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**COURT OF CHANCERY
OF THE
STATE OF DELAWARE**

COURT OF CHANCERY COURTHOUSE
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GEORGETOWN, DELAWARE 19947

Submitted: February 3, 2006
Decided: March 14, 2006

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Re: *William J. LaPoint, et al. v. AmerisourceBergen Corp.*
Civil Action No. 327-N

Dear Counsel:

This is a discovery dispute in a breach of contract case. Briefly, defendant AmerisourceBergen Corporation (“ABC”) purchased Bridge Medical Corporation, Inc. (“Bridge”) in 2002 for \$27 million and the possibility of earnout payments capped at an additional \$55 million. The earnouts were contingent upon Bridge achieving certain EBITA targets in 2003 and 2004. Plaintiffs, former shareholders of Bridge, allege that ABC violated the 2002 merger agreement by improperly calculating Bridge’s EBITA.

Well over a year into the course of discovery, ABC informed plaintiffs that ABC had recently learned of 416 box equivalents (the “boxes”) of hard copy documents at Bridge’s former headquarters that required review. Initially willing to review the documents, ABC’s counsel later represented that the boxes had long ago been reviewed by Bridge employees and that all responsive documents had

been produced. Given the equivocation, plaintiffs' counsel filed a notice of deposition intended to inquire into ABC's efforts in collecting and producing the boxes. Unfortunately, ABC had sold Bridge to another buyer during the course of discovery, so no Bridge employees remain available to represent ABC in discussing how the boxes were examined. Only Mr. Folt, ABC's lead counsel, would both be able to address the deposition's subject of inquiry and still remains within the reach of Rule 30(b)(6). Obviously, ABC would not like its lead counsel to be deposed, even if only limited to the topic of the 416 boxes and, therefore, has filed a motion for protective order.

After carefully considering the arguments presented by counsel, I conclude that there is cause to question how discovery was conducted in respect to the boxes, and that a deposition is an appropriate discovery tool.

Plaintiffs were well into the second request for documents when the boxes first surfaced, and ABC initially represented that the boxes had not yet been searched. More worrisome than this initial representation (and subsequent correction) though, ABC's counsel is still willing to claim that certain documents in the 416 boxes might not be in plaintiffs' possession but might still respond to plaintiffs' requests.¹ ABC cannot claim both: if the boxes have been searched, then all responsive documents should be in plaintiffs' possession; if the boxes have not been searched, then some responsive documents might still lie fallow, awaiting discovery.

Understanding ABC's desire to avoid having its lead counsel deposed, I offer ABC two alternatives. First, ABC might allow plaintiffs to randomly sample approximately 10% of the boxes themselves to verify that they have been already searched and the relevant documents have already been produced. ABC and plaintiffs will split the estimated \$30,000 cost of such a random sample search, (ABC's estimate of \$250,000 for a whole search, divided by ten, adding \$5,000 for lost efficiencies of scale, and the need to make comparisons to documents produced prior), *i.e.*, ABC will pay plaintiffs \$15,000 for undertaking such a random sample search. Second, ABC might itself search through the boxes.

¹ See Ex. Q to Decl. of Eric F. Leon in Supp. of Pls.' Opp'n to Def.'s Mot. for Protective Order at 2 ("Communications with Ernst & Young relating to the subject areas you identified, which relate to the subject matter of this litigation, will be or have been produced to the extent they exist or have been made available among the [416 boxes].")

Finally, without fully delving into the many other discovery disputes raised by plaintiffs in their brief opposing ABC's motion, ABC must produce a privilege log for the 500 electronic documents still withheld as privileged.

Defendant's motion for protective order is hereby denied, with certain qualifications described above.

IT IS SO ORDERED.

Very truly yours,

A handwritten signature in cursive script that reads "William B. Chandler III". The signature is written in dark ink and includes a horizontal line at the end.

William B. Chandler III

WBCIII:bsr