EFiled: Oct 03 2014 01:09PM EDT Transaction ID 56128525 Case No. 9154-VCN

## COURT OF CHANCERY OF THE STATE OF DELAWARE

JOHN W. NOBLE VICE CHANCELLOR 417 SOUTH STATE STREET DOVER, DELAWARE 19901 TELEPHONE: (302) 739-4397 FACSIMILE: (302) 739-6179

October 3, 2014

Blake A. Bennett, Esquire Cooch and Taylor, P.A. 1000 West Street, 10th Floor Wilmington, DE 19801 Gregory V. Varallo, Esquire Richards, Layton & Finger, P.A. 920 North King Street Wilmington, DE 19801

Re: Wolst v. Monster Beverage Corporation

C.A. No. 9154-VCN

Date Submitted: June 13, 2014

## Dear Counsel:

Plaintiff Anastasia Wolst ("Wolst") has owned common stock of Defendant Monster Beverage Corporation ("Monster") continuously since 1999. During 2006 and 2007, with the benefit of nonpublic information about Monster's finances and business prospects, certain insiders allegedly sold Monster common stock. That conduct resulted in federal securities class litigation filed in September 2008.<sup>1</sup> The

 $<sup>^1</sup>$  Am. Pre-Trial Stip. & Order ("Pretrial Stip.")  $\P$  6. Wolst, because of the lack of any trading activities during the pertinent timeframe, was not a member of the class. *See* Pretrial Stip.  $\P$  5.

C.A. No. 9154-VCN

October 3, 2014

Page 2

parties to the federal securities class action entered into a settlement agreement in

April 2014.<sup>2</sup>

In October 2008, other shareholders brought a derivative action regarding

the trading activities. Wolst eventually joined in that effort. Because of an

inability to establish demand futility, the derivative action failed.

Disappointed with that outcome, Wolst, in February 2012, made a demand

on Monster's board of directors to bring litigation related to the alleged insider

trading of 2006 and 2007. In response to her demand, Monster's board appointed a

Special Committee. As a result of the Special Committee's investigation, her

demand for litigation was rejected. The Special Committee did not provide a

written report, and Wolst did not abandon her concerns about those trading

activities.

In March 2013, Wolst sent a letter to Monster seeking to inspect certain of

its books and records in accordance with 8 Del. C. § 220.3 She identified her

purposes for inspection as: (1) "[e]valuating the Board's refusal to act on [her]

 $^2$  Monster's insurers committed to pay the \$16,250,000 settlement. JX 52; Pretrial Stip. ¶ 14.

<sup>3</sup> JX 44; Pretrial Stip. ¶ 56.

C.A. No. 9154-VCN

October 3, 2014

Page 3

litigation demand and whether that refusal constituted a reasonable and good-faith

exercise of the Board's business judgment" and (2) "[e]valuating the process by

which the Board decided to refuse to act on [her] litigation demand."<sup>4</sup> Wolst

concedes that her ultimate goal in pursuing her books and records request is "to

determine whether there is a basis to bring a derivative suit" based on the "wrongs

alleged in" the earlier derivative action.<sup>5</sup> Thus, the "end game" here for Wolst is

the filing of another derivative action. Wolst has not offered any other purpose,

and no other purpose is apparent.

This matter was tried on a paper record, and this letter opinion sets forth the

Court's findings of fact (essentially uncontested) and its conclusions of law

(vigorously debated).

A stockholder invoking her rights under Section 220 must demonstrate a

"proper purpose" for the inspection. A proper purpose is one "reasonably related

to [the stockholder's] interest as a stockholder." Monster argues that Wolst does

not have a proper purpose because the derivative claims that she wants to bring

<sup>4</sup> JX 44; Pretrial Stip. ¶ 58. <sup>5</sup> JX 59 at 109, 119; Pretrial Stip. ¶ 58.

<sup>6</sup> 8 *Del. C.* § 220(b).

Page 4

would be time-barred.<sup>7</sup> Wolst seeks to assess whether the Special Committee's investigation was wrongful or improper in order to develop a basis for avoiding the consequences of Monster's rejection of her demand that litigation be brought to

remedy the trading activities. Her purpose is to advance her derivative claims,

which would be a proper purpose unless the time-bar defense defeats it.

A potentially viable affirmative defense to an anticipated derivative claim will not necessarily defeat a books and records effort. Sometimes developing the record to withstand possible affirmative defenses requires more effort than is practicable for a books and records action. Sometimes conduct that cannot be challenged because of a time-bar defense can, nevertheless, inform consideration of other potentially wrongful conduct that is not yet time-barred. There is, however, "the possibility that, in a specific factual setting, a time bar defense . . . would eviscerate any showing that might otherwise be made in an effort to establish a proper shareholder purpose." The challenged trading activities

<sup>&</sup>lt;sup>7</sup> Monster does not dispute that her purpose would be proper if the eventual derivative claims could be filed timely.

<sup>&</sup>lt;sup>8</sup> See, e.g., Amalgamated Bank v. UICI, 2005 WL 1377432, at \*2 (Del. Ch. June 2, 2005).

<sup>&</sup>lt;sup>9</sup> *Id.* at \*2 n.14.

C.A. No. 9154-VCN

October 3, 2014

Page 5

occurred in 2006 and 2007. Wolst does not identify any more recent potentially

wrongful conduct that could provide a basis for a derivative action. Without some

elaboration upon what she would do with the requested books and records in her

capacity as a stockholder, the burden of producing books and records that

Section 220 imposes upon the corporation should be avoided in this instance. In

sum, consideration of a time-bar defense to the contemplated derivative action is

appropriate in this "specific factual setting." <sup>10</sup>

The last of the events serving as the basis for Wolst's anticipated derivative

action occurred almost seven years ago, well beyond the presumptive three-year

limit of 10 Del. C. § 8106, the analogous statute of limitations. Although equity is

not strictly bound to a statute of limitations in this context, the three-year period is

a start in the Court's laches analysis. Wolst argues that Monster has failed to

satisfy the laches requirements of both unreasonable delay and prejudice.<sup>11</sup>

However, delay of seven years is unreasonable, especially since Wolst had

constructive knowledge of the events by late 2007 and participated in a related

<sup>10</sup> See Graulich v. Dell Inc., 2011 WL 1843813, at \*6 (Del. Ch. May 16, 2011).

<sup>11</sup> See, e.g., Roseton OL, LLC v. Dynegy Hldgs., Inc., 2011 WL 3275965, at \*7

(Del. Ch. July 29, 2011).

C.A. No. 9154-VCN

October 3, 2014

Page 6

derivative action. Although Monster has not itemized how it would be prejudiced,

delay for which Wolst is responsible is presumptively prejudicial under the

circumstances because of fading memories and the protracted distractions diverting

management's attention from the needs of the corporation. The passage of seven

years from events which were the subject of other timely litigation would

unjustifiably prejudice Monster.<sup>12</sup>

Thus, Wolst's derivative claims would be time-barred unless the pendency

of the federal securities class action is a basis for tolling the statute of limitations

and the period for evaluating the laches defense. Wolst relies upon the principle

that the filing of a class action generally tolls the running of the statute of

limitations for all potential class members.<sup>13</sup> In the class action structure, the

putative class representatives who file the action do so not only for themselves, but

also for all similarly situated persons. Those similarly situated persons are entitled

to rely upon the actions of their putative representatives. Otherwise, potential class

<sup>12</sup> Even if it is assumed that the period during which Wolst has attempted to exercise her rights under Section 220 may be excluded from the Court's time-bar

arithmetic, the relevant period still exceeds five years, more than enough time for

her to have exercised any right to bring a derivative action.

<sup>13</sup> See Am. Pipe & Constr. Co. v. Utah, 414 U.S. 538 (1974); Dubroff v. Wren

Hldgs., LLC, 2011 WL 5137175 (Del. Ch. Oct. 28, 2011).

C.A. No. 9154-VCN

October 3, 2014

Page 7

members would be under pressure to file their own actions in order to avoid having

their individual claims time-barred in the event that the initial class representatives

decide to abandon their efforts. It does not appear that the class action concept of

tolling has been extended to derivative actions. 14 It is true, as Wolst points out,

that derivative actions purportedly brought to recover a corporation's losses from

violations of federal securities laws and the resulting litigation are frequently

stayed pending resolution of the foundational securities litigation. Until the

outcome of the securities litigation is known, the scope of the harm suffered by the

corporation is uncertain. Yet just because prudent case management may support a

stay of a derivative action in a similar context, it does not follow that the statute of

limitations ceases to run for every interested party. More specifically, the class

action tolling doctrine has only been applied for the benefit of potential class

members. Wolst was not a member of the class in the federal securities litigation

and thus is not entitled to the benefits accruing to the class. In short, the Court

declines to extend the rationale of American Pipe, which protects stockholders'

1

<sup>14</sup> Cf. Krinsk v. Fund Asset Mgmt., Inc., 1986 WL 205, at \*3 (S.D.N.Y. May 9,

1986).

C.A. No. 9154-VCN

October 3, 2014

Page 8

direct claims, to derivative claims that stockholders might assert on behalf of the

corporation.

In summary, Wolst "has articulated no stated purpose other than to

investigate wrongdoing in order to bring [her derivative] suit against [Monster's

insiders who traded on nonpublic information], and [Wolst] is time-barred from

bringing that suit." <sup>15</sup> Accordingly, because the derivative action contemplated by

Wolst would be time-barred and because no other purpose has been identified, she

has failed to prove a proper purpose, an essential element of her case under 8 Del.

C. § 220. Judgment is entered in favor of Monster. 16

IT IS SO ORDERED.

Very truly yours,

/s/ John W. Noble

JWN/cap

cc:

Register in Chancery-K

<sup>15</sup> Graulich, 2011 WL 1843813, at \*6.

<sup>16</sup> The parties shall bear their own costs. Wolst had a proper purpose, but for the time-bar aspect of her action. Whether the *American Pipe* doctrine should be extended in these circumstances was a question not free of doubt.