



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

DEEPHAVEN RISK ARB)
TRADING LTD.,)
)
Plaintiff,)
)
v.) Civil Action No. 379-N
)
UNITEDGLOBALCOM, INC.,)
)
Defendant.)

MEMORANDUM OPINION

Submitted: May 14, 2004
Decided: August 30, 2004

John L. Reed, Esquire and Matthew Neiderman, Esquire of DUANE MORRIS LLP,
Wilmington, Delaware, Attorneys for Plaintiff

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PARSONS, Vice Chancellor

Deephaven Risk Arb Trading Ltd. (“Deephaven”) brought this action, pursuant to 8 *Del. C.* § 220, seeking to compel inspection of certain books and records of UnitedGlobalCom, Inc. (“UGC”). UGC moved to dismiss Deephaven’s complaint under Court of Chancery Rule 12(b)(6) for failure to state a claim. For the reasons discussed below, the Court will deny UGC’s motion.

I. FACTS¹

Deephaven is a British Virgin Islands company, and a wholly owned subsidiary of Deephaven Capital Management LLC. Deephaven has “at all relevant times” been a beneficial owner of shares in UGC. UGC is a Delaware corporation with its principal place of business in Denver, Colorado.

On January 12, 2004, UGC announced a \$1 billion rights offering (the “Rights Offering”) to holders of UGC Class A common stock. On January 21, 2004, those rights were distributed. Deephaven acquired over 5 million rights during the Rights Offering period.²

¹ Unless otherwise noted, the facts are as stated in the Complaint.

² The parties dispute exactly how Deephaven acquired its rights. Deephaven asserted that it acquired them “through its ownership of [UGC’s] Class A common stock.” Compl. ¶ 3. UGC alleges that Deephaven purchased the rights, which were transferable, from other UGC stockholders without the underlying shares and that whatever shares it held may have been “a short position which would not reflect any beneficial ownership of UGC stock at all.” Defendant’s Opening Brief (“DOB”) at 4-5 & n.4, 21. For purposes of the motion to dismiss, the Court will accept as true the well-plead allegations in the Complaint. Nevertheless, Deephaven will have to prove at trial that it owned, of record or beneficially, some UGC stock at all relevant times.

Under the terms of the Rights Offering, each right entitled its holder to a basic subscription privilege and an oversubscription privilege. The basic subscription privilege entitled the holder to purchase one share of Class A common stock at a price of \$6.00. The oversubscription privilege entitled each rightsholder who had exercised his basic subscription privilege in full to purchase additional shares of common stock not already purchased by other rightsholders under the basic subscription privilege. The Rights Offering stated that it would expire on February 6, 2004 at 5:00 p.m. EST, and that no exercises of rights would be accepted after that time. It also stated that UGC had sole discretion to determine the timeliness, validity, form and eligibility of all exercises of rights. The Rights Offering period was later extended to February 12, 2004. The Rights Offering also authorized acceptance of notices of guaranteed delivery in lieu of completed subscription certificates, provided the completed subscription certificates were submitted by February 18, 2004.

On February 13, 2004, UGC issued a press release declaring that it had received subscriptions for 63.7 million of the 83 million rights, and that consequently there were about 19.3 million rights available for oversubscription privileges.³ Deephaven alleges that, on February 19, 2004, one of its representatives had a conversation with a representative of UGC's subscription agent, Mellon Investment Services, LLC ("Mellon"), who confirmed that the original estimate of 19.3 million available rights was accurate. Deephaven also alleges that its representatives had conversations with UGC representatives, who said that the notices of guaranteed delivery received in connection

³ Certificate of Tanya Jefferis ("Jefferis Cert.") Ex. C.

with the Rights Offering would not materially affect the number of rights available for oversubscription.

On February 20, 2004, however, UGC issued a final press release stating that it had received subscriptions for 82 million of the 83 million rights, leaving only about 1 million rights available for oversubscription.⁴

On February 24, 2004, Deephaven's counsel wrote to UGC to express its concern over the sudden change in available rights,⁵ and to request that all relevant files, documents, and other information be preserved. UGC responded on March 1, 2004, and denied any "wrongful actions after the delivery deadline."⁶ Subsequently, on March 24, Deephaven wrote to UGC demanding inspection of certain categories of UGC's books and records pursuant to 8 *Del. C.* § 220.⁷ Specifically, Deephaven's letter (the "Demand Letter") requested eleven categories of documents relating to various aspects of the Rights Offering and the manner in which it was executed.⁸

⁴ *Id.* Ex. D.

⁵ *Id.* Ex. B.

⁶ *Id.* Ex. E.

⁷ *Id.* Ex. I.

⁸ The categories of documents requested are:

1. All records including copies of taped phone conversations reflecting or referring to all elections of oversubscription rights in the 2004 Rights Offering;
2. All records reflecting or referring to all notices of guaranteed delivery received by the Company or its agents in connection with the 2004 Rights Offering;
3. All records reflecting or referring to the extension of the subscription period for the 2004 Rights Offering;
4. All records reflecting or referring to the subscriptions and notices of guaranteed delivery received by the Company or its agents in connection with the

Deephaven stated four purposes for its demand: (1) to investigate possible corporate wrongdoing or mismanagement, including breaches of fiduciary duty, misuses of corporate assets, misuses of corporate information and/or other wrongdoing in connection with the handling of the 2004 Rights Offering; (2) to investigate and assess the veracity and legality of UGC's public and private disclosures made in connection with the 2004 Rights Offering; (3) to determine whether the rights of Deephaven and

2004 Rights Offering, including, without limitation, all records reflecting or referring to the date and time at which all such subscriptions and notices of guaranteed delivery were received by the Company or its agents;

5. All records reflecting or referring to communications concerning the receipt by the Company or its agents of subscriptions and/or notices of guaranteed delivery in connection with the 2004 Rights Offering, including, without limitation, any requests or demands that subscriptions or notices of guaranteed delivery be accepted or honored by the Company or its agents after the subscription deadline;

6. All memoranda, publications, manuals or other documents reflecting or referring to the Company's policies, procedures or guidelines concerning the 2004 Rights Offering, including, without limitation, all policies, procedures, or guidelines concerning the receipt of subscriptions after the deadline;

7. All records reflecting or referring to 2004 Rights Offering subscriptions received after the subscription deadline;

8. All records reflecting or referring to 2004 Rights Offering notices of guaranteed delivery received after the deadline for such notices;

9. All records reflecting or referring to the number of 2004 Rights Offering subscriptions received at all times during the 2004 Rights Offering subscription period, including, without limitation, all calculations, tabulations, charts, running totals, spreadsheets, and raw data; and

10. All documents and other information provided by the subscription agent for the Company's class A shares concerning the number of 2004 Rights Offering subscriptions received and/or the number of oversubscription rights available at all times during the 2004 Rights Offering.

11. All records, including recorded phone conversation logs between the Company, its subscription agent, and any individual referencing or relating to the oversubscription rights.

Demand Ltr., Compl. Ex. A.

other similarly situated stockholders of UGC were impermissibly interfered with or denied by UGC or its agents in connection with the 2004 Rights Offering; and (4) to determine whether Deephaven and other similarly situated stockholders are in fact entitled to additional oversubscription privileges in connection with the 2004 Rights Offering.⁹

Following UGC's receipt of the Demand Letter, Deephaven and UGC engaged in some discussions in an attempt to resolve Deephaven's demand.¹⁰ When Deephaven concluded the discussions would not be fruitful, it filed its Complaint. UGC then moved to dismiss.

II. ANALYSIS

A motion to dismiss under Rule 12(b)(6) will be granted where it appears with reasonable certainty that the plaintiff cannot prevail on any set of facts that can be inferred from the pleadings.¹¹ Plaintiff is entitled to all reasonable inferences that can be drawn from the Complaint. UGC advances a number of grounds, both procedural and substantive, for its motion to dismiss. The main arguments are discussed below.

⁹ *Id.* at 3.

¹⁰ Plaintiff's Answering Brief ("PAB") at 31.

¹¹ *E.g., Leonard Loventhal Account v. Hilton Hotels Corp.*, 2000 Del. Ch. LEXIS 149, at *11 (Oct. 10, 2000).

A. Alleged Procedural Deficiencies

1. Proof of beneficial ownership

UGC argues that Deephaven's Complaint fails to satisfy 8 *Del. C.* § 220(b), because it does not include documentary evidence establishing its purported beneficial ownership of UGC stock.

Section 220(a)(2) provides in pertinent part that: “‘Stockholder’ means a holder of record of stock in a stock corporation, or a person who is the beneficial owner of shares of such stock held either in a voting trust or by a nominee on behalf of such person. . . .”

Section 220(b) further provides:

In every instance where the stockholder is other than a record holder of stock in a stock corporation or a member of a nonstock corporation, the demand under oath shall state the person's status as a stockholder, be accompanied by documentary evidence of beneficial ownership of the stock, and state that such documentary evidence is a true and correct copy of what it purports to be.

Deephaven's Complaint specifically refers to its March 24, 2004 Demand letter.¹²

The Demand Letter states that Deephaven and its parent are the beneficial owners of class A common stock of UGC held by Barclays. In addition, the letter states: “Attached collectively as Exhibit ‘A’ are true and correct copies of Barclays account statements for Deephaven, reflecting Deephaven's beneficial ownership of the Company's shares on January 21, 2004, February 17, 2004 and March 24, 2004.” Admittedly, the copy of the Demand Letter attached to the Complaint does not include any exhibits. A reasonable

¹² Compl. ¶¶ 11-13.

inference, however, is that the original of the letter sent to UGC did include the referenced Exhibit A.¹³

The legal premise of UGC's argument is wrong. UGC contends that 8 *Del. C.* § 220 requires that Deephaven's Complaint include documentary evidence of its alleged beneficial stock ownership as prescribed in § 220(b). The Court disagrees. Section 220(b) specifies the requirements for a demand letter where the stockholder is other than a record holder. Notably, UGC does not allege that the documents attached to Deephaven's March 24, 2004 Demand Letter were insufficient. Rather, it relies on its suspicion of Deephaven's motives and of the possibility that whatever stock "position" it had with Barclays may have been a short position, and not an ownership position.

UGC can explore its suspicions at trial. They do not provide a basis for dismissal under Rule 12(b)(6). The allegations of beneficial ownership in Deephaven's Complaint and its attached Demand Letter suffice to defeat UGC's motion to dismiss for insufficient proof of ownership.

2. Power of attorney authorizing plaintiff's counsel to conduct inspection

Section 220(b) provides that:

In every instance where an attorney or other agent shall be the person who seeks the right to inspection, the demand under oath shall be accompanied by a power of attorney *or other such writing* which authorizes the attorney or other agent to so act on behalf of the stockholder.

(Emphasis added).

¹³ UGC presented no argument or evidence to suggest that the original Demand Letter did not include the referenced Exhibit A.

UGC claims that, because attorneys for Deephaven would be reviewing the documents, § 220 requires a power of attorney. Deephaven argues that since it, and not its counsel, demanded the inspection, no power of attorney had to accompany its demand.

In *Henshaw v. American Cement Corp.*, this Court held that:

A power of attorney is required under § 220(b) only when an attorney or agent *makes* the demand. Implicit in the statute is a requirement that when inspection is to be made by a person other than the stockholder, the corporation be given evidence of his authority to so act. In this case Henshaw's demand, under oath, met that requirement by naming his agents and attorneys who were to make the inspection.¹⁴

Similarly, Deephaven's Demand Letter in this case met the authorization requirement of § 220(b). The *Mattes* case¹⁵ relied upon by UGC is not inconsistent with this conclusion, because in *Mattes* the demand was made by an attorney purporting to act for the stockholder. Thus, the Court rejects UGC's challenge to Deephaven's § 220 action based on the absence of a power of attorney.

3. "Under penalty of perjury" requirement

A demand for inspection under § 220 must be made in writing and "under oath."¹⁶ "Under oath" includes statements the declarant affirms to be true under penalty of perjury under the laws of the United States or any state."¹⁷ UGC argues that because Deephaven's demand does not aver that the statements therein are true "under penalty of

¹⁴ 252 A.2d 125, 128 (Del. Ch. 1969) (emphasis in original).

¹⁵ *Mattes v. Checkers Drive-In Restaurants, Inc.*, 2000 WL 1800126, at *1 (Del. Ch. Nov. 15, 2000).

¹⁶ 8 *Del. C.* § 220(b)

¹⁷ 8 *Del. C.* § 220(a)(4) (adopted in 2003).

perjury,” it fails to comply with the statute. Deephaven responds that there is no requirement that the demand actually contain the words “under penalty of perjury,” and that its demand is sufficient because it is notarized and therefore subject to penalty of perjury by definition.

This Court has held that the signature of a notary, absent any language indicating an oath or affirmation, is insufficient to fulfill the “under oath” requirement of § 220.¹⁸ Deephaven’s demand, however, contains a verification “under oath that the [statements therein are] true and accurate,” signed by a Deephaven representative with a notation signed by a notary that it was “[s]worn to and subscribed before” him.¹⁹ Such a verification clearly fulfills the “under oath” requirement of § 220. Indeed, UGC’s argument to the contrary borders on frivolous.²⁰ At best, it misreads § 220(a)(4) to require that statements in a demand must be affirmed to be true under penalty of perjury. To the contrary, the Court reads that section’s use of “includes” to authorize use of an affirmation under penalty of perjury *as an alternative* to swearing an oath before a notary public in the more traditional sense.

Based on the foregoing, none of the procedural grounds for UGC’s motion to dismiss have merit.

¹⁸ *Frank v. Libco Corp.*, 1992 Del. Ch. LEXIS 253 (Dec. 8, 1992).

¹⁹ Demand Ltr., Compl. Ex. A.

²⁰ *See* 2 D. Drexler, L. Black, A.G. Sparks, *Delaware Corporation Law and Practice*, § 27.02 n.8. (“Prior to 2003 [when the statute was amended], the demand to be made “under oath” (*i.e.*, notarized), and technical defenses based on the requirement were occasionally made, albeit unsuccessfully.”)

B. Challenges to Deephaven's Purpose

UGC further claims the Complaint should be dismissed because Deephaven's purpose for seeking inspection relates to its interest as a rightsholder, not as a stockholder. In the Rights Offering, UGC distributed to stockholders 0.28 rights for each share of UGC Class A common stock they owned. The rights were transferable, and carried with them oversubscription rights for those rightsholders who chose to exercise their basic subscription privilege.²¹ As noted, UGC claims that Deephaven acquired its subscription rights from other stockholders, without obtaining the underlying shares.²² Deephaven seeks to investigate whether it should have been entitled to additional oversubscription rights. UGC claims that purpose is not proper, because it does not relate to Deephaven's interest as a stockholder, but rather only to its interest as a rightsholder.

1. Standards

Section 220 requires that a stockholder seeking inspection of books and records state a proper purpose for the inspection. UGC contends that Deephaven's purpose for seeking inspection is not proper.

Section 220 defines a "proper purpose" as one "reasonably related to [the requesting] person's interest as a stockholder." It is the corporation's burden to demonstrate that a plaintiff does not have a proper purpose for seeking inspection of

²¹ Jefferis Cert. Ex. A; Compl. ¶¶ 5, 7.

²² Based on the allegations in the Complaint, the Court assumes for purposes of UGC's motion to dismiss that Deephaven was the beneficial owner of at least some UGC stock at all relevant times.

stocklists.²³ In contrast, it is the stockholder's burden to establish that she has a proper purpose for seeking to inspect books and records other than stocklists.²⁴

In order to demonstrate a proper purpose when seeking to investigate possible mismanagement, a stockholder must "present some credible basis from which the Court can infer that waste or mismanagement may have occurred."²⁵ Stockholders are not required to show actual mismanagement, but they must show, by a preponderance of the evidence, that there is a possibility of mismanagement.²⁶ Stockholders cannot satisfy this burden merely by expressing disagreement with a business decision.²⁷ When a business judgment forms the basis of a request for books and records, a stockholder must show a credible basis for an inference that management suffered from some self-interest or failed to exercise due care in a particular decision.²⁸

²³ 8 *Del. C.* § 220(c); *Compaq Computer Corp. v. Horton*, 631 A.2d 1, 3 (Del. 1993).

²⁴ 8 *Del. C.* § 220(c). *E.g.*, *Thomas & Betts Corp. v. Leviton Mfg. Co.*, 685 A.2d 702, 715 (Del. Ch. 1995), *aff'd*, 681 A.2d 1026 (Del. 1996).

²⁵ *Thomas & Betts*, 681 A.2d at 1031.

²⁶ *Id.*; *Sec. First Corp. v. U.S. Die Casting & Dev. Co.*, 687 A.2d 563, 565 (Del. 1997).

²⁷ *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).

²⁸ *Id.*; *Weiland v. Cent. S.W. Corp.*, 1989 WL 48740, at *2 (Del. Ch. May 9, 1989)(dismissing § 220 action for failure to allege facts from which court could infer a lack of independence or failure to exercise due care).

The Delaware Supreme Court has encouraged the use of a § 220 action to meet the specificity requirements of Court of Chancery Rule 23.1 before filing a derivative suit.²⁹ The Court also has noted, however, that its encouragement of stockholders to file section 220 actions before filing a derivative suit has not eviscerated or modified the need for a stockholder to show a proper purpose for a request under § 220.³⁰

2. The record on UGC's motion to dismiss

As a threshold matter, the parties disagree about what the Court may consider on UGC's motion to dismiss. Specifically, UGC argues that the following categories of documents are integral to the Complaint or incorporated in it by reference: (a) the Rights Offering; (b) the February 13 and 20, 2004 press releases; (c) the pre-demand correspondence; and (d) various documents related to the parties' settlement negotiations.³¹ Deephaven objects that UGC is attempting to "prematurely argue factual issues relating to the underlying merits of the claimed wrongdoing by inappropriately and selectively injecting a host of documents and materials well outside of the pleadings."³²

In particular instances and for carefully limited purposes, this Court may consider documents referred to in a complaint when ruling on a motion to dismiss.³³ In the *Sante Fe* case, for example, the Delaware Supreme Court held that the Court of Chancery

²⁹ See, e.g., *Scattered Corp. v. Chicago Stock Exch.*, 701 A.2d 70, 78 (Del. 1997); *Rales v. Blasband*, 634 A.2d 927, 935 n.10 (Del. 1993).

³⁰ E.g., *Thomas & Betts*, 681 A.2d at 1031 n.3.

³¹ See DOB App. A.

³² PAB at 1.

³³ See *In re Santa Fe Pac. Corp. S'holder Litig.*, 669 A.2d 59, 69 (Del. 1995).

properly considered a Joint Proxy Statement in connection with plaintiffs' nondisclosure claims, but not with respect to their *Revlon*³⁴ and *Unocal*³⁵ claims. For the latter claims, the Court ruled that the Joint Proxy Statement amounted to hearsay and could not be relied upon for the truth of the matters discussed in it.³⁶

(a) The rights offering

The Complaint repeatedly refers to the Rights Offering. In addition, Deephaven bases its claim for inspection of UGC's books and records primarily on allegations that UGC may have violated the terms of the Rights Offering. Since the Rights Agreement is integral to, and referred to in the Complaint, the Court will consider it in connection with UGC's motion.

(b) The press releases

Similarly, the Complaint refers to two press releases issued by UGC, one on February 13 and the other on February 20, 2004. Deephaven relies on these press releases to support its claim of a proper purpose. Accordingly, the Court will consider them, but solely as evidence of what the releases stated. To the extent UGC relies on those documents for the truth of what is stated in them, they are hearsay and will not be considered.

³⁴ *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986).

³⁵ *Unocal v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985).

³⁶ *Sante Fe*, 669 A.2d at 68-70.

(c) Pre-demand correspondence

The Complaint refers to and includes as an attachment the March 24, 2004 Demand Letter. Both parties agree that the Demand Letter is part of the record. The only other correspondence referred to in the Complaint is a February 24, 2004 letter from Deephaven's counsel, Mr. Reed, to UGC. If necessary, the Court will consider that document on the motion to dismiss.

UGC argues, however, that five other pieces of correspondence between March 1 and March 24, 2004 also should be deemed part of the record. The reason is that they are referenced in the Demand Letter. Because these documents are at most only tangentially related to the issues presented in the Complaint and UGC's motion to dismiss, the Court finds it unnecessary to consider them.

(d) Settlement negotiations

In a transparent attempt at overreaching, UGC seeks to include in the record on its motion to dismiss a string of emails reflecting the parties' settlement discussions and the selected documents UGC offered to produce in settlement. Deephaven never agreed to accept that offer. To support consideration of these documents, UGC argues that Deephaven "opened the door" to them by referring to the settlement discussions in the Complaint.

The sole reference to settlement discussions in the Complaint (¶ 14) reads:

14. Following Deephaven's service of the Demand letter, counsel for the Company and counsel for Deephaven had some discussions regarding the possibility of an informal resolution of Deephaven's Demand, however, it became apparent to Deephaven that such discussions would prove unfruitful, thus prompting the filing of this action.

This passing and very general reference to settlement discussions provides no basis for concluding that those discussions are integral to the Complaint or otherwise should be considered. Therefore, the Court will exclude all of the documents related to a possible settlement proffered by UGC from consideration on its motion to dismiss.

3. Whether the Complaint should be dismissed for lack of a proper purpose

Relying on *Lynn v. Envirosource*,³⁷ UGC contends that Deephaven's purpose is not related to its interest as a stockholder and is therefore not a proper purpose under 8 Del. C. § 220. In *Lynn*, the stockholder sought access to company records to obtain evidence for use in an age discrimination case he had filed against the company. To determine whether that purpose was reasonably related to Lynn's interests as a stockholder, the Court asked whether it was something a stockholder would be interested in based on its position as a stockholder. The Court held that Lynn's purpose had nothing to do with his status as a stockholder; instead, it stemmed from his status as a litigant before a different tribunal.³⁸ Thus, the Court granted summary judgment against Lynn based on the absence of a proper purpose for his § 220 demand.

UGC analogizes Deephaven's purpose to Lynn's by arguing that only those stockholders who also happened to be rightsholders who had exercised their basic subscription privileges would be interested in the records Deephaven seeks to inspect.³⁹ Deephaven responds that since the subscription rights associated with the Rights Offering

³⁷ 1991 WL 80242, at *2 (Del. Ch. May 13, 1991).

³⁸ *Id.*

³⁹ DOB at 23.

were made available only to holders of UGC stock and were for shares of UGC stock, the distribution of those rights “necessarily involves and affects the rights and interests of the Company’s stockholders.”⁴⁰

Even assuming that not all UGC stockholders would share Deephaven’s interest in the requested documents, the *Lynn* case is readily distinguishable. There, as the Court recognized, it was very unlikely that *any* other stockholders would share Lynn’s purpose, because it was so tied to his specific circumstances and only coincidentally had anything to do with his stock in the defendant. Here, it is reasonable to infer that at least some other stockholders of UGC will share Deephaven’s interest because of their position as stockholders. The Rights Offering was made to UGC stockholders. Most likely some of the other stockholders not only obtained and fully exercised subscription rights under the Rights Offering to obtain UGC stock, but also pursued their oversubscription privileges. Such stockholders probably would be interested in determining why the available oversubscription rights decreased as much as they did. Those oversubscription privileges would have entitled the holders to more UGC stock. Similarly, at this preliminary stage, the Court cannot rule out the possibility that other stockholders would share Deephaven’s suspicions of mismanagement, dilution, preferential treatment or selling to insiders.

UGC also challenges Deephaven’s purpose as being adverse to the interests of UGC. Such adversity of interest could render a stockholder’s purpose improper.⁴¹ UGC argues that Deephaven’s ultimate purpose is to force UGC to issue 18 million additional

⁴⁰ PAB at 19.

⁴¹ See *Catalano v. T.W.A.*, 1977 WL 2576, at *2 (Del. Ch. Nov. 3, 1977).

subscription rights at the discounted price available through the Rights Offering (\$6.00).⁴² Since the market price of the stock is considerably higher, UGC argues, such an issuance would be adverse to UGC and its stockholders.

On the limited record currently before the Court, this argument lacks merit for several reasons. First, the Court has difficulty accepting the argument that UGC and its stockholders would be harmed if it had to comply with its obligations under the Rights Offering and any related fiduciary duties. UGC presumably made the Rights Offering for its own benefit and that of its stockholders, to whom the offering was made. It cannot complain if a holder of both stock and rights takes steps to ensure that UGC adhered to its part of the bargain.

Second, Deephaven has asserted other purposes besides compelling the sale of additional subscription rights. Deephaven also seeks, for example, to investigate whether UGC engaged in mismanagement or wrongdoing in connection with the initial rights offering. When a stockholder has made out a proper purpose, the propriety *vel non* of another, secondary purpose is irrelevant.⁴³ Furthermore, the fact that mismanagement might give rise to UGC's liability to a class of stockholders does not render Deephaven's purpose improper. It is well-settled that the possibility of harm to a corporate defendant is insufficient to deny relief under § 220.⁴⁴

⁴² DOB at 24.

⁴³ *Skoglund & Ackerly v. Ormand Indus.*, 1976 Del. Ch. LEXIS 155, at *2 (Dec. 3, 1976).

⁴⁴ *Compaq*, 631 A.2d at 4. The Court also noted that “insofar as law and policy require corporations and their agents to answer for the breaches of their duties to

4. Challenges to evidence of possible misconduct

Investigation of mismanagement is a proper purpose under § 220,⁴⁵ but the party seeking access to the records must “present some credible basis from which the Court can infer that waste or mismanagement may have occurred.”⁴⁶ Here, Deephaven’s suspicions of mismanagement derive from what it characterizes as a sudden, material change in the amount of oversubscription rights available, despite the fact that contradictory information was provided to Deephaven representatives in contemporaneous conversations they allegedly had with representatives of UGC and its subscription agent, Mellon. To rebut those allegations, UGC advances three arguments: (1) Deephaven has not identified specific actions of any officials of UGC; (2) the terms of the Rights Offering insulate it from liability; and (3) Deephaven’s allegations relating to the change in the availability of rights are not credible. For the reasons stated below, none of these arguments warrants dismissal of Deephaven’s § 220 action at the pleading stage.

The Court rejects UGC’s argument that Deephaven had an obligation to identify specific actions of specific officials of the Company to meet its pleading burden under 8 *Del. C.* § 220. UGC failed to cite any support for such a requirement, and the Court

shareholders, Compaq has no legitimate interest in avoiding the payment of compensatory damages which it, its management or advisors may owe to those who own the enterprise.” *Id.*

⁴⁵ *Sec. First Corp. v. U.S. Die Casting & Dev. Corp.*, 687 A.d 563, 567-69 (Del. 1997).

⁴⁶ *Thomas & Betts*, 681 A.2d at 1031.

knows of none. Section 220 is a summary proceeding, and this contention can best be addressed after the factual record is developed at trial.

In support of its argument that the Rights Offering insulates it from liability, UGC points to language in it that authorized UGC, in its sole discretion, to permit untimely subscriptions, notices and deliveries. Thus, UGC argues that even if it had accepted late submissions (which it denies), it had the right to do so. Deephaven counters that, even if UGC's management had a right to waive the deadlines in the Rights Offering, they would have had to exercise that right within the constraints of their fiduciary obligations to all stockholders. In addition, whether and under what circumstances UGC may have waived deadlines under the Rights Offering goes to the merits of the underlying dispute. Based on the briefing and argument, the Court concludes that UGC's arguments as to its right to waive deadlines raise issues of fact regarding the meaning of the Rights Offering, the attendant fiduciary duties and the actions taken by UGC that simply cannot be resolved on a motion to dismiss.

In questioning the credibility of Deephaven's allegations relating to the availability of rights, UGC points to the February 13 and 20, 2004 press releases as supplying explanations for the drop in the number of available oversubscription rights. In that regard, the Court is mindful of the Delaware Supreme Court's caution that in the context of a motion to dismiss, it should "not employ assertions in documents outside the complaint to decide issues of fact against the plaintiff without the benefit of an appropriate factual record."⁴⁷ Contrary to UGC's suggestion, the cited press releases are

⁴⁷ *White v. Panic*, 783 A.2d 543, 547 n.5 (Del. 2001).

not conclusive evidence of the truth of the statements contained in them. Likewise, the Court is skeptical of the hearsay allegations that provide the basis for Deephaven's contention that the allegations in its Complaint provide a credible basis for inferring possible "claims of breach of fiduciary duty, including mismanagement of corporate assets, waste and stockholder discrimination, by improperly depriving or interfering with the rights of Deephaven and other similarly situated shareholders."⁴⁸ At trial, Deephaven will have the burden to prove that it has satisfied the proper purpose requirement of § 220 by making a credible showing, through documents, logic, testimony or otherwise, that there are legitimate issues of wrongdoing.⁴⁹ At this stage, however, the Court cannot conclude that Deephaven clearly will not be entitled to any relief under § 220 under any set of facts that could be proven based on the allegations in its Complaint. Accordingly, there is no basis to dismiss Deephaven's Complaint under Rule 12(b)(6) for inability to prove a proper purpose.

III. CONCLUSION

For the reasons stated above, UGC's Motion to Dismiss is DENIED.

IT IS SO ORDERED.

⁴⁸ PAB at 21.

⁴⁹ *Sec. First*, 687 A.2d at 568.