EFiled: Jun 05 2020 04:15PM EDT
Filing ID 65680494
Case Number 60,2020

IN THE SUPREME COURT OF THE STATE OF DELAWARE

AMERISOURCEBERGEN CORPORATION, Defendant-Below, Appellant, v. LEBANON COUNTY EMPLOYEES' RETIREMENT FUND AND TEAMSTERS LOCAL 443 HEALTH SERVICES & INSURANCE PLAN, Plaintiffs-Below, Appellee.	No. 60,2020 Court below: Court of Chancery C.A. No. 2019-0527-JTL

APPELLANT'S REPLY BRIEF

POTTER ANDERSON & CORROON LLP

Stephen C. Norman (No. 2686)
Jennifer C. Wasson (No. 4933)
Tyler J. Leavengood (No. 5506)
1313 N. Market Street
Hercules Plaza, 6th Floor
Wilmington, DE 19801
(302) 984-6000

Attorneys for Defendant-Below/Appellant AmerisourceBergen Corporation

OF COUNSEL:

MORGAN, LEWIS & BOCKIUS LLP

Michael D. Blanchard, Esq.
Amelia G. Pennington, Esq.
One Federal Street
Boston, MA 02110

Dated: June 5, 2020

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

PRELIMINARY STATEMENT

Section 220 jurisprudence has long sought to harmonize the interests of the Delaware corporation and its stockholders regarding their qualified right of inspection. That balancing of interests includes requiring the stockholder to have a proper purpose for inspection—one reasonably related to its interests as a stockholder—and requires the stockholder to prove by a preponderance of the evidence that each category of documents sought is necessary and essential to achieving a proper purpose. At common law and pursuant to Section 220 jurisprudence, the corporation is entitled to receive an inspection demand that clearly sets forth the stockholder's purpose for inspection, allowing the corporation to make an informed decision before litigation. As the propriety of every inspection demand is fact-specific, this Court and the Court of Chancery have eschewed the mere utterance of previously recognized proper purposes as a means of establishing a proper purpose in favor of requiring stockholders to explain the objectives of the inspection to ensure that the stockholder's purpose is proper.

The Opinion reverses these well-established principles of Delaware law. In this case, Plaintiffs invoked a recognized proper purpose of investigating mismanagement with the objective of bringing litigation, and Defendant challenged that purpose based on the absence of evidence giving credible suspicion of an actionable claim, necessary to establish that Plaintiffs' purpose is proper. The

Opinion rejected those defenses, holding as a matter of law that a stockholder need not disclose the objectives of their investigation, and therefore need not present evidence of actionable wrongdoing. Under the Opinion's inverted Section 220 construct, Plaintiffs' burden of clearly establishing a proper purpose in the Demand is replaced with Defendant bearing the burden to disprove the purpose after litigation commences.

Similarly, the Opinion relieved Plaintiffs of their burden of establishing at trial that each category of documents sought was necessary and essential to achieving their purpose. In its post-trial Opinion, the trial court held that Plaintiffs had only established entitlement to "formal board materials" because the record was "inadequate" to order a further production. Overlooking that it was Plaintiffs' burden to produce the record that was missing at trial, the trial court in its post-trial decision, *sua sponte*, granted Plaintiffs leave to take a deposition and create that record, *post hoc*. The trial court did so to allow Plaintiffs to seek documents that were not clearly requested in the Demand and that were beyond what Plaintiffs stipulated and the trial court ordered were at issue, purportedly because Defendant objected to an interrogatory that Plaintiffs in fact never propounded.

The Opinion should be reversed, and the balance restored.

ARGUMENT

I. THE TRIAL COURT ERRED BY HOLDING THAT A STOCKHOLDER SEEKING TO INVESTIGATE WRONGDOING IS NOT REQUIRED TO IDENTIFY ITS OBJECTIVES

A. The Court of Chancery Erroneously Held That Plaintiffs Investigating Wrongdoing Need Not State Their Objectives

The Answering Brief does not dispute that Section 220 inspections are only permitted for a "proper purpose," defined as one "reasonably related to such person's interests as a stockholder." 8 *Del C.* § 220(b); *Thomas & Betts Corp. v. Leviton Mfg. Co., Inc*., 681 A.2d 1026, 1033 (Del. 1996) ("[T]he purpose must be something that stockholders would be interested in because of their position as stockholders… [a] purely individual purpose in no way germane to the relationship of stockholder to the corporation is not a proper purpose within the meaning of the statute."). Nor do Plaintiffs challenge that Section 220(c) itself requires that stockholders seeking inspection "*shall first* establish that…[t]he inspection…is for a proper purpose." 8 *Del. C.* § 220(c)(3) (emphasis added); *see also Cent. Laborers Pension Fund v. News Corp.*, 45 A.3d 139, 145 (Del. 2012) (Section 220 not satisfied where required information "was not included with the Inspection Demand"). And Plaintiffs acknowledge that this Court has required stockholders seeking inspection to state their objectives to permit the corporation and court to determine whether the

inspection is a proper purpose. *Nw. Indus., Inc. v. B. F. Goodrich Co.*, 260 A.2d 428, 429 (Del. 1969); *CM & M Grp., Inc. v. Carroll*, 453 A.2d 788, 793 (Del. 1982).[1]

The crux of Plaintiffs' theory for sustaining the lower court's departure from the majority rule is their contention that "[b]y requiring some evidence of potential wrongdoing, this Court has ensured that the stockholder's purpose is reasonably related to his interests as a stockholder." AB 13 (citing *Seinfeld v. Verizon Commc'ns, Inc.*, 909 A.2d 117, 121 (Del. 2006)). Plaintiffs argue that "the same reasons stockholders are required to articulate their need for stock lists to communicate with stockholders or documents to value their shares are already built into the standard to determine whether a stockholder has stated a proper purpose to investigate wrongdoing." *Id.* For that reason, supposedly, *Northwest* and *CM&M* do not support the argument that a stockholder must identify the objectives of its investigation to establish a proper purpose—"It would be illogical to require stockholders to state an intended use to protect against improper uses when that safeguard already exists." AB 21-22. Plaintiffs' argument fails.

---

[1] Plaintiffs argue that "ABC never presented this argument below or in its interlocutory appeal application, so it is waived." AB 19. To the contrary, the Opinion acknowledged that the Company raised this issue. *See* Op. at 24 ("To support its reading of the Demand, [ABC] maintains that if a stockholder wants to investigate corporate wrongdoing and use the resulting documents to achieve an end other than filing litigation, then the stockholder must say so in the demand.") (citing A869).

Plaintiffs' theory presumes without support that Delaware law will only recognize a single means by which a corporation or the Court can evaluate whether an investigation is for a proper purpose—the "some evidence" standard. Nothing in Delaware law supports that notion. The "some evidence" standard is a judicial construct directed at the evidentiary burden needed to sustain a claim. Plaintiffs cite nothing suggesting that the "some evidence" standard was intended to displace Section 220's requirement that a stockholder "shall first establish" that its purpose is a proper purpose, as Plaintiffs' theory suggests. Indeed, as discussed more fully below, a stockholder could meet the "some evidence" test and still have an improper purpose such as harassment or pursuing a claim for which relief is barred.

Contrary to Plaintiffs' hypothesis, the "some evidence" standard was never intended to function as a mechanism (let alone the sole mechanism) for policing whether a purpose is a proper purpose. Rather, the "some evidence" standard was developed to protect against harassment of the corporation through investigations of wrongdoing based upon mere speculation. Neither *Seinfeld*, *Thomas Betts*, nor *Security First* directly addresses whether a stockholder seeking to investigate mismanagement must identify the objectives of the investigation to demonstrate that the purpose of the inspection is a proper purpose. Rather, these cases primarily concerned the evidentiary standard a stockholder must meet to warrant inspection,

driven by an assessment of the relative costs and benefits to the corporation of permitting such investigations. Reaffirming that stockholders must present a credible basis to suspect wrongdoing, *Seinfeld* reasoned that "[i]nvestigations of meritorious allegations of possible mismanagement, waste or wrongdoing, benefit the corporation, but investigations that are 'indiscriminate fishing expeditions' do not." *Seinfeld*, 909 A.2d at 122 (internal quotation marks and citation omitted).

Nonetheless, *Security First Corp. v. U.S. Die Casting and Development Company*, 687 A.2d 563 (Del. 1997), cited by Plaintiffs and reaffirmed in *Seinfeld*, demonstrates that a stockholder may satisfy the "some evidence" standard, yet the objectives of the inspection are not for a proper purpose. After holding that the stockholder established a credible basis to suspect wrongdoing in connection with a failed merger, this Court rejected the stockholder's demand for a stockholder list sought for the stated purpose of "communicat[ing] with the shareholders of Security with respect to…the failed merger," because the stockholder later admitted that he "had no idea what he would do with such a list." *Id*. at 570. In other words, this Court held that the "some evidence" standard had been met, but denied the inspection, in part, because of the absence of an end use reasonably related to its interests as a stockholder.

Critically, while the "some evidence" standard will bar inspections for the limited reason that the investigation is sought based upon mere speculation, there are many other reasons, depending on objectives, as to why a stockholder's investigatory purpose may not be reasonably related to the stockholder's interests as a stockholder. OB 18 (stockholder could seek inspection for improper purposes such as a desire to write an expose or obtain leverage against the corporation in a personal lawsuit). In those instances, even though the stockholder's purpose is not a "proper purpose," there may nonetheless be "some evidence" of possible wrongdoing. Requiring the stockholder to articulate the objectives of the investigation thus guards against subjecting the corporation to an investigation where there may be a credible basis to suspect wrongdoing, but the stockholder does not have a proper purpose. The "some evidence" standard alone, will not achieve this objective.[2] Plaintiffs' contention that requiring stockholders to state the objectives of their investigation is redundant of the protections afforded by the "some evidence" standard is thus wrong. AB 21 & n.12.

[2] Indeed, the Court of Chancery has rejected Section 220 demands where there appeared a credible basis to suspect wrongdoing, but the objectives of the investigation were not reasonably related to the stockholder's interests. *See Graulich v. Dell Inc*., 2011 WL 1843813, at *7 (Del. Ch. May 16, 2011) (stockholder sought inspection regarding matters that had been the subject of derivative litigation which was settled, denied because "plaintiff lacks standing to bring any such claim").

For these reasons, requiring stockholders to state the objectives of their investigation in the demand follows this Court's Section 220 jurisprudence. While *Northwest* concerned a stockholder list and *CM&M* concerned valuation, these decisions stand for the proposition that a stockholder's objectives as stated in the demand bear directly upon whether the stockholder's purpose is a proper purpose pursuant to Section 220. Nothing in Section 220 renders the proper purpose requirement any less applicable when the stockholder seeks to investigate wrongdoing. As Defendant pointed out and Plaintiffs all but ignore, this Court in *Saito v. McKesson HBOC, Inc.* expressly held that the objectives of an investigation of wrongdoing can bear directly on whether the stockholder has a proper purpose: If "a stockholder wanted to investigate alleged wrongdoing that substantially predated his or her stock ownership, *there could be a question as to whether the stockholder's purpose was reasonably related to his or her interest as a stockholder, especially if the stockholder's only purpose was to institute derivative litigation*." 806 A.2d 113, 117 (Del. 2002) (emphasis added).

B. The Balancing Of Stockholders' And Corporations' Interests Counsels In Favor Of The Majority Rule

Requiring stockholders to state the objectives of their inspection, consistent with Section 220, the Court of Chancery's majority rule and *Northwest* and *CM&M*, strikes the appropriate balance between stockholders' and corporations' respective

interests. Judicial economy is served by requiring that the stockholders' objectives be stated in the demand to afford corporations the ability to evaluate whether the stockholder has a proper purpose, as well as the proper scope of inspection, without the necessity of litigation. *See* OB 23-27. Plaintiffs' arguments to the contrary are unavailing.

Plaintiffs attempt to brush aside judicial economy concerns about the proliferation of Section 220 litigation if stockholders are not required to state their objectives in the demand, arguing that "[w]hether a stockholder has a proper purpose to investigate potential misconduct is dictated by the evidence, not the objective." AB 18 (emphasis omitted). As the preceding section of this Reply demonstrates, that contention is unequivocally wrong. It is also nonresponsive. Plaintiffs simply have no answer to the consequences of rejecting the majority rule—corporations' first opportunity to determine whether an investigation is for a proper purpose will often be at the stockholder's deposition. Plaintiffs' response also ignores Delaware law cited by the Company teaching that the corporation must have a fair opportunity to consider and resolve a demand *before* litigation is commenced. *Norfolk Cnty. Ret. Sys. v. Jos. A. Bank Clothiers, Inc.*, 2009 WL 353746, at *11 (Del. Ch. 2009) ("a demand for books and records must be sufficiently specific to permit the court (and the corporation) to evaluate its propriety").

Plaintiffs are similarly dismissive of the fact that, without a statement of the stockholder's objectives in the demand, the corporation cannot assess whether the scope of production demanded is narrowly tailored to the purpose, again, leaving that issue to be determined in litigation. OB 25. Plaintiffs assert that "[s]cope is tethered to *purpose*, not objective….If the corporation is ordered to produce documents aimed at investigating misconduct, those documents would be identical for each potential end use." AB 22 (citing *Saito*, 806 A.2d at 115).[3] Thus, according to Plaintiffs, the exact same scope would be applicable if their investigation was to bring a derivative action as it would if they merely sought to meet with ABC's Board. That is obviously not the law.

One recent example, *Southeastern Pennsylvania Transportation Authority v. Facebook, Inc*., illustrates how the scope of records that are essential varies with the objective:

> At trial, it was clear that the primary purpose for Plaintiffs' inspection demand was to investigate possible fiduciary wrongdoing. As discussed above, Plaintiffs have failed to prove a credible basis to infer the Board

[3] Even the portion of *Saito* Plaintiffs excerpt in their brief—*i.e*. the "stockholder should be given enough information to effectively address the problem, either through derivative litigation or through direct contact with the corporation's directors"—does not suggest that scope would be the same if the objectives are considered separately. AB 22. In any case, the issue in *Saito* was whether Section 327 imposed a bright line cut-off for the date range of a scope of production, not whether the scope for meeting with the board is the same as exploring litigation.

> acted in bad faith. Even so, 'I cannot say at this point ... [that Plaintiffs'] only purpose is to explore the possibility of a derivative suit.' *Thus, to the extent I was satisfied Plaintiffs had demonstrated that additional books and records were "necessary and essential" to fulfill their purpose of engaging with the Board or other stockholders, I might well order inspection.* But that is not the state of this record. *Plaintiffs already have what is "necessary and essential" to satisfy that purpose*—they know what Facebook executives were paid; they know the Board did not consider the advertising metric errors when setting that compensation; and they know more generally how the Company has performed during the timeframes at issue. *A conclusory statement that Plaintiffs wish to discuss compensation issues with the Board and/or stockholders is not a key to unlock more information than the Company has already provided.*

2019 WL 5579488, at *10 (Del. Ch. Oct. 29, 2019) (emphasis added; citation omitted); *see also Fuchs Family Tr. v. Parker Drilling Company*, 2015 WL 1036106, at *7 (Del. Ch. Mar. 4, 2015) (after concluding plaintiff could not bring derivative litigation because of issue preclusion, the Court concluded Fuchs was entitled to *no books and records* for the purpose of making a demand on the board: "Fuchs already has sufficient information to pursue this course of action.").

Finally, Plaintiffs claim that "ABC's insistence that stockholders commit—at the outset—what they will do with the fruits of their investigation is contrary to settled Delaware law." AB 14. This is a straw man argument. Nowhere has Defendant argued that stockholders must "commit" to a sole end use of an investigation. As Defendant pointed out and Plaintiffs ignore, none of the Court of Chancery decisions applying the majority rule have taken that position, either. OB

26. While it is beyond doubt that Plaintiffs will bring a derivative action, they are not committed to that course of action just because they made a demand.

C. Plaintiffs' Sole Objective Is To Commence Derivative Litigation

Plaintiffs do not dispute that the Demand seeks to "investigate possible breaches of fiduciary duty, mismanagement and other violations of law" to "consider any remedies" to be sought, evaluate the independence and disinterestedness of the Board, and evaluate possible litigation or "other corrective measures," but that the Demand fails to explain what vaguely referenced "remedies" or "corrective measures" might be "evaluate[d]," apart from the equally vague assertion that Plaintiffs might take "appropriate action," including bringing litigation or making a demand on the Board. OB 33-34; A622-623.

Plaintiffs seek an abuse of discretion standard of review with respect to the Court of Chancery's interpretation of the Demand, characterizing the decision as a "factual finding." AB 17. Plaintiffs are wrong. First, the Opinion expressly held, "[i]n this case, the Demand did not recite ends to which [Plaintiffs] might put the books and records." Op. at 29. Second, confirming that the Court's decision is grounded in its conclusion of law and not fact, the trial court explained "[f]or the reasons discussed, they were not required to do so." *Id.* *See also id.* at 30 ("[P]laintiffs are not seeking books and records for the sole purpose of investigating a *Caremark* claim" as they "can use the fruits of their investigation for other

purposes.") (citing Part II.A.1.b of the Opinion, holding no requirement to identify investigative purposes).

In any case, Plaintiffs' contention that such vague references in their Demand as evaluating "corrective measures" or "taking appropriate action" states proper potential end uses runs afoul of long-standing Delaware law. *State ex rel. Miller v. Loft, Inc.*, 156 A. 170, 172 (Del. Super. 1931) ("Where the *motive or purpose* of the examination is … made for some *indefinite, doubtful, uncertain,* or mere vexatious *purpose* … it would *not be a proper purpose within this rule*.") (emphasis added). Likely for that reason, Plaintiffs simply ignore Defendant's citation to *Norfolk Cnty. Ret. Sys.*, 2009 WL 353746, at *11 ("a demand for books and records must be sufficiently specific to permit the court (and the corporation) to evaluate its propriety"); OB 23.

Any doubt about Plaintiffs' objective to bring a derivative action is dispelled by the Demand, the engagement letter and Plaintiffs' statements to the trial court. The Demand is purposefully vague, but makes reference to red flags and *Caremark*. The engagement letter's references to litigation, damages, and obtaining fees from a court confirm litigation is their sole purpose. Plaintiffs' response is to ask the trial court to ignore the engagement letters because they did not specifically use the word "derivative." AB 16. This proves nothing. Finally, Plaintiffs have represented that

they are following this Court's admonishment "to us[e] the tools at hand to determine if derivative litigation is necessary...." A1076-77. Plaintiffs' objective could not be clearer.[4]

[4] Plaintiffs never explain why a vague statement of objectives serves the interests of the corporation or its stockholders, likely because obfuscation only serves the interests of counsel avoiding giving the corporation a fair opportunity to consider whether the purpose is truly a proper purpose.

II. THE COURT ERRED HOLDING THAT PLAINTIFFS NEED NOT PRESENT A CREDIBLE BASIS TO SUSPECT ACTIONABLE WRONGDOING

Citing a long list of Court of Chancery decisions in agreement, the Opening Brief argued that the trial court erred in rejecting that a stockholder seeking inspection for the purposes of commencing litigation must present some evidence warranting suspicion of an actionable claim. OB 28-29; *see also United Technologies Corp. v. Treppel*, 109 A.3d 553, 559 n.31 (Del. 2014) (collecting cases). Plaintiffs' lead-off argument is their contention that "ABC did not argue that … Plaintiffs had to meet an actionable wrongdoing requirement." AB 1. The record is quite the opposite (*see* OB 2-3, 26; A905, A907, A909, A910-11, A912, A918-19). Indeed, as the Opinion itself explains, "[ABC] argues that to obtain books and records, [Plaintiffs] 'must present evidence demonstrating a credible basis to suspect actionable wrongdoing on the part of the Board.'" Op. at 30 (citing A844; *accord* A905).

Plaintiffs alternatively attempt to characterize the "actionable wrongdoing" rule as one that advocates for a "new Section 220 standard," (AB 25), wholly ignoring the litany of decisions adhering to this principle. OB 28-29. The standard is hardly "new." Indeed, as cited in the Opening Brief and ignored by Plaintiffs, this Court has affirmed the denial of Section 220 demands on these very grounds. OB 28-29 (citing *Se. Pa. Transp. Authority v. Abbvie Inc.*, 132 A.3d 1 (Del. 2016)

(affirming rejection of Section 220 demand focused solely on commencing litigation where there was no evidence warranting suspicion of actionable wrongdoing: "[b]ecause the petitioner therefore had no viable use for the documents it sought, the Court of Chancery denied its claim for books and records.")).[5] "Under the doctrine of *stare decisis*, settled law is overruled only for urgent reasons and upon clear manifestation of error." *Seinfeld*, 909 A.2d at 124 (internal quotation marks omitted).

Plaintiffs take aim at more straw man arguments, contending that a stockholder is "not required to prove…that waste and [mis]management are actually occurring" and thus "[i]t follows logically that a stockholder is not required to prove that fiduciaries are responsible…." AB 26 (citation omitted). Defendant agrees. Plaintiffs are not required to prove mismanagement or liability to warrant an inspection. They must, however, prove a *credible basis to suspect* actionable mismanagement when seeking to bring litigation. In the same discussion, Plaintiffs mischaracterize *Louisiana Municipal Police Employees' Retirement System v. Countrywide Financial Corporation*, 2007 WL 2896540, at *12 (Del. Ch. Oct. 2,

[5] Ignoring this Court's affirmance, Plaintiffs instead purport to distinguish the trial court decision, arguing, as did the Court of Chancery in the Opinion below, that the decision (affirmed on appeal) "misstated Delaware law." AB 14 n.6.

2007), claiming it stands for the proposition that "[r]equiring a stockholder to prove that there is a credible basis to believe that actionable wrongdoing occurred 'would completely undermine the purpose of Section 220 proceedings, which is to provide shareholders the access needed to make that determination in the first instance.'" AB 27. *Countrywide* concerned whether statistical evidence could "constitute 'some evidence' of possible corporate wrongdoing" (2007 WL 2896540, at *1) and had nothing to do with "[r]equiring a stockholder to prove that there is a credible basis to believe that actionable wrongdoing occurred." AB 27.

Plaintiffs similarly point to the description in *Lavin v. West Corporation*, 2017 WL 6728702 (Del. Ch. Dec. 29, 2017), of cases where inspection was denied because the claims sought to be investigated were legally not viable, arguing that "[t]he same cannot typically be said of investigations of wrongdoing[.]" AB 28. Plaintiffs overlook that the cases described in *Lavin* involved "investigations of wrongdoing." Plaintiffs also attempt to shore up the Opinion's disagreement with *Pfizer*, arguing that the "*Pfizer* standard is inconsistent with *Seinfeld*." *Id.* at 28-29. Plaintiffs ignore that both *Seinfeld* and *Pfizer* rejected demands that presented evidence to suspect possible wrongdoing, but not rising to the level of a viable claim. *Compare Beatrice Corwin Living Irrevocable Tr. v. Pfizer, Inc.*, 2016 WL 4548101 (Del. Ch. Aug. 31, 2016, revised Sept. 1, 2016) (stockholder's evidence of a

"positive violation" of law insufficient absent evidence to infer *Caremark* claim) *with Seinfeld*, 909 A.2d at 119 (rejecting demand where stockholder asserted executives were paid "above the compensation provided for in their employment contracts" but had no "factual basis" to claim waste occurred).

The remainder of Plaintiffs' argument simply repeats the Opinion's bases for holding that there is a credible basis to suspect wrongdoing. AB 29-31. Notably absent from the Answering Brief and Opinion is the identification of any evidence implicating ABC's Board, let alone evidence sufficient to suspect the Board ignored red flags in bad faith as is required to suspect a *Caremark* claim. Without any such evidence, the upshot of the Opinion is that, because *the Company* has been *accused* of violating the law, one can infer that *the Board* breached its fiduciary duty of loyalty. That inference is unreasonable, especially given Plaintiffs' refusal to answer Defendant's interrogatory seeking identification of the red flags presented to and ignored by the Board. OB 13; A740-42.

III. THE COURT OF CHANCERY ERRED AS A MATTER OF LAW WHEN IT *SUA SPONTE* ALLOWED PLAINTIFFS TO ENGAGE IN POST-TRIAL DISCOVERY FOR THE PURPOSE OF REQUESTING DOCUMENTS NOT REQUESTED IN THE DEMAND

A. The Trial Court Erred By *Sua Sponte* Relieving Plaintiffs Of Their Evidentiary Burden And Granting Them A "Do-Over" They Never Requested

Plaintiffs do not—because they cannot—dispute that:

- It was Plaintiffs' burden to prove at trial their entitlement to each category of books and records requested;
- Plaintiffs stipulated there would be no depositions, which the trial court so ordered;
- Plaintiffs served no discovery asking what documents Defendant had;
- Plaintiffs did propound an interrogatory seeking the identification of individuals with "information related to the Demand," (A676) and Plaintiffs never challenged Defendant's well-taken objection;
- Plaintiffs stipulated that the documents they sought in litigation were confined to those "received, authored by or presented to any member of ABC's Board" (A950);
- The limitation to Board documents was approved in the Pre-Trial Order; and

- After trial, the trial court held that Plaintiffs had only carried their burden regarding Formal Board Materials, granting inspection of every category of documents requested;[6]

Despite these undisputed facts:

- The trial court *sua sponte* granted Plaintiffs leave to take a Rule 30(b)(6) deposition, despite Plaintiffs' stipulation and the Pre-Trial Order;
- The trial court's grounds were that Defendant "prevented [Plaintiffs] from obtaining any information about what documents exist," citing Defendant's objection to an interrogatory requesting identification of individuals "with information" (Op. at 57);
- The trial court granted leave to take the deposition in aid of Plaintiffs making a post-trial request for documents beyond those "received, authored by or presented to any member of ABC's Board" in violation

[6] Plaintiffs argue in a footnote that the "trial court reserved decision on this issue." AB 38 n.16 (citing Op. at 57). Raised in a footnote, the argument is waived. Supreme Court Rule 14(b)(vi)(3). In any case, nothing on page 57 of the Opinion or anywhere else did the trial court "reserve decision" (whatever that means when trial is concluded) regarding Plaintiffs only meeting their burden with respect to Formal Board Materials.

of Plaintiffs' stipulation and the Pre-Trial Order, and for which Plaintiffs had failed to carry their burden at trial (A950).

The trial court committed legal error. Plaintiffs made tactical decisions to seek only documents presented to the Board, to eschew discovery except for interrogatories, to not object to Defendant's interrogatory responses and to try the case "in the dark." Plaintiffs had their day in court and are not entitled to a do-over.

Plaintiffs' lead argument seeks application of an abuse of discretion standard based upon Section 220(c)'s authorization of the trial court to "award such other or further relief as the Court may deem just and proper." AB 35 (citing 8 *Del. C.* § 220(c)). The Opinion itself explains that the decision was based upon the Court's interpretation of *Palantir*, Op. at 55-57, a legal issue reviewed *de novo*. But even if abuse of discretion were the standard, "[u]ndergirding this discretion is a recognition that the interests of the corporation must be harmonized with those of the inspecting stockholder," including that "the burden of proof is always on the party seeking inspection to establish that each category of the books and records requested is essential…." *Thomas & Betts Corp.*, 681 A.2d at 1035. Here, post-trial and *sua sponte*, the trial court granted stockholders the right to retroactively modify their demand letter, stipulation and Pre-Trial Order so they might seek documents not previously requested for which they have not carried their burden at trial. Op. at 1-

2 (at trial Plaintiffs only "established their right to inspect … Formal Board Materials"). This was an abuse of discretion.

Arguing that the trial court's discovery directive was justified, Plaintiffs merely recite the trial court's clearly erroneous conclusions that Defendant supposedly prevented Plaintiffs from discovery about what documents exist. AB 35-42. The argument is circular, failing to address that Plaintiffs never requested such discovery. *Price v. Williams*, 9 A.3d 476 (Del. 2010) (TABLE) (trial court "abused its discretion [because it] based [its holding] on factual determinations that were unsupported by the record."). With respect to the discovery Plaintiffs did serve, Plaintiffs purport to dispute the fact that they never challenged Defendant's objection, claiming they argued *at trial* that they were "'in the dark' as to each and every document essential to their purposes." AB 37. "At trial" was too late, and the *actual quote*, as opposed to Plaintiffs' rewriting of it, confirms that Plaintiffs knew the interrogatory did not seek information about documents: "we had asked the company, in discovery, to *identify those directors, officers, and senior managers who would likely have information* pertinent to our case…. So we're kind of in the dark on that." A1147 (emphasis added).

Curiously, Plaintiffs argue that Defendant made an "admi[ssion] at trial that the interrogatory sought 'basically, where is all your documents, or who is in a

reporting relationship,'" and thus the interrogatory means something different than as written. AB 37. Plaintiffs fail to note that Defendant's comment, far from an "admission" that rewrites Plaintiffs' interrogatory, was in response to Plaintiffs' assertion quoted above, characterizing the interrogatory as seeking identification of people with information, not the existence and whereabouts of documents. Plaintiffs cannot escape that the interrogatory only requested identification of "the directors, officers and senior managers…reasonably likely to have information responsive to Plaintiffs' May 21 Demand." A676.

No amount of revisionist history can change the record below. And no matter the standard of review, the Opinion should be reversed.

B. The Opinion's Discovery Directive Conflicts With *Palantir*

Plaintiffs do not and cannot dispute that in *Palantir*, this Court shunned "extensive discovery over which books and records are available and which would be sufficient for its purposes," that "a petitioner meets her burden to prove necessity by identifying the categories of books and records she needs and presenting some evidence that those documents are indeed necessary," and in the settle-order process, "the court will be highly dependent on the respondent's good faith participation in the process, because the respondent is likely to be the only participant in the settle-order process with knowledge of which corporate records are relevant to the

petitioner's proper purpose as determined by the court." *KT4 Partner LLC v. Palantir Techs. Inc.*, 203 A.3d 738, 755-57 (Del. 2019).[7]

Plaintiffs' primary contention as to why it was appropriate for the trial court to part ways with *Palantir* here is because, again, it was purportedly within its discretion. AB 41. The trial court's interpretation of *Palantir* concerns an issue of law reviewed *de novo*. But as explained above, even if a matter of discretion, it was an abuse of discretion to *sua sponte* order a deposition that Plaintiffs never requested, based upon a purported refusal by Defendant to answer an interrogatory Plaintiffs never served, to allow Plaintiffs an opportunity to seek documents not sought in the Demand, stipulated and ordered by the trial court as not at issue, and for which Plaintiffs failed to carry their burden.

C. The Court's Discovery Directive Impermissibly Aims To Expand The Categories Of Documents Sought

Plaintiffs do not dispute that a Section 220 plaintiff is limited to seeking those documents identified in a demand. *See Paraflon Invs., Ltd v. Linkable Networks, Inc*., 2020 WL 1655947, at *6 (Del. Ch. Apr. 3, 2020) ("A corporate board is entitled to be informed of exactly what the stockholder is demanding to inspect so it can

[7] To be clear, Defendant did not argue that Rule 30(b)(6) depositions are *per se* improper (AB 40-41) but rather, consistent with prior Court of Chancery decisions, may be proper "when a defendant places the existence and whereabouts of documents at issue." OB 45 n.8. Defendant did not do so here.

make the call, before litigation, whether to allow inspection or litigate the demand"). Plaintiffs ignore that, to the extent there was ambiguity in the meaning of "Board Materials" (as drafted by Plaintiffs), they resolved that ambiguity in the Pre-Trial Order approved by the Court and relied upon by Defendant; Plaintiffs were seeking documents "received, authored by or presented to any member of ABC's Board." A950. The Court erred as a matter of law by expanding the scope of the Demand, especially as Plaintiffs failed to carry their burden at trial beyond "Formal Board Materials." Op. at 57.[8]

CONCLUSION

For the reasons stated, the trial court's Opinion should be reversed and remanded with instructions to enter an Order in ABC's favor, denying Plaintiffs' inspection request.

[8] Plaintiffs insinuate that this appeal is moot because ABC was ordered to produce "Subset Materials" pending appeal (AB at 9-10). Made only in the Statement of Facts, any such argument is waived. *Cf. Roca v. E.I. du Pont de Nemours & Co.*, 842 A.2d 1238, 1242 (Del. 2004). In any case, the appeal is not moot, as the relief awarded by the trial court is far broader than the "Subset Materials" produced to Plaintiffs, which are subject to an agreed-upon clawback if the Opinion is reversed.

POTTER ANDERSON & CORROON LLP

By: */s/ Stephen C. Norman*
Stephen C. Norman (No. 2686)
Jennifer C. Wasson (No. 4933)
Tyler J. Leavengood (No. 5506)
1313 N. Market Street
Hercules Plaza, 6th Floor
Wilmington, DE 19801
(302) 984-6000

Attorneys for Defendant-Below/Appellant AmerisourceBergen Corporation

OF COUNSEL:

MORGAN, LEWIS & BOCKIUS LLP

Michael D. Blanchard, Esq.
Amelia G. Pennington, Esq.
One Federal Street
Boston, MA 02110

Dated: June 5, 2020

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of June 2020, a copy of the foregoing was served via *File & ServeXpress* upon the following attorneys of record:

Samuel L. Closic, Esquire
Eric J. Juray, Esquire
PRICKETT, JONES & ELLIOTT, P.A.
1310 N. King Street
Wilmington, DE 19801

/s/ Tyler J. Leavengood
Tyler J. Leavengood (#5506)