Ch. 2004).

deny any inspection to the extent that the requested information is available in the corporation's public filings.[14]

A. Polygon Has A Proper Purpose In Valuing Its Stock For Appraisal, But Has All "Necessary And Essential" Information From Public Filings

The threshold matter the court must address is whether Polygon has a proper purpose for inspecting the books and records of West Corp. It is settled law in Delaware that valuation of one's shares is a proper purpose for the inspection of corporate books and records.[15] Through its submissions and at trial, West Corp. maintains that Polygon does not have a proper purpose for valuing its stock, but, instead, is abusing section 220 for its own benefit to the detriment of the company and other stockholders. The evidence at trial did not support this assertion.

Polygon's overriding purpose is to "maximize value" for its fund. There is nothing necessarily improper about this motive, in pursuit of which Polygon explores all options, including the possibility of seeking appraisal and communicating with other West Corp. stockholders about the information it

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[14] *See* DONALD J. WOLFE, JR. & MICHAEL A. PITTENGER, CORPORATE AND COMMERCIAL PRACTICE IN THE DELAWARE COURT OF CHANCERY § 8.6(e)(1) (2005) ("Thus, to the extent that information sufficient to permit the valuation is contained in publicly available records, the inspection of corporate books and records for the purpose of such a valuation exercise will be denied."); *see also DPF, Inc. v. Interstate Brands Corp.*, 1975 WL 1963, at *2 (Del. Ch. Oct. 2, 1975) ("the stock is not only traded on the New York Stock Exchange but it is also registered with the Securities and Exchange Commission pursuant to Section 12 of the Securities Act of 1934 . . . . [T]he plaintiff could well already have access to all the information that it is reasonably and fairly entitled to receive for the purpose stated [valuation of stock].").

[15] *CM & M Group, Inc. v. Carroll*, 453 A.2d 788, 792 (Del. 1982).

obtains and viewpoints it develops about that information. The evidence at trial did show that Polygon, in previous transactions, has voted down agreements to advance its personal interests. Yet here, as Polygon admits, it can do nothing to stop this transaction. Furthermore, there is no evidence that Polygon is doing anything improper with regard to the transaction. Polygon simply saw an opportunity to purchase stock in West Corp. at what it feels was an attractive price. West Corp. has not demonstrated an improper motive, and Polygon's motive to value its stock in order to make a decision on whether to seek an appraisal is proper.

Polygon seeks additional information beyond that in West Corp.'s public filings in order to value its stock to determine whether or not to seek appraisal, yet it has not shown that the information made publicly available in connection with the proposed recapitalization transaction omits information that is necessary, essential, and sufficient for its purpose. There is a dichotomy in section 220 cases between publicly traded companies and closely held companies. With regard to the former, public SEC filings typically provide significant amounts of information about a company, and decisions granting section 220 demands are narrowly tailored to address specific needs, often in response to allegations of wrongdoing.[16]

[16] *See, e.g., Carapico v. Phila. Stock Exch.*, 791 A.2d 787 n.13 (Del. Ch. 2000) ("Of course, a person making a § 220 demand is entitled to demand documents by category and will frequently not be in a position to demand specific documents. What is required is that, at least where the purpose is to investigate particularized claims of mismanagement, the categories of documents be identified more narrowly and precisely than is typical in ordinary civil discovery.").

In contrast, stockholders in non-publicly traded companies do not have the wealth of information provided in SEC filings and are often accorded broader relief in section 220 actions.[17]

In the case of a going private transaction governed by SEC Rule 13e-3,[18] the amount of information made publicly available is even more comprehensive than that required in standard SEC periodic filings. Through its preliminary and final proxy materials, and its Schedule 13E-3, and amendments, West Corp. would appear to have disclosed all material information necessary for Polygon to determine whether or not to seek appraisal. This is not to say that there is a *per se* rule that the disclosure requirements under Rule 13e-3 are coextensive with the "necessary, essential and sufficient" information standard under section 220 demands for valuing stock in the case of a minority squeeze-out merger. Nevertheless, in the present case, the detail and scope of West Corp.'s disclosures makes this so. The disclosures include, among other things, all presentations made by Goldman Sachs and Morgan Stanley, detailed descriptions of their two fairness opinions, company projections, detailed descriptions of the board and special committee meetings, and terms of the Wests' investment in the surviving entity.

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[17] *See, e.g., Macklowe v. Planet Hollywood, Inc.*, 1994 WL 560804, at *4 (Del. Ch. Sept. 29, 1994) ("When a minority shareholder in a closely held corporation whose stock is not publicly traded needs to value his or her shares in order to decide whether to sell them, normally the only way to accomplish that is by examining the appropriate corporate books and records.") (citing *Helmsman Mgmt. Servs., Inc. v. A & S Consultants, Inc.*, 525 A.2d 160, 164 (Del. Ch. 1987)).
[18] 17 C.F.R. § 240.13e-3 (2006).

This wealth of detailed information would appear to satisfy the obligation to disclose all facts material to the decision whether to demand appraisal.

Apparently anticipating the inherent problems with requesting additional information in the face of a transaction with comprehensive public disclosures, Polygon argues that it should be given access to the same information it would receive through discovery in an appraisal action. This argument misapprehends the significant difference in scope between a section 220 action and discovery under Rule 34. The two are, in fact, "entirely different procedures."[19] Section 220 is not intended to supplant or circumvent discovery proceedings, nor should it be used to obtain that discovery in advance of the appraisal action itself.[20] If Polygon wishes to receive the documents it seeks in this action, it must elect to seek appraisal and request them through the discovery process. To now permit Polygon additional information beyond the comprehensive disclosure already in the public domain simply because it could receive such information in a later appraisal action through discovery would be putting the cart before the horse.

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[19] *Highland*, 2006 WL 2589410, at *7.
[20] *See Freund v. Lucent Techs.*, 2003 WL 139766, at *4 (Del. Ch. Jan. 9, 2003) (Section 220 does not authorize a "broad fishing expedition").

B. Polygon's Purpose To Pursue A Derivative Claim For Breach Of Fiduciary Duty Is Not Reasonably Related To Its Interest As A Stockholder, Therefore, Its Second Purpose Is Not Proper

Polygon's sole purpose for investigating claims of wrongdoing is to determine whether the board members "breached their fiduciary duties in approving the Recapitalization Transaction."[21] This purpose is not reasonably related to Polygon's interest as a stockholder as it would not have standing to pursue a derivative action based on any potential breaches.[22] Likewise, Polygon could not pursue a direct claim or class action based on entire fairness.[23] Delaware has a "public policy against the 'evil' of purchasing stock in order to 'attack a transaction which occurred prior to the purchase of the stock.'"[24] This is precisely what Polygon is attempting to do. In fact, it purchased West Corp. stock

[21] Compl. ¶ 5.
[22] *See Saito*, 806 A.2d at 117 ("If a stockholder wanted to investigate alleged wrongdoing that substantially predated his or her stock ownership, there could be a question as to whether the stockholder's purpose was reasonably related to his or her interest as a stockholder, especially if the stockholder's only purpose was to institute derivative litigation. But stockholders may use information about corporate mismanagement in other ways, as well. They may seek an audience with the board to discuss proposed reforms or, failing in that, they may prepare a stockholder resolution for the next annual meeting, or mount a proxy fight to elect new directors."). Obviously, in this case, where Polygon will cease to be a West Corp. stockholder once the transaction is effected, none of these other possibilities can be thought to exist.
[23] *Omnicare, Inc. v. NCS Healthcare, Inc.*, 809 A.2d 1163, 1170 (Del. Ch. 2002) ("The policy animating 8 *Del. C.* § 327 is not, however, limited to derivative claims alone. Rather, that policy is derived from 'general equitable principles' and has been applied to preclude stockholders who later acquire their shares from prosecuting direct claims as well.") (citation omitted).
[24] *Id*. at 1169 (Del. Ch. 2002) (quoting *Rosenthal v. Burry Biscuit Corp.*, 60 A.2d 106, 111 (Del. Ch. 1948)); 8 *Del. C.* § 327 (barring a stockholder from bringing a derivative suit unless the stockholder owned stock at the time of the alleged wrong).

after the announcement of the transaction proposal because it felt the consideration offered was too low.

To permit Polygon additional information to attack a transaction when it purchased stock knowing of the proposed transaction, indeed because of it, would be contrary to Delaware public policy. Nothing in *Saito v. McKesson HBOC, Inc.* is to the contrary. As discussed in that opinion, Saito first bought shares of McKesson common stock months before news of any financial irregularity at McKesson's merger partner, HBOC, was made public.[25] Thus, Saito's section 220 request did not contravene Delaware's strong public policy against purchasing grievances. As Polygon's purpose is not reasonably related to the alleged past breaches of fiduciary duty by the board of West Corp. in approving the recapitalization transaction, it does not have a proper purpose to investigate possible wrongdoing.

Moreover, even if Polygon were an appropriate person to investigate the circumstances of this going private transaction, at trial Polygon did not carry its burden of showing a credible basis from which the court could infer fiduciary misconduct warranting further investigation. Quite simply, there is nothing about the history of the negotiation or the structure or pricing of the proposed transaction that amounts to a "credible showing" of "legitimate issues of wrongdoing."[26]

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[25] 806 A.2d at 115.
[26] *Security First Corp.*, 687 A.2d at 568.

C. Polygon's Purpose To Communicate With Other Stockholders Is Moot

Polygon's third stated purpose is to communicate with other stockholders. A section 220 complaint seeking a stockholder list for communication with other stockholders is rarely denied because the burden is placed on the corporation to prove the plaintiff has an improper purpose.[27] Here, Polygon does not seek a stockholder list and does not intend to conduct any regulated solicitation of proxies. Instead, in its demand letter, Polygon states that it wants to communicate the information it receives through this section 220 demand to other stockholders. In connection with the trial, Polygon stated that it wishes to communicate with other stockholders about the fairness of the transaction and their decision to seek appraisal (although presumably only with a small number of other stockholders in an unregulated fashion).[28] In either case, these statements of purpose are derivative of, and dependent upon, Polygon's first two purposes. Because, as has already been discussed, neither of those purposes supports any inspection under section 220, Polygon's third purpose also fails. Quite simply, while Polygon is free to communicate with other stockholders in compliance with the federal securities

[27] *See* 8 *Del. C.* § 220(c) ("Where the stockholder seeks to inspect the corporation's stock ledger or list of stockholders and establishes that such stockholder is a stockholder and has complied with this section respecting the form and manner of making demand for inspection of such documents, the burden of proof shall be upon the corporation to establish that the inspection such stockholder seeks is for an improper purpose.").

[28] Pl.'s Pretrial Br. at 12-13.

laws, that purpose does not, itself, support any inspection of West Corp.'s books and records.

## V.

For the foregoing reasons, the complaint is DISMISSED and judgment is entered in favor of West Corp. IT IS SO ORDERED.