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IN THE SUPREME COURT OF THE STATE OF DELAWARE

HIGH RIVER LIMITED PARTNERSHIP, ICAHN PARTNERS MASTER FUND LP, and ICAHN PARTNERS LP, Plaintiffs below, Appellants, v. OCCIDENTAL PETROLEUM CORPORATION Defendant below, Appellee.	§ § § § § § § § § § § § § §	No. 483, 2019 On Appeal from the Court of Chancery of the State of Delaware, C.A. No. 2019-0403-JRS

APPELLANTS' OPENING BRIEF

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NATURE OF THE PROCEEDINGS

This is an action pursuant to Section 220 of Delaware's General Corporation Law ("Section 220"). Plaintiffs-Below, Appellants, High River Limited Partnership, Icahn Partner Master Fund LP and Icahn Partners LP (collectively, "High River") respectfully appeal from the post-trial decision of the Court of Chancery denying their request to inspect certain books and records of defendant-below-appellee Occidental Petroleum Corporation ("Occidental" or the "Company"). *See High River Limited Partnership v. Occidental Petroleum Corporation*, C.A. No. 2019-0403-JRS (Mem. Op. Nov. 14, 2019) (the "Opinion") (Exhibit A).

PRELIMINARY STATEMENT

Requests by stockholders to inspect corporate books-and-records under 8 *Del. C.* § 220 normally raise three questions for the Chancery Court.[1] First, has the stockholder stated a ***proper purpose*** to inspect corporate documents? Second, has the stockholder met the standard of proof by showing a ***credible basis*** for believing that an inspection is justified? Third, which documents, if any, are "***necessary and essential***" for the stockholder's purpose?

The paramount question raised in this appeal is what is the standard of proof in the context of seeking books and records for use in a proxy contest? Currently there appears to be no generally recognized established standard for such requests, which the Chancery Court recognized when it stated in Opinion, "the law in this area is unsettled and could use some clarity." Opinion at 20 (quoting *High River Limited Partnership v. Forest Labs, Inc.*, CA No 7663-ML (Del Ch. July 27, 2012)) (Transcript at 3) (Exhibit B).

The trial Court went on to say, "But this case is not the vehicle to provide that clarity." Opinion at 20. With respect, High River submits that this case is a proper vehicle to provide that clarity, and that under a properly balanced "proxy

[1] An exception to this rule appears to apply when stockholders in privately held corporations want to value their shares. *See Rock Solid Gelt Ltd. v. SmartPill Corp.*, 2012 WL 4841602, at *3 (Del. Ch. Oct. 10, 2012).

contest" standard, High River should be allowed to inspect a carefully tailored set of the relevant documents of Occidental in connection with its proxy contest.

The legal issue is narrow. Although in places the Opinion appears to question whether there is currently a right for stockholders to review documents for use in a proxy contest at all[2] – in other words whether seeking documents for use in a proxy contest is a "proper purpose" under § 220—the law on that is long settled. This Court has repeatedly held that "[s]tockholders may use information about corporate mismanagement, waste or wrongdoing in several ways. For example, they may: institute derivative litigation; 'seek an audience with the board [of directors] to discuss proposed reform or, failing in that, they may prepare a stockholder resolution for the next annual meeting, **or mount a proxy fight to elect new directors.**'" *Seinfeld v. Verizon Commc'ns, Inc.*, 909 A. 2d 117, 119-20 (Del. 2006) (emphasis added) (quoting *Saito v. McKesson HBOC, Inc.*, 806 A. 2d 113, 117 (Del. 2002)).

In August 2019, this Court reaffirmed these holdings in *Tiger v. Boast Apparel, Inc.*, 214 A. 3d 933 (Del. 2019). There the Court held that in weighing the balance of whether documents should be treated as confidential or not, one of

[2] *See* Opinion at 2 ("It may well be that, in the right case, this court might endorse a rule that would allow a stockholder to receive books and records relating to questionable, but not actionable, board-level decisions so that he can communicate with other stockholders in aid of a potential proxy contest.")

the benefits of treating them as non-confidential "**might include a stockholders reasonable desire to use Section 220 documents in communications with other stockholders in a legitimate proxy campaign.**" *Id*. n. 20 (*quoting Disney v. Walt Disney Co.*, No. 380, 2004, 2005 WL 1538336 (Del. Mar. 31, 2005) (Order)). In short, inspecting documents in a legitimate proxy campaign can be a proper purpose for seeking the production of documents under § 220.

Nor is there any doubt about the third question in a books-and-records case -- which documents should a plaintiff be allowed to see. The general standard applicable to all § 220 inspections appears to be applicable to proxy contests as well. Stockholders may inspect those documents that are "*necessary and essential*" to their purpose. Opinion at 20, *citing Forest Labs*, Tr. at 14, and *BBC Acquisition Corp. v. Durr-Fillauer Med. Inc.*, 623 A.2d 85, 88 (Del. Ch. 1992).

The question here is what standard of proof should apply in the context of a proxy contests? One possible answer to this question is that the same standard of proof applies to proxy contests as is applied to the far-more-frequent books-and-records investigations that investigate putative wrongdoing. In those cases, a stockholder must show some "credible basis to infer mismanagement, waste or wrongdoing." That standard has proven itself over the years with books-and-records investigations in cases of suspected wrongdoing. As the Opinion says "[w]hile 'credible basis' is the lowest burden of proof recognized in our law, it still

requires a plaintiff to provide some evidence of wrongdoing." Opinion at 13. It is thus a balanced standard of proof that is tied to the purpose of § 220 demands seeking information with which to bring litigation.

As it has been applied over the years, though, that standard of proof does not fit seamlessly with other purposes for inspection. For example, a stockholder might believe that management has made mistakes and blunders or exhibited sheer incompetence and wants to look at the relevant records in order to be able to take the evidence to the board so the directors can deal with the issue. As stated in *Seinfeld*, that is a proper purpose for a stockholder. Similarly, if the board is resistant to change, or if it appears to be part of the group making mistakes, then a stockholder might want to mount a proxy challenge to replace the poorly performing directors. Other times a stockholder might want to pursue a stockholder's resolution criticizing the board's or management's mistakes.

What standard of proof should apply to such cases? A "credible basis of wrongdoing" standard does not work because blunders and incompetence do not constitute "wrongdoing," although blunders can shred stockholder value as surely as breaches of fiduciary duty can. Blunders and incompetence do constitute "mismanagement," however—at least as far as that word is used in normal speech.[3]

[3] The Fifth Edition of *Black's Law Dictionary* does not define "mismanagement," but the prefix "*mis*" is defined as "an inseparable particle use in composition, to mark an ill sense or depravation of the meaning; as 'miscomputation' or

Currently, though the law is unclear on the point since many cases have used the term "mismanagement" as a synonym for "wrongdoing." For example, the Opinion states in the heading to section A. 1 on page 13, that High River had **failed to demonstrate a credible basis to infer "mismanagement,"** and then explains in the text that that is the case because the credible basis standard **"still requires a plaintiff to provide *some* evidence of wrongdoing."** (Italics in original; bold added). In other words the Opinion assumes the two words are equivalent.

That assumption was far from unprecedented; the Court of Chancery was following many other decisions that treat "mismanagement" as being the same as "wrongdoing" for § 220 purposes, and given that most § 220 demands are litigation-driven, that is not surprising. However, a clarification from this Court that "mismanagement" includes material mistakes and blunders for the purpose of

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'misaccompting,' *i.e.* false reckoning;'" while "*manage*" is defined as "[g]overnment, control, superintendence…act of managing by direction or regulation, or administration…" *Webster's Third New International Dictionary* directly defines "mismanage" to the same effect: "to manage wrongly or incompetently." Accordingly, in normal uses 'mismanagement" simply means "bad management." Meanwhile, according to Black's a "*wrongdoer* is "One who commits an injury… The term normally imports an invasion of right to the damage of the party who suffers such invasion." Thus, "wrongdoing" means committing a legal wrong.

seeking to talk to the directors, filing for a stockholder resolution, or mounting a proxy fight, would allow such a standard of proof to work in these contexts.

Alternatively, other language might be used to achieve the same end. High River suggested below that one possible standard of proof would be to ask whether the plaintiff has shown a credible basis to believe the information would be material to the proxy contest.

Under either of those possible standards of proof, High River proved below that there was a credible basis to believe that serious mismanagement occurred at Occidental and, at a minimum, that the information High River seeks about mismanagement is material to a proxy contest. As discussed hereafter, High River put forward unrebutted evidence at trial that Occidental management took multiple steps that materially harmed the Company's value and has left it hugely indebted and at serious risk if oil prices fall much from their current levels.

These decisions might not have involved actionable wrongdoing, or might have only implicated the duty of care, and thus as the Opinion noted, are not prosecutable under the Company's certificate of incorporation. High River, however, believes that it showed a credible basis to infer that "mismanagement" occurred at Occidental under any normal definition of that word and the information it is seeking could be highly relevant to the current proxy contest.

SUMMARY OF ARGUMENT

1. The Opinion errs by declining to articulate a standard of proof for when a stockholder may obtain documents pursuant to § 220 of Delaware's General Corporation Law in furtherance of a proxy contest.

2. The standard of proof that the Court below should have adopted is one that asks whether the plaintiff has shown a credible basis to infer that mismanagement (even if not actionable) occurred at the Company, or, alternatively, whether the plaintiff has shown a credible basis that the information requested is material in a proxy contest? High River made such a showing.

3. The Court below erred in ruling that the documents High River seeks to inspect are not "necessary and essential" to the proxy contest here. Those books and records are necessary and essential to a proxy contest, because to date, the only information Occidental's stockholders have received about the Anadarko acquisition and related transactions is the limited and one-sided information that Occidental's management and Board have chosen to make public, and arguments that High River and others have made based on that information.

STATEMENT OF FACTS

A. The Parties

At the time of trial, High River and its affiliates collectively owned approximately 26 million shares of Occidental stock with an aggregate market value of approximately $1.16 billion at the then-current market price of approximately $44 per share. Opinion at 3.[4] Given that large investment in Occidental, High River has no incentive to harm the Company, but a substantial incentive to help it.

Occidental is a Delaware corporation with headquarters in Houston, Texas operating in the oil and gas and chemical industry. It has operations in many parts of the world. (A550, ¶ 17).

B. Background

1. Occidental's Recent Poor Performance

When Occidental's current CEO, Vicki Hollub took charge of the Company in April 2016, the Company's stock was trading at approximately $76 per share. (A551, ¶ 19). From April 2016 to just before trial, the Company's stock price fell to approximately $44 (A1020), for a decline of about 41%. (It has since further declined to the current price of approximately $38-39 per share). During that same

[4] Since then the plaintiffs have publicly reported that they currently own approximately 22.5 million shares.

period, Occidental's senior managers received approximately $100 million in compensation, with Ms. Hollub alone receiving $40 million. (A441).

2. Management Promises To Run The Company Prudently

Prior to April 2019, Occidental's management team had repeatedly assured the market that they would not undertake high-risk ventures and would manage the Company to preserve and increase its significant common-stock dividend. For example, in a "Message from the CEO" posted on Occidental's website, Ms. Hollub stated that part of the Company's "overall strategy" is to maintain a "strong balance sheet," which "ensures our ability to thrive through the cycles." (A1032-33). Similarly, Occidental stated in its 2019 10-K that it "aims to maximize shareholder returns through … [m]aintenance of a strong balance sheet to secure business and enhance shareholder value." (A51).

In addition, in early 2019 Occidental stated that it did not need to, and would not, become involved with over-priced M&A transactions. Occidental's CFO publicly stated in February 2019 that the Company did not need to pursue an M&A transaction at all since, "if you look at our organic growth opportunities as we've described, they are robust across the globe and across each business sector." (A24). The CFO also emphasized that, if Occidental were to pursue an M&A transaction, it would only be a reasonably priced one: "So we don't have to do a deal, and we only want to do a deal if it's going to be very accretive to our

shareholders and for value. It needs to be a compelling deal for us and for our shareholders." *Id.* That assurance did not last for long.

3. Occidental Pursues Anadarko Despite The Promises

On April 12, 2019, Chevron Corporation ("Chevron") announced that it had agreed to buy Anadarko Petroleum Corporation ("Anadarko") for approximately $65 per share, with most of the consideration being Chevron stock. Opinion at 5. The offer represented a large premium to market; Anadarko's stock price had previously been in the 40's. Opinion at 5. Anadarko accepted Chevron's offer instead of an offer from Occidental, which had also been mainly for stock. Opinion at 6; A681-89.

Occidental's management, which unknown to the markets, had apparently been pursuing Anadarko for over a year, reacted to Anadarko's rejection angrily. It had been attempting to purchase Anadarko – which kept pushing Occidental off. On April 24, 2019, Occidental topped Chevron's bid with a mostly cash offer. Occidental's new offer was for $38 cash and 0.6094 of a share of Occidental common stock per Anadarko share, for a notional value of $76 per share--$11 per share above Chevron's offer. Opinion at 6. On May 5, 2010, Occidental bid one more time, offering $59 cash and 0.2939 of a share of Occidental common stock per Anadarko share. *Id.*

On May 9, 2019, Anadarko terminated the Chevron merger agreement and paid Chevron a $1 billion termination fee due under the agreement. Opinion at 6. Anadarko and Occidental then entered a merger agreement pursuant to which Occidental acquired Anadarko on the terms of Occidental's May 5 proposal. *Id.* The newly issued Occidental common shares constituted less than 20% of the Company's float, meaning that no stockholder vote was required under New York Stock Exchange Rules. Opinion at 6-7; A555, ¶ 27.[5] Occidental was able to avoid the NYSE Rule by issuing new, "non-voting" preferred stock that came with warrants to acquire 80 million common shares—shares that will have the right to vote and which, when combined with the newly issued common shares, greatly exceeded 20% of the previously outstanding stock.

Chevron held matching rights from Anadarko but declined to exercise them. Opinion at 6. According to the May 10, 2019 Wall Street Journal, Chevron's CEO stated that "Costs and capital discipline always matter.… An increased offer would have eroded value to our shareholders and it would have diminished our returns on capital." (*See* A473-75).

[5] The merger agreement provides that, "if the merger would otherwise result in the issuance of shares of Occidental common stock…in excess of 19.99% of the outstanding shares of Occidental common stock immediately prior to the closing of the merger (the "share cap"), (i) the exchange ratio will be reduced by the smallest number … that causes the total number of shares of Occidental common stock…issuable in the merger to not exceed the share cap.…" (A640).

By contrast, Ms. Hollub, who had previously been preaching the gospel of financial discipline in words similar to those of Chevron's CEO, claimed to the press that pursuing the acquisition at a price that the far-larger Chevron would not match, and avoiding an Occidental stockholder vote on the Anadarko acquisition, represented good corporate governance. On May 7, 2019, she was quoted as saying that "[w]e felt that our greater fiduciary duty responsibility from a governance standpoint for our shareholders was to make this deal happen…." (A374-76).

Standing alone the price that Occidental paid to acquire Anadarko vote raises serious questions about management's judgment, particularly in light of its existing promises to maintain a strong balance sheet. Through the Anadarko deal, the Company's debt increased by a factor of four, from approximately $11 billion to over $45 billion, while its assets less than doubled. (A1147).

This four-fold increase in Occidental debt presents the Company with a classic winner's curse. The new debt and mandatory preferred stock payments will be so substantial that if the price of oil declines to approximately $45 per barrel or below for an extended period of time, Occidental might be forced to cut its common dividend (the dividend being one of the main reasons shareholders bought shares in the first instance). (A1188). High River's representative at trial testified

that oil prices tend to go down during recessions and that we are now in the longest period ever since the last recession. (A1193).

In short, Occidental's acquisition of Anadarko constitutes an enormous, and very levered, bet on the price of oil. That bet was made within weeks of management assuring stockholders that Occidental did not need to pursue any M&A deals and would be keeping a firm watch on the Company's balance sheet.

4. Occidental Agrees To Issue Preferred Stock To Berkshire Hathaway On Terms Highly Unfavorable To The Company

Occidental made things worse by agreeing to hugely unfavorable financing term on the preferred stock. Specifically, on April 30, 2019, the Company announced that it had agreed to sell to Berkshire Hathaway, Inc. ("Berkshire") $10 billion of 8% cumulative preferred stock, contingent on the closing of the Anadarko acquisition (A556-57, ¶ 32), which meant $800 million in yearly non-tax deductible, preferred dividend payments for the Company (if not paid in cash they accrue at a 9% rate). (A728). At the time Occidental's debt was yielding approximately 4%. (A556-59, ¶¶ 32 and 36, n.1). Meanwhile, the Company's common stock –a junior security -- was yielding around 5%.

Berkshire also received warrants to purchase 80 million common shares (almost 9% of the Company's float) exercisable at $62.50 per share. Opinion at 8. Using the Black-Scholes Option Pricing Method, Plaintiffs estimate those warrants

to have been worth approximately $1.2 billion on the day the preferred stock deal was announced. *Id.* There was no counter-testimony at trial. Occidental also paid Berkshire a $50 million signing fee. (A557-58, ¶ 33). The Berkshire deal thus was extremely expensive for Occidental – there can be no doubt that Berkshire received billions more in value than it paid for the stock, but it was the Berkshire preferred and warrants that allowed Occidental to avoid seeking a stockholder vote.

The deal with Berkshire was completed only three days after the CEO of Bank of America (one of Occidental's bankers), contacted Berkshire on the Company's behalf. (A366-68). After a 90-minute meeting between Ms. Hollub and Mr. Buffett of Berkshire at Berkshire's offices, a deal was struck. (A558, ¶ 34; A478).

Occidental told the public (without evidence) that few if any other lenders could have promptly agreed to provide such large financing with no syndication contingencies or demand risks. Opinion at 8. As Nicholas Graziano, a portfolio manager at Icahn Capital with many years of capital market experience testified at trial, however, there was no shortage of capital available in the markets at the time and Occidental could have found a much better deal on an expedited basis if it had only attempted to do so. (A1128, 1156-57). There was no contrary testimony to those statements.

Nor, could there have been. The truth of Mr. Graziano's testimony was reaffirmed when the Company issued new debt in August 2019 - $8.8 billion in term loans yielded only 3.0% and $13 billion in bonds carried a 3.1% yield. (A1003). According to published reports, $71 billion in orders came in for those $13 billion in bonds. (A1023-29).

To restate, when Occidental offered bonds yielding only 3.1%—or 39% of the 8% coupon on the Berkshire preferred—it received orders for *over $71 billion* of those bonds, and there were no warrants attached.

Thus, the market confirmed what Mr. Graziano testified: Occidental found no difficulties in raising capital at a far cheaper price. And while the Berkshire-owned preferred stock is a more junior security than the bonds, and thus can be expected to carry a higher rate, it is senior to the common stock, which was trading with only a 5% yield at the time. Opinion at 8. In light of those facts, the 8% yield on the preferred made no sense, while the additional warrants for 80 million shares of stock, with a value of approximately $1.2 billion, are utterly baffling. High River submits that those facts show a credible basis to infer mismanagement on the part of Occidental's directors and senior manager regarding the sale of the preferred, and the matter would be material in the proxy contest.

5. Occidental Pre-Sells Anadarko's African Assets In A Fire Sale

Nor did the missteps end there. On May 5, 2019, Occidental announced that it had agreed to a presale of Anadarko's African assets to Total S.A. ("Total") for $8.8 billion, in what appears to have been a quickly arranged fire sale. (A691). Indeed, it appears that Total was the only prospective buyer to which Occidental talked. (A1159 (37:13-15)) (Graziano).

By selling all of Anadarko's African assets to a single buyer, as Mr. Graziano testified, it appears unlikely that Occidental maximized the price it would receive for the assets. (A1159) Rather, Occidental might have obtained far-higher value had it unbundled the assets and offered them for sale separately to different acquirers. Some potential purchasers might have coveted Anadarko's massive Mozambique gas fields, but not its off-shore oil in Ghana or its Algerian oil, while other bidders might have been interested in Algerian assets but not those in Mozambique. For example, press reports indicated that *Chevron* was very interested in Anadarko's Mozambique gas assets and those were one of the key reasons it had bid for Anadarko. (A1160; A379; A371-72; A389-97). Had Occidental waited, and held a competitive bidding process for Anadarko's African assets, a substantial bid from Chevron for the Mozambique assets might have been

forthcoming.[6] But Occidental held what appears to have been a fire sale instead. That too establishes a credible basis for inferring mismanagement and that it is material information in a proxy contest.

6. Occidental Should Have Been A Seller, Not A Buyer

High River also argued that perhaps the biggest error was the Board's and management's failure to recognize that at present market prices, the Company probably should have been a seller—not a buyer. Occidental owns some very attractive assets. (A564-65, ¶ 50). Both Chevron and Occidental appear to have desired Anadarko because of its strong position in the Permian Basin of West Texas and New Mexico, which Mr. Graziano testified was currently the most desirable oil-producing acreage in the country. (A1138-41). Occidental also has a large position in the Permian Basin (that public reports say is very well operated) (A564-65, ¶ 50) and surely could have attracted strong competitive bids at a premium to its stock price.

7. Plaintiffs' Consent Solicitation

On June 26, 2019, High River and certain other entities related to Carl C. Icahn (together, the "Icahn Entities"), filed preliminary proxy materials with the SEC in connection with their efforts to obtain complex "requests" from the *record*

[6] The $1 billion breakup fee paid to Chevron would have certainly given it a leg up in the bidding.

holders of 20% of the common stock of Occidental necessary to require the Company's Board to set a record date for a consent solicitation. Opinion at 9. To date the Icahn Entities have been unable to obtain the necessary requests and have now submitted the names of 10 nominees for election at Occidental's 2020 annual meeting, which will presumably be held in May 2020. Under Occidental's corporate documents those names were required to be submitted by November 30, 2019 -- almost six months before the meeting.

On July 18, 2019, the Icahn Entities filed definitive proxy materials in connection with their efforts to obtain a sufficient number of shareholder requests to require Occidental's Board to set a record date for a consent solicitation. (A915-57). Occidental filed its definitive revocation solicitation with the SEC on July 22, 2019. (A960-86).

On July 10, 2019, in apparent response to the Icahn Entities proxy contest, (which they knew was coming), Occidental's directors increased the size of the Company's Board from nine to ten members in order to elect Robert M. Shearer to the Board. (A908-12). Mr. Shearer is, perhaps not by coincidence, a former managing director of BlackRock Advisors, LLC, one of the largest investments managers in the world, which owns approximately 7.3% of Occidental's outstanding common stock. *Id.* (A594).

8. Occidental's Proxy Solicitation

Occidental pursued an aggressive attempt to prevent the Icahn Entities from getting 20% of the stockholders to go through the convoluted procedures Occidental requires before a consent solicitation may be launched. Some of its expensively prepared proxy material in that regard goes directly to matters at the heart of this litigation.

For example, Occidental made its historic commitment to a dividend a center point of its "revocation" campaign:

(A989-94).

In other words, Occidental was telling its stockholders to vote for management because it is committed to maintaining and increasing the Company's dividend over time. Then in August 2019, it issued a Presentation stating that the dividend would be safe from 2021 onward so long as the oil price is $40 and above in the long term, and assuming that the Company meets its asset sale and synergy targets. (*See* A997-1017). Given the Company's own emphasis on these points in its proxy material, it is more than a bit difficult for Occidental to argue that High River lacks a credible basis to show that subjects are not material to this proxy contest.

Yet, Occidental is trying to prevent the Icahn Entities—and potentially all the stockholders—from finding out whether, before entering the transaction, its

Board and management carefully studied where on the range of oil prices its dividend might come under pressure. Do those documents back up management's current claim that it is truly committed to not risking the dividend? And, if they do, why the enormous fight to keep them from being produced?

C. Procedural History

On May 21, 2015, High River delivered a demand to Occidental for inspection of books and records provided to the Board about (i) the Berkshire transaction, (ii) the pre-sale of Anadarko's African assets to Total, (iii) the effect fluctuating oil prices would have on Occidental, and (iv) concerning any consideration of selling Occidental's assets or the Company as a whole. Opinion at 10. High River also sought to inspect documents concerning whether the Board intended to comply with a stockholder proposal adopted at Occidental's annual meeting, that seeks to lower the threshold for calling a special meeting from 25% stockholder approval to 15%. Opinion at 10-11. These documents relating to the stockholder proposal were provided to High River on the actual eve of trial and, therefore, are not at issue on this appeal. Opinion at 11, n. 46. They confirm that the Company will be changing its procedures, though only after this election cycle.

High River's primary purpose for seeking inspection is to communicate with other stockholders in connection with a proxy contest. Opinion at 2; A488-540. In

addition, High River also reserved the right to bring individual or derivative claims in connection with the information received.

Trial was held on September 20, 2019. On November 14, 2019, the Chancery Court issued its Opinion. The Court below concluded that High River had not demonstrated a credible basis to infer mismanagement or wrongdoing. Opinion at 13-14. The Court further held that High River was not entitled to inspection in furtherance of its proxy contest.

In addition, the Court below further held that the books and records sought by High River are not necessary and essential to the conduct of High River's proxy contest. Opinion at 20-22. According to the Court of Chancery, the Anadarko acquisition and related transactions have been widely publicized. Opinion at 21. The Court thus concluded further documents are not necessary and essential to advance High River's purpose of raising concerns with Occidental's stockholders about the wisdom of the Board's decisions to enter those transactions. Opinion at 21. The Vice Chancellor further held that inspection was unnecessary for High River to argue to the Company's stockholders that the Board should have, or now should, consider a sale of Occidental. *Id.*

High River respectfully disagrees with these conclusions.

ARGUMENT

I. THE COURT OF CHANCERY ERRED IN HOLDING THAT HIGH RIVER HAD NOT STATED A PROPER PURPOSE

A. Question Presented

Two questions are presented here. First, what is the appropriate standard of proof for determining whether a stockholder should be permitted inspection in connection with pursuing a proxy contest? Opinion at 2. (A1072-73) Second, did the facts put forward at trial by High River meet that standard? This subject was specifically discussed below. Opinion at 12-20. (A1070-74; A1098-1104; A1195-1208)

B. Standard and Scope of Review

Establishing the standard of proof is a question of law and thus the scope of review is *de novo*. *See Doe No. 1 v. Cahill*, 884 A.2d 451, 455 (Del. 2005); *Hubbard v. Hibbard Brown & Co.*, 633 A2d 345, 352 (Del. 1993). Applying that standard of proof to the facts would normally be a mixed question of law and fact. *Vetter v. Diamond State Telephone Co.*, 450 A.2d 877, 883 (Del. 1982). However, since the Court below did not attempt to apply a standard of proof, High River respectfully submits that the scope of review on this issue is also effectively *de novo*. *Cf. Gibson v. State of Delaware*, 135 A.3d 78 at *2, (Order) (Mar. 11, 2016) (Table).

C. Merits of Argument

1. Seeking Documents For Use In A Proxy Contest Is A Proper Purpose Under Settled Law.

As discussed in the Preliminary Statement, *supra*, the Opinion might be read as questioning whether stockholders who have shown that they want to inspect corporate documents for use in a legitimate proxy contest have stated a "proper purpose." But, as briefly discussed previously, this is not an open question. This Court has repeatedly stated that inspecting documents for possible use in a legitimate proxy contest is a proper purpose. *See Saito v. McKesson HBOC, Inc.*, 806 A.2d 113, 117 (Del. 2002); *Seinfeld v. Verizon Commc'ns, Inc.*, 909 A.2d 117, 119-20 (Del. 2006); *cf. Disney v. The Walt Disney Co.*, No. 380, 2004, 2005 WL 1538336 (Del. Mar. 31, 2005) (Order) (attached as Appendix to *Tiger v. Boast Apparel*, 213 A.3d 933d 940-42. As this Court held in *Seinfeld*:

> Stockholders may use information about corporate mismanagement, waste or wrongdoing in several ways. For example, they may: institute derivative litigation; 'seek an audience with the board [of directors] to discuss proposed reform or, failing in that, they may prepare a stockholder resolution for the next annual meeting, or mount a proxy fight to elect new directors.'

909 A.2d at 119-20 (quoting *Saito*, 806 A.2d at 117).

Thus, High River has stated a proper purpose. The issue on appeal is not whether seeking documents for a proxy fight is a proper purpose, but what standard of proof should be used in assessing whether High River has shown

enough evidence to be granted inspection. As the Chancery Court noted, the law in this regard is "at best, murky." Opinion at 2.

2. The Existing Law and The "Credible Basis" Standard.

For books-and-records requests in which a stockholder is seeking documents relating to claimed wrongdoing, the standard is well-developed. A stockholder needs to show a "credible basis" to believe wrongdoing occurred. As the Chancery Court said below, that "is the lowest burden of proof recognized in our law, [but] it still requires a plaintiff to provide some evidence of wrongdoing." Opinion at 13.

No such test has been clearly established for proxy contests, though, and in the few decisions on point the Court of Chancery has struggled on how to deal with the issues. For example in *Tactron, Inc. v. KDI Corporation*, 1985 WL 44694 (Del. Ch. Jan. 10, 1985), plaintiff brought a § 220 action seeking bylaws of defendant and any amendments thereto, board minutes relating to bylaw amendments, and legal opinions and memoranda relating to voting rights of certain preferred stock. *Id*. at *1-2. The stated purpose for plaintiff's demand was:

> to obtain information relating to record dates, quorums, number of directors, amendments, procedures for the solicitation of written consents of stockholders and other provisions in connection with the solicitation of written consents or proxies for the execution of written consents from the holders of the outstanding voting securities of KDI to be used to remove at least a majority of the present members of the board of directors of KDI. . . .

Id. at *1.

The defendant asserted that although a plan to solicit proxies or consents might be a proper purpose to inspect the corporation's stocklist, the same was not true for the inspection of books and records. *Id.* Vice Chancellor Berger rejected that argument, reasoning that:

> where inspection is sought to value one's stock, our courts consistently have limited the extent of that inspection to those records which are 'essential and sufficient' to accomplish the stated purpose. *State ex rel Rogers v. Sherman Oil Co.*, Del. Super., 117 A.2d 122 (1922); *Carroll v. C.M. & M Group, Inc.*, Del. Ch., C.A. No. 6351, Marvel, C. (September 24, 1981); *Neely v. Oklahoma Publishing Co.*, Del.Ch., C.A. No. 5293, Brown, V.C. (August 15, 1977). I see no reason why that standard should not apply here, where the demand is not related to any allegation of mismanagement. *Cf. Skoglund v. Ormand Industries, Inc.*, Del. Ch., 372 A.2d 204 (1976).

Id.

The Opinion attempts to distinguish *Tactron* on the grounds that the documents that the Court ordered produced in *Tactron* contained information about how to contact stockholders to share information plaintiffs already possessed, and did not involve the production of board-level materials such as those requested here. Opinion at 17-18. The Vice Chancellor also noted that, in the present case, High River is seeking documents not just to conduct, but to *win* a proxy contest. Opinion at 18 (emphasis in original).

Of course, *all* proxy contests are conducted to be won, so one may question how that observation actually distinguishes the two cases. And Occidental has cited no authority establishing that attempting to win a proxy contest is not a

proper purpose for seeking inspection. Like the Chancery Court here, the Court in *Tactron* did not attempt to articulate a standard of proof to be applied in its decision, but instead moved from the first question—whether the purpose was proper—to the third one—whether the documents were "essential and sufficient."[7]

High River Limited Partnership v. Forest Labs, Inc. See C.A. No. 7663-ML, at 33 (Del. Ch. July 27, 2012) (TRANSCRIPT) (Ex. B), is also instructive, in part because it discusses the standard to be used. In *Forest Labs*, then-Master Legrow ordered the production of information requested by plaintiffs to assist them in furtherance of a proxy contest. As to one area of concern—a large decline in earnings soon after an optimistic earning forecast, the Court found that there was "a credible basis of the Court to infer mismanagement." *Id*. at 24. The Court also awarded inspection concerning the board's commitment to revising its corporate governance guidelines. *Id.* at 6.

The Court specifically found that the plaintiffs had not established a credible basis to infer mismanagement entitling them to inspect the documents relating to the board's promise to stockholders to revise the guidelines. *Id.* at 33. However, the Court also found that the plaintiffs had shown that a subset of these documents

[7] The stated standard for what documents should be produced has varied over time from *Tactron's* "essential and sufficient" to the "necessary and essential" used in the Opinion, but there appears to be no difference in the meaning of these terms. *See Sanders v. Ohmite Holdings, LLC*, 17 A.3d 1186, 1194, n.2 (Del. Ch. 2011).

was "essential to conducting the proxy contest," because whether the company had followed through on its promise was something the plaintiffs were entitled to explore. *Id.*[8] Thus, the *Forest Labs* court affirmed and applied a "credible basis of mismanagement" standard to certain documents in the context of a proxy contest, but allowed the plaintiffs to inspect other documents that did not necessarily show mismanagement because that made sense under the circumstances and was consistent with plaintiffs' purpose.

3. What Is Meant By "Mismanagement" Under Delaware Case Law?

This Court's decisions provide a case-law argument for the proposition that a proxy-contest standard of proof could revolve at least primarily around mismanagement. For example, in *Seinfeld*, *supra*, this Court noted that stockholders could use information about "corporate mismanagement, waste or wrongdoing" to "mount a proxy fight to elect new directors." 909 A.2d at 119-20. But as discussed previously, epistemological problems come into play at this point because the decisions do not all define "mismanagement" the same way. Some cases, like the Opinion treat the word as a synonym for "wrongdoing." Others,

[8] The Court also summarized this holding in its decision on the plaintiffs' motion for relief from the judgment. *See High River Ltd. P'ship v. Forest Labs*, 2013 WL 492555, at *3 (Del. Ch. Feb. 5, 2013).

such as *Forest Labs*, appear to understand "mismanagement" to include mistakes and blunders.

A survey of the Delaware case law on point does not reveal any definitive answer in the history of its use in this context. Its use in Delaware books-and-records law appears to derive from Chancellor Wolcott's opinion for the Supreme Court in *State v. Cities Serv. Co.*, 115 A. 773 (Del. 1922). *Cities Service* approvingly quotes an 1888 Alabama case to the effect that the statute permitting inspection of books and records, "was enacted in view of the restrictions and limitations placed by the common law upon the exercise of the right; and the purpose is to protect small and minority stockholders against the power of the majority, and against the mismanagement and faithlessness of agents and officers." *Foster v. White*, 86 Ala. 467, 6 South 88 (Ala. 1889). Neither *Foster* nor *Cities Service* defines "mismanagement."

Cases since then appear to go multiple ways on whether "mismanagement" requires actual "wrongdoing," such as breach of fiduciary duty or fraud. In *Skoglund v. Ormand Industries, Inc.*, 372 A.2d 204 (Del. Ch. 1976), Vice Chancellor Brown made a distinction between mismanagement and more wrongful conduct, when he pointed out that plaintiffs claimed that the company was "being mismanaged at best and in all likelihood is being looted." *Id.* at 208. In *Skouras v. Admiralty Enterprises, Inc.*, 386 A.2d 674 (Del. Ch. 1978), the plaintiff

complained of much overspending that would not appear to approach the threshold of actual waste—he intended not to sue but to stir up the other stockholders over it. Chancellor Marvel found the inspection to be proper but did not attempt to distinguish between mismanagement and wrongdoing.

Other cases might be read to conflate "wrongdoing" and "mismanagement." *See, e.g., Sec. First Corp. v. U.S. Die Casting & Dev. Co.*, 687 A.2d 563, 567 (Del. 1997) ("It is well established that investigation of mismanagement is a proper purpose for a Section 220 books and records inspection. A stockholder's entitlement to inspection of corporate books and records depends on whether or not a credible basis to find probable wrongdoing … has been established."); *Espinoza v. Hewlett-Packard Co.*, 32 A.3d 365, 371 (Del. 2011) ("It is uncontested that, as a matter of law, *Espinoza* has stated a proper shareholder purpose under Section 220 – to investigate possible wrongdoing. Nor is it contested that he has made the required factual showing of a credible basis to infer possible mismanagement.")

Based upon the case law, it appears that while the word "mismanagement" is assumed to equal wrongdoing in many cases, others appear to at least include mistakes -- and perhaps exclude actionable wrongdoing -- in their definitions. Sometimes a credible basis for inferring mismanagement alone has triggered inspection; sometimes it has taken a credible basis for inferring actual wrongdoing, which those decisions often conflate with mismanagement. In short, there appears

to be no real clarity about precisely what "mismanagement" means in the context of § 220.

4. Proposed Standards for a Proxy Contest.

Given the lack of clarity in the case law, High River believes that it would helpful if this Court established a suitable standard of proof for cases in which a stockholder was seeking documents for possible use in a proxy contest. The Court below was worried about creating a precedent that would open the floodgates for new § 220 litigation, which of course is a legitimate concern for an overburdened Court. (A1236-37). At the same time § 220 exists for the reason set forth in *Foster v. White* and endorsed by Chancellor Wolcott. It exists to "*protect small and minority stockholders against the power of the majority, and against the mismanagement and faithlessness of agents and officers*."

To use the facts here as an example, in many ways the Anadarko transaction made no sense. Occidental management had spent many months telling the market that it was going to be disciplined about spending, had no need to pursue an M&A transaction, and was going to be particularly careful of its balance sheet. Then, out-of-the-blue, management suddenly entered a bidding contest against a much larger bidder, and paid a price for Anadarko that made the other bidder blanche (and collect a $1 billion break-up fee effectively paid by Occidental). Next, to help pay for the deal and to avoid a stockholder vote, Occidental sold preferred stock

and warrants for a price that the trial testimony showed was billions of dollars less than their real market value.

Under these circumstances why should not a stockholder (especially one with $1 billion of its own money invested in the Company, and which therefore may be presumed not to be pursuing the case in order to hurt the Company) be able to inspect a very select group of documents to try to find out why management and the board jettisoned its existing plans to engage in deals that make no apparent financial sense? That certainly is a stockholder-related purpose.

Moreover, this Court has already provided the answer to the question of whether seeking documents for use in a proxy contest represents a proper purpose—it does. The issue here is only what standard of proof a plaintiff should be required to meet. One alternative—one very much in keeping with a least some of the precedent—would be to use the existing requirement that a plaintiff show a "credible basis of mismanagement or wrongdoing" and make clear that for this purpose, mismanagement includes the normal definition of mismanagement and does not require a show of wrongdoing.

An alternative—one that would permit some of the relief given by the Chancery Court in *Forest Labs*, but which might not fit under a solely "mismanagement" rubric -- would be to broaden the test to one in which the plaintiff must prove a credible basis of mismanagement or wrongdoing, or that

there is a credible basis to believe that particular documents are material to a proxy contest.

High River advances these suggestions with deference, in the hopes they might be useful to the Court if it determines to clarify the standard of proof for proxy contests. There are undoubtedly many additional possible formulations that would allow for the careful balancing of the various legitimate interests involved in such cases.

5. High River Has Shown A Credible Basis For Inferring Mismanagement and That the Documents It Seeks Would Be Material To This Proxy Contest.

High River has shown a credible basis to believe that mismanagement has occurred at Occidental or that there are serious issues material to the current proxy contest that should be disclosed to the stockholders. Multiple aspects of the transaction do not make sense and the glib explanations provided by management do not add up.

(a) The Berkshire Preferred.

Probably the most egregious transaction was the Berkshire preferred stock, where Berkshire Hathaway paid $10 billion for preferred stock worth billions more. As discussed previously the preferred carried an 8% dividend at a time that the common stock was trading with a 5% dividend yield and the Company's debt carried a coupon of approximately 4%. As a mid-level security, the preferred

would logically have paid a dividend rate somewhere between the two. (A1152). But even if one assumes that the market rate was significantly higher—for example, 6%--then the stock should have had a market value of approximately $13.3 billion, which is the annual dividend amount of $800 million divided by a 6% dividend rate. That does not include the warrants, which were independently worth approximately $1.2 billion. Together they total $14.5 billion. That is a very large difference from the $10 billion paid by Berkshire.

Occidental argued to the public that it had to complete a transaction rapidly and only Berkshire could do that, but as Mr. Graziano stated in his unrebutted testimony, there was no capital shortage in the market—when it sold $13 billion in bonds in the summer for 3.1%, Occidental got over $71 billion in offers. (A1156-57). Nor did the Company need to raise the money over a weekend in early May. As shown at trial, the merger agreement between Chevron and Anadarko allowed a topping bid made up until shortly before the stockholder vote, and that could not be accomplished until approximately July. (A333; A347; A353).

In other words, High River demonstrated at trial that the Berkshire preferred stock was sold for billions less than any reasonable market value for reasons that do not make sense on their face. That is a credible basis to infer mismanagement.

(b) The Pre-Sale to Total.

High River also showed that the pre-sale of all of Anadarko's extensive African assets, including it very extensive offshore Mozambique gas fields did not appear to be a commercially reasonable move. Occidental does need to sell assets but it needs to achieve the highest possible price for them. Offering them all in a group to only one buyer, Total, cannot be squared with normal commercial practices, in which a seller usually attempts to obtain multiple bidders for any asset or group of assets. (A1159). Occidental's failure to follow commercially reasonable practices also creates a credible basis to infer mismanagement and is also material to a proxy contest.

(c) The Extremely High Bid for Anadarko and the Corresponding Risks to the Company.

Occidental paid a very high price for Anadarko. Standing alone that might not create a credible basis from which to infer mismanagement, but it does not stand alone. As described previously, management had spent many months assuring investors that it was focused on keeping its balance sheet under control, did not need to pursue M&A—much less bet-your company M&A—and would be a wise steward over their investment.

Then, within a few days' time, it was going head-to-toe with Chevron—a far larger competitor—in bidding for Anadarko. It won the bidding contest, with Chevron walking away (with $1 billion of what was ultimately Occidental's money

in its pocket) because the prices no longer made sense. Occidental was now saddled with so much debt that Mr. Graziano estimates that if the price of oil falls into the mid-40's for any significant length of time, the Company might have to cut its cherished common-stock dividend. (A1169). And the high price was compounded by the problems with the Berkshire preferred stock and the Total pre-sale.

That raises a credible basis from which to question whether management had any idea of the risks they were running on behalf of their stockholders—and if they did, whether they were pushed into their apparently imprudent decisions by some other factor. High River has a difficult time believing that an experienced management team could have made so many different mistakes over such a short period of time, and wonders, among other things, whether there was unstated reason for this conduct. For example, was Occidental trying to hold off a potential acquirer of Occidental by buying Anadarko? That is something that would be extremely material to the stockholders in the proxy contest, and that managers and directors should have no right to keep hidden from the owners of the Company.

In sum, High River's unrebutted evidence at trial raises a credible basis to infer mismanagement (or perhaps worse) and a reasonable basis to believe that the documents they seek might be material to the stockholders in this proxy fight.

II. THE COURT'S DECISION THAT THE DOCUMENTS SOUGHT BY HIGH RIVER WERE NOT NECESSARY AND ESSENTIAL WAS AN AD HOC JUDGMENT THAT WAS NOT MOORED TO A FIXED STANDARD OF INSPECTION AND HENCE WAS ERRONEOUS.

A. Question Presented

Did the Court of Chancery err in ruling that the books and records requested by High River are not necessary and essential without reference to a standard of proof? Opinion at 22; A1079-84; A1114-1119; A1208-1222.

B. Standard of Review

A decision about which documents are necessary and essential is normally a matter for the trial court's discretion. *Thomas Betts Corp. v. Leviton Mfg. Co., Inc.* 681 A.2d 1026, 1034-35 (Del. 1996). That decision, however, must be grounded in the appropriate standard of proof, and the Court of Chancery demurred on holding what that standard should be. Accordingly the question of whether the Court below's decision on what documents were necessary and essential was correct is primarily a matter of law subject to *de novo* review. *Cf. Gibson v. State*, *supra* 135 A.3d 78 at *2.

C. Merits of the Argument

High River's demand for inspection relates in large part to Occidental's acquisition of Anadarko, the related Berkshire financing and pre-sale of Anadarko's African assets to Total. (A488-91). In formulating that demand, High

River tried to be careful to avoid a "scattershot," discovery-like approach, and instead targeted what it believes is a small number of documents.[9]

The Court below stated that these transactions were widely publicized and, therefore, there was no need for High River to obtain the documents it seeks in order to raise concerns with its fellow stockholders about the wisdom of the Board's approval of those transactions. Opinion at 21. The Vice Chancellor further noted that "Plaintiffs have already made their assessment of the Board's decision making and have found it wanting." *Id.* In other words, it was possible for Plaintiffs to run their proxy contest without any books and records.

And that is correct as far as it goes. It is possible for the Plaintiff to wage a proxy contest without these books and records, and it can and has criticized management based on publicly available information. Indeed, as the Court knows, Mr. Icahn is no stranger to proxy contests and he and his affiliates have waged the vast majority of them without seeking to review books and records. But the argument that it is <u>possible</u> to wage a proxy contest without receiving books and records proves too much. Since it is always technically possible to wage a proxy

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[9] High River, of course does not know what documents Occidental has, but if Occidental has similar documents to corporations in similar situations, High River believes that all it would need are certain banker presentations, board minutes, and communications to the board about the bidding, the financing and the sales. High River has agreed from the start not to share with stockholders any information it obtains except with permission from the Court or Occidental.

contest without reviewing the corporation's book and records, if the Chancery Court's statement became the standard of proof, then examination would never be appropriate. The law is clear that is not the case.

1. The Lower Court's Failure to Apply a Standard Caused Error.

High River respectfully submits that the difficulties here were caused by the lower court's application of what was in effect an *ad hoc* standard of proof, that appeared to require High River to prove that inspection was absolutely necessary. Given that plaintiffs by definition do not know what records a corporation has, that amounts to an impossible standard of proof. It is also incorrect under our law.

As discussed at length above, the first question to a plaintiff is whether its inspection is for a proper purpose, and this Court has clearly established that seeking documents for use in a legitimate proxy contest is proper. The second question is what is the standard of proof that the plaintiff needs to satisfy? That then ties directly into the third question—what documents are necessary and essential? To provide an example, suppose this Court were to conclude that in the context of a proxy fight a plaintiff needs to prove a credible basis for inferring mismanagement, with mismanagement defined so that it does not necessarily include wrongdoing. Suppose further the Court were to decide here that High River had shown a credible basis for inferring such mismanagement in regard to

the bid for Anadarko and the Berkshire preferred stock financing, but not the Total pre-sale.

Under this hypothetical, High River (1) would not be entitled to review any documents relating to the Total pre-sale (because it had not met its standard of proof as to them), but (2) would be entitled to review necessary and essential documents relating to the other two issues because it had met its burden of proof as to them.

In other words, the standard of proof defines what type of documents may be reviewed and only when that is determined is it possible to figure out what documents are "necessary and essential" in the case. The failure to attempt to set such a standard of proof thus undermined the Court's attempt to determine which documents might be necessary and essential and required it to use an ad hoc semi-standard in its place.

2. The Court's Conclusions On What Documents Were Necessary And Essential Were Also Factually Incorrect Because They Miss The Purpose Of High River's Request For Inspection.

The Opinion also misses the purpose of High River's demand for inspection. Currently, the only information available to Occidental's stockholders, including High River, is that which Occidental's Board and management have chosen to make public.

While High River has identified what it believes is conduct that fits any normal definition of mismanagement in connection with the Anadarko acquisition and related transactions, it, of course, cannot point its fellow stockholders to the inside communications that might fully prove that the board and management made gross mistakes in judgement. Only Occidental has that information and although management is actively touting how good this deal will be in the long term, it will not release that information to the stockholders.

Thus, under the Court-below's ruling, management is free to portray the Anadarko acquisition as a long-term coup with no serious risks, and the stockholders are not given a chance to see whether the contemporary documents support those claims. While High River can share its own analysis to the contrary, without reviewing documents it cannot show the stockholders any warning management might have received about the bid for Anadarko, the Berkshire preferred stock or the Total pre-sale. For example, if Occidental's bankers told management that the Berkshire preferred was actually worth $13-15 billion when it was sold for $10 billion, that fact alone would be highly material to the stockholders.

Moreover it is very hard to understand why the stockholders should not be entitled to learn about such a fact. While corporations have legitimate interests in protecting the confidentiality of their records, corporate management has no

legitimate interest in being protected from the release of material showing embarrassing mistakes on its part.

Of course, the documents might be entirely benign or even supportive of management here. High River has no way of knowing. One might presume that if that were the case, Occidental would not be fighting so hard to keep the information away from its stockholders. But, the only way to find out for sure is for High River to review the documents. It is for that purpose High River has brought this appeal.

CONCLUSION

For the foregoing reasons, Appellants respectfully request that this Court reverse the Court below and enter judgment in their favor ordering that Occidental provide for inspection of the books and records set forth in the Appellants' Demand Letter (A512-40) within 72 hours of entry of the Order.

ASHBY & GEDDES

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