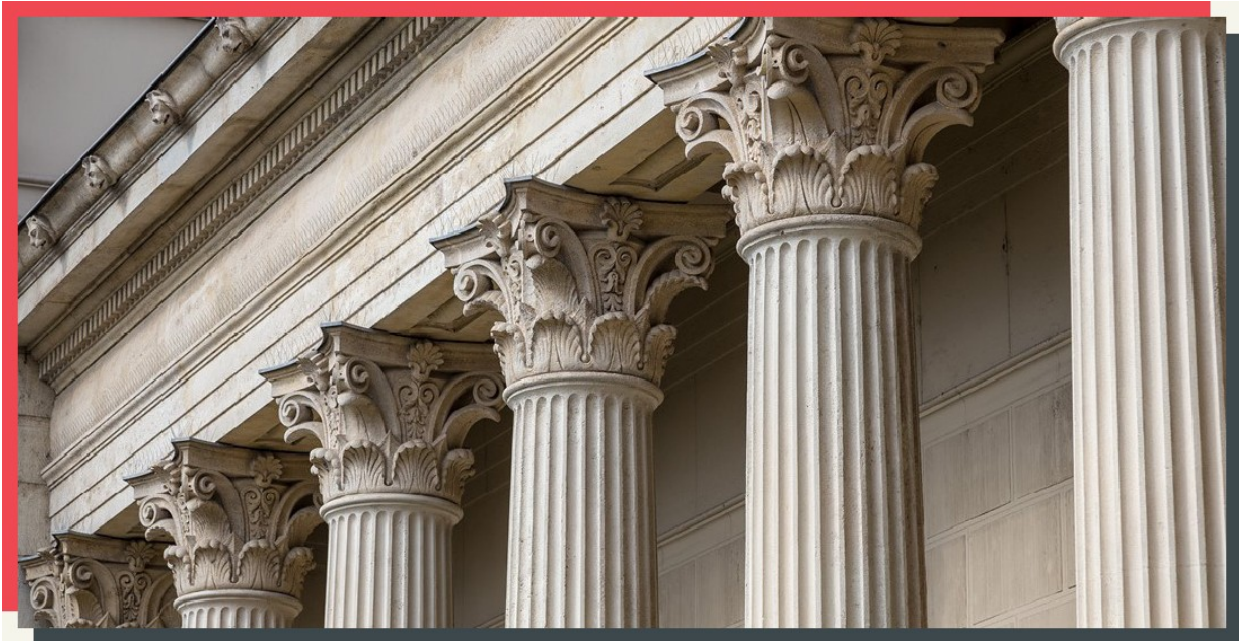


Delaware Court of Chancery Denies a Section 220 Demand against Amazon

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On Oct. 24, the Delaware Court of Chancery in *Roberta Ann K.W. Wong Leung Revocable Trust v. Amazon.com Inc.*^[1] approved a magistrate's May posttrial denial of a Delaware General Corporation Law, Section 220, books and records demand against Amazon, holding that stockholders had no right to inspect Amazon's books despite the company facing suits from the Federal Trade Commission, state attorneys general, private plaintiffs, and a €1.3 billion (\$1.35 billion) fine levied by Italian regulators.

Distinguishing several precedents and challenging the "credible basis" standard generally applied to Section 220 books and records demands, the court: 1) approved the magistrate's rejection of the shareholder's request on the ground that the FTC failed to adequately show its work, and 2) further held the misconduct the stockholder alleged was too temporally and geographically far-flung.

In so doing, the court adopted the "plus factor" approach of an earlier Court of Chancery decision concerning Amazon, whereby the court requires an additional showing of wrongdoing when the Section 220 plaintiff bases their demand primarily on governmental regulatory action. While several previous Chancery rulings cited such additional wrongdoing as a further reason to approve a stockholder's Section 220 request, the Amazon rulings used the plus factor as a gating mechanism to reject the request.

This article places the court's decision in a historical context and observes the impact the plus-factor approach may have on stockholders going forward.

Background Law

According to the October decision, under Title 8 of the Delaware Code, Section 220, a stockholder of a Delaware corporation has the "'qualified' right ... to inspect corporate books and records."^[2] To invoke

this right, a stockholder must demonstrate a "credible basis from which the Court can infer there is 'possible mismanagement.'"[3]

"The 'credible basis' standard of proof is the lowest recognized under Delaware law," requiring merely that a stockholder "provide 'some evidence of wrongdoing' that would warrant further investigation," according to the Court of Chancery's 2022 decision in *Oklahoma Firefighters Pension and Retirement Systems v. Amazon*.^[4] Under this standard, per that 2022 decision, "a stockholder need not 'prove mismanagement actually occurred, but must make a "credible showing, through documents, logic, testimony or otherwise, that there are legitimate issues of wrongdoing.'"^[5]

As the magistrate observed in May, Section 220 requests have been approved where "the scale of investigations and lawsuits, the severity or results of those inquiries, and corporate trauma provided the necessary indication of potential wrongdoing to support stockholders' parallel books and records investigations."^[6]

Indeed, Section 220 requests have been routinely approved where plaintiffs' actions were based on numerous federal investigations and lawsuits brought alongside private civil actions.^[7]

The Amazon Decisions

In this recent Section 220 demand, the stockholder sought access to Amazon's books in light of several private lawsuits, a European regulatory investigation, a €1.3 billion penalty imposed by Italian regulators and the FTC's yearslong investigation into Amazon that culminated in a federal antitrust action joined by 17 states.^[8]

The alleged anticompetitive conduct giving rise to these actions was varied, ranging from Amazon's use of "sensitive data from independent retailers who sell on its marketplace" potentially in violation of EU rules in the case of the European investigation, according to the May magistrate decision;^[9] to the awarding of "special perks to third-party merchants who use Amazon's warehouse and delivery system" by the company's Italian subsidiaries, per a December 2021 *New York Times* article;^[10] to using various tactics to suppress nascent competitors' businesses as recounted in the FTC action.^[11] In all, the potential wrongdoing relied upon by the stockholder spanned over a decade of conduct.^[12]

The magistrate found the stockholder lacked a credible basis for seeking Amazon's records, relying heavily on the 2022 *Oklahoma Firefighters* decision rejecting a prior Section 220 demand concerning Amazon.

There, the court held that news reports of federal investigations into Amazon, settled lawsuits against the company and the Italian fine upon which the stockholder relied was insufficient to demonstrate a credible basis.^[13] Citing *Oklahoma Firefighters*, the magistrate held the stockholder's evidence lacked the plus factor required in Section 220 cases "where ongoing government investigations and lawsuits contributed to the satisfaction of the credible basis standard."^[14]

The magistrate rejected the stockholder's attempt to distinguish *Oklahoma Firefighters* by additionally relying on the FTC action launched in the intervening period, which resulted from "a massive, years-long investigation that included the review of millions of internal Amazon documents and dozens of interviews with Amazon executives,"^[15] characterizing the action as "allegations."

While the magistrate conceded the Italian penalty came closest to satisfying the credible basis standard, she ruled that the €1.3 billion fine represented a mere 0.2% of Amazon's 2023 revenues, and was accordingly inconsequential.

The plaintiff additionally cited two successful Section 220 cases based primarily on government complaints. The magistrate, however, found that the government in those cases had included many exhibits alongside its complaints,^[16] reasoning that the FTC's 150-plus-page complaint against Amazon did not adequately reference the underlying evidence.^[17]

The Court of Chancery in October adopted the magistrate's ruling, agreeing with the magistrate's credible-basis analysis but ultimately holding that it "need not resolve whether the FTC Complaint supports a credible basis," because there was a "more fundamental problem with" the stockholder's request: the stockholder's purpose was overbroad.[18]

The court held that while the investigation of possible wrongdoing is a proper purpose, "[m]ere curiosity or a desire for a fishing expedition" without "specific and credible allegations" is not.[19] The court held that the scope of the potential wrongdoing the stockholder wanted to investigate was unacceptably far-reaching, variously describing the stockholder's approach as "scattershot," "indiscriminate," "haphazard," "boundless" and "disjointed." [20] As discussed, the stockholder alleged misconduct spanning many years, jurisdictions and legal actions.[21]

The recent Amazon decision suggests the Court of Chancery may hold stockholders to a stricter standard in future Section 220 cases. First, if the plus-factor approach announced by the Oklahoma Firefighters court, and endorsed by the magistrate report and October decision, is more widely adopted, it could raise the bar for what evidence stockholders must offer when their Section 220 requests are predicated on government investigations or lawsuits.

Oklahoma Firefighters and the recent rulings analyzed here appear to be the first Court of Chancery decisions to reject a Section 220 request for failing to supplement evidence of substantial ongoing government investigations and lawsuits with other evidence of wrongdoing. Indeed, in every analogous case Oklahoma Firefighters referenced,[22] the court ruled that such evidence further demonstrated wrongdoing — it was additive, rather than prohibitive.

The Oklahoma Firefighters decision rooted the factor in several earlier Court of Chancery holdings, namely its 2020 AmerisourceBergen Corp v. Lebanon County Employees' Retirement Fund decision,[23] 2020 ruling in Pettry v. Gilead Sciences,[24] 2019 In re: Facebook Section 220 Litigation decision[25] and 2021 ruling in Gross v. Biogen Inc.,[26] which all saw the stockholders' requests granted.

As the Oklahoma Firefighters court correctly noted, each of these cases involved a government investigation or litigation, plus some additional indicia of wrongdoing. Pettry, for example, involved an antitrust class action, a federal government suit and several investigations, and a qui tam action; even more similar to the recent Amazon Section 220 demand, Facebook involved "consumer class actions, government enforcement actions, and derivative actions," a "potential multibillion dollar fine by the FTC, and ... detailed reports in the press of a Facebook board meeting connected to the alleged wrongdoing." [27]

In its affirmative credible basis ruling, the Biogen court cited state and federal investigations alongside a small settlement between the target company and a U.S. attorney's office.[28] But, in a passage underscoring the potential shift the plus-factor approach represents, the Biogen court noted: "As this court's prior decisions have found, ongoing governmental investigations can be strong evidence of a credible basis to suspect wrongdoing." [29]

Notably, and unlike the Oklahoma Firefighters decision that cited them, none of these decisions explicitly required the presence of these additional indicia of wrongdoing for Section 220 to be available. The implications of this stricter approach were made clear in the May magistrate report. The evidence adduced by the stockholder closely resembled that which was at issue in those earlier cases, particularly in light of the FTC's investigation and subsequent 17-state lawsuit.

The filing of this complaint created an important piece of evidence that had not been before the Oklahoma Firefighters court. It is noteworthy that the magistrate found this complaint, combined with the additional indicia of wrongdoing here — including the €1.3 billion fine — did not meet the plus-factor standard. Equally noteworthy was the magistrate's reasoning: As mentioned above, though the FTC complaint could have nudged the stockholder over the bar, the apparent inadequacy of the identified supporting evidence prevented this.

Additionally, the Court of Chancery's holding that the stockholder lacked a proper purpose for inspecting Amazon's books and records could similarly raise the standard stockholders must meet in succeeding on a Section 220 action.

As the Court of Chancery noted in its 2007 decision in *Melzer v. CNET Networks Inc.*, "[t]here is no shortage of proper purposes under Delaware law."^[30] For example, in some of the earlier Court of Chancery cases just discussed, the following were found to be proper purposes: "the possibility of breaches of fiduciary duty by Biogen's Board related to the investigation by the United States Attorney offices ... relating to Biogen's alleged kickback violations" and "the independence and disinterest of the Board relating to the Company's alleged kickback violations";^[31] and investigating "anticompetitive activity resulting in a multi-billion dollar lawsuit accusing Gilead of violating federal and state antitrust laws."^[32]

In the October decision in the Amazon case, the stockholder's stated purpose, as recounted by the court, was to "investigate whether 'Amazon's fiduciaries have authorized or allowed the Company [to] take unlawful advantage of [its] dominant position to engage in anticompetitive practices, leading to U.S. and international regulatory scrutiny, lawsuits, and fines."^[33]

At first blush, this purpose seems to resemble the above examples. However, the Court of Chancery took issue with the broad geographical and temporal reach of the evidence the stockholder cited, which included European regulatory violations and alleged misconduct dating to 2010.^[34]

Given that many contemporary companies accused of wrongdoing, like Amazon, operate internationally and are subject to scrutiny at many times and places, the court's denial of the stockholder's stated purpose here could have implications for similar Section 220 actions where the scope of alleged wrongdoing is broad.

In all, these decisions raise important questions about what evidence and purpose a stockholder is required to show to succeed on a Section 220 request. Whether the bar has been raised will only be answered by further rulings, but stockholders should keep these potentially heightened standards in mind when pursuing Section 220 actions.

[1] [Roberta Ann K.W. Wong Leung Revocable Tr. U/A Dated 03/09/2018 v. Amazon.com, Inc.](#), 2024 WL 4564754 (Del. Ch. Oct. 24, 2024) ("October Decision").

[2] October Decision at *3.

[3] *Id.* at *4.

[4] [Oklahoma Firefighters Pension & Ret. Sys. v. Amazon.com, Inc.](#), 2022 WL 1760618, at *6 (Del. Ch. June 1, 2022) (internal citations omitted).

[5] To succeed on their claim, a Section 220 plaintiff must additionally show a "proper purpose... reasonably related to such person's interest as a stockholder." October Decision, at *3.

[6] [Roberta Ann K.W. Wong Leung Revocable Tr. U/A Dated 03/09/2018 v. Amazon.com, Inc.](#), 2024 WL 1916089, at *6—*9. (Del. Ch. May 1, 2024) ("Magistrate Report") (citing *Oklahoma Firefighters*, 2022 WL 1760618, at *7).

[7] See, e.g., [Lebanon Cnty. Empls.' Ret. Fund v. AmerisourceBergen Corp.](#), 2020 WL 132752, at *6 (Del. Ch. Jan. 13, 2020) and [Pettry v. Gilead Scis., Inc.](#), 2020 WL 6870461 (Del. Ch. Nov. 24, 2020), judgment entered, (Del. Ch. 2020).

[8] Magistrate Report at *6—*9.

[9] *Id.* at *1.

[10] Adam Satariano, Amazon is fined \$1.3 billion in Italy over antitrust violations, N.Y. Times (Dec. 9, 2021), <https://www.nytimes.com/2021/12/09/business/amazon-italy-fine.html>.

[11] Magistrate Report at *4.

[12] See October Decision at *5–*6.

[13] 2022 WL 1760618, at *8–*10.

[14] Magistrate Report at *2.

[15] Magistrate Report at *6 (internal citation omitted).

[16] Id.

[17] Id. at *7 (internal quotations omitted) (citing [In re UnitedHealth Grp., Inc. Section 220 Litig.](#), 2018 WL 1110849, at *7 n.92 (Del. Ch. Feb. 28, 2018), aff'd sub nom. [UnitedHealth Grp. Inc. v. Amalgamated Bank as Tr. for Longview Largecap 500 Index Fund](#), 196 A.3d 885 (Del. 2018)).

[18] October Decision at *4.

[19] Id. at *5.

[20] Id. at *5–*6.

[21] Id.

[22] 2022 WL 1760618, at *7 n. 66, 8.

[23] 2020 WL 132752, at *3, *5, *10-11.

[24] 2020 WL 6870461, at *12.

[25] 2019 WL 2320842 (Del. Ch. May 30, 2019), as revised(May 31, 2019), judgment entered sub nom. [In re: Facebook Inc.](#) (Del. Ch. 2019).

[26] 2021 WL 1399282 (Del. Ch. Apr. 14, 2021).

[27] Oklahoma Firefighters at *8.

[28] 2021 WL 1399282 at *9.

[29] Id.

[30] [Melzer v. CNET Networks, Inc.](#), 934 A.2d 912, 917 (Del. Ch. 2007).

[31] Biogen, 2021 WL 1399282 at *6.

[32] Pettry, 2020 WL 6870461 at *12.

[33] October Decision at *5 (quoting the stockholder's demand) (cleaned up).

[34] Id.

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