EFiled: Jan 13 2020 04:48PM EST
Filing ID 64613475
Case Number 483,2019

IN THE SUPREME COURT OF THE STATE OF DELAWARE

HIGH RIVER LIMITED PARTNERSHIP, ICAHN PARTNERS MASTER FUND LP, AND ICAHN PARTNERS LP,	§	
	§	No. 483, 2019
Plaintiffs Below, Appellants,	§	Court Below: Court of Chancery
	§	C.A. No. 2019-0403-JRS
v.	§	
OCCIDENTAL PETROLEUM CORPORATION,	§	
Defendant Below, Appellee.	§	

APPELLEE'S ANSWERING BRIEF

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Dated: January 13, 2020

TABLE OF CONTENTS

Page

TABLE OF CITATIONS

Page(s)

Cases

Statutes & Rules

NATURE OF PROCEEDINGS

Plaintiffs appeal the denial of their request to inspect books and records regarding Occidental Petroleum Corporation's ("Occidental" or the "Company") acquisition of Anadarko Petroleum Corporation ("APC" or "Anadarko") and related transactions. Plaintiffs do not seek inspection because they believe that Occidental's board may have breached its fiduciary duties in approving those transactions, or because the transactions were wrongful. Rather, Plaintiffs fundamentally disagree with the strategic rationale of these transactions, and have threatened to mount a proxy fight to overhaul Occidental's board. In connection with this contemplated proxy fight, Plaintiffs request documents about the decision-making process in order to bolster their arguments that the acquisition was a "mistake."

Plaintiffs all but concede that they cannot satisfy the existing "credible basis to infer wrongdoing" standard—which is a prerequisite for examining books and records concerning business judgments that has been applied by this Court countless times—and admit that they have no evidence or basis from which to believe that any wrongdoing or breach of fiduciary duty occurred. Unable to meet their burden, Plaintiffs ask this Court to lower the bar dramatically when the stockholder seeking inspection is threatening to undertake a proxy contest. Both standards proposed by Plaintiffs would

eradicate the requirement that stockholders establish a basis to suspect wrongdoing when seeking to examine documents about business decisions and would allow inspection based on mere disagreement with a business judgment.

But Plaintiffs have articulated no basis for why the standard for inspecting documents concerning business judgments should be different where the stockholder seeks to pursue a proxy contest rather than derivative litigation. Allowing a different, lower standard for proxy contests would subvert the standard already in place where the stockholder's stated purpose is to determine whether to bring derivative litigation, and would undermine the business judgment rule and encourage fishing expeditions. Any stockholder whose end goal is derivative litigation, for example, could also claim a purpose of bringing a proxy contest and thus avoid the burden of establishing a credible basis to infer wrongdoing.

The issue is not whether a stockholder may inspect books and records relating to the mechanics and logistics of a proxy contest, such as stock lists, lists of non-objecting beneficial owners and the like. Such records may in some cases be "necessary and essential" to the purpose of conducting a proxy contest, without regard to whether the issues in contention relate to potential wrongdoing. But in order to obtain documents reflecting the

deliberative process leading to a business judgment, the stockholder must satisfy the established standard of showing a credible basis from which the court can infer that mismanagement—under the well-settled legal interpretation—or waste or wrongdoing has occurred.

Even if this Court were to adopt a new standard for establishing a proper purpose in the context of proxy contests, however, the trial court's factual finding that the books and records sought by Plaintiffs are not necessary and essential to their stated purpose should end the inquiry. Regardless of whether Plaintiffs have stated a proper purpose under the existing standard—or either of Plaintiffs' proposed lower standards—the trial court found that Plaintiffs have not established that the documents they seek are necessary and essential to advance their threatened proxy contest. Plaintiffs themselves admit that they could pursue and, indeed, have been pursuing, such a contest without the requested books and records. (Appellants' Opening Brief ("Opening Br.") at 39.) The trial court's finding is entitled to deference absent evidence of abuse of discretion, which does not exist here. Accordingly, Occidental respectfully requests that the Court affirm the trial court's opinion. *See High River Ltd. P'ship v. Occidental Petroleum Corp.*, C.A. No. 2019-0403-JRS (Mem. Op. Nov. 14, 2019) (the "Opinion") (Exhibit A to Opening Br.).

SUMMARY OF ARGUMENT

1. Denied. The trial court properly found that Plaintiffs' demand—which sought documents in connection with managerial and board-level decision-making—did not meet the existing standard of credible basis to infer mismanagement or wrongdoing, and found that the documents Plaintiffs sought were not necessary and essential to their purported purpose.

2. Denied. The alternative standards proffered by Plaintiffs—whether they have shown a credible basis to infer that mistakes or blunders occurred at the Company, or, alternatively, whether they have shown a credible basis that the information requested is material in a proxy contest—are not workable, contain no adequate limiting principle and undermine existing standards in books and records cases.

3. Denied. The trial court properly found that the documents Plaintiffs seek are not necessary and essential to running their proxy contest because Plaintiffs already have drawn their conclusions about the propriety of the transactions in question based on publicly available information and their own assessment, and do not need the requested documents to make their case to stockholders.

STATEMENT OF FACTS

A. The Parties.

Occidental is an international oil and gas exploration and production company with operations in the United States, Middle East and Latin America. (A648.) It is incorporated in Delaware and headquartered in Houston, Texas. (*Id.*) Occidental is one of the largest U.S. oil and gas companies, based on equity market capitalization. (*Id.*)

Plaintiffs are affiliates of Carl Icahn and self-identified "activist investors." (A494 ¶ 16; B111.) Starting on May 2, 2019, and continuing through May 9, 2019, Plaintiffs bought shares of Occidental's common stock. (B125.) Plaintiffs purchased additional Occidental stock beginning on May 17, 2019. (*Id.*) These shares were acquired as part of a potential activist strategy, whereby Plaintiffs would seek to inject into the board "new blood to supervise the integration and asset sale process" associated with the Occidental-Anadarko transaction and address the alleged issue of management's "misunderstandings of strategic and finance matters." (B112.) Plaintiffs assert that their holdings in Occidental stock exceeded $1.6 billion when they filed their Complaint. (A492 ¶ 10.)

B. Occidental Pursues Acquisition of Anadarko.

Occidental first expressed interest in pursuing an acquisition of Anadarko in July 2017. (A679.) Occidental believed that it was ideally

positioned to generate compelling value from such a combination. (B10-12.) Subsequent efforts by Occidental to acquire Anadarko in 2017 and 2018, however, were unsuccessful, and in 2019, Chevron Corporation ("Chevron") and Anadarko began talks regarding a potential merger. (A680-81.)

Believing that a deal with Anadarko would be in the best interest of Occidental's shareholders, on March 22, 2019, Occidental CEO Vicki Hollub informed Anadarko that Occidental would like to re-engage in discussions regarding a combination of the companies. (A682.) On March 23, 2019, Ms. Hollub sent a letter to Anadarko, which proposed an acquisition of Anadarko for $19 in cash plus 0.8737 shares of Occidental common stock per share of Anadarko stock, which equated to a total value of $76 per Anadarko share. (A682-83.) Anadarko rejected that offer—as well as a subsequent proposal made on April 8, 2019—due, in part, to the lack of closing certainty surrounding Occidental's proposals, which ultimately would require the approval of Occidental's stockholders. (A683; A685-88.) On April 11, 2019, Anadarko instead executed a merger agreement with Chevron for $65 per share (the "Chevron Merger Agreement"). (A689.)

Following the Chevron Merger Agreement, on April 24, 2019, Occidental delivered another proposal to Anadarko, this time increasing the cash component of the deal (the "April 24 Proposal"). (*Id*.) The April 24 Proposal was to acquire Anadarko for $76 per share consisting of $38 in cash and 0.6094 shares of Occidental common stock per share of Anadarko common stock. (*Id.*) Occidental believed that the proposal had significant strategic and financial rationales, including the potential to generate significant cost and capital synergies, attractive organic growth and a stable, sustainable and growing dividend. (*Id.*) Consistent with its fiduciary duties to Anadarko's stockholders to explore the April 24 Proposal, the Anadarko board of directors authorized and instructed management to resume negotiations with Occidental. (A690.)

C. Occidental Obtains Financing.

As negotiations with Anadarko were ongoing, Occidental worked to obtain financing for the proposed deal, which, as of the April 24 Proposal, was a 50% cash offer. (A689.) It ultimately obtained a portion of this financing from Berkshire Hathaway Inc., which committed to invest $10 billion in Occidental in exchange for 100,000 shares of Series A preferred stock and a warrant to purchase 80 million shares of Occidental common stock, contingent upon Occidental entering into and completing its proposed

acquisition of Anadarko. (B28.) The dividends on this preferred stock will be paid in cash or, at Occidental's option, in shares of Occidental common stock. (*Id.*) Berkshire Hathaway Inc. and Occidental entered into a securities purchase agreement on April 30, 2019. (A690.) By executing this agreement with Berkshire Hathaway Inc., Occidental was able to finance the Anadarko acquisition on an expedited basis from one of few—if any—resources that could provide the cash quickly in the face of the looming consummation of the merger with Chevron.[1] As contemporaneous reports observed, the fact that the financing was equity and not debt may have helped Occidental with its credit ratings and its ability to raise more debt to finance the deal, while also "insulating a large part of the acquisition currency from any sustained downturn in oil prices" because the dividends on the preferred stock can be paid in common stock. (B34; B93.)

[1] On July 22, 2019, in connection with his consent solicitation discussed further below, Mr. Icahn claimed that "at least one large investor that [he] know[s] of would have been happy to provide the financing without the warrants." (B323.) He later admitted that he was referring to himself. (A1184.) In any event, on April 30, 2019, when the Berkshire Hathaway deal was entered into, Mr. Icahn was not yet an investor in Occidental and has provided no support for the assertion that he could have provided $10 billion in financing in the short period of time required, or that Occidental should have been aware of that. (B125.)

Based on their own analysis, however, Plaintiffs argued below that "Occidental's Board and management rushed through a financing arrangement with Berkshire on terrible terms, when the Company could have placed a much better deal with its own large stockholders, had it attempted to do so." (A1077-78.) They specifically took issue with the 8% dividend rate being "far higher than the interest rate on Occidental's debt as well as the dividend on its common stock" and "not tax deductible," with the fact that "if the dividends are not paid they compound at the painful rate of 9% per annum" and with Berkshire's warrant to purchase 80 million shares of stock. (A1077.) Plaintiffs shared these concerns with fellow stockholders, including in open letters in which Mr. Icahn argued that the Company "[a]greed to Berkshire's egregious financing terms." (B358; B323.) At trial, Plaintiffs continued to assert that they had determined based on publicly available information and their own calculations that the price of the Berkshire financing was "extremely high" and that the process for obtaining that financing was "negotiated too quickly," which concerns already had been shared with stockholders by Mr. Icahn. (A1181-84.) Plaintiffs also conceded that they have no basis to believe that Occidental did not consider obtaining financing from a large financial institution, rather than from Berkshire, when negotiating the deal. (A1186.)

D. Occidental Sells Africa Assets.

Five days after the securities purchase agreement with Berkshire Hathaway Inc. was executed, Occidental entered into a binding memorandum of understanding to sell Anadarko's Algeria, Ghana, Mozambique and South Africa assets (the "Africa Assets") to Total, S.A. for $8.8 billion. (B47.) The sale was contingent upon Occidental entering into and completing its proposal to acquire Anadarko. (*Id.*) The proceeds of the sale of the Africa Assets would cover a portion of the cash consideration to fund Occidental's proposed acquisition of Anadarko, fast-track the divestiture plan previously described by Occidental and reduce the overall integration demands of the acquisition of Anadarko, given Occidental's lack of presence in the African region. (*Id.*) When the agreement was signed, Occidental continued to expect to deliver $2 billion of annual cost synergies and $1.5 billion of annual capital reductions from the proposed acquisition of Anadarko. (*Id.*) The price of the sale was widely viewed as appropriate according to contemporaneous accounts and analyses. (B53-54; B57.)

Plaintiffs, however, argued below that the Company erred in "selling all of Anadarko's African assets to a single buyer" rather than "unbundl[ing] the assets and s[elling] them to separate acquirers" and failing to "make sure that foreign officials . . . would not feel that they were blindsided about the

sale to Total." (A1078.) At trial, Plaintiffs asserted that, based on publicly available information and their own analysis, the sale was faulty because it was done quickly and without a full auction. (A1177-79.) They conceded, however, that they have no evidence to suggest that Occidental was poorly informed when it sold the Africa Assets; Plaintiffs also have no opinion as to whether the decision to divest the assets at all was the right strategic choice because "any asset could be a candidate for divestiture if the price is right." (A1177-78.)

E. Occidental and Anadarko Sign Merger Agreement.

After obtaining financing from Berkshire Hathaway Inc. and entering into a binding memorandum of understanding to sell Anadarko's Africa Assets to Total, S.A., Occidental delivered a revised proposal to Anadarko on May 5, 2019 (the "May 5 Proposal"). (A691.) Pursuant to this proposal, Occidental would acquire Anadarko for $76 per share, consisting of $59 in cash and 0.2934 shares of Occidental common stock per Anadarko share. (*Id.*) The proposal reiterated Occidental's belief that it is uniquely positioned to create significant and sustainable growth and value from Anadarko's asset portfolio. (*Id.*) Additionally, the transaction described in the May 5 Proposal would not be subject to any vote or approval by Occidental's stockholders, which had been repeatedly cited by Anadarko as

the explanation for why it previously chose Chevron's $65 offer over Occidental's $76 offer. (B40.) After terminating the Chevron Merger Agreement and paying a $1 billion termination fee, Anadarko accepted the May 5 Proposal. (A692.) Occidental and Anadarko entered into a merger agreement on May 9, 2019 (the "Merger Agreement"). (*Id.*)

Plaintiffs argued below that the Company "should have been a seller—not a buyer" because it "has a large position in the Permian Basin (that public reports say is very well operated) and surely could have attracted strong competitive bids at a premium to its stock price." (A1062.) Plaintiffs have shared these concerns with stockholders, including in open letters claiming that Ms. Hollub and the board's decision to acquire Anadarko "was in part motivated to create a de facto poison pill that would deter an interested buyer from bidding for [Occidental]" (B357) and that they "may go to great lengths to rebuff and prevent an acquisition of [Occidental]" (B344). Plaintiffs conceded at trial, however, that they have no evidence or basis to believe that management or the board turned down any opportunities to be sold or, if there were such opportunities, that the Company failed to consider them fully. (A1186-87.)

Plaintiffs also argued below that the acquisition of Anadarko was "an enormous, and very levered, bet on the price of oil" and that the dividend

may need to be cut if the "price of oil declines to approximately $45 per barrel or below for an extended period of time." (A1056-57.) They conceded at trial, however, that Plaintiffs do not know how long oil prices would have to drop below $45 for the dividend to be in danger, that they do not have any "forecasts of oil prices that suggest that oil prices actually will drop below $45" and that they have no basis to believe the Company did not consider the impact of oil prices on the wisdom of the deal. (A1188-89.)

F. Plaintiffs Acquire Their Interest in Occidental.

Plaintiffs began purchasing Occidental shares on May 2, 2019, after Occidental's April 24 Proposal to Anadarko was publicly known and after the Berkshire Hathaway Inc. financing deal was publicly announced. (B125; A1133; A1175-76.) They continued to buy shares after the binding memorandum of understanding to sell Anadarko's Africa Assets to Total, S.A. was signed on May 5, 2019 and after the final Merger Agreement was executed on May 9, 2019, each of which was publicly announced. (B125; A1176-77.) In total, Plaintiffs purchased almost 90% of their shares after May 5, 2019. (A1177.)

Plaintiffs invested in Occidental because they believed that the company had "good assets" but was making "poor management decisions." (B111.) They acquired Occidental stock with an eye toward becoming

actively involved in Occidental's board and management, including by replacing some of its board members with directors of their choosing. (B111-12.)

G. Plaintiffs Pursue Section 220 Litigation and Consent Solicitation.

After acquiring their shares and consistent with their goals as activist investors, Plaintiffs sent a demand letter to Occidental on May 21, 2019, seeking to inspect certain books and records related to the Anadarko acquisition and the board's consideration of a recent shareholder proposal relating to the threshold for calling a special meeting of stockholders. (A530-32.) Regarding the acquisition, Plaintiffs demanded information about the Berkshire preferred stock transaction, the sale of Anadarko's Africa assets to Total, how Occidental intends to manage its debt following the acquisition and any consideration given to the sale of Occidental or Occidental's assets. (A531.) Plaintiffs sought this information in order to "decide how they should proceed (including whether to bring litigation on behalf of themselves or the Company)," "decide whether to seek to call a special meeting of stockholders for the purpose of removing and replacing incumbent directors" and "in the context of seeking to call a special meeting of stockholders, to potentially share some or all of the information they receive with their fellow stockholders." (A530.)

Counsel for Occidental replied to the Demand Letter on May 28, 2019, stating that "[t]he Company is considering the demand, and . . . will contact you shortly to discuss the Company's position and response." (B77.) Just two days later, Plaintiffs filed their Verified Complaint in this action. (A488.) On June 14, 2019, Occidental filed its Answer to the Complaint. (A543.)

On July 10, 2019, the board of directors increased the size of the board from nine to ten directors in order to elect Robert M. Shearer, a former managing director of BlackRock Advisors, LLC, to the board.[2] (A909.)

On June 26, 2019, Mr. Icahn, Icahn Partners LP, Icahn Partners Master Fund LP, High River Limited Partnership, Hopper Investments LLC, Barberry Corp., Icahn Enterprises G.P. Inc., Icahn Enterprises Holdings L.P., IPH GP LLC, Icahn Capital L.P., Icahn Onshore LP, Icahn Offshore LP and Beckton Corp. (collectively, the "Icahn Group") began the consent solicitation process. They initially filed with the U.S. Securities and Exchange Commission (the "SEC") preliminary solicitation materials in

[2] On January 2, 2020, Occidental announced that it would add another member, Andrew Gould, to the Board of Directors effective March 1, 2020. Occidental Petroleum Corporation, Current Report (Form 8-K) (Jan 2, 2020), https://www.sec.gov/ix?doc=/Archives/edgar/data/797468/000114036120000411/form8k.htm.

order to solicit written requests (the "Icahn Group Solicitation") to demand that the board fix a record date for determining stockholders entitled to act in a planned consent solicitation by the Icahn Group to approve certain proposed actions by written consent without a meeting. (A576-77; A582.) Such proposed actions included removing four current Occidental directors and replacing them with four new directors chosen by the Icahn Group. (A583.) On July 18, 2019, the Icahn Group filed definitive solicitation materials with the SEC in order to solicit written requests to demand that the board fix a record date for the Icahn Group's planned consent solicitation. (A917-18.)

In response to the Icahn Group Solicitation, Occidental filed with the SEC a definitive Revocation Solicitation Statement to allow shareholders to revoke requests that they may have provided to the Icahn Group. (A963.) On August 13, 2019, in connection with the ongoing solicitation, Mr. Icahn filed an open letter to Occidental stockholders with the SEC, which focused on two concerns: that Ms. Hollub may make other "M&A mistakes" and that Ms. Hollub and the board may "rebuff and prevent an acquisition" of Occidental. (B344.) And on August 28, 2019, Mr. Icahn published another open letter, reiterating that the solicitation was motivated by the allegations that the board may fail to consider future bids to acquire Occidental, that Ms.

Hollub and the board will "do anything" to maintain the dividend and that having representatives from the Icahn group on the board will not "cause a distraction" but will "build stockholder value." (B357.)

Occidental's acquisition of Anadarko was completed on August 8, 2019. (B333.) Plaintiffs have failed to obtain sufficient support to request a record date for their consent solicitation. (Opening Br. at 18-19.)

H. The Court of Chancery Rejects Plaintiffs' Section 220 Demand.

The Court of Chancery held trial on September 20, 2019, and delivered its Opinion on November 14, 2019.

In its Opinion, the trial court held that Plaintiffs were not entitled to inspection under Section 220. (Opinion at 12-20.) The court first analyzed whether Plaintiffs had satisfied the prerequisite that they establish a credible basis to infer mismanagement, waste or wrongdoing. (*Id.* at 13-14.) The court explained that to satisfy the standard, Plaintiffs had to "provide *some* evidence of wrongdoing" forming a "credible basis" to infer that Occidental's directors actually committed wrongdoing. (*Id.* at 13.) The court found that a credible basis in this case was "unsupported by the trial record."[3] (*Id.*) Indeed, the court found that Plaintiffs

[3] This finding is unsurprising, given that Plaintiffs have all but conceded that they have no basis to believe that Occidental's board committed any wrongdoing. *See* A1045 ("Plaintiffs are not claiming that the Board

> have not alleged, much less proven, that the Occidental Board was conflicted, disloyal or in some way interested in the transactions at issue. They also do not allege, nor have they proven, that the Occidental Board acted in bad faith. (*Id.*)

Instead of evidence of wrongdoing, the court explained, Plaintiffs offered "nothing more than disagreements with how Occidental's directors exercised their business judgment." (*Id.* at 14.) "[D]isagreeing with a board's business judgment," the court recognized, "is not enough" to satisfy the credible basis standard. (*Id.*)

Just prior to the court's issuance of its opinion, Plaintiffs sent a post-trial letter to the court requesting an expedited decision, in which they suggested that the transactions at issue may have been "knowing intentional breaches of fiduciary duty similar to those seen with Enron, Worldcomm and other failed companies." (B405.) As the court noted, this allegation did not appear in Plaintiffs' complaint. In fact, the court noted that Plaintiffs "explicitly *denied* making such allegations in their pre-trial brief." (Opinion at 13 n.56 (emphasis in original).) The court stated that this "abrupt, unexplained change in position," which has not been raised in this case to date, would "not be countenanced." (*Id.*)

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breached its fiduciary duty of loyalty with respect to the Anadarko acquisition"); Opening Br. at 7 ("[Occidental's] decisions might not have involved actionable wrongdoing . . . .").

Having concluded that Plaintiffs failed to meet the credible basis standard, the court then analyzed Plaintiffs' claim that they did not need to satisfy the credible basis standard and that they should instead be able to inspect documents by showing that those documents are material to a proxy contest. (*Id.* at 15.) The court rejected this argument, explaining that allowing Plaintiffs to obtain documents "relate[d] to a dispute with management about substantive business decisions" through allegations about a proxy contest would unduly interfere with "board[] decision-making." (*Id.* at 20.)

Finally, the trial court assessed whether the documents Plaintiffs demanded were "necessary and essential" to their stated purposes. (*Id.* at 21.) The court assumed for this analysis that Plaintiffs had properly stated a purpose of assessing the board's decisions for mistakes and communicating regarding those mistakes to fellow stockholders. (*Id.*) The court found that the demanded documents were not necessary and essential for those ends, because even in the absence of the documents, Plaintiffs were able to determine that the transactions at issue were mistakes. (*Id.*) Indeed, the court explained that Plaintiffs' demand relates to a series of "widely publicized" transactions that were "front-page news in the business press," such that "[i]t is difficult to discern how a fishing expedition into the

boardroom is necessary and essential to advance Plaintiffs' purpose to raise concerns with their fellow shareholders about the wisdom of the Board's decisions to engage in these transactions." (*Id.*) As the court noted, "Plaintiffs have already made their assessment of the Board's decision-making and have found it wanting." (*Id.*) For these reasons, the court rejected Plaintiffs' demand and entered judgment for Occidental. (*Id.* at 22.)

ARGUMENT

I. The Court of Chancery Correctly Held that Plaintiffs Were Not Entitled to Books and Records Concerning Business Decisions Because They Failed To Establish a Credible Basis To Infer Mismanagement.

A. Question Presented

Did the trial court err in its assessment of whether Plaintiffs had demonstrated a credible basis from which to infer mismanagement, waste or wrongdoing? (Opinion at 11-20; B381-95.)

B. Scope of Review

This Court will review *de novo* the question of what legal standard applies to Plaintiffs' Section 220 demand. *Thomas & Betts Corp. v. Leviton Mfg. Co.*, 681 A.2d 1026, 1030 (Del. 1996). But the trial court's "determination that a credible basis does (or does not) exist to infer managerial wrongdoing is a mixed finding of fact and law that is entitled to considerable deference." *City of Westland Police & Fire Ret. Sys. v. Axcelis Techs., Inc.*, 1 A.3d 281, 287 (Del. 2010). In conducting this review, this Court will accept the trial court's factual conclusions if they are "sufficiently supported by the record and are the product of an orderly and logical deductive process." *Zirn v. VLI Corp.*, 681 A.2d 1050, 1055 (Del. 1996).

C. Merits of Argument

Plaintiffs frame the central question of this appeal as what "standard of proof" should apply to inspection demands to be used in a proxy contest. (Opening Br. at 25.) Because Plaintiffs cannot meet the existing "credible basis to infer wrongdoing" standard, they ask this Court to adopt one of two new standards for inspection demands in the context of proxy contests. But the trial court properly found that (1) Plaintiffs had failed to demonstrate a credible basis to infer mismanagement, which cannot be proven merely by establishing disagreement with a business judgment, and (2) Plaintiffs' alternative "materiality" standard was unworkable and unsupported "[w]here, as here, the documents sought by Plaintiffs relate to a dispute with management about substantive business decisions." (Opinion at 20.) This Court should affirm the trial court's decision.

i. The Court of Chancery Correctly Applied the Existing Credible Basis Standard.

Under well-settled law, when stockholders seek to inspect documents concerning managerial or board level decision-making, they must first establish a credible basis to infer that mismanagement, waste or wrongdoing occurred. *See Seinfeld v. Verizon Commc'ns, Inc.*, 909 A.2d 117, 118 (Del. 2006); *see also Wynnefield Partners Small Cap Value L.P. v. Niagara Corp.*, 2006 WL 1737862, at *8 (Del. Ch. June 19, 2006) ("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." (quoting *Deephaven Risk Arb Trading Ltd. v. UnitedGlobalCom, Inc.*, 2004 WL 1945546, at *5 (Del. Ch. Aug. 30, 2004))), *aff'd in relevant part*, 907 A.2d 146 (Del. 2006).

The trial court properly applied this test and determined that Plaintiffs had not established a credible basis to infer mismanagement. Consequently, Plaintiffs were not entitled to books and records concerning management's and the board's decision-making process. (Opinion at 13-14.) As the trial court found,

> Plaintiffs' allegations of mismanagement appear to be nothing more than disagreements with how Occidental's directors exercised their business judgment. They think the Anadarko purchase, Berkshire preferred stock sale and Total asset sale were bad deals. But disagreeing with a board's business judgment, without more, is not enough to provide a credible basis to infer mismanagement. Plaintiffs' disagreements with the Board's deal making prowess do not establish a credible basis to infer mismanagement or wrongdoing. (*Id.* at 14.)

Plaintiffs have not raised (and cannot raise) allegations or evidence to satisfy the existing credible basis standard on appeal. Plaintiffs do not provide any basis to believe the court below erred in the application of the credible basis standard. The court's finding with respect to the application

of the existing credible basis standard, which is entitled to "considerable deference," should be affirmed. *City of Westland Police & Fire Ret. Sys.*, 1 A.3d at 287.

ii. Plaintiffs' Novel Formulation of the Credible Basis Standard Is Unworkable and Undermines Existing Law.

All but conceding that they cannot meet the existing credible basis standard, Plaintiffs argue that a different, lower standard should apply because their ultimate goal is to mount a proxy fight. They propose a more lenient standard in which "mistakes and blunders" could constitute "mismanagement" under the credible basis standard, where the stockholder's stated purpose is to wage a proxy contest, even where the same showing would not constitute a credible basis to infer wrongdoing that might be redressed through other means. (Opening Br. at 4-5, 29-30, 33.) This interpretation has no support in existing case law and would undermine the policy goals animating this Court's Section 220 jurisprudence.

As the trial court explained, "[m]ere disagreement with a business decision is not enough" from which to infer mismanagement. (Opinion at 13); *see also Seinfeld*, 909 A.2d at 120 ("[A] disagreement with the business judgment of [a] board of directors . . . is not evidence of wrongdoing and [does] not satisfy [a stockholder's] burden under section 220."). Even the cases that Plaintiffs cite in support of their unprecedented

approach clearly demonstrate that "mismanagement" under the credible basis standard does not include purported "mistakes or blunders," but requires evidence of something more than disagreement with business decisions. (Opening Br. at 30-31); *see Skoglund v. Ormand Indus., Inc.*, 372 A.2d 204, 208, 211 (Del. Ch. 1976) (authorizing inspection based on evidence of self-dealing); *Skouras v. Admiralty Enterprises, Inc.*, 386 A.2d 674, 678-79 (Del. Ch. 1978) (authorizing inspection based on stockholders' evidence of acts that "if substantiated, would constitute self-dealing on the part of corporate fiduciaries"); *see also* Opinion at 14 & n.59 ("Plaintiffs' disagreements with the Board's deal making prowess do not establish a credible basis to infer mismanagement or wrongdoing. . . . This is especially so when a company, like Occidental, has a provision in its charter per 8 *Del. C.* § 102(b)(7) exculpating directors for duty of care violations." (citing *Se. Pa. Trans. Auth. v. AbbVie, Inc.*, 2015 WL 1753033, at *13 (Del. Ch. Apr. 15, 2015))).

This longstanding application of the credible basis standard—which requires something more than evidence of a claimed "mistake or blunder"—applies to inspections for the purpose of waging a proxy contest just as it applies to inspections for the purpose of considering or instituting derivative litigation, when those inspections seek to obtain documents about corporate

decision-making. Every stockholder demand for documents concerning managerial or board-level business judgments, no matter the ultimate intended use, raises the risk of unduly disrupting management's work at the expense of the interests of all stockholders, which is one of the concerns that the credible basis standard seeks to address. *See Seinfeld*, 909 A.2d at 121-22 ("At some point, the costs of generating more information fall short of the benefits of having more information. At that point, compelling production of information would be wealth-reducing, and so shareholders would not want it produced." (internal quotation marks omitted)). Allowing inspection of records relating to business judgments regardless of whether there is any basis to suspect mismanagement or wrongdoing, merely on a showing that a stockholder intends to run a proxy contest claiming that such business judgments were poor, fails to properly weigh an individual stockholder's interest in inspection against all stockholders' interest in the unimpeded functioning of the corporation.

Plaintiffs' proposal would also undermine the existing standard where the stated purpose is to consider and/or institute derivative litigation. A stockholder who cannot meet the existing credible basis standard could simply lower the bar by stating a desire to claim in a proxy contest that business decisions were unwise. This would enable stockholders to trawl

through corporate records based on nothing more than a disagreement with business judgment plus an allegation that the stockholders might engage in a proxy contest. In addition to being contradictory to existing law, that result would substantially and unduly impair management's work on behalf of stockholders by encouraging meritless fishing expeditions into corporate boardrooms.

Finally, Plaintiffs' proposed new standard in the context of proxy contests would require courts to assess the likelihood that directors made "mistakes." That is, Plaintiffs' proposed standard would require courts to evaluate the substantive wisdom of business decisions, which courts are not well-positioned to do. *See, e.g.*, *Wilkin v. Narachi*, 2018 WL 1100372, at *16 (Del. Ch. Feb. 28, 2018) (explaining that a court "will not substitute its own notions of what is or is not sound business judgment" for those of elected directors). Such assessments are precluded by the business judgment rule, which exists to prevent serial intrusions by the court into the boardroom based on mere differences of opinion. *See Brehm v. Eisner*, 746 A.2d 244, 264 (Del. 2000) ("Courts do not measure, weigh or quantify directors' judgments."). The law does not—and cannot—allow such intrusions in the boardroom without any shred of evidence of wrongdoing.

iii. The Court of Chancery Correctly Rejected Plaintiffs' Argument that a Stockholder May Inspect Business-Judgment Documents that Are Material to a Proxy Contest Without More.

Plaintiffs also offer an even more permissive alternative standard: stockholders should be able to inspect documents concerning any business decisions that are "material to a proxy contest." (Opening Br. at 33-34.) In other words, a stockholder could first decide on its own which issues it wanted to raise in a proxy contest and then cite that as a sufficient basis to inspect board or management documents about *any* business decision. This materiality standard also offers no workable limiting principle and should be rejected.

While it is true that engaging in a proxy contest may be a proper purpose for an inspection demand—which, in some circumstances, may be enough to allow inspection of documents that are "necessary and essential" to that purpose—a stockholder must still show a credible basis to infer mismanagement, waste or wrongdoing in order to inspect documents reflecting the decision-making process. This principle is illustrated in the two proxy contest cases cited by Plaintiffs.

In *Tactron, Inc. v. KDI Corp.*, a stockholder sought inspection of three kinds of documents—bylaws, board minutes regarding the process of amending the bylaws and legal opinions regarding stockholder voting

rights—to understand how to vote in new directors. No. CIV. A. No. 7884, 1985 WL 44694, at *1-3 (Del. Ch. Jan. 10, 1985). The court below correctly observed that the demand in *Tactron* for documents about proxy procedures was more like a demand for a list of stockholders (which need not meet the credible basis standard) than a demand for documents about substantive business judgments (which must). (Opinion at 17-18 ("[T]he court [in *Tactron*] was addressing a very narrow demand for purely logistical information.").) Without establishing a credible basis, the stockholder could obtain documents that were necessary and essential to understand the logistics of conducting the proxy contest, but could not obtain decision-making documents.

Similarly, in *High River Limited Partnership v. Forest Laboratories, Inc.*, a stockholder sought inspection of, among other documents, certain "corporate governance materials" for the purpose of using them in a proxy contest to consider whether the board had fulfilled promises it made during a prior proxy contest. C.A. No. 7663-ML, at 33 (Del. Ch. July 27, 2012) (TRANSCRIPT) (Exhibit B to Opening Br. at 33). The court ordered disclosure of a limited set of information, including documents necessary and essential to demonstrate whether the board kept its promise. *Id.* at 34. But it specifically rejected disclosure of documents regarding the substance

of any recommendations made to the board without satisfaction of the credible basis standard, noting that such disclosure would have a "relatively obvious chilling effect" on the board's deliberations. *Id.* at 34-35.

These cases demonstrate the longstanding principle that courts will not interfere with, or allow inspection of documents relating to, business decisions unless there is reason to suspect that wrongdoing has occurred. Plaintiffs' proposed materiality standard would undermine this principle by empowering a stockholder with no basis to infer that mismanagement, waste or wrongdoing occurred to inspect related documents by challenging those decisions in a proxy contest. The ultimate outcome would be that a stockholder could obtain documents about any business decision for any purpose (however self-interested), simply by asserting that it may seek to raise that issue in a proxy contest. Delaware law does not and cannot tolerate such indiscriminate disruption of management's work on behalf of all stockholders and intrusions into the boardroom without any shred of evidence suggesting wrongdoing—this is exactly the kind of fishing expedition that the law prohibits. *See Seinfeld*, 909 A.2d at 123 ("Stockholders have a right to at least a limited inquiry into books and records when they have established some credible basis to believe that there has been wrongdoing. . . . Yet it would invite mischief to open corporate

management to indiscriminate fishing expeditions." (quoting *Sec. First Corp. v. U.S. Die Casting & Dev. Co.*, 687 A.2d 563, 571 (Del. 1997))).

II. The Court of Chancery Properly Held that the Documents Demanded by Plaintiffs Were Not Necessary and Essential to Their Purported Purpose.

A. Question Presented

Did the trial court err in finding that the documents sought by Plaintiffs were not necessary and essential to their stated purpose? (Opinion at 22; B397-400.)

B. Scope and Standard of Review

"Absent any apparent error of law, this Court reviews for abuse of discretion the decision of the trial court regarding the scope of a stockholder's inspection of books and records." *Thomas & Betts Corp.*, 681 A.2d at 1034-35. Plaintiffs seek to avoid review under a deferential standard by arguing that the trial court did not first establish a "standard of review" for assessing Plaintiffs' purported purpose. (*See* Opening Br. at 38.) That is wrong. The trial court assumed that Plaintiffs had stated a proper purpose to pursue a proxy contest and then addressed the well-settled question of whether the requested documents are "necessary and essential" to fulfilling that purpose. The court's finding that they are not is entitled to deference.

C. Merits of Argument

According to Plaintiffs, their "primary purpose for seeking inspection is to communicate with other stockholders in connection with a proxy

contest."[4] (Opening Br. at 22.) The topics for which they seek documents—and the subjects of their proxy contest—are the Anadarko transaction and the three main issues that Plaintiffs have with the transaction: the Berkshire financing, the Total asset sale and the failure to effect a sale of Occidental rather than an acquisition of Anadarko. (*Id.* at 14-18.) Assuming that Plaintiffs' purported purpose of investigating these decisions in order to facilitate their proxy contest was a proper one, the trial court proceeded to the next step of the inquiry—considering whether the books and records sought were necessary and essential to Plaintiffs' stated purpose—and found

[4] Plaintiffs also attempt to reserve their right to bring individual or derivative claims in connection with the information received. (Opening Br. at 22-23.) But Plaintiffs themselves have admitted that "[g]iven that they bought their first Occidental shares on May 2, 2019, there obviously might be issues about them bringing suit concerning matters that happened and were announced before that time." (A1079.) These "issues" preclude them from bringing suit. *See Polygon Glob. Opportunities Master Fund v. W. Corp.*, 2006 WL 2947486, at *5 (Del. Ch. Oct. 12, 2006) ("Delaware has a public policy against the evil of purchasing stock in order to attack a transaction which occurred prior to the purchase of the stock." (internal quotation marks omitted)). Moreover, as the trial court recognized, Plaintiffs have no basis to bring suit. (*See* Opinion at 13 ("They have not alleged, much less proven, that the Occidental Board was conflicted, disloyal or in some way interested in the transactions at issue . . . [or] that the Occidental Board acted in bad faith.").) Although Plaintiffs appeared to change their position in a post-trial letter to the court, the court refused to accept "Plaintiffs' abrupt, unexplained change in position after the case ha[d] been submitted." (*Id.* at 13 n.56.)

that Plaintiffs were not entitled to the requested books and records. (Opinion at 22.) This finding was well supported by the record.

Citing numerous news articles describing the merger and related transactions, which was "front-page news in the business press" and "widely publicized," the trial court reasoned that "Occidental stockholders know the transactions well" and that "[i]t is difficult to discern how a fishing expedition into the boardroom is necessary and essential to advance Plaintiffs' purpose to raise concerns with their fellow shareholders about the wisdom of the Board's decisions to engage in these transactions."[5] (Opinion at 21.) Furthermore, the court relied on Plaintiffs' testimony at trial that they already had drawn their conclusions about the propriety of the transactions based on this widely publicized information:

> Indeed, Plaintiffs have already made their assessment of the Board's decision-making and have found it wanting. Likewise, if Plaintiffs think the Board should have considered in the past, or should consider in the future, a sale of the Company, they do not need records from the Company to make that case. (*Id.* at 21-22.)

[5] *See, e.g.*, A365-68; A370-72; A374-76; A389-91; A1022-24; B61-63; B336-39; B349-51.

Accordingly, the trial court found that Plaintiffs had not demonstrated that the documents sought were "necessary and essential to advance their proxy contest," which is the stated purpose for their demand. (*Id.* at 22.)

In critiquing the trial court's conclusion, Plaintiffs assert that the trial court failed to set a "standard of proof" for their demand, and that this failure "undermined" the court's finding that the demanded documents were necessary and essential to their stated purpose. (Opening Br. at 41.) This argument misunderstands the analysis. The scope of inspection under Section 220 is "limited to those books and records that are necessary and essential to accomplish the stated, proper purpose." *Saito v. McKesson HBOC, Inc.*, 806 A.2d 113, 116 (Del. 2002) (citing *Petition of B & F Towing & Salvage Co.*, 551 A.2d 45, 51 (Del. 1988)). As long as the stated purpose is proper, a plaintiff may obtain those documents that are "necessary and essential" to accomplish that purpose. *Id.* Even assuming Plaintiffs had passed the first part of the test, the trial court did not err in finding that they failed the second. (Opinion at 21-22.) Indeed, Plaintiffs themselves admit that "[i]t 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." (Opening Br. at 39.) Plaintiffs cannot assert on the one hand (as they do) that they are capable of pursuing their

proxy contest without the requested documents and argue on the other hand that those same documents are necessary.

Plaintiffs also take issue with the trial court's finding because it "misses the purpose of High River's demand for inspection." (Opening Br. at 41.) Plaintiffs claim that they *believe* management and the board made mistakes but they can only *prove* the mistake by looking at "inside communications." (*Id.* at 42.) But this point is belied by the fact that Plaintiffs already have concluded that management and the board made mistakes based on publicly available information and their own calculations, and shared those conclusions with shareholders. (Opinion at 21-22.) They seek documents now only to further show how "embarrassing" those mistakes are in light of information that may—or may not—have been presented to the decision-makers at the time. (Opening Br. at 42-43.) But that does not meet the standard.

At its core, Plaintiffs' argument is that they are able to run their proxy contest with information they already have, but they hope to better their chance of winning by searching through Occidental's documents first. Delaware law does not—and cannot—permit such blatant fishing expeditions any time a stockholder threatens to engage in a proxy contest.

CONCLUSION

For the foregoing reasons, Occidental respectfully requests that the Court affirm the trial court's judgment in Occidental's favor.

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Dated: January 13, 2020