EFiled: Mar 30 2026 04:18PM EDT
Filing ID 78899659
Case Number 23,2026

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

APPELLEE'S ANSWERING BRIEF

OF COUNSEL:
J. Timothy Mast
Mary M. Weeks
Adam Dixon
TROUTMAN PEPPER LOCKE LLP
600 Peachtree Street NE, Suite 3000
Atlanta, GA 30308
Telephone: (404) 885-3000
tim.mast@troutman.com
mary.weeks@troutman.com
adam.dixon@troutman.com

Douglas D. Herrmann (#4872)
Cassandra L. Thompson (#6937)
TROUTMAN PEPPER LOCKE LLP
Hercules Plaza, Suite 1000
1313 Market Street, PO Box 1709
Wilmington, DE 19899-1709
Telephone: (302) 777-6500
douglas.herrmann@troutman.com
cassandra.thompson@troutman.com

Counsel for Defendant-Below, Appellee Summit Materials, Inc.

Dated: March 30, 2026

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF CITATIONS

Page(s)

Cases

Statutes

Other Authorities

NATURE OF THE PROCEEDINGS

Appellant Michael O'Neill ("Plaintiff") made the choice to file a plenary action without using the "tools at hand" to investigate and develop his claims in the first instance.[1] Apparently, that choice did not pan out as Plaintiff anticipated. But Plaintiff's predicament is by no means unique—this is a commonplace scenario and does not give Plaintiff *carte blanche* to retroactively seek the very books and records that he ***voluntarily*** chose to forego by filing a plenary suit to, in Plaintiff's own words, "get ahead of SB 21."[2]

When SB 21 was first introduced, Plaintiff had already served a books and records demand ("Demand") that sought to investigate Summit's merger with Quikrete ("Merger"), which Plaintiff contended was a controlling stockholder transaction.[3] Plaintiff supposedly feared that SB 21's proposed changes to 8 *Del. C.* § 144 ("Section 144") would negatively impact his potential plenary claims, so he rushed into court before SB 21's enactment.[4] In so doing, Plaintiff certified that he

---

[1] *See Lavin v. W. Corp.*, 2017 WL 6728702, at *9, *10 n.82 (Del. Ch. Dec. 29, 2017).

[2] Dkt. 13 ("Opening Brief" or "OB") at 37.

[3] A0100–110. Appellee Summit Materials, Inc. is referred to herein as "Summit," and Quikrete Holdings, Inc. is referred to herein as "Quikrete."

[4] OB at 2–3; A0024–50 ("220 Complaint" or "220 Compl.").

had all the information he needed to bring his plenary suit, without pursuing his Demand.[5]

That choice did not turn out as Plaintiff expected. As enacted, SB 21's changes to Section 144 ended up applying retroactively to Plaintiff's then-pending Plenary Action.[6] Believing that Section 144's new controlling stockholder definition would doom his claims, Plaintiff dismissed his Plenary Action ***just one day after*** SB 21's enactment.[7]

Over three months later, Plaintiff filed the 220 Action and sought the very documents he chose to forego when he filed the Plenary Action.[8] Both the Magistrate who presided over the Section 220 trial and the Vice Chancellor who overruled Plaintiff's exceptions to the Magistrate's final report (A0007–23 ("Final Report")) came to the same conclusion. Both held that Plaintiff forfeited his proper purpose when he elected to file the Plenary Action instead of pursuing his Demand.[9]

---

[5] *See, e.g.*, *Baca v. Insight Enters., Inc.*, 2010 WL 2219715, at *3–4, *6 (Del. Ch. June 3, 2010); *Bizzari v. Suburban Waste Servs., Inc.*, 2016 WL 4540292, at *6 (Del. Ch. Aug. 30, 2016).

[6] *See* Laws of Del., vol. 85 ch. 6 (2025) (session law adopting SB 21). The action captioned *O'Neill v. Grupo Argos S.A., et al*., C.A. No. 2025-0209-MTZ (Del. Ch.) is referred to herein as the "Plenary Action."

[7] B0001–2.

[8] A0024–50. The action below, captioned *O'Neil v. Summit Materials, Inc.*, C.A. No. 2025-0695-LM (Del. Ch.) is referred to herein as the "220 Action." 8 *Del. C.* § 220 is referred to herein as "Section 220."

[9] A0013–21; OB Ex. A at 6–14.

As the Court of Chancery acknowledged, with two narrow exceptions, stockholders are generally precluded "from seeking books and records after filing a plenary suit."[10] The Court of Chancery cited cases such as *Bizzari* in support of this general rule.[11] Plaintiff, however, argues that the Court of Chancery erred in applying *Bizzari*, and asserts that the *Bizzari* line of authority was overruled by this Court in *AmerisourceBergen II.*[12]

Plaintiff is incorrect. In *AmerisourceBergen II*, this Court merely reaffirmed the credible basis standard and clarified that stockholders can generally demonstrate a proper purpose to investigate wrongdoing even if the conduct they seek to investigate is not actionable.[13] *AmerisourceBergen II* does not give stockholders free reign to rush into court, certify that they have the books and records they need to state a claim, and then contradict those certifications with impunity by later seeking books and records they earlier certified were unnecessary.[14]

---

[10] OB Ex. A at 12; A0013–15.

[11] OB Ex. A at 6–8; A0013–15.

[12] OB at 28–34; *see also AmerisourceBergen Corp. v. Lebanon Cty. Emps.' Ret. Fund*, 243 A.3d 417 (Del. 2020) ("*AmerisourceBergen II*").

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

[14] *See id; see also An v. Archblock, Inc.*, 2023 WL 7320253, at *3–5 (Del. Ch. Nov. 7, 2023) (citing and applying the general rule in *Bizzari* nearly three years after this Court issued its decision in *AmerisourceBergen II*), *report and recommendation adopted*, 2024 WL 1365983 (Del. Ch. Apr. 1, 2024).

Plaintiff next asserts that the Court of Chancery erred in concluding that no special circumstances apply that operate as an exception to the general rule that a stockholder forfeits his proper purpose once he files a plenary suit.[15] The first of these exceptions, recognized by this Court in *King v. Verifone Holdings, Inc.* ("*King* Exception"), allows a stockholder to pursue a books and records demand if his plenary action has been dismissed by a court without prejudice and with leave to amend.[16] For the *King* Exception to apply, there must be judicial action.[17] As the Court of Chancery concluded, here, Plaintiff voluntarily dismissed his Plenary Action, thus, ensuring that the *King* Exception could not apply.[18] In addition, Plaintiff fails to argue that the *King* Exception applies in his Opening Brief and has, therefore, waived the issue.[19]

The second exception applies when the statute of limitations is about to run on a plaintiff's plenary claims and the Section 220 defendant has refused to permit

---

[15] *See* OB at 35–41.

[16] 12 A.3d 1140, 1150–52 (Del. 2011).

[17] *CHC Invs., LLC v. FirstSun Cap. Bancorp*, 2019 WL 328414, at *4–5 (Del. Ch. Jan. 24, 2019).

[18] OB Ex. A at 11. Plaintiff failed to make any meaningful argument that the *King* Exception applied in his pre-trial briefing, *see* A0080–87, A0500–06, and made only a halfhearted attempt to do so in his exceptions briefing, *see* A0595–96, A0610.

[19] *See* Supr. Ct. R. 14(b)(vi)(A)(3); *Emerald P'rs v. Berlin*, 726 A.2d 1215, 1224 (Del. 1999).

inspection ("*Khanna* Exception").[20] Plaintiff fails to identify a single case in which any Delaware court has ever applied the *Khanna* Exception to allow a plaintiff who already filed a plenary action to later seek books and records because of external timing pressures ***other than*** the running of a statute of limitations/laches.[21]

Although Plaintiff could not control the enactment of SB 21, many plaintiffs are faced with timing pressures that they did not cause. Plaintiff is surely not the first litigant to encounter such circumstances, as unforeseen developments happen all the time that can negatively impact a plaintiff's case. If the *Khanna* Exception applied every time a plaintiff faced timing pressures (real or perceived) that were not of his own making, the exceptions would swallow the rule, and stockholders would have no incentive to use the "tools at hand" to develop their claims before filing plenary suits.[22] That is not the law, and the Court of Chancery correctly held that the *Khanna* Exception does not apply.[23]

Nor, as the Court of Chancery correctly held, is there anything about this 220 Action that somehow justifies the creation of a new, third exception.[24] SB 21's

---

[20] *See CHC*, 2019 WL 328414, at *3; *Khanna v. Covad Commc'ns Grp., Inc.*, 2004 WL 187274, at *4–5 (Del. Ch. Jan. 23, 2004).

[21] *See generally* OB.

[22] *See CHC*, 2019 WL 328414, at *2–3, 5; *Baca*, 2010 WL 2219715, at *5–6.

[23] OB Ex. A at 11–12; A0016–17.

[24] OB Ex. A at 12–13; A0018–20.

retroactive effect does not make this case unique in any way. Plaintiff made strategic choices based on the information available to him at the time, and those choices did not pan out as Plaintiff expected or hoped. That happens every day. It is not a reason to turn Delaware law on its head, and encourage stockholders to sue first, and ask questions later, secure in the knowledge that Section 220 will always be unconditionally available as a backstop.[25]

In a final effort to resurrect his long-forfeited proper purpose, Plaintiff argues that the Court of Chancery erred because it declined to hold that the parties' Access Agreement[26] gives him the right to pursue books and records despite his first-filed Plenary Action.[27] As a threshold matter, the Vice Chancellor did not abuse her discretion in holding that Plaintiff waived this argument by failing to present it to the Magistrate.[28] Second, and more significantly, the Court of Chancery correctly concluded that this argument fails on its merits.[29] The Access Agreement does nothing more than preserve Plaintiff's post-Merger standing to pursue his Demand.[30]

---

[25] A0020 ("To create a special circumstance for this matter would expand Section 220 beyond its intended bounds and effectively transform it into a tool of convenience, rather than a limited right tied to proper stockholder purposes."); *see also CHC*, 2019 WL 328414, at *2–3; *Baca*, 2010 WL 2219715, at *5–6.

[26] *See* A0097–99 ("Access Agreement").

[27] *See* OB at 42–45.

[28] OB Ex. A at 13.

[29] *Id.* at 13–14.

[30] A0097–98 §§ 1–2.

It does not prevent Summit from asserting that Plaintiff's post-Merger actions—*i.e.*, filing the Plenary Action—summarily negated his proper purpose for inspection.[31]

Because the Court of Chancery correctly concluded that Plaintiff's decision to file the Plenary Action nullified his proper purpose, the law compels no inspection of books and records.[32] Consequently, the rulings of the Court of Chancery should be affirmed.

[31] A0097–98 §§ 1–2.

[32] OB Ex. A at 10–14; A0020–21.

SUMMARY OF ARGUMENT

1. Denied. As the Court of Chancery correctly concluded, this Court's decision in *AmerisourceBergen II* held that the question of whether a stockholder has established a proper purpose to investigate wrongdoing does not depend upon whether the claims he seeks to investigate are actionable. *AmerisourceBergen II* decidedly did not overrule *Bizzari*. Nor did it give stockholders the right to hastily file plenary actions, knowing that Section 220 will always be available to rescue them from the consequences of their own decisions if rushing into court does not result in a favorable outcome.

2. Denied. The Court of Chancery did not err by concluding that: (1) Plaintiff's 220 Action does not fit within the *King* Exception or the *Khanna* Exception; and (2) Plaintiff fails to demonstrate that a new, third exception should be created for the first time in nearly fifteen years. On appeal, Plaintiff does not even attempt to argue that the *King* Exception applies and has, therefore, waived any such argument. In any case, the *King* Exception cannot apply because Plaintiff dismissed his Plenary Action before any judicial action occurred. Nor does the *Khanna* Exception apply. Plaintiff's attempt to broaden the *Khanna* Exception to encompass a vast and broad range of perceived timing pressures that Section 220 plaintiffs may face—even apparently based on a plaintiff's subjective perceived threat of a potential timing pressure—is unavailing. Simply, Plaintiff's position

threatens to allow the exceptions to swallow the rule. Likewise, Plaintiff fails to demonstrate any grounds for a new exception to be created. Here, Plaintiff and his counsel made the deliberate and tactical choice to "get ahead of SB 21."[33] Plaintiff is stuck with the consequences, even if subsequent events did not turn out as he expected. There is nothing remarkable about Plaintiff's recent regret over his past litigation choices given the benefit of hindsight.

3. Denied. The Court of Chancery did not abuse its discretion in concluding that Plaintiff waived his Access Agreement claim because he did not fairly present it to the Magistrate. In any event, the Court of Chancery did not err in holding that the Access Agreement preserved Plaintiff's post-Merger standing to pursue the Demand, while still allowing Summit to argue that Plaintiff's decision to file the Plenary Action negated his proper purpose for inspection.

4. Denied. Because Plaintiff no longer possesses a proper purpose, no inspection of books and records should be compelled.

[33] OB at 37.

STATEMENT OF FACTS

A. The Section 220 Books and Records Demand

On November 24, 2024, Summit entered into a merger agreement pursuant to which Summit would be acquired by Quikrete.[34] In connection with this impending Merger, Plaintiff served his Section 220 Demand on Summit on January 14, 2025.[35] The Demand sought inspection of eleven broad categories of documents, including one category with twenty-five separate subparts.[36]

At its core, the Demand alleged that Grupo Argos S.A. ("Grupo Argos"), via certain affiliated entities, owned 31% of Summit stock, and was a controlling stockholder that extracted a non-ratable benefit in connection with the Merger.[37] The alleged non-ratable benefit was a waiver of a restrictive covenant in an agreement with Summit that had prevented Grupo Argos from competing in the United States concrete and aggregates market.[38] Based on the flawed premise that this constituted a controlling stockholder transaction, the Demand further alleged that the Merger price and process were unfair and criticized Summit's board of directors ("Board") since it did not create an independent special committee to

---

[34] A0291.

[35] A0100–110.

[36] A0106–09.

[37] A0101, A0105.

[38] A0104–05.

negotiate the Merger or condition the Merger's approval on a majority-of-the minority stockholder vote.[39] Based on these allegations, the Demand sought to investigate purported wrongdoing in connection with the Merger.[40]

B. Summit Responds to the Demand, the Parties Execute the Access Agreement, and the Merger Closes

Summit timely responded to the Demand on January 22, 2025 and indicated that, although it believed the Demand was deficient, it was "willing to negotiate the scope of a reasonable production of certain books and records to resolve the Demand."[41] The next day, Plaintiff delivered a proposed confidentiality stipulation and requested execution of a "standing agreement to avoid filing a 220 complaint," which is referred to herein as the "Access Agreement."[42] The parties executed the Access Agreement on January 29, 2025.[43] The Access Agreement provided only that the closing of the Merger would not extinguish Plaintiff's standing to pursue the Demand and preserved his standing for one year after the Access Agreement's execution—*i.e.*, until January 29, 2026.[44]

---

[39] A0104–05.

[40] A0106.

[41] A0425, A0428.

[42] B0003; *see also* A0097–99.

[43] A0097–99.

[44] A0098 § 2 ("The Company agrees that, for the period of one year after the execution of this Agreement, Stockholder shall continue to have the same right,

On February 5, 2025, Summit held its stockholder vote to approve the Merger and announced that Summit had obtained all requisite stockholder approvals, including 87% of all outstanding shares voting in favor of the Merger and 99% of votes cast at the stockholder meeting in favor of the Merger.[45] The Merger uneventfully closed on February 10, 2025.[46]

C. SB 21 Is Introduced, and Plaintiff Elects to Hastily File the Plenary Action

One week after the Merger closed, SB 21 was introduced in the legislature, proposing amendments to Sections 144 and 220 of the Delaware General Corporation Law ("DGCL").[47] Thereafter, without first communicating with Summit regarding his Demand or otherwise seeking production of any books and records,[48] Plaintiff rushed into the Court of Chancery to file the Plenary Action only eight days after SB 21 was introduced.[49]

---

power, and ability to enforce the Demand as Stockholder had prior to the closing of the [Merger]."); *see also* A0097–98 § 1.

[45] B0006–7.

[46] A0424.

[47] S.B. 21, 153rd Gen. Assemb., Reg. Sess. (Del. 2025).

[48] The trial record does not reflect any communications from Plaintiff to Summit regarding his Demand or any action by Plaintiff to pursue his Demand between January 29—when the Access Agreement was executed—and February 25—when Plaintiff commenced his Plenary Action.

[49] B0010–39 ("Plenary Complaint").

In the Plenary Action, Plaintiff sued Grupo Argos, two of Grupo Argos's three director designees on Summit's eleven-member Board, and several other entities affiliated with Grupo Argos.[50] Plaintiff asserted claims for unjust enrichment and breach of fiduciary duty based on the very same issues he sought to investigate in his Demand.[51]

Specifically, Plaintiff alleged that, when Summit combined with a subsidiary of Grupo Argos in January 2024, Grupo Argos received approximately 31% of Summit's stock, gained the right to elect three of Summit's board members and certain veto rights, and entered into a restrictive covenant agreement where it agreed not to compete with Summit in certain industries and in certain markets.[52] In his Plenary Complaint, Plaintiff then selectively walked through the background of the Merger.[53] This background included Quikrete's approach to Summit regarding a potential acquisition, the Grupo Argos Defendants' alleged involvement in those

---

[50] B0014–16 ¶¶ 11–14. Plaintiff did not name Grupo Argos's third Board designee, Irene Moshouris, as a defendant in the Plenary Action. As used herein, the term "Grupo Argos Defendants" shall refer to Grupo Argos S.A., Cementos Argos S.A., Argos SEM LLC, Valle Cement Investments, Inc., Jorge Mario Velasquez, and Juan Estaban Calle (collectively, "Grupo Argos Defendants"), all of whom were named as defendants in the Plenary Action.

[51] B0035–37 ¶¶ 77–90; *see also* B0040–46 (chart highlighting similarities among allegations in the Demand, Plenary Complaint, and 220 Complaint).

[52] B0012 ¶¶ 3–4, B0018–20 ¶¶ 22–26; A0101, A0104, A0025 ¶¶ 2–3.

[53] *Compare* B0020–32 ¶¶ 28–65 *with* A0101–05 *and* A0031–41 ¶¶ 23–57.

negotiations, and the Board's ultimate agreement to waive the restrictive covenant applicable to Grupo Argos.[54] As in his Demand, Plaintiff alleged that the waiver of the restrictive covenant constituted a "non-ratable benefit."[55]

By filing the Plenary Action, Plaintiff certified that these allegations were already sufficient to state a claim[56]—just as he previously maintained that such allegations constituted a "credible basis" for seeking books and records.[57] Indeed, when he filed the Plenary Action, Plaintiff admits that he was "comfortable that he could state a claim based solely on the public record," conceding that the books and records he sought in the Demand were no longer necessary.[58] Like the Demand, the Plenary Complaint alleged that the price and process with respect to the Merger were unfair because it was: (1) a controlling stockholder transaction; (2) not conditioned on approval of an independent special committee and a majority of Summit's minority stockholders; and (3) Grupo Argos received a non-ratable benefit as a controlling stockholder.[59]

---

[54] *Compare* B0020–30 ¶¶ 28–57 *with* A0101–04 *and* 220 Compl. A0031–39 ¶¶ 23–51.

[55] *Compare* B0032 ¶ 65 *with* A0103–05 *and* A0040 ¶¶ 55–56.

[56] *See* Ct. Ch. R. 11(b).

[57] *See* A0101–06.

[58] *See* A0026–27 ¶ 8, A0570.

[59] *See* B0030–32 ¶¶ 59–65; *see also* B0044–46.

D. SB 21 Is Enacted into Law, and Plaintiff Immediately and Hastily Dismisses the Plenary Action

On March 12, 2025, a new version of SB 21 was introduced that contained a provision that would cause the bill's proposed amendments to apply retroactively to transactions that were not the subject of an already pending lawsuit as of February 17, 2025.[60] As such, SB 21's changes to Section 144 would apply to Plaintiff's Plenary Action.

On March 19, 2025, certain of the Grupo Argos Defendants filed their motion to dismiss in the Plenary Action.[61] Six days later, on March 25, SB 21 was enacted into law.[62] Plaintiff voluntarily dismissed the Plenary Action without prejudice the very next day.[63] Plaintiff chose to dismiss the Plenary Action rather than take any number of other actions, such as: (1) staying the Plenary Action and attempting to ascertain the impact of SB 21's enactment on the viability of his claims; (2) responding to the motion to dismiss in defense of his Plenary Complaint; or (3) amending his complaint to address any perceived deficiencies. Both below and in his Opening Brief, Plaintiff repeatedly asserts that SB 21 caused a seismic change

---

[60] *See* Senate Substitute 1 for S.B. 21 § 3, 153rd Gen. Assemb., Reg. Sess. (Del. 2025).

[61] B0047–48.

[62] *See* Laws of Del., vol. 85 ch. 6 (2025) (session law adopting SB 21).

[63] B0001–2.

in the law that negatively impacted his Plenary Action.[64] If SB 21 really had such a profound impact on the law and on Plaintiff's claims, it begs the question why Plaintiff would immediately dismiss his Plenary Action, without making an effort to explore alternative options or ascertain how the law would actually affect his claims.

E. After More Delay, Plaintiff Files This Section 220 Action

Eight days after dismissing the Plenary Action (and post-closing), Plaintiff's counsel called Summit's former counsel, Davis Polk, and asked if Summit would agree to produce documents covered by the Demand.[65] Davis Polk informed Plaintiff's counsel it no longer represented Summit post-closing and provided contact information for Summit's current counsel, Troutman Pepper Locke LLP ("Troutman").[66] Over two months later, on June 12, 2025, Plaintiff's counsel contacted the Grupo Argos Defendants' counsel to inquire about the Demand.[67] The Grupo Argos Defendants' counsel responded that it did not represent Summit and never had.[68] Nevertheless, Plaintiff and his counsel did not attempt to contact Troutman about the Demand before filing this 220 Action, despite knowing that

---

[64] *See, e.g.*, A0059–60, A0084–87, A0500–05, A0526, A0569–71, A0589–90; OB at 1–4.

[65] B0049–50 ¶ 2.

[66] B0049–50 ¶ 2.

[67] B0049–50 ¶ 2; *see also* B0052.

[68] B0049–50 ¶ 2; *see also* B0052.

Troutman was Summit's counsel following the closing of the Merger. Instead, Plaintiff simply filed this 220 Action on June 20, 2025.[69]

F. The 220 Action Proceeds to Trial, the Magistrate Issues a Final Report in Summit's Favor, and Plaintiff Files His Notice of Exceptions

Shortly after this 220 Action was filed, the Court issued an assignment letter directing the parties to meet and confer.[70] The parties did so.[71] Summit indicated its intent to seek dismissal of the 220 Complaint and to assert its defense that Plaintiff no longer had a proper purpose to inspect books and records once he filed the Plenary Action on February 25, 2025.[72] As Summit explained, Plaintiff's filing of the Plenary Action constituted a certification that Plaintiff had all the information necessary to state a claim as of February 25, 2025, such that no books and records needed to be produced.[73] Summit also communicated that, if the Court ultimately ruled that Plaintiff was entitled to inspection, Summit would be willing to produce formal board materials in response to the Demand.[74] In its Answer to the Complaint, Summit repeated its defense, among others, that Plaintiff's decision to file the

---

[69] *See* A0024–50.

[70] A0006.

[71] A0174.

[72] A0174.

[73] A0174.

[74] A0174.

Plenary Action without seeking books and records negated his proper purpose for inspection.[75]

The Magistrate held a half-day trial on the papers on September 23, 2025.[76] The matter was taken under advisement,[77] and the Magistrate issued the Final Report via a telephonic bench ruling on October 1, 2025.[78] In the Final Report, the Magistrate correctly acknowledged that "a stockholder who initiates a plenary action asserting claims of mismanagement undermines subsequent attempts to justify a Section 220 demand for the same purpose."[79] The Magistrate held that neither of the two narrow exceptions to this general rule applied, and declined to create a new exception.[80] Thus, the Magistrate concluded that Plaintiff lacked a proper purpose, and there was no reason to compel inspection.[81]

---

[75] B0094–95.

[76] *See* A0512–54.

[77] A0003.

[78] *See* A0007–23.

[79] A0013.

[80] A0015–20.

[81] A0021.

Immediately after the conclusion of the Court's bench ruling, Plaintiff filed his notice of exceptions to the Final Report.[82] The 220 Action was subsequently reassigned for the purpose of resolving Plaintiff's exceptions to the Final Report.[83]

G. The Vice Chancellor Adopts the Final Report and Plaintiff Files This Appeal

After the parties completed their exceptions briefing, the Vice Chancellor denied the Plaintiff's exceptions and adopted the Magistrate's Final Report.[84] Like the Magistrate, the Vice Chancellor properly rejected Plaintiff's arguments that: (1) *Bizzari* was overruled by *AmerisourceBergen II*; (2) the *Khanna* or *King* Exceptions apply; (3) a new special circumstance should be created due to SB 21's unexpected retroactive effect on Plaintiff's Plenary Action; and (4) the Access Agreement froze time and gave Plaintiff an absolute right to pursue the Demand, without regard to other facts, such as Plaintiff's decision to file the Plenary Action instead of seeking books and records.[85] The Court rejected all of these arguments,[86] and Plaintiff subsequently filed this appeal.[87]

---

[82] A0555–56.

[83] B0097.

[84] OB Ex. A at 14.

[85] *Id.* at 7–14.

[86] *See id.*

[87] *See* Dkt. 1.

ARGUMENT

I. THE TRIAL COURT CORRECTLY CONCLUDED THAT THE *BIZZARI* LINE OF CASES HAS NOT BEEN OVERRULED.

A. Question Presented

Whether the Court of Chancery correctly concluded that *AmerisourceBergen II* did not upend the well-worn *Bizzari* line of authority,[88] which provides that stockholders generally—with only two recognized exceptions—forfeit their proper purpose once they file a plenary action based on the same alleged wrongdoing they now seek to investigate.[89] The issue was preserved in the trial court at Opening Brief

---

[88] OB Ex. A at 9.

[89] *See Bizzari,* 2016 WL 4540292, at *6 (concluding that plaintiff was not entitled to inspect books and records to investigate specific wrongdoing because plaintiff had already filed a plenary action related to such wrongdoing); *Baca*, 2010 WL 2219715, at *4 (observing that "stockholder does not act with a proper purpose when the stockholder attempts to use Section 220 to investigate matters that the same stockholder already put at issue in a plenary derivative action" and that "stockholder who serves a post-plenary-action Section 220 demand contradicts his own certification that he already possessed sufficient information to file a complaint"); *CHC*, 2019 WL 328414, at *5 (dismissing Section 220 complaint because plaintiff filed plenary action); *Archblock*, 2023 WL 7320253, at *3–5 (recommending dismissal of Section 220 complaint with prejudice because plenary complaint challenged same wrongdoing plaintiff sought to investigate in Section 220 demand); *JJS, Ltd. v. Steelpoint CP Hldgs., LLC*, 2019 WL 5092896, at *7–8 (Del. Ch. Oct. 11, 2019) (rejecting plaintiffs' attempt to seek books and records after filing a plenary action for not establishing either exception to general rule precluding pursuit of books and records demand after filing plenary action related to same issues); *Cent. Laborers Pension Fund v. News Corp.*, 2011 WL 6224538, at *2 (Del. Ch. Nov. 30, 2011) (stockholder was "unable to tender a proper purpose for pursuing its efforts to inspect" books and records, given that its "derivative action necessarily reflects its view that it had sufficient grounds for alleging both demand futility and its substantive claims without the need for the assistance afforded by Section 220"),

Exhibit A at 8–9, A0082–84, A0475, A0497–500, A0522–24, A0530–31, A0539–41, A0600–03, and A0659–65.

B. Scope of Review

The Court of Chancery's legal conclusions regarding whether *Bizzari* was overruled by *AmerisourceBergen II* are to be reviewed *de novo*.[90]

C. Merits of Argument

The Court of Chancery correctly determined that *AmerisourceBergen II* did not overrule the *Bizzari* line of authority.[91] As the Court of Chancery observed, "[t]he filing of a plenary case is not the type of 'merits-based defense' that ordinarily should not be considered in a Section 220 action" under *AmerisourceBergen II*.[92]

Under *AmerisourceBergen II*, this Court reaffirmed the credible basis test, and held that corporations generally cannot avoid inspection by asserting that a Section 220 plaintiff lacks a proper purpose to investigate wrongdoing because the plaintiff's allegations of wrongdoing are not actionable.[93] *AmerisourceBergen II* does not

---

aff'd, 45 A.3d 139 (Del. 2012); *Taubenfeld v. Marriott Int'l, Inc.*, 2003 WL 22682323, at *3 (Del. Ch. Oct. 28, 2003) ("In this case, plaintiffs filed their complaint in January 2003. That filing was a certification under Rule 11 that the plaintiffs had enough information to support their allegations. Plaintiffs chose to file a complaint before pursuing their § 220 rights.") (citation omitted).

[90] *King*, 12 A.3d at 1145.

[91] OB Ex. A at 9.

[92] *Id.* (quoting *AmerisourceBergen II*, 243 A.3d at 437).

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

address the question of whether a stockholder's first-filed plenary action negates his proper purpose to investigate wrongdoing.[94] That question, which was answered by *Bizzari* and its progeny, does not relate to actionability ***in any way***.[95]

Under *Bizzari*, when stockholders file plenary actions, they certify that additional books and records are unnecessary.[96] Generally, stockholders must make a choice: (1) seek books and records in the first instance, before filing a plenary suit; or (2) proceed with their plenary actions and forego their right to books and records.[97] This is consistent with Delaware courts' admonition advising stockholders to use the "tools at hand" to investigate and develop their claims before filing plenary suits—not after.[98] Thus, *Bizzari* is about timing and stockholder incentives—not actionability.

---

[94] *See id.*

[95] *See supra* n.89.

[96] *See, e.g.*, *Bizzari*, 2016 WL 4540292, at *6 (stating that plaintiff and his counsel had "presumably concluded they possessed sufficient information under Rule 11 to file the complaint without first inspecting books and records" when plaintiff filed a plenary action, thereby curtailing his Section 220 rights to investigate specific mismanagement or wrongdoing); *Baca*, 2010 WL 2219715, at *4.

[97] *See CHC*, 2019 WL 328414, at *2–5 (holding that plaintiff lacked a proper purpose for inspection, given that he failed to demonstrate the existence of any special circumstances permitting him to seek books and records after filing a plenary suit); *Archblock*, 2023 WL 7320253, at *5 (holding that plaintiff lacked a proper purpose, where he "could have filed suit to enforce the Demand, but chose, instead, to pursue plenary litigation").

[98] *See Lavin*, 2017 WL 6728702, at *9, *10 n.82 (explaining that Delaware courts encourage stockholders to use the "tools at hand" before filing plenary suits, and that

Summit has never argued that Plaintiff lacks a proper purpose based upon the actionability of the allegations in his Demand. Indeed, Summit does not believe that Plaintiff would ever be able to convince the Court of Chancery that Grupo Argos is a controlling stockholder, either before or after SB 21's introduction and enactment.[99] Grupo Argos only controlled approximately 31% of Summit's voting power and had the power to appoint three designees to Summit's eleven-member Board.[100] But, that is beside the point. What matters here is that Plaintiff no longer has a proper purpose, as he chose to file and dismiss his Plenary Action instead of pursuing his Demand.[101]

On appeal, Plaintiff nevertheless persists in asserting that *AmerisourceBergen II* overruled the *Bizzari* line of cases.[102] Plaintiff also seeks to gloss over the Court of Chancery's ruling in *An v. Archblock, Inc.*,[103] in which the Court specifically cited

---

where a plaintiff waits to file a Section 220 action until after he has filed a plenary action, he likely will "be deemed to have improperly employed Section 220 as a substitute for discovery"); *AmerisourceBergen II*, 243 A.3d at 426 n.33 (collecting cases acknowledging that plaintiffs should use the "tools at hand" to develop their derivative claims before filing plenary suits).

[99] *See* OB Ex. A at 12 ("Plaintiff asserts that '[u]nder the law that governed at the time, these facts would likely have established Grupo Argos as the Company's controlling stockholder.' That is perhaps not as self-evident as Plaintiff suggests . . . .") (citation omitted).

[100] *See id.*

[101] B0001–2, B0010–39.

[102] *See* OB at 29–34.

[103] *Id.* at 30–31.

to *Bizzari*, acknowledging its continuing status as good law.[104] In *Archblock,* the Court of Chancery relied on *Bizzari*, and held that the plaintiff lacked a proper purpose for inspection because he had already filed a plenary suit based upon the same alleged wrongdoing he sought to investigate in his Section 220 demand.[105] Plaintiff responds by arguing that in *Archblock*, the plaintiff was a *pro se* litigant whose AI-generated briefing "cited false legal authority."[106] According to Plaintiff, because the *pro se* plaintiff in *Archblock* never raised the issue of whether *AmerisourceBergen II* overruled *Bizzari*, the Court of Chancery did not have occasion to consider it.[107] Contrary to Plaintiff's view, the identity of the *Archblock* plaintiff and the arguments he raised are irrelevant.

Archblock is significant because it applied *Bizzari* nearly three years after this Court's ruling in *AmerisourceBergen II*.[108] If *AmerisourceBergen II* really had overruled *Bizzari*, the Court of Chancery would have known that, regardless of what arguments the plaintiff in *Archblock* did or did not make. A trial court is "obligated,

---

[104] *Archblock*, 2023 WL 7320253, at *3.

[105] *Id.* at *3–5.

[106] OB at 30–31 (citation omitted).

[107] *Id.* at 31.

[108] *Archblock*, 2023 WL 7320253, at *3–5.

when aware of legal requirements relevant to a matter before it, to address them."[109] Thus, *Archblock*'s reliance on *Bizzari* serves as powerful evidence that the Court of Chancery knows when and whether controlling law applies.[110]

Nor does Plaintiff's reliance on *Employees' Retirement System of Rhode Island v. Facebook, Inc.* ("*Facebook II*"), 2021 WL 529439 (Del. Ch. Feb. 10, 2021), support his argument that *Bizzari* and its progeny are no longer good law.[111] In *Facebook II*, the Court of Chancery merely noted that a stockholder "does not forfeit its statutory inspection rights by candidly describing the strength of its potential claims" in connection with its 220 books and records action.[112] The key word here is "potential." Unlike in this action, the plaintiff in *Facebook II* used the "tools at hand" to develop its claims before filing a plenary suit—not after.[113] In *Facebook II*, the stockholder plaintiff had not filed a plenary action before seeking books and records and, therefore, had not made any Rule 11 certification that operated as a concession that an inspection of books and records was unnecessary.[114] For

---

[109] *Allen v. Reddish*, 2006 WL 1688121, at *2 (Del. Super. Ct. June 20, 2006); *see also Wilson v. Pepper*, 1994 WL 713983, at *3 (Del. Super. Ct. Oct. 27, 1994) (stating that doctrine of merger applies, even though it was not raised by parties).

[110] *See Archblock*, 2023 WL 7320253, at *3.

[111] *See* OB at 34.

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

[113] *See id.*

[114] *See id.*

purposes of this Court's analysis, this alone renders *Facebook II* inapposite. Making statements about potential, as-yet unfiled plenary claims is patently different than filing a plenary suit, pursuant to which the plaintiff makes a Rule 11 certification that he has enough information to bring a claim.[115] Thus, neither *AmerisourceBergen II* nor *Facebook II* help Plaintiff's argument at all.

The Court of Chancery did not err in concluding that the *Bizzari* line of cases is still good law and that Plaintiff is simply "conflat[ing] actionability with proper purpose."[116] Regardless of whether Plaintiff's allegations were ever actionable, Plaintiff likely had a proper purpose to investigate wrongdoing up until the time he decided to rush into court to "get ahead of SB 21."[117] Plaintiff's decision to file the Plenary Action without first pursuing his Demand is what dooms his 220 Action—not the actionability of the Demand's allegations. Plaintiff had every right to file the Plenary Action, but as the Court of Chancery correctly held, that choice has inherent

---

[115] *See Baca*, 2010 WL 2219715, at *4; *see also Taubenfeld*, 2003 WL 22682323, at *3; *CHC*, 2019 WL 328414, at *2 ("[P]lenary and Section 220 complaints are 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 necessary to its plenary claims.") (footnotes omitted).

[116] OB Ex. A at 9.

[117] OB at 37.

consequences.[118] Plaintiff cannot avoid those consequences by marshalling inapposite case law—*i.e.*, *AmersourceBergen II* and *Facebook II*—to advocate for a "sue first, ask questions later" approach to Section 220 that Delaware law does not—and should not now for the first time—embrace.[119] Despite Plaintiff's attempts to assert otherwise, the *Bizzari* line of cases is still good law, and the Court of Chancery did not err in relying on it.

[118] OB Ex. A at 13; A0020.

[119] *See CHC*, 2019 WL 328414, at *2 ("Seeking inspection under Section 220 to investigate pending claims—the 'sue first, ask questions later' approach—is problematic for a number of reasons[,]" including because "plenary and Section 220 complaints are inherently contradictory.") (footnote omitted). Although Plaintiff voluntarily dismissed his Plenary Action without prejudice one day after Senate Bill 21 was enacted, the same problems with the "sue first, ask questions later approach" are present here.

II. THE TRIAL COURT CORRECTLY CONCLUDED THAT PLAINTIFF NEGATED HIS PROPER PURPOSE FOR INSPECTION WHEN HE FILED THE PLENARY ACTION.

A. Question Presented

Whether the Court of Chancery correctly concluded that Plaintiff forfeited his proper purpose because he failed to demonstrate: (1) that his case fit within either the *King* Exception or the *Khanna* Exception; or (2) that the introduction and enactment of SB 21 justified the creation of a new special circumstance for the first time in nearly fifteen years.[120] The issue was preserved in the trial court at Opening Brief Exhibit A at 10–13, A0015–20, A0084–87, A0476–84, A0500–06, A0524–27, A0542–49, A0604–13, and A0643–59.

B. Scope of Review

The Court of Chancery's legal conclusions regarding whether Plaintiff forfeited his proper purpose by filing the Plenary Action will be reviewed *de novo*.[121]

C. Merits of Argument

The Court of Chancery did not err in holding that while the *King* and *Khanna* Exceptions allow plaintiffs to proceed with Section 220 inspections even after filing a plenary suit, neither of these narrow exceptions is applicable to Plaintiff.[122] Nor

---

[120] OB Ex. A at 10–13.

[121] *King*, 12 A.3d at 1145.

[122] OB Ex. A at 10–12.

did the Court of Chancery commit error in declining to recognize a new, third exception for the first time in nearly fifteen years.[123]

1. The *King* Exception Does Not Apply, and Plaintiff Has Waived the Issue on Appeal by Failing to Raise It in His Opening Brief.

Despite Plaintiff's belated and lackluster attempt to argue that the *King* Exception applies in his exceptions briefing,[124] the Court of Chancery correctly held that the *King* Exception does not apply.[125] Plaintiff voluntarily dismissed his Plenary Action, rather than allowing the Court to rule on his complaint or give him leave to replead.[126] As explained in *News Corp.* and *CHC*, where there is no judicial action, the *King* Exception does not and cannot apply.[127] Additionally, Plaintiff's

---

[123] *Id.* at 12–13. No new exceptions have been created since this Court recognized the *King* Exception fifteen years ago, in January 2011. *See King*, 12 A.3d at 1150–52.

[124] *See supra* n.18.

[125] OB Ex. A at 10–11.

[126] B0001–2.

[127] *See News Corp.*, 2011 WL 6224538, at *1–2 (holding plaintiff lacked a proper purpose to inspect books and records after filing derivative action where no judicial action had occurred in derivative action "that would suggest a need or a reason for further pleadings or efforts to gather important facts to support a cognizable purpose for an inspection of [defendant's] books and records"); *CHC*, 2019 WL 328414, at *4–5 (holding *King* Exception did not apply where no judicial action had occurred in plenary action).

Opening Brief does not make any argument that the *King* Exception applies. Therefore, under Supreme Court Rule 14, Plaintiff has waived the issue on appeal.[128]

2. The Court of Chancery Correctly Concluded That the *Khanna* Exception Does Not Apply.

The Court of Chancery did not err in holding that the *Khanna* Exception is inapplicable to the "pressure" Plaintiff asserts that he faced to bring the Plenary Action before SB 21's enactment.[129] The *Khanna* Exception allows a plaintiff to file a plenary action in order to toll the statute of limitations when the defendant refuses to produce books and records and the limitations period is about to expire.[130] Plaintiff, however, improperly embarks upon a futile attempt to construe the *Khanna* Exception more broadly.[131]

First, as an initial matter, Plaintiff fails to cite a single case in which a Delaware court has permitted a Section 220 plaintiff to inspect books and records after filing a plenary suit due to alleged timing pressures other than the running of a statute of limitations.[132] That failure alone demonstrates that the *Khanna* Exception does not—and cannot possibly—sweep as broadly as Plaintiff advocates.

---

[128] *See* Supr. Ct. R. 14(b)(vi)(A)(3); *Emerald P'rs*, 726 A.2d at 1224 ("Issues not briefed are deemed waived.").

[129] OB Ex. A at 11–12.

[130] *Khanna*, 2004 WL 187274, at *4; *CHC*, 2019 WL 32841, at *3.

[131] OB at 36–41.

[132] *See id.*

Second, for the *Khanna* Exception to apply, Plaintiff must demonstrate that he faced "timing pressures [that were] caused by the defendant, or, at least, not caused by the plaintiff."[133] Although Plaintiff argues otherwise, *CHC* does not stand for the proposition that the *Khanna* Exception should be interpreted broadly to encompass any situation in which a Section 220 plaintiff faces alleged timing pressures that the plaintiff did not cause.[134] Such an interpretation is directly contradicted by *CHC*'s rejection of the plaintiff's argument that the *Khanna* Exception applies any time a plaintiff "faces statute of limitations or laches pressures, regardless of the cause of those pressures."[135] Plaintiff's interpretation of the *Khanna* Exception is far broader than the interpretation the Court rejected in *CHC*, and would turn Delaware law on its head.[136]

Moreover, as in *CHC*, Plaintiff fails to demonstrate that any timing pressures he purportedly faced were Summit's fault, which is fatal to his claim. Indeed, Summit timely responded to the Demand and stated that it was "willing to negotiate

---

[133] *CHC*, 2019 WL 328414, at *3.

[134] OB at 38 (asserting that "*CHC Investments* says that all that is required is that the pressure is not the plaintiff's fault").

[135] *CHC*, 2019 WL 328414, at *3.

[136] *Id.* (rejecting plaintiff's attempt to construe the *Khanna* Exception broadly and holding that *Khanna* Exception did not apply due to plaintiff's failure to allege any "facts suggesting that [the company was] at fault for the timing of th[e] action"); *see also JJS, Ltd.*, 2019 WL 5092896, at *7.

the scope of a reasonable production of certain books and records."[137] Thereafter, Summit signed the Access Agreement, which preserved Plaintiff's standing to pursue his Demand after the Merger with Quikrete closed.[138] Nor does Plaintiff identify a single case in which any court applied the *Khanna* Exception to a situation where the plaintiff faced timing pressures that were not alleged to be either party's fault.[139]

Third, Plaintiff's attempt to construe *Khanna* broadly is contradicted by well-established Delaware law, which provides that Section 220 is designed to allow stockholders to investigate and develop their claims ***before*** filing plenary suits.[140] It does not serve as a get-out-of-jail free card that permits stockholders to use Section 220 any time they experience timing pressures allegedly not of their own making. If this Court were to adopt Plaintiff's interpretation of the *Khanna* Exception, stockholders would simply rush into Court and file plenary actions, secure in the knowledge that Section 220 will always be a backup option.[141] Compounding this

---

[137] A0428.

[138] A0097–98 §§ 1–2.

[139] *See* OB at 35–41.

[140] *See Lavin*, 2017 WL 6728702, at *9, *10 n.82; *AmerisourceBergen II*, 243 A.3d at 426 n.33.

[141] *See CHC*, 2019 WL 328414, at *2–3 (describing issues associated with a "sue first, ask questions later" approach to employing Section 220); *Baca*, 2010 WL 2219715, at *5–6 ("Baca contends that these issues are therefore not presently in litigation, and he should be permitted to use Section 220 to explore them. Permitting

problem, the external timing pressures that plaintiffs and their counsel may face at any given time and in a variety of shareholder litigation contexts are legion. If the *Khanna* Exception applied in each of these situations, the exception would swallow the rule, and the rule itself would cease to exist.

Fourth, and *finally*, although Plaintiff was not responsible for the enactment of SB 21, he was responsible for the choices he made in response to its introduction and ultimate enactment. On February 25, 2025, Plaintiff made the strategic decision to file the Plenary Action instead of pursuing the Demand,[142] based purely on his own assumptions about how a hypothetical, as-enacted version of SB 21 would impact his claims.[143] Plaintiff also made the snap decision to dismiss his Plenary Action one day after SB 21's enactment, without making any effort to determine what the law's practical effect on his claims would be.[144] In short, Plaintiff argues

---

strategic amendments of this type would reinforce 'the perverse incentives motivating too many representative plaintiffs' unseemly and inefficient race to the courthouse' that were described in *King*. Under Baca's proposed regime, a stockholder plaintiff could file a placeholder complaint to secure control of the derivative action, then cleverly use the amendment process to open a window for a subsequent Section 220 investigation. Section 220 should be used before filing a derivative complaint, not after.") (citations omitted).

[142] B0010–39.

[143] *See* OB at 40.

[144] B0001–2.

that the *Khanna* Exception should apply because he made the decision to "get ahead of SB 21," without the benefit of 20/20 hindsight.[145]

The *Khanna* Exception, however, does not operate to rescue plaintiffs from the consequences of their own decisions, or from the myriad "timing pressures" they may face. For purposes of determining whether the *Khanna* Exception applies, all that matters is what Plaintiff knew at the time he made the decision to hastily file—and subsequently dismiss—his Plenary Action.[146] As such, this Court's recent decision upholding the constitutionality of SB 21's changes to Section 144 and their retroactive effect is irrelevant to the question of whether the *Khanna* Exception applies.[147] If this Court were to hold otherwise, the *Khanna* Exception would have no limiting principle, and stockholders could exercise their long-foregone inspection rights whenever changes in the law or other subsequent events lead them to regret rushing into court to first file plenary actions.

---

[145] OB at 37; *see also id.* at 40.

[146] *See JJS, Ltd.*, 2019 WL 5092896, at *7 (describing *Khanna* Exception as being applicable "[w]hen defendants' delay in responding to an inspection demand risks prejudicing a plaintiff whose claims may become time-barred while it waits for the response").

[147] *See generally Rutledge v. Clearway Energy Grp. LLC*, 2026 WL 548504 (Del. Feb. 27, 2026).

On the day Plaintiff filed his Plenary Action, Plaintiff did not face any time pressures remotely akin to the running of a statute of limitations.[148] Plaintiff had nearly three years before his potential plenary claims would be barred by the statute of limitations.[149] Indeed, on February 25, 2025, all Plaintiff faced was the mere possibility that SB 21, if enacted, would have a possible negative impact on the viability of his plenary claims in some yet-to-be determined way.[150]

When Plaintiff dismissed his Plenary Action one day after SB 21's enactment, Plaintiff again made a snap decision seemingly based on his belief that SB 21's changes to Section 144 would be fatal to his claims.[151] Unlike in *Khanna*, where the plaintiff feared that his claims were about to be time-barred,[152] Plaintiff made hasty strategic decisions based only on his unsubstantiated assumptions regarding SB 21's potential impact on his claims.[153] Plaintiff did not make any effort to stay the

---

[148] *See JJS, Ltd.*, 2019 WL 5092896, at *7.

[149] Plaintiff does not and cannot argue that the statute of limitations is about to run on his plenary claims, as he still has nearly two years left to pursue them. *See Garfield v. Allen*, 277 A.3d 296, 318 (Del. Ch. 2022) ("The statute of limitations is three years for a claim for breach of fiduciary duty ... and a claim for unjust enrichment."). To the extent that Plaintiff seeks to argue that he faced timing pressures under the Access Agreement, it is worth noting that Plaintiff had almost an entire year left to pursue his Demand when he filed—and then dismissed—his Plenary Action. *See* A0097–99; B0001–2; B0010–39.

[150] *See* OB at 40.

[151] *See id.* at 21.

[152] *Khanna*, 2004 WL 187274, at *3; *JJS, Ltd.*, 2019 WL 5092896, at *7.

[153] *See* OB at 2–5, 21, 40.

Plenary Action, to amend his complaint, or to otherwise ascertain whether his Plenary Action claims were still viable.[154] Just as he had raced into Court in the hopes of "avoid[ing] the risks posed by SB 21," Plaintiff adversely contributed to his predicament by immediately abandoning his Plenary Action following SB 21's enactment.[155] Consequently, for all the reasons explained above, the trial court correctly held that the *Khanna* Exception is inapplicable.

3. The Trial Court Did Not Err in Concluding That SB 21's Enactment Does Not Justify the Creation of a New Special Circumstance for the First Time in Nearly Fifteen Years.

The Court of Chancery rightly declined to create "a new exception to the general rule precluding a stockholder from seeking books and records after filing a plenary suit."[156] As noted by the trial court, Plaintiff made a choice to file the Plenary Action without first seeking books and records and is bound by the consequences of that choice.[157]

---

[154] Summit does not contend that the actionability of the Demand's allegations has any impact on whether Plaintiff has a present proper purpose for inspection. The viability of Plaintiff's plenary claims is only relevant because Plaintiff has asserted that SB 21's potential impact on those claims constitutes an exception to the general rule that a plaintiff forfeits his proper purpose once he files a plenary suit.

[155] OB at 21, 40.

[156] OB Ex. A at 12.

[157] *Id.* at 13.

In his Opening Brief, Plaintiff argues that SB 21's enactment is "special," and that, "[a]t most, Plaintiff filing the Plenary Action in February 2025 is evidence that he believed he had enough information under the law that then applied."[158] In essence, Plaintiff argues that the Court of Chancery should have created a new exception to the general rule outlined in *Bizzari*, because SB 21's enactment supposedly affected the viability of his plenary claims.[159] Yet, all Plaintiff offers in support of this argument are his assertions that: (1) he likely could have convinced the trial court that Grupo Argos was a controlling stockholder pre-SB 21; (2) SB 21 dramatically changed the law; and (3) SB 21's retroactive effect doomed his otherwise viable claims.[160] The trial court was not required to accept Plaintiff's assertions at face value and did not err in holding Plaintiff to the consequences of his decision to file the Plenary Action instead of pursuing his Demand.[161]

Plaintiff may respond that he should not be stuck with the consequences of his decision because he could not have anticipated that SB 21's changes to Section 144 would apply retroactively to his Plenary Action. That is neither here nor there.

---

[158] OB at 41.

[159] OB at 2–5, 21, 38–41.

[160] *See id.*

[161] *See JJS, Ltd.*, 2019 WL 5092896, at *8 (dismissing books and records claim, where plaintiffs failed to "identify any of the special circumstances that would permit [p]laintiffs to enforce their inspection demand" after filing a plenary action).

Plaintiff's predicament is a common one—he made a choice that did not turn out as expected. This all-too-familiar scenario does not warrant the creation of a new exception to the preexisting general rule that a Section 220 plaintiff forfeits his proper purpose to investigate wrongdoing once he files a plenary suit.[162] Section 220 serves an investigatory function under Delaware law.[163] It is not designed to give stockholders a do-over every time some change in the law or other circumstance occurs that causes them to regret their decision not to seek books and records before filing a plenary suit.[164]

[162] *See, e.g.*, *Bizzari,* 2016 WL 4540292, at *6.

[163] *See Lavin*, 2017 WL 6728702, at *9, *10 n.82.

[164] *See CHC*, 2019 WL 328414, at *2–3; *cf. Baca*, 2010 WL 2219715, at *5–6.

III. THE TRIAL COURT CORRECTLY CONCLUDED THAT PLAINTIFF WAIVED HIS ACCESS AGREEMENT CLAIM, WHICH ALSO FAILED ON THE MERITS.

A. Question Presented

Whether the Court of Chancery correctly concluded that Plaintiff: (1) waived his argument that the Access Agreement entitled him to inspection; and (2) failed to demonstrate that the Access Agreement did anything other than preserve his Section 220 standing and rights post-Merger.[165] The issue was preserved in the trial court at Opening Brief Exhibit A at 13–14.

B. Scope of Review

The Court of Chancery's determination that Plaintiff waived his Access Agreement claim because it was not fairly presented to the Magistrate is reviewed for abuse of discretion.[166] The trial court's legal conclusion that the Access Agreement failed on the merits will be reviewed *de novo*.[167]

---

[165] OB Ex. A at 13–14.

[166] *See Realty Enters., LLC v. Patterson-Woods & Assocs., LLC*, 11 A.3d 228, 2010 WL 5093906, at *4 (Del. Dec. 13, 2010) (TABLE); *DeSantis v. Chilkotowsky*, 877 A.2d 52, 2005 WL 1653640, at *1 (Del. June 27, 2005) (TABLE) ("We review a trial court's determination that a party failed to show good cause for abuse of discretion.").

[167] *Riverbend Cmty., LLC v. Green Stone Eng'g, LLC*, 55 A.3d 330, 334 (Del. 2012).

C. Merits of Argument

1. The Court of Chancery Did Not Abuse its Discretion in Finding that Plaintiff Waived His Access Agreement Argument.

As a threshold matter, the Court of Chancery acted within the bounds of its discretion in finding that Plaintiff waived his argument that the Access Agreement entitles him to inspect books and records despite his first-filed Plenary Action.[168] *Realty Enterprises* is instructive on this point. In *Realty Enterprises*, this Court held that the trial court did not abuse its discretion in finding that defendant waived: (1) its third-party claims by failing to raise them in the pre-trial stipulation; and (2) its affirmative defense of lack of capacity by failing to raise it until four days before trial.[169] So too here.

Under Court of Chancery Rule 144(e), the Court of Chancery only "hears exceptions based on the record before the Magistrate," unless it "determines to expand the record for good cause shown."[170] In both his exceptions briefing and on appeal, Plaintiff does not even mention the good cause standard.[171] Plaintiff's post-trial exceptions briefing was the first time that he argued that the Access Agreement

---

[168] OB Ex. A at 13–14.

[169] 2010 WL 5093906, at *4.

[170] Ct. Ch. R. 144(e); *see also DeSantis*, 2005 WL 1653640, at *1.

[171] *See generally* A0557–621; OB.

prohibits the Court of Chancery from considering post-closing events in deciding whether Plaintiff met his burden of demonstrating his entitlement to inspection.[172]

The 220 Complaint's threadbare claim for breach of the Access Agreement does not change this result.[173] Through trial, Plaintiff never argued that his Section 220 and Access Agreement claims required different legal analyses or were meaningfully distinguishable from one another.[174] Unsurprisingly, the Court of Chancery did not find that these claims were legally or factually distinct either.[175] Thus, as in *Realty Enterprises*, the Court of Chancery had discretion to find that Plaintiff waived this argument.[176] Therefore, the Court of Chancery properly exercised its discretion in finding that Plaintiff waived his Access Agreement argument because he did not fairly present it to the Magistrate.[177]

---

[172] *See* A0598.

[173] A0048–49 ¶¶ 77–84.

[174] *E.g.*, A0059, A0081, A0515, A0518.

[175] OB Ex. A at 13–14.

[176] *See Realty Enters.*, 2010 WL 5093906, at *4; *see also HBK Master Fund L.P. v. Pivotal Software, Inc.*, 2023 WL 10405169, at *19–21 (Del. Ch. Aug. 14, 2023) (holding respondent waived standing argument, where it failed to raise argument in pre-trial submissions); *Silverberg v. ATC Healthcare, Inc.*, 2017 WL 6021422, at *1 (Del. Ch. Dec. 5, 2017) (stating, in Section 220 context, "[i]f Plaintiff wished to press this argument, he should have presented it in his Pretrial brief, the Pretrial Stipulation or, at least, at trial. Because he did not, this argument is deemed waived and improper for consideration on a motion for reargument.").

[177] OB Ex. A at 13.

2. The Court of Chancery Did Not Err in Concluding That the Access Agreement Does Not Alter the Legal Impact of Plaintiff's Decision to File the Plenary Action.

In his Opening Brief, Plaintiff fails to cite a single case that meaningfully supports the notion that the Access Agreement entitled him to anything other than the same Section 220 inspection rights he possessed before the Merger with Quikrete.[178] Nonetheless, Plaintiff argues that, because he had not filed the Plenary Action as of February 10, 2025—the day the Merger closed, the Court of Chancery could not consider its impact on his inspection rights, or lack thereof.[179] This interpretation of the Access Agreement is contradicted by the plain terms of the Access Agreement, Delaware law, and common sense.

The Access Agreement provides: "for the period of one year after the execution of this Agreement, [Plaintiff] shall continue to have the same right, power, and ability to enforce the Demand as [Plaintiff] had prior to the closing of the [Merger]."[180] In addition, under the Access Agreement, Summit agreed "not [to] argue or present any defense that [Plaintiff] lacks standing to enforce the Demand following the closing of the [Merger]," but reserved all other arguments.[181] The

---

[178] OB 44–45.

[179] *Id.* at 45.

[180] A0098 § 2.

[181] A0098 § 2; *see also* A0097–98 § 1.

Access Agreement merely ensured that Plaintiff would not lose his inspection rights after the Merger closed.

The Court of Chancery recognized this and cited *Zendesk*[182]—a case Plaintiff himself had relied on in his pre-trial briefing—to establish that the Access Agreement preserved his post-closing standing to pursue the Demand.[183] Now, Plaintiff seeks to abandon and discredit his own cited authority, to no avail.[184] In *Zendesk*, the Court of Chancery acknowledged that the company and "four stockholders entered into 'Standing Agreements' that contractually replicate[d] the stockholders' statutory rights under Section 220 and prevent[ed] the Company from asserting that the closing of the [t]ransaction extinguished the stockholders' standing to pursue books and records pursuant to their Demands."[185] Consequently, the Court concluded that the stockholders' inspection rights were the same under Section 220 and the standing agreements.[186] The same principle applies here. As in *Zendesk*, the Access Agreement preserves Plaintiff's Section 220 inspection rights.[187] It does not

---

[182] OB Ex. A at 13.

[183] *See* A0081.

[184] OB at 45.

[185] *In re Zendesk, Inc. Section 220 Litig.*, 2023 WL 5496485, at *7 (Del. Ch. Aug. 25, 2023), *report and recommendation adopted*, 2023 WL 5666693 (Del. Ch. Aug. 31, 2023).

[186] *Id.* at *7 n.76.

[187] *See* A0097–99.

alter or limit them. Indeed, had Plaintiff filed his Plenary Action pre-closing, Plaintiff would still have lost his proper purpose for inspection.[188] The same is true post-closing.

Plaintiff does not and cannot establish that the Access Agreement has the effect of freezing time just before the Merger closed, such that the trial court could not consider Plaintiff's post-closing actions.[189] Thus, the Court of Chancery did not err in concluding that Plaintiff does not have any independent right to inspect books and records based on his Access Agreement claim.

---

[188] *See Bizzari,* 2016 WL 4540292, at *6.

[189] *See Zendesk*, 2023 WL 5496485, at *7.

IV. BECAUSE THE TRIAL COURT CORRECTLY CONCLUDED THAT PLAINTIFF'S FIRST-FILED PLENARY ACTION ELIMINATED HIS PROPER PURPOSE, NO INSPECTION CAN BE COMPELLED.

A. Question Presented

Whether the trial court correctly concluded that Plaintiff had forfeited his proper purpose, such that no inspection could be compelled.[190] This issue was preserved in the trial court at Opening Brief Exhibit A at 14 and A0020–21.

B. Scope of Review

The Court of Chancery's legal conclusions regarding whether Plaintiff forfeited his proper purpose by filing the Plenary Action, such that no inspection of books and records can be compelled, will be reviewed *de novo*.[191]

C. Merits of Argument

Because Plaintiff's filing of the Plenary Action eliminated his proper purpose, no production of any books and records could be compelled.[192] Accordingly the Court of Chancery correctly concluded its Section 220 inquiry.[193] Thus, the rulings of the Court of Chancery should be affirmed.

---

[190] A0020–21; OB Ex. A at 14.

[191] *King*, 12 A.3d at 1145.

[192] *See* 8 Del. C. § 220.

[193] *See CHC*, 2019 WL 328414, at *5 (dismissing 220 action due to plaintiff's failure to plead a present proper purpose after filing plenary action); *Archblock*, 2023 WL 7320253, at *5 (recommending same).

CONCLUSION

For the reasons set forth above, this Court should affirm the Court of Chancery's ruling that Plaintiff's first-filed Plenary Action negated his proper purpose for inspection of any books and records.

OF COUNSEL:
J. Timothy Mast
Mary M. Weeks
Adam Dixon
TROUTMAN PEPPER LOCKE LLP
600 Peachtree Street NE, Suite 3000
Atlanta, GA 30308
Telephone: (404) 885-3000
tim.mast@troutman.com
mary.weeks@troutman.com
adam.dixon@troutman.com

/s/ Douglas D. Herrmann
Douglas D. Herrmann (#4872)
Cassandra L. Thompson (#6937)
TROUTMAN PEPPER LOCKE LLP
Hercules Plaza, Suite 1000
1313 Market Street, PO Box 1709
Wilmington, DE 19899-1709
Telephone: (302) 777-6500
douglas.herrmann@troutman.com
cassandra.thompson@troutman.com

Counsel for Defendant-Below,
Appellee Summit Materials, Inc.