IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

LOUISIANA MUNICIPAL POLICE EMPLOYEES RETIREMENT SYSTEM,	)	
Plaintiff,	)	
v.	)	C.A. No. 5682-VCL
MORGAN STANLEY & CO., INC., a Delaware Corporation,	)	
Defendant.	)	

MEMORANDUM OPINION

Date Submitted: February 17, 2011
Date Decided: March 4, 2011

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LASTER, Vice Chancellor.

Plaintiff Louisiana Municipal Police Employees Retirement System ("LAMPERS") seeks to inspect books and records pursuant to Section 220 of the Delaware General Corporation Law, 8 *Del. C.* § 220. The purpose for the inspection is to investigate whether the board of directors of Morgan Stanley & Co., Inc. (the "Board") wrongfully refused LAMPERS's earlier demand that Morgan Stanley initiate litigation against certain of its officers and directors for alleged wrongs arising out of the company's involvement with auction rate securities. Morgan Stanley has moved to dismiss the Section 220 complaint. I deny the motion to the extent that Morgan Stanley has argued that LAMPERS lacks a proper purpose. I grant the motion in part to the extent LAMPERS has sought books and records that are not reasonably required to investigate whether the litigation demand was wrongfully refused.

I. FACTUAL BACKGROUND

The facts for purposes of the motion to dismiss are drawn from LAMPERS's complaint and the documents it incorporates by reference. I take judicial notice of filings and rulings in a derivative action pending in the United States District Court for the Southern District of New York (the "Federal Court").

A. The Original Derivative Suit

On August 11, 2008, the Office of the New York Attorney General ("NYAG") announced that it was investigating Morgan Stanley's marketing and selling of auction rate securities. On August 14, 2008, NYAG and Morgan Stanley announced a settlement.

On August 27, 2008, less than two weeks after the announcement of the settlement, LAMPERS filed a stockholder derivative action in the Federal Court on behalf of Morgan Stanley which sought to hold Morgan Stanley's officers and directors liable for the harm the corporation suffered as a result of the conduct that was the subject of the NYAG investigation and settlement. Other stockholder plaintiffs filed similar derivative actions, which were consolidated. LAMPERS became co-lead plaintiff in the consolidated action.

Before suing derivatively, LAMPERS did not make a litigation demand on the Board. Nor did LAMPERS use Section 220 to obtain books and records that might bolster a claim of demand futility. LAMPERS and its fellow fast-filing plaintiffs simply asserted that demand was excused as futile because the board was "dominated and controlled by wrongdoers who continue to obscure their own misconduct." Consol. S'holder Deriv. Compl. ¶ 78, *In re Morgan Stanley & Co., Inc. Auction Rate Sec. Deriv. Litig.*, No. 08 Civ. 7587 (AKH) (S.D.N.Y. Feb. 2, 2009).

The defendants moved to dismiss the consolidated complaint pursuant to Rule 23.1 on the grounds that the plaintiffs failed to make a litigation demand and had not adequately alleged that demand was futile. *See* Fed. R. Civ. P. 23.1. On June 23, 2009, the Federal Court ruled that the complaint had not adequately pled demand futility and granted the defendants' motion to dismiss. The Federal Court entered an order retaining jurisdiction over the litigation and set a schedule providing for (i) the plaintiffs to make a litigation demand on the board, (ii) the board to respond, (iii) the plaintiffs to seek any further relief necessitated by the board's response.

B. LAMPERS Makes A Litigation Demand.

In accordance with the Federal Court's order, by letter dated August 24, 2009 (the "Litigation Demand"), LAMPERS demanded that the Board "take action to remedy breaches of fiduciary duties and other misconduct committed by certain officers and directors of the Company with respect to the Company's participation in the market for auction-rate securities." Gallagher Aff. Ex. C. The Board referred the Litigation Demand to the Audit Committee, which retained the law firm of Simpson Thacher & Bartlett LLP ("Simpson Thacher") to investigate the Litigation Demand and advise the Audit Committee regarding what action to take.

Eight months later, by letter dated April 26, 2010 (the "Demand Refusal Letter"), the Board refused to take any action in response to the Litigation Demand. The Demand Refusal Letter described the process followed by Simpson Thacher in rendering a report to the Audit Committee, by the Audit Committee in making a recommendation to the Board, and by the Board in relying on the Audit Committee's recommendation. The Demand Refusal Letter did not, however, provide any substantive insight into Simpson Thacher's work or the Audit Committee or the Board's determinations, nor did it explain the reasoning behind the decision to refuse the Litigation Demand. In essence, albeit with greater verbosity, the Demand Refusal Letter told LAMPERS that Simpson Thacher talked to a number of people, looked at a slew of documents, researched and pondered the law, then recommended to the Audit Committee that the Litigation Demand be refused. The Demand Refusal Letter next tells LAMPERS that the Audit Committee

carefully considered Simpson Thacher's recommendation, then recommended the same thing to the Board. The Board then refused the Litigation Demand in its entirety.

By letter dated May 12, 2010 (the "Books and Records Demand"), LAMPERS requested that Morgan Stanley make certain books and records available for inspection pursuant to Section 220. LAMPERS sought (i) minutes and notes of Board or Audit Committee meetings where the Litigation Demand was discussed or evaluated; (ii) reports provided to the Board or Audit Committee in connection with those discussions and other documents relied on by the Board or Audit Committee; (iii) documents relied upon by Simpson Thacher in advising the Audit Committee on how to respond to the Litigation Demand; (iv) a report prepared by Skadden, Arps, Slate, Meagher & Flom LLP ("Skadden") following an investigation it conducted in 2007 and 2008 into Morgan Stanley's involvement with auction rate securities (respectively the "Skadden Report" and the "Skadden Investigation"); (v) documents and notes reviewed in connection with the Skadden Investigation; and (vi) the retention agreements for both Skadden and Simpson Thacher. According to the Books and Records Demand, LAMPERS sought these documents "to enable [it] and its legal counsel to evaluate the Board's refusal of the Demand . . . and whether same constituted a reasonable and good-faith exercise of the Board's business judgment." Gallagher Aff. Ex. E. In addition, because the Federal Court retained jurisdiction over the Derivative Action, LAMPERS wrote the Federal Court by letter dated May 12, 2010, to request a case management conference regarding the Books and Records Demand.

By letter dated May 19, 2010 and copied to the Federal Court, Morgan Stanley rejected the Books and Records Demand on the ground that LAMPERS failed to state a proper purpose for conducting an inspection. Morgan Stanley also argued that the requested case management conference would be improper because the Federal Court lacked jurisdiction over the Section 220 issues. By order dated July 1, 2010, the Federal Court denied LAMPERS's request for a case management conference because "Section 220(c) provides that '[t]he [Delaware] Court of Chancery is vested with exclusive jurisdiction to determine whether or not the person seeking inspection is entitled to the inspection sought.'" Gallagher Aff. Ex. H. The Federal Court ordered the plaintiffs to show cause within 30 days why the case should not be dismissed.

On July 30, 2010, before responding to the Order to Show Cause, LAMPERS filed this action. On August 2, 2010, LAMPERS responded to the Order to Show Cause by asking the Federal Court to continue to hold the New York Derivative Action "in abeyance" pending the outcome of the Section 220 proceeding. Gallagher Aff. Ex. K. By order dated September 14, 2010, the Federal Court ruled that the derivative action would "be held in abeyance until the Chancery Court renders a decision." Gallagher Aff. Ex. M. On September 27, 2010, Morgan Stanley moved to dismiss LAMPERS's Section 220 complaint.

II. LEGAL ANALYSIS

A complaint should be dismissed if it fails to plead a plausible basis on which relief could be granted. *See* Ct. Ch. R. 12(b)(6); *Desimone v. Barrows*, 924 A.2d 908, 928-29 (Del. Ch. 2007). In considering a motion to dismiss under Rule 12(b)(6), the

Court must assume that all well-pled allegations of fact in the complaint are true. *Malpiede v. Townson*, 780 A.2d 1075, 1082-83 (Del. 2001).

"[B]ooks and records actions are summary proceedings" that "are to be promptly tried." *Lavi v. Wideawake Deathrow Entm't, LLC*, 2011 WL 284986, at *1 (Del. Ch. Jan. 18, 2011). The summary nature of the proceeding "dictate[s] against allowing preliminary motions addressed to the pleadings to be presented and decided . . . . Such a practice would tend to promote delay, thereby undercutting the statutory mandate and policy that the proceeding be summary in character." *Coit v. Am. Century Corp.*, 1987 WL 8458, at *1 (Del. Ch. Mar. 20, 1987). "Rarely is dispositive motion practice efficient when the case can be tried within two months of filing." *Lavi*, 2011 WL 284986, at *1. A pretrial motion therefore "ought not to be presented for decision in advance of the final hearing on the merits except where necessary to avoid substantial prejudice." *Coit*, 1987 WL 8458, at *1.

Despite the salutary principles counseling against pre-trial motion practice in Section 220 cases, I have entertained the motion to dismiss in this case because it appears that the underlying facts are largely undisputed. Informed by this decision, the parties should be able to agree on an appropriate scope for LAMPERS's inspection.

A. Proper Purpose

Section 220(b) provides, in pertinent part, as follows:

> Any stockholder, in person or by attorney or other agent, shall, upon written demand under oath stating the purpose thereof, have the right during the usual hours for business to inspect for any proper purpose, and to make copies and extracts from: (1) The corporation's stock ledger, a list of its stockholders, and its other books and records . . . .

8 *Del. C.* § 220(b). "A proper purpose shall mean a purpose reasonably related to such person's interest as a stockholder." *Id.*

The Books and Records Demand states that LAMPERS's purpose for conducting its inspection is "to enable [it] and its legal counsel to evaluate the Board's refusal of the [Litigation] Demand . . . and whether same constituted a reasonable and good-faith exercise of the Board's business judgment." Gallagher Aff. Ex. E. Delaware precedents establish that a stockholder plaintiff who filed a demand-excused case and had its complaint dismissed under Rule 23.1 can subsequently make a litigation demand, then use Section 220 to explore whether the demand was wrongfully refused. *See Grimes v. Donald* (*Grimes I*), 673 A.2d 1207 (Del. 1996); *Grimes v. DSC Commc'ns Corp.* (*Grimes II*), 724 A.2d 561 (Del. Ch. 1998).

The *Grimes I* plaintiff filed a derivative action alleging that demand was futile as to certain of its claims. The stockholder had previously made a litigation demand as to other claims, and the Court of Chancery dismissed the derivative action on the grounds that the stockholder had waived its ability to argue demand futility. *Id.* at 1219-20. On appeal, the Delaware Supreme Court held that the stockholder plaintiff could still pursue a demand-refused claim: "If a demand is made, the stockholder has spent one – but only one – 'arrow' in the 'quiver.' The spent 'arrow' is the right to claim that demand is excused. The stockholder does not, by making demand, waive the right to claim that demand has been wrongfully refused." *Id.* at 1218-19.

After the Supreme Court affirmed the dismissal of its demand-excused action, the shareholder made a renewed demand on the board as to all of its claims, which the board

rejected. *Grimes II*, 724 A.2d at 564. In its letter refusing the demand, the board described the procedures it had used to investigate the shareholder's allegations and stated that it had decided, based on that investigation, not to take action. *Id.* at 564 & n.2. The stockholder then served a Section 220 demand to obtain books and records sufficient "to determine . . . whether the Special Committee and the Board have complied with Delaware law in their analysis and rejection of the Demand." *Id.* at 564-65. Vice Chancellor Lamb commended the stockholder for "tak[ing] to heart the Supreme Court's admonition" by "attempting to 'use the tools at hand,' in order to determine whether his demand was wrongfully refused" before filing a complaint on that basis. *Id.* at 566. The Vice Chancellor held that "a Section 220 request for documents under these circumstances is proper." *Id.*; *see also Spiegel v. Buntrock*, 571 A.2d 767, 777 (Del. 1990) (explaining that after the board refuses a litigation demand, the "good faith and reasonableness of its investigation" may still be examined).

Morgan Stanley cites a decision from almost ten years before *Grimes II* in which this Court dismissed a Section 220 action that sought to investigate whether a board of directors, in considering and rejecting the plaintiff's litigation demand, "adhered to the appropriate legal standards and made the required factual determination in arriving at its decision not to pursue any action against the directors and former directors." *Weiland v. Cent. & S. W. Corp.*, 1989 WL 48740, at *1 (Del. Ch. May 9, 1989). After *Weiland*, the Delaware Supreme Court issued its decisions in *Grimes I* and *Spiegel*, and this Court decided *Grimes II*. The later decisions are controlling: Exploring whether a litigation demand was wrongfully refused is a proper purpose for using Section 220.

In a further effort to obtain dismissal of the complaint, Morgan Stanley recasts LAMPERS's purpose as seeking to investigate corporate wrongdoing. With LAMPERS's purpose thus reframed, Morgan Stanley asserts that LAMPERS has not shown "a credible basis for an inference that management suffered from some self-interest or failed to exercise due care in a particular decision." Morgan Stanley Op. Br. 16 (quoting *Wynnefield P'rs Small Cap Value L.P. v. Niagara Corp.*, 2006 WL 1737862, at *8 (Del. Ch. June 19, 2006), *aff'd in part, rev'd in part on other grounds*, 907 A.2d 146, 2006 WL 2727941 (Del. Sept. 1, 2006) (TABLE)). According to Morgan Stanley, because the Demand Refusal Letter described the process used to evaluate the Litigation Demand, and because a stockholder who makes a demand has "conceded the independence and disinterestedness of the Board by making a demand," LAMPERS has no credible basis for questioning the decision to refuse the demand. Morgan Stanley Reply Br. 14 (citing *Spiegel*, 571 A.2d at 777).

Contrary to Morgan Stanley's position, the Delaware Supreme Court has held that a stockholder who makes a demand does *not* concede the independence or disinterestedness of the board for purposes of demand refusal (as opposed to demand futility):

> It is not correct that a demand concedes independence "conclusively" and *in futuro* for all purposes relevant to the demand. *Levine* and *Spiegel* state that, in assessing whether a demand has been wrongfully refused, the Court looks only to good faith and the reasonableness of the investigation. This is completely consistent with the *Grimes* teaching that a board that appears independent *ex ante* may not necessarily act independently *ex post* in rejecting a demand. Failure of an otherwise independent-appearing board or committee to act independently is a failure to carry out its fiduciary

> duties in good faith or to conduct a reasonable investigation. Such failure could constitute wrongful refusal.

Scattered Corp. v. Chi. Stock Exch., Inc., 701 A.2d 70, 74-75 (Del. 1997); *accord Grimes I*, 673 A.2d at 1219. It follows that a stockholder under *Grimes I* is entitled to use Section 220 to determine whether "an otherwise independent-appearing board or committee" failed "to carry out its fiduciary duties in good faith or to conduct a reasonable investigation." *Scattered*, 701 A.2d at 75. The fact that a board "appears independent *ex ante*" does not defeat an inspection under *Grimes I*.

More importantly, exploring corporate wrongdoing is not the only proper purpose that will support a Section 220 investigation.

> A stockholder states a "proper purpose" when he seeks to investigate allegedly improper transactions or mismanagement; to clarify an unexplained discrepancy in the corporation's financial statements regarding assets; to investigate the possibility of an improper transfer of assets out of the corporation; to ascertain the value of his stock; to aid litigation he has instituted and to contact other stockholders regarding litigation and invite their association with him in the case; "[t]o inform fellow shareholders of one's view concerning the wisdom or fairness, from the point of view of the shareholders, of a proposed recapitalization and to encourage fellow shareholders to seek appraisal"; "to discuss corporate finances and management's inadequacies and then, depending on the responses, determine stockholder sentiment for either a change in management or a sale pursuant to a tender offer"; to inquire into the independence, good faith, and due care of a special committee formed to consider a demand to institute derivative litigation; to communicate with other stockholders regarding a tender offer; to communicate with other stockholders in order to effectuate changes in management policies; to investigate the stockholder's possible entitlement to oversubscription privileges in connection with a rights offering; to determine an individual's suitability to serve as a director; to obtain names and addresses of stockholders for a contemplated proxy solicitation; or to obtain particularized facts needed to adequately allege demand futility after the corporation has admitted engaging in backdating stock options.

1 Edward P. Welch et al., *Folk on the Delaware General Corporation Law* § 220.6.3, at GCL-VII-202 to -206 (5th ed. 2010 Supp.) (internal footnotes omitted), *quoted in City of Westland Police & Fire Ret. Sys. v. Axcelis Techs., Inc.*, 1 A.3d 281, 289 n.30 (Del. 2010). There is no basis for recasting LAMPERS's purpose, because a stockholder who seeks books and records to evaluate demand refusal has identified a proper purpose. Exploring corporate wrongdoing would be a separate and distinct purpose.

Consistent with this view, a recent decision by the Delaware Supreme Court held that investigating a board's decision "to override an exercised shareholder voting right without prior shareholder approval" constituted a proper purpose under Section 220 even though the stockholder had not established a credible basis to suspect corporate wrongdoing. *Axcelis*, 1 A.3d at 291. The plaintiff in *Axcelis* demanded to inspect corporate books and records to investigate whether the board had breached its fiduciary duties by rejecting the resignations that certain directors had submitted under the company's "plurality plus" re-election policy. *Id.* at 285. The press release announcing the decision explained that the board rejected the resignations after "consider[ing] a number of factors relevant to the best interests of Axcelis," including the directors' experience and knowledge, that their departure would leave the board shorthanded, and that the board needed to consider a pending takeover bid. *Id.* at 284. The Court of Chancery held that the stockholder failed to establish a credible basis to suspect wrongdoing that would support an inspection. *City of Westland Police & Fire Ret. Sys. v. Axcelis Techs., Inc.*, 2009 WL 3086537, at *5 (Del. Ch. Sept. 28, 2009).

On appeal, the Delaware Supreme Court affirmed the Court of Chancery's decision. 1 A.3d at 288. The Supreme Court then went on to explain "for future guidance" that a stockholder faced with identical circumstances could obtain the same books and records for the different purpose of evaluating the directors' suitability to serve. *Id.* at 290 (citing *Pershing Square, L.P. v. Ceridian Corp.*, 923 A.2d 810, 817-18 (Del. Ch. 2007)). Notwithstanding that the board had exercised its discretionary authority and provided an explanation for its decision, the Supreme Court held that "the question arises whether the directors, as fiduciaries, made a disinterested, informed business judgment that the best interests of the corporation require the continued service of these directors, or whether the Board had some different, ulterior motivation." *Id.* at 291. The Supreme Court explained that "[board] accountability should take the form of being subject to a shareholder's Section 220 right to seek inspection of any documents and other records upon which the board relied in deciding not to accept the tendered resignations." *Id.*

Here, LAMPERS seeks to investigate why the Board refused its Litigation Demand. The question of whether a corporation should sue its directors and senior officers puts directors in a difficult position where they are subject to potentially subtle influences and pressures. "[N]otwithstanding our conviction that Delaware law entrusts the corporate power to a properly authorized committee, we must be mindful that directors are passing judgment on fellow directors in the same corporation . . . . The question naturally arises whether a 'there but for the grace of God go I' empathy might not play a role." *Zapata Corp. v. Maldonado*, 430 A.2d 779, 787 (Del. 1981); *see also*

Aronson v. Lewis, 473 A.2d 805, 815 & n.8 (Del. 1984) (recognizing "the structural bias common to corporate boards throughout America, as well as the other unseen socialization processes cutting against independent discussion and decisionmaking in the boardroom," but requiring supporting facts to be affirmatively pled with particularity in the complaint for purposes of Rule 23.1). Basic notions of accountability require that stockholders be able to use Section 220 to evaluate whether the demand-refusal decision was made in good faith, after a reasonable investigation, "or whether the Board had some different, ulterior motivation." *Axcelis*, 1 A.3d at 291.

I recognize that the *Zapata* Court was commenting on the decision that a special litigation committee faces when addressing derivative claims being actively pursued by a stockholder plaintiff after demand has been excused. The act of considering a litigation demand without a prior finding of demand excusal presents directors with a decision of the same kind. If the directors take up the invitation to litigate, the outcome for the litigation targets is no different than if an SLC assumed the derivative claims under *Zapata*. In both cases, the directors have deployed the resources of the corporation against their fellow directors and officers (and theoretically against themselves). It is only if the directors refuse the litigation demand, as typically happens, that the subsequent litigation paths diverge. An SLC's decision to dismiss a post-demand-excusal derivative claim is reviewed under *Zapata*'s two-step standard, which effectively amounts to reasonableness review and a context-specific application of enhanced scrutiny. *Cf. Reis v. Hazelett Strip-Casting Corp.*, 2011 WL 303207, at *8 (Del. Ch. Jan. 21, 2011) ("Enhanced scrutiny is Delaware's intermediate standard of review. . . .

Enhanced scrutiny applies when the realities of the decision-making context can subtly undermine the decisions of even independent and disinterested directors."). By contrast, a decision to refuse a litigation demand is reviewed under the business judgment rule, which forces a plaintiff to overcome the rule's powerful presumptions before a court will examine the merits of the directors' decision. *See Levine v. Smith*, 591 A.2d 194, 212 (Del. 1991). The highly deferential standard for reviewing a demand-refusal decision makes it critical that an accountability mechanism exist in the form of a limited right to information under Section 220.

Morgan Stanley cannot rely on the Demand Refusal Letter to foreclose LAMPERS's right to use Section 220. The letter describes the Board's process, but it does not provide any substantive insight into the Board's decision. In form, the Demand Refusal Letter is longer than the peremptory refusal found insufficient in *Grimes II*. In substance, the two letters are identical. A board cannot defeat the use of Section 220 that the Delaware Supreme Court contemplated in *Grimes I*, *Scattered*, and *Spiegel* by sending a self-serving letter describing process *sans* content. Such an approach would render nugatory the right to use Section 220 to investigate demand refusal.

LAMPERS recognizes that the deference afforded to the Board's decision means it faces long odds in showing that the refusal was wrongful. Whether the Board in fact acted wrongfully is not currently at issue. Rather, the question is whether LAMPERS's purpose for inspection is proper. It is.

B. The Scope Of The Inspection

A stockholder's inspection is limited to those books and records that are necessary to accomplish the stated purpose. *See Sec. First Corp. v. U.S. Die Casting & Dev. Co.*, 687 A.2d 563, 570 (Del. 1997). "The core inquiry . . . is whether the requested documents are 'reasonably required to satisfy the purpose of the demand.'" *Sanders v. Ohmite Hldg., LLC*, 2011 WL 598436, at *7 (Del. Ch. Feb. 21, 2011) (quoting *Carapico v. Phila. Stock Exch., Inc.*, 791 A.2d 787, 793 (Del. Ch. 2000)).

In *Grimes II*, Vice Chancellor Lamb held that

> [t]he right to obtain corporate records for the purpose of determining whether or not a demand was improperly refused focuses on the committee process itself and extends at least to reports or minutes, reflecting the corporate action. Thus, plaintiff is entitled to receive copies of the Special Committee's report, minutes of the meetings of the Special Committee and minutes of any meeting of the board of directors relating to the creation or functioning of the Special Committee, including any meeting of the board of directors at which the recommendation of the Special Committee was considered or approved.

724 A.2d at 567 (internal quotation marks omitted). The scope of relief granted in *Grimes II* anticipated *Axcelis*, where the Delaware Supreme Court held that "[board] accountability should take the form of being subject to a shareholder's Section 220 right to seek inspection of any documents and other records upon which the board relied." *Axcelis*, 1 A.3d at 291.

LAMPERS has stated a claim to obtain the information contemplated by *Grimes II* and *Axcelis*, *viz.* (i) the minutes of any meeting of the Board or the Audit Committee where the Litigation Demand was discussed or evaluated, (ii) Simpson Thacher's written report and presentation to the Audit Committee in connection with the firm's

recommendation to refuse the Litigation Demand, (iii) the Audit Committee's report and presentation to the Board, and (iv) any documents and other records upon which the Board relied. In addition, LAMPERS has stated a claim to obtain Simpson Thacher's engagement letter so that LAMPERS can evaluate the scope of the firm's engagement and its economic incentives. *Cf. Grimes II*, 724 A.2d at 567 (permitting inspection of "documents reflecting payments made to or on behalf of the members of the Special Committee").

On the facts pled, LAMPERS also has stated a claim to obtain the Skadden Report and those portions of the record from the Skadden Investigation actually considered by Simpson Thacher. Morgan Stanley's response to the Litigation Demand states:

> In connection with the Audit Committee's review of the matters raised in the [Litigation] Demand Letter, we met with attorneys from [Skadden], which previously conducted a comprehensive investigation of Morgan Stanley's marketing and selling of ARS during 2007 and 2008 in response to several regulatory investigations . . . . During the course of its investigation, Skadden reviewed approximately 2.8 million pages of electronic and hard copy documents, and interviewed twelve Morgan Stanley employees, a number of whom were interviewed multiple times. . . .
>
> In addition, as part of the Audit Committee's evaluation and investigation of the matters raised in the [Litigation] Demand Letter, we conducted an independent review and analysis of the relevant material from Skadden's prior investigation, and also investigated certain matters that were not a focus of Skadden's prior investigation by requesting and reviewing additional documents and speaking with relevant Morgan Stanley employees.

Gallagher Aff. Ex. D. The Skadden Report and "the relevant material from Skadden's prior investigation" comprise part of the body of information on which Simpson Thacher, the Audit Committee, and the Board relied in evaluating and responding to the Litigation

Demand. LAMPERS is therefore entitled to those materials. Because LAMPERS has stated a claim to obtain the Skadden Report and these aspects of the Skadden Investigation, LAMPERS has stated a claim to obtain the Skadden engagement letter for the same reasons applicable to the Simpson Thacher engagement letter.

LAMPERS has not stated a claim to obtain the other books and records it seeks, including other materials from the Skadden Investigation. To obtain additional books and records, LAMPERS must make a greater showing of need by articulating in more specific and convincing fashion why the incremental information is reasonably required to evaluate the Board's demand-refusal decision. *See Grimes II*, 724 A.2d at 567. LAMPERS remains free to attempt such a showing by way of a future Section 220 demand, and in doing so LAMPERS may make arguments based on the materials it obtains through this action. If LAMPERS makes such a demand, then Morgan Stanley will have to consider it in due course. For purposes of the current litigation, to the extent the Books and Records Demand sought materials beyond those identified above, LAMPERS's complaint is dismissed.

III. CONCLUSION

For the foregoing reasons, the motion to dismiss is granted in part and denied in part. To the extent the parties cannot resolve their dispute, they will negotiate a schedule that will bring this summary proceeding to a final hearing within sixty days. IT IS SO ORDERED.