EFiled: Dec 10 2021 05:19PM EST
Filing ID 67159752
Case Number 259,2021

IN THE SUPREME COURT FOR THE STATE OF DELAWARE

NVIDIA CORPORATION, Defendant Below, Appellant, v. CITY OF WESTLAND POLICE AND FIRE RETIREMENT SYSTEM, DENNIS HORANIC, ELLEN HOKE, KALLESTAD TRUST, and STEPHEN P. FARKAS, Plaintiff Below, Appellees.	No. 259, 2021 Court Below: Court of Chancery of the State of Delaware C.A. No. 2020-0075-KSJM

APPELLEES' CORRECTED ANSWERING BRIEF

December 10, 2021

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NATURE OF PROCEEDINGS

Pursuant to 8 *Del. C.* § 220 ("Section 220"), between February 22, 2019 and April 16, 2019, Plaintiffs/Appellees City of Westland Police and Fire Retirement System ("Westland"), Dennis Horanic ("Horanic"), Ellen Hoke ("Hoke"), Kallestad Trust ("Kallestad"), and Stephen P. Farkas ("Farkas") (collectively, "Plaintiffs") served their inspection demands (the "Demands") on Defendant NVIDIA Corporation ("NVIDIA" or the "Company"). The Demands complied with Section 220's form and manner requirements and sought to investigate potential malfeasance by the Company's fiduciaries, a well-established proper purpose. The Demands focused in particular on what information certain fiduciaries knew while selling tens of millions of dollars' worth of personally held stock shortly before NVIDIA missed revenue expectations. Nevertheless, the Company improperly rejected the Demands, claiming that Plaintiffs failed to establish a "credible basis" to suspect wrongdoing, and mischaracterized the misstatements at issue as mere opinion and expressions of optimism about NVIDIA's business.

While the Company did lard the record with the production of heavily redacted and, in some cases, unreadable documents, it refused to provide for inspection key necessary and essential information. On February 10, 2020, Plaintiffs filed their Section 220 Complaint. On September 17, 2020 the Court

of Chancery held a trial. On February 10, 2021 the Court issued its opinion (the "Post-Trial Ruling" or "PTR").[1] The Court of Chancery determined that Plaintiffs demonstrated a credible basis to "infer the possibility of wrongdoing" and that Plaintiffs were entitled to enforce their inspection rights. (PTR at 43).

The Court issued its Final Order on August 9, 2021.[2] The Court of Chancery ordered NVIDIA to produce two categories of documents: (1) "communications about the statements Fisher is alleged to have made to Huang" (regardless of whether the statements are in emails or written notes taken by Fisher, Huang, or others) and (2) "the Top 5 emails sent to or by Huang or Kress during the Relevant Period[3] to the extent they relate to the Responsive Topics[4]" as defined in the Final Order ("FO"). FO at 3.

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[1] The Post-Trial Ruling is Exhibit A to Appellant's Opening Brief ("OB").
[2] The Final Order is annexed to Appellant's Brief as Exhibit B.

[3] "Relevant Period" is defined as "August 2017 through November 2018." FO at 2.

[4]"Responsive Topics" is defined as "(a) sales data identifying and quantifying global Gaming GPU sales to cryptocurrency miners, which was consolidated in a central database to which Huang and Kress had access; (b) documents pertaining to quarterly internal meetings in which NVIDIA's vice presidents presented cryptocurrency-specific Gaming GPU sales data to Huang, from Fisher (c) weekly reports sent directly to Huang, at his request, detailing cryptocurrency miners' demand for Gaming GPUs from regions around the world; (d) usage data from the "GeForce Experience," which reflected how the processers were being utilized by end users and which was compiled in

On October 1, 2021, NVIDIA filed its Opening Brief. This is Plaintiffs' Answering Brief.

monthly reports sent to Huang; and (e), weekly sales emails quantifying Gaming GPU sales to cryptocurrency miners in NVIDIA's largest market." FO at 2-3.

SUMMARY OF ARGUMENT

1. Denied. "Documents are 'necessary and essential' pursuant to a Section 220 demand if they address 'the crux of the shareholder's purpose' and if that information 'is unavailable from another source." *Wal-Mart Stores, Inc. v. Indiana Elec. Workers Pension Tr. Fund IBEW*, 95 A.3d 1264, 1271 (Del. 2014), citing *Espinoza v. Herlett-Packard Co.*, 32 A.3d 365, 371-72 (Del. 2011). Plaintiffs filed suit seeking limited documents about a specific subject for a narrow time period, which were included in Plaintiffs' separate Demands from the beginning of the Section 220 process. The Court of Chancery ordered NVIDIA to produce documents within the scope of Plaintiffs' Demands as limited by the Complaint.

2. Denied. The Court of Chancery made no error in assessing Plaintiffs' hearsay evidence, including the Verified Statements[5], to determine Plaintiffs had a proper purpose for their Demands, particularly when a Company chooses not to take a deposition of any stockholder despite stockholders' willingness to sit for one. Numerous Court of Chancery decisions recognize that hearsay may be considered where it is sufficiently reliable. After Plaintiffs submitted credible evidence that their proper purposes were their

[5] At times herein, Plaintiffs' verified Demands, verified interrogatory responses, and the Verified Complaint are referred to collectively as the "Verified Statements".

own in the form of multiple sworn statements, the burden fell to NVIDIA to proffer evidence that Plaintiffs' purposes were not their own. NVIDIA failed to proffer such evidence.

3. Denied. NVIDIA continually mischaracterizes and misstates Plaintiffs' evidence and now seeks to rewrite Section 220 to cast aside "well-established law" that "achieves an appropriate balance" in favor of an actionable wrongdoing standard that would require a stockholder to present evidence of an actionable claim in this summary proceeding. This Court has already specifically rejected this standard. *See Lebanon Cty. Emps' Ret. Fund & Teamster Local 443 Health Servs. & Ins. Plan v. AmerisourceBergen Corp.*, 2020 WL 132752, at *15 (Del. Ch. Jan. 13, 2020) aff'd 243 A.3d 417 (Del. 2020).

COUNTERSTATEMENT OF FACTS

NVIDIA is a technology company that manufactures graphics processing units ("GPUs"). B185. GPUs are computer chips that, among other things, perform rapid math calculations. *See id*. GPUs were traditionally used for video games. NVIDIA admits it originally marketed GPUs for the gaming market and that the "gaming" segment of its business comprised a significant portion of the Company's revenues. *See id.*

Beginning in 2017, cryptocurrency miners switched from traditional computer chips to GPUs, and made bulk purchases of the Company's GPUs chips. *See id.* As a result, there was a spike in NVIDIA's GPU sales because of the use of its GPUs to "mine" cryptocurrency. A695. In particular, between August 2017 and November 2018, NVIDIA's revenue surged 42% with quarterly growth of 18%. B1, B7, B45. Buoyed by sales of GPUs to these miners, the Company's positive financial results led to an increase in the Company's stock price from $155.96 per share on August 11, 2017 to $281.02 on September 28, 2018. B197.

A. Huang and Kress' Public Statements About NVIDIA's Capacity to Meet Crypto-miners' Demands

Huang, NVIDIA's Chairman, issued a series of public statements that downplayed the impact of the cryptocurrency boom on NVIDIA's business and ability to absorb and profit from such demand. Specifically, Huang stated:

- "[W]hen you think about crypto in the context of our company overall, the thing to remember is that we're the largest GPU computing company in the world. And our overall GPU business is really sizable and we have multiple segments." B197.

- "[C]rypto usage of GPUs will be small but not 0 for some time." *See id*.

- "[T]here's a fairly sizable pent-up demand going into this quarter" among gamers looking to purchase NVIDIA GPUs." A392.

- "[The GPU supply] "channel is relatively lean" NVIDIA was "working really hard to get GPUs down to the marketplace for the gamers." *Id*.

- "[W]e try to as transparently reveal our numbers as we can. And . . . our strategy is to create a SKU that allows the crypto miners to fulfill their needs . . . as much as possible, fulfill their demand that way." A523.

- "[We are] 'not concerned about the channel inventory. . .'" A559.

- "We are masters at managing our channel, and we understand the channel very well." *Id*.

Kress, NVIDIA's Chief Financial Officer, issued similar statements:

- "GPU sales [] benefited from continued cryptocurrency mining" . . . the Company "remains nimble in our approach to the cryptocurrency market" . . . "[the crypto-currency boom" will not distract us from focusing on our core gaming market." B56.

- "[C]hannels had been influenced by not only the strength of the overall gaming that we had seen for the overall holiday season, but also the large uptick that we've seen in the overall valuation of cryptocurrency."

. . . "[We are] mak[ing] sure [] gamers worldwide receive the cards that we want to do." *See id*.

- "[W]e do believe we can serve [cryptocurrency miners] primarily with those specialized cards and that's going to be our goal going forward" . . . "we're going to really try our hardest to really focus our overall GPUs for gaming for overall gamers going forward." A523.

- "[NVIDIA] met some of this [cryptocurrency] demand with a dedicated board in our OEM business, and some was not met with our gaming GPUs. . . ." "[T]his contributed to lower than historical channel inventory levels of our gaming GPUs throughout the quarter." A392.

- "[O]verall contribution of cryptocurrency to our business . . . was a higher percentage of revenue than the prior quarter . . ." "[O]ur main focus remains on our core gaming market." *Id*.

While NVIDIA had previously "projected that crypto [currency] would be a larger contribution through the rest of year" the Company changed course in 2018 and projected cryptomining to be immaterial in its financial forecast. A542. Indeed, NVIDIA shocked the market when it announced the Company's revenue had declined by over 7%, far from the growth investors and analysts expected. B427. NVIDIA's revenue decline was due to its stoppage of shipments of the Company's mid-range gaming GPUs for at least a quarter due to an inventory and sales channel backup and as such, channel inventory took longer than expected to normalize. *See id*; A559.

On January 28, 2019, Huang wrote to stockholders advising that NVIDIA was revising revenue guidance down for the remainder of the 2019 fiscal year. B102. Huang wrote to Shareholders:

> We are lowering our revenue guidance for the fiscal 2019 fourth quarter to $2.2 billion, plus or minus two percent.
>
> * * *
>
> The Q4 guidance we provided in November reflected the effect of excess channel inventory of Pascal mid-range GPUs that resulted from the sharp decline of cryptocurrency demand. We delayed the planned production ramp of several new products to allow excess channel inventory to deplete, which resulted in the significantly lowered Q4 guidance.

Id. The Company's stock price crashed when the public learned the truth about cryptocurrency miners inflating the number of GPUs sold by the Company and NVIDIA's inability to manage its GPU supply. B205.

B. Huang, Kress and NVIDIA Insiders Sell Personal Stock

Huang sold 110,000 shares of personal NVIDIA stock for $18.2 million, while Kress sold 36,333 personal shares of NVIDIA stock for $7.7 million. B205-206. Further, NVIDIA admits eight other insiders at the Company sold another $122 million of stock during the same period from August 2017 to June 2018. *See id*. Collectively, Huang and other NVIDIA

insiders contemporaneously sold $147 million of the Company's stock at artificially inflated prices.

C. NVIDIA Faces Securities Fraud Litigation as a Result of the Company's Handling of the Cryptocurrency Demand

Investors sued NVIDIA in a securities fraud class action. A692. The Securities Action Complaint (the "SCA") alleged that Huang and the Board of Directors (the "Board") knew that the Company's GPU sales were dependent on cryptocurrency miners, in contrast to numerous public statements to the contrary. A702, A750.

The SCA specifically contained allegations from multiple former employees during the relevant period. A699-700. These former employees explained that NVIDIA kept a centralized internal sales database indicating cryptocurrency miners were driving the demand for GPUs, not NVIDIA's core gamer market. A703. They also stated that Huang personally reviewed NVIDIA's sales data showing miner-driven demand. A718. Specifically, former employees recounted that Huang received sales data reports detailing gaming GPU sales to cryptocurrency miners, including quarterly sales data reports and weekly "Top 5" emails demonstrating that cryptocurrency miners were driving demand. A719-722. The SCA's allegations describe Huang's knowledge and receipt of weekly and other periodic reports concerning the Company's actual performance versus its plan in 2017 through 2018. These

documents allegedly reveal material dislocation in the Company's customer order flow and historical purchasing patterns of traditional NVIDIA customers as they defensively accelerated future purchases of NVIDIA's GPUs.

D. Plaintiffs' Books and Records Demands

Between February 22, 2019 and April 16, 2019, Plaintiffs sent the Company their inspection Demands. A597-668. The Demands complied with Delaware's form and manner requirements. *See id*. Further, each of Demand was accompanied by documents evidencing the plaintiff's beneficial ownership of Company's stock, verifications, and Powers of Attorney, signed under oath. *Id.* While the Demands contained differences, each at a minimum sought to inspect books and records concerning both NVIDIA's ability to manage and meet the cryptocurrency demand on its supply chain and public statements concerning the supply chain. *See generally*, *id.*

At the Company's urging, Plaintiffs consolidated their efforts and attempted to reach an agreement with NVIDA as to the scope of inspection and collectively continued to demand books and records regarding the misleading statements. On June 7, 2019, Plaintiffs rejected NVIDIA's effort to impose a sweeping Board-level limitation on its document production and demanded that NVIDIA produce certain officer-level documents, including

documents as to Chairman and CEO Huang. A381. Specifically, Plaintiffs needed "to assess whether Huang had a reasonable basis for his positive statements about NVIDIA's ability to successfully manage the cryptocurrency spike in demand for NVIDIA's chips on the dates he made such statements." A380.

From documents produced by NVIDIA, Plaintiffs discovered that the Company's insiders closely watched cryptocurrency sales since at least early 2017 and knew that the Company's GPU sales were highly dependent on cryptocurrency miners. B73. On February 28, 2017, Fisher, the head of gaming at NVIDIA, gave a presentation to Huang and the Board on cryptocurrency and the estimated size of the business for the Company. *See id*. A year later, Huang and the Board received a report on cryptocurrency miners and their impact on the demand for GPUs. For example, one slide showed that as the value of one cryptocurrency – Ethereum – increased, so did GPU mining. *See id.* Thus, Huang and the Board knew that crypto-miners were driving the short-term increase in the sales of GPUs.

During the Section 220 process, Plaintiffs sent a letter to NVIDIA again seeking "the documents that formed the basis of Huang's and Kress's public statements about the Company's ability to manage its GPU sales considering the increased cryptocurrency demand." A687. In response, NVIDIA declined

to produce any "flash reports received or created by NVIDIA's CEO reflecting the state of NVIDIA's supply chain," claiming that the request for documents which formed the basis for Huang's and Kress's public statements that the Company could manage increased cryptocurrency demand needed to be made "narrower and more intelligible." A660.

As a result, Plaintiffs commenced their Section 220 proceeding. A33. The Complaint sought documents necessary and essential to properly investigate wrongdoing by Huang and other officers and directors with respect to the manufacture and sale of the Company's GPUs, its ability to meet the demands of the cryptocurrency market, and the false statements made by Huang and Kress – the "crux" of Plaintiffs' proper purposes. *See id*.

E. Section 220 Discovery and Trial

The Parties engaged in Section 220 discovery. NVIDIA propounded interrogatories to each Plaintiff individually. Each Plaintiff individually responded to the Company with separate verified interrogatory responses. At no time during discovery did NVIDIA notice the deposition of any individual plaintiff despite the discovery schedule allowing ample time for depositions. Plaintiffs' draft pre-trial order made clear that Plaintiffs did not plan to introduce live trial testimony. A793. Plaintiffs even reminded the Company

that the Scheduling Order permitted a five-day period by which to complete depositions. A801.

Trial was on September 17, 2020. After summarizing the evidence, the Court of Chancery held that "Plaintiffs have met the low bar of demonstrating a credible basis from which I can infer the possibility of wrongdoing." PTR at 34. The Court of Chancery ordered NVIDIA to produce two categories of documents: (1) "communications about the statements Fisher is alleged to have made to Huang" (regardless of whether the statements are in emails or written notes taken by Fisher, Huang, or others) and (2) "the Top 5 emails sent to or by Huang or Kress during the Relevant Period to the extent they relate to the Responsive Topics" as defined in the FO. FO at 3.

ARGUMENT

I. THE COURT OF CHANCERY PROPERLY ORDERED NVIDIA TO PRODUCE DOCUMENTS WITHIN THE SCOPE OF PLAINTIFFS' DEMANDS.

A. Question Presented

Did the Court of Chancery abuse its discretion by ordering NVIDIA to produce: (i) communications about the statements that Fisher is alleged in the SCA to have made to Huang, and (ii) the "Top 5 Emails" sent to or by Huang or Kress during the Relevant Period to the extent they relate to the Responsive Topics? PTR at 39-40, 43-44; FO at 3.

B. Standard of Review

This Court reviews *de novo* the Court of Chancery's determination of which documents are included in a written demand. *KT4 Partners LLC v. Palantir Technologies Inc.*, 203 A.3d 738, 749 (Del. 2019) (interpreting a written demand is akin to interpreting a contract as a question of law). Whether a complaint gives a defendant fair notice of the claims asserted is likewise reviewed *de novo*; in doing so, the complaint "is to be liberally construed." *VLIW Tech., LLC v. Hewlett-Packard Co.*, 840 A.2d 606, 611 (Del. 2003). However, the Court of Chancery's determination of the appropriate scope of relief is reviewed for abuse of discretion, a standard that is "highly deferential." *Id.* (footnote and citation omitted).

C. Merits Argument

Plaintiffs filed suit seeking limited documents about a specific subject for a narrow time period, which were included in Plaintiffs' separate Demands from the beginning of the Section 220 process. The Court of Chancery ordered NVIDIA to produce documents within the scope of Plaintiffs' Demands as limited by the Complaint.

1. The Complaint Seeks Particular Documents

"Documents are 'necessary and essential' pursuant to a Section 220 demand if they address 'the crux of the shareholder's purpose' and if that information 'is unavailable from another source." *Wal-Mart Stores*, 95 A.3d at 1271, citing *Espinoza*, 32 A.3d at 371-72. However, "where a plaintiff has shown evidence of wide-ranging mismanagement or waste, a more wide-ranging inspection may be justified." *Freund v. Lucent Tech.*, 2003 WL 139766, at *5 (Del. Ch. Jan. 9, 2003).

As limited by the Complaint, Plaintiffs' Demands sought "only the documents that formed the basis of Huang and Kress's public statements about the Company's ability to manage both its GPU inventory levels and sales channels considering [that] the increased demand in GPUs was a product of cryptocurrency demand [and] not traditional gaming." A38-39; ¶17. The Complaint sought documents necessary and essential to properly investigate

wrongdoing by Huang and other officers and directors with respect to the manufacture and sale of the Company's GPUs, its ability to meet the demands of the cryptocurrency market, and false statements made by Huang and Kress – the "crux" of Plaintiffs' proper purposes. *Wal-Mart*, 95 A.3d at 1271. While demands must be circumscribed with "rifled precision," it "is not a quantitative limitation on the stockholder's right to obtain all documents that are necessary and essential to a proper purpose." *Id.* at 1283.

Although Plaintiffs are entitled to "a more wide-ranging inspection" for having "shown evidence of wide-ranging mismanagement" as set forth in Point III *infra*, the Complaint sought a circumscribed set of documents. *Freund*, *supra.* The universe of relevant public statements for which foundation documents were sought is necessarily limited, as only twelve specific false statements are pleaded in the Complaint. A43-44 ¶¶39-41. The documents sought in the Complaint are not an improper "catch all" trolling for any and all potentially relevant documents as in *Fuchs Family Tr. v. Parker Drilling Co.*, 2015 WL 1036106, at *4 n.36 (Del. Ch. Mar. 4, 2015). Nor does the Complaint make a "sweeping discovery request" as in *Paul v. China MediaExpress Holdings, Inc.*, 2012 WL 28818, at *8 (Del. Ch. Jan. 5,

2012).[6] Here, the Complaint sought foundation documents for Huang and Kress's enumerated public statements about specific topics.

The relevant time period for the documents sought in the Complaint is also limited by the dates of the relevant statements by Huang and Kress. The Complaint initially sought documents from January 1, 2017 through January 1, 2019. A51-52 ¶60. Following trial, Plaintiffs further narrowed the "Relevant Period" for responsive documents sought. A791 ¶10; PTR at 2. Therefore, Plaintiffs' Complaint sought documents highly limited in scope and relevant time period.

The types of documents responsive to the single demand brought in the Complaint are all proper under settled authority. "[T]he general category of 'books and records'… has long been understood to cover both official corporate records and less formal written communications. *KT4*, 204 A.3d at 750 (citations omitted). Board materials are "[t]he starting point . . . for a sufficient inspection." *Amalgamated Bank v. Yahoo! Inc.*, 132 A.3d 752, 790

[6] In *Paul*, plaintiff sought "all e-mails and notes created by, distributed to, or reviewed by or on behalf of [the] Board or any committee thereof concerning well over two dozen subjects," including materials "within the legal possession custody or control of the [c]ompany, its subsidiaries, or its agents, including outside legal counsel and accountants." 2012 WL 28818, at *8 (ellipses and brackets omitted).

(Del. Ch. Feb. 2, 2016). Documents prepared by officers and employees – such as memoranda of communications between Fisher and Huang and weekly sales e-mails exchanged with Huang – are also proper. *Id.* at 791. Electronic communications – such as e-mail to or from Huang about the relevant matters – are likewise proper. *See, e.g., id.* at 792 ("the scope of the production . . . will include email and other electronic documents, which count as corporate books and records"); *Bucks Cty. Employees Ret. Fund v. CBS Corp.*, 2019 WL 6311106, at *9 (Del. Ch. Nov. 25, 2019) (ordering production of e-mails two weeks "before and after" a committee meeting where "Plaintiff's credible basis showing include[d] proof of suspected wrongdoing" at that meeting).

The two categories of documents ordered by the Court of Chancery are even more specific, as they are limited to (i) communications about statements which Fisher is alleged to have made to Huang, for which NVIDIA concedes no responsive documents exist (*see* OB at 18) and (ii) the "Top 5 Emails" (*i.e.,* weekly sales e-mails exchanged by Huang or Kress) but only to the extent they relate to the Responsive Topics. These specific communications "go to the very heart" of Plaintiffs' proper purpose. *Inter-Local Pension Fund GCC/IBT v. Calgon Carbon Corp.*, 2019 WL 479082, at *18 (Del. Ch. Jan. 25, 2019) (ordering production of emails related to mismanagement

allegations). Ample further authority supports the production of a circumscribed set of e-mails, which are not available from any other source.[7]

As forth in Point III *infra*, Plaintiffs have established a credible basis to suspect wrongdoing and support a books and records demand under Section 220. As set forth above, the Complaint liberally construed provided NVIDIA ample notice of the limited documents Plaintiffs sought and the even smaller subset of documents the Court of Chancery ordered NVIDIA to produce. The Court of Chancery's sound exercise of discretion in ordering NVIDIA to produce two limited categories of documents should not be disturbed.

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[7] *See, e.g., Mudrick Capital Mgmt., L.P. v. Globalstar, Inc.*, 2018 WL 3625680, at *9 (Del. Ch. July 30, 2018) (ordering production of emails from the CEO, General Counsel and two directors); *Lavin v. West Corp.*, 2017 WL 6728702, at *14 (Del. Ch. Dec. 29, 2017) (granting inspection of various communications, including "emails, memoranda and notes"); *Yahoo!*, 132 A.3d at 791-93 (requiring production of CEO's emails); *In re Lululemon Athletica Inc. 220 Litig*., 2015 WL 1957196, at *5-7 (Del. Ch. Apr. 30, 2015) (ordering production of emails held by the company); *Dobler v. Montgomery Cellular Hldg. Co*., 2001 WL 1334182, at *5-7 (Del. Ch. Oct. 19, 2001) (ordering production of e-mails that "reflect the decision-making" of the corporation); *Tanyous v. Happy Child World, Inc*., 2008 WL 2780357, at *7 n.50 (Del. Ch. Jul. 17, 2008) (including both emails and letters within general category of "correspondence" to be produced in Section 220 action); *Deephaven Risk Arb Trading Ltd. v. UnitedGlobalCom, Inc*., 2005 WL 1713067, at *10 (Del. Ch. Jul. 13, 2005) (requiring production of "electronic communications").

2. Plaintiffs' Demands and Complaint Were Not Reformulated

NVIDIA erroneously argues that Plaintiffs reformulated their Demands in the Complaint and again during the course of this litigation. OB at 20-24. In truth, the two categories of documents the Court of Chancery ordered NVIDIA to produce are encompassed within Plaintiffs' demands, which have been consistent throughout the entire Section 220 process. Unlike in *Beck & Panico Builders, Inc. v. Straitman,* 2009 WL 5177160 (Del. Super. Nov. 23, 2009), NVIDIA has been on notice of Plaintiffs' demands from the beginning.[8]

Plaintiffs' Demands sought Board Materials[9] including Board packages and presentations in connection with the Company's GPU sale growth. *See* A604 (Request 1 by Horanic); A606-607 (Requests 1-3 and 6 by Hoke); A622 (Requests 1-3 by Kallestad); and A634 (Requests 3-6 by Farkas). Plaintiffs'

[8] *See* OB at 23. In *Beck & Panico*, the Superior Court noted that plaintiff must live with the consequences of electing to sue a general contractor and not the subcontractor or the subcontractor's employee who Plaintiff knew performed the allegedly shoddy tile work at issue.

[9] Hoke defined "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, memorandum, transcripts, notes, minutes of meetings, drafts of minutes of meetings, exhibit distributed at meetings, summaries of meetings, or resolutions." A606.

Demands specifically included "documents forming the basis . . . for NVIDIA's public statements about its ability to manage the inventory, supply chain and sales channel concerns around the cryptocurrency boom experienced by NVIDIA from 2017 to 2019." A663 (Request 1 by Westland).

The Demands substantially reiterated this latter request, subject to Plaintiffs reserving the right to seek all of the documents in each of the individual demands. A675-676 (combined Request 1). Plaintiffs raised the request once again after the Company's production but prior to litigation, which NVIDIA acknowledged. A686, A690. NVIDIA's assertion that this was "the first time stockholder counsel has made such a request in the meet and confer process," (A690) overlooks Westland's individual demand for materially identical documents. *See* A663 (Request 1).

When the parties were unable to resolve their dispute, Plaintiffs commenced a books and records proceeding seeking "only the documents that formed the basis of Huang and Kress's public statements about the Company's ability to manage both its GPU inventory and sales channels considering the increased demand in GPUs was a product of cryptocurrency demand [and] not traditional gaming." A38 ¶17; *see also* A38 ¶16, A51 ¶59, A54 ¶68, A55 ¶69.

The documents sought in the Complaint were materially identical to what Plaintiffs (and particularly Westland) had previously sought individually and reiterated to NVIDIA *two more times*. The two categories of documents that the Court of Chancery ordered the Company to produce fall within the documents sought in the Complaint.

With respect to the "Top 5 Emails," Plaintiffs explained in their correspondence with the Company prior to filing the Complaint that they were seeking "flash reports and similar materials that Huang received from his direct reports,"(*see* B108), that Plaintiffs believed "formed the basis of Huang's and Kress' public statements about the Company's ability to manage its GPU sales considering the increased cryptocurrency demand and expressly inquired if the Company would produce those documents." A686. Contrary to NVIDIA's assertions, the "Top 5 Emails" are neither vague nor expansive. *See* FO at 2. The Chancery Court properly found that these e-mails are "easily gathered, cover the topics, and seem, to me, necessary and essential to meet the Plaintiffs' stated purposes." PTR at 43.[10]

[10] NVIDIA erroneously contends that Plaintiffs "did not reiterate [their] request" for "Top 5 [E]mails" in "either the Pre-Trial Order or their Pretrial or Post-Trial Briefs." *See* OB at 22-23. They are mistaken. *See* A791-792 ¶ 10 (Plaintiffs' proposed Pre-Trial Order seeking production of "electronic documents (including email) from the period of August 2017 and November 2018 received… by Huang… or Officers/senior members of management

With respect to communications about the statements in the SCA Fisher allegedly made to Huang,[11] Plaintiffs alleged that the Board Materials produced by NVIDIA established that Fisher had a direct reporting line to Huang, Kress and the Board and lengthy meetings occurred. A55-56 ¶¶71, 73, 74. Plaintiffs specifically pleaded:

> As a representative example, attached is an agenda from the Board's February 2017 meeting where [Fisher] presented information concerning cryptocurrency, including: (i) what cryptocurrency is; (ii) the impact of cryptocurrency on the GPU market; (iii) who players in the market were; (iv) the Company's strategy with respect to the cryptocurrency; and (v) the estimated size of business for the Company. The discussion was scheduled to take place from 12:45 to 5:30 pm, along with another topic also listed under 'Business Update….' Thus, it appears from the document that a substantial portion of the Board Meeting was devoted to [the] cryptocurrency issue."

[*e.g.,* Kress] relating to…(vi) the Company's sales of GPUs between August 2017 and November 2018); A77 ¶ 13 (same, in Pre-Trial Stipulation and Order granted September 11, 2020); A123 (Plaintiffs' Pretrial Brief, noting "that reports…provided to [] Huang…on the subject of the Company's manufacture and sales of the GPUs… are directly relevant to the 'crux' of Plaintiffs' proper purposes."); A878 (Plaintiffs' Post-Trial Brief, expressly seeking "'Top 5' emails for the period August 2017 and November 2018").

[11] NVIDIA alleges there are no responsive documents. *See* OB at 22.

Id. ¶74.[12] Fisher's communications with Huang would plainly fall inside Plaintiffs' request for documents forming the basis of Huang's public statements.

Plaintiffs did not expand the scope of their demands as in *Fuchs Family Trust, supra*. As the Court of Chancery correctly noted: any difference between Plaintiffs' demands throughout the Section 220 process is not because the Demands were expanded or reformulated, but *rather because Plaintiffs have narrowed them*. PTR at 43-44 (emphasis added). Accordingly, the Court of Chancery did not abuse its discretion in ordering NVIDIA to produce two discrete categories of documents.

[12] As alleged in the SCA, Fisher had been cautioned by a member of the Company's sales team in China that "NVIDIA had to 'take care,' given the growing reliance on crypto-miners, which . . . Fisher called '***dangerous***' during the meeting." A692.

II. THE COURT OF CHANCERY'S CONSIDERATION OF HEARSAY TO ASSESS PLAINTIFFS' PROPER PURPOSES WAS CONSISTENT WITH DELAWARE LAW

A. Question Presented.

Did the Court of Chancery properly rely on hearsay statements from Plaintiffs to establish a proper purpose for their Demands when the statements were verified under penalty of perjury and NVIDIA proffered no evidence that would suggest Plaintiffs had any improper purpose? PTR at 4, 23-24.

B. Standard of Review.

Whether the Court of Chancery properly considered hearsay evidence as sufficiently reliable is a "fact-intensive, judgment-based determination[] that [is] reviewed for abuse of discretion." *KT4*, 203 A.3d at 749; *see also City of Westland Police & Fire Ret. Sys. v. Axcelis Techs., Inc.*, 1 A.3d 281, 287 (Del. 2010), *as corrected* (Aug. 13, 2010) (recognizing that *de novo* review applies to the question of whether a stated purpose is a proper purpose, but that "[a] trial judge's determination that a credible basis does (or does not) exist to infer managerial wrongdoing is a mixed finding of fact and law that is entitled to considerable deference"). Accordingly, the proper standard of review is abuse of discretion, and not *de novo* asserted by NVIDIA.

C. Merits Argument.

1. The Court of Chancery Properly Determined Plaintiffs Proved a Proper Purpose

The Court of Chancery made no error in assessing Plaintiffs' hearsay evidence, including the Verified Statements, to determine Plaintiffs had a proper purpose for their Demands. Numerous Court of Chancery decisions recognize that hearsay may be considered where it is sufficiently reliable. Here, the verifications attached to the Verified Statements provide that indicia of reliability and NVIDIA offered no evidence to the contrary. NVIDIA's suggestion that Plaintiffs' proper purposes must be "tested" is made without any support. Finally, though NVIDIA couches its argument as "Plaintiffs' Hearsay Evidence … Not [Being] Reliable" (OB at 29), this argument fails as a meager attempt to shift its burden of proving Plaintiffs' proper purposes is not their actual purpose—a point for which NVIDIA failed to offer any evidence.

a. Delaware Courts Have Repeatedly Reaffirmed That Sufficiently Reliable Hearsay May Be Considered

NVIDIA starts with the premise that "[hear]say is not admissible except as provided by law," and "[n]o authority creates an exception to this fundamental rule." OB at 26. However, just a few sentences later, NVIDIA buries in a footnote that Delaware explicitly recognizes such an exception,

namely "[h]earsay statements may be considered, provided they are sufficiently reliable." OB at 26, n. 3 (citing *In re Plains All Am. Pipeline, L.P.*, No. 11954-VCMR, 2017 WL 6016570, at *4 (Del. Ch. Aug. 8, 2017) (citing *Yahoo!,* 132 A.3d at 778)).

NVIDIA incorrectly argues that despite the decision's clear language, the Court in *In re Plains* meant that "[h]earsay may be permitted for *other purposes*, such as showing a credible basis to suspect wrongdoing" (emphasis added). OB at 26, n. 3. However, *Plains* imposes no such limitation on the ways sufficiently reliable hearsay may be used in a books and records proceeding. Nor does NVIDIA offer any coherent reason why hearsay evidence would be admissible for some, but not all, of a plaintiff's burden. Further, a legion of cases echoes the general precept that "hearsay statements may be considered, provided they are sufficiently reliable" without any such arbitrary limitation. *See e.g.*, *Jacob v. Bloom Energy Corp.*, 2021 WL 733438, at *1 (Del. Ch. Feb. 25, 2021) (recognizing that "I am mindful that these sources are hearsay and, in some cases, double hearsay. Even so, in a Section 220 proceeding, [h]earsay statements may be considered, provided they are sufficiently reliable" (internal citations omitted)).[13] In the same vein, NVIDIA

[13] *See also Woods Tr. of Avery L. Woods Tr. v. Sahara Enterprises, Inc.*, 238 A.3d 879, 894 (Del. Ch. July 22, 2020), *judgment entered sub nom. In re*

suggests that for hearsay to be admissible there must be an agreement from the opposing party. OB at 26, n. 3. Again, no such limitation appears in the cited authority (or elsewhere). NVIDIA's "see" citation to *Wal-Mart Stores*, 95 A.3d at 1269 provides zero support for this idea: the case attributes no significance to the fact that "[t]he parties agreed to conduct a Section 220 trial on the basis of a paper record"—it simply mentioned this fact in the "Facts" section of the order. The case also has no discussion of hearsay. *Id.*

Woods v. Sahara Enterprises, Inc. (Del. Ch. 2020) (recognizing that "plaintiff also may rely on hearsay, as long as it is sufficiently reliable"); *Amerisourcebergen Corp.*, 2020 WL 132752, at *8 (recognizing same); *Se. Pennsylvania Transportation Auth. v. Facebook, Inc.*, 2019 WL 5579488, at *2, n. 7 (Del. Ch. Oct. 29, 2019), *judgment entered sub nom. Se. Pennsylvania Transp. Auth. v. Facebook, Inc.* (Del. Ch. 2019) (recognizing that "I am mindful that these reports are hearsay" but "[e]ven so, in a Section 220 proceeding, [h]earsay statements may be considered, provided they are sufficiently reliable" (internal citation omitted); *In re Facebook, Inc. Section 220 Litig.*, 2019 WL 2320842, at *2, n. 10 (Del. Ch. May 30, 2019), *as revised* (May 31, 2019), *judgment entered sub nom. In re Facebook, Inc.* (Del. Ch. 2019) (recognizing same); *Paul*, 2012 WL 28818, at *4-5 (rejecting challenge to sufficiency of evidence based on it being hearsay, and noting "Delaware law, however, d[oes] not endorse a categorical rule of law . . . that hearsay statements not offered for their truth fail as a matter of law to meet Section 220's evidentiary requirements."); *Troy Corp. v. Schoon*, 959 A.2d 1130, 1135 (Del. Ch. 2008) (concluding that "[i]f anything, the evidentiary rules in the [prior] 220 action were more permissive than here [litigation on other claims]—[and that] courts may consider 'sufficiently reliable' hearsay evidence in a 220 action"); *Marmon v. Arbinet-Thexchange, Inc.*, 2004 WL 936512, at *4 (Del. Ch. Apr. 28, 2004) (allowing inspection where Defendant argued that "at trial [plaintiff] presented only hearsay evidence that was not admissible" and recognizing that "the [Delaware] Supreme Court indicated that . . . it could properly have considered . . . hearsay testimony" if it found it was reliable")

Accordingly, NVIDIA's attempt to divine novel restrictions on the use of hearsay evidence in Section 220 actions is incorrect and unsupported by any of the numerous Delaware cases recognizing that hearsay evidence may be considered.

b. Plaintiffs' Evidence Was Sufficiently Reliable

In support of their proper purpose, Plaintiffs submitted the Verified Statements, which were made under penalty of perjury. *See* A599, A612, A631-632, A649-651, A666, B270-272, 302-303, 331-332, 362-363, 388-389. Plaintiffs thus personally attested to their purpose for pursuing their Section 220 Demands and filing the Verified Complaint. Court of Chancery Rule 3(aa) requires that all complaints and related pleadings be accompanied by a notarized verification from a qualified individual for each named plaintiff, which attests to the correctness and truthfulness of the filing. *Bessenyei v. Vermillion, Inc.*, 2012 WL 5830214, at *1 (Del. Ch. Nov. 16, 2012), *aff'd*, 67 A.3d 1022 (Del. 2013). Indeed, documents that meet the Court's verification requirements carry a presumption of reliability because if the notarizations are invalid, their use as verifications for the purposes of Delaware law and Court of Chancery Rule 3(aa) is also invalid. *Id.*, at *2. Thus, sufficient indicia of reliability existed for the Court of Chancery to have

properly evaluated the hearsay statements in the Verified Statements regarding Plaintiffs' proper purposes.

After Plaintiffs submitted credible evidence that their proper purposes were their own in the form of multiple sworn statements, the burden fell to NVIDIA to proffer evidence that Plaintiffs' purposes were not their own. *Donnelly v. Keryx Biopharmaceuticals, Inc.*, 2019 WL 5446015, at *3-4 (Del. Ch. Oct. 24, 2019) ("[a] corporate defendant may resist demand where it shows that the stockholder's stated purpose is not the actual purpose for the demand."). To meet its burden, NVIDIA must "prove false pretenses, which 'is fact intensive and difficult to establish.'" *Id.* (citing *Pershing Square, L.P. v. Ceridian Corp.*, 923 A.2d 810, 817 (Del. Ch. 2007)) (recognizing that to succeed at showing false pretenses, it is not sufficient to show "a secondary improper purpose exists" but "the defendant must prove that the plaintiff pursued its claim under false pretenses, and its primary purpose is indeed improper").

NVIDIA failed to present *any* evidence to meet its burden. The closest it came is the speculative and unsupported supposition that "[i]ndeed, the very fact that Plaintiffs for no apparent reason failed to appear by videoconference at trial or submit a current affidavit suggests that Plaintiffs' purported purpose is no longer valid and creates some doubt about whether this is really the

stockholders' purpose or, instead, the lawyers.'" OB at 30. But it was NVIDIA that chose not to depose Plaintiffs or call them as witnesses at trial. In a similar instance where "the Company chose not to depose [the plaintiff] and did not point to any documents or circumstances that suggest an improper motive," instead "only offer[ing] suspicions," the court held it was "not enough to carry the Company's burden." *Sahara Enterprises, Inc.*, 238 A.3d at 893.

While NVIDIA attempts to portray this as an instance where circumstances changed such that the primary purpose for the demand became moot, it is nothing of the sort. OB at 30. NVIDIA cites to *Amalgamated Bank v. NetApp, Inc.*, 2012 WL 379908, at *7 (Del. Ch. Feb. 6, 2012), but the case is inapposite, since there, *facts* in the record established that the "Plaintiff's proper purpose for seeking the Defendant's books and records [to amend a complaint], formerly established, is now moot [because that deadline had passed]." Here, NVIDIA does not offer any *facts* that would have allowed the Court of Chancery to conclude that any of Plaintiffs' proper purposes were moot. NVIDIA admits as much in its appeal, with equivocal language like "[o]ne could *reasonably infer*" and "suggests that" and "creates some doubt." OB at 30. NVIDIA's unfounded suspicions and self-serving proclamations, without more, cannot rebut Plaintiffs' evidence of proper purpose.

NVIDIA also attempts to shift its burden by arguing that Plaintiff's burden must be tested. OB at 29. NVIDIA does not even *attempt* to find some tenuous connection to law to divine this requirement. That "Plaintiffs cited no case (and NVIDIA is aware of none) where a books and records plaintiff was allowed to proceed at trial without such testimony (absent an agreement by the parties)" is irrelevant. No case or statute has set a requirement that Plaintiffs provide live testimony. As the Court of Chancery concluded, "No decision has ever required this." PTR at 23. Thus, NVIDIA had every reason to know that Plaintiffs *did not need to provide live testimony*.

Moreover, Plaintiffs also explicitly informed NVIDIA that Plaintiffs would not provide live testimony. After, NVIDIA stated that it believed Plaintiffs could not meet their burden of proof without such testimony. In response, Plaintiffs reminded the Company that the Scheduling Order permitted a five-day period by which to complete depositions. A801. Nevertheless, NVIDIA did not notice a deposition of any of the Plaintiffs.[14] The Court of Chancery also noted that NVIDIA "failed to . . . call any of the Plaintiffs as witnesses at trial." PTR at 25. NVIDIA cannot now blame its

[14] *See Pettry v. Gilead Scis., Inc*., CA N 2020-01320KSJM at 59 (Del. Ch. May 2020) where NVIDIA's counsel was also counsel for the Company and conducted depositions of multiple plaintiffs during COVID-19.

strategic decisions for its inability to provide any evidence of improper motive.

III. THE COURT OF CHANCERY PROPERLY DETERMINED THAT PLAINTIFFS ESTABLISHED A CREDIBLE BASIS FOR INSPECTION.

A. Question Presented

Did the Court of Chancery commit clear error in holding that Plaintiffs established a credible basis to infer possible wrongdoing or mismanagement occurring at NVIDIA? PTR at 28.

B. Scope of Review

The Court of Chancery's determination that a credible basis exists to infer wrongdoing is a mixed finding of fact and law that is entitled to considerable deference. *Axcelis Techs., Inc.*, 1 A.3d at 286-87. The trial court's factual determinations, including as to the interpretation of Plaintiffs' Demands and Complaint, are reviewed under the "highly deferential" abuse of discretion standard. *KT4*, 203 A.3d at 748 (citation omitted). Factual findings will be affirmed unless they are the product of "clear error." *RBC Capital Markets, LLC v. Jervis*, 129 A.3d 816, 861 (Del. 2015). Questions of law are reviewed *de novo*. *KT4*, 203 A.3d at 748-49.

C. Merits of Argument

As the Court of Chancery correctly noted: "In determining whether a plaintiff has presented a credible basis for inspection, I must look at the allegations collectively. The threshold may be satisfied by a credible showing

through documents, logic, testimony, or otherwise, that there are legitimate issues of wrongdoing. When evaluating whether a credible basis exists, this Court may consider ongoing lawsuits, investigations, circumstantial evidence, and even hearsay statements evincing possible wrongdoing." PTR at 27.

Plaintiffs have marshaled the following facts from which a credible basis to suspect wrongdoing and/or mismanagement can and should be inferred, thus establishing a credible basis for inspection: (a) the Company's response to the cryptocurrency demand (A361-376; B56-71; B81-92; B185-228; A692-778); (b) Huang and Kress' public statements (B56-71; A392-407; 523-541; A542-558; B185-228); (c) the Company's revision of its revenue guidelines (B102-104; B185-228; A692-778); (d) the sale of personally held stock by Huang, Kress and other NVIDIA insiders in the amount of $147 million (B12-44; B72; B93-100; B185-228); (e) the Company's embroilment in securities fraud litigation (B110-184; B229-A254; A692-778); and (f) former employee accounts of documents requested by and sent to Huang regarding GPU sales. A692.

NVIDIA incorrectly argues that "The Court of Chancery found Plaintiffs' had established a credible basis to '***suspect an insider trading scheme***' based on three categories of evidence: '[allegedly] false or misleading statements, the securities litigation, and insider stock sales.'" OB

at 32 (emphasis added). In so arguing, NVIDIA limits the reasoning of the Court of Chancery to a single purpose and to a specific iron-clad theory of NVIDIA's wrongdoing. To be clear, after a well-reasoned analysis, the trial court actually determined, "Plaintiffs have met the low bar of demonstrating a credible basis from which I can infer the possibility of ***wrongdoing***." OB at 37.

1. Plaintiffs Established a Credible Basis to Suspect Potential Wrongdoing

More than 20 years ago, in *Sec. First Corp. v. U.S. Die Casting & Devel. Co.*, this Court held that "[s]tockholders have a right to at least a limited inquiry into books and records when they have established some credible basis to believe that there has been wrongdoing." 687 A.2d 563, 571 (Del. 1997). In *Seinfeld v. Verizon Commc'ns, Inc.*, 909 A.2d 117 (Del. 2006), this Court reaffirmed "the well-established law of Delaware that stockholders seeking inspection under section 220 must present 'some evidence' to suggest a 'credible basis' from which a court can infer that mismanagement, waste or wrongdoing may have occurred." *Id*. at 118 (citation omitted); *see also Cent. Laborers Pension Fund v. News Corp.*, 45 A.3d 139, 144-45 (Del. 2012); *Axcelis*, 1 A.3d at 286-87. The "credible basis" standard requires only "some evidence of possible wrongdoing." *Seinfeld*, 909 A.2d at 122 (emphasis and

citations omitted). It is the "lowest possible burden of proof" in Delaware. *Id.* at 123. Plaintiffs far exceeded this minimal threshold burden.

A stockholder is "not required to prove by a preponderance of the evidence that waste and [mis]management ***are actually occurring***." *Thomas & Betts Corp. v. Leviton Mfg. Co.*, 681 A.2d 1026, 1031 (Del. 1996) (emphasis added) (collecting cases demonstrating that the proper purpose inquiry requires "some credible basis" of potential wrongdoing, does not require stockholders to identify end uses of their inspection). It follows that a stockholder is not required to prove the specific nature of the wrongdoing or mismanagement that the stockholder seeks to investigate. In fact, "Delaware courts generally do not evaluate the viability of the demand based on the likelihood that the stockholder will succeed in a plenary action." *Lavin v. W. Corp.*, 2017 WL 6728702, at *9 (Del. Ch. Dec. 29, 2017) (collecting cases); *see Saito v. McKesson HBOC, Inc.*, 806 A.2d 113, 117 (Del. 2002); *In re Facebook, Inc. Section 220 Litig,* 2019 WL 2320842, at *2 ("I reject, as a matter of law, Facebook's implicit suggestion that I must adjudicate the merits of Plaintiffs' *Caremark* claim before allowing an otherwise proper demand for inspection to stand.").

NVIDIA continually mischaracterizes Plaintiffs' evidence and now seeks to rewrite Section 220 to cast aside this "well-established law" that

"achieves an appropriate balance" in favor of an actionable wrongdoing standard that would require a stockholder to present evidence of an actionable claim. This Court has already rejected this standard. Indeed, stockholders seeking documents in Section 220 need not satisfy the higher burden of proving "actionable-wrongdoing" in this summary proceeding. *AmerisourceBergen Corp.*, 2020 WL 132752, at *15. Indeed, a stockholder enforcing its Section 220 rights need not "identify all of the potential uses for books and records before knowing what the books and records reveal." *Id*., at *12 (rejecting the reasoning of cases requiring a "purpose-plus-an-end," such as *Graulich v. Dell Inc*., 2011 WL 1843813 (Del. Ch. May 16, 2011). Simply, a "Section 220 action is not the proper forum for [a merits-based] analysis" as NVIDIA advocates. *Khanna v. Covad Commc'ns Grp. Inc.*, 2004 WL 187274, at *6 (Del. Ch. Jan. 23, 2004); *Lavin v. W. Corp.*, 2017 WL 6728702, at *9; *Calgon Carbon*, 2019 WL 479082, at *13 ("[A] stockholder need not prove actual wrongdoing as a Section 220 action is not a full trial on the merits." (citing *Khanna* and *Lavin*, among other authorities)).

a. The Court Did Not Err in Inferring Wrongdoing from Huang and Kress' Stock Sales

First, NVIDIA argues that Huang's "single stock sale" was not "remotely suspicious" because Huang's small stock sale is "too insignificant to be suspicious." OB at 33. In so arguing, NVIDIA's reliance on *In re Clovis*

Oncology, Inc. Derivative Litig., 2019 WL 4850188, (Del. Ch. Oct. 1, 2019) and *In re Oracle Corp.,* 867 A.2d 904, 954 (Del. Ch. 2004) is misplaced. Both *Clovis* and *Oracle* resulted in a dismissal of federal securities law claims under the 1934 Securities Act or merit-based claims under Delaware law which each require an analysis of the claims under a much more stringent standard than that of determining credible basis.

Yet, NVIDIA argues "selling a very small portion of total holdings is not suspicious." OB at 33, n.4. Although it may be that the "small quantity" of stock Huang sold is evidence of his innocence, "that is not the only possible reason for such 'small sales.' There are any number of reasons why [one may] have chosen to keep . . . insider trading to a limit, not least of which is . . . to avoid getting caught or tipping off the market as to the fraud that prompted [the sale of] . . . stock." *In re Am. Intern. Group, Inc*., 965 A.2.d 763, 801 (Del. Ch 2009), *aff'd sub nom. Teachers' Retirement Sys. of Louisiana v. PricewaterhouseCoopers LLP*, 11 A.3.d 228 (Del 2011). Accordingly, the Court of Chancery correctly opined "the relative percentage of stock sold does not make the evidence less probative." PTR at 33.

NVIDIA then argues that Kress' stock sales cannot be suspicious because those sales "were made pursuant to 10b-5 plans" and the purpose of those plans is "to prevent insider trading by taking trading decisions out of the

executive's hands." OB at 34. However, absent any proof of a public statement or other indication that the Company's Board examined the trades, or Huang or Kress' conduct, it is proper for Plaintiffs to examine the timing of these trades and whether the Company's Board may have mismanaged the situation. *In re Lululemon Athletica Inc. 220 Litig*., 2015 WL 1957196, at *7.

b. The Trial Court Properly Inferred Wrongdoing from Huang and Kress' Misstatements

NVIDIA argues Huang and Kress's public statements cannot support an inference of wrongdoing. OB at 39. NVIDIA further argues Plaintiffs would have to rely on Huang and Kress' statements since those statements were "vague corporate optimism or puffery." OB at 41. Again, NVIDIA relies on inapposite precedent to urge a rewrite of Delaware law.[15]

NVIDIA urges this Court to require a plaintiff to prove malice or reliance by a shareholder with respect to alleged misstatements. NVIDIA fails to offer any authority that plaintiffs in a summary proceeding must have specific and concrete evidence of possible wrongdoing or mismanagement by the Board or senior management before the Court may permit a Section 220

[15] *See* OB at 41 relying on *Lazard Debt Recovery GP, LLC. v Weinstock*, 864 A2d 955, 971 (Del. Ch. 2004) (discussing types of statements generally not found to be material under the federal securities laws) and *In re Burlington Coat Factory Sec. Litig*., 114 F3d 1410, 1428 (3d Cir 1997) (discussing when statements of opinion by top corporate officials may be actionable).

inspection. This standard would "both ignore the very low burden of proof required by the credible basis standard and would threaten to render meaningless the Delaware courts' repeated urging that stockholder plaintiffs seek books and records before filing class or derivative complaints so they may prepare factually accurate and legally sufficient pleadings." *Oklahoma Firefighters Pension & Retirement Sys. v. Citigroup Inc*., 2014 WL 5351345, at *6 (Del. Ch. Sept. 30, 2014).

It is true that "credible evidence of mismanagement . . . requires more than a divergence between forward-looking statements and subsequent results [.] Something more must be tendered . . . to bridge the gap between unfulfilled projections and mismanagement." *Shamrock Activist Value Fund, L.P. v. iPass Inc*., 2006 WL 3824882, at *2 (Del. Ch. Dec. 15, 2006).

Despite NVIDIA's protestations, Plaintiffs have articulated "more." Indeed, the Court of Chancery did not consider Huang and Kress' public misstatements in a vacuum. As in *Barnes v. Sprouts Farmers Mkt., Inc*., 2018 WL 3471351, at *6 (Del Ch. July 18, 2018), the Court of Chancery examined the evidence to fill in the "gaps" between statements and mismanagement. NVIDIA's instance that the statements here are distinguishable from those at issue in *Sprouts* is of no matter. *Sprouts* stands for the principle that Plaintiffs are not required to prove actual wrongdoing to establish credible basis and as

an example of the Court reviewing the evidence to determine that the gaps between misstatements and mismanagement are filled. Here, the Court examined Huang and Kress' unfulfilled projections concerning the reality that NVIDIA could not meet the crypto-miners' demand, the Company's backlog with its inventory and supply channel coupled with Huang and Kress' stock sales and, as discussed *infra*, the allegations of the SCA, and determined that Plaintiffs' established a credible basis for inspection. PTR at 29-34. Accordingly, the Chancery Court did not err in considering these statements in deciding Plaintiffs established credible basis.

c. The SCA Augments Plaintiffs' Credible Basis

NVIDIA argues "the allegations in the SCA do not provide a credible basis to suspect wrongdoing." OB at 36. Yet, NVIDIA fails to cite a single piece of precedent establishing that shareholders have to establish a "theory of wrongdoing." NVIDIA manufacturers Plaintiffs "core theory": that Plaintiffs are solely investigating insider trading. The Demands made clear, however, that Plaintiffs are investigating, *inter alia*, possible mismanagement or wrongdoing and depending on the nature of the books and records, Plaintiffs may determine to seek corrective measures. A597-668.

NVIDIA similarly ignores the Court of Chancery's analysis of the SCA and the basis of its allegations. Indeed, the SCA allegations are "based on

thorough research citing to: public filings, research reports by securities and financial analysts, and other documents". PTR at 30. Moreover, the Court of Chancery also considered that the SCA was dismissed because of a failure to meet the more stringent pleading standard, when the "Plaintiffs failed to describe the expert's assumptions and analysis with sufficient particularity to establish a probability that its conclusions are reliable." PTR 31-32.

This Court has repeatedly encouraged stockholders to use the "tools at hand" to investigate potential wrongdoing. *See*, *e.g.*, *Cal. State Teachers' Ret. Sys. v. Alvarez*, 175 A.3d 86, 2017 WL 6421389, at *1 (Del. 2017) (TABLE); *Schoon v. Smith*, 953 A.2d 196, 208 n.47 (Del. 2008); *White v. Panic*, 783 A.2d 543, 557 n.54 (Del. 2001) (collecting cases); *King v. VeriFone Holdings, Inc.*, 12 A.3d 1140, 1145-46 (Del. 2011). As the court below recognized, "[a] responsible stockholder cannot identify all of the potential uses for books and records before knowing what the books and records reveal." *AmerisourceBergen*, 2020 WL 132752, at *25.

Finally, Plaintiffs' interpretation of the underlying conduct at NVIDIA is not ironclad, but at the Section 220 proceeding stage, "it does not need to be" because the alleged misleading statements, together with the rest of Plaintiffs' allegations "need only provide some evidence from which" the Court of Chancery can infer that wrongdoing possibly occurred. *Sprouts*, 2018

WL 3471351, at *6. Here, the Court of Chancery carefully reviewed the record.

CONCLUSION

For all the foregoing reasons, the decision of the Chancery Court should be affirmed.

Dated: December 10, 2021

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