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**IN THE SUPREME COURT OF THE STATE OF DELAWARE**

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| LABORERS' DISTRICT COUNCIL CONSTRUCTION INDUSTRY PENSION FUND and HALLANDALE BEACH POLICE OFFICERS AND FIREFIGHTERS' PERSONNEL RETIREMENT FUND, derivatively on behalf of LULULEMON ATHLETICA, INC.,<br><br>Plaintiffs Below,<br>Appellants,<br><br>v.<br><br>ROBERT BENSOUSSAN, MICHAEL CASEY, ROANN COSTIN, CHRISTINE M. DAY, WILLIAM H. GLENN, MARTHA A.M. MORFITT, RHODA M. PITCHER, THOMAS G. STEMBERG, JERRY STRITZKE, EMILY WHITE, and DENNIS J. WILSON,<br><br>Defendants Below,<br>Appellees,<br><br>-and-<br><br>LULULEMON ATHLETICA, INC., a Delaware Corporation,<br><br>Nominal Defendant Below,<br>Appellee. | No. 358, 2016<br><br>Court Below:<br>Court of Chancery<br>of the State of Delaware<br>C.A. No. 11293-CB<br><br>**PUBLIC VERSION**<br>**E-FILED: Oct. 6, 2016** |

**APPELLANTS' OPENING BRIEF**

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**CASES**

**TREATISES**

## NATURE OF THE PROCEEDINGS

This is a stockholder derivative action on behalf of nominal defendant lululemon, Inc. ("Lululemon" or the "Company") concerning company founder Dennis J. (Chip) Wilson's ("Wilson") suspicious trades around the time of then-CEO Christine Day's departure. Plaintiffs-Appellants (the "Delaware Plaintiffs")[1] are beneficial owners of Lululemon common stock. Following a successful Section 220 books and records action,[2] the Delaware Plaintiffs filed this suit (the "Delaware Action").[3]

The Defendants-Appellees ("Defendants"), present and former officers and directors of the Company, moved to dismiss, asserting that Delaware Plaintiffs' claims were barred by collateral estoppel and *res judicata* based on the dismissal of a prior shareholder derivative suit, *Canty v. Day* (the "New York Action"),[4] and that the Delaware Complaint failed to allege particularized facts excusing demand. The Court of Chancery granted dismissal on collateral estoppel and *res judicata* grounds, declining to reach the demand futility arguments.

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1 Laborers' District Council Construction Industry Pension Fund ("LDC") and Hallandale Beach Police Officers and Firefighters' Personnel Retirement Fund ("Hallandale").

2 Hallandale and LDC each filed verified complaints, and the actions were later consolidated as *In re Lululemon Athletica Inc. 220 Litigation*, No. 9039-VCP (Del. Ch.) (the "220 Action").

3 *See LDC & Hallandale v. Bensoussan*, C.A. No. 11293-CB (Del. Ch. July 20, 2015), the "Del. Compl.").

4 13 F. Supp. 3d 333 (S.D.N.Y. 2014), *aff'd*, 599 F. App'x 20 (2d Cir. 2015).

## SUMMARY OF ARGUMENT

1. ***Res judicata does not apply***. The Court of Chancery committed legal error in concluding that claims in the Delaware Action were precluded by *res judicata.* The claims in the New York Action were dismissed "without prejudice," so they do not constitute a final adjudication on the merits. The Court of Chancery's contrary conclusion confuses the doctrines of issue and claim preclusion; as the court recognized, the *claims* in the New York Action may still be pursued.[5] In any event, under controlling New York law, the dismissal of an earlier derivative action cannot bind another stockholder who attempted to intervene in the earlier action and was rebuffed.[6] Delaware Plaintiffs moved to intervene in the New York Action to protect their interests, but the district court judge denied intervention based on her dismissal without prejudice.

2. ***Collateral estoppel does not apply***. The Court of Chancery also committed legal error in ruling that the Delaware Plaintiffs were collaterally estopped from litigating demand futility. The demand futility issues in the two suits were not identical, as required for collateral estoppel: Delaware Plaintiffs contend that the Lululemon Board's failure to investigate Wilson's suspicious trades is a decision that was not protected by the business judgment rule and thus exposes board

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[5] *See* June 14, 2016 Memorandum Opinion (attached hereto as Exhibit A and cited herein as "Op.").

[6] *Parkoff v. Gen. Tel. & Elecs. Corp.*, 425 N.E.2d 820 (N.Y. 1981).

members to potential liability. By contrast, the New York Plaintiffs alleged that the board members "facilitated" Wilson's trades because they were under his domination and control; no pleading in that case even mentioned the Board's failure to investigate. Collateral estoppel also is inapplicable because the Delaware Plaintiffs did not have a full and fair opportunity to litigate their demand futility allegations. As just noted, those issues were never properly raised or litigated in the New York Action. Even if they had been, under *Parkoff*, the Delaware Plaintiffs cannot be said to have had an opportunity to litigate them because they were thwarted in their attempt to intervene in the earlier suit.

3. ***The plaintiffs in the New York Action are inadequate representatives***. The Court of Chancery erred in finding that Delaware Plaintiffs were adequately represented in the New York Action. There is no dispute that plaintiffs' counsel in the New York Action (1) rushed to file a derivative complaint without first conducting an adequate pre-suit investigation, (2) resorted to copying verbatim significant portions of that complaint from a federal securities fraud complaint, and (3) included their *Brophy* claim against Wilson with other unrelated claims almost as an afterthought. Such actions are characteristic of a "feckless fast filer."[7] Under either New York or Delaware law, they constitute "grossly deficient"

[7] *See Asbestos Workers Local 42 Pension Fund v. Bammann*, No. 9772-VCG, 2015 WL 2455469, at *17 (Del. Ch. May 21, 2015), *as revised* (May 22, 2015), *aff'd*, 132 A.3d 749 (Del. 2016).

representation. The inadequacy of the New York Plaintiffs' representation is further demonstrated by their active opposition to the Delaware Plaintiffs' intervention in the New York Action. Their "antagonism"[8] to the Delaware Plaintiffs' participation proves that they could not adequately represent the Delaware Plaintiffs' interests.

[8] *Daventree Ltd. v. Republic of Azerbaijan*, 349 F. Supp. 2d 736, 753 (S.D.N.Y. 2004).

## STATEMENT OF FACTS

### A. Lululemon's Chairman's Insider Sales

On Tuesday, June 4, 2013 and Friday, June 7, 2013, Wilson, Lululemon's founder, then-Chairman and largest shareholder, sold in the aggregate one million shares of Lululemon common stock for proceeds of $81,646,043.[9] Wilson sold 392,455 shares on June 4 and 607,545 shares on June 7.[10] On the first trading day of the following week, Monday, June 10, 2013, the Company surprised the market with news that its long-time CEO, Christine Day ("Day"), had tendered her resignation.[11] On this news, Lululemon's stock dropped 17%, the largest one-day stock drop in the Company's history.[12]

Within days of this announcement, prominent new outlets, including *The Wall Street Journal* and *Reuters,* questioned the timing of Wilson's stock sales, particularly the sales on June 7.[13] In addition to the suspicious timing of the stock sales – immediately before a major corporate event – the volume of the trades that day was significantly out of line with Wilson's previous trading history.[14]

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9 Del. Compl. at ¶¶ 46, 52 (A115, A117).
10 *Id*.
11 *Id.* at ¶ 53 (A117-18).
12 *Id*.
13 *Id.* at ¶ 54 (A118-19).
14 *Id.* at ¶ 53 (A117-18).

In response to press reports about Wilson's insider sales, the Company cited a 10b5-1 stock trading plan ("Trading Plan") that Wilson had entered into six months earlier and that (allegedly) ceded authority over Wilson's trades to his broker at Merrill Lynch.[15] Under the Trading Plan (which the Delaware Plaintiffs gained access to through a Section 220 investigation), Wilson was permitted to sell up to 5.7 million shares in two groups: 300,000 shares to be sold between January 10 and December 31, 2013 at market prices; and 5.4 million shares eligible to be sold between January 10, 2013 and June 30, 2014 at no less than $81.25 per share.[16] The Trading Plan limited sales in any calendar month to one million shares.[17] The details of the Trading Plan confirm that Wilson not only sold significantly more shares on June 7 than on any previous day, but also that he sold the maximum number of shares permitted that day under the Trading Plan.[18] In other words, in the first seven days of June, Wilson maxed out his one million share monthly limit.

### B. The Section 220 Action And The Present Litigation

Following news reports of these trades, the Delaware Plaintiffs sought books and records under Delaware's Section 220 concerning, among other things,

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15 *Id.* at ¶ 6 (A100).
16 *Id.* at ¶¶ 31-33 (A108-109).
17 *Id.*
18 *Id.*

(1) documents related to when Wilson and Lululemon's Board were made aware of Ms. Day's plan to resign, and (2) any Board inquiry or investigation into the trades.[19]

In an oral order ("the Section 220 Order"),[20] Vice Chancellor Parsons determined that the Delaware Plaintiffs had met their burden of showing that a credible basis of wrongdoing had occurred in connection with Wilson's June 2013 trades.[21] The Court of Chancery acknowledged that Wilson's June 7 trades were suspicious:

> So [Wilson's broker is] going to sell every single share that he can today, because it's never going to be better than today. For this month, anyway. So I'm going to get that out there. It looks like maybe that person had some information. And he's not thinking about Mr. Wilson's other 95 percent of his shares. His focus is completely on what's happening here.
>
> And so then they come in and they say, well, this looks so suspicious. What did the board do to investigate? I don't know.[22]

In advancing the Section 220 Action through and beyond trial,[23] the Delaware Plaintiffs learned that, no later than June 5, 2013, Wilson was aware of Day's impending resignation and, equally significant, of the timetable for public disclosure

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19 *See* Exs. A & B to Del. Compl. (A143-161).

20 *See In re Lululemon Athletica Inc. 220 Litig.*, Consol. C.A. No. 9039-VCP (the "220 Action"), Telephonic Rulings of the Court (Transcript) (Apr. 2, 2014) (D.I. 37).

21 *See id.* at 40:23-41:16.

22 *See* 220 Action, Trial Transcript (D.I. 35) at 56:10-20 (Feb. 19, 2014).

23 *See In re Lululemon Athletica Inc. 220 Litig.*, Consol. C.A. No. 9039-VCP, 2015 WL 1957196 (Del. Ch. Apr. 30, 2015).

of this major corporate event.[24] This fact, of course, was highly relevant to any claims against Wilson under *Brophy v. Cities Service Co*.[25]

Another previously undisclosed fact that the Delaware Plaintiffs learned through their Section 220 investigation was that, notwithstanding the suspicious nature of Wilson's stock sales and the prominent media attention to those trades, the Board failed to investigate.[26] This lack of investigation was all but confirmed in a July 2013 email exchange between Erin Nicholas, Lululemon's "Director of Legal," and Jerry Stritzke, a (now former) Lululemon Board member. Stritzke wrote:

> Have we had an attorney look at the facts surrounding the last trade made under [Wilson's] previous plan? Who is your Board contact for this subject?[27]

Nicholas responded three days later:

> We haven't had an attorney look into the facts surrounding the last trade made under [Wilson's] plan. We were advised that the trade was made pursuant to the parameters of the plan by his advisors and assisted with the drafting of the Form 4 for that transaction. . . .[28]

Armed with these new facts, the Delaware Plaintiffs filed a stockholder derivative complaint alleging a *Brophy* claim against Wilson and a claim for breach

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24 Del. Compl. at ¶ 51 (A117).

25 70 A.2d 5 (Del. Ch. 1949).

26 *Id.* at ¶¶ 1, 6, 60-64, 70, 72-76, 78 (A096-97, A100, A124-132).

27 *Id.* at ¶¶ 62-63 (A124-125).

28 *Id.* In the 220 Action, the Company was ordered to produce, *inter alia*, all documents concerning any inquiry by the Board or any of its members regarding Wilson's June 2013 trades. The Company produced nothing apart from this email exchange. *Id*. at ¶¶ 62-64 (A124-126).

of fiduciary duty against the full Lululemon Board for its failure to investigate Wilson's stock sales. Delaware Plaintiffs alleged that demand on the Board was excused because the Board's failure to investigate raised a reasonable doubt that the Board members were entitled to the protections of the business judgment rule.[29]

Defendants moved to dismiss on both demand futility and preclusion grounds. The Court of Chancery granted the motion and dismissed the action with prejudice, holding that it was precluded as a matter of law under the doctrines of *res judicata* and collateral estoppel, based on the dismissal of the New York Action.[30]

### C. The New York Action

In August 2013, after the Delaware Plaintiffs' Section 220 investigation was underway, two other Lululemon stockholders (the "New York Plaintiffs") filed stockholder derivative actions in federal court in New York.[31] The primary focus of the New York Action was on claims arising from the March 2013 recall of "Luon" yoga pants, one of the Company's best-selling products, but it did also include a *Brophy* claim based on Wilson's stock sales.

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29 *Id.* at ¶¶ 1, 6-7, 70-72, 75-76, 78 (A096-97, A100-101, A127-132).

30 *See* Op.

31 *Canty v. Day*, No. 1:13-cv-05629 (S.D.N.Y. Aug. 12, 2013); *Federman v. Day*, No. 1:13-cv-05977 (S.D.N.Y. Aug. 23, 2013). The complaint filed in *Canty* is the operative complaint and ECF references in the New York Action are to the docket in *Canty*.

The New York Action failed to include a claim for breach of fiduciary duty against the Board related to Wilson's stock sales.[32] Nor did the New York Complaint include any allegations concerning the Lululemon Board's failure to investigate Wilson's trades, but instead alleged that demand was excused as to the *Brophy* claim because the Board was dominated and controlled by Wilson.[33]

The New York Action was further distinguishable from the Delaware Action in that it contained allegations that were apparently lifted from a pending federal securities fraud class action ("SDNY 10(b) Action")[34] against Lululemon related to alleged false and misleading statements concerning the yoga pants recall.[35] Defendants in the New York Action rightly took note of these similarities:

> [P]laintiffs add 101 paragraphs copied almost verbatim from the complaint in the federal securities litigation against Lululemon. . . . Forty-one of those 101 new paragraphs simply replace the words "lululemon" or "the Company" in the federal securities action with the word "Defendants" – a term plaintiffs use here to encompass thirteen individuals, eleven of whose names do not even appear in the securities complaint.[36]

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32 *Compare* N.Y. Compl. at ¶¶ 217-238 (A298-301) *with* Del. Compl. at ¶¶ 77-81 (A132-133).

33 *See* N.Y. Compl. at ¶ 208 (A289-296). Regarding the yoga pants recall, complaint alleged that the Board failed to respond to red flag warnings about Lululemon's quality control. *Id.*

34 *Alkhoury v. Lululemon Athletica Inc*, 13 Civ. 4596 (KBF) (S.D.N.Y. July 2, 2013). The action was later renamed *In re Lululemon Securities Litigation* on October 1, 2013. *See* Mem. Decision & Order, ECF No. 17.

35 *See* N.Y. Compl. at ¶¶ 70-133, 138-40, 143-51, 153-66, 168, 170-79 (A232-275).

36 *See, e.g.*, Mem. in Supp. of Mot. to Dismiss Am. Compl. at 2, New York Action (S.D.N.Y. Jan. 31, 2014), ECF No. 23 (A020).

The district court took note as well.[37]

Defendants moved to dismiss the New York Action pursuant to Rule 23.1 of the Federal Rules of Civil Procedure for failing to allege particularized facts that excused the New York Plaintiffs' failure to make a demand on Lululemon's Board. Recognizing that the New York Action included a *Brophy* claim related to the same stock sales at issue in their 220 Action, the Delaware Plaintiffs moved to intervene in the New York Action. Their motion asked the district court to either (a) stay the case pending the outcome of their Section 220 investigation; or (b) assuming the court was inclined to dismiss the action, to do so "without prejudice."[38]

The New York Plaintiffs actively opposed the motion, stating in a letter to the district court that the Delaware Plaintiffs were merely trying to "carv[e] out a role for themselves" and that their proposed course of action (*i.e.*, the Section 220 investigation) was "inefficient."[39]

The morning of the hearing, the district court issued a preliminary order[40] that proposed to dismiss the New York Action "without prejudice" and deny the

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37 *See* Order at 11 n.5, N.Y. Action (S.D.N.Y. Apr. 9, 2014), ECF No. 54 ("N.Y. Order") (A069-093).

38 *See* Mem. in Supp. of LDC's Mot. to Intervene at 1, N.Y. Action (S.D.N.Y. Mar. 25, 2014), ECF No. 37 ("Mot. to Intervene") (A049).

39 Letter from New York Plaintiffs to The Hon. Katherine B. Forrest at 2-3 (Apr. 2, 2014), ECF No. 51 (citations omitted) ("N.Y. Pls.' Letter") (A065-68).

40 U.S. District Judge Forrest has a practice of issuing "preliminary" orders before oral argument.

Delaware Plaintiffs' motion to intervene as "moot."[41] Specifically the Court indicated its inclination to grant the motion to dismiss:

> because plaintiffs have failed to adequately allege particularized facts showing demand on lululemon's Board of Directors was excused. The Court thus DISMISSES the complaint without prejudice, in the event plaintiffs seek to pursue these claims after making a demand on the Board.[42]

At oral argument the district court made clear that the dismissal without prejudice was intended to protect Delaware Plaintiffs'rights:

> [J]ust so that I understand the lay of the land, . . . *what you really want to be sure of is that if something gets dismissed, it doesn't get dismissed with prejudice that would then foreclose any rights that you might have*.[43]

Counsel for the Delaware Plaintiff intervenors agreed.[44] Later in the hearing, when counsel for Defendants sought clarification on the meaning of the proposed dismissal, the court responded: "*Let's put it this way. The counts are not dismissed with prejudice*."[45] On April 9, 2014, the district court dismissed the New York Action, using the exact same "without prejudice" language contained in its preliminary order.[46] That dismissal was affirmed on appeal.

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41 N.Y. Order at 23 (A093).

42 *Id.*

43 Tr. of Oral Argument at 67:7-13, SDNY 10(b) Action (Apr. 4, 2014), ECF No. 72 ("SDNY Tr.") (A447-523). The SDNY 10(b) Action and the cases in the New York Action are Related Cases so they were argued at the same hearing.

44 *Id.* at 14:19.

45 *Id.* at 74:11-12.

46 *See* N.Y. Order at 23 (A092).

## ARGUMENT

## I. THE COURT OF CHANCERY ERRED IN FINDING THAT DELAWARE PLAINTIFFS' CLAIMS WERE BARRED BY *RES JUDICATA*.

### A. Question Presented

Did the Court of Chancery err as a matter of law when it concluded that the Delaware Action was barred by *res judicata*? This issue was preserved for appeal.[47]

### B. Scope Of Review

Whether to give preclusive effect to a prior judgment is a question of law that this Court reviews *de novo*. *Columbia Cas. Co. v. Playtex FP, Inc.*, 584 A.2d 1214, 1219 (Del. 1991).

### C. Merits Of Argument

The Court of Chancery erred in holding that the dismissal of the New York Action barred Delaware Plaintiffs' claims under the doctrine of *res judicata*. Under New York law,[48] a party seeking to invoke claim preclusion based on the dismissal of a prior action must demonstrate that "(1) the previous action involved an adjudication on the merits; (2) the previous action involved the plaintiffs or those in

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[47] *See* [Del.] Pls.' Omnibus Opp'n to Defs.' Mots. to Dismiss at 23, 35-39, Del. Action (Del. Ch. Nov. 2, 2015) ("Opp'n to MTD") (A331, A343-347).

[48] There is no dispute that New York law governs the preclusive effect of the dismissal of the New York Action. *See Pyott v. La. Mun. Police Emps.' Ret. Sys.*, 74 A.3d 612, 615-16 (Del. 2013).

privity with them; [and] (3) the claims asserted in the subsequent action were, or could have been, raised in the prior action."[49]

The Court of Chancery ruling founders on the very first criterion.[50] The dismissal of the New York Action was expressly "without prejudice" to renewal of the claims therein and, thus, was not an adjudication on the merits. The Court of Chancery's attempt to reinterpret that explicit language to mean a dismissal "with prejudice" confuses and conflates the doctrines of issue preclusion (collateral estoppel) and claim preclusion: if, as Chancellor Bouchard acknowledged, the Lululemon board "retained the prerogative . . . to pursue the derivative claims,"[51] then the *claims* cannot have been conclusively adjudicated on the merits.

Moreover, even if the New York claims had been adjudicated on the merits, that ruling could not have preclusive effect against Delaware Plaintiffs. Delaware Plaintiffs sought to intervene in the New York Action to protect their interests, but were denied. The New York Court of Appeals has expressly held that, under such circumstances, the prior derivative action cannot preclude claims subsequently brought by the thwarted intervenors.[52]

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49 *Monahan v. N.Y. City Dept. of Corr.*, 214 F.3d 275, 285 (2d Cir. 2000).

50 Preclusion also does not apply because New York Plaintiffs did not adequately represent the interests of Lululemon or its stockholders.

51 Op. at 35.

52 *Parkoff*, 425 N.E.2d at 823-24.

### 1. The New York Action was dismissed "without prejudice" and thus was not an "adjudication on the merits"

As recently as 2008, the Court of Appeals of New York reaffirmed the basic proposition that "a dismissal 'without prejudice' lacks a necessary element of *res judicata*—***by its terms such a judgment is not a final determination on the merits***."[53] The rule in the Second Circuit is the same: "[w]here a dismissal is without prejudice, *res judicata* does not apply."[54]

There is no dispute that Judge Forrest dismissed the amended complaint in the New York Action "without prejudice."[55] The Court of Chancery's analysis of *res judicata* should have ended there.

### 2. The Court of Chancery's attempt to construe the New York Judgment as an adjudication on the merits confuses the doctrines of collateral estoppel and *res judicata*

It seems clear, in context, that the district court's use of the term "without prejudice" was intended to protect the interests of Delaware Plaintiffs, who had sought to intervene in the New York Action in order to preserve their ability to initiate a derivative claim concerning Wilson's stock sales if and when their Section

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53 *Landau, P.C. v. LaRossa, Mitchell & Ross*, 892 N.E.2d 380, 383 (N.Y. 2008) (emphasis added).

54 *Gaft v. Mitsubishi Motor Credit of Am.*, No. 07-CV-527 (NG)(LB), 2009 WL 3148764, at *6 (E.D.N.Y Sept. 29, 2009) (citing *Camarano v. Irvin*, 98 F.3d 44, 47 (2d Cir. 1996)).

55 *See Canty*, 13 F. Supp. 3d at 350; *see also* SDNY Tr. at 74:11-12 ("Let's put it this way. The counts are not dismissed with prejudice.") (A520).

220 books and records action revealed a proper factual basis to excuse a demand on Lululemon's board. Delaware Plaintiffs moved to intervene for the express purpose of seeking a stay of any ruling until after the conclusion of the 220 Action or, in the alternative, to argue that any dismissal of the claim concerning Wilson's stock sales be "without prejudice."[56] Judge Forrest understood this, explaining that "what you really want to be sure of is that if something gets dismissed, it doesn't get dismissed with prejudice [as] *that would then foreclose* ***any rights*** *that you might have.*"[57] Defendants and nominal defendant Lululemon expressed a willingness to accede to a dismissal "without prejudice" of that claim.[58] And the district court entered precisely that judgment, while simultaneously denying the motion to intervene as moot (presumably because the relief sought already had been granted).[59]

Chancellor Bouchard nevertheless treated Judge Forrest's ruling as a final judgment on the merits for purposes of *res judicata*.[60] He focused on the fact that the district court appended to its dismissal without prejudice the phrase "in the event plaintiffs seek to pursue these claims after making a demand on the board," and

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56 *See* Mot. to Intervene at 1.

57 SDNY Tr. at 67:10-13 (emphasis added).

58 *See* Letter from Defendants to The Hon. Katherine B. Forrest at 3-4 (Apr. 1, 2014), ECF No. 48 (A065-69). Defendants, however, agreed to such a "without prejudice" dismissal only if subject to a number of burdensome conditions. *Id.*

59 N.Y. Order at 23 (A092).

60 Op. at 33-37.

reasoned that the New York court had intended to foreclose "the opportunity for [the Delaware P]laintiffs to attempt to re-plead demand futility."[61] In so ruling, the Court of Chancery confused the doctrines of issue and claim preclusion.

It simply cannot be argued that the district court's ruling was intended to preclude the relitigation of any *claims*. The claims in a derivative suit belong to the corporation, for the benefit of its stockholders: "in such suits the wrong to be redressed is the wrong done to the corporation."[62] As such, if the judgment in a derivative action had *res judicata* effect, it would preclude subsequent claims not only by stockholders, but also by the corporation itself.[63] Yet Judge Forrest's order clearly contemplates the possibility that the Lululemon board could still pursue claims based on Wilson's alleged insider trades, as could stockholders following a demand on and refusal by the board.[64] The Court of Chancery likewise recognized this possibility.[65]

What the Court of Chancery apparently meant is that Judge Forrest's ruling meant to preclude New York Plaintiffs from "re-plead[ing] demand futility."[66] But demand futility is not a "claim." Rather, it is an element of (or perhaps, more

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61 *Id.* at 34-35.
62 *Dana v. Morgan*, 232 F. 85, 89 (2d Cir. 1916).
63 *See Ratner v. Paramount Pictures, Inc.*, 6 F.R.D. 618, 619 (S.D.N.Y. 1942).
64 *Canty*, 13 F. Supp. 3d at 350.
65 *See* Op. at 35.
66 *Id.*

precisely, a precondition to) a stockholder derivative action. It can therefore only properly be discussed in the context of issue preclusion.[67] There is no claim preclusion here.

The distinction between issue and claim preclusion matters, because of *res judicata*'s broader scope. Whereas collateral estoppel only applies to issues actually litigated in the prior action,[68] claim preclusion "bars litigation of any claim for relief that was available in a prior suit . . . , whether or not the claim was actually litigated."[69] One of the two claims in the present action – the claim against members of the Board for failing to investigate and take action against Wilson relating to his June 7, 2013 stock sale – was not raised in the New York Action.[70] Thus, the Court of Chancery erred in dismissing that claim on the ground that it could have been raised in the earlier litigation.

### 3. The New York Action could not be preclusive against Delaware Plaintiffs because their attempt to intervene in that case to protect their interests was denied

Even if the Court of Chancery had been correct in concluding that the New York Action constituted a "final adjudication on the merits," it would still be error

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67 *See Bammann*, 2015 WL 2455469, at *15-18 (considering only collateral estoppel effect of prior dismissal for failure to plead demand futility, not *res judicata*).

68 *See, e.g.*, *Flaherty v. Lang*, 199 F.3d 607, 613 (2d Cir. 1999).

69 *Irish Lesbian & Gay Org. v. Giuliani*, 143 F.3d 638, 644 (2d Cir. 1998).

70 *See* Op. at 40.

for that court to have held Delaware Plaintiffs' claims precluded. That is because under New York law there is an exception to claim preclusion in derivative actions where a stockholder seeks to intervene in the prior action to protect its interests but is denied leave to participate.[71] Delaware Plaintiffs sought to intervene in the New York Action to protect their interests, but their motions to intervene were denied as moot.[72] As a result, they cannot be bound by the decision in that earlier case.[73]

This limitation on preclusion under New York law is articulated most clearly in *Parkoff*, a stockholder derivative action to recover for alleged waste of corporate assets and breach of fiduciary duties. The nominal defendant, GTE, moved to dismiss the *Parkoff* action based, *inter alia*, on the dismissal of a prior derivative suit brought by a different stockholder, Auerbach. The New York Court of Appeals rejected the *res judicata* application of that dismissal to Parkoff, because Parkoff had sought to intervene in the earlier action but had been denied.[74]

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71 *Parkoff*, 425 N.E.2d at 823-24.

72 *See* N.Y. Order at 37 (A093).

73 Delaware Plaintiffs did not cite the *Parkoff* decision to the Court of Chancery. Nevertheless, the issues and interests raised by the *Parkoff* doctrine (including finality of adjudication, opportunity to litigate, and adequate representation) were all properly raised and preserved below, justifying this Court's consideration of the issue. If, however, the Court is of the opinion that *Parkoff* presents a question that was not "fairly presented to the trial court," Delaware Plaintiffs request that this Court consider and determine this issue in "the interests of justice," as permitted by Rule 8 of the Delaware Supreme Court Rules.

74 The Court of Appeals did, however, affirm dismissal of Parkoff's suit based on the *res judicata* effect of another prior derivative action, *Cramer v. General Telephone & Electronics*, 443 F. Supp. 516 (E.D. Pa. 1977), in which Parkoff had not attempted to intervene. *Parkoff*, 425 N.E.2d at 824.

As the Court of Appeals explained, the rule that a judgment in one derivative action will normally have preclusive effect on subsequent shareholder suits based on the same misconduct is subject to several important limitations:

> Because the claim asserted in a stockholder's derivative action is a claim belonging to and on behalf of the corporation, a judgment rendered in such an action brought on behalf of the corporation by one shareholder will generally be effective to preclude other actions predicated on the same wrong brought by other shareholders. ***The foregoing rule is qualified*** by the condition that the judgment being raised as a bar not be the product of collusion or other fraud on the nonparty shareholders and ***by the further condition that the shareholder sought to be bound by the outcome in the prior action not have been frustrated in an attempt to join or to intervene in the action that went to judgment***.[75]

The *Parkoff* court explained the reason for this qualification, to protect the interests of the stockholder against the risk that the first-filing stockholder will not effectively litigate their shared claim:

> The latter condition derives from the fact that corporate shareholders—who in principle have an equal interest and right in seeing that claims for wrongs done to the corporation are prosecuted—should not be compelled against their will to have the prosecution of the corporate claims depend on the diligence and ability of the first shareholder to institute litigation when their own attempts to participate in the litigation have been rebuffed and no other appropriate provision for the protection of their interests has been made.[76]

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75 *Id.* (citations omitted).

76 *Id.* (citations omitted).

Because Parkoff had sought to intervene in the Auerbach case and his motion to intervene had been denied, that was "a sufficient ground for rejecting defendants' claim that the dismissal of that action precludes the present one."[77]

That is exactly the situation that confronts this Court. Delaware Plaintiffs feared that the plaintiffs in the New York Action would not adequately protect their interests because, among other things, New York Plaintiffs had not adequately investigated their derivative action before filing. Delaware Plaintiffs therefore moved to intervene in the New York Action to protect their interests – interests that were equal to those of the first filers in "seeing that claims for wrongs done to the corporation are prosecuted" – but their motions to intervene were denied. Under *Parkoff*, that alone is sufficient ground to deny any preclusive effect to the New York judgment.

*Parkoff* establishes an important limitation on New York preclusion law, especially in the derivative suit context. Earlier in the opinion, the Court of Appeals reframed the test for *res judicata* in such suits:

> The rejection on the merits of a stockholders' derivative action brought by one shareholder on behalf of the corporation against designated directors and officers for corporate waste and breach of fiduciary duty operates as a *res judicata* bar to a similar action instituted by another shareholder where the first action was not collusive or fraudulent, ***the second shareholder was not excluded from participation in the first***

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77 *Id.*

> ***action***, and both actions arose out of the same underlying transaction or series of connected transactions.[78]

It is precisely for this reason that so many decisions involving similar preclusion claims under New York law emphasize that the latter-filing shareholder did not attempt to join in the earlier suit. For example, in affirming the *res judicata* dismissal of a derivative action, the Court of Appeals in *Dana* emphasized that "the plaintiff in the case at bar was well aware . . . of the pendency of the [earlier] suit," that he "could at any time have intervened therein and become a party thereto," but that "[h]e did not . . . see fit to do so."[79] The Second Circuit summarized the applicable preclusion rule: "The judgment in the state court is conclusive not only upon the stockholders who brought the suit but upon the corporation also and upon ***those who had the right to intervene but did not avail themselves of it***."[80]

Here, by contrast, Delaware Plaintiffs sought to intervene in the prior New York Action in order to protect their and the corporation's interests, but were "frustrated in their attempt" when the district court denied the motions to intervene.[81]

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78 *Id.* at 821 (emphasis added).

79 232 F. at 88.

80 *Id.* at 89 (emphasis added); *see also City of Providence v. Dimon*, No. 9692-VCP, 2015 WL 4594150, at *7 (Del. Ch. July 29, 2015) (quoting *Dana*, 232 F. at 89); *In re Sonus Networks, Inc. S'holder Deriv. Litig.*, 422 F. Supp. 2d 281, 292 (D. Mass. 2006) (dismissing derivative suit based on issue preclusion, noting plaintiffs do not argue "they were frustrated in their attempt to join or to intervene in a state action of which they were concededly aware").

81 The district court was likely not seeking to "frustrate" Delaware Plaintiffs, but rather to protect their interests by dismissing "without prejudice," thereby ensuring that the dismissal would not "foreclose any rights that [Delaware Plaintiffs] might have." SDNY Tr. at 67:7-13 (A513).

## II. THE COURT OF CHANCERY ERRED IN FINDING THAT DELAWARE PLAINTIFFS WERE BARRED UNDER THE DOCTRINE OF COLLATERAL ESTOPPEL

### A. Question Presented

Did the Court of Chancery err as a matter of law when it ruled that Delaware Plaintiffs were collaterally estopped from litigating the issue of demand futility? This issue was preserved for appeal.[82]

### B. Scope Of Review

Whether to give preclusive effect to a prior judgment is a question of law that this Court reviews *de novo*. *Columbia Cas.*, 584 A.2d at 1219.

### C. Merits Of Argument

The Court of Chancery erroneously determined that collateral estoppel barred Delaware Plaintiffs from litigating demand futility. Under New York law, collateral estoppel only precludes consideration of an issue if "'the matter raised in the second suit is *identical in all respects* with that decided in the first proceeding and where *the controlling facts and applicable legal rules remain unchanged*.'"[83] This is true, even if the "suits involve 'the same parties, similar or overlapping facts, and similar legal issues.'"[84]

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82 *See* Opp'n to MTD at 23-35 (A331-343).

83 *Brautigam v. Blankfein*, 8 F. Supp. 3d 395, 401 (S.D.N.Y. 2014) (emphasis added), *aff'd sub nom. Brautigam v. Dahlback*, 598 F. App'x 53 (2d Cir. 2015).

84 *Id.* at 401-02 (quoting *Sec. & Exch. Comm'n v. First Jersey Sec., Inc.*, 101 F.3d 1450, 1463 (2d Cir. 1996)).

### 1. The Court of Chancery Erred in Concluding that the Demand Futility Issues in the Delaware Action Are Identical to the Issues Litigated in the New York Action

#### a. The New York Plaintiffs never litigated the issue of the Board's failure to investigate Wilson's trades

Defendants – as the party seeking to invoke collateral estoppel – had the burden of showing "identity of issues" by establishing that the demand futility issues presented in both cases were "'identical in all respects.'"[85] The Court of Chancery erred in finding that Defendants met this burden.

Delaware Plaintiffs' demand futility argument is that the Defendants' documented failure to investigate Wilson's suspicious trades was not a legally-protected business decision or a valid exercise of business judgment, thereby exposing Board members to liability.[86] This lack of investigation was confirmed through a fiercely contested Section 220 Action. By contrast, the New York Plaintiffs never raised the issue of the Board's failure to investigate in their Amended Complaint, asserting instead that the Board "'facilitated' Wilson's June 13 stock sales."[87]

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85 *Brautigam*, 8 F. Supp. 3d at 401.

86 *See* Cmplt. ¶ 70 (A127-128).

87 *Canty*, 13 F. Supp. 3d at 343 n.5; *see also* N.Y. Compl. at ¶ 2 ("***[T]he Board carefully timed*** [the] negative disclosure [of Day's resignation] in order to maximize the value of a massive, planned insider sale."); *id*. at ¶ 33 ("***[T]he Board . . . waited*** to announce Day's departure as CEO ***until the end of the next trading day***."); *id*. at ¶ 208(f) ("***[The Board] concealed*** the fact that Defendant Day would be imminently resigning from the Company.").

This failure to investigate allegation represents a "controlling" fact that easily sets the demand futility allegations in the two cases apart given that it squarely implicates a specific Board decision.[88] As such, the Delaware Plaintiffs' demand futility facts go to whether that decision is deserving of the protections of the business judgment rule.[89] By any measure, this issue was not litigated or decided in New York. The district court agreed: "'[T]he subject of the [New York Action] is not a business decision of the board.'"[90]

Instead, as the district court explained, the demand futility allegations supporting the *Brophy* claim in the New York Action focused on Wilson's alleged domination and control over the Board and the Board purposefully delaying the announcement of Day's departure. At best, these allegations support an aiding and abetting claim. But no such claim or cause of action was alleged in the New York Action.[91]

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88 *See, e.g.*, *In re China Agritech, Inc. S'holder Derivative Litig.*, No. 7163-VCL, 2013 WL 2181514, at *23 (Del. Ch. May 21, 2013) ("The conscious decision not to take action [is] itself a decision."); *Aronson v. Lewis*, 473 A.2d 805, 813 (Del. 1984) (equating "a conscious decision to refrain from acting" with a decision to act).

89 *See* Del. Compl. ¶¶ 70-71, 75-76, 78 (A127-128, A131-132).

90 *Canty*, 13 F. Supp. 3d at 343 n.5.

91 *See id.* at 346 n.7.

The Court of Chancery failed to appreciate these distinctions.[92] The court explained,

> the NY plaintiffs argued that demand was excused because Lululemon's outside directors "failed to take any punitive action . . . [which] shows both ***domination and control*** by Wilson and a substantial likelihood of liability for these Director Defendants" so as to cast reasonable doubt on their ***independence***.[93]

The Court then set forth the New York Plaintiffs' failure to overcome the presumption of directorial independence.[94] Of course, the Delaware Plaintiffs did not allege that demand would be futile because of Wilson's dominance or control or the Director Defendants' lack of independence.

Ultimately, as this Court is keenly aware, the tests for demand futility under a business judgment rule analysis or a directorial independence analysis are quite different under Delaware law and certainly not considered "identical in all respects."[95] They are also highly fact specific.[96] The central issue raised by Delaware Plaintiffs to support their demand futility argument – the Board's failure to investigate – was never alleged in the New York Action. Thus, the Court of

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92 Op. at 19.
93 *Id.* at 19-20 (emphases added).
94 *Id.* at 20.
95 *See Brautigam*, 8 F. Supp. 3d at 401.
96 *See Aronson*, 473 A.2d at 815; *Beam ex rel. Martha Stewart Living Omnimedia, Inc. v. Stewart*, 845 A.2d 1040, 1049-50 (Del. 2004).

Chancery erred in concluding that Defendants met their burden of showing that the issues litigated in the two suits were the same.

### b. The Court of Chancery misapplied Second Circuit law on collateral estoppel

In the Second Circuit, collateral estoppel applies to bar litigation only of issues that are "identical in all respects"[97] between the two cases, not issues that merely "overlap substantially."[98] The Second Circuit is "mindful that '[d]espite the economics achieved by use of collateral estoppel, it is not to be mechanically applied, for it is capable of producing extraordinary harsh and unfair results.'"[99]

This is precisely what has occurred here. The Court of Chancery rigidly and incorrectly applied the standard for collateral estoppel in reasoning that because both cases involved Wilson's stock sales, any issues related to these sales must be identical. This is not the correct test.[100] Instead, the court should have focused on whether the issues in the New York Action were "'identical in all respects'" and

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97 *See Brautigam*, 8 F. Supp. 3d at 401.

98 *See Bader v. Goldman Sachs Grp., Inc.*, 455 F. App'x 8, 10 n.1 (2d Cir. 2011).

99 *Lefkowitz v. McGraw-Hill Glob. Educ. Holdings, LLC*, 23 F. Supp. 3d 344, 359 (S.D.N.Y. 2014) (alteration in original) (quoting *Remington Rand Corp. v. Amsterdam-Rotterdam Bank, N.V.*, 68 F.3d 1478, 1486 (2d Cir. 1995)); *see also D'Arata v. N.Y. Cent. Mut. Fire Ins. Co.*, 564 N.E.2d 634, 636 (N.Y. 1990).

100 *See Bansbach v. Zinn*, 801 N.E.2d 395, 402 (N.Y. 2003) (noting prior court's "conclu[sion that] these defendants were not subject to [chairman's] domination and control with respect to the stock options and warrants . . . does not for all time and in all circumstances insulate their conduct from similar claims").

whether "'controlling facts . . . remain unchanged,'"[101] not simply that both involved Wilson's trades.

In reaching this incorrect conclusion, the Court of Chancery oddly relied on a New York commercial litigation treatise, which states that the identity of issues element is "'grounded on the same gravamen of the wrong.'"[102] The Court's reliance on this treatise, which cites a 35-year-old case discussing *res judicata*,[103] rather than the more recent test for collateral estoppel articulated by the Second Circuit,[104] was in error. The Court of Chancery declared that, since the Delaware Action and New York Action were part of the same "factual grouping," the New York judgment should be given preclusive effect.[105] But the same "factual grouping" by itself does not show that the identical issue was decided.

The Court of Chancery claimed to find support for its analysis in *Bammann*.[106] In that case, however, the plaintiffs effectively *conceded* that the issues in the first action were the same as those alleged in the subsequent action;[107] they argued simply

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101 *Brautigam*, 8. F. Supp. 3d at 401.

102 Op. at 23 (quoting Robert L. Haig, *Commercial Litigation in New York State Courts* § 93:3 (4th ed. 4C West's N.Y. Prac. Series 2015)).

103 *See Smith v. Russell Sage Coll.*, 429 N.E.2d 746, 749 (N.Y. 1981).

104 *See Brautigam*, 8 F. Supp. 3d at 401.

105 Op. at 38.

106 *Id.* at 23-24.

107 *Bammann*, 2015 WL 2455469, at *17.

that pleading more specific facts to support that same issue rendered preclusion inapplicable.[108]

That is not the case here. Identity of the issues has not been conceded *and* the underlying facts supporting the Delaware Action are decidedly different than those in the New York Action. The Court of Chancery's faulty understanding of New York law led it to the erroneous conclusion that the identity of issue element of collateral estoppel had been met.

### 2. The Court of Chancery Also Erred in Finding That Plaintiffs Had a Full and Fair Opportunity to Litigate

In addition to identity of the issues, for collateral estoppel to apply "the party to be precluded from relitigating an issue must have had a full and fair opportunity to contest the prior determination."[109] That determination "requires consideration of 'the "realities of the [prior] litigation," including the context and other circumstances which . . . may have had the practical effect of discouraging or deterring a party from fully litigating the determination which is now asserted against him.'"[110] For two separate reasons, the Court of Chancery erred in holding that the Delaware Plaintiffs had such an opportunity in the New York Action.[111]

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108 *Id.* at *111.
109 *D'Arata*, 564 N.E.2d at 636.
110 *Ryan v. N.Y. Tel. Co.*, 467 N.E.2d 487, 503 (N.Y. 1984) (alterations in original).
111 *See* Op. at 26-27.

First, as just discussed, the question whether the Lululemon Board's decision not to investigate Wilson's trades was entitled to the protections of the business judgment rule was never litigated in the prior action. "[F]or 'a question to have been actually litigated' [for collateral estoppel purposes], it 'must have been properly raised by the pleadings or otherwise placed in issue and actually determined in the prior proceeding.'"[112] That did not occur in the New York Action.

Second, under the *Parkoff* doctrine discussed above, the Delaware Plaintiffs cannot be said to have had a full and fair opportunity to litigate in the New York Action, because they were "frustrated in [their] attempt . . . to intervene in the action that went to judgment."[113] Although *Parkoff* directly addressed *res judicata*, its reasoning is fully applicable to collateral estoppel.[114] For this reason as well, the Delaware Plaintiffs were denied a full and fair opportunity to litigate demand futility in the New York Action.

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112 *D'Arata*, 564 N.E.2d at 638.

113 *Parkoff*, 425 N.E.2d at 420.

114 *Id.* at 420-21 ("[C]orporate shareholders . . . should not be compelled against their will to have the prosecution of the corporate claims depend on the diligence and ability of the first shareholder . . . when their own attempts to participate in the litigation have been rebuffed.").

## III. THE COURT OF CHANCERY ERRED IN CONCLUDING THAT DELAWARE PLAINTIFFS WERE ADEQUATELY REPRESENTED IN THE NEW YORK ACTION

### A. Question Presented

Did the Court of Chancery err as a matter of law when it found that the Delaware Plaintiffs were adequately represented in the New York Action? This issue was preserved on appeal.[115]

### B. Standard of Review

Errors of law are reviewed *de novo*. *Wal-Mart Stores, Inc. v. AIG Life Ins. Co.*, 860 A.2d 312, 318 (Del. 2004).

### C. Merits of Argument

Final judgments in representative litigation "'remain vulnerable to collateral attack for failure to satisfy the adequate representation requirement.'"[116] This is so, even where a second claim is "identical" to a claim from a prior action.[117]

In order to demonstrate adequacy of representation, New York district courts generally require: (1) "'an intent and desire to vigorously prosecute the underlying corporate claim;'" (2) that plaintiff "'has engaged competent counsel to assist in that endeavor;'" and (3) the absence of "'either a conflict of interest which goes to the

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115 *See* Opp'n to MTD at 39-46 (A347-354).

116 *Wolfert v. Transamerica Home First, Inc.*, 439 F.3d 165, 171 (2d Cir. 2006) (quoting *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 396 (1996) (Ginsberg, J., concurring in part and dissenting in part)).

117 *Pyott*, 74 A.3d at 618.

forcefulness of the prosecution or the existence of antagonism between the plaintiff and other shareholders arising from differences of opinion concerning the best method of vindicating the corporate claim.'"[118]

The Restatement (Second) of Judgments § 42, which is cited favorably by courts in both New York[119] and Delaware,[120] also is instructive on the issue of adequate representation in this context:

> Where the representative's management of the litigation is *so grossly deficient as to be apparent to the opposing party*, it likewise creates no justifiable reliance interest in the adjudication on the part of the opposing party."[121]

In applying these principles, the Court of Chancery committed legal error when it held that the Delaware Plaintiffs were adequately represented in the New York Action.[122] As an initial matter, the New York Plaintiffs' management of the litigation is strikingly similar to what Delaware courts have skeptically referred to as "feckless fast-filers.[123] The New York Action: (1) was hastily filed "without a

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118 *Daventree*, 349 F. Supp. 2d at 753 (quoting *Sweet v. Bermingham*, 65 F.R.D. 551, 554 (S.D.N.Y. 1975)); *see also In re Literary Works in Elec. Databases Copyright Litig. v. Thomson Corp.*, 654 F.3d 242, 249 (2d Cir. N.Y. 2011) ("'Adequacy is twofold [under Rule 23]: the proposed class representative must have an interest in vigorously pursuing the claims of the class, and must have no interests antagonistic to the interests of other class members.'" (emphasis added)).

119 *See Wolfert*, 439 F.3d at 171 (citing Supreme Court case of *Matsushita Elec.*, 516 U.S. at 396, which itself relies on the Restatement (Second) of Judgments § 42).

120 *South v. Baker*, 62 A.3d 1, 13 n.4 (Del. Ch. 2012); *see also Pyott*, 74 A.3d at 618 n.21.

121 Restatement (Second) of Judgments § 42 cmt. f (emphasis added).

122 Op. at 33.

123 *See Bammann*, 2015 WL 2455469, at *18 n.147.

period of investigation and reflection,"[124] – and without a prior Section 220 or comparable investigation – barely a month after an underlying federal securities fraud class action was filed,[125] (2) substantially cribbed allegations, almost verbatim, from that securities fraud case,[126] and (3) included the unrelated *Brophy* claim almost as an afterthought.

The failure of the New York Plaintiffs to adequately represent the Delaware Plaintiffs' interests is further driven home by their response to the Delaware Plaintiffs' efforts to intervene in the New York Action. Not only did counsel for the New York Plaintiffs summarily oppose the motion, they stated that the Delaware Plaintiffs were "seeking to carve out roles for themselves" in the derivative litigation and that their efforts to stay the action pending the outcome of the Section 220 investigation was an "inefficient practice[]."[127] Given this express "antagonism" between the New York and Delaware Plaintiffs "concerning the best method of vindicating the corporate claim,"[128] the New York Plaintiffs (and their counsel)

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124 *King v. VeriFone Holdings, Inc.*, 994 A.2d 354, 357 (Del. Ch. 2010).

125 *See Baca v. Insight Enters., Inc.*, No. 5105-VCL, 2010 WL 2219715, at *5 (Del. Ch. June 3, 2010); *see also Rogosin v. Steadman*, 71 F.R.D. 514, 516 (S.D.N.Y. 1976) (noting "*prima facie* disturbing circumstances" and setting for hearing to determine if "there was an adequate investigation performed by the attorneys or any one else on behalf of the plaintiffs before the [shareholder derivative] suit was commenced.").

126 *See Baca*, 2010 WL 2219715, at *4.

127 N.Y. Pls.' Letter at 1, 3 (A065-067).

128 *Daventree*, 349 F. Supp. 2d at 753.

simply cannot be said to have adequately represented the interests of the Delaware Plaintiffs under New York law.

The Court of Chancery disagreed. The court held that the New York Plaintiffs' shortcomings and conflicts with the Delaware Plaintiffs merely fall into "the category of an imperfect legal strategy," not inadequate representation.[129] The Court of Chancery erroneously claimed to find support for this view in this Court's *Pyott* decision.[130]

Although *Pyott* rejected an "irrebuttable presumption" that fast filers are inadequate representatives,[131] it surely does not stand for the proposition that fast-filing – and opposition to a stay while a Section 220 investigation is pursued – are merely "imperfect legal strateg[ies]." To the contrary, this Court declared: "Undoubtedly there will be cases where a fast filing stockholder also is an inadequate representative."[132]

This Court found no "record support" for inadequate representation in *Pyott* because the complaint in the first suit was "essentially the same" as the complaint filed after a books and records inspection.[133] By contrast, here, the two complaints

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129 Op. at 32.
130 Op. at 31.
131 *Pyott*, 74 A.3d at 618.
132 *Id*.
133 *Id.* at 618, 615.

could not be more different. The New York Plaintiffs' inadequate representation constitutes an additional reason for reversal.

## CONCLUSION

For the foregoing reasons, the decision of the Court of Chancery should be overturned and the case remanded for further proceedings.

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