IN THE COURT OF CHANCERY FOR THE STATE OF DELAWARE

In re PLAINS ALL AMERICAN PIPELINE, L.P. UNITHOLDERS BOOKS AND RECORDS LITIGATION	))))	CONSOLIDATED C.A. No. 11954-VCMR

POST-TRIAL ORDER

WHEREAS, Plaintiffs seek books and records of Defendants under Section 3.4(a) of the Plains All American Pipeline, L.P. ("Plains") limited partnership agreement[1] and 6 *Del. C.* § 17-305(a) to investigate whether an oil spill from a Plains pipeline in California was the result of mismanagement;

WHEREAS, the facts in this order are my findings based on the parties' pre-trial stipulation, 117 documentary exhibits introduced at a trial on February 16, 2017, and the parties' pre- and post-trial briefing; and I grant the evidence the weight and credibility that I find it deserves;[2]

NOW, THEREFORE, THE COURT HEREBY FINDS AND ORDERS:

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[1] The text of Section 3.4(a) of the Plains limited partnership agreement closely tracks the text of 6 *Del. C.* § 17-305(a). The only material difference is that Section 3.4(a) of the limited partnership agreement provides that a limited partner's right to books and records shall be "at such Limited Partner's own expense." JX 18, § 3.4(a).

[2] Citations to exhibits are in the form "JX #." The Joint Pre-Trial Order is cited as "PTO ¶ #." And citations to the trial transcript are in the form "Tr. #." Unless otherwise indicated, citations to the parties' briefs are to post-trial briefs.

1. Plaintiffs lack standing to obtain the books and records of Plains GP Holdings, L.P. The remaining Defendants shall produce the documents listed in paragraph 47 of the Joint Pre-Trial Order going back to 2010. Plains may redact non-responsive data, and the parties shall negotiate a confidentiality stipulation. The production shall be incorporated by reference into any subsequent derivative complaint on the terms described in *Amalgamated Bank v. Yahoo! Inc.* (132 A.3d 752 (Del. Ch. 2016)) (the "Incorporation Condition"). Plaintiffs shall bear the expense of gathering, transporting, and copying the documents. Defendants shall be responsible for their own attorneys' fees and expenses—including, but not limited to, any vendor fees, expenses, and costs—in connection with any privilege or confidentiality review.

2. Defendant Plains is a publicly traded Delaware master limited partnership that, through its subsidiaries, owns and operates midstream energy infrastructure, including crude oil pipelines in the United States and Canada. PTO ¶ 8. Defendant PAA GP LLC, a Delaware limited liability company, is the general partner of Plains and holds a 2% interest in Plains. JX 117. Defendant Plains AAP, L.P., a Delaware limited partnership, is the sole owner of PAA GP LLC. *Id.* And Defendant Plains All American GP LLC, a Delaware limited liability company, is the general partner of Plains AAP, L.P. *Id.* Plains All American GP LLC manages Plains's operations and activities and employs its domestic employees. Defendant

Plains GP Holdings, L.P. ("GP Holdings") is a publicly traded Delaware limited partnership with its own set of public unitholders. GP Holdings is the sole managing member of Plains All American GP LLC. *Id.* Plaintiffs Roger Kirby, Linda Greenberg, and Fireman's Retirement System of St. Louis own Plains's publicly traded common units. JX 91; JX 100.[3]

3. Defendants assert that Plaintiffs do not have standing to obtain the books and records of GP Holdings because they are not beneficial owners of that entity. Plaintiffs in their post-trial opening brief argue that they have standing to obtain documents from Plains's "General Partner." The opening brief does not identify which entity the term "General Partner" references. Defendants respond that their standing objection relates exclusively to GP Holdings. GP Holdings is a separate entity from Plains and from Plains's general partner, PAA GP LLC. GP Holdings has its own set of public unitholders, its own ticker symbol on the New York Stock Exchange, and its own partnership agreement. Plaintiffs fail to address standing at all in their post-trial reply brief and, thus, abandon any argument that they have standing to obtain GP Holdings's books and records. *Emerald P'rs v. Berlin*, 726 A.2d 1215, 1224 (Del. Ch. 1999) ("Issues not briefed are deemed

[3] The exhibits do not include evidence of Firemen's Retirement System of St. Louis's ownership of Plains units, but Defendants do not challenge whether Plaintiffs are unitholders.

waived."). Plaintiffs, thus, lack standing to obtain the books and records of GP Holdings.

4. As to the remaining Defendants, to obtain books and records of a limited partnership under 6 *Del. C.* § 17-305, a limited partner must establish "(1) that the limited partner has complied with the provisions of [that] section respecting the form and manner of making demand for obtaining such information, and (2) that the information the limited partner seeks is reasonably related to the limited partner's interest as a limited partner." 6 *Del. C.* § 17-305(e). Defendants do not dispute that Plaintiffs complied with the form and manner requirements of Section 17-305.

5. Defendants dispute whether Plaintiffs seek books and records "for a purpose reasonably related to [Plaintiffs'] interest as . . . limited partner[s] in [Plains]," as required by the Plains limited partnership agreement. JX 18, § 3.4(a). To determine "whether a purpose is reasonably related to the limited partner's interest under § 17-305, the Court of Chancery will consider whether that purpose is 'proper' within the meaning of 8 *Del. C.* § 220, the corporate analog to § 17-305. Plaintiff bears the burden of proving a proper purpose." *Madison Real Estate Immobilien-Anlagegesellschaft Beschrankt Haftende Kg v. Kanam USA XIX Ltd. P'ship*, 2008 WL 1913237, at *5 (Del. Ch. May 1, 2008); *cf.* 8 *Del. C.* § 220(b) ("A proper purpose shall mean a purpose reasonably related to such person's interest as a stockholder.").

6. Plaintiffs' sole asserted purpose for seeking books and records in this case is to investigate mismanagement or wrongdoing in connection with the Line 901 oil spill. Pls.' Pre-Trial Br. 26-28. In the 8 *Del. C.* § 220 context, "[t]his Court routinely has acknowledged that investigating corporate waste, mismanagement, or wrongdoing is a proper purpose for which to demand inspection of books and records." *Beatrice Corwin Living Irrevocable Tr. v. Pfizer, Inc.*, 2016 WL 4548101, at *4 (Del. Ch. Aug. 31, 2016). But a plaintiff cannot obtain books and records merely by alleging that its purpose is to investigate mismanagement. Instead, "a stockholder whose stated purpose is investigating mismanagement must provide 'some evidence' to suggest a 'credible basis' from which this Court may infer possible mismanagement, waste, or wrongdoing may have occurred." *Id.* (quoting *Seinfeld v. Verizon Commc'ns, Inc.*, 909 A.2d 117, 118 (Del. 2006)). The credible basis standard requires far less than proving actual waste or mismanagement. *Seinfeld*, 909 A.2d at 123. Rather, "[s]tockholders need only show, by a preponderance of the evidence, a credible basis from which the Court of Chancery can infer there is possible mismanagement that would warrant further investigation . . . ." *Id.* That "threshold may be satisfied by a credible showing, through documents, logic, testimony or otherwise, that there are legitimate issues of wrongdoing." *Id.* (quoting *Sec. First Corp. v. U.S. Die Casting & Dev. Co.*, 687 A.2d 563, 568 (Del. 1997)) (internal quotation marks omitted). "Hearsay statements

may be considered, provided they are sufficiently reliable." *Yahoo! Inc.*, 132 A.3d at 778. The credible basis standard is "the lowest possible burden of proof" under Delaware law. *Seinfeld*, 909 A.2d at 123. "The only way to reduce the burden of proof further would be to eliminate any requirement that a stockholder show *some evidence* of possible wrongdoing." *Id.*

7. The evidence Plaintiffs presented at trial sufficiently establishes a credible basis to warrant further investigation into whether the Plains board complied with its standard of care under the Plains limited partnership agreement. The Plains limited partnership agreement states as follows regarding the Plains directors' duties:

> Any standard of care and duty imposed by this Agreement or under the Delaware Act or any applicable law, rule or regulation shall be modified, waived or limited, to the extent permitted by law, as required to permit the General Partner to act under this Agreement or any other agreement contemplated by this Agreement and to make any decision pursuant to the authority prescribed in this Agreement, so long as such action is reasonably believed by the General Partner to be in, or not inconsistent with, the best interests of the Partnership.

JX 18, § 7.10(d). On May 19, 2015, the primary event giving rise to Plaintiffs' demand for books and records occurred. Line 901, a Plains pipeline, ruptured in Santa Barbara County, California and spilled an estimated 1,700 to 2,500 barrels of crude oil on a Pacific Ocean beach and the surrounding area. JX 31; JX 32; JX 39. The oil spill covered four miles of coast in crude oil and damaged the natural

environment and at least some wildlife. JX 31; JX 57. On May 20, 2015, a *Los Angeles Times* article reporting on the Line 901 spill stated that "[a] Times analysis of data from the Pipeline and Hazardous Materials Safety Administration shows Plains'[s] rate of incidents per mile of pipe is more than three times the national average. Such incidents may include problems with pipelines, storage tanks and drains, among others." JX 35. The article stated that "only four companies reported more infractions than Plains," and Plains's incidents "caused more than $23 million in property damage" from 2006 to the date of the article. *Id.* The article further explained that Plains said it had inspected Line 901 two weeks before the spill but that the results of that inspection had not come back before the rupture. *Id.* On May 21, 2015, an article in the *New York Times* described the Line 901 spill and quoted Carl Weimer, the executive director of the Pipeline Safety Trust, a "nonprofit watchdog group," as saying "Plains Pipeline had a 14 percent higher rate of incidents per mile of pipeline than the national average rate . . . ." JX 40.

8. On May 20, 2015, the Santa Barbara County district attorney's office publicly confirmed that it was investigating the Line 901 rupture (JX 34), and a year later on May 16, 2016, the Santa Barbara County grand jury returned a 46-count indictment of Plains and Plains employee James Colby Buchanan. The indictment includes four felony counts and alleges, in part, that Plains "knowingly engaged in or caused, or reasonably should have known that [it] was engaging in or causing, the

discharge or spill of oil into the waters of the state," and that Plains "did knowingly make a false or misleading oil spill report to the California Office of Emergency Services, regarding the discharge or spill of approximately 140,000 gallons of crude oil discharged by the operation of a pipeline known as Line 901 . . . ." Indictment, *People v. Plains All American Pipeline, L.P.*, No. 1495091 (Cal. Super. Ct. Santa Barbara Cnty. May 16, 2016).

9. Defendants assert various challenges to Plaintiffs' evidence of a credible basis to warrant further investigation. They argue that the newspaper articles in the record are inadmissible hearsay and that the Santa Barbara County grand jury indicted only Plains and a Plains employee but not the Plains board members. These challenges fail. The evidence shows that various newspapers reported based on federal government data that Plains's incident rate per mile was higher than the national average. JX 35; JX 40. In establishing a credible basis for further investigation of possible mismanagement, "[h]earsay statements may be considered, provided they are sufficiently reliable." *Yahoo! Inc.*, 132 A.3d at 778. Defendants' arguments about the admissibility of the articles in the record are properly directed to the weight of the evidence and the merits of a subsequent derivative claim. *See Marmon v. Arbinet-Thexchange, Inc.*, 2004 WL 936512, at *4-5 (Del. Ch. Apr. 28, 2004) (finding hearsay testimony regarding an out-of-court declarant's accusation of mismanagement sufficiently reliable to be considered in a

Section 220 case); *La. Mun. Police Empls.' Ret. Sys. v. Countrywide Fin. Corp.*, 2007 WL 2896540, at *12 (Del. Ch. Oct. 2, 2007) (Plaintiff's expert's analysis "may be unpersuasive on the ultimate question of whether Countrywide has in fact engaged in manipulation of its option grants, but on the whole, it is sufficient . . . . to warrant further limited inquiry into Countrywide's books and records under Section 220."). And the Santa Barbara County grand jury's indictment of Plains in connection with the Line 901 spill, including four felony counts and allegations of knowing violations of law, establishes a credible basis to investigate. Indictment, *Plains*, No. 1495091; *see also Cohen v. El Paso Corp.*, 2004 WL 2340046, at *2 (Del. Ch. Oct. 18, 2004) (relying, in part, on the fact that the SEC launched a formal investigation as evidence sufficient for a credible basis to investigate mismanagement). The evidence sufficiently establishes "a credible basis from which the Court of Chancery can infer there is possible mismanagement that would warrant further investigation" (*Seinfeld*, 909 A.2d at 123) into whether the Plains board did not "reasonably believe[]" that their actions were "in, or not inconsistent with, the best interests of the Partnership" (JX 18, § 7.10(d)). Plaintiffs, thus, have established a proper purpose to inspect Plains's books and records.

10. I do not consider the consent decree that Plains entered with the EPA because it related to conduct that occurred from June 2004 through September 2007. JX 9. Defendants assert that such conduct is outside the statute of limitations. Defs.'

Pre-Trial Br. 18 (citing *Se. Pa. Transp. Auth. v. Abbvie Inc.*, 2015 WL 1753033, at *13 (Del. Ch. Apr. 15, 2015) ("[T]he Court has denied a stockholder the ability to inspect books and records solely to investigate bringing litigation where . . . the underlying suit would be time-barred.")). And Plaintiffs do not explain how those incidents could give rise to actionable claims.

11. At trial, the parties—assuming a proper purpose—agreed to the production of the board-level documents listed in paragraph 47 of the Joint Pre-Trial Order, which states as follows:

> Board, committee, and sub-committee minutes relating to Pipelines 901 and 903 . . .
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> Board, committee, and sub-committee minutes relating to the Consent Decree . . .
>
> Board, committee, and sub-committee minutes relating to any information and reporting system relating to Pipelines 901 and/or 903 . . . and
>
> Any non-privileged, non-confidential supplemental materials relating to any of the above.

PTO ¶ 47. The parties agreed that "supplemental materials" includes "documents used at board meetings, presentations to board meetings, handouts to board meetings, discussion materials, [and] notes from board meetings." Tr. 27, 59-60. Those board-level documents going back to 2010 shall be produced.

12. One dispute regarding the scope of the documents to be produced remains: are Plaintiffs entitled to obtain the emails of Greg L. Armstrong, Plains's

chairman and chief executive officer? Plaintiffs rely on *Yahoo! Inc.* (132 A.3d 752) and *Wal-Mart Stores, Inc. v. Ind. Elec. Workers Pension Tr. Fund IBEW* (95 A.3d 1264 (Del. 2014)), and assert that they are entitled to obtain Armstrong's emails related to Line 901 and Line 903, another Plains pipeline that Plains shut down after the Line 901 spill. JX 65. Plaintiffs argue that Armstrong was in a unique position to know about Plains's pipeline operations as its chairman and chief executive officer. And Plaintiffs introduced Plains's responses to requests from members of Congress for information regarding the spill, which Armstrong signed. *Id.*; JX 73. Plaintiffs assert that those responses indicate that Armstrong has operational-level information about Plains.

13. Under the Plains limited partnership agreement, Plaintiffs are entitled to documents "regarding the affairs of [Plains] as is just and reasonable." JX 18, § 3.4(a)(vi); 6 *Del. C.* § 17-305(a)(6). That language is identical to 6 *Del. C.* § 17-305(a)(6). In determining the proper scope of a books and records demand on a limited partnership, the Delaware Court of Chancery has relied on case law applying 8 *Del. C.* § 220, the corporate analog to Section 17-305. *See Madison Ave. Inv. P'rs, LLC v. Am. First Real Estate Inv. P'rs, L.P.*, 806 A.2d 165, 176 (Del. Ch. 2002). As such, Plaintiffs' "[i]nspection rights are 'limited to those documents that are necessary, essential and sufficient for the shareholder's purpose.' The plaintiff must describe 'with reasonable particularity [its] purpose and the records [it] desires to

inspect.'" *Id.* (quoting *Magid v. Acceptance Ins. Cos., Inc.*, 2001 WL 1497177, at *3 n.10 (Del. Ch. Nov. 15, 2001); *Thomas & Betts Corp. v. Leviton Mfg. Co.*, 681 A.2d 1026, 1031 n.3 (Del. 1996)). "Unlike in plenary discovery, where the responding party bears the burden of limiting its scope, the burden in a Section 220 proceeding is on the party seeking production. Moreover, the court must tailor the production order to balance the interests of the stockholder and the corporation." *Yahoo! Inc.*, 132 A.3d at 789 (citation omitted). "The starting point—and often the ending point—for a sufficient inspection will be board level documents evidencing the directors' decisions and deliberations, as well as the materials that the directors received and considered." *Id.* at 790.

14. Plaintiffs are not entitled to Armstrong's emails because board-level materials are sufficient for their stated purpose. This case is distinguishable from *Wal-Mart* and *Yahoo!*. In both *Wal-Mart* (95 A.3d at 1267-68) and *Yahoo!* (132 A.3d at 792), the plaintiffs carried their burden of showing why board-level documents alone would not be sufficient for their stated purposes. Plaintiffs here have not done so. No evidence suggests that the board was not informed of facts relevant to the board's oversight of pipeline safety. In contrast, Armstrong is on the board, and nothing suggests that he concealed information from the other directors. The Plains board-level materials that Plains agreed to produce at trial are necessary and sufficient for Plaintiffs' purpose.

15. At trial, the parties agreed to two conditions to any document production. Tr. 32. First, Defendants shall be entitled to redact non-responsive information from the documents produced. Second, Plaintiffs and Defendants agreed to negotiate a proposed confidentiality order for the Court to enter. If the parties cannot agree to a confidentiality stipulation, Plaintiffs and Defendants may submit competing confidentiality orders.

16. Defendants also request that the Court order that any documents produced in this action be incorporated by reference into any derivative complaint Plaintiffs file. The Court ordered such a condition in *Yahoo!*. *Yahoo! Inc.*, 132 A.3d at 796-99. While the heading of the section of Plaintiffs' opening brief on this point states that only "referenced documents, not the entire production" should be incorporated by reference into a derivative complaint, Plaintiffs unambiguously agree to an incorporation by reference condition like that imposed in the *Yahoo!* case in the text of their argument.[4] Plaintiffs' opening brief states, "[b]ecause it was applied in a balanced fashion, Plaintiffs have no objection to the application of the

[4] Plaintiffs' reply brief argues against a condition incorporating any production by reference into a derivative complaint in this case. But Plaintiffs' chance to present that argument was in their opening brief such that Defendants could respond. In reliance on Plaintiffs' opening brief, Defendants' answering brief presents no argument regarding whether an incorporation condition is appropriate given the facts of this case. Plaintiffs unambiguously agreed to the incorporation condition in their opening brief, and I will not allow them to retreat from that position after Defendants relied on it.

Incorporation Condition as that term was used by Vice Chancellor Laster in the *Yahoo!* case." Pls.' Opening Br. 18. As such, any documents produced to Plaintiffs shall be considered incorporated by reference into any subsequent derivative complaint Plaintiffs may file.

17. Finally, the parties dispute who must bear the expense of gathering, reviewing, and redacting the books and records. Section 17-305(a) of the Delaware Limited Partnership Act provides that limited partners' right to books and records is "subject to such reasonable standards (including standards governing what information and documents are to be furnished, at what time and location and at whose expense) as may be set forth in the partnership agreement or otherwise established by the general partners." 6 *Del. C.* § 17-305(a). Section 3.4(a) of the Plains partnership agreement states that

> *except as limited by Section 3.4(b)*, each Limited Partner shall have the right, for a purpose reasonably related to such Limited Partner's interest as a limited partner in the Partnership, upon reasonable written demand and *at such Limited Partner's own expense* . . . to obtain such other information regarding the affairs of the Partnership as is just and reasonable.

JX 18, § 3.4(a) (emphasis added). "[T]he construction and interpretation of an unambiguous written contract is an issue of law within the province of the court." *Bank of N.Y. Mellon v. Realogy Corp.*, 979 A.2d 1113, 1120 (Del. Ch. 2008) (quoting *Law Debenture Tr. Co. of N.Y. v. Petrohawk Energy Corp.*, 2007 WL 2248150, at

*5 (Del. Ch. Aug. 1, 2007)) (internal quotation marks omitted). And the parties do not submit extrinsic evidence bearing on the interpretation of Section 3.4(a). Plaintiffs agree that this provision means that they must pay the expense of collecting and photocopying the documents. Pls.' Reply Br. 23-24; *see also Jefferson v. Dominion Hldgs., Inc.*, 2014 WL 4782961, at *1 (Del. Ch. Sept. 24, 2014) ("Payment by the stockholder of the reasonable costs of copying company paper records is part of the Section 220 process."). But Defendants assert that it also covers their attorneys' fees in reviewing any documents to be produced and any eDiscovery costs.

18. Section 3.4(a) provides a limited partner right to obtain books and records "at such Limited Partner's own expense." Section 3.4(b) grants the general partner the right to keep certain records confidential. Section 3.4(b) states as follows:

> The General Partner may keep confidential from the Limited Partners and Assignees, for such period of time as the General Partner deems reasonable, (i) any information that the General Partner reasonably believes to be in the nature of trade secrets or (ii) other information the disclosure of which the General Partner in good faith believes (A) is not in the best interests of the Partnership Group, (B) could damage the Partnership Group or (C) that any Group Member is required by law or by agreement with any third party to keep confidential . . . .

JX 18, § 3.4(b). The introductory phrase to Section 3.4(a) indicates that Section 3.4(b) is a limitation on the limited partners' Section 3.4(a) right. The general

partner's attorneys' fees in reviewing the documents to be produced and redacting them are necessary only to protect the general partner's Section 3.4(b) confidentiality rights and any privileges held by the general partner. Without a more explicit statement in the partnership agreement that limited partners must fund the general partner's protection of its own confidentiality interests, I hold that the expense referenced in Section 3.4(a) is the expense of collecting, transporting, or photocopying the books and records—in other words, the expenses that must be incurred for the limited partners to obtain copies of the books and records. But the general partner must bear the expenses associated with protecting the general partner's confidentiality and privilege interests. Plaintiffs are not required to bear that expense.

19. Within 7 days of the entry of this order, the parties shall submit a stipulated confidentiality order or, if they cannot agree, competing confidentiality orders. Within 30 days of the entry of this order, the Defendants other than GP Holdings shall produce the documents listed in paragraph 47 of the Joint Pre-Trial Order going back to 2010, and such documents shall be subject to the Incorporation Condition. Plaintiffs lack standing to obtain the books and records of GP Holdings. The expense of production shall be allocated in accordance with this order.

/s/ Tamika Montgomery-Reeves
Vice Chancellor
Dated: August 8, 2017