

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE UNITEDHEALTH GROUP INC.) Consolidated
SECTION 220 LITIGATION) C.A. No. 2017-0681-TMR

ORDER GRANTING CONDITIONAL STAY PENDING APPEAL

WHEREAS, on February 28, 2018, this Court issued a memorandum opinion granting Plaintiffs’ Amalgamated Bank, Coral Springs Police Officers’ Retirement Plan, and Central Laborers Pension Fund (collectively, “Plaintiffs”) request to inspect certain books and records (the “Memorandum Opinion”);

WHEREAS, on March 23, 2018, Defendant UnitedHealth Group, Inc. (“UnitedHealth”) filed a Motion to Stay Pending Appeal of the Memorandum Opinion (the “Motion”);

WHEREAS, on April 3, 2018, Plaintiffs filed an opposition to Defendant’s Motion;

WHEREAS, on April 9, 2018, Defendant filed a reply in further support of its Motion;

WHEREAS, stockholders filed a derivative action in Minnesota against UnitedHealth’s senior management and board of directors;

NOW, THEREFORE, THE COURT HEREBY FINDS AND ORDERS AS FOLLOWS:

1. UnitedHealth's Motion is GRANTED conditioned on UnitedHealth moving for a stay from the Delaware Supreme Court within ten days.

2. "Stays pending appeal . . . shall be governed by . . . the Rules of the Supreme Court." Ct. Ch. R. 62(d). Supreme Court Rule 32(a) provides that "[a] stay . . . pending appeal may be granted or denied in the discretion of the trial court." Supr. Ct. R. 32(a). In determining whether a stay should be granted, the Court balances four factors: (1) "a preliminary injunction 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 irreparable injury 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.

3. The first factor, the "likelihood of success on appeal," is not to be interpreted "literally or in a vacuum when analyzing a motion for stay pending appeal." *Kirpat*, 741 A. 2d at 358. In *Kirpat*, the Delaware Supreme Court reversed the denial of a stay pending appeal because the Court of Chancery focused too

narrowly on this factor. *Id.* at 357. Specifically, the Supreme Court reasoned, “[a] motion for stay . . . requires the trial court to analyze the likelihood of success on appeal *after* the trial court already has considered and issued its final determination on the merits of the case.” *Id.* at 358. Therefore, “[r]equiring a literal reading of the ‘likelihood of success on appeal’ [factor] 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.* Instead, “[i]f the other three factors *strongly favor* interim relief, then a court may . . . [grant] a stay if the petitioner has presented a serious question that raises a fair ground for litigation and thus for more deliberative investigation.” *Id.* (emphasis added).

4. UnitedHealth contends that it has presented a serious legal question that raises fair ground for litigation: “whether the existence of two underlying lawsuits can establish a credible basis to infer that wrongdoing occurred when, as of the Section 220 trial, one of the lawsuits had been dismissed, and the other was facing a motion to dismiss.” Reply in Supp. of Def.’s Mot. for Stay 8. Stated differently, UnitedHealth argues that a books and records inspection should not be granted until the motion to dismiss is decided on the underlying merits of the claims. First, UnitedHealth’s argument ignores the Memorandum Opinion’s ruling that: (a) “[t]he documents uncovered by the DOJ’s lengthy investigation, coupled with the sworn testimony and statements of Defendant’s own management are enough to meet the

‘lowest possible burden of proof’ in Delaware law,” *In re UnitedHealth Gp., Inc. Section 220 Litig.*, 2018 WL 1110849, at *7 (Del. Ch. Feb. 28, 2018); and (b) “even if a complaint alone is insufficient, Defendant cannot escape the testimony and documents that demonstrate a credible basis for this Court to infer possible wrongdoing or mismanagement simply because they are referenced in a complaint.”

Id. Second, the Federal District Court ruled on the motion to dismiss before this Court issued its ruling, denying the motion to dismiss as to counts one, five, and six. *In re UnitedHealth*, 2018 WL 1110849, at *2 n.24. In fact, Defendant submitted two letters to the Court informing it of the Federal District Court’s ruling on the motion to dismiss before the Court issued the Memorandum Opinion. Def.’s Letter (Feb. 2, 2018); Def.’s Letter (Feb. 16, 2018). Third and finally, as it did in its briefings and at trial, UnitedHealth raises a merits-based argument. It is well-settled Delaware law that Section 220 actions do not warrant a trial on the merits of underlying claims. *E.g., Lavin v. W. Corp.*, 2017 WL 6728702, at *1 (Del. Ch. Dec. 29, 2017) (“Any contrary finding would invite defendants improperly to draw the court into adjudicating merits defenses to potential underlying claims in order to defeat otherwise properly supported Section 220 demands.”); *Okla. Firefighters Pension & Ret. Sys. v. Citigroup Inc.*, 2014 WL 5351345, at *6 (Del. Ch. Sept. 30, 2014) (“Although Citigroup disclaims any effort to turn this proceeding into a trial on the merits of Plaintiffs possible derivative claims, Citigroup essentially seeks that

result by implying that Plaintiff must have specific, tangible evidence that Citigroup's Board or senior management was complicit in the fraud at Banamex. That argument ignores the inferences that this Court can—and must—draw under the credible basis standard, and would discourage the very behavior this Court has sought to encourage among would-be derivative or class plaintiffs.”); *LAMPERS*, 2007 WL 2896540, at *12 (rejecting, in a Section 220 proceeding, that no springloading ever occurred because “by raising such a defense, Countrywide seeks to litigate the ultimate issue in a possible future derivative suit that might eventually be filed by LAMPERS. This is neither the time nor the procedural setting to address that issue.”). Thus, UnitedHealth has failed to raise a new or substantial question of law and has not shown a likelihood of success on appeal. *Cf. Amalgamated Bank v. Yahoo! Inc.*, C.A. No. 10774, 7 (Del. Apr. 14, 2016) (ORDER) (quoting *Kirpat*, 741 A.2d at 358) (granting a stay in part because Yahoo “contend[ed] that the Final Order is the first ruling in a Section 220 proceeding holding that the personal emails of outside directors constitute corporate books and records subject to inspection,” and it was “fair to say that Yahoo’s appeal present[ed] substantial questions that are a fair ground for litigation and . . . more deliberative investigation.”); *Orloff v. Weinstein Enters., Inc.*, 2004 WL 1488678, at *2 (Del. Ch. June 22, 2004) (“In this case, a stay is particularly appropriate because

the statutory provisions involved are new and raise fair ground for litigation over their scope and meaning.”).

5. The second factor is whether UnitedHealth will suffer irreparable injury. UnitedHealth argues that failure to grant a stay will cause it irreparable harm for two reasons. First, UnitedHealth argues that it will suffer irreparable harm because the production of the documents would moot its appeal in a books and records action. Def.’s Mot. for Stay 4. Second, UnitedHealth argues that it will suffer irreparable harm because Plaintiffs will not be able to “unsee” the production once it is made. *Id.* Both the Delaware Supreme Court and this Court have accepted these arguments as irreparable harm. *Yahoo! Inc.*, C.A. No. 10774, at 5 (recognizing in a books and records action that “failure to grant a stay of judgment pending appeal would preclude effective appellate review.”); *id.* at 3 (finding Yahoo may suffer irreparable injury “because the production cannot be reversed.”); *Orloff*, 2004 WL 1488678, at *2 (“Unless a stay is entered, it is likely that the full production required by the Final Order could be accomplished before the appeal is heard and, thus, moot the appeal.”). I agree that UnitedHealth has identified potential irreparable injury. But I also recognize that by this logic, courts would have to grant stays pending appeal in every case involving the production of books and records. This, however, is not the law in Delaware. *See Yahoo! Inc.*, C.A. No. 10774, at 7 (“[A] stay pending appeal in a Section 220 proceeding is not necessarily appropriate in every such

case.”). Therefore, this factor weighs in favor of granting the stay, but I am not convinced that it alone weighs “strongly” enough to warrant a stay.¹

6. The third factor is whether any other party, in this case, Plaintiffs, will suffer irreparable injury. Plaintiffs argue that a stay would cause them irreparable harm in two ways. First, Plaintiffs aver that further delay of this summary action will cause irreparable harm. Pls.’ Opp’n to Def. Mot. to Stay 7. But this reasoning would require denial of a stay in any summary or expedited proceeding. This is not the law in Delaware. *See Yahoo! Inc.*, C.A. No. 10774, at 7 (granting stay). Further, Plaintiffs could remedy their concerns regarding delay by seeking an expedited schedule with the Delaware Supreme Court. *See* Supr. Ct. R. 25(e). Second, Plaintiffs argue that the Delaware Supreme Court’s recent ruling in *California State Teachers’ Retirement Systems v. Alvarez*, 179 A.3d 824, 855 (Del. 2018), counsels against a stay in a books and records case if there is a pending derivative action that relates to the same underlying claims but does not rely on books and records. Pls.’ Opp’n to Def. Mot. to Stay 7. UnitedHealth responds that any such harm is purely speculative here because no motion to dismiss has been filed, that action may survive a motion to dismiss, and that action may not have preclusive effect on Plaintiffs’

¹ Plaintiffs argue that these concerns can be remedied by a confidentiality order that significantly restricts use during appeal and allows clawback of the documents if UnitedHealth succeeds on appeal. Pls.’ Opp’n to Def.’s Mot. to Stay 9–10. I am not convinced that Plaintiffs’ proposed confidentiality order would remedy the alleged harm.

claim. Reply in Supp. of Def.’s Mot. for Stay 6–7. Although not directly addressing this particular issue, the Delaware Supreme Court has rejected allegations of harm based on a speculative development. *Yahoo! Inc.*, C.A. No. 10774, at 6 (finding the argument that Amalgamated faces a risk that the Company will engage in transformative transaction speculative and uncertain). Furthermore, Plaintiffs admit that the proposed confidentiality agreement in this action would prohibit use of the books and records in the Minnesota action pending appeal of this action. Plaintiffs do not explain how immediate production of the documents in this litigation would affect the Minnesota litigation. Again, it seems as though an expedited scheduled would address Plaintiffs’ concern. At best, this factor weighs slightly in favor of denying the stay.

7. The fourth factor is “whether the public interest will be harmed if the stay is granted.” *Kirpat*, 741 A. 2d at 357. Neither litigant provides convincing arguments that the public interest will be harmed if the stay is granted or denied. This factor appears neutral.

8. In balancing the *Kirpat* factors, even assuming UnitedHealth presents a serious legal question that raises a fair ground for litigation, the other factors do not weigh “strongly” in favor of granting a stay. *Kirpat*, 741 A. 2d at 358. It is possible, however, that the Delaware Supreme Court disagrees. Recognizing that the Delaware Supreme Court may balance the factors differently, this Court has

taken the precaution of granting a conditional stay pending appeal that preserves the *status quo* to enable the appellant to seek a longer stay from the Delaware Supreme Court. *See Ward v. Schmalhofer*, 2017 WL 87478, at *3 (Del. Ch. Jan. 9, 2017) (ORDER); *Jagodzinski v. Silicon Valley Innovation Co., LLC*, 2011 WL 4823569, at *4 (Del. Ch. Aug. 16, 2011). I do the same here. Thus, this proceeding is stayed for ten days to allow UnitedHealth to seek a longer stay from the Delaware Supreme Court if it so chooses. If UnitedHealth fails to move for a stay within that period, then this stay will lift. If it does file a motion to stay, then this stay will remain in effect until the Delaware Supreme Court has ruled on it.

9. Article IV § 24 of the Constitution of the State of Delaware requires adequate security for a stay pending appeal. Plaintiffs have not requested security, so the stay is not conditioned on any.

/s/ Tamika Montgomery-Reeves

Vice Chancellor

Dated: April 27, 2018