

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

POSCO ENERGY CO., LTD.,)
)
 Plaintiff,)
)
 v.) C.A. No. 2020-0713-MTZ
)
FUELCELL ENERGY, INC.,)
)
 Defendant.)

FINAL ORDER AND JUDGEMENT

WHEREAS, on August 13, 2020, pursuant to 8 *Del. C.* § 220, plaintiff POSCO Energy Co., LTD. (“POSCO”) served a demand on defendant FuelCell Energy, Inc. (“FuelCell”);

WHEREAS, on August 28, 2020, POSCO filed its complaint in the above-captioned action;

WHEREAS, on September 22, 2020, pursuant to 8 *Del. C.* § 220, POSCO served an amended demand (the “Amended Demand”) on FuelCell;

WHEREAS, on October 22, 2020, the Court granted POSCO’s motion for leave to amend its complaint to reflect the Amended Demand, and POSCO filed its amended Complaint (the “Amended Complaint”) in the above-captioned action later that day;

WHEREAS, on November 6, 2020, FuelCell answered POSCO’s Amended Complaint;

WHEREAS, the parties engaged in fact discovery and took the depositions of Mr. Kim, Ms. Arasimowicz, and Mr. Lee;

WHEREAS, the parties exchanged opening pre-trial briefs on March 19, 2021 and answering pre-trial briefs on April 5, 2021;

WHEREAS, the Court held a one-day trial on a paper record on April 16, 2021;

THEREFORE, for the reasons stated in the July 9, 2021 post-trial transcript ruling (attached hereto to this Final Order and Judgment as Exhibit A):

1. POSCO's demand to inspect FuelCell's books and records under 8 *Del. C.* § 220 is **DENIED**.

2. Final Judgment is entered in favor of Defendant FuelCell, and Plaintiff POSCO's claims are dismissed with prejudice.

3. Pursuant to Rule 54(d), the Court otherwise directs that each party shall bear its own fees and costs.

IT IS SO ORDERED on _____ day of July, 2021.

Vice Chancellor Zurn

EXHIBIT A

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

POSCO ENERGY CO., LTD.,	:
	:
Plaintiff,	:
	:
v.	: Civil Action
	: No. 2020-0713-MTZ
FUELCELL ENERGY, INC.,	:
	:
Defendant.	:

- - -

Chancery Court Chambers
Leonard L. Williams Justice Center
500 North King Street
Wilmington, Delaware
Friday, July 9, 2021
11:00 a.m.

- - -

BEFORE: HON. MORGAN T. ZURN, Vice Chancellor.

- - -

TELEPHONIC POST-TRIAL BENCH RULING

CHANCERY COURT REPORTERS
Leonard L. Williams Justice Center
500 North King Street - Suite 11400
Wilmington, Delaware 19801
(302) 255-0532

1 APPEARANCES:

2 JACLYN C. LEVY, ESQ.
 Potter Anderson & Corroon LLP
 3 -and-
 ANTON A. WARE, ESQ.
 4 People's Republic of China
 Arnold & Porter Kaye Scholer LLP
 5 -and-
 SASHA ZHENG, ESQ.
 6 of the New York Bar
 Arnold & Porter Kaye Scholer LLP
 7 -and-
 YESEUNG JANG, ESQ.
 8 Seoul, Korea
 Arnold & Porter Kaye Scholer LLP
 9 for Plaintiff

10

11 MARTIN S. LESSNER, ESQ.
 M. PAIGE VALESKI, ESQ.
 12 ALBERTO E. CHAVEZ, ESQ.
 Young Conaway Stargatt & Taylor, LLP
 13 -and-
 GREGORY M. WILLIAMS, ESQ.
 14 LUKMAN S. AZEEZ, ESQ.
 of the District of Columbia Bar
 15 Wiley Rein LLP
 for Defendant

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1 THE COURT: Good morning, Counsel.
2 This is Morgan Zurn. May I have appearances, please,
3 beginning with counsel for POSCO.

4 MS. LEVY: Good morning, Your Honor.
5 Jackie Levy of Potter Anderson on behalf of POSCO.
6 With me on the line are James Lee, Anton Ware, Sasha
7 Zheng, and Yeseung Jang of Arnold & Porter.

8 THE COURT: Good morning.
9 And counsel for FuelCell.

10 MR. LESSNER: Good morning, Your
11 Honor. This is Marty Lessner, counsel for FuelCell.
12 With me on the phone is Alberto Chavez and Paige
13 Valeski of Young Conaway, Greg Williams and Luk Azeez
14 of the Wiley firm, and Joshua Dolger, interim general
15 counsel for FuelCell.

16 THE COURT: Good morning.
17 Well, as I believe my assistant
18 previewed for Delaware counsel, this bench ruling is
19 quite lengthy. So go ahead and mute your lines and
20 get your coffee. Do whatever you need to do to get
21 comfortable. I am reviving or resorting to the
22 tradition of delivering summary actions via bench
23 ruling. The length of this one perversely favors a
24 bench ruling format to get you the answer as quickly

1 as I could rather than polishing it for written form.
2 So here we go.

3 This is my post-trial ruling on
4 plaintiff POSCO Energy Co. Limited's demand to inspect
5 defendant FuelCell Energy's, Inc.'s books and records
6 under 8 Delaware Code Section 220. This books and
7 records action has raised several disputes, including
8 (1) POSCO's compliance with Section 220(b)'s form and
9 manner requirements; (2) POSCO's status as a FuelCell
10 stockholder; (3) whether POSCO's stated purpose of
11 investigating wrongdoing is its primary purpose; and
12 if it is, (4) whether there is a credible basis to
13 suspect the wrongdoing POSCO seeks to investigate.

14 I conclude, over the company's
15 objection, that the stockholder's demand satisfied
16 Section 220(b)'s form and manner requirement. The
17 stockholder has also proven its status as a beneficial
18 owner. The stockholder seeks 10 broad categories of
19 the company's books and records purportedly to
20 investigate wrongdoing related to three issues
21 recently disclosed in the company's public filing.
22 The company argues that in light of the parties'
23 strained and litigious relationship, the stockholder's
24 stated purpose is pretextual and its actual purpose is

1 to harass the company. I agree with the company on
2 this point. For the reasons I will explain, I deny
3 the stockholder's requested inspection.

4 As background, this unusually large
5 220 trial record includes 216 joint exhibits and
6 deposition testimony from three witnesses. FuelCell
7 objected to some documents POSCO produced after the
8 discovery cutoff. These late-produced documents are
9 (1) recordings of certain conversations between the
10 parties and (2) additional documents evidencing
11 POSCO's beneficial ownership. The late productions
12 did not prejudice FuelCell, which discussed the
13 documents in its brief and at trial.

14 (Interruption.)

15 THE COURT: Could everyone mute your
16 lines, please. Thank you. I'm hearing some hold
17 music. Can you all hear me all right?

18 MS. LEVY: I can hear you, Your Honor,¹⁹ but I also
hear the music.

20 MR. LESSNER: Your Honor, I hear you.
21 I believe everybody is muted. I'm not sure where that
22 is coming from.

23 THE COURT: Do you all have thoughts
24 on what's going on?

1 MR. LESSNER: Unless there's a problem
2 with the line. If it's a problem with the line, I can
3 provide a different dial-in.

4 (Interruption.)

5 MR. LESSNER: Your Honor, perhaps I
6 could circulate a different dial-in, if that's the
7 Court's preference.

8 THE COURT: Let's do that, please.

9 MR. LESSNER: I'll just send an email¹⁰ that will have
the information.

11 THE COURT: Thanks so much. We'll
12 reconvene.

13 (Recess taken.)

14 THE COURT: Good morning, Counsel.
15 It's Morgan Zurn. Can you hear me all right?

16 MR. LESSNER: This is Marty Lessner
17 for FuelCell. I can hear you fine, Your Honor.

18 THE COURT: Thank you. That was
19 entertaining, but hopefully that's behind us.

20 I was addressing FuelCell's objection
21 to POSCO's late-produced documents. As I was saying,
22 the late production did not prejudice FuelCell, which
23 discussed the documents in its brief and at trial.

24 And there is good cause for the late productions. The

1 audio recordings were discovered after the discovery
2 cutoff, and the parties agreed to postpone trial,
3 after they were discovered, to address them. The
4 additional documents supporting POSCO's beneficial
5 ownership appeared to have been produced in direct and
6 timely response to FuelCell's request made in a
7 March 10th, 2021, letter at JX 203. I will,
8 therefore, consider the documents over FuelCell's
9 objection. I have found the following facts based on
10 the preponderance of the evidence.

11 Plaintiff POSCO is a South Korean
12 company that is heavily involved across the energy
13 sector. Defendant FuelCell Energy, Inc., or
14 "FuelCell," is a Delaware energy company that
15 specializes in the production of molten-carbonate fuel
16 cells.

17 The parties have a long-standing and
18 strained business relationship. Their partnership
19 began in 2007, when the parties entered an agreement
20 under which FuelCell would progressively license
21 rights to its proprietary technology to POSCO in
22 return for certain royalty payments on POSCO's Korean
23 and Asian sales and other obligations. I'll call this
24 the "Transaction Agreement." Pursuant to that

1 agreement, the parties entered into a series of
2 securities purchase agreements, "SPA's," in which
3 POSCO purchased about \$84 million in FuelCell
4 securities as a registered holder.

5 The parties agree that POSCO was a
6 FuelCell record holder from the time of the 2007
7 transaction agreement to September 2018. That's at
8 the pretrial stip., paragraphs 17 to 18. POSCO's 2007
9 investment comprised 3,822,630 FuelCell shares. Under
10 the two SPA's, POSCO bought 6,963,788 shares in 2009
11 and 20 million shares in 2012. After a 1-for-12
12 reverse stock split in December 2015, POSCO owned
13 2,565,534 FuelCell shares. See JX 9 and JX 39. POSCO
14 held those shares through September 2018.

15 During this period, FuelCell's stock
16 price fell dramatically. The parties' commercial
17 relationship deteriorated as FuelCell's economic
18 troubles grew. In 2018, POSCO sought to exit its
19 investment with FuelCell and the fuel cell business
20 altogether. POSCO contemplated two exit routes: (1)
21 selling its FuelCell shares, and (2) spinning off its
22 investment into a joint venture with FuelCell, which I
23 will call the "Joint Venture."

24 The journey of POSCO's FuelCell shares

1 has led FuelCell to dispute that POSCO is a beneficial
2 stockholder with standing to bring this action.

3 FuelCell relies on the failed joint venture to support
4 its pretext defense in this action. I therefore find
5 facts as to both of POSCO's exit strategies in some
6 detail.

7 POSCO FuelCell's shares bore a
8 restrictive legend, which had to be removed before
9 they could be sold. In June 2018, POSCO asked
10 FuelCell to remove the restrictive legend. After
11 some squabbling, FuelCell did so on or around
12 September 11th.

13 Around that time, POSCO set out to
14 transfer its FuelCell shares to its broker, Mirae
15 Asset Daewoo, which I will refer to as "Mirae Daewoo."
16 Mirae Daewoo appears to be an affiliate of Mirae Asset
17 Financial Group, or "Mirae Financial." The parties
18 have interchangeably referred to various Mirae
19 entities as "Mirae." JX 35.09 and emails in JX 35
20 discussing the transfer, including JX 35.17, show
21 POSCO's shares were transferred to Mirae Asset
22 Securities (USA), Inc., which I will refer to as
23 "Mirae USA," in mid-September 2018, around the same
24 time FuelCell removed the restrictive legend. Mirae

1 is not the record holder and does not appear on
2 FuelCell's September 2018 stock list at JX 155.

3 In accordance with Korean law, POSCO's
4 shares transferred to Mirae had to be held by Korea
5 Securities Depository, or "KSD." In turn, CitiBank,
6 N.A., managed the shares that KSD held. Because
7 FuelCell hotly disputes that POSCO is a beneficial
8 owner, I will work through the evidence showing these
9 facts.

10 JX 35 contains two nearly identical documents
entitled "Irrevocable Stock Power"

12 indicating assignment of 2,565,534 shares of FuelCell
13 issued in POSCO's name to an assignee. The documents'
14 assignees and dates are different. Page JX 35.9 is
15 dated September 10th, 2018, and purports to transfer
16 the stock to DTC No. 1043. Page JX 35.11, dated
17 September 7th, 2018, purports to transfer the stock to
18 DTC No. 0908. According to DTC's public website, DTC
19 1043 is the unique numerical identifier for Mirae USA,
20 and 0908 is the unique numerical identifier for
21 Citibank, N.A., which I will refer to as "Citibank."
22 JX 33, which the parties also cite, is unsigned by the
23 assignee's representative, but also assigns the shares
24 to DTC 0908, Citibank. Based on the emails in JX 35,

1 particularly the email on page 17, and subsequent
2 documents demonstrating that Mirae held POSCO's
3 shares, I conclude that the Mirae USA transfer
4 ultimately became effective.

5 As a side note, I take judicial notice
6 of the DTC identification numbers from the list on
7 DTC's website under Delaware Rule of Evidence
8 201(b)(2) because they can be accurately and readily
9 determined from sources whose accuracy cannot
10 reasonably be questioned. It appears FuelCell would
11 not object to this notice, as it linked the DTC
12 directory page in footnote 45 of its opening brief.

13 Mirae treated POSCO as a beneficial
14 owner. Mirae Daewoo's monthly account balances from
15 September 2018 to November 2020 reflects that POSCO
16 owned FuelCell shares. That's JX 169. The September
17 and October 2018 statements reflect that POSCO owned
18 2,565,534 shares. JX 169, 1 to 6.

19 JX 195 is a January 2021 email from a
20 Mirae representative requesting that POSCO fill out an
21 attached form "indicat[ing] your votes." The attached
22 form is titled "FCEL Exercise of Voting Rights" and
23 solicits votes on several issues at FuelCell,
24 including electing directors. The form produced

1 contains FuelCell's CUSIP number.

2 JX 189 is a January 26th, 2021, letter
3 from Mirae to POSCO certifying its shares are in a KSD
4 depositor account. The Mirae account statement, at
5 JX 188, confirms 63,794 shares of FuelCell stock are
6 in POSCO's account. This is consistent with the Mirae
7 statement at JX 169.

8 JX 154 is a KSD account summary
9 showing that as of September 18th, 2020, over 200,00010
FuelCell shares are in Mirae Daewoo's account at KSD.11 In
a letter, JX 209, KSD confirmed Mirae's deposit of12
FuelCell shares in accordance with Korean law.

13 It states, in relevant part: "In
14 accordance with Article 75 of the Financial Investment
15 Services and Capital Markets Act, an investment trader
16 or an investment broker shall promptly deposit to the
17 Korea Securities Depository investor-owned securities
18 it holds as a result of trading financial investment
19 instruments or other transactions.

20 "In accordance with the above statute,
21 the Korea Securities Depository informs you that
22 [redacted] FuelCell Energy securities [with a U.S.
23 number and a record date of March 24th, 2021], which
24 you have deposited as investor-owned securities, are

1 currently being managed through Citibank, N.A."

2 FuelCell's DTC list at JX 155 lists
3 Citibank as record holder of 35,339,697 shares of
4 FuelCell stock. It also reflects Citibank's DTC
5 number, 0908.

6 Other evidence shows POSCO retained
7 the power to sell the shares transferred to Mirae. In
8 its opening brief, FuelCell acknowledges these sales,
9 criticizing POSCO for selling 98 percent of its shares
10 before undertaking the investigation it seeks here.
11 But given the dispute over POSCO's ownership, I note
12 the evidence supporting the power to sell anyway.

13 JX 40 is an October 2018 board
14 presentation proposing that POSCO sell its FuelCell
15 shares due to its diminishing value. It reflects
16 POSCO owned 2,565,534 shares and that after the
17 restrictive legend was removed, the stocks were
18 transferred to a deposit account.

19 POSCO broadcast its plan to sell its
20 shares to the Korean press. According to news
21 articles at JX 42 and 43, POSCO's board approved
22 selling FuelCell holdings in early November. JX 169
23 confirms two large sales: One as of November 30th,
24 showing 1,265,534 shares in POSCO's account in

1 November and December 2018, and another in January
2 2019, dropping its holdings to 765,534. Those sales
3 were also reported in the Korean press, as in JX 47.

4 In May 2019, a stock split dropped
5 POSCO's FuelCell holdings to 63,794 shares. The Mirae
6 statements at JX 169 from May 2019 to November 2020
7 reflect this number. POSCO also submitted votes for
8 its remaining shares and attended stockholder
9 meetings. This too is disputed, so I will again
10 recite what I find to be the preponderance of the
11 evidence.

12 JX 96 is a translated email thread
13 showing POSCO's efforts to attend FuelCell's 2020
14 meeting. The first message in that thread, dated
15 March 16th, 2020, was from a KSD representative to
16 Bo-Suh An, a Mirae representative. It stated:
17 "FuelCell Energy will hold a virtual meeting this
18 year. One needs a control number to have access to
19 the virtual meeting, but we cannot provide you with
20 the control number due to the overseas stock
21 investment process. In regard to this, the voting
22 rights service agency suggested a method of accessing
23 the virtual meeting in guest mode." That is at JX 9624 at
7. I will refer to this as the "Guest Email."

1 That same day, An forwarded the guest
2 email to Taehyong Kim at POSCO, who forwarded it to
3 POSCO's in-counsel, Ms. Jung-Ah Lee, who in turn
4 forwarded it to a POSCO employee, Soh-Young, or
5 "Jessica," Park to complete, which she did and then
6 returned the form to Kim. JX 96.05. The form
7 indicated POSCO would be attending the meeting.
8 JX 96.03, .04, and JX 97. Kim then forwarded the
9 completed form to An at Mirae and asked An to "confirm
10 the procedure and method of attending the
11 shareholder's meeting virtually." JX 96.02. Kim
12 indicated the proxy was sent to Mirae by registered
13 mail. JX 97 appears to be the completed form that
14 POSCO mailed to Mirae.

15 On March 20th, An confirmed that he
16 had sent the voting form to KSD in an email marked
17 JX 98. An explained that POSCO would need to attend
18 the meeting as a guest because KSD could not provide
19 an individual control number. JX 98.02.

20 JX 105 is a list of attendees from
21 that meeting, including guests. One of the guests is
22 Soh-Young Park. Her name appears in line 78 of that
23 document. The email handle used to log into the
24 stockholder meeting, jess124@naver.com, is the same

1 as the one for Park's POSCO email,
2 jess124@poscoenergy.com. I conclude Soh-Young Park
3 at POSCO attended the meeting after filling out the
4 voting form.

5 POSCO voting at this meeting is
6 corroborated by deposition testimony from POSCO's
7 30(b)(6) witness, Kim, and POSCO's senior vice
8 president of planning and finance, Mr. H.S. Lee, who
9 is also copied in the JX 96 email chain. Both
10 testified that POSCO voted by proxy in 2020 before the
11 meeting. Kim deposition page 81, lines 3 to 8 and 20
12 to 23, and Lee deposition page 96, lines 8 to 10.
13 Going forward, I will differentiate between H.S. Lee
14 and Jung-Ah Lee, POSCO's general counsel, by referring
15 to them as "Mr. Lee" and "Ms. Lee," respectively.

16 I now turn to POSCO's efforts to exit
17 its FuelCell investment by spinning it off into the
18 joint venture.

19 POSCO was unable to reach an agreement
20 with FuelCell. FuelCell contends POSCO brought this
21 action as one of many fronts to pressure FuelCell into
22 agreeing to the joint venture.

23 In May 2018, POSCO proposed that POSCO
24 spin off its existing fuel cell business into a new

1 entity, called "NewCo." in its proposal at JX 24.
2 Under that proposal, NewCo. would receive the rights
3 to FuelCell's proprietary technology originally
4 licensed to POSCO under the transaction agreement.
5 POSCO and FuelCell would both initially be investors
6 in NewCo., though, crucially, POSCO proposed to find a
7 new strategic investor to take its place.

8 News that the parties' relationship
9 was faltering appeared in the Korean press in
10 January 2019. See JX 47. But on July 3rd, 2019, the
11 parties entered a memorandum of understanding, or
12 "MOU," to negotiate in good faith and attempt to
13 achieve the joint venture. JX 54, PTO paragraph 26.
14 On September 2nd, POSCO sent FuelCell 15 a draft
term sheet. FuelCell objected to the terms, 16 and
negotiations stalled. At some point, FuelCell
17 asserted a creditor's objection to the proposed joint
18 venture. It also filed a complaint with the United
19 States Trade Representative, or "USTR."

20 Attempting to bridge the gap, the
21 parties held a series of meetings on December 3rd to
22 5th in South Korea to discuss the joint venture. I
23 will refer to them as the "December Meetings."
24 Mr. Lee, Ms. Lee, Kim, and Park attended on behalf of

1 POSCO. FuelCell's representatives included its
2 president, Jason Few; its general counsel, Jennifer
3 Arasimowicz; its senior VP of sales, Ben Toby; and
4 others. Arasimowicz's contemporaneous notes are in
5 JX 67, JX 72, and JX 77. These meetings were also
6 recorded by Park, who served as POSCO's interpreter at
7 the meeting. Certified transcripts of those
8 recordings are JX 69, 71, 74, 76, 78, and 80.

9 Early in the meetings, the parties
10 appeared to have engaged in relatively pleasant
11 discussions, but at times the discussions became
12 heated. The extent of the animosity is disputed and
13 bears on FuelCell's pretext defense.

14 FuelCell contends Mr. Lee threatened
15 to bring a "torrent, a flood of legal action" if
16 FuelCell did not enter the joint venture POSCO
17 proposed. That's a quote from Arasimowicz's
18 deposition page 50, lines 6 to 12, and is consistent
19 with her notes in JX 67. But because that phrase does
20 not appear in the transcripts, I find Mr. Lee did not
21 say it.

22 Mr. Lee did mention POSCO might "have
23 no choice but to take stronger actions" if the parties
24 could not come to an understanding on the creditor's

1 objection and USTR complaint. See JX 67, page 7. He
2 went on to discuss the specifics of those two claims
3 and expressed hopes that the issues could be discussed
4 and resolved at this meeting, moving the joint venture
5 along. Mr. Lee said those issues were precluding
6 constructive discussions. He also mentioned that if
7 FuelCell pursued litigation, POSCO would take action
8 as well. See JX 71, page 56.

9 Later in the meeting, POSCO's general¹⁰ counsel
asked Few if FuelCell was willing to bring a ¹¹ legal
claim against POSCO. Few refused to take

12 litigation off the table, but expressed a desire to
13 resolve the matter through other means. Id page 63.

14 Near the end of the meeting, Mr. Lee
15 suggested that if FuelCell continued to push its
16 creditor's objection, POSCO may respond with
17 litigation. He acknowledged that both sides may end
18 up filing suits, but that doing so would be
19 counterproductive for their strategic partnership.
20 Mr. Lee also emphasized that if "we were to take that
21 path, taking legal actions," the legal fees would
22 burden FuelCell. Id at 72.

23 Currently thereafter, Few reiterated,²⁴ "I
recognize that if we get to a point where you are

1 taking legal actions and we are taking legal actions,
2 we've gotten to a bad place, but that being said, we
3 can't continue as we sit today." Id page 74.

4 In response, Mr. Lee made a remark
5 FuelCell has seized upon, that he "does not play a
6 losing game." Id page 75. The context of that remark
7 reveals Mr. Lee to be focused on getting a deal done
8 and cautioning that litigation would frustrate that
9 endeavor. Few understood this message, and responded
10 in kind.

11 The parties agreed to talk more the
12 next day, planning to leave lawyers out of it as much
13 as possible, and adjourned the meeting. The next two
14 days, discussions were fruitless but otherwise
15 unremarkable. Negotiations ended abruptly on
16 December 5th. Page 39 of JX 80.

17 When the joint venture negotiations
18 floundered, the parties' relationship went into a
19 nosedive and both parties resorted to litigation.
20 News that the December joint venture negotiations
21 failed was almost immediately published in the Korean
22 press, as in JX 81. The coverage was unfavorable to
23 FuelCell and Few.

24 POSCO also began initiating additional

1 attachment proceedings against FuelCell. The earliest
2 prejudgment attachment was in 2018, as reflected in
3 JX 41. JX 45 is another attachment against FuelCell
4 from January 2019. By January 2020, after the joint
5 venture negotiations fell apart, the parties began
6 taking more antagonistic steps against each other.
7 POSCO obtained more attachments against FuelCell.
8 JX 82 and 95. News of those attachment proceedings
9 made its way into the Korean press. JX 83. These
10 attachments became a bargaining chip during
11 negotiations and previewed the parties' willingness to
12 resort to litigation and the threat of litigation to
13 fortify their business position.

14 On February 19th, FuelCell struck
15 back, notifying POSCO that it was in breach of the
16 transaction agreement.

17 Meanwhile, the parties continued to
18 have phone conversations attempting to reconcile the
19 situation and strike a deal on a joint venture. POSCO
20 was intent on securing FuelCell's participation in its
21 proposed transaction. Mr. Lee and FuelCell's Korean
22 counsel, Jae Min Jeon, texted and had several calls in
23 early 2020. Jeon related those conversations via
24 email to FuelCell officials, including Arasimowicz and

1 Few. See JX 118.

2 Several features of these emails call
3 their reliability into question: First, they are
4 hearsay statements from FuelCell's lawyer, who was
5 neither deposed nor offered for live testimony.
6 Second, they are heavily redacted, depriving many of
7 the statements of context. Third, Jeon translated
8 Mr. Lee's quotes from Korean to English. The
9 statements Jeon attributed to Mr. Lee are more
10 aggressive in tone than Mr. Lee's text messages to
11 Jeon, which have been produced in their original and
12 translated forms in JX 138. For his part, Mr. Lee
13 testified during his deposition that Jeon's summaries
14 of his alleged threats were inaccurate and took his
15 true statements out of context. FuelCell argues that
16 Jeon would have no reason to lie to his clients about
17 Mr. Lee's statements. But given the reliability
18 concerns surrounding Jeon's notes, I give them less
19 weight than the more reliable direct text messages
20 from Mr. Lee.

21 Considering both the text messages and
22 the emails, I conclude that through April 2020,
23 Mr. Lee continued to seek FuelCell's engagement in
24 negotiations towards a joint venture, both offering to

1 remove the attachments or withhold future legal action
2 as a carrot and threatening future legal action as a
3 stick. See JX 118 at 7, 14, and 16.

4 News of POSCO's plan to sue FuelCell
5 appeared in the Korean press on April 5th, per JX 101.
6 In an April 16th letter, at JX 107, FuelCell demanded
7 that POSCO cease and desist from disclosing such
8 information to the press. POSCO denied it had done
9 so.

10 On April 21st, Jeon texted Mr. Lee
11 that FuelCell believed POSCO was "bullying." Mr. Lee
12 responded on April 22nd, again pursuing the joint
13 venture: "I hope [FuelCell] will act responsibly as a
14 strategic partner and to vitalize the domestic fuel
15 cell market. We believe the JV is a measure that will
16 benefit [FuelCell] in many ways." JX 138 at 9 to 10.

17 As foretold in the press reports and
18 Mr. Lee's messages, POSCO initiated three separate
19 arbitration proceedings against FuelCell with the
20 International Chamber of Commerce, or "ICC," on
21 April 24th. Those proceedings related to a
22 sub-megawatt conditioning facility. PTO at 33 and
23 JX 114.

24 On April 28th, the parties reconvened

1 for further discussions about the joint venture.
2 Mr. Lee, Ms. Lee, Kim, and Park attended for POSCO and
3 Arasimowicz, Toby, and other representatives attended
4 for FuelCell. Two representatives from Bank of
5 America also attended. The full transcript of the
6 meeting is at JX 113. At the end of the meeting, Mr.
7 Lee informed FuelCell of the pending ICC arbitrations
8 so FuelCell would hear about them directly from POSCO.
9 See id at 46. Toby responded, noting FuelCell wanted
10 to work out a path forward and that the sub-megawatt
11 conditioning facility is "a very small issue compared
12 to the huge issues that we can solve by listening
13 together." Id at 47. The conversation ended
14 cordially.

15 According to Jeon, Mr. Lee followed up
16 with him after the meeting with a strong statement.
17 To quote Jeon, "H.S. Lee called me again and said,
18 'Mr. Jeon, you should advice your client well. Let
19 them know who they are dealing with. [POSCO] has a
20 deep pocket with more than 2 billion U.S. dollars. If
21 [FuelCell] makes a bad decision, that will be the end.
22 This is their last chance. If Jason [Few] lets go of
23 his greed, it can be a win-win situation for both
24 companies.'" JX 118 at 4.

1 On May 7th, Jeon passed along his
2 final messages about conversations with Mr. Lee.
3 Mr. Lee mentioned to Jeon that he brought up the ICC
4 arbitration to FuelCell, and he indicated that he was
5 checking FuelCell's public filings "and noticed that
6 there were some discussions going on between
7 [FuelCell] and Orion for a PPA in another project
8 immediately after the video conference with [POSCO]."
9 Id at 3.
10 Mr. Lee also discussed the parties'11 joint
venture negotiations, again stating this was 12
FuelCell's last chance before POSCO "will launch a
13 full-scale war" that FuelCell could not win because it
14 lacks resources. Jeon quoted Lee as saying, "No
15 money, no win." Id at 3.
16 While I decline to take these
17 statements at face value, they prophesize the parties'
18 escalating litigious relationship.
19 On June 28th, FuelCell terminated the
20 parties' transaction agreements in a letter. JX 137.
21 That same day, June 28th, FuelCell initiated two ICC
22 arbitrations against POSCO, seeking \$200 million in
23 money damages for breaches of the transaction
24 agreement.

1 Over the next couple of days, Mr. Lee
2 messaged Jeon cordially to express regret about how
3 the relationship was unfolding and to state he would
4 not be contacting Jeon directly anymore. JX 138 at 13
5 to 14.

6 To date, the joint venture
7 negotiations have been fruitless. POSCO's focus on
8 securing FuelCell's participation in the joint
9 venture, thereby securing POSCO's exit from the
10 relationship, appears to have animated that
11 relationship from at least late 2019 to 2020. When
12 the negotiations stalled, POSCO resorted to
13 litigation, and FuelCell responded with more.
14 Since it filed its books and records¹⁵ in this
15 Court, POSCO has filed two other claims
16 against FuelCell. On September 14th, POSCO filed a
17 lawsuit in the United States District Court for the
18 Southern District of New York, alleging FuelCell's
19 delay in removing the restrictive legend on its stocks
20 in 2018 caused it damages and lost profits. The
21 complaint is JX 151. POSCO has also asserted a
22 substantial counterclaim in FuelCell's breach of
23 contract arbitration filed on October 7th. POSCO has
24 also obtained additional prejudgment attachments in

1 Korean courts on October 12th and November 12th. Per
2 paragraph 52 of the pretrial stipulation, POSCO posted
3 a substantial bond to secure those attachments.

4 All told, POSCO initiated at least ten
5 legal proceedings against FuelCell in the 2020
6 calendar year, including three ICC arbitrations, a
7 counterclaim in FuelCell's breach of contract
8 arbitration, four attachment proceedings, a claim for
9 damages in the Southern District of New York, and this
10 books and records action. Together, these proceedings
11 facially seek over \$900 million in damages and have
12 attached over \$100 million in FuelCell's accounts
13 payable.

14 Turning to this litigation. On
15 August 13th, POSCO served its initial demand. JX 141.
16 Its stated purpose is to investigate whether
17 FuelCell's board of directors and its management
18 breached their fiduciary duties by causing or
19 permitting FuelCell to violate federal securities
20 laws, by failing to establish or implement procedures
21 for compliance with those laws, and by mismanaging
22 FuelCell's financial performance and entering into
23 debt obligations that constitute corporate waste.

24 In particular, POSCO points to two SEC

1 inquiries: one into FuelCell's compliance with SEC
2 regulations with its sale of stock pursuant to a
3 series of at-market sales plans, and one into
4 FuelCell's application and resulting loan under the
5 Paycheck Protection Program, or PPP.

6 Finally, POSCO seeks to investigate
7 two loan agreements FuelCell entered into with Orion.
8 I will describe each alleged instance of mismanagement
9 in turn.

10 First, POSCO seeks books and records¹¹ related to
the SEC's investigation into FuelCell's
12 securities law violations. FuelCell sold shares from
13 2005 to 2017 through a series of at-the-market sales
14 plans. Outside counsel advised FuelCell in preparing
15 the registration statements. In January 2018, after
16 FuelCell hired Arasimowicz as its first general
17 counsel and retained new securities counsel, FuelCell
18 self-disclosed to the SEC that these sales plans may
19 not have complied with securities laws. See JX 146.
20 In an April 2018 Form 10-K, FuelCell disclosed the
21 problem, that the SEC had opened an informal
22 investigation, and that FuelCell may be subject to
23 penalties. See JX 44.43.

24 The SEC completed its investigation

1 and determined that the plans violated Section 5(b)(2)
2 of the Securities Act. FuelCell disclosed this in an
3 April 7th, 2020, Form 8-K. See JX 103 at 6. It
4 disclosed it had not filed or delivered requisite
5 prospectus supplements; that the SEC staff was
6 recommending enforcement proceedings; and that without
7 a waiver, the violation would disqualify FuelCell from
8 using the private placement safe harbor from
9 registration; but that a settlement agreement in
10 principle had been reached. See JX 103.06.

11 On September 3rd, between POSCO's
12 original demand and its amended demand, FuelCell
13 finalized its settlement with the SEC. The settlement
14 agreement noted FuelCell's violations were a result of
15 inaccurate advice from outside counsel. See the
16 pretrial stip. at 46, JX 146. The SEC granted a
17 waiver, permitting POSCO from using a private
18 placement safe harbor that same day. See JX 147. The
19 SEC settlement does not impose any civil penalty on
20 FuelCell. PTO paragraph 46, JX 146.

21 The second topic POSCO seeks to
22 investigate is FuelCell's application and receipt of
23 loans under the PPP of the CARES Act. FuelCell
24 applied for and received \$6.5 million in PPP loans in

1 April 2020. On May 11th, the SEC "sent [FuelCell] an
2 inquiry requesting that [FuelCell] voluntarily provide
3 information to the SEC pertaining to [FuelCell's]
4 application and resulting loan under the PPP." That's
5 the pretrial order, paragraph 37, quoting the 10-Q.

6 On June 12th, FuelCell filed a
7 Form 10-Q, at JX 133, disclosing it intended to
8 cooperate and that doing so was completely voluntary.
9 The parties provided several third-party news articles
10 published during this time period, including JX 127,
11 128, 135, and 136. JX 127, a Lexology article
12 authored by several lawyers from Baker & Hostetler,
13 describe the SEC's May inquiry into the PPP loans as
14 voluntary and likely a "sweep" inquiry. JX 135 and
15 136 parrot FuelCell's position that the inquiry is
16 voluntary.

17 The June 10-Q also disclosed concerns
18 about FuelCell's financial viability, including a
19 growing liquidity issue. To remedy this problem,
20 FuelCell entered into a series of loan agreements with
21 Orion Energy Partners Investment Agent, LLC, a major
22 PE investor in the company, which I will call the
23 "Orion Loans." All told, FuelCell borrowed
24 \$235 million from Orion. According to the June 10-Q,

1 the loans alleviated management's concerns about
2 FuelCell's financial viability, and management
3 expected to be able to meet FuelCell's obligations for
4 at least one year because of this funding. JX 133 at
5 13, 106.

6 POSCO finds the onerous terms of these
7 loans suspicious. According to the 10-Q, the
8 June 2020 Orion loan includes cash interest of
9 9.9 percent per annum to be paid quarterly;
10 payment-in-kind interest of 2.05 percent per annum,
11 also paid quarterly; a \$1 million option premium; and
12 several debt discounts based on the timing of
13 FuelCell's repayment. See JX 143 at 39 to 41.
14 Earlier loans, specifically those in 15 October 2019,
have similar interest terms. Those
16 loans also included cashless exercise warrants, under
17 which Orion gained the right to purchase up to
18 6 million shares of FuelCell common stock without
19 making cash payments. They also included a
20 change-of-control provision, which would make any
21 outstanding balance of the loan immediately due in the
event the majority of the FuelCell board turns over in 23 any
two-year period. See JX 133 at 23, 29 to 30 and
24 JX 186 at 14, 109 to 111. Per JX 177, FuelCell paid

1 off the Orion loans in full in December 2020, during
2 the pendency of this action.

3 On September 1st, POSCO filed its
4 initial complaint in this action. JX 145. POSCO's
5 original complaint alleged it had standing to inspect
6 FuelCell's books and records under Section 220(a)(1)
7 because it was a record stockholder. Counsel
8 discussed this issue at length, reflected in JX 157.

9 On September 21st, POSCO informed
10 FuelCell's counsel that it had determined that POSCO
11 is a beneficial owner of its FuelCell stock and that
12 POSCO intended to serve a new demand. POSCO filed an
13 amended demand on September 22nd. JX 159. The
14 amended demand is substantially similar to the
15 original, except it states POSCO is a beneficial
16 owner, not a record holder. Exhibit A includes a
17 sworn statement from Mr. Lee, under penalty of
18 perjury, that POSCO is a beneficial owner of 63,794
19 shares of FuelCell stock and that the statements in
20 the demand letter are accurate, to the best of his
21 knowledge. Exhibit A also attached a "certificate of
22 account balance" from Mirae Daewoo, indicating that
23 63,794 shares of FuelCell stock were in POSCO's
24 account with Mirae.

1 On October 22nd, I granted POSCO's
2 motion for leave to amend its complaint to reflect the
3 amended demand. POSCO filed its amended complaint,
4 alleging it was a beneficial owner of FuelCell stock,
5 later that day.

6 FuelCell answered POSCO's amended
7 complaint on November 6th. The parties engaged in
8 fact discovery and deposed Kim, Arasimowicz, and
9 Mr. Lee. The parties exchanged opening trial briefs
10 on March 19th, answering briefs on April 5th, and we
11 held a one-day trial on a paper record on April 16th.
12 Turning to the analysis. We're about 13 halfway
there, folks.

14 Section 220(c) provides: Where the
15 stockholder seeks to inspect the corporation's books
16 and records, other than its stock ledger or list of
17 stockholders, such stockholder shall first establish
18 that (1) such stockholder is a stockholder; (2) such
19 stockholder has complied with the section respecting
20 the form and manner of making demands; and (3) the
21 inspection such stockholder seeks is for a proper
22 purpose.

23 Here, I understand FuelCell to dispute both
POSCO's compliance with Section 220(b)'s form and

1 manner requirements and whether POSCO is a beneficial
2 owner. FuelCell also challenges the amended demand's
3 substance, arguing that POSCO does not have a credible
4 basis to suspect wrongdoing and that its stated
5 investigatory purpose is pretextual.

6 I begin with the form and manner
7 requirements. Section 220(b) sets forth the demand
8 requirements for a beneficial owner.

9 In every instance where the
10 stockholder is other than a record holder of stock in
11 a stock corporation, the demand under oath shall state
12 (1) the person's status as a stockholder, (2) be
13 accompanied by documentary evidence of beneficial
14 ownership of the stock, and (3) state that such
15 documentary evidence is a true and correct copy of
16 what it purports to be.

17 Delaware courts require strict
18 adherence to the Section 220 inspection demand
19 procedural requirements, per the *Katz* case. This
20 ensures that the corporation has the right to "receive
21 and consider a demand in proper form before litigation
22 is initiated," to quote *Barnes v. Telestone Techs.*

23 In view of that concern, "[a] demand's
24 compliance with the technical requirements of

1 Section 220 is measured as of the time of the demand,"
2 under *Fuchs Family Trust*. Thus, the question is
3 whether the documents POSCO attached to the amended
4 demand, a certificate of account balance from Mirae
5 and the sworn affidavit, are sufficient "documentary
6 evidence of beneficial ownership of the stock," to
7 quote the statute.

8 FuelCell argues that the documentary
9 evidence Section 220(b) requires must conclusively
10 prove POSCO's beneficial owner status at the time of
11 the amended demand. FuelCell overstates the form and
12 manner requirements.

13 In *Amalgamated Bank v. Yahoo!*, Vice
14 Chancellor Laster explained that only *prima facie*
15 evidence is required under Section 220(b). "If the
16 party seeking books and records is not a record holder
17 of the corporation's stock, then Section 220 requires
18 that the demand attach *prima facie* evidence that the
19 party making the demand is either a beneficial owner
20 or a duly empowered agent acting on behalf of a record
21 holder or beneficial owner."

22 A *prima facie* showing is minimal.
23 Black's Law Dictionary defines it as "[a] party's
24 production of enough evidence to allow the fact-trier

1 to infer the fact at issue and rule in the party's
2 favor."

3 In Delaware, a *prima facie* case
4 typically requires the presentation of "some credible
5 evidence" of the necessary elements of the relevant
6 claim or criminal offense. See, for example, *Moody v.*
7 *Nationwide Mutual Insurance Company* and 11 Delaware
8 Code Section 301(a).

9 *Amalgamated Bank* held that the
10 plaintiff satisfied this requirement by "providing
11 documentary evidence supporting [its] ownership at a
12 point proximate to the ... Demand and stating in the
13 Demand, under oath, that the documentation was what it
14 appeared to be" The *Amalgamated Bank* plaintiff
15 attached an account statement from its broker, stating
16 that it was a beneficial owner of the company's stock
17 as of three days before the demand. The *Amalgamated*
18 *Bank* court rejected the company's argument that the
19 stockholder was "required to provide [it] with an
20 ongoing stream of daily trading and ownership records
21 confirming their continuing stock ownership" as more
22 than what the statute requires and as "impractical and
23 overly burdensome for both the party making the demand
24 and for the company responding to it."

1 This low bar is consistent with
2 documents typically attached to a demand and
3 Section 220(b)'s requirements. Given Section 220(b)'s
4 relatively minimal burden, it is unsurprising that
5 this Court has remarked that "[c]ompliance with it is
6 not difficult." That's seen in *Seinfeld v. Verizon*
7 *Communications* and *Smith v. Horizon Lines*.

8 To be sure, not just any documentary
9 evidence is sufficient to satisfy this burden, as
Chancellor Chandler observed in *Smith v. Horizons*
11 *Lines*.

12 In *Barnes v. Telestone Technologies*,
13 the Court found that a plaintiff's sworn affidavit
14 confirming beneficial ownership was insufficient to
15 satisfy Section 220(b) where plaintiff "did not
16 provide a brokerage statement or similar independent
17 proof of beneficial ownership" When this Court
18 has rejected brokerage statements in the past, the
19 statements have obscured or omitted critical
20 information. Rejected showings have been heavily
21 redacted, as in *Smith v. Horizon Lines*; out of date,
22 as in *Jacob v. Bloom Energy*; or missing the
23 stockholder's name, as in *Elow v. Express Scripts*.

24 To paraphrase *Amalgamated Bank*, the

1 most commonly used method of providing documentary
2 evidence of stockholder status is account statements,
3 which are issued periodically. While such account or
4 brokerage statements do not necessarily conclusively
5 prove that a plaintiff is, in fact, a beneficial
6 owner, they provide documentary evidence of beneficial
7 ownership sufficient to make a *prima facie* showing.
8 Where, as here, beneficial owner status is disputed,
9 such showing can be questioned and rebutted at a later
10 stage of the proceedings.

11 I conclude POSCO has satisfied
12 Section 220(b)'s form and manner requirements. Recent
13 brokerage statements are adequate to satisfy
14 Section 220(b). POSCO provided exactly that, a
15 certificate of account balance from its broker. The
16 statement identifies POSCO as the beneficial owner,
17 indicates the number of FuelCell shares POSCO
18 beneficially owns, and is dated September 22nd, 2020,
19 the day POSCO served the amended demand. The
20 certificate of account balance attached has no
21 infirmities like those in *Horizon Lines*, *Bloom Energy*,
22 or *Express Scripts*. I conclude that POSCO attached
23 sufficient documentary evidence of beneficial
24 ownership to the amended demand. FuelCell does not

1 dispute compliance with other form and manner
2 requirements, and so I conclude POSCO has satisfied
3 those as well.

4 FuelCell also argues that POSCO has
5 not sufficiently established its status as a
6 beneficial owner. In particular, FuelCell contends
7 POSCO has fallen short because it has not shown that
8 CitiBank, which is on FuelCell's stock list, manages
9 POSCO's shares at KSD. I conclude POSCO has shown it
10 is a beneficial owner.

11 Unlike the form and manner questions,
12 which measure a plaintiff's compliance against the
13 statutory rubric, the question of whether POSCO is
14 truly a beneficial owner of FuelCell stock is a
15 factual inquiry for which POSCO bears the burden of
16 proof.

17 To evaluate whether POSCO has
18 satisfied its burden, it is helpful to consider the
19 features of beneficial ownership. Blacks' Law
20 Dictionary describes a beneficial owner as a
21 "corporate shareholder who has the power to buy or
22 sell shares, but who is not registered on the
23 corporation's books as the owner." Similarly, SEC
24 Rule 13d-3 describes a beneficial owner as one who has

1 voting power over a security and/or investment power,
2 the right to sell it. The "Street Name" treatise,
3 cited at length in FuelCell's briefs, describes the
4 practice of beneficial ownership as follows: "The
5 vast majority of publicly traded shares in the United
6 States are registered on the companies' books not in
7 the name of beneficial owners - i.e., those investors
8 who paid for, and have the right to vote and dispose
9 of, the shares - but rather in the name of 'Cede &
10 Co.,' the name used by the Depository Trust Company
11 (DTC).

12 "Shares registered in this manner are
13 commonly referred to as being held in 'street name.'
14 ... DTC holds the shares on behalf of banks and
15 brokers, which in turn hold on behalf of their clients
16 (who are the underlying beneficial owners or other
17 intermediaries)."

18 The Delaware Supreme Court quoted this¹⁹ section of
the treatise in *Crown EMAK Partners, LLC v.*²⁰ *Kurz*. From
these sources, two features of beneficial²¹ ownership
emerge: the right to sell shares, and the
22 right to vote shares. Evidence that a purported
23 stockholder has both powers suggests that she is a
24 beneficial owner.

1 This case presents the unique issue of
2 what showing is required to prove beneficial
3 ownership. While this question does not appear to
4 have been litigated in the Section 220 context before,
5 it is a characteristic dispute in statutory
6 proceedings under 8 Delaware Code Section 168.
7 Section 168 permits a purported lawful owner of stock
8 whose physical stock certificate has been lost,
9 stolen, or destroyed to petition the Court for an 10
order directing the company to issue her a new one.
11 The "lawful owner" requirement has been interpreted to
12 mean the claimant must show she is a beneficial owner, 13
not simply a record owner of the company's stock. The 14
claimant has the burden of establishing her beneficial 15
ownership with "reasonable certainty." This
16 requirement is echoed in several cases, including
17 *Keech v. Zenith Radio Corp.*, *In re Metro Royalty*
18 *Corp.*, and the Delaware Supreme Court's opinion in
19 *Merrill Lynch Pierce Fenner & Smith v. Northern*
20 *European Oil Royalty Trust*, which cited the rules from
21 *Keech* and *Metro Royalty*.

22 Evaluating whether a purported
23 beneficial owner has carried its burden is both a
24 question of fact and a question that is necessarily

1 fact intensive. In *Castro v. ITT Corp.*, Chancellor
2 Allen reiterated that Section 168's reference to the
3 "lawful owner" was not limited to record stockholders,
4 nor was record ownership without beneficial ownership
5 sufficient to establish lawful ownership. In doing
6 so, he rejected the argument that a mechanical inquiry
7 into the claimant's place on the company's stock
8 ledger was necessary.

9 To quote, "Thus, for purposes of
10 Section 168, registration on the issuer's stock ledger
11 as the owner is not critical; the substance of
12 petitioners' claim to be the 'lawful owner' of lost,
13 stolen or destroyed certificates is. Once the
14 mechanical test of registration is discarded, no
15 simple or abstract test of 'lawful owner' suggests
16 itself. Rather an inquiry into the specifics of the
17 claim seem necessary."

18 Under the principle that no particular
19 type of proof is necessary to show beneficial
20 ownership, I consider whether POSCO has shown that it
21 is a beneficial owner of FuelCell stock by evaluating
22 the totality of the evidence in the record. It is
23 unclear whether the preponderance of the evidence
24 standard, typically used for determining factual

1 questions, or the reasonable certainty standard,
2 applicable in Section 168 proceedings, is the proper
3 framework for evaluating this question. I do not
4 resolve it here because POSCO has met its burden under
5 either standard.

6 I start from the undisputed facts that
7 POSCO was a record holder of FuelCell stock from 2007
8 to September 2018, holding the ability to vote
9 FuelCell shares.

10 When POSCO transferred its stock to Mirae in
September 2018, it retained the rights of 12
beneficial ownership. FuelCell does not argue that
13 the transfer destroyed POSCO's beneficial ownership
14 rights. FuelCell does not dispute or address that
15 transfer at all, nor has FuelCell pointed to any other
16 transactions that could have dislodged POSCO's
17 interests or seriously argued that POSCO sold all its
18 shares. And as I have explained, the evidence in the
19 record shows that POSCO retains the rights to sell and
20 to vote.

21 FuelCell's argument is, at its core,
22 that POSCO ought to provide evidence tracing title of
23 its shares to a DTC participant. FuelCell argues that
24 POSCO has not established that the CitiBank shares

1 listed in FuelCell's stock list include POSCO's 63,794
2 purported shares. There is no documentation from
3 CitiBank in the record.

4 In advancing this argument, FuelCell
5 primarily relies on federal law, particularly SEC
6 Rule 14a-8, which governs a stockholder's eligibility
7 to submit a shareholder proposal via the company's
8 proxy statement. Under subsection (b)(2) of that
9 rule, a beneficial owner must "submit to the company a
10 written statement from the 'record' holder of [its]
11 securities (usually a broker or bank)" verifying the
12 stockholder's eligibility to submit such a proposal.
13 The cases FuelCell cites interpret the requirement of
14 "a written statement from the 'record' holder" as
15 requiring a statement from a DTC participant, since
16 Cede & Co. is the shareholder of record for most
17 shares of publicly traded companies. As explained,
18 Section 220 contains no such requirement, so these
19 cases are inapposite here.

20 More importantly, FuelCell's argument
21 about chain of title misstates the inquiry. As I have
22 explained, the question of whether POSCO is a
23 beneficial owner is not a question of interpreting
24 Section 220 or any other statute. It is a question of

1 fact and necessarily turns on the consideration of the
2 totality of the facts in the record. Certainly,
3 evidence of the shares' full chain and title would be
4 helpful in making this factual determination. But, as
5 Chancellor Allen suggested in *Castro v. ITT*, a
6 mechanical inquiry into registration on the issuer's
7 stock ledger is not critical. Rather, there is no
8 simple or abstract test, and an inquiry into the
9 specifics of the claim is necessary.

10 FuelCell points out that POSCO does not appear
11 on its list of Non-Objecting Beneficial
12 Owners, also known as the NOBO list. This fact is not
13 dispositive of POSCO's status as a beneficial owner.
14 To paraphrase *Apache v. Chevedden*, one of the federal
15 securities cases FuelCell cites, "[b]ecause of the
16 limited nature of the NOBO list, [POSCO's] absence
17 from the list would not have been definitive."
18 Indeed, many beneficial owners do not appear on that
19 list because they are objecting beneficial owners.

20 For reasons that are unclear, POSCO
21 did not indicate during discovery whether it was an
22 objecting beneficial owner. POSCO also dodged this
23 question in its pretrial brief. At trial, POSCO's
24 counsel indicated that POSCO was an objecting

1 beneficial owner. While POSCO should have been able
2 to answer this question earlier, I do not find this
3 failure to be fatal to its claim of beneficial
4 ownership.

5 Upon considering all the evidence in
6 the record, which demonstrates that POSCO holds the
7 ability to sell and vote its shares, POSCO has
8 satisfied me that it is a beneficial owner of FuelCell
9 stock.

10 I turn next to the question of whether POSCO's
demand states a proper purpose. I conclude
12 that while POSCO has identified a proper purpose of
13 investigating wrongdoing, that purpose is not
14 sincerely held. I come to this conclusion in view of
15 POSCO's weak showing on credible basis and the
16 substantial evidence that its true purpose is to gain
17 leverage in the parties' vast commercial disputes.

18 "The paramount factor in determining
19 whether a stockholder is entitled to inspection of
20 corporate books and records is the propriety of the
21 stockholder's purpose in making such inspection."

22 That's a quote from *CM & M Group*. If the stockholder
23 seeks to inspect the corporation's books and records,
24 he must establish that the inspection he seeks is for

1 a proper purpose. A purpose is proper if it is
2 reasonably related to such person's interest as a
3 stockholder, and the propriety of a demanding
4 shareholder's purpose must be determined from the
5 facts in each case.

6 I begin with POSCO's stated purpose of
7 investigating wrongdoing and potential breaches of
8 fiduciary duty in connection with FuelCell's
9 at-the-market sales plans, PPP loans, and Orion loans.
10 It is well established that a stockholder's desire to
11 investigate wrongdoing or mismanagement is a proper
12 purpose. The stockholder bears the burden of proof to
13 establish a credible basis in support of its proper
14 purpose, but need only present some evidence from
15 which the Court could infer legitimate issues of
16 possible waste, mismanagement, or wrongdoing that
17 warrant further investigation. The credible basis
18 standard is the lowest burden of proof known in our
19 law, and the only way to reduce it further would be to
20 eliminate any requirement that a stockholder show some
21 evidence of possible wrongdoing. I draw these
22 principles from *Seinfeld v. Verizon Communications*.

23 "Mere curiosity or a desire for a
24 fishing expedition will not suffice. But the

1 threshold may be satisfied by a credible showing,
2 through documents, logic, testimony or otherwise, that
3 there are legitimate issues of wrongdoing." That's a
4 quote from *Security First v. U.S. Die Casting*.

5 POSCO's showing on credible basis is
6 weak. The SEC's investigation into FuelCell's
7 at-the-market sales plan has settled on extremely
8 favorable terms, without an admission of wrongdoing by
9 FuelCell and with an explanation that the issue arose
10 from inaccurate legal advice from former counsel. The
11 SEC's investigation into FuelCell's PPP loans, while
12 still ongoing, appears to be a broad sweep inquiry for
13 which FuelCell's participation is voluntary. POSCO
14 has not presented any reason to doubt that this is so.

15 Finally, POSCO's opposition to
16 FuelCell's business decision to take out the Orion
17 loans appears to be grounded primarily on its belief
18 that the terms of these loans are oppressive and
19 unfair to FuelCell. At trial, POSCO abandoned its
20 more aggressive position that the Orion loans
21 contained a dead-hand provision, conceding they did
22 not. POSCO's apparent concern for the terms of the
23 Orion loans is undercut by the fact that FuelCell paid
24 them off during the pendency of this action.

1 Because I find that POSCO's demand
2 fails on other grounds, I assume, without deciding,
3 that this relatively weak showing would satisfy the
4 credible basis standard.

5 POSCO's stated purpose
6 notwithstanding, FuelCell questions the sincerity of
7 this purpose and argues that POSCO's alleged desire to
8 investigate wrongdoing at FuelCell is a mere pretext
9 for its real purpose: gaining leverage in the parties'
10 commercial dispute and harassing FuelCell with
11 drawn-out litigation.

12 "[O]nce a stockholder has identified a³ proper
purpose ... the burden shifts to the
14 corporation to prove that the stockholder's avowed
15 purpose is not her actual purpose and that her actual
16 purpose for conducting the inspection is improper.
17 This showing is not made where a secondary improper
18 purpose exists[,] as "secondary motivations for
19 seeking inspection, even if improper, will not be
20 examined by the court once a proper purpose has been
21 established." And "[the company's] subjective view of
22 what plaintiff's motives are for making the
23 Section 220 demand is irrelevant[,] as the primary
24 issue remains "what in fact plaintiff's reasons for

1 seeking inspection are."

2 "Instead, in order to succeed, the
3 defendant must prove that the plaintiff pursued its
4 claim under false pretenses, and its primary purpose
5 is indeed improper. Such a showing is fact intensive
6 and difficult to establish." Although heavy, the
7 company's "burden of showing an improper purpose is
8 [not] impossible to bear. Previous cases provide
9 valuable examples of the degree to which a stated
10 purpose is so indefinite, doubtful, uncertain or
11 vexatious as to warrant denial of the right of
12 inspection." These principles come from the *Woods*,
13 *Sutherland*, *Hoschett*, *Pershing Square*, *Wilkinson*,
14 *Kosinski*, and *Compaq* cases.

15 As the Delaware Supreme Court observed
16 in *Compaq Computer Corporation v. Horton*, a "fair
17 reading of [those] cases leads to the conclusion that18
where the person making demand is acting in bad faith19 or
for reasons wholly unrelated to his or her role of20 the
stockholder, access to the [books and records]
21 will be denied." Improper purposes cited by *Compaq*
22 Computer include "instituting annoying or harassing
23 litigation against the corporation," as in *State*
24 *ex rel. Linihan v. United Brokerage*, and "conducting a

1 'fishing expedition' [or] satisfying idle curiosity,"
2 as in *Insuranshares Corporation of Delaware v.*
3 *Kirchner*.

4 More recent examples include the
5 demand in *Highland Select Equity Fund v. Motient*.
6 There, the stockholder issued a "patently
7 inappropriate demand," initially seeking broad
8 inspection into 47 categories of documents. The
9 stockholder publicized its demand several times.
10 Adding to the Court's concern was the fact that the
11 stockholder was currently in the throes of a proxy
12 contest. The *Highland Select* court concluded that
13 this "remarkable confluence of events" amounted to "an
14 abuse of the Section 220 process, designed for some
15 purpose other than to exercise [the stockholder's]
16 legitimate rights as a stockholder. Indeed, the facts
17 adduced at trial clearly suggest that [the
18 stockholder's] purported purpose in bringing this
19 Section 220 action to gain information for use in its
20 proxy fight verges on being a ruse." The Court
21 concluded that the stockholder "appears to have
22 maintained its books and records demand in large part
23 because it has derived utility from the demand itself
24 as a rhetorical platform."

1 I conclude that the evidence of the
2 parties' litigious relationship compels a finding of
3 another, improper purpose: burdening FuelCell with
4 additional litigation and gaining leverage in the
5 parties' overarching business dispute. This purpose
6 is focused on litigation strategy and the use of this
7 proceeding, rather than the information obtained from
8 it, to leverage POSCO's position in its myriad
9 disputes with FuelCell, not to advance POSCO's
10 interests as a stockholder. As I have described, the
11 parties have a hostile relationship and are engaged in
12 arbitrations and litigation around the world. These
13 disputes, and the demand and amended demand coinciding
14 with their escalation, support an inference that POSCO
15 made the amended demand, at least in part, to vex or
16 harass FuelCell. FuelCell argues that the amended
17 demand and POSCO's inspection are a mere pretext.
18 As between POSCO's stated purpose and19 this
improper purpose, the issue of which purpose is 20
POSCO's primary purpose presents a factual question.
21 As then-Vice Chancellor Jacobs observed in *Helmsman*:
22 "The issue of whether a concept so elusive as purpose
23 or motive is 'primary' or 'secondary,' involves a
24 judgment that necessarily is qualitative, not

1 mathematical. Specifically, where a stockholder who
2 seeks inspection of corporate books and records has
3 two purposes, one stockholder-related and the other
4 not, the critical inquiry is whether the
5 stockholder-related purpose predominates over the
6 ulterior purpose."

7 "If there is any doubt, it must be
8 resolved in favor of the statutory right of the
9 stockholder to have an inspection," as set forth in
10 the *Compaq* case.

11 To support its theory that POSCO's
12 improper purpose predominates its proper purpose,
13 FuelCell relies primarily on threats of litigation
14 attributed to Mr. Lee. The most aggressive statements
15 appear in secondhand accounts from FuelCell's lawyers
16 or are taken out of context. I do not follow FuelCell
17 as far as it would like me to go. But the
18 preponderance of the evidence shows escalating tension
19 between the parties and an outburst into multiple
20 litigation fora. When the joint venture negotiations
21 broke down in December 2019, the parties' relationship
22 spiraled. POSCO began taking more aggressive
23 negotiation positions. Meanwhile, it ramped up its
24 litigation efforts, securing attachments in Korean

1 courts and filing arbitrations with the ICC. News of
2 the parties' disputes was covered extensively in the
3 Korean press, often with quotes attributed to POSCO
4 sources. This coverage was generally unfavorable to
5 FuelCell and mentioned FuelCell's weakening financial
6 position.

7 Joint venture negotiations continued
8 in the background. Tensions appeared to have boiled
9 over in June 2020, when FuelCell filed its
10 arbitrations against POSCO. POSCO responded by
11 increasing its litigation efforts, including by filing
12 this inspection demand. While this dispute has been
13 pending, POSCO has filed additional claims, including
14 an action in the Southern District of New York
15 relating to FuelCell's behavior in the summer of 2018.
16 While the mere fact that the parties are engaged in
17 other litigation is not enough to show pretext, the
18 remarkable confluence of the parties' escalated
19 commercial dispute and this action is impossible to
20 ignore.

21 Though the demand in this case is not
22 as abusively overbroad as the demand in *Highland*
23 *Select*, the weak credible basis and the parties'
24 intense and far-reaching battle similarly supports a

1 finding of pretext. There, as here, the record
2 suggests that the stockholder sought inspection
3 because it viewed the demand itself, rather than the
4 information it could gain from it, as a useful tool in
5 this dispute. As noted in *Highland Select*, the Court
6 must "act vigilantly to protect [Section 220] from
7 being used as a tool of oppression, especially when
8 the stockholder makes a demand in the context of an
9 ongoing proxy contest." Like the proxy contest in
10 *Highland Select*, the dispute between POSCO and
11 FuelCell involves a slew of litigation and commercial
12 disputes beyond this Court. These similar
13 circumstances require similar vigilance by the Court
14 to protect against abusive books and records demands
15 made for their own sake rather than any legitimate
16 stockholder-related purpose.

17 POSCO argues that its decision to
18 bring its demand at the same time the parties' other
19 disputes were ramping up is a mere coincidence and
20 that the timing was based on learning more information
21 in public filings. The issues POSCO seeks to
22 investigate were disclosed in FuelCell's public
23 filings in the spring and early summer of 2020. But
24 FuelCell first disclosed the at-the-market sales plan

1 investigation in 2018, albeit with less detail than
2 the June 2020 disclosure. POSCO was purportedly
3 piqued by the 2020 disclosure that FuelCell might lose
4 the Regulation D safe harbor. But that sensitivity is
5 undercut by the fact that the SEC and FuelCell reached
6 a favorable settlement after POSCO made its demand and
7 before its amended demand. The SEC issued its waiver
8 before the amended demand. Timing of the SEC
9 disclosure investigation *vis-a-vis* POSCO's demands
10 supports FuelCell's pretext defense.

11 The Orion loans were similarly paid
12 off during the pendency of this litigation, apparently
13 avoiding the oppressive terms POSCO feared. While I
14 have assumed the flawed prospectuses and Orion loans
15 are credible bases to suspect wrongdoing, it is
16 telling that the concomitant harm to the company
17 evaporated before POSCO brought its amended demand.
18 And according to Jeon, before the demand was filed,
19 Mr. Lee specifically and ominously mentioned he had
20 been reviewing public filings and saw mention of a
21 transaction with Orion.

22 POSCO's witnesses have not done much
23 to help assuage my concerns. I note POSCO does not
24 bear the burden of establishing the sincerity of its

1 purpose. The burden is on FuelCell to establish that
2 POSCO's improper purpose predominates.

3 That said, when asked if POSCO was
4 seeking FuelCell's records to investigate wrongdoing,
5 POSCO's 30(b)(6) witness, Kim, responded, "We didn't
6 say there was a wrongdoing, but we're kind of
7 suspicious about that, so we just want to make sure."

8 Mr. Lee similarly suggested that POSCO
9 was "curious to know" about FuelCell's finances and
10 why it decided to take out loans from Orion and the
11 PPP. At the end of his deposition, Mr. Lee brought up
12 the joint venture negotiation and stressed that he
13 hoped to find a win-win solution to the parties'
14 commercial disputes. In fairness, he would not
15 testify, when asked, that he would seek to dismiss the
16 books and records action if the parties' commercial
17 disputes would settle.

18 But it is apparent from the totality 19 of the
evidence in the record that the joint venture, 20 more
than any other issue, including and especially 21 any
concern over FuelCell's SEC disclosures or the
22 Orion loans, have dominated this litigation. At best,
23 POSCO has an idle curiosity in rummaging through
24 FuelCell's books and records, unsupported by any

1 genuine interest in investigating any particular
2 wrongdoing. At worst, POSCO has initiated this
3 litigation to gain leverage in its vast commercial war
4 with FuelCell. In either case, its purported
5 investigation purpose is insincerely held. Lacking a
6 proper purpose, POSCO is not entitled to the
7 inspection it seeks.

8 I come to this conclusion cautiously.
9 FuelCell bears a heavy burden in showing pretext, and
10 much of the evidence on which it relies presents
11 credibility problems. While the parties took
12 aggressive stances negotiating the joint venture, I
13 cannot conclude that Mr. Lee was the unhinged bully
14 that FuelCell suggests he was. But the more reliable
15 evidence in the record still supports a conclusion
16 that POSCO's desire to burden FuelCell with litigation
17 predominates over any desire it has to inspect
18 FuelCell's records.

19 In short, the totality of the facts in²⁰ the record
have persuaded me that POSCO has no
21 interest in the documents it has demanded to inspect.
22 It is simply looking for another forum in which it can
23 force FuelCell to litigate.

24 For the foregoing reasons, POSCO is

1 not permitted to inspect the books and records it
2 seeks. Each party shall bear its own fees and costs.
3 The parties shall submit a stipulated final order
4 within 20 days.

5 With that, Ms. Levy, are there any
6 questions, or is there anything unclear, or are you
7 still awake?

8 MS. LEVY: No, Your Honor. That was
9 all clear. Thank you.

10 THE COURT: Thank you.

11 Mr. Lessner, all clear?

12 MR. LESSNER: All clear. Nothing¹³ further, Your
Honor. Thank you.

14 THE COURT: Thank you, all. Take care
15 and have a good weekend.

16 We're adjourned.

17 (Court adjourned at 12:12 p.m.)

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CERTIFICATE

I, DENNEL NIEZGODA, Official Court Reporter for the Court of Chancery for the State of Delaware, Registered Merit Reporter, Certified Realtime Reporter, do hereby certify that the foregoing pages numbered 3 through 59 contain a true and correct transcription of the rulings as stenographically reported by me at the hearing in the above cause before the Vice Chancellor of the State of Delaware, on the date therein indicated, except as revised by the Vice Chancellor.

IN WITNESS WHEREOF I hereunto set my hand at Wilmington, this 14th day of July, 2021.

/s/ Dennel Niezgoda

Dennel Niezgoda
Official Court Reporter
Registered Merit Reporter
Certified Realtime Reporter

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