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IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

APPELLANT'S CORRECTED OPENING BRIEF

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NATURE OF PROCEEDINGS

This appeal arises from a final judgment in a books and records inspection proceeding under 8 *Del. C.* § 220. Between February and April of 2019, NVIDIA Corporation ("NVIDIA") received nearly a dozen separate inspection demands (the "Initial Demands"). Ultimately, certain stockholders submitted a consolidated demand (the "Consolidated Demand"), listing fourteen document categories. NVIDIA produced thousands of pages of documents responsive to nine of those categories. But negotiations broke down when Plaintiffs made an entirely new demand for all documents that "formed the basis" of over a dozen statements made by NVIDIA's CEO and CFO over a twelve-month period. NVIDIA explained it would be impossible to identify specific documents that "formed the basis" of the statements, which were necessarily informed by years of accumulated knowledge. A782-87. Plaintiffs eventually filed their Verified Complaint ("Complaint") seeking to enforce "only" that single request for documents that "formed the basis" of the statements. A61 ¶90.

The Court of Chancery held a half-day trial with no witnesses on September 17, 2020 and issued its Post-Trial Bench Ruling ("Post-Trial Ruling") on February 10, 2021. Ex. A. In its Post-Trial Ruling, the Court of Chancery found that:

- Even absent consent by NVIDIA, Plaintiffs could prove a proper purpose solely with hearsay;

- Plaintiffs' repeated alteration of their demands did not improperly expand the scope of inspection; and
- Plaintiffs demonstrated a credible basis to infer possible wrongdoing.

In its Final Order, the Court ordered NVIDIA to produce two categories of documents: "(i) communications about the statements Fisher is alleged in [the federal Securities Class Action Complaint] to have made to Huang, if any, regardless of where they are found, be it in email, or in written notes taken by Fisher, Huang, or others present for conversations between them; [and] (ii) the Top 5 emails sent to or by Huang or Kress during the Relevant Period to the extent they relate to the Responsive Topics." Ex. B ¶2. Neither of these categories had been requested in Plaintiffs' Initial Demands, Consolidated Demand, or Complaint.

This appeal followed, and upon NVIDIA's motion, the Court of Chancery stayed its Final Order.

SUMMARY OF ARGUMENT

The Court of Chancery erred in three respects.

1. ***First***, the Court of Chancery failed to properly apply Section 220's form and manner requirements by permitting Plaintiffs to repeatedly reformulate their demands through trial, and by ordering NVIDIA to produce overly broad categories of documents that Plaintiffs did not request in their Initial Demands, Consolidated Demand, or Complaint.

2. Plaintiffs' Complaint asks "only" for the "documents that formed the basis of Huang's and Kress's public statements." A38 ¶17, A61 ¶90. On its face, this demand does not come close to meeting the "rifled precision" requirement under Section 220, and instead reads like a discovery request in plenary litigation. Setting that aside, given that the statements identified in the Complaint are vague and general statements of corporate optimism, the request is impossible to fulfill, because the opinions and optimism CEO Huang and CFO Kress expressed were necessarily based on everything that they knew at the time, rather than on some discrete and identifiable set of documents.

3. Perhaps for that reason, Plaintiffs abandoned this request and, at trial, requested a completely different set of document categories. Then, after trial, the Court of Chancery ended up ordering NVIDIA to produce two entirely different categories of documents. Notably, one of those categories does not actually exist.

Although the Court of Chancery ordered the production of documents concerning statements made by a senior NVIDIA executive to Huang, as alleged in a separate securities class action ("SCA") complaint, that complaint does not actually allege that any such statements were made. In other words, Plaintiffs' demands were so difficult to pin down that the Court of Chancery ordered NVIDIA to produce something that does not exist. Plaintiffs' moving-target demands violated Section 220's form and manner requirements, which require Plaintiffs to have their demands in order *before* litigation, and the fundamental requirement that a complaint must provide defendants with notice of the claims asserted.

4. ***Second***, the Court of Chancery erred by permitting Plaintiffs to proceed at trial on a paper record, without any deposition or trial testimony from Plaintiffs. As a result, the only evidence supporting Plaintiffs' proffered purpose is inadmissible, untested, unreliable hearsay. The Court of Chancery nevertheless considered and credited the hearsay because requiring admissible evidence "would result in inefficiencies"—namely, requiring stockholders to appear and testify about their purpose. But here, NVIDIA had good reason to question whether Plaintiffs' purpose was still current at the time of trial, nineteen months after their Initial Demands. By then, NVIDIA's stock price had more than doubled, and it was clear that the inventory build-up that gave rise to the Initial Demands was short-lived. By allowing Plaintiffs to proceed based solely on hearsay evidence of their purpose, the

Court of Chancery deprived NVIDIA of a fair opportunity to challenge Plaintiffs' purpose at trial.

5. ***Third***, the Court of Chancery erred by finding a credible basis to suspect an "insider trading" scheme based on a combination of (i) executive stock sales with no suspicious features, (ii) allegations in a single securities class action that was focused on a different theory of wrongdoing and challenged mostly different statements, and (iii) generally optimistic and largely forward-looking executive statements followed by a temporary business setback. While the credible basis standard is low, affirming the Court of Chancery's decision here would render it meaningless.

6. The insider stock sales were not suspicious in any way (based on size, timing, or for any other reason) and were facially inconsistent with an insider trading scheme. Yet the Court of Chancery inferred wrongdoing from the stock sales essentially because they occurred at all. But that is not the law—wrongdoing cannot be inferred simply because an insider sold stock.

7. The Court of Chancery inferred wrongdoing from allegations in the SCA. But it should not have. The SCA Complaint alleged a different theory of wrongdoing, claiming that NVIDIA understated how much of its Gaming segment revenue was comprised of sales to crypto miners. Plaintiffs here, in contrast, claim that NVIDIA "misrepresented to investors that the Company was able to manage the

cryptocurrency demand" even though it knew that demand was "not sustainable" and would disrupt "NVIDIA's sales channels." A35 ¶5, A43 ¶39. There is not a single fact alleged in the SCA Complaint (which has been dismissed twice, most recently with prejudice) that supports this theory here. The Court of Chancery erred in drawing an inference of wrongdoing from allegations about a different theory of wrongdoing.

8. Further widening the divide between the SCA and the action here, Plaintiffs have shied away from challenging the thirteen public statements challenged in the SCA. With a handful of exceptions, Plaintiffs argue different public statements were false. Many of those statements were forward-looking statements that ultimately did not come true. As a matter of law, wrongdoing cannot be inferred from such statements. The rest were so vague, general, and rife with opinion and corporate optimism that they could not credibly support an inference of wrongdoing. And because Plaintiffs offered no evidence that any of the statements were false, the Court of Chancery erred in drawing an inference of wrongdoing.

9. Even when viewed collectively, no wrongdoing can be inferred from this record—stacking nothing on nothing still amounts to nothing.

STATEMENT OF FACTS

A. NVIDIA's Business.

NVIDIA makes and sells (among other things) graphics processing units ("GPUs"). *See* A35 ¶3. These computer chips, which perform complex calculations rapidly, are designed and marketed for video gaming. NVIDIA markets its gaming GPUs under the brand "GeForce."

NVIDIA generally does not sell GeForce GPUs directly to end customers, but instead sells them through a complex, multi-level distribution channel (the "channel"). A429. It takes months for a product to move from the beginning of the channel (when NVIDIA sells into the channel) to the end (when an end user purchases it). A401, A571. At any given time, the channel will have some number of NVIDIA GPUs in inventory, referred to as "channel inventory." A570-71. While NVIDIA suggests a Manufacturer Suggested Retail Price ("MSRP") for graphics cards containing its GPUs, it does not control either channel or retail prices. A403, A413.

If sales at the end of the channel accelerate suddenly, before NVIDIA can increase the supply coming into it, supply for end users can get tight and prices can increase beyond what some are willing to pay. If, on the other hand, end-user demand slows down while NVIDIA continues to sell products into the channel, then channel inventory can increase to a point at which NVIDIA's channel customers

might halt their purchases of its GPUs. A436, A530. Managing the supply of products into the channel is complex, and NVIDIA has long warned investors that it might end up selling too much or too little product into the channel. *E.g.*, A436.

B. Cryptocurrency Mining Demand for GPUs.

GPUs also can be used for cryptocurrency "mining." In mid-2017, and then again in late 2017 and early 2018, the price of a cryptocurrency called "Ether" spiked, causing an increase in the demand for GPUs. *See* A317-29. In response to the first spike (roughly summer 2017), NVIDIA created a new GPU product (the "Crypto SKU") optimized for mining but without graphics capability, which made it useless for gaming. A389. NVIDIA's goal was to address this new market for GPUs, while protecting GeForce supply for gaming customers. *Id.*

Initially, the strategy appeared to succeed: In the first quarter after introducing the Crypto SKU, NVIDIA sold $150 million worth of that product, evidently addressing a large part of the market. *See* A367. During this period, NVIDIA's executives made clear that, although crypto miners were buying large amounts of the Crypto SKU, they were also buying GeForce GPUs. *See* A364, A367. They also expressed optimism that the Company could be flexible in responding to shifting market dynamics. A367.

In late 2017, the price of Ether spiked again—this time by orders of magnitude more than the prior spike—and the resulting demand for GPUs strained NVIDIA's

distribution channel, as channel inventory dropped to historic lows and prices increased above MSRP. A395. In this period, executives again expressed confidence in NVIDIA's ability to address the cryptocurrency-driven changes in the GPU market without losing focus on its core gaming market. A395, A401, A413-14. NVIDIA told investors it was working hard to increase supply in order to stabilize supply and pricing and to serve the "pent-up" demand from gamers who had been priced out of the market. A398.

This strategy, too, appeared to succeed: Even as crypto mining demand evaporated in the spring and summer of 2018, channel customers purchased record amounts of GeForce GPUs from NVIDIA. A545-46. By November 2018, however, it had become clear that, despite the increase of supply, prices did not come down—and pent-up gaming demand did not materialize—as quickly as NVIDIA expected, which caused a glut of inventory in the channel. A562, A568-70. On a November 2018 earnings call, NVIDIA announced that, to allow the inventory to sell through, NVIDIA would temporarily halt sales of certain GeForce products into the channel. A562, A568.

In the ensuing days, NVIDIA's stock price declined 28.5%, closing at $143 per share on November 19, 2018. A330-60. In the next quarter, NVIDIA saw further deterioration in its business, and ended up having to lower its quarterly guidance. A565. However, NVIDIA also announced that it expected channel inventory to

normalize in Q1 FY2020, in line with the one-to-two-quarter estimate NVIDIA had provided on the previous earnings call. A563, A579.

NVIDIA's stock subsequently recovered, and within a few quarters, the stock price was back up above $200. A330-60. Near the time of trial, NVIDIA's stock was worth about $535 per share. *Id.*

C. Following NVIDIA's Stock Drop, Litigation Ensues.

The temporary drop in NVIDIA's stock price led to a federal securities class action lawsuit. Filed in December 2020 and styled *In re NVIDIA Securities Litigation*, No. 4:18-cv-7669-HSG, the case was dismissed for failure to state a claim twice, first with leave to amend and then with prejudice, which dismissal is currently on appeal. *See* Trans. ID 66573243.

D. Plaintiffs Submit Inspection Demands, and NVIDIA Produces Substantial Documents.

Between February and April of 2019, NVIDIA received almost a dozen different books and records demands. Those demands collectively included a total of 66 separate requests. Five of the Initial Demands remain at issue in this litigation. A597-667. While there was some overlap, each Initial Demand requested different documents and asserted varying purposes. NVIDIA believed (and told Plaintiffs) that the Initial Demands were deficient. *See, e.g.*, A669-74. Nevertheless, between June 2019 and February 2020, the parties engaged in extensive negotiations, and Plaintiffs eventually consolidated their demands into fourteen categories. A675-78.

After further discussions, NVIDIA produced over 500,000 pages of documents responsive to nine of Plaintiffs' fourteen categories for the period January 1, 2017 to January 1, 2019, including:

- All board and committee meeting presentations and minutes that addressed:
    - NVIDIA's revenue, earnings and guidance;
    - GeForce GPU demand or sales;
    - Crypto SKU demand or sales;
    - Development and manufacture of the Crypto SKU; and
    - Actual and projected inventory of GeForce GPUs and Crypto SKUs at NVIDIA and in the sales channel;
- Insider trading and director independence policies;
- Internal controls and policies relating to financial reporting;
- Documents reflecting review or approval of stock sales by directors and the CEO and CFO; and
- 10b5-1 trading plans for the CEO and CFO.

A679-80.

While NVIDIA's production was ongoing, Plaintiffs asked for something they had never previously requested: "the documents that formed the basis of Huang's and Kress's public statements about the Company's ability to manage its GPU sales

considering the increased cryptocurrency demand." A685-86. NVIDIA explained that, not only was the request overbroad, but it was impossible to identify specific documents that formed the basis of the vague, generally optimistic statements Plaintiffs cited. A684, A690, A782-87. Plaintiffs did not respond with a proposal for an identifiable set of documents.

E. The Complaint and the Reformulated Requests.

On February 10, 2020, Plaintiffs filed their Complaint, which stressed that Plaintiffs were "only" seeking to enforce a single request for "documents that formed the basis of Huang's and Kress's public statements about the Company's ability to manage both its GPU inventory levels and sales channels considering increased demand in GPUs was a product of cryptocurrency demand not traditional gaming." A61 ¶90. Plaintiffs cited over a dozen statements over a twelve-month period, all of which generally touched on NVIDIA's ability to manage market dynamics arising from crypto mining demand, and only a few of which were also challenged in the SCA. A43-44 ¶¶39–41.

Each statement is (1) a forward-looking statement that Plaintiffs claim did not come true (*e.g.*, A44 ¶41 (bullet 3) ("[C]rypto usage of GPUs will be small but not 0 for some time."), *id.* (bullet 1) ("[the cryptocurrency boom] will not distract us from focusing on our core gaming market")); (2) vague corporate optimism or opinion (*e.g.*, A43 ¶39 ("because we have such large volumes, we have the ability

to rock and roll with this market as it goes"), A44 ¶41 (bullet 1) (NVIDIA is "nimble in [its] approach to the cryptocurrency market")); or (3) an objectively accurate statement of facts (*e.g.*, A44 ¶41 (bullet 2) ("we're the largest GPU computing company in the world"), A45 ¶41 (bullet 6) ("[T]he overall contribution of cryptocurrency to our business . . . was a higher percentage of revenue than the prior quarter.")). Although Plaintiffs generally asserted that these statements were false, they alleged no facts supporting that conclusion.

F. Plaintiffs' Mid-Litigation Second Reformulation of Their Requests.

In the draft Pre-Trial Order that Plaintiffs sent NVIDIA on August 20, 2020—six months after filing their Complaint, a month after the close of fact discovery, and four weeks before trial—they abandoned the "only" demand they sought to enforce in their Complaint, and purported to demand something entirely different—namely, all hard-copy and electronic documents (including email) that were sent to or from Huang, all members of the board and all officers or senior members of management relating to seven different categories: "(i) what cryptocurrency is; (ii) the impact of cryptocurrency on the GPU market; (iii) who the players in the GPU market were; (iv) the Company's strategy with respect to cryptocurrency; (v) the estimated size of the GPU business for the Company; (vi) the Company's sales of GPUs between August 2017 and November 2018; and (vii) the independence of NVIDIA's directors and committees of the Board." A791-92. None of those categories pertains

to the statements Plaintiffs identified in their Complaint, and Plaintiffs presented no evidence that any of these documents "formed the basis" for those statements. Five of these categories were not even included in Plaintiffs' Consolidated Demand.

G. Plaintiffs' Belated Offer to Discuss Stockholder Testimony.

This case was filed by six separate Plaintiffs (one of whom dropped out before trial). *See generally* A33-66. Understanding that not all six would testify at trial, NVIDIA opted not to depose them all, and instead asked Plaintiffs which one(s) would testify at trial. Plaintiffs indicated they may wish to proceed by affidavit at trial. A788. NVIDIA said it would consider that request but would need to see the affidavit(s) to, among other things, decide whether to depose the witness(es). *Id.* But by the deadline to identify trial witnesses, Plaintiffs failed to either identify any trial witnesses or provide any affidavits. *Id.* NVIDIA wrote to Plaintiffs' counsel but received no response. *Id.* A week later, in a Draft Pre-Trial Order, Plaintiffs stated for the first time that they would not produce any testimony at trial, and the Company objected. A801. Plaintiffs responded by offering—one week before NVIDIA's Pre-Trial Brief was due—to "discuss" whether NVIDIA would like to "take the deposition of a particular plaintiff." *Id.*

H. Trial, Post-Trial Ruling, and Final Order.

Following a half-day bench trial on September 17, 2020, the Court of Chancery issued its Post-Trial Ruling on February 10, 2021, finding that:

(1) Plaintiffs may rest solely on their demand letters and interrogatory responses to show the purpose for their demand, Ex. A at 3, 22; (2) Plaintiffs established a credible basis to suspect an "insider trading scheme," *id.* at 28, 34; and (3) Plaintiffs did not impermissibly modify their inspection demands before or during litigation, *id.* at 38-43.[1]

On August 9, 2021, the Court issued its Final Order requiring NVIDIA to produce two categories of documents: "(i) communications about the statements Fisher is alleged in [the SCA Complaint] to have made to Huang, if any, regardless of where they are found, be it in email, or in written notes taken by Fisher, Huang, or others present for conversations between them; [and] (ii) the Top 5 emails sent to or by Huang or Kress during the Relevant Period to the extent they relate to the Responsive Topics."[2] Ex. B ¶2. Notably, however, these two categories were not

[1] On May 24, 2021, the Court of Chancery granted NVIDIA's request to supplement the record with the decision by the District Court dismissing with prejudice the Amended Complaint in the SCA. A926-57. The Court of Chancery found that the dismissal of the SCA did not alter its Post-Trial Ruling. A947.

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

included in Plaintiffs' pre-litigation demands, nor were they part of the relief requested in Plaintiffs' Complaint, nor were they specifically requested in the Pre-Trial Order, Plaintiffs' Pre- or Post-Trial Brief, or at trial. Not surprisingly, then, there was no evidence introduced at trial about either category of documents. Indeed, the first category actually purports to describe a category of documents that does not exist. There are no allegations in the SCA Complaint about any conversations between Huang and Fisher. *See generally* A692-778. As to the second category, there is no evidence about the breadth of what it encompasses, such as the number of Top 5 emails it includes or how far down into the organization it reaches.

On August 17, 2021, the Court of Chancery granted NVIDIA's motion to stay its Final Order pending this appeal. Trans. ID 66855887.

largest market." Ex. B ¶1(f).

ARGUMENT

I. THE COURT OF CHANCERY ERRED BY ORDERING NVIDIA TO PRODUCE DOCUMENTS THAT PLAINTIFFS DID NOT REQUEST BEFORE LITIGATION.

A. Question Presented.

Whether the Court of Chancery erred by ordering NVIDIA to produce documents that Plaintiffs did not request in their pre-litigation demands or in their Complaint. This issue was raised and considered below. *See* Ex. A at 37, 43-44.

B. Standard of Review.

This Court reviews de novo questions about which documents are included in a Section 220 demand, *KT4 Partners LLC v. Palantir Techs. Inc.*, 203 A.3d 738, 749 (Del. 2019), as well as whether a complaint "give[s] the defendant fair notice of a claim," *VLIW Tech., LLC v. Hewlett-Packard Co.*, 840 A.2d 606, 611 (Del. 2003).

C. Merits Argument.

This Court has stressed that Section 220's form and manner requirements must be applied with "strict adherence" because doing so "'furthers the interest of insuring prompt and limited litigation' of books and records actions." *Martinez v. GPB Cap. Holdings, LLC*, 2020 WL 3054001, at *9 (Del. Ch. June 9, 2020) (citation omitted). In particular, although Section 220 sets a relatively low bar for obtaining documents, stockholders are limited to seeking documents that are "necessary and essential" to their stated purpose, and they are required to identify the requested

documents, with "rifled precision," before litigation begins. *Bucks Cty. Emps. Ret. Fund v. CBS Corp.*, 2019 WL 6311106, at *8 (Del. Ch. Nov. 25, 2019).

If affirmed, the Court of Chancery's judgment in this case would badly upset this balance. Instead of requiring Plaintiffs to identify the records sought with "rifled precision" before litigation, the Court of Chancery here allowed Plaintiffs to begin with a demand that did not come close to meeting the "rifled precision" requirement, and then to repeatedly change their demands along the way—including by requesting wholly new categories of documents in the Pre-Trial Order and then again in their Post-Trial Brief. As a result, the Court of Chancery ordered NVIDIA to produce two categories of documents that Plaintiffs did not request pre-litigation, one of which does not even exist. If allowed to stand, the Court of Chancery's judgment below would effectively obliterate Section 220's form and manner requirements and would deprive corporate defendants of their right to know what demands are at issue before deciding whether to proceed to litigation. This approach invites abuse, and it should be reversed for two reasons.

1. Plaintiffs' Request for Documents That "Formed the Basis" of Huang's and Kress's Public Statements Is Impermissibly Broad.

Under Section 220, "stockholders are entitled to inspect only those documents that are 'necessary, essential and sufficient' to their stated purpose." *High River Ltd. P'ship v. Occidental Petroleum Corp.*, 2019 WL 6040285, at *7 (Del. Ch. Nov. 14,

2019). To that end, they "bear the burden of . . . specific[ally] and discrete[ly] identif[ying], with rifled precision, . . . the documents sought." *Brehm v. Eisner*, 746 A.2d 244, 266 (Del. 2000). "Section 220 is also not a way to circumvent discovery proceedings, and is certainly not meant to be a forum for . . . wide-ranging document requests." *Highland Select Equity Fund, L.P. v. Motient Corp.*, 906 A.2d 156, 165 (Del. Ch. 2006), *aff'd*, 922 A.2d 415 (Del. 2007) (TABLE). "[I]t is not the court's responsibility to pick through the debris of a Section 220 demand . . . to find the few documents that might be justified as necessary and essential to the plaintiff's demand." *Id.* at 168.

Here, Plaintiffs did not seek any identifiable category of documents, much less describe them with "rifled precision," but instead requested all documents that "formed the basis" of more than a dozen statements over a twelve-month period. That request is plainly overbroad and fails the form and manner requirements of Section 220. The number of documents that might have "form[ed] the basis" of Huang's and Kress's statements is virtually unlimited. The statements themselves are broad, referencing NVIDIA's overall "strategy," "channel inventory," "multiple segments," and "crypto in the context of [the] company overall." A43-44 ¶¶39, 41. Most of the statements are so vague and general that they could not possibly be suspicious in any meaningful sense, and in any event, the stated opinions were necessarily informed by Huang's and Kress's accumulated knowledge of NVIDIA's

business built up over years of experience, (*see, e.g.*, A44 ¶39 (the Company's "strategy is to stay very, very close to the market," and the Company "understand[s] its dynamics really well"), rather than on some specific and identifiable set of documents. Courts routinely reject similarly broad requests. *See, e.g.*, *Fuchs Family Tr. v. Parker Drilling Co.*, 2015 WL 1036106, at *4 n.36 (Del. Ch. Mar. 4, 2015) (rejecting "catch all" inspection demand because it did not "request any category of documents" and "lack[ed] the requisite 'rifled precision'"); *Paul v. China MediaExpress Holdings, Inc.*, 2012 WL 28818, at *8 (Del. Ch. Jan. 5, 2012) (rejecting inspection demand that "reads much more like a sweeping discovery request than a narrowly focused § 220 demand"). The problem is compounded here because the statements were not necessarily based upon any documents at all, and could have been based on information from any number of different sources. Plaintiffs presuppose that identifiable documents exist that would satisfy this overbroad request, without providing any evidence that they do. *E.g.*, A38-39 ¶¶16-17, A54-55 ¶¶68-69.

2. Ordering Production of Documents That Plaintiffs Did Not Request in Their Complaint or Their Pre-Litigation Demands Violates Section 220(b)'s Form and Manner Requirements.

Demands must be "in proper form *before* litigation is initiated." *Cent. Laborers Pension Fund v. News Corp.*, 45 A.3d 139, 146 (Del. 2012). That means stockholders may not alter their requests "by pleading during the course of the

litigation." *Durham v. Grapetree, LLC*, 2019 WL 413589, at *3 (Del. Ch. Jan. 31, 2019); *see also Fuchs*, 2015 WL 1036106, at *4 (holding that stockholders may not "expand [their] inspection[s]" after filing a complaint). This requirement ensures defendants are "informed of exactly what the stockholder is demanding to inspect so [they] can make the call, before litigation, whether to allow inspection or litigate the demand." *Paraflon Invs., Ltd. v. Linkable Networks, Inc.*, 2020 WL 1655947, at *6 (Del. Ch. Apr. 3, 2020).

Here, the Court of Chancery did not hold Plaintiffs to this standard, and instead allowed them to completely reformulate their requests throughout the course of litigation. Plaintiffs' inconsistent requests ranged from an exceedingly broad set of categories in the Initial Demands (A597-668) and the Consolidated Demand (A675-78), to a new (equally overbroad but different) request in the Complaint "only" for documents that "formed the basis" of Huang's and Kress's statements (*e.g.*, A61 ¶90). Plaintiffs then abandoned that one request in favor of a wholly new set of also broad (but detailed) requests in a draft Pre-Trial Order shared with NVIDIA on August 20, 2020 (A791-92) and submitted to the Court in the final Pre-Trial Order (A77-78). Plaintiffs' Pre-Trial and Post-Trial Briefs, conversely, were so vague as to the specific relief requested that they provide little to no guidance as to exactly what documents Plaintiffs wanted to inspect. A88-124, A857-903. These

ever-evolving requests made it effectively impossible for NVIDIA to pin down, at any point, the precise contours of Plaintiffs' demands.

It was similarly difficult for the Court of Chancery. In its Post-Trial Ruling rejecting NVIDIA's objections to Plaintiffs' ever-evolving requests, the Court of Chancery stated that "the complaint made broad requests"—such as "documents concerning what cryptocurrency is" and "the Company's strategy with respect to cryptocurrency"—but that Plaintiffs properly narrowed those requests through litigation. Ex. A at 44. But that finding is incorrect: the "broad" requests that the Court of Chancery cited in its Post-Trial Ruling came, not from the Complaint, but rather from the Pre-Trial Order. A67-87. And Plaintiffs did not "narrow" their requests at all, but instead completely reformulated them multiple times during litigation.

The Court of Chancery then subsequently ordered NVIDIA to produce two new categories—the Fisher communications alleged in the SCA and the Top 5 emails—documents that Plaintiffs did not request prior to litigation, and which in one instance do not exist. Plaintiffs mentioned communications between Fisher and the CEO in their Post-Trial brief, but in the context of meetings with vice presidents, not referring to communications alleged in the SCA (of which there are none). A877-78, A881-82. Additionally, Plaintiffs first requested the Top 5 emails in a May 21, 2020 settlement demand (A779-81), but then did not reiterate that request

in either the Pre-Trial Order or their Pre-Trial or Post-Trial Briefs. Even if they had properly requested them, such a request is for broad discovery not permitted in a Section 220 action. Plaintiffs offered no evidence (and NVIDIA had no chance to respond) regarding how many emails potentially fall into that category (whether it is hundreds or tens of thousands), which employees sent the emails (whether senior management or low-level), or what facts tie those emails to the purported insider trading scheme to render them necessary and essential.

The complete lack of evidence in the record about these document categories highlights one reason why rifled precision is required ***before*** litigation, not in the middle of it, and certainly not at the end. In part because these categories were not requested in Plaintiffs' Initial Demand, Consolidated Demand, Complaint, or even Pre- or Post-Trial Briefs, there is no evidentiary basis for finding that these documents are "necessary, essential and sufficient" for Plaintiffs' stated purpose. The judgment should be reversed for failure to adhere to Section 220's form and manner requirements.

The repeated reformulations of Plaintiffs' demands also violate fundamental principles of fairness. Defendants are entitled to notice of the claims asserted, and thus under Chancery Rule 8, Plaintiffs are bound to the claim they set forth in their Complaint. *Fuchs*, 2015 WL 1036106, at *4 n.35; *see also Beck & Panico Builders, Inc. v. Straitman*, 2009 WL 5177160, at *7 (Del. Super. Nov. 23, 2009). Here,

despite having stressed the limited nature of the claim in their Complaint (A38 ¶17, A61 ¶90 (stressing that Plaintiffs sought "only" to enforce one request)), Plaintiffs abandoned that request and proceeded to request a series of completely different sets of documents through the Pre-Trial Order, Pre-Trial Brief, and Post-Trial Brief. The process was manifestly unfair to NVIDIA, and the Court of Chancery also erred by ordering production of documents that were not fairly encompassed by the claims asserted in the Complaint.

II. THE COURT OF CHANCERY ERRED BY ALLOWING PLAINTIFFS TO ESTABLISH THEIR PURPOSE WITH INADMISSIBLE HEARSAY.

A. Question Presented.

Whether the Court of Chancery's conclusion that Plaintiffs may rest solely on their demand letters and interrogatory responses—which are indisputably hearsay—to establish their purpose, was correct as a matter of law where NVIDIA did not agree to proceed at trial on a paper record. This issue was raised and considered below. A220-28.

B. Standard of Review.

"The question of a 'proper purpose' under Section 220(b) . . . is an issue of law and equity which this Court reviews de novo." *Thomas & Betts Corp. v. Leviton Mfg. Co.*, 681 A.2d 1026, 1030 (Del. 1996) (citation omitted). Whether Plaintiffs can rely on hearsay evidence as opposed to live testimony at trial turns on the interpretation of Section 220, which is a legal question for de novo review. *Rehoboth Bay Homeowners' Ass'n v. Hometown Rehoboth Bay, LLC*, 252 A.3d 434, 441 (Del. 2021); *see also* Ex. A at 21 (identifying the issue as what does the statutory language "'shall establish that . . . the inspection such stockholder seeks is for a proper purpose' require of a Section 220 plaintiff" (alteration in original)).

C. Merits Argument.

At trial, Plaintiffs did not present live testimony by the stockholders, relying instead on their demand letters and interrogatory responses. Ex. A at 15-16, 18. The

Court of Chancery acknowledged, correctly, that those documents were "technically hearsay." *Id.* at 4, 17. But it nevertheless allowed Plaintiffs to rely on that hearsay because their demands met Section 220's form and manner requirements and because requiring live testimony would "result in inefficiencies." Ex. A at 22-23. For the following reasons, the Court of Chancery's decision on this "novel issue" was erroneous. *See* Ex. A at 3, 22.

1. Plaintiffs Must Prove a Proper Purpose with Admissible Evidence.

Under the Delaware Uniform Rules of Evidence, which "apply to *all actions and proceedings in all the courts* of this State," D.R.E. 1101(a) (emphasis added), "[h]earsay is not admissible except as provided by law." D.R.E. 802; *see, e.g.*, *KT4 Partners, LLC v. Palantir Techs., Inc.*, C.A. No. 2017-0177-JRS, at 66-68 (Del. Ch. Sept. 5, 2017) (TRANSCRIPT) (applying Rules of Evidence in a Section 220 proceeding). No authority creates an exception to this fundamental rule. Just the opposite—under Section 220(c)(3), "stockholder[s] shall first *establish* that . . . [t]he inspection . . . is for a proper purpose." And this Court has held that Section 220 plaintiffs must establish a proper purpose "by a preponderance of the evidence." *Thomas & Betts*, 681 A.2d at 1028. Considering inadmissible hearsay to prove a proper purpose is at odds with these requirements.[3]

[3] Hearsay may be permitted for other purposes, such as showing a credible basis to suspect wrongdoing. *See, e.g.*, *In re Plains All Am. Pipeline, L.P.*, 2017 WL

There is no dispute that Plaintiffs' demands and interrogatory responses are hearsay—they are out-of-court statements offered for the truth of the matter asserted. D.R.E. 801(c)(1)-(2). The Court of Chancery agreed on that point, *see* Ex. A at 4, 17, but held that requiring live testimony or depositions was "unnecessary" because "the form and manner requirements . . . are *the* limiting principle designed to ensure that demands for inspection are credible and to protect the corporation from undue burden," *id.* at 23 (emphasis added). But the existence of one limiting principle does not preclude the existence of others, and the Court of Chancery cited no authority suggesting that the form and manner requirements are the exclusive limitation on Section 220 demands. Indeed, the form and manner requirements apply in an entirely different context. They govern the form of pre-litigation demands, not the admissibility of trial evidence. *Cent. Laborers*, 45 A.3d at 144 (explaining that Section 220's "statutory language makes it clear that a stockholder must comply with the 'form and manner' of making the demand *before* the corporation determines whether the inspection request is for a proper purpose"); *see also Mattes v. Checkers*

6016570, at *2 (Del. Ch. Aug. 8, 2017) ("Hearsay statements may be considered, provided they are sufficiently reliable." (citation omitted)). NVIDIA has found no case, and neither Plaintiffs nor the Court of Chancery ever cited one, where a plaintiff was allowed to show a proper purpose by hearsay without agreement from the opposing party. *See, e.g.*, *Wal-Mart Stores, Inc. v. Ind. Elec. Workers Pension Tr. Fund IBEW*, 95 A.3d 1264, 1269 (Del. 2014) ("The parties agreed to conduct a Section 220 trial on the basis of a paper record.").

Drive-In Rests., Inc., 2000 WL 1800126, at *1 (Del. Ch. Nov. 15, 2000) (noting that form and manner requirements protect "the right of the corporation to receive and consider a demand in proper form *before* litigation is initiated").

The Court of Chancery also concluded that requiring live testimony "would result in inefficiencies that are inconsistent with the statutory designation of Section 220 actions as summary proceedings." Ex. A at 22-23. However, the summary nature of Section 220 proceedings does not justify setting aside the rules of evidence. The difference between a summary proceeding and an ordinary one is the scope of the relief sought and the time it takes to resolve the dispute. *KT4 Partners*, 203 A.3d at 755 ("[T]he point of a summary § 220 action is to give the stockholder access to a discrete set of books and records that are necessary for its purpose—a set that is much less extensive than would likely be produced in discovery under the standards of Rule 26 in a plenary suit."); *Brehm*, 746 A.2d at 267 ("From a timing perspective, however, we note that such a proceeding is a summary one that should be managed expeditiously."). There is no reason why requiring live testimony would result in any meaningful delay or inefficiency. The trial was conducted by videoconference, and as the Court of Chancery acknowledged, Plaintiffs' testimony likely would not have required much time. *See* Ex. A at 23. Avoiding such minimal additional effort did not warrant sweeping aside the rule against hearsay.

2. Because Plaintiffs Did Not Sit for a Deposition or Testify at Trial, Their Purported Purpose Was Not Tested at Any Point.

The Court of Chancery recognized that NVIDIA's decision not to take the deposition of a half dozen Plaintiffs, but instead to cross-examine Plaintiffs at trial, was "reasonable and an approach that many are advised to follow." Ex. A at 25. Moreover, Plaintiffs cited no case (and NVIDIA is aware of none) where a books and records plaintiff was allowed to proceed at trial without such testimony (absent an agreement by the parties). As such, NVIDIA had no reason to believe—before trial—that it would be precluded from cross-examining Plaintiffs at trial. By deciding, after the fact, that Plaintiffs could prove their purpose with hearsay evidence (*id.* at 22-24), the Court of Chancery effectively precluded NVIDIA from testing Plaintiffs' stated purpose through cross-examination.

3. Plaintiffs' Hearsay Evidence Is Not Reliable.

The Court of Chancery acknowledged that, "[i]f a defendant demonstrates reason to doubt the sincerity of the plaintiff's demand, then a plaintiff might need to appear at trial to allay the concerns raised by the defendant." *Id.* at 24. The Court of Chancery nevertheless ruled that Plaintiffs here did not need to "reaffirm their purposes through the date of trial" because there was no "intervening event." Post-Trial Ruling at 26. But this ruling simply ignored NVIDIA's arguments about the continued viability of these demands. A224-28.

More specifically, by the time the Court of Chancery held trial, Plaintiffs' Demands and interrogatory responses were no longer reliable evidence of Plaintiffs' purpose. It would make no sense to permit an inspection by a plaintiff who had a proper purpose at the time of its demand but had abandoned that purpose prior to trial. *See Amalgamated Bank v. NetApp, Inc.*, 2012 WL 379908, at *7 (Del. Ch. Feb. 6, 2012) (evaluating stockholder's purpose in light of events in plenary litigation: "The Plaintiff's proper purpose for seeking the Defendant's books and records, formerly established, is now moot."). Here, trial occurred about 19 months after Plaintiffs identified their purpose in their Initial Demands. A597-668 (Demands executed between February and April 2019). During that time, NVIDIA's stock price more than doubled, and the channel inventory issue had proven to be short-lived. A330-61. One could reasonably infer that, during the 19 months between Plaintiffs' Initial Demands and trial, NVIDIA's skyrocketing stock price convinced Plaintiffs that their Demands were no longer necessary. Indeed, the very fact that Plaintiffs for no apparent reason failed to appear by videoconference at trial or submit a current affidavit suggests that Plaintiffs' purported purpose is no longer valid and creates some doubt about whether this is really the stockholders' purpose or, instead, the lawyers'. Thus, the Court of Chancery erred by allowing Plaintiffs to establish their purpose with inadmissible hearsay.

III. THE COURT OF CHANCERY ERRED BY FINDING THAT PLAINTIFFS PROVED A CREDIBLE BASIS TO INFER WRONGDOING.

A. Question Presented.

Whether the Court of Chancery erred by finding that Plaintiffs established a credible basis to suspect an insider trading scheme. This issue was raised and considered below. Ex. A at 17-18, 26-34.

B. Standard of Review.

Whether Plaintiffs established a credible basis from which to infer wrongdoing "is a mixed finding of fact and law." *City of Westland Police & Fire Ret. Sys. v. Axcelis Techs., Inc.*, 1 A.3d 281, 287 (Del. 2010). Legal conclusions of mixed questions are reviewed de novo. *Chavous v. State*, 953 A.2d 282, 286 n.15 (Del. 2008).

C. Merits Argument.

Establishing a credible basis "is not a formality." *Haque v. Tesla Motors, Inc.*, 2017 WL 448594, at *4 (Del. Ch. Feb. 2, 2017). Rather, the Court "must put the stockholder plaintiff to his proof," which means "by a preponderance of evidence." *Hoeller v. Tempur Sealy Int'l, Inc.*, 2019 WL 551318, at *1, *7 (Del. Ch. Feb. 12, 2019). "To meet this burden, the stockholder must present a credible basis from which the court can infer that the alleged wrongdoing occurred." *Id.* at *7. The "mere suspicion of wrongdoing" is not enough. *La. Mun. Police Emps.' Ret. Sys. v. Lennar Corp.*, 2012 WL 4760881, at *3 (Del. Ch. Oct. 5, 2012) (denying

inspection based on "mere suspicion of wrongdoing" because it "would invite mischief and expose companies to indiscriminate fishing expeditions.").

The Court of Chancery found Plaintiffs had established a credible basis to suspect "an insider-trading scheme" based on three categories of evidence: "[allegedly] false or misleading public statements, the securities litigation, and insider stock sales." Ex. A at 28. The Court of Chancery held that, while none of those categories standing alone was "sufficient to give rise to an inference of possible wrongdoing," these three categories sufficed when "[v]iewed collectively." *Id.* at 28-29, 32, 34. For the reasons below, Plaintiffs' evidence, whether viewed individually or collectively, does not show a credible basis to infer that any "insider trading scheme" occurred here.

1. Stock Sales.

Wrongdoing can only be inferred from stock sales with "enough questionable features." *Laborers' Dist. Council Constr. Indus. Pension Fund v. Bensoussan*, 2016 WL 3407708, at *5 (Del. Ch. June 14, 2016), *aff'd*, 155 A.3d 1283 (Del. 2017) (TABLE). Here, the Court of Chancery inferred wrongdoing from stock sales despite the lack of any questionable features at all. In fact, in Huang's case, the Court of Chancery inferred wrongdoing precisely because his only stock sale appeared innocuous. Ex. A at 33. For the reasons below, no wrongdoing can be inferred from the stock sales in the record.

a. Huang's Stock Sale Was Not Suspicious.

Huang sold a tiny fraction of his personal holdings—less than one half of one percent. Ex. A at 33. Yet the Court of Chancery inferred wrongdoing from his sale because "[i]t is . . . possible that [he] sold a relatively small amount of stock to avoid getting caught and tipping off the market as to the fraud that prompted him to sell his stock." *Id.* (internal quotation marks omitted). In other words, the Court of Chancery found that Huang's single stock sale was suspicious because it appeared unsuspicious. But that analysis would suggest that any stock sale—no matter the size, no matter the timing, and without any questionable circumstances at all—can be deemed suspicious. That is not the law. Courts have repeatedly held that sales as small as Huang's (or larger) are too insignificant to be suspicious.[4]

Nothing else about Huang's sale is remotely suspicious. He made the sale just weeks after the very first of the challenged statements, and it is the only stock sale he is alleged to have made during the fourteen months of the alleged "insider trading scheme." He also sold at a price that was barely above the price before the

[4] *See, e.g.*, *In re Clovis Oncology, Inc. Derivative Litig.*, 2019 WL 4850188, at *16 (Del. Ch. Oct. 1, 2019); *In re Oracle Corp., Derivative Litig.*, 867 A.2d 904, 954 (Del. Ch. 2004), *aff'd*, 872 A.2d 960 (Del. 2005) (TABLE); *Metzler Inv. GMBH v. Corinthian Colls., Inc*., 540 F.3d 1049, 1067 (9th Cir. 2008). At trial, Plaintiffs argued that these cases are inapposite because they arose in plenary litigation. A153-54. But the principle remains applicable here—that selling a very small portion of total holdings is not suspicious.

challenged statements began, and far below the peak price during the period. A48-49 ¶50, A330-60. None of these facts can be reconciled with the notion that Huang was engaged in an "insider trading scheme."

b. Kress's Stock Sales Were Not Suspicious.

The Court of Chancery inferred wrongdoing from Kress's stock sales even though they were made pursuant to 10b-5 plans. Ex. A at 33. The whole point of such plans, of course, is to prevent insider trading by taking trading decisions out of an executive's hands. *See, e.g.*, *Busch v. Richardson*, 2018 WL 5970776, at *3 n.20 (Del. Ch. Nov. 14, 2018). Here, Kress adopted the most conservative plans imaginable. Before, during, and after the relevant period, Kress adopted a series of plans with the same basic structure: Each plan provided that, whenever a set of RSU grants vested (quarterly), 50% of the newly vested shares (after withholding for taxes) would be sold. *See* A269-316. The plans were completely time-based, and not tied to any stock price movements. *Id.* Moreover, Kress continued to sell pursuant to her plan even after the stock price fell. A237-38, A308-316, A330-60, A828.

The Court of Chancery nevertheless inferred wrongdoing from her stock sales because "Kress could have made false and misleading statements to prop up NVIDIA's stock price, knowing that there was an upcoming sale, pursuant to her

10b-5 plan." Ex. A at 33. But by that logic, every executive with a 10b-5 plan always has a motive to commit fraud.

Even worse, taken together with the Court's analysis of Huang's single trade, the Court of Chancery's ruling would effectively mean that any insider stock sale in any amount could support a credible basis to suspect wrongdoing—no matter when the sale was made, or at what price, or whether it was executed pursuant to an otherwise innocuous, pre-set plan. If the credible-basis standard is that low, it might as well not exist. This flawed analysis, by itself, is enough to reverse the Court of Chancery's judgment, which was (by its own terms) based on all three categories viewed together.

2. The Securities Class Action.

The Court of Chancery acknowledged that "the mere existence of another lawsuit does not, in itself, give rise to an inference of potential wrongdoing." *Id.* at 31. "Th[e] 'credible basis' standard has been interpreted as a low one, but simply saying that the company has already been subject to lawsuits, with nothing else, does not cut it." *Graulich v. Dell Inc.*, 2011 WL 1843813, at *5 n.49 (Del. Ch. May 16, 2011). Wrongdoing can only be inferred from other pending lawsuits where the allegations in those lawsuits have probative value to the wrongdoing alleged here. *See Hoeller*, 2019 WL 551318, at *12 (refusing to infer wrongdoing from other lawsuits arising out of the same events because their theories (breach of contract and

misuse of intellectual property) were not probative of the wrongdoing alleged in the Section 220 case (breach of fiduciary duty)). But here, the allegations in the SCA do not provide a credible basis to suspect wrongdoing.

Acknowledging that the District Court had dismissed the SCA, the Court of Chancery found that it could still "connect the dots" between the allegations in the SCA Complaint and the "insider trading scheme" alleged by Plaintiffs here. Ex. A at 34. But the SCA has no allegations about insider trading. Although plaintiffs routinely rely on stock trading allegations to show scienter in federal securities cases, the plaintiffs in the SCA did not claim that either Huang or Kress engaged in insider trading, and in fact, did not allege any facts about executive stock sales at all. *See generally* A692-778.

Moreover, the allegations in the SCA Complaint are focused entirely on a different theory, and therefore, provide no basis from which to infer the wrongdoing that Plaintiffs allege here. The plaintiffs in the SCA claimed NVIDIA misrepresented the amount of its Gaming segment revenue that was driven by demand from crypto miners rather than gamers. *E.g.,* A700-702, A752-53, A772. To that end, they purported to cite several confidential witnesses saying, in effect, that cryptocurrency miners were buying large amounts of GeForce GPUs. *E.g.,* A722-24. But there is not a single fact alleged in the SCA Complaint to support Plaintiffs' core theory here. Plaintiffs' theory is that NVIDIA's executives reassured

investors that NVIDIA would be able to manage supply and channel inventory, despite volatility from crypto mining demand, but that NVIDIA ended up selling too much product into the channel too quickly, causing a glut of channel inventory. *Compare* A43 ¶38 ("Insiders also repeatedly misrepresented to investors that the Company was able to manage the cryptocurrency demand and downplayed the adverse impact it had on NVIDIA's business."), *with* A714 ¶62 (alleging three categories of misrepresentations: (1) revenue from sales of crypto products was insignificant, (2) Gaming segment revenue was driven by sales to gamers and not miners, and (3) crypto-related revenue was contained in a non-Gaming segment).

For example, Plaintiffs here allege that Huang and Kress said they believed there was "pent-up" gaming demand and expressed optimism that increasing supply would bring channel prices back down. A398. But the SCA Complaint does not allege any facts inconsistent with this stated belief about "pent-up" gaming demand, or opinions about how quickly that demand would materialize. In fact, there are no allegations linking the drivers of NVIDIA's Gaming segment revenue to its ability to manage crypto demand and sales channels. *See generally* A692-778. And not one confidential witness suggests that in the spring or summer of 2018 NVIDIA suspected there would an inventory buildup.[5] *Compare* A43 ¶39 ("Huang

[5] In finding that the allegations in the SCA supported the alleged insider trading scheme, the Court of Chancery pointed to the Complaint (A764 ¶219) stating that "the plaintiffs in the Securities Action alleged that Huang and Kress were aware of

misrepresented that, because of its size, NVIDIA could absorb the enormous cryptocurrency demand for its GPUs."), *with* A764 ¶219 (alleging CEO and CFO had access to "sales and technical usage data" regarding how many gaming GPUs were being bought by miners). Thus, when fairly read, the allegations in the SCA Complaint cannot support an inference that insiders engaged in a trading scheme while misleading investors about the Company's ability to handle cryptocurrency demand.

And as the District Court recognized, none of the information attributed to the confidential witnesses was inconsistent with anything Huang and Kress said. SCA A918-20, A922-23. Huang and Kress acknowledged that miners were buying both GeForce and the Crypto SKU and that crypto mining was having an impact on the Gaming business. Indeed, by February 2018, following the second spike in Ether prices, they told investors that the increased demand had depleted channel inventory and driven up prices, preventing gamers from buying GeForce chips. They also told investors that NVIDIA planned to increase its sales into the channel to address the problem. Plaintiffs here cite no evidence at all suggesting that those statements were

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the discrepancy in demand between Crypto GPUs and Gaming GPUs because they had access to data." Ex. A at 31. That is not what the SCA alleges and, even if it did, having access to data about demand discrepancies does not support an inference of an insider trading scheme.

false when made, or that Huang or Kress foresaw the inventory build-up that eventually caused NVIDIA's stock drop. *E.g.*, A35-37 ¶¶5-13, A59-60 ¶¶82-88.

Simply put, the Court of Chancery erred by relying on the SCA Complaint to find a credible basis here because the SCA Complaint alleges no facts suggesting (i) that the statements Plaintiffs challenge here were false or misleading, (ii) that the CEO and CFO engaged in an insider trading scheme, or (iii) that there was any wrongdoing at all.

3. Alleged Misstatements.

The Court of Chancery found that Huang's and Kress's public statements could not, on their own, "serve as conclusive evidence of possible wrongdoing," but when "coupled with the other evidence, [the statements met] the very low bar." Ex. A at 30. As discussed above, the other evidence—the stock sales and SCA—do not support an inference of wrongdoing. Accordingly, the alleged misstatements are insufficient on their own and the Court of Chancery's ruling must be reversed.

Even if the statements were to be evaluated, many of them are forward-looking, others are too immaterial for anyone to have relied on them, and others are objectively accurate. A43-46 ¶¶39-41.

a. Wrongdoing Cannot Be Inferred from Results That Diverge from Predictions.

"[A]s a matter of law," a "divergence between forward-looking statements and subsequent results" cannot "satisfy at trial the minimum evidentiary burden

imposed upon a plaintiff in a § 220 action." *Shamrock Activist Value Fund, L.P. v. iPass Inc.*, 2006 WL 3824882, at *2 (Del. Ch. Dec. 15, 2006). "Delaware law requires more[.]" *Haque*, 2017 WL 448594, at *5 (internal quotation marks omitted).

Plaintiffs here did not come up with more. Their theory is that NVIDIA's executives reassured investors the Company would be able to manage channel inventory despite the impact from crypto, but NVIDIA ended up selling too much product into the channel, resulting in a glut of channel inventory. *See* A61 ¶92 ("Huang and Kress repeatedly downplayed the impact that cryptocurrency demand had on the Company, maintaining that the Company was able to meet the demand and that the demand would not have a negative impact on the Company's sales or inventory channel. *As later became clear*, NVIDIA was unable to properly handle the demand." (emphasis added)). This is exactly the type of hindsight argument that Delaware courts have repeatedly rejected as a basis to suspect wrongdoing. *See Shamrock*, 2006 WL 3824882, at *2; *Hoeller*, 2019 WL 551318, at *13 ("That Thompson did not prove to be an accurate forecaster does not mean that his communications were false or misleading when made.")

The Court of Chancery acknowledged this principle, but then cited *Barnes v. Sprouts Farmers Market, Inc.*, 2018 WL 3471351 (Del. Ch. July 18, 2018) and held that NVIDIA's "optimistic statements" plus the rest of Plaintiffs' "evidence" was

enough to establish a credible basis here. Ex. A at 29-30. But *Barnes* does not apply here, because (among other things), *Barnes* did not involve forward-looking statements or opinions about the future. As such, nothing in *Barnes* affects the well-established rule that divergence of predictions and results does not support a credible basis to suspect wrongdoing.

b. The Enumerated Statements Are Not Evidence of Wrongdoing.

Huang's and Kress's statements also do not support a credible basis because they consist almost entirely of vague corporate optimism or puffery. *See* A43-46 ¶¶39-41. Courts have long held that no reasonable investor could rely on such statements. *Lazard Debt Recovery GP, LLC v. Weinstock*, 864 A.2d 955, 971 (Del. Ch. 2004); *see In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1428 n.14 (3d Cir. 1997) ("Certain vague and general statements of optimism have been held not actionable as a matter of law because they constitute no more than 'puffery' and are understood by reasonable investors as such."). Just as no reasonable investor would rely on this type of "puffery," it is absurd to suggest that corporate executives engaged in an "insider trading scheme" would try to inflate the price of the company's stock with statements such as NVIDIA has "the ability to rock and roll," is "nimble in [its] approach to cryptocurrency," will not be "distract[ed] [] from focusing on [its] core gaming market" and is a "master[] at managing [its] channel." A43 ¶39, A44 ¶41.

Simply put, this entire category of statements is so bland that no wrongdoing can reasonably be inferred from the words themselves.[6] And as discussed above, because there is no other evidence of wrongdoing, the statements Plaintiffs rely on cannot form a credible basis from which the Court of Chancery could have properly inferred wrongdoing.

[6] To the extent some of these statements assert any facts at all, those facts are indisputably true and create no inference of wrongdoing. *See, e.g.*, A44 ¶44 ("[W]e're the largest GPU computing company in the world. And our overall GPU business is really sizeable."

CONCLUSION

For the foregoing reasons, the Post-Trial Ruling of the Court of Chancery should be reversed.

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