EFiled: Feb 07 2020 10:03AM EST
Transaction ID 64685725
Case No. 2019-0527-JTL

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.	)	C.A. No. 2019-0527-JTL
AMERISOURCEBERGEN CORPORATION,	)	
Defendant.	)	

PLAINTIFFS' OPPOSITION TO AMERISOURCEBERGEN CORP.'S APPLICATION FOR CERTIFICATION OF AN INTERLOCUTORY APPEAL

Plaintiffs Lebanon County Employees' Retirement Fund and Teamsters Local 443 Health Services & Insurances Plan ("Plaintiffs") hereby oppose AmerisourceBergen Corp.'s ("ABC" or the "Company") application for interlocutory appeal ("App." or the "Application") of the January 13, 2020 Memorandum Opinion ("Op." or the "Opinion"). The Application must be denied because the Opinion did not decide "a substantial issue of material importance that merits appellate review before final judgment."

PRELIMINARY STATEMENT

1. ABC seeks an interlocutory appeal of the Court's interim, post-trial Opinion that determined Plaintiffs were entitled to inspect certain books and records

of ABC pursuant to 8 *Del. C.* § 220 ("Section 220"), and, if shown as necessary, later apply to inspect additional documents. Op. at 63. At trial, Plaintiffs presented "strong circumstantial evidence" of possible wrongdoing related to ABC's historical non-compliance with federal law concerning the distribution of opioids, including that the Company is the target of numerous governmental investigations and lawsuits. *Id.* at 23. Based on those factual findings—which are entitled to deference[1]—the Court held Plaintiffs stated a proper purpose for the inspection of books and records. *Id.*

2. After finding that Plaintiffs stated a proper purpose, the Opinion directed the Company to produce (i) director independence questionnaires and (ii) certain "Formal Board Materials." *Id.* at 1-2, 51, 63. The Court also permitted Plaintiffs, after inspection, to conduct a Court of Chancery Rule 30(b)(6) deposition to explore "what types of books and records exist and who has them." *Id.* at 63. This limited deposition is mainly due to ABC's refusal to answer party discovery. At that point, Plaintiffs may seek informal board materials or officer-level documents if Plaintiffs can show they are necessary and essential for their inspection. *Id.* This straightforward process is unexceptional.

[1] *See, e.g.*, *SV Inv. Partners, LLC v. ThoughtWorks, Inc.*, 37 A.3d 205, 210 (Del. 2011).

3. Interlocutory appeals "are rarely granted and generally not favored,"[2] absent "extraordinary" or "exceptional" circumstances.[3] ABC has not cited to a single case where this Court has accepted an interlocutory appeal in Section 220 litigation, and certainly not one where ***only*** board-level materials were ordered produced. Nevertheless, ABC argues that the Opinion determined "substantial issues" in this Section 220 case because (i) in supposed contravention of Delaware law, Plaintiffs (who did not receive any inspection material) did not state precisely what they want to do with the inspection material (App. ¶¶ 17-19); (ii) Plaintiffs did not prove "actionable wrongdoing" (App. ¶ 20) and the Court nonetheless rejected ABC's efforts to inject improper merits-based defenses into Plaintiffs' Section 220 proceeding (App. ¶ 21); and (iii) Plaintiffs have leave to take a Rule 30(b)(6) deposition (App. ¶¶ 22-25). These "issues" are not "substantial."

4. ABC is also wrong on the facts and the law. The Opinion correctly applied Delaware precedent and the Court's broad discretionary power to the facts

[2] Supr. Ct. R. 42, cmt (2015).

[3] *See e.g.*, *Amalgamated Bank v. Dauphin Cty. Emps. Ret. Fund*, 61 A.3d 617 (Del. 2013) (Table) ("[E]xceptional circumstances warranting interlocutory review do not exist in this case."); *Black v. Hollinger Int'l Inc.*, 856 A.2d 1066 (Del. 2004) (Table) ("Applications for interlocutory review are addressed to the sound discretion of this Court and are granted only in exceptional circumstances."); *TLC Beatrice Int'l Holdings, Inc. v. Carlton Invs.*, 676 A.2d 908 (Del. 1996) (Table); *Allen v. Jim Walker Corp.*, 577 A.2d 751 (Del. 1990) (Table); *Wilmington Sav. Fund Soc., FSB v. Covell*, 577 A.2d 756 (Del. 1990) (Table).

of this case to permit Plaintiffs to (i) inspect Formal Board Materials, and seek additional documents thereafter if necessary, and (ii) take a limited deposition. *See* Op. at 1-2, 56-57, 63; 8 *Del. C.* § 220(c) (the Court may "summarily order" inspection of books and records and "may, in its discretion, . . . award such other or further relief as the Court may deem just and proper"). This basic inspection right is unexceptional and does not provide any basis for interlocutory review.

5. The Court's inability to fashion a final inspection order at this stage is because ABC "refused to provide any discovery into what types of books and records exist, how they are maintained, and who has them." Op. at 2. Without citation, ABC now asserts its own obstruction as a basis for providing interlocutory review. Granting Plaintiffs leave to conduct a Rule 30(b)(6) deposition to ascertain this information was well within the Court's discretion to direct discovery "into the limited issues raised by the Section 220 proceeding." *Id.* at 56.

6. No Rule 42 factor supports the Application; as such, the Application should be denied.

ARGUMENT

I. THE STANDARD FOR AN INTERLOCUTORY APPEAL

7. "No interlocutory appeal will be certified by the trial court or accepted by th[e Supreme] Court unless the order of the trial court decides a substantial issue of material importance that merits appellate review before 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). The addition of the language "exceptional" and "not routine" to Rule 42 in 2015's amendment "reinforce[s] what has always been the case with interlocutory appeals—they are rarely granted and generally not favored." Supr. Ct. R. 42, cmt (2015); *see also Mountain W. Series of Lockton Cos. v. Alliant Ins. Servs., Inc.*, C.A. No. 2019-0226-JTL (Del. Ch. June 7, 2019) (ORDER) ¶ 11 (Ex. A).

II. THE OPINION DID NOT DECIDE A SUBSTANTIAL ISSUE

8. The Application fails to meet the threshold issue for certification that the Court's Opinion decided "a substantial issue of material importance that merits appellate review before a final judgment." Supr. Ct. R. 42(b)(i). "Specifically, [t]he Opinion does not conflict with existing jurisprudence or involve a substantial issue of first impression." *In re Fitbit, Inc. Stockholder Deriv. Litig.*, 2019 WL 190933, at *2 (Del. Ch. Jan. 14, 2019), *aff'd sub nom. Fitbit, Inc. v. Agyapong*, 202 A.3d 511 (Del. 2019). The Opinion does not touch on any of these potential "substantial issues of material importance."

9. ABC argues the Opinion determined "substantial issues" because it (i) concluded that Plaintiffs had established a proper purpose, (ii) were entitled to inspect Formal Board Materials and (iii) had leave to take a limited deposition. App.

¶ 15. ABC is wrong. The Opinion correctly determined that Plaintiffs had satisfied "the lowest burden of proof known in [Delaware] law,"[4] and were therefore entitled to inspect Formal Board Materials and director questionnaires. Op. at 63. The routine application of Section 220 in this specific case has no "broader" impact on Delaware corporate law. *Cf.* App. ¶ 15. As such, ABC cannot satisfy the threshold requirement that the Opinion determined a substantial issue.

III. THE APPLICATION DOES NOT SATISFY RULE 42

10. Assuming, *arguendo*, that the Opinion decided a "substantial issue," "Rule 42(b)(iii) instructs the trial court to weigh whether an interlocutory appeal will produce substantial benefits that outweigh its inevitable costs." *Mountain West*, ¶ 15. "[E]ven if an interlocutory appeal satisfies one or more of the possible criteria set forth in the Rule, the Court may still refuse the appeal." Supr. Ct. R. 42, cmt (2015). "If the balance is uncertain, the trial court should refuse to certify the interlocutory appeal." Supr. Ct. R. 42(b)(iii).

11. The Application invokes four Rule 42(b)(iii) factors. None of the factors weighs in favor of certification.

[4] *Lavin v. W. Corp.*, 2017 WL 6728702, at *7 (Del. Ch. Dec. 29, 2017) (citing *Seinfeld v. Verizon Commc'ns, Inc*., 909 A.2d 117, 123 (Del. 2006)).

A. The Opinion Correctly Applied Delaware Law

12. The Opinion is consistent with and correctly applied controlling Delaware Supreme Court precedent. As a result, there is no actual conflict for the Supreme Court to resolve and the Application is meritless. To try to create an issue where one does not exist, ABC argues that the Opinion conflicts with other Court of Chancery decisions. App. ¶¶ 16-25. This, too, is wrong and misguided as to matters of the Court's discretion.[5]

13. **Purpose-plus-an-end test.** ABC tries to create an issue under Supreme Court Rule 42 by arguing that Plaintiffs must state a specific end to their investigation "up-front." App. ¶ 17. The Company asserts that the Opinion "conflicts with Delaware law" and "other cases decided by the Court of Chancery" by holding that a stockholder is not required to state definitively what it intends to do with documents received in response to a Section 220 demand (the "purpose-plus-an-end" test). App. ¶¶ 17-19. Delaware law, however, does not require Plaintiffs to assert specific ends without conducting their investigation. Op. at 24-29.

[5] *Tavistock Civic Assoc., Inc. v. Owen*, 2019 WL 6487282, at *3 n.17 (Del. 2019) (affirming award of attorneys' fees and expenses and "separately not[ing] that the award of attorneys' fees for discovery violations rests squarely in the Court of Chancery's discretion, and we will not hold that one Vice Chancellor's discretion in one situation binds another Vice Chancellor's discretion in another situation as a matter of law").

14. This Court closely examined the cases underlying the "purpose-plus-an-end" test and concluded that they were contrary to Delaware Supreme Court precedent, which "has held that a stockholder who generally sought to investigate corporate wrongdoing could use the fruits of the investigation to file a lawsuit or for other purposes." Op. at 24 (citing cases); *see also id.* at 28.

15. The Opinion also distinguished other "purpose-plus-an-end test" cases on the facts and posture. Plaintiffs' Section 220 demands stated Plaintiffs' intent "to evaluate possible litigation *or other corrective measures with respect to some or all of these matters.*" *Id.* at 26-29 (emphasis added). The Court noted that Plaintiffs had not yet filed any plenary action and had stated proper purposes under Section 220, while the "purpose-plus-an-end" test arose from cases where the plaintiffs had already filed plenary litigation and were seeking unfair collateral litigation advantages through Section 220 proceedings. *Id.* at 26-27.[6] Contrary to Section 220's investigative purposes, such a result here "would require stockholders to commit in advance to what it will do with an investigation before seeing the results of the investigation." *Id.* at 24.[7]

[6] To the extent it applied here, Plaintiffs have met the test by explicitly stating in the Demand their potential uses of inspection materials, which are not limited to litigation, and by not seeking a collateral litigation advantage through these proceedings. *See* Op. at 29.

[7] For the same reason, ABC is also wrong that the Opinion "allows [s]tockholders to meet Section 220's requirement by merely reciting a purpose that has been

16. ABC complains that without "identifying the objective of [Plaintiffs'] investigation," the Court cannot construct an inspection order "because the stockholders' objectives, and thus the scope of books and records necessary to achieve them, are unknown." App. ¶ 19. ABC misunderstands Section 220 inspections, which are limited to documents essential to a stockholder's "stated purposes"—*e.g.*, investigating possible mismanagement—not the stockholder's "objectives"—*e.g.*, commencing litigation. App. ¶ 19 (quoting *KT4 Partners LLC v. Palantir Techs. Inc.*, 203 A.3d 738, 751-52 (Del. 2019)). This does not satisfy Supreme Court Rule 42.

17. **Actionable Wrongdoing.** ABC is also incorrect that the Opinion "conflicts with Delaware case law that requires a stockholder to investigate mismanagement for the purpose of bringing litigation to demonstrate a credible basis to suspect *actionable* wrongdoing[.]" App. ¶ 20 (citing cases) (emphasis in original). The Supreme Court's decision in *Seinfeld v. Verizon Commc'ns, Inc.*[8] "only requires that a stockholder establish, by a preponderance of the evidence, that there is a

recognized to be proper in the abstract, without demonstrating that it is one 'reasonably related to the interests of the stockholder' as required." App. ¶ 18; *see* Op. at 28-29. Plaintiff have stated numerous potential uses of the documents, and forcing them to commit to a single use pre-inspection would eviscerate the very purpose of using investigatory tools. Furthermore, given the evidence of potential misconduct at ABC presented at trial, it is absurd to characterize Plaintiffs' potential uses as "mere curiosity." *Cf.* App. ¶ 18.

[8] 909 A.2d 117 (Del. 2006).

credible basis to infer *possible* corporate wrongdoing or mismanagement." Op. at 31 (emphasis added); *see also id.* at 32. The Court adhered to Supreme Court precedent, and no actual jurisprudential conflict exists.

18. The Court carefully considered, but declined to follow, other Court of Chancery decisions that were inconsistent with *Seinfeld*, including *Beatrice Corwin Living Irrevocable Trust v. Pfizer, Inc.*, 2016 WL 4548101 (Del. Ch. Aug. 31, 2016) ("*Pfizer 220*"). The Court reasoned that the standard articulated in *Pfizer 220*, which applied a "credible basis" standard that was "functionally equivalent" to the Rule 23.1 standard, contravened *Seinfeld*. Op. at 38-39.

19. ABC's proposed "actionable-wrongdoing" requirement in a Section 220 proceeding would encounter the "phalanx" of Supreme Court cases repeatedly urging "stockholders to use Section 220 to investigate possible wrongdoing *before* filing derivative actions." *Id.* at 31-32, 34-36 (emphasis in original). As a result, "a stockholder does not have to introduce evidence from which a court could infer the existence of an actionable claim." *Id.* at 31-32.

20. Even if an actionable-wrongdoing showing were required, the Court found that ABC's "argument also fails in its own right," because "[t]he issues that the plaintiffs wish to investigate could well lead to non-exculpated claims." *Id.* at 41, 46-47 (discussing potential claims based on trial evidence). Similarly, the Court rejected the Company's statute of limitations defense based on the facts, discussing

four different ways in which Plaintiffs could have defeated a time-bar defense based on the evidence. *See id.*

21. **Deposition.** Finally, asserting a conflict with *Palantir*, ABC seeks to challenge Plaintiffs' ability to take a deposition, arguing that it upends "the relative burden of the parties and scope of discovery in Section 220 actions." App. ¶¶ 22-24. ABC's refusal to respond to party discovery alone created this issue, and ABC should not now be heard that its own conduct creates a "substantial issue."[9]

22. ABC's position is also contrary to Delaware law and creates no decisional conflict necessary for interlocutory review. Op. at 55. The Opinion simply reiterated "Delaware's case-by-case approach to Section 220 proceedings" (*id.*) and kept the burden on Plaintiffs to establish entitlement to additional books and records as "necessary and essential." *See id.* at 1-2, 63 (requiring Plaintiffs to seek additional materials).

23. Nor does the Opinion violate any required "settle-order" procedure. App. ¶ 25. *Palantir* did not, and could not, mandate a "settle-order" procedure to apply in every case regardless of circumstances; rather, the Supreme Court merely

[9] ABC's Application states the Court's determination that Plaintiffs are entitled to Formal Board Materials "should have been the end of the matter." App. ¶ 22. Yet, at trial, ABC acknowledged that if the Court determined Plaintiffs had a proper purpose, the next step would be to determine what exists other than Formal Board Materials. *See Lebanon Cty. Emps.' Ret. Fund v. AmerisourceBergen Corp.*, C.A. No. 2019-0527-JTL, at 119-22 (Del. Ch. Oct. 15, 2019) (TRANSCRIPT) ("Trial Transcript") (Ex. B).

described a typical case. 203 A.3d at 756-57. The General Assembly explicitly gave *this Court* discretion to fashion an inspection remedy. 8 *Del. C.* §220(c).

24. Though the parties here agreed to only written discovery, involuntary Rule 30(b)(6) depositions in Section 220 actions are hardly unprecedented. *See Wal-Mart Stores, Inc. v. Indiana Elec. Workers Pension Tr. Fund IBEW*, 95 A.3d 1264, 1269 (Del. 2014). Without knowing *what* books and records exist at ABC (as a result of ABC's failure to conduct discovery in good faith), it is impossible for the Court to determine with "rifled precision" *which* of those books and records would be necessary to fulfill Plaintiffs' investigative purpose under these circumstances. Imposing the prosaic solution of a limited-issue party deposition is an ordinary exercise of the Court's wide discretion under Section 220.

25. In short, the Opinion correctly applied Delaware Supreme Court precedent to the facts of this case, and exercised the Court's broad discretion to fashion appropriate relief. This is a typical Section 220 result, far short of the exceptional kind that may require interlocutory review.

B. The Opinion Unremarkably Applied Section 220 In Accordance with Its Terms and Relevant Precedent

26. In two bald sentences, ABC argues that an interlocutory appeal should be certified pursuant to Rule 42(b)(iii)(c), relating to the interpretation and application of statutes (App. ¶¶ 3, 26), but fails to identify a single legal question in the Opinion that "has not been" decided by the Delaware Supreme Court. The

Opinion applied established precepts under Section 220. As such, this is no basis for interlocutory review.

C. Termination of Litigation Does Not Support an Interlocutory Appeal

27. ABC asserts that the Application satisfies Rule 42(b)(iii)(G) because, if the Delaware Supreme Court determines that Plaintiffs lack a proper purpose, it would terminate the litigation. App. ¶ 27. That is necessarily true with respect to many issues for which interlocutory appeals are routinely denied. *See Fitbit*, 2019 WL 190933, at *2. Nothing distinguishes this case. Allowing interlocutory appeals related to proper purpose determinations would undermine Section 220's objective of providing a summary proceeding for inspection.

D. An Interlocutory Appeal Will Not Serve the Interests of Justice

28. ABC is wrong that it would suffer prejudice if forced to produce Formal Board Materials. App. ¶ 28. Plaintiffs are ABC stockholders seeking to exercise their statutory Section 220 inspection rights. The production of board-level documents and director questionnaires has become routine in Section 220 actions. There is no prejudice to a multi-billion dollar company in producing these core documents. Moreover, ABC has never argued that the production of board-level

documents would be costly or burdensome; as a result, those arguments are waived.[10]

CONCLUSION

29. The Application should be denied.

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[10] Trial Transcript at 103-07 (where ABC conceded that board-level documents should be produced if there is a proper purpose); *see Emerald Partners v. Berlin*, 2003 WL 21003437, at *43 (Del. Ch. Apr. 28, 2003) ("It is settled Delaware law that a party waives an argument by not including it in its brief.").

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Dated: February 3, 2020

CERTIFICATE OF SERVICE

I, Samuel L. Closic, hereby certify that on February 3, 2020 true and correct copies of the foregoing documents were served via electronic mail upon the following counsel:

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