IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

WYNNEFIELD PARTNERS SMALL CAP VALUE L.P.,	)	
Plaintiff,	)	
v.	)	Civil Action No. 1261-N
NIAGARA CORPORATION,	)	
Defendant.	)	

MEMORANDUM OPINION

Submitted: February 15, 2006
Decided: June 19, 2006

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PARSONS, Vice Chancellor.

Plaintiff Wynnefield Partners Small Cap Value, L.P. ("Wynnefield") filed this action on April 14, 2005 seeking inspection of books and records pursuant to 8 *Del. C.* § 220 based on defendant Niagara Corporation's ("Niagara") decision to deregister its common stock and an allegation that Niagara failed to comply with its reporting obligations under federal securities laws. This Memorandum Opinion reflects the Court's post-trial findings of fact and conclusions of law.

For the reasons that follow, the Court grants Requests Nos. 1, 2, 8, 9 and 10 of Wynnefield's demand letter and denies its request in all other respects.

I. BACKGROUND

A. The Parties' Businesses

Wynnefield is a small cap value fund organized as a limited partnership. It has Wynnefield Capital Management, LLC ("WCM"), as a general partner and Nelson Obus as its managing member.

Niagara is one of the world's foremost producers of high quality specialty and commodity cold finished steel bars. Michael Scharf serves as Niagara's Chairman, President and Chief Executive Officer. Obus claims Scharf and other insiders own 38% of the Company.[1]

Although Niagara is the largest independent producer of cold finished steel bars in the United States, it is not a large company. Niagara has a market cap between $75 and

[1] Tr. at 155. Citations in this form refer to the trial transcript. Where it is unclear from the text, the identity of the witness testifying is indicated parenthetically.

$90 million.[2] In 2001 Niagara reported its net income as a loss of $4.63 million. Niagara had positive net income in 2002 and 2003, however, netting $1.67 million in 2002 and $1.61 million in 2003. Niagara's stock also has done very well in recent years closing at $1.58 on January 2, 2003, $7.00 on January 2, 2004, and as high as $9.98 on March 2, 2004.[3]

B. Niagara Decides to "Go Dark"

The Niagara board first began discussing deregistration in October 2003 and further reviewed the advantages and disadvantages of remaining a public company in early 2004.[4] The Niagara board publicly informed its shareholders that it considered the following factors in deciding to deregister:

> (i) the costs, both direct and indirect, incurred by the Company each year in connection with preparing and filing periodic reports with the SEC, (ii) the benefits of permitting senior management of the Company to spend less time on report preparation, which will allow them to devote full time and attention to the Company's operations, (iii) the substantial increase and expected further substantial increase in accounting, legal and other costs associated with remaining a registered public company in light of the requirements of Sarbanes-Oxley and the related SEC and NASDAQ rules, (iv) that the Company has not, in the recent past, raised capital in the public marketplace, nor does it plan to do so in the future, (v) that the Company does not regularly use its public stock to consummate acquisitions, (vi) that the Company's status as a registered public NASDAQ-listed company has not necessarily enhanced its corporate image and increased incentives for management and employees, (vii) the effects of

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2 Tr. at 173 (Obus).

3 JX 58.

4 JX 25 at WYN00090.

> public disclosure of information relating to the Company's business and operations to competitors, and (viii) the potential loss of liquidity to stockholders (whether or not such shares are traded on the Pink Sheets). The Board also reviewed the procedure, timing and costs associated with deregistration, as well as the effects of deregistration and deregistering on other public companies.[5]

On April 27, 2004, Niagara filed a Form 15 with the SEC to deregister under the Exchange Act. Under Section 12(g)(4) of the Exchange Act, an issuer can deregister within 90 days if it files a Form 15 certification stating that the company has less than 300 stockholders of record.[6] In this regard Niagara certified to the SEC that it had the right to deregister since it had 124 stockholders of record when it filed the Form 15.[7]

On the same day, Scharf, Niagara's CEO, issued a press release which stated that "[a]fter careful consideration, our Board of Directors unanimously decided to [deregister] because it believes that the burdens associated with operating as a registered public company currently outweigh any advantages to the Company and its stockholders."[8] To support this claim Niagara estimated that deregistration would result in one-time savings of $2.5 million related to compliance with the Sarbanes-Oxley Act of 2002 and an

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5 JX 25 at WYN00090-91.

6 15 U.S.C. § 78l(g)(4).

7 JX 8. Wynnefield does not challenge the accuracy of Niagara's Form 15. Tr. at 129 (Obus), 261-62 (Nelson).

8 JX 9.

additional $750,000 every year thereafter.[9] Niagara also promised that although the company would no longer have reporting obligations it

> will continue to hold annual stockholders meetings and intends to provide its stockholders with quarterly financial information and annual financial statements. Niagara also intends to update its stockholders with information about the Company through mailings and/or postings on the Company's web site at www.niag.com.[10]

Despite Niagara's assurances that it would continue to provide reports to the stockholders, its stock price dropped immediately after the announcement of deregistration.[11]

C. Wynnefield's Effort to Cause Re-Registration

Following Niagara's announcement, Wynnefield engaged in a series of acts designed to force Niagara to reregister. On June 22, 2004, Wynnefield transferred ten Niagara shares directly to each of its partners and certain third parties in order to re-trigger Niagara's reporting obligations.[12] According to Obus, Wynnefield developed a list of more than 300 transferees from its own partners and from a list of what Wynnefield understood were sympathetic investors provided to it by Carr Securities.[13]

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9 JX 25.

10 JX 9.

11 JX 58 at WYN00009 (Niagara's stock closed at $5.23 on April 27, 2004 and $3.80 on April 28, 2004). "The stock lost 25 to 30 percent of its value that day." Tr. at 35 (Obus).

12 JX 15-16.

13 Tr. at 42-47 (Obus). The Court overrules Niagara's hearsay objection to this evidence and admits this and similar testimony to the extent it goes to

After the transfers took place Wynnefield maintained custody of the share certificates in a safe deposit box, except for those shareholders who requested the certificates, which Wynnefield subsequently delivered.[14] Niagara made a second distribution of an additional 90 shares to those same persons on December 10, 2004.[15]

D. The Reverse Forward Stock Split

In order to prevent Wynnefield from necessitating re-registration Niagara's Board of Directors decided to reduce the number of stockholders through a reverse and forward stock split. Niagara circulated a consent solicitation on December 10, 2004, seeking shareholder approval to authorize the Board to conduct a reverse and forward stock split.[16] The consent solicitation stated that if "the number of stockholders of record is below 500 at the end of the fiscal year, the Board does not intend to affect the Reverse/Forward Split."[17] Niagara asserts, however, that it performed the splits even though it thought, but did not know for sure, that it had less than 500 stockholders of record on December 31, 2004.[18] On January 5, 2005, Niagara released a written notice to

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Wynnefield's state of mind, but not for the truth of what the list supplied by Carr Securities actually represented.

14 JX 19, 21-22, 84, 93, 95, 98; Tr. at 151-52 (Obus).

15 JX 26, 27.

16 JX 25; Tr. at 95 (Obus).

17 JX 25 at WYN00086.

18 In Niagara's Section 228(e) notice under 8 *Del. C.* § 228(e), it stated that it "believed that it had slightly less than 500 purported stockholders of record but was not in a position to make a definitive determination at the time of the decision." JX 65.

all shareholders stating that a majority of shareholders approved the reverse and forward stock split by written consent.[19]

By the terms of the 1:200 reverse stock split persons with less than 200 shares were cashed out at the average closing sales price on the Pink Sheets of the shares for the ten trading days ending on December 31, 2004, which was $8.47 per share.[20] The stock split did not affect stockholders who owned 200 shares or more because those stockholders participated in the 200:1 forward split one minute later.

The parties dispute when Niagara effectuated the reverse and subsequent forward stock splits. Niagara asserts that certain documents demonstrate that the splits occurred on December 31, 2004, while Wynnefield contends they did not occur until January 7, 2005. The Delaware Secretary of State certified that the reverse stock split had an "effective date" of 5:00 pm on December 31, 2004, New Year's Eve, and the forward split had an "effective date" of 5:01 pm the same day.[21]

The Over the Counter Bulletin Board's ("OTCBB") daily list contains a different date. The OTCBB daily list provides information on new issues, symbol and name

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19 JX 65; Tr. at 155 (Obus). Wynnefield asserts that they have no way of determining whether the company actually obtained consent from 50% of the shareholders. Tr. at 155 (Obus) ("We knew insiders owned 38 percent. We couldn't figure out how the company got to 50. That is one reason we want to look at things.").

20 JX 65.

21 JX 66; Tr. at 315-17 (Nelson).

changes, and deleted issues for OTCBB securities.[22] The OTCBB daily list contains an entry for January 6, 2005 whereby Niagara changed its trading symbol from "NIAG" to "NGCD" and its name from "Niagara Corporation Common Stock" to "Niagara Corporation New Common Stock."[23] The entry states that it has an effective date of January 7, 2005 and in the comments section states "1-200 R/S followed immediately by 200-1 F/S. Payable Upon Surrender. Shareholders holding less than 200 shares will be cashed out at $8.47/sh**." The OTCBB daily list also includes another entry for Niagara with different headings that appear more related to declaration of a dividend. This entry contains essentially the same information as the entry described above; however, the column that refers to "Record Date" is blank.[24]

Wynnefield also cites to several conversations they had with NASDAQ's Office of Market Integrity concerning the record date and notice requirements for the stock splits. Because Wynnefield offered that testimony to prove the truth of statements made by NASDAQ officials, it is clearly hearsay and inadmissible.[25]

The parties also cite to Niagara's stocklists.[26] Those stocklists indicate that Niagara had 421 holders of record on December 31, 2004, and 83 holders of record on

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22 *See* http://www.otcbb.com/daily list.

23 JX 61; *see also* JX 30 (referencing the name and symbol change); JX 36.

24 JX 61.

25 *Thomas & Betts Corp. v. Leviton Mfg. Co.*, 681 A.2d 1026, 1032 (Del. 1996).

26 Niagara provided Wynnefield with a copy of its stocklists shortly before trial.

January 3 and 7, 2005.[27] These lists, however, do not reflect the number of Depository Trust Company ("DTC") participants, and both parties agree that the SEC would count those participants as stockholders of record for purposes of Sections 12(g) and 15(d) of the Exchange Act.

The DTC registers its shares in the name of CEDE & Co., a partnership used by DTC solely as a nominee to hold the shares of its participants.[28]

> The use of DTC and similar central security depositories is a common method for holding publicly traded securities. Such depositories serve their participant brokerage houses by providing a central storage facility for large numbers of stock certificates. This allows participants to buy and sell shares without the burdens of transferring certificates and reregistering shares in the name of the new buyer after each transaction. Whether a beneficial stockholder participates in a depository system is a matter between the beneficial stockholder and his broker, and is not a consideration for issuers.[29]

Niagara's transfer agent's records, which also do not include DTC participants, show Niagara had 33,331 less shares on January 3, 2005 than on December 31, 2004.[30] Niagara's annual report and audited financial statements for 2004 report that it retired

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27 JX 83.

28 *Enstar Corp. v. Senouf*, 535 A.2d 1351, 1353 (Del. 1987).

29 *Id.* at 1353 n.2.

30 JX 83 (Niagara had 10,297,455 shares of record on December 31, 2004 and 10,264,124 shares of record on January 3, 2005).

45,830 shares (including DTC participants' shares) as a result of the splits on December 31, 2004.[31]

In a letter dated January 4, 2005, Wynnefield requested that some of the shareholders it distributed shares to endorse the stock certificates Wynnefield sent to them and give the certificates to their brokers to sell right away.[32] Wynnefield's shares are not held in the street name "CEDE & Co." Thus, Wynnefield could increase the number of DTC participants through this procedure.

E. Wynnefield Contacts the SEC

Between June 2004 and June 2005 Nelson and Stuart Stein of Hogan & Hartson made around 18 phone calls and wrote several letters to the SEC, NASDAQ and NASD.[33]

On June 29, 2004 Wynnefield sent a letter to the SEC requesting that they reject Niagara's application to deregister because Niagara had more than 300 shareholders of record on April 27, 2004.[34] Wynnefield also issued a related press release on June 30, 2004 which discussed the arguments they made to the SEC and the negative impact Wynnefield believed remaining deregistered would have on Niagara's share price.[35]

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31 JX 28 at WYN00109.

32 JX 29; Tr. at 252-56 ("What would happen is because the shares were formerly not a record Cede & Co., Cede's position would have updated when those shares were tendered to Cede & Co. or to DTC.").

33 Tr. at 234-36 (Nelson).

34 JX 17.

35 JX 18.

Nelson admitted at trial, however, that the SEC "would not concur, with [Wynnefield's] position."[36]

Stein contacted the SEC again on March 9 and 23, 2005 and argued that Niagara had a duty to reregister under Section 15(g) because it had more than 500 shareholders as of December 31, 2004.[37] The SEC, according to Nelson, responded that it was not inclined to concur with that position. Perhaps, the SEC was not convinced that Niagara had more than 500 stockholders on December 31, 2004, even before the splits.[38]

After Nelson received Niagara's consent solicitation in December 2004 he called the SEC because he thought Niagara was required to file a transaction statement under Rule 13e-3.[39] The SEC told Nelson that "this was a matter of first impression for the staff, but they were taking the position that at that time Niagara did not have an obligation because the consent was requested in a year in which they did not have an obligation [to meet the reporting obligations of a public company], and would be finalized in a year in which they didn't have an obligation."[40]

Nelson contacted the SEC again in January 2005 and asked them to "revisit the position they took in December," arguing that Niagara was required to file a 13e-3,

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36 Tr. at 264-65.

37 Tr. at 282-83.

38 Tr. at 284.

39 Tr. at 287. Rule 13e-3 requires certain disclosures, such as a fairness opinion, for transactions involving issuers that result in securities being held by less than 300 persons. 17 C.F.R. § 240.13e-3.

40 Tr. at 288 (Nelson).

because it failed to file a 10b-17 notice.[41] Nelson testified that the SEC described this issue as a "very interesting" and "much closer question" and said they would discuss it and get back to him later.[42] After a few weeks the SEC called Nelson and informed him that they did not concur with his position.[43]

Subsequently, on January 25, 2005, Obus sent a letter to Scharf which stated that Niagara had reporting obligations to the SEC because the stock splits were not effective until January 7, 2005 and was required to file a Rule 13e-3 Transaction Statement with the SEC as to any such split and distribute the statement to Niagara's shareholders.[44] Wynnefield also included this letter in a press release.[45]

On May 23, 2005, Wynnefield sent another letter to the SEC notifying them of this books and records case and requesting that they take action against Niagara.[46] Since Nelson and Stein initially contacted the SEC in June 2004, however, the Commission has not publicly taken any action against Niagara with respect to its deregistration.[47]

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41 Tr. at 290-91. Rule 10b-17 requires issuers to timely give the NASDAQ information relating to: (1) a dividend or other distribution in cash or in kind; (2) a stock split or reverse split; and (3) a rights or other subscription offering. 17 C.F.R. § 240.10b-17.

42 Tr. at 291.

43 Tr. at 292.

44 JX 33.

45 JX 34.

46 JX 56.

47 Tr. at 162 (Obus), 236-37 (Nelson).

Niagara asserts that the Court should exclude Nelson's and Stein's testimony and the e-mail communications that document their conversations with the SEC[48] because those statements are hearsay and not within any exception. At the same time, however, Niagara contends that any statements of Nelson and Stein that reflect the SEC's refusal to concur with their positions are admissible as admissions. Wynnefield urges admission of all of the conversations Nelson and Stein had with the SEC claiming they satisfy the residual exception to the hearsay rule.

Hearsay is a statement, other than one made by the declarant while testifying at a trial or hearing, offered in evidence to prove the truth of the matter asserted.[49] The residual exception to the hearsay rule states:

> A statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness is not excluded by the hearsay rule, if the court determines that: (A) The statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.[50]

In *Skoglund v. Ormand Industries, Inc.*, the court allowed testimony regarding out-of-court statements made by a declarant who did not testify at trial where it appeared there was "at least some reason to believe" that the information offered by the declarant

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48 *See, e.g.*, JX 20, 40.

49 D.R.E. 801(c).

50 D.R.E. 807.

had "a factual basis which can either be confirmed or clarified from the corporate records."[51]

In this case Wynnefield has not cited any circumstantial evidence that guarantees the trustworthiness of Nelson's and Stein's overall recounting of their conversations with the SEC. In fact, according to Nelson, even the SEC told him that they "will not share with counsel, opposing counsel, what enforcement action they will take against a nonreporting issuer or, for that matter, anyone in violation of the securities laws."[52] In these circumstances, the materiality and probity of the evidence regarding Nelson's and Stein's communications are quite limited. Further, Nelson is an interested party. Thus, the trustworthiness of his description of these conversations would be subject to challenge. Therefore, the evidence of these conversations does not meet the requirements of the residual exception to the hearsay rule (Rule 807), and I will exclude it as hearsay except to the extent Nelson admits the SEC did not agree with his position. Statements in the latter category are admissible as admissions.[53]

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51 372 A.2d 204, 212-13 (Del. Ch. 1976); *Thomas & Betts Corp. v. Leviton Mfg. Co.*, 681 A.2d at 1032.

52 Tr. at 298.

53 "A statement is not hearsay if . . . [t]he statement is offered against a party and is (A) his own statement, in either his individual or a representative capacity, or (B) a statement of which he has manifested his adoption or belief in its truth, or (C) a statement by a person authorized by him to make a statement concerning the subject, or (D) a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship." D.R.E. 801(d)(2).

Similarly, Wynnefield seeks to admit e-mails that Nelson wrote summarizing his conversations with NASD's Office of Market Integrity.[54] Specifically, the letters state that NASD told Nelson that the reverse and forward stock splits had an effective date of January 7, 2005. According to Nelson, the NASD records confirm this statement.[55]

Like Nelson's conversations with the SEC, I find these e-mails do not have significant circumstantial guarantees of trustworthiness. In addition, this evidence is only marginally relevant and probative, at best. In particular, Nelson admits that the individual he contacted at NASD, Tara Petta, was "not a lawyer. She is an operations person. For purposes of the markets, purposes of operations, the 7th is when this occurred. She has no idea what that means for purposes of Delaware law, federal law or any other law."[56] Consequently, I find that the requirements of Rule 807 have not been met, and therefore will exclude JX 76-78 and any other testimony concerning conversations with NASDAQ's Office of Market Integrity on hearsay grounds.

F. Niagara's Reporting After Deregistration

Even after deregistration Niagara continued to send reports to its shareholders. Specifically, Niagara has published regular press releases, quarterly reports of more than 15 pages, an annual report of more than 50 pages, and financial statements audited by Deloitte & Touche.[57]

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54 JX 76-78.

55 *Citing* JX 30, 36, 58 at WYN00014 and 61.

56 Tr. at 312-13.

57 Tr. at 138-42 (Obus); JX 28, 68-74.

G. Wynnefield Seeks Niagara's Books and Records

On May 28, 2004, Wynnefield wrote Niagara expressing its desire to communicate with other shareholders before the September 2004 annual meeting to discuss Niagara's decision to deregister and to urge stockholders to oppose re-election of directors who supported deregistration.[58] Wynnefield also requested assistance from Niagara in communicating with Niagara's shareholders pursuant to Rule 14a-7 and demanded to inspect and copy the stock ledger and the list of stockholders pursuant to Section 220 of the Delaware General Corporation Law (the "DGCL").[59] Niagara refused to comply with Wynnefield's request.[60]

Similarly, on February 22, 2005, Wynnefield sent Niagara a letter demanding to inspect Niagara's books and records to: (a) determine whether the reverse and forward splits were valid and effective and had the effect described by Niagara in its public disclosures; (b) determine whether, notwithstanding the filing by Niagara of a Form 15 with the SEC on April 28, 2004, Niagara has a current reporting obligation under Section 12(g) or Section 15(d) of the Exchange Act; (c) to investigate potential mismanagement, wrongdoing, and breaches of fiduciary duty in connection with the reverse and forward splits and the deregistration of Niagara's common stock; and (d) to communicate with

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58 JX 12; Tr. at 41 (Obus).

59 JX 12.

60 Tr. at 41 (Obus).

other stockholders of Niagara or commence possible litigation.[61] After Niagara refused that demand, Wynnefield filed this suit on April 14, 2005.

On September 7, 2005, Niagara produced stocklist records certified by its transfer agent as of the close of business on December 31, 2004,[62] January 3, 2005, and January 7, 2005.[63] I held trial on September 12 and 13, 2005.

II. ANALYSIS

A. Standard

A stockholder in a Delaware corporation is entitled to inspect corporate books and records under 8 *Del. C.* § 220 if (i) the form and manner requirements for making a demand are met; and (ii) it proves by a preponderance of the evidence that the inspection is for a proper purpose which is reasonably related to such person's interest as a stockholder.[64] In addition, once a proper purpose has been established, it is irrelevant whether any secondary purpose or ulterior motive exists for the request.[65] The primary purpose may not, however, be adverse to the interests of the corporation.[66]

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61 JX 41.

62 The transfer agent erroneously certified the date as of December 31, 2005.

63 JX 83.

64 *Sec. First Corp. v. U.S. Die Casting & Dev. Co.*, 687 A.2d 563, 566-67 (Del. 1997); *Thomas & Betts Corp.*, 681 A.2d at 1030. The statute defines "proper purpose" as "a purpose reasonably related to such person's interest as a stockholder." 8 *Del. C.* § 220(b).

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

66 *Compaq Computer Corp. v. Horton*, 631 A.2d 1, 4 (Del. 1993).

Normally the plaintiff in a Section 220 action has the burden of proof, but if the document sought is a stocklist or stock ledger a proper purpose is presumed. In that case, the corporation has the burden of proof to show the inspection is being sought for an improper purpose.[67]

It is well established that investigation of mismanagement constitutes a proper purpose for a Section 220 books and records inspection.[68] A stockholder asserting that purpose must demonstrate by a preponderance of the evidence a credible basis to find probable wrongdoing on the part of corporate management.[69] Actual wrongdoing need not be proved in a Section 220 proceeding.[70] Moreover, once a stockholder has shown a proper purpose reasonably related to its status as a stockholder, it must show that the books and records sought are "essential and sufficient" for that purpose.[71]

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67 8 *Del. C.* § 220(c).

68 *Sec. First Corp.*, 687 A.2d at 567.

69 *Id.*

70 *Id.*

71 *Id.* at 570.

B. Did Wynnefield Satisfy the Form and Manner Requirements for Its Request for the DTC Participant List?[72]

Niagara contends that Wynnefield's demand letter does not ask for Niagara's DTC participant list. Thus, Niagara asserts that the demand does not satisfy the specific and discrete identification requirement in that regard.[73] Wynnefield responds that its request for Niagara's stocklist in item 1 of its demand letter implicitly includes the DTC participant list.

Item 1 requests: "The Corporation's stock ledger and list of stockholders as of December 31, 2004, January 1, 2005, January 3, 2005, and January 7, 2005."[74] "This Court has recognized that a party entitled to a stocklist pursuant to § 220 is also entitled to a Cede breakdown even though technically Cede is the record holder on the company's books."[75]

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72 In their pretrial brief Niagara asserted that Wynnefield did not comply with the signature requirements of Section 220; however, they did not address that issue in their post-trial brief or at argument. Consequently, Niagara has waived that issue. *Emerald Partners v. Berlin*, 2003 WL 21003437, at *43 (Del. Ch. Apr. 28, 2003) ("It is settled Delaware law that a party waives an argument by not including it in its brief.").

73 Defendant Niagara Corporation's Post-Trial Answering Brief ("DAB") at 37, citing *Saito v. McKesson HBOC, Inc.*, 806 A.2d 113, 117 n.10 (Del. 2002). The other post-trial briefs are cited to in the same form, *i.e.*, Wynnefield's opening and answering briefs are cited as "POB" and "PAB," and Niagara's opening brief as "DOB."

74 JX 41.

75 *Olson v. Buffington*, 1985 WL 11575, at *3 (Del. Ch. Jul 17, 1985). *See also Giovanini v. Horizon Corp.*, 1979 WL 178568, at *2 (Del. Ch. Sept. 10, 1979) ("Since the evidence here shows that a [CEDE] breakdown is readily available to the corporation for the purpose of making its contact with the shareholders, then I feel that such information should be made available to the plaintiff forthwith so

The *Hatleigh Corp. v. Lane Bryant, Inc.* case provides an example where a court allowed the plaintiff to have access to the DTC participant list even though its demand only requested the stocklist.[76] In *Hatleigh* the plaintiff's Section 220 demand letter stated that it sought "to obtain the [stock] list to enable solicitation of proxies in connection with the election of members to the Board of Directors of [Defendant]."[77] The court held that the demand included a demand for the "CEDE breakdown."[78]

In arriving at its conclusion the court reasoned that:

> A CEDE breakdown showing the names of the brokerage firms and the number of shares they hold is readily available to [defendant] and without it there would be no practical way for [plaintiff] to learn how many copies of its proposed communication it should send to CEDE & CO. for distribution to the brokerage firms and thence to the true owners of [defendants] stock. I therefore find that [plaintiff] is entitled to a breakdown of the CEDE & CO. listings and other similar listings generally recognized as indicating the shares of stock are being held for brokerage firms and similar financial institutions.[79]

Likewise, in this case Niagara seeks the DTC participant list in order to communicate with shareholders and determine whether Niagara complied with its

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that his list of stockholders for his proper purpose of soliciting their proxies is at least equivalent, in this aspect, with the list available to the corporation for the same purpose."). The DTC participant list is the same thing as the "CEDE breakdown."

[76] 428 A.2d 350 (Del. Ch. Feb. 5, 1981).

[77] *Id.* at 351.

[78] CEDE & Co. is merely the nominee name for DTC. DTC and Cede & Co. are synonymous and are often used interchangeably.

[79] *Id.* at 355.

reporting obligations under the securities laws. Thus, consistent with the cases discussed above, I hold that Wynnefield's demand requesting a list of stockholders includes the DTC participant list.

C. Does Wynnefield Have a Proper Purpose to Inspect Wynnefield's Books and Records?

Wynnefield contends that it has a proper purpose to inspect Wynnefield's books and records because it has demonstrated a credible basis to find probable wrongdoing. In particular Wynnefield contends that it has demonstrated a credible basis to find that: (1) Niagara's board engaged in wrongdoing in its decision to deregister; (2) Niagara's board engaged in wrongdoing when it decided to remain deregistered and execute the reverse and forward stock splits; and (3) Niagara violated Exchange Act Rules 12(g), 15(d), and 10b-17. I will discuss each of these issues in turn.

1. Did Wynnefield demonstrate a credible basis to infer mismanagement or wrongdoing concerning Niagara's decision to deregister?

Wynnefield makes two primary arguments regarding the Board's decision to deregister. First, they assert that they need the requested documents to investigate the possibility that the Board breached their fiduciary duties by deregistering. Second, they contend that Scharf may have violated the duty of loyalty by using deregistration as a tool to purchase Niagara stock at a low price.

a. Did the Board's decision to deregister potentially violate the duty of care or loyalty?

Wynnefield contends that the board's decision to deregister alone demonstrates a potential breach of duty. Specifically, they argue that in other contexts this Court has

characterized the threat of deregistering a company as harmful and potentially coercive.[80] Further they argue that at least one Delaware court has held that allegations that a board decided to deregister shares states a claim for breach of duty.[81]

Niagara responds that this Court never has held that the decision to deregister alone gives rise to an inference of potential mismanagement sufficient to meet a plaintiff's burden in a Section 220 case. Further, they assert that Wynnefield admits that they do not have any evidence that the board did not carefully consider the decision to deregister and that deregistration only temporarily had an adverse effect on the share price.

"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."[82] Mere disagreement with a business decision does not provide a credible basis that satisfies Section 220.[83]

In the consent solicitation the board asserts that in deciding to deregister they considered, among other things, the costs, including the costs of complying with

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80 PAB at 13 n.11 (citing *Pure Res., Inc. S'holder's Litig.*, 808 A.2d 421, 453 n.26 (Del. Ch. 2002)).

81 *Hamilton v. Nozko*, 1994 WL 413299, at *7 (Del. Ch. July 27, 1994).

82 *Deephaven Risk Arb Trading Ltd. v. UnitedGlobalCom, Inc.*, 2004 WL 1945546, at *5 (Del. Ch. Aug. 30, 2004).

83 *Mattes v. Checkers Drive-In Rest., Inc.*, 2001 WL 337865, at *6-7 (Del. Ch. Mar. 28, 2001); *Everett v. Hollywood Park, Inc.*, 1996 WL 32171, at *6 (Del. Ch. Jan. 19, 1996).

Sarbanes-Oxley, the effect of deregistering on liquidity, and the benefits of public listing.[84] Obus admits that he does not have any facts that the board did not carefully consider the decision to deregister. The following exchange occurred at trial:

> [Niagara's counsel:] And you don't have any facts that show or even suggest that the board's consideration of deregistration was driven by some kind of secret agenda or some kind of loyalty concern
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> * * *
>
> [Obus:] I have suspicions, which is why I want to look at the books and records but I don't have facts that – if I did, I would go right to a proceeding.[85]

A plaintiff cannot satisfy their burden under Section 220 by a mere suspicion of wrongdoing or mismanagement.[86] Thus, I find Wynnefield's argument unpersuasive.

Furthermore, the cases Wynnefield cites are distinguishable. In *Pure Resources, Inc. Shareholders Litigation*, the court found deregistration coercive because the context involved a controlling stockholder and an implicit threat to use deregistration as a tool to obtain a lower price after a tender offer.[87] Similarly, in *Hamilton v. Nozko*, a board

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84 JX 25 at WYN00090-91.

85 Tr. at 135.

86 *Sec. First Corp.*, 687 A.2d at 568; *Helmsman Mgmt. Servs., Inc. v. A&S Consultants, Inc.*, 525 A.2d 160, 165-66 (Del. Ch. 1987); *Weiland v. Cent. & S.W. Corp.*, 1989 WL 48740, at *1 (Del. Ch. May 9, 1989).

87 808 A.2d 421, 453 n.26 (Del. Ch. 2002) ("I include within the concept of structural coercion an offer that is coercive because the controlling stockholder threatens to take action after the tender offer that is harmful to the remaining minority (*e.g.,* to seek affirmatively to deregister the company's shares).").

member actually attempted to purchase the company's shares at a low price following deregistration.[88]

In this case, as discussed *infra*, Wynnefield has not demonstrated that Scharf or any of the other board members supported deregistration in order to lower the share price and buy more shares. Thus, I do not find either of Wynnefield's cases to be apposite here.

Delaware law recognizes a corporate board's ability, in a proper exercise of their business judgment, to cause the corporation to take steps to deregister even if, as an incidental matter, deregistration might adversely impact the market for the corporation's securities.[89] I know of no books and records case where a plaintiff succeeded on its demand solely because the board decided to deregister the company's shares. Without more specific facts that provide a credible basis to suspect wrongdoing, I decline to so hold in this case.

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[88] 1994 WL 413299, at *6 (Del. Ch. July 27, 1994) ("The question is whether corporate fiduciaries commit an actionable breach of fiduciary duty if *for self-interested reasons* they cause the corporation's stock to be deregistered [] and as a result, cause the market for the stockholders' investment to become significantly impaired or eliminated. As a purely conceptual matter that question must be answered in the affirmative, if only by reason of the doctrine that corporate action, even where legally permissible, will be proscribed if taken for an inequitable purpose.") (emphasis added).

[89] *Hamilton*, 1994 WL 413299, at *6.

b. Has Wynnefield presented credible evidence that demonstrates Scharf potentially violated the duty of loyalty?[90]

Wynnefield asserts that it has presented facts sufficient to demonstrate that Scharf potentially violated the duty of loyalty. In particular they assert that Scharf sought to deregister the company's shares so that he could lower the share price to purchase more Niagara shares at a cheap price. Wynnefield further contends that Scharf has a demonstrated propensity to purchase companies because he has engaged in several leveraged buyouts in the past.

Niagara disagrees and denies that Scharf attempted to purchase a substantial number of shares after the deregistration. Moreover, it denies that there is any credible basis to suspect a plan to purchase more of the company's shares at an undervalued price in the future because the share price has risen dramatically since deregistration.

I find that Wynnefield has failed to demonstrate a credible basis to believe that Scharf potentially violated the duty of loyalty. First, Obus admitted at trial that he did not

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[90] Wynnefield also asserts that Niagara's recent announcement that it has hired investment bankers to explore strategic alternatives, including "a possible sale of the Company to unaffiliated third parties," evidences potential wrongdoing or mismanagement. Allegations of post-trial conduct, however, are excluded under the well settled rule that a proper purpose cannot be established through post-demand conduct. *AAR Corp. v. Brooks & Perkins, Inc.*, 1980 WL 6419, at *2 (Del. Ch. Aug. 12, 1980) (refusing demanded inspection of stocklist where plaintiff's purpose arose only after he had submitted written demand); *Sutherland v. Dardanelle Timber Co.*, 2005 WL 1074357, at *2 (Del. Ch. Apr. 25, 2005) (denying plaintiff's motion to compel because post-demand conduct was not admissible to bolster plaintiff's alleged proper purpose). Consequently, I sustain Niagara's objection to this evidence as irrelevant.

have facts to support a duty of loyalty violation.[91] Second, since deregistration, Scharf has purchased only 42,000 shares on the open market, including a fully disclosed purchase of 15,000 shares.[92] That is less than one-half of one percent of all shares outstanding. This is not significant in view of Scharf's present Niagara holdings since Wynnefield alleges that Scharf and other insiders own more than 38% of the company.

The fact that Scharf owned a large portion of the company before deregistration further undercuts Wynnefield's argument. If Scharf had planned to deregister the company in order to reduce the share price, that would have had the collateral effect of reducing his own investment in Niagara. Hence, deregistration might be an expensive and risky way of acquiring more Niagara shares at a lower price.[93] Based on these considerations and the absence of specific facts supporting Wynnefield's professed fears,

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91 Tr. at 133-36.

92 Niagara's 2005 Proxy Statement disclosed that Scharf owned 2,821,300 shares and 600,000 currently exercisable options. POB Ex. C at 5. Niagara's 10-K/A dated April 27, 2004 showed ownership of 2,479,300 shares and 900,000 currently exercisable options. JX 7 at WYN00186. Comparing those two figures, Scharf purchased only 42,000 shares on the open market, including the 15,000 shares already discussed. There are presently 8,856,624 shares outstanding. POB Ex. C at 5.

93 *See AOC Ltd. P'ship v. Horsham Corp.*, 1992 WL 136474, at *9 (Del. Ch. June 17, 1992) ("I am not persuaded that defendants have a material adverse interest in the [initial public] Offering because the Offering would be an incredibly expensive way (*e.g.*, attorneys' and underwriters' fees are bound to be fairly substantial) of acquiring a portion of Holdings' shares owned by AOC cheaply and because it would be self defeating since Horsham would be diluting its investment in Clark Oil.").

I conclude that it has not demonstrated a credible basis for believing Scharf potentially violated the duty of loyalty.

2. Has Wynnefield demonstrated a credible basis to find probable wrongdoing in the Board's decision to remain deregistered?

Wynnefield's challenge to the decision to remain deregistered revolves around whether the board properly obtained the consents necessary to effectuate the splits. In particular Wynnefield contends that the combination of the following factors gives rise to a credible basis for finding probable wrongdoing: (a) the speed with which the solicitation was undertaken at year-end given the less than majority stockholdings of insiders; (b) the limited nature of the solicitation itself; and (c) other errors made by Niagara in this process (*e.g.*, the failure to file a 10b-17 notice).

Niagara argues that it undertook the reverse and forward stock splits consistent with Delaware law. Further, they assert that Wynnefield has not demonstrated any facts that show that Niagara did not obtain enough consents or that it wrongly obtained them.

At trial Obus admitted that he did not have any facts suggesting that Niagara's stockholders did not validly approve the consent solicitation.[94] Thus, his primary argument is that a stockholder cannot determine how Niagara obtained a sufficient number of consents. Yet, at trial, Obus admitted that "[m]ore than 50% of Niagara's stock is held by its management and affiliates, giving them a very free hand."[95] Wynnefield has not presented any evidence to the contrary. A stockholder is not likely to

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94 Tr. at 155, 276-79.

95 Tr. at 279-80; JX 57 at WYN00268.

meet the requirements of section 220 if they have no specific knowledge of any impropriety.[96] Section 220 requires more than "mere curiosity" as to how Niagara obtained consents from the holders of more than 50% of the stock.[97] Wynnefield has not demonstrated a credible basis for doubting that management and its affiliates lawfully obtained the consents necessary to effectuate the consent solicitation. Therefore, their demand for books and records regarding Niagara's decision to conduct reverse and forward stock splits and to remain deregistered must be denied.

Wynnefield attempts to buttress its claim of probable wrongdoing by urging this Court to take judicial notice of a recent decision by a New York state court[98] denying a motion to dismiss for failure to state a claim in two shareholder actions against Scharf and others challenging Niagara's decision to deregister its stock. Those actions accuse Scharf of acting in breach of his duty of loyalty and in bad faith and include allegations similar to this case. Wynnefield argues that it would be anomalous if a stockholder could get discovery into the disputed conduct in New York, but not in Delaware.

I have reviewed the New York decision carefully but do not consider it dispositive of the issues before me. Consistent with New York procedural law the court evaluated the allegations in the complaints before it and took the well pleaded allegations in those actions as true in ruling on a Rule 12(b)(6) type motion to dismiss. This is a separate

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96 *Thomas & Betts Corp. v. Leviton Mfg. Co.*, 685 A.2d 702, 711 (Del. Ch. 1995) (plaintiff "had no specific knowledge of any impropriety").

97 *Saito v. McKesson HBOC, Inc.*, 806 A.2d 113, 117 n.10 (Del. 2002).

98 *Berger v. Scharf*, 2006 WL 825171 (N.Y. Sup. Ct. Mar. 29, 2006).

case based on similar, but not identical, allegations seeking particularized relief under Section 220 of the DGCL. Applying the well established standard for obtaining information pursuant to Section 220, it is my opinion, for the reasons stated above, that Wynnefield has not met its burden of proving a proper purpose for seeking inspection of documents relating to Niagara's decisions to deregister and to remain deregistered by means of the reverse/forward stock split.

3. Securities law violations

Wynnefield argues that they have shown a credible basis from which to infer that Niagara violated the securities laws in connection with the stock splits.[99] In particular Wynnefield asserts that they have shown a credible basis for inferring that Niagara violated Exchange Act Sections 12(g) and 15(d) and Rule 10b-17. I will discuss each in turn.

a. Section 15(g)

Wynnefield asserts that they are entitled to the DTC participant list to determine whether Niagara complied with Exchange Act Section 15(g).[100] Niagara responds that Wynnefield has not met their burden to demonstrate a potential violation of Section 15(g) because they have not demonstrated that Niagara had enough shareholders to trigger its reporting obligations under that section. Further, they assert that Wynnefield cannot demonstrate that Niagara had more than 500 stockholders on December 31, 2004 because

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99 Investigation of a potentially improper transaction is a proper purpose. *Victory Group, Ltd. v. Cindy's, Inc.*, 1983 WL 8938, at *2 (Del. Ch. Feb. 24, 1983).

100 15 U.S.C. § 78l(g)(1).

the December 31 stocklist shows 421 stockholders[101] and the DTC participant list for September 30, 2005 shows only 67 DTC participants.[102] In the alternative, Niagara challenges the effectiveness under 17 C.F.R. § 240.12g5-1(b)(3) of the transfers through which Wynnefield increased the number of stockholders in an effort to force re-registration.

Section 15(g)(1)(B) provides that every issuer shall:

> within one hundred and twenty days after the last day of its first fiscal year . . . on which the issuer has total assets exceeding $1,000,000 and a class of equity security (other than an exempted security) held of record by five hundred or more but less than seven hundred and fifty persons . . . register such security by filing with the Commission a registration statement (and such copies thereof as the Commission may require) with respect to such security. . . . Each such registration statement shall become effective sixty days after filing with the Commission or within such shorter period as the Commission may direct. Until such registration statement becomes effective it shall not be deemed filed for the purposes of section 78r of this title (Section 14 of the Act).

Further, Section 15(g)5-1 provides in pertinent part that securities are "'held of record' by each person who is identified as the owner of such securities on records of security holders maintained by or on behalf of the issuer," provided that such records have been maintained "in accordance with accepted practice."[103] The direct participants in the DTC system, who constitute the second tier of that system, are the "holders of

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101 DOB at 38, citing JX 83.

102 DAB Ex. A.

103 15 U.S.C. § 78l(g)5-1.

record" of the certificates for purposes of Section 15(g)5-1 and Sections 15(d) and 12(g).[104] Further, although such participants may have certificates registered in their names or the names of their nominees and held in customer's accounts, the SEC, in adopting Section 15(g)5-1, has indicated that it would not require each such account to be counted as a "holder of record".[105]

The definition of securities "held of record," however, provides that "[i]f the issuer knows or has reason to know that the form of holding securities of record is used primarily to circumvent the provisions of section 12(g) or 15(d) of the act, the beneficial owners of such securities shall be deemed to be the record owners thereof."[106] Although Niagara cited the latter provision it does not appear applicable to this case because Niagara has not presented sufficient evidence to demonstrate that Wynnefield remained a beneficial owner of the shares it distributed. In fact, Wynnefield informed the shareholders that "Wynnefield Capital transferred shares of Niagara Common stock as a gift" and that "[t]hese certificates are in your name and are unconditionally yours."[107]

In addition, Niagara interprets the phase "primarily to circumvent the provision of section 12(g) or 15(d)" to apply to the situation where a shareholder distributes shares in order to force re-registration. I question with this interpretation. The statute was "aimed

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104 *Bay View Securitization Corp. v. Bay View Auto Trusts*, 1998 WL 15674**,** at *10 (SEC No-Action Letter Jan. 15, 1998).

105 *Id.*; Exchange Act Release No. 34-7492.

106 17 C.F.R. § 240.12g5-1(b)(3).

107 JX 84.

at deterring the organization of holding companies, subsidiaries, or trusts for the primary purpose of avoiding registration."[108] Thus, 12g5-1(b)(3) is directed at issuers who seek to evade registration.[109] For purposes of this Section 220 action, I do not read the statute as being intended to aide Niagara's efforts to remain deregistered. Nevertheless, Niagara remains free to pursue this argument in another forum.

In this case Wynnefield has shown a credible basis to believe that Niagara may have violated Section 15(g) and that it should receive Niagara's DTC participant list for several reasons. The DTC participant list for September 30, 2005 shows 67 participants. Combining that number with the number of stockholders on the December 31st stocklist equals 488 stockholders, only 12 less than the number that would trigger Niagara's reporting obligations. While less than 500, 488 is close enough that, together with the other questions Wynnefield has raised, it provides a credible basis for concluding there are legitimate issues of probable wrongdoing.

Moreover, the fact that Niagara could only say that it believed it had less than 500 shareholders demonstrates that Niagara likely had a total number of holders of record that was close to, if not above the 500 shareholder threshold.[110] This conclusion is reinforced by the fact that Niagara went forward with the splits even though it stated in the consent solicitation that "the Board does not intend to affect the Reverse/Forward Split" in the

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108 Louis Loss & Joel Seligman, *Securities Regulation*, Vol. IV at 1764 (3d ed. 2000).

109 *Id.* at n.78.

110 *See* JX 65.

event that "the number of stockholders of record is below 500 at the end of the fiscal year."[111]

Additionally, Niagara incorrectly assumes that Wynnefield has the burden of proof with respect to the DTC participant list. As discussed above, a demand for the stocklist includes a demand for the DTC participant list. Where a stockholder seeks to inspect the corporation's stock ledger or list of stockholders and meets the form and manner requirements of Section 220, the burden of proof is on the corporation to establish that the inspection such stockholder seeks is for an improper purpose.[112] Thus, Niagara had the burden to prove that Wynnefield had an improper purpose in seeking to inspect the DTC list. Niagara failed to satisfy that burden.

b. Section 15(d)

Wynnefield also asserts that Niagara had reporting obligations under Section 15(d) of the Exchange Act because it had more than 300 stockholders on January 1, 2005. Wynnefield bases this argument on its contention that the splits did not occur until January 7th because NASDAQ reset the transfer date. Niagara contends the splits occurred on December 31, 2004, as certified by the Secretary of State.

A company has reporting obligations under Section 15(d) if it has 300 or more stockholders on the first day of its fiscal year, in this case January 1, 2005.[113] Niagara's

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111 JX 25 at WYNN00086.

112 8 *Del. C.* § 220(c).

113 15 U.S.C. § 78o(d) ("The duty to file under this subsection shall also be automatically suspended as to any fiscal year, other than the fiscal year within

stocklist shows that it had 421 holders of record on December 31, 2004. Thus, whether Wynnefield has demonstrated a credible basis for inferring that Niagara may have violated Section 15(d) hinges on whether they have presented sufficient evidence to show that the splits may have occurred on or after January 1, 2005.

Under Section 103(d) of the DGCL instruments such as the Niagara charter amendments which authorized the stock splits are effective on filing with the Delaware Secretary of State or as specified within the instrument.[114] Therefore, for purposes of Delaware law the forward split occurred on December 31, 2004 at 5:00 p.m. and the reverse split occurred at 5:01 p.m. the same day.[115] This does not necessarily mean, however, that the splits occurred at that time for purposes of the federal securities laws.

The stocklists maintained by Niagara's transfer agent also show that Niagara had 421 holders of record on December 31, 2004 and 83 holders of record on the next trading day, January 3, 2005.[116] The OTCBB daily list, however, raises a question as to whether

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which such registration statement became effective, if, at the beginning of such fiscal year, the securities of each class to which the registration statement relates are held of record by less than three hundred persons."); *Sys. Energy Res., Inc.*, 1992 WL 55817, at *4 **(**SEC No-Action Letter, Mar. 16, 1992) ("those persons appearing of record in the DTC system as having positions in the Bonds constitute 'holders of record' of the Bonds for purposes of Section 15(d) of the 1934 Act").

114 8 *Del. C.* § 103(d).

115 *See* JX 66.

116 JX 83.

the splits occurred on December 31, 2004 or January 7, 2005.[117] The daily list has the following heading format:

> Daily listDate | Type | NewSymbol | NewName | OldName | EffDate | Comments | Notes | CoPhone | Mkt_Cat.

The entry relied upon by Wynnefield states,

> 01/06/2005 16:58:36 | S2 | NGCD | NIAG | Niagara Corporation New Common Stock | Niagara Corporation Common Stock | 01/07/2005 | 1-200 R/S followed immediately by 200-1 F/S. Payable Upon Surrender. Shareholders holding less than 200 shares will be cashed out at $8.47/sh** | | | u.[118]

Although this entry may demonstrate only that the name and symbol changed on January 7, 2005, its reference in the comments section to the stock splits suggests that the splits also may have occurred on that date for purposes of the markets. In addition, Wynnefield presented evidence that Niagara's stock stopped trading at least on January 7, 2005.[119] Niagara did not present any evidence as to whether or why any stoppage of trading occurred in that timeframe.

Although Niagara could have called an expert in securities markets or some other competent witness to clarify the meaning of this documentary evidence, it did not do so.

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117 *See* JX 61.

118 JX 61.

119 JX 58 at WYN00014.

Thus, Wynnefield has shown a credible basis for finding that Niagara may have violated Section 15(d).[120]

c. Rule 10b-17

Wynnefield asserts that Niagara violated SEC Rule 10b-17 by failing to provide NASDAQ notice of the stock splits ten days before they occurred. Wynnefield further asserts that Niagara's failure to give notice caused NASDAQ not to make the splits effective until January 7, 2005. For its part, Niagara denies that it had any obligation to file a 10b-17 notice or that NASDAQ has authority to change the effective dates of the splits based on an alleged 10b-17 violation.

Rule 10b-17 generally requires issuers timely to provide information to NASDAQ relating to: (1) a dividend or other distribution in cash or in kind; (2) a stock split or reverse split; and (3) a rights or other subscription offering.[121] Under Rule 10b-17, the issuer is required to provide this information to NASDAQ no later than 10 days before the record date or, in case of a rights subscription or other offering if such 10 days advance notice is not practical, on or before the record date.

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120 The Court also notes that the information Wynnefield seeks related to the timing of the splits is not the type of information that might give Wynnefield an advantage in the market over other shareholders. Thus, disclosure of this information to Wynnefield is not likely to be adverse to the legitimate interests of Niagara.

121 17 C.F.R. § 240.10b-17.

NASDAQ publishes the record date of the action and the "ex-date" in its "Daily List" on its website.[122] The Daily List provides information to broker/dealers, clearing agencies, and the public regarding the record date and settlement of such trades. OTCBB issuers, such as Niagara, are required to give NASDAQ the information prescribed by Rule 10b-17.[123] In fact, NASDAQ has authority to halt trading if an issuer fails to provide notice as prescribed by Rule 10b-17. Specifically, NASDAQ Rule 6545 provides:

> In circumstances in which it is necessary to protect investors and the public interest, NASDAQ may direct members, pursuant to the procedures set forth in paragraph (b), to halt trading and quotations in the over-the-counter ("OTC") market of a security or an American Depository Receipt ("ADR") that is included in the OTC Bulletin Board ("OTCBB") if:
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> * * *
>
> (3) the issuer of the OTCBB security or the security underlying the OTCBB ADR fails to comply with the requirements of SEC Rule 10b-17 regarding Untimely Announcements of Record Dates.[124]

Niagara does not claim that it timely filed a 10b-17 notice; instead, it asserts that it did not have to file such a notice.[125] Wynnefield, however, has shown a credible basis for

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122 The OTCBB Daily List is published on *www.otcbb.com*; the NASDAQ Daily List is available on *www.NASDAQtrader.com.*

123 NASDAQ Notice to Members 00-41 (entitled "SEC Approves Trade Halt Rule For OTCBB") (Jun. 26, 2000).

124 NASDAQ Rule 6545, amended by SR-NASDAQ-2005-089 eff. Oct. 1, 2005. *See also* NASDAQ Notice to Members 00-41.

125 Niagara also argues that Rule 10b-17 doesn't apply because that rule requires issuers to provide notice to the NASDAQ of the *record date* for dividends, stock

finding that NASDAQ may have suspended trading in Niagara's stock because it failed to provide notice under Rule 10b-17. Thus, Wynnefield has demonstrated a credible basis for its assertion that Niagara potentially violated Rule 10b-17, and is entitled to inspect the documents essential and sufficient to pursue that purpose.

D. The Scope of the Inspection to Which Wynnefield is Entitled

"A stockholder's right to inspect and copy a stocklist is not absolute. Rather, it is a qualified right depending on the facts presented."[126] If a court orders inspection of books and records or stocklists, the court has wide discretion in determining the proper scope of inspection in relation to the stockholder's purpose. The scope of inspection should be circumscribed with precision and limited to those documents that are essential and sufficient to the stockholder's purpose.[127]

In request nos. 1 and 2 of its demand letter Wynnefield seeks Niagara's stocklist, transfer sheets and related records. I find these documents essential and sufficient to determine the number of record holders on the relevant dates in December 2004 and January 2005. Niagara already has provided Wynnefield the stocklist, but did not provide additional documents necessary to determine the number of stockholders for

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splits or rights offerings and JX 61 only refers to the "effective date." In that regard, Niagara points out that JX 61 has a blank in the column that refers to the record date. I reject Niagara's argument for purposes of this Section 220 action because it failed to present cogent and probative evidence to support the theory it espouses.

126 *Marathon Partners, L.P. v. M&F Worldwide Corp.*, 2004 WL 1728604, at *4 (Del. Ch. July 30, 2004).

127 *Id.*

reporting purposes, including the daily transfer sheets and the list showing the number of DTC participants. Therefore, Niagara must produce those documents, as well as any other documents responsive to nos. 1 and 2 of Wynnefield's demand.

Wynnefield has not shown a credible basis to infer probable wrongdoing as to the board's decisions to deregister, remain deregistered and effect the reverse and forward stock split. Based on that conclusion I deny request nos. 3 – 7 in Niagara's demand letter.

Wynnefield has shown, however, that it is entitled to Niagara's 10b-17 notice, if any, and all documents related to its filing and Niagara's communications with the SEC, NASD, DTC and Niagara's transfer agent related to the implementation of the reverse and forward splits, including the date on which they occurred. The direct communications that Niagara (or its lawyers) had with the SEC, NASD, and other third parties regarding the splits are likely to be essential in understanding the status of the splits and Niagara's reporting obligations. Thus, along with the stocklists already produced, Niagara must make available all documents sought in requests nos. 8-10 of Wynnefield's demand letter.

III. CONCLUSION

For the reasons stated, Wynnefield's request to inspect Niagara's books and records pursuant to 8 *Del. C.* § 220 is **GRANTED IN PART** and **DENIED IN PART**.

The Court grants requests nos. 1, 2, 8, 9 and 10 of Wynnefield's demand letter and denies its request in all other respects.[128]

IT IS SO ORDERED.

[128] At the post-trial argument Wynnefield requested that I grant attorneys' fees because Niagara did not produce its stock list until the eve of trial. At that time, I indicated a preference for treating any application for fees separately. Having since studied the issues raised in this litigation closely for purposes of preparing this opinion, I do not anticipate granting attorneys fees to either side. Nevertheless, if any party still intends to pursue a claim for attorneys' fees, they should make such application promptly.