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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, Appellees.	)	No. 259, 2021 Court Below: Court of Chancery of the State of Delaware C.A. No. 2020-0075-KSJM

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

Page

TABLE OF CITATIONS

Page(s)

CASES

RULES

INTRODUCTION

This Court should reverse the Court of Chancery's decision. At all turns, Plaintiffs' Answering Brief ("AB") either ignores or misstates NVIDIA's Opening Brief ("OB") arguments. Plaintiffs' refusal to meaningfully engage with NVIDIA's arguments is a tacit admission that their own positions cannot withstand scrutiny.

First, Plaintiffs do not even try to show that the demand in the Complaint—for documents that "formed the basis" of a dozen statements by NVIDIA's CEO and CFO in 2017 and 2018 (the "formed-the-basis" demand)—meets the "rifled precision" requirement under Section 220, nor do they try to explain how NVIDIA could possibly fulfill that demand. Plaintiffs strain to argue that the documents the Court of Chancery ordered NVIDIA to produce are within the scope of their pre-litigation demands and/or the demand in their Complaint, but that effort fails. Plaintiffs began this lawsuit with an indefensibly defective demand, and far from narrowing it, the Court of Chancery ended up ordering NVIDIA to produce two completely unrelated categories of documents.

Second, Plaintiffs cite no legal authority and offer no persuasive argument supporting the Court of Chancery's decision permitting them to prove their purpose with only hearsay evidence. Plaintiffs fail to show that their hearsay evidence was "reliable," and their claim that NVIDIA made a "strategic decision" not to depose Plaintiffs before trial is demonstrably false. In fact, Plaintiffs hid the ball until it was

too late for NVIDIA to depose them. By allowing Plaintiffs to rely solely on their demands and interrogatory responses, the Court of Chancery let Plaintiffs get away with this gambit and deprived NVIDIA of the ability to cross-examine Plaintiffs about their true purposes.

Third, Plaintiffs fail to show the evidence at trial was sufficient to carry their burden of proving a credible basis to infer the existence of an insider trading scheme. Plaintiffs argue, outlandishly, that they need not articulate any particular theory of wrongdoing. But no case law supports that position, which is completely illogical and violates Section 220's prohibition against fishing expeditions. Plaintiffs' theory below, and the theory on which the Court of Chancery's ruling was based, was that NVIDIA executives carried out an insider trading scheme to enrich themselves while knowingly making false statements about the Company's ability to manage GPU channel inventory. But the evidence presented simply does not give rise to even a credible basis to suspect that this theory is possibly true.

In sum, none of Plaintiffs' arguments adequately address the issues NVIDIA has identified with the Court of Chancery's Post-Trial Ruling and Final Order. They should be reversed.

ARGUMENT

I. THE COURT OF CHANCERY ERRED BY PERMITTING PLAINTIFFS TO PROCEED WITH AN IMPROPER DEMAND AND BY ORDERING INSPECTION OF DOCUMENTS NOT REQUESTED BEFORE TRIAL.

A. The Complaint's "Formed-the-Basis" Demand Is Impermissibly Broad.

NVIDIA's Opening Brief showed that the sole demand in Plaintiffs' Complaint violates the "rifled precision" requirement under Section 220 because it does not adequately describe the documents sought. OB at 19-20; *see also Paul v. China MediaExpress Holdings, Inc.*, 2012 WL 28818, at *6 (Del. Ch. Jan. 5, 2012) (noting demand must be circumscribed with precision). In response, Plaintiffs have made no effort to show otherwise, nor do they cite any cases enforcing such a vague and indefinite inspection demand. Plaintiffs' failure to meet the form and manner requirements was itself a reason to deny Plaintiffs' request, and the Court of Chancery's failure to do so was error. *Cent. Laborers Pension Fund v. News Corp*., 45 A.3d 139, 144 (Del. 2012).

Plaintiffs nevertheless argue that their demand is justified by evidence of "wide-ranging mismanagement." AB at 21-22. But the trial record does not contain evidence of "wide-ranging mismanagement."[1] *Cf. Lebanon Cty. Emps.' Ret. Fund*

[1] Plaintiffs say they have shown evidence of wide-ranging mismanagement, and then cross-cite to another section of their brief. AB at 22. But that section does not cite any evidence of wide-ranging mismanagement. *See* AB at 39-49.

v. AmerisourceBergen Corp., 2020 WL 132752, at *8 (Del. Ch. Jan. 13, 2020) (finding evidence of wide-ranging mismanagement related to distribution of prescription opioids), *aff'd*, 243 A.3d 417 (Del. 2020). What it shows is that the CEO and CFO offered opinions and general optimism about future events that failed to materialize, they sold stock in a manner that was not suspicious, and the Company was subject to a (now dismissed) lawsuit based on a completely different theory of wrongdoing. OB at 32-42. Setting aside whether it shows a "credible basis" to suspect wrongdoing, this is hardly evidence of "wide-ranging mismanagement." Indeed, the record at trial showed the inventory build-up Plaintiffs are complaining about was short-lived, and very soon afterwards, NVIDIA's stock price not only recovered, but it soared. A330-60.

More importantly, Plaintiffs cite no authority for the proposition that the scope of alleged "mismanagement" excuses them from stating their demand with rifled precision. *See, e.g.*, *Freund v. Lucent Techs., Inc.*, 2003 WL 139766, at *6 (Del. Ch. Jan. 9, 2003) (denying production of certain document categories, despite evidence of wide-ranging mismanagement, because those categories were "unlimited by time or particularized subject matter"); *Sec. First Corp. v. U.S. Die Casting & Dev. Co.*, 687 A.2d 563, 570 (Del. 1997). At most, the breadth of the alleged wrongdoing may be relevant to deciding the scope of documents to be produced, but that presupposes that the stockholder has met the rifled precision requirement. *E.g.*, *Woods v. Sahara*

Enters., Inc., 238 A.3d 879, 896-902 (Del. Ch. 2020) (limiting production scope to Formal Board Materials based on breadth of trial evidence); *Gross v. Biogen Inc.*, 2021 WL 1399282, at *13 (Del. Ch. Apr. 14, 2021) (noting "[a] more limited purpose entails a more limited scope of inspection"). Plaintiffs do not even argue that they did so.

Instead, Plaintiffs argue their demand is not overbroad because the Complaint identified "only" twelve statements and sought documents for a "limited" period. AB at 22-23. But the problem is not the number of statements. The problem is the type of statements and the vagueness of the demand. These problems would apply as much to a single statement as they do to twelve. Additionally, the demand is not actually limited in time. Although Plaintiffs' Consolidated Demands sought documents from a specific period, the "formed-the-basis" demand in the Complaint has no temporal limitation. *Compare* A51 ¶60 *with* A38-39 ¶17, A61 ¶90. Because the statements were necessarily informed by knowledge about varied aspects of NVIDIA's business accrued over many years, *see, e.g.*, A44 ¶39, the potentially responsive documents could be decades old.

NVIDIA's Opening Brief also pointed out that Plaintiffs' "formed-the-basis" demand is impossible to fulfill. OB at 19-20. This is because, among other things, the challenged statements generally did not assert any particular facts, but instead expressed optimism about NVIDIA's business. *Id.* Thus, the request is akin to

asking for all the documents that made an executive optimistic about their company's business. There is no way for NVIDIA to identify a discrete set of documents upon which those statements were based, if they were even based on documents at all. *Id.* This argument, too, goes completely unrebutted in Plaintiffs' Answering Brief, as Plaintiffs make no effort to explain how NVIDIA could possibly identify all documents that "formed the basis" of a series of vaguely optimistic statements about NVIDIA's business.

B. The Court of Chancery Ordered Production of Documents Plaintiffs Did Not Request Before Trial.

Plaintiffs argue that the Court of Chancery properly ordered production of the communications about statements Fisher is alleged to have made to Huang in the SCA Complaint (the "Fisher Communications") and the Top 5 Emails because (1) they fall within the scope of requests made before filing; and (2) they are subsets of the "formed-the-basis" demand in the Complaint. AB at 26. But in so doing, Plaintiffs have conceded that they did not specifically request either category of documents before filing their Complaint or in the Complaint itself. And there is no evidence in the record that those categories constitute a subset of documents covered by any prior requests or documents forming the basis of the challenged statements.

Initially, Plaintiffs spend a great deal of space arguing that they made their "formed-the-basis" demand before they filed their Complaint. AB at 27. But that is a red herring. NVIDIA challenges Plaintiffs' "formed-the-basis" demand because it

does not satisfy the rifled precision requirement and is impossible to fulfill. Separately, NVIDIA challenges the Final Order because it requires production of two categories of documents that Plaintiffs never requested before trial. The question of whether Plaintiffs made their "formed-the-basis" demand before they filed their Complaint is not relevant to either argument.[2]

Plaintiffs also claim the Fisher Communications, and seemingly also the Top 5 Emails, are encompassed by their "formed-the-basis" demand. AB at 28-30. But that argument fails. There was no evidence or argument at trial suggesting that these two categories of documents were among those that "formed the basis" of the challenged statements. As noted in NVIDIA's Opening Brief, the Court of Chancery's finding that Plaintiffs had "narrowed" their demand was based on a clear factual error. OB at 22. Plaintiffs do not even try to defend it.

Plaintiffs strain to argue that because they alleged that Fisher had a reporting relationship to the CEO and CFO, and because he once gave a presentation to the

[2] Plaintiffs claim the documents sought in the Complaint were "materially identical" to what one stockholder requested in its Initial Demand. AB at 27. That is irrelevant, as discussed above. Moreover, the Parties never engaged in negotiations over any Initial Demands and only negotiated Plaintiffs' Consolidated Demand. A675-81. The Consolidated Demand did not include the "formed-the-basis" request. A675-78. Four months after they served their Consolidated Demand, Plaintiffs sent a letter asking for documents that formed the basis of public statements. A685-86. That was the first time Plaintiffs raised the "formed-the-basis" demand during negotiations.

Board about cryptocurrency, Fisher must have had communications with Huang, and those communications would "fall inside" their "formed-the-basis" demand. AB at 29-30. But there was no evidence or argument at trial to support this string of assumptions. Moreover, the Court of Chancery did not reference any of these allegations in its ruling (Ex. A at 40, 42-43), and did not order NVIDIA to produce communications referenced in Plaintiffs' Section 220 Complaint. It ordered NVIDIA to produce communications allegedly referenced in the SCA Complaint. Ex. B. Plaintiffs indisputably never requested those from NVIDIA pre-litigation or in their Complaint.[3] *See* A692-778. At bottom, Plaintiffs' argument is just a post hoc rationalization that finds no support in the record.

Plaintiffs next argue that the Fisher Communications and Top 5 Emails fall within requests articulated in their Initial Demands and pre-litigation letters, but they are wrong. Plaintiffs say the Initial Demands requested "Board Materials" (AB at 26-27), but neither the Fisher Communications nor Top 5 Emails are "Board Materials." Plaintiffs argue that Top 5 Emails are covered by a pre-litigation letter requesting "flash reports." AB at 28. But there is no evidence that "flash reports"

[3] Even more, the Court of Chancery ordered production of a null set of documents because there are no communications between Fisher and Huang alleged in the SCA Complaint. *See* A692-778. NVIDIA pointed this out to Plaintiffs prior to entry of the Final Order but Plaintiffs indicated they were satisfied with the language. AR32-37.

and Top 5 Emails have anything to do with one another, and there was no evidence or argument at trial suggesting that Top 5 Emails should be produced pursuant to Plaintiffs' prior request for "flash reports." Moreover, the Court of Chancery did not reference "flash reports" in its ruling and did not order NVIDIA to produce Top 5 emails on the basis that Plaintiffs had requested "flash reports." Ex. A at 42-43. It ordered NVIDIA to produce Top 5 Emails based on allegations about them in the SCA Complaint. *Id.* In fact, it is unclear what "flash reports" are—Plaintiffs never provided a coherent definition, as NVIDIA requested.[4] A687-91. In any event, through negotiations, Plaintiffs limited their demand to the "formed the basis" documents, and then in the Complaint only sought those documents, not "Board Materials" or "flash reports." *See generally* A33-66. This line of argument is completely irrelevant to the Court of Chancery's ruling.

Plaintiffs' argument, however, highlights how the Post-Trial Order badly upsets the balance struck by Section 220 and this Court's prior decisions interpreting the statute. If affirmed, the decision would encourage stockholders to do exactly

[4] Plaintiffs also point to post-Complaint filings to argue that the Top 5 Emails were encompassed in requests made there. AB at 28 n.10. Even if that were true, Plaintiffs' requests came far too late. Demands must be in order before litigation, which they were not. *Cent. Laborers*, 45 A.3d at 146. And demands may not be altered during litigation. *Durham v. Grapetree, LLC*, 2019 WL 413589, at *3 (Del. Ch. Jan. 31, 2019).

what Plaintiffs did here—start with the broadest possible request, hoping the court will order defendants to produce something that arguably falls within it. *See Highland Select Equity Fund, L.P. v. Motient Corp.*, 906 A.2d 156, 168 (Del. Ch. 2006) (finding court need not "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"), *aff'd*, 922 A.2d 415 (Del. 2007) (TABLE). But that approach cannot be reconciled with (among others) *Bucks County Employees Retirement Fund v. CBS Corp.*, 2019 WL 6311106, at *8 (Del. Ch. Nov. 25, 2019) and *Central Laborers*, 45 A.3d at 146.

Finally, Plaintiffs ask the Court to review the Court of Chancery's decision regarding the scope of relief for abuse of discretion. AB at 20. But that misstates the issue. The questions here—whether Plaintiffs' Complaint asked for the documents the Court of Chancery ordered produced, and whether NVIDIA had notice of the claims against it—are legal issues, reviewed de novo. *See* OB at 17; *KT4 Partners LLC v. Palantir Techs. Inc.*, 203 A.3d 738, 749 (Del. 2019).

II. THE COURT OF CHANCERY ERRED BY FINDING A PROPER PURPOSE BASED SOLELY ON HEARSAY EVIDENCE.

A. This Is a Legal Question Reviewed De Novo.

Claiming that the issue before the Court is whether the Court of Chancery properly admitted hearsay evidence, Plaintiffs argue that this issue should be reviewed for abuse of discretion. AB at 31. But that is not the issue NVIDIA presented. OB at 25. Instead, the question is whether Section 220 permits a stockholder to prove their purpose at trial solely with hearsay evidence. *Id.* As the Court of Chancery recognized, that legal question turns on an interpretation of Section 220 (Ex. A at 21), which is reviewed de novo. *City of Wilmington v. Nationwide Ins. Co.*, 154 A.3d 1124, 1127 (Del. 2017).

B. Plaintiffs Cannot Prove Their Purpose Solely with Hearsay.

Plaintiffs argue that a "legion of cases" hold that hearsay evidence may be used to prove a stockholder's purpose. AB at 33. Those cases say no such thing—they hold that hearsay evidence may be used (among other things) to demonstrate a credible basis to suspect wrongdoing.[5] No case has held that Section 220 plaintiffs

[5] *See, e.g., In re Plains All Am. Pipeline, L.P.*, 2017 WL 6016570, at *4 (Del. Ch. Aug. 8, 2017) ("In establishing a *credible basis* . . . '[h]earsay statements may be considered, provided they are sufficiently reliable.'" (emphasis added)); *Se. Pa. Transp. Auth. v. Facebook, Inc.*, 2019 WL 5579488, at *1 (Del. Ch. Oct. 29, 2019) (considering hearsay on issue of credible basis, and where, "[b]y stipulation of the parties, the matter was tried on a paper record").

can prove their own purpose with solely hearsay evidence, which is why the Court of Chancery called this a "novel issue." Ex. A at 3-4.

Plaintiffs further argue there is no authority prohibiting them from relying solely on hearsay evidence at trial. AB at 33-34, 38. But that gets the burden precisely wrong. This Court has stressed that Section 220 plaintiffs bear the burden of proving their right to relief at trial. *Kosinski v. GGP Inc.*, 214 A.3d 944, 952 (Del. Ch. 2019) (noting stockholder has burden "to demonstrate a proper purpose by a preponderance of the evidence" (citation omitted)). Moreover, the hearsay rule prohibits using out-of-court statements to prove the truth of the matter asserted. D.R.E. 802, 1101(a). With that backdrop, it was Plaintiffs' burden to cite some legal basis for the Court to deviate from these principles, but they have cited none. If anything, for the reasons cited below, this case well illustrates why the Court of Chancery should not have allowed Plaintiffs to prove their purpose solely with hearsay.

C. The Court of Chancery's Order, Together with Plaintiffs' Gamesmanship, Deprived NVIDIA of its Right to Cross-Examine Plaintiffs About Their Purpose.

Plaintiffs argue that it was NVIDIA's "strategic decision[]" not to depose any Plaintiffs. AB at 38-39. That is false. NVIDIA said it would depose whomever Plaintiffs identified as trial witness(es), and never consented to trial solely on the papers, thereby preserving its right to cross-examine witnesses at trial. A788. As

the Court of Chancery recognized, that was a reasonable strategy. Ex. A at 25. NVIDIA had no reason to expect that Plaintiffs could proceed at trial solely based on hearsay without calling any witness.

Plaintiffs' suggestion that NVIDIA could have deposed Plaintiffs under the "five-day period" in the Scheduling Order is false. AB at 38. The Scheduling Order provided that, ***for any trial witnesses that were identified*** on August 18, 2020 who had not yet been deposed, the parties could depose them between August 31, 2020 and September 4, 2020. AR3. Plaintiffs never identified any trial witnesses—by August 18th or any date. A801-02. The five-day period under the Scheduling Order has no application here.

In sum, NVIDIA made clear its intention to depose (or cross-examine at trial) any stockholder put forward by Plaintiffs to establish their purpose. Plaintiffs' conduct—first declining to say which stockholder would testify at trial, then claiming (falsely) that they would proceed by affidavit—effectively precluded NVIDIA from cross-examining Plaintiffs about the purposes for their demands. Instead, the Court of Chancery improperly allowed Plaintiffs to establish their purpose based solely on the pre-litigation demands and their interrogatory answers, which were hearsay. OB at 14.

D. Plaintiffs' Hearsay Evidence Is Not Reliable.

Plaintiffs argue that their admittedly hearsay evidence was presumptively reliable because it was notarized. AB at 35-36. That is absurd. The hearsay rule exists because our adversary system relies upon cross-examination as a key tool for discovering the truth. No law in Delaware suggests that parties can simply dispense with the hearsay rule by submitting notarized, written testimony.

In any event, in addition to challenging the authenticity of Plaintiffs' stated purposes (whether they are theirs or counsels'), NVIDIA challenged whether, as of trial, Plaintiffs continued to hold the purpose they stated nineteen months earlier, before it became clear that the channel inventory issue was short-lived and before NVIDIA's stock price had doubled. A330-60. There is no evidence at all showing that Plaintiffs maintained their proper purpose through trial. Indeed, the fact that none of them appeared at trial, or even submitted a contemporaneous affidavit, as Plaintiffs proposed, suggests that some or all of them had lost interest in the matter. NVIDIA had a right to explore this issue through cross-examination at trial, and the Court of Chancery erred in allowing Plaintiffs to establish their purpose with untested, unreliable, and stale hearsay.

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

A. Plaintiffs Must Articulate a Coherent Theory of Wrongdoing.

Plaintiffs argue—remarkably—that a Section 220 plaintiff has no obligation to articulate what wrongdoing the stockholder seeks to investigate. AB at 42. Plaintiffs cite no case so holding. Instead, Plaintiffs cite cases holding that a stockholder need not prove that wrongdoing is "actually occurring" or that they have evidence of an "actionable" claim (AB at 41-43, 47-48), and argue that it "follows" they need not prove the "specific nature" of the wrongdoing they seek to investigate. *Id.* at 42. But that conclusion does not "follow" at all. In fact, Plaintiffs' cases say the opposite. For example, in *Thomas & Betts Corp. v. Leviton Manufacturing Co.*, 681 A.2d 1026 (Del. 1996), the court denied inspection holding that, although the stockholder did not need to prove wrongdoing was actually occurring, he was obligated to "com[e] forward with *specific and credible allegations* sufficient to warrant a suspicion of waste and mismanagement." *Id.* at 1031 (emphasis added).

Even in those of Plaintiffs' cases where inspection was granted, the stockholders submitted credible evidence of specifically articulated wrongdoing. *E.g.*, *Lavin v. West Corp.*, 2017 WL 6728702, at *11 (Del. Ch. Dec. 29, 2017) (evidence provided credible basis to suspect management "may have caused the Board to steer the Merger process in a way that benefited their own interests at the

expense of the other shareholders"); *In re Facebook, Inc. Section 220 Litig.*, 2019 WL 2320842, at *13 (Del. Ch. May 30, 2019) (finding credible basis to infer "Board and Facebook senior executives failed to oversee Facebook's compliance with the Consent Decree and its broader efforts to protect the private data of its users"). Delaware case law could not be clearer that "[a] mere statement of a purpose to investigate possible general mismanagement, without more, will not entitle a shareholder to broad §220 inspection relief." *Seinfeld v. Verizon Commc'ns, Inc.*, 909 A.2d 117, 122-23 (Del. 2006) (citations omitted). Plaintiffs should not be permitted to sidestep this elementary requirement.

Indeed, Plaintiffs' position is counter to longstanding Delaware policy. Section 220 inspections are *not* meant to be "fishing expeditions" where stockholders can obtain discovery into any and all aspects of the corporation's business affairs. *E.g.*, *id.* (demand to investigate possible wrongdoing where no "'credible basis,' is a license for 'fishing expeditions' and thus adverse to the interests of the corporation"). Letting Plaintiffs investigate "potential wrongdoing" that they cannot clearly articulate would run counter to that policy and would functionally eliminate the credible basis standard.

At bottom, Plaintiffs' position makes no sense: If a stockholder does not articulate what wrongdoing he or she seeks to investigate, how could the Court of Chancery possibly evaluate whether there is a credible basis to suspect that such

wrongdoing existed? How would a corporate defendant, such as NVIDIA, know what claim it is defending at trial? Plaintiffs' continually shifting demands, and repeated obfuscation of what they seek to investigate, show precisely what is wrong with the approach Plaintiffs advocate here.

B. Plaintiffs Failed to Establish a Credible Basis to Infer an Insider Trading Scheme.

In their Answering Brief, Plaintiffs are at pains to argue that they are not seeking to investigate potential insider trading by NVIDIA's executives. AB at 41, 47. In all likelihood, this is because they know the evidence does not support their insider trading theory, and without it, the "credible basis" case they put on at trial falls apart. But as discussed elsewhere (*see supra,* Section III.A.), Plaintiffs do not get to change their "credible basis" theory on appeal. Throughout the litigation below, Plaintiffs' theory was that insiders sold stock during a period of alleged misstatements and omissions that artificially inflated NVIDIA's stock price. *E.g.*, A97, A888. More importantly, the Court of Chancery's Final Order was expressly premised on the notion that Plaintiffs had established a credible basis to infer that there was an "insider trading scheme" at NVIDIA. *E.g.*, Ex. A at 28, 32, 34. For the reasons discussed below, however, that conclusion was in error and should be reversed.

1. The Insider Stock Sales

Plaintiffs fail to show how evidence of NVIDIA executives' stock sales supports a finding of a credible basis to infer that those executives carried out an insider trading scheme.

With respect to Huang's single stock sale, the case law Plaintiffs cite is inapposite. *See* AB at 44 (citing *In re Am. Int'l Grp., Inc. (AIG)*, 965 A.2d 763, 801 (Del. Ch. 2009), *aff'd sub nom. Teachers' Ret. Sys. of La. v. PricewaterhouseCoopers LLP*, 11 A.3d 228 (Del. 2011)). In *AIG*, for example, the plaintiffs alleged specific facts supporting an inference that management was aware of an ongoing fraud when they sold stock. *AIG*, 965 A.2d at 800-01. In light of those allegations, the small size of the sales was not enough to overcome that inference. *Id.* at 801.

Here, however, Plaintiffs have failed to present any evidence that Huang was aware of any wrongdoing at the time of the sale that would have driven him to keep his trading "to a limit" in order to avoid "tipping off the market." *Id.* Indeed, the evidence shows the opposite. The CEO made one sale during the period just weeks after the first challenged statement and at a price barely above the price before the challenged statement, far below the peak price during the period. A48-49 ¶50, A330-60. As such, there is nothing in the record that is even remotely suggestive of insider trading by Huang.

With respect to Kress, Plaintiffs do not try to argue that the stock sales themselves are suspicious. Instead, Plaintiffs now argue that "absent any proof of a public statement or other indication that the Company's Board examined the trades, or Huang or Kress's conduct, it is proper for Plaintiffs to examine the timing of these trades and whether the Company's Board may have mismanaged the situation." AB at 45 (citing *In re Lululemon Athletica Inc. 220 Litig.*, 2015 WL 1957196, at *7 (Del. Ch. Apr. 30, 2015)). Like the *AIG* decision discussed above, *Lululemon* included evidence beyond the mere sale of stock, including "that the Company's directors may have acted wrongfully in failing to monitor sufficiently possible insider trading activity at the Company," as well as evidence that raised suspicion regarding the stock sales themselves. *Hallandale Beach Police Officers & Firefighters' Personnel Ret. Fund v. Lululemon Athletica Inc.*, Nos. 8522-VCP, 9039-VCP, 2014 WL 1714375 (Del. Ch. Apr. 2, 2014) (transcript). Here, in contrast, Plaintiffs' evidence regarding Kress's stock sales shows that they are entirely unsuspicious. OB at 34-35.

More importantly, however, this argument reflects a startling change of theory. Plaintiffs' Complaint does not offer this theory as a subject for investigation, much less allege any facts about inadequate Board supervision of stock sales. *See generally* A33-66. Indeed, there was no evidence or argument advanced at trial about the need to investigate whether the Board properly oversaw Kress's stock

trading, and none of Plaintiffs' pre- or post-trial briefing cited *Lululemon* for this proposition. *See, e.g.*, A116, A125. Perhaps most telling of all, the documents the Court of Chancery ordered NVIDIA to produce have nothing to do with investigating Board supervision of Kress's sales. Plaintiffs have simply made up a new investigative theory after the fact, in an effort to mimic the one used in *Lululemon*.[6]

2. The Securities Class Action

In the Opening Brief, NVIDIA showed that the theory (unsuccessfully) pled in the SCA Complaint was quite different from the insider trading scheme that Plaintiffs asserted here. Faced with this reality, Plaintiffs repeat their contention that they are not required to establish a "theory of wrongdoing." AB at 47. Plaintiffs are wrong. As discussed in Section III.A. *supra*, Plaintiffs are required to do more than make "[a] mere statement of a purpose to investigate possible general mismanagement." *Seinfeld*, 909 A.2d at 122-23 (citations omitted).

Plaintiffs argue that their interpretation of the potential wrongdoing need not be "ironclad." AB at 49. But the case they cite for this proposition, *Barnes v. Sprouts Farmers Market, Inc.*, 2018 WL 3471351, at *6 (Del. Ch. July 18, 2018), says no such thing. There, the stockholder defined the potential wrongdoing as

[6] NVIDIA agreed long before litigation to produce a range of documents concerning executive stock sales, including written insider trading policies and documents showing review of certain insider's stock sales. A679-81.

management's failure to disclose a known negative trend that was occurring at the same time the company was engaged in a stock offering that benefitted management and certain insiders. *Id.* at *4. The stockholder cited later statements by management as evidence that they had contemporaneous knowledge of the negative trend at the time of the offering. *Id.* at *6. The court noted that, while the stockholder's interpretation of those statements was not "ironclad," the company's countervailing interpretation was insufficient to reject the stockholder's interpretation, in light of other allegations. Nothing in *Barnes* suggests that Section 220 plaintiffs can continually change their theory of wrongdoing as the case progresses, much less that they can change their theory on appeal. The *Barnes* court held only that the stockholder's ***evidence*** of wrongdoing need not be "ironclad."

Plaintiffs claim they never said they were solely investigating insider trading because in their Initial Demands they said they may seek "corrective measures" depending on the nature of the books and records produced. AB at 47-48. They further argue that they cannot identify all the "potential uses" of the books and records before knowing what they reveal. AB at 48. But this incorrectly conflates identifying the wrongdoing they are investigating with identifying the remedies they would seek if the books and records revealed such wrongdoing. In any event, as noted above, the Court of Chancery's ruling was expressly based upon suspicion of an "insider trading" scheme, and no other theory.

Next, Plaintiffs argue that the Post-Trial Order should stand because it found that the SCA Complaint was well-researched and that it was dismissed under a standard more stringent than "credible basis." AB at 48. But this point, too, is irrelevant. The SCA Complaint does not support a credible basis here because it does not make a single allegation about insider trading and is premised on a different theory of wrongdoing. OB at 36-39. Thus, it has no probative value on the question of whether Plaintiffs established a credible basis to suspect an insider trading scheme. *La. Mun. Police Emps.' Ret. Sys. v. Lennar Corp.*, 2012 WL 4760881, at *4 (Del. Ch. Oct. 5, 2012) (finding prior lawsuits did not provide a credible basis where they had "low probative value for showing any current wrongdoing"). Plaintiffs' insistence that they are not investigating insider trading—without offering any explanation of what they ***are*** investigating—supports NVIDIA's argument that the SCA Complaint is not relevant here and that losing this category of evidence is fatal to Plaintiffs' credible basis argument.

3. The Public Statements

Plaintiffs claim NVIDIA is urging the Court to require them to prove "malice or reliance" in relation to the challenged statements. AB at 45-46. That is not true. NVIDIA's argument is that Plaintiffs failed to present any evidence that the optimistic, forward-looking statements they challenge are evidence of wrongdoing. OB at 39-41. In response, Plaintiffs rely on the Court of Chancery's finding that

there was "more" evidence. AB at 46-47. But the "more" evidence the Court of Chancery relied on were the insider sales and the SCA Complaint. For the reasons discussed above, those are not evidence of wrongdoing either. Accordingly, they cannot "bridge the gap" between unrealized predictions and wrongdoing. *Shamrock Activist Value Fund, L.P. v. iPass Inc.*, 2006 WL 3824882, at *2 (Del. Ch. Dec. 15, 2006) (holding that a "divergence between forward-looking statements and subsequent results" is insufficient evidence of wrongdoing in Section 220 context absent "[s]omething more . . . to bridge the gap").

Plaintiffs again rely on *Barnes*, 2018 WL 3471351, at *6. AB at 46-47. But their reliance is misplaced. The court in *Barnes* inferred wrongdoing from allegations about statements made with contemporaneous knowledge of a negative development, which the company did not disclose, as well as evidence that certain insiders were conflicted when they signed the statements. 2018 WL 3471351, at *2-4, *6. Here, Plaintiffs have not cited any evidence that Huang or Kress made any challenged statements with contemporary knowledge of contrary facts or other negative information. Absent such evidence, the statements themselves do not support a credible basis.

4. There Is No Credible Basis to Suspect an Insider Trading Scheme

The Court of Chancery held that none of the categories of evidence standing alone supports a credible basis. Ex. A at 28, 34. But adding them together does not

do so, either. The three types of evidence do not reinforce one another. The stock sales themselves are not suspicious. The SCA purports to allege that a (largely different) set of statements were knowingly false, but does not allege any insider trading at all (and, in any event, failed to allege facts showing knowledge of falsity). And the challenged statements are all vague and generally optimistic, with no evidence that they were anything other than honestly held beliefs. Accordingly, it was error for the Court of Chancery to find that Plaintiffs established a credible basis.

CONCLUSION

For these reasons, the Post-Trial Ruling and Final Order should be reversed.

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