IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

NORFOLK COUNTY RETIREMENT SYSTEM,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 3443-VCP
	)	
JOS. A. BANK CLOTHIERS, INC.,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION

Submitted: October 27, 2008
Decided: February 12, 2009

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PARSONS, Vice Chancellor.

This action concerns a demand, pursuant to 8 *Del. C.* § 220, for certain books and records of a well-known haberdasher, Jos. A. Bank Clothiers, Inc. In 2007, a federal securities class action was filed in a district court in Maryland alleging various misrepresentations related to the financial affairs of Jos. A. Bank Clothiers, Inc. from late-2005 to mid-2006. A derivative action also was filed in the same court alleging breaches of fiduciary duty. Although the plaintiff in the Maryland derivative action did not request any books and records before filing or in the course of prosecuting that suit, he sought to avoid the requirement of making a demand on the board by arguing demand futility. The federal court rejected that argument and dismissed the derivative action. The Maryland derivative plaintiff then made a demand on the board. In response, the board set up a special litigation committee ("SLC") to investigate the alleged wrongdoing. After an investigation, the SLC determined there was no wrongdoing and that the derivative action and the securities class action were without merit. In the meantime, however, the securities class action had survived a motion to dismiss and a motion for judgment on the pleadings.

Plaintiff in this action under Section 220 had no involvement in the federal litigation and seeks to inspect books and records of the Company regarding the same underlying conduct at issue in the securities class action and the derivative action in Maryland. The Company has provided Plaintiff with the SLC's Report, the exhibits thereto, the minutes of the meeting of the Board of Directors approving the formation of the SLC, and the minutes of the meetings of the SLC, but objects to producing anything more. The Company and Plaintiff have filed cross motions for summary judgment. For

the reasons stated in this opinion, I conclude that Plaintiff has not demonstrated that it has a right under 8 *Del. C.* § 220 to inspect any additional documents. I, therefore, grant Defendant's motion and deny Plaintiff's motion for summary judgment.

I. BACKGROUND

A. The Parties

Plaintiff, Norfolk County Retirement System ("Norfolk"), is a beneficial holder of stock in Defendant, Jos. A. Bank Clothiers, Inc. ("Jos. A. Bank" or the "Company").[1] Jos. A. Bank is a Delaware corporation whose principal place of business is located in Maryland.[2]

B. Facts

1. The alleged wrongdoing

Through this Section 220 action, Norfolk seeks to investigate alleged wrongdoing in connection with Jos. A. Bank's financial affairs from December 2005 through June 2006. The Company made a series of statements over that time period regarding its financial condition supposedly without disclosing the existence of excessive levels of inventory of the Company's Fall/Winter 2005 clothing lines.[3] These inventory levels

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1 Norfolk's Verified Complaint ("Complaint") ¶ 3.

2 *Id.* ¶ 2.

3 *Id.* ¶ 15.

allegedly led the Company to steeply discount inventory, which increased sales but eroded profit margins.[4]

On June 7, 2006, the Company reported a drop in year-over-year first quarter earnings.[5] In the first quarter of 2006, the Company's net income was $5.9 million compared with $6.7 million for the first quarter of fiscal 2005.[6] By the end of the day on June 8, 2006, the Company's stock price fell 29%.[7] During the relevant period preceding June 7, 2006, Jos. A. Bank's Chief Executive Officer, Robert N. Wildrick, sold 74% of his common stock for an alleged profit of $36 million.[8]

2. The Securities Class Action

In response to the stock price drop, stockholders filed securities class action complaints in the United States District Court for the District of Maryland (the "Securities Class Action") alleging violations of Section 10(b) of the Securities and Exchange Act of 1934[9] and Rule 10b-5 promulgated thereunder.[10] Those actions were consolidated into *Lefkoe v. Jos. A. Bank Clothiers, Inc.*, C.A. No. WMN-06-1892

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4 *Id.* ¶ 17.

5 *Id.* ¶ 20.

6 *Id.*

7 *Id.* ¶ 25.

8 *Id.* ¶ 24.

9 15 U.S.C. § 78j(b).

10 17 C.F.R. § 240.10b-5 (2007).

(D. Md.).[11] The Securities Class Action alleges, among other things, that senior management attempted to conceal excessive inventory by conducting liquidation sales and issued false and misleading statements regarding the Company's financial affairs.[12] Specifically, that Action alleges that a series of statements attributable to the Company were false because they omitted the Company's knowledge of excessive inventory levels throughout the final two quarters of 2005 and into the first quarter of 2006.[13]

3. The Maryland Derivative Action

On August 11, 2006, Glenn Hutton (the "Maryland Derivative Plaintiff") filed a stockholder derivative action (the "Maryland Derivative Action") in the United States District Court for the District of Maryland alleging that the Company's Board of Directors breached their fiduciary duties to the Company in connection with the same

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11 The *Lefkoe* court issued two decisions related to the adequacy of the plaintiff's pleadings. The first decision ("*Lefkoe I*") was issued September 10, 2007 and is attached as Exhibit C to Plaintiff's Opposition to Defendant's Motion for Summary Judgment. The second decision ("*Lefkoe II*") was issued May 1, 2008 and is attached as Exhibit 2 to the Transmittal Affidavit of Brian D. Long, Esq., in Support of Plaintiff's Motion for Summary Judgment.

12 Report of the Special Litigation Committee of Jos. A. Bank Clothiers, Inc. ("SLC Report") at 2, Ex. 2 at 1-4; Compl. ¶¶ 14-22. The SLC Report is attached as Exhibit A to the Affidavit of Sean M. Brennecke, filed on September 10, 2008 ("Brennecke Aff."). The facts recited in this opinion from the SLC Report are not subject to genuine dispute. I cite to the Report primarily for convenience in that it assembles in one place a number of relevant background facts and documents. The opinion does not rely on the SLC Report as establishing any disputed issue regarding the merits of the dispute over the underlying conduct of the Company's officers and directors.

13 SLC Report at 2.

conduct at issue in the Securities Class Action.[14] Hutton did not make a demand on the Board, claiming that demand would be futile because the directors lacked independence.[15] On September 13, 2007, Chief Judge Benson Everett Legg dismissed the Maryland Derivative Action, because Hutton did not make any "particularized allegations creating a reasonable doubt that a majority of the directors would be disinterested or independent in considering a shareholder demand."[16] Hutton did not appeal.

Following the dismissal, Hutton sent a letter to the Company's Board, demanding that it establish a special litigation committee "to take action to fully investigate and remedy, *inter alia*, potential breaches of fiduciary duty by certain current and/or former officers and directors of the Company."[17] Hutton's demand concerned the same buildup of inventory levels and price markdowns in the first quarter of 2006 that motivated the Securities Class Action and the Maryland Derivative Action.

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14 *Id.* at 8, Ex. 4. A second derivative action in the Maryland District Court was filed and the cases were consolidated. *Id.*

15 *Id.* at 9.

16 *In re Jos. A. Bank Clothiers, Inc. Deriv. Litig.*, No. L-06-2095, slip op. at 9-10 (D. Md. Sept. 13, 2007). The court's decision dismissing the Maryland Derivative Action appears in Exhibit 6 to the SLC Report.

17 *See* SLC Report at 10, Ex. 7.

4. The Investigation by the SLC

Responding to the demand, on September 25, 2007, the Company's Board appointed the SLC to investigate Hutton's claims.[18] The SLC consisted of three nonexecutive directors that Judge Legg previously held were capable of impartially investigating and pursuing a derivative demand: William E. Herron, Sidney H. Ritman, and Andrew A. Giordano.[19]

The SLC retained the law firm of Kramon & Graham, P.A. to represent it.[20] Over a span of sixteen weeks, the SLC held eleven meetings to review the investigation's progress.[21] In the course of its work, the SLC interviewed over forty current and former Company employees, including corporate management, store managers, and others having knowledge of inventory and sales issues.[22] In addition, the SLC also reviewed approximately 5,000 emails, a number of the Company's filings with the SEC, store expansion schedules and progress reports, audit letters, management letters, spreadsheets, financial projections, marketing event calendars, and organizational charts.[23] The SLC also reviewed the results of an investigation performed in March 2006 by the law firm of

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18 *See id.* at 6, 10, Ex. 8.

19 *See id.* at 6, 11-12.

20 *See id.* at 12.

21 *See id.* at 7.

22 *See id.* at 18, Ex. 17.

23 *See id.* at 17-18.

WilmerHale and the accounting firm of Ernst & Young on behalf of the Company's audit committee, which had received an anonymous tip that the inventory had been misstated.[24]

On February 7, 2008, the SLC issued a report, and then advised Hutton that it had rejected his demand.[25] The SLC concluded that: the Company's inventory was not impaired or excessive; sales and promotions used by the Company were not out of the ordinary; and management did not make material misstatements or withhold information concerning the level of inventory.[26] In the opinion of the SLC, senior management "acted honestly and appropriately in preparing and releasing [the Company's] financial disclosures."[27] The SLC also concluded the Maryland Derivative Action and the Securities Class Action were without merit.[28]

5. The Section 220 Demand

Nearly eighteen months after the June 2006 earnings announcement and share price decline and over two months after the dismissal of the Maryland Derivative Action, Norfolk sent a demand letter on November 27, 2007 to Jos. A. Bank ("the "Demand Letter"), seeking to inspect and copy certain books and records.[29] The books and records

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24 *See id.* at 15-16, 39-40.

25 *See* Brennecke Aff. Ex. C.

26 *See* SLC Report at 3-4.

27 *See id.* at 54.

28 *See id.* at 54-55.

29 *See* Compl. Ex. A.

Norfolk seeks largely relate to the circumstances surrounding the allegedly false and misleading statements at issue in the Securities Class Action, which also formed the basis for the Maryland Derivative Action. Specifically, Norfolk seeks all Board Materials[30] relating to eleven categories of documents specified in paragraphs A-K of the Demand Letter. Paraphrasing somewhat, those categories concern:

> A. The Company's financial data reporting procedures and controls;
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> B. The Company's inventory management procedures and controls;
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> C. The Company's procedures and controls for tracking, auditing and reporting its inventory levels;
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> D, E. Inventory levels and pricing strategies at the Company for the period June 1, 2005 through June 15, 2006;
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> F. The Company's compliance (or noncompliance) with Generally Accepted Accounting Principles;
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> G. The Company's auditing procedures and controls;
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> H. The Company's quarterly and annual financial statements for fiscal years 2005 to the present;
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> I. The "events, circumstances, and transactions underlying the announcements made by the Company in its Form 10-Q filed with the United States Securities and Exchange Commission ("SEC") on or around

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[30] Norfolk defines "Board Materials" as "all documents concerning, related to, provided at, considered at, discussed at, or prepared or disseminated in connection with any meeting of the Company's Board of Directors or any regular or specially created committee thereof, including all presentations, board packages, recordings, agendas, summaries, memoranda, transcripts, notes, minutes of meetings, drafts of minutes of meetings, exhibits distributed at meetings, summaries of meetings, or resolutions." *See id.* at 2 n.1.

June 7, 2006 (the "June 2006 Form 10-Q"), through which it reported its financial results for the first fiscal quarter of 2006";

J. Any "internal investigation by the Company or its accountants or advisors concerning the subject matter of the preceding categories of documents"; and

K. Any "investigation undertaken by the SEC, or any other state or federal government or regulatory agency concerning any of the above subject matter."

The Demand Letter also stated that Norfolk seeks access to these categories of books and records for the following purposes:

A. To investigate potential wrongdoing, mismanagement, and breaches of fiduciary duties by the members of the Company's Board of Directors or others in connection with the events, circumstances, and transactions underlying the Company's June 2006 Form 10-Q, including, among other things, the events surrounding the Company's announcements that Jos. A. Bank's gross profits had declined (by 16% as compared with the prior year period) as a result of increased customer demand for fall merchandise, resulting in less demand for year-round core merchandise;

B. To assess the ability of the Company's Board of Directors to impartially consider a demand for action (including a request for permission to file a derivative lawsuit on the Company's behalf) related to the items described in this demand; and

C. To take appropriate action in the event the members of the Company's Board of Directors did not properly discharge their fiduciary duties.

Since receiving the Demand Letter, the Company has provided Norfolk with a copy of the SLC Report, the exhibits thereto, the minutes of the meetings of the SLC, and the minutes of the Company's Board approving the creation and functioning of the SLC.[31]

C. Procedural History

Norfolk filed its Complaint on January 3, 2008, seeking to compel inspection of certain Jos. A. Bank books and records pursuant to 8 *Del. C.* § 220. Jos. A. Bank promptly answered, and then amended its answer on February 13, 2008. On September 10, 2008, the parties cross moved for summary judgment. Having carefully considered the parties' subsequent briefing and oral arguments, this is the Court's opinion on the pending motions for summary judgment.

D. Parties' Contentions

Norfolk primarily relies upon the denial of a motion to dismiss for failure to state a claim and a motion for judgment on the pleadings in the Securities Class Action to demonstrate a proper purpose for its books and records demand. Because the plaintiff there survived motions under Court of Chancery Rule 12 to dismiss in the face of the heightened pleading standards for federal securities class actions, Norfolk contends that a Section 220 complaint premised on the same facts underlying the Securities Class Action necessarily provides a credible basis to infer wrongdoing occurred at the Company. Norfolk further argues that the dismissal of the Maryland Derivative Action for failure to show demand futility is irrelevant to Norfolk's demand for books and records.

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[31] *See* Brennecke Aff. Ex. D.

In support of its motion for summary judgment, the Company makes two primary arguments. First, the Company asserts it has mooted Norfolk's Section 220 demand by producing the SLC Report, the exhibits thereto, the minutes of the SLC, and the minutes of the Board relating to the creation and functioning of the SLC.[32] The "operative question," according to the Company, is whether Norfolk already possesses the documents that are necessary and sufficient to address its purpose.[33] Second, the Company contends Norfolk has no right to any inspection of documents because Norfolk has no factual basis to challenge the independence of the Jos. A. Bank Board in any future action.

II. ANALYSIS

Without conceding the propriety of Norfolk's purpose for inspecting books and records of the Company pursuant to § 220, the Company has produced certain documents to Norfolk pursuant to its Demand Letter. The Company maintains, however, that it has produced all the documents that would be necessary and sufficient to satisfy Norfolk's purpose. Because Norfolk disputes that contention, I must examine the purposes for Norfolk's demand and the scope of the documents necessary and sufficient to address any proper purpose.

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[32] DOB at 12-17. Defendant's opening brief in support of its motion for summary judgment is cited to as "DOB," and its reply as "DRB." Plaintiff's opening and reply briefs for its cross motion for summary judgment likewise are styled "POB" and "PRB," respectively. Defendant's and Plaintiff's respective answering briefs to their adversary's motion are referred to as "DAB" and "PAB."

[33] DOB at 13-14.

A. Standard

A stockholder of a Delaware corporation has a statutory right to inspect the books and records of the corporation under 8 *Del. C.* § 220. The stockholder must satisfy form and manner requirements for requesting books and records, and have a proper purpose for the inspection.[34] The statute defines "proper purpose" as any purpose "reasonably related to such person's interest as a stockholder."[35] Where, as here, the demand is for inspection of books and records rather than for a stock list, the stockholder bears the burden of proving a proper purpose.[36]

Additionally, "[p]roper purpose has been construed to mean that a shareholder's *primary purpose* must be proper, irrespective of whether any secondary purpose is proper."[37] Also, the primary purpose must not be adverse to the corporation's best interest.[38] One purpose Delaware courts have recognized as proper under certain circumstances is investigating wrongdoing by a corporation's management or board for

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34 *Highland Select Equity Fund, L.P. v. Motient Corp.*, 906 A.2d 156, 164 (Del. Ch. 2006). There is no serious dispute that Norfolk is a stockholder and that it complied with the technical requirements of Section 220.

35 8 *Del. C.* § 220(b).

36 8 *Del. C.* § 220(c); *BBC Acq. Corp. v. Durr-Fillauer Med., Inc.*, 623 A.2d 85, 88 (Del. 1992).

37 *Grimes v. DSC Commc'ns Corp.*, 724 A.2d 561, 565 (Del. Ch. 1998) (citations omitted).

38 *Id.*

the ultimate purpose of evaluating a board of directors' ability to evaluate a stockholder demand in good faith, independently, and with care.[39]

In general, summary judgment may be granted "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[40] Because this matter is before me on cross motions for summary judgment, it is also subject to Rule 56(h). Under Rule 56(h), where, as here, the parties have cross moved for summary judgment and have not presented argument that there is an issue of fact material to the disposition of either motion, "the Court shall deem the motions to be the equivalent of a stipulation for decision on the merits based on the record submitted with the motion."[41]

In a case like this one, summary judgment may be granted for a corporate defendant if the stockholder seeks inspection to investigate potential corporate wrongdoing and yet fails to present "some evidence to suggest a credible basis from which a court can infer that mismanagement, waste or wrongdoing may have occurred."[42] The "credible basis" standard has been described as "the 'lowest possible burden of

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39 *Seinfeld v. Verizon Commc'ns, Inc.*, 909 A.2d 117, 118 (Del. 2006).

40 Ct. Ch. R. 56(c).

41 Ct. Ch. R. 56(h). Rule 56(h) applies here with one possible exception. As explained *infra* Part II.B.2, there is a potential dispute concerning whether Norfolk has stated any purpose other than evaluating a potential derivative suit. To the extent there could be a dispute as to that, I draw all inferences in favor of Norfolk.

42 *Seinfeld*, 909 A.2d at 118 (internal quotations omitted).

proof' in Delaware jurisprudence."[43] Under Delaware law, a stockholder making a Section 220 demand does not have to prove mismanagement actually occurred, but must make a "credible showing, through documents, logic, testimony or otherwise, that there are legitimate issues of wrongdoing."[44]

The scope of the documents available to a stockholder under § 220, however, is limited. Even if a plaintiff demonstrates a proper purpose, that plaintiff is not entitled to inspect all the documents that he or she believes are relevant or even likely to lead to information relevant to that purpose. Delaware courts repeatedly have held that "[t]he scope of inspection should be circumscribed with precision and limited to those documents that are necessary, essential and sufficient to the stockholder's purpose."[45]

The issues presented by this case, therefore, are: (1) to what extent has Norfolk demonstrated a proper purpose for its request for inspection; and (2) if Norfolk has articulated a proper purpose, has the Company produced the documents "necessary, essential and sufficient" for that purpose?

B. Does Norfolk have a Proper Purpose?

Norfolk's Demand Letter sets forth three purposes for its request for books and records: (1) to investigate potential wrongdoing in connection with a disclosure in a

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43 *Melzer v. CNET Networks, Inc.*, 934 A.2d 912, 917 n.19 (Del. Ch. 2007) (citation omitted).

44 *Sec. First Corp. v. U.S. Die Casting & Dev. Co.*, 687 A.2d 563, 568 (Del. 1997).

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

Form 10-Q in June 2006 announcing a decline in both net income and earnings per share, which resulted in a substantial drop in the market price of Jos. A. Bank stock; (2) to assess the ability of the Company's Board of Directors to consider a demand for action, including permission for leave to file a derivative action, based on the same disclosure-related conduct; and (3) to take appropriate action if the requested documents indicate the board did not properly discharge their fiduciary duties.

The Company acknowledges Norfolk's purpose of exploring a possible derivative action,[46] but denies that Norfolk has any other purpose. Norfolk emphasizes that it has other purposes, as well. Before tackling the question of additional purposes, I focus first on whether Norfolk's purpose of investigating the possibility of bringing a derivative action based on the alleged misrepresentations of the Company's inventory situation in June 2006 warrants granting it access to additional documents.

1. Investigating a possible derivative action

The Delaware courts have recognized that investigating the possibility of pursuing a derivative action based on perceived wrongdoing by a corporation's officers or directors represents a proper purpose for a Section 220 demand.[47] If the filing of such a future derivative action would be barred by claim or issue preclusion, however, a § 220

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46 All three stated purposes are consistent with this purpose. In addition, Norfolk's first two stated purposes strongly suggest that its *primary* purpose is to evaluate whether or not it should file a derivative suit.

47 *See, e.g.*, *Seinfeld*, 909 A.2d at 121; *Saito v. McKesson, HBOC, Inc.*, 806 A.2d 113, 115 (Del. 2002); *Sec. First Corp.*, 687 A.2d at 567-68.

demand may be denied as a matter of law.[48] Applying this line of reasoning, the Company argues that even if Norfolk's purpose is to file a derivative action, the determination of the Maryland court regarding demand futility and the action of the SLC would preclude Norfolk from maintaining a future derivative suit. Further, the Company contends that it already has provided all of the documents that would be necessary and essential under the applicable precedents to address Norfolk's purpose of exploring a possible derivative action. In particular, the Company has provided Norfolk with a copy of the SLC Report, the exhibits thereto, the minutes of the meetings of the SLC, and the minutes of the Company's Board approving the creation and functioning of the SLC.[49] Thus, I turn next to whether the Company has produced all the documents necessary and essential to enable Norfolk to investigate the desirability of filing a derivative action.

Norfolk contends that the actions of the plaintiff in the Maryland Derivative Action should not preclude Norfolk from seeking a wide range of documents beyond those it has received. In attempting to avoid the potentially preclusive effects of the action taken by the plaintiff in the Maryland Derivative Action, Norfolk stresses that initially the Maryland Derivative Plaintiff did not make a demand on the board, but

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48 *See West Coast Mgmt. & Capital, LLC*, 914 A.2d 636, 638 (Del. Ch. 2006); *Polygon Global Opportunities Master Fund v. West Corp.*, 2006 WL 2947486, at *5 (Del. Ch. Oct. 12, 2006).

49 *See* Brennecke Aff. Ex. D.

instead chose to make a case for demand futility.[50] But the Maryland Derivative Action was dismissed for failure to plead demand futility adequately. The Maryland Derivative Plaintiff then made a demand on the Jos. A. Bank Board,[51] which resulted in the

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[50] The demand requirement has been extensively discussed by this court elsewhere. Accordingly, I merely relate those elements pertinent to the actions of those persons relevant to this litigation. To show demand futility, the Delaware Supreme Court articulated a two-part test in *Aronson v. Lewis*. 473 A.2d 805, 814 (Del. 1985). The court must decide whether, given the particularized facts alleged, a "reasonable doubt is created that: (1) the directors are disinterested and independent [or] (2) the challenged transaction was otherwise the product of a valid exercise of business judgment." *Id.* Thus, the plaintiff has two options to make out a demand futility argument. First, the plaintiff may argue that a majority of the board is either interested or lacks independence from those who are interested. *Levine v. Smith*, 591 A.2d 194, 205-06 (Del. 1991). Second, the plaintiff may allege particularized facts that demonstrate that the challenged transaction simply cannot be a valid exercise of valid business judgment. *Id.* Demand futility under the second *Aronson* prong arises only in an extreme case of directorial failure. The situation must be one of the "rare cases [in which] a transaction may be so egregious on its face that board approval cannot meet the test of business judgment, and a substantial likelihood of director liability exists." *Aronson*, 473 A.2d at 815. The second *Aronson* prong applies, for example, in situations where the particularized facts are such that it is "difficult to conceive" that a director could have satisfied his or her fiduciary duties. *See Ryan v. Gifford*, 918 A.2d 341, 355 (Del. Ch. 2007). In short, the first prong typically has been easier for plaintiffs to fulfill than the second.

[51] If a plaintiff makes a demand on the board and the board refuses the demand, the plaintiff must then demonstrate that the demand was wrongfully refused to proceed with suit. *See Zapata Corp. v. Maldonado*, 430 A.2d 779, 784 (Del. 1981). Demonstrating wrongful refusal is more daunting than demonstrating demand futility. The Delaware Supreme Court has explained that once a plaintiff has made a demand on the board the plaintiff effectively has conceded the board had the requisite independence and disinterest to objectively evaluate the demand. *See Levine*, 591 A.2d at 211-13. Therefore, a plaintiff seeking to show wrongful refusal must argue the board failed the second prong of the *Aronson* test, that the board's decision was not the product of valid business judgment. *Id.*

formation of the SLC.[52] It was only after a court refused to excuse demand, a demand was made, and the SLC was formed, that Norfolk sought books and records.

The Company argues that the determination in the Maryland Derivative Action that demand is not excused would be binding upon subsequent plaintiffs based on collateral estoppel or issue preclusion. The Company further maintains that because the Maryland Derivative Plaintiff ultimately made a demand on the board and the demand was refused by the SLC, Norfolk is only entitled to those documents that a plaintiff would need to attempt to prove wrongful refusal of a demand.[53]

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[52] Even when demand would be futile, the corporation still may control derivative litigation by setting up a special litigation committee. The Delaware Supreme Court in *Zapata* fashioned a procedure whereby a special litigation committee can evaluate whether or not to pursue remedial action. 430 A.2d at 788-89. If the special litigation committee decides not to pursue any action, the court then applies a two-part test. First, the court looks at the independence and good faith of the investigation performed by the special committee and at the reasonableness of the committee's conclusion. *Id.* If the corporation fails to demonstrate the existence of those conditions, the plaintiff regains control. If the corporation succeeds in making that showing, the court then uses its own independent judgment to determine whether the suit should be dismissed. *Id.*; *see also In re Oracle Corp. Deriv. Litig.*, 824 A.2d 917, 948 (Del. Ch. 2003).

[53] If in a future derivative action Norfolk was held not to be bound by the court's decision in the Maryland Derivative Action that demand would not be futile, the significance of the SLC's action to such a derivative action presumably would shift accordingly. That is, if Norfolk was able to demonstrate demand futility at some point in the future, then the SLC theoretically would become a *Zapata* committee and the burden would shift to the Company to show the committee was composed and acted appropriately. *See supra* note 52.

The Delaware Court of Chancery addressed an analogous situation in *Grimes v. DSC Communications Corp*.[54] There, a corporation had refused a pre-suit demand to rescind a compensation package awarded to the company's CEO. Following refusal of the demand, the stockholder filed a derivative suit, which was then dismissed.[55] The same stockholder then made a second demand. In response to the second demand, the board formed a special committee to investigate the stockholder's allegations. The committee then recommended rejection of the second demand.[56]

After the second rejection, the stockholder made a demand for books and records pursuant to § 220. His stated purpose for the demand was to "determine the independence of the Special Committee and whether the Special Committee and the Board have complied with Delaware law in their analysis and rejection of the Demand."[57] The board responded by producing some documents, but refused to provide the special committee's report or any documents accompanying it.[58]

The court in *Grimes* held that the plaintiff was entitled to receive copies of the special committee report, minutes of the meetings of the special committee, and minutes of any meeting of the board of directors relating to the creation or the recommendations

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54 724 A.2d 561 (Del. Ch. 1998).

55 *Id.* at 563-64.

56 *Id.*

57 *Id.* at 565.

58 *Id.*

of the special committee.[59] The court noted that those documents ordinarily "should suffice for the purposes of establishing or raising reasonable grounds for suspicions about a special committee's independence, good faith and due care."[60] In addition, those were the documents necessary to the plaintiff's proper purpose. Thus, the court held that it would require a "further showing of need before requiring" the company to produce additional documents, such as interview summaries prepared by corporate counsel for use by the special committee.[61]

In this case, Jos. A. Bank has produced the same types of documents. Nevertheless, Norfolk conclusorily asserts that "[i]ssue preclusion plainly does not apply" here as to questions of demand futility and the directors' independence and disinterestedness, and that it is entitled to inspect additional documents.[62]

Norfolk relies on a footnote in *West Coast Management & Capital, LLC v. Carrier Access* that suggests when a subsequent plaintiff "makes substantially different allegations of demand futility based on additional information, issue preclusion, from both a logic and fairness standpoint, would not apply."[63] In *West Coast*, the court observed:

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59 *Id.* at 567.

60 *Id.*

61 *Id.*

62 PRB at 2.

63 914 A.2d 636, 643 n.22 (Del. Ch. 2006).

> Preventing subsequent individual plaintiffs from bringing potentially meritorious suits based on additional information gained in a section 220 demand would undercut the purpose of the statute and the policy concern articulated by the Delaware Supreme Court that plaintiffs should employ section 220 before filing suit. While a prior suit by another plaintiff with similar allegations of demand futility may bar a second plaintiff from filing the same suit, if the second plaintiff makes substantially different allegations of demand futility based on additional information, issue preclusion, from both a logic and fairness standpoint, would not apply.[64]

West Coast recognized the trend in federal case law extending collateral estoppel to different plaintiffs in a second derivative suit concerning the same common nucleus of facts.[65] As noted in *In re Career Education Corp. Derivative Litigation*, those cases justified the extension of collateral estoppel based on the unique position in a derivative suit of the corporation, which is the true party in interest.[66] To some extent, therefore, the applicability of collateral estoppel depends upon the adequacy of representation in the prior proceeding. If a subsequent plaintiff makes credible allegations that the interests of the corporation were not suitably represented in the prior proceeding, collateral estoppel may not apply.[67]

Here, Norfolk contends the Maryland Derivative Plaintiff did not adequately represent the interests of the corporation in the prior lawsuit, principally because the

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64 *Id.*

65 *Id.* (listing cases).

66 2007 WL 2875203, at *10 (Del. Ch. Sept. 28, 2007).

67 *Id.*

plaintiff there did not seek books and records before filing suit and then failed to demonstrate demand futility.[68] Although the prior plaintiff's failure to make a books and records request before filing a derivative lawsuit does not comport with the approach suggested by Delaware courts, that alone does not indicate that he was an inadequate representative.

This case is currently before me on cross motions for summary judgment. In that context, Norfolk has not demonstrated a reasonable basis for believing that Jos. A. Bank was not adequately represented by the prior derivative plaintiff or the SLC. As in *Grimes*, Norfolk has received documents that "should suffice for the purposes of establishing or raising reasonable grounds for suspicions about a special committee's independence, good faith and due care."[69] Under the low burden imposed by Delaware courts in § 220 actions, such a showing could entitle Norfolk to inspect additional documents beyond what the Company voluntarily provided. Yet, Norfolk has made no

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[68] Norfolk also questions the wisdom of the Maryland Derivative Plaintiff's decision, after that action was dismissed, to make a demand on the Jos. A. Bank Board. That decision had the effect of conceding the independence and disinterestedness of the board in considering a demand. Norfolk's criticism of the decision, therefore, is not surprising. Nevertheless, a strategic calculation by one plaintiff's attorney that puts a different plaintiff's attorney at a disadvantage in a later lawsuit does not necessarily mean that the original plaintiff's calculation was harmful to the corporation or a mark of inadequate representation.

[69] 724 A.2d at 567.

meaningful attempt to question the adequacy of the SLC's process or the reasonableness of its investigation and conclusions.[70]

Likewise, Norfolk's reliance on the opinions in the *Kaufman* case[71] is unavailing, because the principles upon which those opinions rest tend to support the Company's position. In *Kaufman I*, the court denied a special litigation committee's motion to stay a books and records action under § 220. The stated purpose of the § 220 demand was the investigation of corporate wrongdoing.[72] The year before the plaintiff filed the § 220 action, the company's board already had settled a shareholder derivative suit and related federal class action litigation filed in New York. The settlements included releases from civil liability for certain individuals employed at the company who later were indicted.[73] The indictments led to the filing of several more derivative actions in federal court in the Eastern District of New York.[74]

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70 In fact, Norfolk's designated representative admitted on deposition that he was only made aware of the SLC Report the day before his deposition, and that he was not aware of any facts that led him to believe that the board was not capable of conducting an "independent, thorough, good faith investigation of the allegations relating to its earnings announcement in the first quarter of 2006." *See* Brennecke Aff. Ex. E at 31-34.

71 *Kaufman v. Computer Assocs. Int'l (Kaufman I)*, 2005 WL 3470589, at *1-2 (Del. Ch. Dec. 13, 2005); *Kaufman v. CA, Inc. (Kaufman II)*, 905 A.2d 749 (Del. Ch. 2006).

72 *Kaufman I*, 2005 WL 3470589, at *1-2.

73 *Id.*

74 *Id.*

The § 220 plaintiff in *Kaufman* was not a party to the first or second rounds of derivative litigation in New York. Shortly after filing the § 220 action in Delaware, however, she moved under Fed. R. Civ. P. Rule 60(b) in the first round of derivative litigation to vacate the releases given by the company as part of the settlements. In response to these developments, the board formed a special litigation committee.[75]

Kaufman I dealt with the issue of whether the Section 220 action in Delaware should be stayed at the request of a special litigation committee pending resolution of the second round of derivative actions in New York. In *Kaufman I* the court began its analysis by noting that a special litigation committee formed in accordance with *Zapata Corp. v. Maldonado* has broad powers to control litigation nominally filed on behalf of a corporation.[76] The court also remarked that "[f]undamentally, the right to proceed under Section 220 to inspect books and records exists independently of any claim the stockholder might ultimately choose to bring."[77] Still, the court recognized that there could be "circumstances in which a Section 220 action can be understood to interfere with the workings of a special litigation committee of a corporation's board of directors."[78] Based on the specific facts in that case, however, the court determined that

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75 *Id.* at *2.

76 *Id.* at *3 (citing *Zapata Corp. v. Maldonado*, 430 A.2d 779 (Del. 1981)).

77 *Id.*

78 *Id.* at *4.

the request for documents constituted a minimal burden on the company and, thus, denied the stay.[79]

Kaufman II involved a different procedural posture. The issues revolved around the scope of documents that should be made available to the plaintiff. In *Kaufman II*, the plaintiff sought books and records under § 220 for the purpose of evaluating a possible derivative suit.[80] The court held that relief under § 220 is limited to those books and records that are "necessary and essential to the satisfaction of the stated purpose."[81] When a § 220 plaintiff's purpose is to evaluate a potential derivative lawsuit, "the books and records that satisfy the action are those that are required to prepare a well-pleaded complaint."[82]

Pursuant to *Kaufman I*, the plaintiff had received "a wide range of basic documents" that should have provided "her with a substantial basis to investigate misconduct" at the company.[83] She had received "lightly redacted notes of all board meetings from the entire period in which any misconduct could have occurred, internal

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79 *Id.* The court in *Kaufman I* held that the stockholder was entitled to the discrete set of books and records sought, even though a derivative action covering the same allegedly wrongful conduct was ongoing, and the documents received as part of the § 220 demand were unlikely to lead to the "assertion of new or different claims." *Id.*

80 *Kaufman II*, 905 A.2d at 749.

81 *Id.* at 753.

82 *Id.*

83 *Id.* at 754.

documents laying out the [company's] legal strategy, [Wachtell Lipton's] talking points to present to the government, and even summaries of interviews conducted with central figures in the fraud." Nevertheless, the plaintiff sought additional documents.[84]

The court denied the plaintiff's request, because she failed to explain "why the remaining documents are either necessary or essential to her proper investigative purpose."[85] As the court explained, the plaintiff had conflated the "usefulness or responsiveness of further discovery" with the "proper standard of necessity under Section 220."[86] That is, the plaintiff had confused potentially discoverable material with those materials that are necessary and essential under § 220. Consistent with the limited production authorized under § 220, a "plaintiff is not entitled to receive or examine copies of documents not directly related to the Special Committee's conclusions and recommendations unless he can articulate a reasonable need to inquire further after a review of those basic documents."[87]

The same principle applies to this case. Norfolk received a number of documents that should suffice for the purpose of evaluating a derivative suit. Like the situation in *Kaufman II*, Norfolk must now articulate a reasonable need for whatever additional documents it seeks. Norfolk could have studied the documents provided by the Company

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84 *Id.* at 754-55.

85 *Id.*

86 *Id.* at 755.

87 *Id.* at 754.

to show how these documents are insufficient or how other documents are necessary.[88] Yet, Norfolk failed to do so. In particular, Norfolk has not proffered any evidence to demonstrate reasonable grounds for suspicion about the SLC's independence, good faith, or due care, or the reasonableness of its processes or conclusions. Thus, I conclude the Company has produced all of the documents required under § 220, the relevant case law, and the circumstances of this case as to Norfolk's purpose of exploring a possible derivative suit.

2. Does Norfolk have any other proper purposes?

Norfolk contends it seeks not only to determine whether to file a derivative action, but also whether to take other "appropriate action" based on the suspected wrongdoing. The Company denies that Norfolk, in fact, has any purpose beyond investigating the possibility of bringing a derivative action. Therefore, I next examine that issue.

I begin by examining the three purposes stated in Norfolk's Demand Letter. The first purpose Norfolk articulates for its demand is to evaluate potential "wrongdoing, mismanagement, and breaches of fiduciary duties" regarding certain financial disclosures

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[88] Norfolk argues that it cannot demonstrate that the SLC Report was inadequate, because to do so, it would need additional documents or discovery. I disagree, especially in light of the low burden of proof required for a Section 220 claim. Norfolk could have compared, for example, the complaint in the Securities Class Action to the SLC Report and attempted to demonstrate that the SLC did not adequately address issues raised by the complaint in that action. Once it was provided with the SLC Report and the exhibits thereto, Norfolk also could have identified weaknesses in the SLC's investigation or its Report that might provide a credible basis to distrust the way in which the SLC proceeded or the conclusions the SLC reached.

in June 2006, which could lead to the filing of a derivative suit. The second stated purpose patently concerns the possibility of filing a derivative suit. The third purpose, however, is somewhat broader, and conceivably could encompass other purposes beyond filing a derivative suit at some point in the future. The third purpose reads: "To take appropriate action in the event the members of the Company's Board of Directors did not properly discharge their fiduciary duties."

Because Norfolk's assertion of an additional purpose is quite vague, one might question whether it is Norfolk's true purpose. This court is not required to accept without question a plaintiff's stated purpose as being its true purpose.[89] The court may consider a plaintiff's actual purpose, and discount any secondary or ulterior purposes.[90] Furthermore, to warrant relief from this court, a demand for books and records must be sufficiently specific to permit the court (and the corporation) to evaluate its propriety.[91] As this court has long held, "unless a demand in itself unspecific as to purpose can in some way successfully be given an expanded reading viewed in the light of surrounding

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89 *See Thomas & Betts Corp. v. Leviton Mfg. Co.*, 681 A.2d 1026, 1033 (Del. 1996); *Marathon Partners, L.P. v. M&F Worldwide Corp.*, 2004 WL 1728604, at *3 (Del. Ch. July 30, 2004).

90 *See Marathon Partners*, 2004 WL 1728604, at *3 (citing *CM & M Group, Inc. v. Carroll*, 453 A.2d 788, 792 (Del. 1982)).

91 *See Northwest Indus., Inc. v. B.F. Goodrich Co.*, 260 A.2d 428, 429 (Del. 1969).

circumstances . . . a vague demand without more must a fortiori be deemed insufficient."[92]

To show the importance of its additional purpose of evaluating whether to take appropriate action in connection with a perceived breach of fiduciary duties, Norfolk relies on the Delaware Supreme Court's decision in *Saito v. McKesson, HBOC, Inc.*[93] In *Saito*, the Court addressed when and to what extent the unavailability of a derivative action would prevent a stockholder from seeking inspection of books and records.[94] In that case, the specific issue was whether a stockholder could seek books and records that predated his or her stock ownership. The question arose because to have standing for a derivative suit, a stockholder must have owned stock at the time of the alleged wrongful conduct.[95] The defendant in *Saito* sought to limit the books and records to which the plaintiff would have access to documents that were created at or after the date the plaintiff became a stockholder. The Supreme Court disagreed for reasons related to the facts in that case.

In its analysis, the Court noted that a stockholder might use information in other ways than to file a derivative suit. The stockholder might "seek an audience with the board [of directors] to discuss proposed reform, or failing in that, they may prepare a

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92 *Weisman v. W. Pac. Indus., Inc.*, 344 A.2d 267, 269 (Del. Ch. 1975) (internal citations omitted).

93 806 A.2d 113 (Del. 2002).

94 *Id.* at 117.

95 *See* 8 *Del. C.* § 327.

stockholder resolution for the next annual meeting, or mount a proxy fight to elect new directors."[96] Norfolk contends the Court's comments mean that its ability to pursue a derivative action is not dispositive. Likewise, Norfolk argues the "right to undertake an investigation under Section 220 is independent of any future derivative action plaintiff may or may not choose to file."[97] In any event, *Saito* recognizes that there may be proper purposes for a § 220 demand besides filing a derivative suit, and that, therefore, when a stockholder articulates such an alternate purpose, a bar to a derivative action will not necessarily preclude a books and records action.

Norfolk plainly states in its papers: "Plaintiff filed this action in order to investigate potential corporate mismanagement and to determine whether there is a basis to file a derivative action."[98] Norfolk has not stated anywhere that it intends to engage in a proxy contest, or communicate directly with the board, or take some specific action other than evaluating the actions of the board for a potential derivative suit.

Nevertheless, I cannot say at this point from the record presented on the Company's motion for summary judgment that, as a matter of undisputed fact, Norfolk's only purpose is to explore the possibility of a derivative suit. Thus, giving Norfolk the

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96 *Saito*, 806 A.2d at 117. The stockholder in *Saito* was investigating potential wrongdoing that might have been reflected in documents that were generated before he became a stockholder, but nevertheless were necessary and essential to the stockholder's purpose. *Id.*

97 PAB at 7.

98 POB at 4-5.

benefit of all reasonable inferences, I assume for purposes of the Company's motion that Norfolk also has an additional purpose of determining whether to take any other action based on the suspected wrongdoing.

C. Assuming Norfolk has a Purpose to Explore Other Action Beyond a Derivative Suit, has it Demonstrated a Right to any Additional Documents?

Norfolk contends it has shown a credible basis for suspecting possible wrongdoing as to the Company's disclosures in June 2006 through two denials of motions challenging the adequacy of the pleadings in the Securities Class Action. In some circumstances that might have been correct. The question presented in the briefing and argument here, however, is whether those preliminary decisions in the Securities Class Action standing alone are sufficient to demonstrate a credible basis for suspecting wrongdoing in the face of the later SLC Report and the absence of any reasonable basis to suspect the disinterestedness, independence, or business judgment of the SLC or the Board. Norfolk answers that question in the affirmative, and urges this Court to ignore the SLC Report and the fact that the plaintiff in the Maryland Derivative Action, after being dismissed for failing to prove demand futility, made a demand upon the Company's Board thereby waiving any opportunity to challenge the disinterestedness or independence of the Board.

According to Norfolk, it "seeks only 'Board Materials' related to the allegations in the federal class action that the federal court sustained."[99] Norfolk relies upon two decisions by Judge Legg in the Securities Class Action to bolster its claim that these

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[99] PRB at 10.

allegations provide a credible basis for wrongdoing.[100] Norfolk contends the allegations in the Securities Class Action deserve substantial weight, because the complaint there withstood a motion to dismiss based on the heightened pleading standard of the Private Securities Litigation Reform Act ("PSLRA").[101]

Specifically, § 21D(b)(2) of the PSLRA requires a plaintiff to "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind."[102] The United States Supreme Court has held that to "qualify as 'strong' . . . an inference of scienter must be more than merely plausible or reasonable—it must be cogent and at least as compelling as any opposing inference of nonfraudulent intent."[103] Norfolk suggests that if the allegations in the Securities Class Action lead to a strong inference of scienter, then a Section 220 complaint based on those same allegations clearly would satisfy the lower burden of showing a credible inference of wrongdoing.[104]

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100 PRB at 6 n.5 ("Plaintiff bases its action on the *Lefkoe* court's *two* decisions upholding the federal plaintiffs' complaint, as well as the findings of that court.").

101 *See* 15 U.S.C. § 78u-4(b)(2).

102 *Id.*

103 *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 127 S. Ct. 2499, 2504-05 (2007).

104 I note that civil liability for federal securities fraud does not necessarily imply that one would be liable on a derivative claim brought on state law fiduciary duty grounds. This observation holds true for reasons beyond procedural objections, such as standing or laches. For example, one might be civilly liable for federal securities fraud, and yet not be liable for breach of the duty of loyalty for the same conduct, because the required state of mind arguably is different. In *Tellabs*, the Supreme Court noted that "[e]very Court of Appeals that has considered the issue

The Company counters that Judge Legg did not make any findings of fact related to the wrongdoing, but rather merely assessed the sufficiency of the allegations. This objection is not persuasive, because a stockholder seeking books and records simply has the burden of coming forward with specific and credible allegations sufficient to warrant a suspicion of waste and mismanagement. The stockholder is not required actually to prove by a preponderance of the evidence that waste or mismanagement occurred.[105]

The Company also contends that the Court should assess the existence of the requisite credible basis in the context of all the facts in the record on summary judgment. That would include, for example, the SLC Report and the extensive exhibits to it. Norfolk objects to that approach on the ground that it has not been permitted to take discovery as to the SLC Report or to obtain production of such things as the notes of the numerous interviews conducted by the SLC during its investigation.[106]

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has held that a plaintiff may meet the scienter requirement by showing that the defendant acted intentionally *or recklessly*." *Tellabs*, 127 S. Ct. at 2507 n.3 (emphasis added). On the other hand, Delaware courts have held that recklessness by itself only amounts to gross negligence, which is not sufficient to demonstrate the state of mind necessary for finding a breach of the duty of loyalty. *See In re Lear Corp. S'holder Litig.*, 2008 WL 4053221, at *9 n.45 (Del. Ch. Sept. 2, 2008) ("Indeed, the definition [of gross negligence in the corporate breach of fiduciary duty context] is so strict that it imports the concept of recklessness into the gross negligence standard, thus conflating two standards that are distinct when used in the criminal law concept.") (collecting cases and secondary materials).

105 *Thomas & Betts Corp. v. Leviton Mfg. Co.*, 681 A.2d 1026, 1031 (Del. 1996).

106 The type of discovery Norfolk sought and was denied equated to production of the very documents it seeks in this action. The courts repeatedly have denied such discovery requests. *See U.S. Die Casting & Dev. Co. v. Sec. First Corp.*, 1995 WL 301414, at *3 (Del. Ch. Apr. 28, 1995) ("To grant U.S. Die its complete

I hold that the Court cannot ignore the circumstances in which this case has arisen for purposes of evaluating Norfolk's § 220 demand and must consider all the relevant evidence. The alleged wrongdoing, various misrepresentations relating to the Company's inventory situation, occurred in 2006 and resulted in a sharp drop in the stock price. The first case in the Federal Securities Action was filed in July 2006; the first case in the Maryland Derivative Action was filed in August 2006; the Derivative Action was dismissed in September 2007; and the plaintiff in that action made his demand on the Jos. A. Bank Board later that same month. Only after that, on November 27, 2007, more than fifteen months after the initial lawsuits were filed, did Norfolk make its demand for books and records under 8 *Del. C.* § 220. The SLC issued its report on February 7, 2008, and the Company later voluntarily provided Norfolk with that report and related documents.

The SLC consisted of three nonexecutive directors that Judge Legg previously held were capable of impartially investigating and pursuing a derivative demand. The SLC retained its own counsel, met extensively, interviewed over forty current and former Company employees, and reviewed a large number of relevant documents of varied types, including the results of a former investigation performed in March 2006 by the law

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requested discovery would obviate the need for the § 220 action because U.S. Die would obtain through discovery all of the documents requested before a determination of the scope of its rights under § 220"); *see also Maitland v. Int'l Registries, LLC*, 2008 WL 2440521, at *1-3 (Del. Ch. June 6, 2008). Instead, Norfolk could have worked with publicly available documents and the documents made available by the Company to attempt by documents, logic, or otherwise to meet the relatively low credible basis standard.

firm of WilmerHale and the accounting firm of Ernst & Young on behalf of the Company's audit committee.[107] For the reasons stated in its Report, the SLC concluded the Maryland Derivative Action and the Securities Class Action were without merit. According to the SLC, senior management "acted honestly and appropriately in preparing and releasing [their] financial disclosures" in 2006. Thus, the SLC Report and related documents support a contrary inference to that which Norfolk seeks to draw from the decisions in the Securities Class Action.

This Court obviously is not bound by the conclusions of the SLC. Rather, the SLC Report and exhibits and the other documents that have been made available to Norfolk constitute a portion of the evidence from which the Court must determine whether Norfolk has shown a credible basis for suspecting wrongdoing by the Company's management and directors. The decisions of the *Lefkoe* court are part of that evidence, as well.

In that regard, there is an important congruence among the allegations underlying the Securities Class Action, the SLC investigation, and this lawsuit. The plaintiff in the Maryland Derivative Action relied on the same allegations of wrongdoing in its complaint as were asserted in the Securities Class Action. Moreover, when the same plaintiff made his demand of the Company's Board and the SLC undertook to investigate his allegations, he again relied on those same allegations. And, finally, in this action

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[107] The previous investigation occurred after the Audit Committee of the Board received an anonymous tip. *See* SLC Report at 15.

under Section 220, Norfolk bases its claims of suspected wrongdoing on the very same allegations that were made in the Securities Class Action and later investigated by the SLC.

Lefkoe I was issued September 10, 2007 and denied a motion to dismiss the Securities Class Action. In *Lefkoe II*, issued May 1, 2008, the court denied a motion for judgment on the pleadings under Fed. R. Civ. P. 12(c). One of the issues presented in *Lefkoe II* was the extent to which the court could consider exhibits to the defendants' answer in deciding the Rule 12(c) motion. Defendants argued that the court could consider, among other things, the SLC Report when evaluating the competing inferences as to scienter without converting the 12(c) motion into one for summary judgment.[108] The court declined to examine the SLC Report at the pleading stage, however, because the SLC Report was not incorporated by reference into the plaintiff's complaint and was not a public document.[109] The circumstances here are quite different.

This action is before me on cross motions for summary judgment. In litigating the pending motions, Norfolk made no attempt, other than a few comments by its counsel at oral argument, to challenge the reliability or reasonableness of the SLC's investigation or the conclusions reflected in its Report. Instead, Norfolk relied on the *Lefkoe* court's decisions in the Securities Class Action to show a credible basis for wrongdoing. As

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108 *Id.* at 12-13.

109 *Id.*

Norfolk points out, the "credible basis" standard is a relatively low one. Nevertheless, the party seeking inspection under § 220 bears the burden of meeting that standard.[110]

In the absence of contrary evidence, such as the SLC Report, the decisions in the Securities Class Action might have been sufficient to carry Norfolk's burden. Having waited as long as it did while the Company responded to actions of other shareholders, however, Norfolk cannot ignore the other facts of record here. Norfolk was at least on inquiry notice in 2006 that the Maryland Derivative Action proceeded in the absence of a Section 220 action. Yet, Norfolk did not seek books and records from the Company until after the Maryland Derivative Action had already been dismissed, a demand made, and an SLC formed.

A books and records request is the favored method of obtaining information that is reasonably related to a stockholder's interest before filing a lawsuit, and the law looks favorably on requests conforming to the requirements of 8 *Del. C.* § 220. Indeed, Delaware courts have repeatedly encouraged the use of the "tools at hand," including § 220, before filing derivative suits.[111] There is, however, a countervailing concern that

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110 Delaware courts have held that even with a credible showing of wrongdoing, a plaintiff still may not be entitled to books and records where the circumstances indicate that the request is burdensome or opportunistic. *See, e.g.*, Trial Tr., *Parfi Holding, AB v. Mirror Image Internet, Inc.*, No. 18457, at 6-9 (Del. Ch. Mar. 23, 2001) (denying demand for books and records where a court in a different jurisdiction already granted a stay of discovery, and the same plaintiff came before the court to compel a corporate defendant to produce documents according to a Section 220 action).

111 *See Seinfeld v. Verizon Commc'ns, Inc.*, 909 A.2d 117, 120 (Del. 2006).

at some point a books and records request has diminishing returns for wealth creation and at some point begins to harm the company. "A stockholder may not use § 220 as a means to invade the corporate board room and inspection rights may be limited where production of certain documents would be adverse to the interests of the corporation."[112] The Delaware Supreme Court has reaffirmed that the courts must look at the interests of the corporation when assessing the documents that should be made available:

> Investigations of meritorious allegations of possible mismanagement, waste or wrongdoing, benefit the corporation, but investigations that are indiscriminate fishing expeditions do not. At some point, the costs of generating more information fall short of the benefits of having more information. At that point, compelling production of information would be wealth-reducing, and so shareholders would not want it produced. Accordingly, this Court has held that an inspection to investigate possible wrongdoing where there is no credible basis, is a license for fishing expeditions and thus adverse to the interests of the corporation.[113]

The difficulty Norfolk faces stems from its dilatory demand for books and records. Norfolk's arguments might have had more force if Norfolk had pursued its demand for books and records promptly. Because it did not, Norfolk had to make at least a threshold showing that it had a reasonable prospect of overcoming the additional and contrary evidence presented by the SLC related documents. Norfolk failed to meet that burden. In particular, I find that because the decisions in the Securities Class Action on which

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[112] *Radwick PTY., Ltd. v. Medical, Inc.*, 1984 WL 8264, at *3 (Del. Ch. Nov. 7, 1984); *see also Eastlund v. Fusion Sys. Corp.*, 1990 WL 126660, at *3 (Del. Ch. Sept. 6, 1990).

[113] *Seinfeld*, 909 A.2d at 118.

Norfolk relies dealt with motions under Fed. R. Civ. P. 12 and did not consider the SLC Report or the exhibits to that report, those decisions are not dispositive on the issue of a proper purpose. To the contrary, based on all the facts available to me and to Norfolk on the summary judgment record in this § 220 action, I find that the *Lefkoe* decisions alone are not sufficient to demonstrate a credible basis for suspecting wrongdoing sufficient to warrant granting Norfolk access to additional records and documents of the Company beyond those that already have been made available to Norfolk.

III. CONCLUSION

For the foregoing reasons, Norfolk's motion for summary judgment is denied, and the Company's motion for summary judgment is granted. Norfolk's Complaint is, therefore, dismissed with prejudice.

IT IS SO ORDERED.