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**IN THE SUPREME COURT OF THE STATE OF DELAWARE**

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| UNITEDHEALTH GROUP INCORPORATED, a Delaware corporation,<br><br>Defendant-Below, Appellant,<br><br>v.<br><br>AMALGAMATED BANK, as TRUSTEE FOR LONGVIEW LARGECAP 500 INDEX FUND, THE LONGVIEW LARGECAP 500 INDEX VEBA FUND, THE LONGVIEW QUANTITATIVE LARGECAP FUND, THE LONGVIEW QUANT LARGECAP EQUITY-VEBA FUND, LV LARGECAP 1000 GROWTH INDEX FUND, THE LONGVIEW BROAD MARKET 3000 INDEX FUND, CORAL SPRINGS POLICE OFFICERS' RETIREMENT PLAN and CENTRAL LABORERS PENSION FUND,<br><br>Plaintiffs-Below, Appellees. | No. 162, 2018<br><br>On Appeal from the Court of Chancery, C.A. No. 2017-0681-TMR |

# APPELLANT'S REPLY BRIEF

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### I. THE COURT OF CHANCERY MISAPPREHENDED UNITED'S CREDIBLE BASIS ARGUMENT AND ERRED BY FAILING TO REQUIRE PLAINTIFFS TO DEMONSTRATE A CREDIBLE BASIS FOR CONCLUDING THAT UNITED'S ALLEGED CONDUCT MIGHT BE WRONGFUL.

Before the court below, United argued that Delaware's credible basis standard requires a plaintiff to make not only a credible showing that certain conduct occurred, but also a credible showing that such conduct could be considered wrongful. *See, e.g.*, *Sec. First Corp. v. U.S. Die Casting & Dev. Co.*, 687 A.2d 563, 568 (Del. 1997) ("The threshold of a plaintiff in a Section 220 case is not insubstantial. Mere curiosity or a desire for a fishing expedition will not suffice. But the threshold may be satisfied by a ***credible showing***, through documents, logic, testimony or otherwise, ***that there are legitimate issues of wrongdoing.***" (emphasis added)). The Court of Chancery misunderstood United's argument, interpreting it as seeking a merits-based determination on whether wrongdoing actually occurred. Op. at 20-21. Plaintiffs likewise misapprehended or mischaracterized United's argument in their Answering Brief. *See* AB at 16, 22.

United did not seek any merits determination from the trial court. United's defense concerns Plaintiffs' failure to meet the credible basis standard because the trial record had no credible evidence indicating that the conduct

alleged in the FCA Litigation[1] could be considered wrongful. The credible basis standard, to have any meaning, must require a plaintiff to make a showing that alleged conduct – even accepting such conduct occurred – could credibly be considered wrongful. In their Answering Brief, Plaintiffs spend several pages quoting the "evidence" the Court of Chancery cited in its Opinion, which the Court of Chancery determined credibly supported Plaintiffs' claims that certain conduct occurred. *See* AB at 16-18 (quoting Op. at 7-9); AB at 18-19 (quoting Op. 10-11); AB at 19-20 (quoting Op. at 11-12); AB at 20-21 (quoting Op. at 13-14). What the Court of Chancery failed to consider, however, was whether the trial record provided grounds for a finding that the conduct could credibly be considered wrongful. This was error, and far from a "manufacture[d] . . . dispute over the legal standard" (AB at 4, 15).

Plaintiffs' citation in their Answering Brief to *Marmon v. Arbinet-Thexchange, Inc.*, 2004 WL 936512 (Del. Ch. Apr. 28, 2004) is inapposite. *See* AB at 22-23. In *Marmon*, the Court of Chancery found that a Section 220 plaintiff had satisfied the credible basis standard through (i) the trial testimony of two witnesses who testified that the defendant-company's Vice Chairman (and former

[1] Capitalized terms have the same meaning as in United's Opening Brief.

CEO and Chairman) had provided information concerning pervasive mismanagement at the company, ***and*** (ii) the "company's pre-litigation course of conduct[,]" which included plain violations of statutory and fiduciary law. *Marmon*, 2004 WL 936512, at *4-5. For example, the court noted that the company had held "no annual stockholders' meeting for over three years" which "alone constitute[d] a violation of Delaware statutory law." *Id.* at *5. The company had also not "disclosed to its shareholders any information about itself or its activities, as would normally occur in connection with a shareholders' meeting[,]" despite engaging in material transactions during that time period, in violation of fiduciary law. *Id.* The trial record in *Marmon*, unlike here, contained evidence of conduct that was, on its face, unlawful.

The company in *Marmon* "attempt[ed] to prove at trial, through live witnesses, that the conduct that [the plaintiff] claim[ed] may constitute mismanagement was in all respects substantively lawful and in no sense improper." *Id.* at *6. That is not United's argument here. United has maintained that when a Section 220 plaintiff bases its demand solely on an ancillary complaint in a wholly separate litigation, the credible basis standard must require the plaintiff to set forth credible evidence that the allegations in the complaint are legally viable

– that they at least state a claim – not that the claims in the complaint will ultimately be successful.

Here, Plaintiffs' demands were admittedly based solely on the FCA Litigation, which consisted of two actions: the *Swoben* Action and *Poehling* Action. As of the date of trial, the *Swoben* Action (and specifically the Government's Complaint-In-Partial-Intervention thereof) had been dismissed in its entirety for failure to state a claim. The Court of Chancery, therefore, could not have rationally concluded that the *Swoben* complaint provided a credible basis to believe that United's alleged conduct might have been wrongful. Since the dismissal of the *Swoben* Action, Plaintiffs have attempted to distance themselves from it (*see, e.g.*, AB at 24 n.14), but Plaintiffs cannot take back – *ex post* – their contemporaneous description of the *Swoben* Action in their demands as "alleg[ing] a nearly identical scheme to that found in both the [DOJ's] Complaint [in *Poehling*] and the [relator's] *Qui Tam* Complaint [in *Poehling*]." A1143; A0890.

As of the date of trial, the *Poehling* Action, which (i) was based on the same government investigation as the *Swoben* Action, and (ii) asserted claims similar to those asserted in the *Swoben* Action, was subject to a pending motion to dismiss for failure to state a claim. ***Thus, the trial record in this case contained no claim against United that had made it past the pleading stage.*** The dismissal

of the *Swoben* Action undercut any credible basis to believe that the *Poehling* complaint stated a viable claim.[2]

Just weeks after the Section 220 trial, the District Court issued a decision in the *Poehling* Action – the sole remaining basis for Plaintiffs' Section 220 demand – on the motion to dismiss. For the reasons stated in United's Opening Brief, this decision was not part of the trial record, and this Court should not consider it on appeal. *See* OB at 27.

Should the Court decide to consider the decision in *Poehling*, it illustrates the need for the Court of Chancery to consider whether the alleged conduct that serves as the basis for a Section 220 demand could credibly be considered wrongful. The presiding judge in *Poehling* dismissed all of the FCA claims based on alleged false statements or attestations filed by United, the theory on which Plaintiffs' demands and Section 220 complaints were based, just as the

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[2] Prior to the resolution of the motion to dismiss in *Poehling*, United filed a Motion for Early Deposition Discovery. That motion was far from an "admi[ssion]" that the claims in the *Poehling* Action were viable (AB at 12 n.8), as United made clear at the Section 220 trial. *See* A2047-48 (explaining that the presiding judge in *Poehling* "has a standing order requiring very early institution of discovery" and that, in any event, "[t]he fact that UnitedHealth has said, 'Yeah, I want to take discovery as soon as I may need to, because you have been looking at this for six years,' is no admission that the motion [to dismiss] is not strong or that in any way UnitedHealth expects this case to go forward.").

presiding judge in the *Swoben* Action had done. The only FCA claim that remains is based on a factual theory – that "diagnostic codes" are themselves overpayments – that was first pled by the DOJ after Plaintiffs sent their demands and filed their Section 220 complaints. Thus, the "reverse" FCA claim that survived the motion to dismiss is based on a different theory of liability and a substantially narrower time period than that on which Plaintiffs' demands and complaints are based.

To the extent the Court decides to consider it, the decision in the *Poehling* Action makes clear that the scope of documents that are "necessary and essential" to Plaintiffs' investigation is different than the scope of documents the Court of Chancery ordered United to produce based on the trial record. The surviving FCA claim purports to start in 2009, and even the government has acknowledged that the *Poehling* Action "seeks damages for payment years 2009-17," ***not*** earlier. AR0015; *see also* A2119. Yet the dismissed claims in *Poehling* – and the period covered by the Court of Chancery's production order – go back to January 1, 2005.[3] United has been forced to produce to Plaintiffs documents (4,542 pages) under Paragraph 1(a) of the production order (Ex. B to OB) that

[3] For this reason, in their Answering Brief (at 24), Plaintiffs avoid confronting the fact that that the majority of the claims in the *Poehling* Action were dismissed and that the FCA claim that remains relates to a different time period.

includes a time period, covering four years (2005-2008), that the government in the underlying complaint is no longer even pursuing.[4]

The trial record contained no evidence that could support a finding that there was a credible basis to believe United's alleged conduct might be wrongful. The post-trial *Poehling* decision actually reinforces the conclusion that Plaintiffs failed to demonstrate a credible basis to believe United's conduct was wrongful because that decision dismissed the claims based on the theory that Plaintiffs cited in support of their demands. Indeed, in a parallel action pending in federal court in Washington, DC, United has argued that CMS does not even have authority to impose the kind of claims submission regime that is the framework for the DOJ's allegations in the FCA Litigation. At the time of trial in this action, United's lawsuit against CMS had already survived a motion to dismiss – which is

[4] United has already been required to produce documents, including for a time period the government is not even pursuing in the *Poehling* Action, during the briefing of this appeal. United sought a stay of the production order pending appeal, which was denied. That result is regrettable because the case law on stays pending appeal in Section 220 actions has recognized the irreparable harm to defendants from producing documents that the Supreme Court later determined the Plaintiff was not entitled to inspect. An inspection of documents "cannot be undone." *Wynnefield Partners Small Cap Value L.P. v. Niagara Corp.*, 2006 WL 2521434, at *2 (Del. Ch. Aug. 9, 2006), *rev'd*, No. 385, 2006 (Del. Aug. 16, 2006) (order granting stay). Plaintiffs cannot "unsee" documents they have inspected.

more than can be said of the FCA Litigation. The Court of Chancery's decision should be reversed.

## II. THE COURT OF CHANCERY INCORRECTLY APPLIED THE CREDIBLE BASIS STANDARD BY RELYING ON CHARACTERIZATIONS OF DOCUMENTS AND TESTIMONY NOT PART OF THE RECORD BEFORE IT.

The Court of Chancery incorrectly applied the credible basis standard by relying solely on characterizations, which were made by a litigant in a separate case, of documents and testimony that were not part of the record before the court.

Plaintiffs incorrectly assert that this issue was not raised before the Court of Chancery. AB at 26-27. This concern was, in fact, discussed during the trial:

> The Court: Because that document is cited in the complaint, all of a sudden I can't look at that document in the same way?
>
> Mr. Scaggs: Of course you can look at it, Your Honor. That's not my point. The point is, can it support by itself, as an allegation, a credible basis? And the answer is, we would submit, needs to be no, because every complaint, and what lawyers are paid to do is write a one-sided set – a version of facts trying to maximize their ability to state a claim. It's not in context. It's not meant to be in context. And if you look at those documents, they are, of course, spun very hard in the allegations that refer to them. So it's just allegations. It's backup for allegations.

A2032-A2033.

United never disputed that the Court of Chancery could consider the *qui tam* complaints, their exhibits, and the other documents submitted as part of the

trial record. Instead, United pointed out that it would be improper for the trial court to rely upon allegations in a pleading characterizing and purporting to summarize documents and testimony without actually first having seen those documents or read that testimony.

Delaware case law is clear that there must be some ***independent*** evidence – in addition to allegations in an ancillary complaint – to meet the credible basis standard. *See Graulich v. Dell Inc.*, 2011 WL 1843813, at *5 (Del. Ch. May 16, 2011). The type of additional evidence deemed to be sufficient has included: (i) a company's answer and counterclaims and public statements made by the company's management;[5] (ii) a Special Committee appointed by the company's board to conduct an internal investigation;[6] and (iii) a company's announcement of a substantial financial restatement and subsequently becoming the subject of a formal SEC investigation.[7] Here, the Court of Chancery erroneously relied upon a plaintiff's characterizations of documents and testimony

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5 *Elow v. Express Scripts Holding Co.*, 2017 WL 2352151, at *6 (Del Ch. May 31, 2017).

6 *Romero v. Career Educ. Corp.*, 2005 WL 1798042, at *2 (Del. Ch. Jul. 19, 2005).

7 *Freund v. Lucent Techs., Inc.*, 2003 WL 139766, at *1 (Del. Ch. Jan. 9, 2003).

as the requisite "additional evidence." The documents and testimony themselves were never before the Court of Chancery, and are not part of the evidentiary record. The characterizations of the documents and testimony were, of course, inherently one-sided and highly selective because they were made by a plaintiff aiming to assert claims that might survive a motion to dismiss.

Both the Court of Chancery and Plaintiffs ignore the distinction between an actual document or transcript and a litigant's characterization of it. Plaintiffs' Section 220 complaints and the Memorandum Opinion both proclaim that the allegations in the FCA Litigation are based on the testimony of twenty employees and over 600,000 documents collected over a five-year period. But with scant exceptions, these documents and testimony were not a part of the evidentiary record. The Court of Chancery relied overwhelmingly on allegations purporting to summarize or characterize unseen documents and testimony (*compare* Op. bullet points at 7-14 to Appellee's Appendix at B00151-B00168 (exhibits to Complaint)), and only cited to one exhibit attached to the *Poehling* complaint. Op. at 13 (citing PX 14 - Exhibit 2 to *Poehling* complaint.).

In concluding "[t]he documents uncovered by the DOJ's lengthy investigation, coupled with the sworn testimony and statements of Defendant's own management, are enough to meet the 'lowest possible burden of proof' in

Delaware law" (Op. at 20), the Court of Chancery drew on language in *Elow*, but meaningfully lowered the standard applied in that case. In *Elow*, the court held that "the pleadings in the Anthem Action, coupled with the [public] statements by Express Scripts's management, are enough to meet the 'lowest burden of proof' set by Delaware law." *Elow*, 2017 WL 2352151, at *6 (basing its finding on public statements by company management made during earnings calls, in public financial filings, and in the company's answer and counterclaims in a publicly filed lawsuit). The Court of Chancery in this case, on the other hand, conflated reliance on documents and statements with reliance on a litigant's characterizations of those documents and statements. A litigant's one-sided characterizations of evidence are fundamentally different than a company's "own answer and counterclaims and the public statements of [its] management." *Id*. at *5, n.61. Plaintiffs did not provide the same type of additional evidence the Court of Chancery found sufficient in *Elow*, *Romero*, and *Freund*.

United does not seek to "escape" the testimony and documents simply because they are mentioned in the complaint (Op. at 20), but rather argues that they do not constitute the requisite additional evidence because they are *only* mentioned in the complaint, and were never themselves part of the evidentiary record. The Court of Chancery never saw the testimony and documents it claims "demonstrate

a credible basis" (*Id.*), but nonetheless treated selective references and purported quotations as if they were the actual testimony and documents.

Allegations in a separate lawsuit, standing alone, have never been sufficient to establish a credible basis, and Plaintiffs do not contend otherwise. In treating allegations and characterizations of documents that the trial court had never seen as the additional evidence sufficient to meet the credible basis burden, the Court of Chancery departed from established precedent, and accepting this approach would place the law governing Section 220 on a slippery and uncertain slope of when allegations in a complaint, standing alone, are purportedly the product of sufficient background evidence, which is not before the court, to justify allowing a stockholder to impose the expenditure of resources and disruption involved in a large document production on a Delaware corporation. The Court of Chancery's near sole reliance on the characterizations of a litigant in ancillary litigation was error, and its decision should be reversed.

## CONCLUSION

For the reasons set forth above and in the Opening Brief, United respectfully requests that the Court reverse the Court of Chancery's Memorandum Opinion and production order and deny Plaintiffs' request for inspection.

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