

1 APPEARANCES: (via telephone)

2 PETER B. ANDREWS, ESQ.

3 DAVID M. SBORZ, ESQ.

4 Andrews & Springer LLC

5 -and-

6 GREGORY M. EGLESTON, ESQ.

7 of the New York Bar

8 Gainey McKenna & Egleston

9 for Plaintiffs

10 EDWARD P. WELCH, ESQ.

11 SARAH R. MARTIN, ESQ.

12 Skadden, Arps, Slate, Meagher & Flom LLP

13 -and-

14 ALLEN L. LANSTRA, ESQ.

15 of the California Bar

16 Skadden, Arps, Slate, Meagher & Flom LLP

17 for Individual Defendants

18 LEWIS H. LAZARUS, ESQ.

19 ALBERT J. CARROLL, ESQ.

20 Morris James LLP

21 for Nominal Defendant

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1 THE COURT: Good morning, everyone.

2 ALL COUNSEL: Good morning, Your
3 Honor.

4 THE COURT: Before we start, can we
5 have a roll call, starting with plaintiffs' side
6 first?

7 MR. ANDREWS: Good morning,
8 Your Honor. Peter Andrews, Andrews & Springer. Also
9 on the phone with me are David Sborz from Andrews &
10 Springer and Greg Egleston from Gainey McKenna &
11 Egleston.

12 MR. EGLESTON: Good afternoon, Your
13 Honor.

14 MS. MARTIN: And from Skadden Arps,
15 you have Sarah Martin, Ed Welch and Allen Lanstra.

16 MR. LAZARUS: And from Morris James,
17 on behalf of CytrRx, Lewis Lazarus and Albert Carroll.
18 Good afternoon, Your Honor.

19 THE COURT: Thank you. Is there
20 anyone else on the line?

21 Okay. Well, thank you all for jumping
22 on. I'm sorry, go ahead.

23 MEDIA REPORTER: Joseph sitting in for
24 *The Chancery Daily*.

1 THE COURT: Okay. Thank you all for
2 jumping on the line. I appreciate you getting here on
3 such short notice. I wanted to give you the benefit
4 of my ruling.

5 The facts underlying this case are
6 well known. On March 13, 2014, Richard Pearson, a
7 contributor on the website *Seeking Alpha*, published an
8 article titled, "Behind the Scenes with DreamTeam,
9 CytRx and Galena," in which he detailed how he went
10 undercover after DreamTeam solicited him to write
11 favorable articles on behalf of CytRx without
12 disclosing payment, how DreamTeam's articles coincided
13 with the company's disclosures and stock offerings,
14 and how CytRx's stock price responded.

15 Pearson described his goal as "to
16 determine how involved management from these two
17 companies were in this undisclosed paid promotion
18 scheme."

19 With respect to CytRx, Pearson
20 concluded that "management at CytRx was intimately
21 involved in editing [dummy articles] extensively."

22 Following publication of Pearson's
23 article, multiple lawsuits were filed in Delaware and
24 in California.

1 Since about June 2014, CyTRx and its
2 board of directors, including several of the
3 defendants here, have been defending what amounts to
4 four lawsuits, which I will refer to as the "Federal
5 Securities Action," the "First Delaware Action," the
6 "California Derivative Action," and the "Niedermayer
7 Action," which is this action.

8 As an aside, I would note that there's
9 also the "State Securities Action" in Los Angeles
10 County, but it's not relevant to my ruling, so I won't
11 refer to it anymore.

12 The following is a chronological
13 procedural history of the four actions that doubles as
14 the basic facts underlying this motion to stay.

15 On June 13, 2014, the Federal
16 Securities Action was consolidated in the United
17 States District Court for the Central District of
18 California.

19 On June 24, 2014, Mr. Niedermayer
20 submitted his 220 demand to the company.

21 On July 1, 2014, the company replied,
22 requesting additional proof and documentation of
23 Mr. Niedermayer's beneficial ownership of the
24 company's stock throughout the time period at issue.

1 Also on July 1, 2014, the First
2 Delaware Action was commenced. The First Delaware
3 Action focused on the spring-loaded options but also
4 included allegations about the DreamTeam and the
5 company's secondary offerings. Later, however, the
6 plaintiff in that action represented to Vice
7 Chancellor Laster that none of their claims were based
8 on the DreamTeam's allegations.

9 On July 9², 2014, or 28 days after the
10 company requested additional documentation,
11 Mr. Niedermayer sent the company unsworn Internet
12 printouts.

13 On August 5, 2014, the company replied
14 that the recent attempt also was deficient.

15 On August 14, 2014, the first
16 derivative action was commenced in the United States
17 District Court for the Central District of California.
18 Another followed that was consolidated into the
19 California Derivative Action on October 8, 2014.

20 On November 10, 2014, the defendants
21 moved to dismiss the First Delaware Action.

22 On December 16, 2014, or about four
23 and a half months after the company notified
24 Mr. Niedermayer of their belief that his latest demand

1 was deficient, Mr. Niedermayer sent the company an
2 unsworn printout of a brokerage statement.

3 Three days later, on December 19,
4 2014, the company acknowledged receipt of the letter,
5 sent a draft confidentiality statement, and requested
6 Mr. Niedermayer provide the required representation
7 under oath.

8 On December 20, 2014, the defendants,
9 among other things, moved to dismiss the California
10 Derivative Action. The judge there later vacated a
11 hearing date and asked for a supplemental briefing
12 regarding the stay, which he entered pending
13 resolution of the First Delaware Action.

14 On January 8, 2015, Vice Chancellor
15 Laster stayed claims in the First Delaware Action
16 relating to DreamTeam and the secondary offerings
17 pending the resolution of the Federal Securities
18 Action and denied defendant's motion to dismiss. The
19 California Derivative Action plaintiffs later moved to
20 vacate the stay in their action.

21 In February 2015, the parties to the
22 Federal Securities Action, First Delaware Action, and
23 California Derivative Action began discussing a
24 settlement and agreed to a mediator.

1 On April 6, 2015, the California
2 Derivative Action plaintiffs sent defendants a
3 detailed settlement statement.

4 Then, on April 15, 2015, the parties
5 in the California Derivative Action submitted
6 respective confidential mediation statements to the
7 mediator. Mediation occurred between the parties in
8 the Federal Securities Action, the First Delaware
9 Action, and the California Derivative Action for two
10 days over April 23rd and 24th of 2015.

11 On June 24, 2015, the judge in the
12 California Derivative Action granted plaintiffs'
13 motion to vacate the stay, denied defendants' motion
14 to stay in favor of the Federal Securities Action, and
15 denied defendants' 12(b)(3) improper venue motion, but
16 granted leave to move to dismiss the California
17 Derivative Action under forum non conveniens based on
18 Cytrx's forum selection bylaw.

19 The company's forum selection bylaw
20 states, in relevant part, "Unless the corporation
21 consents in writing to the selection of an alternative
22 forum, the Court of Chancery of the State of Delaware
23 shall be the sole and exclusive forum for (i) any
24 derivative action or proceeding brought on behalf of

1 the corporation, (ii) any action asserting a claim for
2 breach of fiduciary duty owed by any director,
3 officer, employee, or agent of the corporation to the
4 corporation or the corporation's stockholders"

5 One month later, defendants filed such
6 a motion, on July 24, 2015.

7 On August 28, 2015, the parties to the
8 First Delaware Action reached a settlement which they
9 memorialized in a stipulation and agreement of
10 settlement.

11 On September 14, 2015, plaintiff Brent
12 Reed sent his 220 demand to the company. Four days
13 later, and a full nine months after the company had
14 requested the documents, Mr. Niedermayer sent the
15 company a signed confidentiality agreement and the
16 requested representation under oath on September 18,
17 2015.

18 On September 23, 2015, the company
19 acknowledged receipt of Mr. Reed's and
20 Mr. Niedermayer's letters and indicated it was
21 preparing the documents.

22 The company delivered the documents to
23 Mr. Reed and Mr. Niedermayer between October 16th and
24 23rd of 2015.

1 On October 30, 2015, the judge in the
2 California Derivative Action granted defendants' forum
3 non conveniens motion to dismiss based on the
4 company's forum selection bylaw.

5 On November 4, 2015, the parties to
6 the Federal Securities Action reached an agreement in
7 principle to settle that action.

8 On November 17, 2015, the plaintiffs
9 in the California Derivative Action filed a notice of
10 appeal in the Ninth Circuit regarding dismissal of its
11 claims based on forum non conveniens.

12 On November 20, 2015, Vice Chancellor
13 Laster held a hearing in the Court of Chancery in
14 which he approved the stipulation and agreement of
15 settlement in the First Delaware Action.

16 Sometime around Thanksgiving 2015, the
17 parties to the California Derivative Action reached an
18 agreement in principle.

19 On December 10, 2015, the parties to
20 the Federal Securities Action filed a stipulation of
21 settlement creating an \$8.5 million settlement fund.

22 Four days later, and 16 months after
23 the California Derivative Action was consolidated in
24 the Central District of California, the Niedermayer

1 action was commenced on December 14, 2015, when
2 Mr. Niedermayer filed the verified stockholder
3 derivative complaint in this Court.

4 On December 23, 2015, the parties to
5 the California Derivative Action entered an MOU
6 documenting the agreement in principle to resolve that
7 action. In the MOU, the company, consistent with the
8 forum selection bylaw, consented in writing to the
9 California Derivative Action as an alternative forum
10 to the Court of Chancery for purposes of settlement.

11 On January 21, 2016, the judge in the
12 Federal Securities Action preliminarily approved the
13 stipulation of settlement submitted by the parties
14 there.

15 On February 19, 2016, the Ninth
16 Circuit granted the California Derivative Action
17 parties' stipulated motion to dismiss the appeal
18 without prejudice to reinstate the appeal.

19 On February 23, 2016, counsel for the
20 company in this action contacted Mr. Niedermayer's
21 counsel to request an extension of time to respond to
22 the complaint in light of the California Derivative
23 Action settlement.

24 Two days later, Mr. Niedermayer's

1 counsel sent a letter to this Court requesting an
2 immediate status conference. Later that day,
3 individual defendants filed a motion to dismiss the
4 verified stockholder derivative complaint and, in the
5 alternative, a motion to stay this action pending
6 Court approval of the California Derivative
7 Settlement.

8 On February 26, 2016, the judge in the
9 California Derivative Action granted the parties'
10 notice of settlement and joint request to stay
11 proceedings effective until March 25, 2016, to allow
12 the parties to prepare and submit a stipulated
13 settlement.

14 This Court held the requested status
15 conference on March 8, 2016, where the parties agreed
16 to brief the motion to stay ahead of the motion to
17 dismiss. The defendants filed their opening brief on
18 March 21, 2016, but the next day, plaintiffs filed an
19 amended complaint late in the afternoon. Plaintiffs
20 later filed their brief opposing the motion to stay on
21 April 1, 2016.

22 Then, on April 4, 2016, the parties in
23 the California Derivative Action filed a motion for
24 preliminary approval of the proposed settlement along

1 with their stipulation and agreement of settlement.

2 The defendants here filed their reply
3 brief on April 11, 2016, and the Court held oral
4 argument on April 18, 2016.

5 Finally, on May 9, 2016, the Central
6 District of California is scheduled to hold two
7 hearings, one for the final approval of settlement in
8 the Federal Securities Action and another for
9 preliminary approval of the settlement in the
10 California Derivative Action.

11 This matter is before me on
12 defendants' motion to stay. The authority to grant a
13 stay is incident to the inherent power of a court to
14 exercise its discretion to control the disposition of
15 actions on its docket in order to promote economies of
16 time and effort for the court, litigants, and counsel.

17 Among the relevant factors for a court
18 to consider when deciding whether to grant a stay are
19 practical considerations that make it unduly
20 complicated, inefficient, and unnecessary for the
21 action before it to proceed ahead or apace of a
22 related litigation pending elsewhere.

23 The McWane doctrine is also relevant
24 as to whether or not I should grant a stay. To avoid

1 the wasteful duplication of time, effort, and expense
2 that occurs when judges, lawyers, parties, and
3 witnesses are simultaneously engaged in the
4 adjudication of the same cause of action in two
5 courts, this Court exercises its discretion freely in
6 favor of a stay when there is a prior action pending
7 elsewhere in a court capable of doing prompt and
8 complete justice involving the same parties and the
9 same issues.

10 The Court is aware that this case
11 suggests a novel issue: a company relied on a forum
12 selection bylaw to secure a dismissal in a foreign
13 jurisdiction before consenting to that same forum's
14 jurisdiction in order to reach a non-monetary
15 settlement.

16 This raises questions of whether and
17 to what extent companies might be taking advantage of
18 forum selection bylaws to forum shop, run reverse
19 auctions, or play other games, which this Court agrees
20 probably was not intended by Boilermakers versus
21 Chevron or Section 115 of the DGCL. The Court does
22 not expect to see these sorts of things happen, but if
23 they do, the Court stands ready to address any
24 allegations of misconduct, if and when they arise.

1 But I do not believe that is what has
2 happened here. On the facts before the Court at this
3 stage, this is not a case where I'm concerned about
4 gamesmanship with respect to the bylaw, as illustrated
5 by the following.

6 First, plaintiffs were dilatory in
7 pursuing their 220 demand. Defendants have been
8 defending this case, although not this precise action,
9 at least since June of 2014.

10 On June 24, 2014, Mr. Niedermayer
11 mailed his first 220 demand to the company, but the
12 company promptly complained on July 1st that
13 Mr. Niedermayer's demand failed to demonstrate that he
14 had held shares of common stock prior to May 1, 2014,
15 or that he held common stock throughout the entirety
16 of the time period for which he sought documents.

17 Nearly a month later, on July 29,
18 2014, Mr. Niedermayer sent a second demand attaching
19 an Internet printout of a brokerage statement, which
20 the company concluded did not provide sufficient proof
21 of Mr. Niedermayer's beneficial ownership of the
22 company's common stock as required by Section 220.

23 The company communicated its concerns
24 and conclusions to Mr. Niedermayer about one week

1 later, on August 5, 2014. This time, however,
2 Mr. Niedermayer waited until December 16, 2014, more
3 than four months, to attempt to cure the purported
4 defect, and included a different Internet printout of
5 a brokerage account.

6 Three days later, on December 19,
7 2014, the company replied with a letter pointing out
8 that Mr. Niedermayer's demand letters had not yet
9 stated that the enclosed documentary evidence was a
10 true and correct copy of what it purported to be, and
11 the company also included a draft confidentiality
12 agreement.

13 Mr. Niedermayer waited almost nine
14 months to respond to this letter and provide the
15 documentation that defendants requested.

16 The company promptly replied on
17 September 23, 2015, notifying plaintiffs' counsel that
18 it was identifying documents it believed were
19 responsive to their demand. Although plaintiffs
20 questioned the validity of some of defendants'
21 challenges to the 220 demand, in all, plaintiffs'
22 dilatory efforts resulted in their demand extending
23 over the course of at least 15 months for, as far as I
24 can tell, reasons completely within the plaintiffs'

1 control, and, more importantly, during which period
2 plaintiffs never once sought this Court's intervention
3 on grounds that defendants were "slow-rolling" them.

4 Nothing that I have seen supports
5 plaintiffs' suggestion that defendants slow-rolled
6 their 220 demand in order to game a cheap settlement
7 in California.

8 Second, after two years of defending
9 various claims, defendants reached a settlement in
10 principle to resolve the final piece of litigation
11 before plaintiffs filed this action in Delaware. And,
12 only a week after the Delaware complaint was filed,
13 defendants memorialized the settlement in a memorandum
14 of understanding.

15 Contrary to plaintiffs' suggestion,
16 then, it doesn't appear that defendants rushed into a
17 settlement in order to avoid litigating with
18 plaintiffs in Delaware. Defendants had to defend or
19 settle the litigation in California, and for the
20 majority of the life of that litigation, the same
21 claims were not pending in Delaware.

22 Third, plaintiffs don't even argue
23 that the documents they obtained in their 220 demand
24 make their complaint materially better than the

1 operative complaint in California, and instead
2 completely hang their hat on the bylaw issue. This
3 dovetails with the final issue: As a practical
4 matter, it wouldn't make sense to deny the stay here.

5 Regardless of whether I stay this
6 action, plaintiffs have to bring their objections to
7 the California court. If they won in the California
8 court, they could come back here, and we would deal
9 with the next procedural step. If their objections
10 were overruled, they could appeal and assert their
11 jurisdictional questions there.

12 To the extent there were novel issues
13 that are questions of law, the appropriate appellate
14 court of California could certify the questions back
15 to the Delaware Supreme Court and get a final answer.

16 Finally, as Vice Chancellor Glasscock
17 aptly stated in Cook versus Whitman, which is
18 factually and procedurally similar: "Essentially, the
19 Plaintiff requests an expedited decision in the belief
20 that, if my decision on the Motion to Stay is
21 favorable to him, he may find that decision useful to
22 leverage a favorable decision at the California
23 preliminary settlement hearing. ... It is not,
24 however, generally the purpose of this Court to act as

1 a stalking horse for issues that a sister court will
2 have before it, and which that court is perfectly
3 qualified to resolve. More to the point, expedited
4 litigation here, or indeed any continued briefing of
5 the Motion to Stay, would risk waste of limited
6 judicial and litigants' resources in light of the
7 pending settlement of the matter in California, which
8 has a reasonable likelihood of staying, if not
9 terminating, litigation here."

10 Here, the parties conceded at argument
11 that even if I denied the stay at that time, they
12 would not be able to brief the issues before the
13 California court preliminarily approves the settlement
14 on May 9th. Nonetheless, plaintiffs, like in Cook,
15 argue that denying the motion would send a message to
16 the California court.

17 The only message that I wish to send,
18 however, is that the California court is qualified to
19 resolve plaintiffs' objections to the settlement if
20 and when they arise. Practicality and efficiency
21 weigh in favor of staying this action in favor of the
22 California proceedings.

23 For the foregoing reasons, defendants'
24 motion to stay this action is granted. To the extent

1 an order is needed, it is so ordered.

2 Are there any questions?

3 MR. ANDREWS: No, Your Honor. Thank
4 you.

5 MS. MARTIN: No, Your Honor. Thank
6 you.

7 MR. LAZARUS: None from the company,
8 Your Honor. Thank you.

9 MR. EGLESTON: Thank you, Your Honor.

10 THE COURT: Thank you all. Enjoy the
11 rest of your afternoon.

12 MR. ANDREWS: Thank you.

13 (Conference adjourned at 12:21 a.m.)

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CERTIFICATE

I, JEANNE CAHILL, RDR, CRR,
Official Court Reporter for the Court of Chancery of
the State of Delaware, do hereby certify that the
foregoing pages numbered 3 through 20 contain a true
and correct transcription of the proceedings as
stenographically reported by me at the hearing in the
above cause before the Vice Chancellor of the State of
Delaware, on the date therein indicated.

IN WITNESS WHEREOF I have hereunto set
my hand at Wilmington, Delaware, this 2nd day of May,
2016.

/s/ Jeanne Cahill

Jeanne Cahill, RDR, CRR
Official Chancery Court Reporter
Registered Diplomate Reporter
Certified Realtime Reporter