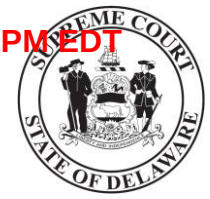
EFiled: Aug 11 2015 03:51PM EDT
Filing ID 57689829
Case Number 239,2015



IN THE SUPREME COURT OF THE STATE OF DELAWARE

SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY,	:	
Plaintiff Below, Appellant,	:	No. 239, 2015
v.	:	Court Below: Court of Chancery of the State of Delaware
ABBVIE, INC., a Delaware Corporation,	:	C.A. No. 10374-VCG
Defendant Below, Appellee,	:	

APPELLANT'S REPLY BRIEF

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Dated: August 11, 2015

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I. THE COURT OF CHANCERY ERRED BY HOLDING SEPTA FAILED TO ESTABLISH A PROPER PURPOSE UNDER SECTION 220

AbbVie[1] argues that the Court of Chancery did not establish a new, limited interpretation of the proper purpose requirement but merely "applied a principle articulated in prior Court of Chancery decisions." Ans. Br. at 14.[2] AbbVie is wrong. The plain text of the Opinion demonstrates that instead of applying the well-settled proper purpose requirement of investigating potential wrongdoing or mismanagement,[3] the Court of Chancery held that SEPTA's "purpose to investigate corporate wrongdoing [was] proper only to investigate whether AbbVie's directors breached their fiduciary duty of loyalty." Op. at 33; *See also* Op. at 34 (stating SEPTA's proper purpose was limited to "investigating *non-exculpated* corporate wrongdoing…")(emphasis added).[4]

Without citing a single case in which a court applied a Section 102(b)(7) provision in a Section 220 action, AbbVie cites the same cases relied upon by the

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[1] Capitalized terms were previously defined in Appellant's Opening Brief ("Opening Brief").

[2] The Appellant's Opening Brief is cited herein as "Op. Br. at __." Appellee's Answering Brief is cited herein as "Ans. Br. at __."

[3] *See Seinfeld v. Verizon Communs., Inc.*, 909 A.2d 117, 121 (Del. 2006); *Thomas & Betts Corp. v. Leviton Mfg. Co.*, 685 A.2d 702, 710 (Del. Ch. 1995) ("investigating possible waste and mismanagement is a proper purpose under 8 Del. C. § 220").

[4] AbbVie does not and cannot dispute that the Court of Chancery acknowledged that it has never addressed "the issue of whether, when a stockholder seeks to investigate corporate wrongdoing solely for the purpose of evaluating whether to bring a derivative action, the 'proper purpose' requirement under Section 220 is limited to investigating non-exculpated corporate wrongdoing." Op. Br. at 16; Ans. Br. at 14-15.

Court of Chancery for the proposition that the new standard "should" apply. Ans. Br. at 14-15. However, in each of these cases, the Court concluded from the record that the defenses at issue precluded plenary claims regardless of the facts that could be found in the inspection. *See Graulich v. Dell, Inc.*, 2011 Del. Ch. LEXIS 76 (May 16, 2011) (the Court determined it could not be disputed that the potential derivative claims were more than six years old and were released by a settlement in Texas, and, as such, the stockholder was time-barred from bringing the claims and barred by issue preclusion); *West Coast Mgmt. Capital LLC v. Carrier Access Corp.*, 914 A.2d 636 (Del. Ch. Nov. 14, 2006) (the Court determined that it could not be disputed that the stockholder was barred from relitigating the claims to be investigated by a prior court order); *Wolst v. Monster Beverage Corporation*, 2014 Del. Ch. LEXIS 198 (Oct. 3, 2014) (the Court determined that it could not be disputed that the potential derivative claims were more than seven years old and, thus, the stockholder was time-barred from bringing the claims).[5] As argued in SEPTA's Opening Brief, these cases are inapposite. Op. Br. at 19-21.

In contrast to the time barred and *res judicata* defense cases relied upon by the Court of Chancery and AbbVie, a Section 102(b)(7) provision cannot act *ab*

[5] AbbVie also cites the same dicta in *La. Mun. Police Emps.' Ret. Sys. v. Lennar Corp.*, 2012 Del. Ch. LEXIS 230 (Oct. 5, 2012) that the Court of Chancery relied upon. However, again, as argued in the Opening Brief, *Lennar* provides no support to require a stockholder to establish a non-exculpated breach of duty in order to have a proper purpose under Section 220. Op. Br. at 20-21.

initio as an absolute bar to a Section 220 investigation. Whether or not a Section 102(b)(7) provision will apply as a defense to plenary claims depends on facts that will be found in the Section 220 investigation. In a Section 220 action, the Court should not evaluate the viability of such an affirmative defense to claims "that have not been, and more importantly may not ever be, asserted" because Section 220 actions are summary in nature and the factual development necessary to evaluate the merits of each claim are not consistent with the statutory purpose of Section 220. *Amalgamated Bank v. UICI*, 2005 Del. Ch. LEXIS 82, *6-7 (June 2, 2005). Furthermore, a Section 102(b)(7) provision does not eliminate the merits of any fiduciary duty claims,[6] but merely eliminates the plaintiff's ability to recover monetary damages for a breach of the duty of care.[7] *Emerald Partners v. Berlin*, 787 A.2d 85, 92 (Del. 2001).

Whether a Section 102(b)(7) provision applies to potential plenary claims is dependent on the facts uncovered by the books and records investigation.[8] Under

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[6] As such, AbbVie's statement that SEPTA "has no potential derivative claim against AbbVie's directors for breach of the duty of care" is wrong. Ans. Br. at 14.

[7] AbbVie does not dispute that the new standard will require stockholders seeking inspection, and the Court, to speculate as to what relief could be available for plenary claims that have not been, or may never be, asserted. Op. Br. at 18-19. In fact, AbbVie adopts this premise and alleges "SEPTA has never suggested it sought to pursue injunctive relief." Ans. Br. at 14 n.3. AbbVie's assertion ignores that the Court of Chancery has broad discretion in plenary cases to fashion any appropriate remedy and a determination of what forms of relief, if any, may be appropriate cannot occur without first investigating and concluding what wrongdoing may have occurred. Op. Br. at 18-19.

[8] AbbVie does not dispute that the Court of Chancery's narrow interpretation of the proper purpose requirement - *i.e*. a breach of the duty of loyalty - will require shareholders to establish the very facts for which Section 220 is necessary. Op. Br. at 16-17.

Delaware law, fiduciary conduct resides on a continuum, ranging from the loyal, careful discharge of fiduciary duties on the one end to disloyal, interested, bad faith conduct on the other. *Shocking Techs. Inc. v. Kosowsky*, 2012 Del. Ch. LEXIS 224, *33 (Sept. 28, 2012) ("In theory, there may be something of a *continuum* on which [a fiduciary's] actions…should be measured. Where the line is between the acceptable and the unacceptable is not readily pinpointed.") (emphasis added). *See also Brehm v. Eisner*, 906 A.2d 27, 64-67 (Del. 2006) (discussing the spectrum of potential bad faith conduct); *Stone v. Ritter*, 911 A.2d 362, 369-370 (Del. 2006) (same). Delaware Courts have repeatedly instructed plaintiffs to use a Section 220 investigation to determine where on the continuum a fiduciary's actions fall.[9] *Ash v. McCall*, 2000 Del. Ch. LEXIS 144, *55-56 (Sept. 15, 2000) (determining that Section 220 investigation may have uncovered facts demonstrating that directors possessed knowledge of potential accounting improprieties and took no action to respond to them, failing to act in good faith); *Okla Firefighters Pension Ret. Sys. v. Citigroup Inc.*, 2015 Del. Ch. LEXIS 119, *13 (April 24, 2015) (noting once a stockholder receives books and records, "[he] can make an intelligent decision about whether or not to sue"). Once a stockholder establishes a basis to infer that misconduct may have occurred, the stockholder has established a proper purpose

[9] AbbVie ignores SEPTA's arguments that the Court of Chancery's new standard eviscerates and undermines the policy of and admonitions by this Court that shareholders should use Section 220 to determine if actionable claims exist. Op. Br. at 21-23.

under this Court's well-settled standard.

Recognizing, but glossing over, the fact that the Court established a new, unsupportable standard, AbbVie conflates the "proper purpose" requirement under 8 Del. C. §220 with the "credible basis" burden of proof. Ans. Br. at 16. AbbVie cites *City of Westland Police & Fire Ret. Sys. v. Axcelis Techs., Inc.*, 1 A.3d 281, 287 (Del. 2010) and *Seinfeld*, 909 A.2d 117, 122-23; for the proposition that "a mere statement of a purpose to investigate possible general mismanagement, without more, will not entitle a shareholder to broad §220 inspection relief." Ans. Br. at 16. However, the quotation from *Axcelis* and *Seinfeld* discusses the credible basis burden of proof, not the proper purpose requirement of Section 220. As such, contrary to AbbVie's assertion, investigating ***any*** wrongdoing or mismanagement is a proper purpose under Delaware law.[10] Op. Br. at 15-16; citing *Seinfeld*, 909 A.2d at 121; *Thomas & Betts*, 685 A.2d at 710.

[10] This was recognized by the Court of Chancery at trial when it noted: "the statement 'director wrongdoing' would seem to encompass even exculpated breaches of duty." A59:2-4

II. THE COURT OF CHANCERY ERRED WHEN IT CONSIDERED THE EVIDENCE AGAINST ITS NEW, IMPROPERLY NARROWED PROPER PURPOSE STANDARD

AbbVie incorrectly asserts that the Court of Chancery ruled that SEPTA "failed to establish a credible basis to investigate *wrongdoing* by AbbVie's directors." Ans. Br. at 19 (emphasis added). The Court of Chancery made no such finding. The Court of Chancery found that the evidence did not "show a credible basis that the Company's directors have *breached their duty of loyalty*…" Op. at 43 (emphasis added). Rather than apply the facts presented to the proper purpose requirement articulated by this Court, to investigate ***possible*** wrongdoing or mismanagement (Op. Br. at 16-17; 24-27), the Court of Chancery applied its own improperly narrowed proper purpose requirement, *i.e.*, investigating non-exculpated corporate wrongdoing, to the factual record at trial. Op. at 34, 43.

As more fully discussed in SEPTA's Opening Brief, viewing the evidence under the correct proper purpose requirement – which the Court of Chancery did not do[11] – the record fully supports a finding that SEPTA established a credible basis to infer that wrongdoing or mismanagement may have occurred. Op. Br. at 26-28. SEPTA demonstrated that AbbVie's officers and directors were aware of

[11] AbbVie's assertion that the Court of Chancery's determination that SEPTA did not establish a credible basis to infer possible wrongdoing and mismanagement should be "entitled to a high level of deference," is wrong. Ans. Br. at 18. Because the Court of Chancery applied the incorrect legal standard for the proper purpose requirement to the evidence, this Court should review the Court of Chancery's decision *de novo. DV Realty Advisors LLC v. Policemen's Annuity and Benefit Fund of Chi., Ill.,* 75 A.3d 101, 109 (Del. 2013)(on a mixed question of law and fact "[a]ppellate courts review a trial court's conclusions *de novo*.").

the government's efforts to curb ***retroactively*** inversion deals. Op. Br. at 4, 5, 8. Yet, despite these highly publicized efforts, either the AbbVie Board made no effort to determine or it disregarded whether the Transaction was in the stockholders' best interests even if the tax benefits were eliminated.[12] Op. Br. at 8-9, 27. Moreover, AbbVie's officers and directors failed to negotiate a fiduciary out clause in the merger agreement in the event the tax benefits were eliminated, while directors and officers in similar deals were doing so. Op. Br. at 6-7, 27-28. In fact, recognizing that a change to the tax laws or regulations was a palpable risk, the Merger Agreement provided that two closing conditions related to regulatory events occurring after December 31, 2013 would not apply if such change eliminated the tax benefits of the Transaction. Op. Br. at 6, 27-28. After the Inversion Regulations were announced, AbbVie's officers and directors terminated the Transaction, notwithstanding the numerous other benefits stated and purportedly given equal weight by the Board,[13] costing AbbVie $1.635 billion, or roughly 40% of its 2013 net earnings. Op. Br. at 7, 10, 11, 26-28.

[12] AbbVie's assertion that SEPTA provided no evidentiary support for the proposition that the Board made no effort to form an opinion whether the Transaction was still in the best interest of the stockholders if the tax benefits were eliminated is wrong. Ans. Br. at 24. As SEPTA cited in its Opening Brief, AbbVie admitted in the S-4 that the Board did not "form an opinion as to whether any individual factor (positive or negative), considered in isolation, supported or failed to support" the Transaction; or "quantify, rank or otherwise assign specific weights to the factors that it considered in reaching its determination and recommendation." Op. Br. at 8-9, citing A569-571.

[13] This reversal was despite the fact that prior to engaging in negotiations with Shire, Gonzalez determined that, even without the tax benefits, acquiring AbbVie made sense and, when publicly discussing the benefits of the Transaction, downplayed the tax benefits of the Transaction. Op. Br. at 5, 7, 27.

AbbVie acknowledges, as it must, that the Court of Chancery concluded that the factual record presented at trial provided an inference that the AbbVie directors' actions were negligent.[14] Ans. Br. at 21. The Court of Chancery's finding that the evidence was sufficient to infer a failure by the Board, characterizing without support the failure as negligence, establishes the requisite credible basis to infer that wrongdoing or mismanagement may have occurred in the approval and termination of the Transaction.

AbbVie attempts to evade the Court of Chancery's negligence finding by arguing that SEPTA was required to present evidence to infer that the AbbVie directors and officers actually breached their fiduciary duties. *See e.g.* Ans. Br. at 20 (arguing SEPTA was required to establish a credible basis to infer "the AbbVie board consciously failed to act on an informed basis or otherwise acted in bad faith."); Ans. Br. at 22 ("Rather, a shareholder invoking Section 220 must establish a credible basis to believe wrongdoing ***has occurred*** before it is entitled to inspection.") (emphasis added); Ans. Br. at 23 ("SEPTA provides no evidence to infer that AbbVie's directors breached their duty of care."); Ans. Br. at 32 ("SEPTA presented no evidence that the $1.635 billion Break Fee was an attempt

[14] This acknowledgement rebuts AbbVie's unsupported assertion that the Court of Chancery did not find the decision of the AbbVie Board to move forward with the Transaction to be "anything but a reasonably calculated, informed determination…." Ans. Br. at 26. Moreover, the Court of Chancery never made such a finding, nor could it, without having access to the very books and records sought by the Demand.

by AbbVie's directors to 'give away corporate assets.'"). That is not what the credible basis standard requires. A stockholder seeking inspection under Section 220 need only present "some evidence" to suggest a "credible basis" from which the court can infer that mismanagement ***may have*** occurred. *Seinfeld*, 909 A.2d at 123 (Del. 2005). Such a showing may "fall well short of demonstrating that anything wrong occurred." *Seinfeld*, 909 A.2d at 123.

In fact, Delaware Courts have held that a stockholder is "not required to prove by a preponderance of the evidence that waste and [mismanagement] are actually occurring." *Citigroup*, 2015 Del. Ch. LEXIS 119, *10, *citing Thomas & Betts*, 681 A.2d at 1031. "Both the stated purpose and the underlying need for information necessarily derive from an absence of conclusive facts, and such a standard would beg the ultimate question at issue." *Id*. (citation omitted). Moreover, a stockholder seeking inspection pursuant to Section 220 need not create a record that would "support fiduciary duty claims capable of surviving a motion to dismiss." *Id*. at 13. Instead, "the relevant question is whether the record establishes a credible basis, the 'lowest burden of proof' to support a conclusion that [a stockholder's] demand is based on more than mere suspicion and conjecture." *Id*.

AbbVie's assertion that SEPTA's argument that "[t]he Board's failure…. may just as conceivably constitute a breach of the duty of loyalty" relies on the

"mere suspicion" standard rejected by this Court in *Seinfeld* (Ans. Br. at 22) is wrong for a couple of reasons. *First*, SEPTA's argument simply makes the point that without books and records and the facts found therefrom, neither SEPTA nor the Court of Chancery can determine whether the action or inaction of AbbVie's officers and directors fall on the non-exculpated part of the continuum. Investigating fiduciary conduct to determine whether a breach of fiduciary duty has occurred and whether it sounds in loyalty is the quintessential purpose of Section 220. *Ash*, 2000 Del. Ch. LEXIS 144, *55-56 (noting that a Section 220 investigation may have uncovered facts demonstrating that directors possessed knowledge of potential accounting improprieties and took no action to respond to them, failing to act in good faith).

Second, in contrast to SEPTA here, the stockholder in *Seinfeld* conceded he had no basis from which to infer possible wrongdoing or mismanagement. In *Seinfeld*, the stockholder sought to investigate the compensation of the company's three highest officers, alleging that the compensation was excessive and wasteful because the three executives performed the same job and were paid amounts above the compensation provided for in their employment contracts. *Id.* However, at his deposition the stockholder testified that:

> …he had no factual support for his claim that mismanagement had taken place. He admitted that the three executives did not perform any duplicative work. Seinfeld conceded he had no factual basis to allege the executives "did not earn" the amounts paid to them under their

> respective employment agreements. Seinfeld also admitted "there is a possibility" that the $205 million executive compensation amount he calculated was wrong.

Id. at 119. In rejecting the stockholder's argument that the burden of proof in Section 220 actions should be reduced from the credible basis standard to allow "inspection based upon suspicions, reasonable beliefs, and logic arising from public disclosures," the *Seinfeld* Court held that such a reduction "would be tantamount to permitting inspection based on the 'mere suspicion' standard." 909 A.2d at 119, 123. The evidence produced here by SEPTA establishes a credible basis to infer that AbbVie's directors and officers may have engaged in wrongdoing or mismanagement, thereby nullifying AbbVie's "mere suspicion" argument.

AbbVie also attempts improperly to engage in a merits defense[15] by injecting the quality and content of the AbbVie officers' and directors' considerations and deliberations in approving and terminating the Transaction. Specifically, AbbVie asserts that: the "directors *carefully* evaluated the [Transaction]…." (Ans. Br. at 21); "received *detailed* advice from management and advisors, and *thoroughly* considered the risk of adverse changes to tax laws" (Ans. Br. at 25); and armed with knowledge of the risks "made an *informed*,

[15] *See Norman v. US MobilComm, Inc.*, 2006 Del. Ch. LEXIS 81, *18 (Apr. 28, 2006) ("A company engages in a merits defense when it seeks to rebut the plaintiff's allegations as to purpose by arguing that the alleged conduct never occurred or was proper.")

deliberate decision to move forward with the Transaction" (Ans. Br. at 25) (emphasis added). However, AbbVie cannot cite any evidence in the record that details: the extent of the officers' and directors' knowledge of the government's efforts to retroactively deter inversion deals; the specific information AbbVie's officers and directors considered in approving and terminating the Transaction; the thoroughness of the review of the benefits of the Transaction; or the detail of the advice and information provided to or by AbbVie's officers and directors.

Moreover, AbbVie asserts "[t]he Break Fee was required by Shire to protect it against AbbVie's board withdrawing its recommendation…." Ans. Br. at 31. However, AbbVie does not cite any facts in the record evidencing that Shire demanded or even proposed the $1.635 billion Break Fee. Indeed, the only evidence adduced at trial of Shire's specific demands for a termination fee indicates that Shire requested the $500 million Cost Reimbursement Payment, not the Break Fee.[16]

AbbVie cannot defeat the Demand by relying on its own representations regarding the content and thoroughness of the information considered and relied upon by the officers and directors in determining to approve and terminate the

[16] AbbVie's assertion that SEPTA asserted for the first time on appeal that "Shire demanded the $500 million Cost Reimbursement Payment, not the $1.635 billion Break Fee, to protect against the risk the tax benefits were eliminated," and never presented such evidence, is wrong. Ans. Br. at 31 n.9. SEPTA specifically raised this very argument in its Reply Trial Brief. *See* A227 citing A790.

Transaction. *La. Mun. Police Emples. Ret. Sys. v. Hershey Co.*, 2013 Del. Ch. LEXIS 273, *26 n.63 (Nov. 8, 2013) (noting that a company could not defeat the inspection demand by relying on its own representations regarding the issues to be investigated because it would "turn Section 220 on its head and result in companies litigating, in books and records cases, merit defenses to the alleged wrongdoing."); *La. Mun. Police Emples. Ret. Sys. v. Morgan Stanley & Co.*, 2011 Del. Ch. LEXIS 42, *21 (Mar. 4, 2011) (stating a board cannot defeat the use of Section 220 by describing a process *sans* content because such an approach would render nugatory the right to use Section 220 to investigate demand refusal.). Moreover, it is not proper in a Section 220 action to weigh the strength of the stockholder's claims for wrongdoing and mismanagement "against other possible explanations for the conduct, particularly because of the informational divide that separates the parties" at that procedural stage. *Greg de Vries v. Diamanté Del Mar, L.L.C.*, 2015 Del. Ch. LEXIS 156, *20 (June 3, 2015).[17] Whether a defendant can articulate a plausible alternative explanation for the challenged events is not relevant as the question of whether a stockholder has a credible basis to infer possible mismanagement or wrongdoing "should not turn on whether the facts might ultimately demonstrate the absence of wrongdoing." *Diamanté*, 2015 Del. Ch.

[17] S*ee also Khanna v. Covad Communs. Group*, 2004 Del. Ch. LEXIS 11, *21-22 (Jan. 23, 2004) (noting that engaging in a merits defense analysis in a Section 220 action would possibly be less plaintiff friendly than one that would be carried under Court of Chancery Rules 23.1 or 12(b)(6) because, in part, the facts might be those provided by the corporate insiders, and, as such, would defeat the purposes of Section 220.).

LEXIS 159, *24-25. As such, AbbVie's untested factual representations made outside of the record and possible alternative explanations are not relevant and amount to a merits defense that is inequitable and subversive to this action.[18]

In sum, in making these untested factual representations that cannot be determined by the record below to support their arguments,[19] AbbVie effectively concedes that SEPTA needs the requested books and records to determine if wrongdoing or mismanagement did in fact occur.

[18] *La. Mun. Police Emples. Ret. Sys. v. Countrywide Fin. Corp.*, 2007 Del. Ch. LEXIS 138, *43 (Oct. 2, 2007) (rejecting defense against a stockholders' allegation that it has a credible basis to infer possible springloading of option grants by proving that in fact no springloading ever occurred in this case, "because to accept it would 'turn on its head both Section 220 and the case law upholding a books and records inspection for the purpose of investigating mismanagement.'"); *Norman*, 2006 Del. Ch. LEXIS 81, *18 ("the Court has characterized a company's merits defense to a stockholder's stated purpose as 'inequitable and subversive of Section 220.'"); *Marmon v. Arbinet-Thexchange, Inc.*, 2004 Del. Ch. LEXIS 44, *18-19 (Apr. 28, 2004) (stating defendant's attempt to litigate a 'merits' defense that no mismanagement occurred in order to defeat a claim to inspect books and records in order to investigate possible mismanagement would turn on its head § 220 and was inequitable and subversive of § 220.)

[19] Because these factual representations are not in the record on appeal, they are not properly before this Court and should not be considered. *Viola v. Viola*, 53 A.3d 303, 303 n.2 (Del. 2012) (This Court does not "consider any materials contained in [a] brief that are beyond the scope of the record on appeal.").

III. THE COURT OF CHANCERY ERRED WHEN IT REQUIRED SEPTA TO ARTICULATE SPECIFIC WRONGDOING BY SPECIFIC OFFICERS IN ORDER TO DEMONSTRATE A CREDIBLE BASIS TO INFER WRONGDOING BY ABBVIE'S OFFICERS

AbbVie ignores the admonition by Delaware Courts instructing stockholders to use Section 220 investigations to uncover facts sufficient to demonstrate wrongdoing by specific officers. *See* Op. Br. at 32, *citing In re Sanchez Energy*, 2014 Del. Ch. LEXIS 239, *34 (Nov. 25, 2014)*; In re J.P. Morgan Chase & Co. S'holder Litig.*, 906 A.2d 808, 819-20 (Del. Ch. 2005). AbbVie also ignores SEPTA's argument that Gonzalez was acting in his capacity as an officer and as such is not protected under AbbVie's Section 102(b)(7) provision in a plenary action. Op. Br. at 33.[20]

Instead of addressing SEPTA's arguments, AbbVie asserts that "SEPTA raised no substantial claims against the officers at trial" and as such is barred under Supreme Court Rule 8 from doing so on appeal. AbbVie is wrong. The record below demonstrates that SEPTA raised allegations and presented evidence during the trial related to the significant role AbbVie's officers played in the approval and termination of the Transaction. At trial SEPTA argued: that the officers were the driving force behind the Transaction, having identified Shire as a potential target (A129), "management was intimately involved in the negotiation of the

[20] AbbVie concedes that it's Section 102(b)(7) provision "would not apply to officers" in a plenary action. Ans. Br. at 34.

Transaction and the later determination that the Transaction was no longer in the best interests of the Company and its shareholders" (A219), "management … was the [information] conduit" to the Board (A88); and "in response to the Inversion Regulations, AbbVie's management concluded that pursuing the Transaction 'was no longer in the best interest of AbbVie and its shareholders.'" A223, 242; s*ee also* A29("[T]he officers … were directly involved in the negotiations and in providing information to the board."); A241 ("The Transaction was negotiated between AbbVie's senior management and advisors, on the one side, and Shire and its advisors on the other."). SEPTA further argued that these facts provided a credible basis to infer AbbVie's officers "failed to identify and consider or disregarded the deal breaker of the inversion tax regulations"[21] and therefore the officers may have failed to "exercise[] care[22] and loyalty in first approving and recommending the acquisition, and then terminating the acquisition based on the advent of the tax regulations which were a palpable risk at the time of the original agreement to acquire Shire."[23] A14-15; s*ee also* A17-18 (if the "officers disregarded, intentionally disregarded that risk and proceeded with the transaction in the face of

[21] "This was in the context where the deal documents, the agreements, brought [the government's efforts to deter inversion deals] squarely to the fore and should have been in the fore of the board's and the directors' and officers' attention given that there was a carveout of the closing condition specifically for the tax regulations." A21-22.

[22] "[A] breach by the officers in negotiating the transaction would not be subject to exculpation and requiring a loyalty claim in order to bring a viable claim." A82.

[23] In addition, the purposes enumerated in the Demand sought "to investigate possible breaches of fiduciary duties, [waste] and mismanagement by the Board and officers of AbbVie." A250-251.

that risk, that that would be [sic] constitute a breach of loyalty under case law."). As such, contrary to AbbVie's assertion (Ans. Br. at 33-34), SEPTA's argument that AbbVie's officers may have engaged in mismanagement or wrongdoing due to their significant role in the approval and termination of the Transaction is properly before this Court.

Further, this issue is also properly before the Court because it was raised by the Court of Chancery in the Opinion. *Watkins v. Beatrice Cos*., 560 A.2d 1016, 1020 (Del. 1988) ("In determining whether an issue has been fairly presented to the trial court, this Court has held that the mere raising of the issue is sufficient to preserve it for appeal. In a case where the trial court noted in passing that it finds an argument unpersuasive, such issue was deemed to have been fairly raised for the purpose of Supreme Court Rule 8.").

In the end, AbbVie is left to adopt the Court of Chancery's unsupported finding that SEPTA was required to allege "concrete allegations" of specific wrongdoing supported by evidence against specific AbbVie officers. However, like the Court of Chancery, AbbVie, cites no authority to support this proposition. Ans. Br. at 34. SEPTA has provided sufficient evidence to support a credible basis to infer AbbVie's officers may have engaged in mismanagement or wrongdoing. That is all that is required. *See Seinfeld*, 909 A.2d at 122-23.

CONCLUSION

For the foregoing reasons, the Court of Chancery's judgment should be reversed in its entirety. Furthermore, as SEPTA respectfully requested in the Opening Brief, and such request not being opposed by AbbVie,[24] this Court should also determine the scope of books and records given SEPTA established below that the books and records sought are "necessary and essential" given the passage of time in this summary proceeding.

Dated: August 11, 2015

CHIMICLES & TIKELLIS LLP

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[24] AbbVie does not dispute this Court's authority to determine the scope of the books and records SEPTA is entitled to inspect or oppose this Court exercising such authority. Nor does AbbVie dispute that SEPTA established before the Court of Chancery that the books and records sought are necessary and essential to SEPTA's proper purpose.