

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK**

RETIREMENT PLAN FOR GENERAL
EMPLOYEES OF THE CITY OF NORTH
MIAMI BEACH AND ROBIN STEIN

Petitioners,

- v. -

THE MCGRAW-HILL COMPANIES, INC.,

Respondent.

Index No. 650349/2013

Hon. Jeffrey K. Oing

**RESPONSE OF THE MCGRAW-HILL COMPANIES, INC. IN
OPPOSITION TO PETITIONERS' PETITION PURSUANT TO
N.Y. CPLR ARTICLE 4**

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PRELIMINARY STATEMENT

Petitioners Retirement Plan For General Employees of the City of North Miami Beach and Robin Stein (collectively, “Petitioners”) do not dispute that they have received or have been offered all books and records to which they are statutorily entitled under N.Y. Bus. Corp. Law § 624 (“Section 624”). This includes minutes of shareholder meetings, a record of shareholders, and annual balance sheet and profit and loss information. Accordingly, resolution of this Petition turns not on an interpretation of Section 624, but solely on the application of New York common law. Nevertheless, Petitioners’ brief says virtually nothing about the New York common law, likely because no New York court has ever granted a shareholder’s request for anything approaching the vast array of materials sought here. Lacking support under New York law, Petitioners improperly focus on Delaware law, which requires application of an entirely different standard that is simply not applicable to this dispute.¹

Under New York common law, shareholders are entitled to inspect books and records beyond those enumerated in Section 624 only if they make a duly supported factual showing of a proper purpose, and demonstrate that the books and records they seek are both relevant and necessary to such purpose. Moreover, it is well-settled that shareholders’ common law rights to books and records may not be exercised for speculative purposes, for the gratification of curiosity, or where compliance would be unduly burdensome. Petitioners fail under this standard.

The specific “purpose” underlying the demand here is set forth on page one of Petitioners’ brief, stating that McGraw-Hill’s documents are being sought “in order to (i) make a determination of whether wrongdoing occurred at [McGraw-Hill] that was caused by the Board of Directors’ failure to oversee the Company’s [Standard & Poor’s] subsidiary, resulting in breach-

¹ Even Delaware law requires Petitioners to make demands with “rifled precision,” a standard clearly not met here as described below.

es of fiduciary duties, and (ii) make an informed decision as to whether to make a demand on the Board to take corrective action or whether such a demand would be futile.” Although Petitioners’ alleged purpose is, on its face, focused on the McGraw-Hill Board of Directors, Petitioners’ brief says almost nothing specific about the Board, or any of the Board’s alleged actions or inactions. Nor do Petitioners offer anything more than sheer speculation to suggest that any member of the Board breached any duties or otherwise engaged in wrongdoing.

Petitioners’ only effort to make a “factual showing” of any kind in support of their ostensible purpose is to cut and paste a disparate collection of allegations from various well-publicized investigations and cases brought against McGraw-Hill and S&P by government agencies and private litigants. Pet. Br. at 2-8. These investigations and civil actions generally relate to S&P’s credit ratings of Residential Mortgage-Backed Securities (“RMBS”) and Collateralized Debt Obligations (“CDOs”). These other investigations and actions are generally based on allegations related to the conduct of particular analysts and managers at S&P who worked on ratings of particular securities. They are not about the actions or inactions of the Board of Directors of McGraw-Hill and do not begin to support (or even remotely touch upon) Petitioners’ theory of alleged Board misconduct, which remains entirely speculative. Put simply, there can be no “proper purpose” to investigate wrongdoing by the Board where there is nothing to suggest that any such wrongdoing occurred.

In this respect, Petitioners are situated no differently than the plaintiffs in a previously dismissed derivative action brought against certain directors and officers of McGraw-Hill. *See Teamsters Allied Benefit Funds v. McGraw*, No. 09 Civ. 140 (PGG), 2010 WL 882883, at *6 (S.D.N.Y. Mar. 11, 2010). That case was dismissed on grounds that the plaintiffs (like Petitioners here) failed to make sufficient allegations of specific wrongdoing by the Board or individual

directors in a demand letter. *Id.* (finding that while plaintiffs may have alleged that “investors who relied on [credit] ratings [had been] defrauded, it does not begin to suggest that the individual defendants defrauded the Company”) (emphasis in original). Thus, it was not enough for plaintiffs to make allegations of wrongdoing by individuals involved in S&P’s credit ratings practice. The Court reasoned that to state a derivative claim, plaintiffs needed to make specific allegations about actions of the named relevant officers and directors—something they simply could not do.

Tellingly, the allegations at issue in the now-dismissed *Teamsters* case are nearly identical in key respects to the allegations underlying Petitioners demand for documents here. This is exemplified in the following chart:

<i>Teamsters Allegations</i>	<i>Allegations Here</i>
<p>“The Company’s Officers and Directors . . . permitted and/or encouraged employees to issue false ratings on securities in order to satisfy Wall Street expectations, and artificially adjust commercial-mortgage rating criteria in response to Wall Street pressure.” <i>See</i> April 26, 2013 Affirmation of Brian T. Markley (“Markley Affirmation”) at 3 (Formal Demand on the Board attached at Exhibit A to the <i>Verified Shareholder’s Derivative Complaint in Teamsters</i> (“Ex. A”).</p>	<p>“[T]he Board allowed S&P to continue to issue inflated ratings for the RMBSs and CDOs, which produced billions in revenue...” Petition ¶ 22.</p>

<p>“[A] July 8, 2008 report issued by the Staff of the Securities and Exchange Commission identified numerous issues regarding McGraw-Hill and other rating agencies’ credit rating procedures.” Markley Affirmation at 3, Ex. A.</p>	<p>“Without attributing conduct to any particular credit rating agency, the SEC issued its conclusions in a July 2008 report...” Petition ¶ 12.</p>
<p>“It appears that the Board has breached their fiduciary duties by failing to properly supervise and monitor the adequacy of McGraw-Hill’s internal controls[.]” Markley Affirmation at 3, Ex. A.</p>	<p>“[T]he Board knew or should have known of the growing problems in the mortgage industry, problems about which S&P publically reported and which would directly impact the RMBS and CDO ratings.” Petition ¶ 22.</p>
<p>“Defendants peddled McGraw-Hill’s ratings for increased profits – effectively selling the Company’s integrity for a steady and increasing stream of fees on these transactions.” Markley Affirmation at 3, ¶ 4.</p>	<p>“[T]he Board allowed S&P to continue to issue inflated ratings for the RMBSs and CDOs, which produced billions in revenue...” Petition ¶ 22.</p>
<p>“[The] Connecticut Attorney General . . . confirmed that his office issued a subpoena on October 10, 2007 to McGraw-Hill as part of an antitrust investigation into the commercial debt ratings industry.” Markley Affirmation at 3, ¶ 68.</p>	<p>“On October 16, 2007, S&P received a subpoena from the Connecticut Attorney General’s Office requesting information and documents relating to the conduct of S&P’s credit ratings business.” Petition ¶ 13.</p>

Despite these obvious similarities, Petitioners argue in a footnote that the *Teamsters* case is of no moment because it was decided “before some of the critical facts provided by Petitioners,” namely a report by the U.S. Senate Permanent Subcommittee on Investigations (“PSI”) and a Wells Notice served by the Securities and Exchange Commission. Pet. Br. 18, n.10. What Petitioners fail to acknowledge is that these supposedly “new” and “critical” allegations continue to say nothing specific about the Board of Directors, and still provide no basis to support even a

suspicion of wrongdoing by the Board. Petitioners also fail to recognize the preclusive effects of the *Teamsters* decision, as addressed below.

Petitioners should not be permitted to use Section 624 and their common law rights to seek corporate records as an end-run around civil discovery mechanisms, especially given that their demand is based on a theory that has no merit and which has already been flatly rejected. Rather, the Court should hold that Petitioners have already received or been offered all the material—and more, as discussed below—to which they are entitled.

BACKGROUND

McGraw-Hill is an information services provider serving the financial services and business markets. Prior to November 2010, McGraw-Hill had three principal divisions: Education, Information & Media and Financial Services. McGraw-Hill's Financial Services division, operating under the Standard & Poor's brand, provided independent credit ratings, indices, risk evaluation, investment research and data. As of January 1, 2009, Standard & Poor's has operated as a wholly owned subsidiary of McGraw-Hill. McGraw-Hill has its principal place of business in New York and is organized under the laws of the State of New York. Petitioners' demand requests a wide array of information regarding S&P's "credit ratings for RMBS and CDOs" from January 1, 2002 through the present.

Over the past several years, governmental entities have conducted several investigations, and private plaintiffs have brought various suits related in part to S&P's credit rating opinions of RMBS and CDOs. Neither McGraw-Hill, nor S&P has been found liable in any of these U.S. cases, dozens of which have been dismissed.² As a credit rating agency, S&P does not function

² See, e.g., *In re Lehman Bros. Mortgage-Backed Securities Litigation*, 650 F.3d 167 (2d Cir. 2011) (affirming dismissals of (1) *In re Lehman Bros. Securities and ERISA Litigation*, 681 F. Supp. 2d

as an underwriter, arranger, or issuer of securities and does not provide investment advice. Rather, as the Second Circuit Court of Appeals has recognized, a “rating issued by a Rating Agency speaks merely to the Agency’s opinion of the creditworthiness of a particular security.” *In re Lehman Bros. Mortgage-Backed Securities Litigation*, 650 F.3d 167, 183 (2d Cir. 2011).

The current dispute was initiated on November 18, 2011, when the Retirement Plan for General Employees of the City of North Miami Beach (“North Miami”)³ wrote the Chairman of the Board of Directors of McGraw-Hill demanding access to books and records of the Corporation dating back to January 1, 2002. The demand was extremely broad, covering, among other things, “all books and records concerning S&P’s policies and procedures for issuing credit ratings for RMBS and CDOs” and “all books and records that identify and discuss S&P’s business and operations.” See Petition at Exhibit A, Demands 4 and 6.

McGraw-Hill’s initial response to the demand stated, among other things, that it was vastly overbroad and sought material well beyond what is contemplated under Section 624 or New York common law. The response further explained that the vague allegations underlying the demand were very similar to those at issue in the dismissed *Teamsters* case and more than 20

495 (S.D.N.Y. 2010); (2) *Tsereteli v. Residential Asset Securitization Trust 2006-A8*, 692 F. Supp. 2d 387 (S.D.N.Y. 2010); and (3) *In re IndyMac Mortgage-Backed Securities Litigation*, 718 F. Supp. 2d 495 (S.D.N.Y. 2010)); *Ohio Police & Fire Pension Fund v. Standard & Poor’s Financial Services LLC*, 700 F.3d 829 (6th Cir. 2012) (affirming dismissal); *New Jersey Carpenters Health Fund v. Residential Capital, LLC*, No. 08 CV 8781(HB), 2010 WL 1257528 (S.D.N.Y. Mar. 31, 2010); *Boilermakers National Annuity Trust Fund v. Wamu Mortgage Pass Through Certificates, Series ARI*, 748 F. Supp. 2d 1246 (W.D. Wash. 2010); *Space Coast Credit Union v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, No. 12-60430-CIV, 2013 WL 1131628 (S.D. Fla. Mar. 18, 2013); *New Jersey Carpenters Vacation Fund v. Royal Bank of Scotland Group, PLC*, 720 F. Supp. 2d 254, 272 (S.D.N.Y. 2010). See also *Reese v. McGraw-Hill Cos.*, 08 Civ. 7202, 2012 U.S. Dist. LEXIS 83753 (S.D.N.Y. Mar. 30, 2012), *aff’d sub nom. Boca Raton Firefighters and Police Pension Fund v. Bahash*, No. 12-1776-cv, 2012 WL 6621391 (2d Cir. Dec. 20, 2012); *Gearren v. McGraw-Hill Cos.*, 690 F. Supp. 2d 254 (S.D.N.Y. 2010), *aff’d* 660 F.3d 605 (2d Cir. 2011), *cert. denied*, 133 S. Ct. 476 (2012); *Sullivan v. McGraw-Hill Cos.*, 08-cv-07890 (RJS) (consolidated with *Gearren*).

³ This is the name under which Petitioners are bringing the instant action. The initial letter and power of attorney were on behalf of North Miami Beach General Employees Retirement Plan.

other actions based on allegations related to S&P's RMBS and CDO ratings. McGraw-Hill did, however, produce shareholder meeting minutes dating back to 2002 and offered to produce the other categories of material specified in Section 624.⁴ Petition at Exs. C, F.

The parties participated in a meet and confer telephone call on January 19, 2012. No agreement was reached and counsel for McGraw-Hill memorialized the meeting in a letter dated February 3, 2012. Petition at Ex. F. Petitioners did not respond to this letter for over four months. Following additional correspondence, counsel spoke again on September 6, 2012, at which time Petitioners indicated for the first time that they would narrow their request to documents regarding the "flow of information" to McGraw-Hill's Board relating to the business and operations of S&P, as well as documents relating to directors' responsibility for oversight of S&P's business. Counsel for McGraw-Hill asked Petitioners if producing this category of documents would constitute satisfaction of the demand, but Petitioners would not make such a representation. Petition at Ex. J. On October 2, 2012, Petitioners wrote that they would seek relief and subsequently filed this Petition four months later on January 31, 2013.

Subsequent to the filing of this Petition, McGraw-Hill tried again at compromise, offering to produce--subject to its previous objections, and in exchange for withdrawal of the Petition—all documents produced to the PSI that were responsive to a request for material possessed by, or transmitted to or from the Board or a subcommittee of the Board regarding S&P's ratings on mortgage-backed products such as RMBS and CDOs from July 1, 2005 through December 31, 2007. These documents include minutes of meetings of the Board and some of its committees,

⁴ North Miami, averring that it bought its shares in May 2009, made this initial demand notwithstanding that it was not a shareholder for the approximately seven and a half year period starting in January 2002 covered by its defined timeframe. Nonetheless, the Company produced its shareholder minutes for the full timeframe requested, subject to its previously-stated objections.

Board of Directors' reports, as well as materials and presentations shown to the Board. Petitioners rejected the offer.

McGraw-Hill will still produce thousands of other pages of documents in a good faith effort to resolve this dispute, as soon as Petitioners' execute a confidentiality stipulation. Subject to and without waiving its objections, McGraw-Hill is producing more than 1800 pages of shareholder meeting minutes from 2002-2012 and their attachments. This material includes facts regarding certain Board members and their election to the Board, compensation information for outside directors and executives, and information regarding Board and Board Committee activities. The production also includes annual reports for 2002-2012 with detailed financial and operating information.

Put simply, Petitioners have already received or been offered the documents to which they are statutorily entitled, and much more. Because Petitioners have no serious basis to allege—or for that matter even suspect—any breaches of duty or other wrongdoing by the Board of Directors, they are not entitled to more documents. Their Petition should therefore be denied.

ARGUMENT

New York law governs this dispute. The Company is a New York corporation and Petitioners' books and records demand was made under Section 624 and New York common law. Petition at ¶ 1, 4. These facts are not disputed. Yet, from the very first paragraph of their brief Petitioners focus almost exclusively on Delaware's books and records statute and its interpretation. Although Petitioners' demand would fail under either state's law—even Delaware requires demands to be made with "rifled precision"—the weakness of their arguments is most glaring under the New York standard, which is significantly narrower and has never been applied to require a production of anything approaching the array of material sought here.

I. SECTION 624 PROVIDES ONLY A NARROW RIGHT TO CERTAIN SPECIFIC CATEGORIES OF DOCUMENTS THAT HAVE ALREADY BEEN PRODUCED OR OFFERED

The section of Petitioners' brief that outlines the "Legal Standards" applicable to this petition (Pet. Br. at 14-16) does not cite the actual text of Section 624. The statute provides in relevant part that:

(b) Any person who shall have been a shareholder of record of a corporation upon at least five days' written demand shall have the right to examine in person or by agent or attorney, during usual business hours, its *minutes of the proceedings* of its shareholders and *record of shareholders* and to make extracts therefrom for any purpose reasonably related to such person's interest as a shareholder.

(e) Upon the written request of any shareholder, the corporation shall give or mail to such shareholder an *annual balance sheet and profit and loss statement* for the preceding fiscal year, and, if any interim balance sheet or profit and loss statement has been distributed to its shareholders or otherwise made available to the public, the most recent such interim balance sheet or profit and loss statement.

BCL § 624(b), (e) (emphasis added).

Thus, under Section 624, Petitioners are *only* entitled to three categories of information:

(i) minutes of proceedings of shareholders; (ii) record of shareholders; and (iii) an annual balance sheet and profit and loss statement. *See Guenzel v. American Culture, Inc.*, 2012 N.Y. Slip Op. 30409(U), 2012 WL 756601, at *2 (Sup. Ct. Suffolk Co. Feb. 17, 2012) ("the corporate documents that are subject to inspection under statutes such as BCL § 624 by qualified shareholders are limited to those enumerated therein"); *see also Bed Bath & Beyond Inc. v. Hill*, No. 600561/08, 2008 WL 6487330 (Sup. Ct. N.Y. Co. Dec. 22, 2008) (contrasting documents available by "statutory right" with those available under the common law and declining to compel under either authority). By contrast, the Delaware version of this statute is broader, permitting shareholders access to "other books and records" beyond any specifically enumerated categories. *See Del. Code Ann. tit. 8, § 220(b)(1)*.

Here, Petitioners seek records well beyond the categories prescribed by Section 624. *See* Pet. Br. at Schedule A; Pet. Br. at 11, 22. Petitioners do not and cannot deny that their statutory rights are narrowly circumscribed to these three categories. Accordingly, there can be no dispute that this matter turns completely on the question of whether Petitioners are entitled to any documents under common law that have not already been produced.

II. PETITIONERS' DEMAND FAILS UNDER NEW YORK COMMON LAW

Shareholders' common law right to access the books and records of a corporation has never been applied as broadly as Petitioners are asking here. As a threshold matter, it is Petitioners who must first demonstrate a proper purpose that would justify the broad scope of their request. *See Crane v. Anaconda Co.*, 39 N.Y.2d 14, 18 (1976) (“When asserting a common law right of access the petitioner must plead and *prove* that inspection is desired for proper purpose.”) (emphasis added) (citations omitted); *see also Matter of Steinway*, 159 N.Y. 250, 263 (1899) (“[W]hen the right is guaranteed by statute the motive for its exercise is immaterial, but when it rests upon the common law it will not be allowed for speculative purposes, the gratification of curiosity, or where its exercise would produce great inconvenience.”); *Bed Bath & Beyond Inc.*, 2008 WL 6487330, at *5 (denying a books and records request as petitioners had all the records they were entitled to and “[t]he only other purpose that can be ascertained by the Respondents’ demand is that they plan to make a demand on [the] board of directors in order to commence” a meritless derivative action). Because the common law right is “discretionary,” Petitioners must first show that they have a proper purpose for making the books and records request before they will be granted access to any documents beyond the statutory categories. *See Guenzel*, 2012 WL 756601, at *3 (finding that petitioners lacked a proper purpose under the common law and would only be permitted to inspect under Section 624). Assuming that a prop-

er purpose could be identified, Petitioners would also be required to show that their demands are narrowly tailored to serve that purpose. In this case, Petitioners have done neither.

A. PETITIONERS CANNOT SHOW A PROPER PURPOSE

Petitioners must show specific facts to support a proper purpose for inspecting Company records under a theory of corporate wrongdoing. New York courts have long held that “in the absence of any facts tending to support” a shareholders’ ostensible purpose, access to corporate records will not be compelled. *In re Colwell*, 76 A.D. 615, 616 (1st Dep’t 1902) (finding that petitioner did not show proper purpose by merely asserting that “some of the transactions are characterized as of doubtful legality and as seemingly unauthorized”). Other New York courts have similarly found that shareholder record demands would only provide a basis for a “limited” production and that such demands should be “granted with great circumspection and only in those cases wherein such claims [are] *duly supported*.” *Guenzel*, 2012 WL 756601 at *3 (emphasis added).⁵ By the same token, it is well-settled that conclusory assertions of wrongdoing are insufficient to support shareholder records demands (*Lapsley v. Sorfin International, Ltd.*, 43 A.D.3d 1113, 1114 (2d Dep’t 2007)), and that relief will be “granted cautiously, and never for...speculative purposes.” *See Camhe-Marcille v. Sally Lou Fashions Corp.*, 289 A.D.2d 162, 162 (1st Dep’t 2001) (citation and internal quotation marks omitted) (denying books and records demand because claims of corporate waste were unsupported).

⁵ Delaware law also requires a strict analysis of “proper purpose.” In alleging corporate wrongdoing under Delaware law, a plaintiff must establish a “credible basis to find probable wrongdoing.” *Security First Corp. v. U.S. Die Casting & Development Co.*, 687 A.2d 563, 567 (Del. 1997). “This burden is not insubstantial, and mere curiosity or a desire for a fishing expedition will not suffice.” *Mattes v. Checkers Drive-In Restaurants, Inc.*, No. C.A. 17775, 2001 WL 337865, at *5 (Del. Ch. Mar. 28, 2001) (citation and internal quotation marks omitted). *See also Yusufzai v. Owners Transport Communication, Inc.*, 18 Misc. 3d 1127(A) (Table), 2008 WL 343022, at *3 (Sup. Ct. Queens Co. Feb. 4, 2008) (analyzing Delaware law and finding that “a party’s subjective belief that waste and mismanagement had occurred, absent specific and credible facts, is insufficient to warrant an inspection of books and records”).

Here, as noted, Petitioners rely on a litany of unproven allegations in various investigations and civil actions. These sources of “facts” often do not reference any specific rating agency in their findings (as opposed to the industry as a whole), let alone any actions or inactions of the McGraw-Hill Board. Petition ¶¶ 11-12, 17-18, 23. Petitioners are thus left to draw inferences that are not based on the slightest bit of actual fact. For example, Petitioners allege that a report issued by the PSI focuses on a rating S&P published in connection with a particular CDO, then leap to a baseless, conclusory assertion that “serious questions [thus] exist regarding the Board’s exercise of its fiduciary responsibilities.” Petition ¶ 18. In fact, the PSI report says nothing about the Board’s role with respect to that, or any other, S&P rating. Similarly, Petitioners attempt to manufacture a basis for asserting misconduct by the Board through a misleading citation to a 2008 *Wall Street Journal* article. Petition ¶ 16. This article discussed how Harold McGraw, the Chairman and CEO of McGraw-Hill, led the Company at a time when S&P earned “booming profits” and that he was a “big supporter of the innovative products S&P was rating during the boom.” *Id.* While the article mentions that there have been “regulatory inquiries about the independence of [S&P’s] ratings,” it plainly does not suggest any sort of wrongdoing by Mr. McGraw or any other member of the Board. These sorts of speculative and conclusory allegations are far from sufficient to meet Petitioners’ common law burden to justify the purpose of their demand.

B. EVEN IF THEY HAD A “PROPER PURPOSE,” PETITIONERS’ DEMAND WOULD STILL BE OVERLY BROAD

Petitioners’ demand is overbroad on its face and an order compelling compliance with it would be unprecedented in New York jurisprudence. *See, e.g.*, Petition at Exhibit A, Demand 4 (seeking “all books and records that identify and discuss S&P’s business and operations”). New York common law requires much more precision than Petitioners have offered. Courts have held

that the scope of a shareholder's records demand must be "limited to those documents which in the trial court's exercise of reasonable discretion the situation requires be reviewed" and "petitioner's right of inspection should be limited to those books and records [that are] relevant and necessary" to its proper purpose. *Dwyer v. Di Nardo & Metscl, P.C.*, 41 A.D.3d 1177, 1179 (4th Dep't 2007) (citation and internal quotation marks omitted).

Petitioners' brief does not attempt to explain with any specificity how each of their demands is relevant and necessary to their purported purpose. Rather, Petitioners simply request wholesale access to an array of material on broad grounds that the documents may address the Board of Directors' alleged "failure to oversee" S&P's credit ratings business. Pet. Br. 1-2. *See also id.* at 22 (suggesting that the demanded documents may show the Board's "failure to properly oversee the management of the Company and in particular, S&P"). While such an approach would not be appropriate in any case, it is especially ill-fitting here where Petitioners have already received, or been offered, thousands of pages of books and records from the Company, including all material specified in Section 624, and other Board-related documents produced by McGraw-Hill to the PSI. Petitioners persist with their demand for additional documents, yet have failed to explain on a request-by-request basis (or even generally) how the additional documents they seek are relevant and necessary to advance their blunderbuss theory of Board misconduct.

In *Matter of Steinway*, a leading case on this subject, the court observed that judges "should proceed cautiously and discreetly, according to the facts of the particular case" when evaluating a common law request for books and records. 159 N.Y. at 263. More recently, another court wrote that "[a] claim of waste of corporate assets may be a basis for limited review of the books and records, but such requests must be granted cautiously, and may not be based upon unsupported claims." *See Lapsley*, 43 A.D.3d at 1114 (denying even a limited review of corporate books and records). *See also Barouh v. Barouh*, No. 012254/2008, 2009 WL 1172596, at

*12 (Sup. Ct. Nassau Co. Apr. 20, 2009) (finding that “access is generally limited to relevant, necessary and/or statutorily enumerated documents”).⁶

Here, Petitioners cannot cite to a single case that would entitle them to more materials than have already been produced and offered. At the same time, some of the cases Petitioners do cite tellingly offer no support for their position at all, and/or dealt with demands much more narrowly tailored than the demands here. For example, Petitioners cite *Tatko v. Tatko Bros. Slate Co.*, 173 A.D.2d 917, 919 (3d Dep’t 1991), for the general proposition that the common law right of inspection is “broad” (Pet. Br. at 20). The court in that case actually found, however, that petitioner’s demand was “too expansive” and on that basis *reversed* a lower court ruling that had ordered production. 173 A.D. 2d at 919 (finding that “petitioner’s right of inspection should be limited to those books and records relevant and necessary to establish the book value of respondent’s stock”). Similarly, in *Rockwell* (Pet. Br. at 15), the court significantly limited the scope of a shareholder demand:

The question remains whether plaintiff is entitled to all the materials requested. I think not. Plaintiff is entitled to inspect only insofar as is necessary to ascertain the names of his fellow shareholders who are entitled to vote at the October shareholders’ meeting ... This includes the most recent list of SCM shareholders, and transfer sheets reflecting all transfer of SCM stock subsequent to the date of the list.. . Access to the other materials must be denied.

⁶ As noted, Petitioners would also find no support for the broad scope of their demand under Delaware law, even if it were to apply. See *Thomas & Betts Corp. v. Leviton Manufacturing Co.*, 681 A.2d 1026, 1035 (Del. 1996); *Marathon Partners L.P. v. M & F Worldwide Corp.*, No. Civ. A. 018-N, 2004 WL 1728604, at *4 (Del. Ch. July 30, 2004) (“The scope of inspection should be circumscribed with precision and limited to those documents that are necessary, essential and sufficient to the stockholder’s purpose.”); see also *Brehm v. Eisner*, 746 A.2d 244, 266-67 (Del. 2000) (finding that petitioners may seek documents under Section 220 “if they can ultimately bear the burden of showing a proper purpose and make specific and discrete identification, with rifled precision, of the documents sought...they must establish that each category of books and records is essential to the accomplishment of their articulated purpose for the inspection”).

Rockwell v. SCM Corp., 496 F. Supp. 1223, 1127 (S.D.N.Y. 1980). *Cf. Kaufman v. CA, Inc.*, 905 A.2d 749, 755 (Del. Ch. 2006) (finding that just because a document may be relevant in civil litigation does not make it discoverable in response to a books and records request).

Because Petitioners have failed to state a proper purpose based on any actual facts, as opposed to sheer speculation of Board wrongdoing, and because their demands are in any event wildly overbroad to accomplish their ostensible purposes, the Petition should be denied.⁷

C. ESTOPPEL PRINCIPLES LIMIT SUBSEQUENT ACTIONS THAT MAY BE BROUGHT BY PETITIONERS

Finally, estoppel and *stare decisis* principles also support denial of Petitioners' demands. As noted, a court in the Southern District of New York has already dismissed a derivative claim (*Teamsters*) that was based on virtually identical allegations to those underlying Petitioners' demand here. Pet. Br. 2-8. It has been the law in New York for at least 100 years that derivatives actions such as *Teamsters* have preclusive effects for *all* shareholders of a Company. *See, e.g., Dana v. Morgan*, 232 F. 85, 89 (2d Cir. 1916) (Because "the wrong to be redressed [in a derivative suit] is the wrong done to the corporation and as the corporation is a necessary part to the suit, it inevitably follows that there can be but one adjudication on the rights of the corporation.") (citation omitted). Thus, among other things, Petitioners here will be precluded from arguing that the board was not disinterested in the alleged wrongdoing, as this issue was clearly

⁷ Petitioners' demand is also overbroad insofar as it seeks eleven years of documents, especially considering that the statute of limitations for a derivative action in New York is only six years. CPLR § 213(7). *See also Ruggiero v. Powers*, 284 A.D.2d 593, 595 (3rd Dep't 2001) (holding that documents not discoverable if the claims for which they would be used are not timely). *Cf. Graulich v. Dell Inc.*, No. 5846-CC, 2011 WL 1843813, at *1 (Del. Ch. May 16, 2011) (finding that "because plaintiff would be 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 the Delaware books and records statute).

before the court in *Teamsters* and was fully adjudicated. *Teamsters Allied Benefit Funds v. McGraw*, No. 09 Civ. 140 (PGG), 2010 WL 882883, at *6-*8 (S.D.N.Y. Mar. 11, 2010). See also *Henik ex rel. LaBranche & Co., v. LaBranche*, 433 F. Supp. 2d 372, 380 (S.D.N.Y. 2006) (holding that “shareholder plaintiffs could indefinitely relitigate the demand futility in an unlimited number of state and federal courts, a result the preclusion doctrine specifically is aimed at avoiding”); *Carroll ex rel. Pfizer, Inc. v. McKinnell*, 19 Misc. 3d 1106(A) (Table), 2008 WL 731834, at *4 (Sup. Ct. N.Y. Co. 2008) (finding that plaintiff in a derivatives suit filed under New York law was collaterally estopped from litigating the issue of demand futility and lack of independence because previous derivatives suit in federal court litigated the same factual issue); accord *Levin ex rel. Tyco International Ltd. v. Kozlowski*, 13 Misc. 3d 1236(A) (Table), 2006 WL 3317048 (Sup. Ct. N.Y. Co. 2006).

Petitioners’ stated goal of potentially re-litigating claims dismissed in *Teamsters* is a dead-end, and certainly not in the best interests of the Company. For that reason alone, the Petition should be denied.

CONCLUSION

For the foregoing reasons, McGraw-Hill respectfully submits that Petitioners' request for additional books and records of the Company should be denied.

Dated: April 26, 2013

Respectfully submitted,

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