

**COURT OF CHANCERY
OF THE
STATE OF DELAWARE**

WILLIAM B. CHANDLER III
CHANCELLOR

COURT OF CHANCERY COURTHOUSE
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GEORGETOWN, DELAWARE 19947

Submitted: June 22, 2009
Decided: August 31, 2009

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Re: *Smith v. Horizon Lines, Inc.*
Civil Action No. 4573-CC

Dear Counsel:

Before me is a motion to dismiss filed by defendant Horizon Lines, Inc. requesting this Court to dismiss the complaint pursuant to Rule 12(b)(6) for failure to state a claim upon which relief can be granted. For the reasons set forth briefly below, I grant the motion to dismiss without prejudice.

I. BACKGROUND

Plaintiff Patrick Smith, a purported stockholder of Horizon, filed a verified complaint in this Court seeking to enforce a demand to inspect books and records that had been served on Horizon on March 19, 2009. Horizon moved to dismiss the complaint on the grounds that plaintiff's demand letter did not satisfy the strict requirements of 8 *Del. C.* § 220. Horizon contends that the demand letter was

procedurally defective because it was not “accompanied by documentary evidence of beneficial ownership of the stock.”¹ Horizon points out that the demand letter attached a heavily redacted and undated document that lacked sufficient information from which a reader could determine that plaintiff owned Horizon stock at the time he served the demand.

On March 19, 2009, plaintiff served his demand letter on Horizon. The demand letter was made under oath, stated plaintiff’s status as a beneficial owner of Horizon stock, and was accompanied by a document (an account statement) that purported to show plaintiff’s beneficial ownership of Horizon stock. On March 26, 2009, Horizon responded that the demand letter failed to comply with § 220(b) because the “documentary evidence” (the account statement) accompanying the demand letter was insufficient. On March 31, 2009, plaintiff’s counsel wrote to Horizon’s counsel stating, among other things, that the demand letter complied with § 220 because it was accompanied by documentary evidence of plaintiff’s beneficial ownership of Horizon stock, as well as a verification that stated under oath that such documentary evidence was a true and correct copy of what it purported to be.

Finally, on May 8, 2009, having received no response to his March 31, 2009 letter, plaintiff commenced this action to enforce his inspection rights under § 220. Defendant moved to dismiss on June 2, 2009, and this is the Court’s decision on that motion.

II. ANALYSIS

When considering a motion to dismiss under Court of Chancery Rule 12(b)(6), the Court assumes “the truthfulness of all well-pleaded allegations of fact in the complaint.”² Dismissal is inappropriate unless “it appears with a reasonable certainty that the plaintiff would not be entitled to the relief sought under any reasonable set of facts properly supported by the complaint.”³ In considering the motion, the Court may also consider the documents attached to the complaint.⁴ In

¹ 8 *Del. C.* § 220(b).

² *In re BHC Commc’ns, Inc. S’holders Litig.*, 789 A.2d 1, 8 (Del. Ch. 2001).

³ *FS Parallel Fund L.P. v. Ergen*, 2004 WL 3048751, at *2 (Del. Ch. Nov. 1, 2004).

⁴ *See* Ct. Ch. R. 10(c) (stating that “a copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes”); *Baron v. Siff*, 1997 WL 666973, at *2 (Del. Ch. Oct. 17, 1997) (stating that “it is correct that the refusal letter is a part of the pleadings to be considered for the purposes of this Motion”).

this case, from the face of the complaint and the documents attached thereto, I conclude that plaintiff has failed to comply with the requirements of § 220.

Section 220 sets out the procedure that a stockholder must follow to be entitled to the inspection of a corporation's books and records. It provides in relevant part:

In every instance where the stockholder is other than a record holder of stock in a stock corporation or a member of a nonstock corporation, the demand under oath shall state the person's status as a stockholder, *be accompanied by documentary evidence of beneficial ownership of the stock*, and *state that such documentary evidence is a true and correct copy of what it purports to be.*⁵

The demand letter sent by plaintiff to Horizon fails to comply with this statutory mandate because it was not accompanied by documentary evidence of beneficial ownership. Instead, the demand letter was accompanied by a heavily redacted account statement that merely showed that "Smith" owned some type of Horizon security at some unknown time. In *Mattes*, this Court dismissed a § 220 action because the accompanying affidavit did not comply with the requirement of § 220 that a demand letter be "accompanied" by a power of attorney.⁶ *Mattes* illustrates that the express statutory requirements of § 220 are applied strictly, because strict adherence furthers "the interest of insuring prompt and limited litigation" of actions under § 220.⁷ Here, the heavily redacted page that lacked the full name of the owner and the date of ownership does not satisfy the "documentary evidence" requirement.

Plaintiff contends that he complied with the statutory requirements of § 220 by serving on Horizon a demand letter accompanied by a statement under oath that he is a beneficial stockholder of Horizon as evidenced by the true and correct copy of his account statement. According to plaintiff, because the plain language of § 220(b) does not specify a particular form of documentary evidence, he has satisfied the requirement even though the account statement he attached to the demand letter was so heavily redacted that it cannot be read to show plaintiff was a beneficial

⁵ 8 *Del. C.* § 220(b) (emphasis added).

⁶ *Mattes v. Checkers Drive-In Rests., Inc.*, 2000 WL 1800126 (Del. Ch. Nov. 15, 2000).

⁷ *Id.* at *1 (citing *Bear Stearns & Co. v. Pabst Brewing Co.*, 1977 WL 2578, at *2 (Del. Ch. Nov. 25, 1977)).

owner of Horizon stock on the relevant date. Put differently, plaintiff is arguing that any form of document will suffice, regardless of whether it demonstrates beneficial ownership on the appropriate date, if the document is accompanied by a sworn statement asserting beneficial ownership.

I am unable to conclude that *any* “documentary evidence” is sufficient to show ownership simply because the demanding shareholder has sworn the document is “true and correct.” The stockholder’s sworn statement is an independent requirement under § 220 and does not substitute for the requirement of “documentary evidence of beneficial ownership.” Section 220 requires *both* “documentary evidence of beneficial ownership of the stock” *and* that the beneficial owner “state that such documentary evidence is a true and correct copy of what it purports to be.”⁸ If a sworn statement alone is sufficient, then what purpose would be served by “documentary evidence of beneficial ownership?”

The statutory requirement of “documentary evidence” exists because the General Assembly wants any stockholder who is not a “record” owner (that the company could independently confirm is a shareholder) to prove her beneficial ownership. The purpose of § 220 is not served if the shareholder supplies a document that does not actually evidence that she is the beneficial owner of the company’s stock on the relevant date. In this case, all that the heavily redacted account statement proved was that someone named “Smith” owned some amount of something in Horizon at some unknown time. The redacted document plaintiff supplied—for reasons he has never explained—does not evidence what the statute plainly requires. This Court has noted that 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.”⁹ The “form and manner” requirements of § 220 are clear. They serve a wholesome purpose, and our law has always taken a straightforward and literal interpretation of them. As in *Mattes*, I find the requirements of § 220 have not been met, and the complaint should be dismissed.

Plaintiff, however, now insists that he is prepared to file a new demand with clear “documentary evidence” of his beneficial ownership in Horizon and can amend his complaint accordingly if the Court determines that plaintiff’s initial demand did not attach proper documentary evidence of his beneficial ownership of Horizon stock. In light of this representation, and in the exercise of my discretion,

⁸ 8 *Del. C.* § 220(b).

⁹ *Seinfeld v. Verizon Commc’ns Inc.*, 873 A.2d 316, 317 (Del. Ch. 2005).

I will grant plaintiff additional time to file a new demand before dismissing his complaint.

III. CONCLUSION

For the reasons set forth above, the motion to dismiss is granted without prejudice *unless* plaintiff moves to amend his complaint within 30 days of this date, after filing a new demand letter that attaches unambiguous documentary evidence showing his beneficial ownership of Horizon stock.

IT IS SO ORDERED.

Very truly yours,

A handwritten signature in cursive script that reads "William B. Chandler III". The signature is written in black ink and is positioned above the printed name.

William B. Chandler III

WBCIII:ysb