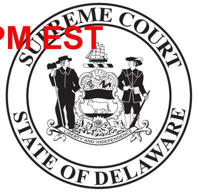
EFiled: Mar 04 2026 06:49PM EST
Filing ID 78611685
Case Number 23,2026



IN THE SUPREME COURT OF THE STATE OF DELAWARE

MICHAEL O'NEILL,	:	
	:	
Plaintiff-Below,	:	
Appellant,	:	No. 23, 2026
	:	
v.	:	Court Below:
	:	Court of Chancery of the
SUMMIT MATERIALS, INC.,	:	State of Delaware
	:	
Defendant-Below,	:	C.A. No. 2025-0695-LM
Appellee.	:	

PLAINTIFF-BELOW/APPELLANT'S REVISED OPENING BRIEF

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NATURE OF PROCEEDINGS

This is a books and records action. Plaintiff-Below/Appellant Michael O'Neill,[1] was a stockholder of Defendant-Below/Appellee Summit Materials, Inc.[2] Plaintiff seeks documents concerning a conflicted transaction: the sale of Summit to Quikrete Holdings, Inc.[3] Summit's largest stockholder, Grupo Argos S.A.,[4] owned 31% of the Company and conditioned its support for the Transaction on waiver of a pre-existing non-compete provision that would have significantly limited Grupo Argos' ability to do business in the United States.

Plaintiff served a books-and-records demand on January 14, 2025 seeking to investigate potential breaches of fiduciary duty and related misconduct in connection the Transaction. Two weeks later, Plaintiff and the Company entered into an access agreement, giving Plaintiff a contractual right to enforce the Demand after closing of the Transaction.[5] The Transaction closed on February 10, 2025. The Company never produced any documents, despite the statute's five-business-day deadline.[6]

One week after closing, Delaware's Senate Majority Leader, Bryan

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[1] "Plaintiff."

[2] "Summit" or the "Company."

[3] "Quikrete" and the "Transaction."

[4] Collectively, with its subsidiaries Argos SEM LLC, Cementos Argos S.A., and Valle Cement Investments, Inc., "Grupo Argos."

[5] The "Access Agreement."

[6] 8 *Del. C.* § 220(c).

Townsend, introduced Senate Bill 21,[7] which dramatically rewrote decades of carefully crafted Delaware law to provide safe-harbor provisions greatly reducing stockholder protections in conflicted transactions. The bill created mechanisms to cleanse conflict transactions not involving a "controlling stockholder" (a statutorily defined term) as long as the transaction was approved by either disinterested directors or disinterested stockholders. And the bill defined "controlling stockholder" as being limited to stockholders who held voting power of "one-third" or more.

Grupo Argos held slightly less than one-third voting power and so would not qualify as a "controlling stockholder" under this definition (although it likely would have under prior Delaware precedent). Importantly, however, the original version of SB 21 did not apply retroactively. Senator Townsend publicly insisted that the bill would be "effective only upon the signature of the governor" because "retroactive legislation faces an exceptionally high constitutional bar."[8]

Plaintiff faced significant time pressure. Based on what Plaintiff knew at the time, Plaintiff believed he had enough information to state a non-dismissible entire fairness claim under existing law. The waiver of the non-compete was a non-ratable

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[7] "SB 21."

[8] A0439.

benefit to Grupo Argos, and Grupo Argos was plausibly a controller.[9] So, under this Court's decision in *Match*,[10] the Transaction was subject to entire fairness review because it was not conditioned on approval by a majority of minority stockholders.

But once SB 21 was enacted, it would create a new, bright-line rule that a stockholder owning less than one-third voting stock could not be a "controlling stockholder." And transactions not involving a controlling stockholder would not require dual cleansing. Because of the time pressure, on February 25, 2025, Plaintiff filed a plenary action,[11] asserting breach of fiduciary duty claims against Grupo Argos, its subsidiaries, and its two dual-fiduciary designees, Jorge Mario Velásquez and Juan Estaban Calle.

Two weeks later, Senator Townsend introduced Senate Substitute 1 for SB 21. Senator Townsend's previous assurances that the bill would be "effective only upon the signature of the governor" proved false. Senate Substitute 1 for SB 21 added a new retroactivity provision making the safe-harbor provisions applicable to any breach of fiduciary duty claim brought after February 17, 2025. The General

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[9] *See, e.g.*, *Tornetta v. Musk*, 310 A.3d 430, 502–03 & n.581 (Del. Ch. 2024) ("Musk owned approximately 21.9% of Tesla's outstanding common stock. ... It is ... no surprise that this court has found that holders of similar or lesser percentages of stock are controlling stockholders.") (collecting cases), *aff'd in part and rev'd in part on unrelated grounds In re Tesla, Inc. Derivative Litig.*, 2025 WL 3689114 (Del. Dec. 19, 2025).

[10] *In re Match Grp., Inc. Derivative Litig.*, 315 A.3d 446, 451 (Del. 2024).

[11] The "Plenary Action."

Assembly passed Senate Substitute 1 for SB 21 on March 25, 2025. Governor Meyer signed the bill late that evening.

The next day, Plaintiff voluntarily dismissed the Plenary Action. Plaintiff sought to enforce the Access Agreement and obtain books and records responsive to his demand to investigate an alternate theory: if Grupo Argos was not a controller, then it aided-and-abetted breaches of fiduciary duty by its dual-fiduciary designees. To prevail on this new theory, Plaintiff would have to show that the vote was uninformed.

Because Plaintiff filed the Plenary Action, the Company has refused to produce any documents in response to the Demand or to honor the Access Agreement. Its sole basis for this refusal was (and remains) its assertion that "Plaintiff's filing of his plenary action, thereby certifying he had all the information necessary to state a claim[,] *[s]ee, e.g., Bizzari v. Suburban Waste Servs.*, 2016 WL 4540292, at *6 (Del. Ch. Aug. 30, 2016)[,]"[12] means that Plaintiff lacks a proper purpose. Below, the Magistrate agreed with this argument and recommended that Plaintiff be denied any books and records. The Vice Chancellor adopted the Magistrate's report, holding that Plaintiff had forfeited his right to books and records by filing the Plenary Action.

This was reversible error.

[12] A0174.

First, the logic of *Bizzari*, and the line of cases it followed, is that filing a plenary complaint reflects a certification by counsel that counsel could state an actionable claim without any additional documents and that this vitiates any proper purpose. That logic cannot survive this Court's later decision in *AmerisourceBergen II*, which flatly rejected tying the proper-purpose analysis to the question of whether alleged mismanagement or wrongdoing is actionable.[13]

Second, long before *AmerisourceBergen II*, this Court held "that [a] ... bright-line rule barring stockholder-plaintiffs from pursuing inspection relief under 8 *Del. C.* § 220 solely because they filed a [plenary] action first, does not comport with existing Delaware law or with sound policy."[14] Even when *Bizzari* was still good law, if a stockholder filed a plenary complaint because of "timing pressures" that were "not caused by the plaintiff," the filing of that plenary complaint did not bar the stockholder's ability to show a proper purpose for a books-and-records inspection.[15] And even if the Plenary Action did operate as an implicit concession that Plaintiff did not need documents to state a claim *under the old law*, that is not a concession that the same is true under the new law.

[13] *AmerisourceBergen Corp. v. Lebanon Cnty. Emps.' Ret. Fund* ("*AmerisourceBergen II*"), 243 A.3d 417, 437 (Del. 2020).

[14] *King v. VeriFone Holdings, Inc.*, 12 A.3d 1140, 1145 (Del. 2011).

[15] *CHC Inves., LLC v. FirstSun Cap. Bancorp*, 2019 WL 328414, at *3 (Del. Ch. Jan. 24, 2019).

Third, pursuant to the Access Agreement, the Company agreed that Plaintiff "shall continue to have the same right, power, and ability to enforce the Demand as Stockholder had prior to the closing of the Transaction[.]" "Prior to the closing of the Transaction," on February 10, 2025, SB 21 had not even been introduced and Plaintiff had not filed the Plenary Action. Thus, as a matter of basic contract interpretation, the trial court erred in denying Plaintiff books and records based on events that happened after closing.

Finally, Plaintiff otherwise has a credible basis to investigate and the Company has never argued otherwise.

The Court should reverse and remand.

SUMMARY OF ARGUMENT

1. In *AmerisourceBergen II*, this Court held that "where a stockholder meets [the] low burden of proof from which possible wrongdoing or mismanagement can be inferred, a stockholder's purpose will be deemed proper under Delaware law."[16] The Court "reaffirm[ed] the 'credible basis" test as the standard by which investigative inspections under Section 220 are to be judged" and held that a "stockholder need not demonstrate that the alleged mismanagement or wrongdoing is actionable."[17] The trial court erred in holding that Plaintiff lacked a proper purpose, even if he had a credible basis, on the theory that the filing of the Plenary Action acted as an implicit concession that Plaintiff had enough information to state an actionable claim.

2. Even if the *Bizzari* line of cases was still good law, Summit concedes that Delaware has always recognized "special circumstances" exceptions. Among others, if a plaintiff has filed a plenary complaint because of "timing pressures" that are "not caused by the plaintiff," the filing of that plenary complaint cannot vitiate the plaintiff's ability to show a proper purpose for a books-and-records inspection.[18] The trial court erred in holding that the introduction of SB 21 was not a special

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[16] *AmerisourceBergen II*, 243 A.3d at 428.

[17] *Id.* at 437.

[18] *CHC Invs.,* 2019 WL 328414, at *3.

circumstance. Among other things, the introduction of SB 21 created timing pressure because Plaintiff (1) could plausibly plead that Grupo Argos was a controller under the then-existing law but (2) would be unable to plead that Grupo Argos was a controller after the law was enacted. And even if filing the Plenary Action operates as an implicit concession that Plaintiff did not need documents to state a claim *under the old law*, that is not a concession that the same is true under the new law.

3. Pursuant to the Access Agreement, the Company agreed that Plaintiff "shall continue to have the same right, power, and ability to enforce the Demand as Stockholder had prior to the closing of the Transaction[.]" The trial court erred in denying Plaintiff books and records because he filed the Plenary Action after closing.

4. Summit has never denied that Plaintiff otherwise has a credible basis to investigate. This Court should reverse and remand, instructing the Court of Chancery that Plaintiff has established a proper purpose and the Court of Chancery should determine the scope of inspection.

STATEMENT OF FACTS

I. Factual Background

1. Grupo Argos Was Summit's Largest Stockholder

On January 12, 2024, Summit combined with Argos North America Corp., the United States operations of Cementos (a subsidiary of Grupo Argos), in a transaction valued at $3.2 billion.[19] In connection with the combination, Grupo Argos received $1.2 billion in cash and Summit stock.[20] At all relevant times thereafter, Grupo Argos controlled about 31% of the Company's voting power.[21]

In connection with the January 2024 combination, the Company and Grupo Argos entered into the Stockholder Agreement, which provided that, so long as Grupo Argos owned more than 25% of the Company's outstanding common stock, Grupo Argos was entitled to nominate three directors to the Company's Board.[22] At all relevant times, Calle and Velásquez were Grupo Argos' director nominees.[23] The Stockholder Agreement also gave Grupo Argos certain consent rights that allowed it

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[19] A0384.

[20] A0394.

[21] A0282.

[22] A0147.

[23] A0217; A0282.

to control the Company's operations so long as Grupo Argos exceeded the 25% ownership threshold.[24]

The Company and Grupo Argos also entered into a restrictive covenant agreement, which imposed a noncompete provision prohibiting Grupo Argos from owning any interest and operating, managing, joining, controlling, or acquiring any business that competed with Summit within the United States and certain parts of Canada.[25] The noncompete had a five-year term and would not expire until January 2029.[26] Relevant here, the Restrictive Covenant Agreement would not terminate upon a sale of the Summit.[27] Therefore, if Summit was sold to a third party, Grupo Argos would not be able to access the United States cement market until the noncompete expired.

2. The Transaction

On September 19, 2024, Quikrete's advisors from Wells Fargo Bank, N.A. contacted the Company's chairman Howard Lance to inform him that Quikrete wanted to speak.[28] The following week, Lance met with Quikrete CEO William R.

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[24] A0154-55.

[25] A0031; A0126-33.

[26] A0031; A0131.

[27] A0031.

[28] A0216.

Magill.[29] Magill stated that "Quikrete was interested in a potential acquisition of Summit and relayed that Quikrete was prepared to submit a formal proposal to acquire Summit for $48.00 per share in cash."[30] Later that day, Quikrete presented its formal offer to Lance.[31] On October 1, 2024, Lance informed the Board of Quikrete's offer and set a Board meeting for October 7, 2024 to discuss it.[32]

On October 4, Summit's lawyers spoke with Grupo Argos' lawyers about Grupo Argos' rights under the Stockholder Agreement and Grupo Argos' director nominees participating in the upcoming Board meeting.[33] Both advisors agreed that Calle, Velásquez, and Irene Moshouris, a purportedly independent director nominated by Grupo Argos, "would depart the meeting of the Summit board of directors after the general terms of the first Quikrete offer were presented and the Summit board of directors was briefed on its fiduciary duties and would not participate during the presentations from Summit's financial advisors[.]"[34]

During the October 7 Board meeting, the Board discussed Quikrete's offer to

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[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] A0217.

[34] *Id.*

acquire the Company.[35] Lance noted that, under the Stockholder Agreement, "Summit was required to inform [Grupo Argos] of the first Quikrete offer and to provide [Grupo Argos] with an opportunity to participate in the potential sale process on the same terms as other potential counterparties."[36]

On October 14, 2024, following discussions between Lance and Magill, Quikrete submitted a second offer, which increased the proposed purchase price from $48.00 to $50.00 per share.[37] On October 21, 2024, the Board met and determined to reject Quikrete's second offer.[38]

On October 24, 2024, Bloomberg reported, for the first time publicly, that Summit was considering a transaction with Quikrete.[39] Later that evening, Summit released a statement confirming that it had held preliminary discussions with a third party regarding a potential transaction.[40]

After public disclosure of the potential Transaction, Wall Street analysts opined that any acquisition of Summit should be in the mid-$50s per share range and

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[35] *Id*.

[36] *Id*.

[37] A0218.

[38] A0219.

[39] A0219.

[40] A0220.

that they did not expect Grupo Argos to support any deal that would result in Grupo Argos not having access to the U.S. market.[41]

On October 26, 2024, Lance and the Company's other senior executives reached out to four other counterparties regarding a potential transaction.[42] Once the Company began reaching out to other parties regarding a potential transaction, Grupo Argos became involved in the negotiations.[43] Thereafter, Grupo Argos' Board representatives and dual-fiduciary directors Velásquez and Calle directly inserted themselves in the Transaction negotiations.[44]

On October 27, 2024, Velásquez called Lance to discuss a potential acquisition of Summit by Quikrete, during which Velásquez made clear that Grupo Argos would not support any sale of the Company unless the Non-Compete Provision was waived.[45]

On October 29, 2024, Quikrete sent the Company a proposed initial draft merger agreement, which contemplated Grupo Argos entering into a voting agreement to vote its Summit shares in favor of the Transaction.[46]

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[41] A0405; A0409; A0416.

[42] A0220.

[43] *Id*.

[44] *Id*.

[45] A0220-21.

[46] A0221.

On November 6, 2024, the Company's lawyers spoke with Grupo Argos' lawyers and informed them that the Company expected that the ultimate buyer of Summit would request a voting agreement from Grupo Argos as a condition to entering into a transaction.[47] Grupo Argos' lawyers responded by emphasizing (i) "the strategic importance to [Grupo Argos] and its board of directors of exposure to the United States cement and aggregates markets" and (ii) "that [Grupo Argos] would have a difficult time supporting any transaction as a stockholder, with or without a voting agreement, that eliminated its exposure to and precluded [Grupo Argos] from re-entering these markets."[48]

On November 10, 2024, Lance spoke with Velásquez, who posed questions about the value being offered by Quikrete and requested to speak directly with Quikrete's management to discuss a voting agreement.[49] Lance explained that Velásquez would have an opportunity to speak with Quikrete's management after Summit's next Board meeting, which was scheduled for November 13, 2024.[50]

Later that day, Lance also told the Company's lawyers that prior to the November 13 Board meeting, he would like to schedule a call between Velásquez,

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[47] A0222.

[48] *Id*.

[49] A0223.

[50] *Id*.

Calle, and Summit's financial advisors to discuss the proposed transaction with Quikrete.[51]

On November 13, 2024, the Board met and authorized Lance to counter Quikrete's offer with $52.50 per share.[52] Lance also provided an overview of his discussions with Magill regarding Quikrete's requirement that Grupo Argos enter into a voting agreement to support the Transaction.[53] Velásquez then explained Grupo Argos' "goal of having a long-term investment providing [Grupo Argos] exposure to the United States market in the form of its current equity position in Summit."[54] Velásquez also noted that Grupo Argos was "grappling with its long-term strategy in the United States and concerns that the sale would eliminate its investment exposure in the United States market with [Grupo Argos] being limited in its ability to re-invest in the United States due to the [Non-Compete Provision]…."[55] Accordingly, Grupo Argos felt it was "very important" to have a conversation with Quikrete regarding relief from the Restrictive Covenant Agreement in light of the request from Quikrete for a voting agreement.[56]

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[51] *Id.*

[52] A0224.

[53] *Id.*

[54] *Id.*

[55] *Id.*

[56] A0224-25.

On November 14, 2024, the Company's lawyers reached out to Grupos Argos' lawyers to notify them of an informal agreement on the $52.50 per share price[57] and that Quikrete's proposal was conditioned on Grupo Argos entering into a voting agreement.[58] Three days later, the lawyers discussed the possibility of Quikrete waiving the Non-Compete Provision and other related provisions under the Restrictive Covenant Agreement in connection with and conditioned on the closing of the proposed Transaction.[59]

The following day, Grupo Argos sent a revised draft of the voting agreement to the Company, which provided, among other things, that Grupo Argos would vote its shares of Company stock in favor of the Transaction, subject to the limitation in the Stockholder Agreement requiring Grupo Argos to vote all shares representing more than 25.01% of the outstanding voting power of Summit common stock in the same proportion of all other votes cast on the matter.[60] The revised draft of the voting agreement also provided that the non-compete and certain related provisions of the Restrictive Covenant Agreement would no longer be in effect following the closing of the proposed Transaction.[61]

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[57] A0225.

[58] *Id*.

[59] *Id*.

[60] The "25.01% Limitation." *Id*.

[61] *Id*.

The next day, Quikrete shared a revised draft of the voting agreement with the Company and Grupo Argos, which reflected, among other things, that Summit would waive the 25.01% Limitation, that Grupo Argos would vote all of its shares of Summit common stock in favor of the transaction, and that, subject to certain conditions, the non-compete and certain related provisions of the Restrictive Covenant Agreement would no longer be in effect following the closing of the proposed transaction.[62] Also on November 19, 2024, Lance attended a dinner with Magill and Velásquez.[63] During dinner, Magill confirmed that, "subject to receipt of a voting agreement from [Grupo Argos], Quikrete was willing to terminate the [Non-Compete Provision] effective at the closing of the [T]ransaction."[64] Velásquez thereafter agreed to support the execution of the voting agreement in favor of the proposed Transaction.[65]

On November 22, 2024, the parties' lawyers held a call to discuss the voting agreement.[66] Quikrete relayed its insistence that Summit waive the 25.01% Limitation.[67] On November 23, 2024, Lance, Velásquez, and Calle discussed the

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[62] A0226.

[63] *Id*.

[64] *Id*.

[65] *Id*.

[66] *Id*.

[67] *Id*.

terms of the voting agreement that Magill had indicated was necessary for Quikrete to proceed with the Transaction.[68] Lance informed Velásquez and Calle that, as requested by Quikrete, "the Summit [B]oard of directors would waive the 25.01% [L]imitation" to enable Grupo Argos to agree to vote all of its shares of Summit common stock in favor of the Transaction.[69] Velásquez and Calle then agreed in principle to enter into a voting agreement with the waiver of the 25.01% Limitation.[70]

On November 24, 2024, the Board approved the Transaction at $52.50 per share, Summit waived the non-compete provision, Grupo Argos agreed to the voting agreement, and Summit and Quikrete publicly announced the Transaction.[71] The Transaction closed on February 10, 2025.[72]

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[68] *Id*.

[69] *Id*.

[70] *Id*.

[71] A0226-27.

[72] A0424.

II. Procedural History

1. *Plaintiff Serves The Demand And The Parties Agree To The Access Agreement*

On January 14, 2025, Plaintiff served the Demand, seeking books and records relating to the Transaction and other related issues.[73]

On January 22, 2025, the Company responded to the Demand with boilerplate objections.[74] The Company stated that it was "willing to negotiate the scope of a reasonable production of certain books and records to resolve the Demand, subject to a mutually-agreeable confidentiality agreement."[75]

On January 29, 2025, Plaintiff and the Company entered into the Access Agreement to preserve Plaintiff's standing to pursue and enforce the Demand.[76] The

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[73] A0100.

[74] A0425.

[75] A0428.

[76] A0097.

Access agreements (sometimes called "standing agreements") are a tool that parties use to avoid the need for stockholders to file placeholder Section 220 complaints prior to the closing of a transaction, in light of the Court of Chancery's decision in *Weingarten v. Monster Worldwide, Inc.* holding "that only those who are stockholders at the time of filing have standing to invoke this Court's assistance under Section 220." 2017 WL 752179, at *5 (Del. Ch. Feb. 27, 2017).

The idea is to "contractually replicate the stockholders' statutory rights under Section 220 and prevent the Company from asserting that the closing of the Transaction extinguished the stockholders' standing to pursue books and records pursuant to their Demands." *In re Zendesk, Inc. Section 220 Litig.*, 2023 WL 5496485, at *7 (Del. Ch. Aug. 25, 2023), *report and recommendation adopted,* (Del. Ch. 2023). Such

Access Agreement gave Plaintiff a contractual right to books and records measured by the scope of what he would have the right to obtain from the Company pursuant to Section 220 as of immediately prior to the closing of the Transaction. Specifically, the Company agreed that "for the period of one year after the execution of [the] Agreement, [Plaintiff] [would] continue to have the same right, power, and ability to enforce the Demand as [he] had prior to the closing of the Transaction," notwithstanding the closing of the Transaction.[77]

The Transaction closed on February 10, 2025.

On February 17, 2025, Senator Townsend introduced SB 21.[78] The initial version of SB 21 did not apply retroactively.[79] And under the then-applicable law, Plaintiff believed that he could state a claim based on the public record.

On February 25, 2025, Plaintiff filed the Plenary Action.[80]

On March 12, 2025, Senator Townsend introduced Senate Substitute 1 for SB 21, which included explicit language that purported to apply SB 21's safe-harbor provisions retroactively unless a plenary breach of fiduciary duty claim had been

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agreements, therefore, benefit all parties and court by seeking to avoid litigation while the parties attempt to resolve Section 220 demands consensually.

[77] A0098 ¶2.

[78] *See* S.B. 21, 153rd Gen. Assemb., Reg. Sess. (Del. 2015).

[79] *Id.*; *see* A0430; A0437.

[80] *See O'Neill v. Grupo Argos S.A. et al.*, C.A. No. 2025-0209-MTZ (Del. Ch.) (Trans. ID 75707999).

filed before February 17, 2025.[81] The General Assembly passed SB 21 in its amended form on March 25, 2025, and Governor Meyer signed it later that evening.

Given the now-retroactive application of the safe-harbor provisions, Plaintiff voluntarily dismissed the Plenary Action the next day[82] and instead sought to use the "'tools at hand' to develop [the] facts further[.]"[83] Plaintiff attempted to engage with the Company and requested the books-and-records sought under his Demand to no avail. The Company refused to produce any documents, including formal board materials that are routinely produced—*e.g.*, Board minutes, presentations, and director and officer questionnaires.[84]

Plaintiff filed this action,[85] asserting two counts: one statutory claim pursuant to Section 220 and a second claim for breach of contract for the Company's breach of the Access Agreement.[86]

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[81] *See* Senate Substitute 1 for S.B. 21, 153rd Gen. Assemb., Reg. Sess. (Del. 2015).

[82] *See O'Neill v. Grupo Argos S.A. et al.*, C.A. No. 2025-0209-MTZ (Del. Ch. Mar. 26, 2025) (Trans. ID 75939741).

[83] *Emps' Ret. Sys. Of Rhode Island v. Facebook, Inc.* ("*Facebook II*"), 2021 WL 529439, at *6 (Del. Ch. Feb. 10, 2021).

[84] *See Hightower v. SharpSpring, Inc.*, 2022 WL 3970155, at *9 (Del. Ch. Aug. 31, 2022) ("[T]his court encourages corporations to produce Formal Board Materials in response to meritorious demands for inspection without forcing stockholders to litigate over them."). After the SB 21 amendments, 8 *Del. C.* § 220(a)(1) defines "[b]ooks and records" to include such formal board materials.

[85] A0024 ("Compl.").

[86] A0097.

Chancellor McCormick's letter assigned the action to Magistrate Loren Mitchell and ordered the parties to meet and confer "to attempt to minimize the scope of disputes presented to the Magistrate."[87] The Chancellor's letter also ordered Summit to "identify any defenses it intends to assert to each category of documents and the location of such document. If documents responsive to any category do not exist, the defendant shall so state. If the defendant objects to inspection on grounds of volume or burden, the defendant shall provide evidence of the volume and burden of documents sought."[88]

Pursuant to the Chancellor's order, the parties met and conferred on June 26, 2025. The Company did not identify any defenses it intends to assert to each category of documents and the location of such document. The Company did not identify any volume or burden objections, nor did it provide any evidence of the volume or burden of documents sought. In its briefing, the Company's sole argument was that Plaintiff's filing of the Plenary Action prevented him from establishing a proper purpose because "[b]y filing the Plenary Action, Plaintiff certified that" he could "state a claim," and thereby "conced[ed] that the books and records he sought in the Demand were no longer necessary."[89]

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[87] Trans. ID 76511509.

[88] *Id.*

[89] A0463.

2. *The Magistrate's Report*

After trial on a paper record, the Magistrate issued a final report on October 1, 2025 by a transcript ruling.[90] The Magistrate ruled for the Company, holding that Plaintiff lacked a proper purpose because Plaintiff had implicitly conceded that he could state an actionable claim by filing the Plenary Action, and recommending that judgment be entered for the Company.

The Magistrate first stated that "[t]his matter comes before this Court on the Plaintiff's request for inspection of books and records pursuant to Section 220...."[91] This was only half-right. In fact, Plaintiff asserted two counts: one statutory claim pursuant to Section 220 and a second claim for breach of contract for the Company's breach of the Access Agreement.[92] The Magistrate did not mention Plaintiff's contract claim under the Access Agreement, even though the Company's contractual obligation to produce books and records was measured by the circumstances "prior to ... closing,"[93] and the Report depended on events that occurred after closing.

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[90] A0007-23 (the "Report").

[91] A0009-10.

[92] *See* A0024 [Compl., caption] ("Verified Complaint for Breach of Contract"); A0026 ¶7 ("The Access Agreement gives Plaintiff a contractual right to enforce the Demand to the same extent as Plaintiff had prior to the closing of the Transaction."); A0048-49 ¶¶77-84 (breach of contract count).

[93] A0098 ¶2.

Next, the Magistrate briefly summarized the Transaction, observing, correctly, that "[i]nitially, Grupo Argos opposed the deal unless a noncompete agreement was waived. The transaction eventually closed in February 2025, with Grupo Argos supporting it after securing the waiver, raising concerns about the fairness of the process and valuation."[94]

The Magistrate then turned to the merits of Plaintiff's Section 220 count. The Magistrate entirely skipped over Plaintiff's argument that the Supreme Court had implicitly overruled the Company's line of cases in *AmerisourceBergen II*. The Report did not discuss, distinguish, or even mention *AmerisourceBergen II*. Instead, the Magistrate listed five cases—all pre-dating *AmerisourceBergen II*—which she read to stand for the proposition that "a stockholder does not act with a proper purpose when seeking to use Section 220 to investigate matters that have already been placed at issue in a plenary derivative action."[95]

Finally, the Magistrate recognized that, in other cases, the Court had recognized that filing a plenary action does not undermine a plaintiff's proper purpose where the plenary action was filed because of "timing pressures" that were not the plaintiff's fault.[96] Yet the Magistrate suggested that Plaintiff here was at fault

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[94] A0010.

[95] A0013-15.

[96] A0016.

for "rushing to file a plenary action" and then not "staying the action" after SB 21 was made retroactive.[97] The Magistrate did not explain why Plaintiff was unreasonable to rely on Senator Townsend's initial assurances that SB 21 would not be made retroactive. Nor did the Magistrate explain how Plaintiff seeking a stay would have made any difference given that the new law gutted Plaintiff's breach of fiduciary duty claim predicated on the theory that Grupo Argos was a controller.

3. *The Vice Chancellor's Decision*

Plaintiff timely noticed exceptions to the Magistrate's Report[98] and the case was reassigned to Vice Chancellor David. After briefing, the Vice Chancellor issued a letter opinion on December 19, 2025.[99] In the Decision, the Vice Chancellor denied Plaintiff's exceptions and adopted the Report.

First, the Vice Chancellor held that "*AmerisourceBergen* did not ... upend well-worn case law explaining that a stockholder who files a plenary lawsuit challenging alleged misconduct has certified that the information he already has is sufficient for his purpose, such that he has no further need for books and records to investigate the same alleged misconduct."[100] The trial court did not offer further

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[97] A0017.

[98] A0555.

[99] Ex. A (the "Opinion").

[100] Ex. A at 9.

support for this conclusion other than a footnote suggesting that “Plaintiff conflates actionability with proper purpose.”[101]

Second, the Vice Chancellor held that this case did not present “special circumstances” justifying an exception to the *Bizzari* rule because “Summit’s supposed delay in producing books and records did not cause Plaintiff to run up against a statute of limitations, prejudicing Plaintiff’s rights.”[102] The trial court found that “[w]hatever ‘pressure’ Plaintiff may have felt to pursue the Plenary Action while legislation was pending, Summit was not responsible for it.”[103] Notably, the trial court did not find that the pressure was *Plaintiff*’s fault, merely that it was not *Summit’s* fault.

Third, the Vice Chancellor held that the facts did not “present special circumstances justifying a new exception to the general rule precluding a stockholder from seeking books and records after filing a plenary suit” because “Plaintiff [purportedly] [did] not explain why a codification of the definition of a controlling stockholder requires further factual investigation into the Merger now,

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[101] *Id.* at n.3.

[102] Ex. A at 10-11.

[103] *Id.* at 11-12.

when he concluded that the public record was sufficient to investigate possible breaches of fiduciary duty previously."[104]

Finally, the Vice Chancellor rejected Plaintiff's argument that the Magistrate erred in failing to analyze the breach of contract count. The trial court held that "[t]his argument was not fairly presented to the Magistrate Judge, and in any event fails on the merits."[105] The Court rejected the argument on the merits, because "[n]owhere in the Standing Agreement did Summit waive its right to argue that Plaintiff lacked a proper purpose for seeking books and records based on his later decision to pursue a plenary action."[106]

Plaintiff noticed a timely appeal.

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[104] *Id.* at 12.

[105] *Id.* at 13.

[106] *Id.* at 14.

ARGUMENT

I. The Trial Court Erred In Refusing To Apply The Credible Basis Test As The Standard By Which To Judge Plaintiff's Demand

A. Question Presented

Where "a stockholder meets [the] low burden of proof from which possible wrongdoing or mismanagement can be inferred, a stockholder's purpose will be deemed proper under Delaware law."[107] *AmerisourceBergen II* "reaffirm[ed] [this] 'credible basis" test as the standard by which investigative inspections under Section 220 are to be judged" and held that a "stockholder need not demonstrate that the alleged mismanagement or wrongdoing is actionable."[108] Did the trial court err in holding that Plaintiff lacked a proper purpose, even if he had a credible basis, on the theory that the filing of the Plenary Action acted as an implicit concession that Plaintiff had enough information to state an actionable claim?

This issue was raised[109] and decided below.[110]

B. Scope of Review

The Court reviews "*de novo* whether a stockholder's stated purpose for demanding inspection under Section 220 is a proper purpose."[111]

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[107] *AmerisourceBergen II*, 243 A.3d at 428.

[108] *Id.* at 437.

[109] A0082-83; A0599-603.

[110] Ex. A at 7-9.

[111] *AmerisourceBergen II*, 243 A.3d at 424.

C. Merits of Argument

This Court has never held that a stockholder loses his proper purpose by filing a plenary action after serving a books-and-records demand but before bringing suit to enforce the demand. In *King v. VeriFone Holdings, Inc.*, this Court "conclude[d] that the Court of Chancery's bright-line rule barring stockholder-plaintiffs from pursuing inspection relief under 8 *Del. C.* § 220 solely because they filed a derivative action first, does not comport with existing Delaware law or with sound policy."[112] The following year, in *Central Laborers Pension Fund v. News Corp.* ("*News Corp. II*"),[113] this Court was given another opportunity to hold that a stockholder plaintiff who files a plenary complaint vitiates any proper purpose. Again, the Court declined.[114]

In *News Corp. I*, the Court of Chancery had held that filing a plenary action "refutes any claim of a proper purpose for [an] inspection demand. ... [B]y filing its [plenary] complaint, [the stockholder] acknowledged—if, for no other reason than to satisfy its lawyers' Rule 11 obligations—that it had sufficient information to support its substantive allegations and its allegations of demand futility ... In short, the stockholder plaintiff who files a Section 220 action immediately after its

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[112] 12 A.3d at 1145.

[113] 45 A.3d 139 (Del. 2012).

[114] *Id.* at 141.

derivative action is acting inconsistently."[115] On appeal, rather than affirm the Court of Chancery's conclusion, this Court decided to resolve the case "on the basis of a different rationale" that was "not addressed" by the Court of Chancery (*i.e.*, that the stockholder had failed to satisfy the form-and-manner requirements).[116]

Here, in holding that Plaintiff could not have a proper purpose because he filed the Plenary Action before seeking to enforce his books-and-records demand, the trial court relied on *News Corp. I* and five other Court of Chancery decisions.[117] One of those decisions rejected the argument that the plaintiff's filing of a plenary action vitiated his proper purpose.[118] Of the remaining decisions, four pre-dated *AmerisourceBergen II* (including two that pre-dated *Verifone*).[119] The fifth[120] was brought by a *pro se* litigant who drafted his papers using generative AI that "cite[d]

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[115] *Cent. Laborers Pension Fund v. News Corp.* ("*News Corp. I*"), 2011 WL 6224538, at *1 (Del. Ch. Nov. 30, 2011).

[116] *News Corp. II*, 45 A.3d at 141.

[117] Ex. A at 7-8.

[118] *Schnatter v. Papa John's Int'l, Inc.*, 2019 WL 194634, at *12–13 (Del. Ch. Jan. 15, 2019), *abrogated on unrelated grounds by Tiger v. Boast Apparel, Inc.*, 214 A.3d 933 (Del. 2019).

[119] *CHC Invs.,* 2019 WL 328414, at *5; *Bizzari*, 2016 WL 4540292, at *6; *News Corp. I*, 2011 WL 6224538, at *2; *Baca v. Insight Enters., Inc.*, 2010 WL 2219715, at *4 (Del. Ch. June 3, 2010); *Taubenfeld v. Marriott Int'l, Inc.*, 2003 WL 22682323, at *3 (Del. Ch. Oct. 28, 2003).

[120] *An v. Archblock, Inc.* ("*Archblock I*"), 2023 WL 7320253 (Del. Ch. Nov. 7, 2023), *report and recommendation adopted,* 2024 WL 1365983 (Del. Ch. Apr. 1, 2024).

false legal authority."[121] The *pro se* stockholder never argued—and, so, the Court of Chancery never considered—how *AmerisourceBergen II* affected the *Bizzari* line of cases.[122]

None of the cases on which the trial court relied survive *AmerisourceBergen II*'s severing of the proper-purpose analysis from actionability. The core premise of each case holding that the filing of a plenary complaint vitiated a stockholder proper purpose was that the stockholder had implicitly conceded that the existing record was sufficient to state an actionable claim:[123]

- *Archblock I*: "When a stockholder files a plenary action challenging the same issues he seeks to investigate through his demand, he "effectively concede[s] that the books and records he seeks are not necessary or essential to his stated purpose of investigating mismanagement or wrongdoing."[124]

- *CHC Investments*: Plaintiff did not have a proper purpose because filing "plenary and Section 220 complaints [is] inherently contradictory. On the one hand, by commencing plenary litigation a plaintiff represents that it has sufficient information to support its allegations. On the other hand, to inspect books and records under Section 220 to support its plenary claims, a stockholder must represent that the information is

[121] *An v. Archblock, Inc.*, 2025 WL 1024137, at *1 (Del. Ch. Apr. 4, 2025).

[122] *Archblock I*, 2023 WL 7320253 (Del. Ch. Nov. 7, 2023).

[123] Other cases had said the same thing. *Amalgamated Bank v. NetApp, Inc.*, 2012 WL 379908, at *3 (Del. Ch. Feb. 6, 2012) ("If the purpose of the Section 220 action is to seek information necessary to meet the pleading requirements in a substantive action, the Plaintiff should, for purposes of economy, and consistent with the requirements of Rule 11, bring the Section 220 action before filing the substantive action.").

[124] *Archblock I*, 2023 WL 7320253, at *3 (cleaned up).

necessary to its plenary claims."[125]

- *Bizzari*: The plaintiff did not have a proper purpose because filing a plenary complaint reflects a certification by counsel that "they possessed sufficient information under Rule 11 to file the complaint without first inspecting books and records."[126]

- *News Corp. I*: "[B]y filing its derivative complaint, Central Laborers acknowledged—if, for no other reason than to satisfy its lawyers' Rule 11 obligations—that it had sufficient information to support its substantive allegations and its allegations of demand futility..."[127]

- *Baca*: The plaintiff did not have a proper purpose because "[b]y filing the Federal Derivative Action, Baca and his counsel certified that they had sufficient facts to pursue the Federal Derivative Action in good faith and in accordance with the applicable pleading standards."[128]

- *Marriott*: The plaintiffs did not have a proper purpose because "[P]laintiffs filed their complaint in January 2003. That filing was a certification under Rule 11 that the plaintiffs had enough information to support their allegations."[129]

After *AmerisourceBergen II*, none of this matters. Where "a stockholder meets [the] low burden of proof from which possible wrongdoing or mismanagement can be inferred, a stockholder's purpose will be deemed proper under Delaware law."[130] Actionability is irrelevant, except "[i]n the rare case in which the stockholder's sole reason for investigating mismanagement or

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[125] *CHC Invs.*, 2019 WL 328414, at *2.

[126] *Bizzari*, 2016 WL 4540292, at *6.

[127] *News Corp.*, 2011 WL 6224538, at *1.

[128] *Baca v*, 2010 WL 2219715, at *3.

[129] *Marriott*, 2003 WL 22682323, at *3.

[130] *AmerisourceBergen II*, 243 A.3d at 428.

wrongdoing is to pursue litigation and a purely procedural obstacle, such as standing or the statute of limitations" renders "that the anticipated litigation will be dead on arrival."[131] Absent those circumstances (not present here), Section 220 defendants cannot rely on "defenses that do not directly bear on the stockholder's inspection rights, but only on the likelihood that the stockholder might prevail in another action."[132] This Court "reaffirm[ed] the 'credible basis' test as the standard by which investigative inspections under Section 220 are to be judged" and confirmed that "[t]he stockholder need not demonstrate that the alleged mismanagement or wrongdoing is actionable."[133]

Here, the trial court did precisely what this Court said it should not. The trial court treated Plaintiff's filing of the Plenary Action as a concession that Plaintiff believed that his complaint was likely actionable, then treated that concession as barring a finding that Plaintiff had a proper purpose, even if he had a credible basis to investigate mismanagement. The trial court thereby credited a defense based on "the likelihood that the stockholder might prevail in another action" and rejected "the 'credible basis' test as the standard by which investigative inspections under Section 220 are to be judged." This runs afoul of *AmerisourceBergen II*.

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[131] *Id*. at 437.

[132] *Id.*

[133] *Id*.

Facebook II expands on this point. There, the defendant argued that "Plaintiff's own trumpeting of confidence that it could survive a motion to dismiss in a plenary action by pleading the facts it already possesses, reveal[ed] that Plaintiff ha[d] received more than 'sufficient' information to fulfill its stated purposes for inspection."[134] Vice Chancellor Slights rejected that argument, holding that the plaintiff did "not forfeit its statutory inspection rights by candidly describing the strength of its potential claims" and it should not "be denied use of the 'tools at hand' to develop those facts further so that it can well-plead its claims in a complaint, particularly a derivative complaint."[135] That is the correct analysis after *AmerisourceBergen II* and this Court should adopt it here.

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[134] *Facebook II*, 2021 WL 529439, at *6.

[135] *Id.*

II. The Trial Court Erred In Refusing To Hold That These Were Special Circumstances

A. Question Presented

Even if the *Bizzari* line of cases was still good law, Delaware has always recognized "special circumstances" exceptions.[136] Among others, if a plaintiff has filed a plenary complaint because of "timing pressures" that are "not caused by the plaintiff," the filing of that plenary complaint cannot vitiate the plaintiff's ability to show a proper purpose for a books-and-records inspection.[137] The introduction of SB 21 created timing pressure because (1) Plaintiff could plausibly plead that Grupo Argos was a controller under the then-existing law but (2) Plaintiff would be unable to plead that Grupo Argos was a controller after the law was enacted. Did the trial court err in holding that the introduction of SB 21—and the later amendment making it retroactive—was not a special circumstance?

This issue was raised[138] and decided below.[139]

B. Scope of Review

The Court's review of a proper-purpose analysis is *de novo*.[140]

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[136] A0604.

[137] *CHC Invs.*, 2019 WL 328414, at *3.

[138] A0084-87; A0604-613.

[139] Ex. A at 10-13.

[140] *AmerisourceBergen II*, 243 A.3d at 424.

C. Merits of Argument

Even if the *Bizzari* line of cases were still good law, this Court has "conclude[d] that [a] ... bright-line rule barring stockholder-plaintiffs from pursuing inspection relief under 8 *Del. C.* § 220 solely because they filed a derivative action first, does not comport with existing Delaware law or with sound policy."[141] *VeriFone* remains binding law, which means that, even before *AmerisourceBergen II*, Delaware law required that "in special circumstances, Delaware courts [should] enforce[] a stockholder's Section 220 rights notwithstanding the stockholder's [prior] plenary complaint."[142]

Below, the Company conceded that what it called "the *Khanna*[[143]] Exception," permits a Section 220 inspection after "a plaintiff files a plenary action while its Section 220 claim is pending due to a concern that the substantive claims would be time-barred because of delay[.]"[144] In *Khanna*, the stockholder plaintiff served a 220 demand several months ahead of an expiring statute of limitations, then filed a plenary action 62 days later—while his 220 demand was pending—to avoid

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[141] *VeriFone*, 12 A.3d at 1145.

[142] *CHC Invs.*, 2019 WL 328414, at *3 (cleaned up).

[143] *Khanna v. Covad Commc'ns Grp., Inc.*, 2004 WL 187274 (Del. Ch. Jan. 23, 2004).

[144] A0476.

being time-barred.[145] The Court of Chancery held that this time-pressured filing of a plenary action did not undermine the stockholder's ability show a proper purpose.[146]

Here, the trial court refused to apply *Khanna* because "unlike in *Khanna*, Summit's supposed delay in producing books and records did not cause Plaintiff to run up against a statute of limitations, prejudicing Plaintiff's rights."[147] But as the Court of Chancery explained in *CHC Investments*, *Khanna* applies outside the context of an impending statute of limitations defense. It stands for the proposition that where, as here, a plaintiff has filed a plenary complaint because of "timing pressures" that are "not caused by the plaintiff," the filing of that plenary complaint cannot vitiate the plaintiff's ability to show a proper purpose for a books-and-records inspection.[148]

The *Khanna* plaintiff's need to file a plenary action to preserve his claim is strikingly similar to Plaintiff's actions here. Forty-two days after serving his books-and-records demand and having received zero documents from the Company, Plaintiff filed the Plenary Action. He did so to get ahead of SB 21, which its Senate sponsor was, at the time, insisting would not be retroactive to claims pending before

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[145] *Khanna*, 2004 WL 187274, at *3.

[146] *Id.* at *4.

[147] Ex. A at 11.

[148] *CHC Invs.*, 2019 WL 328414, at *3.

enactment. The trial court found that "[w]hatever 'pressure' Plaintiff may have felt to pursue the Plenary Action while legislation was pending, Summit was not responsible for it."[149] Notably, the trial court did not find that the pressure was *Plaintiff*'s fault, merely that it was not *Summit's* fault. *CHC Investments* says that all that is required is that the pressure is not the plaintiff's fault.[150] Yet the trial court refused to apply the exception.

This was reversible error. The *Khanna* plaintiff bore most of the blame for the time crunch, having sat on his rights for years before serving a 220 demand.[151] Here, by contrast, Plaintiff had nothing to do with SB 21. Rather, "after meeting with Silicon Valley firms and Meta, which had announced that it was considering leaving Delaware, the Governor asked representatives of Richards Layton and Morris Nichols to craft the first version of [SB 21] in secret."[152] This was a bolt from the blue that the drafters hid even from the Corporation Law Council.[153] Neither Plaintiff

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[149] Ex. A at 11-12.

[150] *CHC Invs.*, 2019 WL 328414, at *3.

[151] *Khanna*, 2004 WL 187274, at *3.

[152] Marcel Kahan and Edward B. Rock, *The New Political Economy of Delaware Corporate Lawmaking*, European Corporate Governance Institute, Law Working Paper 879/2025 (October 2025), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5489066 at 29.

[153] *See* Dorothy Lund and Eric Talley, *Should Corporate Law Go Private,* European Corporate Governance Institute, Law Working Paper 877/2025 (September 2025), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5534959 at 1 ("Over Valentine's weekend of 2025, a fierce Nor'easter buffeted the Mid-Atlantic coast,

nor his counsel were part of the process that led to SB 21 and they cannot be faulted for the scramble that resulted from a "legislative process [that] was fast, opaque, and dominated by actors with a stake in reversing the court's holdings."[154]

The Company concedes that "special circumstances" permit a plaintiff who has filed a plenary action to later seek documents through Section 220.[155] The Company did not (and could) dispute that SB 21:

- Was "the most significant single-year revision of Delaware's corporate code since at least 1967[,]"[156]
- Represented "a wholesale repudiation of Delaware's common law approach to [corporate] lawmaking[,]"[157]
- Was a "wholesale rejection [of] the Delaware Supreme Court's work

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driving all but the hardiest weekend warriors indoors. Within the Delaware offices of Richards, Layton & Finger LLC, however, the clouds were all silver lining to a cadre of attorneys and scriveners furiously at work. Their objective? To craft an unprecedented realignment of Delaware's General Corporate Law[.]").

[154] Charles Whitehead, *Delaware's Agency Problem* (Aug. 4, 2025), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5380168 at 35.

[155] A0476-77 (citing *VeriFone*, 12 A.3d at 1150 and *Khanna*, 2004 WL 187274, at *4–5).

[156] Eric Talley, Sarath Sanga, and Gabriel Rauterberg, *Delaware Law's Biggest Overhaul in Half a Century: A Bold Reform – or the Beginning of an Unraveling?*, CLS BLUE SKY BLOG (Feb. 18, 2025), https://clsbluesky.law.columbia.edu/2025/02/18/delaware-laws-biggest-overhaul-in-half-a-century-a-bold-reform-or-the-beginning-of-an-unraveling/.

[157] Ann Lipton, *Delaware Decides Delaware Law Has No Value*, BUSINESS LAW PROF BLOG (Feb. 17, 2025), https://www.businesslawprofessors.com/2025/02/delaware-decides-delaware-law-has-no-value/.

and the common law[;]"[158]

- "Overturn[ed] and replace[d] a substantial body of Delaware caselaw[,]"[159] and
- "[D]eviate[d] from Delaware's traditional attitude toward the work of the state's corporate law courts[.]"[160]

The Company does not—and cannot—deny that SB 21 "was not retroactive" when Plaintiff filed the Plenary Action,[161] meaning that Plaintiff reasonably believed he could avoid the risks posed by SB 21 by filing before it was enacted.

Below, the Vice Chancellor stated that "Plaintiff [purportedly] [did] not explain why a codification of the definition of a controlling stockholder requires further factual investigation into the Merger now, when he concluded that the public record was sufficient to investigate possible breaches of fiduciary duty previously."[162] Respectfully, this is not accurate. Below, Plaintiff explained the problem clearly:

> In the Plenary Action, Plaintiff alleged that Grupo Argos owned 31% of the Company's stock, was entitled to nominate three directors to the Board, and held certain governing rights. Under the law that governed

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[158] Brian JM Quinn, *Just a little adjustment?*, M&A LAW PROF BLOG (Feb. 28, 2025), https://lawprofessors.typepad.com/mergers/2025/02/just-a-little-adjustment.html.

[159] Lucian Bebchuk, *Delaware: The Empire Strikes Back*, HARVARD L. SCH. FORUM ON CORP. GOVERNANCE (Mar. 4, 2025), https://corpgov.law.harvard.edu/2025/03/04/delaware-the-empire-strikes-back/.

[160] *Id.*

[161] *In re Aspen Tech., Inc., Section 220 Litig.*, 2025 WL 2828269, at *6 (Del. Ch. Oct. 6, 2025) ("Section 220 was not retroactive when Elliott served its demand.").

[162] Ex. A at 12.

> at the time, these facts would likely have established Grupo Argos as the Company's controlling stockholder. Grupo Argos' non-ratable benefit (in the form of the waiver of the Non-Compete Provision) and the lack of a majority-of-the-minority condition for approval of the Transaction would have, thus, made the Plenary Action non-dismissible. Then the law changed.
>
> ...
>
> [T]he Company admit[s] the obvious: 'Grupo Argos does not meet the definition of 'controlling stockholder' set forth in Section 144(e),' as amended by Senate Bill 21, because it owned slightly less than one-third of the Company's outstanding stock. As amended, Section 144(d)(4) now states that '[n]o person shall be deemed a controlling stockholder unless such person satisfies the criteria' of Section 144(e). And Sections 144(a)–(c) rewrite Delaware law to provide that transactions that are not 'a controlling stockholder transaction constituting a going private transaction' can be cleansed in the absence of a majority-of-the-minority vote.
>
> At most, Plaintiff filing the Plenary Action in February 2025 is evidence that he believed he had enough information under the law that then applied. But that is not the law today, and it does not mean that Plaintiff has conceded that he has enough information today.[163]

Even if the Court believes that these circumstances are meaningfully distinguishable from *Khanna*, they are surely still "special."

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[163] A0606-07.

III. The Access Agreement Gave Plaintiff The Same Power To Enforce The Demand That He Had At Closing; The Trial Court Erred In Finding That Post-Closing Events Deprived Plaintiff of a Proper Purpose

A. Question Presented

In Count II, Plaintiff asserts the Company breached the Access Agreement.[164] Pursuant to the Access Agreement, the Company agreed that Plaintiff "shall continue to have the same right, power, and ability to enforce the Demand as Stockholder had prior to the closing of the Transaction[.]" The Transaction closed on February 10, 2025. Did the trial court err in denying Plaintiff books and records based on Plaintiff filing the Plenary Action on February 25, 2025?

This issue was raised[165] and decided below.[166]

B. Scope of Review

The Court "review[s] questions of contract interpretation *de novo*."[167]

C. Merits of Argument

1. The Court Can Consider The Argument

The Vice Chancellor held that "this argument was not fairly presented to the Magistrate Judge."[168] That was error. Plaintiff's complaint pled a breach-of-contract

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[164] A0048-49.

[165] A0024; A0061; A0076-77; A0518; A0597-98.

[166] Ex. A at 13-14.

[167] *GMG Capital Invs., LLC v. Athenian Venture Partners I, L.P.*, 36 A.3d 776, 779 (Del. 2012).

[168] Ex. A at 13.

count.[169] Plaintiff's briefing before the Magistrate argued that "the Company has refused to ... honor the Access Agreement,"[170] relied on the same contractual language,[171] and cited *Zendesk* where the Court held that the "result [was] the same" as either "a matter of contract or statutory entitlement (or both)" in ordering an additional production.[172] Plaintiff then highlighted the same contractual language at oral argument.[173] There was no waiver.[174]

But even if Plaintiff had not made the argument to the Magistrate, this Court must consider it because the Vice Chancellor decided the question on the merits. In its recent decision in *Tesla*, this Court reversed the remedy ordered by the Court of

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[169] *See* A0024 [Compl., caption] ("Verified Complaint for Breach of Contract"); A0026 ¶7 ("The Access Agreement gives Plaintiff a contractual right to enforce the Demand to the same extent as Plaintiff had prior to the closing of the Transaction."); A0048-49 ¶¶77-84 (breach of contract count).

[170] A0061.

[171] A0076-77 ("Specifically, under the terms of the Access Agreement, the Company agreed that 'for the period of one year after the execution of [the] Agreement, [Plaintiff] [would] continue to have the same right, power, and ability to enforce the Demand as [he] had prior to the closing of the Transaction,' notwithstanding the closing of the Transaction.").

[172] *In re Zendesk, Inc. Section 220 Litig.*, 2023 WL 5496485, at *7 n.76 (Del. Ch. Aug. 25, 2023) (cited in Plaintiff's PTB at 23 n.105).

[173] A0518 ("Shortly after that, plaintiff and the company entered into the access agreement, which gives plaintiff a contractual right to enforce the demand to the same extent that plaintiff had prior to the closing of the transaction.").

[174] Indeed, the Company admitted in its briefing before the Vice Chancellor that "[t]he arguments in Plaintiff's Opening Brief are almost identical to the arguments he made in his pre-trial briefing and at trial" before the Magistrate. A0642 n.77.

Chancery in reliance on an argument that the defendants had "not addressed in the main post-trial briefs, [made only] a cursory reference [to] in a post-trial opening submission, and was [first] raised in a supplemental submission directed at unrelated issues."[175] The Court reasoned that "where, as here, the trial court has addressed in its decision the issues raised on appeal, the arguments on appeal are not waived."[176] That logic applies foursquare here.

2. The Court Erred In Its Interpretation of The Contract

The trial court was wrong on the merits. The Magistrate did not analyze Plaintiff's breach of contract claim and the Vice Chancellor simply stated that "[n]owhere in the Standing Agreement did Summit waive its right to argue that Plaintiff lacked a proper purpose for seeking books and records based on his later decision to pursue a plenary action."[177]

That is not a reasonable reading of the contract. "Delaware is a contractarian state that holds parties' freedom of contract in high regard."[178] "Where no ambiguity exists, the contract will be interpreted according to the ordinary and usual meaning

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[175] *In re Tesla, Inc. Deriv. Litig.*, 2025 WL 3689114, at *10 (Del. Dec. 19, 2025).

[176] *Id.*

[177] Ex. A at 14.

[178] *Thompson St. Cap. Partners IV, L.P. v. Sonova U.S. Hearing Instruments, LLC*, 340 A.3d 1151, 1165–66 (Del. 2025) (cleaned up).

of its terms."[179] Here, there was no ambiguity. The contract provided that: "Stockholder shall continue to have the same right, power, and ability to enforce the Demand as Stockholder had **prior to the closing** of the Transaction."[180] At the closing of the Transaction, Plaintiff had not filed the Plenary Action, so it was plain error for the trial court to look to post-closing events in evaluating the scope of Plaintiff's contractual right.[181]

Zendesk, cited by the trial court,[182] does not require a different result. The "result [was] the same" for both a contractual and statutory analysis *under the specific facts of that case* because the defendant was not making any argument based on a change in circumstances after the transaction closed.[183] *Zendesk* did not make a sweeping pronouncement that the results would always be the same in each and every case involving an access agreement. Nor did it hold that the actual language of an access agreement is irrelevant.

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[179] *Origis USA LLC v. Great Am. Ins. Co.*, 345 A.3d 936, 952 (Del. 2025) (cleaned up).

[180] A0098 (emphasis added).

[181] Indeed, under the logic of *Weingarten*, 2017 WL 752179, at *5, the sole focus must be Plaintiff's pre-closing inspection rights.

[182] Ex. A at 13 n.6.

[183] *Zendesk*, 2023 WL 5496485, at *7 n.76.

IV. Plaintiff Otherwise Has A Credible Basis

A. Question Presented

"To obtain books and records, a stockholder must show, by a preponderance of the evidence, a credible basis from which the Court of Chancery can infer there is possible mismanagement or wrongdoing warranting further investigation. The stockholder need not demonstrate that the alleged mismanagement or wrongdoing is actionable."[184] Summit has never denied that Plaintiff has a credible basis. Has Plaintiff stated a proper purpose?

This issue was raised below.[185] The Court of Chancery did not reach the question.

B. Scope of Review

The Court's review of a proper-purpose analysis is *de novo*.[186]

C. Merits of Argument

Plaintiff has a credible basis to investigate. The Company has never argued otherwise. The investigation of potential breaches of fiduciary duty and/or corporate mismanagement, wrongdoing, or waste is a proper purpose under Section 220.[187] "To inspect documents for the purpose of investigating mismanagement or

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[184] *AmerisourceBergen II*, 243 A.3d at 437.

[185] A0087-91; A0599-613.

[186] *AmerisourceBergen II*, 243 A.3d at 424.

[187] *Id.* at 433.

wrongdoing, a stockholder must present some evidence to suggest a credible basis from which a court can infer that mismanagement or wrongdoing may have occurred."[188] This Court "has repeatedly described the credible basis standard as the lowest possible burden of proof under Delaware law."[189]

A "conflicted transaction" is, alone, enough to provide a credible basis for investigation.[190] Here, there are multiple reasons to justify an investigation of this conflicted transaction. As set forth above, the Transaction provided significant non-ratable benefits to Grupo Argos through the waiver of the non-compete, which was a key deal point.[191] This created a conflict for Grupo Argos' dual-fiduciary board

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[188] *Pettry v. Gilead Scis., Inc.*, 2020 WL 6870461, at *10 (Del. Ch. Nov. 24, 2020) (cleaned up).

[189] *Roberta Ann K.W. Wong Leung Revocable Tr. v. Amazon.com, Inc.*, 2025 WL 2104036, at *8 (Del. July 28, 2025) (cleaned up).

[190] *Donnelly v. Keryx Biopharmaceuticals, Inc.*, 2019 WL 5446015, at *5 (Del. Ch. Oct. 24, 2019) ("Plaintiff has met his burden to point to some evidence sufficient to imply that this was a conflicted transaction investigation of which is a proper purpose."); *Bucks Cnty. Emps.' Ret. Fund v. CBS Corp.*, 2019 WL 6311106, at *7 (Del. Ch. Nov. 29, 2019) (evidence that controller obtained non-ratable benefit constituted "some evidence of possible wrongdoing"); *Lavin v. W. Corp.*, 2017 WL 6728702, at *13 (Del. Ch. Dec. 29, 2017) ("Lavin presented some evidence from which the Court can infer that the directors and high-level officers had financial incentives to approve a sale of the Company even if a sale of its segments offered more value. ... From this evidence, there is a credible basis to infer that the directors faced two options—a sale of the Company as a whole or a more valuable sale of its segments—and they pursued the less valuable option that provided benefits to them that were not enjoyed by the other shareholders.").

[191] A0222-27.

members, Velásquez and Calle. The record shows that the Board knew it:[192] the dual-fiduciary directors were asked to "depart the meeting of the Summit board of directors after the general terms of the first Quikrete offer were presented."[193] Yet the public record also shows that Velásquez and Calle were intimately involved in the negotiations.[194]

There is a credible basis to investigate whether Velásquez and Calle breached their fiduciary duties by "participat[ing] in the Transaction" while "laboring under the inherent conflict of being a dual fiduciary."[195] Similarly, there is a credible basis to investigate whether Grupo Argos aided-and-abetted these breaches. "A director's knowledge and participation in a breach may be imputed to a non-fiduciary entity for which that director also serves in a fiduciary capacity."[196]

Thus, the Court should hold that Plaintiff has established a proper purpose and remand to the Court of Chancery to determine the scope of inspection.

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[192] *Compare with Klein v. H.I.G. Cap., L.L.C.*, 2018 WL 6719717, at *15 (Del. Ch. Dec. 19, 2018) ("The inference that the HIG Share Sale had unique value to, and posed a conflict for, HIG is bolstered by the fact that HIG's representative on the Board at the time (Lozow) abstained from voting on the Transactions.").

[193] A0217; A0220; A0223.

[194] A0220.

[195] *In re Match Grp., Inc. Derivative Litig.*, 2024 WL 4372313, at *5 (Del. Ch. Oct. 2, 2024).

[196] *Carr v. New Enter. Assocs., Inc.*, 2018 WL 1472336, at *16 (Del. Ch. Mar. 26, 2018).

Conclusion

The Court should reverse and remand to the Court of Chancery, instructing the Court of Chancery that Plaintiff has established a proper purpose and the Court of Chancery should determine the scope of inspection.

Dated: March 4, 2026

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