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IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

LEBANON COUNTY EMPLOYEES' RETIREMENT FUND AND TEAMSTERS LOCAL 443 HEALTH SERVICES & INSURANCE PLAN, Plaintiffs, v. AMERISOURCEBERGEN CORPORATION, Defendant.	)	C.A. No. 2019-0527-JTL

DEFENDANT AMERISOURCEBERGEN CORP.'S APPLICATION FOR CERTIFICATION OF AN INTERLOCUTORY APPEAL

Pursuant to Supreme Court Rule 42, Defendant AmerisourceBergen Corp. respectfully asks this Court to certify to the Delaware Supreme Court an interlocutory appeal from this Court's January 13, 2020 Post-Trial Memorandum Opinion (the "Opinion" or "Op.").[1] Defendant and its counsel have determined in good faith that this application meets the criteria in Rule 42(b)(iii).

PRELIMINARY STATEMENT

1. The Opinion decides substantial issues of material importance and should be certified for interlocutory review. The benefits of interlocutory appeal far outweigh the costs: the Opinion satisfies at least four of the eight factors under

[1] The Opinion is attached as Exhibit A hereto.

Rule 42(b)(iii)—any one of which independently supports certification of the appeal.

2. ***First***, the Opinion decides three fundamental principles of Delaware corporate law in conflict with prior decisions from this Court and the Supreme Court by holding that: (1) a stockholder seeking books and records for the purpose of investigating mismanagement need not state what the objective of the inspection will be, thus permitting inspections for purposes other than those reasonably related to the stockholder's interest *qua* stockholder; (2) a stockholder seeking books and records for the purpose of investigating mismanagement focused on bringing litigation need not present evidence forming a credible basis to suspect actionable wrongdoing; and (3) the scope of the books and records to be produced in a Section 220 action is determined by what documents exist, as directed by the Court, as opposed to what categories of documents the stockholder has demonstrated are necessary and essential to achieving a proper purpose. To this end, the Opinion, *sua sponte*, grants leave for the stockholders to conduct a Rule 30(b)(6) deposition, after trial, to explore what books and records exist, even though the stockholders had never sought to take such a deposition and specifically stipulated that "No depositions shall be taken in this case."

3. ***Second***, the questions of law decided by the Opinion relate to the construction and application of a statute of this State—8 *Del. C.* § 220—that should be settled promptly by the Supreme Court.[2]

4. ***Third***, interlocutory review would terminate the litigation if the Supreme Court were to reverse and hold that the plaintiffs have failed to demonstrate a proper purpose.[3]

5. ***Fourth***, interlocutory review would serve considerations of justice because Defendant may forfeit its right to appeal if it is required to produce books and records before any appeal from a final order can be heard.[4]

BACKGROUND AND PROCEDURAL HISTORY

6. On July 8, 2019, AmerisourceBergen Corporation ("Defendant" or the "Company") stockholders Lebanon County Employees' Retirement Fund and Teamsters Local 443 Health Services & Insurance Plan ("Stockholders") filed a complaint seeking books and records from the Company. Stockholders alleged that there is a credible basis to suspect wrongdoing by the Company's officers and directors in connection with the Company's legal obligations to implement a diversion control program designed to detect illegal opioid orders.

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[2] Sup. Ct. R. 42(b)(iii)(C).

[3] Sup. Ct. R. 42(b)(iii)(G).

[4] Sup. Ct. R. 42(b)(iii)(H).

7. The parties entered into a Stipulation and Proposed Order Governing Case Schedule, which was granted by the Court on August 13, 2019 (the "Stipulation").

8. The Stipulation provides: "No depositions shall be taken in this case." Stipulation ¶2. The Stipulation also provides that, other than certain interrogatories, "No other discovery shall be permitted in this case." *Id.* ¶1(a).

9. The Parties served and responded to interrogatories. In Interrogatory No. 1, the plaintiffs sought the identification of officers and directors who were likely to have "information" responsive to Stockholders' Section 220 Demand. The Company objected because, *inter alia*, it was premature and contrary to the practice in Section 220 cases.

10. Stockholders never challenged the Company's objection to that interrogatory.

11. On October 15, 2019 the Court conducted a trial on a paper record. On January 13, 2020 the Court issued the Opinion, but did not finally resolve the entire case.

12. In the Opinion, the Court held that Stockholders had stated a proper purpose for inspection of the Company's books and records. In so holding, the Court held: (i) "a stockholder need not both articulate a proper purpose for inspection and commit in advance to the ends to which it will put the books and

records" (Op. 28); and (ii) a stockholder investigating mismanagement for the purpose of bringing a derivative action need not provide evidence from which a credible basis to suspect an actionable claim may be shown, rendering defenses based on a 102(b)(7) exculpatory clause and the statute of limitations irrelevant. (Op. 28-52).

13. With respect to the scope of the inspection, the Court prefaced its decision by reasoning that "In this case, an additional obstacle is the absence of information about what types of records AmerisourceBergen maintains and who has them. The plaintiffs sought this information in discovery, but AmerisourceBergen refused to provide it. JX 56 at '006." Op. 54. For this proposition, the Court cites Stockholders' Interrogatory No. 1 seeking the identification of individuals with "information responsive to" the Demand and the Company's objection, which was never challenged by Stockholders. The Court then held that "[a]t present, the plaintiffs have shown that they are entitled to Formal Board Materials." *Id*. at 57. Reasoning that "[i]t is often helpful when ruling on a Section 220 demand to have information about what types of books and records exist and who has them," id. at 56-57, the Court concluded that "[a]fter AmerisourceBergen produces Formal Board Materials, the plaintiffs may conduct a Rule 30(b)(6) deposition to determine what other types of books and records exist and who has them. If the parties cannot agree on a final production order at

that point, then the plaintiffs may make a follow-on application for Informal Board Materials or Officer-Level Documents." *Id*. at 57.

ARGUMENT

14. The Court may in its discretion certify an interlocutory appeal where, as here, "the order of the trial court decides a substantial issue of material importance that merits appellate review before a final judgment."[5] The Court should "identify whether and why the likely benefits of interlocutory review outweigh the probable costs, such that interlocutory review is in the interests of justice."[6] Rule 42(b)(iii) identifies eight factors courts should consider when determining whether to certify an interlocutory appeal, four of which are applicable here: (i) whether the decisions of the trial courts are conflicting upon the question of law, (ii) whether the question of law at issue relates to the construction and application of a Delaware statute that should be resolved by the Delaware Supreme Court, (iii) whether review of the interlocutory order may terminate the litigation, and (iv) whether review of the interlocutory order may serve considerations of justice.[7] Each of these factors demonstrates that the Opinion represents exactly the type of decision warranting an interlocutory appeal,

[5] *See* Sup. Ct. R. 42(b)(i).

[6] Sup. Ct. R. 42(b)(iii)(G).

[7] Sup. Ct. R. 42(b)(iii).

and any one of them would be sufficient.[8]

A. The Opinion Determines a Substantial Issue.

15. An interlocutory order determines a "substantial issue" for purposes of Rule 42 if it "relate[s] to the merits of the case."[9] The core issues in this Section 220 action concern whether Stockholders had stated a proper purpose for inspection, and whether Stockholders had met their burden of demonstrating why each category of documents sought is necessary and essential. The Opinion concluded that Stockholders had established a proper purpose and, "at present" established entitlement to certain books and records as a starting point, with leave to request additional documents after taking a Rule 30(b)(6) deposition. These are substantial issues of material importance, both in this case and in the broader context of Delaware corporate law.

B. The Opinion Satisfies the Supreme Court Rule 42(b)(iii) Criteria.

16. The Opinion satisfies four of the Rule 42(b)(iii) factors, any one of which is sufficient to certify an interlocutory appeal.

17. ***First***, the Opinion conflicts with Delaware case law.[10] Indeed, the Opinion acknowledges that it conflicts with other cases decided by the Court of

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[8] *Id.*

[9] *Castaldo v. Pittsburgh-Des Moines Steel Co., Inc.*, 301 A.2d 87, 87 (Del. 1973).

[10] *See* Sup. Ct. R. 41(b)(iii)(B) (certification proper where "[t]he decisions of the trial courts are conflicting upon the question of law").

Chancery that have "required stockholders who wanted to investigate mismanagement to state up-front what they planned to do with the fruits of the inspection," (Op. 25), specifically identifying *West Coast Management & Capital, LLC v. Carrier Access Corp.*, 914 A.2d 636 (Del. Ch. 2006), and *Beiser v. PMC-Sierra, Inc.*, 2009 WL 483321 (Del. Ch.). The Opinion cites several other cases that stand for the same proposition. *See* Op. 27 (citing *S.E. Pa. Trans. Authority v. Abbvie Inc.*, 2015 WL 1753033 (Del. Ch.), *aff'd* 132 A.3d 1 (Del. 2016); *Senetas Corp., Ltd. v. DeepRadiology Corp.*, 2019 WL 3430481 (Del. Ch.); *Hoeller v. Tempur Sealy Int'l, Inc.*, 2019 WL 551318 (Del. Ch.); *Beatrice Corwin Living Irrevocable Tr. v. Pfizer, Inc.*, 2016 WL 4548101 (Del. Ch.); *Graulich v. Dell Inc.*, 2011 WL 1843813 (Del. Ch.).

18. By rejecting this requirement, the Opinion allows Stockholders to meet Section 220's requirement by merely reciting a purpose that has been recognized to be proper in the abstract, without demonstrating that it is one "reasonably related to the interests of the stockholder" as required. Thus, for example, Stockholders could seek to investigate mismanagement—which in the abstract is a proper purpose—but the ultimate objective could be for "[m]ere curiosity," well recognized as unrelated to the legitimate interests of a stockholder. *Sec. First Corp. v. U.S. Die Casting & Dev. Co.*, 687 A.2d 563, 568 (Del. 1997) ("Mere curiosity or a desire for a fishing expedition will not suffice."). The

Opinion thereby upsets the balance between a stockholder's right to information and a corporation's protection from mischief. *Id*. at 571 ("a Section 220 proceeding may serve a salutary mission as a prelude to a derivative suit. Yet it would invite mischief to open corporate management to indiscriminate fishing expeditions. The trial court must assure that a proper balance is struck.")

19. The Opinion's rejection of the requirement is also inconsistent with the Court's obligation to ensure that its production "order [is] circumscribed with rifled precision," *id*. at 570, which is dictated by the purpose of the inspection. To that end, "the Court of Chancery must tailor its order for inspection to cover only those books and records that are 'essential and sufficient to the stockholder's stated purpose.'" *KT4 Partners LLC v. Palantir Techs. Inc.*, 203 A.3d 738, 751-52 (Del. 2019). If stockholders may satisfy Section 220's requirements without identifying the objective of their investigation, it is impossible for the Court of Chancery to craft an order with "rifled precision," because the stockholders' objectives, and thus the scope of books and records necessary to achieve them, are unknown. This problem is compounded by the Opinion's *sua sponte* grant of leave to take a Rule 30(b)(6) deposition, which permits the existence of books and records to become determinative of the scope of the production order, as opposed to the scope being dictated by the extent of the proper purpose.

20. The Opinion also admittedly conflicts with Delaware case law that requires a stockholder seeking to investigate mismanagement for the purpose of bringing litigation to demonstrate a credible basis to suspect *actionable* wrongdoing, including: *In re Facebook, Inc. Section 220 Litigation*, 2019 WL 2320842 (Del. Ch.); *Hoeller v. Tempur Sealy International, Inc.*, 2019 WL 551318 (Del. Ch.); and *Beatrice Corwin Living Irrevocable Trust v. Pfizer, Inc.*, 2016 WL 4548101 (Del. Ch.). *See* Op. n.20.

21. The result of the Opinion's rejecting these cases was to reject the Company's defenses based upon a Section 102(b)(7) exculpatory clause and the statute of limitations as merits-based defenses. Op. 43-52. Where a stockholder seeks to investigate mismanagement for the purposes of bringing derivative litigation, absent a basis to suspect a non-exculpated, actionable claim, the purpose is by definition improper. *S.E. Pa. Trans. Authority v. Abbvie, Inc.*, 2016 WL 235217, at *1 (Del.) (affirming rejection of Section 220 demand where stockholder "had not shown a credible basis for the court to infer that a non-exculpated breach of fiduciary duty had occurred when the only use for the books and records identified by the petitioner was to help plead a later claim in litigation"). So too regarding time-barred claims. The Opinion acknowledges that "a stockholder lacks a proper purpose for an inspection that relates solely to time-barred derivative claims" (*see* Op. 49 (citing *Graulich*, 2011 WL 1843813, at *6)), but

does not address Stockholders' allegations establishing inquiry notice far beyond three years ago. *See* Company's Opening Brief, pps. 41-42 (addressing Stockholders' allegations of publicly disclosed subpoenas, settlements and lawsuits dating back to 2007, and 2012-15).

22. The Opinion also conflicts with Delaware case law regarding the relative burden of the parties and scope of discovery in Section 220 actions. It is a stockholder's burden to establish the categories of documents that are necessary for achieving a proper purpose. *Palantir*, 203 A.3d at 751-52. After a one-day trial, where Stockholders had the opportunity to meet their burden, the Court held that "[a]t present, the plaintiffs have shown that they are entitled to Formal Board Materials." Op. 57. That should have been the end of the matter.

23. The Opinion continues, however, reasoning that "[i]t is often helpful when ruling on a Section 220 demand to have information about what types of books and records exist and who has them." *Id*. at 56. The Court thus concluded, *sua sponte*, that "[a]fter AmerisourceBergen produces Formal Board Materials, the plaintiffs may conduct a Rule 30(b)(6) deposition to determine what other types of books and records exist and who has them." *Id*. at 57.

24. The Court's *sua sponte* decision to grant leave to Stockholders to take a Rule 30(b)(6) deposition in furtherance of satisfying their burden of proof is in conflict with numerous decisions of the Court of Chancery precluding Section 220

plaintiffs from obtaining discovery to satisfy their burdens. *E.g.*, *Treppel v. United Techs. Corp.*, C.A. No. 8624-VCG, at 12-13 (Del. Ch. Dec. 5, 2013) (TRANSCRIPT) ("The existence and whereabouts of the documents sought by the plaintiff in this 220 action are not relevant to any issues before me."); *Elow v. Express Scripts Holding Co.*, C.A. No. 12721-VCMR, at 30-33, 55 (Del. Ch. Nov. 18, 2016) (TRANSCRIPT) (denying plaintiff's motion to compel deposition of 30(b)(6) representative in a Section 220 proceeding). Allowing discovery post-trial is inconsistent with the summary nature of a Section 220 proceeding as explained in *Palantir*. 203 A.3d at 755 (plaintiff is "in no position to get discovery to determine how a company like Palantir conducts business and whether the books and records that address its needs come in the form of hardcopy documents, electronic PDFs, emails, or some other medium.").

25. The Company respectfully submits that the Opinion regarding scope also conflicts with the Supreme Court's decision in *Palantir* regarding the "settle-order" process for implementing production orders. Eschewing "extensive discovery" as a means to this end, the Supreme Court instructed that "once the Court of Chancery has determined the subject matter that the inspection must address, the respondent must exercise good faith in agreeing to a final order …. the court will be highly dependent on the respondent's good faith participation in the process, because the respondent is likely to be the only participant in the settle-

order process with knowledge of which corporate records are relevant to the petitioner's proper purpose as determined by the court." *Id*. at 755-57.

26. ***Second***, the legal questions answered by the Court relate to the construction and application of Section 220 that should be settled promptly by the Delaware Supreme Court. As the Opinion departs from other Chancery decisions, Section 220 litigation will proceed with great uncertainty until these splits are resolved.

27. ***Third***, immediate review of the Opinion by the Supreme Court may terminate the litigation if the Supreme Court finds that Stockholders have not stated a proper purpose.[11] As such, Defendant respectfully submits that it makes sense for the Delaware Supreme Court to resolve that issue before the parties are required to engage in protracted discovery and additional rounds of briefing regarding a potential expanded scope of inspection.

28. ***Fourth***, interlocutory review would serve considerations of justice. Without immediate review, the Company will suffer prejudice. The Company cannot "un-produce" documents and there is nothing that will offset the costly,

[11] Rule 42(b)(iii)(G) (certification proper where review "may terminate the litigation"). *See also Chemtura Corp. v. Certain Underwriters at Lloyd's*, 2016 WL 3960282, at *2 (Del. Super. Ct.) (granting certification where doing so "may terminate the litigation or may otherwise serve considerations of justice" despite finding all other factors unmet).

burdensome, and unnecessary deposition and further briefing that the Opinion has set in motion. *Cf. Jagodzinski v. Silicon Valley Innovation Co.*, 2011 WL 4823569, at *3 (Del. Ch.) ("Because the inspection of books and records cannot be undone, this Court has granted stays pending appeal in these types of actions."); *Orloff v. Weinstein Enters., Inc.*, 2004 WL 1488678, at *2 (Del. Ch.) ("Unless a stay is entered, it is likely that the full production required by the Final Order could be accomplished before the appeal is heard and, thus, moot the appeal.").

CONCLUSION

29. For the foregoing reasons, Defendant respectfully requests that the Court grant its application for certification of an interlocutory appeal.

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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of January 2020, a copy of the foregoing was served via *File & ServeXpress* upon the following attorneys of record:

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