COURT OF CHANCERY
OF THE
STATE OF DELAWARE

DONALD F. PARSONS, JR.
VICE CHANCELLOR

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Date Submitted: June 22, 2010
Date Decided: July 26, 2010

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Re: *Pope Investments LLC v. Benda Pharmaceutical, Inc.*,
Civil Action No. 5171-VCP

Dear Counsel:

This Letter Opinion addresses a motion by Plaintiff, Pope Investments LLC ("Pope"), to supplement the record with a 2009 Form 10-K Defendant, Benda Pharmaceutical, Inc. ("Benda"), filed with the Securities and Exchange Commission ("SEC") on May 18, 2010. Additionally, I address Benda's request to strike five exhibits Pope attached to its post-hearing brief, filed on April 7, 2010.

Having carefully considered the parties' submissions, I have decided to deny Pope's motion to supplement for three reasons: First, Pope knew before the hearing on its motion to appoint a receiver that Benda would soon be filing its 2009 10-K, but did nothing to conduct discovery regarding that document, inform the Court of its anticipated filing, or put the document's existence (or relevance) in contention until May 25, 2010—

nearly two months after the hearing. Second, while the evidence in the 10-K seems largely cumulative and unlikely to change the outcome of Pope's motion to appoint a receiver, Benda would be unduly prejudiced if that document were admitted as evidence without allowing Benda an opportunity to respond to the new information. Finally, I find that considerations of judicial economy favor denial of Pope's motion.

Additionally, I deny in part and grant in part Benda's request to strike the five new exhibits Pope attached to its post-hearing brief.[1]

I. BACKGROUND

On December 29, 2009, Pope filed (1) a Verified Complaint, which asserted direct and derivative claims against Benda and its directors and sought appointment of a receiver for Benda, and (2) a motion for expedited proceedings with regard to Pope's application for a receiver.[2] After granting the motion for expedited proceedings, I heard argument on Pope's application for appointment of a receiver on March 29, 2010 (the "Hearing").[3] Following the Hearing, the parties filed simultaneous supplemental briefs on April 7, responding to several issues raised by the Court.[4] Benda objected to five exhibits filed with Pope's supplemental brief and requested that they be stricken.

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1 *See infra* Part II.C.

2 Docket Item ("D.I.") 1.

3 D.I. 9.

4 D.I. 46-48.

On March 31, 2010, Benda filed a Notification of Late Filing with the SEC regarding its 2009 10-K annual report, which it ultimately filed on May 18, 2010. Pope then moved to supplement the record with it on May 25. Benda submitted an opposition to the motion to supplement the record, to which Pope promptly responded. This Letter Opinion represents my decision on Pope's motion and Benda's request to strike.

II. ANALYSIS

A. Standard for a Motion to Supplement the Record

A motion to reopen and supplement the record is addressed to the discretion of the Court.[5] Generally, "the admission of late-submitted evidence is not favored."[6] In *Carlson v. Hallinan*, the Court culled a list of factors illustrating the types of issues that inform whether a court should allow new evidence into the record.[7] These factors include:

> 1) whether the evidence has come to the moving party's knowledge since the trial, 2) whether the exercise of reasonable diligence would have caused the moving party to discover the evidence for use at trial, 3) whether the evidence is so material and relevant that it will likely change the

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5 *Fitzgerald v. Cantor*, 2000 WL 128851, at *1 (Del. Ch. Jan. 10, 2000) (citing *El Paso Nat. Gas Co. v. Amoco Prod. Co.*, 1992 WL 43925, at *10 (Del. Ch. Mar. 4, 1992) (granting motion to reopen the record by allowing defendant to submit evidence that clarified the record and did not prejudice plaintiffs)).

6 *TR Investors, LLC v. Genger*, 2009 WL 4696062, at *12 n.36 (Del. Ch. Dec. 9, 2009).

7 925 A.2d 506 (Del. Ch. 2006), *clarified by*, 2006 WL 1510759 (Del. Ch. May 22, 2006).

> outcome, 4) whether the evidence is material and not merely cumulative, 5) whether the moving party has made a timely motion, 6) whether undue prejudice will inure to the nonmoving party and 7) considerations of judicial economy.[8]

Because considerations of fairness and justice ultimately control whether a court will allow a party to supplement the record,[9] however, this list is not all-inclusive.

Using the listed factors as a guide, the Court in *Carlson* denied the defendants' motion to supplement the record with two years of a company's tax returns, an expert opinion explaining the significance of those returns, and an affidavit relating to one of the plaintiffs' claims. The Court did so largely because the limited probative value of that evidence was "far outweighed by the fact that much of the underlying information" should have been discovered by the defendants before trial and undue prejudice would have resulted if the Court considered only "[a] selective snippet of [the company's] financial information."[10] Similarly, "[i]n *In re U.S. Robotics Corp. Shareholders Litigation*, the Court refused to reopen a Final Judgment to allow the submission of a Form 10-Q . . . [because the information in that Form] was not 'newly discovered evidence' as required by Rule 60(b)(2) as the movants had the opportunity, but failed, to

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8 *Id*. at 519-20.

9 *Id*. at 520 (citing *Kahn v. Tremont Corp.*, 1997 WL 689488, at *5 (Del. Ch. Oct. 28, 1997)).

10 *Id*.

inquire about the performance of the defendant at the time it deposed the defendant's CEO."[11]

As reflected in *In re U.S. Robotics Corp.* and, later, in *Fitzgerald v. Cantor*, the Court often will deny a motion to supplement the record with a document that, although not in final form before a hearing or trial, is based on facts that "could have been flushed out and put in contention" either before or during that proceeding.[12] In such circumstances, the Court is reluctant to risk (1) causing undue delay in the disposition of a case, (2) wasting the Court's and the nonmovant's time, or (3) unfairly prejudicing the nonmovant by requiring them to "galvanize . . . [a] major effort to gather evidence to explain their view of the inferences to be drawn" from a document whose underlying facts could have been discovered before trial.[13]

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[11] *Fitzgerald*, 2000 WL 128851, at *2 (citing *In re U.S. Robotics Corp. S'holders Litig.*, 1999 WL 160154, at *12 (Del. Ch. Mar. 15, 1999)); *see also In re Transamerica Airlines Inc.*, 2008 WL 509817, at *4-5 (Del. Ch. Feb. 25, 2008) (denying motion to supplement record with evidence that was not material, could have been obtained and presented before trial, and resulted from an ex parte proceeding); *Sutherland v. Sutherland*, 2008 WL 571253, at *2-3 (Del. Ch. Feb. 14, 2008) (denying motion to supplement because proffered evidence was without any probative value, could have been discovered before trial, and would prejudice nonmovant by requiring significant additional litigation).

[12] *See Fitzgerald*, 2000 WL 128851, at *2.

[13] *Id*.

B. Benda's 2009 Form 10-K

In this case, I find Benda's most recent 10-K marginally probative. Among other things, this document discloses information that may be relevant to determining Benda's solvency and whether special circumstances of great exigency exist that would justify appointing a receiver, *i.e.*, possible managerial misconduct or failure to disclose important aspects of Benda's corporate activities.[14] As such, Benda's 2009 10-K conceivably could assist the Court in resolving Pope's motion for appointment of a receiver.

Nevertheless, on balance, I find that the interests of fairness require denial of Pope's motion to supplement the record. Specifically, using the *Carlson* factors as a guide, I deny Pope's motion to supplement because I find that: (1) using reasonable diligence, Pope could have obtained much of the information included in the 2009 10-K before the Hearing; (2) the evidence in the 10-K is largely cumulative and unlikely to change the outcome of Pope's motion to appoint a receiver; (3) Benda may be unduly prejudiced if the 2009 10-K is introduced without giving Benda an opportunity to respond to the new information; and (4) considerations of judicial economy favor such denial.

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[14] The Form 10-K discloses, for example, information relevant to Benda's internal financial controls, violations of the Sarbanes-Oxley Act, statements made by its new auditor, Malone Bailey, the result of lawsuits against Benda for default on a bank loan, and a previously undisclosed joint venture involving one of Benda's subsidiaries. *See* D.I. 57, Ex. A.

1. Pope's knowledge of and ability to discover the information contained in the 10-K prior to the Hearing

Benda admittedly filed the 2009 10-K after the Hearing and closing of the record.[15] Pope, therefore, did not have access to that document—as it was filed with the SEC—until after the Hearing. Nevertheless, Benda argues that Pope knew well in advance of the Hearing that Benda would be filing a Form 10-K sometime after the Hearing, but "expressed no reservations about the Court deciding the application without it."[16] Specifically, Benda alleges without contradiction that Pope knew of Benda's appointment of a new independent auditor, Malone Bailey, as early as March 3, 2010. Benda further asserts that Pope should have recognized the importance of Malone Bailey's involvement in the preparation of the 2009 10-K and taken reasonable steps to discover information from them. Benda thus contends that by failing to contact or depose representatives from Malone Bailey, request records related to the preparation of the Form 10-K, or notify the Court that Benda's Form 10-K would be forthcoming, Pope waived its right to introduce that document after the March 29 Hearing. Having considered all the relevant circumstances, I agree.

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[15] At the end of the Hearing, I closed the record to allow the case to proceed expeditiously. Tr. 251-53. Nevertheless, I informed the parties that if other documents came to light in the ensuing days, I was willing to consider them, but did not "want this to be a continuing thing going forward." *Id.*

[16] Opp'n of Def. Benda to Pl.'s Mot. to Supp. the Record 6.

While Pope did not have access to the final 10-K until May 18, it knew that Benda planned to file such a document and that it likely would contain information pertinent to its motion for appointment of a receiver. Additionally, it appears that, with reasonable diligence, Pope could have obtained the relevant information from Benda and Malone Bailey in advance of or shortly after the Hearing. Thus, these factors are neutral here or, if they favor Pope at all, do so only weakly.

2. Materiality, relevance, and uniqueness of information in the Form 10-K

The information contained in the 10-K, while potentially probative, seems largely cumulative of information already in the record. For instance, Pope emphasizes that the 2009 10-K reveals that Malone Bailey doubts Benda's ability to continue as a going concern. But, that document only reiterates the doubts expressed by Kempisty, Benda's former auditor, in other SEC filings. Additionally, while the 2009 10-K indicates that certain loans made by Benda to its officers violate Section 402 of the Sarbanes-Oxley Act of 2002, Benda disclosed the existence and terms of these loans in the 2008 10-K and the September 2009 10-Q. Therefore, even though the Form 10-K includes other revelations, such as Benda's previously undisclosed joint venture and the fact that Yiqing Wan—Benda's CEO—confirmed that Benda's disclosure controls and procedures were not effective, I find the information in the 2009 10-K mostly cumulative and unlikely to be so material and relevant as to change the outcome of Pope's motion.

3. Likelihood of undue prejudice to Benda if the 2009 10-K is introduced

As noted *supra* Part II.B.1, Pope did not act promptly to discover or disclose the substance of the supplemental information included in the 2009 10-K, despite knowing several weeks before the Hearing that Benda was engaged in the preparation of that document. Pope's delay in putting the existence or underlying facts of the 10-K in contention has created a situation where, for the Court to grant Pope's motion to supplement the record, it would have to do one of three things: (1) allow Benda to take discovery regarding the 2009 10-K and submit arguments responding to and, perhaps, putting into context relevant portions of that document on an expedited basis; (2) allow Benda a short amount of time to respond to the 2009 10-K without affording it an opportunity for additional discovery; or (3) admit the 2009 10-K wholesale without allowing any response from Benda. Because I find all of these options potentially prejudicial to Benda, I deny Pope's motion to supplement the record.

Pope's delay in bringing the anticipated filing of Benda's 2009 10-K to the attention of the Court contrasts starkly with its supposed desire for expedited relief. While the Court may grant a motion for expedited proceedings where the party moving for such proceedings shows good cause, it remains mindful of the increased outlay of time and money such motions require of the parties and the Court. Here, the parties already have engaged in expedited discovery and motion practice in preparation for the Hearing. Benda suggests that, if I grant Pope's motion to supplement, I also should open the record and afford Benda the opportunity to conduct discovery to respond to the 2009

10-K. I am not convinced Benda would need additional discovery to respond. If it did, however, both Benda and the Court would be forced to begin expedited proceedings a second time regarding the same underlying issues. Doing so would force Benda to accrue further costs, prevent its executives from focusing on the company, and prolong the uncertainty about Benda's future vitality.

Additionally, even if I assume that Benda can supplement the record effectively without additional discovery, I still would be inclined, in the interests of fairness, to afford Benda time to respond to the 2009 10-K. Yet, doing so would burden Benda with increased costs and a more protracted period of uncertainty. In light of the marginal probative value of the 2009 10-K, I see no reason to prejudice Benda by saddling it with the expense and difficulty of additional expedited proceedings in these circumstances.

Pope counters that because Benda has not questioned the validity of the facts in the 10-K, it has no need for an opportunity to contradict or explain away those facts. Instead, Pope asks the Court to take judicial notice of the "undisputed" facts in the 10-K without affording Benda a reply. I find this alternative unappealing. Because the 2009 10-K is a lengthy document (over 130 pages), the danger exists that isolated snippets, such as those cited by Pope, could be taken out of context. Justice suggests, therefore, that, if I allow Pope to supplement the record with the 2009 10-K, I should grant Benda at least the opportunity to respond to its contents. Even though the Form 10-K contains admissions by Benda and is signed by Wan, such statements could unduly harm Benda if presented in an inaccurate or misleading light. As such, were I to grant Plaintiff's motion

to supplement, I probably would also provide Benda at least the opportunity to respond to the 2009 10-K and attempt to put the information from that document relied on by Pope in the proper context. But this would increase the time and resources Benda would have to devote to this matter and undercut the parties' desire for expedition. Thus, the factor of potential prejudice to Benda weighs against Pope's motion to supplement the record.

4. Considerations of judicial economy

Finally, because Pope initially requested expedited treatment, I cannot lightly excuse its decision to wait nearly two months before bringing the 2009 10-K to the Court's attention, despite knowing, almost a month before the Hearing, that (1) Benda was preparing the very 10-K it now seeks to introduce and (2) the information to be disclosed in the Form 10-K likely would be probative to Pope's motion for the appointment of a receiver. Such delay has already caused the expenditure of additional time and money by the parties, as well as judicial resources, and undermines the expedited proceedings Pope sought. Indeed, by its motion to supplement the record, Pope has diverted the Court's attention from the issues underlying its motion for a receiver. Additionally, as noted above, if I were to grant Pope's motion to supplement, I would allow Benda, at a minimum, to file a response to the information in the 2009 10-K Pope seeks to introduce. Consideration of that additional material as well as the Form 10-K would increase the burden on the Court's resources and further delay the ultimate decision on Pope's motion for appointment of a receiver. As such, this factor also favors denial of Pope's motion to supplement. Therefore, after reviewing the *Carlson* factors in

the context of the surrounding circumstances, I conclude that the interests of justice and fairness require that I deny that motion.

C. Exhibits Attached to Pope's Supplemental Brief

On April 7, 2010, the parties submitted simultaneous, supplemental briefs at the Court's request. Several of the exhibits attached to Pope's supplemental brief ("Pope's April Brief"), however, contained previously unidentified documents. Benda objects to the Court considering five of these exhibits—Exhibits A, B, C, E, and G—arguing that they are new and that, by submitting them, Pope is impermissibly attempting to reopen the closed Hearing record.[17] Because I find Pope's submission of Exhibits A, B, C, and G timely, responsive to the Court's questions, and not unduly prejudicial to Benda, I overrule Benda's objections as to these documents and will consider them subject to the conditions set forth below. The submission of Exhibit E, however, was both untimely and potentially prejudicial to Benda. Therefore, I sustain Benda's objection to that Exhibit and will not consider it in connection with Pope's motion for appointment of a receiver.

1. Exhibits A, B, C, and G

Exhibits A, B, C, and G are, respectively, an April 7, 2010 letter from Charles Li,[18] a February 12, 2010 New York Times article, some letters from Chinese

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17 D.I. 50.

18 Li is a partner at the Han Kun Law Offices in Beijing.

pharmaceutical company CEOs, and several letters purportedly submitted by Benda's creditors reflecting their consent to Pope's motion for appointment of a receiver. Pope purports to submit Exhibits A, B, C, and G in response to inquiries made by the Court at the Hearing.[19] Benda seeks to exclude these documents as untimely and prejudicial or, if the Court decides to consider them, to have an opportunity to respond. For the reasons summarized below, I overrule Benda's objections to these exhibits, but will grant it a limited opportunity to respond to them.

First, Benda objects to Exhibit A as being an expert opinion on certain aspects of Chinese law and contends it should be able to test these opinions by deposing the expert or retaining its own expert. Pope responds that it submitted Exhibit A merely to direct the Court to Chinese law that may answer its question regarding why Pope did not seek to enforce its New York judgment against Benda in China.[20] In this regard, the only provision of Chinese law cited by Li in Exhibit A is Article 108 of the Civil Procedure Law of the People's Republic of China. In addition, Li briefly describes the procedural problems and uncertainties attendant to an effort to enforce a United States judgment, such as Pope has against Benda, in China. These aspects of Exhibit A fairly respond to the Court's inquiry. Moreover, I note that under Court of Chancery Rule 44.1, "[t]he

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19 *See* Tr. 177, 196-98, 205-06.

20 D.I. 51 ("Pope provided [Exhibit A] . . . as an expression of Chinese law. This letter does not provide Mr. Li's opinion of Chinese law. Judicial notice may be taken of Chinese law and this exhibit directs the Court to the applicable Chinese law.").

Court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under Rule 43." Thus, I overrule Benda's objection as to the first page of Exhibit A and will consider Li's opinions regarding the aspects of Chinese law he discusses there. If Benda disagrees with Li's characterization of this law or believes another aspect of Chinese law is pertinent, it may direct my attention accordingly.

The second page of Exhibit A, however, relates to the legal effect in China of a company showing a stated price on a document, but actually billing at another price. This is a different topic that raises more complicated questions in terms of timeliness and potential prejudice to Benda. Because I find that Benda would need to respond more thoroughly to this aspect of Li's letter and that such a response could be time-consuming and expensive and unnecessarily delay these proceedings, I uphold Benda's objection and will not consider page 2 of Exhibit A.

Second, Benda half-heartedly objects to inclusion of Exhibit B, a publicly available newspaper article, claiming that, under normal circumstances, it would have explored the article to determine whether it should respond to it. Yet, Benda has not shown that it would be unduly prejudiced by the Court's considering Exhibit B in connection with Pope's motion to appoint a receiver. Pope submitted the New York Times article merely to support its statement that "in 2009 11 of the 14 foreign public

offerings on U.S. exchanges were of mainland Chinese companies."[21] This statement, and the challenged article, may provide context to some of Pope's arguments, but will not materially affect Pope's motion for a receiver. Thus, Benda will not be prejudiced by the Court's consideration of Exhibit B and its objection is overruled.

Third, Benda objects to four letters attached in Exhibit C as hearsay from unknown persons who may be biased due to Pope's communications with them. In response, Pope asserts that it submitted these letters to address the Court's question about how a receiver could function in China and to support its contention that appointment of a receiver for a Chinese pharmaceutical company is possible. There is reason to be skeptical of both the authenticity and the relevance of these letters, which appear to be form letters purportedly submitted by Chinese pharmaceutical companies that may be in competition with Benda. Nevertheless, Pope suggests that these documents, though potentially hearsay, may be considered at the very least as evidence of William Wells' state of mind when he testified before me at the March 29 Hearing, even if they are not admissible as evidence of resources in China available to Wells to support a receiver. Because consideration of these unauthenticated documents in any other capacity would be unduly prejudicial to Benda, I accept Pope's suggestion and will consider these letters only as evidence of Wells' state of mind. In all other respects, Benda's objection to Exhibit C is sustained.

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[21] Pope's Apr. Br. 1.

Finally, Benda argues that the Court should not consider Exhibit G because it received a copy of this Exhibit only one day before its supplemental brief was due and, as such, did not have time to review the terms of the notes or determine the validity of the letters that make up that Exhibit. Pope asserts that it submitted these letters in response to Benda's contention at the Hearing that Pope is the only creditor not willing to weather the current financial storm with Benda.[22] Pope suggests that Benda may examine its own records to determine whether the debts referenced in these letters are, in fact, past due. Pope further states that it "will not object if Benda produces any documents or information that Benda paid any of these creditors." I find Pope's response persuasive and, thus, will consider Exhibit G subject to any evidence submitted by Benda contradicting that Exhibit, including the allegation that debt purportedly held by these creditors remains past due.

In summary, I see no undue prejudice to Benda or other problem with considering Exhibits A, B, C, and G to the extent indicated above in connection with Pope's motion for appointment of a receiver. As previously noted, however, I will grant Benda 20 days from the date of this Letter Opinion to file a response as to these Exhibits and submit any rebuttal evidence.

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[22] *See* Tr. 193.

2. Exhibit E

I sustain Benda's objection, however, with regard to Exhibit E. This Exhibit is a printout from the Chinese "State Food and Drug Administration" ("SFDA") website. Benda objects to the Court considering Exhibit E because it has not had an opportunity to examine its context and implications. Pope proffers Exhibit E in support of its contention that Benda's management failed to obtain a timely renewal of a required government certificate for the manufacture and sale of Gendicine, a rather serious charge highly material to Pope's motion for appointment of a receiver. Pope filed Exhibit E, however, without providing any context to explain the relevance or validity of the proffered website printout. Additionally, unlike the Exhibits mentioned above, Exhibit E was not submitted in response to questions raised by the Court at trial and Pope could have discovered and presented this translated SFDA website fragment to the Court well before the Hearing, but failed to do so. Thus, I find Pope's submission of Exhibit E untimely. Based on the potential prejudice to Benda if Exhibit E were introduced without rebuttal and the undue delay that would result if I allowed the parties to conduct discovery in connection with that Exhibit, I sustain Benda's objection and will not consider Exhibit E in connection with Pope's motion.

III. CONCLUSION

For the foregoing reasons, I deny Pope's motion to supplement the record. Additionally, subject to the limitations and conditions set forth in this Letter Opinion, I deny Benda's request to strike Exhibits A, B, C, and G to Pope's April Brief, but sustain

Benda's objection to Exhibit E and will not consider that Exhibit in connection with Pope's motion.

IT IS SO ORDERED.

Sincerely,

/s/Donald F. Parsons, Jr.

Donald F. Parsons, Jr.
Vice Chancellor