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Case No. 2019-0527-JTL

**IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE**

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| LEBANON COUNTY EMPLOYEES' RETIREMENT FUND and TEAMSTERS LOCAL 443 HEALTH SERVICES & INSURANCE PLAN, | ) | |
| Plaintiffs, | ) | |
| v. | ) | C.A. No. 2019-0527-JTL |
| AMERISOURCEBERGEN CORPORATION, | ) | |
| Defendant. | ) | |

**ORDER GRANTING LIMITED STAY PENDING APPEAL**

1. This court's post-trial opinion (i) ordered defendant AmerisourceBergen Corporation (the "Company") to produce books and records falling within the category of "Formal Board Materials" and (ii) granted the plaintiffs leave to take a Rule 30(b)(6) deposition to determine what other types of books and records exist and who has them. *See Lebanon Cty. Empls.' Ret. Fund v. AmerisourceBergen Corp.*, 2020 WL 132752, at *1 (Del. Ch. Jan. 13, 2020) (the "Opinion" or "Op."). At the Company's request, this court certified an interlocutory appeal from the Opinion, which the Delaware Supreme Court accepted. The Company moved for a stay pending appeal. The plaintiffs opposed the stay only as to the production of Formal Board Materials. The stay therefore is granted as to other aspects of the relief addressed in the Opinion.

2. Whether to grant a stay as to the production of Formal Board Materials is complicated by the fact that the Company produced a subset of those documents to another

stockholder who has brought a derivative action in the United States District Court for the District of Delaware (respectively, the "Federal Plaintiff" and the "Federal Action"). The plaintiffs in this action (the "State Plaintiffs") argue that there is no reason to delay their access to documents that the Company already produced to the Federal Plaintiff.

3. "Stays pending appeal . . . shall be governed by article IV, § 24 of the Constitution of the State of Delaware and by the Rules of the Supreme Court." Ct. Ch. R. 62(d). The applicable Supreme Court rule is Rule 32(a), which provides, "A stay or an injunction pending appeal may be granted or denied in the discretion of the trial court . . . ." Supr. Ct. R. 32(a).

4. The Supreme Court has identified four factors to guide the trial court in exercising its discretion: (1) "a preliminary assessment of likelihood of success on the merits of the appeal," (2) "whether the [party seeking a stay] will suffer irreparable injury if the stay is not granted," (3) "whether any other interested party will suffer substantial harm if the stay is granted," and (4) "whether the public interest will be harmed if the stay is granted." *Kirpat, Inc. v. Del. Alcoholic Beverage Control Comm'n*, 741 A.2d 356, 357 (Del. 1998). The factors are not to be considered in isolation, but as part of a balancing of "all of the equities involved in the case together." *Id.* at 358.

5. The first *Kirpat* factor requires "a preliminary assessment of likelihood of success on the merits of the appeal." *Id.* at 357. This factor "cannot be interpreted literally or in a vacuum when analyzing a motion for stay pending appeal." *Id.* at 358. To do so "would lead most probably to consistent denials of stay motions . . . because the trial court would be required first to confess error in its ruling before it could issue a stay." *Id.* (internal

quotation marks omitted). Instead, the relevant inquiry is whether "the petitioner has presented a serious legal question that raises a fair ground for litigation and thus for more deliberative investigation." *Id.* (internal quotation marks omitted). The plaintiffs do not contest that the Company's interlocutory appeal presents serious legal questions. Dkt. 59 at 7 n.1. This factor weighs in favor of certification.

6. The second *Kirpat* factor is whether the party seeking a stay "will suffer irreparable injury if the stay is not granted." *Id.* at 357. Once Formal Board Materials have been produced to the State Plaintiffs, then the State Plaintiffs will have seen their contents. The documents themselves can be clawed back, but the current state of technology happily does not allow knowledge gleaned from the production to be wiped from human minds. In that sense, the Company will suffer irreparable injury absent a stay. *See Wynnefield P'rs Small Cap Value L.P. v. Niagara Corp.*, 2006 WL 2521434, at *2 (Del. Ch. Aug. 9, 2006). The logic of that position, however, would lead to an automatic stay in every Section 220 action, which is not the law. *See, e.g.*, *Jagodzinski v. Silicon Valley Innovation Co.*, 2011 WL 4823569, at *4 (Del. Ch. Aug. 16, 2011) (denying stay); *Wynnefield*, 2006 WL 2521434, at *3 (denying stay); *see also Bond Purchase, L.L.C. v. Patriot Tax Credit Props., L.P.*, 1999 WL 669358, at *8 (Del. Ch. Aug. 16, 1999) ("[A] movant pursuant to Rule 62(c) must point to some injury other than compliance with this Court's Order and mootness of its appeal in order for this factor to weigh in the movant's favor."). Moreover, similar harm exists whenever a court orders the production of discovery material, yet parallel reasoning has not resulted in a regime of automatic interlocutory appeals from discovery rulings and concomitant stays pending appeal. Here, the Company has not

identified anything out of the ordinary to support a stay. In the abstract, the second *Kirpat* factor neither counsels for or against a stay.

7. The State Plaintiffs argue that on the facts presented, the second *Kirpat* factor counsels against a stay because the Company "has produced substantially the same books and records" to the Federal Plaintiff. Dkt. 59 at 7. As the State Plaintiffs see it, because the Company voluntarily produced the same documents to other stockholders, the production of those documents cannot constitute irreparable harm. The Company points out that its production to the Federal Plaintiff was subject to a confidentiality agreement, and the documents thus are not publicly available. That is not a meaningful distinction because the Opinion contemplates that any production to the State Plaintiffs would also be subject to a confidentiality agreement. Op. at *29. The Federal Plaintiff and the State Plaintiffs do not appear differently situated such that production to the State Plaintiffs would constitute legally cognizable harm even though production to the Federal Plaintiff would not.

8. As the Company made clear in its briefing on the merits, the Company believes that the State Plaintiffs are interested only in filing suit, and the Company anticipates that after obtaining whatever books and records the State Plaintiffs receive through this action, the State Plaintiffs will bring a derivative action against some combination of the Company's present and former directors and officers. It thus seems likely that the Company's decision to provide books and records voluntarily to the Federal Plaintiff while resisting a similar production to the State Plaintiffs reflects a preference by the prospective defendants to litigate against the former rather than the latter. In multi-plaintiff representative litigation, it is not uncommon for defendants to take action to favor

the opponent that they would prefer to face. One way to do that is to provide documents to a particular adversary, which enables that adversary's case to get ahead of competing litigants' cases.

9. Declining to stay relief as to the State Plaintiffs would harm the Company by undermining its ability to choose the adversary that its present and former directors and officers may face. That tactical interest, however, is not deserving of protection. In a derivative case, the Company should have the benefit of the best possible representation, which is unlikely to be the litigation team that the prospective defendants favor.

10. The fact that the Company chose to produce a subset of the Formal Board Materials to the Federal Plaintiff undermines any claim of irreparable harm based on the production of the same materials to the State Plaintiffs. In light of the Company's decision, the second *Kirpat* factor weighs against a stay.

11. The third *Kirpat* factor asks "whether any other interested party will suffer substantial harm if the stay is granted." 741 A.2d at 357. Because granting a stay would delay production of the Formal Board Materials, the State Plaintiffs face a risk of harm. The State Plaintiffs cannot meaningfully determine how to proceed, including whether to file litigation, before they obtain and evaluate the books and records that they seek. Because there will be a stay as to the production of some materials, the State Plaintiffs' ability to determine how to proceed will be impaired in any event, but the extent of the impairment is a matter of degree. The State Plaintiffs would suffer greater harm from a stay of all relief than from a partial stay. The harm to the State Plaintiffs counsels against a stay.

12. The fourth *Kirpat* factor asks "whether the public interest will be harmed if the stay is granted." *Id.* at 357. AmerisourceBergen is a public company and one of the world's largest wholesale distributors of opioid pain medication. The State Plaintiffs seek to investigate the Company's opioid distribution practices, which possibly violated federal law and contributed to America's opioid epidemic—a public health crisis that has killed hundreds of thousands of people and harmed millions more. The Company's role in the opioid epidemic has made it the target of numerous subpoenas, government investigations, and lawsuits, which have cost the Company more than $1 billion. The subject matter of the State Plaintiffs' investigation has received significant attention from the news media. This case is thus a matter of public interest.

13. The State Plaintiffs are seeking to uncover meaningful information about a matter of public interest. To the extent that the State Plaintiffs uncover meaningful information, the public interest will be served. If the Company is correct and the information is not meaningful, then the public interest will not be affected, particularly because the cost of producing the subset of Formal Board Materials that the Company already produced to the Federal Plaintiff should be minimal. The public interest thus is served by denying a stay and harmed by granting a stay.

14. Focusing more narrowly on the prospect of litigation, as the Company has throughout this matter, the public interest is harmed by allowing the likely defendants to use the Company's production of books and records to promote their favored adversary. When there are multiple potential plaintiffs exploring similar claims, defendants could use this technique to "shop" for the plaintiff that the defendants prefer. By voluntarily

producing selected books and records to the plaintiff that the defendants regard as weaker, the defendants can advantage that plaintiff and its case. "First to file" is no longer the dominant rule, at least in this jurisdiction, but the degree to which a sister court has engaged with a matter necessarily plays a role when a court evaluates whether one action should proceed in the face of another. A weaker plaintiff who files a complaint based on more limited information is also more likely to suffer dismissal under Rule 23.1, which bars all other stockholders from litigating through the operation of collateral estoppel. *See La. Mun. Police Emps.' Ret. Sys. v. Pyott*, 46 A.3d 313, 336–47 (Del. Ch. 2012) (discussing pathologies of multi-forum derivative litigation and collecting related authorities), *rev'd on other grounds*, 74 A.3d 612 (Del. 2013). All else equal, a weaker plaintiff is more likely to settle a case on terms that are more favorable to the defendants, implicitly trading a release for a fee. *See In re Emerson Radio S'holder Deriv. Litig.*, 2011 WL 1135006, at *4 (Del. Ch. Mar. 28, 2011) (discussing incentives that lead to suboptimal settlements in representative litigation and collecting related authorities); *In re Revlon, Inc. S'holders Litig.*, 990 A.2d 940, 959–60 (Del. Ch. 2010) (same).

15. The public interest is favored by having cases resolved based on their merits, without outcomes being skewed by tactical maneuvering. Some degree of maneuvering inevitably will be present, but a court need not lend its aid to that effort by granting a stay.

16. There may be circumstances where differential treatment is warranted, but this is not such a case. If anything, differences between the federal and state litigation teams in this case reinforce the inference of plaintiff shopping. The Federal Plaintiff is an individual stockholder, whereas the State Plaintiffs are institutional investors. The latter

typically have more resources at their disposal, greater incentive to litigate vigorously, and a track record of securing better litigation outcomes. *See, e.g.*, David H. Webber, *Private Policing of Mergers and Acquisitions: An Empirical Assessment of Institutional Lead Plaintiffs in Transactional Class and Derivative Actions*, 40 Del. J. Corp. L. 907 (2014). It is understandable that a defendant would prefer to litigate against a plaintiff with fewer resources, less incentive to litigate, and a worse track record. Similar arguments might be made about the law firms representing the Federal Plaintiff and the State Plaintiffs. *See, e.g.*, Joel Edan Friedlander, *How* Rural/Metro *Exposed the System Problem of Disclosure Settlements*, 40 Del. J. Corp. L. 877, 904–10 (2016) (discussing two-tiered plaintiffs bar). Without passing judgment on whether the Company is pursuing a plaintiff-shopping strategy, the risk of selective production creates a sufficient risk of abuse to harm the public interest. The fourth *Kirpat* factor therefore counsels against a stay.

17. Based on the foregoing factors, the balancing of interests favors staying the relief granted in the Opinion as to the Formal Board Materials that the Company has not produced to the Federal Plaintiff. The balancing of interests counsels against staying the relief granted in the Opinion as to any Formal Board Materials that the Company already has produced to the Federal Plaintiff. To reiterate, a stay is granted as to the aspects of the Opinion that do not involve Formal Board Materials.

18. The Delaware Supreme Court might well see the issue differently. A stay is in large part a litigation management device, and a narrower or broader stay could be warranted when balanced against other factors that are beyond this court's purview, such as the schedule for the appeal. Recognizing the possibility that the senior tribunal could

have a different view regarding a stay, this court previously has taken the precaution of granting a brief stay pending appeal to enable the parties to seek a different form of stay from the Delaware Supreme Court. *See In re UnitedHealth Gp. Inc.*, 2018 WL 2110958, at *3 (Del. Ch. Apr. 27, 2018) (ORDER); *Jagodzinski*, 2011 WL 4823569, at *4. This order follows the same course. Thus, all of the relief granted in the Opinion is stayed for ten days to allow the Company to move for a broader stay from the Delaware Supreme Court or otherwise seek relief from this ruling. If the Company acts within the ten-day period, then this court's interim stay shall remain in place until the Delaware Supreme Court rules.

19. Article IV, § 24 of the Constitution of the State of Delaware requires adequate security for a stay pending appeal. The plaintiffs are the parties who could be harmed by a lack of security, and they have not requested any. The stay is therefore not conditioned on the posting of any security.

*/s/ J. Travis Laster*
Vice Chancellor Laster
March 26, 2020