

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

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|---------------------------------------|---|----------------------|
| HIGHLAND SELECT EQUITY FUND, |) | |
| L.P., a Delaware Limited Partnership, |) | |
| |) | |
| Plaintiff, |) | |
| |) | |
| v. |) | C.A. No. 2092-VCL |
| |) | |
| MOTIENT CORPORATION, |) | Supreme Court Appeal |
| a Delaware Corporation, |) | No. 355, 2006 |
| |) | |
| Defendant. |) | |

***REPORT TO THE DELAWARE SUPREME COURT
UPON REMAND FOR CLARIFICATION***

**Remanded: February 26, 2007
Report Submitted: March 14, 2007**

LAMB, Vice Chancellor.

On July 6, 2006, the Court of Chancery issued a Memorandum Opinion and Order denying Highland Select Equity Fund, L.P. any relief on its complaint pursuant to Section 220(c) of the Delaware General Corporation Law demanding access to the books and records of Motient Corporation. Highland appealed the decision to the Delaware Supreme Court and, following briefing and *en banc* argument, the Supreme Court remanded the matter for certain clarifications. In particular, the Supreme Court's order poses two questions, as follows:

1. Did the court find that all of Highland's actual purposes were improper? If so, what were Highland's actual purposes and why did those purposes preclude relief under Section 220?

2. If the court found that some of Highland's actual purposes were proper, on what basis did the court determine that Highland was not entitled to relief that would address those proper purposes?

I.

Highland claimed two proper purposes: first, to investigate possible mismanagement; and, second, to communicate with stockholders in connection with an announced proxy contest for control of the Motient board of directors. Motient argued that Highland's actual purpose was to use the Section 220 demand as a vehicle to attack Motient's management in connection with the proxy contest, without regard to whether the litigation was, itself, successful. To support this

argument, Motient pointed to the extraordinarily overbroad character of the Section 220 demand letter, Highland's publication of that overbroad demand to attack Motient in various filings, and the manner in which Highland conducted the litigation.

II.

A. Question 1

Highland's stated purposes are, of course, proper purposes under the law and nothing in the Opinion was intended to suggest otherwise. At page 13 of the Opinion, the court observes that Highland presented credible evidence at trial, through the testimony of Minces, to support a conclusion that Highland had reasonable grounds to suspect corporate misconduct. In the absence of other material facts, the court would have found that Highland had a proper purpose and would have granted some relief to Highland, despite the extraordinary overbreadth of its demand. But, there was other highly probative evidence that led to the conclusion that Highland's stated purposes were pretextual and that its actual purpose was improper. The Opinion does not, however, plainly and unequivocally set out this logical sequence.

Highland's actual improper purpose was found by examining the form of its Section 220 demand, the context in which it was made, the way Highland used it to advance other objectives, and, to a lesser extent, how the litigation itself was

conducted. The starting point of this analysis is a demand letter that suffers from such extreme overbreadth that it is impossible to conclude that it was drawn in a good faith effort to comply with the clear, controlling authority of the Delaware Supreme Court. That letter spanned 25 single-spaced pages and included 47 categories requiring the production of “all books, records, documents, and correspondence in the Company’s possession, custody, or control that constitute, identify, analyze, discuss, evaluate, consider or address” a wide variety of issues. As stated in the Opinion, this demand letter “in both form and substance, is inconsistent with the [Delaware Supreme Court’s] holding in *Security First*.”¹ Further addressed in the Opinion are a number of other facts that support the conclusion of improper purpose: (1) the pendency of related litigation in other jurisdictions in which Highland moved to obtain stays of discovery; (2) Highland’s failure to comply in good faith with Rule 30(b)(6) in connection with the deposition of Minces; (3) the fact that the highly expedited nature of the proceeding was of Highland’s making; (4) Highland’s earlier failure to use Section 220 before instituting derivative litigation with inadequate demand futility allegations; and (5) Highland’s repeated publication of its detailed and excessive demand. The Opinion also contains a discussion of Highland’s multiple but futile

¹ Opinion at 19, referring to *Security First Corporation v. U.S. Die Casting and Development Company*, 687 A.2d 563, 570 (Del. 1997).

efforts to pare down its demand to a reasonable scope in the days and hours leading to trial. In conclusion, the Opinion finds that these “amount to an abuse of the Section 220 process, designed for some purpose other than to exercise Highland Select’s legitimate rights as a stockholder.”²

One observation: The holding of the Opinion denying relief must be understood in the context in which Highland pressed its demand. The finding in the Opinion that Highland’s conduct amounted to an abuse of the legitimate rights afforded to it under Section 220 was specifically based on the circumstances existing during the course of the litigation, on Highland’s failure to fashion a demand in a good faith effort to comply with controlling precedent, and on the court’s duty to police such proceedings “to prevent possible abuse of the shareholder’s right of inspection.”³

In this connection, the existence of the impending proxy contest was a significant factor, as explained in the Opinion:

Recent experience teaches that the potential for abuse is very much alive when the Section 220 demand is made—as this one is—in the context of an impending proxy contest. While a Section 220 books and records action is a summary proceeding that demands prompt attention from this court, it can be difficult to process from start to finish on a schedule that accommodates the foreshortened time frame of an ongoing proxy fight. This is especially true where the stockholder makes a broad demand and expects to be able to publicly

² Opinion at 23.

³ *CM&M Group, Inc. v. Carroll*, 453 A.2d 788, 793-94 (Del. 1982).

disclose in its proxy materials otherwise confidential documents or information obtained from the corporation after trial.⁴

As further observed in the Opinion, based on this court's experience in *Disney v. The Walt Disney Co.*,⁵ such a combination of circumstances produces extraordinary pressures on the litigants and the court. The court is not only called upon to try and decide the case within a few weeks of its filing, but also to referee "the inevitable series of disputes arising out of the inherently confidential nature of many of the documents that are responsive to a proper demand."⁶ If a demand is to be made in that context, it is essential to the orderly processes of this court that the stockholder make a narrowly tailored, good faith demand in compliance with clearly established precedent of the Delaware Supreme Court.⁷ In those circumstances, a stockholder proceeding in good faith will make a narrow request calling for the production of only those documents or categories of documents that are essential and sufficient to its purpose.

As is reflected in the Opinion, the demand Highland made and pressed with extreme expedition entirely failed to satisfy this standard. On the contrary, it was plainly drawn for a different purpose—to serve as part of Highland's platform in its

⁴ Opinion at 17.

⁵ 857 A.2d 44, 447 (Del. Ch. 2004), *remanded with questions*, No. 380 (Del. 2004) (Order), *modified by* 2005 WL 1538336 (Del. Ch. June 20, 2005), *appeal dismissed* ___ A.2d ___ (Del. ___).

⁶ Opinion at 17-18.

⁷ *Thomas & Betts Corp. v. Leviton Mfg. Co.*, 681 A.2d 1026, 1034-35 (Del. 1996).

proxy contest. Thus, the making of the demand, Motient's refusal of it on the obvious grounds of overbreadth, and the litigation itself all became aspects of Highland's attack on Motient's management in its proxy materials. These facts, although now nearly a year passed, all bore importantly on the court's conclusion that Highland was acting with an improper purpose.

B. Question 2

Because the court found that Highland did not have a proper purpose, Question 2 is moot.