



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

GEORGE W. HAYWOOD and )  
DENIS CRONIN, )  
 )  
Plaintiff, )  
 )  
v. ) Civil Action No. 342-N  
 )  
AMBASE CORPORATION, )  
 )  
Defendant. )

**MEMORANDUM OPINION**

Submitted: May 12, 2005  
Decided: August 22, 2005

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**PARSONS, Vice Chancellor.**

Plaintiffs, George Haywood and Denis Cronin, are beneficial owners of Defendant AmBase Corporation's ("AmBase" or the "Company") common stock. AmBase is a publicly held Delaware corporation whose primary business purpose, at this point in time, is to pursue pending litigation against the United States government based on the impact of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA") on its business. Richard Bianco is the chairman, president and chief executive officer of AmBase.

In 2003, Haywood and Cronin became alarmed by the payment of compensation and benefits to Bianco that, in their view, seemed patently excessive. After confronting Bianco and receiving no satisfactory explanation for what they considered his lavish compensation, Haywood and Cronin made written demands to inspect AmBase's books and records. AmBase refused to permit inspection of the documents requested. Consequently, Haywood and Cronin brought this suit to compel inspection of certain of AmBase's books and records pursuant to 8 *Del. C.* § 220.

For the reasons discussed below, the Court finds that Haywood and Cronin have stated a proper purpose under 8 *Del. C.* § 220 and orders AmBase to permit inspection of the requested documents subject to the limitations indicated. Additionally, the Court declines to find AmBase liable for Haywood and Cronin's attorneys fees in connection with this matter.

## **I. FACTS**

### **A. Parties and Background**

Haywood and Cronin are sophisticated investors. Haywood is AmBase's second largest stockholder and holds 5,523,475 shares (12%) of its common stock. Before becoming a private investor, Haywood was a managing director and head of the bond department at Lehman Brothers, and served as a hedge fund manager at Moore Capital.<sup>1</sup> Additionally, Haywood serves on the boards of several private and public companies, including XM Satellite Radio. Cronin holds 536,000 shares (1%) of AmBase common stock. Cronin is a former partner of Wachtell, Lipton, Rosen & Katz, where he advised numerous corporations during restructurings and bankruptcies. Cronin also serves on the boards of a public company and private association. Both Haywood and Cronin became stockholders of AmBase in 1996.

AmBase was incorporated in 1975. In August 1988, AmBase acquired Carteret Bancorp, Inc., which wholly owned Carteret Savings Bank, F.A. ("Carteret"), a savings and loan institution. On December 4, 1992, the Office of Thrift Supervision placed Carteret into receivership under the management of the Resolution Trust Company. Shortly thereafter, AmBase commenced litigation against the Office of Thrift Supervision (the "Supervisory Goodwill Litigation"), seeking damages based on FIRREA's elimination of AmBase's "supervisory goodwill" in Carteret.

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<sup>1</sup> Tr. at 14.

Since 1993, AmBase’s principal business operation has been to manage its assets and liabilities remaining after the loss of Carteret, including resolution of IRS claims against AmBase for alleged tax withholding liabilities,<sup>2</sup> and prosecution of the Supervisory Goodwill Litigation. AmBase presently employs only Bianco and two other individuals. In addition to serving as AmBase’s CEO, president and chairman, Bianco served as the CEO, president and chairman of Carteret between 1991 and 1992.

### **B. Bianco’s Compensation**

Bianco receives a base salary, bonuses, stock options and retirement benefits from various compensation plans instituted by AmBase. In 1989, the board adopted the Supplemental Retirement Plan (“SERP”), a continuation of an existing retirement plan that AmBase used when it ran Carteret. Presently, Bianco is the only executive who participates in SERP.<sup>3</sup> In 1994, the personnel committee of AmBase’s board of directors (the “Personnel Committee”) adopted, subject to stockholder approval, a Senior Management Incentive Compensation Plan (the “SMIC Plan”). The purpose of the SMIC Plan was to “attract and retain the best available personnel” and “stimulate efforts of executive officers by giving them a direct economic interest in the performance of

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<sup>2</sup> AmBase had established a \$66 million reserve to cover this potential liability. In 2001, AmBase succeeded in its defense of the IRS claim and reversed the reserve it had been holding. This had the effect of increasing AmBase’s net worth from negative \$24 million to positive \$38 million.

<sup>3</sup> Bianco was not a director in 1989 when SERP was adopted. The plan is an unfunded plan, *i.e.* had AmBase fallen into bankruptcy Bianco would have lost any payments he was entitled to under SERP.

[AmBase].”<sup>4</sup> Though the SMIC Plan tied the award of bonuses to AmBase’s performance, it also allowed the Personnel Committee to grant additional awards of cash or other incentive compensation at their discretion.<sup>5</sup> In fact, though AmBase failed to meet its target performance under the SMIC Plan in 2002 and 2003, Bianco was awarded discretionary bonuses of \$800,000 and \$1,000,000, respectively, for those years.

Between September 30, 2001 and 2004, AmBase’s total stockholder’s equity dropped approximately \$10.5 million. Of that amount, \$6.175 million was paid to Bianco in salary and bonuses, and approximately \$4 million represented an increase in pension plan liability related to Bianco.<sup>6</sup>

### **C. Haywood and Cronin Bring Their Concern to the Attention of AmBase**

Both Haywood and Cronin felt that Bianco’s compensation was patently excessive. Bianco’s annual compensation between 2001 and 2003 amounted to approximately 10% of the market capitalization of the Company.<sup>7</sup> Haywood, who looks at “hundreds of companies” a year as a private investor, testified that he has “[n]ever seen anything like it”; “[it] just sticks out like a sore thumb. It’s extraordinary.”<sup>8</sup> Cronin, who has come across many pension plans in the course of his work, commented that “in my

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<sup>4</sup> JX 2.

<sup>5</sup> The Personnel Committee is comprised of the three outside directors of AmBase, John Costello, Robert Long and Michael Quinn.

<sup>6</sup> Pre-Trial Stipulation and Order (“PTO”) ¶¶ 16, 21, 22.

<sup>7</sup> *See* Tr. at 36; PTO ¶¶ 19-23.

<sup>8</sup> Tr. at 35-36.

career of 32 years, I don't think that I've seen on a comparable basis a pension plan that is as excessive as this plan is.”<sup>9</sup> In late 2003, Haywood called Bianco and expressed concern that he was “getting paid way, way, way too much.”<sup>10</sup> Bianco, however, disagreed and asserted that, if anything, he was being under-compensated.<sup>11</sup>

#### **D. Haywood and Cronin's Demands**

In January 2004, Haywood and Cronin's unabated concerns regarding Bianco's compensation lead them to make written demands to inspect certain categories of AmBase's documents (the “January Demands”).

The January Demands state that their purpose is “to investigate possible mismanagement, breaches of fiduciary duty, waste of corporate assets and fraud at [AmBase] and to communicate with other stockholders about the results of such investigation.” The January Demands request inspection of:

1. All Books and Records relating to Richard A. Bianco's direct and indirect compensation (including, but not limited to, salary, bonus, stock options, SARS, split dollar life insurance, any other insurance, tax reimbursements or gross-ups, perquisites such as personal use of [AmBase] assets, etc.) from [AmBase] for the years 2000, 2001, 2002 and 2003, whether or not reflected in [AmBase's] Proxy statements, including, without limitation, all committee minutes,

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<sup>9</sup> Tr. at 147.

<sup>10</sup> Tr. at 45.

<sup>11</sup> In fact, during one conversation between the two, Bianco argued that no one complains about the salary of for example, Dick Fuld, chairman of Lehman Brothers. Haywood responded that “if Dick Fuld got paid the same percentage of market cap that you get paid, he'd be getting paid \$2 billion a year, with a B.” Tr. at 36.

all board minutes, and all employment contracts, relating to Mr. Bianco's compensation.

2. All Personnel Committee minutes and related materials relating to executive compensation for the years 2000, 2001, 2002 and 2003.
3. All Books and Records relating to [AmBase's] 1994 Senior Management Incentive Plan (the "Plan"), including, without limitation, all documents, reports, resolutions and minutes relating to the rationale for said Plan, its drafting, its adoption and any awards made, or contemplated to be made in the future, pursuant to said Plan.
4. Any expert's or consultant's reports or opinions concerning the Plan or compensation paid to executive officers between 2000 and the present.<sup>12</sup>

The January Demands were made under oath and delivered to Bianco at AmBase's principal place of business. AmBase refused to permit inspection of the documents requested. On March 23, 2004, Haywood and Cronin filed this action to compel inspection of AmBase's books and records under 8 *Del. C.* § 220.

On May 11, 2004, Plaintiffs served supplemental demand letters on AmBase (the "May Demands"). The May Demands state that their purpose is to "investigate possible mismanagement, breaches of fiduciary duty, waste of corporate assets and fraud at [AmBase], to assess the independence or lack thereof of the non-management members of the board of directors of [AmBase], and to communicate with other stockholders about the results of such investigation." The May Demands request inspection of:

1. All Books and Records relating to any retirement benefits for executives of [AmBase] including, but not

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<sup>12</sup> JX 15, 16.

limited to, a copy of [AmBase's] Supplemental Retirement Plan (the "Supplemental Plan") and all documents, reports, resolutions and minutes relating to the rationale for the Supplemental Plan, its drafting, its adoption and any awards made, or contemplated to be made in the future, pursuant to said Plan.

2. All minutes of [AmBase's] board of directors or any committee thereof for the period from January 1, 2000 to the present.
3. All Books and Records relating to the consideration of individuals to serve as directors of [AmBase] for the period from January 1, 1993 to the present, including, but not limited to, all documents, reports, resolutions and minutes relating to the evaluation of candidates to serve on [AmBase's] board of directors whether or not such individuals were nominated for election.<sup>13</sup>

The May Demands were again made under oath and delivered to Bianco at AmBase's principal place of business. AmBase again refused to permit inspection of the documents requested in the January and May Demands (collectively referred to as the "Demand Letters"). On June 1, 2004, Haywood and Cronin filed their First Amended Complaint, which incorporated the May Demands.

On June 17, 2004, Haywood and Cronin met with Bianco to discuss the action and their concern regarding his compensation. Bianco maintained his position that he was not overpaid and suggested that Haywood and Cronin hire an expert to evaluate his compensation.<sup>14</sup> Accordingly, Haywood and Cronin retained Graef Crystal, a well

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<sup>13</sup> JX 17, 18.

<sup>14</sup> See Tr. at 39-40.



known analyst specializing in the field of executive compensation.<sup>15</sup> In his report (the “Crystal Report”), Crystal compared Bianco’s compensation, including salary, stock options, bonuses and retirement benefits, over a three year period between 2001 and 2003 against 71 other S&Ls with similar total assets, net revenues and shareholders’ equity.

The Crystal Report found that:

- In salary, the \$625,000 per year average annual salary paid to Mr. Bianco ranked him at the 100<sup>th</sup> percentile of the consolidated comparator group distribution, i.e., higher than any other CEO. The next highest salary was \$590,000.
- In the combination of salary and annual bonus, the \$2.1 million annual average for Mr. Bianco once again ranked him at the 100<sup>th</sup> percentile of the distribution. The next highest combination of salary and bonus was just \$648,000, *less than one-third* of Mr. Bianco’s average salary and bonus.
- In the combination of all pay elements, except stock options, Mr. Bianco’s annual average of \$2.1 million was once again at the 100<sup>th</sup> percentile level. The next highest-paid CEO earned \$1.4 million. . . .
- In the combination of all pay elements, including the estimated present value of stock options, . . . Mr. Bianco’s total pay averaged \$2.2 million a year. In this case, he ranked at the 96<sup>th</sup> percentile of the distribution.<sup>16</sup>

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<sup>15</sup> See JX 20. Haywood and Cronin retained Crystal at their own expense. In the recent *Disney* decision, Chancellor Chandler described Crystal as an executive compensation consultant “who is particularly well known within the industry for lambasting the extravagant compensation paid to America’s top executives.” *In re The Walt Disney Co. Derivative Litig.*, 2005 WL 187504, at \*7 (Del. Ch. Aug. 9, 2005).

<sup>16</sup> JX 19 at HC 0020-21. Crystal observed that the three companies whose CEOs received total pay exceeding that of Bianco’s had much lower base salaries and

Additionally, Crystal found the pension accorded to Mr. Bianco “exceedingly generous even at a major company”, and “unheard of” for a company the size of AmBase.<sup>17</sup>

Crystal summarized the situation at AmBase as one where Bianco had

engineered for himself the very best of all possible worlds. He wins big, and has won big, even though there is no recovery from the [Supervisory Goodwill Litigation]. And if there is a recovery, he wins stupendously. In the real world, there are no investments that combine huge reward with virtually no risk.<sup>18</sup>

In August 2004, Haywood and Cronin shared the Crystal report with AmBase and reiterated their request to inspect the documents outlined in the Demand Letters. AmBase, however, continues to refuse inspection.

On October 19, 2004, AmBase moved to dismiss Haywood and Cronin’s complaint under Court of Chancery Rule 12(b)(6) for failure to state a claim for which relief may be granted. Plaintiffs moved for, and were granted, leave to amend their complaint again to incorporate the Crystal Report. On November 22, 2004, Plaintiffs filed their Second Amended Complaint to compel inspection pursuant to 8 *Del. C.* § 220. AmBase moved to dismiss the Second Amended Complaint on December 7, 2004, once again under Rule 12(b)(6). The Court denied AmBase’s motion to dismiss on February 7, 2005. Trial was held on February 14, and the Court heard post-trial argument

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bonuses (all under \$900,000 combined base salary and bonus). Their total compensation surpassed that of Bianco because of the value of their stock options, which reflected their respective companies’ positive performances.

<sup>17</sup> JX 19 at HC 0022.

<sup>18</sup> *Id.* at HC 0024.

on May 12, 2005. This is the Court’s post-trial opinion regarding Haywood and Cronin’s action to compel inspection under § 220.

## **II. ANALYSIS**

The parties continue to dispute whether Haywood and Cronin have stated a proper purpose to inspect AmBase’s books and records, whether the scope of the categories of documents sought is essential and sufficient, and whether AmBase should be found liable for attorneys fees in connection with its defense of this action.

### **A. Proper Purpose**

Section 220 of the DGCL requires that a stockholder state a proper purpose for their requested inspection of books and records. A “proper purpose” is defined by § 220(b) as one “reasonably related to such person’s interest as a stockholder.” It is well settled that investigation of mismanagement is a proper purpose to inspect books and records.<sup>19</sup> While “actual wrongdoing itself need not be proved in a Section 220 proceeding,” a plaintiff must demonstrate a “credible basis to find probable wrongdoing” by a preponderance of the evidence.<sup>20</sup>

The Demand Letters assert that the purpose of their requests to inspect AmBase’s books and records is to “investigate possible mismanagement, breaches of fiduciary duty, waste of corporate assets and fraud at [AmBase], to assess the independence or lack

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<sup>19</sup> *Sec. First Corp. v. U.S. Die Casting & Dev. Co.*, 687 A.2d 563, 567 (Del. 1997); *Freund v. Lucent Tech., Inc.*, 2003 WL 139766, at \*3 (Del. Ch. Jan. 9, 2003).

<sup>20</sup> *Sec. First*, 687 A.2d at 567. *See also Thomas & Betts Corp. v. Leviton Mfg. Co.*, 681 A.2d 1026, 1031 (Del. 1996).

thereof of the non-management members of the board of directors of [AmBase], and to communicate with other stockholders about the results of such investigation.”<sup>21</sup>

I find that Haywood and Cronin have demonstrated, by a preponderance of the evidence, a credible basis to find probable wrongdoing. Bianco’s annual compensation between 2001 and 2003 amounted to approximately 10% of the market capitalization of AmBase. The lavish compensation that Bianco received for performing what appears to be an unremarkable amount of work, itself, raises some concern.<sup>22</sup> Nevertheless, stockholders generally cannot satisfy their burden in a § 220 action “merely by expressing disagreement with a business decision.”<sup>23</sup> Haywood and Cronin, however, have plead facts that reflect more than a mere disagreement with a business decision.

The Crystal Report, which is incorporated by reference in the Second Amended Complaint, provides specific facts and statistical analysis that supports Haywood and Cronin’s belief that Bianco is overcompensated to the point of corporate mismanagement and waste. The Report also constitutes credible evidence in support of Plaintiffs’ questioning of the Personnel Committee’s independence, familiarity with the issues, and

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<sup>21</sup> JX 15-18.

<sup>22</sup> AmBase does not have operations other than managing its various legal proceedings, the most notable of which is the Supervisory Goodwill Litigation. Outside counsel represents AmBase in this litigation. Additionally, other than Bianco, AmBase only employs two people.

<sup>23</sup> *Marathon Partners, L.P. v. M&F Worldwide Corp.*, 2004 WL 1728604, at \*4 (Del. Ch. July 30, 2004). *See also Everett v. Hollywood Park, Inc.*, 1996 WL 32171, at \*5-6 (Del. Ch. Jan. 19, 1996) (rejecting challenges to business judgments without a credible basis from which the Court could infer self-dealing or failure to exercise due care).

decision making process.<sup>24</sup> For example, Bianco's \$2.1 million annual average of salary and bonus between 2001 and 2003, not only placed him at the 100<sup>th</sup> percentile of Crystal's comparable company distribution, but also meant that the next highest paid CEO received less than one third of Bianco's compensation. Though Bianco ranked at the 96<sup>th</sup> percentile when the present value of the various CEOs' stock options were included in the comparison, the three companies whose CEOs received total pay exceeding that of Bianco's had much lower combined base salaries and bonuses (all under \$ 900,000). Furthermore, their level of total compensation was attributable to the high present value of their stock options, which reflected their respective companies' favorable performances.

Additionally, during 2002 and 2003 the Personnel Committee awarded Bianco discretionary bonuses of \$800,000 and \$1,000,000 despite the fact that the SMIC Plan's criteria for awarding bonuses were not met. These bonuses, in turn, caused a significant increase in AmBase's pension liability relating to Bianco.<sup>25</sup> The material effect that these bonuses had on AmBase's pension liability raises doubts about the Personnel

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<sup>24</sup> AmBase argues that the Crystal Report is "so flawed, it does not provide credible evidence to support a finding of probably [sic] mismanagement." Def.'s Post Trial Answering Br. at 34. They contend that Crystal did not compare AmBase to an appropriate set of companies, and failed to consider AmBase's "liabilities and legal problems" and the going concern qualification to AmBase's financial statements through 2000. *Id.* at 32. AmBase, however, failed to present any rebuttal expert or any other persuasive evidence as to why these factors should affect Crystal's analysis of the Company. Therefore, for the limited purposes of this § 220 action, I find the Crystal Report credible.

<sup>25</sup> See PTO ¶ 22.

Committee's independence and the level of care they utilized in making these decisions. The resulting pension liability raises even more questions in view of the fact that AmBase adopted the pension plan, SERP, in 1989 when it actively ran Carteret. After 1992, the nature of AmBase and its business changed dramatically. Yet, the stockholders have not been afforded an opportunity to vote on the viability of SERP since 1989. All of this evidence, taken together, provides a credible basis for an inference of probable wrongdoing.<sup>26</sup>

Finally, based on the facts recited above, Haywood and Cronin also question the Personnel Committee's independence, *i.e.* whether they were a "rubber stamp" board.<sup>27</sup> "While there may be instances in which a board may act with deference to corporate officers' judgments, executive compensation is not one of those instances. The board must exercise its own business judgment in approving an executive compensation transaction."<sup>28</sup> This court has held that "director independence is a 'contextual inquiry,' [and] potential shareholder plaintiffs have been admonished to employ the Section 220

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<sup>26</sup> AmBase isolates certain aspects of Bianco's compensation, such as base salary and a specific year's bonus award, to make the argument that no credible basis to infer mismanagement exists. Haywood and Cronin's concern, however, arose from the totality of the circumstances. Furthermore, the combination of several decisions of the board, together with the unique characteristics of AmBase and Bianco's level of total compensation, amply demonstrate that a credible basis for an inference of mismanagement exists.

<sup>27</sup> Tr. at 155, 161. The three members of the Personnel Committee, together with Bianco, constitute the entirety of the AmBase board of directors.

<sup>28</sup> *Official Comm. of Unsecured Creditors of Integrated Health Serv., Inc. v. Elkins*, 2004 WL 1949290, at \*12 (Del. Ch. Aug. 24, 2004).

process to delve into the relationship among board members.”<sup>29</sup> The Delaware Supreme Court has noted that a § 220 action may uncover:

facts that would have created a reasonable doubt [as to the board's independence]. For example, irregularities or “cronyism” in [the Company’s] process of nominating board members might possibly strengthen her claim concerning [the allegedly dominant stockholder’s] control over [the Company’s] directors. A books and records inspection might have revealed whether the board used a nominating committee to select directors and maintained a separation between the director-selection process and management. A books and records inspection might also have revealed whether [the allegedly dominant stockholder] unduly controlled the nominating process or whether the process incorporated procedural safeguards to ensure directors’ independence. [The stockholder plaintiff] might also have reviewed the minutes of the board’s meetings to determine how the directors handled [the allegedly dominant stockholder’s] proposals or conduct in various contexts.<sup>30</sup>

Haywood and Cronin seek to inspect AmBase’s books and records to determine exactly these types of things. In the circumstances of this case, the evidence provides a reasonable basis to question the board’s independence. Thus, I find that Haywood and Cronin’s desire to investigate that subject constitutes a proper purpose for a § 220 demand.

All the categories of documents requested in the Demand Letters generally relate to Bianco’s compensation, the board and Personnel Committee’s consideration of the SERP and SMIC Plans when awarding Bianco’s annual compensation, and the

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<sup>29</sup> *Amalgamated Bank v. UICI*, 2005 WL 1377432, at \*3 (Del. Ch. June 2, 2005).

<sup>30</sup> *Beam v. Stewart*, 845 A.2d 1040, 1056 (Del. 2004); *Amalgamated Bank*, 2005 WL 1377432, at \*4.

independence of the Personnel Committee. These categories also relate to the possible corporate wrongdoing alleged. Therefore, I find that Haywood and Cronin have stated a proper purpose for all seven requests contained in the Demand Letters.

### **B. Scope of Requests**

“A stockholder who demands inspection for a proper purpose should be given access to all of the documents in the corporation’s possession, custody or control, that are necessary to satisfy that proper purpose.”<sup>31</sup> In other words, a “stockholder should be given enough information to effectively address” the corporate wrongdoing alleged and regarding which they have stated a proper purpose.<sup>32</sup> A stockholder in a § 220 action, however, is not entitled to the same “wide ranging discovery that would be available in support of litigation,” but rather those records that are “essential and sufficient” to the stockholder’s purpose.<sup>33</sup> Haywood and Cronin request seven categories of documents in their Demand Letters.<sup>34</sup> I address each of those categories in turn.

AmBase argues that the first category, which seeks all books and records relating to Bianco’s direct and indirect compensation for the years 2000 to the present, is overly

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<sup>31</sup> *Saito v. McKesson HBOC, Inc.*, 806 A.2d 113, 115 (Del. 2002).

<sup>32</sup> *Saito*, 806 A.2d at 115.

<sup>33</sup> *Deephaven*, 2005 WL 1713067, at \*10 (quoting *Helmsman Mgmt. Servs., Inc. v. A&S Consultants, Inc.*, 525 A.2d 160, 167 (Del. Ch. 1987)). *See also Magid v. Acceptance Ins. Cos.*, 2001 WL 1497177, at \*3 (Del. Ch. Nov. 15, 2001).

<sup>34</sup> I will refer to the categories of documents requested in the January Demands as categories 1 through 4, and those requested in the May Demands as categories 5 through 7.



broad.<sup>35</sup> I disagree. Haywood and Cronin have demonstrated a need to understand all aspects of Bianco's compensation, reported and unreported, and review documents that bear on how that compensation was established and what was considered.

AmBase next argues that the second and fourth categories are overbroad because they seek materials regarding all AmBase executives' compensation rather than just Bianco's. Once again, I disagree. Because AmBase only has two or three executives, Haywood and Cronin should be given information regarding all executives in order to understand fully how the Personnel Committee functions and makes its decisions related to executive compensation.

AmBase next argues that the third category seeking documents relating to the SMIC Plan is overbroad because it encompasses drafts of the plan that were never presented to, or voted on by the Company's stockholders. I agree. I do, however, find that all documents and reports related to the plan, and purpose of the plan, that ultimately was adopted by the Company's stockholders in 1994 are necessary to satisfy Haywood and Cronin's proper purpose of investigating mismanagement.

AmBase also argues that the fifth category seeking all books and records related to any retirement benefits for executives is overbroad. I agree. To the extent that this category encompasses plans that have been abandoned or were never considered in

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<sup>35</sup> Although the January Demands, submitted in January 2004, only sought documents through 2003, Plaintiffs argue that they are entitled to information through to the present time. In the circumstances of this case, I conclude that Plaintiffs are entitled to inspect the requested documents in all categories where a temporal limitation might apply to the present time. *See Landgarten v. York Research Corp.*, 1988 WL 7392, at \*7 (Del. Ch. Feb. 3, 1988).

relation to Bianco, it is overbroad. Documents relating to the board or Personnel Committee's consideration of making any kind of change in the SERP, whether or not it specifically related to Bianco, however, are essential to Haywood and Cronin's proper purpose and should be made available.

Additionally, AmBase seeks to limit the board minutes that Haywood and Cronin request in the sixth category. This court recently held that:

[I]t is clear that [defendants] may not limit [plaintiff]'s inspection of its minutes to only those portions specifically addressing the [alleged probable wrongdoings]. Instead, [plaintiff] is entitled to broad access to the minutes in order to evaluate whether [defendant's] directors, through their conduct as revealed in those minutes, have satisfied their fiduciary duties.<sup>36</sup>

In this case, general access to the minutes is necessary to put Bianco's compensation in perspective and evaluate the independence of the other board members. Therefore, I deny Ambase's attempt to limit the scope of this category.

Finally, I find that the seventh category, books and records relating to the consideration of individuals to serve as directors of AmBase from 1993 to the present, is essential to Haywood and Cronin's proper purposes. As discussed above, "director independence is a 'contextual inquiry,'" and stockholders have been encouraged "to employ the Section 220 process to delve into the relationship among board members."<sup>37</sup> Determining whether "irregularities or 'cronyism' [exist] in [the Company's] process of

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<sup>36</sup> *Amalgamated Bank*, 2005 WL 1377432, at \*4.

<sup>37</sup> *Id.* at \*3.

nominating board members”, “whether [Bianco] unduly controlled the nominating process or whether the process incorporated procedural safeguards to ensure directors’ independence”<sup>38</sup> are all essential to address the issue of whether the board was truly independent.

### C. Attorneys Fees

Delaware follows the “American Rule,” under which a prevailing party generally is expected to pay its own attorney’s fees and costs.<sup>39</sup> Attorneys fees may be awarded under the bad faith exception to the American Rule “where a party has engaged in ‘bad faith conduct,’ which ‘unnecessarily prolonged or delayed [the] litigation’ or ‘knowingly asserted frivolous claims.’”<sup>40</sup> As stated in the *Montgomery Cellular* case, “[t]he bad faith exception is applied in ‘extraordinary circumstances’ as a tool to deter abusive litigation and to protect the integrity of the judicial process.”<sup>41</sup>

In *Montgomery Cellular*, the Delaware Supreme Court recently summarized some of the circumstances in which awards of attorneys’ fees have been found justified.

In *Johnston v. Arbitrium (Cayman Is.) Handels AG*, [720 A.2d 542 (Del. 1998)], this Court held that a fee-shifting award of attorneys’ fees was appropriate under the bad faith exception, because the defendants had: (i) defended the action despite their knowledge that they had no valid defense,

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<sup>38</sup> *Beam*, 845 A.2d at 1056.

<sup>39</sup> *Montgomery Cellular Holding Co. v. Dobler*, 2005 WL 1936157, at \*15 (Del. Aug. 1, 2005).

<sup>40</sup> *Nagy v. Bistricher*, 770 A.2d 43, 64-65 (Del. Ch. 2000) (quoting *Johnston v. Arbitrium (Cayman Is.) Handels AG*, 720 A.2d 542, 546 (Del. 1998)).

<sup>41</sup> 2005 WL 1936157, at \*15.

(ii) delayed the litigation and asserted frivolous motions, and (iii) falsified evidence, and (iv) changed their testimony to suit their needs. Similarly, in *RGC International Investors v. Greka Energy Corp.*, [2001 WL 984689 (Del. Ch. Aug. 22, 2001),] the Court of Chancery awarded attorneys' fees against the defendant under the bad faith exception, because the defendant had forced the plaintiff to engage in litigation that would not have been necessary if the defendants had acted with even minimal responsibility; and because the multiple theories advanced by the defense had "minimal grounding in fact and law" and made the litigation more expensive than it should have been. And, in *Kaung v. Cole National Corp.*, [2005 WL 1635200 (Del. July 5, 2005),] this Court recently upheld the application of the bad faith exception to the American Rule where the plaintiff had an improper motive for filing the action, the plaintiff's attorneys had made excessive and duplicative discovery requests while ignoring their own client's discovery obligations, and one of the plaintiff's key witnesses had refused to answer any questions during his deposition.<sup>42</sup>

In support of their request for attorneys' fees, Haywood and Cronin complain about a number of Ambase's actions in connection with this litigation. Plaintiffs argue that they had a "clearly established legal right" to inspect Ambase's books and records, and that Defendant had no good faith basis to resist their Demand Letters. Plaintiffs also complain that Ambase requested and obtained more than ten extensions, suggested that Plaintiffs retain a compensation consultant, but then refused to accept the consultant's report in support of their claimed proper purpose, deposed both Plaintiffs, filed two motions to dismiss that were both "frivolous," according to Plaintiffs, and needlessly forced them to incur the costs of discovery, trial and post-trial briefing and argument. For the most part, Ambase denies those allegations.

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<sup>42</sup> *Id.* (footnotes and citations omitted).

Having presided over all aspects of this litigation, I conclude that Plaintiffs have not shown that Ambase's conduct was in bad faith or otherwise sufficiently egregious to justify an award of attorneys' fees. There was no evidence of any intentional misconduct by Ambase. Though AmBase resisted Haywood and Cronin's demands every step of the way, they did appear to have a legitimate basis for their first motion to dismiss, which resulted in Plaintiffs voluntarily amending their complaint, and valid concerns regarding the scope of the documents requested. Ambase also made a colorable, albeit strained, argument that Bianco's compensation was merely a business decision and that Plaintiffs' disagreement with it could not support a § 220 demand. In the latter regard, I further note that the publicly available information suggested that Ambase's directors, other than Bianco, were disinterested in the challenged actions and at least arguably capable of acting independently from Bianco. Lastly, the discovery taken by Ambase appears to have been commensurate with the limited nature and scope of this § 220 action. Therefore, I decline Haywood and Cronin's request for attorneys fees.

### **III. CONCLUSION**

For the reasons stated above, the Court finds that Haywood and Cronin have met the technical requirements of, and stated a proper purpose under, 8 *Del. C.* § 220, including the investigation of possible wrongdoing. Thus, I order AmBase to permit Haywood and Cronin to inspect its books and records as specified in this memorandum opinion. Furthermore, the Court declines to find AmBase liable for Haywood and Cronin's attorneys fees.

**IT IS SO ORDERED.**