



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

ORDER CERTIFYING INTERLOCUTORY APPEAL

1. This court issued a post-trial decision that (i) ordered defendant AmerisourceBergen Corporation (the "Company") to produce books and records falling within the category of "Formal Board Materials" and (ii) granted the plaintiffs leave to take a Rule 30(b)(6) deposition to determine what other types of books and records exist and who has them. *See Lebanon Cty. Empls.' Ret. Fund v. AmerisourceBergen Corp.*, 2020 WL 132752, at *1 (Del. Ch. Jan. 13, 2020) (the "Opinion" or "Op."). The Company moved for certification of an interlocutory appeal (the "Application").

2. The Application seeks leave to appeal three rulings: (i) the Opinion's rejection of the purpose-plus-an-end test, (ii) its rejection of the actionable-wrongdoing requirement, and (iii) its grant of leave to the plaintiffs to conduct a Rule 30(b)(6) deposition and potentially obtain books and records beyond Formal Board Materials.

3. Supreme Court Rule 42 governs the certification of an interlocutory appeal. “No interlocutory appeal will be certified by the trial court or accepted by this Court unless the order of the trial court decides a substantial issue of material importance that merits appellate review before a final judgment.” Supr. Ct. R. 42(b)(i).

4. A substantial issue of material importance is one that “relate[s] to the merits of the case, not to matters of discovery.” *Castaldo v. Pittsburgh-Des Moines Steel Co., Inc.*, 301 A.2d 87, 87 (Del. 1973). The issues that the Company raises are substantial issues of material importance for purposes of actions to obtain books and records pursuant to Section 220 of the Delaware General Corporation Law. 8 *Del. C.* § 220.

a. Whether a stockholder must satisfy the purpose-plus-and-end test affects the scope of the statutory proper purpose requirement, which the Delaware Supreme Court has described as “[t]he paramount factor in determining whether a stockholder is entitled to inspection of corporate books and records” *CM & M Gp., Inc. v. Carroll*, 453 A.2d 788, 792 (Del. 1982). Section 220(b) authorizes a stockholder to conduct an inspection “for any proper purpose” and requires that the written demand “stat[e] the purpose” for the inspection. 8 *Del. C.* § 220(b). Based on a line of recent Court of Chancery decisions, the Company argued that a plaintiff must both state a proper purpose for the inspection and identify a viable end for which the resulting materials could be used. The Opinion noted that the first two decisions to rely on the concept of a purpose plus an end had reached context-specific determinations, but that subsequent decisions framed the concept as a general requirement for an inspection. The Opinion concluded that under the language of the statute and governing Delaware Supreme Court precedent, a stockholder

was not required to also state an end, although it might be possible for a court to find in a particular case that a stockholder only sought to use materials for a specific end, and to take that conclusion into account when determining the stockholder's entitlement to inspection. *See, e.g., Se. Pa. Transp. Auth. v. Abbvie, Inc.*, 2015 WL 1753033, at *11–12 (Del. Ch. Apr. 15, 2015), *aff'd*, 132 A.3d 1, 2016 WL 235217 (Del. Jan. 20, 2016) (ORDER). A ruling by the Delaware Supreme Court that a plaintiff must identify both a proper purpose for an inspection and a viable end to which the materials could be put would have widespread implications for how stockholders frame demands and how companies respond.

b. Whether the plaintiffs had to meet an actionable-wrongdoing requirement is potentially an outcome-determinative issue. Based on a line of recent Court of Chancery decisions, the Company argued that the plaintiff needed to introduce evidence from which the court could infer the existence of an actionable claim against the board of directors. The Company then relied on decisions granting motions to dismiss pursuant to Rule 23.1 to argue that the plaintiffs failed to introduce evidence from which the court could infer the existence of an actionable claim. In substance, the Company contended that to establish a credible basis to suspect actionable wrongdoing, a plaintiff must introduce evidence sufficient to support a claim that could survive a pleading-stage motion to dismiss pursuant to Rule 23.1. The Opinion rejected this standard, holding that a stockholder need only “show, by a preponderance of the evidence, a credible basis from which the Court of Chancery can infer there is possible mismanagement that would warrant further investigation” Op. at *8 (internal quotation marks omitted) (quoting *Seinfeld v.*

Verizon Commc'ns, Inc., 909 A.2d 117, 120 (Del. 2006)). Were it necessary to analyze the plaintiffs' showing under an actionable-wrongdoing standard, it is possible that the plaintiffs would not be entitled to an inspection.

c. Whether the court can order a Rule 30(b)(6) deposition on the issue of documents and grant the plaintiffs leave to seek additional books and records presents a significant issue regarding the scope of the Court of Chancery's remedial discretion. Section 220 states that as part of granting an inspection of books and records, "[t]he Court may, in its discretion, . . . award such other or further relief as the Court may deem just and proper." 8 *Del. C.* § 220(c). Delaware Supreme Court precedent places the burden on the trial court to craft an order in a Section 220 case that is "circumscribed with rifled precision." *Sec. First Corp. v. U.S. Die Casting & Dev. Co.*, 687 A.2d 563, 570 (Del. 1997). The Delaware Supreme Court has held that determining what is sufficiently rifled "requires a fact specific inquiry and can only be determined in the context of a specific case." *Wal-Mart Stores, Inc. v. Ind. Elec. Workers Pension Trust Fund IBEW*, 95 A.3d 1264, 1283 (Del. 2014). When tailoring the production order, the court must balance the interests of the stockholder and the corporation. *See Sec. First* at 569. "[T]he court must give the petitioner everything that is 'essential,' but stop at what is 'sufficient.'" *KT4 P'rs v. Palantir Techs. Inc.*, 203 A.3d 738, 752 (Del. 2019). At bottom, the plaintiff should receive "access to all of the documents in the corporation's possession, custody or control, that are necessary to satisfy [the plaintiff's] proper purpose." *Saito v. McKesson HBOC, Inc.*, 806 A.2d 113, 115 (Del. 2002). The Delaware Supreme Court previously has remanded a case and directed the trial court to develop the record necessary to conduct this inquiry. *See Sec.*

First, 687 A.2d at 570. Whether a trial court can order the parties to develop a record so that the trial court can carry out its obligations presents a material issue. The answer will affect how this case proceeds and how other Section 220 actions are handled.

d. The third ruling raises the related issue of whether the parties' stipulation that there would be no depositions during the discovery phase binds the trial court during the remedial phase. If the stipulation is binding on the court during the remedial phase, then the plaintiffs should not be able to obtain a deposition. In addition to affecting how this case proceeds, a ruling to that effect would influence the willingness of parties to enter into stipulations, how they are drafted, and how trial judges approach the remedial phase.

5. The Application thus clears the first requirement for interlocutory appeal because it identifies substantial issues of material importance. But that alone is not enough. The trial court's ruling must also "merit[] appellate review before a final judgment." Supr. Ct. R. 42(b)(i). "Interlocutory appeals should be exceptional, not routine, because they disrupt the normal procession of litigation, cause delay, and can threaten to exhaust scarce party and judicial resources." Supr. Ct. R. 42(b)(ii). When analyzing whether an issue warrants certification of an interlocutory appeal, Rule 42(b)(iii) instructs trial courts to consider eight factors.

6. The first factor asks whether "[t]he interlocutory order involves a question of law resolved for the first time in this State." Supr. Ct. R. 42(b)(iii)(A). This factor does not apply.

7. The second factor asks whether “[t]he decisions of the trial courts are conflicting upon the question of law.” Supr. Ct. R. 42(b)(iii)(B). This factor applies, because decisions of the trial court appear to conflict on each of the three issues in question.

a. The Opinion identified Court of Chancery decisions that appear to require that a plaintiff identify both a purpose for the inspection and an end use for the materials. *See* Op. at *12–14. The Opinion declined to apply the purpose-plus-an-end test.

b. The Opinion identified Court of Chancery decisions that can be read to require that a plaintiff in a Section 220 action introduce evidence from which the court can infer the existence of an actionable claim against a company’s directors or officers. *See* Op. at *18 n.20. The Opinion declined to apply the actionable-wrongdoing requirement.

c. As to the Opinion’s approach to the remedial phase, the Application identifies two transcript rulings that the Company says conflict with the Opinion. *See* Dkt. 52 ¶ 24 (citing *Elow v. Express Scripts Hldg. Co.*, C.A. No. 12721-VCMR (Del. Ch. Nov. 18, 2016); *Treppel v. United Techs. Corp.*, C.A. No. 8624-VCG (Del. Ch. Dec. 5, 2013)). The *Elow* case does not conflict. The *Treppel* case does not conflict if read narrowly, but does conflict if read broadly.

d. The plaintiff in *Elow* sought a Rule 30(b)(6) deposition of the defendant to understand the factual underpinnings of the company’s affirmative defenses. The plaintiff was not seeking understand what documents existed or who had them so as to develop a record that would assist the court in crafting an appropriately tailored inspection order. The court did not deny the request for a Rule 30(b)(6), but rather held that

it was moot after the company withdrew its affirmative defenses. *Elow, supra*, at 30–33, 55. The *Elow* transcript is thus inapposite.

e. The issue in dispute in *Treppel* was whether a company could require the plaintiff to agree to a Delaware forum provision in the confidentiality order governing a Section 220 production. There was no dispute over the existence of responsive documents or the defendant’s willingness to produce them. *See Treppel, supra*, at 6, 9. Despite the parties’ agreement, the plaintiff sought a Rule 30(b)(6) deposition to determine what documents existed and who had them. In that factual and legal setting, the court held that “the existence and whereabouts of the documents sought by the plaintiff in this 220 action are not relevant to any issues before me.” *Id.* at 12.

f. The court in *Treppel* then went on to make a broader statement that could be regarded as inconsistent with the Opinion:

Now, the plaintiff argues here that the scope of the request is also at issue, as it always is in Section 220 cases, but the scope of the request and the propriety of the scope is not limited by the actual universe of documents in existence. It is simply whether the type of documents sought, the classes and kind of documents sought, are those that are necessary and proper to address the issue that the plaintiff seeks to address.

So it doesn’t matter to me whether a specific document exists in a category. If the category is appropriate, I can order all documents in that category subject to whatever limitations are appropriate produced, and I expect the defendants will produce them. So I don’t find that arguments that this discovery needs to be made to address scope concerns persuasive.

Id. at 12–13. To the extent this comment suggests that an understanding of what types of documents exist is generally irrelevant to a Section 220 proceeding, the Opinion takes a different view. The Opinion proceeds with the understanding that the fact-specific inquiry

required to craft an order with rifled precision and to balance the interests of the stockholders and the company will be affected by what documents exist and who has them. If the company maintains particularly informative records that directly address the stockholders' purpose, then the court may hold that production of those records is sufficient and forego ordering the production of any other categories of documents. Or if informative records exist, but they would be difficult to gather and produce, the court may take that factor into account when balancing the interests of the stockholders and the company. Determining what is both essential and sufficient is invariably fact-dependent.

g. Although it is theoretically possible to rule on categories of documents in the abstract without an understanding of what documents exist, that posture puts the court in the same difficult position as stockholders crafting the demand (or any litigant requesting documents). To ensure that the order gives the stockholders what is essential, the court may err on the side of inclusion, resulting in a less tightly rifled order. Or the stockholders and the court may fail to identify the documents that go to the crux of the demand because the petitioner and the court did not know that they existed.

h. The Company reads *Treppel* as standing for the proposition that a petitioner never can obtain a Rule 30(b)(6) deposition in a Section 220 proceeding to explore what records exist and who has them. Under that reading, *Treppel* and the Opinion conflict.

8. The third factor asks whether “[t]he question of law relates to the constitutionality, construction, or application of a statute of this State, which has not been,

but should be, settled by this Court in advance of an appeal from a final order.” Supr. Ct. R. 42(b)(iii)(C).

a. The Opinion addressed the construction and application of Section 220. The critical question is whether the issues addressed in the Opinion should be settled by the Delaware Supreme Court in advance of a final order.

b. The Opinion contemplates that the plaintiffs will receive Formal Board Materials and can conduct a Rule 30(b)(6) deposition to determine what types of documents exist and who has them, and then can seek additional books and records if the plaintiffs can show that they would be necessary and essential to their proper purpose. Under this procedure, the plaintiffs will have received Formal Board Materials before any appeal to the Delaware Supreme Court could take place as a matter of right. Decisions in which the Delaware Supreme Court has stayed books and records rulings pending appeal reflect a preference for resolving issues before any documents are produced. *See, e.g., Yahoo! Inc. v. Amalgamated Bank*, No. 83, 2016 (Del. Apr. 14, 2016) (ORDER); *Parkcentral Glob., L.P. v. Brown Inv. Mgmt. L.P.*, No. 288, 2010 (Del. May 27, 2010) (ORDER). An immediate appeal will enable the Delaware Supreme Court to address the issues that the Company has raised before any books and records are produced or a Rule 30(b)(6) deposition takes place. This factor therefore supports certification.

9. The fourth factor asks the court to determine whether “[t]he interlocutory order has sustained the controverted jurisdiction of the trial court.” Supr. Ct. R. 42(b)(iii)(D). This factor does not apply.

10. The fifth factor asks whether the interlocutory order “reversed or set aside a prior decision of the trial court, a jury, or an administrative agency from which an appeal was taken to the trial court” Supr. Ct. R. 42(b)(iii)(E). This factor does not apply.

11. The sixth factor asks whether the interlocutory order has “vacated or opened a judgment of the trial court.” Supr. Ct. R. 42(b)(iii)(F). This factor does not apply.

12. The seventh factor asks whether “[r]eview of the interlocutory order may terminate the litigation.” Supr. Ct. R. 42(b)(iii)(G). If the Delaware Supreme Court concludes that the plaintiffs have not stated a proper purpose, then the litigation will terminate. This factor therefore weighs in favor of certification.

13. The eighth factor asks whether “[r]eview of the interlocutory order may serve considerations of justice.” Supr. Ct. R. 42(b)(iii)(H). If an interlocutory appeal is not certified, then the Company will have to produce Formal Board Materials, tender a witness for deposition, and potentially have to produce additional books and records if the plaintiffs make an additional showing. Although a stay pending appeal could be granted at the end of the case, the Company already would have produced the Formal Board Materials and the witness for deposition. Although the burden on the Company is likely small, it could be viewed as an injustice. By contrast, an appeal at this stage is unlikely to impose injustice on the plaintiffs. Given its approach to the litigation to date, the Company seems likely to appeal in any event, so the plaintiffs will have to litigate these issues before the Delaware Supreme Court at some point. On balance, review of the Opinion at this stage would serve considerations of justice, supporting certification.

14. Four of the eight factors support certification, but the weighing of the factors is not a mathematical exercise. The rule states:

After considering these factors and its own assessment of the most efficient and just schedule to resolve the case, the trial 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. If the balance is uncertain, the trial court should refuse to certify the interlocutory appeal.

Supr. Ct. R. 42(b)(iii).

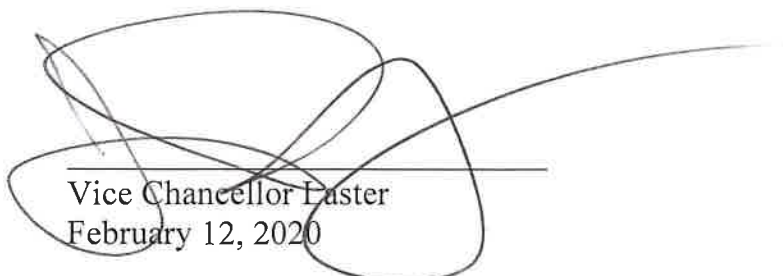
a. The most efficient and just schedule for resolving this case would involve interlocutory review of the Opinion at this stage. Interlocutory review offers the case-specific benefit of determining whether the Company must produce the Formal Board Materials, whether the plaintiffs can conduct a Rule 30(b)(6) deposition, and whether the plaintiffs can seek additional books and records. Interlocutory review also offers the wider benefit of having the Delaware Supreme Court bring clarity to the legal issues discussed in the Opinion. The Delaware Supreme Court's decision will have significant implications for the case. Depending on the outcome of the appeal, the case could end. Alternatively, the trial court might need to revisit the merits issues under a different framework.

b. If the Delaware Supreme Court does not address these issues now, then it seems likely that the high court will have to address them at some point. The Opinion contemplates that after receiving Formal Board Materials and conducting a Rule 30(b)(6) deposition, the plaintiffs can make a follow-on application to for additional books and records. Whatever the outcome, the Company is almost certain to appeal from the final judgment. Depending on the outcome of further proceedings, the plaintiffs might file a

cross-appeal. The fact that the Delaware Supreme Court will have to address these issues eventually means that the incremental expenditure of judicial resources for an interlocutory appeal is relatively low.

c. In other circumstances, the fact that the high court likely would have to address an issue eventually could warrant waiting to consider the appeal until after the final order. But here, because the interlocutory order requires the Company to produce the Formal Board Materials and provide a witness for deposition, it seems more efficient and just to address the issue now.

15. In granting the application for certification of an interlocutory appeal, this court recognizes that it has no ability to determine whether or not the Delaware Supreme Court will take the appeal. Only the high court can determine whether to accept the appeal. This court's recommendation, in the form of this certification, is that an interlocutory appeal be accepted.



Vice Chancellor Easter
February 12, 2020