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IN THE SUPREME COURT OF THE STATE OF DELAWARE

UNITEDHEALTH GROUP INCORPORATED, a Delaware corporation, Defendant-Below, Appellant, v. AMALGAMATED BANK, as TRUSTEE FOR LONGVIEW LARGECAP 500 INDEX FUND, THE LONGVIEW LARGECAP 500 INDEX VEBA FUND, THE LONGVIEW QUANTITATIVE LARGECAP FUND, THE LONGVIEW QUANT LARGECAP EQUITY-VEBA FUND, LV LARGECAP 1000 GROWTH INDEX FUND, THE LONGVIEW BROAD MARKET 3000 INDEX FUND, CORAL SPRINGS POLICE OFFICERS' RETIREMENT PLAN and CENTRAL LABORERS PENSION FUND, Plaintiffs-Below, Appellees.	No. 162, 2018 On Appeal from the Court of Chancery, C.A. No. 2017-0681-TMR

APPELLANT'S OPENING BRIEF

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NATURE OF PROCEEDINGS

Plaintiffs made broad demands for books and records of UnitedHealth Group Incorporated ("United" or the "Company") under 8 *Del. C.* § 220 based ***solely*** on untested allegations in two civil lawsuits brought by *qui tam* relators – James Swoben and Benjamin Poehling – and in complaints-in-intervention in those cases filed by the United States' Department of Justice (the "DOJ"). Both lawsuits alleged violations of the False Claims Act, 21 U.S.C. §§ 3729 *et seq*. (the "FCA"). United has consistently denied wrongdoing and has vigorously defended against what it believes are meritless claims. United declined to provide the demanded books and records because the allegations did not provide a credible basis to infer wrongdoing or mismanagement. Indeed, at the time of trial in this action, one of the complaints had already been dismissed, and the other was facing a pending motion to dismiss on similar grounds. Meanwhile, in a related, affirmative lawsuit that United filed ***against*** the Government before the Government filed its complaints-in-intervention, the presiding judge had denied the Government's motion to stay or dismiss United's lawsuit.

Plaintiffs filed actions under Section 220 on September 25, 2017 and September 26, 2017. Those actions were consolidated on October 11, 2017. The Court of Chancery held a one-day trial on a paper record on January 9, 2018.

On February 28, 2018, the Court of Chancery issued a post-trial Memorandum Opinion (the "Memorandum Opinion" or "Op."), which held that Plaintiffs are entitled to inspect some of United's books and records. The court below entered an order implementing the Memorandum Opinion on March 28, 2018. This appeal followed.[1]

[1] United filed a Motion for a Stay Pending Appeal in the Court of Chancery, and on April 27, the Court of Chancery granted a Conditional Stay Pending Appeal, allowing United ten days to seek a stay pending appeal from this Court. United did so on May 7.

SUMMARY OF ARGUMENT

1. The Court of Chancery Erred By Failing To Consider Whether The Alleged Conduct Was Wrongful. The Court of Chancery erred in expressly declining to consider whether United's alleged conduct, even if true, could credibly be considered wrongful – classifying that consideration as requiring the Court of Chancery to make an impermissible merits-based determination. Op. at 20-21. Logically, however, there must be a credible basis to infer that alleged conduct was **wrongful** for there to be a credible basis to infer that **wrongdoing** occurred. Untested allegations in contested lawsuits – even those purportedly supported by documents and testimony – cannot provide a credible basis to infer wrongdoing if they fail to state a claim for relief. Here, Plaintiffs seek to satisfy their credible basis burden solely on the basis of untested allegations in two *qui tam* lawsuits. Yet on the date of the Section 220 trial, the presiding judge in one of those lawsuits (*Swoben*) had dismissed the case entirely as failing to state a claim for relief. And the parties were briefing a similar motion to dismiss in the other lawsuit (*Poehling*). The trial record contains no allegations against United that any court had deemed sufficient to state a claim. There was no credible basis to infer that wrongdoing occurred because there was no credible basis to infer that the alleged conduct, even if true, was wrongful.

2. The Court of Chancery Erred By Relying On Documents And Testimony That Were Not In The Record. The Court of Chancery erred in formulating and applying the credible basis standard. It is well-established that a Section 220 plaintiff seeking to investigate wrongdoing or mismanagement has the burden to "show, by a preponderance of the evidence, a credible basis from which the Court of Chancery can infer there is possible [wrongdoing or] mismanagement that would warrant further investigation." *Seinfeld v. Verizon Commc'ns, Inc.*, 909 A.2d 117, 123 (Del. 2006). The Court of Chancery properly recognized that untested allegations in ancillary complaints cannot by themselves provide a credible basis from which a court can infer that certain conduct occurred. Op. at 18-19. But the Court of Chancery went further and ruled that documents and testimony that were characterized and referenced in the *Poehling* complaint, which were never made part of the Court of Chancery trial record, provided sufficient evidence to infer that the conduct alleged in the complaint might have occurred. *Id.* at 19-20. This was error. Plaintiffs actually sought those documents through this action, and the Court of Chancery ordered United to produce them. Yet both Plaintiffs and the Court of Chancery simultaneously used those same documents – none of which either has ever seen – to justify a finding that Plaintiffs have shown a credible basis.

STATEMENT OF FACTS

I. THE COMPANY AND ITS MEDICARE ADVANTAGE PROGRAM.

United is a diversified health and well-being company that serves tens of millions of people throughout the United States. A0438. Through its UnitedHealthcare Medicare & Retirement business, the Company provides health care coverage for seniors and other eligible Medicare beneficiaries, including through the Medicare Advantage program administered by the Centers for Medicare & Medicaid Services ("CMS").[2] A0441-42. Under the Medicare Advantage program, UnitedHealthcare Medicare & Retirement provides health insurance coverage in exchange for a fixed monthly premium per member from CMS. A0442. The payments United receives from CMS vary based on the geographic areas in which members reside, demographic factors such as age, gender and institutionalized status, and the health of the individual. *Id.*

[2] Companies like United that offer Medicare Advantage programs are often referred to as Medicare Advantage Organizations ("MAOs"). Op. at 4. A traditional Medicare plan is where CMS pays the health care provider directly for its services to the beneficiary. *Id.* at 3.

II. THE FALSE CLAIMS ACT LITIGATION: RELATORS AND THE GOVERNMENT SEARCH FOR A VIABLE CLAIM AGAINST UNITED.

A. The *Swoben* Action Sputters And Fails.

1. Swoben Makes Multiple Attempts At Pleading A Claim Under The False Claims Act.

On July 13, 2009, relator James M. Swoben brought a *qui tam* action in the U.S. District Court for the Central District of California (the "*Swoben* Action") against Scan Health Plan and Senior Care Action Network for supposed violations of the False Claims Act,[3] based on the submission of allegedly false certifications to CMS. A0078; *see also* A0008. Swoben amended his complaint three times – on September 30, 2009, October 19, 2010, and November 23, 2011 (the "Third Amended Complaint") – and added defendants, including United. A0009. The Government declined to intervene against United. A0194.

The defendants in the *Swoben* Action, including United, moved to dismiss Swoben's Third Amended Complaint based on Federal Rule of Civil Procedure ("FRCP") 9(b). A0201; *see also* A0272. Swoben requested thirty days

[3] Under the FCA, a private person, known as a "relator," can bring a lawsuit on behalf of the United States in certain circumstances. The DOJ then investigates the alleged violations of the FCA. After the investigation, the DOJ chooses either to intervene in one or more counts or to decline to intervene.

to file yet another amended complaint. A0244; A0250-51. The District Court issued an order requiring Swoben to file a declaration describing "in detail the proposed Fourth Amended Complaint and why such an amendment would not be futile or denied due to evidence of a lack of diligence or undue delay." A0252. Swoben's counsel filed a declaration stating that he "intend[ed] to add allegations" without detailing those allegations. A0255. The District Court dismissed the Third Amended Complaint. A0287; A0297.

Swoben appealed, and the Ninth Circuit vacated the District Court's judgment and remanded the action with instructions to allow Swoben to file his fourth amended complaint. A0387; A0433-34.

On March 13, 2017, Swoben filed his fourth amended complaint, alleging a single claim for violation of the FCA based on United's submission of certifications to CMS. A0553. The United States, which previously had declined to intervene, now elected to partially intervene and filed a complaint-in-partial-intervention. A0571; A0579. The Government alleged four claims under the FCA (based on United's submission of certifications to CMS), a claim for restitution, and a claim for payment by mistake.[4] A0617; A0650-53.

[4] All parties agreed that Swoben's complaint became moot in the face of the Government's complaint-in-partial-intervention.

2. The Court Grants United's Motion To Dismiss And The Government Walks Away.

United moved to dismiss the Government's complaint-in-partial-intervention on five grounds (the "Motion to Dismiss"). A0850; A1467; A1502.

On October 5, 2017, the District Court granted United's motion on each of those five grounds. A1520. In addition to various procedural grounds for dismissal, the District Court found that the Government had failed: (1) to allege that the individuals who signed relevant attestations on behalf of United knew those attestations were false (A1525-26); (2) to plead its FCA claims with particularity as required by FRCP 9(b) (A1527-28); and (3) most fatally, failed even to allege that the challenged conduct was material to the Government's decision to pay United:

> [T]he Government's Complaint-in-Partial-Intervention includes only conclusory allegations that the United Defendants' conduct was material, and fails to allege that CMS would have refused to make risk adjustment payments to the United Defendants if it had known the facts about the United Defendants' alleged involvement with the Healthcare Partners' chart review process."

A1527.

The District Court granted the Motion to Dismiss but gave the Government leave to amend on the claims that were not procedurally barred, noting the "Ninth Circuit's liberal policy favoring amendments." A1524; A1526-

28. The Government chose, however, ***not*** to file an amended complaint. Instead, it chose to abandon the *Swoben* complaint entirely, and filed a voluntary Notice of Dismissal. A1531; A1533.

B. Poehling Files FCA Claims, The Government Intervenes And United Moves To Dismiss.

On March 24, 2011, another relator, Benjamin Poehling filed a *qui tam* action in the U.S. District Court for the Western District of New York against United and others (the "*Poehling* Action," and with the *Swoben* Action, the "FCA Litigation").[5] Poehling, like Swoben, asserted FCA claims based on the submission of allegedly fraudulent certifications to CMS. A0186-87. After Poehling amended his complaint on October 27, 2011 (A0089), the case remained pending, under seal, for nearly six years.

The Government eventually elected to partially intervene in the *Poehling* Action. A0544; *see also* A0047. The Government and Poehling filed multiple amendments and corrections to their pleadings until, on November 17, 2017, the Government filed an amended complaint-in-partial-intervention (A1573) (the "*Poehling* Complaint"), which became the operative complaint in the case.

[5] Following the Ninth Circuit's decision to permit Swoben to file a fourth amended complaint, but before *Poehling* was unsealed, the Government unilaterally moved to transfer the *Poehling* Action to the Central District of California. A0045.

United moved to dismiss the *Poehling* Complaint on December 8, 2017. A1739. On the trial date in this case, January 9, 2018, the parties were briefing United's motion to dismiss.

C. One Critical, Missing Element In The Attempts To State FCA Claims Against United: Materiality.

The misrepresentations alleged in the *Swoben* and *Poehling* cases involve diagnostic codes provided to CMS to support risk-adjusted payments for enrollees in United's Medicare Advantage plans. Op. at 4. CMS makes risk adjustment payments for enrollees who have received specific and more serious diagnoses, compared to an average beneficiary on "traditional" Medicare, as evidenced in diagnostic codes. *Id.* The Government's risk adjustment program is based on the common sense notion that sicker beneficiaries are more expensive to treat.

CMS bases its risk adjustment payments to MAO on the diagnostic codes submitted to CMS by health care providers, not MAOs. A1578 ¶ 3. Unavoidably, and as CMS has long known and accepted, diagnostic codes entered by the providers will not always match the information on patients' medical charts. A1757-61. The Government alleges that United was in a position to know of differences between information on patients' charts and those same patients' diagnostic codes as submitted by providers to CMS. A1643-60 ¶¶ 123-63; A1687-

88 ¶¶ 235-38; A1689-90 ¶¶ 240-43. United, like other MAOs, submitted annual attestations that its enrollees' risk adjustment data was correct based on facts reasonably available to United. A1717-33 ¶¶ 309-340. The Government alleges that United conducted chart review and audit programs that identified the existence of these discrepancies between charts and codes. A1660-88 ¶¶ 164-238. The Government alleges that United's attestations of accuracy were therefore knowingly or recklessly false and that United's submission of them to CMS was "false or fraudulent." A1708-27 ¶¶ 293-327; A1734 ¶ 345-46; A1735 ¶ 349-50.

One of the major pleading issues in the FCA Litigation has been "materiality." The FCA's "materiality standard is demanding." *Universal Health Servs., Inc. v. U.S.*, 136 S. Ct. 1989, 2003 (2016). The FCA's materiality standard focuses on "the effect[s] on the likely or actual behavior of the recipient[s] of the alleged misrepresentation." *Id.* at 2002. FCA law is clear that it is strong evidence that a representation is not material if the Government routinely pays a claim despite noncompliance. *Id.* at 2003.

A primary deficiency with the Government's FCA Litigation is that the Government did not and cannot allege that United's purportedly false attestations had, or likely had, any effect on the actual behavior of the Government. CMS knew of discrepancies between medical charts of Medicare Advantage

beneficiaries and the diagnostic codes submitted for those beneficiaries, and CMS sees these same discrepancies between medical charts and diagnostic codes of beneficiaries in the "traditional" fee-for-service Medicare program. A1754; A1757-61. Unsurprisingly, CMS continued to make risk adjustment payments to United without disputing or reducing payments on the grounds that United's diagnostic codes were incorrect. A1754; A1766.

III. UNITED FILES AN ACTION UNDER THE ADMINISTRATIVE PROCEDURE ACT THAT STANDS TO UNDERMINE THE GOVERNMENT'S FCA LITIGATION FURTHER.

In January 2016, long before the Government's partial intervention decisions in *Poehling* and *Swoben*, United filed a lawsuit against the Government (the "APA Action") challenging the validity of a CMS regulation that purports to require diagnostic code verification efforts by MAOs and that embodies the same unlawful interpretation of the Medicare Act that underlies all of the claims in the FCA Litigation. A0300; *see also* A0070. The Central District of California noted that the "legal underpinnings of the Government's arguments" in the FCA Litigation are squarely presented in this separate, earlier-filed suit brought by United against the Government. A0608.

The legal underpinnings of the Government's claims in the FCA Litigation are at issue in the APA Action because Congress mandates that CMS

must pay MAOs in a manner "to ensure actuarial equivalence" between traditional fee-for-service Medicare and Medicare Advantage. *See* 42 U.S.C. § 1395w-23(a)(1)(C)(i). A principal theory underlying the Government's argument in the FCA Litigation is that an MAO must, in certain circumstances, take steps to verify the accuracy of diagnostic codes that have been submitted by healthcare providers before those codes are submitted to CMS for purposes of determining the appropriate risk adjustment payment. A0308 ¶ 9. That theory, however, cannot be reconciled with the fact that CMS does not ***itself*** engage in any such independent verification efforts with respect to the diagnostic codes submitted to it by healthcare providers for beneficiaries covered under traditional, fee-for-service Medicare. *Id.*

CMS does not obtain the underlying medical charts for its beneficiaries on traditional Medicare, nor does it seek to validate the diagnoses against those medical charts. A0307-08 ¶ 7. Instead, CMS treats diagnostic codes received from providers for traditional Medicare patients as being conclusively valid for purposes of determining payment. A0308 ¶ 9. Thus, United argues in the APA Action, the CMS regulation cannot require a Medicare Advantage Organization to undertake a more intensive and searching inquiry of diagnostic codes than CMS itself conducts because that would violate the statute's mandate of

ensuring actuarial equivalence between traditional Medicare and the Medicare Advantage program. *Id.* In short, United could not have fraudulently submitted claims for payment to CMS (as alleged in the FCA Litigation) if it was under no regulatory obligation to independently verify the diagnostic codes submitted by providers.

Unlike the *Swoben* Action, the APA Action has survived a motion by the Government to dismiss it. A0603. It has also survived the Government's motion to stay the APA Action pending resolution of the FCA Litigation. A0661; *see also* A0836. United moved for summary judgment on October 17, 2017 (A1532), and the Government filed a cross-motion for summary judgment on December 4, 2017. A0077. Those respective motions are fully briefed and remain pending.

IV. PLAINTIFFS DEMAND INSPECTION OF UNITED'S BOOKS AND RECORDS BASED SOLELY ON THE FCA LITIGATION.

Plaintiffs Amalgamated Bank, Coral Springs and Central Laborers sent Section 220 demands (collectively, the "220 Demands") to United on July 6, 2017, July 27, 2017 and August 7, 2017, respectively. *See* A0662; A0888; A1141.

The basis of the Amalgamated Bank Demand was solely the *Poehling* Action:

> The Whistleblower Suit and the DOJ Suit [in the *Poehling* Action] are hereinafter collectively referred to as the "FCA Litigation." All of the facts concerning UnitedHealth's alleged improper diagnostic coding and risk adjustment program are derived from the FCA Litigation.

A0664.

The Coral Springs and Central Laborers Demands are identical, except for the stockholder asserting the demand. *Compare* A1141 *with* A0888. They were based solely on the *Poehling* Action and the now-dismissed *Swoben* Action. The Coral Springs and Central Laborer Demands describe the Government's complaint in *Swoben* as "alleg[ing] *a nearly identical scheme* to that found in both the [Government's *Poehling*] Complaint and the [*Poehling*] Qui Tam Complaint." A1143 (emphasis added); A0890 (emphasis added). Both demands cite to the allegations in the FCA Litigation, but neither provides any new or independent evidence of wrongdoing. A1142-60; A0889-907. United declined to produce documents on the basis that Plaintiffs' exclusive reliance on the untested allegations in the FCA Litigation failed to satisfy the credible basis standard. A1138-39; A1463-65; A0885-86.

V. THE TRIAL RECORD AND ITS LACK OF VIABLE CLAIMS AGAINST UNITED.

The Plaintiffs' burden of offering "credible basis" evidence in the trial record rested entirely on the untested and dismissed allegations from the FCA

Litigation – the *Swoben* and *Poehling* actions. But the trial record contained ***no*** claims against United that ***any*** court had deemed adequate to state a claim for relief under basic pleading requirements. On the date of trial, the district judge in the *Swoben* Action had already dismissed the entire case for failure to state a claim, and the Government had abandoned the case. The *Poehling* Complaint, which was based on the same Government investigation as the *Swoben* Action, was facing a similar motion to dismiss.

The *Poehling* and *Swoben* complaints followed a Government investigation where United produced over 600,000 documents and the Government deposed 20 witnesses. Op. at 6-7. Those documents, except for certain of the exhibits the Government selected to attach to the *Poehling* Complaint (A1535; A1936), were not in the trial record and the Court of Chancery never reviewed them. None of the deposition transcripts were placed into evidence.

VI. POST-TRIAL DEVELOPMENTS IN THE *POEHLING* CASE.

On February 12, 2018, the District Court for the Central District of California issued an order (the "*Poehling* Order") granting United's motion to dismiss all of the Government's FCA claims except a "reverse" false claims act count based on the 2009 amendments to the False Claims Act that, unlike the DOJ's other theories, did not depend on the alleged falsity of United's attestations.

A2115; A2118. The Government added the new reverse false claims count to its complaint for the first time in its amended complaint-in-partial-intervention filed November 17, 2017, nearly two months ***after*** Plaintiffs filed their respective complaints in this action. In other words, the only allegations to survive United's motion to dismiss in *Poehling* were not even part of the Government's complaint when Plaintiffs asserted that complaint provided a credible basis to infer wrongdoing.

Reverse false claims are based on a different theory than traditional false claims; instead of alleging that a party obtained payments from the Government based on false representations or attestation, they are focused on the alleged failure by a party to return overpayments received from the Government.[6]

The Claims for Relief based on reverse false claims against United that survived the motion to dismiss cover a narrower period (starting in 2009) than the Claims for Relief based on false claims (which alleged claims starting as far back as 2004). A2119 ("[T]he Government is only pursuing [reverse false] claims

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[6] The District Court also denied the motion to dismiss the Government's unjust enrichment and payment by mistake claims (Fifth and Sixth Claims For Relief) based on reasoning that those two common law claims were, like the reverse FCA claims, based not on allegedly false attestations to CMS but on the allegation that United failed to correct diagnostic codes submitted by health care providers that were not supported by the medical charts. A2118.

to the extent they apply to risk adjustment payments for payment year 2009" and "to the extent that any of the Government's claims are premised on [United's] obligations during payment years 2004 to 2008, they are dismissed."). At trial, United argued to the Court of Chancery that if only reverse false claims survived the motion to dismiss, it would change the time period for any Section 220 production. *See* A2063-64 (noting "the problems here on issuing a ruling before we know what happens with the Poehling complaint. Because if just the one reverse – the reverse False Claims Act count survives, then that would limit the time frame, we believe, to 2009 forward.").

After trial in this matter, Plaintiffs sent the *Poehling* Order to the Court of Chancery, but never moved to have it included in the trial record. A2095.

VII. THE COURT GRANTS PLAINTIFFS ACCESS TO UNITED'S BOOKS AND RECORDS BASED SOLELY ON THE STATUS OF THE FCA LITIGATION ON THE TRIAL DATE.

On February 28, 2018, the Court of Chancery issued its Opinion directing United to produce certain books and records in response to the demands. The Memorandum Opinion expressly disclaimed reliance on the *Poehling* Order. *See* Op. at 19 n.91 ("The Federal District Court's ruling in the *Qui Tam* Action does not alter my holding."). The court below ruled that Plaintiffs demonstrated a credible basis sufficient to infer that wrongdoing or mismanagement may have

occurred based solely on the *Poehling* Complaint. *See id.* at 19-20. The court below granted Plaintiffs access to books and records for the full period of the FCA claims (*id.* at 28) – back to 2005[7] – as opposed to the shorter period relevant to reverse false claims – which would go back to 2009.

[7] The *Poehling* Complaint contains varying references to 2005 (the payment year) as the operative year and 2004 (the year of data on which the 2005 payment year was based) as the operative year.

ARGUMENT

I. THE COURT OF CHANCERY INCORRECTLY FORMULATED AND APPLIED THE CREDIBLE BASIS STANDARD WHEN IT DECLINED TO CONSIDER WHETHER THE CONDUCT ALLEGED IN THE FCA LITIGATION WAS WRONGFUL.

A. Question Presented

Whether the Court of Chancery incorrectly formulated and applied the credible basis standard when it declined to consider whether Plaintiffs had made a credible showing that the conduct alleged in the two lawsuits that formed the sole basis of Plaintiffs' demands was wrongful? A2088; *see also* Op. at 20; A1138-39; A1460-61; A1463-65; A0885-86.

B. Scope of Review

The Supreme Court "review[s] a trial court's formulation and application of legal principles *de novo*." *Genger v. TR Investors, LLC*, 26 A.3d 180, 190 (Del. 2011).

C. Merits of Argument

Stockholders who seek inspection of books and record to investigate wrongdoing or mismanagement must satisfy their burden to "show, by a preponderance of the evidence, a credible basis from which the Court of Chancery can infer there is possible [wrongdoing or] mismanagement that would warrant further investigation." *Seinfeld*, 909 A.2d at 123.

This Court has described the burden of a Section 220 plaintiff as "not insubstantial." *Id.* at 123 (citing *Sec. First Corp. v. U.S. Die Casting & Dev. Co.*, 687 A.2d 563, 568 (Del. 1997)). Plaintiffs can satisfy their burden only by making "a ***credible showing***, through documents, logic, testimony or otherwise, that there are ***legitimate issues of wrongdoing***." *Sec. First Corp.*, 687 A.2d at 568 (emphasis added). Thus, although plaintiffs "are 'not required to prove by a preponderance of the evidence' that the wrongdoing 'actually occur[red],'" (*Thomas & Betts Corp. v. Leviton Mfg. Co.*, 681 A.2d 1026, 1031 (Del. 1996)), their burden is no mere formality. *See, e.g.*, *City of Westland Police & Fire Ret. Sys. v. Axcelis Techs., Inc.*, 1 A.3d 281, 287-88 (Del. 2010) ("[A]ny reduction of [a Section 220 plaintiff's] burden would be tantamount to permitting inspection based on the plaintiff-stockholder's mere suspicion of wrongdoing."); *Haque v. Tesla Motors, Inc.*, 2017 WL 448594, at *4 (Del. Ch. Feb. 2, 2017) ("It is . . . a burden the plaintiff seeking inspection must bear; it is not a formality." (citations omitted)).

There is good reason why a Section 220 plaintiff's burden is no mere formality: Delaware law imposes this burden to protect and balance important interests. As this Court explained in *Seinfeld*:

> The "credible basis" standard achieves an appropriate balance between providing stockholders who can offer some evidence of possible wrongdoing with access to corporate records and safeguarding the right of the

> corporation to deny requests for inspections that are based only upon suspicion or curiosity. . . .
>
> The evolution of Delaware's jurisprudence in section 220 actions reflects judicial efforts to maintain a proper balance between the rights of shareholders to obtain information based on credible allegations of corporation mismanagement and the rights of directors to manage the business of the corporation without undue interference from stockholders.

909 A.2d at 118, 122 (citation omitted); *see also La. Mun. Police Emps.' Ret. Sys. v. Lennar Corp.*, 2012 WL 4760881, at *3 (Del. Ch. Oct. 5, 2012) (describing the balance as "between encouraging productive Section 220 actions where there is a reasonable likelihood of wrongdoing while preventing inspections without a factual basis from draining corporate resources" (citation omitted)).

To disrupt this balance by failing to give meaning to a Section 220 plaintiff's burden is not without consequence:

> Investigations of meritorious allegations of possible mismanagement, waste or wrongdoing, benefit the corporation, but investigations that are "indiscriminate fishing expeditions" do not. "At some point the costs of generating more information fall short of the benefits of having more information. At that point, compelling production of information would be wealth-reducing, and so shareholders would not want it produced." Accordingly, this Court has held that an inspection to investigate possible wrongdoing where there is no "credible basis," is a license for "fishing expeditions" and thus adverse to the interests of the corporation . . . .

> The "credible basis" standard maximizes stockholder value by limiting the range of permitted stockholder inspections to those that might have merit."

Seinfeld, 909 A.2d at 122-23, 125 (citations omitted).

1. The Court of Chancery Erred By Declining To Consider Whether The Conduct Alleged In The Underlying Lawsuits, Even If True, Could Credibly Be Considered Wrongful.

Even assuming that there was a credible basis to believe that the conduct alleged in the *Swoben* and *Poehling* complaints actually occurred, the Court of Chancery erred by expressly declining to consider whether that conduct could credibly be considered wrongful – classifying that consideration as a merits-based defense that impermissibly required a merits-based determination (Op. at 20-21). The Court of Chancery based its refusal to consider whether the conduct alleged in the *qui tam* complaints could credibly be considered wrongful on two grounds: (i) that the Court of Chancery "has repeatedly stated that a Section 220 proceeding does not warrant a trial on the merits of underlying claims" (*id.* at 20-21), and (ii) that the public policy of Delaware is to encourage stockholders to utilize Section 220 prior to filing a derivative complaint (*id.* at 21).

Basic logic demonstrates that the Court of Chancery's decision not to consider "whether Defendant's behavior is actually wrongful or violates the law" (*id.*) was error. There must be a credible basis to infer not just that alleged conduct

occurred, but also that it was ***wrongful***, for there to be a credible basis to infer that ***wrongdoing*** occurred. A Section 220 plaintiff must make "a credible showing . . . that there are *legitimate issues of wrongdoing*" to satisfy its burden. *Sec. First Corp.*, 687 A.2d at 568 (emphasis added).

Here, even assuming that the allegations in the *qui tam* complaints provided a credible basis for the court below to have inferred that certain conduct occurred, those allegations did not provide a credible basis for inferring that the conduct was wrongful – *i.e.*, that the allegations, even if true, could support legally viable claims. The reason is twofold: ***First***, before trial in this Section 220 action, the District Court had already dismissed in its entirety one of the two actions relied upon by Plaintiffs in their demands – the *Swoben* Action – for failure to state a claim. It did so despite the lengthy investigation, the many thousands of documents, and the 20 depositions touted by Plaintiffs. A1520. ***Second***, as of the date of trial, a motion to dismiss for failure to state a claim was pending in the lawsuit that formed the only other basis for Plaintiffs' demands – the *Poehling* Action. A1739. The *Poehling* Action was based on the same investigation as the *Swoben* Action and, according to Plaintiffs' own demands, the *Swoben* Action "alleg[ed] a nearly identical scheme to that found in" the *Poehling* Action. A1143; A0890. As of trial, no claim in the FCA Litigation had been deemed legally

viable. All claims in one of the actions had been dismissed, and a motion to dismiss in the other action was pending. A1520; A1739. Additionally, as of trial, in United's APA Action, the district court had rejected the Government's motions to dismiss or stay United's challenge to the critical regulation, which challenge could render untenable the theories of recovery asserted by the Government in the FCA Litigation. A0585; A0656; A0836. Plaintiffs did not make a credible showing that there were legitimate issues of wrongdoing.

As to the Court of Chancery's second basis for declining to consider whether there was a credible basis to infer that the alleged conduct was wrongful – Delaware's public policy of encouraging Plaintiffs to utilize Section 220 prior to filing derivative actions (Op. at 21) – the case law makes clear that this policy must be balanced against equally important policies, which the court below did not consider. *See Seinfeld*, 909 A.2d at 122 (acknowledging "the rights of directors to manage the business of the corporation without undue interference from stockholders"); *La. Mun. Police Emps.' Ret. Sys.*, 2012 WL 4760881, at *3 ("This [credible basis] requirement strikes an appropriate balance between encouraging productive Section 220 actions where there is a reasonable likelihood of wrongdoing while preventing inspections without a factual basis from draining corporate resources." (internal quotation marks and citations omitted)).

The Court of Chancery's refusal to consider whether there was a credible basis to infer that the alleged conduct was actually wrongful runs contrary not only to established law but also to common sense and sound policy. A stockholder should not be able to force a Delaware corporation to expend substantial resources providing books and records to investigate derivative claims against directors and officers based solely on the fact that some other persons have filed lawsuits against the corporation – even if the lawsuits are bought by the Government, which (as so plainly proved by *Swoben*) is as fallible as any other litigant. This is especially true when the presiding courts have dismissed one lawsuit and have not yet decided whether the factual allegations in the remaining lawsuit, if true, state a legally viable claim. A1520; A1739. Otherwise, Delaware corporations could be forced to produce documents any time they are sued over any matters that purportedly involve board oversight or decisions – no matter how weak the allegations. And, a corporation might otherwise be forced to spend time, money, and other precious resources providing documents – perhaps voluminous documents – only to have the grounds for the Section 220 demand disappear when the underlying lawsuit against the corporation is dismissed at the pleading stage. Thus, the Court of Chancery erred in concluding that Plaintiffs satisfied their credible basis burden at trial when the Court of Chancery never considered

whether there was a credible basis to believe the alleged conduct was actually illegal or otherwise wrongful.

2. The Post-Trial Decision From The *Poehling* Case, To The Extent This Court Decides To Consider It, Proves That Plaintiffs Do Not Have A Credible Basis For The Inspection Granted By The Court Of Chancery.

The District Court's decision in the *Poehling* case on United's motion to dismiss was never part of the trial record and the Court of Chancery disclaimed any reliance on it. Op. at 19 n.91. ("The Federal District Court's [post-trial] ruling in the *Qui Tam* Action does not alter my holding."). This Court should not consider it on appeal. *See, e.g.*, *Clark v. Clark*, 2012 WL 6597798, at *2 (Del. Dec. 17, 2012) ("We will not consider on appeal any evidence that was not included in the trial court record below."); *Del. Elec. Coop., Inc. v. Duphily*, 703 A.2d 1202, 1206 (Del. 1997) ("Materials not offered into evidence are not a part of the record, unless considered by the trial court and necessary to disposition on appeal."); *see also* A1943 ("In lieu of all discovery, the parties have agreed that the record for this trial shall consist of the exhibits cited in Plaintiffs' Opening Brief, UnitedHealth's Answering Brief, and Plaintiffs' Reply Brief, which are set forth below in accordance with the numbering provided by the parties in their briefing (the "Stipulated Record").).

To the extent that this Court is inclined to consider the *Poehling* court's decision, it only reinforces the conclusion that Plaintiffs did not satisfy their trial burden to make a credible showing of legitimate issues of wrongdoing for purposes of investigating false claims under the FCA.

Despite the length of the *Poehling* Complaint (165 pages and 364 paragraphs) and the Government's extensive investigation, the District Court dismissed the Claims for Relief based on false claims liability under the FCA because the Government (and relator) failed to allege that United's attestations were "material to the Government's cause of action and specifically, to the Government's payment decision." A2115. Consequently, Plaintiffs do not have, and never had, a credible basis to believe that United's conduct constituted wrongful acts under the provisions of the FCA governing straightforward claims for misrepresentations to the Government. A2098.

The District Court denied the motion to dismiss the Government's Claims for Relief based on the "reverse false claims" theory that did not depend on allegations about the accuracy of United's attestations – the theory that the Government added to the *Poehling* Complaint *after* Plaintiffs submitted their demands and filed their Section 220 complaints. The court decided that, in spite of the lack of materiality of United's attestations to the Government's decisions to

make risk adjustment payments, United could still be liable for knowingly failing to return to CMS overpayments based on incorrect diagnostic codes and that the allegations of materiality as to that count were sufficient at the pleading stage. A2110.

The difference between false claims and reverse false claims is important in considering the books and records that would be "necessary and essential,"[8] to Plaintiffs' purpose of investigating potential wrongdoing. The Court of Chancery's production order was based on Plaintiffs having a credible basis to investigate both false claims and reverse false claims. Consequently, the Court of Chancery ordered United to produce documents back to 2005. Op. at 28. As made clear by the District Court, reverse false claims against United can only go back to 2009 because that is when Congress revised the FCA to allow for reverse false claims. A2119. Additionally, books and records related to reverse false claims would not include documents related to all of United's attestations, but would be limited to United's knowledge of incorrect diagnostic codes – such as knowledge obtained through medical chart audits.

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[8] *See, e.g.*, *Se. Pa. Transp. Auth. v. AbbVie, Inc.*, 2015 WL 1753033 (Del. Ch. Apr. 15, 2015), *aff'd*, (Del. 2016).

At trial, United predicted that, if the parties and the Court of Chancery did not wait for the *Poehling* decision, then the Court of Chancery could issue an inspection order that was too broad and that the parties and court would need to consider the impact of a decision:

> THE COURT: Taking a step back to the first schedule, assume on January 29th your client loses the motion to dismiss. Do you concede then that the plaintiffs have stated a credible basis?
>
> MR. SCAGGS: No, Your Honor. We would have to see what that said, what that looked like. We could win and they could get a leave to amend. We could lose and it could be subject to appeal, not to say we would say that this all should wait for appeal. But we could just lose on one count, the reverse FCA claim count. That count would go only back to 2009.
>
> So it could be any number of things that could happen there. So I can't – I can't say that. What I can address is the record as we know it today. I can't admit that today without seeing the grounds for that decision.

A2041. When Plaintiffs sent the *Poehling* decision to the Court of Chancery, United requested additional briefing on it, if the court intended to consider it. A2121 ("[I]f the Court decides to consider the [*Poehling*] Order in making its ruling in the pending case, it should allow briefing . . . .).

The bottom line is that, if this Court considers the *Poehling* decision, the production order of the court below is clearly too broad, and determining an appropriate set of "reverse false claims" books and records would require

additional proceedings before the Court of Chancery.[9] The difficulties in determining the set of documents that would be "necessary and essential" to fulfill Plaintiffs' purpose in this case highlights the sound rationale for not allowing a Section 220 inspection based solely on an ancillary lawsuit until the claims in that lawsuit have been deemed either sufficient or insufficient to state a claim for relief.

[9] The parties and Court would also have to address which documents would be "necessary and essential" to investigating the Government's unjust enrichment and payment by mistake claims. *See* A2118.

II. THE COURT OF CHANCERY INCORRECTLY FORMULATED AND APPLIED THE CREDIBLE BASIS STANDARD WHEN IT RELIED ON CHARACTERIZATIONS OF DOCUMENTS AND TESTIMONY NOT PART OF THE RECORD BEFORE IT.

A. Question Presented

Whether the Court of Chancery incorrectly formulated and applied the credible basis standard by relying on characterizations, which were made by a litigant in a separate case, of documents and testimony that were not part of the record before the Court? A2033-35; *see also* Op. at 18; A1138-39; A1460-61; A1463-65; A0885-86.

B. Scope of Review

A trial court's formulation and application of legal principles are reviewed by this Court *de novo*. *Genger*, 26 A.3d at 190.

C. Merits of Argument

No Delaware court has previously held that a Section 220 plaintiff can meet its credible basis burden solely through allegations made in an ancillary lawsuit. In fact, the weight of Delaware law indicates that it takes ***viable*** claims in ancillary litigation ***plus additional evidence*** to meet the credible basis standard. As the Court of Chancery recognized in *Graulich v. Dell, Inc.*: "Th[e] 'credible basis' standard has been interpreted as a low one, but simply saying that the

company has already been subject to lawsuits, with nothing else, does not cut it." 2011 WL 1843813, at *5 n.49 (Del. Ch. May 16, 2011).

The case law both prior and subsequent to *Graulich* bears out this principle. In *Elow v. Express Scripts Holding Co.*, 2017 WL 2352151 (Del. Ch. May 31, 2017), the Court of Chancery found that a Section 220 plaintiff had established a credible basis through "the pleadings in the [ancillary] Anthem Action,[[10]] ***coupled with*** the statements made by [the company's] management." *Id.* at *6 (emphasis added). Express Scripts, Inc. ("ESI") answered the complaint and asserted counterclaims, and the plaintiff argued successfully that the answer and counterclaims created an inference of wrongdoing and helped to meet the credible basis standard. *Id.* at *5-6 ("***ESI's own admissions and contentions in the Anthem Action*** are evidence that the Company's representatives misled investors about the relationship with Anthem." (emphasis added)). In *Romero v. Career Education Corp.*, 2005 WL 1798042 (Del. Ch. July 19, 2005), the plaintiff's credible basis claim depended not just on ancillary lawsuits, ***but also*** on

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[10] The Anthem Action was a breach of contract action brought in the U.S. District Court for the Southern District of New York by Anthem, Inc. against a wholly-owned subsidiary of the Section 220 defendant. *Id*. at *1-2. In addition, subsequently, a class action lawsuit alleging violations of federal securities laws based on similar facts as the Anthem Action was filed in the same court. *Id*. at *3.

the fact that the company's "own board ha[d] appointed a Special Committee to conduct an internal investigation into the same matters." *Id.* at *2. And in *Freund v. Lucent Technologies, Inc.*, 2003 WL 139766 (Del. Ch. Jan. 9, 2003), the plaintiff offered evidence not just of ancillary lawsuits ***but also*** that the company had restated revenues and profits by more than $1 billion, saw a precipitous drop in its stock price ***and*** was the subject of a formal SEC investigation into its accounting practices. *Id.* at *3.

The Memorandum Opinion acknowledged this case law, stating that "th[e] Court [of Chancery] has held that a plaintiff fails to state a credible basis for the Court to infer wrongdoing when the plaintiff relies solely on the fact that others have sued the company." Op. at 19 n.91 (citing *Graulich*, 2011 WL 1843813, at *5 n.49)). The court below distinguished this case from the prior case law on the grounds that the documents and testimony referenced in the *qui tam* complaints constituted the additional evidence necessary for Plaintiffs to satisfy their credible basis burden. *See id.* at 19-20.

This reliance was erroneous because thousands of pages of documents and deposition testimony purportedly gathered by the Government to support its complaint-in-partial intervention – which the Court of Chancery found to "demonstrate a credible basis . . . to infer possible wrongdoing or mismanagement"

(*id.* at 20) – were never before the court. Thousands of pages of "evidence" on which the court below premised its decision were never in the evidentiary record in this case. The Court of Chancery instead relied exclusively on the Government's one-sided characterization of those documents through its allegations in the *qui tam* complaints.

Nor have Plaintiffs ever seen these documents. Instead, Plaintiffs actually sought those very documents through this action, and the Court of Chancery ordered United to produce them. *See* A2007 ("Also, documents referenced in the complaint. So there are documents specifically referenced in the complaint. We would ask that those be produced."); *see also* Op. at 25-26 (granting Plaintiffs' request for documents referenced in the *qui tam* complaints subject to the requirement "that Plaintiffs provide a list detailing which documents Plaintiffs seek from the complaints"). The Court of Chancery, therefore, ruled circularly that the documents Plaintiffs sought to obtain in their 220 action provided the basis for the court to order United to produce them.

Unlike the plaintiffs in *Elow*, *Romero* and *Freund*, Plaintiffs failed to present evidence beyond a litigant's allegations in an ancillary complaint, which Delaware case law indicates– for good reason – is insufficient.

CONCLUSION

For the foregoing reason, United respectfully requests that the Court reverse the Court of Chancery's Memorandum Opinion and production order and deny Plaintiffs' request for inspection.

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May 17, 2018

CERTIFICATE OF SERVICE

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