



**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

**ANSWERING BRIEF OF APPELLEE LAWRENCE TREPPEL**

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## NATURE OF PROCEEDINGS

This appeal arises from Defendant Below-Appellant United Technologies Corporation's ("UTC" or the "Company") refusal to permit Plaintiff Below-Appellee Lawrence Treppel ("Treppel") to inspect books and records. After UTC paid a \$75 million fine to the U.S. Department of Justice ("DOJ") in connection with criminal charges for violations of the Arms Export Control Act of 1976 and the International Traffic in Arms Regulations (together, the "Regulations"), Treppel demanded UTC's Board of Directors (the "Board") to investigate and bring litigation against the responsible wrongdoers (the "Litigation Demand"). The Board's peremptory five-sentence response stated only that the Company's Audit Committee and Board had considered and rejected the Litigation Demand.

Under Delaware law, a stockholder whose pre-suit demand on a board of directors is denied has the right to use the "tools at hand" – including, first and foremost, title 8, section 220 of the Delaware Code ("Section 220") – to learn, through a document inspection, the substantive consideration given to, and the reasoning behind, that rejection. *La. Mun. Police Emps. Ret. Sys. v. Morgan Stanley & Co.*, No. CIV.A. 5682-VCL, 2011 WL 773316, at \*5 (Del. Ch. Mar. 4, 2011) ("*LAMPERS*") ("Exploring whether a litigation demand was wrongfully refused is a proper purpose for using Section 220."); *see also Grimes v. Donald*, 673 A.2d 1207, 1218 (Del. 1996) ("*Grimes I*"), *overruled on other grounds by*

*Brehm v. Eisner*, 746 A.2d 244 (Del. 2000); *Grimes v. DSC Commc'ns Corp.*, 724 A.2d 561, 565-66 (Del. Ch. 1998) ("*Grimes II*").<sup>1</sup> UTC contested Treppel's proper purpose at the outset, but agreed to produce documents pursuant to a confidentiality order. This confidentiality order, however, attempted to impose a forum exclusivity clause that would limit Treppel to filing any shareholder derivative complaint in Delaware. After Treppel would not agree to this provision (but did agree to the remainder of the confidentiality stipulation and that he would only bring litigation in a court of competent jurisdiction), the Company refused to proceed with any production. Treppel was forced to bring a Section 220 inspection action to obtain documents about the Board's peremptory refusal of his Litigation Demand.

After trial, the Court of Chancery rejected UTC's attempt to limit the use of books and records to filings in Delaware. UTC's request was framed by the Court of Chancery as a request to impose an exclusive forum clause amounting to a prophylactic anti-suit injunction as a condition for the release of records. The Court of Chancery properly determined that this is not the type of restriction that Section 220(c) seeks to impose because it places an undue burden on the rights of the stockholder. (A 451).

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<sup>1</sup> Here, as throughout, all emphasis is added and citations and footnotes are omitted unless otherwise noted.

The Court of Chancery's decision faithfully follows and applies established law. Section 220(c) of the Delaware General Code allows the Court of Chancery, "in its *discretion*," to prescribe any limitations or conditions on the inspection of corporate books and records. Section 220(c) accords the court with significant deference in setting appropriate preconditions to both protect stockholder inspection rights and confidential company information from public dissemination. The Court of Chancery appropriately exercised its discretion, and determined that the use limitation imposed an undue burden on Treppel's inspection rights. UTC's attempts to unilaterally impose a forum exclusivity clause represent an unjustified attempt to extract a litigation concession as a precondition to a stockholder's exercise of his statutory rights. UTC's argument that it was entitled to limit Treppel's use of documents obtained through his inspection rights, if accepted, would allow a company the unfettered ability to insert clauses irrelevant to protecting sensitive information into confidentiality agreements under the guise of the company's "best interests." Such a low threshold for what can be imposed in a confidentiality agreement would vitiate stockholder inspection rights and render Section 220 meaningless.

On March 11, 2014, UTC filed its notice of appeal. UTC abandoned the argument below that Treppel's proper purpose was transmuted into an improper one when he refused to agree to the forum exclusivity clause. The only issue UTC



raises in this appeal is whether the Court of Chancery failed to properly exercise its discretion when it rejected UTC's attempt to insert an irrelevant forum exclusivity clause into a confidentiality agreement. In UTC's view, the Company was "entitled" to a restrictive forum exclusivity clause because it is purportedly in the best interests of the Company. UTC, however, presented no evidence at trial that an exclusive forum clause was in the best interest of the Company. Nor did UTC produce any evidence during discovery or trial addressing the interests of the Company. Based on the Court of Chancery's findings that the forum exclusivity clause is an undue burden on Treppel's inspection rights and the Company's failure to present evidence of its "best interests," UTC does not and cannot show that the Court of Chancery abused its discretion in declining to mandate UTC's exclusive forum clause.

## **SUMMARY OF ARGUMENT**

1. Denied. The lower court properly exercised discretion when it denied UTC's attempt to impose a use restriction under Section 220(c). The Court of Chancery properly reached the conclusion that a use restriction such as the one proposed by UTC creates an undue burden on a stockholder's inspection rights. This conclusion was appropriate given the Company's failure to present any evidence in support of its argument that a use restriction was in the Company's best interests. The lower court properly applied relevant authority in determining that the use restriction UTC sought to impose on Treppel is not of the type contemplated by Section 220(c). Contrary to UTC's assertions on appeal, the Court of Chancery's ruling is consistent with the policies underlying Rule 23.1 of the Court of Chancery Rules ("Rule 23.1") and Section 220. Accordingly, the Court of Chancery did not abuse its discretion in determining that the use restriction was improper.

## STATEMENT OF FACTS

### A. UTC Is Fined for Export Control Violations

The Regulations provide the U.S. government with the authority to control the export of defense articles and services in order to safeguard U.S. national security. Under this authority, in 1989, the U.S. prohibited export to China of all defense articles and services. As a U.S. defense contractor, UTC and its subsidiaries are obligated to comply with the Regulations.

In contravention of the Regulations, from approximately 2000 to October 2003, UTC's subsidiaries exported engines and military engine software to China for use in the development of a military attack helicopter. On June 28, 2012, the DOJ issued a press release describing the scheme employed by UTC to aid China in the development of the military attack helicopter as part of an illegal plan to drive future profits through additional contracts with China. The DOJ press release further detailed that it had filed three different criminal charges against UTC and two of its subsidiaries, Pratt & Whitney Canada Corp. ("P&WC") and Hamilton Sundstrand Corporation ("HSC"), in the District of Connecticut. P&WC pled guilty to the first two counts, and the DOJ agreed to defer prosecution on the third count and against UTC and HSC if the companies paid a \$75 million fine and agreed to hire an independent compliance monitor for the next two years.

**B. The Board Summarily Rejects Stockholder Treppel's Litigation Demand**

On August 22, 2012, Treppel, a longtime UTC stockholder, sent a litigation demand to the Board. (A 138-44). The Litigation Demand demanded that the Board investigate, address, remedy, and commence proceedings against certain officers and directors in connection with damages incurred by UTC as a result of improper and illegal business practices at the Company and its subsidiaries.

On December 14, 2012, on behalf of the Board, the Company's counsel replied to the Litigation Demand (the "Litigation Rejection"). (A 197). The peremptory five-sentence letter stated that the Company's Audit Committee and Board had considered and rejected the Litigation Demand, determining that no further action would be taken. The Litigation Rejection failed to offer any reasoning as to the Audit Committee and Board's decision to reject the litigation. Nor did the Litigation Rejection offer any insight into the scope or content of any investigation – or, indeed, whether the Audit Committee had even performed an investigation.

**C. UTC Refuses to Allow Stockholder Treppel to Inspect Books and Records to Evaluate the Board's Peremptory Refusal of His Litigation Demand**

On March 12, 2013, Treppel served a narrowly focused books and records demand upon the Company in accordance with Section 220 (the "Inspection Demand"). (A 198-204). The Inspection Demand sought to inspect certain books

and records of UTC relating to the UTC Board's decision to reject his Litigation Demand, including relevant Board meeting minutes, written reports concerning Treppel's Litigation Demand, and documents reviewed and relied upon by the Board in reaching a decision on Treppel's Litigation Demand. (A 198-99).

In its initial response to the Inspection Demand, UTC refused to permit Treppel to inspect these books and records. Instead, UTC objected that Treppel's Inspection Demand did not show that his request was for a "proper purpose" and that it was not "narrowly tailored to seek only items 'necessary and *essential*' to address his avowed purpose." (A 205). Despite the Company's response that it did not believe Treppel's Inspection Demand was proper, the parties entered into negotiations concerning the production of certain documents.

The Company, however, subsequently insisted that it would not produce the responsive documents unless Treppel agreed to a restrictive confidentiality stipulation which included a provision stating that the documents provided to Treppel could only be used for personal use or "as part of a filing in the Delaware Court of Chancery," but not as part of a filing in any other jurisdiction. (A 237-38, 286, 339-40, 350-51). Treppel's counsel subsequently requested that the above provision be revised to allow Treppel to use the documents produced for personal use or "as part of a filing in a court of competent jurisdiction," rather than exclusively in Delaware. (A 208-38, 339-40, 350-51). The Company's counsel

refused Treppel's proposed revision. (A 237). The Company argued, without providing any legal authority, that the potential use of the documents in a filing outside of Delaware somehow transformed Treppel's proper purpose into an improper one. (A 237).

Because the parties could not reach an agreement on the inclusion of an exclusive forum clause, on June 5, 2013, Treppel filed the Verified Shareholder Derivative Complaint for Relief Pursuant to 8 Delaware Code Section 220 (the "Complaint"). (A 239-50). On July 5, 2013, UTC filed its answer to the Complaint, objecting to the production of any books and records requested in the Inspection Demand. (B1-15). Treppel served requests for production and interrogatories to narrow the disputed issues and to discern UTC's affirmative defenses. UTC also served requests for production, interrogatories, and took Treppel's deposition. UTC, however, refused to produce a witness pursuant to Treppel's Rule 30(b)(6) of the Court of Chancery Rules ("Rule 30(b)(6)") notice of deposition. UTC did not identify any potential witnesses in connection with the trial. Treppel brought a motion to compel a Rule 30(b)(6) deposition, which was denied by the Court of Chancery.

**D. The Court of Chancery Rules UTC May Not Impose a Unilateral Forum Selection Clause in a Confidentiality Agreement as a Precondition to Obtaining Books and Records**

On January 13, 2014, after a trial was held on the matter, the Court of Chancery granted Treppel the right to inspect documents relating to the Board's decision to refuse his Litigation Demand. (A 450).

Prior to trial, the parties entered into a Stipulation and [Proposed] Order regarding Stipulated Facts and Trial Exhibits, entered by the Court the of Chancery on January 10, 2014 (the "Pre-Trial Order"). (B37-41). The parties stipulated Treppel had satisfied the form and manner requirements of Section 220. (B38). The parties also stipulated that UTC had not adopted a forum selection bylaw at the time Treppel had made his Inspection Demand. *Id.* The Pre-Trial Order permitted both parties to call Treppel to present live testimony. (B39). Other witness testimony was not prohibited by the Pre-Trial Order.

During trial, Treppel proffered substantial testimonial evidence in aid of his cause. Though he was also deposed, Treppel appeared personally and detailed why he needed the specific documents he sought to inspect. (A 439). Treppel also explained his experience investigating matters such as this one as a former U.S. Treasury Department, International Revenue Service agent. (A 433). Treppel confirmed that he had not agreed to the forum selection clause, without elaboration given the privileged nature of discussions about forum selection with his counsel. (A 436); *see also* (B21-23). UTC's counsel cross-examined Treppel regarding the

forum selection clause, but did not attempt to elicit any information about the interests of the Company. (A 437-38).

UTC elected not to present any live testimony, and did not call any witness of any position it had or would advance during the trial. Despite their failure to present evidence on the topic, UTC argued during closing that the inclusion of a forum selection clause in the confidentiality order was in the best interests of the Company. (A 443-46). Counsel for Treppel argued that there was absolutely no evidence whatsoever about what the best interests of the Company were. (A 440-41, 448-49). Counsel also noted that, by failing to present any witness testimony about the Company's interests, Treppel was foreclosed from cross-examining any such corporate witness. (A 440). This cross-examination necessarily would have entailed questioning about the corporate headquarters, the location of witnesses, the location of UTC's counsel, and other related litigation. *Id.* Treppel's counsel also noted that courts across the country had applied Delaware law for decades. (A 447-48).

Treppel prevailed at trial.

First, the Court of Chancery found that Treppel had the proper purpose of determining 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." (A 450). The Court of Chancery rejected UTC's argument that



Treppel's proper purpose was vitiated because there was not a "foreswearing of litigation outside the jurisdiction." (A 450).

Second, the Court of Chancery subjected the inspection to a confidentiality agreement, but rejected UTC's attempts to impose under Section 220(c) a condition that "should the documents convince [Treppel] that litigation ... is in his interests as a stockholder and the corporation's interest, that he limit that litigation to this jurisdiction." (A 451). The Court of Chancery framed the question presented under Section 220(c) as whether it could issue "what amounts to a prophylactic anti-suit injunction as a ... condition for the release of records in a 220 action, and if [it] could, whether [it] should." (A 451). The Court of Chancery concluded that this type of restriction is not the type of restriction that Section 220(c) seeks to impose because it acts as an undue burden on the rights of the stockholder. (A 451).

## ARGUMENT

### I. UTC IS NOT ENTITLED TO IMPOSE ADDITIONAL REQUIREMENTS ON A STOCKHOLDER MAKING AN INSPECTION DEMAND

#### A. Question Presented

Whether UTC presented sufficient evidence to demonstrate that a forum exclusivity clause in a confidentiality agreement was in the "best interests" of the Company. UTC's purported need for an exclusive forum clause is relevant to the application of Section 220(c), and was addressed by the Court of Chancery below. (A 450-52).

#### B. Scope of Review

A trial court's factual findings are entitled to considerable deference and are reviewed to ensure they are "sufficiently supported by the record and are the product of an orderly and logical deductive process." *Levitt v. Bouvier*, 287 A.2d 671, 673 (Del. 1972). A trial court's factual findings will be overturned only when they are clearly wrong and doing justice so requires. *Id.*

This Court reviews the Court of Chancery's construction of Delaware statutory law, as well as its legal conclusions, *de novo*. *Rapposelli v. State Farm Mut. Auto. Ins. Co.*, 988 A.2d 425, 427 (Del. 2010) ("We review questions of statutory interpretation *de novo*, because they include questions of law.").

### C. Merits of Argument

The Court of Chancery correctly applied its discretion and held that a forum exclusivity clause places an undue burden on a stockholder seeking to exercise his statutory inspection rights. UTC, however, contends the lower court had not the discretion, but the *duty*, to restrict Treppel's inspection rights in favor of a forum selection clause invented whole cloth by the Company and inserted into an agreement designed to protect sensitive information. UTC's proposition has no basis in precedence or reason. It is axiomatic that the Court is empowered with the discretion to impose "reasonable restrictions and limitations" under Section 220(c) "as [the court] deems proper on the exercise of the right." Del. Code tit. 8, §220. Nothing in Section 220(c) *mandates*, as UTC suggests, that the Court is obligated to adopt a restriction on the exercise of a stockholder's inspection rights merely on the Company's say-so.

Even if Section 220(c) did impose a duty on the Court of Chancery to implement the use restriction (which it does not), the Company did not present any evidence showing any interest, yet alone the Company's best interests, are served by imposing the use restriction.

Finally, UTC makes the argument that the lower court's failure to implement the proposed use restriction is not consistent with the policies underlying Section 220 or Rule 23.1. UTC claims that Section 220 and Rule 23.1 are designed to work

in tandem to "minimize the costs to the corporation of derivative litigation." (AOB at 31).<sup>2</sup> UTC further suggests the Court of Chancery erred because the "court required no [] showing to support Treppel's claim that he was entitled to *use th[e]* books and records to litigate in another jurisdiction." (AOB at 32). The Company cites no authority in support of this supposed error, because there is none.

**1. Nothing in Section 220(c) Mandates the Restrictive Clause Requested by UTC**

Section 220(c) states "the Court may, in its discretion, prescribe any limitations or conditions with reference to the inspection." Del. Code tit. 8, §220(c)(3). The Delaware Supreme Court describes the weighing that must take place in evaluating any such limitation:

Counterposed to the *duty to protect the rights of the stockholder*, the Court has the duty to safeguard *the rights and legitimate interests of the corporation*. It follows that the Court of Chancery is empowered 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 its deems proper on the exercise of the right*.

*CM & M Grp., Inc. v. Carroll*, 453 A.2d 788, 793-94 (Del. 1982).

Under the plain language of Section 220(c) the imposition of restrictions on a stockholder's rights involves a weighing of rights to allow only "*reasonable restrictions and limitations*" as the Court deems proper. More, as evidenced by

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<sup>2</sup> "AOB" or "Opening Brief" refers to Defendant Below Appellant United Technologies Corporation's Opening Brief filed in this Court on April 25, 2014.

UTC's own authority, the Court's exercise of its power to place reasonable restrictions is discretionary, not mandatory. *See* AOB at 17; *CM & M Grp.*, 453 A.2d at 793-94 ("placing such reasonable restrictions and limitations *as it deems proper*"); *State ex rel. Armour & Co. v., Gulf Sulphur Corp.*, 233 A.2d 457, 462 (Del. Super. 1967), *aff'd*, 231 A.2d 470 (Del. 1967) ("clear that the Court *can* consider and balance the interest of the corporation").

UTC's analysis of its own authority shows "reasonable restrictions" are restrictions limiting disclosure of information to other adverse parties that may be interested in confidential documents. (AOB at 16-17). In *CM & M Group*, for example, the court noted the concern that the stockholder's exercise of his inspection rights may open a company's confidential corporate financial data to third parties who are not entitled to the information. *CM & M Grp.*, 453 A.2d at 793. To address the well-established right of a company to keep sensitive inside information confidential, the *CM & M Group* court ordered that the inspection be contingent upon an appropriate confidentiality order. *Id.* at 794. Similarly, *Henshaw v. American Cement Corporation*, 252 A.2d 125 (Del. Ch. 1969), involved a stockholder who utilized conflicted counsel in his inspection demand. *Id.* at 130. The Court of Chancery expressed concern that conflicted counsel, who represented parties adverse to the company in a pending suit based on the same facts as the inspection, would obtain discovery "unbound by work-product,

privilege or any other limitation upon discovery" by participating in the inspection. *Id.* To narrowly address this conflict, the court imposed a limited restriction that prohibited only conflicted counsel from participating in the inspection. *Id.*<sup>3</sup>

Both *CM & M Group* and *Henshaw* represent established Delaware law that the Court may condition inspection on execution of a confidentiality agreement. Entry into a confidentiality agreement is a "reasonable restriction," that places little burden on the stockholder inspection rights while simultaneously protecting sensitive and confidential business information. There is no dispute that Treppel has agreed to enter into such an agreement.<sup>4</sup> (A 208, 217). But where Treppel may eventually file a derivative action is irrelevant to the steps needed to keep information confidential.

UTC stretches the holdings in *CM & M Group* and *Henshaw* to the breaking point with its assertion that the forum exclusivity clause is a "reasonable" inspection limitation "because it limits only Treppel's use of the documents

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<sup>3</sup> UTC also points to *Thomas & Betts Corporation v. Leviton Manufacturing Co., Inc.*, 681 A.2d 1026, 1035 (Del. 1996) for the proposition that the Court of Chancery can limit inspection to documents that are "essential and sufficient" to the stockholder's proper purpose. Nothing in this common-sense proposition-enumerated in the actual language of Section 220-supports the Company's tortured attempts to fit a restriction forum exclusivity clause into a statutory construct where there is no place for it.

<sup>4</sup> It is arguable that a confidentiality agreement is necessary for the limited production associated with the handling of Treppel's Litigation Demand. The general rule in Delaware is that a party seeking confidential treatment bears the burden of demonstrating the need for such treatment. *See* Ch. Ct. R. 5.1(b)(3); *Romero v. Dowdell*, No. Civ.A. 1398-N, 2006 WL 1229090, at \*1 & n.6 (Del. Ch. Apr. 28, 2006). Nevertheless, Treppel agreed at the outset that he would enter into a reasonable confidentiality agreement.

produced for inspection; it does not regulate Treppel's conduct in any way unrelated to his inspection of UTC's books and records." (AOB at 20). On this basis, UTC asserts it is *entitled* to the restrictive use clause. (AOB at 19-20). Nonsense. To accept UTC's argument that it is *entitled* to a provision dictating the stockholder's future litigation as part of a "reasonable confidentiality stipulation" because it is purportedly in the best interest of the Company is akin to imposing additional requirements into the statutory Section 220 scheme.

UTC essentially asks the Court to bless the notion that a company can insert *any* provision, no matter how tenuously related, into a confidentiality agreement as a precondition to production of books and records. UTC asserts that the Court *must* order restrictive provisions if the Company asserts a "legitimate interest" in the clause, regardless of the restrictions such a provision places on the stockholder's rights. Nothing in Delaware law countenances this construction of Section 220(c).

**2. UTC Did Not Present Any Evidence that a Forum Exclusivity Clause Is in the Best Interests of the Company**

The plain language of Section 220(c) demonstrates that the use restriction UTC seeks to impose is not mandatory. *See supra* Argument section I.C.1. Rather, it was within the Court of Chancery's discretion to impose any reasonable restriction protecting the legitimate interests of the Company. *CM & M Grp.*, 453

A.2d at 793. The Court of Chancery properly exercised its discretion in declining to impose the forum restriction.

UTC presented no evidence at trial that the proposed forum selection clause protected any legitimate interests of the Company, yet alone was in the best interest of the Company. The parties conducted discovery and Treppel personally appeared to testify at trial. (A 432). UTC produced no one to testify that the use restriction was necessary to protect any legitimate Company interest. (A 432). UTC did not submit any affidavit from a single Company official attesting to the need for a forum selection clause. Not one scintilla of evidence (other than the Company attorney's say-so) supports that the use restriction was or is necessary to protect UTC's interests.

On appeal, UTC argues that its proposed forum selection clause does not impair Treppel's rights. UTC reasons that, because Treppel could file a potential derivative suit in any forum (just not utilizing the documents obtained during the inspection), the use limitation does not actually limit Treppel's ability to pursue a derivative suit. (AOB at 21-22). But UTC then does an about-face, and notes the "modest restriction" would create a "material disincentive" to filing in any jurisdiction other than Delaware, creating a "significant safeguard of UTC's legitimate interests." (AOB at 25). UTC provides no explanation as to how creating a "material disincentive" to filing in a court of competent jurisdiction does



not infringe on Treppel's inspection rights. The proposed restriction may well limit Treppel's ability to obtain complete relief for the Company through a derivative suit due to potential limitations on the Court of Chancery's jurisdictional reach over certain former UTC officers.<sup>5</sup> More, factors generally analyzed under *forum non conveniens*, particularly the ease of access to proof and other practical considerations that would make the trial easy, expeditious, and inexpensive, may well support filing any potential suit in a different court.<sup>6</sup> A clause that restricts a filing using documents obtained through inspection rights solely to the Delaware Chancery Court skirts the limits of Delaware authority upholding forum selection bylaws. *See Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934, 961 (Del. Ch. 2013) (analyzing hypothetical federal derivative claim and noting

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<sup>5</sup> Delaware statute grants the Court of Chancery personal jurisdiction over certain non-residents who, after January 1, 2004, serve as the most senior officers of a corporation, such as the chief executive officer, chief operating officer, and chief financial officer, at any time during the course of conduct alleged in the action. Del. Code tit. 10, §3114(c)(3). The misconduct Treppel requested the Board investigate occurred between 2000 and 2003, but was not made public until 2012, when the DOJ filed criminal charges. Because the misconduct alleged in the Litigation Demand occurred before the 2004 amendment to Section 3114, the Court of Chancery could decline to exercise jurisdiction over potential non-resident officer defendants. *See, e.g., In re Am. Int'l Grp., Inc.*, 965 A.2d 763, 814 (Del. Ch. 2009), *aff'd sub nom Teachers' Ret. Sys. of Louisiana v. PricewaterhouseCoopers LLP*, 11 A.3d 228 (Del. 2011) (Granting motion to dismiss for lack of personal jurisdiction against non-resident officers and noting "[i]mportantly, at the time of the wrongs of which they are accused, Delaware had not yet revised 10 Del. C. § 3114 to expand its scope to reach corporate officers.")

<sup>6</sup> *See In re Bear Stearns Cos., Inc. S'holder Litig.*, No. 3643-VCP, 2008 WL 959992, at \*5 (Del. Ch. Apr. 9, 2008) (*Forum non conveniens* factors are: (1) the applicability of Delaware law, (2) the relative ease of access to proof, (3) the availability of compulsory process for witnesses, (4) the pendency or non-pendency of similar actions in other jurisdictions, (5) possibility of need to view premises, and (6) all other practical considerations that would make trial easy, expeditious, and inexpensive).

plaintiff could argue forum selection bylaw did not bar claim within exclusive jurisdiction of federal court). But all of this puts the cart before the horse. Where Treppel may file a theoretical derivative suit has absolutely nothing to do with (i) whether he is entitled to inspect documents about the Board's rejection of his Litigation Demand; or (ii) whether he will keep information confidential.

UTC also argues that the use limitation protects the interests of the Company because it would avoid "the wasteful litigation of duplicative derivative suits in multiple forums." (AOB at 22-25). UTC speculates that it *may* have to defend duplicative litigation. This concern is overblown following the Delaware Supreme Court's affirmation of the dismissal *Harold Grill 2 IRA v. Chênevert*,<sup>7</sup> because there is no litigation concerning any fiduciary duty claims pending in any forum.<sup>8</sup> UTC's argument that any action brought by Treppel in a different forum will increase costs and the "burden" on UTC and its executives through participation in

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<sup>7</sup> No. CV 7999-CS, 2013 WL 3014120 (Del. Ch. June 18, 2013).

<sup>8</sup> Much of the criticism directed at stockholder litigation by Justice Strine, et al. in *Putting Stockholders First, Not the First-Filed Complaint* surrounds multi-jurisdiction merger litigation where plaintiffs file in different forums to leverage leadership roles to justify fee awards and force the defendant company into early settlement. Leo E. Strine, Jr., et al., *Putting Stockholders First, Not the First-Filed Complaint*, Business Lawyer, Vol. 69, 2013; Harvard John M. Olin Center for Law, Economics, and Business Discussion Paper No. 740; Widener Law School Legal Studies Research Paper No. 13-25, at 1-3 (Jan. 10, 2013), available at <http://ssrn.com/abstract=2200499>. This is not that type of case. Treppel made a Litigation Demand which was met by a peremptory refusal. Any allegations of wrongful refusal would be specific to the facts of Treppel's Litigation Demand and the subsequent Litigation Rejection. Treppel cannot seek "leverage" in another forum where his is the sole case being litigated.

litigation in different jurisdictions (AOB at 24) is moot in light of the Delaware Supreme Court's dismissal of the only existing factually-related action.

UTC's attempts to recast its unreasonable restriction as somehow mandated under Delaware law should be rejected by this Court, as it was rejected by the Court of Chancery. (A 451). Because UTC produced no evidence that it was in the best interests of the Company to impose an exclusive forum selection clause, the Court of Chancery properly exercised its discretion in denying the use limitation.

**3. The Court of Chancery's Ruling that the Proposed Use Restriction Is Improper Squares with Section 220 Policies and Precedent**

Finally, UTC proposes a tortured reading of purported "cross-purposes" created by the lower court's ruling. UTC's proposed interpretation of the interplay between Section 220 and Court of Chancery Rule 34 ("Rule 34") is wrong and should be rejected.

Delaware courts have consistently implored plaintiffs to utilize the "tools at hand" – namely, Section 220 inspection rights – prior to bringing a suit alleging a demand is futile or was wrongfully refused because discovery under Rule 34 is not permitted to proceed until a plaintiff has established standing to pursue an action. *See Scattered Corp. v. Chicago Stock Exch., Inc.*, 701 A.2d 70, 77 (Del. 1997), *overruled on other grounds by Brehm*, 746 A.2d 244. UTC claims that Delaware contemplates a system in which Section 220 and Rule 23.1 operate "in tandem" to

minimize the corporation's costs of derivative litigation. UTC cites no authority for this proposition, because there is none. Section 220 is not intended to prevent future litigation, as UTC implies. Rather, Section 220 is an expansion of the common law right of stockholders to protect themselves by keeping abreast of how the company is conducting corporate affairs, and is meant to operate as a tool for stockholders to investigate wrongdoing. *See Melzer v. CNET Networks, Inc.*, 934 A.2d 912, 917 (Del. Ch. 2007).

UTC further claims the lower court erred by failing to require Treppel to produce evidence that he is entitled to use books and records in another jurisdiction. (AOB at 32). Again, UTC cites no authority for this proposition, because none exists. A stockholder must show he has a proper purpose to establish his right to inspect documents. "Exploring whether a litigation demand was wrongfully refused is a proper purpose for using Section 220." *See LAMPERS*, 2011 WL 773316, at \*5; *see also Grimes I*, 673 A.2d at 1207; *Grimes II*, 724 A.2d at 561. A proper purpose is all that is needed to obtain inspection. A stockholder is not required to separately show their intended use for the inspection under Section 220(c). That is and was part of the Court of Chancery's analysis under Section 220(b) when it considered whether Treppel had a proper purpose. (A 444-45, 450-51).

After showing a proper purpose, a court may, in its discretion, impose reasonable restrictions to prevent the abuse of inspection rights. *See* Del. Code tit. 8, §220; *see also* *CM & M Grp.*, 453 A.2d at 788. UTC argues the Court of Chancery's ruling "does not advance a coherent scheme for the efficient management of Delaware-law derivative litigation" because it declined to impose the forum restriction. (AOB at 32). Bringing a Section 220 demand to support derivative claims brought in another jurisdiction is not an "abuse" of a stockholder's inspection rights sufficient to trigger restrictions under Section 220(c). Relevant authority shows the opposite - Delaware courts have granted inspection demands by stockholder plaintiffs who have already filed a derivative action in another jurisdiction. *See, e.g., Melzer*, 934 A.2d at 912 (granting inspection where action currently pending in California federal court); *King v. VeriFone Holdings, Inc.*, 12 A.3d 1140, 1152 (Del. 2011) (reversing denial of inspection rights relating to allegations in shareholder derivative action pending in California federal court). The Court of Chancery correctly rejected UTC's unilateral imposition of extrajudicial requirements in Treppel's Inspection Demand.

## II. CONCLUSION

This Court should affirm the judgment of the Court of Chancery in all respects.

Date: May 27, 2014

**COOCH AND TAYLOR, P.A.**

*/s/ Blake A. Bennett*

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