



IN THE SUPREME COURT OF THE STATE OF DELAWARE

HAROLD GRILL 2 IRA, Derivatively on Behalf)
of Nominal Defendant UNITED) No. 390,2013
TECHNOLOGIES CORPORATION,)
) On appeal From the
Plaintiff Below-Appellant,) Court of Chancery in
) and for New Castle
v.) County
)
LOUIS R. CHÊNEVERT, JOHN V. FARACI,) The Honorable
JEAN-PIERRE GARNIER, JAMIE S.) Leo Strine, Jr.
GORELICK, EDWARD A. KANGAS, ELLEN) C.A. No. 7999-CS
J. KULLMAN, MARSHALL O. LARSEN,)
RICHARD D. MCCORMICK, HAROLD)
MCGRAW III, RICHARD B. MYERS, H.)
PATRICK SWYGERT, ANDRE)
VILLENEUVE, CHRISTINE TODD)
WHITMAN, and GEORGE DAVID,)
)
Defendants Below-Appellees,)
)
and)
)
UNITED TECHNOLOGIES CORPORATION,)
)
Nominal Defendant Below-Appellee.)

REPLY BRIEF OF PLAINTIFF-BELOW APPELLANT

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Dated: October 21, 2013

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
ARGUMENT	3
CONCLUSION.....	6

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>Aronson v. Lewis</i> , 473 A.2d 805 (Del. 1984)	1
<i>La. Mun. Police Emps. Ret. Sys. v. Pyott</i> , 46 A.3d 313 (Del. Ch. 2012), <i>rev'd on other grounds</i> , 2013 Del. LEXIS 179 (Del. Apr. 4, 2013)	5
<i>Rales v. Blasband</i> , 634 A.2d 927 (Del. 1993)	1, 4

INTRODUCTION

The Complaint in this action alleges that, for almost two years, the directors of UTC,¹ during at least six full Board and/or Board committee meetings, focused on the illegal export of certain components to be used in connection with China's manufacture of the Z-10 military helicopter. ¶¶ 101-103, 105, 106. A 46-7.² The export issue discussed at those meetings, unlike other situations in which UTC made voluntary disclosures, led to the imposition of penalties by the United States government almost four years after a September 10, 2008 Board meeting at which the "Z-10 Investigation" was discussed and a contemporaneous Audit Committee meeting during which the "Z-10 export matter" was also discussed. ¶¶ 105, 106. A 47. Yet defendants assert in their Answering Brief that "the complaint is devoid of particularized allegations suggesting that UTC's directors knowingly sanctioned the company's violation of § 1001 or any other law." Appellees' Answering Brief at 18.³ In so arguing, defendants ignore this Court's reasonable doubt standard enunciated in *Rales v. Blasband*, 634 A.2d 927, 934 (Del. 1993) (citing *Aronson v. Lewis*, 473 A.2d 805, 811-12 (Del. 1984)), which requires plaintiffs to make only "a threshold showing, through the allegation of particularized facts, that their

¹ Defined terms herein shall have the same meaning as in Plaintiff-Appellant Below's Corrected Opening Brief.

² Paragraphs in the Complaint shall be referred to as "¶ ____." References to pages of the Appendix shall be "A ____."

³ Hereafter, "Defts' Br. at ____" or "Answering Brief."

claims have some merit.” By describing the background facts leading to the Board discussions, setting forth the dates of Board discussions concerning the “Z-10 Investigation” and “Z-10 export matter,” and the resultant penalties suffered by UTC due to its admitted deficient disclosures to the Department of State, plaintiff meets this Court’s standard for a threshold showing that its claims have some merit. As a result, for the reasons set forth herein and in greater detail in the Opening Brief of Plaintiff-Below Appellant (“Opening Brief”), the Court of Chancery’s dismissal of this action should be reversed.

ARGUMENT

The Answering Brief skirts the prime issue upon which plaintiff alleges liability. As UTC admits in its Form 10-K, filed February 9, 2012, for its 2011 fiscal year (the “2011 10-K”), UTC was being investigated by each of the Departments of State and Justice in connection with its subsidiaries’ sales of helicopter components to China. Normally, according to the 2011 10-K, “[m]ost of our disclosures are resolved without the imposition of penalties or other sanctions.” ¶ 112. A 49. This time, however, it was different. According to the 2011 10-K, in connection with the Department of State’s investigation:

[I]n November 2011, DTCC informed us that it considers certain of our voluntary disclosures filed *since 2005* to reflect deficiencies warranting penalties and sanctions. . . . The voluntary disclosures that we anticipate will be addressed in the consent agreement currently under discussion include 2006 and 2007 disclosures regarding the export by Hamilton Sundstrand to P&WC of certain modifications to dual-use electronic engine control software . . . to China during the period 2002 – 2004 for use in the development of the Z-10 Chinese military helicopter.

(Emphasis added). The Department of Justice conducted a related investigation of those deficient disclosures. ¶ 112. A 49-50.

It was different this time because, for the six years since false disclosures were made to the Department of State in 2006 (¶ 93; A 45), the Board discussed the investigation, yet failed to correct those disclosures in a manner that could have avoided the imposition of penalties or other sanctions.

Defendants further contend that “there is no pleaded basis to infer that UTC incurred any liability for deliberately failing to correct the false statements made in the 2006 disclosures.” Defts’ Br. at 19. This argument is meritless. The Complaint references six instances in which UTC’s Board or one of its committees discussed the Chinese helicopter issue. It is a reasonable inference that the directors at those six meetings were aware of the false disclosures about the helicopter issue. The particularized facts at least make a “threshold showing, through the allegation of particularized facts, that their claims have some merit.” *Rales*, 634 A.2d at 934. Those meritorious claims are that, through discussions at those meetings, the directors became aware of those false statements, but then failed to correct them. That claim has some merit, as defendants have admitted in the 2011 10-K that the Department of State “considers certain of our voluntary disclosures filed since 2005 to reflect deficiencies warranting penalties and sanctions.” ¶ 112. A 49. As a result, based on the Board meeting discussions of prior misleading statements to the government, the Complaint seeks damages from defendants because, *inter alia*, they “failed to disclose UTC’s illegal business practices to the government.” ¶ 142(c). A 63.

Moreover, defendants’ effort to avoid liability is not shielded by their description (Defts’ Br. at 26, n.5) of cooperation and reforms recognized by the government. The fact remains that defendants suffered penalties for deficient

disclosures. A reasonable inference regarding UTC's remedial cooperation is that it mitigated the government's ultimate penalty.

Plaintiff has not attempted any "sleight of hand." *See* Defts' Br. at 24. Defendants attempt to tie every misstatement leading to UTC's disclosures leading to the imposition of penalties or other sanctions to the 18 U.S.C. § 1001 admission by UTC. But that is not the basis of plaintiff's claim. Defendants spent two years discussing the Chinese helicopter issue at Board meetings and four years later suffered fines and penalties of \$55 million. While plaintiff has not "point[ed] to actual confessions of illegality by defendant directors," *La. Mun. Polic Emps.' Ret. Sys. v. Pyott*, 46 A.3d 313, 357 (Del. Ch. 2012), *rev'd on other grounds*, 2013 Del. LEXIS 179 (Del. Apr. 4, 2013), defendants have not demonstrated that plaintiff's claims have no merit. By describing with particularized facts the UTC Entities' admitted illegal conduct and the fact that the Board discussed extensively the underlying issue for which UTC suffered penalties and sanctions, plaintiff has met his burden to defeat defendants' motion.

CONCLUSION

For the reasons stated in the Opening Brief, the June 24, 2013 decision of the Court of Chancery should be reversed.

Dated: October 21, 2013

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