EFiled: Feb 13 2025 02:36PM EST
Filing ID 75634063
Case Number 491,2024

IN THE SUPREME COURT OF THE STATE OF DELAWARE

MARTIN FLOREANI, **CHRISTINA FLOREANI**, and **CHARLENE FLOREANI**,	:	
Plaintiffs-Below/ Appellants,	:	
v.	:	No. 491,2024
FLOSPORTS, INC., a Delaware Corporation,	:	Court Below:
Defendant-Below/ Appellee.	:	Court of Chancery of the State of Delaware C.A. No. 2023-0684-LM

APPELLEE'S ANSWERING BRIEF

OF COUNSEL:

Benjamin D. Schuman
DLA PIPER LLP (US)
650 S. Exeter Street, Suite 1100
Baltimore, MD 21202
(410) 580-4022
ben.schuman@us.dlapiper.com

John L. Reed (I.D. No. 3023)
Peter H. Kyle (I.D. No. 5918)
Daniel P. Klusman (I.D. No. 6839)
DLA PIPER LLP (US)
1201 North Market Street, Suite 2100
Wilmington, Delaware 19801
(302) 468-5700
(302) 394-2341 (Fax)
john.reed@us.dlapiper.com
peter.kyle@us.dlapiper.com
daniel.klusman@us.dlapiper.com

Attorneys for Defendant-Below/Appellee FloSports, Inc.

DATED: February 13, 2024

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES **PAGE(S)**

RULES and STATUTES

NATURE OF PROCEEDING

This appeal involves three written demands to inspect books and records pursuant to Section 220 of the Delaware General Corporation Law ("Section 220") for the *sole* stated purpose of valuing shares to sell them. The record below is extensive and unnecessarily convoluted for such demands. Fortunately, the issues on appeal are straightforward.

In its October 31, 2024 Letter Opinion ("Opinion," cited as "Op."), the trial court entered judgment for Appellee/Defendant-Below FloSports, Inc. ("FloSports" or the "Company") because Appellants/Plaintiffs-Below Martin Floreani, Christina Floreani, and Charlene Floreani ("Plaintiffs") failed to comply with the basic form-and-manner and jurisdictional strictures of Section 220.

None of Plaintiffs' demands complied with Section 220. Among other things, the First Demand failed to even identify the stockholders on whose behalf demand was being made. The Second Demand failed to satisfy the "under oath" verification requirement of Section 220(b). The Third Demand was served shortly before trial, added a stockholder and removed two others identified in the first two demands, and on the very day the Third Demand was served, Plaintiffs invoked the jurisdiction of the trial court with respect to it prior to expiration of the 5-day jurisdictional waiting period in Section 220(c). For those straightforward and indisputable reasons, the trial court entered judgment for FloSports. That ruling should be affirmed.

Although there is more to this story (to put the three demands in context), none of it changes the required outcome. FloSports was founded in 2006 by brothers Mark Floreani ("Mark") and Martin Floreani ("Martin"). FloSports is not a publicly traded company and is in the business of live sporting events streaming and the publishing of highlights, editorial content, data and rankings for more than 25 sports. (A0150.) In 2018, the Company's Board of Directors removed Martin as CEO and installed Mark in his place. Since that time, Martin has pursued a scorched-earth campaign against FloSports, including forming a company called Rokfin to compete with FloSports, harassing FloSports' directors and officers, and even posting publicly available YouTube videos disparaging the Company and its personnel during the pendency of this action.

Notwithstanding the fact that Plaintiffs' First Demand was defective and unenforceable, FloSports engaged with Plaintiffs, executed a confidentiality agreement, and provided the following documents essential to valuing their shares: audited financials for three years; current unaudited financials; several 409A valuation reports; the Company's debt schedule; the Company's capitalization table; and forecasts of key operations through 2025. Without obtaining the Company's written consent as required by the confidentiality agreement, Plaintiffs gave those confidential documents to a non-stockholder buyer. Martin also used some confidential information in his YouTube videos disparaging the Company.

Further, Martin initially held his shares through his entity MMF Family Partners, Ltd. ("MMF"), and MMF was one of the stockholders identified in the First and Second Demands. But in the midst of this litigation, MMF transferred its shares to Martin individually to avoid certain contractual obligations under a First Refusal Agreement. Then *shortly before trial*, Plaintiffs served the Third Demand, ostensibly to cure MMF's self-inflicted standing problem. The Third Demand removed MMF and another stockholder (John Joseph Williamson) and added Martin. That same day, Plaintiffs moved the trial court to add the Third Demand to the case and to realign the parties. Plaintiffs did that before expiration of the statutory 5-day *jurisdictional* waiting period in Section 220(c). On top of that, *all* Plaintiffs entered into a Common Interest Agreement ceding control *to MMF* over the demands and any documents produced, and to FloSports' knowledge, that Agreement is still in effect even though MMF is no longer a party nor a FloSports stockholder. Plaintiffs also refused discovery into any of these issues.

Trial was held on November 8, 2023 before a Magistrate, who issued a Post-Trial Final Report on April 9, 2024, and an Addendum on April 25, 2024. Overlooking the dispositive defects with the demands, and discounting Plaintiffs' discovery abuses and erratic behavior, the Magistrate ordered FloSports to produce documents well in excess of what is "essential" and "sufficient" to value shares and permitted Plaintiffs to share the documents with yet-to-be-identified buyers.

FloSports filed exceptions which the trial court granted. In its Opinion, the trial court held that all three of Plaintiffs' demands failed in various ways to comply with Section 220. Specifically, the court found that "[t]he first and second demands do not meet the form-and-manner requirements of Section 220(b)" because: (i) the first demand was "not accompanied by a power of attorney[,] was not made under oath[, and] did not identify the stockholders on whose behalf it was sent, which is an implied condition of the fifth and sixth form-and-manner requirements[]"; and (ii) the second demand failed the under oath requirement. (Op. at 3-4.) As for the Third Demand, the court held that "Plaintiffs violated [the five-day] requirement by petitioning the court—through the motion to amend—to enforce the third demand before the statutory five-day window closed." (*Id*. at 4.) These rulings resulted in judgment in FloSports' favor and mooted many other issues raised by the exceptions.

As explained below, the trial court committed no error. Respectfully, the Opinion should be affirmed and Plaintiffs should be denied any further inspection of the Company's books and records.

SUMMARY OF ARGUMENT

1. DENIED. The trial court correctly found that by filing their motion to amend contemporaneously with serving their Third Demand, Plaintiffs violated Section 220(c)'s "5 business days" waiting period necessary to invoke the court's jurisdiction.

2. DENIED. The trial court correctly found that Plaintiffs' First and Second Demands failed to meet the form-and-manner requirements of Section 220. Moreover, whether the Third Demand satisfied the form-and-manner requirements is beside the point. Independent of the form-and-manner requirements, Plaintiffs invoked the jurisdiction of the trial court with regard to their Third Demand prior to expiration of Section 220(c)'s "5 business days" waiting period. Plaintiffs have failed to identify any cogent reason why they should be entitled to additional books and records.

STATEMENT OF FACTS

A. FloSports' Rejection Of The Anonymous First Demand

This dispute first arose on November 18, 2022, when the law firm of Allen & Overy LLP ("Allen & Overy") served a written demand on FloSports pursuant to Section 220 seeking to inspect and copy the Company's books and records on behalf of an undisclosed "group of investors" (the "First Demand"). (A0075-77.)

By letter dated November 28, 2022, FloSports denied the request because the First Demand failed to satisfy the form-and-manner requirements of Section 220(b). (A0079.)

B. Disclosure Of Plaintiffs' Identities And The First Refusal Agreement Governing The Majority Of Plaintiffs Shares

Notwithstanding the fatal defects in the First Demand, FloSports engaged with Allen & Overy, during which the then-Plaintiffs were disclosed as the "group of investors" behind the First Demand. The then-Plaintiffs collectively held 1,717,692 shares, or approximately 12.9%, of the outstanding common stock of the Company, broken down as follows: (i) MMF (controlled by Martin) held 1,600,166 shares or approximately 12%; (ii) Christina Floreani held 53,090 shares or approximately 0.4%; (iii) Charlene Floreani held 46,757 shares or approximately 0.35%; and (iv) John Joseph Williamson held 17,679 shares or approximately 0.1%. (A0146, A0149-150.)

The shares held by MMF (now held by Martin) are bound by the FloSports, Inc. Second Amended And Restated Right Of First Refusal And Co-Sale Agreement, dated May 23, 2019 (the "First Refusal Agreement"). (B00001-27.) Under Section 2.1, FloSports has a right of first refusal with respect to "all or any portion" of FloSports stock that is part of a "Proposed Key Holder Transfer," which is defined as "any assignment, sale, offer to sell, pledge, mortgage, hypothecation, encumberance, disposition of or any other like transfer or encumber[ance] …" (B00002-33.)

C. The Plaintiffs' Common Interest Agreement And The "Committee" That Controls Their Demands

Before the First Demand was served, unknown to FloSports at the time, Plaintiffs entered into an Ad Hoc Shareholder Committee And Common Interest Agreement, effective October 31, 2022 (the "Common Interest Agreement," A0025-35), in which they agreed to: (i) retain Kinetic Advisors LLC ("Kinetic") as their financial advisor and Allen & Overy as their legal counsel (A0026); (ii) "cooperate" and "act as a group" with respect to their "purpose" and any "potential litigation with the Company regarding their rights" (A0025); and (iii) form a "Committee" "to take action collectively" with respect to their shares (*id*.). Under Section 4, the "Controlling Holders" have "the right to take all actions (or to elect not to take action) on behalf of the Committee." Under Section 1, "Controlling Holders" is defined as "90%" of the shares subject to the Common Interest Agreement. MMF

owned more than 93% of the shares subject to the Common Interest Agreement and therefore controlled the Committee.

The Common Interest Agreement was not initially produced in discovery despite document requests clearly calling for its production. (B00793-796.) In fact, FloSports did not discover its existence until Martin (on behalf of MMF) and Sudhin Roy (on behalf of Kinetic) were deposed on September 1, 2023. The document itself was not produced until September 5, 2023, after the close of document discovery.

D. The Parties Execute A Confidentiality Agreement And FloSports Produces "Essential" Documents

After Plaintiffs were identified as the "group of investors," the parties negotiated and executed a Confidentiality Agreement, effective February 7, 2023 (the "Confidentiality Agreement," B00354-371). The parties to the Confidentiality Agreement are FloSports, each of the original Plaintiffs and the Plaintiffs' financial advisor, Kinetic. The Confidentiality Agreement includes typical terms for Section 220 productions involving non-public corporations, such as requiring all information to be kept confidential, and limiting access to counsel, court personnel, mediators, court reporters, representatives of the parties, and witnesses. (*Id*.)

Critical to the Confidentiality Agreement is Section 5.b.vii regarding disclosure to other persons that expressly requires the "written consent" of FloSports or a court order. This consent provision is critical because: (i) FloSports is not a public company; (ii) Martin is the brother of Mark and has been adversarial to

FloSports; (iv) Martin is the CEO of Rokfin, a company that directly competes with FloSports; and (v) FloSports at the time of Plaintiffs' demands was engaged in efforts to raise financing, which would be adversely impacted by the disclosure of its confidential information to non-stockholders and parallel competing efforts to sell a large percentage of FloSports shares in the market.

Pursuant to the Confidentiality Agreement, FloSports produced the following documents "essential" to the Plaintiffs' stated purpose of valuing their shares: (i) audited financials for 2019, 2020, 2021; (ii) unaudited financials for 2022 (audit not complete as of production); (iii) several 409A valuation reports; (iv) debt schedule as of December 31, 2022; (v) capitalization table as of February 23, 2023; and (vi) forecasts of key operations through 2025. (A0164.) FloSports executives also held meetings with Allen & Overy and Kinetic to answer questions about the documents.

E. Plaintiffs Request That FloSports Participate In A Buyer's Due Diligence Process

On April 28, 2023, Allen & Overy informed FloSports, by email, that a third party named Second Alpha Partners ("Second Alpha") "expressed a willingness to explore a financing" of Plaintiffs' shares and requested that FloSports (i) provide additional financial information, (ii) arrange a meeting between the appropriate businesspeople at FloSports and Second Alpha's due diligence team, and (iii) execute an NDA with Second Alpha.

On May 3, 2023, Allen & Overy, Kinetic, and FloSports' counsel had a brief call so FloSports could clarify and understand Plaintiffs' request. Plaintiffs wanted FloSports to (i) execute an NDA with Second Alpha, (ii) set up a data room with information equivalent to what would be available to a potential buyer in a formal acquisition process, (iii) communicate directly with and answer questions from Second Alpha, and (iv) participate in and satisfy the due diligence requests of Second Alpha to assist them in evaluating whether to purchase Plaintiffs' shares. At the end of the call, the Company told Plaintiffs they would follow up. (B00372-373.)

F. Plaintiffs' Breach Of The Confidentiality Agreement And Revelation Of Plans To Circumvent The First Refusal Agreement

On May 16-18, 2023, while FloSports was considering Plaintiffs' request, executives from FloSports participated in the 2023 Needham & Co. 18th Annual Technology and Media Conference in New York, New York, where interested parties can sign up to meet participants. Second Alpha representatives showed up to meet with FloSports personnel and raised the topic of purchasing Plaintiffs' shares.

Much to the concern of FloSports, information conveyed to FloSports by Second Alpha led FloSports to believe that someone had already shared confidential FloSports information with Second Alpha in violation of the Confidentiality Agreement. Also, on a call with Second Alpha, FloSports learned that Kinetic was exploring transaction structures to avoid the contractual obligations in the First

Refusal Agreement. (B00400; B00531-532.) FloSports, through counsel, expressed these and other concerns in a June 16, 2023 letter to Allen & Overy. (B00397-399.) Tellingly, FloSports received no explanation or response.

FloSports' suspicions about Plaintiffs' breaches were realized during Mr. Roy's deposition. Mr. Roy revealed that, on April 13, 2023, Plaintiffs had Second Alpha execute an Acknowledgment And Agreement To Be Bound (the "Acknowledgement," Attachment A to the Confidentiality Agreement, B00812) and gave Second Alpha access to the confidential FloSports financial information made available to Plaintiffs in a data room pursuant to the Confidentiality Agreement.

Plaintiffs never obtained the "written consent" required by Section 5.b.vii of the Confidentiality Agreement prior to sharing this confidential information with Second Alpha. Also, the Acknowledgment executed by Second Alpha (i) was not provided to FloSports at the time it was executed, (ii) was not revealed or provided to FloSports on April 28, 2023, when Plaintiffs requested that FloSports "execute a direct NDA" with Second Alpha, and (iii) was not even produced during discovery. After Mr. Roy's admission, the executed Acknowledgement was not produced until September 5, 2023, after the close of document discovery. Plaintiffs also refused discovery into this issue further concealing their breach. (B00783-787; B00793-796.)

Plaintiffs' concealment of the Acknowledgment demonstrates their awareness of their breach of the Confidentiality Agreement. Following a break during his deposition, Mr. Roy provided the farcical explanation that Kinetic (Plaintiffs' financial advisor) engaged Second Alpha as *its* advisor, so that Plaintiffs could rely on a purported exception to their requirement to obtain FloSports' consent about the disclosure. At trial, Mr. Roy was forced to concede that Kinetic had no engagement letter with Second Alpha and paid no compensation for its alleged "advisory" services to Kinetic. (A1270-1274.) Plaintiffs' bald-faced attempt to justify their improper distribution of the Company's confidential documents supports FloSports' arguments to the trial court that Plaintiffs cannot be trusted with additional documents.

G. Plaintiffs' Second Demand And FloSports' Rejection

Just four days after FloSports complained about Plaintiffs' breach and efforts to circumvent the First Refusal Agreement, Plaintiffs served a so-called "Renewed Demand" pursuant to Section 220, dated June 20, 2023 (the "Second Demand"). (A0061-73.)

While the Second Demand at least identified the shareholders at issue, it nonetheless failed to satisfy other form-and-manner requirements of Section 220(b). The "under oath" affidavits attached as Exhibit B to the Second Demand are dated June 6 and 7, 2023, but the Second Demand—*executed by Plaintiffs' counsel* (not

the Plaintiffs themselves) pursuant to a "special power of attorney"—is dated June 20, 2023, two weeks later.

By letter dated June 26, 2023, FloSports rejected the Second Demand (A0108-111) but nonetheless informed Plaintiffs that, while the Company already provided documents "essential" to valuing Plaintiffs' shares, the Company was willing to discuss producing the Company's 2018 Audited Financials (2019, 2020 and 2021 audited, and 2023 unaudited already having been produced), Q1 2023 Quarterly Financials, Auditor Letters, and tax returns, assuming concerns over the prior breach of the Confidentiality Agreement could be overcome. Plaintiffs rejected FloSports' offer to negotiate and, instead, filed their Verified Complaint on July 5, 2023. (A0036-52.)

H. Plaintiffs' Abusive Discovery And Other Tactics

In verified answers to interrogatories, Plaintiffs confirmed that their "sole asserted purpose is valuation," and they objected to discovery into their real "purposes" on that basis. (B00428; B00777-779.) Plaintiffs also noticed a 30(b)(6) deposition of FloSports, the deposition of Mark Floreani, the CEO of FloSports, and the deposition of Patrick Noonan, a Director of FloSports, and insisted they appear "in person" in Delaware (B00471-473; B00474-476; B00477-483), until being convinced to drop that unreasonable demand. Relatedly, Plaintiffs' counsel objected to FloSports' counsel making a record so that this case could be presented on the

papers as is common in 220 cases, thereby requiring live testimony from FloSports executives who then had to travel to Delaware. (*See, e.g.*, B00542-544.)

Also, consistent with his pattern of adversity with FloSports, in June and July of 2023, Martin filed a disciplinary complaint against the Executive Vice President and General Counsel of FloSports, Paul Hurdlow (B00028-353), directly e-mailed every DLA Piper attorney involved in this action and demanded they withdraw (B00412-413; B00414-416), and even wrote directly to the Office of General Counsel at DLA Piper and demanded that DLA Piper withdraw from this litigation. (B00410-411.)

For a stockholder presumably wanting to obtain the most value for his shares, Martin engaged in behavior designed to *harm* FloSports. Martin made and posted YouTube videos disparaging FloSports. (B00389-396; B00770-774.) Specifically, in the videos, Martin accused FloSports' CFO of financial fraud. (*See, e.g.*, B00771 ("Is [CFO] Patrick Noonan sending out models to investment bankers that don't add up? Or is he creating specific ones for specific classes of shareholders?"); *id.* ("…the cap table they sent me as a founder was redacted…It makes us think that there's additional fraud going on. Something else is happening at the company now"); *id*. ("And so with this pattern of behavior, it makes us very suspicious that there's something else afoot at FloSports"); *id*. ("And if there is fraud, that fraud needs to be exposed").) Martin also accused management—*who will be the management for*

any buyer of Plaintiffs' shares—of consciously harming the Company by eroding its value (*see id*. ("…you are eroding value in the company"); *id*. ("you're eroding value for all shareholders, not just the shareholders you don't like")), creating a toxic culture in the Company (*see* B00390 ("But it's the type of the toxic culture that [FloSports board member] Mark Wan has facilitated and enabled that is spreading to outside")), and wrongfully impeding his and other stockholders' efforts to sell their shares (*id*. ("Now, [FloSports investor] Causeway Media partner…You've been working with Paul Hurdlow to prevent me from selling my shares, and I don't know why you guys don't like me.").) If Martin wants to sell his shares, and presumably get the most for them, his conduct raises questions.

In addition, Martin's sisters and fellow Plaintiffs sent vexatious emails to FloSports management and other unidentified third parties. (*See, e.g.*, B00374; B00386; B00401 (Christina: "As a forensic psychiatrist who's worked with inmates in the segregation unit of a maximum security prison, I know a thing or two about manipulation…This email continues a pursuit to expose the business decisions of FloSports management and board, which appear recklessly corrupt from my perspective…"); B00409 (Christina: "The story goes that the greedy Causeway VCs work through corrupted FloSports management to screw over the little guy shareholders. This is the role you have chosen."); B00768.)

I. MMF Transfers All Of Its FloSports Shares To Martin Floreani

On July 21, 2023, MMF transferred all of its FloSports' shares to Martin. Thus, MMF no longer held any shares in FloSports, thereby raising questions about the operation of the Common Interest Agreement that gives MMF (now a non-shareholder that lacks standing to assert a Section 220 claim) control over the litigation. Again, Plaintiffs' obstreperous discovery tactics prevented investigation into this issue beyond the face of the documents themselves. Plaintiffs also restricted discovery into the reason for the share transfer to determine whether it was part of Kinetic's plan to try to circumvent the First Refusal Agreement.

J. Plaintiffs' Third Demand And Enforcement Prior To Expiration Of The 5-Day Jurisdictional Waiting Period

On September 27, 2023, Plaintiffs served FloSports with a Third Demand (A0202-227), dropping MMF and John Joseph Williamson and adding Martin. That same day, Plaintiffs filed a motion to amend to add the Third Demand to this case without waiting for expiration of the statutory 5-day response time. (A0228-239.) The court (Magistrate) granted the motion.

FloSports rejected the Third Demand by letter dated October 4, 2023. (B00760-767.) As with the Company's rejection of Plaintiffs' Second Demand, FloSports informed Plaintiffs that they were already provided with those documents "essential" to valuing their shares, but that the Company was willing to discuss producing the Company's 2018 Audited Financials, Q1 2023 Quarterly Financials,

Auditor Letters, and tax returns, if concerns over the prior breach of the Confidentiality Agreement could be overcome. Plaintiffs instead opted to proceed with trial, which was held before a Magistrate on November 8, 2023.

The Magistrate issued a Final Report on April 9, 2024, entering judgment in Plaintiffs favor, and issued an Addendum on April 25, 2024. On June 3, 2024, FloSports filed its Opening Brief in Support of its Exceptions to the Final Report and Addendum.

In the intervening time between the Final Report and the briefing on FloSports' Exceptions—in an effort to bring this dispute to an end and facilitate a sale of Plaintiffs' shares to Second Alpha—FloSports provided Plaintiffs with everything ordered in the Magistrate's Final Report and Addendum rendering this action largely moot. Still, Plaintiffs pressed their demands.

On October 31, 2024, the trial court issued its Letter Opinion entering judgment in FloSports' favor, finding the First and Second Demand violated Section 220(b)'s form-and-manner requirements and the Third Demand violated Section 220(c)'s jurisdictional waiting period.

As explained below, the trial court made no legal error, and the Opinion should be affirmed.

ARGUMENT

I. THE TRIAL COURT CORRECTLY FOUND THAT PLAINTIFFS' FIRST AND SECOND DEMANDS FAILED TO SATISFY SECTION 220(b)'s FORM-AND-MANNER REQUIREMENTS

A. Question Presented

Did the trial court correctly find that Plaintiffs' First and Second Demands failed to satisfy Section 220(b)'s form-and-manner requirements? (Preserved at A1060-1127; A1463-1501.)

B. Scope Of Review

"[I]n § 220 cases, … *de novo* review applies to questions of law[.]" *KT4 Partners LLC v. Palantir Technologies Inc.*, 203 A.3d 738, 749 (Del. 2019). "Interpreting a written demand is more analogous to contract interpretation, which is subject to *de novo* review as a question of law[.]" *Id*. Statutory interpretation is a question of law, which is reviewed *de novo*. *Salzberg v. Sciabacucchi*, 227 A.3d 102, 112 (Del. 2020).

C. Merits Of Argument

1. Section 220(b)'s Form-And-Manner Requirements

As a general matter, Section 220 "permits a stockholder, who shows a specific proper purpose and who complies with the procedural requirements of the statute, to inspect specific books and records of a corporation." *Sec. First Corp. v. U.S. Die Casting & Dev. Co.*, 687 A.2d 563, 566–567 (Del. 1997).

The form-and-manner requirements are simple: "a demand must be made in writing, under oath, and must state the stockholder's purpose for making it." *Quantum Tech. P'rs IV, L.P. v. Ploom, Inc.*, 2014 WL 2156622, at *7 (Del. Ch. May 28, 2014) (citing 8 *Del. C.* § 220(b)). "[C]ompliance with [Section 220] is not difficult, and it is not too much to ask of a stockholder or his lawyers to read the statute and comply with its plain provisions when making a demand." *Seinfeld v. Verizon Comnc'ns Inc.*, 873 A.2d 316, 317 (Del. Ch. 2005), *aff'd*, 909 A.2d 117 (Del. 2006). "*Strict adherence* to the [Section 220] procedural requirements for making an inspection demand protects '*the right of the corporation to receive and consider* a demand in proper form *before litigation is initiated*.'" *Cent. Laborers v. NewsCorp.*, 45 A.3d 139, 146 (Del. 2012) (quoting *Mattes v. Checkers Drive-In Rests., Inc.*, 2000 WL 1800126, *1 (Del. Ch. Nov. 15, 2000) (emphasis added)).

2. The First And Second Demands Failed To Satisfy The Statutory Form-And-Manner Requirements

FloSports encourages the Court to read all of the Plaintiffs' demands and the Company's responses thereto. (A0075-77; A0079; A0061-73; A0108-111; A0202-227; B00760-767.) From just a cursory review of those documents, this Court can readily determine that the trial court was correct in finding that Plaintiffs' First and Second Demands fail the form-and-manner requirements of Section 220(b).

To start, as the trial court noted, the First Demand was "not accompanied by a power of attorney[,] was not made under oath[,] [and] did not identify the stockholders on whose behalf it was sent, which is an implied condition of the fifth and sixth form-and-manner requirements." (Op. at 3-4.) Plaintiffs cannot dispute that the First Demand failed to satisfy Section 220(b)'s form-and-manner requirements in all respects.

The trial court further found that "[t]he second demand too fails because counsel for Plaintiffs signed the oath instead of Plaintiffs." (Op. at 4.) Although there was no legal error in the court's ultimate conclusion that the Second Demand failed the "under oath" requirement, part of the court's analysis in getting to its conclusion requires correction. The court stated that "counsel for Plaintiffs signed the oath instead of Plaintiffs." (*Id*.) In fact, Plaintiffs' counsel executed the Second Demand pursuant to a "special power of attorney," dated June 20, 2023, but contrary to what is stated in the Opinion, Plaintiffs did sign the "under oath" affidavits. This does not change the outcome, however, because the problem for Plaintiffs is that they signed the verifications two weeks earlier, on June 6 and 7, 2023. Plaintiffs then resisted legitimate discovery into whether what they supposedly verified on June 6 and 7 was what was executed and served by their counsel on June 20.[1]

[1] The Court may affirm on this modified ground or "different rationale." *Unitrin, Inc. v. American General Corp.*, 651 A.2d 1361, 1390 (Del. 1995).

Section 220 defines "under oath" as "including statements the declarant affirms to be true under penalty of perjury under the laws of the United States or any state." 8 *Del. C.* § 220(a)(3). The trial court correctly observed that the point of the "under oath" requirement in Section 220 is the same as the requirement that parties verify complaints and answers to interrogatories, which is to preserve the integrity of the proceeding. (Op. at 4 ("[T]he oath requirement under Section 220 operates like the verification requirement for complaints. And as with a verification, the real client and not counsel must execute the oath.") (citing *Bessenyei v. Vermillion, Inc.*, 2012 WL 5830214, at *8 (Del. Ch. Nov. 16, 2012), *aff'd*, 67 A.3d 1022 (Del. 2013) (TABLE) (describing the verification as "an effort to assure truthfulness" and stating that a failure to comply with the requirement "is not a mere technicality").) In other words, the law assumes the *party* has personal knowledge of the facts attested to, and therefore the party—not the lawyer—should be the primary subject of consequences if the statements are false.

Again, the discrepancy between the "under oath" affidavits, dated June 6 and 7, 2023, and the Second Demand executed by Plaintiffs' counsel (not Plaintiffs) pursuant to a "special power of attorney," dated June 20, 2023, is the problem. The record includes no evidence that the Second Demand was even drafted at the time the "under oath" affidavits were executed, and Plaintiffs resisted document discovery and refused to answer questions regarding what they affirmed to be

accurate. Plaintiffs first objected to FloSports' request for documents "showing the date the Demand was in final and executable form." (BB00461-462 (objecting as "overbroad, unduly burdensome, … calls for materials not relevant to any claim or defense …, nor reasonably calculated to lead to the discovery of admissible evidence.").) Then, Martin (who executed the verification on behalf of MMF) was unable during his deposition to demonstrate that what he verified on June 6, 2023, was, in fact, the final version of the Second Demand executed by counsel and served weeks later, on June 20, 2023, claiming that he relied on his "lawyers." (B00599-600 ("Q. …I just want to know what you did, if anything, to ensure that what you attested to on June 6 is identical to what was ultimately served on the company two weeks later. A. I was in communication with my lawyers. Q. That's it? A. That's a lot.").) *If* Plaintiffs reviewed a draft demand on June 6 and 7, perhaps it is what their counsel executed and served on June 20, but we will never know from the record. Plaintiffs' obstruction foreclosed any efforts by FloSports (and the trial court) to compare what Plaintiffs received on June 6 and 7, 2023, with what was executed by their counsel on June 20, 2023. This should not be countenanced.

A failure to satisfy this form requirement necessitates dismissal of a Section 220 action. *See Frank v. Libco*, 2018 WL 3953765, at *2 (Del. Ch. Dec. 8, 1992) ("This Court has held that the failure to comply with the requirement in 8 *Del. C.* § 220(b) that the demand be under oath requires the dismissal of the complaint.").

II. THE TRIAL COURT CORRECTLY FOUND THAT PLAINTIFFS' THIRD DEMAND VIOLATED SECTION 220(c)'s 5-DAY JURISDICTIONAL WAITING PERIOD

A. Question Presented

Did the trial court correctly find that, by invoking the jurisdiction of the court contemporaneous with serving their Third Demand, Plaintiffs violated Section 220(c)'s jurisdictional "5 business days" waiting period? (Preserved at A1060-1127; A1463-1501.)

B. Scope Of Review

"[I]n § 220 cases, … *de novo* review applies to questions of law[.]" *Palantir*, 203 A.3d at 749. "Interpreting a written demand is more analogous to contract interpretation, which is subject to *de novo* review as a question of law[.]" *Id*. Statutory interpretation is a question of law, which is reviewed *de novo*. *Sciabacucchi*, 227 A.3d at 112. "Whether a court has subject matter jurisdiction is a question of law that [is] review[ed] *de novo*." *Imbragulio v. Unemployment Insurance Appeals Board*, 223 A.3d 875, 878 (Del. 2019).

C. Merits Of Argument

1. Section 220(c)'s 5-Day Jurisdictional Waiting Period

In addition to Section 220(b)'s form-and-manner requirements, Section 220(c)'s mandatory and jurisdictional "5 business days" waiting period is equally critical to enforcing a demand.

As with Section 220(b), compliance with Section 220(c) is strictly enforced and failure to do so warrants dismissal. *MaD Investors GRMD, LLC v. GR Companies, Inc*., 2020 WL 6306028, at *2 (Del. Ch. Oct. 28, 2020) ("'This Court has enforced the statutory response period strictly and dismissed prematurely filed complaints.' 'The obligation to wait out the response period is *jurisdictional*.'") (quoting *Katz v. Visionsense Corp.*, 2018 WL 3953765, at *2 (Del. Ch. Aug. 16, 2018) (emphasis added)); s*ee Frank*, 1992 WL 364751, at *3 (holding the court cannot "eviscerate the statutory five business day waiting period by ignoring it").

2. By Seeking To Enforce Their Third Demand Prior To Expiration Of The Statutory 5-Day Waiting Period, Plaintiffs Deprived The Trial Court Of Jurisdiction

Plaintiffs served their Third Demand on September 27, 2023 (A0202-227), which dropped MMF and John Joseph Williamson and added Martin. Without waiting for expiration of the statutory response time, Plaintiffs filed a motion to amend their complaint on September 27, 2023 (the same day) to add the Third Demand to the fatal complaint attempting to enforce their defective First and Second Demands. Section 220(c) grants a corporation "5 business days" to respond to a demand, and thus, the time for FloSports to respond to the Third Demand did not lapse until midnight on October 4, 2023. Plaintiffs' actions were at odds with Delaware's strict adherence to the procedural and jurisdictional requirements of Section 220(c).

Furthermore, once demand is made, a stockholder-plaintiff must stand on that demand in seeking to enforce its rights in a Section 220 proceeding. It is the complaint that enforces a Section 220 demand, but it is the demand itself (not the complaint) that invokes the statutory inspection right. Thus, the viability of a Section 220 action rises and falls on the face of the demand and whether it complies with the substantive and jurisdictional requirements of the statute. Stockholders cannot pile demands on top of each other. Once a stockholder-plaintiff makes a demand and sues on it, the stockholder is stuck with that demand, and any dispositive deficiencies cannot be cured. *See Cent. Laborers*, 45 A.3d at 146; *Mattes*, 2000 WL 1800126, *2.

In *Central Laborers*, for example, this Court affirmed the dismissal of a Section 220 action where: (a) the demand identified the wrong corporation; (b) the supporting materials were inconsistent as to whether the stockholder was a record holder or beneficial owner; and (c) no evidence of beneficial ownership was "annexed" to the demand despite what one of the affidavits said. 45 A.3d at 145. This Court rejected the stockholder's attempt to correct those errors by attaching the missing documents to the complaint, observing that any effort by plaintiff to cure a defect in the demand "as part of its filing in the 220 Action [does] not effectively cure the statutory defect in the [demand]." *Id.* at 146. *"[A]bsent [] procedural compliance, the stockholder has not properly invoked the statutory right to seek*

inspection." *Id*. at 144 (emphasis added). This "protects 'the right of the corporation to receive and consider a demand in proper form before litigation is initiated.'" *Id.* at 146 (quotation omitted).

If Plaintiffs wished to (or needed to) issue a new demand to correct their fatal defects, not to mention substitute stockholders driven in part by a self-made standing problem when MMF transferred its shares, Section 220 required them to dismiss this litigation, wait the five days for FloSports' response to the Third Demand, and only then file a new lawsuit if they were dissatisfied with FloSports' response. As FloSports stated in a letter to the trial court and again in its Opening Brief in support of its exceptions:

> Section 220 complaints enforce 220 demands. The cases turn on the face of the demands and complaints are not typically amended like plenary actions. *See Cent. Laborers v. NewsCorp*., 45 A.3d 139, 146 (Del. 2012). If the original Plaintiffs need the Third Demand, they should dismiss this action, wait until the statutory 5 days lapses and file a new action. The new Plaintiff must do the same. FloSports should not have to defend against evolving demands and, at a minimum, should be entitled to further discovery.

(A0368; *see* A1089 (same).)

Through this appeal, Plaintiffs invite this Court to ignore the procedural and jurisdictional requirements of Section 220. *See Frank*, 1992 WL 364751, at *3 (holding the court cannot "eviscerate the statutory five business day waiting period by ignoring it"). Respectfully, the Court should decline the invitation.

The Court of Chancery previously addressed similar jurisdictional questions in *MaD Investors*: "'This Court has enforced the statutory response period strictly and dismissed prematurely filed complaints.' 'The obligation to wait out the response period is *jurisdictional*.'" 2020 WL 6306028, at *2 (quoting *Katz*, 2018 WL 3953765, at *2) (emphasis added). The plaintiffs in *MaD Investors* filed their 220 complaint the evening before the statutory 5-day period lapsed and the court dismissed the complaint with prejudice. Here, Plaintiffs did not even wait *one* day before running to the court. The court in *MaD Investors* also rejected the argument that jurisdiction is suddenly restored once the 5-day period passes: "Plaintiffs' failure to comply with Section 220(c)'s five-day response period deprives this Court of jurisdiction over Plaintiffs' Complaint and request to supplement it." *Id.* at *6.

Plaintiffs cite two cases to suggest that, under certain circumstances, the Court of Chancery may permit a stockholder to amend a previously defective complaint and proceed on a second demand: *Gay v. Cordon International Corp.*, 1978 WL 2491 (Del. Ch. Mar. 31, 1978), and *Frank v. Libco*, 1992 WL 364751 (Del. Ch. Dec. 8, 1992). Neither case, however, supports Plaintiffs' position and the Court of Chancery in *Katz* already considered and rejected any reading of these cases as supporting an equitable carve-out of the jurisdictional 5-day waiting period. 2018 WL 3953765, at *1-2 (Del. Ch. Dec. 8, 1992). In a tacit concession of this weakness, Plaintiffs relegated these cases to a footnote. (OB at 14 n.2.)

In *Gay*, a shareholder, whose original demand to inspect a corporation's stock ledger was not submitted under oath, sued under Section 220 to compel the corporation to permit him to inspect the stock ledger. 1978 WL 2491, at *1. The corporation moved to dismiss the complaint on the grounds that the demand was not under oath. *Id*. The plaintiff then submitted a new sworn demand to the corporation and *after five business days had passed*, moved pursuant to Court of Chancery Rule 15(b) to supplement his complaint to incorporate the second, sworn demand that was made after the complaint had been filed. *Id*. That is different than what happened here. Plaintiffs did not wait the five days and moved the *same* day to amend their complaint to incorporate their Third Demand. This violated Section 220(c)'s 5-day waiting period, which is a prerequisite to invoking the court's jurisdiction. Plaintiffs cannot rely on equitable principles or the general inclination to liberally grant leave to amend pleadings as there was no jurisdiction to do either.

Unlike in *Gay*, but similar to Plaintiffs here, the shareholder in *Frank* failed to adhere to Section 220's five-day requirement. The *Frank* court found that the plaintiff-shareholder "submitted his purported amendment to his complaint *prior to the lapse of the statutory waiting period*, thereby denying Libco the five-day opportunity granted it by 8 *Del. C.* § 220 to consider and respond to the demand." *Frank*, 1992 WL 364751, at *3 (emphasis added). The court held that it "cannot eviscerate the statutory five business day waiting period by ignoring it." *Id*. In

distinguishing the *Gay* decision, the *Frank* court noted the key distinction was that "the plaintiff-shareholder [in *Gay*] submitted a second, sworn demand to the defendant-corporation during the pendency of the litigation *but waited until five business days after the corporation had received the demand before moving to supplement his complaint with the second, sworn demand*." *Id*. (emphasis added).

In another similar case, *Katz*, the plaintiff-stockholder served his demand on April 24, 2018, and filed his complaint on April 30, just *four* business days later. 2018 WL 3953765, at *1. The court held that plaintiff's complaint was premature and dismissal was warranted on that basis. *Id*. In so holding, the court noted that Section 220(c) "gives a corporation '5 business days' to respond to a demand" and that the "court has enforced the statutory response period *strictly* and dismissed prematurely filed complaints." *Id.* (emphasis added) (citing *Frank*, 1992 WL 364751, at *3; *Levy v. Recognition Equip. Co.*, 1982 WL 17877, at *1 (Del. Ch. Feb. 26, 1982) ("Inasmuch as the required statutory period had not expired as of February 12, 1982 when plaintiffs complaint was filed, it was prematurely filed.")). Importantly, "[t]he obligation to wait out the response period is *jurisdictional*." *Id*. at *2 (emphasis added).

The court in *Katz* also observed that the *Gay* and *Frank* cases "do not support an equitable carve-out. Rather, they show that in circumstances where a stockholder has served a new curative demand and *satisfied all the requirements for proceeding*

on that demand, this court has permitted a stockholder to amend its previously defective complaint and proceed on the second demand." *Id*. at *2 (emphasis added). That is not the case here. Plaintiffs cannot rely on *Gay* or *Frank* because by petitioning the trial court contemporaneously with serving their Third Demand, Plaintiffs failed to satisfy the condition precedent to sue on the demand—that is, they failed to wait out the mandatory and *jurisdictional* "5 business days" prior to petitioning the court.

The trial court properly determined that it did not have jurisdiction to allow this case to proceed due to Plaintiffs' failure to wait the jurisdictional "5 business days" before seeking to enforce the Third Demand. (Op. at 4 ("Plaintiffs violated that [five-day] requirement by petitioning the court—through the motion to amend—to enforce the third demand before the statutory five-day window closed.").)

Plaintiffs rely on Court of Chancery Rule 15 to argue that while their *motion* was filed prior to the 5-day window closing, they waited until later to file their *amended complaint*. (OB at 12-16.) This argument fails because it was Plaintiffs' *motion* that deprived the court of jurisdiction, and without an order permitting the Third Demand to be added to this case—which the court lacked jurisdiction to issue—Plaintiffs could not file an amended complaint. In *Gay*, the court emphasized that the *motion* was filed after the five-day waiting period. 1978 WL 2491, at *1. In *Frank*, the plaintiff submitted a revised (signed) complaint *with his reply brief* to

defendant's motion to dismiss—which was filed just two days after defendant received the second demand. 1992 WL 364751, at *1. Thus, the court observed that plaintiff "submitted his purported amendment to his complaint prior to the lapse of the statutory waiting period." *Id*. at *3.

Here, the trial court focused on when Plaintiffs' *motion* was filed, not the complaint: "Plaintiffs violated that [five-day] requirement by *petitioning* the court—*through the motion to amend*—to enforce the third demand before the statutory five-day window closed." (Op. at 4 (emphasis added).) Put simply, Plaintiffs' reliance on Rule 15 and their attempts to distinguish between a motion to amend and the filing of the amended complaint do not merit reversal.

Accepting Plaintiffs' argument would create a rule that "would implicitly amend the statute, which this court cannot do." *Katz*, 2018 WL 3953765, at *2 (refusing to credit plaintiff's argument that would permit a stockholder to shorten the statutory response period by requesting a meet-and-confer session because "[s]uch a rule would implicitly amend the statute, which this court cannot do").

In sum, all of these fatal defects are a result of Plaintiffs' frivolous treatment of Section 220's clear mandates. The trial court committed no legal error.

3. FloSports Did Not—And Could Not—Confer Jurisdiction On The Trial Court

Plaintiffs also argue that FloSports consented to the Third Demand and point to the following statement from FloSports' counsel at trial:

> We have no problem with the third demand. We have no issue with the signature on the third demand. Just to save time, we'll stipulate that that demand complies with the form and manner requirements and we can move on.

(A1149.) To state the obvious, an acknowledgment that the Third Demand satisfied the form-and-manner requirements has nothing to do with jurisdiction. Even accepting Plaintiffs' characterization, "parties to an action may not confer subject matter jurisdiction by agreement, and the Court cannot acquire jurisdiction by estoppel." *Bruno v. Western Pacific R. Co.*, 498 A.2d 171 (Del. Ch. 1985) (citations omitted) (dismissing appraisal action for lack of subject matter jurisdiction as preempted under the Interstate Commerce Act despite respondents' representations that it would not object if stockholders demanded appraisal); *see Gunn v. McKenna*, 116 A.3d 419, 421 (Del. 2015) ("This Court has also held lack of jurisdiction may be raised at any time on motion of the court *sua sponte*, even though the parties, by failure to raise the question, may have waived the right. Accordingly, whenever it appears by suggestion of the parties or by being raised *sua sponte* that the court lacks jurisdiction, the court must dismiss the action.") (cleaned up).

The *form-and-manner* requirements of Section 220*(b)* are distinct from the *jurisdictional* waiting period pursuant to Section 220*(c)*. This distinction was apparent in the Opinion. (*Compare* Op. at 2 ("The first and second demands do not meet the form-and-manner requirements of Section 220(b)…") *with* Op. at 4 ("The third demand fails under Section 220(c), which states that a stockholder must wait 'five business days after the demand has been made,' or sooner if the corporation has refused the demand, to apply the court or an order compelling inspection. Like the form-and-manner requirements, Delaware courts construe the five-day period strictly.") (citations omitted).) Thus, even if FloSports admitted that to the Third Demand complied with Section 220*(b)*, the jurisdictional issues with respect to Section 220*(c)* were still very much at issue. (*See, e.g.*, A0525 (REED: "I do think there's a major jurisdictional issue as it relates to the motion and ultimately the amended complaint…"); A0527 (REED: "…let's assume we keep the current trial date and we were to move forward, I have a major jurisdictional issue that I get to raise.").)

The trial court was clearly correct in finding it had no jurisdiction over the Third Demand or the motion to amend seeking to prematurely add and enforce the Third Demand.

III. THERE IS NO INDEPENDENT BASIS TO PERMIT FURTHER INSPECTION OF THE COMPANY'S BOOKS AND RECORDS

A. Question Presented

Notwithstanding the failure of Plaintiffs' demands to satisfy Section 220, is there any basis to grant Plaintiffs a further inspection of the Company's books and records? (Preserved at A1060-1127; A1463-1501.)

B. Scope Of Review

"[I]n § 220 cases, abuse of discretion is the appropriate standard of review for the scope of relief and the limitations and conditions imposed on that relief, whereas *de novo* review applies to questions of law, such as the applicability of attorney–client privilege and whether a stated purpose is proper." *Palantir*, 203 A.3d at 749.

C. Merits Of Argument

1. Plaintiffs Must Be Denied Any Further Inspection Of The Company's Books And Records For All The Reasons Presented To The Trial Court

As a preliminary matter, the summary and section headings of Plaintiffs' Argument II do not match. In the Summary of Argument, Plaintiffs argue that the trial court erred by unnecessarily finding that the First and Second Demands failed to meet the form-and-manner requirements because FloSports stipulated to the sufficiency of the Third Demand. However, the body of Plaintiffs' Opening Brief drops that argument entirely, instead arguing the merits of their case as if this were

a pre- or post-trial brief. This is a distraction from Plaintiffs' dispositive jurisdictional problem and nothing but a rehash of arguments the trial court did not have to reach.

To the extent Plaintiffs argue—and if this Court determines—that there are outstanding issues necessary to resolve this appeal (there are not), the trial court should be given the opportunity to address those issues in the first instance. Although FloSports does not dispute that this Court "may affirm on the basis of a different rationale than that which was articulated by the trial court…[and] may rule on an issue fairly presented to the trial court, even if it was not addressed by the trial court," the Court has expressed a reluctance to do so. *Unitrin,* 651 A.2d at 1390 (declining to address breach of fiduciary duty issues not addressed by the trial court, "conclud[ing] that it would be inequitable" and that "[t]he Court of Chancery should have the opportunity to address those alternative breach of duty arguments in the first instance[]"); *see also Kroll v. City of Wilmington*, 276 A.3d 476, 479 (Del. 2022) (declining to affirm the Court of Chancery's judgment on arguments raised by appellees on appeal but not addressed by the trial court, explaining "the Court of Chancery should have the opportunity to address the [a]ppellee's arguments in the first instance[]"). Here, of course, Plaintiffs ask the Court to *reverse* the trial court for reasons not addressed by the trial court, which the Court should be even more reluctant to do.

Should this Court choose to engage in the multiple issues created by the record below, FloSports touches on them below.

a. The Common Interest Agreement Stripped Plaintiffs Of Their Standing

The Common Interest Agreement deprived Plaintiffs of standing to pursue their Section 220 claims. Plaintiffs cannot give control of their rights under Section 220 and this action (and consequently documents produced pursuant to an order) to a non-stockholder and non-party. By entering into the Common Interest Agreement, Plaintiffs—by their own actions—ceded control of (all) their demands to MMF, which is an entity that no longer holds any shares in FloSports and is not a party to this action. Although, Martin controls MMF, he has not conceded—nor does FloSports expect him to concede—that he is the alter ego of MMF, which has different rights, obligations, and liabilities.

Again, Plaintiffs resisted discovery into the Common Interest Agreement, so FloSports and the trial court were left only with the plain language of the document itself, the four corners of which unquestionably cede control to MMF. (A0025-28 at §§ 1, 4 ("The Controlling Holders [MMF] will have the right to take all actions (or to elect not to take action) on behalf of the Committee").) By definition and common sense, a non-stockholder cannot have a proper purpose for seeking books and records under Section 220—particularly for valuing shares it no longer owns.

More fundamentally, the named Plaintiffs cannot relinquish control of the Company's documents to a non-party and non-stockholder and maintain standing.

b. Plaintiffs' True Purpose Is To Cause Reputational Harm To FloSports And Gain A Competitive Advantage

Here, the record overwhelmingly demonstrates that Plaintiffs' primary purpose is adverse to the interests of FloSports and that release of FloSports' confidential information would be harmful to the Company. *See CM & M Group, Inc. v. Carroll*, 453 A.2d 788, 792 (Del. 1982) (a stockholder's "primary purpose must not be adverse to the best interests of the corporation"); *Pershing Square, L.P. v. Ceridian Corp*., 923 A.2d 810, 817 (Del Ch. 2007) (even a stockholder "who proves [a proper purpose] may be limited in its use of any information where the information is confidential and release would harm the company.").

Every action by Plaintiffs in connection with this litigation—sharing confidential documents with third parties, harassing Company executives and directors in public videos, direct competition with FloSports' business model—has damaged or could reasonably be expected to damage the Company. Plaintiffs: (i) through Martin's company Rokfin, are directly competing with FloSports (*see generally* A1207-1209 (Martin admitting to similarities between the two platforms); A1240-1251; A1327-1328); (ii) already breached a confidentiality agreement; (iii) improperly used FloSports' confidential information in YouTube videos and emails

to harass management (B00374-380; B00381-388; B00389-396; B00401-408; B00409; B00768-769; B00770-774); (iv) have an advisor who was at the time of trial exploring ways to get around the First Refusal Agreement (B00400 ("Go around the terms/find some loophole"); B00531-532; B00397-399); and (v) were aware at the time that FloSports was in the process of raising capital, and disclosure of its information and a parallel process of selling a material percentage of its stock in the market would cause untold harm.

In *Pershing*, the court held that the stockholder had the improper purpose of seeking to broadcast company information out of a vendetta with the company, and stated that it "appears that self-interest, not the best interest of the corporation or its stockholders, drove" the action in which the stockholder sought "to enlist this Court as an aider and abettor" in its improper plans. 923 A.2d at 819-820. Chancellor Chandler stressed that the court's job is to "prevent abusive use" of corporate information, resolved any "doubt" in the company's favor, and denied inspection based on the totality and "confluence of events." *Id*. at 824.

The facts here compel the same conclusion. Just like in *Pershing*, Martin's self-interest and personal vendetta against his brother has fueled this litigation. In other words, "it is evident from the facts on the record that the [Plaintiffs'] actual, predominating, purpose is something unrelated to [their] purpose as a stockholder." *Sutherland v. Dardanelle Timber Co.*, 2006 WL 1451531, at *9 (Del. Ch. May 16,

2006); *see Bizzari v. Suburban Waste Services, Inc.*, 2016 WL 4540292, at *7-8 (Del. Ch. Aug. 30, 2016) ("In defining the scope of an inspection, this Court may consider any ulterior motives of the stockholder demanding inspection.")

In all, Plaintiffs have actively pursued their ulterior purpose of causing reputational harm to FloSports and to gain a competitive advantage. FloSports must then rely on the court to safeguard its interests and to prevent any further abuse from Plaintiffs—as is its duty. *CM & M*, 453 A.2d at 793 ("Counterposed to the duty to protect the rights of the stockholder, the Court has *the duty* to safeguard the rights and legitimate interests of the corporation.") (emphasis added); *id*. ("It follows that the Court of Chancery is empowered to protect the corporation's legitimate interests and to prevent possible abuse of the shareholder's right of inspection by placing such reasonable restrictions and limitations as it deems proper on the exercise of the right.").

c. The Documents Plaintiffs Seek Are Not "Essential" To Their Alleged Purpose Of Valuing Their Shares, But Are Meant To Facilitate A Third-Party Financing Transaction

Plaintiffs' cursory argument that the documents requested are necessary and essential is without merit, and FloSports has already provided all the documents that are essential to value the Plaintiffs' shares.

The decision in *Rivest v. Hauppauge Digital, Inc.* provides useful insight as to what information "may" be available when a stockholder's purpose is valuation:

> The invariable starting point is financial statements—both audited and unaudited and both annual and quarterly. *At times*, a stockholder *may* show a need to look beyond the financial statements by obtaining copies of key contracts, entries from the general ledger, or accounting work papers. A stockholder also *may* be able to obtain potentially more sensitive documents, such as tax returns or forward-looking documents, such as forecasts and projections.

2022 WL 3973101 at *20 (Del. Ch. Sept. 1, 2022) (emphasis added) (permitting inspection of company's quarterly and annual financial statements and reports, including cash flow statements, balance sheets, and income statements, for the years 2016 through 2020 where plaintiff's sole purpose was valuation).

Similarly, the court in *Thomas & Betts Corp. v. Leviton Mfg. Co., Inc.* found the following to be essential and sufficient for valuation purposes: audited financial statements for the last three years; audited financial statements of all direct and indirect subsidiaries for the last three years (not an issue here); and all federal tax returns for the last three years. 685 A.2d 702, 714 (Del. Ch. 1995). On the other hand, it held that the following document categories were *not* essential and sufficient for valuation purposes: any and all written consents and minutes of board of directors; any and all written consents and minutes of shareholders meetings, records relating to interested director transactions, material contracts and lease agreements,

and real estate agreements, internal financials statements on a monthly basis; internal and books and records regarding "key man" or other life insurance policies. *Id.* at 715.

Here, FloSports has already provided Plaintiffs with: (i) audited financial statements for 2019, 2020, 2021; (ii) unaudited financials for 2022; (iii) several 409A valuation reports; (iv) debt schedule as of December 31, 2022; (v) capitalization table as of February 23, 2023; and (vi) forecasts of key operations through 2025. FloSports also produced its operative bylaws *and* FloSports' executives met with Plaintiffs' counsel and their financial advisor to answer any questions that the information posed. In-line with *Thomas & Betts*, FloSports later produced three years of its audited financial statements, and more recently, FloSports expressed a willingness to provide tax returns and even more information, assuming adequate protection of its information was provided. (A0108-111.) This is more than what would typically be deemed "essential" to any stockholder whose "*sole* asserted purpose is valuation." Yet, Plaintiffs continue to press this action.

Even after trial, FloSports produced all of the documents ordered by the Magistrate's Final Report. Still, Plaintiffs seek documents that exceed the scope of what is essential or necessary to their claimed *sole* purpose of valuing their shares. Plaintiffs have failed to demonstrate how the additional documents they seek are "essential" to valuing their shares: (i) corporate agreements to which Plaintiffs are

not parties such as voting agreements, *see Bizzari*, 2016 WL 4540292 at *3, *7 (denying requests for "credit, security, and pledge agreements," as well as "stockholder agreements, operating agreements, and similar governing documents" as not essential to the valuation purpose); (ii) cap tables where the names of FloSports' stockholders are not essential nor have Plaintiffs expressed a desire to communicate with other stockholders, *Marathon Partners, L.P. v. M&F Worldwide Corp.*, 2004 WL 1728604, at *10 (Del. Ch. July 30, 2004) (allowing inspection of stockholder list to further purpose of "communicat[ing] with other stockholders to effectuate changes in management policies"); (iii) documents about older events that *did not occur*, *id*. at *5-8 (denying access to documents related to proposed transaction because plaintiff failed to meet burden establishing possibility of mismanagement, and such documents were not essential to secondary purpose of valuing shares); and (iv) electronic correspondence and emails, *Palantir*, 203 A.3d at 752-53 ("the Court of Chancery should not order emails to be produced when other materials (*e.g.*, traditional board-level materials, such as minutes) would accomplish the petitioner's proper purpose.").

This latter point applies especially to the goal of valuation, which turns solely on the Company's financial documents. Plaintiffs simply should not be afforded any leeway here when the documents that FloSports already provided do more than accomplish Plaintiffs' stated purpose, and Martin is essentially a competitor seeking

to pry beyond the FloSports' financial documents and into its correspondence and emails. *See BBC Acquisition Corp. v. Durr-Fillauer Med., Inc.*, 623 A.2d 85, 90 (Del. 1992) (a court can consider competition if the company can demonstrate "that a confidentiality agreement will not afford it sufficient protection.").

Moreover, Plaintiffs' reliance on Mr. Roy is misplaced. (*See* OB at 26.) Mr. Roy essentially admitted at trial to crowdsourcing a list of documents he believed potential buyers would want to see to gauge their interest. (A1282-1283.) Which just proves the point that he is unable to separate documents that are essential to valuing one's shares in a Section 220 context from what an investment banker contemplating an acquisition would desire. (A1279 (Mr. Roy admitting he did not consider "what Delaware court have said is necessary and essential to valuing one's shares in a 220 context").) Plaintiffs are using the latter as their measuring stick which is simply wrong. *See Dobler v. Montgomery Cellular Holding Co., Inc.*, 2001 WL 1334182, at *7 n.28 (Del. Ch. Oct. 19, 2001) ("[t]he labeling by the Plaintiffs or the Plaintiffs' expert of a particular document as 'necessary' does not control the issue. The Court is required to evaluate, under the circumstances, whether the sought after document is necessary for the proper purposes of the shareholders.").

Simply put, Plaintiffs are not entitled to what their advisor deems necessary for investment bankers. They are entitled merely to what is "essential" for their sole purpose of valuing their shares, which FloSports has already provided in spades.

d. A New Confidentiality Agreement Will Not Adequately Protect FloSports In Light Of Plaintiffs' Repeated And Sustained Breaches Of The Parties' Preexisting Confidentiality Agreement

FloSports has already described Plaintiffs' brazen violations of their existing Confidentiality Agreement. A new one, regardless of its forcefulness, will not adequately protect Flosports. Indeed, it would barely slow them down.

Rather than give Plaintiffs more documents, the appropriate remedy—if any besides affirming the Opinion dismissing this action—is a mandatory injunction like the one employed in *Metro Storage International LLC v. Harron*, 275 A.3d 810, 871-72 (Del. Ch. 2022) (holding the remedy for breach of a confidentiality agreement is a mandatory injunction requiring the return of all confidential information belonging to the subject company). Here, there can be no dispute that Plaintiffs breached the Confidentiality Agreement warranting a mandatory injunction and return or destruction of all confidential FloSports information.

In any event, to reward Plaintiffs' conduct with inspection of additional and more intrusive documents would offend notions of logic and common sense where courts have held such breaches forfeit equitable rights entirely. *See Metro Storage*, 275 A.3d at 876-77 ("[b]ecause of his antecedent breach [of the confidentiality agreement], [defendant] is now in no equitable position to invoke" other rights against the plaintiff) (citing *Eureka VIII LLC v. Niagra Falls Hldgs. LLC*, 899 A.2d 95, 98 (Del. Ch. 2006)).

CONCLUSION

For the foregoing reasons, this Court should affirm the trial court's judgment.

DATED: February 13, 2025

DLA PIPER LLP (US)

/s/ John L. Reed

John L. Reed (I.D. No. 3023)
Peter H. Kyle (I.D. No. 5918)
Daniel P. Klusman (I.D. No. 6839)
1201 North Market Street, Suite 2100
Wilmington, Delaware 19801
(302) 468-5700
(302) 394-2341 (Fax)
john.reed@us.dlapiper.com
peter.kyle@us.dlapiper.com
daniel.klusman@us.dlapiper.com

Attorneys for Defendant-Below/Appellee FloSports, Inc.

OF COUNSEL:

Benjamin D. Schuman
DLA PIPER LLP (US)
650 S. Exeter Street, Suite 1100
Baltimore, MD 21202
(410) 580-4022
ben.schuman@us.dlapiper.com