



IN THE SUPREME COURT OF THE STATE OF DELAWARE

EPICENTRX, INC.,

Plaintiff Below-Appellant,

v.

PROTHEX, INC.,

Defendant Below-Appellee.

No. 167, 2023

APPEAL FROM THE
COURT OF CHANCERY OF
THE STATE OF DELAWARE,
C.A. NO. 2021-0724-PAF

Redacted Public Version

Dated: July 20, 2023

APPELLANT'S CORRECTED OPENING BRIEF

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Dated: July 18, 2023

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NATURE OF PROCEEDINGS

This appeal arises from a books-and-records case that Plaintiff-Appellant EpicentRx, Inc. (“Plaintiff” or “EpicentRx”) filed under 8 *Del. C.* § 220 (“Section 220”) against Defendant-Appellee Prothex, Inc., f/k/a Drais Pharmaceuticals, Inc. (“Defendant” or “Prothex”). After a one-day trial on May 24, 2022, the Court of Chancery concluded that, although Plaintiff established a proper purpose for a Section 220 demand by offering credible evidence of mismanagement at Prothex, Defendant nonetheless proved that EpicentRx’s stated purpose for inspection is pretextual, and that its primary purpose is improper. Accordingly, the Court of Chancery denied Plaintiff’s demand to inspect books and records and entered judgment in Defendant’s favor.

EpicentRx is both a stockholder of Prothex and a party to a license agreement with Prothex. The Court of Chancery held that Prothex met its burden to prove that EpicentRx’s stated purpose to investigate mismanagement was not its true purpose; rather, the trial court found that the purpose of Plaintiff’s demand related not to its status as a stockholder, but as a licensor and potential buyer to ostensibly pressure Prothex to accept an acquisition offer at a purportedly low price so that Plaintiff could regain Prothex’s interest in RRx-001, a compound EpicentRx had developed and partially licensed to Prothex under the parties’ limited use license agreement. Based on this finding, the Court of Chancery ruled that EpicentRx was not entitled

to inspect any books and records beyond those that Prothex had already produced.

Plaintiff contends that this ruling was in error, and this appeal followed.

SUMMARY OF THE ARGUMENT

1. The Court of Chancery erred in holding that, although Plaintiff met the standard required to show mismanagement to prove a proper purpose of investigation under Section 220, Defendant met its burden to prove that Plaintiff's stated purpose is pretextual, and its primary purpose is improper. The trial court made this ruling based on facts that are not in dispute; hence, its decision is not based on factual findings or credibility assessments. Rather, the trial court's ruling erroneously applied the law to these undisputed facts and, accordingly, this Court should review the ruling *de novo*. Even if this Court reviews the Court of Chancery's analysis of Plaintiff's primary purpose under a more deferential standard of review, such as abuse of discretion, Defendant nonetheless failed to meet its substantial burden of proof to overcome Plaintiff's showing of a proper purpose to inspect books and records, and Plaintiff should have been awarded judgment in its favor.

STATEMENT OF FACTS

A. The Parties

EpicentRx is a “patient-driven immuno-oncology company with minimally toxic therapies that work across diverse patient populations and tumor types for the best possible quality of life during treatment.” (A0030.)

Prothex promotes itself as a “clinical stage pharma company working to help patients receiving radiation therapy,” focused on a treatment with the “potential to limit the ravages of radiation on normal tissues.” (A0029-A0030.)

B. The License Agreement Between the Parties

On July 2, 2018, EpicentRx and Prothex entered into a limited use License and Development Agreement (the “Agreement”), under which EpicentRx granted Prothex, among other things, [REDACTED] the compound RRx-001, a cancer treatment that EpicentRx had created (A0030; A00403), [REDACTED] [REDACTED] (A0031; *see also* A0820). [REDACTED] 42.99% of outstanding stock of Prothex, which it has held at all times since July 2, 2018. (A0403; A0822.)

C. Plaintiff’s Personnel on Defendant’s Board

Current EpicentRx CEO Dr. Tony Reid was on Prothex’s board from around May or June 2020 until August 2021. (A0403; A0817.) Former EpicentRx CEO

Dr. Corey Carter was on the board of Prothex prior to Dr. Reid's appointment. (A0818.) He no longer works for EpicentRx. (*Id.*)

Dr. Arnold Oronsky was also on the board of Prothex. (A0866.) He died in November 2020. (A0929.)

D. Defendant's Breaches of the Agreement

1. Failure to Comply with [REDACTED]

The Agreement requires Prothex to [REDACTED]. [REDACTED]. (A0033-A0034.) Prothex has not provided EpicentRx [REDACTED] since February 26, 2020. (A0035.)

2. Defendant's Improper Interactions with the USPTO and FDA

On January 31, 2020, Prothex filed a patent application for RRx-001 related to chemoprotection, which violated the Agreement and is outside of its licensed field of use. (A0032; A0831.) EpicentRx was not notified before the filing or given an opportunity to object to it. (A0032; A0831.) EpicentRx requested several times that Prothex withdraw it, and it finally did. (A0581-A0585; A0832-A0833.)

EpicentRx believes that Prothex claimed to be representing EpicentRx in communications with the U.S. Food and Drug Administration ("FDA") about RRx-001, without consulting EpicentRx. (A0828-A0829.) EpicentRx never authorized Prothex to act on its behalf with the FDA. (A0032-A0033.)

Prothex's discussions with the FDA were improper, impacted RRx-001 beyond Defendant's limited field of use and should have included EpicentRx. (A0828-A0829.) Prothex was not prepared to respond to the FDA's questions and did not contest its request for expensive and unnecessary reproductive toxicology and embryo-fetal lethality studies. (A0032-A0033; A0831.)

On April 24, 2020, the FDA sent a response from the meeting, which Prothex did not forward to EpicentRx until May 6, 2020. (A0032-A0033.)

E. Amendments to the License Agreement

EpicentRx grew concerned about Prothex's conduct and adherence to the limited field of use of RRx-001 in the Agreement. (A0033; A0427-A0442; A0830-A0831; A0833.) In July 2020, the parties executed a second amendment to the Agreement ("Amendment No. 2"), which required collaboration, sought to protect EpicentRx from Prothex further violating the Agreement, and included [REDACTED] [REDACTED] to ensure that Prothex did not engage in further unauthorized behavior. (A0033; A0826-A0828.)

F. Defendant Failed to Comply with Payment Obligations

Under the Agreement, "[REDACTED] [REDACTED], which requires Prothex to "[REDACTED]"; and "[REDACTED] [REDACTED]. (A0034; A0404;

A0824-A0826.) The [REDACTED] to which Prothex agreed in writing and that has never been modified. (A0322; A0826.) Prothex paid invoices EpicentRx issued to it in 2018 and 2019. (A0841-A0842.)

In 2020 and 2021, EpicentRx issued Prothex three invoices totaling roughly \$1.05 million. (A0844-A0845.) Prothex acknowledged in writing receiving the invoices and did not contest them. (A0035; A0461-A0580; A0590-A0688; A0789-A0792; A0842-A0844; A0880.) However, Prothex claimed it should receive a credit for invoices it had already paid. (A0880.) Early in the parties' relationship under the Agreement, EpicentRx requested advances on payments Prothex owed for the expenses that would be due under the invoices, but the advances were for actual costs that would be incurred under the [REDACTED] and were trued up against actual documentation and pass-through expenses, not loans that needed to be paid back, and are not part of the invoice amounts that Prothex owes EpicentRx. (A0841.)

Prothex never contested the contents of the invoices as being inaccurate or not subject to payment under the [REDACTED], and they were included within the agreed [REDACTED]. (A0844; A0880.) The roughly \$1.05 million outstanding under the three invoices is for amounts owed through December 2020. (A0844-A0855.) EpicentRx is still tracking moneys owed after that date. (*Id.*) Prothex has not paid any of the amounts due under the invoices. (A0035; A0842-A0844.)

G. Plaintiff Notified Defendant of Its Breaches of the Agreement

On March 30, 2021, EpicentRx provided Prothex with written notice that it was in breach of its [REDACTED] under the Agreement and demanded that Prothex cure its breaches within the time periods in the Agreement. (A0035.) EpicentRx also sought assurances that Prothex would be able to “[REDACTED]” under Section 5.1. (*Id.*) EpicentRx received no such assurances, and Prothex did not cure its material breaches. (*Id.*)

H. Plaintiff’s Legitimate Concerns Over Defendant’s Finances

The “Going Concern” section to the Notes to Financial Statements in Prothex’s December 31, 2019 Independent Auditor’s Report, contain the following statements:

[REDACTED]

Although management is actively seeking additional capital to further develop the compound, [REDACTED]

[REDACTED]

(A0454; *see also* A0837-A0839.)

At least as far back as 2019, [REDACTED]

[REDACTED] caused EpicentRx concern about Prothex's finances at the end of 2019. Soon after this, Prothex refused to provide any information about its finances reinforced that concern. (A0838-A0840.)

In addition, during this time period while Prothex was having financial difficulties and admitted it was unable to move forward with its work on RRx-001, Dr. Tempel paid herself and her colleague James Bianco significant salaries and bonuses. (A0837-A0838; A0919-A0920; A0938-A0939.)

I. Plaintiff's Letter of Intent and Defendant's Indication of Interest

Because Prothex had shown a pattern of mismanagement, including breaches of the Agreement and the inability to raise funds and develop RRx-001, EpicentRx lacked confidence in Prothex's ability to honor its obligations, including the licensed development of RRx-001, which was the primary source of value for Prothex's shareholders. (A0036.) To ensure the full commercialization of RRx-001 in Prothex's limited field of use, which was essentially the only way to benefit Prothex's shareholders, on March 4, 2021, EpicentRx sent Prothex a Letter of Intent ("LOI") and a proposed term sheet for the [REDACTED]. (Id.)

Dr. Tempel and the rest of Prothex's management team did not present EpicentRx's LOI to Prothex's entire Board of Directors. (A0036-A0037.) Prothex did not respond to the LOI. (A0846.)

On March 15, 2021, without any comment on the LOI, Dr. Tempel sent EpicentRx an "Indication of Interest" ("IOI"), whereby EpicentRx would [REDACTED] [REDACTED] [REDACTED]. (A0037; A0846-A0847.) [REDACTED] [REDACTED] (*id.*), [REDACTED] [REDACTED] (A0037; A0847). [REDACTED] [REDACTED] even though the company would be focused on EpicentRx's technology RRx-001. (A0037; A0847.) EpicentRx rejected the IOI. (A0037-A0038.)

J. Plaintiff's Pre-Demand Requests for Documents from Defendant

Before 2020, EpicentRx requested financial and corporate information from Prothex, including financial statements, and Prothex complied with certain of the requests. (A0835.) Prothex also provided certain other documents (A0835-A0836), but EpicentRx had no way to know whether these were complete or had been amended. Prothex first refused to provide financial statements in February 2021. (A0586-A0589; A0839.)

EpicentRx had to involve its internal counsel, Prothex's internal counsel, and both parties' accountants to obtain Prothex's financial statements so that EpicentRx could file its taxes. (A0836; A0839-A0840.)

K. Plaintiff's Section 220 Demand

Because of Prothex's repeated breaches of the Agreement, financial problems, lack of transparency, refusal to provide documents and information, failure to present the LOI to its entire Board for consideration, and the IOI that benefitted Prothex's management above the stockholders and anyone else (which also was not approved by Prothex's entire board), among other acts and omissions, EpicentRx believed that Prothex's management was not acting in its shareholders' best interests. (A0038.) Accordingly, on March 30, 2021, EpicentRx made a Demand pursuant to Section 220 to Prothex. (A0406; A0848-A0849.) In the Demand, EpicentRx demanded that Prothex make eighteen categories of books and records available for inspection and copying. (A0689-A0786.) As EpicentRx wrote, it made the Demand for several purposes, including to examine whether Prothex's Board adequately performed its fiduciary obligations to shareholders and to investigate Prothex management. (*Id.*)

EpicentRx delivered the original Demand with the expectation of conferring with Prothex about documents that did not exist or were not relevant, as Prothex has not been forthcoming and EpicentRx could not know what it did not have or had not

seen. (A0849-A0851.) The breadth of EpicentRx's initial Demand resulted precisely from confusion created by Prothex's lack of transparency and refusal to provide any documentation or information to EpicentRx.

L. Defendant Refused to Produce Documents

On April 6, 2021, Prothex responded to the Demand, agreeing to make available for inspection "some of the materials set forth in Item 1," which requested corporate documents like "articles of incorporation, bylaws, minute books, notices and records of Board and shareholder meetings," but Prothex did not identify which documents it would make available, and refused to allow EpicentRx to inspect any document in response to category nos. 2 through 18. (A0787-A0788; A0850.) Prothex contended that the Demand did not "provide a credible basis to establish proper purpose or necessity for inspection of the items requested" and that EpicentRx needed to provide "some evidence" or "factual support from which to infer probable wrongdoing." (A0787.)

In Prothex's initial response to the Demand and its subsequent correspondence with EpicentRx, Prothex did not state whether it had produced all documents it had or whether any of the documents EpicentRx had requested did not exist. (A0793-A0804; A0871-A0872.)

EpicentRx explained to Prothex that the original Demand was proper because at the time EpicentRx made the Demand, it could not discern what documents

Prothex had and what it had provided; Prothex's behavior and change in position about providing documents was deeply concerning; Prothex refused to produce anything other than "some" documents that complied with the first category; Prothex would not identify whether it produced documents that had complied with any category in the Demand or that no documents responded to a category or if documents it produced satisfied a category. (A0871-A0872.)

M. Defendant's Due Diligence Production

After EpicentRx's LOI, EpicentRx made a second offer to [REDACTED] Prothex, and the parties entered into an agreement with a term sheet (for a deal that ultimately was not consummated). (A0851.) As part of Prothex's due diligence obligations for that transaction, in July 2021, Prothex's officer James Bianco provided a flash drive to EpicentRx's corporate counsel. (A0851-A0852.) The flash drive contained thousands of documents, including irrelevant materials, in no discernable order and with no indication how the documents corresponded to EpicentRx's due diligence requests. (*Id.*)

EpicentRx's Controller and VP of Special Projects, Meaghan Stirn, reviewed the contents of the flash drive and created an index of its contents. (A0852-A0853.) The due diligence requests were not the same as the Demand at issue in this case, and the documents on the flash drive did not fully respond to any category in the original Demand. (A0853.)

N. Other Litigation Concerning the Parties

On August 13, 2021, EpicentRx separately filed a complaint in California state court against Dr. James Bianco, former Chief Development Officer of Prothex, for several causes of action including breach of fiduciary duty, intentional and negligent interference with prospective economic advantage, and business disparagement/trade libel. (Ex. A, at 12:7-22.)

On August 30, 2021, EpicentRx separately filed a complaint in California state court against Prothex for breach of the Agreement and declaratory relief as to its termination. (*Id.* at 13:1-15.)

On January 27, 2023, after trial in this action had concluded, EpicentRx filed another complaint in the Court of Chancery against Prothex and Dr. Tempel seeking judicial winding up and the appointment of a receiver due to Prothex's purported dissolution and lack of transparency as to its assets. (*Id.* at 16:23-17:5.)

O. Plaintiff Narrowed the Scope of the Demand

On August 24, 2021, EpicentRx filed this books and records action. (Compl.) EpicentRx contended, as it does now, that it made the Demand to investigate mismanagement of Prothex and breaches of fiduciary obligations to protect shareholder interests. (A0042-A0043.)

Prior to trial, following discovery and at the Court of Chancery's direction, EpicentRx narrowed the scope of the demanded books and records at issue. (A0388-

A0389.) After considering documents and information it received in discovery, EpicentRx modified its Demand to include ten significantly narrower categories rather than the eighteen in the original Demand. (A0854-A0855; A0891-A0892.) EpicentRx's revised Demand included materials that were necessary for its investigation of mismanagement, consistent with its rights as a shareholder, and required to file its taxes and comply with SEC obligations. (A0856-A0862; A0895-A0896.)

The revised categories are as follows:

- 1A. Final minutes for the following Board meetings: Nov. 16, 2018; March 28, 2019; May 21, 2019; Feb. 26, 2020; July 19, 2020; and confirmation that there are no Board minutes since July 19, 2020.
- 1B. Board of Director Consent dated Nov. 15, 2019; and confirmation that there are no Board Consents since that date.
- 1C. Any Board of Director Consents to approve stock option grants.
- 1D. Any amendments to Bylaws since Dec. 13, 2007 (date of most recent Bylaws in EpicentRx's possession).
- 1E. Update of Dec. 31, 2020 capitalization table to include stock option awards.
2. Prothex's detailed balance sheets and profit and loss statements for 2020 and 2021, and federal tax filings for 2020 and 2021.
3. Documents sufficient to show all current outstanding debts owed by Prothex, identifying the amount owed, and the name and contact information of the entity or individual the debt is owed.

4. All records, written or electronic documents pertaining to the 2020 informal Raymond James valuation identified by Donna Tempel in deposition testimony.
5. Internal Prothex communications and documents not shared with the Board (and not produced in discovery or in the June 2021 flash drive from James Bianco) pertaining to EpicentRx's LOI and term sheet regarding a proposed [REDACTED].
6. All communications with and information provided to InterWest (and not produced in discovery or in the June 2021 flash drive from James Bianco) regarding the LOI and term sheet.
7. All communications with and information provided to James Brown about RRx-001, and all communications between Prothex, InterWest and/or Mr. Brown concerning Mr. Brown [REDACTED] in connection with Prothex's IOI.
8. Internal Prothex communications, communications with FDA and documents not shared with the Board (and not produced in discovery or in the June 2021 flash drive from James Bianco) pertaining to submission and communications with the FDA pertaining to RRx-001, after April 24, 2020.
9. Internal Prothex communications, communications with the U.S. Patent and Trademark Office, and documents not shared with the Board (and not produced in discovery or in the June 2021 flash drive from James Bianco) pertaining to submissions, applications, assignments, and communications.
10. Records, written or electronic documents reflecting Prothex's efforts to comply with [REDACTED] under the License Agreement.

(A0390-A0394; A0946-A0955.)

P. The Court of Chancery's Ruling

The Court of Chancery conducted a one-day trial on May 24, 2022, and the parties thereafter submitted post-trial briefing. (Ex. A, at 3:18-23.) After the parties

submitted their briefs, the Court of Chancery directed the parties to attempt to resolve the remaining areas of disagreement; while EpicentRx attempted in good faith to resolve the disputes, the parties were unable to do so. (*Id.*, at 3:19-23.)

On March 24, 2023, the Court of Chancery issued a post-trial bench ruling. The Court of Chancery ruled that EpicentRx had met its burden and established a credible basis to infer mismanagement at Prothex to substantiate its stated purpose of investigating mismanagement, which is a proper purpose for a Section 220 demand. (*Id.*, at 22:13-15, 23:1-3.) The trial court found that EpicentRx presented evidence showing that Prothex “struggled to comply with its contractual obligations under the license. As a result, EpicentRx contended Prothex was in danger of losing a critical license, its only significant asset.” (*Id.*, at 23:4-8.)

Then, the Court of Chancery also held that Prothex met its burden to show that EpicentRx’s stated primary purpose is pretextual, and its true primary purpose, which is “to exert pressure on Prothex to cede control of the rights to RRx-001,” is improper. (*Id.*, at 23:9-20.) Specifically, the trial court found that EpicentRx’s purpose in seeking corporate records relates primarily to its interests as a license holder and potential acquirer rather than as a stockholder, and “[t]hose interests are adverse to those of the corporate defendant.” (*Id.*, at 23:12-20, 31:7-11.) The Court of Chancery concluded that EpicentRx “demanded to inspect books and records ... to pressure Prothex to accept its acquisition offer at a low price and has launched

this action as part of a multi-pronged litigation strategy to cancel the license agreement or otherwise extract the rights that Prothex currently has to RRx-001 for itself” (*id.*, at 26:15-22), and that each of EpicentRx’s “bases to suspect mismanagement relate to its interests as license holder or potential acquirer.” (*Id.*, at 32:1-3.)

ARGUMENT

I. THE COURT OF CHANCERY ERRED IN HOLDING THAT PLAINTIFF’S PRIMARY PURPOSE WAS NOT TO INVESTIGATE MISMANAGEMENT AND THAT ITS PRIMARY PURPOSE WAS IMPROPER.

A. Question Presented

Whether Prothex overcame the high legal threshold to meet its burden of establishing an improper primary purpose, once EpicentRx had established a proper purpose of investigating mismanagement? (A0416-A0417; A0994-A1001.)

B. Standard of Review

“The question of a ‘proper purpose’ under Section 220(b) of our General Corporation Law is an issue of law and equity which this Court reviews *de novo*.” *Compaq Computer Corp. v. Horton*, 631 A.2d 1, 3 (Del. 1993) (citing *Oberly v. Kirby*, 592 A.2d 445, 462 (Del. 1991)). *See also Western Air Lines, Inc. v. Kerkorian*, 254 A.2d 240 (Del. 1969) (Court reviewed proper purpose determination in stocklist case *de novo*).

“The determination of whether [plaintiff’s] stated purpose for the inspection was its primary purpose, is a question of fact warranting deference to the trial court’s credibility assessments. The ... Court’s factual determinations will not be disturbed by this Court unless clearly erroneous.” *Thomas & Betts Corp. v. Leviton Mfg. Co., Inc.*, 681 A.2d 1026, 1030 (Del. 1996) (quoting *State ex rel. Scattered Corp. v. Chicago Stock Exch.*, 1996 WL 191023, at *2, reported at 676 A.2d 907 (Del. 1996)

(TABLE)). In *Thomas & Betts*, this Court cited *State ex rel. Scattered Corp. v. Chicago Stock Exchange* as precedent for applying an abuse of discretion standard to review the trial court's determination whether a stockholder plaintiff's stated purpose is its primary purpose. That case, however, concerned a "request for a writ of mandamus to compel inspection of certain books and records," which is ... a separate remedy which does not share entirely the analytical framework of section 220." *Scattered Corp.*, 1996 WL 191023, at *1, *4. While the Court in *Scattered Corp.* affirmed under an abuse of discretion standard the trial court's determination that the plaintiff sought books and records for an improper purpose, it noted that "[i]n the mandamus setting, ... the court is free to consider other factors that may not be relevant to a section 220 action." *Id.*, at *4. Given these distinctions, the holdings of *Scattered Corp.* and *Thomas & Betts* are limited in scope. In this case, where the Court of Chancery applied settled case law in Section 220 actions to undisputed facts, this Court should review the trial court's legal analysis *de novo*.

C. Merits of Argument

Irrespective of the standard of review this Court applies to the Court of Chancery's holding – *de novo* or abuse of discretion – Prothex did not meet its substantial burden, after the trial court found that EpicentRx demonstrated a proper purpose under Section 220, to prove that EpicentRx's stated purpose was not its true purpose and its primary purpose was improper.

In a Section 220 action, the Court of Chancery must first determine whether the plaintiff has presented a “proper purpose” for inspection, which is “a purpose reasonably related to such person’s interest as a stockholder.” 8 *Del. C.* § 220(b). If the court determines that a proper purpose has been proven, “the burden shifts to the corporation to prove that the stockholder’s avowed purpose is not her actual purpose and that her actual purpose for conducting the inspection is improper.” *Pershing Square, L.P. v. Ceridian Corp.*, 923 A.2d 810, 817 (Del. Ch. 2007).

Thus, once a proper purpose is established, the burden falls on the corporation to “show[] that the stockholder’s stated proper purpose is not the actual purpose for the demand.” *Id.* It is not sufficient for the corporation to show that a second, improper purpose exists; rather, “the defendant must prove that the plaintiff pursued its claim under false pretenses, and its primary purpose is indeed improper. ***Such a showing is fact intensive and difficult to establish.***” *Id.* (emphasis added). *See also Woods Tr. of Avery L. Woods Tr. v. Sahara Enterprises, Inc.*, 238 A.3d 879, 891 (Del. Ch. 2020) (“[O]nce a stockholder has identified a proper purpose, ... the burden shifts to the corporation to prove that the stockholder’s avowed purpose is not her actual purpose and that her actual purpose for conducting the inspection is improper.”); *Caspian Select Credit Master Fund Ltd. v. Key Plastics Corp.*, 2014 WL 686308, at *4 (Del. Ch. Feb. 24, 2014) (“[A] defendant may not rebut a proper purpose solely by demonstrating that a secondary improper purpose or additional

ulterior motive also exists. The defendant must demonstrate that the plaintiff's stated purpose was offered under false pretenses and thus the primary purpose is improper.”).

As this Court has held, if a stockholder plaintiff can show that the “primary purpose” of inspection is a proper purpose, “***the fact that it may also have ‘a further or secondary purpose ... is irrelevant.’***” *AmerisourceBergen Corp. v. Lebanon Cnty. Employees’ Ret. Fund*, 243 A.3d 417, 426 (Del. 2020) (emphasis added). *See also, e.g., Gen. Time Corp. v. Talley Indus., Inc.*, 240 A.2d 755, 756 (Del. Ch. 1968) (listing examples of irrelevant potential ulterior motives, such as the stockholder’s own corporation status as a competitor of the defendant corporation, or a stockholder desiring to use information to defeat a corporate claim against his principal). After a proper purpose is found, “the Court properly passe[s] over any ancillary purpose” the stockholder may have. *CM & M Grp., Inc. v. Carroll*, 453 A.2d 788, 793 (Del. 1982).

The Court of Chancery’s holding that EpicentRx was not entitled to inspect Prothex’s books and records, notwithstanding the trial court’s finding that EpicentRx offered proof sufficient to establish a proper purpose of inspecting mismanagement, runs contrary to this Court’s precedent. Once EpicentRx established a proper purpose, Prothex bore the substantial burden to prove that EpicentRx’s stated purpose was not its true purpose and that its true purpose was improper – and Prothex

ultimately did not and could not do so. The Court of Chancery erred when it held that Prothex met its burden of proof, relying on *State v. United Brokerage Co.*, 101 A. 433 (Del. Super. Ct. 1917). The Superior Court’s holding in *United Brokerage*, however, predated the adoption of Section 220 and considered a stockholder’s **common law** right to compel inspection of books and records; as such, *United Brokerage* did not address the burdens of proof borne by the stockholder and the corporation in statutory proceedings brought under Section 220.

Moreover, even if *United Brokerage* is applicable to Section 220 actions, it is distinguishable on its facts. In that opinion, the Superior Court recognized that a stockholder could be denied inspection where he “threat[ened] to exercise his right as a stockholder to inspect the books and records of the company, and use the information gained in such inspection, for the purpose of bringing suits to annoy and harass the defendant, and to injure its business and the business of its subsidiaries.” 101 A. at 437. There is no evidence that EpicentRx intended to injure Prothex’s business, nor would it have any incentive to do so. Indeed, the Court of Chancery noted in its ruling that “the scenario in the case before me is not nearly as severe in that in *United Brokerage*.” Ex. A, at 26:13-15. Nonetheless, and despite its own finding of mismanagement at Prothex sufficient to establish a proper purpose for inspecting books and records, the trial court erroneously relied upon *United*

Brokerage to hold that EpicentRx’s true purpose for demanding inspection was to pressure Prothex to accept its acquisition offer. Ex. A, at 26:15-18.

Additionally, the facts cited by the Court of Chancery do not support its conclusion that EpicentRx’s true purpose in demanding to inspect books and records was not to investigate mismanagement. For example, the Court of Chancery inferred that EpicentRx’s true motivation was not to investigate mismanagement from the fact that EpicentRx’s designated directors on Prothex’s board did not also seek to inspect books and records. Ex. A, at 29:10-31:11. Those directors’ statutory inspection right as individuals, however, arises separately and independently from EpicentRx’s statutory right as a stockholder. *See 8 Del. C. § 220(b), (d)*. Whether those directors may not have sought to inspect books and records on their own – albeit before some of the facts at issue even arose – does not waive EpicentRx’s statutory rights.

The Court of Chancery also found that the mere pendency of other litigation between the parties supported its conclusion that EpicentRx did not deliver the Demand for the purpose of investigating mismanagement at Prothex. Ex. A, at 33:2-22. This Court, however, has rejected “a rule that would automatically bar a stockholder-plaintiff from bringing a Section 220 action solely because that plaintiff previously filed a plenary derivative suit” as “a remedy that is overbroad and

unsupported by the text of, and the policy underlying, Section 220.” *King v. VeriFone Holdings, Inc.*, 12 A.3d 1140, 1151 (Del. 2011).

The Court of Chancery further cited what it described as a “facially overbroad demand that resembled a document request in a plenary action” as evidence proving that EpicentRx’s primary purpose to investigate wrongdoing was pretextual. Ex. A, at 34:9-13. The facts of this case, however, make any overbreadth a non-issue. As the trial court noted in its ruling, it has discretion to “either identify the records that should be produced or to decide that it will not ‘pick through the debris’ of an impermissibly overbroad demand that abuses the Section 220 process.” Ex. A, at 34:19-23 9 (quoting *NVIDIA Corp. v. City of Westland Police & Fire Ret. Sys.*, 282 A.3d 1, 14 (Del. 2022), *as revised* (July 25, 2022)). Here, however, EpicentRx explicitly narrowed the scope of its demanded materials before trial at the Court of Chancery’s direction in an effort to narrow the issues for trial. Nonetheless, as this Court has held, “[t]here is no blanket rule that requires the Court of Chancery to outright deny those demands that it finds to be overbroad.” *NVIDIA Corp.*, 282 A.3d at 14.

“The issue of whether a concept so elusive as purpose or motive is ‘primary’ or ‘secondary,’ involves a judgment that necessarily is qualitative, not mathematical. Specifically, where a stockholder who seeks inspection of corporate books and records has two purposes, one stockholder-related and the other not, the critical

inquiry is whether the stockholder-related purpose predominates over the ulterior purpose.” *Helmsman Mgmt. Servs., Inc. v. A & S Consultants, Inc.*, 525 A.2d 160, 166-67 (Del. Ch. 1987). Even if EpicentRx had a secondary purpose for its Demand beyond investigating mismanagement at Prothex – and to be clear, it did not – any secondary purpose became irrelevant under this Court’s precedent when EpicentRx proved its primary purpose at trial. Once the trial court correctly held that the evidence established EpicentRx’s proper purpose for inspection, EpicentRx was entitled to inspection under Section 220, *unless* Prothex met its substantial burden of proving that EpicentRx’s actual purpose was improper. The Court of Chancery’s ruling that Prothex satisfied this burden misapplied the law and was not supported by the record facts.

CONCLUSION

The Court of Chancery erred by holding that Prothex met its burden to prove that EpicentRx's stated purpose of investigating mismanagement, which is a proper purpose under Section 220, was not its true purpose, and by denying EpicentRx its statutory inspection rights as a stockholder. Accordingly, EpicentRx respectfully requests that this Court reverse the Court of Chancery's post-trial ruling and enter judgment in EpicentRx's favor.

Dated: July 18, 2023

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on July 20, 2023, true and correct copies of the foregoing were served upon the following counsel of record via File & ServeXpress:

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