IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

KARL GRAULICH,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 5846-CC
	)	
DELL INC.,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION

Date Submitted: March 28, 2011
Date Decided: May 16, 2011

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Gregory P. Williams, Geoffrey G. Grivner and Nicole C. Bright, of RICHARDS, LAYTON & FINGER, P.A., Wilmington, Delaware; OF COUNSEL: John L. Latham and Susan E. Hurd, of ALSTON & BIRD LLP, Atlanta, Georgia, Attorneys for Defendant.

CHANDLER, Chancellor

This action involves a demand by Karl Graulich to inspect the books and records of Dell Inc. pursuant to 8 *Del. C.* § 220. Plaintiff purportedly seeks to investigate possible corporate mismanagement relating to Dell's sale of OptiPlex computer systems, sold from 2003 through 2005, in order to initiate "an appropriate suit" should he find evidence of wrongdoing. Plaintiff, however, does not have standing to bring such a suit, as he was not a stockholder of Dell until 2007. Moreover, even if plaintiff did have standing to pursue derivative claims relating to the OptiPlex systems (specifically, claims relating to the failure of a vendor part that had been installed in certain OptiPlex computers sold during the 2003-2005 time period, the related "costs of servicing or replacing" those faulty Dell OptiPlex systems in 2005-2006, and subsequent board action taken in response to the faulty capacitors and relating to any potential resulting detrimental effect on Dell's brand name), such claims would be barred. First, those claims are barred by the settlement release in *In re Dell, Inc. Derivative Litigation*.[1] Second, the applicable statute of limitations on any such claim has already run.

Defendant has moved for judgment on the pleadings. For the reasons more fully explained below, I conclude that because plaintiff would be

[1] Case No. 07-691-C26 (District Court of Williamson County, Tex.). *See* Def.'s Opening Br. 7 & Ex. A (Dell Inc. Form 10-K (Mar. 18, 2010), at 81-82).

unable to bring any of the derivative claims he seeks to assert—which is the only stated purpose in his books and records demand—plaintiff does not have a proper purpose under 8 *Del. C.* § 220 to inspect Dell's books and records. Thus, defendant's motion is granted.

I. BACKGROUND

The facts are taken from the pleadings and attached exhibits. All reasonable inferences are drawn in plaintiff's favor.[2] In addition, the Court may consider "documents that are required by law to be filed, and are actually filed, with federal or state officials" without converting the present motion into one for summary judgment.[3] I also take judicial notice of the filings and rulings in a derivative action in the Williamson County District Court of Texas, captioned *In re Dell, Inc. Derivative Litigation*, No. 07-691-C26 (the "Texas Action").[4]

A. Facts

According to the complaint, plaintiff is a stockholder of Dell—he owns 2,000 shares which he acquired in February 2007.[5] Through his Section 220 demand and the filing of this action, plaintiff purportedly

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[2] *See* Section II for a discussion of the applicable standard in a motion for judgment on the pleadings.
[3] *In re Tyson Foods, Inc.*, 919 A.2d 563, 584 (Del. Ch. 2007).
[4] *See Louisiana Municipal Police Employees Ret. Sys. v. Morgan Stanley & Co.*, 2011 WL 773316, at *1 (Del. Ch. Mar. 4, 2011).
[5] Compl. ¶ 1; *see also* Am. Demand and Ex. A.

seeks—by way of eight requests for documents[6]—to investigate alleged wrongdoing in connection with Dell's sale of OptiPlex computers "from about May 2003 to July 2005,"[7] the failure of certain "vendor supplied capacitors" in those computers and certain steps taken by the board to deal with the faulty parts,[8] the "costs of servicing or replacing" those faulty OptiPlex systems,[9] documents related to a derivative litigation filed in connection with those failures,[10] and other board minutes relating to "the OptiPlex situation."[11] In his brief, plaintiff describes his Amended Demand and the categories he seeks to investigate as being "designed to elicit [] facts" about "whether there was a systematic failure by the Board to supervise and correct the failures [relating to the OptiPlex systems] which

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[6] The complaint essentially restates the categories of requests in the demand letter. There are eight document requests in the complaint, and nine in the Amended Demand. Defendant attributes this to plaintiff apparently "abandon[ing] a document request contained in his Amended Demand," (Def.'s Opening Br. 10 n.7) but upon closer inspection it appears that the first "request" in the Amended Demand is not actually a proper request at all. Rather, it is a vague demand for "All minutes of [Dell's] Board of Directors ('Board') and any Committee thereof which discuss, refer to or relate to, but not limited to e-mails and/or internet postings." This request is entirely unclear—it appears to request minutes of the board discussing or relating to "emails and/or internet postings" (Any emails or internet postings? No topic is mentioned). Moreover, the request is "not limited" to that—essentially, it could be asking for anything. Plaintiff was wise to remove that category in his complaint. I will disregard that "request" as one of the categories of documents in the Amended Demand for purposes of this Opinion.

[7] Compl. ¶ 2(ii); Am. Demand ¶ 3.

[8] Compl. ¶ 2(iii)-(vi); Am. Demand ¶¶ 4-7.

[9] Compl. ¶ 2(i); Am. Demand ¶ 2.

[10] Compl. ¶ 2(vii); Am. Demand ¶ 8.

[11] Compl. ¶ 2(vi); Am. Demand ¶ 7; *see also* Compl. ¶ 2(viii); Am. Demand ¶ 9 (requesting board minutes dealing with publications regarding the problems with the OptiPlex computers).

mounted by leaps and bounds as they became known."[12] Investigation of possible "systematic failure" to supervise is nowhere to be found in plaintiff's Amended Demand or complaint, but I will infer from the eight categories of documents requested that plaintiff is, in general, seeking to investigate corporate wrongdoing and failure to supervise with respect to the OptiPlex systems and the faulty vendor part.[13]

B. The Alleged Wrongdoing

There are very few well-pled facts in plaintiff's three-page complaint (one of which is a signature page). From about May 2003 to July 2005, Dell sold "some 11.5 million" OptiPlex computers containing "a vendor part that did not perform to Dell's specifications."[14] According to the complaint, customers allegedly "claim[ed] that their Dell OptiPlex computer[s] were

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[12] Pl.'s Answering Br. 2.

[13] To the extent plaintiff seeks to make out a *Caremark* claim based on the board's "systematic failure" to supervise, it is worth pointing out that plaintiff would face a steep uphill battle. As this Court has recognized:

> The Delaware Supreme Court made clear in *Stone* [*v. Ritter*, 911 A.2d 362 (Del. 2006)] that directors of Delaware corporations have certain responsibilities to implement and monitor a system of oversight; however, this obligation does not eviscerate the core protections of the business judgment rule . . . . [T]he burden required for a plaintiff to rebut the presumption of the business judgment rule by showing gross negligence is a difficult one, and the burden to show bad faith is even higher. Additionally, as former-Chancellor Allen noted in *Caremark*, director liability based on the duty of oversight 'is possibly the most difficult theory in corporation law upon which a plaintiff might hope to win a judgment.'"

In re Citigroup Inc. S'holder Deriv. Litig., 964 A.2d 106, 125 (Del. Ch. 2009) (quoting *In re Caremark Int'l Inc. Deriv. Litig.*, 698 A.2d 959, 967 (Del. Ch. 1996)).

[14] Compl. ¶ 2(ii); Am. Demand ¶ 3.

faulty,"[15] and Dell incurred "charges in the third quarter of fiscal 2006 for costs of servicing or replacing certain of [those] OptiPlex systems that included the [faulty] vendor part that failed to perform to Dell's specifications."[16] The problems surrounding the OptiPlex systems exposed Dell to litigation.[17] Reading all inferences in plaintiff's favor, every "fact" alleged in plaintiff's complaint relates directly to the "OptiPlex situation."[18]

The existence of problems involving the OptiPlex systems and the faulty vendor part has been a matter of public record since at least November 2005. In its Form 10-Q for the third quarter of 2005 (fiscal year 2006), Dell clearly stated in the "Executive Overview" section that:

> Operating income and earnings per share declined year-over-year due to charges of $442 million primarily for warranty costs of $307 million for servicing or replacing certain OptiPlex systems that include a vendor part that failed to perform to our specifications. This charge also included amounts for workforce

[15] Compl. ¶ 2(iii); Am. Demand ¶ 4.
[16] Compl. ¶ 2(i); Am. Demand ¶ 2.
[17] Compl. ¶ 2(vii); Am. Demand ¶ 8.
[18] Compl. ¶ 2(vi). This includes the only specific reference to anything occurring outside the "OptiPlex time period" which asks for minutes of the board "dealing with publications in or about June and July 2010 regarding with failures [sic] of Dell OptiPlex computers." Compl. ¶ 2(viii); Am. Demand ¶ 9. Plaintiff does not specify any publications. Defendant points to one article that plaintiff was surely referring to—as it corresponds closely with the categories of documents requested in plaintiff's Amended Demand and complaint—a New York Times article dated June 28, 2010 discussing the capacitor problems with certain OptiPlex computers during the 2003-2006 time period and recently unsealed documents from a related lawsuit brought by a Dell customer. *See* Def.'s Opening Br. 8-9 and Ex. H (Ashlee Vance, *Suit Over Faulty Computers Highlights Dell's Decline*, N.Y. Times, June 28, 2010).

realignment, product rationalizations, excess facilities, and a write-off of goodwill.[19]

The problems related to the OptiPlex systems and the resulting effects on Dell's financials were noted in subsequent filings as well. For example, Dell's Form 10-K for the fiscal year ending February 3, 2006 ("Fiscal 2006") mentions—at least six times—the warranty costs of "servicing or replacing certain OptiPlex systems that include a vendor part that failed to perform to Dell's specifications," as well as additional charges for workforce realignment, product rationalizations, excess facilities and a write-off of goodwill that were all recognized in the third quarter of Fiscal 2006 (i.e., November 2005).[20] Those costs were mentioned again several times in Dell's Form 10-K for the fiscal year ending February 2, 2007.[21]

C. The Texas Action

On April 16, 2007, certain stockholders of Dell filed a derivative litigation in the District Court of Travis County, Texas, 201st Judicial District on behalf of Dell against certain of its officers and directors (the "Texas Action").[22] The consolidated petition in the Texas Action asserted claims against the defendants for "breaches of fiduciary duties, abuse of

[19] Dell Form 10-Q (Nov. 28, 2005), at 11; *see also id.* at 15, 19.
[20] *See* Dell Form 10-K (Mar. 15, 2006) at 19 n.(a), 21n.(a), 24-25, 55n.(a), 58n.(a), 62n.(a).
[21] *See, e.g.*, Dell Form 10-K (Oct. 30, 2007), at 22, 26, 39, 102.
[22] The Texas Action was later transferred from the District Court of Travis County to the District Court of Williamson County. Dell Form 10-Q (Dec. 10, 2007), at 14.

control, gross mismanagement, waste of corporate assets, [and] unjust enrichment . . . that have caused substantial losses to Dell and other damages, such as to its reputation and goodwill."[23] Plaintiffs in the Texas Action also alleged that defendants "allow[ed] and caus[ed] misrepresentations to be made regarding Dell's financial results and prospects" between February 2003 and April 2007 (the date of the filing).[24] In their detailed, 94-page petition, the Texas plaintiffs explicitly referenced (among numerous other allegations) problems relating to the OptiPlex systems.[25]

On September 11, 2009, the parties to the Texas Action agreed to a Stipulation of Settlement. On September 28, 2009, Dell filed a Form 8-K disclosing that the District Court in Texas had granted preliminary approval of the settlement[26] and attaching a copy of the Stipulation of Settlement.[27]

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[23] Answer Ex. B (Consolidated Shareholder Derivative Petition ("Texas Petition") at ¶ 2).
[24] *Id.* at ¶¶ 2, 7.
[25] *See, e.g.*, Texas Petition ¶ 78 ("In November 2005, the Company took a $300 million charge because of faulty components used on motherboards of certain desktop PCs."); Texas Petition ¶ 79 ("Dell has gone through a credibility crisis in recent years due to these poor customer service and product quality issues."); Texas Petition ¶ 113 (noting that Dell incurred a "one-time charge of $442 million[, consisting] of the cost of servicing certain OptiPlex systems that include a vendor part that failed to perform to Dell's specifications, workforce realignment, product rationalizations and excess facilities").
[26] Answer Ex. A (Dell Form 8-K (Sept. 28, 2009), at Ex. 99.1 ("Notice of Proposed Settlement")).
[27] *Id.* at Ex. 99.2 ("Texas Stipulation of Settlement").

On December 15, 2009, the Texas court granted final approval of the settlement.[28] The settlement provided for a broad release of claims.

> Specifically, the Stipulation of Settlement provides that:
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> > [T]he Settling Plaintiffs and Dell shall be deemed to have, and by operation of the Judgment shall have, fully, finally, and forever released, relinquished and discharged the Released Claims against the Released Persons and any and all claims (including Unknown Claims) arising out of, relating to, or in connection with the defense, settlement or resolution of the Released Claims against the Released Persons.[29]

"Released Persons" are defined as the defendants to the Texas Action, which includes all present and future directors and officers of Dell.[30] "Released Claims" are defined as:

> > All claims (including "Unknown Claims" as defined in ¶ 1.26 hereof [essentially, any Released Claims that the parties were unaware of]), or causes of action, including demands, rights, liabilities of every nature and description whatsoever, known or unknown, whether or not concealed or hidden, asserted or that might have been asserted, including, without limitation, claims for negligence, gross negligence, breach of duty of care and/or breach of duty of loyalty, bad faith, fraud, breach of fiduciary duty, or violations of any state or federal statute, rule or regulation, that have been or could have been asserted by Settling Plaintiffs, Dell, or Dell shareholders in their derivative capacity against the Released Persons, that are based upon, arise out of or are related to the claims, facts, transactions, events, occurrences, acts, disclosures, statements, omissions or

[28] Dell Form 10-K (Mar. 18, 2010), at 81-82.
[29] Stipulation of Settlement 14.
[30] *Id.* at 9.

> failures to act that were alleged or could have been alleged in the Action, the Federal Action, or the Demand.[31]

D. The Demand

On July 19, 2010, plaintiff Karl Graulich made a written demand pursuant to 8 *Del. C.* § 220 to inspect Dell's books and records regarding the OptiPlex issue. Because the demand letter did not include an "Exhibit A" referenced in the document that purportedly evidenced Graulich's beneficial ownership of Dell stock, counsel for Dell notified plaintiff of the omission, and plaintiff submitted a new demand letter on August 24, 2010 (previously referenced in this Opinion as the "Amended Demand").

Exhibit A, attached this time around, demonstrated that Graulich owned Dell common stock from February 1, 2007 through February 28, 2007. Dell responded to the Amended Demand on September 1, 2010, stating that plaintiff had failed to state a proper purpose under 8 *Del. C.* § 220 for several reasons, most notably because plaintiff would not have standing to bring any derivative claim based on the purported wrongdoing he wished to investigate. This is because (1) the Amended Demand's stated purpose related to a potential derivative action based on

[31] *Id.* at 9. The "Federal Action" was a parallel derivative case in the District Court for the Western District of Texas that was dismissed without prejudice on October 9, 2007, and the "Demand" was a stockholder demand made on Dell's board pursuant to Delaware Court of Chancery Rule 23.1 on November 12, 2008. *Id.* at 6.

alleged conduct occurring between 2003 and 2006 (the OptiPlex issue), at which time plaintiff was not a stockholder of Dell, and (2) Graulich had not established current ownership of Dell (or continuous ownership since the time of the wrongdoing), which is required before a stockholder can bring a derivative suit. Dell also attached the Stipulation of Settlement in the Texas Action to its response letter and informed plaintiff that any claims he would seek to assert relating to the problems with the OptiPlex systems would be barred by the Texas Settlement, and would also be untimely.

Plaintiff replied to Dell's letter on September 14, 2010, providing evidence of Dell stock ownership from August 1, 2010 through August 31, 2010. Dell responded on September 23, 2010, pointing out that Graulich had still not provided evidence that he was a Dell stockholder during the time of the alleged wrongdoing, i.e., from 2003 to 2006.

Plaintiff filed this action—"Complaint for Inspection of Books and Records"—on September 23, 2010. The complaint essentially restates the demand, and attaches the Amended Demand as an exhibit. Defendant filed its answer on October 18, 2010. At the same time, defendant moved for judgment on the pleadings.

II. STANDARD

A. Judgment on the Pleadings

Although Section 220 cases are generally "summary proceedings [that] are to be promptly tried,"[32] pre-trial motion practice may be entertained in a books and records action where the underlying facts are largely undisputed.[33] Under Court of Chancery Rule 12(c), judgment on the pleadings will be granted "if the pleadings fail to reveal the existence of any disputed material fact and the movant is entitled to judgment as a matter of law."[34] In ruling on a motion for judgment on the pleadings, the Court must take the well-pled facts alleged in the complaint as true, and view "the inferences to be drawn from such facts in a light most favorable to the non-moving party."[35] The Court need not, however, "blindly accept as true all allegations," nor must it draw unreasonable inferences in the non-moving

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[32] *Lavi v. Wideawake Deathrow Entm't, LLC*, 2011 WL 284986, at *1 (Del. Ch. Jan. 18, 2011).

[33] *Louisiana Municipal Police Employees Ret. Sys. v. Morgan Stanley & Co.*, 2011 WL 773316, at *3 (Del. Ch. Mar. 4, 2011) (ruling on defendant's motion to dismiss in a Section 220 action); *see also West Coast Mgmt. & Capital, LLC v. Carrier Access Corp.*, 914 A.2d 636 (Del. Ch. 2006) (ruling on defendant's motion for judgment on the pleadings in a Section 220 action); *Norfolk County Ret. Sys. v. Jos. A. Bank Clothiers, Inc.*, 2009 WL 353746 (Del. Ch. Feb. 12, 2009) (ruling on cross motions for summary judgment in a Section 220 action).

[34] *West Coast Mgmt. & Capital, LLC v. Carrier Access Corp.*, 914 A.2d 636, 641 (Del. Ch. 2006).

[35] *Desert Equities, Inc. v. Morgan Stanley Leveraged Equity Fund, II, L.P.*, 624 A.2d 1199, 1205 (Del. 1993).

party's favor.[36] In addition to the factual allegations contained in the complaint and demand letter, the Court may consider the exhibits attached to the pleadings without converting the motion into a Rule 56 summary judgment motion.[37]

B. Section 220: Inspection of Books and Records

A stockholder of a Delaware corporation has a statutory right to inspect the books and records of the corporation under 8 *Del. C.* § 220. This statutory right is conditioned on (1) the stockholder actually being a stockholder of the corporation; (2) certain form and manner requirements having been met in making the inspection request; and (3) the stockholder having a proper purpose for the inspection.[38] The statute defines "proper purpose" as "a purpose reasonably related to such person's interest as a stockholder."[39] The stockholder seeking to inspect a corporation's books and records (other than the stock list) bears the burden of proving that he has met the statutory requirements and has a proper purpose.[40]

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[36] *West Coast Mgmt.*, 914 A.2d at 641.
[37] *Id.*; *see also Bernstein v. Canet*, 1996 WL 342096, at *3 (Del. Ch. June 11, 1996); *Rag Am. Coal Co. v. AEI Res., Inc.*, 1999 WL 1261376, at *1 (Del. Ch. Dec. 7, 1999).
[38] 8 *Del. C.* § 220(c).
[39] 8 *Del. C.* § 220(b).
[40] 8 *Del. C.* § 220(c).

III. ANALYSIS

A. Stockholder of the Corporation; Form and Manner Requirements

Defendant concedes that plaintiff is a stockholder of Dell and has been since February 2007.[41] As far as the Court is aware, however, plaintiff was a stockholder of Dell for one month in 2007 (February), and one month in 2010 (August).[42] It is unclear to the Court why it is so difficult for plaintiff to show proof of continuous ownership from the time he acquired the shares (presumably February 2007) until now. Nonetheless, reading all well-pled facts and inferences in the complaint and the Amended Demand in favor of plaintiff, I accept plaintiff's representation that he is currently a stockholder of Dell and has been since 2007. Similarly, the parties do not dispute that plaintiff complied with the technical form and manner requirements of Section 220. Accordingly, the only issue to be decided is whether plaintiff has stated a proper purpose in his Amended Demand.

B. Proper Purpose (Investigating Corporate Mismanagement in Order to Bring Potential Derivative Litigation)

One purpose that Delaware courts have recognized in some circumstances as a proper purpose for demanding the inspection of corporate

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[41] *See* Def.'s Reply Br. 2.

[42] *See* Def.'s Opening Br. 9-10 & Exs. J, K. This is because all that was ever given to defendant—after multiple requests to furnish proof of stock ownership—and all that was ever submitted to the Court is evidence of ownership from February 1 to February 28, 2007, and ownership from August 1 to August 31, 2010.

books and records is the investigation of wrongdoing or possible mismanagement by the board.[43] Although plaintiff did not phrase his demand in those exact words here, plaintiff purportedly seeks to investigate potential wrongdoing by the Dell board relating to the sale of Dell's OptiPlex computer systems in 2003-2005—in particular, problems with some of those computers relating to a faulty vendor part.[44] Specifically, plaintiff's version of the "investigating possible wrongdoing or mismanagement" purpose is worded as follows:

> It is necessary in the interests of my investment in Dell to ascertain what, if anything the directors were doing to monitor and prevent such improper and illegal activities [presumably the failure of the vendor part that resulted in Dell having to service and replace certain OptiPlex computers] which have damaged the Company and its shareholders.[45]

But a stockholder "must do more than state, in a conclusory manner, a generally accepted proper purpose"—the investigation of corporate mismanagement "must be to some end."[46] In other words, plaintiff "must

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[43] DONALD J. WOLFE, JR. & MICHAEL A. PITTENGER, CORPORATE AND COMMERCIAL PRACTICE IN THE DELAWARE COURT OF CHANCERY § 8.06[e][l] at 8-118 (2010); *Norfolk County Ret. Sys. v. Jos. A. Bank Clothiers, Inc.*, 2009 WL 353746, at *5 (Del. Ch. Feb. 12, 2009); *Seinfeld v. Verizon Commc'ns, Inc.*, 909 A.2d 117, 118 (Del. 2006).
[44] Am. Demand ¶ 11; *see* Am. Demand ¶¶ 2-9.
[45] *Id.*
[46] *West Coast Mgmt. & Capital, LLC v. Carrier Access Corp.*, 914 A.2d 636, 646 (Del. Ch. 2006).

state a reason for the purpose, i.e., what it will do with the information or an end to which that investigation may lead."[47]

Stockholders may seek to investigate corporate mismanagement or wrongdoing for a number of reasons—they may seek to institute possible derivative litigation, or "[t]hey may seek an audience with the board to discuss proposed reforms or, failing in that, they may prepare a stockholder resolution for the next annual meeting, or mount a proxy fight to elect new directors."[48] Here, plaintiff only has one stated purpose: to investigate potential wrongdoing in order to commence "an appropriate suit."[49] In this

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[47] *Id.*

[48] *Saito v. McKesson HBOC, Inc.*, 806 A.2d 113, 117 (Del. 2002).

[49] Am. Demand ¶ 12. ("If it is found that the directors and their agents failed in their duties, then an appropriate suit will be commenced."). In his complaint, plaintiff's word choice for his "investigation of corporate wrongdoing" purpose is even less clear, and he does not mention an intent to investigate a potential derivative suit at all. The complaint includes two paragraphs explaining plaintiff's purpose. First, "[t]he reason these documents are sought is that Dell is the subject of lawsuits relating to these computers and has already been subjected to substantial damage awards. It has sustained reputational injury that could be devastating." Compl. ¶ 3. Plaintiff continues, "[t]he reason for the demand is as follows: Dell is the subject to a number of lawsuits relating to these computers. Dell has cultivated a reputation and image of a reputable company selling extraordinary products. The failure of the computer system sold by Dell and the possibility that the Board knew but permitted the continued selling of such systems has led to the lawsuits and could have damaging effects on Dell's finances and reputation." Compl. ¶ 4. Those two paragraphs are the entirety of, and the only, stated "reasons" in plaintiff's complaint for seeking to investigate Dell's books and records. Just because a company has previously been a party to a lawsuit, however, is not a reason or purpose sufficient to allow any *other* plaintiff to bring a similar lawsuit. The plaintiff must articulate some credible basis for his demand to investigate the books and records of the company. That "credible basis" standard has been interpreted as a low one, but simply saying that the company has already been subject to lawsuits, with nothing else, does not cut it. Still, reading every inference in the complaint and Amended Demand in plaintiff's

case, however, plaintiff would be procedurally barred from bringing a derivative suit based on the wrongdoing he purportedly seeks to investigate in his Amended Demand. First, he lacks standing to bring suit because he was not a stockholder at the time of the alleged wrongdoing. Second, any claim based on the alleged wrongdoing in the complaint and Amended Demand would be barred by claim preclusion. Third, any such claim would be time-barred. Accordingly, because plaintiff would be unable to maintain a derivative suit, he has not stated a proper purpose.

1. Plaintiff lacks standing

If "a books and records demand is to investigate wrongdoing and the *plaintiff's sole purpose is to pursue a derivative suit, the plaintiff must have standing to pursue the underlying suit to have a proper purpose*."[50] If plaintiff would not have standing to bring suit, plaintiff does not have a proper purpose to investigate wrongdoing because its stated purpose is not reasonably related to its role as a stockholder.[51] Here, plaintiff's only

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favor, investigating corporate wrongdoing in order to pursue a potential derivative suit can be interpreted as a sufficiently "stated" purpose for me to continue with my analysis.

[50] *West Coast Mgmt.*, 914 A.2d at 641 (emphasis added).

[51] *Id.* at 646; *Polygon Global Opportunities Master Fund v. West Corp.*, 2006 WL 2947486, at *5 (Del. Ch. Oct. 12, 2006) ("This purpose [investigating claims of wrongdoing to determine whether the board breached its fiduciary duties] is not reasonably related to [plaintiff's] interest as a stockholder as it would not have standing to pursue a derivative action based on any potential breaches.").

purpose is to pursue potential derivative claims.[52] As described above, those claims all involve alleged wrongdoing that took place from 2003 through 2006.[53] In order to have standing to institute a derivative suit, plaintiff must have been a stockholder of the corporation at the time of the alleged wrongdoing.[54] But it is undisputed that plaintiff did not acquire his shares until February 2007. Thus, as plaintiff was not a stockholder of Dell during the time of the alleged wrongdoing, he lacks standing to bring suit based on the facts articulated in his complaint and demand.[55]

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[52] Am. Demand ¶ 12 ("If it is found that the directors and their agents failed in their duties, then *an appropriate suit* will be commenced.") (emphasis added).

[53] Each paragraph in plaintiff's complaint and Amended Demand is described in Sections I.*A.* and I.*B.* and all relate directly to "the OptiPlex situation" surrounding the vendor part that failed to perform to Dell's specifications in certain OptiPlex computers "sold to customers from about May 2003 to July 2005." Am. Demand ¶¶ 7, 2.

[54] 8 *Del. C.* § 327. Alternatively, plaintiff's stock may have been "thereafter devolved upon [him] by operation of law," which no one alleges took place here. *Id.* Plaintiff has not stated an intent to pursue direct claims, but he would similarly lack standing in that case. *Polygon*, 2006 WL 2947486, at *5 n.23 (quoting *Omnicare, Inc. v. NCS Healthcare, Inc.*, 809 A. 2d 1163, 1170 (Del. Ch. 2002) ("The policy animating 8 *Del. C.* § 327 is not [] limited to derivative claims alone. Rather, that policy is derived from 'general equitable principles' and has been applied to preclude stockholders who later acquire their shares from prosecuting direct claims as well.").

[55] Although "the date of [a stockholder's] purchase should not be used as an automatic 'cut-off' date in a § 220 action," a stockholder may only access books and records "[i]f activities that occurred before the purchase date are 'reasonably related' to the stockholder's interest as a stockholder." *Saito v. McKesson HBOC, Inc.*, 806 A.2d 113, 117 (Del. 2002). In other words, if—as in *Saito*—the stockholder *already has a proper purpose* and is seeking additional documents that slightly predate the date of ownership, that stockholder is not automatically barred from inspecting those books and records. *See also Melzer v. CNET Networks, Inc.*, 934 A.2d 912 (Del. Ch. 2007) (granting access to documents that pre-dated plaintiff's ownership where plaintiff already had standing). The Court in *Melzer v. CNET* specifically distinguished cases like *Polygon* where, as here, the "shareholder's articulated purpose was solely to investigate potential claims—claims that the shareholder would be barred from bringing." *Id.* at 919.

2. Plaintiff's claims are time-barred

The wrongdoing that plaintiff purportedly seeks to investigate involves corporate mismanagement and "systematic failure" by the board to supervise—in other words, alleged breach of fiduciary duties by the board relating to the OptiPlex situation. A three-year statute of limitations "almost universally" applies to stockholder derivative suits for alleged breaches of fiduciary duty in Delaware.[56] "A claim for breach of fiduciary duty accrues at the time of the wrongful act,"[57] and "[t]he statute of limitations begins to run at the time that the cause of action accrues."[58] "This is true even if the plaintiff is unaware of the cause of action or the harm."[59]

Plaintiff argues that "[n]on or misleading disclosure to shareholders prevents the Statute of Limitations from running."[60] Plaintiff also contends that "defendant concealed the problems surrounding the purchases and sales of the defective computers and [went to] extraordinary efforts to mislead the purchasers of those computers," and that defendant's "[p]artial disclosures in public filings and news comments do not and did not reveal the extent of the

[56] *Sutherland v. Sutherland*, 2010 WL 1838968, at *8 n.57 (Del. Ch. May 13, 2010); *see id.* at *17 ("[A]ll claims arising [earlier than] three years before the § 220 action was initiated[] are time barred."); 10 *Del. C.* § 8106.
[57] *Sutherland*, 2010 WL 1838968, at *8.
[58] *In re Tyson Foods, Inc.*, 919 A.2d 563, 584 (Del. Ch. 2007).
[59] *Id.*
[60] Pl.'s Answering Br. 5.

misconduct and whether it was systemic."[61] Plaintiff cites *In re Tyson Foods* for the proposition that "the Statute of Limitations cannot be considered to have run when shareholders were not put on notice of the full scope of the actual wrongs."[62] Plaintiff apparently misunderstands the Court's holding in *Tyson*.

In *Tyson*, the Court recognized that the statute of limitations may be tolled under the doctrines of fraudulent concealment[63] or equitable tolling.[64] Under these theories, "plaintiff bears the burden of showing that the statute was tolled, and relief from the statute extends only until the plaintiff is put on inquiry notice."[65] Put simply, as the Court in *Tyson* explained, "no theory will toll the statute beyond the point where the plaintiff was objectively aware, or should have been aware, of facts giving rise to the wrong."[66]

Plaintiff has alleged not a single "affirmative act of actual artifice" by Dell, and in any event plaintiff was put on inquiry notice in November 2005

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[61] *Id.*
[62] *Id.* at 6.
[63] Under the theory of fraudulent concealment, "a plaintiff must allege an *affirmative act of 'actual artifice' by the defendant* that either prevented the plaintiff from gaining knowledge of material facts or led the plaintiff away from the truth." *In re Tyson Foods, Inc.*, 919 A.2d at 585.
[64] Under the doctrine of equitable tolling, the statute of limitations is tolled "while a plaintiff has reasonably relied upon the competence and good faith of a fiduciary. No evidence of actual concealment is necessary in such a case, but the statute is *only tolled until the investor 'knew or had reason to know of the facts constituting the wrong*.'" *Id.*
[65] *Id.*
[66] *Id.*

(if not earlier), when Dell publicly filed its Form 10-Q disclosing problems with the OptiPlex systems and associated charges incurred by the company. At that point, plaintiff was objectively aware—and if he was not, he should have been—of facts giving rise to the alleged wrongs he seeks to investigate as articulated in his Amended Demand, which relate precisely to those problems surrounding the OptiPlex systems and the faulty vendor part.

As this Court has held, "in a specific factual setting, a time bar defense or a claim or issue preclusion defense would eviscerate any showing that might otherwise be made in an effort to establish a proper shareholder purpose."[67] Well, this case involves that "specific factual setting"—plaintiff has articulated no stated purpose other than to investigate wrongdoing in order to bring an appropriate suit against defendant, and plaintiff is time-barred from bringing that suit.

3. Plaintiff's claims are barred by claim preclusion

Claim preclusion also "eviscerate[s] any showing" of proper purpose here.[68] The Texas Action was based on the same set of facts plaintiff purportedly seeks to investigate here—claims involving breach of fiduciary duty, gross mismanagement, waste of corporate assets, loss of reputation and

[67] *Amalgamated Bank v. UICI*, 2005 WL 1377432, at *2 n.14 (Del. Ch. June 2, 2005).
[68] *Id.*; *see also Norfolk County Ret. Sys. v. Jos. A. Bank Clothiers, Inc.*, 2009 WL 353746, at *6 (Del. Ch. Feb. 12, 2009) ("If the filing of such a future derivative action would be barred by claim or issue preclusion . . . a § 220 demand may be denied as a matter of law.").

good will,[69] misrepresentations made by the board regarding Dell's financial results and prospects during the relevant time period (2003-2007),[70] and specific references to the problems relating to the OptiPlex computers and the failure of certain capacitors.[71]

The settlement of that action—which, as noted above, is quite broad—explicitly precludes plaintiff from bringing suit based on the released claims, and "Delaware has traditionally treated the impact of settlement judgments on subsequent litigation in state court as a question of claim preclusion."[72]

Plaintiff attempts to argue that the Texas settlement "did not relate to the systematic failure to supervise and correct the problems arising from the purchases and sales of defective computers," and thus plaintiff's potential claims would not be barred.[73] As just explained, though, the underlying facts alleged in the Texas Action *did* cover the same core facts plaintiff purports to investigate in his Amended Demand. Even without reading the full Stipulation of Settlement, the bare-bones notice of settlement explained that the Texas Action and the settlement of that action covered claims involving allegations of directors "failing in their oversight responsibilities"

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[69] Texas Petition at ¶ 2.
[70] *Id.* at ¶¶ 2, 7.
[71] *See, e.g.*, Texas Petition ¶¶ 53, 75-80, 83, 113, 117, 126.
[72] *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 376 (1996).
[73] Pl.'s Answering Br. 8.

during the relevant time period—precisely the claims plaintiff would seek to investigate here.

C. Plaintiff states no other proper purpose

There are many purposes related to the investigation of corporate wrongdoing, other than pursuing derivative litigation, that plaintiff could have properly articulated in his demand. For example, plaintiff could have purported to seek to investigate corporate mismanagement for any of the proper purposes listed in *Saito*.[74] Alternatively, though somewhat vague, plaintiff could have stated that his purpose would be more generally to "take appropriate action" if it were found that the directors breached their duties (this might encompass some of the *Saito* purposes other than solely instituting a derivative suit). To illustrate, in *Norfolk County Retirement System v. Jos. A. Bank Clothiers, Inc.*,[75] one of the stated purposes in plaintiff's demand letter was to "take appropriate action in the event the members of the Company's Board of Directors did not properly discharge their fiduciary duties."[76] Despite the broader wording of the demand, plaintiff there plainly explained in its submissions to the Court that it was

[74] *Saito v. McKesson HBOC, Inc.*, 806 A.2d 113, 117 (Del. 2002) ("They may seek an audience with the board to discuss proposed reforms or, failing in that, they may prepare a stockholder resolution for the next annual meeting, or mount a proxy fight to elect new directors.").
[75] 2009 WL 353746 (Del. Ch. Feb. 12, 2009).
[76] *Id.* at *10.

seeking to investigate potential corporate mismanagement for the purpose of "determin[ing] whether there is a basis to file a derivative action."[77]

The Court in *Norfolk* recognized that plaintiff "has not stated anywhere that it intends to engage in a proxy contest, or communicate directly with the board, or take some specific action other than evaluating the actions of the board for a potential derivative suit."[78] The same is true here. In *Norfolk*, however, it was not "a matter of undisputed fact" that plaintiff's *only* purpose was "to explore the possibility of a derivative suit" because, giving plaintiff all reasonable inferences, plaintiff there could have had an "additional purpose of determining whether to take any *other action* based on the suspected wrongdoing."[79] In this case, though, there are no such reasonable inferences to afford plaintiff—the Amended Demand letter states that plaintiff's purpose is to commence "an appropriate *suit*" if it is found that the directors breached their fiduciary duties; it does not say that plaintiff's purpose includes taking any other "appropriate action."[80] Thus, plaintiff has no additional stated purposes and none can be reasonably

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[77] *Id.* at *11.
[78] *Id.* at *11.
[79] *Id.* at *12 (emphasis added). Comparing the plain language of the two stated purposes in the *Norfolk* demand and Graulich's demand side by side clearly demonstrates this difference: one (Norfolk) seeks to "take appropriate *action*" while the other (Graulich) seeks to commence "an appropriate *suit*." There can be no question that plaintiff here has not articulated any purpose other than pursuing a derivative suit.
[80] Am. Demand ¶ 12.

inferred—the only purpose that can be fairly read out of plaintiff's demand is that he seeks to investigate "whether there was a systematic failure by the Board to supervise" *in order to determine whether there is a basis to file a derivative suit*.[81] To repeat, the *only* stated purpose in plaintiff's poorly-worded complaint is to pursue a possible derivative claim. As explained above, plaintiff lacks standing to bring any such claim—he lacks standing to bring a claim derivatively *or* directly because he was not a stockholder at the time of the alleged wrongdoing, and on top of that, any such claim is barred by both claim preclusion *and* the applicable statute of limitations. Thus, his stated purpose is not related to his interest as a stockholder.

For the foregoing reasons, plaintiff has failed to state a proper purpose under 8 *Del. C.* § 220. Judgment on the pleadings is entered in favor of defendant.

An Order has been entered consistent with this Memorandum Opinion.

[81] Pl.'s Answering Br. 2; Am. Demand ¶ 12.