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Case Number 162,2018

IN THE SUPREME COURT OF THE STATE OF DELAWARE

UNITEDHEALTH GROUP INC., a Delaware corporation,	)	
	)	No. 162, 2018
Defendant-Below, Appellant,	)	On appeal from the Court of Chancery, C.A. No. 2017-0681-TMR
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.	)	

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NATURE OF PROCEEDINGS

Defendant-Below / Appellant UnitedHealth Group, Inc. ("Defendant" or "UnitedHealth") appeals the Memorandum Opinion ("Op.") and implementing order of the Court of Chancery directing the inspection of certain books and records of Defendant pursuant to 8 *Del. C.* § 220 ("Section 220"). Defendant's appeal is limited to aspects of the Court of Chancery's post-trial finding that Plaintiffs-Below / Appellees ("Plaintiffs") stated a credible basis from which a court can infer that wrongdoing or mismanagement may have occurred.

In July and August 2017 – nearly a year ago – Plaintiffs served Section 220 demands on Defendant. Plaintiffs' demands sought the inspection of books and records concerning Defendant's allegedly decade-long, company-wide scheme to overbill Medicare by hundreds of millions of dollars. Defendant refused Plaintiffs' demands.

Plaintiffs commenced litigation to enforce their statutory right to inspection in September 2017. The parties stipulated to a trial on the paper record, which the Court of Chancery held on January 9, 2018. At trial, Plaintiffs presented extensive evidence of wrongdoing and mismanagement derived from related *qui tam* litigation against Defendant being prosecuted by a former Director of Finance at a key subsidiary of Defendant and by the U.S. Department of Justice (the "DOJ") following a five-year investigation into the allegations of the former Director of

Finance. *United States ex rel. Poehling v. UnitedHealth Group, Inc.*, No. CV 16-08697-MWF (SSx) (the "*Qui Tam* Action"). The DOJ investigation included depositions of twenty employees of Defendant and the review of more than 600,000 documents produced by Defendant, including internal emails, letters, audit reports, charts, attestations, policies, presentation materials, and memoranda.

The Court of Chancery issued its post-trial Memorandum Opinion on February 28, 2018, and its stipulated order implementing the Memorandum Opinion on March 28, 2018. The Memorandum Opinion finds that Plaintiffs stated "a credible basis from which a court can infer that wrongdoing or mismanagement may have occurred, entitling them to inspect certain books and records." Op. at 1. As the Memorandum Opinion explains:

> The DOJ Complaint includes references to, and quotations from, [Defendant's] internal emails, letters, audit reports, charts, attestations, policies, presentation materials, and memoranda. . . . The documents uncovered by the DOJ's lengthy investigation, coupled with the sworn testimony and statements of Defendant's own management, are enough to meet the "lowest possible burden of proof" in Delaware law.

Op. at 19-20 (quoting *Seinfeld v. Verizon Commc'ns, Inc.*, 909 A.2d 117, 123 (Del. 2006)); *see id*. at 20 ("Defendant cannot escape the testimony and documents that demonstrate a credible basis for this Court to infer possible wrongdoing or mismanagement").

Defendant moved for a stay pending appeal. By order dated April 27, 2018, the Court of Chancery found that a stay pending appeal was not warranted, but

nonetheless granted a limited stay to give Defendant an opportunity to seek a stay from this Court. B579-587. By order dated May 21, 2018, this Court denied Defendant's motion, finding "no abuse of discretion in the Court of Chancery's determination that the *Kirpat* factors weighed against granting a stay in this case."[1]

[1] Order at 5 (May 21, 2018) (Trans. ID 62050125). Defendant filed a motion for reargument on June 4, 2018, which was stricken the same day as procedurally improper. (Trans. ID 62094213).

SUMMARY OF ARGUMENT

1. Denied. The Court of Chancery did not abuse its discretion or otherwise err in holding that Plaintiffs' demand met "the lowest possible burden of proof in Delaware law," and stated a proper purpose and a credible basis from which a court can infer that wrongdoing or mismanagement *may* have occurred. As the Court of Chancery found following trial, Plaintiffs pointed to allegations by the DOJ in the *Qui Tam* Action, as well as the Company's internal emails, letters, audit reports, charts, attestations, policies, presentation materials, memoranda, and testimony cited and attached to a complaint filed against the Defendant by the DOJ (the "DOJ Complaint"). Op. at 7.

Defendant's appeal manufactures a dispute over the legal standard to avoid review for abuse of discretion. Defendant argues that the Court of Chancery should have denied the Section 220 demand because it did not find that Defendant's company-wide and decade-long overbilling scheme actually constituted "wrongdoing." If a finding of actual wrongdoing was required, no Section 220 inspection would be necessary, sought or granted. Defendant cannot escape from the trial court's extensive factual findings that Plaintiffs presented sufficient evidence from which the court can infer that mismanagement or wrongdoing *may* have occurred. Nothing more is required. *See Seinfeld*, 909 A.2d at 123-24 (holding that a "credible basis" to "infer there is possible mismanagement" may be shown

"through documents, logic, testimony or otherwise" and is "a showing that may ultimately fall well short of demonstrating that anything wrong occurred.") (internal quotation marks omitted). In fact, the Court of Chancery was rightly careful not to prejudge whether wrongdoing or mismanagement in fact had occurred, as this issue was outside the scope of the Section 220 proceeding on Plaintiffs' inspection demand.

2. Denied. The Court of Chancery did not abuse its discretion in finding a credible basis for a Section 220 demand based on the evidence Plaintiffs presented at trial. The Court of Chancery held a trial that, with Defendants' consent, was conducted on a paper record without live testimony. Plaintiffs presented evidence, including the DOJ Complaint and documents and testimony attached thereto, from which the Court could conclude that wrongdoing or mismanagement may have occurred at UnitedHealth. Following trial, the Court of Chancery concluded that the "voluminous documents and testimony cited and attached to the DOJ Complaint" were sufficient to "infer that wrongdoing or mismanagement *may* have occurred" at UnitedHealth. Op. at 1, 7 (emphasis added).

Having agreed to trial on a paper record, Defendant now seeks a ruling that the Court of Chancery should not have been permitted to base its factual findings on the DOJ Complaint's allegations where the complete underlying documents and testimony that formed the basis of those allegations were not before the trial court.

In other words, Defendant argues that the Court of Chancery improperly considered hearsay evidence. However, Defendant failed to raise this argument below or to make a hearsay objection or otherwise argue that the hearsay evidence was not credible at trial. Therefore, this argument is waived. In addition, Defendant's argument is refuted by well-established precedent. *See Seinfeld*, 909 A.2d at 123-24. (Court of Chancery may order inspection of books and records based on "documents, logic, testimony or otherwise," pursuant to the "credible-basis-from-some-evidence" standard which "sets the lowest possible burden of proof" in Delaware).

Defendant devotes a significant portion of its second argument on appeal to whether the Court of Chancery may, in finding a credible basis to infer possible mismanagement or wrongdoing, rely solely on a complaint in separate litigation without additional evidence obtained from another source. Defendant's Second Question Presented, however, does not address this issue. Even assuming this issue is properly raised on appeal, UnitedHealth's proposed "viable claims in ancillary litigation plus additional evidence" standard is inconsistent with this Court's "credible-basis-from-some-evidence" standard which "sets the lowest possible burden of proof" and is "settled law" in Delaware. *Seinfeld*, 909 A.2d at 123-24. Indeed, adoption of Defendant's proposed arbitrary, bright-line rule would diminish the trial court's role in weighing and determining the credibility of evidence.

STATEMENT OF FACTS

Plaintiffs are stockholders of Defendant who made tailored demands pursuant to Section 220 to inspect Defendant's books and records in connection with Defendant's allegedly widespread practice of overbilling Medicare.[2] The purposes of Plaintiffs' demands were to investigate (1) mismanagement or misconduct, (2) possible breaches of fiduciary duties, and (3) the independence and disinterest of Defendant's directors. Defendant refused Plaintiffs' Section 220 demands.[3]

On February 28, 2018, the Court of Chancery issued its post-trial Memorandum Opinion finding that Plaintiffs had stated a proper purpose and established a credible basis from which the Court could infer that wrongdoing or mismanagement may have occurred. Op. at 1. The Court of Chancery made the following factual post-trial findings:

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[2] Plaintiffs Amalgamated Bank, Central Laborers Pension Fund ("Central Laborers"), and Coral Springs Police Officers' Retirement Plan ("Coral Springs") sent books and records inspection demands to Defendant (the "Demands") on July 17, 2017, July 27, 2017, and August 7, 2017, respectively. A662-835; A888-1137; A1141-1459.

[3] Defendant rejected Amalgamated Bank's, Central Laborers', and Coral Springs' demands on August 8, 2017, August 3, 2017, and August 14, 2017, respectively. Memorandum Opinion ("Op.") at 14. Defendant did not object to the form and manner of Plaintiffs' demands, nor did it challenge that the investigation was for a proper purpose. Op. at 18. Defendant similarly did not object to Plaintiffs' standing. The Court of Chancery's post-trial opinion found that Amalgamated Bank, Coral Springs, and Central Laborers have been stockholders since approximately May 27, 2005, January 1, 2006, and May 9, 2006, respectively. Op. at 2; *accord* B00532-533 ¶¶ 1, 3; B00173; B00200.

I. MEDICARE REQUIRES UNITEDHEALTH TO ATTEST TO THE ACCURACY OF ITS PAYMENT REQUESTS.

The Center for Medicare & Medicaid Services ("Medicare") is the administrator of the Federal Medicare program, which provides Medicare benefits to elderly and disabled individuals. Op. at 3. The Medicare Advantage Program includes a provision that allows Medicare beneficiaries to enroll in managed healthcare insurance plans that are owned and operated by private organizations. Op. at 3-4. These private organizations are called Medicare Advantage Organizations. Op. at 4.

Defendant is the largest Medicare Advantage Organization, or Medicare beneficiary, in the United States, providing health services to individuals age fifty and older throughout all fifty states.[4] Op. at 2-3. Stephen Hemsley ("Hemsley") was Defendant's Chief Executive Officer ("CEO") until 2017 and is a member of its Board of Directors. Op. at 3.

Medicare pays UnitedHealth and other Medicare Advantage Organizations fixed monthly amounts for each enrollee based on various "risk adjustment data."

[4] In 2011, UnitedHeath acquired non-party WellMed Medical Management, Inc. ("WellMed"), which is a large physician-owned practice management company operating in Texas and Florida. Op. at 3. Non-party Ingenix, Inc. ("Ingenix") is a direct subsidiary of UnitedHealth and provides data services for the company, including submitting claims to Medicare. Op. at 3. UnitedHealth is alleged to have engaged in improper conduct and/or caused the submission of false claims through WellMed and Ingenix. Op. at 10-11.

Op. at 4. These data are comprised of medical diagnosis codes that each enrollee receives, and the data fluctuate based on the severity of the diagnosis. Op. at 4. Generally, the more numerous and severe the conditions, the higher the risk score for the beneficiary, and the larger the payout to the Medicare Advantage Organization. Op. at 5. The Medicare Advantage Program requires all Medicare Advantage Organizations, including UnitedHealth, to submit diagnosis codes that are "unambiguously" supported by information included in the beneficiaries' medical records. Op. at 4-5. Medicare requires Medicare Advantage Organizations to delete previously submitted codes that are either unsupported by medical records or invalid diagnoses. Op. at 5.

II. THE DEPARTMENT OF JUSTICE AND A UNITEDHEALTH WHISTLEBLOWER CONTEND THAT UNITEDHEALTH VIOLATED THE FALSE CLAIMS ACT AND OVERBILLED MEDICARE FOR HUNDREDS OF MILLIONS OF DOLLARS.

In July 2011, Benjamin Poehling ("Poehling"), the former Director of Finance at UnitedHealthcare Medicare & Retirement UnitedHealth, a UnitedHealth subsidiary, filed a *qui tam* complaint (the "Poehling Complaint") against UnitedHealth. *United States ex rel. Poehling v. UnitedHealth Group, Inc.*, No. CV 16-08697-MWF (SSx) (the "*Qui Tam* Action"), Op. at 5-6.[5] Poehling alleged that

[5] While the Memorandum Opinion correctly indicates that Poehling filed a complaint against UnitedHealth in 2017, Poehling initiated the *Qui Tam* Action in 2011 in the Western District of New York. The *Qui Tam* Action was transferred to

since at least 2006, UnitedHealth has violated the False Claims Act by improperly "upcoding" risk adjustment data and failing to delete incorrect diagnosis codes, which resulted in overpayments from Medicare. Op. at 5-6.[6]

After Poehling initiated the *Qui Tam* Action, the DOJ initiated an extensive, five-year investigation into his allegations. The DOJ deposed twenty UnitedHealth employees and reviewed more than 600,000 documents produced by UnitedHealth, including UnitedHealth's internal emails, letters, audit reports, charts, attestations, policies, presentation materials, and memoranda. Op. at 6-7. Based on its investigatory findings, the DOJ intervened in the *Qui Tam* Action, filing a detailed complaint attaching 21 documents alleging that, despite repeated warnings, UnitedHealth violated both Medicare regulations and the False Claims Act since at least 2005.[7] Op. at 6. Based on the evidence collected, the DOJ alleged that Defendant overbilled Medicare by "hundreds of millions- and likely billions of dollars." Op. at 7.

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the Central District of California in 2016 and the Poehling Complaint was filed on July 24, 2017.

[6] While Defendant devoted considerable attention to the action styled *United States ex rel. Swoben v. Secure Horizons*, No. CV 09-5013 JFW (JEMx), the *Swoben* action neither formed the basis of Plaintiffs' allegations, nor was it relied on in the trial court's Memorandum Opinion. *See, e.g.*, Op. at 6, n. 24 (merely noting the existence of the case in a footnote); B00235, n.9.

[7] The DOJ Complaint was most recently amended on November 17, 2017 (the "DOJ Complaint").

III. THE COURT OF CHANCERY DETERMINES THAT PLAINTIFFS HAVE A PROPER PURPOSE AND CREDIBLE BASIS.

On October 16, 2017, UnitedHealth and Plaintiffs agreed that Plaintiffs' Section 220 demand would be the subject of a trial on a paper record, including argument before the Court of Chancery. B00218-222. Plaintiffs submitted 62 exhibits and Defendant submitted 42 exhibits, including the DOJ Complaint and Exhibits, court filings in cases involving UnitedHealth, excerpts from SEC filings, and correspondence between the parties, among other things. On January 9, 2018, the Court held the trial and argument.

On February 28, 2018, the Court of Chancery found based on the evidence before it that Plaintiffs had a credible basis to investigate possible wrongdoing or mismanagement at UnitedHealth. Op. at 18-19. This was, in part, because the "DOJ Complaint include[d] documents and testimony provided by Defendant and Defendant's employees" and "include[d] references to, and quotations from, the Company's internal emails, letters, audit reports, charts, attestations, policies, presentation materials, and memoranda. Op. at 19.

Based on all this evidence, the Court of Chancery concluded that Plaintiffs had a credible basis to investigate potential wrongdoing or mismanagement.

IV. THE COURT OF CHANCERY ORDERS PRODUCTION OF UNITEDHEALTH'S BOOKS AND RECORDS.

In the Memorandum Opinion, the Court of Chancery granted Plaintiffs' demand for five categories of documents: (1) written materials for board and committee meetings; (2) meeting preparation materials; (3) policies and procedures relating to the matter; (4) documents concerning the director nomination process and disclosure and questionnaire files; and (5) documents referenced in the Poehling Complaint and the DOJ Complaint. Op. at 24-25. The Memorandum Opinion further required the parties to submit a conforming order. Op. at 28.

While negotiating the confirming order, Defendant confirmed that it had "been able to locate, or believe we can locate, without substantial additional efforts." more than 70 categories of the documents referenced in the DOJ Complaint and the Poehling Complaint. *See* B573-578.[8] On March 28, 2018, the Court entered its Conforming Order requiring that UnitedHealth produce those documents, as well as written board materials, policies and procedures, as well as board independence materials within 60 days of the Conforming Order, allowing 60 additional days for Plaintiffs to identify board and committee meeting preparation materials relating to

[8] UnitedHealth all but admitted that the claims in the *Qui Tam* Action are viable when it filed a Motion for Early Deposition Discovery on the basis that the United States Government "has already engaged in more than five years of unilateral discovery to build the government's case" and the Company needs "to start defending itself through deposition discovery." A1542.

the demands, and then another 60 days for Defendant to produce the materials. UnitedHealth does not contest the scope of documents ordered to be produced.

ARGUMENT

I. THE COURT OF CHANCERY DID NOT ABUSE ITS DISCRETION IN FINDING, AFTER TRIAL, THAT SUFFICIENT GROUNDS EXIST TO INFER THAT MISMANAGEMENT OR WRONGDOING MAY HAVE OCCURRED.

A. Question Presented

Did the Court of Chancery abuse its discretion in finding, after trial, sufficient grounds to infer that mismanagement or wrongdoing may have occurred with respect to an allegedly decade-long, Company-wide scheme to overbill Medicare, based on the statements of the DOJ in a complaint replete with references and quotations to internal company reports, presentations and correspondence and filed after a five-year investigation involving the production of over 600,000 documents and depositions from twenty Company employees? No.

B. Scope of Review

A trial court's findings of fact are reviewed by this Court using the "clearly erroneous standard." *Liberis v. Europa Cruises Corp.*, 702 A.2d 926, 1997 WL 725634, at *1 (Del. Nov. 10, 1997) (TABLE); *Levitt v. Bouvier*, 287 A.2d 671, 673 (Del. 1972); *Lank v. Steiner*, 224 A.2d 242, 245 (Del. 1966). A trial court's determination in a Section 220 proceeding that a credible basis exists to infer managerial wrongdoing or mismanagement "is a mixed finding of fact and law that is entitled to considerable deference." *City of Westland Police & Fire Ret. Sys. v. Axcelis Techs., Inc.*, 1 A.3d 281, 287 (Del. 2010) (citing *Sec. First Corp. v. U.S.*

Die Casting & Dev. Co., 687 A.2d 563, 565 (Del. 1997) ("[T]he trial judge's determination of that credible basis after considering the totality of the evidence is entitled to considerable deference.")).

C. Merits of Argument

The Court of Chancery correctly set forth the legal standard for determining proper purpose in its Opinion:

> "It is well established that a stockholder's desire to investigate wrongdoing or mismanagement constitutes a 'proper purpose.'" The stockholder is not, however, "required to prove by a preponderance of the evidence that waste and [mis]management are actually occurring." Instead, a plaintiff who seeks to investigate wrongdoing or mismanagement must also show "'some evidence' to suggest a 'credible basis' from which a court can infer that mismanagement, waste or wrongdoing may have occurred." The "'credible basis' standard sets the lowest possible burden of proof." The credible basis standard can be satisfied through "documents, logic, testimony or otherwise." "The trial court may rely on 'circumstantial evidence,'" and "[h]earsay statements may be considered, provided they are sufficiently reliable."[9]

Defendant does not contest the Court of Chancery's statement of the law.

Nonetheless, in its appeal, Defendant attempts to manufacture a purported dispute over the legal standard in an effort to avoid the deference this Court accords the Court of Chancery's post-trial findings. Defendant argues that the Court of Chancery improperly failed to find that Defendant's company-wide and decade-long

[9] Op. at 16-17 (quoting *Seinfeld*, 909 A.2d at 118, 121, 123; *Amalgamated Bank v. Yahoo! Inc.*, 132 A.3d 752, 778 (Del. Ch. 2016)).

overbilling scheme ***actually*** constituted "wrongdoing." Defendant is reframing the proper legal standard for a Section 220 demand to attack the trial court's well-supported post-trial finding that Plaintiffs presented sufficient evidence from which it could infer that mismanagement or wrongdoing *may* have occurred. Defendants' transparent attempt to reframe the applicable legal standard is contrary to Delaware law and should be rejected.

In *Seinfeld* this Court held that a "credible basis" to "infer there is possible mismanagement" may be shown "through documents, logic, testimony or otherwise" and is "a showing that may ultimately fall well short of demonstrating that anything wrong occurred." 909 A.2d at 123-24.

At trial, Plaintiffs presented extensive evidence from which the Court of Chancery could infer that wrongdoing or mismanagement may have occurred. This evidence, obtained from the *Qui Tam* Action being prosecuted by the DOJ, included the following:

- Testimony from UnitedHealth's Vice President of Finance that in 2006, UnitedHealth implemented the Chart Review Program designed to determine if the physicians' medical records supported the diagnoses that they reported to UnitedHealth, which revealed inaccurate data [(the Chart Review Program")]. [B00026; B00031].

- Testimony, audit reports, presentations, training guides, and email communications that revealed provider-reported diagnoses were invalid; in some cases, approximately thirty percent of the codes were invalid. [B00031-33].

- Memoranda that showed the Chart Review Program was originally designed to "look both ways," [B00034] but because UnitedHealth would recover upwards of $450 in revenue per every $30 spent on a specific chart review, the diagnoses coders tasked with finding and deleting false codes were told to "look one way" in order to increase these payments. [B00113; B00040-49; B00163].

- Evidence that UnitedHealth created the Patient Assessment Forms, a program created to identify chronic conditions coded less frequently than their prevalence rates would indicate. [B00113-114]. The program was designed to encourage doctors to enter codes for patients that were at all eligible for the diagnosis code. [B00114]. UnitedHealth only distributed the Patient Assessment Forms to providers who were eligible for Medicare payments.

- Evidence that UnitedHealth entered into "gainsharing" agreements, which gave doctors incentive payments based on the revenues that UnitedHealth received from Medicare for treating those doctors' patients. [B00064].

- Testimony that internal audit programs revealed "faulty coding." When UnitedHealth employees found codes unsupported by actual diagnoses, they were told that UnitedHealth "did not have the resources [to remove or delete them]" before the final submission deadline. [B00031-32].

- A presentation that showed thirty-two percent of diagnosis codes under review were not supported by the beneficiaries' medical records. [B00032].

- Testimony that in 2010, UnitedHealth implemented risk adjustment coding and compliance reviews (the "RACCR Program"), a program designed to meet Medicare requirements of submitting accurate risk adjustment data. [B00037]. This program revealed that more than forty percent of diagnosis codes were invalid. [B00038].

- Evidence that UnitedHealth excluded certain providers from the RACCR Program in order to reduce the number of deleted codes. [B00065-66].

- Evidence that the RACCR Program found diagnoses codes not supported by the medical records, but UnitedHealth did not always delete them. [B00067-68].

Op. at 7-9.

The Court of Chancery also cited evidence suggesting that UnitedHealth caused other Medicare Advantage Organizations to submit false risk adjustment claims:

- Testimony that UnitedHealth created WellMed's subsidiary, DataRap, a processing system that identified, processed, and submitted diagnosis codes for Medicare payment, in order to maximize its risk adjustment submissions without regard to their accuracy or eligibility. [B00141].

- Testimony that WellMed's practice was not to delete incorrect diagnosis codes from prior years. [B00142].

- Testimony that WellMed claimed Medicare payments for diagnoses codes it identified as fraudulent. [*Id.*].

- Evidence that WellMed set up at least two health plans to use DataRap for the purpose of submitting fraudulent diagnoses codes. [B00143].

- Evidence that a Medicare Advantage Organization in Dallas, Texas paid WellMed a fee based almost entirely on the increase in UnitedHealth's risk score year after year. [B00105].

- Evidence that, as a selling point to other Medicare Advantage Organizations for its risk adjustment services, Ingenix would emphasize that more than thirty percent of provider-reported diagnoses were unsupported by the beneficiaries' medical records. [B00032].

- Emails from compliance personnel at Ingenix that acknowledged UnitedHealth risked having to return Medicare payments if it alerted Medicare of payments it received based on diagnoses that were not validated by beneficiaries' medical records. [B00033].

Op. at 10-11.

The Court of Chancery also found that there was evidence to suggest that "at least ten senior executives and directors had actual knowledge of UnitedHealth's widespread and systematic corporate misconduct." Op. at 11. The Court of Chancery cited the following evidentiary examples supporting this claim:

- Reports given in mid-2010 to executives that showed risk adjustment data was over forty percent inaccurate in California and Texas because the "diagnoses were not supported by the beneficiaries' medical records or were uncertain or unconfirmed diagnoses." [B00036; B00205].

- A report given in June 2010 to Hemsley, the CEO and a board member, and other members of the executive team that identified compliance as an important issue of immediate concern. This report showed that UnitedHealth knew Medicare Advantage Organizations were liable under the False Claims Act for reporting and refunding overpayments in an untimely manner. [B00036].

- A presentation given in November 2011 to Hemsley that noted, "the medical record is the 'source of truth' and that looking at this 'source of truth' had a negative revenue impact because comparing provider-reported diagnoses with the information in the providers' medical records resulted in having to delete some of their diagnoses." [B00046-47].

- A report given in October 2012 to executives, including the CFO of UnitedHealth, that showed over thirty-three percent of diagnoses reviewed were unsupported by the beneficiaries' medical records, even though the coded inputs received two separate reviews for accuracy. [B00054-55].

- Testimony that executives knew the Medicare advantage claims did not always match the medical record documentation. [A0636; B00205].

- A presentation to executives that indicated "'[p]rovider coding is highly inaccurate and incomplete' and that 'more than 30% of coded conditions are not supported by [Medicare] validation findings.'" [B00030; A0637-38; B00205].

Op. at 11-12.

In addition, the Court of Chancery found that there was evidence to suggest "that senior executives and members of the board either encouraged or deliberately failed to address the scheme to improperly increase Medicare payments," citing the following evidence:

- An email from the CFO of UnitedHealth's Medical Advantage that acknowledged "vasculatory disease opportunities, screening opportunities, etc with huge $ opportunities." [B00168]. In that email, he encouraged employees to "turn on the gas!" in order to increase revenue opportunities. [B00030; B00168].

- Evidence that executives knew that UnitedHealth would not delete or otherwise report to Medicare at least 100,000 invalid diagnoses in 2011 and 2012 encounters. [B00062].

- Evidence that UnitedHealth liberalized its coding policies to enable coders to identify *more* diagnoses when it did not achieve its expected return on investment from 2012 chart reviews. [B00043].

- A presentation given to executives that revealed UnitedHealthcare Medicare & Retirement would miss its 2014 target budget by half a billion dollars. [B00057]. As a result, executives, including Hemsley, terminated audit programs that UnitedHealth had implemented in order to improve the accuracy of risk adjustment data. By terminating these programs, UnitedHealth could "cut the $500 million miss by $250 million by . . . not deleting the provider-reported diagnoses invalidated by its chart reviews." [B00058].

- A document that showed Hemsley and other executives knew that terminating these audit programs would enable UnitedHealth to achieve

> massive financial benefit in the second quarter 2014 earnings. [B00062].

Op. at 13-14.

In light of the evidentiary record, the Court of Chancery did not abuse its discretion in finding:

> The DOJ Complaint includes references to, and quotations from, the Company's internal emails, letters, audit reports, charts, attestations, policies, presentation materials, and memoranda. These documents suggest that Defendant's senior executives, including [CEO and director] Hemsley, were involved in meetings and presentations that revealed the codes submitted to Medicare for reimbursement were inaccurate. The evidence also suggests that Defendant did not engage in steps to correct the inaccuracies or alert Medicare of the previous payments it received based on faulty coding. Instead, the Company removed audit programs designed to catch inaccuracies, such as the Chart Review Program, in order to avoid missing a $250 million payout from Medicare for 2014. The documents uncovered by the DOJ's lengthy investigation, coupled with the sworn testimony and statements of Defendant's own management, are enough to meet the "lowest possible burden of proof" in Delaware law.[10]

As the trial court correctly held, "Defendant cannot escape the testimony and documents that demonstrate a credible basis for this Court to infer possible wrongdoing or mismanagement simply because they are referenced in a

[10] Op. at 19-20; *see id*. at 19 ("The allegations in the *Qui Tam* Action are based on depositions from twenty of Defendant's employees and Defendant's production of over 600,000 documents after the DOJ conducted a five-year investigation. Defendant does not contest that the Company provided this information to the DOJ.").

complaint."[11]

In the face of this evidence – which, at the Section 220 stage, is more voluminous than usual – Defendant argues that Plaintiffs should still not be permitted to exercise their statutory inspection right because the Court of Chancery was required to conduct its own analysis of the merits of the DOJ complaint. But, that is not the law. As this Court held in *Seinfeld*, the trial court needed only to identify "possible" mismanagement or wrongdoing, and there is no requirement that the Court of Chancery find that actual wrongdoing has occurred. 909 A.2d at 123-24. This showing of "possible" mismanagement or wrongdoing can be "a showing that may ultimately fall well short of demonstrating that anything wrong occurred." *Id.*[12]

In *Marmon v. Arbinet-Thexchange, Inc.* a defendant in a Section 220 action attempted to make a defense similar to the one presented by Defendant here, arguing that "the conduct that [Plaintiff] claims may constitute mismanagement was in all respects substantively lawful and in no sense improper." 2004 WL 936512, at *6

[11] Op. at 20.

[12] *See* Op. at 20-21 ("This Court has repeatedly stated that a Section 220 proceeding does not warrant a trial on the merits of underlying claims.") (citing *Lavin v. W. Corp.*, 2017 WL 6728702, at *1 (Del. Ch. Dec. 29, 2017); *Okla. Firefighters Pension & Ret. Sys. v. Citigroup Inc.*, 2014 WL 5351345, at *6 (Del. Ch. Sept. 30, 2014); *La. Mun. Police Emps.' Ret. Sys. v. Countrywide Fin. Corp.*, 2007 WL 2896540, at *12 (Del. Ch. Oct. 2, 2007)).

(Del. Ch. Apr. 28, 2004). Former Justice Jacobs, sitting by designation on the Court of Chancery, characterized this defense as "[t]he pretext under which the company sought to litigate a 'merits' defense to this claim to inspect books and records in order to investigate possible mismanagement, is that there can be no "credible" evidence of mismanagement if, in fact, no mismanagement ever occurred." *Id.*[13]

Just as this defense failed in *Marmon*, so it should fail here. *See also Sec. First Corp.*, 687 A.2d at 567 ("The actual wrongdoing itself need not be proved in a Section 220 proceeding"); *Thomas & Betts Corp. v. Leviton Mfg. Co.*, 681 A.2d 1026, 1031 (Del. 1996) ("While stockholders have the burden of coming forward with specific and credible allegations sufficient to warrant a suspicion of waste and mismanagement, they are not required to prove by a preponderance of the evidence that waste and management are actually occurring.").

Defendant also suggests that, before the federal court issued its decision denying the motion to dismiss in the *Qui Tam* Action (B00551-572), the Court of

[13] "This gambit, if allowed, would turn on its head both § 220 and the case law upholding a books and records inspection for the purpose of investigating mismanagement. In such a case, the issue is whether the evidentiary showing is sufficient to justify a court-ordered books and records inspection to uncover evidence (if any exists) of mismanagement. Under [the corporation's] view of the law, a demanding shareholder under § 220 would first have to prove actual mismanagement in order to become entitled to conduct the predicate books and records inspection that would uncover (if it exists) evidence of such mismanagement. Besides being circular and conceptually wrong, that litigation approach, is inequitable and subversive of § 220." *Id.*

Chancery could in no way find a basis to infer that wrongdoing or mismanagement may have occurred. In nearly the same breath, Defendant then argues that the subsequent decision in the *Qui Tam* Action sustaining the DOJ's litigation somehow also shows that the Court of Chancery erred. Defendant's argument is positively Orwellian. The facts alleged in the *Qui Tam* action – and presented to the Court of Chancery at trial – remained the same both at the time of the Section 220 trial and when the federal court denied the motion to dismiss in the *Qui Tam* Action, regardless of the particular cause of action that the federal court sustained.[14] The Court of Chancery was well within its discretion to find, based on the extensive evidence presented at trial, that it could infer that wrongdoing or mismanagement may have occurred, even assuming that the showing might, as this Court explained in *Seinfeld*, "ultimately fall well short" of demonstrating that anything wrong

[14] Discussion of the *Swoben* action comprises a substantial portion of Defendant's argument on appeal, suggesting that the dismissal of *Swoben* should have been dispositive of this action. However, it was irrelevant that the allegations in a tag-along *qui tam* action (*i.e.*, *Swoben*) were dismissed when another credible *qui tam* action (*i.e.*, *Poehling*) was simultaneously pending against Defendant. Like the *Poehling* action, the *Swoben* action alleged False Claims Act violations and sought restitution for overpayments made to Defendant. However, the *Swoben* action was not brought by a company insider with extensive knowledge of Defendant's fraudulent scheme and did not contain the particularized facts and allegations present in the *Poehling* action. Indeed, the decision of the federal district court denying the *Poehling* defendants' motion to dismiss, if anything, confirms that the Court of Chancery did not abuse its discretion in finding a credible basis to infer that wrongdoing or mismanagement may have occurred.

actually occurred. 909 A.2d at 123-24.

The Court of Chancery did not abuse its discretion or otherwise err in rejecting the argument that Defendant now presents on appeal.[15]

[15] Op. at 20-21 ("This Court has repeatedly stated that a Section 220 proceeding does not warrant a trial on the merits of underlying claims. Indeed, as this Court noted, "the Delaware Supreme Court has made it clear that the public policy of this State is to encourage stockholders to utilize Section 220 *before* filing a derivative action . . . in order to meet the heightened pleading requirements . . . applicable to such actions."); *id*. (confirming that "Plaintiffs have alleged facts sufficient to infer that Defendant may have violated" the law "sufficient to warrant inspection").

II. THE COURT OF CHANCERY DID NOT ABUSE ITS DISCRETION IN DETERMINING TO CREDIT EVIDENCE SOURCED FROM RELATED LITIGATION BEING PROSECUTED BY THE DOJ AND A FORMER HIGH-LEVEL INSIDER.

A. Question Presented

Did the Court of Chancery abuse its discretion in finding, after trial, a credible basis for a Section 220 inspection based on statements, documents and testimony submitted in a related case prosecuted by the DOJ and a former high-level insider? No.

B. Scope of Review

A trial court's findings of fact are reviewed by this Court using the "clearly erroneous standard." *Liberis*, 1997 WL 725634, at *1; *Levitt*, 287 A.2d at 673; *Lank*, 224 A.2d at 245. A trial court's determination in a Section 220 proceeding that a credible basis exists to infer managerial wrongdoing or mismanagement "is a mixed finding of fact and law that is entitled to considerable deference." *Axcelis Techs.*, 1 A.3d at 287 (citing *Sec. First Corp.*, 687 A.2d at 565) ("[T]he trial judge's determination of that credible basis after considering the totality of the evidence is entitled to considerable deference.")).

C. Merits of Argument

Defendant failed to fairly present its argument that the documents and testimony referenced by the DOJ Complaint "were not part of the record before the

Court" to the Court of Chancery.[16] UHG Brief at 32. Accordingly, this issue is not properly before this Court. Supr. Ct. R. 8 ("Only questions fairly presented to the trial court may be presented for review; provided, however, that when the interests of justice so require, the Court may consider and determine any question not so presented."). Abundant case law demonstrates the Court's general refusal to consider claims, questions or arguments raised for the first time on appeal. *See, e.g.*, *DFC Glob. Corp. v. Muirfield Value Partners, L.P.*, 172 A.3d 346, 363 (Del. 2017) ("We place great value on the assessment of issues by our trial courts, and it is not only unwise, but unfair and inefficient, to litigants and the development of the law itself, to allow parties to pop up new arguments on appeal they did not fully present below."); *Shawe v. Elting*, 157 A.3d 152, 169 (Del. 2017) ("It is axiomatic that an appellate court will generally not review any issue not raised in the court below.") (quoting 5 Am. Jur. 2d *Appellate Review* § 618 (2016)).

Had Defendant raised this question below, the Court of Chancery would have had an opportunity to point out that characterizations of documents referred to in a

[16] Defendant did not even use the word "hearsay" before the Court of Chancery and only used the word "characterize" once: "I can't tell you that the witness statements are fairly characterized." A2034. Moreover, Defendant agreed that the DOJ Complaint and exhibits would be part of the trial record and made no hearsay objection.

complaint are classic examples of hearsay.[17] *See, e.g.*, *Soden v. Freightliner Corp.*, 714 F.2d 498, 508 (5th Cir. 1983) ("Allegations in a complaint may be unsubstantiated and because of their hearsay character they are not subject to cross-examination"); *Rivera v. Metro. Transit Auth.*, 750 F. Supp. 2d 456, 461 (S.D.N.Y. 2010) ("An unsworn statement by a non-party in a complaint in another lawsuit is hearsay"); *Beechwood Restorative Care Ctr. v. Leeds*, 856 F. Supp. 2d 580, 604 (W.D.N.Y. 2012) ("[C]omplaints, and the charges and allegations they contain, are hearsay under the Federal Rules of Evidence.") (internal quotation marks omitted). Nevertheless, the trial court correctly applied the law – hearsay evidence is admissible in the context of establishing a credible basis to infer possible mismanagement or wrongdoing, subject to the Court of Chancery's weighing of the credibility of that evidence. *See* Op. at 17 ("The trial court may rely on 'circumstantial evidence,'" and "[h]earsay statements may be considered, provided they are sufficiently reliable."); *Thomas & Betts Corp.*, 681 A.2d at 1032 (indicating that, had the Court of Chancery found the hearsay testimony reliable, it could properly have considered the testimony to determine whether there was a credible

[17] Defendant also ignores the documents that were explicitly attached to the DOJ Complaint. This was raised by the Court of Chancery at the trial in a question: "Why isn't it the case, frankly, that even putting – putting aside that this is in a complaint, the pleadings, if you just take out and lift from it the documents that are quoted, the quotes from the documents and from the depositions, that alone is enough." A1974-5.

basis to infer that mismanagement had occurred); *Wal-Mart Stores, Inc. v. Ind. Elec. Workers Pension Tr. Fund IBEW*, 95 A.3d 1264, 1273 (Del. 2014) (affirming trial court order setting forth scope of required Section 220 production on the basis of hearsay evidence derived from a *New York Times* article).[18]

Consistent with these rulings, the Court of Chancery considered the evidence presented in the DOJ Complaint and found it reliable:[19]

> the DOJ Complaint includes documents and testimony provided by Defendant and Defendant's employees. The allegations in the *Qui Tam* Action are based on depositions from twenty of Defendant's employees and Defendant's production of over 600,000 documents after the DOJ conducted a five-year investigation. Defendant does not contest that the Company provided this information to the DOJ.

Op. at 19.

The Court of Chancery proceeded to issue findings of fact based on this evidence, concluding that "[t]hese documents suggest that Defendant's senior executives, including Hemsley, were involved in meetings and presentations that revealed the codes submitted to Medicare for reimbursement were inaccurate" and

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[18] *See also Marmon*, 2004 WL 936512, at *4 ("In [*Thomas & Betts*], the Supreme Court indicated that, had this Court found the disputed testimony reliable, it could properly have considered the hearsay testimony to determine whether there was a credible basis to infer that mismanagement had occurred."); *Amalgamated Bank v. Yahoo! Inc.*, 132 A.3d 752, 778 (Del. Ch. 2016) ("Hearsay statements may be considered, provided they are sufficiently reliable.").

[19] Defendant has already located many of the documents described in the DOJ Complaint. *See* B00573-578.

that "the Company removed audit programs designed to catch inaccuracies, such as the Chart Review Program, in order to avoid missing a $250 million payout from Medicare for 2014."[20] Op. at 19-20.

Defendant's Second Question Presented raises the issue – addressed above – of whether the trial court can employ hearsay evidence presented in a complaint filed in a separate case to make findings of fact and apply the credible basis standard. However, Defendant also devotes a significant portion of its second argument on appeal to an issue not raised in its Second Question Presented – namely, whether the Court of Chancery may, in finding a credible basis to infer possible mismanagement or wrongdoing, rely solely on a complaint filed in separate litigation without additional evidence obtained from another source.

Defendant cites dicta from *Graulich v. Dell Inc.*, 2011 WL 1843813, at *5, n.49 (Del. Ch. May 16, 2011), in arguing that there should be a bright-line rule requiring that there be "*viable* claims in ancillary litigation *plus additional evidence* to meet the credible basis standard." UHG Brief at 32 (emphasis in original). But the evidence presented by Plaintiffs' in this matter was far more substantial than "simply saying that the company has already been subject to lawsuits, with nothing

[20] It should be noted that the hearsay of which Defendant complains are characterizations by the DOJ of Defendant's own documents – documents that Defendant refused to provide to Plaintiffs and yet now complains were not part of the record below.

else," which was deemed inadequate to establish a credible basis in *Graulich*.[21] 2011 WL 1843813, at *5. Indeed, the Court of Chancery distinguished this case from *Graulich*, noting that the allegations of wrongdoing here include "testimony from numerous employees and several documents demonstrating the board's knowledge of inaccurate billing practices" and concluded that "simply because the testimony and documents are available in a complaint does not forbid the Court from examining them to determine if there exists an inference of wrongdoing." Op. at 19, n. 92.

The Court of Chancery's approach was consistent with the purpose of the credible basis inquiry in a Section 220 proceeding, which is to ensure that there is more than a "mere suspicion" of possible wrongdoing and instead requiring that there is "*some evidence* of possible wrongdoing." *Seinfeld*, 909 A.2d at 123.

Defendant presents no argument for why allegations in a complaint should be treated differently than other types of hearsay evidence and for that reason should not be able to establish a credible basis on their own. Indeed, the DOJ Complaint at issue here demonstrates how credible such hearsay allegations may be.

[21] The *Graulich* demand did not even describe the nature of the lawsuits facing the company, merely stating "[t]he reason these documents are sought is that Dell is the subject of lawsuits relating to these computers and has already been subjected to substantial damage awards. It has sustained reputational injury that could be devastating." 2011 WL 1843813, at *5, n.49.

As required by the Section 220 case law holding that the Court of Chancery may rely on hearsay to establish a credible basis, the Court of Chancery here reviewed that evidence and weighed its credibility. Defendant has not argued that the Court of Chancery abused its discretion in considering, weighing, and issuing findings of fact based on this evidence. Similarly, Defendant has not argued that the Court of Chancery abused its discretion in finding the evidence credible. Accordingly, since the findings made by the trial judge "are sufficiently supported by the record and are the product of an orderly and logical deductive process[,]" this Court should accept them "in the exercise of judicial restraint." *Levitt*, 287 A.2d at 673; *Barks v. Herzberg*, 58 Del. 162, 164 (1965) (when the determining of the facts by the trier of them turns on a question of credibility. . . [her] acceptance and rejection of testimony in the exercise of [her] discretion will be accepted by this Court.").

CONCLUSION

For the foregoing reasons the judgment of the Court of Chancery should be affirmed.

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