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IN THE SUPREME COURT OF THE STATE OF DELAWARE

AMERISOURCEBERGEN CORPORATION, Defendant-Below, Appellant, v. LEBANON COUNTY EMPLOYEES' RETIREMENT FUND AND TEAMSTERS LOCAL 443 HEALTH SERVICES & INSURANCE PLAN, Plaintiffs-Below, Appellee.	No. 60,2020 Court below: Court of Chancery C.A. No. 2019-0527-JTL **PUBLIC VERSION** **DATED: May 6, 2020**

APPELLANT'S OPENING BRIEF

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NATURE OF PROCEEDINGS

Plaintiffs Lebanon County Employees' Retirement Fund ("Lebanon") and Teamsters Local 443 Health Services & Insurance Plan ("Teamsters") (together with Lebanon, "Plaintiffs") served a demand under 8 *Del. C.* § 220 upon Defendant AmerisourceBergen Corp. ("ABC," the "Company" or "Defendant") on May 21, 2019 (the "Demand"). The Demand sought wide-ranging books and records purportedly to investigate whether ABC's officers and directors breached their fiduciary duties under *Caremark* in connection with its subsidiary's AmerisourceBergen Drug Corporation ("ABDC") distribution of opioid medications. (*See generally* A611-A659.) ABC rejected the Demand on June 7, 2019 on the grounds that the demand failed to state a proper purpose and that the Demand sought books and records that exceeded what was necessary and essential to meet Plaintiffs' alleged purpose. (A660-A665.) Plaintiffs then filed their complaint to enforce their demand on July 8, 2019. On October 15, 2019, the lower court, by agreement of the parties, conducted a trial on the paper record that precluded the taking of depositions. On January 13, 2020, the lower court issued a Memorandum and Opinion (the "Opinion" or "Op.") (Exhibit A hereto) that held, *inter alia*: (i) Plaintiffs stated a proper purpose for inspection; (ii) Plaintiffs had met their evidentiary burden of demonstrating that "Formal Board Materials" were

essential to achieving Plaintiffs' purpose; and (iii) Plaintiffs were granted leave, following production of the "Formal Board Materials," to conduct a Rule 30(b)(6) deposition to determine "what other documents exist and who has them" and thereafter request additional documents, including "Informal Board Materials" and "Officer-Level Documents." (Op. at 57.)

On January 23, 2020 the Company timely sought certification of an interlocutory appeal. This Court certified the interlocutory appeal on February 12, 2020.

SUMMARY OF ARGUMENT

1. The lower court erroneously interpreted Section 220 to hold that a stockholder has satisfied the statute's "proper purpose" requirement by stating an intention to investigate wrongdoing without explaining the objectives of the investigation. In the abstract, investigating wrongdoing is a well-recognized purpose for inspection of books and records, but it is meaningless standing alone. To be a "proper purpose," the investigation must be "reasonably related to [the stockholder's] interests as a stockholder." *Id.* Accordingly, a long line of Court of Chancery decisions has held that it is insufficient for a stockholder to simply invoke the phrase "investigating wrongdoing" to satisfy its burden of establishing a proper purpose. (Op. at 27 n.10 (collecting cases).) Rather, the stockholder must state the objectives of the investigation such that the corporation and court may evaluate whether the statute's requirements are met. Otherwise, the investigation could be sought for mere curiosity or other reasons not reasonably related to the stockholder's interests as a stockholder. The Opinion conflicts with this majority rule by holding that a stockholder need not identify the objectives of its investigation in a Section 220 demand and thus constitutes legal error.

2. After rejecting that Section 220 required Plaintiffs to state the objectives of their investigation in the Demand, the lower court erroneously concluded that Plaintiffs, even though seeking books and records solely to evaluate litigation, need not proffer a credible basis to suspect that actionable wrongdoing has occurred. The Court of Chancery has repeatedly held that a stockholder investigating wrongdoing solely for the purpose of evaluating derivative litigation must present some evidence demonstrating a credible basis to suspect that actionable wrongdoing has occurred. This Court has affirmed at least one decision on that very ground. Nonetheless, the lower court rejects the majority rule based on the Court's misapprehension that the rule requires stockholders to "introduce evidence sufficient to support a claim that could survive a pleading-stage motion to dismiss pursuant to Rule 23.1." (*Id*. at 31.) The cases applying the majority rule do not so hold, nor did Defendant argue in favor of such a rule below. Rather, the majority rule is nothing more than an application of Section 220's requirement that a stockholder's purpose be reasonably related to such person's interest as a stockholder. The Opinion's alternative standard is precisely that which this Court rejected in *Seinfeld*. Having rejected the actionable wrongdoing requirement as a matter of law, the lower court then erred by concluding that Plaintiffs stated a proper purpose based upon evidence

which, at most, suggests a basis to suspect claims barred by the Company's Section 102(b)(7) provision and the statute of limitations.

3. The lower court also erroneously applied the law with respect to determining the scope of books and records to be produced. In particular, after concluding that Plaintiffs had demonstrated only that the "Formal Board Materials" were necessary and essential to their purpose, the lower court nevertheless *sua sponte* permitted Plaintiffs to take a post-trial, Rule 30(b)(6) deposition of the Company. The purpose of the deposition is to aid Plaintiffs in proving that additional documents are essential to achieve their purpose, including documents that were not requested in the Demand. The lower court's ruling is erroneous as a matter of law for several reasons.

First, the lower court effectively relieves Plaintiffs of their burden. Having found that Plaintiffs had only met their burden of demonstrating that "Formal Board Materials" were essential to achieving their purpose, Plaintiffs thus failed to meet their burden of proving that any other categories of documents are essential to their purpose. Yet the lower court granted Plaintiffs, *sua sponte*, a second bite at the apple, after trial, through taking a deposition that Plaintiffs themselves declined, and the lower court had prohibited in an agreed-upon stipulation: "No depositions shall

be taken in this case." (A667.) The lower court predicates the decision to do so on the erroneous ground that the Company refused to answer an interrogatory asking to identify the types of books and records maintained by the Company, effectively overruling, *sua sponte*, an objection that Plaintiffs never challenged. And the lower court permitted the deposition in furtherance of allowing Plaintiffs to request additional categories of books and records including documents that Plaintiffs did not seek in their Demand.

The lower court's post-trial discovery directive is also in conflict with this Court's decision in *KT4 Partners LLC v. Palantir Technologies Inc.*, 203 A.3d 738 (Del. 2019). *Palantir* instructs that Section 220 summary proceedings should be streamlined, and therefore, consistent with many Chancery decisions, are not appropriately the subject of discovery into collateral issues such as the existence and whereabouts of documents. Eschewing such discovery, *Palantir* establishes that the courts should instead look to the good faith participation of the company in determining the production order.

Finally, the lower court's expansion of the categories of documents Plaintiffs seek beyond what was sought in the Demand was error. As numerous Court of

Chancery decisions hold, a corporation is entitled to a fair opportunity to comply with an inspection demand before incurring the costs of litigation.

STATEMENT OF FACTS

A. AmerisourceBergen Corporation

AmerisourceBergen is one of the largest global pharmaceutical sourcing and distribution services companies. The Company distributes pharmaceuticals, over-the-counter healthcare products, home healthcare supplies and equipment, and related services to a wide variety of healthcare providers, through its subsidiary ABDC. (A39.) It is part of the supply chain for medications and has no insight into the process of prescribing medications or the relative supply and demand of medications. (A534.) The distribution of opioid medications is an immaterial part of ABDC's business, accounting for less than two percent of the Company's annual revenue. (*Id*.)

B. AmerisourceBergen's Diversion Control Program And The "Industry Wide" Dragnet Of Investigations And Lawsuits

Federal and state law require pharmaceutical distributors of controlled substances to implement "diversion control" programs—a system designed and operated "to disclose to the [distributors] suspicious orders of controlled substances." 21 C.F.R. § 1301.74(b). ABC has had a diversion control program to monitor suspicious orders since as early as 1980. (A30.) ABC's current diversion control program has been in place since a settlement with the DEA in 2007 arising

from the alleged failure of the diversion control program to detect suspicious orders from rogue internet pharmacies. As a condition to reinstatement of ABDC's license, ABDC's diversion control program was required to pass several DEA inspections. ABDC's license was reinstated on August 25, 2007. (A19.)

Starting in 2012, the Company, along with virtually all manufacturers, distributors and pharmacies with a connection to opioids, became the subject of numerous investigations and lawsuits relating to diversion control. (*See* A616-A618.) The Company entered into a settlement with the State of West Virginia in 2017, with no admission of liability. (A864, A873; A165.) In fact, the Company has admitted no liability in connection with any of the investigations or lawsuits, and to date, none of the DEA or DOJ investigations (which began in 2014) have resulted in any enforcement action of any kind. Notably, none of the lawsuits have implicated the Board in any wrongdoing.

While the investigations and lawsuits proliferated, the Company was continuously reporting publicly its enhancements to its diversion control programs. The Company reported it undertook a "comprehensive review" of its diversion control program in 2014. (A382.) Following this comprehensive review, the Company rolled out substantial enhancements to its diversion control and order

monitoring programs in August of 2015. (*Id.*) Two years later in 2017, the Company's diversion control and order monitoring programs underwent further review, followed by further enhancements. (A21.)

C. The Demand

Plaintiffs each retained their attorneys for the purpose of commencing derivative litigation in the pursuit of damages. On May 17, 2019, Teamsters retained counsel for the sole purpose of "represent[ing] [Teamsters] in connection with the Section 220 demand, and *potential lawsuit* as a named plaintiff and representative of the [C]ompany, involving the Board of Directors and AmerisourceBergen Corp. . . . and other defendants, if necessary, involving damages arising out of breaches of fiduciary duty and corporate malfeasance." (A829 (emphasis added).) Four days later, the Demand was sent on behalf of both Teamsters and Lebanon. (*See* A611-A659.) Nearly two months later, Lebanon retained counsel in connection with "AmerisourceBergen Corporation Shareholder Litigation" and Lebanon's "seeking to be a class representative . . . ." (A763.)

On May 21, 2019, Plaintiffs sent to the Company a purported demand to inspect books and records. Consistent with their engagement letters and their objective of pursuing litigation, the Demand seeks to "investigate possible breaches

of fiduciary duty, mismanagement and other violations of law" by the Company's officers and directors, to "consider any remedies" to be sought, evaluate the independence and disinterestedness of the Board, and evaluate possible litigation or "other corrective measures." (A622-A623.) The Demand fails to explain what vaguely referenced "remedies" or "corrective measures" might be "evaluate[d]," apart from the equally vague assertion that Plaintiffs might take "appropriate action," including bringing litigation or making a demand on the Board. (A623.)

The Demand seeks Board Materials concerning thirteen broad topics that Plaintiffs assert are "necessary to investigate whether the Company's Directors and Officers have committed mismanagement or breached their fiduciary duties . . . ." (*Id*.) Plaintiffs define "Board Materials" as:

> documents dated from May 1, 2010 to the present that were provided at, considered at, discussed at, or prepared or disseminated, in draft or final form, in connection with, in anticipation of, or as a result of any meeting of the Company's Board or any regular or specially created committee thereof, including, without limitation, all presentations, Board packages, recordings, agendas, summaries, memoranda, charts, transcripts, notes, minutes of meetings, drafts of minutes of meetings, exhibits distributed at meetings, summaries of meetings, and resolutions.

(A621.) Plaintiffs later described in their trial briefs that their requested categories of documents are "appropriately limited to books and records of the Company *within*

the Board's purview." (A1019 (emphasis added).) This was confirmed by a pre-trial order entered by the lower court, which specifically provided that the Demand only sought documents "received, authored by or presented to any member of ABC's Board." (A950.)

D. This Litigation

Plaintiffs filed their Complaint on July 8, 2019. The Parties entered into a Stipulation and Proposed Order Governing Case Schedule, granted by the lower court on August 13, 2019. The Stipulation provided that "*No depositions shall be taken in this case,*" (A667) and that, other than a limited number of interrogatories, "*[n]o other discovery shall be permitted in this case.*" (*Id.* (emphasis added).)

Plaintiffs served interrogatories upon Defendant. Plaintiffs' Interrogatory 1 requested the Company to "Identify the directors, officers and senior managers of ABC and ABDC who are reasonably likely to have information responsive to Plaintiffs' May 21 Demand." (A676.) No request was ever made to identify the types of books and records maintained by ABC and who has them. ABC objected on the grounds that, *inter alia*, "such discovery is not relevant to a Section 220 action, which limits inspections to books and records in the corporation's actual possession or control and does not extend to individuals' knowledge or information,"

(*id.*), and would entail a massive expenditure of time and money to answer this interrogatory. Plaintiffs never challenged the Company's objection, implicitly acknowledging the discovery was improper in a Section 220 action.

Despite alleging a suspicion of *Caremark* claims in the Demand and Complaint, Plaintiffs raised improper objections to Defendant's discovery, refusing to identify a single red flag that was presented to the Board and ignored. Instead, Plaintiffs simply copied and pasted the allegations from their Complaint. (A703-A766, A767-A833.)

E. Trial And The Opinion

The Court conducted a trial on a paper record on October 13, 2019. At trial, Defendants argued, *inter alia*, that the Demand sought to investigate a *Caremark* claim for the purpose of evaluating litigation. (A1168.) Defendants argued that, because Plaintiffs' investigatory purpose was directed solely at evaluating litigation, Plaintiffs were required to present a credible basis to suspect an actionable claim. (A844, A869-A870.) Defendants also argued that, because the Company has a Section 102(b)(7) exculpatory provision, Plaintiffs were required to demonstrate a credible basis to suspect bad faith by the Board and failed to do so. (A870.) Defendants further argued that Plaintiffs could not meet their burden because any

possible claim was barred by the statute of limitations, as demonstrated by the allegations in the Complaint. (A846, A882-A884.) Finally, Defendants argued that, if Plaintiffs had proven a proper purpose, only a subset of the Board Materials requested were essential to achieving Plaintiffs' purpose. (A884-A894.) At trial, the Court engaged Defendant regarding whether the Demand requested emails, as well as "informal board materials" and "officer level materials." (A1136-A1145.) Counsel for Defendant objected that the Demand contained no request for such materials. (*Id*.)

On January 15, 2020, the Court issued its Opinion. In the Opinion, the Court made three rulings that are the subject of this Appeal:

1. The Court rejected Defendant's argument that the Demand sought investigation of wrongdoing solely for the purpose of evaluating litigation because the Court held that Plaintiffs were not required to identify their end use under Delaware law.

2. The Court rejected Defendant's argument that Plaintiffs were required to demonstrate a credible basis to suspect actionable wrongdoing as contrary to Delaware law, and held that Plaintiffs stated a proper purpose to investigate wrongdoing generally.

3. Regarding the scope of production, the Court held that Plaintiffs had proven only that "they are entitled to Formal Board Materials." (Op. at 57.) Despite this finding, the Court reasoned that "[i]t is often helpful when ruling on a Section 220 demand to have information about what types of books and records exist and who has them," (*id*. at 56-57), but purportedly "AmerisourceBergen refused" to provide such information in discovery. (*Id*. at 54.) Accordingly, the Court held that "[a]fter AmerisourceBergen produces Formal Board Materials, [Plaintiffs] may conduct a Rule 30(b)(6) deposition to determine what other types of books and records exist and who has them. If the parties cannot agree on a final production order at that point, then [Plaintiffs] may make a follow-on application for Informal Board Materials or Officer-Level Documents." (*Id.* at 57.)

ARGUMENT

I. THE LOWER COURT ERRED BY HOLDING THAT A STOCKHOLDER SEEKING TO INVESTIGATE WRONGDOING IS NOT REQUIRED TO IDENTIFY THE OBJECTIVES OF THE INVESTIGATION.

A. Question Presented

Whether the Court erred by holding, *sua sponte*, that stockholders seeking to investigate wrongdoing are not required to identify the objectives of the investigation? (*See* A868-A871; A905, A908-A910; A1168-A1181.)

B. Standard Of Review

The lower court's legal conclusions are reviewed *de novo*. *Nationwide Emerging Managers, LLC v. NorthPointe Holdings, LLC*, 112 A.3d 878, 889 (Del. 2015).

C. Merits Of Argument

1. The Statutory Definition Of A Proper Purpose And Delaware Supreme Court Precedent Require A Stockholder Seeking To Investigate Wrongdoing To Identify The Objectives Of The Investigation.

Section 220 defines a proper purpose as one "reasonably related to such person's interests as a stockholder." 8 *Del. C.* § 220(b). As this Court has explained:

> …[w]hat is required by ... section [220] is that the purpose for the demand be reasonably related 'to such person's interest as a

> stockholder.' That is, the purpose must be something that stockholders would be interested in because of their position as stockholders." Conversely, "[a] purely individual purpose in no way germane to the relationship of stockholder to the corporation is not a proper purpose within the meaning of the statute.

Thomas & Betts Corp. v. Leviton Mfg. Co., Inc., 681 A.2d 1026, 1033 (Del. 1996) (emphasis added; citations omitted; alterations in original). As the statute requires, the stockholder must establish a proper purpose as defined in the statute as a prerequisite to being entitled to inspect books and records:

> Where the stockholder seeks to inspect the corporation's books and records, other than its stock ledger or list of stockholders, such stockholder *shall first establish* that: (1) [s]uch stockholder is a stockholder; (2) [s]uch stockholder has complied with [section 220] respecting the form and manner of making demand for inspection of such documents; and (3) *[t]he inspection such stockholder seeks is for a proper purpose.*

8 *Del. C.* § 220(c) (emphasis added).[1]

[1] In *Central Laborers Pension Fund v. News Corporation*, 45 A.3d 139 (Del. 2012), for example, this Court held that a stockholder failed to satisfy Section 220(c) where, *inter alia*, evidence of beneficial ownership "was not included with the Inspection Demand." *Id*. at 145. While *Central Laborers* concerns the "form and manner" requirements of Section 220(c), "[t]he *ratio decidendi* … applies with equal force in this case." 45 A.3d at 146. Like the "form and manner" requirements of Section 220(c), so too must the stockholder "first establish" that "[t]he inspection such stockholder seeks is for a proper purpose." 8 *Del. C.* § 220(c).

Investigating corporate wrongdoing is, in the abstract, a widely recognized proper purpose. *City of Westland Police & Fire Ret. Sys. v. Axcelis Techs., Inc.*, 1 A.3d 281, 287 (Del. 2010) ("Our law recognizes investigating possible wrongdoing or mismanagement as a 'proper purpose.'"). However, more is required to determine whether the intended investigation is "reasonably related to such person's interests as a stockholder." There are many reasons why a stockholder might seek to investigate possible wrongdoing that are unrelated to its interests as a stockholder, and thus, by definition, are improper purposes. As is commonly recognized, for example, "[m]ere curiosity or a desire for a fishing expedition will not suffice." *Sec. First Corp. U.S. Die Casting & Dev. Co.*, 687 A.2d 563, 568-69 (Del. 1997). Likewise, disputes over business decisions are not sufficient. *Seinfeld v. Verizon Commc'ns, Inc.*, 2005 WL 3272365, at *3 (Del. Ch. Nov. 23, 2005) ("it is not enough under Section 220 for Seinfeld to state that he disagrees with the business judgment of Verizon's board of directors"), *aff'd*, 909 A.2d 117 (Del. 2006). Hypothetically, a stockholder might seek to investigate possible corporate wrongdoing for purposes of harassment, to write an exposé, or to find ammunition to pursue individual claims against the corporation or third parties. The critical point is that while investigating corporate wrongdoing may be a commonly accepted proper purpose in the abstract,

whether that purpose in a specific case is reasonably related to the stockholder's interests as a stockholder cannot be ascertained in a vacuum. The objectives of the investigation will dictate whether the purpose is in fact a proper purpose.

For these reasons, Delaware courts have required stockholders to explain the objectives of their inspections. For example, a frequent use of Section 220 occurs when stockholders seek to inspect the corporation's stockholder list. Stockholders often do so to communicate with other stockholders, a commonly accepted purpose of inspection, in the abstract. Recognizing, however, that a mere statement of an intention to communicate with other stockholders fails to address whether the purpose is a statutorily defined "proper purpose," this Court has required more than a generic statement of an intent to communicate with other stockholders:

> In our opinion, § 220 required more, as a statement of "purpose", than a mere statement of intent to communicate with other stockholders of Northwest regarding a forthcoming meeting. If that were the limit of the statutory requirement, any stockholder stating a willingness to pay the expense of a mailing to other stockholders would be entitled to the list, regardless of the nature of the communication. We think that § 220 requires more as a statement of purpose, especially when, as we have held, a secondary purpose is irrelevant though improper . . . . The "purpose" required to be stated in the demand, under § 220, must be a "proper purpose" in order to make the demand effective; this would appear to be necessarily implied from the juxtaposition of those terms in § 220. And a "proper purpose" is defined as "a purpose reasonably related to" the demander's "interest as a stockholder."

Nw. Indus., Inc. v. B. F. Goodrich Co., 260 A.2d 428, 429 (Del. 1969) (emphasis added). Accordingly, in light of Section 220's requirements that a stockholder satisfy its burden of demonstrating that its stated purpose is a statutorily defined "proper purpose," this Court rejected the demand where the stockholder failed to explain its objectives in communicating with other stockholders:

> Accordingly, in our view, § 220 *required Goodrich to state in its demand the substance of its intended communication sufficiently to enable Northwest, and the courts if necessary, to determine whether there was a reasonable relationship between its purpose, i.e.,* the intended communication*, and Goodrich's interest as a stockholder* of Northwest.

Id. (emphasis added); *see also Shamrock Assocs. v. Dorsey Corp.*, 1984 WL 8237, at *3 (Del. Ch. July 24, 1984) ("[I]t is necessary for this Court to determine whether there was a reasonable relationship between plaintiff's purpose in intending to communicate with other shareholders and its interest as a shareholder of the corporation. In the apparent vacuum in which the demand has been made … I cannot….").

The need for further elaboration on the objectives of an inspection has also been recognized when stockholders seek inspection for the generally accepted purpose of valuing shares. Especially regarding privately held companies whose stock does not trade on an exchange, valuation is a widely recognized proper

purpose. *Polygon Global Opportunities Master Fund v. W. Corp.*, 2006 WL 2947486, at *3 (Del. Ch. Oct. 2006). However, a stockholder who merely claims its seek to value its shares has not demonstrated that the purpose is reasonably related to such person's interests as a stockholder. Rather, "valuation of one's stock can be a proper purpose … if there is a particular need or reason for the valuation." *Mehta v. Kaazing Corp.*, 2017 WL 4334150, at *5 (Del. Ch. Sept. 29, 2017). Thus, a demand that merely recites valuation as a purpose of the inspection is insufficient where it fails to explain the present need for the valuation. *Id.* (rejecting demand because stockholder "failed to identify any reason why he needs to value his membership interests at this time"). This Court has affirmed on those same grounds. *CM & M Grp., Inc. v. Carroll*, 453 A.2d 788, 793 (Del. 1982) (affirming where the Court of Chancery had determined "the need for inspection," concluding the stockholder "is seeking valuation of his shares in order to negotiate a fair sale of his stock and does, therefore, have a proper purpose for the inspection").

While this Court has not had occasion to squarely consider whether a stockholder must state the objectives of an investigation of wrongdoing, the Court has nonetheless held that such objectives are material to the analysis of a proper purpose. In *Saito v. McKesson HBOC, Inc.*, 806 A.2d 113 (Del. 2002), this Court

was confronted with whether the temporal scope of a stockholder's investigation of wrongdoing should be limited to the period in which the stockholder would have standing to bring suit. This Court held that if "a stockholder wanted to investigate alleged wrongdoing that substantially predated his or her stock ownership, there could be a *question as to whether the stockholder's purpose was reasonably related* to his or her interest as a stockholder, *especially if the stockholder's only purpose was to institute derivative litigation*." *Id*. at 117 (emphasis added); *see also United Techs. Corp. v. Treppel*, 109 A.3d 553, 558-59 (Del. 2014) (noting "inspections have been denied entirely if the plaintiff's 'proper purpose' for seeking books and records could not be effectuated because, for example, the plaintiff would lack standing to sue if the inspection warranted further legal action"). Accordingly, this Court has expressly recognized that the objectives of an investigation are critical to a determination of whether an investigative purpose is reasonably related to the stockholder's interests as a stockholder. This requirement is reasonable given there are varied reasons why a stockholder might seek inspection, as catalogued by the Court (Op. at 14-15), and companies should not be left to guess.

2. The Balancing Of Stockholders' And Corporations' Interests Strongly Counsels In Favor Of The Majority Rule.

Delaware law has long recognized that a stockholder's right to obtain information "must be balanced against the rights of directors to manage the business of the corporation without undue interference from stockholders." *Cent. Laborers*, 45 A.3d at 144. One way of achieving that balance is to require stockholders to comply with the dictates of Sections 220(b) and 220(c). *Id*. at 145. Another is to ensure that a corporation has adequate information regarding a demand to allow the corporation to meaningfully evaluate its propriety. *Norfolk Cnty. Ret. Sys. v. Jos. A. Bank Clothiers, Inc.*, 2009 WL 353746, at *11 (Del. Ch. Feb. 12, 2009) ("a demand for books and records must be sufficiently specific to permit the court (and the corporation) to evaluate its propriety."), *aff'd*, 977 A.2d 899 (Del. 2009).

The majority rule that the lower court rejected serves to achieve the balance required by Delaware law between a stockholder's right to inspection and a corporation's right to meaningfully evaluate a demand and avoid litigation. As Section 220 mandates, investigating wrongdoing is only a proper purpose if reasonably related to the interests of the stockholder as a stockholder. Absent a stockholder's statement of its objectives, the corporation is impaired, if not entirely thwarted in its efforts to evaluate the propriety of the demand's purpose. That is the

sine qua non of the majority rule. *Se. Pa. Transp. Authority v. Abbvie Inc.*, 2015 WL 1753033, at *12 (Del. Ch. Apr. 15, 2015) ("a plaintiff who states a purpose to investigate corporate wrongdoing, without elaboration as to *why* that investigation is relevant to its interest as a stockholder, has not stated a proper purpose at all") (emphasis in original), *aff'd*, 132 A.3d 1 (Del. 2016) (TABLE). Without provision of this critical information, it is impossible to know whether the stockholder is seeking the documents for reasons unrelated to its interests as a stockholder—*i.e.*, curiosity or harassment. Indeed, the lower court itself recognized, as it must, that a demand should be rejected if the "stockholder cannot identify a credible potential end use." (Op. at 28.)

The lower court acknowledges that a stockholder's objectives for an investigation are relevant, but disagrees that they are relevant at the demand letter stage. Rather, the lower court deems the objectives of an investigative purpose relevant only if the corporation "challenges whether the stockholder's proper purpose is *bona fide*." (*Id.*) That logic, however, substitutes a corporation's litigation defenses (*i.e.* directed at whether a purported purpose is the stockholder's true purpose), for the Company's pre-suit rights to evaluate a demand on its face and avoid litigation altogether. In other words, if the Opinion's proposed rule were

adopted and the majority rule reversed, corporations faced with demands seeking to investigate wrongdoing with no explanation as to why, will have no means of testing whether the demand is for a proper purpose other than litigating the demand and deposing the stockholder. If the minority rule became the law, already-prolific Section 220 litigation would only expand exponentially.

Adoption of the minority rule would also contribute to proliferating litigation over the scope of books and records to be produced. It is axiomatic that the "plaintiff bears the burden of proving that each category of books and records is essential to the accomplishment of the stockholder's articulated purpose for the inspection." *Sec. First Corp.*, 687 A.2d at 569. Undoubtedly, the categories of documents deemed essential will be different depending on whether the stockholder is evaluating derivative litigation or, for instance, seeking an audience with the board. Absent specification of the purposes of the investigation, there is no way to measure whether each category of documents requested is essential, except by litigating and seeking the information in discovery.

In contrast with the foregoing detrimental outcomes of adopting the minority rule, the lower court fails to identify genuine negative consequences that have resulted from the longstanding application of the majority rule. For instance, the

lower court rejected the majority rule based on its misperception that the rule "would require a stockholder to commit in advance to what it will do with an investigation before seeing the results of the investigation." (Op. at 24.) Similarly, the Opinion mistakenly asserts that the majority rule "hold[s] that a stockholder who fails to cite ends other than litigation when making a demand cannot use the fruits of the investigation for any purpose other than litigation." (*Id*. at 27 & n.12.) The lower court's concerns are mistaken. Merely disclosing that the stockholder wants to evaluate derivative litigation does not commit the stockholder to bring such litigation. Indeed, no case cited in the Opinion so holds.[2]

[2] None of the cases cited in the Opinion limits what a stockholder can do with the "fruits of the investigation" in any manner. Rather, each holds that, in light of the stockholder's objectives of "evaluating potential shareholder or derivative litigation," the demand failed to state a proper purpose. *Beatrice Corwin Living Irrevocable Trust v. Pfizer, Inc.*, 2016 WL 4548101, at *7 (Del. Ch. Aug. 31, 2016, revised Sept. 1, 2016) (in light of the stockholder's litigation objectives "the plaintiffs' credible basis argument falters for want of any quantum of evidence of an identifiable breach of fiduciary duty"); *Se. Pa. Transp. Authority*, 2015 WL 1753033, at *12 ("a plaintiff who states a purpose to investigate corporate wrongdoing, without elaboration as to *why* that investigation is relevant to its interest as a stockholder, has not stated a proper purpose at all") (emphasis in original); *Graulich v. Dell Inc.*, 2011 WL 1843813, at *7 (Del. Ch. May 16, 2011) ("the only stated purpose … is to pursue a possible derivative claim … he lacks standing … any such claim is barred by both claim preclusion *and* the applicable statute of limitations … his stated purpose is not related to his interest as a stockholder.") (emphasis in original).

The lower court also expressed a concern that requiring disclosure of the end use would require the use of "magic words." (Op. at 28 n.13.) Under the Opinion's proposed rule, the opposite would be true, as stockholders will be deemed to have stated a proper purpose by merely reciting an intent to investigate wrongdoing. Whether a stockholder has stated a proper purpose should not turn on the appearance of magic words in the demand, but rather, should be assessed in consideration of an honest statement about the intended use when submitting a demand under oath.

In short, the Opinion's novel theory would, contrary to the terms of Section 220, the long-established majority rule of the Court of Chancery, and the decisions of this Court, deprive corporations of the ability to evaluate, based upon the demand, whether the stockholder's purpose and the scope of documents requested are proper. Those determinations could only be made by rejecting and litigating the demand, which will only accelerate the proliferation of Section 220 litigation.

II. THE COURT ERRED BY HOLDING THAT PLAINTIFFS NEED NOT PRESENT A CREDIBLE BASIS TO SUSPECT ACTIONABLE WRONGDOING.

A. Question Presented

Whether the Court erred by holding that a stockholder investigating wrongdoing for the sole purpose of pursuing litigation satisfied the proper purpose requirement with only a credible basis to suspect, at most, claims that would be legally barred? (*See* A869-A884; A910-A925.)

B. Standard Of Review

The lower court's legal conclusions are reviewed de novo. *Nationwide Emerging Managers, LLC*, 112 A.3d at 889.

C. Merits Of Argument

1. Stockholders Investigating Wrongdoing Solely For The Purpose of Evaluating Derivative Litigation Must Present A Credible Basis To Suspect Actionable Wrongdoing, As A Matter Of Law.

As explained above, a stockholder investigating wrongdoing must state the objectives of its investigation to demonstrate that its purpose is reasonably related to its interests as a stockholder. For the same reason, where the stockholder's sole purpose of an investigation is to evaluate possible litigation, the stockholder must present a credible basis to infer "actionable" wrongdoing. Otherwise, the "purpose

is not reasonably related to [the plaintiff's] interest as a stockholder as it [could not] pursue a derivative action based on any potential breaches." *Polygon Global Opportunities Master Fund*, 2006 WL 2947486, at *5.

As this Court has noted, "inspections have been denied entirely if the plaintiff's 'proper purpose' for seeking books and records could not be effectuated because, for example, the plaintiff would lack standing to sue if the inspection warranted further legal action." *United Technologies Corp.*, 109 A.3d at 558-59. This long-recognized rule has also been applied to bar inspections focused solely on pursuing litigation where the claims are barred by issue preclusion and the statute of limitations. *Graulich*, 2011 WL 1843813, at *6. And in *Southeastern Pennsylvania Transportation Authority v. Abbvie Inc.*, the Court of Chancery held: "Because a Section 102(b)(7) exculpatory provision serves as a bar to stockholders recovering for certain director liability in litigation, a stockholder seeking to use Section 220 to investigate corporate wrongdoing solely to evaluate whether to bring derivative litigation has stated a proper purpose only insofar as the investigation targets non-exculpated corporate wrongdoing." 2015 WL 1753033, at *13. This Court affirmed, which constitutes controlling law. *Se. Pa. Transp. Authority v. Abbie Inc.*, 132 A.3d

1 (Del. 2016) (TABLE) ("[b]ecause the petitioner therefore had no viable use for the documents it sought, the Court of Chancery denied its claim for books and records.")

2. The Opinion Mistakenly Concludes That The "Credible Basis To Infer Actionable Wrongdoing" Standard Requires Evidence That Actionable Wrongdoing Has In Fact Occurred.

The lower court's principal quarrel with the actionable wrongdoing standard is the mistaken view that, under the standard, a "plaintiff must introduce evidence sufficient to support a claim that could survive a pleading-stage motion to dismiss pursuant to Rule 23.1." (Op. at 31.) That is simply not the case.

The Opinion cites no case holding, or even implicitly suggesting, that the actionable wrongdoing standard requires a stockholder "to plead an actionable *Caremark* claim" to obtain books and records. (*Id*. at n.19.) This erroneous conclusion appears to be grounded more in the lower court's frustration with the result, rather than the actual reasoning, in a single case, *Beatrice Corwin Living Irrevocable Trust v. Pfizer, Inc.*, 2016 WL 4548101 (Del. Ch. Aug. 31, 2016, revised Sept. 1, 2016). The stockholder in *Pfizer* sought to investigate a single suspicion of wrongdoing, *i.e.*, the board's "failing to assure compliance with applicable accounting rules"—a *Caremark* claim—solely for evaluating litigation. *Id.* at *5 (footnote omitted). The stockholder's evidence at trial, however, focused

exclusively on whether lower level management violated the law, with no evidence offered from which the Court could infer that the board consciously disregarded its oversight duties—the essence of a *Caremark* claim. Rejecting the demand, the Court held:

> [W]here a stockholder's sole purpose for investigating mismanagement is to determine whether the board breached its duty of oversight, it is not enough to provide a credible basis from which the Court may infer that management or lower-level employees engaged in wrongdoing. The stockholder also must provide some evidence from which the Court may infer that the board utterly failed to implement a reporting system or ignored red flags.

Id.

The gravamen of the lower court's frustration with *Pfizer* is that, to have satisfied its burden of demonstrating a credible basis to infer actionable wrongdoing, the necessary evidence would have been "the type of evidence that typically would only appear in internal corporate documents, which is what the plaintiff sought to obtain by seeking books and records." (Op. at 38.) That is a debatable point.[3] What

[3] *See, e.g., Okla. Firefighters Pension & Ret. Sys. v. Citigroup Inc.*, 2015 WL 1884453, at *2-3 (Del. Ch. Apr. 24, 2015) (granting inspection to investigate a *Caremark* claim based on public statements by the Company disclosing fraud, information in Form 10-K disclosing receipt of grand jury subpoenas, and series of consent orders neither admitting nor denying legal violations); *Paul v. China MediaExpress Holdings, Inc*., 2012 WL 28818, at *4 (Del. Ch. Jan. 5, 2012) (granting inspection to investigate a *Caremark* claim based upon "(1) numerous

is not subject to debate (and what the Opinion does not dispute) is the fact that the stockholder in *Pfizer* did not present a scintilla of evidence, credible or otherwise, from which the Court could infer that the board failed in its oversight responsibilities—the sole focus of the stockholder's anticipated investigation. Yet the Opinion suggests that *Pfizer* was wrongly decided due to its application of the actionable wrongdoing standard. If *Pfizer* should have granted an inspection, as the Opinion advocates, despite the utter lack of evidence from which the Court could infer board-level wrongdoing, the standard a stockholder must meet to obtain an inspection degenerates into mere suspicion alone.

The frustrations advanced in the Opinion with *Pfizer* are precisely those rejected by this Court in *Seinfeld*. There the plaintiff argued, as the lower court reasoned here (Op. at 38), that the credible basis standard was too burdensome: "If the shareholder had evidence, a derivative suit would be brought. Unless there is a whistleblower, or a video cassette, the public shareholder, having no access to corporate records, will only have suspicions." *Seinfeld*, 909 A.2d at 121. Rejecting

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third-party media reports alleging fraudulent conduct. . .; (2) the NASDAQ Stock Market's halting of trading in, and subsequent delisting of, CME shares; (3) the resignation of the Company's independent auditor; (4) the noisy resignations of three board members. . . ; and (5) CME's initiation of its own internal investigation.").

the argument, this Court held that "[t]he only way to reduce the burden of proof further would be to eliminate any requirement that a stockholder show *some evidence* of possible wrongdoing." *Id.* at 123 (emphasis in original). The same reasoning and result applies here.

3. Plaintiffs' Sole Purpose For Seeking Books And Records Is To Evaluate Derivative Litigation, And Accordingly, Plaintiffs Were Required To, But Did Not, Present A Credible Basis To Suspect Actionable Wrongdoing.

Apart from rejecting the actionable wrongdoing rule on doctrinal grounds, the Opinion states that the rule is inapplicable because "[p]laintiffs are not seeking books and records for the sole purpose of investigating a *Caremark* claim." (Op. at 30.) The primary support the Opinion cites for that conclusion, however, is Part II.A.1.b of the Opinion holding that investigative purposes need not be disclosed—*i.e.*, Plaintiffs "can use the fruits of their investigation for other purposes." *Id.* Otherwise, the lower court notes that the Demand states an intent "to evaluate possible litigation or other corrective measures," implying that the "other corrective measures" states objectives other than evaluating litigation. (*Id.* at 29.) The Court overlooks that the Demand makes no effort to explain what vaguely referenced "corrective measures" might be "evaluate[d]," apart from the conclusory assertion that Stockholders might take "appropriate action," including bringing litigation or

making a demand on the Board. (A623.) The Opinion also overlooks Delaware law negating such a vaguely stated objective as a matter of law. *See, e.g.*, *Fuchs Family Tr. v. Parker Drilling Co.*, 2015 WL 1036106, at *3 n.28 (Del. Ch. Mar. 4, 2015) (Whether a stockholder "has vaguely referenced 'in a conclusory manner, [other] generally accepted proper purpose[s]' is of no effect . . . .") (*quoting W. Coast Mgmt. & Capital, LLC v. Carrier Access Corp.*, 914 A.2d 636, 646 (Del. Ch. 2006)).

Plaintiffs' actions from day one confirm they are only seeking to investigate a *Caremark* claim. (*See* A969-A970 (arguing evidence "demonstrate[s] ABC's complete disregard for its obligations to establish effective anti-diversion and compliance programs" [*i.e.* a *Caremark* claim] and therefore "Plaintiffs are investigating ABC's actions with respect to opioids to determine whether stockholder litigation is necessary to remedy fiduciary misconduct, or, alternatively, whether to make demand on the Company's Board of Directors ….").)

Plaintiffs' Demand is consistent with their position in the litigation. Indeed, in recognition that Plaintiffs bear the burden of proving a credible basis to suspect an actionable *Caremark* claim, the Demand, Complaint, and pre-trial briefing are littered with assertions that the Board ignored red flags. For example, the Demand conclusorily claims that "[t]he Board and management failed to address these

problems despite a litany of red flags…." (A620.) Likewise, Plaintiffs' opening pre-trial brief contains a section entitled "The Company's Board and Senior Officers Ignored Red Flags…." (A982.) Despite these conclusory assertions, no evidence was ever presented at trial to support them. In fact, Plaintiffs repeatedly assert that they are following this Court's urging that stockholders use the "tools at hand" before bringing derivative litigation. (A1076; A1103.) Any doubt is removed by their engagement letters,[4] which unquestionably establish that they are only concerned only with "potential litigation" seeking "damages," obtaining attorneys' fees approved by a court, and serving as a "class representative." (A763-A764.)

Accordingly, Plaintiffs were required to present a credible basis to suspect actionable wrongdoing. They have failed to do so. In particular, because the Company has adopted an exculpatory clause in its charter pursuant to Section 102(b)(7), Plaintiffs were required to submit evidence demonstrating a credible basis for suspecting that the Board failed in its oversight responsibilities in bad faith. *Se. Pa. Transp. Authority*, 2015 WL 1753033, at *14 (citations omitted). Yet Plaintiffs

[4] The Court downplays the significance of the engagement letters by asserting that "[P]laintiffs would not need their counsel to use the fruits of their investigation for other ends." Op. at 29. Aside from the lack of evidentiary support, this contention is wrong. If Plaintiffs were to conduct a proxy contest or make a demand, their counsel would be involved.

offered no evidence concerning the Board whatsoever, let alone sufficient to suspect that the Board ignored red flags in bad faith. *Hoeller v. Tempur Sealy Int'l, Inc.*, 2019 WL 551318, at *8 (Del. Ch. Feb. 12, 2019) ("When a stockholder's purpose is premised on the board's possible breach of its duty of oversight (i.e., a *Caremark* claim), the stockholder 'must provide some evidence from which the Court may infer that the board utterly failed to implement a reporting system or ignored red flags.'").

Similarly, the Complaint demonstrates on its face that any claim would be barred by the statute of limitations. As argued below, Plaintiffs' recitation of alleged red flags goes back to at least 2012, including the filing of a lawsuit against the Company by the State of West Virginia. (A864). Because this information was all publicly available, the three-year limitations period was triggered. (A882-A884 (citing *Graulich*, 2011 WL 1843813, at *6) (denying inspection where statute of limitations plainly barred derivative claim to be investigated).) As any claim that Plaintiffs might bring under the *Caremark* theory they seek to investigate would be long-barred by the statute of limitations, Plaintiffs' purpose is not proper. *La. Mun. Police Emps' Ret. Sys. v. Lennar Corp.*, 2012 WL 4760881, at *2 (Del. Ch. Oct. 5, 2012) ("[I]f a stockholder seeks to use Section 220 to investigate corporate

wrongdoing for which there is no remedy … then that stockholder has not stated a proper purpose.")

III. THE LOWER COURT ERRED AS A MATTER OF LAW WHEN IT *SUA SPONTE* ALLOWED PLAINTIFFS TO ENGAGE IN POST-TRIAL DISCOVERY FOR THE PURPOSE OF REQUESTING DOCUMENTS NOT REQUESTED IN THE DEMAND.

A. Question Presented

Whether the Court erred as a matter of law when it *sua sponte* permitted Plaintiffs to conduct post-trial discovery for the purpose of meeting its burden to demonstrate that certain books and records, many of which were not requested in Plaintiffs' Demand, were essential? (*See* A884-A894; A927-A947; A1184-A1207.)

B. Standard Of Review

The lower court's legal conclusions are reviewed *de novo*. *Nationwide Emerging Managers, LLC*, 112 A.3d at 889.

C. Merits Of Argument

1. The Opinion Erroneously Relieves Plaintiffs Of Their Burden Of Proving Those Categories Of Documents Which Are Essential To Achieving Plaintiffs' Purpose.

As a matter of law, a plaintiff "bears the burden of proving that each category of books and records is essential to accomplishment of the stockholder's articulated purpose for the inspection." *Palantir*, 203 A.3d at 751 (internal quotation marks and citation omitted). Here the lower court ruled after a one-day trial that Plaintiffs only satisfied their burden of proof with respect to "Formal Board Materials." (Op. at

57.) That should have been the end of the matter. The lower court, however, *sua sponte* granted Plaintiffs leave to depose Defendant and then seek additional documents, many of which were not included in those requested in the Demand. As explained below, the lower court's ruling, which relieves Plaintiffs of their burden, is contrary to established Delaware law.

Parties that are anticipating or engaging in litigation often make decisions that impact their ability to carry their respective burdens at trial. This case is no different. Here, Plaintiffs made the initial decision about what documents to seek in their Demand. Once in litigation, Plaintiffs chose to stipulate that "No depositions shall be taken in this case." (A667.) That stipulation—which also precluded Defendant from deposing Plaintiffs—was entered as an Order of the Court. Prior to trial, Defendant objected to an interrogatory that requested Defendant to identify persons who might have "information responsive" to Plaintiffs' Demand, and Plaintiffs chose not to challenge that objection, thereby conceding that the request was improper.

Having found after trial that Plaintiffs had *not* met their burden of establishing that books and records beyond "Formal Board Materials" were essential, the lower

court *sua sponte* granted Plaintiffs a second bite at the apple.[5] To effectuate this "do-over," the Opinion reverses Plaintiffs' decisions that led to their failure to meet their burden (in part). To begin, noting that "[i]t is often helpful when ruling on a Section 220 demand to have information about what types of books and records exist and who has them," the Opinion laments that "AmerisourceBergen prevented [Plaintiffs] from obtaining any information about what types of books and records exist and who has them," citing a single interrogatory to which Defendant objected. (Op. at 56-57.) There are two major problems with this holding. First, the Interrogatory did not request information about "what types of books and records exist and who has them." Instead, it requested that Defendant "[i]dentify the directors, officers and senior managers … reasonably likely to have information responsive to Plaintiffs' May 21 Demand." (A676.) Thus, the underlying factual predicate for allowing the deposition was contrary to the record. Second, Plaintiffs never challenged Defendant's well-taken objection. The Opinion thus has the effect of overruling Defendant's objection, *sua sponte*, to grant leave to depose Defendant. In that connection, the lower court effectively (and unilaterally) rescinds Plaintiffs'

[5] Notably, the Opinion cites no authority that permits a Court to, *sua sponte*, after trial, give a Section 220 plaintiff who failed to meet his burden a second bite at the apple.

stipulation (and its own Order) prohibiting Plaintiff from taking Defendant's deposition.[6]

In addition, the lower court effectively amends Plaintiffs' Demand to permit them to seek new categories of documents not sought in the Demand. *See infra* at pp. 46-49.

It is Plaintiffs' burden to demonstrate which documents are essential. Having decided that Plaintiffs failed to meet their burden at trial to demonstrate that materials beyond Formal Board Materials were essential, the lower court errs by relieving Plaintiffs of their burden and granting them a (one-sided) "do-over" to meet their burden, after trial, on a reset playing field. This is error. *See Oxbow Carbon & Minerals Holdings, Inc. v. Crestview-Oxbow Acquisition*, LLC, 202 A.3d 482, 501 (Del. 2019) (holding that the Court of Chancery erred by relying upon a theory first raised *sua sponte*, and then ultimately abandoned by the plaintiffs, to find in their favor).

[6] Notably, the lower court did not afford Defendant the same opportunity to take Plaintiffs' deposition. More importantly, had Defendant taken Plaintiffs' deposition before trial, it could have revealed any number of grounds that would have negated Plaintiffs' stated purpose, mooting the instant discussion regarding scope. There is fundamental unfairness in the lower court's selective rescission of the stipulation.

2. The Lower Court's Discovery Directive Conflicts With *Palantir*.

The lower court's post-trial discovery directive, if permitted, will send the parties on a sprawling inquiry about "what types of books and records exist and who has them." (Op. at 57.) Especially given that the detour will occur after trial, the discovery directive is in stark contradiction with "the importance of maintaining § 220 actions as streamlined, summary proceedings that do not get bogged down in collateral issues …." *United Techs. Corp.* 109 A.3d at 561. This Court's decision in *Palantir* speaks directly to the Court's error below.

In *Palantir*, this Court considered whether plaintiff demonstrated that emails were "necessary" to investigate a corporate decision for which board materials did not exist. 203 A.3d at 754. The company resisted, arguing that the plaintiff "had simply 'not met its burden of proving that email communications are essential.'" *Id*. (footnote omitted). The issue before this Court was therefore similar to that here: whether plaintiff had met its burden of demonstrating that certain categories of documents were "essential." *Id.* The decision thus speaks directly to the standard for proving essentiality in Section 220 actions, and how evidence is developed toward that end.

Holding that the plaintiff had met its burden, this Court gave firm guidance on the extent to which discovery is or should be made available to plaintiffs in Section 220 litigation concerning the books and records in the corporation's possession. This Court began its analysis with the observation that "[b]ooks and records actions are not supposed to be sprawling, oxymoronic lawsuits with extensive discovery." *Id*.[7] Accordingly, "[a] petitioner… is therefore in no position to get discovery to determine how a company like Palantir conducts business and whether the books and records that address its needs come in the form of hardcopy documents, electronic PDFs, emails, or some other medium." *Id*. at 755. This Court explained that such discovery is generally unavailable because Section 220 actions have a far narrower scope than plenary litigation: "After all, the point of a summary § 220 action is to give the stockholder access to a discrete set of books and records that are necessary for its purpose—a set that is much less extensive than would likely be produced in discovery under the standards of Rule 26 in a plenary suit." *Id*. To

[7] Indeed, the Court of Chancery has historically been able to determine what documents are necessary and essential without resorting to deposition practice. *See, e.g.*, *Lavin v. W. Corp.*, 2017 WL 6728702, at *1, 14 (Del. Ch. Dec. 29, 2017) (determining on a paper record "without deposition or live testimony" what categories of documents are necessary and essential). There is no reason to deviate from this time-honored practice.

prove necessity, Section 220 does not contemplate discovery into the existence and whereabouts of documents: "Instead, a petitioner meets her burden to prove necessity by identifying the categories of books and records she needs and presenting some evidence that those documents are indeed necessary." *Id.*

Palantir thus recognizes that "forcing the petitioner to conduct extensive discovery over *which books and records are available* and which would be sufficient for its purposes" would "subvert the statutory scheme governing books and records inspections." *Id.* at 756 (emphasis added). That is consistent with Court of Chancery decisions rejecting attempts by Section 220 plaintiffs to explore the existence and whereabouts of documents as inconsistent with the issues presented in Section 220 litigation. *E.g.*, *Treppel v. United Techs. Corp.*, C.A. No. 8624-VCG, at 12 (Del. Ch. Dec. 5, 2013) (TRANSCRIPT) ("The existence and whereabouts of the documents sought by the plaintiff in this 220 action are not relevant to any issues before me."); *Okla. Firefighters Pension & Ret. Sys. v. Citigroup Inc*., C.A. No. 9587-ML, at 30-31 (Del. Ch. June 9, 2014) (TRANSCRIPT) (denying discovery into "location" and "identification of various documents"); *Zucker v. Bank of N.Y. Mellon Corp*., C.A. Nos. 10102-VCG and 10146-VCG, at 12 (Nov. 25, 2014) (TRANSCRIPT) ("the nature of a 220 action is very narrow[;] . . . discovery does not need to enter into … the

scope of what's out there . . . ."); *Schnatter v. Papa John's Int'l, Inc.*, C.A. No. 2018-0542-AGB, at 17-18 (Del. Ch. Sept. 20, 2018) (TRANSCRIPT) (granting protective order against Rule 30(b)(6) deposition pertaining to "measures taken by the company to preserve and collect potentially relevant documents," because it is not "an appropriate basis for discovery."); *Hoeller v. Tempur Sealy Int'l, Inc.*, C.A. No. 2018-0036-JRS, at 25-26 (Del. Ch. Oct. 10, 2018) (TRANSCRIPT) (granting protective order against Rule 30(b)(6) deposition because defendants had not presented an "affirmative defense"; "[t]he only burden in play here…is the plaintiff's burden to demonstrate a credible basis…because it's a low burden[] our courts consistently hold that discovery on behalf of the plaintiff directed to the defendant, in aid of meeting that burden, generally speaking, is not permitted in a summary Section 220 proceeding.").[8]

[8] Only when a defendant places the existence and whereabouts of documents at issue does discovery into those affirmative defenses to production become appropriate. Thus, in *Chammas v. NavLink*, 2015 WL 5121095, at *2 (Del. Ch. Aug. 27, 2015), the Court concluded that "[s]ome limited discovery is necessary in order to address [Defendant's] contention that certain categories of documents which Plaintiffs seek do not exist and that production of other categories would be too costly and unduly burdensome." *See also Elow v. Express Scripts, Inc.*, C.A. Nos. 12721-VCMR and 12734-VCMR at 30-33, 55 (Del. Ch. Nov. 18, 2016) (TRANSCRIPT) (denying plaintiff's motion to compel deposition of Rule 30(b)(6) representative in a Section 220 proceeding as moot because defendant withdrew affirmative defenses).

With "oxymoronic" discovery into the whereabouts of documents generally unavailable in Section 220 actions, *Palantir* instructed that the parties should use the settle-order process to determine the scope of production. "[O]nce the Court of Chancery has determined the subject matter that the inspection must address, the respondent must exercise good faith in agreeing to a final order that gives the petitioner the books and records she needs to accomplish the purposes that the Court of Chancery found proper." *Palantir*, 203 A.3d at 756-57. "[T]he court will be highly dependent on the respondent's good faith participation in the process, because the respondent is likely to be the only participant in the settle-order process with knowledge of which corporate records are relevant to the petitioner's proper purpose as determined by the court." *Id.* at 757. The failure to implement the settle-order process here was legal error.

3. The Court's Discovery Directive Impermissibly Aims To Expand The Categories Of Documents Sought Beyond Those Identified In The Demand.

The ostensible purpose of the lower court's post-trial discovery directive is to facilitate Plaintiffs' requesting "Informal Board Materials" and "Officer-Level Documents," categories that by definition would include documents beyond the

"Board Level Materials" requested in the Demand, including emails never presented to the Board. (Op. at 57.) This too is error.

Delaware 220 jurisprudence has long been concerned with "[s]triking the proper balance between a stockholder's inspection rights and the right of a company's board to manage the corporation without undue interference from stockholders." *Paraflon Invs., Ltd v. Linkable Networks, Inc.*, 2020 WL 1655947, at *6 (Del. Ch. Apr. 3, 2020). Toward that end, a stockholder litigating a demand is limited to seeking those documents requested in the demand. That prudent rule allows the corporation to "make the call, before litigation, whether to allow inspection or litigate the demand." *Id.*; *Durham v. Grapetree, LLC*, 2019 WL 413589, at *3 (Del. Ch. Jan. 31, 2019) ("A plaintiff seeking books and records must first afford the company the opportunity to avoid litigation by making a written demand and allowing the company to comply; accordingly, she may not add new requests for documents, absent a demand, by pleading during the course of the litigation."); *Fuchs Family Tr.*, 2015 WL 1036106, at *4 ("[Stockholder's] late attempt to expand its inspection must be rejected" because the corporation has "the right … to receive and consider a demand in *proper form before litigation is initiated*.") (emphasis in original). Permitting stockholders to seek new categories

of documents in litigation impermissibly converts Section 220 inspections into "iterative, ongoing request[s] for production." *Paraflon Invs., Ltd.*, 2020 WL 1655947, at *6.

Here, the Demand sought "Board Materials," as defined in the Demand. *See supra* at pp. 11-12. To the extent there could have been any ambiguity in the meaning of "Board Materials," Plaintiffs resolved that ambiguity in the pre-trial order approved by the lower court, which states that Plaintiffs were seeking certain documents "received, authored by or presented to any member of ABC's Board." (A950.) As Plaintiffs themselves describe their requests in briefing: "Plaintiffs' Demand is appropriately limited to books and records of the Company *within the Board's purview*." (A1019 (emphasis added).) Yet at trial and again in the Opinion, the lower court injected consideration of "Informal Board Materials" and "Officer-Level Documents," including emails never presented to the Board. (Op. at 57, A1136-A1145.) The lower court's new categories of books and records far exceed the categories of documents fairly requested in the Demand. (*Compare* A621-A622, *with* Op. at 53.)

The lower court's discovery directive, ordering an interim production of Formal Board Materials to be followed by a deposition and further requests for

categories of documents not appearing in the Demand is the quintessence of an impermissible, "iterative, ongoing request for production." *Paraflon Invs., Ltd.*, 2020 WL 1655947, at *6. The Opinion should be reversed.

CONCLUSION

For the reasons stated, the Opinion should be reversed and the lower court should be instructed to enter an Order in favor of AmerisourceBergen denying Plaintiffs' inspection request.

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CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of May 2020, a copy of the foregoing was served via *File & ServeXpress* upon the following attorneys of record:

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