EFiled: Jun 11 2014 11:27PM EDT
Filing ID 55581696
Case Number 127,2014

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 REPLY BRIEF

MORRIS NICHOLS ARSHT &TUNNELL LLP
William M. Lafferty (No. 2755)
D. McKinley Measley (No. 5108)
Christopher P. Quinn (No. 5823)
1201 North Market Street
Wilmington, Delaware 19801
(302) 658-9200

Attorneys for Defendant Below and Appellant United Technologies Corp.

OF COUNSEL:

William Savitt
Ryan A. McLeod (No. 5038)
Anitha Reddy
A.J. Martinez
WACHTELL, LIPTON, ROSEN & KATZ
51 West 52nd Street
New York, New York 10019
(212) 403-1000

June 11, 2014

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

PRELIMINARY STATEMENT

Invoking 8 *Del. C.* § 220, plaintiff Treppel seeks to inspect UTC's books and records for the purpose of pursuing Delaware-law internal affairs derivative litigation. The litigation Treppel proposes is closely related to another lawsuit that has already been litigated in the Court of Chancery and through an appeal in this Court. Treppel has identified no interest of any kind in bringing his derivative litigation anywhere but Delaware. Pointing to its undisputed interests in obtaining the authoritative application of Delaware law and in promoting litigation efficiency, UTC requested that Treppel be restricted from using the documents UTC produces pursuant to the Court of Chancery's order in a non-Delaware forum. The question on this appeal is whether the requested restriction is proper under Delaware law.

Statute, case law, and policy all say yes. Section 220(c) confers upon the Court of Chancery the broad discretion to condition inspection rights "as the Court may deem just and proper." The case law uniformly holds that the Court of Chancery has a duty to impose a proposed restriction on inspection where, as here, the corporate interests protected by the restriction outweigh any stockholder interests impaired by the restriction. And the use restriction here complements the policy concerns animating both this Court's promotion of § 220 as a tool for limited pre-complaint discovery in potential derivative actions and the judicial decisions recognizing that internal affairs litigation is best resolved in the state of incorporation.

Treppel argued below that the court did not have authority to order the use restriction because UTC had to instead rely on a forum selection bylaw to regulate the venue of any derivative suit—even though he claimed he was not bound by

UTC's bylaw. A 402. The trial court agreed, ruling that the use restriction is "not the type" authorized by § 220(c), given the availability of "legitimate avenues" such as a forum selection bylaw to "limit multiple jurisdiction litigation." A 451.

On appeal, Treppel abandons his position below and with it the trial court's ruling. He now concedes that a § 220(c) condition should issue when the corporate interests it protects outweigh any stockholder interests it impairs. But he has not identified even a single way in which the proposed use restriction impairs any stockholder interest. Nor does he offer any reason why confidential documents produced pursuant to § 220 should not be limited to use in the court that orders the production when such a restriction is routinely included in protective orders governing civil discovery.

Treppel instead contends that § 220(c)—contrary to its plain language—only permits confidentiality-related restrictions and that the proposed use restriction does not relate to confidentiality. He also contends that the use restriction should not be ordered because UTC did not introduce adequate evidence in support of its interests—even though those interests are undisputed and established as a matter of law. As detailed below, both arguments are wrong.

Missing from Treppel's answering brief is any reason why a Delaware corporation should be compelled, in a Delaware proceeding brought under a Delaware statute, to produce documents for use in a Delaware-law derivative action brought in another jurisdiction, notwithstanding the risk of duplicative litigation and a non-authoritative application of Delaware law. There is no such reason. This Court should therefore order the use restriction UTC seeks.

ARGUMENT

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

A. Abandoning his position below, plaintiff concedes that a § 220(c) restriction should be ordered when the corporate interests it protects outweigh any stockholder interest it impairs.

In the Court of Chancery, Treppel opposed UTC's proposed use restriction on the ground that the "proper" way to limit the use of § 220 inspection materials was through a charter or bylaw forum selection provision—while nevertheless insisting, erroneously, that UTC's forum selection bylaw did not apply to him because it was adopted after he acquired his shares. A 402; A 441.[1] The Court of Chancery adopted Treppel's argument, holding that UTC's proposed use provision was "not the type of restriction" authorized by § 220(c) because the "legitimate" "mechanism for limiting which forum a suit may be brought in to enforce corporate interests . . . is . . . a charter or bylaw provision." A 451.

As set out in the opening brief, the ruling below is not consistent with either the words of § 220(c) or the decisions interpreting it. Section 220(c) broadly 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." The provision includes no exception that disallows an otherwise proper condition to inspection in a specific case just because the condition could incidentally be im-

[1] This court has recently rejected Treppel's position that UTC's bylaw does not apply to him because it was enacted after he bought UTC stock. *See ATP Tour, Inc.*, v. *Deutscher Tennis Bund, et al.*, --- A.3d ---, 2014 WL 1847446, at *5 (Del. May 8, 2014) (citing *Boilermakers Local 154 Ret. Fund* v. *Chevron Corp.*, 73 A.3d 934, 956 (Del. Ch. 2013) (holding that a bylaw presumptively applies to stockholders who purchase stock after enactment of the bylaw)).

posed by an amendment to the corporate contract governing all stockholders. Nor do decisions of this Court or the Court of Chancery recognize any such exception. To the contrary, the precedents hold that a restriction should be ordered under § 220(c) when the corporate interests protected by the restriction outweigh any stockholder interests impaired by the restriction. *See* A 377-79; 419-22; OB 16-19.

Treppel makes no effort to answer any of this. He abandons his argument that a corporation's ability to adopt a forum selection bylaw renders UTC's proposed use restriction unavailable under § 220(c). Treppel now concedes that a "weighing" of corporate and stockholder interests "must take place in evaluating any . . . limitation" under § 220(c), and that it is "clear that the Court *can* consider and balance the interest of the corporation." AB 15-16 (emphasis in original).

Treppel's concession that the trial court must weigh competing interests in evaluating a proposed § 220(c) restriction is a recognition that the Court of Chancery erred below in holding that the proposed use restriction is statutorily unauthorized in all cases. Rather than acknowledge the court's error, however, Treppel instead defends a ruling the court did not make. Again and again, Treppel asserts that the Court of Chancery "appropriately exercised its discretion" in denying UTC's proposed use restriction. AB 3; *see also* AB 14 (court "correctly applied its discretion"); AB 22 (court "properly exercised its discretion"). But the record shows that the Court of Chancery did not weigh the parties' interests and then deny the use restriction on the basis of a discretionary determination that Treppel's interests outweighed those of UTC and its other stockholders. The Court of Chancery instead ruled that the use restriction was "not the type of restriction" author-

ized by § 220(c) and was thus impermissible as a matter of law. A 451; *see also id.* (court framing the question as "whether I can issue" the proposed use restriction). Rather than exercising its discretion, the Court of Chancery concluded that it had no discretion to exercise. The decision below cannot be affirmed, or defended, on the ground that the trial court properly exercised its discretion in denying UTC's proposed use restriction.

B. The Court of Chancery's authority under § 220(c) is not confined to restrictions that limit the disclosure of information.

Having abandoned the bright-line rule he sponsored below, Treppel seeks to substitute a second in this Court. Treppel contends that the use restriction at issue may never be imposed because § 220(c) authorizes only those restrictions that "limit[] disclosure of information to other adverse parties that may be interested in confidential documents." AB 16. That argument has no more legal basis than the argument Treppel discarded.

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 language of § 220(c) limits the Court of Chancery's discretion to restrictions relating to the disclosure of confidential corporate information to adverse parties. *See New Cingular Wireless PCS* v. *Sussex Cnty. Bd. of Adjustment*, 65 A.3d 607, 611 (Del. 2013) (a statute "is to be interpreted according to its plain and ordinary meaning").

Unable to find any support in the words of § 220(c), Treppel argues that *CM & M Group, Inc.* v. *Carroll*, 453 A.2d 788 (Del. 1982), and *Henshaw* v. *American*

Cement Corp., 252 A.2d 125 (Del. Ch. 1969), stand for the proposition that a restriction may be imposed under § 220(c) only if it limits the disclosure of corporate information to adverse parties. Neither decision remotely so held.

In *CM & M*, this Court held that § 220(c) "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." 453 A.2d at 793-94. Invoking that broad authority, the Court restricted the inspecting stockholder from disclosing the company's financial data to anyone other than bona fide prospective purchasers of the stockholder's shares. Nowhere did the Court hold (or even suggest) that other types of restrictions are unreasonable or disfavored, or that the corporation's only legitimate interest is in maintaining the confidentiality of internal documents.

Similarly, in *Henshaw*, the Court of Chancery noted that § 220(c) grants it "the power to impose restrictions or conditions on the inspection." 252 A.2d at 130. In limiting the agents the stockholder could use to conduct the inspection out of a concern for confidentiality, the court did not suggest that it could not impose restrictions unrelated to confidentiality. As in *CM & M*, because the restriction at issue concerned confidentiality, the court had no occasion to rule on the propriety of restrictions that did not concern confidentiality. Treppel accuses UTC of "stretch[ing] the holdings in *CM & M Group* and *Henshaw* to the breaking point," AB 17, but it is Treppel who attributes to these decisions rulings that the courts never made.

At any rate, Treppel is wrong to argue that our courts have used their discretion under § 220(c) to approve only confidentiality-related restrictions. The power to impose restrictions on inspection under § 220(c) is the source of the court's "well-established" "responsibility to tailor the inspection right to a stockholder's stated purpose." *See Thomas & Betts Corp.* v. *Leviton Mfg. Co.*, 681 A.2d 1026, 1035 (Del. 1996). In *Thomas & Betts*, this Court held that the Court of Chancery properly exercised its discretion under § 220(c) "to limit plaintiff's inspection to those documents which are essential and sufficient to its . . . purpose."[2] 681 A.2d at 1035; *see also Sec. First. Corp.* v. *U.S. Die Casting & Dev. Co.*, 687 A.2d 563, 569 (Del. 1997) (invoking § 220(c) as justification for limiting inspection to books and records "essential" to the accomplishment of the stockholder's stated purpose). And in both *Marathon Partners LP* v. *M & F Worldwide Corp.*, 2004 WL 1728604 (Del. Ch. July 30, 2004), and *Szeto* v. *Phoenix Laser Systems, Inc.*, 1993 WL 257382 (Del. Ch. June 25, 1993), the court approved restrictions under § 220(c) that narrowly limited, in accordance with the plaintiffs' proper purpose, the plaintiffs' use of stocklist materials to communicate with other stockholders.

Equally inaccurate is Treppel's assertion that the proposed use restriction is unrelated to confidentiality concerns. Restrictions limiting the use of discovery

[2] Treppel claims that in *Thomas & Betts*, this Court did not rely on § 220(c) to affirm the Court of Chancery's limitation of the scope of inspection to books and records that were "essential and sufficient" to accomplish the stockholder's stated purpose. Rather, Treppel claims, that limitation is "enumerated in the actual language of Section 220." AB 17 n.3. Treppel is wrong on both counts. The Court expressly invoked § 220(c) as the source of the Court of Chancery's authority to impose the limitation, 681 A.2d at 1035, and § 220 nowhere expressly limits the scope of inspection to books and records that are "essential and sufficient" to accomplish the stockholder's stated purpose.

materials to litigation in the court authorizing the discovery appear in model confidentiality orders all over the country.[3] This is not a coincidence. It reflects a broad judicial consensus that the management and policing of the use of confidential discovery material is appropriately handled by the court that has ordered its production. Restrictions limiting disclosure to certain parties and venue-limiting use restrictions are not strangers, as Treppel supposes. To the contrary, they are complementary elements of customary protective orders that prevent misuse of discovery.

C. The proposed use restriction should be ordered because it protects UTC's legitimate interests without impairing any legitimate interest of the plaintiff.

Section 220(c) "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*, 453 A.2d at 793-94. Just as the court has a "duty to protect the rights of the stockholder," it also has a "duty to safeguard the rights and legitimate interests of the corporation." *Id.* Section 220(c) thus gives the Court of Chancery not merely the power, but also "the responsibility . . . to narrowly tailor the inspection right to a stockholder's stated purpose." *Thomas & Betts*, 681 A.2d at 1035. In recognition of that obligation, the precedents teach that the

[3] *E.g.*, Court of Chancery Sample Stipulation and [Proposed] Order For the Production and Exchange of Confidential Information ¶ 9, http://courts.delaware.gov/chancery/docs/ Sample_Confidentiality_Stipulation.pdf; Supreme Court of the State of New York, County of New York: Commercial Division, Sample Stipulation and Order for the Production and Exchange of Confidential Information ¶ 6, http://www.nycourts.gov/courts/comdiv/PDFs/2009%20Approved%20Confidentiality%20Stipulation.pdf; Los Angeles Superior Court Model Stipulation and Protective Order -- Confidential Designation Only ¶ 8, http://www.lasuperiorcourt.org/civil/UI/pdf/FormProtectiveOrder1Confidential_1.pdf.

court must place reasonable restrictions on the stockholder's inspection right if the corporate interests protected by the restriction outweigh any stockholder interests impaired by the restriction. OB 16-19.

Under that principle, UTC is entitled to the proposed use restriction because it protects UTC's legitimate interests without impairing any legitimate interest of Treppel's. Treppel contends that UTC seeks to turn a discretionary judicial decision into a mandatory one. He mischaracterizes UTC's argument, which is much more modest. Treppel has not identified any legitimate interest of his that would be impaired by the restriction. In contrast, UTC has identified multiple legitimate interests that would be impaired by the restriction. On the facts and circumstances of this case, the weighing of interests can lead to only one outcome: approval of the restriction. That result is mandated here because Treppel has left the record bare of any basis to deny the restriction.

Treppel tries to escape this inevitable result by arguing for the first time that UTC's proposed use restriction might impair his ability to sue a UTC officer not subject to jurisdiction in Delaware and that UTC did not present "evidence" that the use restriction serves its legitimate interests. As set out below, these arguments are meritless and waived.

1. Plaintiff has not identified any legitimate interest of his that would be impaired by the use restriction.

Treppel has proffered only two purposes for his inspection demand: to evaluate the UTC board's rejection of his litigation demand and to potentially bring a derivative suit challenging that rejection. A 198-99; 436-37. The use restriction

does not impair Treppel's ability to achieve either purpose. Treppel can evaluate the propriety of the rejection by examining the relevant books and records; he does not need to bring a suit outside Delaware to achieve that purpose. Nor does the use restriction impair Treppel's ability to pursue a derivative suit. Treppel's only legitimate interest in pursuing such a suit is to obtain any relief to which UTC is entitled—and complete relief is available in the Court of Chancery, where Treppel would be free to use the books and records produced for inspection.

In the proceedings below, Treppel never disputed any of this or identified any legitimate interest of his that would be impaired by the Delaware venue use restriction. Indeed, Treppel blocked UTC's efforts to investigate the existence of any such interest, invoking the attorney-client privilege and refusing to answer questions regarding his reasons for opposing the use restriction. A 438.

In this Court, Treppel argues for the first time that "[t]he proposed restriction may well limit [his] 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." AB 20. Treppel acknowledges that 10 *Del. C.* § 3114(c)(3) extends jurisdiction over the officers of Delaware corporations, but he argues the misconduct alleged in his litigation demand "occurred between 2000 and 2003," before § 3114(c)(3) became effective in 2004. AB 20 n.5.

This argument is without merit. To begin with, the alleged misconduct at issue occurred between 2002 and 2006, as Treppel's own demand letter makes clear. A 139-40. Treppel's argument thus rests on the hypothetical existence of a UTC officer who is subject to liability for actions taken between 2002 and 2004, but not

after, and who is not otherwise amenable to jurisdiction in Delaware and refuses to consent to jurisdiction in Delaware. On the basis of this speculation, Treppel contends that he is entitled to use UTC's books and records to sue outside of Delaware regardless of whether this phantom officer ever materializes. If and when Treppel identifies such a potential defendant, he may move to lift or modify the use restriction. As UTC pointed out in its opening brief, Court of Chancery Rule 60(b) authorizes the court to relieve a party from a final judgment when "it is no longer equitable that the judgment should have prospective application." OB 26. Treppel does not dispute that the Rule 60(b) safety valve will remain open to permit the court to remedy any inequity that might result from the use restriction. But if the restriction is denied now, Treppel will be free to use UTC books and records to launch derivative litigation in another jurisdiction, even when no legitimate stockholder interest would be served by such a suit.[4]

2. UTC has demonstrated that the use restriction would protect its legitimate interests.

In the trial court and again on this appeal, UTC identified two interests that the use restriction would protect: (1) its interest in obtaining the authoritative application of Delaware law to issues concerning its internal affairs; and (2) its interest in avoiding the wasteful litigation of related derivative suits in multiple jurisdictions. A 373-76; OB 22-25. Treppel does not dispute on appeal—and did not

[4] Treppel also argues for the first time on appeal that the use restriction might impede his ability to use UTC's books and records to bring a "federal derivative claim." There is no such thing as a "federal derivative claim." Any derivative claim Treppel might wish to bring on UTC's behalf is governed by Delaware law and may be heard in the Court of Chancery. And Treppel's only stated litigation-related purpose for inspection is the potential prosecution of a potential Delaware-law derivative claim. A 198.

dispute below—that either interest is a legitimate corporate interest. Rather, Treppel now complains that UTC did not establish these interests with any evidence. AB 18-22. This objection is both meritless and waived.

In the trial court, UTC established that both of its asserted interests were legitimate corporate interests as a matter of law. Delaware courts have repeatedly recognized that a Delaware corporation and its stockholders have a legitimate interest in obtaining the authoritative application of Delaware law to suits concerning the corporation's internal affairs—which include any derivative suit Treppel might bring. *See* A 373-74 (citing *In re Compellent Techs., Inc. S'holder Litig.*, No. 6084-VCL (Del. Ch. Jan. 13, 2011) (transcript) at 19; *In re Topps Co. S'holders Litig.*, 924 A.2d 951, 961 (Del. Ch. 2007)). Delaware courts have also recognized that the prosecution of duplicative representative stockholder litigation in multiple forums creates imposes heavier burdens on the corporation without creating any corresponding benefit, and is thus harmful to the corporation and its stockholders. *See* A 373-75 (citing *In re RAE Sys., Inc. S'holders Litig.*, No 5848-VCS (Del. Ch. Nov. 10, 2010) (transcript) at 17). Treppel has cited no authority to the contrary.

In addition, UTC showed that the risk of duplicative non-Delaware derivative litigation is a significant concern in the circumstances of this case. Shortly after Treppel filed this action, UTC raised the existence of a derivative suit pending in the Court of Chancery (the *Grill* action) that was premised on the same alleged corporate misconduct on which Treppel premised his litigation demand. *See* B 13 (UTC's Answer); *see also* AR 22-24. Treppel does not dispute that the *Grill* action sought the same relief that he would seek in any action he brings using UTC's

books and records.[5] UTC also demonstrated that Treppel has a history of bringing internal affairs litigation outside the state of incorporation that is unjustified by any legitimate corporate or stockholder interest. OB 13; A 10, 13, 32, 36, 50, 61.

The record before the Court of Chancery thus established the legitimacy of the corporate interests that UTC proffered in support of the use restriction. Furthermore, no part of the ruling below reflected the trial court's conclusion that UTC's record in support of its asserted interests was marred by an evidentiary deficiency. To the contrary, the Vice Chancellor ruled that the "legitimate avenue" for protecting those interests was a charter or bylaw forum selection provision, not a use restriction imposed under § 220(c). A 451.

The weakness of Treppel's objection is further exposed by his contention that UTC was obligated to introduce the testimony of a "Company official" to show that "the use restriction was . . . necessary to protect UTC's interests."[6] AB 19. Treppel does not cite any authority for such a rule, and his own brief confirms that no such rule exists. As Treppel notes, a party's interest in obtaining the authoritative application of Delaware law and avoiding inefficient duplicative litigation are factors that courts consider in adjudicating motions to stay duplicative representative stockholder litigation. AB 20 n.6 (citing *In re Bear Stearns Cos., Inc.*

[5] Treppel also suggests that the use restriction is not necessary to protect UTC's interest in avoiding duplicative derivative litigation because this Court affirmed the Court of Chancery's dismissal of *Grill* in December 2013, shortly before the trial below. AB 21. But Treppel does not and cannot dispute that other UTC stockholders, including others who have already demanded to inspect pertinent books and records, could yet commence related litigation.

[6] Treppel also suggests he was entitled to cross-examine a UTC witness, but he does not identify any issue of fact, much less any issue of fact that turned on a credibility assessment, that required either direct or cross-examination.

S'holder Litig., 2008 WL 959992, at *5 (Del. Ch. Apr. 9, 2008)). But because those interests are established and properly weighed as a matter of law, the courts have never required a party to present testimony relating to those interests, rather than legal argument, in considering whether to grant a stay application. *See, e.g.*, *Bear Stearns*, 2008 WL 959992, at *5-8 (considering these interests without requiring or receiving testimony); *see also* AR 1-6 (*Bear Stearns* briefing exhibits showing that parties did not rely on any testimony).

Even if there were a requirement that the record contain an indication that UTC officials supported the use restriction, Treppel himself fulfilled it by introducing UTC's forum selection bylaw. A 392; AR 2. Adoption of that bylaw by UTC's entire board of directors is powerful evidence—more powerful than testimony by "a single Company official"—that UTC believes that the concentration of derivative litigation in Delaware is in its best interests. Measures that further that goal, such as the use restriction, necessarily protect those interests. *See Steiner* v. *Yahoo!, Inc.*, No. 9181-ML (Del. Ch. Apr. 1, 2014) (Stipulated Record Trial Transcript and Master's Draft Bench Report) at 77 (refusing to order a § 220(c) inspection condition barring the stockholder from bringing derivative litigation outside Delaware because the company had not demonstrated its interest in avoiding out-of-state internal affairs litigation by adopting a forum selection bylaw).[7]

At any rate, Treppel waived any objection to the adequacy of UTC's evidentiary showing. At the argument on his unsuccessful motion to compel the testimo-

[7] The restriction that the Yahoo! sought was thus different from the restriction UTC seeks here, which bars Treppel only from using UTC's books and records in litigation outside of Delaware.

ny of a UTC witness on an issue unrelated to the use restriction,[8] Treppel asserted that the issue of the use restriction was "really a legal issue" that did not require witness testimony and that he had "offered to simplify this proceeding at the outset by just briefing a summary judgment motion on that confidentiality order issue." AR 12. Treppel thus did not merely decline to seek testimony from a UTC witness related to the use restriction—he declared that such testimony was neither necessary nor appropriate.

Furthermore, after the discovery period closed and UTC confirmed to Treppel's counsel that it would not be presenting any witnesses at trial, UTC relied on the undisputed facts and Delaware law—but no testimony of a company witness—to argue in its pre-trial opening brief that the use restriction protected its legitimate interests. In his answering brief, Treppel did not argue that UTC's legitimate interests could not be considered because UTC had failed to establish them with appropriate evidence. Treppel instead argued that the "proper" way for UTC to protect its interests was through a forum selection provision in its charter or bylaws, not through a use restriction imposed under § 220(c). A 402. *See Alexander* v. *Cahill*, 829 A.2d 117, 128-29 (Del. 2003) (issue is waived when "the issue could have been, but was not, raised pretrial in some form and [] the failure to do so caused prejudice to a party without notice of the defense by making it difficult, if not impossible, to fairly face the issue for the first time during trial").

[8] Treppel moved to compel testimony to confirm the existence of the books and records he sought for inspection. *See* AR 13. The Court of Chancery properly denied the motion on the ground that "the existence and whereabouts of the documents sought by the plaintiff in this 220 action are not relevant to any issue before me." AR 18.

Not until closing arguments at trial did Treppel's counsel assert for the first time that UTC should have presented a witness to testify "about what the interests are of the company."[9] A 440. After UTC's counsel responded that Treppel's objection was meritless and untimely,[10] Treppel's counsel promptly disclaimed making any such objection: "I just wanted to note for the record, [UTC's] counsel suggested that we criticized his evidentiary record. I think he was off there, so I'm not going to respond to it. . . . He was making a good point, but it just wasn't one that I made. If I had made that point, I think maybe I would have responded." A 449. Treppel thus expressly denied making below the objection he now seeks to raise in this Court.

D. The restriction UTC seeks is consistent with the policies underlying § 220 and Rule 23.1.

As this Court has explained, the judicial discretion conferred by § 220(c) is "undergird[ed]" by "a recognition that the interests of the corporation must be harmonized with those of the inspecting stockholder." *Thomas & Betts*, 681 A.2d at 1035. In the context here—an inspection demand in support of potential derivative litigation—this directive has been interpreted to mean that the court should give a § 220 plaintiff access to information sufficient to fairly confront a Rule 23.1

[9] Treppel asserts that UTC could have put on a witness at trial even if UTC had not previously identified any trial witnesses in the Pre-Trial Order. AB 10. Thus, by his own account, Treppel's failure to suggest any evidentiary objection until closing arguments prejudiced UTC.

[10] *See* A 446 ("I also think I heard [Treppel's counsel] suggest that there was a problem with the lack of evidence . . . . I don't know if that's what the argument was, but . . . these are, first of all, matters of law that do not require evidence. It's also plainly so that we have been requesting this condition throughout and expressly in our opening papers. If it was thought that there was any evidentiary issue that we needed to fulfill, the appropriate time to raise that point was in the answering brief so that it could have been promptly addressed. But, candidly, I don't think there is an issue of evidence.").

motion, but avoid imposing unnecessary costs on a responding corporation. *See id.*; *Brehm* v. *Eisner*, 746 A.2d 244, 255, 266-67 (Del. 2000).

The use restriction at issue here accords with this principle because it protects UTC's legitimate interests without impeding Treppel's ability to obtain through derivative litigation any relief to which UTC is entitled. The use restriction leaves Treppel free to use UTC's books and records to file his Delaware-law derivative suit in a Delaware court. Treppel has provided no reason that he cannot obtain complete relief in Delaware, and if such a reason should emerge, the Court of Chancery can and will lift the restriction. Contrary to Treppel's suggestion, the use restriction thus does not interfere with § 220's aim of giving stockholders access to corporate documents to protect their interests as stockholders.

In contrast, the unrestricted relief Treppel seeks is inconsistent with the "responsibility of the trial court" to use the discretion afforded by § 220(c) "to narrowly tailor the inspection right to a stockholder's stated purpose." *Thomas & Betts*, 681 A.2d at 1035 (quoting § 220(c) and explaining that this "well established" responsibility results from the duty to harmonize the interests of the corporation and the inspecting stockholder). Discharging that responsibility, the Court of Chancery consistently limits the scope of documents produced for inspection to those "essential" to a stockholder's purpose. And it is the *stockholder's* burden to show that the documents sought meet that test. *Id.* Here, Treppel seeks the right to use UTC's books and records to launch derivative litigation outside Delaware. There is no precedent for awarding Treppel that relief when he has made no show-

ing that it is essential to accomplish his stated purpose and when the corporation has shown that granting such relief is contrary to its legitimate interests.

Faced with the absence of any authority in support of his position, Treppel cites two inapposite cases that he says establish his right to use books and records produced for inspection to commence litigation outside Delaware. The cases establish no such right. In *King* v. *Verifone Holdings, Inc.*, 12 A.3d 1140, 1141 (Del. 2011), the "sole issue" was whether a § 220 plaintiff who has already brought a derivative action in any court necessarily lacks a proper purpose for seeking books and records in support of that suit. In *Melzer* v. *CNET Networks, Inc.*, 934 A.2d 912, 916 (Del. Ch. 2007), the sole issue was "whether plaintiffs may properly inspect books and records predating plaintiffs' ownership of stock." In neither case was a restriction limiting the plaintiff's use of the books and records to a particular forum at issue. The courts consequently had no occasion to address whether such a restriction would be appropriate given the facts and circumstances of each case.

Nor does either case support Treppel's effort to avoid the use restriction here. In *King*, the § 220 plaintiff had filed a derivative suit in California court *after* a federal securities class action based on the same facts had already been filed there on behalf of the company's stockholders. 12 A.3d at 1142. Imposing a use restriction in that case would thus have ensured rather than avoided multijurisdictional litigation. And in *Melzer*, the Court of Chancery ordered production of the company's books and records to a plaintiff who had previously brought a derivative suit in California only after the company had "itself raised the availability of [a § 220] inspection" in briefing submitted to the California court. 934 A.2d at 915.

When a stockholder chooses to become a derivative plaintiff, he chooses to become a fiduciary to the corporation and his fellow stockholders. Treppel, however, has refused to articulate any way in which bringing a derivative suit outside Delaware is consistent with the corporate and stockholder interests he would be obligated to prioritize as a derivative plaintiff. And he provides no reason why, given that refusal, he should be permitted to invoke his status as a potential derivative plaintiff to obtain the right to use UTC's books and records to file suit outside Delaware.

No such reason exists. Nothing in § 220 jurisprudence or Delaware law requires the courts of this state to facilitate the litigation of Delaware-law derivative claims in other jurisdictions when that litigation threatens the legitimate interests of Delaware corporations and their stockholders. To the contrary, denial of the restriction would yield anomalous results with no basis in law or policy. It would create the spectacle of a lone stockholder haling a Delaware corporate citizen into a foreign court to defend Delaware-law fiduciary breach claims on the strength of discovery ordered by the Delaware Court of Chancery, even where departure from the established principle that internal affairs cases are properly heard in the state of incorporation will not serve any legitimate corporate or stockholder interest. This makes no sense at all.

Fundamentally, Treppel's claim to an inalienable right to use UTC's books and records to bring fiduciary duty litigation outside of Delaware cannot be squared with his concession—and our courts' conclusion—that a corporation acts properly when it adopts a bylaw precisely to prevent that outcome. If directors can

enact a bylaw to that end, then surely our courts are empowered to further the same salutary goal. In the face of UTC's interest in rationally organizing internal affairs litigation, Treppel has proffered no legitimate reason for using his pre-complaint discovery to litigate outside of Delaware. Accordingly, the restriction UTC seeks is both authorized by § 220(c) and part of the responsible solution to the problem of multi-jurisdictional and out-of-state Delaware internal affairs litigation.

CONCLUSION

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

/s/ William M. Lafferty
William M. Lafferty (No. 2755)
D. McKinley Measley (No. 5108)
Christopher P. Quinn (No. 5823)
1201 North Market Street
Wilmington, Delaware 19801
(302) 658-9200
Attorneys for Defendant Below and Appellant United Technologies Corp.

OF COUNSEL:

William Savitt
Ryan A. McLeod (No. 5038)
Anitha Reddy
A.J. Martinez
WACHTELL, LIPTON, ROSEN & KATZ
51 West 52nd Street
New York, New York 10019
(212) 403-1000

June 11, 2014

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of June, 2014, a copy of the foregoing APPELLANT'S REPLY BRIEF was served, by File & Serve XPress, on the following attorneys of record:

Blake A. Bennett
Cooch and Taylor P.A.
1000 West Street, 10th Floor
P.O. Box 1680
Wilmington, DE 19899

/s/ Christopher P. Quinn
Christopher P. Quinn (#5823)