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COURT OF CHANCERY
OF THE
STATE OF DELAWARE

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VICE CHANCELLOR

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Submitted: July 25, 2006
Decided: August 9, 2006

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Re: *Wynnefield Partners Small Cap Value L.P. v. Niagara Corporation*, Civil Action No. 1261-N

Dear Counsel:

Defendant Niagara Corp. ("Niagara") has moved for a stay pending appeal of the Court's June 19, 2006, Memorandum Opinion and Order ("Opinion")[1] granting in part Plaintiff Wynnefield Partners Small Cap Value L.P.'s ("Wynnefield") Section 220 request for inspection of Niagara's books and records. Niagara principally argues that absent a stay its appeal will effectively be moot. Wynnefield opposes a stay, arguing that a recently announced merger agreement to make Niagara a private company threatens to

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[1] 2006 WL 1737862 (Del. Ch. June 19, 2006). Familiarity with this opinion is presumed.

eliminate Wynnefield's standing to obtain the Section 220 relief for which it has fought. For the reasons set forth below, the Court denies Niagara's motion.

I. LEGAL STANDARD

A motion for a stay pending appeal is addressed to the discretion of the trial court.[2] In exercising its discretion, the Court considers four factors: 1) the appeal's likelihood of success on the merits; 2) whether the movant will suffer irreparable harm absent a stay; 3) whether any other interested party will suffer substantial harm if the Court grants the stay; and 4) whether the grant of the stay will harm the pubic interest.[3] No one factor is dispositive; rather, the Court will carefully weigh all relevant considerations.[4]

II. ANALYSIS

A. Likelihood of Success on the Merits

When considering the appeal's likelihood of success on the merits, this Court "is called upon not to second guess its decision, but to assess, as objectively as possible,

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[2] Sup. Ct. R. 32(a); Donald J. Wolfe, Jr. & Michael A. Pittenger, CORPORATE & COMMERCIAL PRACTICE IN THE DELAWARE COURT OF CHANCERY § 14-9 at 14-17 (2005).

[3] *Tafeen v. Homestore, Inc.*, 2005 WL 1314782, at *1 (Del. Ch. May 26, 2005) (citing *Kirpat, Inc. v. Del. Alcoholic Beverage Comm'n*, 741 A.2d 356, 357–58 (Del. 1998)).

[4] Wolfe & Pittenger § 14-9 at 14-18 (citing cases).

whether the case presents a fair ground for litigation and more deliberative investigation."[5]

1. Compliance with the Securities Exchange Act of 1934

Niagara contends that it can show a likelihood of success on appeal of its challenge to the Court's conclusion that Wynnefield established a credible basis for inferring wrongdoing in its compliance with Sections 12(g) and 15(d) of the Securities Exchange Act of 1934 ("Exchange Act") and Rule 10b-17 thereunder. Niagara, however, has merely restated the arguments it presented to the Court in the first instance.[6] These arguments did not prevail when Niagara first made them and they are no more persuasive now. In other words, Niagara has failed to demonstrate a likelihood of success on appeal on these issues. As this Court said in denying defendant's motion for a stay pending appeal in *Tafeen*, "[s]imply stating an intention to appeal is insufficient . . . to demonstrate a likelihood of success on the merits."

Niagara has, however, presented a fair ground for litigation with respect to its compliance with Exchange Act Section 15(d). In the Opinion, the Court acknowledged that Niagara's stock splits occurred on December 31, 2004, for purposes of Delaware law, but then observed that "[t]his does not necessarily mean . . . that the splits occurred

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5 *Id.* (internal quotation omitted) (citing cases).

6 *Compare* Def. Niagara Corp.'s Post-Trial Br. ("DOB") at 28–31; Def. Niagara Corp.'s Post-Trial Answering Br. ("DAB") at 6–11, 19–21 *with* Def. Niagara Corp.'s Mot. for Stay Pending Appeal ("DMS") ¶¶ 5–6.

at that time for purposes of the federal securities laws."[7] In making that observation, this Court did not have the benefit of any precedent cited by either side that it considered controlling or sufficiently analogous to be dispositive. The Court remains unaware of any such precedent.[8] Because the Court may have erred in deciding this novel issue of law, Niagara has presented a fair ground for litigation regarding it.[9]

2. Scope of inspection

Niagara also contends that it can show a likelihood of success on appeal of its challenge to the Court's conclusion that Wynnefield is entitled to inspect 1) communications between Niagara and its transfer agent, the SEC, the NASD or other third parties regarding the reverse and forward stock splits and 2) Niagara's DTC participant list. Wynnefield did not specifically request inspection of these documents.

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[7] 2006 WL 1737862, at *13.

[8] Niagara argues Vice Chancellor Lamb ruled on this question in a related proceeding. Letter from Def.'s counsel to the Court at 2 (July 25, 2006) (quoting *Wynnefield Partners Small Cap Value L.P. v. Niagara Corp.*, No. 1846-N (oral ruling) (Dec. 22, 2005)). An examination of the full quotation, however, reveals that Vice Chancellor Lamb was not nearly as authoritative as Niagara contends. *See* Tr. of Dec. 22, 2005 Oral Ruling at 13–14 ("Frankly, I would assume the federal court, looking at this, would say, 'We have to give effect to the reverse-forward split that occurred at the end – after the close of business on December 31st, 2004',' but I can't interpret the rule authoritatively. I have no authority at all to interpret that.").

[9] *Cf. Gans v. MDR Liquidating Corp.*, 1999 WL 669364, at *1 (Del. Ch. Aug. 17, 1999) (holding that the case did not present a fair ground for litigation where, among other things, there were no issues of first impression or unsettled areas of Delaware law).

As such, Niagara contends that the Court's ruling conflicts "with the well established rule that Section 220 litigants are required to make demands with 'specific and discreet identification' and 'rifled precision.'"[10]

Section 220 litigants are required to make demands for *categories* of books and records with "specific and discreet identification." Such litigants need not, however, demand documents with pinpoint specificity.[11] Further, this Court "has wide discretion in determining the proper scope of inspection in relation to the stockholder's purpose."[12] Wynnefield requested Niagara's Rule 10b-17 notice for the reverse and forward stock splits and all of Niagara's communications with Nasdaq and the Depository Trust Corporation concerning these transactions. Wynnefield thus requested a category of documents that the Court concluded reasonably included Niagara's communications with the SEC and NASD, as well.[13] Given Wynnefield's specific identification of categories

[10] DMS ¶ 7 (quoting *Saito v. McKesson HBOC, Inc.*, 806 A.2d 113, 117 n.10 (Del. 2002)).

[11] *Carapico v. Phila. Stock. Exch., Inc.*, 791 A.2d 787, 792 n.13 (Del. Ch. 2000).

[12] 8 *Del. C.* § 220(c); *Thomas & Betts Corp. v. Leviton Mfg. Co.*, 681 A.2d 1026, 1035 (Del. 1996) ("[T]he trial court has wide latitude in determining the proper scope of inspection.").

[13] The Court did not order Niagara to turn over communications concerning the reverse and forward stock splits with "other third parties." *See Wynnefield*, 2006 WL 1737862, at *15 ("Wynnefield has shown, however, that it is entitled to Niagara's 10b-17 notice, if any, and all documents related to its filing and Niagara's communications with the SEC, NASD, and Niagara's transfer agent

of documents and this Court's wide discretion in determining the proper scope of inspection pursuant to a Section 220 request, the Court concludes that Niagara has failed to show a likelihood of success on appeal with respect to the scope of Wynnefield's inspection.

As to the DTC participant list, Niagara again merely restates the argument it previously made. In doing so, Niagara ignores well settled Delaware law that provides that a stockholder who requests the stocklist also is entitled to the DTC list.[14] Niagara thus has failed to show a likelihood of success on appeal, or even ground for future litigation, on the DTC list.

In summary, the likelihood of success on appeal factor favors granting a stay only slightly because Niagara has shown a fair ground for future litigation only as to the Court's conclusion about the effective date of the stock splits.

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related to the implementation of the reverse and forward splits, including the date on which they occurred.").

[14] *Id.* at *7 ("This Court has recognized that a party entitled to a stocklist pursuant to § 220 is also entitled to a Cede breakdown even though technically Cede is the record holder on the company's books.") (internal quotation omitted), *7–8 (citing *Hatleigh Corp. v. Lane Bryant, Inc.*, 428 A.2d 350 (Del. Ch. Feb. 5, 1981) as an example of a case where this Court allowed a Section 220 plaintiff to inspect the DTC list even though plaintiff's demand requested only the stocklist). The DTC participant list is the same thing as the "CEDE breakdown."

B. Irreparable Harm to Niagara

Denial of Niagara's motion would harm it because it may effectively deny Niagara Supreme Court review. Such a result is contrary to the "fundamental interest that all appellants share . . . in having effective appellate review."[15] Indeed, this Court generally grants stays pending appeal in Section 220 actions because inspection of books and records cannot be undone.[16] This factor thus weighs heavily in favor of granting a stay.[17]

C. Substantial Harm to Wynnefield

Wynnefield argues that it will suffer substantial harm if the Court grants a stay pending appeal because it may permanently be denied its Section 220 right to inspect Niagara's books and records. Niagara recently announced that it entered into a definitive agreement to merge with a third party and effectively go private; existing shareholders will be cashed out.[18] Niagara expects the transaction to close in September 2006.[19] If the transaction closes before the Supreme Court decides Niagara's appeal, which appears

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[15] *State Dep't of Ins. v. Remco Ins. Co.*, 1986 WL 3419, at *2 (Del. Ch. Mar. 18, 1986).

[16] *See, e.g., Weinstein Enters., Inc. v. Orloff*, 870 A.2d 499 (Del. 2005) (observing that the Court of Chancery had granted a stay pending appeal of its decision to allow inspection pursuant to Section 220).

[17] Niagara's right to petition the Delaware Supreme Court for immediate relief from this Court's denial of a stay lessons the risk of potential harm to Niagara.

[18] Letter from Wynnefield's counsel to the Court Ex. A (July 21, 2006).

[19] *Id.*

likely,[20] Wynnefield will suffer substantial harm if the Court grants a stay because its standing to inspect Niagara's books and records likely will be lost forever.[21]

Wynnefield also may need to inspect Niagara's books and records before the transaction closes to determine whether to seek to compel Niagara to provide further transaction-related disclosure and whether the Section 220 documents affect other rights related to the pending merger.[22] If the books and records reveal that Niagara should have

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[20] Appellant Niagara's opening brief is not due until August 28, 2006. Under the Supreme Court's rules, Appellant's reply brief will not be due until mid-October. Thus, resolution of the appeal before the close of Niagara's going private transaction is unlikely.

[21] *See* Wolfe & Pittenger § 8-6[b] at 8-68–69 (observing that the termination of a Section 220 plaintiff's status as a stockholder is "relevant to the continuing validity of [its] stated purpose for the inspection"). Although it does not appear to be Wynnefield's sole purpose, to the extent its purpose in seeking inspection pursuant to Section 220 is to file a derivative suit, termination of its status as a stockholder almost certainly will terminate its standing to inspect Niagara's books and records. *See id.* ("The defendant promptly asserted that because plaintiff was no longer a shareholder of the defendant corporation . . . his avowed purpose to investigate the propriety of the company's refusal to institute suit, presumably to determine whether he could institute a derivative claim notwithstanding that refusal, could no longer be regarded as proper inasmuch as plaintiff could no longer bring a derivative claim. Pursuing an analysis much like that invoked in [*Cutlip v. CBA Int'l, Inc.*, 1995 WL 694422 (Del. Ch. Oct. 27, 1995)] the Court in this instance agreed."); 8 *Del. C.* § 220(b) (limiting inspection right to "any stockholder").

[22] *See* Letter from Wynnefield's counsel to the Court at 2 (July 21, 2006) (arguing that the transaction may close without Wynnefield obtaining documents that would allow it to determine whether Niagara must make "additional disclosures mandated by state law or the federal securities laws" or documents that might "affect the rights pursuant to the pending merger").

been a public company during the preceding years, it may have an obligation under federal or state law to disclose more information than it does currently. If the transaction closes before Wynnefield obtains the books and records, this purpose for inspection will likely become moot and, accordingly, Wynnefield may lose its standing as a Section 220 plaintiff. Assuming such disclosure is required, Wynnefield also will be unable to use this information to determine how to vote on the transaction or whether to perfect any appraisal rights it may have. Finally, to the extent Wynnefield wishes to use information obtained from its inspection to bring a derivative suit or communicate with other stockholders, such a right will be lost forever once its standing as a stockholder is terminated. This factor thus weighs heavily in favor of denial of a stay.

D. Harm to the Public

The parties have not argued that the grant or denial of the stay will harm the public and the Court concludes that neither result presents a possibility of harm to the public.

E. *Kirpat* Test Conclusion

Wynnefield previously demonstrated a credible basis for suspecting possible wrongdoing and proved its entitlement to inspect Wynnefield's books and records. If the Court grants the stay, Wynnefield likely will lose that right forever. Conversely, if the Court denies the stay, Niagara's right to appellate review may be mooted. In the unique circumstances of this case, *i.e.,* where the grant of a stay will likely permanently deprive Wynnefield of its Section 220 inspection right, the Court concludes that the substantial

harm Wynnefield will suffer as a result of a stay outweighs the harm Niagara will suffer in the absence of a stay.

III. CONCLUSION

For the foregoing reasons, Defendant Niagara's motion for a stay pending appeal is DENIED. Counsel for Plaintiff Wynnefield may inspect the books and records delineated by this Court in the Opinion subject to an "attorneys only" confidentiality order of the type Wynnefield offered to put in place in its July 21, 2006, letter. Counsel for both parties shall confer and submit an appropriate proposed confidentiality order by August 16, 2006. After entry of said order, Niagara shall make the appropriate books and records available to Wynnefield's counsel forthwith.

IT IS SO ORDERED.

Sincerely,

/s/Donald F. Parsons, Jr.

Vice Chancellor

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