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IN THE SUPREME COURT OF THE STATE OF DELAWARE

UNITED TECHNOLOGIES CORP., a Delaware corporation,

*Defendant Below, Appellant,*

v.

LAWRENCE TREPPEL,

*Plaintiff Below, Appellee.*

**No. 127, 2014**

COURT BELOW:

COURT OF CHANCERY OF
THE STATE OF DELAWARE
C.A. NO. 8624-VCG

# APPELLANT'S OPENING BRIEF

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## NATURE OF PROCEEDINGS

Section 220(c) of the General Corporation Law provides that "[t]he Court may, in its discretion, prescribe any limitations or conditions with reference to the inspection" of corporate books and records "as the Court may deem just and proper." "Undergirding this discretion is a recognition that the interests of the corporation must be harmonized with those of the inspecting stockholder." *Thomas & Betts Corp.* v. *Leviton Mfg. Co.*, 681 A.2d 1026, 135 (Del. 1996). Section 220(c) thus "empowers" the court to place "reasonable restrictions and limitations" on the inspection right in order to fulfill its duty "to protect the corporation's legitimate interests." *CM & M Group, Inc.* v. *Carroll*, 453 A.2d 788, 793-94 (Del. 1982).

In this case, plaintiff Lawrence Treppel demanded to inspect books and records of United Technologies Corporation ("UTC") in order to evaluate the board's rejection of his litigation demand, and potentially to challenge that rejection in derivative litigation. At the time of Treppel's demand, another UTC stockholder had already brought a derivative lawsuit in the Court of Chancery asserting the same claims that Treppel had demanded that UTC bring directly. Treppel nevertheless brought this suit insisting that he had the right not only to inspect UTC's books and records, but also to use them to launch duplicative derivative litigation, concededly governed by Delaware law, in a court outside Delaware.

That litigation would undermine UTC's legitimate interests in obtaining the authoritative application of Delaware law to its internal affairs and avoiding the waste of defending related derivative litigation in two or more forums. On the oth-

er hand, litigation outside Delaware would not advance any legitimate interest of Treppel's. His only legitimate interest in pursuing derivative litigation is to obtain relief on behalf of UTC—but complete relief is concededly available in the Court of Chancery.

Accordingly, UTC requested that the Court of Chancery limit Treppel's use in litigation of any books and records produced for inspection to use in an action in Delaware. Because the proposed use restriction protects UTC's interests without interfering with Treppel's ability to achieve his stated purposes, the Court of Chancery had not only the power, but also the responsibility, to grant the restriction.

The Court of Chancery nevertheless rejected the use restriction as unauthorized by § 220(c), not just in this case but as a bright-line rule, reasoning that a corporation could protect the interests UTC identified by passing a charter or bylaw forum selection provision. That result is inconsistent with the plain language of the statute and the decisions of this Court. Whether a restriction is authorized under § 220(c) is properly determined by conducting a fact-specific weighing of the corporate and stockholder interests in the particular case. Here, that weighing could lead to only one outcome—approval of the restriction—because Treppel did not proffer any legitimate interest that would be impaired by the restriction.

Under the ruling below, a stockholder is entitled to invoke the process of the Court of Chancery to compel a Delaware corporation to turn over books and records so that the stockholder may use them to launch Delaware-law derivative litigation in another jurisdiction. And the stockholder is entitled to do so even when

that use creates the risk of duplicative representative shareholder litigation that threatens the corporation's legitimate interests, and even when the stockholder has made no showing that the use is necessary to achieve its own purposes for inspection. The ruling below thus deprives Delaware's corporate citizens of a statutorily authorized tool to organize representative shareholder litigation where it generally belongs—in the courts of this state. Nothing in § 220, or the rest of Delaware law, requires the Delaware courts to facilitate litigation that threatens a corporation's best interests by ordering the production of the corporation's books and records with license to use them to litigate in another jurisdiction.

As set out below, a use restriction limiting the forum in which a stockholder may use a Delaware corporation's books and records is a reasonable, statutorily authorized mechanism for promoting the orderly and efficient management of Delaware-law derivative litigation. The Court of Chancery's judgment should therefore be modified to include a restriction limiting Treppel's use in litigation of the books and records UTC produces for inspection to use in an action in Delaware.

## SUMMARY OF ARGUMENT

Section § 220(c) provides that "[t]he Court may, in its discretion, prescribe any limitations or conditions with reference to the inspection . . . as the Court may deem just and proper." As this Court has explained, the provision "empower[s]" the court "to protect the corporation's legitimate interests and to prevent possible abuse of the shareholder's right of inspection by placing such reasonable restrictions and limitations as it deems proper on the exercise of the right." *CM & M Group, Inc.* v. *Carroll*, 453 A.2d 788, 793-94 (Del. 1982).

Under the plain language of § 220(c) and the decisions applying it, UTC is entitled to the use restriction on plaintiff Treppel's inspection right that the Court of Chancery improperly denied below. That use restriction would limit Treppel's use of UTC's books and records in litigation to an action in Delaware. The restriction is reasonable because it protects UTC's legitimate interests without preventing Treppel from achieving the proper purposes that entitle him to inspection.

The use restriction does not prevent, or even impede, Treppel from accomplishing either of his two stated purposes for inspection: (1) to evaluate the UTC board's rejection of his litigation demand; and (2) to obtain any relief to which UTC is entitled by filing a derivative action asserting any claims that the UTC board improperly refused to bring directly. He can accomplish the first without bringing litigation at all. And he can accomplish the second by proceeding in the Court of Chancery, where he is free to use UTC's books and records.

While the proposed use restriction does not impair any legitimate interest of Treppel's, it does protect UTC's legitimate interests. When Treppel brought this action, a derivative lawsuit asserting the same claims that Treppel had demanded that UTC bring directly was pending in the Court of Chancery. The Court of Chancery granted UTC's Rule 23.1 motion to dismiss that lawsuit, and this Court affirmed that ruling on appeal. In addition, other UTC stockholders who have demanded to inspect books and records on the same subject matter may yet bring similar suits in the Court of Chancery. The use restriction UTC seeks would discourage Treppel from filing a similar suit in another jurisdiction because he could not use UTC's books and records to overcome the heightened pleading requirements applicable to derivative actions. The proposed use restriction thus furthers UTC's legitimate interests in (1) obtaining the authoritative application of Delaware law to its internal affairs, and (2) reducing the risk of costly and inefficient duplicative derivative litigation proceeding in multiple forums.

Because the use restriction would protect UTC's legitimate interests without impairing any legitimate interest of Treppel's, no discretionary balancing can justify a refusal to impose the restriction in this case. Nevertheless, the Court of Chancery denied the restriction as statutorily unauthorized, not just in this case but in all cases. The court reasoned that the restriction was not "of the type" authorized by § 220(c) because (1) the restriction was essentially "a prophylactic anti-suit injunction" barring Treppel from bringing derivative litigation outside Delaware; and (2) the "legitimate" way to limit the forum in which a stockholder may bring deriva-

tive litigation is for the corporation to adopt a forum selection provision in its charter or bylaws.

The Court of Chancery's reasoning was flawed: (1) The restriction UTC seeks is not an anti-suit injunction; it does not bar Treppel from suing anywhere, but only from using books and records produced pursuant to Delaware law to prosecute a suit in another jurisdiction. (2) The corporation's ability to adopt a charter or bylaw provision regulating the conduct of all of its stockholders is neither legally nor logically relevant to whether the court may properly impose a restriction under § 220(c) on a particular stockholder's inspection.

In addition, the Court of Chancery's ruling is inconsistent with the policies underlying Rule 23.1 and § 220, which promote the orderly and efficient management of derivative litigation. The rationale for prohibiting pre-complaint discovery under Rule 23.1 and for limiting relief under § 220 to books and records necessary to a stockholder's proper purpose is the same: to avoid imposing unjustified costs on the corporate enterprise. Yet the bright-line ruling below deprives the Court of Chancery and Delaware corporations of a tool for discouraging stockholders claiming to act in a fiduciary capacity from needlessly imposing costs on the corporation by launching potentially duplicative derivative litigation in other jurisdictions. For that reason as well, the Court of Chancery's ruling is in error and should be modified to include the use restriction UTC seeks.

## STATEMENT OF FACTS

### A. UTC resolves federal enforcement actions for export control violations.

UTC was incorporated in Delaware in 1934. UTC, Annual Report (Form 10-K) 3 (Feb. 6, 2014). Headquartered in Hartford, Connecticut, it conducts business across the United States and around the world. *Id.* at 18. UTC is the 50th largest corporation in the Fortune 500.[1]

In June 2012, the U.S. Department of Justice charged UTC and two of its subsidiaries, Pratt & Whitney Canada Corp. and Hamilton Sundstrand Corp., with criminal violations in a three-count information. A 78. The violations related to the subsidiaries' unlicensed export of software to the Chinese government for use in a military helicopter and the company's subsequent false statements regarding the export in voluntary disclosures made to the U.S. Department of State. A 78-86. On the same day, Pratt & Whitney Canada pleaded guilty to two counts of the information and UTC entered into a deferred prosecution agreement ("DPA") with the Justice Department. A 91, 99. Under the DPA, UTC agreed to pay approximately $20 million to the Justice Department and implement remedial compliance measures. A 94-103. The outstanding charges, including all charges against UTC and Hamilton Sundstrand, were deferred and will be dismissed in June 2014 if UTC complies with the DPA. A 93. At the same time that it entered into the DPA, UTC also entered into a consent agreement with the State Department to resolve outstanding export control charges, including charges based on the unlicensed ex-

[1] *See* http://money.cnn.com/magazines/fortune/fortune500/2013/full_list.

port of software to China and related false statements. A 91, 100. In that agreement, UTC agreed to pay $55 million to the State Department, with a credit for funds applied to remedial compliance measures. A 100.

### B. After plaintiff demands that UTC bring claims against its directors and officers based on the export control violations, another stockholder brings the same claims derivatively in the Court of Chancery.

Less than two weeks after UTC entered into the DPA and the consent agreement, stockholder Harold Grill sent an inspection demand to the company. A 149-50. Grill demanded to inspect documents reviewed by the UTC board that related to the DPA, the consent agreement, and the export control charges resolved by those agreements. UTC disputed the propriety of Grill's demand but offered to avoid litigation by permitting him to inspect relevant documents, subject to his entry into a confidentiality agreement. Grill accepted the offer.

In late August, more than a month after Grill made his inspection demand, the plaintiff in this action, Treppel, sent a litigation demand letter to UTC's board. A 138. The letter recounted the unlicensed software export and related disclosure violations. A 138-41. The letter stated that UTC had incurred damages as a result of the charged conduct, namely the costs of the remedial compliance measures and penalties called for under the agreements with the government, as well as the cost of responding to the government's investigation. A 141. Treppel demanded that UTC's board investigate the charged conduct and then sue the directors, officers, or employees of UTC and its subsidiaries who were responsible for that conduct.

A 142. In particular, he demanded that the company "bring claims for breaches of fiduciary duty and indemnification and contribution," as well as "seek recovery of the salaries, bonuses, director remuneration, and other compensation paid to the parties responsible." A 142.

In early November, while the UTC board was considering Treppel's litigation demand, Grill filed a derivative action in the Court of Chancery: *Harold Grill 2 IRA* v. *Chênevert et al.*, C.A. No. 7999-CS. A 145. The complaint relied on the books and records that Grill had obtained from UTC. A 175-76. In it, Grill alleged that UTC's directors, as well as its former chairman and chief executive, had breached their fiduciary duties by either participating in or failing to prevent the export control and related disclosure violations that had led to UTC's entry into the DPA and the consent agreement. A 145, 191-93. Grill further alleged that the violations caused UTC to incur damages, namely the costs of remedial compliance measures and penalties called for under the agreements with the government, as well as the cost of responding to the government's investigation. A 182-83. As relief, Grill sought compensatory damages for UTC, including "[c]osts incurred in compensation and benefits paid to defendants that breached their duties to the Company," A 183, 194. Asserting that demand was excused, Grill thus brought derivatively the same claims that Treppel had demanded that the UTC board bring directly.

### C. Plaintiff demands to inspect books and records relating to the rejection of his litigation demand.

The UTC board rejected Treppel's litigation demand in December 2012. A 197. In a letter to Treppel's counsel, UTC's counsel explained that the board had retained counsel to investigate the matters raised in the litigation demand and, after carefully considering the demand, had concluded that further action, including commencing legal proceedings, was not in the best interests of UTC. A 197.

In February 2013, UTC moved to dismiss the *Grill* complaint for failure to satisfy Court of Chancery Rule 23.1. A 308. A month later, while that motion was pending, Treppel sent an inspection demand to UTC. A 198. The letter stated that his purpose was "to evaluate the decision of the UTC Board . . . to reject his litigation demand," and demanded that he be permitted to inspect seven categories of documents. A 198-99. UTC disputed the propriety of Treppel's inspection demand but offered to avoid litigation by permitting him to inspect relevant documents in six of the seven categories he had identified. A 205-07. UTC's offer was contingent on Treppel's entry into an appropriate confidentiality agreement. A 207. When Treppel accepted UTC's offer, UTC proposed a confidentiality agreement that included a provision requiring him to bring any action relating to "this Agreement, . . . documents produced pursuant to this Agreement, or the subject matter outlined in [Treppel's inspection] Demand" in a Delaware court. A 213-14. The provision UTC proposed to include in the agreement thus required Treppel to bring in a Delaware court any derivative action related to the books and records he sought.

Treppel returned a revised draft agreement rejecting the provision and expressly reserving his right to bring a derivative action anywhere but Delaware. A 225 ("Stockholder expressly reserves its right to assert a derivative claim on behalf of UTC in a jurisdiction other than the Delaware Court of Chancery or a court of competent jurisdiction located in the State of Delaware."). When UTC reinserted the original provision, Treppel's counsel responded that Treppel was unwilling to agree to a Delaware forum provision. A 237. Treppel's counsel did not provide any explanation for his client's rejection of the provision. A 237.

### D. Unwilling to agree to file a derivative suit relating to the export control violations in Delaware, despite the pendency of another suit seeking the same relief for the same violations in the Court of Chancery, plaintiff files this § 220 action.

In early June 2013, while UTC's motion to dismiss the *Grill* action was still pending, Treppel filed this § 220 action seeking access to UTC's books and records without any restriction on his ability to use them to file a derivative action based on the export control violations in a court outside Delaware. A 230-50. When Treppel filed this suit, Grill's derivative suit had been pending in the Court of Chancery for more than six months and UTC's motion to dismiss had not yet been decided. A 310-11. In that suit, Grill asserted the same claims based on export control violations that Treppel had demanded that UTC bring directly, and thus the same claims that Treppel would seek to bring derivatively if he determined that the UTC board had improperly rejected his litigation demand. In his complaint, however, Treppel did not explain why he sought license to use UTC's books

and records to file a derivative suit based on the export control violations outside Delaware, other than to assert that a restriction preventing him from doing so "improperly limit[s] [his] rights as a shareholder." A 248.

Later that month, the Court of Chancery dismissed the *Grill* action for failure to satisfy the pleading standard of Rule 23.1. A 251-60. The Court ruled that "the complaint does not allege that the directors caused any legal breach, in the first instance, or even that they were aware before the end of 2011 that UTC had broken the law." A 258. Grill appealed the decision.

### E. During discovery, plaintiff invokes the privilege to block UTC from inquiring into his reasons for opposing a restriction limiting his use of UTC's books and records in litigation to use in an action in Delaware.

At his deposition, Treppel testified that he was unaware of any derivative action asserting the claims that he had demanded that UTC bring directly. A 287. He thus conceded that he was unaware of the *Grill* action, which was then pending in this Court. A 352.

At his deposition, Treppel was asked why he opposed a Delaware forum restriction on his use of UTC's books and records in litigation. Invoking attorney-client privilege, Treppel refused to give any explanation for his opposition to the restriction. A 286, 438. Treppel also was asked for any reason he would bring a derivative action related to the documents he sought to inspect in a court outside Delaware. Treppel again invoked the privilege and refused to answer. A 288, 438.

Treppel has served as a representative plaintiff in a total of three shareholder suits, all alleging breach of fiduciary duty by the corporation's directors. A 10, 32-33, 50-51. Each time, he brought suit outside the corporation's state of incorporation. A 10, 14, 32, 36, 50, 61. (Two of the corporations were incorporated in Delaware.) A 14, 36. Treppel refused to testify as to why he filed these lawsuits where he did, asserting that his reasons were privileged. A 277-78, 281.

**F. UTC adopts a forum selection bylaw.**

On December 11, 2013, UTC's board of directors adopted a forum selection bylaw requiring stockholders to bring derivative litigation in a Delaware court, unless jurisdiction was lacking or the company agreed otherwise. A 315, 330.

On December 19, 2013, this Court affirmed the Court of Chancery's dismissal of the *Grill* action. A 385-86.

**G. The Court of Chancery rules that § 220(c) does not authorize it to limit a stockholder's litigation use of books and records produced for inspection to use in an action in Delaware.**

At trial, Treppel argued that he had established a proper purpose for inspection and that all of the documents he sought were necessary for that purpose. A 342-49. Treppel further argued that he was entitled to use the books and records produced for inspection to bring litigation outside Delaware. He was entitled to do so, he argued, because the "proper" way to regulate the forum in which derivative litigation may be brought is through a charter or bylaw provision, not through a condition on the use of books and records produced for inspection. A 402. Trep-

pel also contended that UTC's forum selection bylaw did not apply to him at all because it was adopted after he acquired his UTC shares. A 441.

UTC argued that even if Treppel had established a proper purpose for inspection, he was not entitled to use its books and records to prosecute derivative litigation in another jurisdiction. Such litigation threatened UTC's legitimate interests in (1) obtaining the authoritative application of Delaware law to its internal affairs, and (2) avoiding the wasteful litigation of duplicative derivative suits in multiple forums, all seeking the same relief for the same export violations. In addition, Treppel had made no showing that using UTC's books and records in litigation outside Delaware was necessary to achieve his stated purposes. Therefore, UTC argued, it was entitled to a restriction under § 220(c) barring such use.[2] A 373-80; A 445-46. UTC also argued that Treppel had not established that the seventh category of documents he sought for inspection was necessary to accomplish his stated purposes. A 380-82.

The questions before the Court of Chancery were thus (1) whether a use restriction should be imposed under § 220(c) that would limit Treppel's use of the books and records produced for inspection to use in an action in Delaware, and (2)

[2] While UTC had offered to produce books and records to Treppel on the condition that he bring in Delaware any litigation related to their contents, UTC did not ask the Court of Chancery to impose that condition. Instead, in the proceedings below, UTC sought only a restriction limiting Treppel's use of the books and records produced for inspection to use in an action in Delaware. *See, e.g.*, A 383 (requesting that the Court grant inspection "only on the condition that plaintiff not use the inspected documents in an action outside the State of Delaware.").

whether Treppel was entitled to all seven categories of documents he sought for inspection.[3]

The court rejected UTC's proposed restriction on Treppel's use of the documents. In the court's view, the question presented was whether it had authority under § 220(c) to issue "what amounts to a prophylactic anti-suit injunction" as a condition of inspection. A 451. The court concluded that it did not because the "mechanism for limiting which forum a suit may be brought in to enforce corporate interests . . . is . . . a charter or bylaw provision," such as the one UTC had adopted. A 451. If Treppel brought suit outside Delaware, the court noted, UTC could seek to dismiss his suit on the basis of its forum selection bylaw. A 451. The court noted that UTC could also seek a declaratory judgment or anti-suit injunction from the Court of Chancery to enforce its bylaw. A 451. Because UTC could limit derivative litigation outside of Delaware through these "legitimate avenues," the court concluded that the restriction UTC sought was "not the type of restriction" authorized by § 220(c). A 451.

The Court of Chancery then ruled that Treppel had established that only six of the seven categories of documents he sought were necessary to accomplish his stated purposes. Treppel was therefore not entitled to the seventh category of documents, which the Court deemed "profoundly overbroad." A 451.

[3] UTC disputed at trial that Treppel had established a proper purpose for inspection, but UTC is not appealing the Court of Chancery's ruling that he did so. The only issue raised on appeal is whether the Court of Chancery erred in not imposing the proposed use restriction under § 220(c).

## ARGUMENT

## I. UTC IS ENTITLED TO A RESTRICTION UNDER § 220(C) LIMITING PLAINTIFF'S USE OF UTC'S BOOKS AND RECORDS IN LITIGATION TO USE IN AN ACTION IN DELAWARE.

### A. Question Presented

Did the Court of Chancery err in not imposing, under § 220(c), a restriction limiting the plaintiff's use of UTC's books and records in litigation to use in an action in Delaware, where the restriction would protect UTC's legitimate interests and the plaintiff did not identify any legitimate interest of his own that would be impaired by the restriction?

This issue was raised below and considered by the Court of Chancery. A 373-80; A 450-51.

### B. Scope of Review

This Court reviews *de novo* the interpretation of statutory provisions. *See In re Krafft-Murphy Co., Inc.*, 82 A.3d 696, 702 (Del. 2013). This Court also reviews *de novo* the application of law to uncontroverted or established facts. *See B.F. Rich & Co., Inc.* v. *Gray*, 933 A.2d 1231, 1241 & n.13 (Del. 2007).

### C. Merits of Argument

#### 1. The court has a duty to place a reasonable restriction on a stockholder's inspection right in order to protect the legitimate interests of the corporation when those interests outweigh any legitimate interests of the stockholder impaired by the restriction.

A stockholder's right to inspect corporate books and records is a "qualified" right, not an absolute one. *See, e.g.*, *Seinfeld* v. *Verizon Commc'ns, Inc.*, 909 A.2d

117, 119 (Del. 2006). A stockholder is entitled to inspection only for a "proper purpose." § 220(b). Once that entitlement is established, § 220(c) provides that "[t]he Court may, in its discretion, prescribe any limitations or conditions with reference to the inspection . . . as the Court may deem just and proper."

"Undergirding th[e] discretion" conferred by § 220(c) "is a recognition that the interests of the corporation must be harmonized with those of the inspecting stockholder." *Thomas & Betts Corp.* v. *Leviton Mfg. Co., Inc.*, 681 A.2d 1026, 1035 (Del. 1996). This Court has held that § 220(c) thus "empower[s]" the court "to protect the corporation's legitimate interests and to prevent possible abuse of the shareholder's right of inspection by placing such reasonable restrictions and limitations as it deems proper on the exercise of the right." *CM & M Group, Inc.* v. *Carroll*, 453 A.2d 788, 793-94 (Del. 1982). This Court has further instructed that a Delaware court has not merely the prerogative, but also the obligation to protect the corporation's legitimate interests. For "[c]ounterposed to the duty to protect the rights of the stockholder" is the court's "duty to safeguard the rights and legitimate interests of the corporation." *Id.* It is therefore "the responsibility of the trial court to narrowly tailor the inspection right to a stockholder's stated purpose." *Thomas & Betts*, 681 A.2d at 1035 (calling this responsibility "well established"). And "[i]t is . . . clear that the Court can consider and balance the interest of the corporation as a unit against the stockholder's interest" in order to fulfill that responsibility. *State ex rel. Armour & Co.* v. *Gulf Sulphur Corp.*, 233 A.2d 457, 462 (Del. Super. Ct. 1967), *aff'd*, 231 A.2d 470 (Del. 1967).

This Court and the Court of Chancery have used the authority extended by § 220(c) to limit a stockholder's inspection right in a variety of ways, depending on the facts and circumstances of the particular case. Both courts have expressly invoked § 220(c) to limit the extent or manner of inspection, as well as to limit the use and dissemination of the books and records produced for inspection. For example, in *Thomas & Betts Corp.* v. *Leviton Mfg. Co., Inc.*, 681 A.2d 1026, 1035 (Del. 1996), this Court held that the Court of Chancery properly exercised its authority under § 220(c) to limit inspection to documents that were "essential and sufficient" to value the stockholder's shares. The limitation thus allowed the stockholder to achieve its only proper purpose, while protecting the corporation against the stockholder's use of books and records unnecessary for that purpose to advance unstated or improper purposes. *Id.* In *Henshaw* v. *Am. Cement Corp.*, 252 A.2d 125 , 130 (Del. Ch. 1969), the Court of Chancery, citing § 220(c), barred the stockholder from using his first choice of counsel to conduct the inspection because that counsel represented parties adverse to the corporation in another action relating to the subject matter of the books and records sought for inspection. The limitation thus allowed the stockholder to investigate potential corporate mismanagement—his proper purpose—by using another agent for inspection, while avoiding the risk that the prohibited agent would obtain "back-door discovery" that could be used against the corporation in the related lawsuit. *Id.* at 129-30. And in *CM & M Group, Inc.* v. *Carroll*, 453 A.2d 788, 793-94 (Del. 1982), this Court relied on § 220(c) to bar the stockholder from disclosing the books and records pro-

duced for inspection to anyone who did not enter into a confidentiality agreement and swear that he was a bona fide prospective purchaser of the stockholder's shares. The limitation thus allowed the stockholder to use the corporation's confidential financial data to value and market his shares—his proper purpose for inspection—while mitigating the risk that the data would be revealed to "outsiders who may be merely curiosity-seekers." *Id.* at 792-93.

In each case, the proposed limitation was held reasonable because it protected the corporation's legitimate interests without preventing the stockholder from achieving the proper purpose that entitled it to inspection. And because a proper purpose is one that is "reasonably related to [the stockholder]'s interest as a stockholder," § 220(b), the limitations imposed reflected the court's balancing of the legitimate interests of the stockholder against those of the corporation. Each case thus illustrates the principle that the court should approve a reasonable restriction on inspection when the corporate interests protected by the restriction outweigh any interests of the stockholder impaired by the restriction.

**2. UTC is entitled to a restriction limiting plaintiff's use of its books and records in litigation to use in an action in Delaware because the restriction protects UTC's legitimate interests without impairing any legitimate interest of the plaintiff.**

Below, UTC sought a restriction under § 220(c) that would limit Treppel's use of its books and records in litigation to use in a Delaware action. A straightforward application of § 220(c), and the decisions interpreting it, to the facts and circumstances of this case entitles UTC to that restriction.

The plain language of § 220(c) gives the court discretion to impose "any limitations or conditions with reference to the inspection . . . as the Court may deem just and proper." The proposed use restriction is a "limitation[] . . . with reference to the inspection" because it limits only Treppel's use of the documents produced for inspection; it does not regulate Treppel's conduct in any way unrelated to his inspection of UTC's books and records. In addition, the restriction is a "just and proper" one that should be imposed under this Court's precedent. This Court has held that § 220(c) authorizes the placement of "reasonable restrictions and limitations" on the inspection right in order "to protect the corporation's legitimate interests and to prevent possible abuse of the shareholder's right of inspection." *CM & M*, 453 A.2d at 793-94. As the decisions discussed above illustrate, a restriction or limitation is reasonable when it protects the corporation's legitimate interests without preventing the stockholder from achieving the purpose that entitled it to inspection. The proposed use restriction is reasonable under this standard.

The proposed use restriction does not prevent Treppel from achieving the proper purposes that entitle him to inspection. Treppel identified only one purpose in his inspection demand: to evaluate the UTC board's rejection of his litigation demand. At trial, he acknowledged that he might bring a derivative suit after making that evaluation. A 393-94; A 441. The restriction does not impair Treppel's ability to accomplish either of these purposes. Treppel can evaluate the propriety of the rejection by simply examining the relevant books and records. Using those

books and records to bring litigation, in or out of Delaware, is not necessary to make that evaluation.

Nor does the restriction impair Treppel's ability to pursue a derivative suit. The only interest that Treppel, as a UTC stockholder, has in pursuing such a suit is to obtain any relief to which UTC is entitled. Indeed, that is the only reason Treppel has standing to pursue such a suit. *See Schoon* v. *Smith*, 953 A.2d 196, 201 (Del. 2008); *id*. at 202 ("[t]he right of a stockholder to file a bill to litigate corporate rights is, therefore, solely for the purpose of preventing injustice where it is apparent that material corporate rights would not otherwise be protected"). That interest can be totally vindicated by filing suit in the Court of Chancery. For that reason, the Court of Chancery has held that "[r]epresentative plaintiffs seeking to wield the cudgel for all stockholders of a Delaware corporation have no legitimate interest in obtaining a ruling from a non-Delaware court." *See In re Topps Co. S'holders Litig.*, 924 A.2d 951, 961 (Del. Ch. 2007). The proposed use restriction applies only to litigation in a non-Delaware court; it does not limit Treppel's use of the documents produced for inspection to litigate in the Court of Chancery, and in particular to overcome the pleading standard of that court's Rule 23.1. Nor does the use restriction bar Treppel from prosecuting derivative litigation outside Delaware without using the books and records produced for inspection.

Moreover, in the proceedings below, Treppel did not dispute that he could achieve his stated purposes for inspection even if the restriction was imposed. Treppel never identified any interest of his that would be impaired by the re-

striction UTC seeks. Furthermore, during discovery, Treppel blocked any inquiry by UTC into his reasons for opposing the restriction—claiming that those reasons were privileged. Treppel also shut down, on the same ground, inquiry by UTC into why he might want to pursue derivative litigation outside of Delaware. As a result of these tactical choices, the record is bare of any basis to conclude that the use restriction UTC seeks could possibly impair any legitimate interest of Treppel's.

On the other hand, the restriction would protect UTC's legitimate interests in (1) obtaining the authoritative application of Delaware law to its internal affairs, and (2) avoiding the wasteful litigation of duplicative derivative suits in multiple forums, all seeking the same relief on the basis of the same export violations.

Because UTC is a Delaware corporation, Delaware law governs disputes regarding its internal affairs. That elemental rule is one UTC's stockholders are deemed to understand and embrace by virtue of their investment in a Delaware corporation. *See Biondi* v. *Scrushy*, 820 A.2d 1148, 1162 (Del. Ch. 2003) ("By investing in a corporation chartered in Delaware, stockholders seek out and are entitled to the protections afforded by our law."). Corporations choose to incorporate in Delaware, and stockholders choose to invest in Delaware corporations, because both perceive value in subjecting the corporation not only to Delaware law, but also to the authoritative application of that law by the courts of this state. UTC and all of its stockholders therefore have a legitimate interest in the adjudication of internal affairs disputes by a Delaware court, one whose judgment may be appealed as of right to this Court. *See In re Topps*, 924 A.2d at 961 ("For investors in Dela-

ware corporations, it is important that the responsibilities of directors be articulated in a consistent and predictable way.").

Authoritative application of the governing law is especially important in derivative suits, which are subject to dismissal at the outset under Court of Chancery Rule 23.1 and similar rules. Such rules serve a critical sorting function: they "allow a plaintiff to proceed with discovery and trial if the plaintiff . . . can articulate a reasonable basis to be entrusted with a claim that belongs to the corporation" but "do[] not permit a stockholder to cause the corporation to expend money and resources in discovery and trial in the stockholder's quixotic pursuit of a purported corporate claim based solely on conclusions, opinions or speculation." *Brehm* v. *Eisner*, 746 A.2d 244, 255 (Del. 2000). The prospect of an erroneous ruling at the pleading stage is heightened in the case of a derivative suit by Treppel because his suit would be premised on the UTC board's allegedly wrongful refusal of his litigation demand, not the far more common allegation that demand is excused. As this Court has itself recognized, "the law regarding wrongful refusal [of a demand] is not as well developed" as that regarding demand excusal. *Grimes* v. *Donald*, 673 A.2d 1207, 1217-18 (Del. 1996). Only a decision by the Court of Chancery, however, is subject to review by this Court, the ultimate arbiter of Delaware law.

Moreover, if Treppel brings derivative litigation outside Delaware, UTC may well have to simultaneously defend derivative litigation arising out of the same export control violations in Delaware and whatever jurisdiction Treppel chooses. In fact, such litigation—the *Grill* action—had already been pending in

Delaware for months when UTC offered to let Treppel conduct his inspection on the condition that he bring related derivative litigation in Delaware. The *Grill* action asserted the same claims on behalf of UTC arising out of the underlying export control violations that Treppel would pursue in any derivative suit he brings. And the *Grill* action was still pending when Treppel filed this action to obtain access to UTC's books and records with license to use them to launch redundant derivative litigation in another jurisdiction. This Court did not dismiss the *Grill* action until less than a month before the trial in this action. Notwithstanding the dismissal of the *Grill* action, the possibility remains that other UTC stockholders—including any who have already demanded to inspect books and records—will institute related derivative litigation in the Court of Chancery, the natural and optimal forum for such litigation.

UTC has a simple reason for trying to avoid multijurisdictional litigation: Multiple derivative lawsuits proceeding in different forums that seek to assert the same underlying claims on behalf of the corporation are not in the corporation's best interests. The prospective relief is not doubled by the prosecution of two suits instead of one. All that grows is the cost that the corporation and its stockholders incur in litigating or settling the redundant suits. That increased cost includes not only out-of-pocket expenses, but also the burden on the corporation and its executives of administering and participating in litigation in different jurisdictions. *See In re Bear Stearns Cos., Inc. S'holder Litig.*, 2008 WL 959992, at *7 (Del. Ch. 2008) ("[d]uplicative proceedings are disfavored because they waste judicial and

financial resources"); *In re RAE Sys., Inc. S'holders Litig.*, C.A. No. 5848-VCS (Nov. 10, 2008) (Transcript) 16-17 ("It is not in the interests of diversified investors to . . . have [representative] litigation in three different places.").

The modest restriction UTC seeks does not eliminate entirely the possibility that Treppel will file a suit outside of Delaware because it does not bar him from suing in another jurisdiction without using UTC's books and records. But the restriction creates a material disincentive to such a filing, because the pleading standards applicable to derivative actions are not easily overcome without pre-complaint discovery. Section 220 is the vehicle for that pre-complaint discovery—in that sense, it is the first step in a properly conceived derivative claim. And a § 220 action may be brought only in the Court of Chancery. § 220(c). Indeed, the difficulty of surmounting the pleading requirements of Rule 23.1 is the reason this Court encourages plaintiffs like Treppel to use § 220 to obtain relevant books and records before filing a derivative suit. *See Seinfeld*, 909 A.2d at 120. So the proposed use restriction is a significant safeguard of UTC's legitimate interests.

The proposed use restriction thus protects UTC's legitimate interests while in no way impairing Treppel's legitimate interests as a stockholder. In these circumstances, UTC is entitled to the restriction. While the interests of the corporation and stockholder may sometimes conflict, requiring the court to fashion relief that impairs the interests of one to accommodate the weightier interests of the other, this is not such a case. *Cf. Henshaw*, 252 A.2d at 130 (holding that the stockholder's "right to [conduct inspection through] agents and attorneys of his own

choosing" must "give way" to accommodate the corporation's "legitimate interest in protecting its position in a lawsuit"). Here, no discretionary balancing of interests can justify denying the restriction because no interest of Treppel's would be impaired by the restriction. Accordingly, there is no basis for the court to forsake its duty to protect the corporation's interests.

Moreover, the possibility that Treppel might in the future be able to show that the balance of interests weighs against the restriction does not justify denying the restriction either. If Treppel can make that showing—the one he did not make below—he may move the Court of Chancery to lift the restriction. Court of Chancery Rule 60(b) expressly authorizes the court to relieve a party from a final judgment when "it is no longer equitable that the judgment should have prospective application." But if the restriction is withheld now, Treppel will be free to use UTC's books and records to launch derivative litigation in another jurisdiction, thus impairing the legitimate interests of UTC, even if he can *never* show that the restriction impairs his legitimate interests as a UTC stockholder. As the Court of Chancery itself recognized, "it is extremely unlikely that any other jurisdiction would be more appropriate as a forum than this one." A 451.

In sum, there is no warrant in the plain language of § 220, the decisions interpreting it, or equity for declining to impose a use restriction tailoring Treppel's inspection right to his stated purposes when awarding unrestricted relief threatens UTC's legitimate interests.

### 3. The Court of Chancery's ruling that the proposed use restriction is not authorized by § 220(c) is not consistent with the statutory text or the decisions applying it.

The Court of Chancery denied the proposed use restriction on the ground that it "is not the type of restriction" authorized by § 220(c). A 451. The court reasoned as follows: (1) the restriction amounts to a "prophylactic anti-suit injunction" barring Treppel from bringing a derivative action outside Delaware; (2) the "legitimate" mechanism for limiting the forum in which a stockholder may bring a derivative action is a charter or bylaw provision; (3) therefore, the restriction is not available under § 220(c). A 451.

The court's reasoning is flawed. To begin with, the proposed use restriction does not operate as an anti-suit injunction. An anti-suit injunction restrains a party from instituting or proceeding with an action in another forum. *See, e.g.*, *Household Int'l, Inc.* v. *Eljer Indus., Inc.*, 1995 WL 405741, at *3 (Del. Ch. June 19, 1995); *see also* Edward F. Sherman, *Anti-Suit Injunction and Notice of Intervention and Preclusion: Complementary Devices to Prevent Duplicative Litigation*, 1995 BYU L. Rev. 925, 926-27. Under the use restriction proposed here, however, Treppel remains free to file and prosecute a derivative suit in whatever jurisdiction he wishes. The restriction bars him only from using documents produced pursuant to § 220 in litigation outside Delaware. That restriction is not an anti-suit injunction. It is rather a use restriction on a document production of the most ordinary and conventional sort. Indeed, the Court of Chancery's own standard protective order, like those commonly issued by other courts, bars the use of discovery pro-

duced in the action in any other litigation, and thus in any other jurisdiction. *See* Court of Chancery Sample Stipulation and [Proposed] Order Governing the Production and Exchange of Confidential Information ¶ 9 (providing that "Discovery Material shall be used solely for purposes of this Litigation and shall not be used for any other purpose . . . including . . . any other litigation or proceeding"). The court thus erred in holding that the use restriction was an anti-suit injunction in all but name.

Compounding that error, the Court of Chancery then assumed that it did not have the authority to impose the use restriction under § 220(c) because UTC itself has the ability to regulate where Treppel may bring a derivative suit by adopting a charter or bylaw forum selection provision. In making that assumption, the court overlooked a basic tenet of statutory construction—that a statute "is to be interpreted according to its plain and ordinary meaning." *New Cingular Wireless PCS* v. *Sussex Cnty. Bd. of Adjustment*, 65 A.3d 607, 611 (Del. 2013). Section 220(c) provides that "[t]he Court may, in its discretion, prescribe *any* limitations or conditions with reference to the inspection . . . as the Court may deem just and proper." (emphasis added). Nothing in the plain language of § 220(c) suggests that the court is not authorized to impose a limitation on a particular stockholder's inspection right just because the corporation can amend the corporate contract in a manner that would incidentally impose the limitation at issue. But that is what the Court of Chancery concluded—simply because UTC could adopt a forum selection provision barring all stockholders from bringing internal affairs suits outside Del-

aware, the court could not impose a restriction under § 220(c) barring Treppel from using the books and records produced for inspection in a derivative suit outside Delaware. The court's reading thus inserts into the statute, without any textual basis, a broad exception to the equitable power that § 220(c) confers on the court.

The Court of Chancery's reading of § 220(c) is inconsistent not only with the plain language of that provision, but also with the decisions interpreting and applying that provision. In *CM & M*, this Court modified the judgment to, among other things, bar the stockholder from disclosing the books and records produced for inspection to anyone who did not execute a confidentiality agreement. 453 A.2d at 794. This Court explained that it was imposing the restrictions "in order to protect the corporation's legitimate interests." *Id.* at 793-94. Before imposing those restrictions, the Court did not determine whether the corporation could itself effectively impose the same restrictions on the stockholder by amending its charter or bylaws. *Id.*; *see also Henshaw*, 252 A.2d at 129-30 (cited with approval in *CM & M*, 453 A.2d at 794). Nothing in the analysis in that case, or in other cases involving § 220(c), suggests that the corporation's ability to amend its charter or bylaws is at all relevant to the question whether the court may impose a restriction on a particular stockholder's inspection right.

Moreover, the Court of Chancery's ruling appears to rest on the premise that a corporation will never need the protection of the proposed use restriction because a corporation can always rely on a charter or bylaw forum selection provision. But this very case exposes the flaw in that premise. Citing out-of-state cases, Treppel

argued at trial that UTC's new forum selection bylaw does not regulate where he may bring derivative litigation because it was adopted after he acquired his UTC shares—an argument rejected by the Court of Chancery in *Boilermakers Local 154 Ret. Fund* v. *Chevron Corp.*, 74 A.3d 934, 955-56 (Del. Ch. 2013).[4] A 441. In its ruling, the Court of Chancery acknowledged that Treppel might well file suit in another jurisdiction challenging the application of UTC's bylaw to him on that basis, and suggested that UTC's recourse was to then seek a declaratory judgment or anti-suit injunction in the Court of Chancery to enforce its bylaw. A 451. But that is no recourse at all: even assuming that UTC could persuade the Court of Chancery to grant such extraordinary relief, the court would not have the requisite jurisdiction over Treppel, a California resident, A 433, to order that relief. In contrast, Treppel does not dispute that he would be bound by, and would comply with, a restriction imposed in this action barring him from using UTC's books and records in an action in another jurisdiction. Thus, the restriction UTC seeks would serve as an important safeguard of its legitimate interests, notwithstanding the existence of its forum selection bylaw.

[4] As the court explained in that case, a stockholder is bound by a board-adopted bylaw, including a forum selection bylaw, regardless of when the stockholder bought his shares. *See id.* at 956 (explaining that under the framework of the corporate contract, "the stockholders assent to not having to assent to board-adopted bylaws"). UTC's charter, like those of Chevron Corp. and FedEx Corp., gives the board the power to adopt bylaws unilaterally.

### 4. The Court of Chancery's ruling that the proposed use restriction is not authorized by § 220(c) is not consistent with the policies underlying § 220 or Court of Chancery Rule 23.1.

Rule 23.1 is a "screening mechanism" for derivative actions that "deter[s] costly, baseless suits." *Brehm*, 746 A.2d at 255 (quoting *Grimes*, 673 A.2d at 1217). As such, the rule "does not permit a stockholder to cause the corporation to expend money and resources in discovery and trial" unless the stockholder has overcome the rule's heightened pleading requirement. *Id.* at 255. Although this Court has encouraged would-be derivative plaintiffs to seek limited pre-complaint discovery through § 220, *see, e.g.*, *id.* at 266, it has emphasized that the nature of relief available under § 220 is "not the same and should not be confused with" the documentary discovery available under the Court of Chancery's rules, *Sec. First Corp.* v. *U.S. Die Casting & Dev. Co.*, 687 A.2d 563, 570 (Del. 1997). While § 220 entitles a stockholder only to books and records "essential and sufficient to its stated purpose," *id.*, Rule 34 entitles a plaintiff to all documents that are merely "relevant" to the action. This Court thus contemplates a system in which § 220 and Rule 23.1 operate in tandem to minimize the costs to the corporation of derivative litigation, while still permitting tailored pre-complaint discovery of corporate books and records in support of potentially meritorious suits.

Under the Court of Chancery's ruling, however, § 220 and Rule 23.1 work at cross-purposes, rather than as complementary devices for efficiently managing derivative litigation costs. Below, the court ruled that Treppel was not entitled to one of the seven categories of documents he sought for inspection because he had

failed to show that it was essential to his stated purposes. But the court required no similar showing to support Treppel's claim that he was entitled to *use* those books and records to litigate in another jurisdiction. Instead, the court denied UTC's proposed use restriction even though Treppel had not demonstrated that the use was essential—or even helpful—to his proper purpose. Considered as a whole, the Court of Chancery's ruling does not advance a coherent scheme for the efficient management of Delaware-law derivative litigation. The long-standing rationale for limiting the inspection of books and records to those necessary to effect the stockholder's proper purpose is to minimize the cost to the corporation. It thus makes little sense for the court to parse categories of documents to determine which are necessary to a stockholder's purpose, but to nevertheless permit the stockholder to *use* those documents in ways that are not necessary to a stockholder's purpose and that threaten to impose costs on the corporation.

Furthermore, had Treppel sought UTC's books and records under Court of Chancery Rule 34, that production would have been subject in the normal course to a protective order. Protective orders commonly prohibit the use of discovery produced in the action in another litigation—and by definition, in another court. *See, e.g.*, Court of Chancery Sample Stipulation and [Proposed] Order Governing the Production and Exchange of Confidential Information ¶ 9 (providing that "Discovery Material shall be used solely for purposes of this Litigation and shall not be used for any other purpose . . . including . . .any other litigation or proceeding"). Section 220 is often, as it is in this case, a vehicle for pre-complaint discovery. *See*

Stephen A. Radin, *The New Stage of Corporate Governance Litigation: Section 220 Demands*, 26 Cardozo L. Rev. 1595, 1647 (2005) (observing that § 220 actions by potential derivative plaintiffs are actions for "in essence, pre-complaint discovery intended to facilitate better drafted complaints"). The restriction on inspection proposed here operates as a conventional use restriction of the sort found in nearly every protective order, requiring that documents produced pursuant to the court's rules should be used only in that court and only in the context of the anticipated proceedings. There is no reason that Delaware corporations should receive less protection for pre-complaint discovery produced pursuant to § 220 than they would receive in any other court and in any other litigation.

UTC incorporated here more than 75 years ago to benefit from this state's corporate law, widely recognized as the most comprehensive and sophisticated in the nation. And UTC's stockholders have endorsed that choice by investing in the company. The benefit UTC and its stockholders seeks through incorporation here includes the authoritative, expert, and consistent application of Delaware law by the Delaware courts. For that reason, the courts of other states that look to Delaware law in developing their own corporate law regimes look not to decisions that merely apply Delaware law, but to the authoritative decisions of our courts.

Yet under the Court of Chancery's ruling, the court may never impose a restriction limiting the use of the corporation's books and records in litigation to use in an action in Delaware. The consequence in this case is that Treppel may use UTC's books and records to launch derivative litigation in another jurisdiction,

even though UTC has already litigated a derivative action seeking the very same relief on the very same facts to a final judgment in this Court, and even though other UTC stockholders have demanded and could yet demand to inspect books and records on the same subject, thus raising the possibility of duplicative derivative suits. Furthermore, the consequences of the Court of Chancery's ruling in other cases will be even more harmful to the corporation. Under the Court of Chancery's ruling, a stockholder like Treppel will be able to use corporate books and records to launch derivative litigation in another jurisdiction even if a dozen suits on the same subject are pending in the Court of Chancery.

There is no good reason for permitting a stockholder to use the corporation's books and records to launch derivative litigation in another jurisdiction, when the stockholder cannot show that such use advances a proper purpose. A restriction limiting the forum in which a stockholder may use the corporation's books and records is a reasonable, statutorily authorized mechanism for promoting the orderly and efficient management of derivative litigation. The Court of Chancery's ruling that such a restriction is nevertheless unavailable as a matter of law is the result of asking the wrong question. The question is not whether the court can or should order a stockholder not to bring a derivative suit in another jurisdiction. Rather, the question is whether anything in § 220, or Delaware law generally, requires the court to facilitate litigation that threatens the corporation's best interests by ordering not only the production of corporate books and records, but license to use them to litigate in another jurisdiction. The answer to that question is no.

## CONCLUSION

For the foregoing reasons, the judgment of the Court of Chancery should be modified to include a restriction barring Treppel from using the books and records produced for inspection in an action outside Delaware.

MORRIS, NICHOLS, ARSHT & TUNNELL LLP

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April 25, 2014

# Exhibit A

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

| | | |
|---|---|---|
| LAWRENCE TREPPEL,<br><br>Plaintiff,<br>v.<br><br>UNITED TECHNOLOGIES CORP.,<br>a Delaware corporation,<br><br>Defendant. | ) | C.A. No. 8624-VCG |

**FINAL ORDER AND JUDGMENT**

For the reasons stated on the record at the conclusion of trial on January 13, 2014, it is hereby ORDERED that:

1. Plaintiff's demand under 8 *Del. C.* §220 to inspect the books and records of Defendant United Technologies Corp. (the "Company") is granted as to the books and records identified in request numbers 1, 4, 5 and 6 in Plaintiff's demand for inspection (the "Demand"), which is attached to Plaintiff's complaint herein as Exhibit A. In addition, Plaintiff's Demand is granted with respect to the books and records identified in request numbers 2 and 3 of Plaintiff's Demand, but as narrowed in the Court's ruling. Plaintiff's Demand is denied as to the books and records identified in request number 7 of Plaintiff's Demand.

2. Inspection or production of the books and records shall occur within thirty (30) days of the date of the final resolution of any appeal. In the event that the Company withholds documents on a claim of privilege or as attorney work-product, it shall provide a privilege log within ten (10) days of the completion of production.

3. As a condition of Plaintiff's inspection, Plaintiff shall enter into an appropriate confidentiality stipulation with Defendant.

4. In accordance with Court of Chancery Rule 54(d), the costs of the action are awarded to Plaintiff.

5. The Register in Chancery is directed to enter and docket this Final Order and Judgment in the above captioned matter.

DATED: _____

_____
THE HONORABLE SAM GLASSCOCK, III
Vice Chancellor

924559_1

This document constitutes a ruling of the court and should be treated as such.

**Judge:** Sam Glasscock

**File & Serve Transaction ID:** 54972821

**Current Date:** Feb 12, 2014

**Case Number:** 8624-VCG

**Case Name:** Treppel, Lawrence vs United Technologies Corp

**/s/ Judge Glasscock, Sam**

# Exhibit B

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

| | | |
|---|---|---|
| LAWRENCE TREPPEL, | : | |
| | : | |
| Plaintiff, | : | |
| | : | |
| v. | : | Civil Action |
| | : | No. 8624-VCG |
| UNITED TECHNOLOGIES CORP., a Delaware Corporation, | : | |
| | : | |
| | : | |
| Defendant. | : | |

- - -

Courtroom No. 1
Court of Chancery Courthouse
34 The Circle
Georgetown, Delaware
Monday, January 13, 2014
10:05 a.m.

- - -

BEFORE: HON. SAM GLASSCOCK, III, Vice Chancellor.

- - -

TRIAL TRANSCRIPT

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CHANCERY COURT REPORTERS
500 North King Street
Wilmington, Delaware 19801
(302) 255-0521

APPEARANCES:

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Cooch and Taylor, P.A.
-and-
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Robbins Arroyo LLP
for Plaintiff

WILLIAM M. LAFFERTY, ESQ.
D. MCKINLEY MEASLEY, ESQ.
Morris, Nichols, Arsht & Tunnell LLP
-and-
WILLIAM SAVITT, ESQ.
ANITHA REDDY, ESQ.
of the New York Bar
Wachtell, Lipton, Rosen & Katz LLP
for Defendant

- - -

they're all matters of law that have been resolved as a legal question. And it isn't that in an individual instance, there might be an argument to be had, but there is nothing shown at all to say why such a condition isn't appropriate here. The record is barren. And in light of that, the condition that is being requested is eminently reasonable. And for that reason, we would suggest, at a minimum, this objection to the condition should be waived.

THE COURT: Thank you.

Mr. Arroyo, anything else?

MR. ARROYO: No, Your Honor.

THE COURT: Thank you. I appreciate that.

Counsel, first let me say it's always a pleasure to -- that one of the great benefits and joys, frankly, of sitting on this Court is hearing argument and watching litigation from the finest lawyers from around the country. And it's a great pleasure to have you here, Mr. Arroyo, and it was the same, Mr. Savitt, to have you argue and have Ms. Reddy conduct examination. That's always a great pleasure to me to have the benefit of legal minds from outside my jurisdiction. I appreciate that, and I appreciate

you, again, coming here to Georgetown. That was of assistance to me.

I think I can give you a decision because I think the legal issues are fairly clear. So let me start with the issues under Section 220(b).

There is no question that under Section 220, Mr. Treppel has fulfilled the technical requirements here. The question involves proper purpose. There is a serious underlying issue. Mr. Treppel made a litigation demand on the board. The board refused it. And the explanation given to Mr. Treppel was simply the board had determined that that explanation -- or that that litigation would not be in the best interests of the company.

Given that, our case law is clear that inquiring about why that decision was made is a proper purpose. And, frankly, the proper purpose itself is not simply curiosity but to determine whether the board in rejecting the litigation demand has breached a duty to the corporation, which it is appropriate, then, for this stockholder to vindicate. So that much of a proper purpose is clear.

The argument here, really, is that in rejecting the offer of some or most of the documents

he seeks on the basis that they were offered subject to a forum litigation clause and in not otherwise supplementing the record, Mr. Treppel falls short of showing a proper purpose because there is a reasonable suggestion based on that record that he intends or at least is considering litigating outside this jurisdiction, and that that, in itself, is inimical to the corporation and its stockholders and vitiates any proper purpose he may have had.

I have to reject that. I don't think that it vitiates a proper purpose that there is not a foreswearing of litigation outside the jurisdiction.

So I find that the plaintiff has stated a proper purpose under Section 220(b) and he is entitled to the documents he seeks, assuming that they are tailored to his proper purpose. And I will discuss that issue in a moment.

The question then becomes what restrictions should be placed on the use of those documents under 220(c). It's clear that there should be a confidentiality order in place. I don't think the parties are in serious disagreement on that, either as to whether it should exist or as to its form. I assume that can be worked out among the

parties.

The real question is whether I should impose under Section 220(c) a condition that should the documents convince the petitioner that litigation on behalf of the corporation is in his interests as a stockholder and the corporation's interests, that he limit that litigation to this jurisdiction.

Mr. Savitt is absolutely convincing, should I have needed any convincing, that the best forum for that litigation is Delaware. The Delaware Supreme Court is the only Court that can render a definitive decision as to what the law of Delaware is with respect to fiduciary duties and the internal affairs of Delaware corporations. And UTC, of course, is a Delaware corporation. But I think that that, perhaps, is not precisely the question in front of me.

The question in front of me is not, in nearly all the situations, what is, in my opinion, best for Delaware. It is whether I can issue what amounts to a prophylactic anti-suit injunction as a part of -- as a condition for the release of records in a 220 action, and if I can, whether I should.

I think that that is not the type of restriction that 220(c) seeks to impose. There is a

mechanism for limiting which forum a suit may be brought in to enforce corporate interests, and that is through either a charter or bylaw provision. And UTC, in fact, has put one in place here.

It's quite possible that if I order these documents produced, and if they lead Mr. Treppel to believe that litigation is in his best interests as a stockholder and in the interests of the corporation, and if he should attempt to bring it in another jurisdiction, that that barrier will be raised to that litigation, effectively. I suppose there could also be a declaratory judgment action in this Court in such a situation or a request for an anti-suit injunction.

There are avenues, legitimate avenues, through which to limit multiple jurisdiction litigation or litigation that is in violation of the bylaw restriction as to forum. And I will leave to whatever Court examines that issue whether retroactive application -- it would not be retroactive to the litigation, obviously -- whether the demand is appropriate. But my main point is that there are ways to attempt to limit such extra-Delaware litigation of issues that involve internal affairs of a Delaware corporation.

Given that, it seems to me to say to a litigant, "I will give you these documents but only if you agree to not litigate in any other jurisdiction," notwithstanding the fact that that jurisdiction would have both personal and subject matter jurisdiction over the litigation, which is an undue burden on the rights of the stockholder.

And I say that notwithstanding my profound agreement with Mr. Savitt's argument that it is extremely unlikely that any other jurisdiction would be more appropriate as a forum than this one.

And so I am imposing under 220(c) a confidentiality agreement to be worked out between the parties but not the forum restriction that is sought here. So the question remaining is the scope of the demand.

Points 2 and 3 have been, I think, legitimately narrowed to read, "All meeting minutes of the Board's Audit Committee in which petitioner's litigation demand is considered and any written report or presentation" -- this is number 3 -- "regarding that litigation demand." That was an early tailoring that was made, and I think it's entirely appropriate.

The discussion concerns number 7, and

I'm going to read it into the record. "All documents concerning the steps the Board and Company have taken in response to the broader concerns raised by Mr. Treppel's litigation demand, including measures to remedy certain improper and illegal business practices of the Company and its Pratt on Whitney Canada Corp. and Hamilton Sundstrand Corporation subsidiaries, including illegally providing U.S. government with military technology to China, and making false and belated disclosures to the U.S. government regarding those illegal exports."

That is profoundly overbroad. Our Section 220 is limited to documents that are necessary to the proper purpose. Here, the proper purpose is investigating the board's decision to reject Mr. Treppel's demand. There's been an attempt in the answering, which is the last set of briefing, to limit that to a timeframe more closely tailored to the interests here.

First of all, I think that's an inappropriate place to try to impose such a limitation on such a profoundly overbroad request. Second, it seems to me that the precise investigation here will turn up any such remedial actions which the board

considered in rejecting the demand.

So I'm not at all convinced that, essentially, number 7 will not be a null set with respect to the proper purpose, but to the extent it's not, the overbreadth is so profound and the attempt to limit it is so late that I think it's improper, in any event.

So I am directing the release of documents pursuant to Items 1 through 6 with the caveat that numbers 2 and 3 have been narrowed pursuant to an appropriate confidentiality order.

Is anything I've said here unclear, Mr. Arroyo?

MR. ARROYO: Not to us, Your Honor.

THE COURT: Anything unclear to the corporation?

MR. LAFFERTY: No, Your Honor. I think we understand that. There is one issue I think we wanted to discuss with Your Honor.

THE COURT: I'll be happy to hear it.

MR. LAFFERTY: Which would be the following, which is, Your Honor, I guess we would ask that we be given the opportunity to appeal the ruling here today but to not have our colleagues run off and

file litigation outside of Delaware. So I assume it would be in the form of asking for an injunction pending any appeal that they not be permitted at this point to file an underlying derivative case outside of this jurisdiction.

THE COURT: I assume if an appeal is filed, Mr. Arroyo, there is not going to be litigation outside the jurisdiction based on these documents. I'm not even sure the documents would be produced in that time period. Is that --

MR. ARROYO: I'm at a loss here, Your Honor. You're asking me if they file an appeal -- I don't know when we're going to get the documents or when they're going to file an appeal, but if you're asking if we get the documents and they file an appeal --

THE COURT: Let me ask Mr. Lafferty because I'm not so sure. I assume there is going to be an appeal and that my order would be stayed pending the appeal, so there would be no documents turned over. They can file suit wherever they want, I guess, but without the documents, because you've not asked for that type of anti-suit injunction.

MR. LAFFERTY: That is correct,

Your Honor. Why don't we do this? Why don't we discuss it with our colleagues in the context of producing the documents.

THE COURT: All right. Let me say this: To the extent the documents are produced, I think the Supreme Court should have a chance to opine as to whether the request for a restriction on the forum is appropriate before suit is filed. So try to work that out. If you can't work it out, give me a suggestion, and I'll do what I can to impose it because I think that's appropriate. But it would seem to me that the best way to proceed is for me to simply have the order stayed pending any appeal, as I assume the Supreme Court would desire.

MR. ARROYO: Well, the problem that I have with that, Your Honor, is I haven't had an occasion yet to look at the extent to which that's appropriate here. And I hate to disagree with Your Honor because I hear the wisdom. I'm just at a loss as to whether I should be doing this on my feet. Can we have some period of time to at least look at this before I say, yes, that's fine with me?

THE COURT: All right. Wisdom is in great abundance here but so is caution, probably to a

much greater degree than wisdom, I'm afraid. Sure. Why don't you do this. I am in trial in Wilmington all week, but if you'll contact my secretary, she'll make an appointment for you. During one of the breaks, we can have a telephone conference. If you work something out, great. If you need further participation on my part, that's fine too, and I'll give you whatever time you need to do that.

So what I'm going to want, I suppose, is a form of order that embodies both my bench ruling and whatever conditions are put in place. If you can agree to that, that would be fine. If not, as I say, we'll address it.

MR. ARROYO: I bet we'll get there.

THE COURT: Anything else we can do?

MR. LAFFERTY: No. Thank you.

THE COURT: I appreciate the high level of the argument. It was a pleasure. And the brevity of the evidentiary presentation was also a pleasure. So I thank you all for your cooperation, and I look forward to hearing from you.

MR. LAFFERTY: Thank you.

MR. BENNETT: Thank you, Your Honor.

(Court adjourned at 11:40 a.m.)

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CERTIFICATE

I, JEANNE CAHILL, RDR, CRR, Official Court Reporter for the Court of Chancery of the State of Delaware, do hereby certify that the foregoing pages numbered 3 through 85 contain a true and correct transcription of the proceedings as stenographically reported by me at the hearing in the above cause before the Vice Chancellor of the State of Delaware, on the date therein indicated.

IN WITNESS WHEREOF I have hereunto set my hand at Wilmington, Delaware, this 15th day of January, 2014.

/s/ Jeanne Cahill
---
Official Court Reporter
of the Chancery Court
State of Delaware

# Exhibit C

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE RAE SYSTEMS, INC. SHAREHOLDERS LITIGATION ) CONSOLIDATED ) C.A. No. 5848-VCS

- - -

Chancery Conference Room
New Castle County Courthouse
Wilmington, Delaware
Wednesday, November 10, 2010
3:00 p.m.

- - -

BEFORE: HON. LEO E. STRINE, JR., Vice Chancellor.

- - -

HEARING ON MOTION TO EXPEDITE

- - -

APPEARANCES:

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THE COURT: Good afternoon, everybody.

MR. SCAGGS: Good afternoon, Your Honor.

THE COURT: I assume we have some esteemed guests on the phone.

MR. SCAGGS: Yes, Your Honor. On the phone representing my clients are, also, Dean Kristy and Kevin Muck, from Fenwick & West in San Francisco.

MR. SEITZ: With me, Your Honor, is David Berger and Steve Guggenheim, from the Wilson, Sonsini firm.

MR. WILLIAMS: Your Honor, it's Greg Williams. I don't know if Jordan Hershman has joined yet, from Bingham.

THE COURT: Mr. Hershman?

A MAN: He apparently is still trying to dial in.

(Mr. Hershman joined the conference.)

THE COURT: Mr. Hershman? Mr. Hershman?

MR. HERSHMAN: Yes.

THE COURT: Is that you? Good.

MR. HERSHMAN: It is.

THE COURT: I understand it's been

quite a technological journey.

MR. HERSHMAN: You are correct.

THE COURT: We are glad to have you.

Mr. Rigrodsky, your motion. Right?

MR. RIGRODSKY: Yeah, Your Honor. Would the Court want me to address the defense motion to proceed in one jurisdiction or the motion to expedite?

THE COURT: Well, I mean, the motion -- you know, you haven't formally answered the motion to proceed in one jurisdiction. I know the origin of the motion to proceed in one jurisdiction. I want to -- I believe it's a Wachtell invention, originally, that has spread.

Is it your intention to have me decide it today? You didn't answer it. I mean, it was more your motion to expedite that brought us here. I -- obviously, the papers then raised the question that had -- the motion had been filed shortly before Halloween. My understanding, my esteemed colleague in California is going to be hearing the same motion Friday?

MR. RIGRODSKY: Actually, the -- we just found out that the Court in California postponed

-- adjourned the hearing until December.

MR. SCAGGS: December 3rd, Your Honor.

MR. RIGRODSKY: So it's not going to be decided. We did respond --

THE COURT: Adjourn -- you sent a letter.

MR. RIGRODSKY: Right.

THE COURT: I mean, the art of letter writing is much diminished in this day and age, I understand. It would be good for it to come back, but not in -- my aging eyes are such that when people want to file motions, or oppose things, I want them to file briefs, and I want to double space it. Single-spaced page, I mean, even with motions-to-expedite letters -- honestly, I know we do it as scheduling things. If they are going to be like ten pages of legal argument, why not file an answering brief in opposition to the motion to expedite?

The real question is: As a practical matter, what are we doing today? There is no -- as I understand it, there is no stockholder vote scheduled --

MR. RIGRODSKY: That's correct.

THE COURT: -- yet. Is it -- am I

correct in assuming that if the board exercises its ability to accept a superior proposal, that there is a release of the large stockholders from any obligation to vote for this deal? Or no?

MR. SCAGGS: Well, that is my understanding, Your Honor.

THE COURT: So that if the board exercises its contractual out, then the -- is he the founder?

MR. SCAGGS: There is two. One is the founder. One is a more technological side. There is two gentlemen, yes, Your Honor.

THE COURT: The founders can also vote their shares in favor of that superior proposal?

MR. SCAGGS: That is my understanding.

THE COURT: Is there anybody on the phone that does not have that understanding?

MR. SCAGGS: Mr. Muck and Mr. Kristy are actually closer to more of the details. I'm not sure if they will know any better than I.

MR. KRISTY: This is Dean Kristy. Yes, they would have the right to vote in favor of the proposal in the event the board terminates the existing deal in accordance with the terms.

THE COURT: Right. I assume their ability to not vote is tied to whether the board has exercised its out.

MR. KRISTY: Correct, Your Honor.

THE COURT: There is no -- the defendants are telling me there is no likelihood of any meeting even this calendar year?

MR. SCAGGS: Yes, Your Honor. Our best estimate is -- we are still preliminary with the proxy. The SEC is doing a review, which takes --

THE COURT: Right. My only question about the best estimate -- it's nice at this point; right? It's to the defendants' advantage at this point to say, "Don't worry about it. You know, get your Christmas shopping done. Focus on your turkey. If you can afford a place in Florida, the Caribbean, over the holidays, go." Then all of a sudden it gets approved by the SEC and a meeting is set for December 9th and, "Oh, no. We couldn't push it back. Yes, we said it before, but now there is an exigency, which means it's convenient for us to push forward at this point."

Are defendants telling me we are not going to expect a meeting before the middle of

December, at the earliest, and most probably not until next year?

MR. SCAGGS: That would be -- that would be the absolute -- more like the middle of January, I think, is fairly conservative, but certainly the middle of December I think would be faster than we could even anticipate.

THE COURT: Realizing that your clients will then bust your chops if you get clearance and want you to come back to me or my colleague in California and say, "It's got to be in a hurry."

And you say, "We told the judge this."

And they will say, "But we are the clients."

I mean, I get -- I'm trying to appreciate your real world. And it just has real-world implications for Mr. Rigrodsky and the other plaintiffs, and has real-world implications for the Court.

What I'm a little confused about is: What we are supposed to be doing here? As I understand it, the board is actively giving some information to another possible bidder. Right?

MR. SCAGGS: Yes, Your Honor.

THE COURT: And the SEC is reviewing the preliminary proxy.

MR. SCAGGS: Correct.

THE COURT: So how would I set an injunction hearing, Mr. Rigrodsky?

MR. RIGRODSKY: I think, Your Honor, what we are asking for is a -- at least in this context, is the relaxation of the deadlines on discovery, in the sense that I don't think we would be necessarily asking the Court to schedule a date on preliminary injunction right now, because obviously, the hearing date is -- the meeting date has not been set. But in circumstances very similar to this, where there is a preliminary proxy held, we have read the decisions of the Court to say that it is the proper time to challenge the deal terms or disclosures, and we are doing that now.

We would like the defendants to begin the production of some core documents. It's -- just to be clear, this is not a go-shop, or anything like that. They supposedly did that, or had a pre-shop, before this merger agreement was entered into.

THE COURT: You don't have any doubt that they actually talked to a large number of buyers?

MR. RIGRODSKY: I have no reason to believe that what is set forth in the preliminary proxy is untrue. But on the other hand, right now, a couple of things: There is a preliminary proxy on the street. The deal is going forward. There is no -- the process hasn't stopped. They are not actively shopping the company right now. I think it's problematic for us, as we set forth in our papers, that after this supposed canvassing of the market to strategic and financial buyers, this firm comes out of nowhere and makes its offer. It's problematic for us in that the offer appears to be superior --

THE COURT: The buyer, the one who signed up, is a private -- the one that signed up is a private equity firm?

MR. SCAGGS: Yes, Your Honor. Yes, they are. Yes, they are. Both are, and the insurgents also. They both are. Yes, Your Honor.

THE COURT: I'm not spoiling anything to say that I think that the interloper is not KKR?

MR. RIGRODSKY: That's probably correct.

MR. SCAGGS: I can reveal that, Your Honor. That is not too confidential. It's not KKR.

THE COURT: It's not KKR. I don't know. I guess I am the -- the economic idea that, you know, it's somehow implausible for -- that you might have -- that there might be buyers that come out of the woodwork because someone else has validated the value of something does not seem strange to me at all. Seems to me to happen all the time. In fact, I did a class on a very famous, very controversial Delaware Supreme Court case in which very distinguished member of the M&A bar, when asked about why his client hadn't made an offer for equity value of a company, said, "Well, until that other person..." -- basically, "Until that other person signed up a contract to pay value for the equity, there was no equity value." And that -- they hadn't even bought a share of the stock. And, "So it was only when someone else actually looked at it and thought there might be a value?

"Yes, Your Honor. Before that, we will buy it in bankruptcy. That doesn't mean it was fair for them to leave us out once we determined -- had our impression of value valued by a competitor. Of course, our motivations are different."

I'm not sure what to make of that, Mr. Rigrodsky. What I'm trying to figure out,

practically speaking, even from the defendants, is how you want me to proceed. Is there a reason why the hearing in California got moved back?

MR. RIGRODSKY: Don't know, Your Honor.

THE COURT: The only thing going on in California now, essentially, the motion, or is there discovery?

MR. RIGRODSKY: There is a motion to expedite that one of the firms filed responses to. Their document requests are due. I don't know what is happening in that regard. And four different firms have filed motions for lead plaintiff there.

THE COURT: The motion to expedite, is that going to be heard in December, too?

MR. SCAGGS: Yeah. The three things that were on for Friday, which have been moved to the 3rd -- I believe all three. That is motion for appointment of lead counsel, the motion for limited expedited discovery, I believe, and the one foreign motion, which is the counterpart to what we filed here. All those are on for December 3rd.

MR. RIGRODSKY: Our difficulty is that we have reached out to one of the firms, in

particular, and the others, and we tried to see if we could work this out as far as proceeding in one jurisdiction. But with four competitors jockeying for position in California, it's a moving target for us.

THE COURT: They have no agreement among themselves?

MR. RIGRODSKY: There is no agreement right now. The Delaware cases are consolidated, coordinated, and we want to move forward.

THE COURT: I understood there was one California plaintiff willing to proceed. Were you able to reach any agreement with that plaintiff?

MR. RIGRODSKY: Yes. Yes, we were, but only if they become lead counsel. They put that in their papers in California.

THE COURT: Only if they become sole lead counsel?

MR. RIGRODSKY: That's what they told us, yes.

THE COURT: There is a kind of --

MR. RIGRODSKY: Cooperating with us, I guess, is an advantage. I hope. But, you know -- we are in a tough position vis-a-vis the other plaintiffs, but we want to sort of direct ourselves to

the case at hand.

I agree with the Court. The general proposition, it's not -- unremarkable that a financial buyer sort of jumps in, sees what might happen. But the buyer here is a buyer that specializes in these technology companies. And you know, there are -- I'm sure it's a well-known short list of private equity firms that invest in companies like RAE. I don't know if they contacted here, or not --

THE COURT: Every fifth person I meet at some corporate hoo-ha is in some form of private equity.

MR. RIGRODSKY: But I imagine that the universe must be somewhat limited, because the banker for the committee did go out and identify people who might be interested. So there is some -- someone has a short list somewhere. I don't know whether this -- this bidder, this new bidder, was part of that group or not. What is problematic to us is it's a superior-priced offer. I know the board said, "Okay. We are willing to give you documents, engage in due diligence," but the thing about this offer which is different from the offer on the table, which is going forward, is there is no equity component to us, to the

founders, no rollover shares. Therefore, the offering price is higher, $1.80, as opposed to $1.60.

THE COURT: I don't know why that is necessarily higher.

MR. RIGRODSKY: Less cash to the buyers -- to the sellers and, you know -- so the cash price would necessarily be higher. That is our theory.

THE COURT: Right.

MR. RIGRODSKY: The current deal has cash and equity in it. So if you took -- if you said, "No. You are just getting equity and no cash," more cash to give to the shareholders. At least that is our contention.

THE COURT: Well, yeah. But your cost of acquisition is actually higher than the roll. Right?

MR. RIGRODSKY: Possibly.

THE COURT: Well, I think it is. I mean, your immediate out-of-pocket is higher, right, because you are buying -- the premise of this is they are going to buy the founders out.

MR. RIGRODSKY: Right.

THE COURT: A lot of -- you lower your

cost of equity acquiring, it's viewed as an opportunity, and most private equity firms compete in some ways on the notion, "Well, you know, however good they are to you as managers, we are even better," although this is a level of the market that is a little bit different and, you know, the lunch is probably not at the Four Seasons.

MR. RIGRODSKY: Right.

THE COURT: Might be at In-N-Out Burger, if you are in LA. I don't know where in Silicon Valley you would go. Probably -- maybe not as good as In-N-Out Burger. But what I'm trying to -- the defendants have moved to what? You have -- you haven't moved to stay either case? You have moved -- "We are happy to be anywhere, as long as it's one place"?

MR. SCAGGS: That's essentially our position. We have -- we have moved, in the alternative, if we can't --

THE COURT: I grant your idea -- I grant the notion this -- for stockholders, this should be in one place. Okay. No -- I have said this before. I believe in the value of the representative litigation process for investors. It is not in the

interests of diversified investors to have food fights about -- and have litigation in three different places. It doesn't make any sense. I defy anyone to explain how it's good for investors. It's not. And it cannot be justified on the grounds of it's good for investors.

There is no magic place. I happen to believe -- and it's no secret -- that in expedited litigation, that -- and there is a choice between two forums, the forum whose law is at stake ought to go forth. My California colleague is much smarter in California law than I am. I have no insecurity in saying that. That is what he or she does all the time. I don't even have the books on my shelves, and I doubt he or she has the Delaware books on his shelf. You can -- I have done California-law cases, but that is not my expertise. If -- and I certainly don't -- you can't get appellate review in Delaware that is authoritative under California law. You can't get, in California, appellate review authoritative under Delaware law.

And my view in expedition, that's when, frankly, it's most important that things be heard -- you kind of stay in your own lane. That is

why I have deferred to New York, other courts. I have a case now where I tried to defer to Massachusetts on their own statute, and there is something under judicial advisement, and my judicial colleague up there doesn't want to hear it. I'm trying to avoid: Why am I interpreting a Massachusetts statute?

I mean, I will tell you my inclination is this ought to be -- if it's a jump ball, which it is, everybody -- I don't give any credit, by the way, to the: "Gee, I was the first to file," in a situation where there is no need to be first. "So what I did was I skimmed the document." Usually, in elementary school and middle school you get taught by your teachers to actually -- "If you have 30 minutes for a test, why are you done in two, when you just got 18 of the 20 questions wrong because you never read any of them?" That would tend -- teachers tend to punish that behavior.

I don't know why, in situations where there is really no genuine exigency -- I thought about writing an opinion where it says the presumption is if you are the first to file in a situation where there is no necessity, and where the amount of time you took on its face indicates that you didn't do adequate

reflection, that should actually count against you, and you should go to the end of the line. The presumption should be if it's within 48 hours of a press release, you are out of luck unless something is going to happen in the 48 hours.

What I'm saying is I don't really know what to do with this. My general inclination would be to say, "Delaware law. This is my lane." If it were California law, I would say it was my colleague's. Not disrespecting the California courts, not saying they have never done a Delaware-law case. If one case had been -- was demonstrably farther along -- but we are talking about four days difference. I'm not even talking about the leadership structure. I'm open to a leadership structure. I don't know that saying, "I will come to Delaware if you make me sole lead counsel" -- that that is a particularly useful way to start a discussion. It sounds kind of unreasonable.

But, you know, I don't have a motion to proceed in a single jurisdiction. Your motion is granted, if you want the moral force of Strine saying it should be in a single jurisdiction. I will be willing to talk to my colleague in California if that is the -- the parties agree that that is something

that should happen. The judge putting it off might be a signal that he wanted to kind of hear some preliminary guidance from today. Judges, we do read each other, although the debates about what we read -- I had a prior case that some of you may know about, where I took a signal from California because a judge scheduled -- everything I did -- what happened in California is the schedule would be set two months behind my schedule. I took that as a signal that we had an understanding about who would go first. Some people may disagree about that, might be even the subject of an active controversy.

But the -- you read these things. I'm happy to talk to my colleague in California. I have never had a problem with a colleague in California about this. And, you know, I think each of the state courts respect each other. And again, I welcome the lawyers in California into the leadership structure, but I'm not sure what to do.

One of the things all the Delaware lawyers know is I would not enjoin the California action. That would be the last thing to do. Typically what would happen is the defendants would pick some forum where they think it's more appropriate

to proceed. I'm assuming there is a -- like the flip side of the brief I got here in California says something like, you know, "On balance, because it's Delaware law, it's easier for the Delaware court to deal with that; we could go to the Supreme Court; but there is evidence here." Sort of the flip side of what you told me. Nobody takes offense. Everybody gets -- I get the predicament the defendants are in, but I'm not sure what to do. I can -- I'm not really staying the case.

The hard thing, Mr. Rigrodsky, is, you know, I'm going to grant expedited discovery. If I can't expedited discovery to you, what happens in California?

MR. RIGRODSKY: Well --

THE COURT: I have no problem with granting some limited written discovery on the assumption that it's coordinated and that there is a single set of document requests that is promulgated to the defendants by counsel for the plaintiffs, including counsel in California. If -- honestly, if all of the law firms for the plaintiffs can't get along, you know, in some ways what it suggests is the absence of clients.

What I mean is if there was a group of real stockholders who was actually monitoring counsel, counsel would get along, because counsel would get fired, because the group might actually pick a counsel, depending how reasonably it acts. "Frankly, seven of you are gone, and we are just hiring one." The real problem is that counsel are policing each other, and no one is policing themselves. You know, unless I miss my guess, there is no nobody here among the plaintiffs who represents somebody who has like eight percent of the stock of RAE. Right?

MR. RIGRODSKY: Not that I know of. We have about 22,000 shares represented, at least by my firm; about 50,000, maybe, total in Delaware.

THE COURT: Right. Which is something of an investment, maybe, approaching 100,000 if the high bid comes in. I'm not saying it's trivial, but you know, it's the sort of thing where the stake of all the plaintiffs, economically -- if you get a boffo deal, could be less significant than the disclosure fee, if there is a disclosure settlement. And that is the problem we are dealing with. We all have to be realistic about it.

So, you know, I'm open to solutions,

but I'm not -- I'm not enjoining California. I'm not staying Delaware. I will be open to expedition if it's coordinated. I have no problem putting in an order that I'm granting it, but subject to the agreement of the California and the Delaware plaintiffs on a single set of document requests and requiring some consultation.

I have said my preference. My belief is -- again, I think it's pretty simple. One of the reasons why we have choice-of-law factors is there are public policy factors. And when the public policy factors suggest the law of a particular jurisdiction, that's important. And if you have a jump ball, particularly in the commercial field, between a forum whose law is at stake and a forum whose is not, what everybody bargained for was to get an answer from the horse's mouth or, if you consider it -- from the horse. Might be that you might consider it's another part of the horse, but you get a chance to ultimately have the answer from the horse.

In this case, Delaware is sort of the horse. And in other cases, as I said, it's been California. You get mixes and matches, where people pick Delaware law and a different choice of forum. I

have seen California contract law and a Delaware choice of forum, where it gets confusing, because if the parties chose a different forum, it complicates it. But absent a choice of forum, you know, in a commercial context, where we are not talking about a tort -- even the tort, the thing about it -- when it's a tort, there is almost never any divergence. If you run over somebody's foot in San Jose, it's going to be California law that applies.

In the corporate context, you are talking about a publicly-traded company. Geography has, really, no relevance to the law at stake. It's just not the issue. And that's why some of the old factors just don't make any sense. It's true, convenience, or whatever, but you all have national practices. You take depositions all over the place. The -- you can take all the depositions in California. You would have an oral argument here. I don't know if it's more or less efficient. Depends how the thing can happen.

Frankly, in California you could spend more time driving somebody someplace than it would take you to fly here, because it's such a grandly beautiful and capacious state.

MR. RIGRODSKY: Your Honor, could I make one suggestion? I think you are pushing against an open door in terms of the people in this room; at least me, representing the plaintiffs, who have agreed. We filed in Delaware and agreed to get together and go forward in Delaware. We are more than happy to coordinate with the plaintiffs' counsel in California. The difficulty -- we are dealing with real-world difficulty here -- is having to secure the agreement of four different firms at war with each other. I've seen some of the briefs, and they are not pleasant briefs. Having to -- having to have us take the burden and coordinate with those firms a single document or request I think is problematic as a practical matter. What I think would make more sense --

THE COURT: Here is what I'm going to say. I want to be very clear about this. If a meeting gets scheduled and the state of things in California is four law firms having a food fight with each other about who is going to organize on behalf of the class, and we have an organizational structure in Delaware and there has been an open invitation to the California plaintiffs to try to be part of the

leadership -- I'm assuming you are not saying you have to be the sole leader.

MR. RIGRODSKY: No. Not at all. There is an open invitation.

THE COURT: I have to do what is right for the class. I've said to people before, and I will say, there is no reason why a motion for class certification couldn't be brought on, frankly, jointly by the parties here, and certify a class. It creates a situation. Could another court -- would my California colleague certify a class in the face of an already certified class? I think probably not. Usually, it's not the judges who are an issue.

One of the things I'm saying, Mr. Rigrodsky, is we are having a hearing here. My colleague will have access to the hearing. One of the things that doubtlessly would influence him would be if he has four different firms that can't even agree on a leadership structure, but they want to keep the case in California until the deal closes. You can't have that. And so sometimes what we are doing is we are having a little bit of a conversation, bi-coastal in some ways already, because we have good members of the California bar on the phone. But this transcript

is a bit of a conversation with folks who aren't here. But I can't -- if we had a date for a PI, that would be different. But I guess I'm not at the stage where I'm prepared to say, "The first step is you go ahead," because what I think that will -- what I don't want to have is my colleague in California, who probably, like me, has a lot of other matters, all of a sudden have an emergency motion to move the hearing up to this week because Delaware is getting ahead of California.

What I think is everybody ought to be pulling together in one place. The defendants should answer one set of document requests. There should be one complaint, and people should figure out how they are proceeding. So --

MR. SCAGGS: Your Honor, I think -- my suggestion would be that based on this transcript, and the use of it both with the plaintiffs' counsel in California and perhaps before or at the December 3rd hearing, in light of the fact that we don't have a hearing date, we have another bidder rambling around, that time period can go by and -- if, for example, Faruqi & Faruqi is lead counsel out there, we have a deal, and there may not be a problem, to the extent a meeting date gets set and somebody has to be back here

before December 3rd.

THE COURT: What do you mean, you have a deal?

MR. RIGRODSKY: The other counsel that we -- that spoke to us was Faruqi & Faruqi, one of the people who are vying for a position in California. What they said was we -- they agreed with us that if they were to be appointed lead counsel out there, we would agree to proceed in one jurisdiction, whether -- we think it should --

THE COURT: What is the likelihood of that?

MR. RIGRODSKY: It's hard to handicap. I don't know. It's not that we favor one firm over the other. We are trying to find somebody to deal with. What happens to us is that we get whipsawed in these cases. We file in Delaware. Your Honor and other members of the Court have told us repeatedly, go out to California, go out to Michigan --

THE COURT: I understand.

MR. RIGRODSKY: We do that, but the firms that we deal with view that with a different kind of incentive. What they say is, "Now I've got two bites of the apple. Now I can still pursue my

motion in California, and if I lose, I know I can always go into Delaware."

THE COURT: But see what -- that's what I'm saying. I understand that incentive, and it's a thing we have been -- you are reluctant to -- you know, you are reluctant to enjoin people, for obvious reasons. But I agree that it can create incentives to just simply create a filing conflict simply to obtain leverage.

What I'm talking about here, though, is, you know, absent some -- I don't actually view a situation where a bunch of lawsuits were filed very rapidly a couple of days before the suit is here, and where no one agrees on how to go forward among those suits, as further advanced than this. I would actually say where the different plaintiffs' firms that filed have an organizational structure and are ready to go, this lawsuit is more advanced and mature. They can't even figure out who is their leader.

What I'm saying is I'm giving limited -- I'm giving credit. I want this to be worked out consensually, if it can be. If this clears the SEC in two weeks and I have got a structure ready to go, and there is a meeting date set, and nobody has reached

agreement with anybody on anything, then, you know, I'm going to be inclined to set a schedule. I just -- I'm not in a position where I have to get to that level of, you know -- of making a choice, I guess. I would prefer that, you know, to be -- to use the famous words of a California man, everybody get along.

MR. RIGRODSKY: We are trying. We really are.

THE COURT: No. I understand that. But I will have -- I'm saying on the transcript -- I think my judicial colleague in California would appreciate this. What do you do if all you have got is, "We want to have a preliminary injunction hearing, and we want to have four different lawyers be at the podium"? I mean, that is not a case that is ready to move forward. And in a situation where you -- I mean, I also think, though I'm trying to be judicious about this -- no pun intended -- because it appears that there are some developments going on which could -- I mean, if they really do accept a superior proposal, one, I wouldn't be shocked to see the superior proposal attacked. If there is a deal, it gets attacked. But it might not in this case, because there are already people on the scene, and they will

say: You guys put the pressure, the titanium fist and the nylon glove, or whatever -- however you want to describe the trite metaphor. We might not even have a hearing in that situation.

MR. RIGRODSKY: Understood, but we filed a motion, and the reason we are here today is that the discord in California -- we feel like defendants are using that in a way to prejudice us, in the sense that we usually and typically have not had an issue with the scheduling of at least expedited proceedings -- forget about the hearing for a minute, but expedited proceedings on a preliminary proxy that has not cleared the SEC. And that happens all the time. In the situations where people waited for the final, we have received comments from the Court saying, "Why did you wait so long?"

THE COURT: I get that. But there is a unique situation here, where they are talking to somebody who can potentially pay more, and where they are not going to hurry to vote, I assume, until that process is exhausted. And as a result -- I mean, I get your frustration, Mr. Rigrodsky. We could all stand around and talk about our frustrations. I'm sure that there are members of your -- of the

plaintiffs' bar who are filed in California who have frustrations.

MR. RIGRODSKY: Sure. Sure.

THE COURT: There is an HBO show about therapy and treatment, and perhaps next year's could be a motion-to-file-in-a-single-jurisdiction episode of that, different people talking about: Why? But for now, I'm going to be -- I'm not rising to the bait. I'm not impulsively grabbing the hook which will land me into some fisherman's boat and have my head chopped off. I'm going to be a little slower about it.

Keep talking. As I said, I view this as a -- you know -- I mean, in some ways we are not even at the point where we are talking about whether there should even be a hearing. I'm not -- you know, there are a couple of the disclosure things that probably warrant discussion, and we never even got to that today or in the papers, because of the thing. Also, that is where the SEC process could be potentially meaningful.

MR. RIGRODSKY: Your Honor, may I add something? To the extent that the motion to proceed in one jurisdiction is basically almost a --

THE COURT: It's been granted. It's just I haven't determined which jurisdiction. I don't have any authority to do it. I told you my preference.

MR. RIGRODSKY: That is understood, Your Honor. But if we find ourselves in a position --

THE COURT: I grant the motion for peace on earth, to the extent Strine has the authority.

MR. RIGRODSKY: Your Honor, if we find ourselves in a position come December that there is another adjournment of that hearing, or there still is fighting -- no. Let's take this scenario.

THE COURT: I have already told you. If it comes to that -- if we get a date for a meeting and we need to make a decision about the schedule -- I'm not saying I'm going to schedule a preliminary injunction hearing until I hear from everybody about it, but if we get to the point where there is a date for a meeting, the state of things in California is that the four different filing firms are all just throwing rocks at each other about who should be the leadership structure, we have an organizational structure and are ready to go. I have said we will

go.

That will be no disrespect to the California court at all. As I said, I don't know that -- I'm happy to talk to my colleague in California. My sense is the two of us have similar sentiments about these things. As I said, if this was a California corporation or this was a California contract, I would be telling you, "Go out to my colleague in California, and go litigate this case. Why did you file it here?"

So I think I have said what I have to say. I'm not going to let the hearing -- I'm not going to let the deal close while people fight about a leadership structure in California. Honestly speaking, if we started having leadership structure fights in Delaware -- fortunately, most people get together. They realize that. They realize they better get organized in time to do it. If you don't get organized, you know, the party is going to be over.

I have also said -- and I do mean it -- there is no reason why you can't bring on a motion for class certification jointly. And you know, if they want to contest the adequacy of

representation, or something, they can join the party. But -- so I don't think the danger you are talking about is going to come to pass.

MR. RIGRODSKY: Just concerned, not necessarily with the deal closing --

THE COURT: I know that you are concerned.

MR. RIGRODSKY: But --

THE COURT: I have addressed your concerns to the extent that I can. I am not going to allow you to go forward and take discovery in isolation at this stage, because there is no -- I don't believe there is any exigency that requires subjecting the company -- right? There is also the possibility that neither of the buyers will close. We have been through a period where buyers don't close. If you run up the cost to the defendants, you are running up the costs for investors. They should not have to answer more than one set of discovery. Apparently, there would be the potential for five, because it could be four different sets of discovery in California, plus one in Delaware. And I know you could make the argument, "Well, I'm just one, and therefore -- so it should at least -- maybe they only

have to answer one set in California." No. I hear you. My door remains open. Get back --

I expect there will be communication about the timing of the meeting. I have no problem putting in an order requiring the defendants to timely communicate about the meeting, and to provide Mr. Rigrodsky and the plaintiffs here with information about that, so that if they do need to move to set a schedule, we can do that.

And good luck. And again, I will be happy to talk my colleague in California. I'm happy to talk with the California plaintiffs.

(Recess at this time.)

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CERTIFICATE

I, WILLIAM J. DAWSON, Official Court Reporter of the Chancery Court, State of Delaware, do hereby certify that the foregoing pages numbered 3 through 36 contain a true and correct transcription of the proceedings as stenographically reported by me at the hearing in the above cause before the Vice Chancellor of the State of Delaware, on the date therein indicated.

IN WITNESS WHEREOF I have hereunto set my hand at Wilmington, this 11th day of November, 2010.

/s/William J. Dawson
Official Court Reporter
of the Chancery Court
State of Delaware

Certification Number: 187-PS
Expiration: Permanent

## CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of April, 2014, a copy of the foregoing APPELLANT'S OPENING BRIEF was served, by File & Serve XPress, on the following attorneys of record:

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