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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/Appellees.	No. 60, 2020 Court below: Court of Chancery of the State of Delaware C.A. No. 2019-0527-JTL

APPELLEES' ANSWERING BRIEF

Of Counsel:

KESSLER TOPAZ MELTZER & CHECK, LLP
Eric L. Zagar
Michael C. Wagner
Christopher M. Windover
280 King of Prussia Road
Radnor, Pennsylvania 19087
(610) 667-7706

Counsel for Plaintiff/Appellee Lebanon County Employees' Retirement Fund

PRICKETT, JONES & ELLIOTT, P.A.
Samuel L. Closic (Bar No. 5468)
Eric J. Juray (Bar No. 5765)
1310 N. King Street
Wilmington, Delaware 19801
(302) 888-6500

BERNSTEIN LITOWITZ BERGER & GROSSMANN LLP
Gregory V. Varallo (Bar No. 2242)
500 Delaware Avenue, Suite 901
Wilmington, Delaware 19801
(302) 364-3600

Counsel for Plaintiffs/Appellees

HACH ROSE SCHIRRIPA & CHEVERIE LLP
Frank R. Schirripa
Daniel B. Rehns
Hillary Nappi
112 Madison Avenue, 10th Floor
New York, New York 10016
(212) 213-8311

BERNSTEIN LITOWITZ BERGER & GROSSMANN LLP
David Wales
Andrew Blumberg
1251 Avenue of the Americas, 44th Floor
New York, New York 10020
(212) 554-1400

Counsel for Plaintiff/Appellee Teamsters Local 443 Health Services and Insurance Plan

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NATURE OF PROCEEDINGS

On May 21, 2019, Plaintiffs/Appellees Lebanon County Employees' Retirement Fund and Teamsters Local 443 Health Services & Insurance Plan ("Plaintiffs") served a demand (the "Demand") for books and records on AmerisourceBergen Corp. ("ABC" or the "Company") pursuant to 8 *Del. C.* § 220 ("Section 220"). *See* A611–A659. On June 7, 2019, ABC rejected the Demand, contending it did not "state a proper purpose or a credible basis to suspect wrongdoing" and that the scope of inspection was "overly broad." A665.[1] ABC did not argue that (i) Delaware law required Plaintiffs to identify a specific end use at the outset to establish a proper purpose or (ii) Plaintiffs had to meet an actionable wrongdoing requirement. The linchpin of ABC's appeal, however, is that Delaware law requires both.

On July 8, 2019, Plaintiffs filed their Section 220 complaint. After a one-day trial, the trial court issued its Memorandum Opinion (the "Opinion" or "Op.") on January 13, 2020,[2] holding that Plaintiffs presented "strong circumstantial evidence" of potential wrongdoing at ABC. Op. at 16-24, 46-48. The trial court ordered ABC to produce (i) certain "board-level documents that formally evidence the directors'

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[1] Plaintiffs are ABC stockholders and their Demand satisfied the statutory "form and manner" requirements. Op. at 13.

[2] The Opinion is Exhibit A to Appellant's Opening Brief ("OB").

deliberations and decisions and comprise the materials that the directors formally received and considered (the 'Formal Board Materials')" and (ii) director independence questionnaires. *Id.* at 1-2, 51, 63. The trial court also permitted Plaintiffs, after inspection, to (i) seek "Informal Board Materials" and "Officer-Level Materials" and (ii) conduct a Court of Chancery Rule 30(b)(6) deposition to explore "what types of books and records exist and who has them." *Id*. at 53, 63.

On February 12, 2020, this Court certified an interlocutory appeal. ABC filed its Opening Brief on April 21, 2020. This is Plaintiffs' Answering Brief.

SUMMARY OF ARGUMENT

1. Denied. When a stockholder seeks to investigate potential wrongdoing, his purpose is proper if he provides some evidence of possible wrongdoing. *See Seinfeld v. Verizon Commc'ns, Inc.*, 909 A.2d 117, 123 (Del. 2006); *KT4 Partners LLC v. Palantir Techs. Inc.*, 203 A.3d 738, 755 (Del. 2019). A stockholder does not have to commit—at the outset—to the objective of his investigation. *Cf.* OB at 23-27.

ABC mischaracterizes its contrary position as the "majority rule." Whether a stockholder has a proper purpose to investigate potential wrongdoing requires consideration of the *evidence*, not the *objective*. By requiring some evidence of possible wrongdoing, this Court has provided corporations the tools to deny Section 220 demands based on mere suspicion. *Cf.* OB at 3. Even if Delaware law requires a stockholder to state his objectives at the outset, Plaintiffs' Demand stated only proper objectives. Op. at 15; *see also* A622-A623; B782. As such, the trial court did not commit clear error and the Opinion must be affirmed.

2. Denied. The trial court correctly applied Section 220, which requires Plaintiffs to establish a credible basis to suspect potential wrongdoing to investigate wrongdoing. Op. at 16-18; *Seinfeld*, 909 A.2d at 118. Plaintiffs met this standard and the Court can affirm on this basis.

ABC's contrary interpretation of Section 220 (again mischaracterized as a "majority rule") to require Plaintiffs to demonstrate "actionable wrongdoing" is inconsistent with Delaware law. *Cf.* OB at 4. ABC's erroneous argument is premised on the claim that Plaintiffs were only seeking to investigate a derivative *Caremark* claim. The trial court did not commit clear error in finding that Plaintiffs' Demand was not limited to derivative litigation and that, even if it was, the standard would remain the same. Moreover, even if there was a basis to utilize an "actionable wrongdoing" standard, Plaintiffs also met that standard. Finally, regardless of the standard applied, the trial court correctly rejected ABC's statute of limitations defense, which is improper in a Section 220 proceeding and failed at trial.

3. Denied. Under Section 220(c), the Court of Chancery has broad discretion to fashion appropriate relief. To date, the only relief ordered by the trial court is the inspection of Formal Board Materials in aid of investigating potential misconduct and director independence. This was well within the Court of Chancery's discretion.

After reviewing those materials, Plaintiffs may take a limited deposition to identify where additional documents are located and then may apply for Informal Board Materials or Officer-Level Materials. The trial court made this careful, staged ruling because ABC (i) refused to respond to discovery about the location and sources of essential documents and (ii) advocated for a staged process. The Opinion

neither relieves Plaintiffs of their burden nor conflicts with any Supreme Court authority. Instead, the trial court's ruling is consistent with both Delaware law and the Demand and must be affirmed.

COUNTERSTATEMENT OF FACTS

A. ABC's Legal Obligations as An Opioid Distributor

ABC is one of the three largest opioid distributors in the United States. Op. at 2. ABC is required to comply with extensive state and federal regulation, including the Comprehensive Drug Abuse Prevention and Control Act of 1970. *Id.* Generally, under this regulatory framework, ABC is required to maintain effective controls, order management programs and compliance programs to protect against opioid diversion. *See id*. at 2-3.

In 2007, the Drug Enforcement Agency (the "DEA") suspended ABC's Orlando, Florida distribution license, held through its distribution subsidiary AmerisourceBergen Drug Corporation, for failure to maintain effective controls. *Id.* at 4. In settling that enforcement action, ABC committed to adopt a more compliant anti-diversion program. *Id*. at 5. While ABC insists it put reasonably attuned compliance programs in place (OB at 8-9), public evidence casts doubt on that claim.

B. ABC's Failure to Maintain Effective Anti-Diversion Programs

Governmental reports, lawsuits and other public documents indicate that ABC has not implemented or monitored anti-diversion programs attuned to the critical legal and regulatory issues facing the Company.[3] The following summarizes the most pertinent trial evidence.

[3] These credible sources demonstrate that Plaintiffs have a credible basis to suspect potential wrongdoing. *See* Op. at 19 (a credible basis to suspect wrongdoing is

In 2018, the Energy and Commerce Committee of the United States House of Representatives released the "Red Flags and Warning Signs Ignored: Opioid Distribution and Enforcement Concerns in West Virginia" report (the "West Virginia Report"). A197–A521. Among other troubling issues, the West Virginia Report concluded that ABC "failed to address suspicious order monitoring" and that its "reporting of suspicious orders became virtually non-existent" in 2016. Op. at 7, 20-21; A204; A449.

Later in 2018, the Office of the Ranking Member for the Homeland Security and Governmental Affairs Committee in the United States Senate released the "Fueling an Epidemic, Report Three: A Flood of 1.6 Billion Doses of Opioids into Missouri and the Need for Stronger DEA Enforcement" report (the "Missouri Report"). Op. at 8, 20-21; B381-B416. The Missouri Report concluded that ABC "consistently failed to meet its reporting obligations." Op. at 8, 20-21; B382. As compared to its competitors, ABC reported suspicious orders far less frequently. Op. at 8. Both the West Virginia Report and the Missouri Report found that ABC's failure to report suspicious monitoring contributed to the opioid epidemic in those states. Op. at 21.

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stronger "when governmental agencies or arms of law enforcement have conducted the investigations or pursued the lawsuits") (collecting cases).

ABC likewise continues to face litigation. The New York Attorney General's 2019 amended complaint (the "NY AG Complaint") alleged that ABC had "consistently stood out as compared to its major competitors [because of] its unwillingness to identify suspicious orders, even among customers that regularly exceeded their thresholds and presented multiple red flags of diversion." Op. at 8-9, 20, 22; B670. The NY AG Complaint, in singling out ABC, detailed how ABC (i) set arbitrary limits on the number of suspicious orders held for review, (ii) enabled blocked pharmacies to continue receiving opioids, and (iii) lacked an internal rule or policy that required investigation of a customer based on a specific number of suspicious orders. Op. at 8-9, 20; B662-B675.

ABC is also a defendant in multidistrict litigation, which centralized 1,548 lawsuits (the "MDL"). Op. at 10; B460. In the MDL, certain plaintiffs alleged that ABC failed to report or halt suspicious opioid orders. Op. at 10. The claims against ABC largely survived ABC's motions to dismiss and for summary judgment. *Id*. at 11. In August 2019, the Company and other distributors offered to pay $10 billion dollars to settle the claims asserted by state attorney generals. *Id.* at 11, 22; B722.[4]

[4] ABC has also (i) received subpoenas relating to its ineffective anti-diversion and order-monitoring programs from the DEA and from multiple U.S. Attorneys' Offices and (ii) paid $16 million in 2017 to settle litigation filed by West Virginia's Attorney General related to ineffective anti-diversion controls. Op. at 6-7; A61; B13.

After summarizing the evidence, the trial court held that "[t]here is a credible basis to suspect that AmerisourceBergen's situation did not result from an ordinary business decision that, in hindsight, turned out poorly." Op. at 22-23. Instead, the trial court concluded that Plaintiffs demonstrated that there was "strong circumstantial evidence" to suspect that ABC may have (i) ignored indications of suspicious orders, (ii) failed to halt and investigate suspicious orders, (iii) failed to report suspicious orders to the DEA, (iv) ignored indications that it was distributing opioids to rogue pharmacies and chose to continue distributing opioids to those rogue pharmacies rather than cutting them off, and (v) pushed opioids into the distribution chain under circumstances where it knew or should have known that they would be diverted for improper uses. *Id.* at 23.

The trial court found that Plaintiffs met their burden and ordered ABC to produce (i) director independence questionnaires and (ii) certain Formal Board Materials. *Id.* at 1-2, 51, 63. After inspection, Plaintiffs may (i) seek Informal Board Materials and Officer-Level Materials and (ii) conduct a Rule 30(b)(6) deposition to explore "what types of books and records exist and who has them." *Id.* at 53, 63.

C. Post-Trial Proceedings

After Plaintiffs prevailed at trial, ABC sought an interlocutory appeal and to stay document production. In seeking a stay, ABC argued that "the production to Plaintiffs . . . would . . . moot[] the Company's appellate rights." B755; *see also*

B756, B763-B764, B765, B771, B772. That argument was belied by ABC's prior production of certain Formal Board Materials to another ABC stockholder. This Court denied ABC's stay and ABC produced the "Subset Materials" on May 11, 2020, which, according to ABC, moots its appeal. *See Stroud v. Milliken Enters., Inc.*, 552 A.2d 476, 480 (Del. 1989) ("[O]ur courts will not lend themselves 'to decide cases which have become moot[.]'") (citation omitted); *see also Germaninvestments AG v. Allomet Corp.*, 225 A.3d 316, 343 (Del. 2020) (declining to render a "purely advisory" opinion as to a moot issue).

ARGUMENT

I. THE COURT OF CHANCERY CORRECTLY HELD THAT PLAINTIFFS ESTABLISHED A PROPER PURPOSE TO INVESTIGATE POTENTIAL WRONGDOING

A. Question Presented

Did the trial court correctly apply settled Delaware law to only require Plaintiffs to present some evidence of potential wrongdoing to establish a proper purpose? Op. at 16-29; A950-A951; A1005; A1057-A1069.

B. Standard of Review

The Court of Chancery's factual determinations, including as to the interpretation of Plaintiffs' Demand, are reviewed under the "highly deferential" abuse of discretion standard. *Palantir*, 203 A.3d at 748 (citation omitted). Factual findings will be affirmed unless they are the product of "clear error." *RBC Capital Markets, LLC v. Jervis*, 129 A.3d 816, 861 (Del. 2015). Questions of law are reviewed *de novo*. *Palantir*, 203 A.3d at 748-49.

C. Merits of Argument

The Court of Chancery applied the correct legal standard and then found that, based on the evidence, Plaintiffs' Demand stated a credible basis to suspect potential wrongdoing. Op. at 15-24; *supra* pp. 6-9. Although it did not need to, the trial court also found that Plaintiffs' Demand stated only proper uses for the books and records. Those findings were well supported by the record and must be affirmed. ABC instead argues that Plaintiffs could not have a proper inspection purpose because

they did not identify and commit to only one, specific end for which they will use ABC's books and records. The trial court correctly rejected that argument.

1. Section 220 Only Requires "Some Evidence" of Potential Wrongdoing

Section 220 requires that a stockholder state a proper purpose. *See* 8 *Del. C.* § 220(b); Op. at 28. A purpose is proper if it is "reasonably related to such person's interest as a stockholder." 8 *Del. C.* § 220(b); Op. at 13. Delaware law is clear that when the stockholder's purpose is to investigate potential wrongdoing, it is proper when he provides "some evidence" of potential wrongdoing. Contrary to ABC's argument, there is no basis to rewrite Delaware law to require stockholders to state their specific end use when seeking to investigate wrongdoing. *Cf.* OB at 23-27; Stephen C. Norman, *Books and Records Litigation: The Precursor to Derivative and Class Actions*, at 2 (Jan. 1, 2006) ("As long as there exists 'some credible basis' to support an inference of wrongdoing or mismanagement by the corporation, the proper purpose requirement of Section 220 will be met.") (Ex. A).

More than 20 years ago, in *Sec. First Corp. v. U.S. Die Casting & Devel. Co.*, this Court held that "[s]tockholders have a right to at least a limited inquiry into books and records when they have established some credible basis to believe that there has been wrongdoing." 687 A.2d 563, 571 (Del. 1997). The Court re-affirmed this standard in *Seinfeld*, holding that so long as the stockholder provides some evidence of possible wrongdoing, inspection is warranted. 909 A.2d at 123. Just

last year, the Court again held that "[w]hen a stockholder has made a colorable showing of potential wrongdoing, inspecting the company's books and records can help the stockholder to ferret out whether that wrongdoing is real and then possibly file a lawsuit if appropriate." *Palantir*, 203 A.3d at 758; *see also Thomas & Betts Corp. v. Leviton Mfg. Co.*, 681 A.2d 1026, 1031 (Del. 1996) (collecting cases demonstrating that the proper purpose inquiry requires "some credible basis" of potential wrongdoing, does not require stockholders to identify end uses of their inspection). By requiring some evidence of potential wrongdoing, this Court has ensured that the stockholder's purpose is reasonably related to his interests as a stockholder. *Seinfeld*, 909 A.2d at 121. Plaintiffs easily met this burden. Op. at 19-24; *cf.* OB at 17 n.1 (wrongly asserting that Plaintiffs' Demand did not establish a proper purpose).[5] The Court should adhere to this settled application of Section 220.

The investigatory purpose of Section 220 demonstrates that the *Seinfeld* standard strikes the appropriate balance. This Court has repeatedly encouraged stockholders to use the "tools at hand" to investigate potential wrongdoing. *See, e.g.*, *Cal. State Teachers' Ret. Sys. v. Alvarez*, 175 A.3d 86, 2017 WL 6421389, at *1 (Del. 2017) (TABLE); *Schoon v. Smith*, 953 A.2d 196, 208 n.47 (Del. 2008);

[5] ABC wrongly argues that under the current Section 220 framework, "stockholders will be deemed to have stated a proper purpose by merely reciting an intent to investigate wrongdoing." OB at 27. As set forth above, that is not Delaware law, nor is it the standard the trial court applied. *See* Op. at 18-24.

White v. Panic, 783 A.2d 543, 557 n.54 (Del. 2001) (collecting cases); *King v. VeriFone Holdings, Inc.*, 12 A.3d 1140, 1145-46 (Del. 2011). As the court below recognized, "[a] responsible stockholder cannot identify all of the potential uses for books and records before knowing what the books and records reveal." Op. at 25. As such, ABC's insistence that stockholders commit—at the outset—what they will do with the fruits of their investigation is contrary to settled Delaware law.

2. Plaintiffs' Demand Stated Proper Uses of the Books and Records Other Than Bringing Litigation

The trial court correctly found that Plaintiffs' Demand identified proper potential ends to their investigation and was not limited to bringing derivative litigation. Op. at 15 (citing A622-A623). Specifically, the trial court found that the Demand identified filing litigation or evaluating other corrective measures or remedies as proper potential end uses. *Id.*[6] ABC does not dispute that pursuing litigation is a proper use of books and records. *See* OB at 21-22, 28. Nor does it dispute that corrective action, such as making a demand on ABC's Board of Directors ("Board") or discussing potential reform with the ABC Board, is a proper

[6] For this reason, *Se. Pa. Trans. Authority v. AbbVie Inc.*, 2015 WL 1753033, at *12-13 (Del. Ch. Apr. 15, 2015), is distinguishable. *Cf.* OB at 24. There, the trial court relied on certain authorities to impose a requirement that stockholders state their objectives. As the court below correctly held, those other authorities were inapplicable and misstated Delaware law. Op. at 25-27. Moreover, unlike the demands in *AbbVie*, the Demand here *did* state potential end uses.

use. *See id.* at 33-34.[7] Instead, ABC argues that that Plaintiffs' sole purpose for investigating potential wrongdoing is to potentially bring a derivative *Caremark* claim. *Id.* As the trial court correctly found, ABC is wrong.

First, cherry-picked sentences do not demonstrate that the trial court committed clear error in rejecting ABC's argument. *Cf. id.* at 34-35 (citing A969-A970, A620, A982, A1076 and A1103). Plaintiffs did not dispute that, among others, derivative litigation *could be* one potential use of the books and records. *See* A951. The Demand makes clear, however, that Plaintiffs are investigating, *inter alia*, possible mismanagement or wrongdoing and depending on the nature of the books and records, Plaintiffs may instead determine to seek corrective measures, such as a demand on the Board. Op. at 15 (citing A622-A623). *See Saito v. McKesson HBOC, Inc.*, 806 A.2d 113, 117 (Del. 2002) (a stockholder may use information about corporate wrongdoing in myriad ways, including to "seek an audience with the board to discuss proposed reforms or, failing in that, they may prepare a stockholder resolution for the next annual meeting, or mount a proxy fight

[7] ABC is wrong that portions of Plaintiffs' Demand are too vague as a matter of law. OB at 34 (citing *Fuchs Family Tr. v. Parker Drilling Co.*, 2015 WL 1036106, at *3 n.28 (Del. Ch. Mar. 4, 2015)). *Fuchs* noted that a demand could be limited to the purposes expressly noted in a demand or it could be read more broadly based on the circumstances. *Fuchs* did not establish any precedent "negating" other potential ends, such as taking other corrective measures. Furthermore, the *Fuchs* demand was limited, by its own terms, to derivative litigation and a board demand. *See id.* Plaintiffs' Demand here is not so limited. *See* A622-A623.

to elect new directors"). Without first evaluating ABC's books and records, Plaintiffs cannot commit to a specific end use, nor does Delaware law require they do so. Op. at 24-25, 28-29; *infra* pp. 17-23.

Second, ABC is wrong that Plaintiffs' engagement letters with counsel confirm that derivative litigation is the only possible end. OB at 35. The engagement letters do not mention derivative litigation. *See* A763-A764; A829-A831. That the engagement letters describe litigation in the context of forthcoming Section 220 litigation is unsurprising. In all events, preparing clients for potential, future plenary litigation is not dispositive, particularly as to the type of litigation that may be pursued. *See* Op. at 29. The trial court committed no clear error by rejecting this argument below.[8]

Alternatively, ABC asserts that Plaintiffs may be seeking books and records out of mere curiosity or for other improper reasons. OB at 18. ABC, however, never argued below (nor could it) that Plaintiffs were seeking to use books and records for improper reasons. ABC's argument is also belied by the Demand and the parties' confidentiality agreement, which limits Plaintiffs' uses of the books and records to

[8] ABC's argument that the trial court "downplayed" the significance of the engagement letters is an admission that it was a disputed issue of fact on which ABC lost. OB at 35 n.4. ABC also concedes that for actions such as a proxy contest or making a demand, counsel could be involved, not that it *has* to be involved. *See id.* As such, the trial court was correct. Op. at 29.

"the purposes stated in the May 21, 2019 demand to inspect books and records of AmerisourceBergen under Section 220." B782. The Demand is limited only to proper end uses. A622-A623.

The trial court's factual finding that Plaintiffs stated proper investigatory purposes and valid potential uses of the books and records is based on the evidence and must, therefore, be affirmed. The Court need not go any further. *See State v. Robinson*, 209 A.3d 25, 54 (Del. 2019) (where it can limit its holding to facts of the case, the Court need not broadly decide issues).

3. ABC's Rewrite of Delaware Law Is Meritless

ABC's primary argument—that the court below "erred by holding, *sua sponte*, that stockholders seeking to investigate wrongdoing are not required to identify the objectives of the investigation"—misstates the Opinion, is wrong on the facts of this case, and is inconsistent with Delaware law. OB at 16.

ABC's proposed test that to investigate potential wrongdoing a stockholder must state its sole end use objective up front is inconsistent with settled Delaware law. *Supra* pp. 12-14. None of ABC's rationales justify upending Delaware law. *Seinfeld*, 909 A.2d at 124 ("Under the doctrine of *stare decisis*, settled law is overruled only 'for urgent reasons and upon clear manifestation of error.'") (citation omitted).

First, ABC claims that without forcing stockholders to identify upfront their singular objective, corporations cannot ascertain whether investigating misconduct is a proper purpose. OB at 18-19, 23-24. According to ABC, "[t]he objectives of the investigation will dictate whether the purpose is in fact a proper purpose," because otherwise, a stockholder may only seek books and records for mere curiosity. *See id.* at 18-19. That is contrary to Delaware law. Whether a stockholder has a proper purpose to investigate potential misconduct is dictated by the *evidence*, not the objective. By requiring *some* evidence of possible wrongdoing, a standard had already been set to evaluate whether a purpose is proper and to allow corporations to deny demands based on "mere suspicion." *Seinfeld*, 909 A.2d at 123. In other words, if stockholders do not present some evidence of possible wrongdoing, they do not have a proper purpose, because their purpose is not reasonably related to their interests as stockholders,[9] and they cannot inspect books and records.

Corporations and the Court of Chancery have, since at least *Seinfeld*, made proper purpose determinations by evaluating the evidence cited in Section 220 demands and adduced at trial. *See* Op. at 18 (evaluating whether Plaintiffs "met the

[9] Where the stockholder has some evidence of possible wrongdoing, the investigatory purpose is reasonably related to the interest of the stockholder because remedying that misconduct increases stockholder returns. *Seinfeld*, 909 A.2d at 121.

Seinfeld test" by making "a judgment grounded in the facts" of this case as to whether there was a credible basis to suspect wrongdoing). ABC knows this. In its letter refusing Plaintiffs' Demand, ABC (i) articulated the *Seinfeld* standard, noting that Plaintiffs must present "some evidence of possible mismanagement," and (ii) analyzed Plaintiffs' evidence, wrongly concluding that Plaintiffs did not state a proper purpose because they lacked a credible basis to suspect wrongdoing. A661. ABC did not argue that it could not evaluate Plaintiffs' purposes because they did not articulate a specific end use. A660-A665; *see also* Op. at 12. ABC cannot now feign confusion to try to rewrite Delaware law to avoid its statutory obligation.[10]

Second, ABC's analogy to other proper purposes (such as seeking to communicate with other stockholders and valuing shares) does not demonstrate a "need for further elaboration" on the purpose of investigating potential wrongdoing. *Cf.* OB at 19-21. As a threshold matter, ABC never presented this argument below or in its interlocutory appeal application, so it is waived. Supr. Ct. R. 8; *Almond as Tr. For Almond Family 2001 Tr. v. Glenhill Advisors, LLC*, 224 A.3d 200, 2019 WL

[10] Because ABC denied the Demand by analyzing the *Seinfeld* standard and the evidence, and not its litigation-position here, ABC's argument that it could not evaluate the Demand to "avoid litigation altogether" is wrong. *Cf.* OB at 24 & 47-48. ABC chose to litigate. ABC is also wrong that the Demand provided "no explanation" as to why Plaintiffs were investigating potential wrongdoing. *Cf. id.* at 25; *see supra* pp. 6-9; *see also* Op. at 19-24.

6117532, at *1 n.1 (Del. 2020) (TABLE); *see* A834-A947, A1092-A1222; B726-B739.[11]

Regardless, ABC's analogy only helps Plaintiffs. Where stockholders seek stock lists for the purpose of communicating with other stockholders or valuing shares, Delaware courts may require incremental information, such as reference to a stockholder meeting or a pending tender offer, "to determine whether there was a reasonable relationship between its purpose, *i.e.*, the intended communication," and the stockholder's interest as a stockholder. *See Nw. Indus., Inc. v. B. F. Goodrich Co.*, 260 A.2d 428, 429 (Del. 1969); *see also Shamrock Assocs. v. Dorsey Corp.*, 1984 WL 8237, at *3 (Del. Ch. July 24, 1984); *Mehta v. Kaazing Corp.*, 2017 WL 4334150, at *5 (Del. Ch. Sept. 29, 2017). In those situations, Delaware courts may require that incremental information because the *stockholder alone* possesses the information necessary to articulate why the books and records are related to his interests as a stockholder, which satisfies the proper purpose prong. A company can only evaluate whether the purpose is related to the stockholder's interest as a stockholder with that information. If the stockholder cannot articulate that need, the purpose is more likely to be considered for mere curiosity or harassment, *i.e.*, not

[11] ABC only cited two of the five authorities below that it cited on pages 20-21 of its Opening Brief, but it did so for different arguments. *See* A884, A888 (citing *Polygon* for statute of limitations and scope arguments) and A895 (citing *Carroll* for confidentiality argument).

reasonably related to the stockholder's interest as a stockholder. *See CM & M Grp., Inc. v. Carroll*, 453 A.2d 788, 792 (Del. 1982).

In contrast, where a stockholder seeks to investigate potential wrongdoing, the requirement that the stockholder present a showing of potential wrongdoing "achieves an appropriate balance between providing stockholders who can offer some evidence of possible wrongdoing with access to corporate records and safeguarding the right of the corporation to deny requests for inspections that are based only upon suspicion or curiosity." *Seinfeld*, 909 A.2d at 118. In other words, the same reasons stockholders are required to articulate their need for stock lists to communicate with stockholders or documents to value their shares are *already built* into the standard to determine whether a stockholder has stated a proper purpose to investigate wrongdoing. In the former, stockholders must indicate an intended use to safeguard against mere suspicion, and in the latter, must provide some evidence to suspect wrongdoing *for the same reason*.[12] It would be illogical to require

[12] Stated another way, when stockholders seek books and records to communicate with other stockholders or to value shares, in lieu of an evidentiary "credible basis" standard, Delaware courts may require the stockholder to provide incremental information. Both standards achieve the same goal: ensuring the stockholder's purpose is reasonably related to his interest as a stockholder.

stockholders to state an intended use to protect against improper uses when that safeguard already exists.[13]

Third, ABC is wrong that its proposed standard is necessary to avoid a proliferation of litigation over Section 220 production scope. *Cf.* OB at 25. Scope is tethered to *purpose*, not objective. Where the purpose is to address corporate wrongdoing, the "stockholder should be given enough information to effectively address the problem, either through derivative litigation or through direct contact with the corporation's directors and/or stockholders." *Saito*, 806 A.2d at 115. If the corporation is ordered to produce documents aimed at investigating misconduct, those documents would be identical for each potential end use. As a result, ABC's argument is unsupported factually. Even if the production scope would change (and there is no evidence here that it would), *Saito* requires production sufficient to satisfy

[13] Both *Saito* and *Treppel* discussed whether standing was relevant to proper purpose. *Saito*, 806 A.2d at 117; *United Techs. Corp v. Treppel*, 109 A.3d 553, 558-59 (Del. 2014) (noting that inspections may be denied where a stockholder lacked standing). They did not hold that stockholders' objectives were "material" to the analysis. *Cf.* OB at 21-22. Indeed, in *Saito*, this Court recognized that the standing question is less relevant where—as here—the stockholder seeks books and records for multiple possible purposes. *See Saito*, 806 A.2d at 117 (noting that in addition to bringing derivative litigation, "stockholders may use information about corporate mismanagement in other ways").

both potential ends. The point is to ensure the stockholder has sufficient information to seek the right remedy to benefit all stockholders.[14]

Thus, ABC has identified no legal or factual basis for rewriting Delaware law to require stockholders to state specific end uses prior to inspecting books and records. The Court should reaffirm settled law that to investigate potential wrongdoing, a stockholder need only show some evidence of potential wrongdoing.

[14] For this reason, ABC's argument that stockholders must commit in advance to a single use contradicts *Seinfeld*, 909 A.2d at 120-21 and *Saito*, 806 A.2d at 117, which hold that stockholders may use information about corporate wrongdoing in many contexts, including instituting derivative litigation, seeking an audience with directors to discuss reforms, prepare a stockholder resolution for the next annual meeting, or mounting a proxy fight.

II. THE TRIAL COURT CORRECTLY REJECTED ABC'S ACTIONABLE WRONGDOING STANDARD

A. Question Presented

Did the trial court commit clear error in holding that Plaintiffs proved a proper purpose based on its findings that (i) Plaintiffs were not seeking books and records solely to investigate a potential *Caremark* claim, (ii) there was a credible basis to infer possible wrongdoing, and (iii) an inspection of ABC's documents may support non-exculpated breach of fiduciary duty claims? Op. at 19, 29-30, 46-48; A1068-A1081.

B. Standard of Review

The trial court's determination that a credible basis exists to infer wrongdoing is a mixed finding of fact and law that is entitled to considerable deference. *City of Westland Police & Fire Ret. Sys. v. Axcelis Techs., Inc.*, 1 A.3d 281, 286-87 (Del. 2010).

C. Merits of Argument

ABC argues that Plaintiffs' Demand was solely limited to evaluating derivative litigation. OB at 28. From that wrong premise, ABC also incorrectly argues that Plaintiffs did not establish a proper purpose because they were required to "present a credible basis to infer 'actionable' wrongdoing." *Id.* The court below did not commit clear error in rejecting those arguments.

1. The Court Can Affirm on the Basis that Plaintiffs' Purpose for Investigating Was Not Limited to Bringing Litigation

ABC's argument that Plaintiffs did not establish a proper purpose because they were required to "present a credible basis to infer 'actionable' wrongdoing" is premised on ABC's argument that Plaintiffs' "sole purpose" for investigating is to evaluate possible derivative litigation. OB at 28. Because the Court of Chancery did not commit clear error in rejecting that argument, this Court can affirm that finding for all of the reasons stated *supra* in Section I.C.2. and need not go any further to affirm that Plaintiffs established a proper purpose.

2. Plaintiffs Established a Credible Basis to Suspect Potential Wrongdoing

The trial court correctly held that even if Plaintiffs had limited their purpose for investigating to evaluating possible litigation (and they did not), Plaintiffs were not required to present evidence of "actionable wrongdoing" to inspect books and records. Op. at 30-40. Well-established Delaware law only requires Plaintiffs to establish a credible basis to suspect potential wrongdoing. *Id.* at 16. Plaintiffs met that standard. *Id.* at 19-24. ABC does not dispute that holding, instead arguing for another new Section 220 standard.

In *Seinfeld*, this Court reaffirmed "the well-established law of Delaware that stockholders seeking inspection under section 220 must present 'some evidence' to suggest a 'credible basis' from which a court can infer that mismanagement, waste or wrongdoing may have occurred." 909 A.2d at 118 (citation omitted); *see also,*

e.g., *Cent. Laborers Pension Fund v. News Corp.*, 45 A.3d 139, 144-45 (Del. 2012); *Axcelis*, 1 A.3d at 286-87. The "credible basis" standard requires only "some evidence of possible wrongdoing." *Seinfeld*, 909 A.2d at 122 (emphasis and citations omitted). It is the "lowest possible burden of proof" in Delaware. *Id.* at 123.

A stockholder is "not required to prove by a preponderance of the evidence that waste and [mis]management are actually occurring." *Thomas & Betts*, 681 A.2d at 1031. It follows logically that a stockholder is not required to prove that fiduciaries are responsible—much less can be held monetarily liable—for the mismanagement that the stockholder seeks to investigate. Thus, even where, unlike here, a "stockholder demands inspection as a means to investigate wrongdoing [solely] in contemplation of a class or derivative action, Delaware courts generally do not evaluate the viability of the demand based on the likelihood that the stockholder will succeed in a plenary action." *Lavin v. W. Corp.*, 2017 WL 6728702, at *9 (Del. Ch. Dec. 29, 2017) (collecting cases); *see also Saito*, 806 A.2d at 116 (applying "credible evidence of possible wrongdoing" standard to demand limited to inspection in furtherance of litigation); *In re Facebook, Inc. Section 220 Litig*, 2019 WL 2320842, at *2 (Del. Ch. May 31, 2019), *judgment entered* 2019 WL 2616578 (Del. Ch. June 24, 2019) ("I reject, as a matter of law, Facebook's implicit

suggestion that I must adjudicate the merits of Plaintiffs' *Caremark* claim before allowing an otherwise proper demand for inspection to stand.").

ABC now seeks to rewrite Section 220 to cast aside this "well-established law" that "achieves an appropriate balance" in favor of an actionable wrongdoing standard that would require a stockholder to present evidence of an actionable claim. This new standard must also be rejected.[15]

ABC's actionable wrongdoing standard is inconsistent with Section 220's purpose. As explained *supra* pp. 13-14, this Court has encouraged stockholders to use Section 220 as a tool for investigating wrongdoing. *See also* Op. at 31 & n.15. Requiring a stockholder to prove that there is a credible basis to believe that actionable wrongdoing occurred "would completely undermine the purpose of Section 220 proceedings, which is to provide shareholders the access needed to make that determination in the first instance." *La. Mun. Police Emps.' Ret. Sys. v. Countrywide Fin. Corp.*, 2007 WL 2896540, at *12 (Del. Ch. Oct. 2, 2007); *see also Marmon v. Arbinet-Thexchange, Inc.*, 2004 WL 936512, at *6 (Del. Ch. Apr. 28, 2014) (allowing defendant to litigate whether mismanagement actually occurred

[15] In denying Plaintiffs' Demand, ABC never used the phrase "actionable wrongdoing," demonstrating that, as with its first argument, this is another litigation-driven argument that ABC did not believe at the outset. *See* A660-A665.

"would turn on its head both § 220 and the case law upholding a books and records inspection for the purpose of investigating mismanagement").

ABC's reliance on cases in which the Court of Chancery denied inspection because the claims were "barred by issue preclusion and the statute of limitations" is misplaced. OB at 29. In those cases, "it was clear to the court that no amount of additional information would aid the stockholder in pleading or prosecuting the contemplated plenary action, so the inspection demand was denied." *Lavin*, 2017 WL 6728702, at *9 (citation omitted). The same cannot typically be said of investigations of wrongdoing, particularly here where the trial court held that "[a] books and records investigation into the potential wrongdoing at AmerisourceBergen thus may support non-exculpated claims for breach of the duty of loyalty." Op. at 47-48. ABC has no response to this dispositive finding.

ABC's focus on then-Master Legrow's decision in *Beatrice Corwin Living Irrevocable Tr. v. Pfizer, Inc.*, 2016 WL 4548101 (Del. Ch. Sept. 1, 2016) similarly fails. ABC defends *Pfizer* as correctly decided (OB at 30-33), but the Opinion did not suggest otherwise. Rather, the trial court correctly explained that the standard applied in *Pfizer*—that the stockholder was required to "provide some evidence from which a *Caremark* claim could be inferred" in order to receive books and records—is even more onerous than the Court of Chancery Rule 23.1 standard for demand futility, which does not require a plaintiff to plead evidence. Op. at 36-39. The

Pfizer standard is inconsistent with *Seinfeld* and the purpose of Section 220, and should be rejected.

3. The Court Can Affirm on the Basis that Plaintiffs Presented a Credible Basis to Suspect "Actionable Wrongdoing"

Even if Plaintiffs had limited their purpose of investigating to bringing derivative litigation (they did not) and even if the trial court erred in failing to apply an actionable wrongdoing standard (it did not), ABC's appeal still fails because the trial court went even further and held that Plaintiffs presented evidence that would support a credible basis to suspect actionable wrongdoing. *See* Op. at 46-48.

After arguing that actionable wrongdoing is the appropriate standard (OB at 16-35), ABC devotes just a single paragraph to arguing that Plaintiffs failed to present credible evidence of actionable wrongdoing. *See id.* at 35-36. Without elaboration, and ignoring the trial court's factual findings, ABC argues that "Plaintiffs offered no evidence concerning the Board whatsoever, let alone sufficient to suspect that the Board ignored red flags in bad faith." *Id.* The trial court did not commit clear error in finding just the opposite.

In rejecting ABC's 8 *Del. C.* § 102(b)(7) defense, the trial court held that the Plaintiffs' evidence supported an inference that "AmerisourceBergen's directors and officers may have breached their fiduciary duty of loyalty by consciously permitting the Company to violate positive law." Op. at 46. The trial court reasoned that "[t]aken as a whole, the evidence surrounding the volume of AmerisourceBergen's

distribution of opioids through rogue pharmacies, the minimal levels of reporting of suspicious orders, and the changes over time in reporting levels is sufficient to support an inference that AmerisourceBergen's directors and officers may have pursued the maximization of profit at the expense of legal compliance." *Id.* The trial court further held that "[t]he same pattern of evidence that supports an inference that AmerisourceBergen's senior officers and directors may have consciously permitted AmerisourceBergen to violate the law also supports the lesser inference of consciously failing to monitor a mission-critical source of regulatory risk." *Id.* at 47.

The trial court did not stop there, further holding that "[t]here is also a credible basis from which to infer that AmerisourceBergen's directors and officers possibly breached their fiduciary duties by knowingly failing to respond to red flags." *Id.* The trial court reasoned that "[b]ecause it is possible to infer that fiduciaries at AmerisourceBergen who were actively monitoring a compliance system would have detected the company's regulatory issues and taken action, one reasonable follow-on inference is that the fiduciaries were not engaging in monitoring" and another reasonable inference "is that the fiduciaries engaged in monitoring, identified the issues, and ignored them, such as by failing to implement additional compliance measures in response to gaps in the compliance program or by consciously failing to take remedial steps in response to problems that the compliance system revealed."

Id. In sum, the trial court concluded that "[a] books and records investigation into the potential wrongdoing at AmerisourceBergen thus may support non-exculpated claims for breach of the duty of loyalty." *Id.* at 47-48.

These findings of fact are "entitled to considerable deference." *Axcelis*, 1 A.3d at 287. The Court can affirm on this basis.

4. The Trial Court Correctly Rejected ABC's Statute of Limitations Defense

As a last-ditch argument, ABC contends in a single paragraph that the trial court erred by not finding that any claim would be barred by the statute of limitations. OB at 36-37. The trial court correctly rejected this argument for the threshold reason that it is premised on ABC's incorrect argument that Plaintiffs' only purpose for seeking inspection is to bring litigation. Op. at 48. It also rejected this argument because ABC did not prove that Plaintiffs' potential plenary claims would be barred by the statute of limitations. *Id.* at 48-50.

In the vast majority of cases, "[t]he potential availability of affirmative defenses to withstand fiduciary duty claims cannot solely act to bar a plaintiff under Section 220" because "the factual development necessary to assess fairly the merits of a time-bar affirmative defense, for example, as to each potential claim, is not consistent with the statutory purpose" and "courts should not be called upon to evaluate the viability of affirmative defenses to causes of actions that have not been, and more importantly may not ever be, asserted." *Amalgamated Bank v. UICI*, 2005

WL 1377432, at *2 (Del. Ch. June 2, 2005). Only in the rare case in which a plaintiff limits itself to bringing litigation *and* it is clear from the record that any claim would be time-barred can an affirmative statute of limitations defense bar inspection. *See Graulich v. Dell Inc.*, 2011 WL 1843813, at *5-6 (Del. Ch. May 16, 2011) (plaintiff lacked a proper purpose because he "articulated no stated purpose other than to investigate wrongdoing in order to bring an appropriate suit against defendant" and defendant's public filings put plaintiff on notice of his potential claim more than three years before his Section 220 action). The trial court correctly concluded that this is not such a rare case.

Revelations set forth in the West Virginia Report, the Missouri Report and the NY AG Complaint alerted Plaintiffs to ABC's potential wrongdoing. Those sources note ABC's potential misconduct continued through 2018. *See supra* pp. 6-9; Op. at 10. The statute of limitations has not run on any claim arising out of that conduct.

Moreover, even if the trial court could consider these merits arguments at the Section 220 stage, ABC did not prove that the new revelations in the reports and in the NY AG Complaint were available to Plaintiffs before 2018. Thus, even if there was a breach more than three years ago, "[i]t is possible that doctrines like fraudulent concealment or equitable tolling could enable the plaintiffs to pursue otherwise stale claims" and "[i]t is also possible that the plaintiffs could show a continuing wrong." Op. at 49 (citing *Saito*, 806 A.2d at 117 (rejecting argument that the stockholder

could not obtain books and records pre-dating the stockholder's purchase of shares, noting that "the potential derivative claim may involve a continuing wrong that both predates and postdates the stockholder's purchase date")). Plaintiffs also "may be able to use earlier information to support non-time-barred claims, such as by citing earlier conduct as evidence of intent, knowledge, or lack of mistake." *Id.*; *see also Amalgamated Bank*, 2005 WL 1377432, at *2 ("A document that contributes to the investigation of a continuing wrong or provides background and context to a current, actionable wrong may be relevant and, indeed, necessary to a shareholder's proper purpose regardless of whether the events revealed in the documents are themselves actionable."); *Wolst v. Monster Beverage Corp.*, 2014 WL 4966139, at *2 (Del. Ch. Oct. 3, 2014) ("Sometimes conduct that cannot be challenged because of a time-bar defense can, nevertheless, inform consideration of other potentially wrongful conduct that is not yet time-barred.").

In short, as a matter of law, the Court of Chancery should not consider merits-based defenses at the Section 220 stage. Even if the trial court has that ability in rare cases, the trial court rejected ABC's arguments at trial. Those findings are entitled to considerable deference and must be affirmed.

III. THE COURT OF CHANCERY DID NOT ABUSE ITS DISCRETION IN TAILORING APPROPRIATE RELIEF AS TO THE SCOPE OF INSPECTION

A. Question Presented

Did the Court of Chancery abuse its discretion by (i) ordering ABC to produce the Formal Board Materials and granting Plaintiffs leave to conduct a limited-issue Rule 30(b)(6) deposition and (ii) finding that Plaintiffs' Demand sought Informal Board Materials and Officer-Level Materials, which Plaintiffs may seek? Op. at 50-62; A611-A624; A950-A951; A1014-A1027; A1081-A1088; A1128-A1157; A1218-A1221.

B. Standard of Review

The Court reviews for abuse of discretion the determination of both the scope of relief and any limitations or conditions on that relief. *Palantir*, 203 A.3d at 749. The Court "adopt[s] a *de novo* standard of review as to which types of books and records are included in the actual written demand, except to the extent that the written demand is ambiguous and there are factual determinations underlying the Court of Chancery's resolution of that ambiguity." *Id.* This is because "[i]nterpreting a written demand is more analogous to contract interpretation, which is subject to *de novo* review as a question of law, than to the sorts of fact-intensive, judgment-based determinations that are reviewed for abuse of discretion (*e.g.*, the appropriate scope of relief or limitations on relief)." *Id.* (internal footnotes and citations omitted).

C. Merits of Argument

1. The Trial Court Did Not Abuse its Discretion in Fashioning Appropriate Relief

Under Section 220(c), the Court of Chancery may "in its discretion, prescribe any limitations or conditions with reference to the inspection, or award such other or further relief as the Court may deem just and proper." Here, the trial court fashioned an inspection remedy that was well within its broad discretionary powers under Section 220(c). *See Treppel*, 109 A.3d at 557-58. Alternatively, to the extent the court's ruling is considered to be a discovery ruling in an on-going Section 220 case, the ruling is still entitled to deference. *McKesson Corp. v. Saito*, 818 A.2d 970, 2003 WL 897814, at *1 (Del. 2003) (TABLE); *see* OB at 38 (describing the ruling as "post-trial discovery").

The trial court determined that Plaintiffs' inspection right extended beyond the Board to its senior officers, including whether those senior officers "were involved in the violation, condoned it, consciously ignored indications that it was going on, or consciously failed to establish and monitor the necessary information and reporting systems that would have enabled them to identify and address the violations of positive law." Op. at 23-24. The trial court, however, could not craft specific relief aimed at investigating that misconduct for two reasons. The trial court noted that "[b]ecause of the fact-specific nature of this inquiry, it will often be difficult to determine in the abstract whether a stockholder is entitled to more than

Formal Board Materials." *Id*. at 54. The difficulty was compounded because, "[i]n this case, an additional obstacle is the absence of information about what types of records AmerisourceBergen maintains and who has them." *Id.* Plaintiffs "sought this information in discovery, but AmerisourceBergen refused to provide it." *Id.*

As a result, the trial court ordered ABC to first produce Formal Board Materials. *Id.* at 57. To remedy the gap in the record created by ABC, the trial court granted Plaintiffs leave, after inspecting the Formal Board Materials, to conduct a Rule 30(b)(6) deposition in order "to determine what other types of books and records exist and who has them." *Id.* The trial court further held that, "[i]f the parties cannot agree on a final production order at that point, then the plaintiffs may make a follow-on application for Informal Board Materials or Officer-Level Documents." *Id.* These discretionary rulings reflect a careful and cautious harmonization of the interests of Plaintiffs and ABC under the unique circumstances of this case and a good-faith effort by the trial court to carry out its responsibility to ensure that "an order [on inspection is] circumscribed with rifled precision." *Sec. First Corp.*, 687 A.2d at 569-70.

None of ABC's disagreements with the trial court's case-specific ruling suggest that the trial court arbitrarily exercised its discretion or that the trial court otherwise acted contrary to law. *See Leonard v. Copeland*, 572 A.2d 393, 1990 WL 17758, at *2 (Del. 1990) (TABLE).

First, ABC argues that Plaintiffs' interrogatory "did not request information about 'what types of books and records exist and who has them[,]" but rather asked ABC to "[i]dentify the directors, officers and senior managers . . . reasonably likely to have information responsive to Plaintiffs' May 21 Demand." OB at 40. However, ABC admitted at trial that the interrogatory sought "basically, where is all your documents, or who is in a reporting relationship." A1209. ABC's interpretation of the interrogatory demonstrates that the trial court did not abuse its discretion in its interpretation of the interrogatory. Op. at 56-57.

Second, ABC argues that because Plaintiffs "never challenged" their objections to Plaintiffs' interrogatory, the trial court's ruling "has the effect of overruling Defendant's objection, *sua sponte*, to grant leave to depose Defendant," and "effectively (and unilaterally) rescinds Plaintiffs' stipulation (and its own Order) prohibiting Plaintiff from taking Defendant's deposition." OB at 40-41; *see also id.* at 39. That is not accurate. At trial, Plaintiffs noted that they were "in the dark" as to each and every document essential to their purposes because ABC refused to respond to the interrogatory. A1147. ABC cannot refuse to meaningfully engage in discovery and then use its own failure to avoid the consequences of its own actions at trial. *See Palantir*, 203 A.3d at 754-55 & n.84 ("Books and records actions are not supposed to be sprawling, oxymoronic lawsuits with extensive discovery.").

Third, the trial court did not "relieve Plaintiffs of their burden" of establishing that additional books and records are essential. *Cf.* OB at 41. The trial court was constrained by ABC's failure to respond to discovery. ABC's conduct is all the more striking given its focus on the stipulation concerning depositions. *Id.* at 39. While the stipulation says that "[n]o depositions shall be taken in the case," that stipulation was executed *before* ABC refused to answer Plaintiffs' interrogatory. *Compare* A666-A670 (August 13, 2019) *with* A671-A702 (August 23, 2019).

ABC alone knows where its documents are located. *Palantir*, 203 A.3d at 755. Corporate defendants cannot place stockholders and the trial court in a black box by refusing to provide information concerning *what documents* it possesses and thereby prevent them from determining with any precision *which of those documents* are necessary and essential to fulfill a proper investigative purpose.[16] The trial court was left with three options: (i) award Plaintiffs all documents, including electronic communications (which discretionary ruling would have been appropriate here), (ii) deny Plaintiffs many essential documents, and reward ABC for its lack of candor, or (iii) order Formal Board Materials to be produced, with limited subsequent

[16] To be clear, the trial court did not "f[ind] after trial that Plaintiffs had *not* met their burden of establishing that books and records beyond 'Formal Board Materials' were essential[.]" OB at 39-40. The trial court reserved decision on this issue until after Plaintiffs reviewed the Formal Board Materials, conducted a Rule 30(b)(6) deposition, and conferred with ABC on an appropriate order. *See* Op. at 57.

proceedings. The trial court did not abuse its discretion in selecting option three to aid the trial court's ability to craft a post-trial judgment, particularly when ABC advocated at trial for a staged process to determine which books and records were essential to Plaintiffs' purposes. *See* A1211-A1212 (advocating for a phased process that bifurcates purpose and scope).[17] It certainly did not abuse its discretion by not rewarding ABC's obstructionist tactics to interfere with Plaintiffs' Section 220 rights. *See Leonard*, 1990 WL 17758, at *2 ("This Court does not condone the inadequate responses to proper discovery demands.").[18]

2. The Opinion Does Not Conflict with *Palantir*

ABC exaggerates the impact of the trial court's ruling, asserting that it "will send the parties on a sprawling inquiry about 'what types of books and records exist and who has them.'" OB at 42 (citing Op. at 57). In reality, the trial court's ruling imposes a streamlined process that minimizes any burden on ABC and is consistent with Delaware practice:

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[17] In rejecting the Demand, ABC "reserve[d] its objections to the scope of the records requested for the time being," asserting that it would address scope only *after* Plaintiffs "demonstrate a proper purpose," which is exactly the process set by the trial court. *See* A665.

[18] The lone case cited by ABC does not involve a Section 220 proceeding or the trial court's exercise of discretion. *See* OB at 41 (citing *Oxbow Carbon & Minerals Holdings, Inc. v. Crestview-Oxbow Acquisition, LLC*, 202 A.3d 482, 501 (Del. 2019)). In *Oxbow*, this Court found that the trial court committed error by raising a legal theory *sua sponte* and then relying on that theory in its post-trial opinion despite the fact that it was abandoned by the parties who later adopted it. *Id.* at 490, 502.

1. ABC produces Formal Board Materials;[19]
2. After review, Plaintiffs may a conduct a limited Rule 30(b)(6) deposition; and
3. The parties confer on a final production order or, if no agreement is reached, Plaintiffs may apply for Informal Board Materials or Officer-Level Materials.

Op. at 57. The Opinion is consistent with Delaware law, which recognizes that Rule 30(b)(6) depositions are entirely appropriate (and usually necessary) in books and records actions. Another Vice Chancellor recently rejected this same argument, explaining that requiring a Section 220 defendant to disclose "the existence and whereabouts of documents sought in a 220 demand is certainly relevant and . . . helpful" and "comports directly with my view of what the law is and should be in Delaware." *Hollywood Police Officers' Ret. Sys. v. Gilead Sciences, Inc.*, C.A. No. 2020-0155-KSJM, at 58, 62 (Del. Ch. May 8, 2020) (TRANSCRIPT) (Ex. B); *see also Indiana Elec. Workers Pension Tr. Fund IBEW v. Wal-Mart Stores, Inc.*, C.A. No 7779-CS, at 10, 20 (Del. Ch. Oct. 12, 2012) (TRANSCRIPT) (ordering a Rule 30(b)(6) deposition and noting that it would not create a "parade of horribles") (Ex.

[19] The process of collecting the Formal Board Material can be accomplished "promptly and with minimal burden." Op. at 52. This is especially true for ABC, which maintains certain books and records in a centralized electronic platform. *See id.*; *see also* A1196 (ABC has used "Directors Desk" since 2013).

C); *Chammas v. NavLink, Inc.*, 2015 WL 5121095, at *1 (Del. Ch. Aug. 27, 2015) (ordering deposition).

ABC is wrong that *Palantir* stands for the proposition that discovery into the types of books and records in the corporation's possession is "generally unavailable" in Section 220 actions. OB at 43. Indeed, "*Palantir* does not say that, and to interpret the decision as establishing a bright-line rule would run contrary to Delaware's case-by-case approach to Section 220 proceedings." Op. at 55 (collecting cases).[20] Furthermore, there is no indication that *Palantir* reflects a judgment by this Court to circumscribe the Court of Chancery's power under Section 220(c) to "prescribe any limitations or conditions with reference to the inspection, or award such other or further relief as the Court may deem just and proper." *Palantir*, 203 A.3d at 749 n.48 (citing 8 *Del. C.* § 220(c)).

Nor did *Palantir* impose a "settle-order" in every case. *Cf.* OB at 46. The Court instead offered guidance on future Section 220 proceedings because the

[20] The limitations on discovery in Section 220 actions are intended "to ensure that the parties do not expand books-and-records action into a plenary proceeding, with the plaintiffs seeking discovery into the merits of future claims and the defendants seeking discovery into future defenses." Op. at 56. However, "[j]ust as a defendant can serve interrogatories or depose a plaintiff about its proper purpose, so too can a plaintiff serve interrogatories or notice a Rule 30(b)(6) deposition to understand what books and records exist and who has them." *Id.* The record created by this limited discovery can, in turn, "assist the parties in resolving their dispute, and it later assists the court in crafting a tailored order." *Id.* at 56-57.

parties "spent more time arguing over the form of the books and records that had to be produced rather than the substantive nature of those books and records." *Palantir*, 203 A.3d at 757. Accordingly, the Court noted that "[i]n the settle-order process in a [Section] 220 action, *it may be* that a focus on this question of substance, rather than form, would provide a more concrete basis for the parties to resolve their differences and, at the very least, better help the Court of Chancery to decide any final disputes." *Id.* (emphasis added). The Court cautioned, however, that "the [trial] 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.* Here, ABC's lack of candor in discovery compelled the trial court to use its discretion to craft specific relief under the facts of this case. *See* Op. at 54. That judgment is entitled to considerable deference and must be affirmed.

3. The Demand Requested Informal Board Materials and Officer-Level Materials

ABC is wrong that the trial court "injected consideration of 'Informal Board Materials' and 'Officer-Level Documents'" into Plaintiffs' Demand. *Cf.* OB at 48. The trial court explained at trial and in the Opinion:

> For each demanded category, the Demand seeks "Board Materials," which it defines as documents "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."
>
> Through this definition, the Demand requests Formal Board Materials, Informal Board Materials, and Officer-Level Materials. The Demand seeks Formal Board Materials by requesting documents "provided at, considered at, discussed at, or . . . disseminated . . . 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." The Demand seeks Informal Board Materials by requesting "documents prepared or disseminated, in draft or final form" and because the phrases "in connection with," "in anticipation of," and "as a result of" are broad enough to extend beyond documents formally reviewed during an official meeting. The Demand requests Officer-Level Materials because officers and other employees could have prepared documents in connection with, in anticipation of, or as a result of a board meeting.

Op. at 53-54 (internal citation omitted); A1185-A1198; OB at 14. This is another issue on which ABC lost at trial. The trial court's findings are not clear error and the Opinion should be affirmed.[21]

The trial court was correct, as Plaintiffs repeatedly noted that the Demand sought those additional documents. *See* A1019 ("Plaintiffs seek to inspect Board Materials to the extent they were authored by the Board . . . , those with a reporting relationship to the same, or senior management with direct involvement in the alleged misconduct."); A1021 ("Under the definition of Board Materials, the policies and procedures requested by Plaintiffs include those (1) "provided at, considered at,

[21] To the extent this Court determines that the Demand was ambiguous as to whether Plaintiffs sought more than Formal Board Materials, the Court of Chancery's resolution of facts must be afforded deference. *See Palantir*, 203 A.3d at 749.

discussed at, or prepared or disseminated, in draft or final form, in connection with, [or] in anticipation of . . . . any meeting of the Company's Board or any regular or specially created committee thereof," and (2) "prepared or disseminated, in draft or final form . . . as a result of any [such] meeting."); A1131-A1145; *cf.* OB at 48. As a result, the Demand sought Informal Board Materials and Officer-Level Materials, and the Opinion must be affirmed.[22]

[22] Even assuming, *arguendo*, that the Demand did not seek documents beyond Formal Board Materials (which it did), the issue as to whether Plaintiffs were entitled to these additional materials was properly joined and addressed by ABC. *See Facebook*, 2019 WL 2320842, at *17-18. As a result, this is another fact issue on which ABC lost.

CONCLUSION

The Opinion should be affirmed.

Dated: May 27, 2020

PRICKETT, JONES & ELLIOTT, P.A.

/s/ Samuel L. Closic
Samuel L. Closic (Bar No. 5468)
Eric J. Juray (Bar No. 5765)
1310 N. King Street
Wilmington, Delaware 19801
(302) 888-6500

BERNSTEIN LITOWITZ BERGER & GROSSMANN LLP
Gregory V. Varallo (Bar No. 2242)
500 Delaware Avenue, Suite 901
Wilmington, Delaware 19801
(302) 364-3600

Counsel for Plaintiffs/Appellees

Of Counsel:

KESSLER TOPAZ MELTZER & CHECK, LLP
Eric L. Zagar
Michael C. Wagner
Christopher M. Windover
280 King of Prussia Road
Radnor, Pennsylvania 19087
(610) 667-7706

Counsel for Plaintiff/Appellee Lebanon County Employees' Retirement Fund

HACH ROSE SCHIRRIPA & CHEVERIE LLP
Frank R. Schirripa
Daniel B. Rehns
Hillary Nappi
112 Madison Avenue, 10th Floor
New York, New York 10016
(212) 213-8311

BERNSTEIN LITOWITZ BERGER & GROSSMANN LLP
David Wales
Andrew Blumberg
1251 Avenue of the Americas, 44th Floor
New York, New York 10020
(212) 554-1400

Counsel for Plaintiff/Appellee Teamsters Local 443 Health Services and Insurance Plan

CERTIFICATE OF SERVICE

I, Eric J. Juray, do hereby certify on this 27th day of May, 2020, I caused a copy of the foregoing to be served via File and Serve*Xpress* upon the following counsel:

Stephen C. Norman, Esq.
Jennifer C. Wasson, Esq.
Tyler J. Leavengood, Esq.
1313 N. Market Street
Hercules Plaza 6th Floor
Wilmington, Delaware 19801

/s/ Eric J. Juray
Eric J. Juray (Del. No. 5765)