1 IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

2 THE POLICE AND FIRE :
RETIREMENT SYSTEM OF THE CITY :
3 OF DETROIT, individually and :
on behalf of all others :
4 similarly situated, :
Plaintiff, :
5 :
vs. : Civil Action
6 : No. 3638-VCP
THE BEAR STEARNS COMPANIES :
7 INC., HENRY S. BIENEN, JAMES :
E. CAYNE, CARL D. GLICKMAN, :
8 MICHAEL GOLDSTEIN, ALAN C. :
GREENBERG, DONALD J. :
9 HARRINGTON, FRANK T. NICKELL, :
PAUL A. NOVELLY, FREDERIC V. :
10 SALERNO, ALAN D. SCHWARTZ, :
VINCENT TESE, and WESLEY S. :
11 WILLIAMS, JR., :
Defendants. :
12 --------------------------------:
WAYNE COUNTY EMPLOYEES' :
13 RETIREMENT SYSTEM, individually,:
and on behalf of all those :
14 similarly situated, :
Plaintiff, :
15 :
vs. :
16 : Civil Action
JAMES E. CAYNE, ALAN D. SCHWARTZ: No. 3643-VCP
17 HENRY S. BIENEN, CARL D. :
GLICKMAN, MICHAEL GOLDSTEIN, :
18 ALAN C. GREENBERG, DONALD J. :
HARRINGTON, FRANK T. NICKELL, :
19 PAUL A. NOVELLY, FREDERIC V. :
SALERNO, VINCENT TESE, WESLEY S.:
20 WILLIAMS, JR., THE BEAR STEARNS :
COMPANIES, INC. and JPMORGAN :
21 CHASE & CO.
Defendants.
22 ------------------------------------------------------
CHANCERY COURT REPORTERS
23 500 North King Street - Suite 11400
Wilmington, Delaware 19801-3759
24 (302) 255-0525

1 Courtroom No. 12A
New Castle County Courthouse
2 Wilmington, Delaware
Monday, March 31st, 2008
3 2:02 p.m.

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6 BEFORE: HON. DONALD F. PARSONS, JR., Vice Chancellor.

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ARGUMENT ON DEFENDANTS' MOTION TO STAY
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1 APPEARANCES:

2 PAMELA S. TIKELLIS, ESQ.
ROBERT J. KRINER, ESQ.
3 Chimicles & Tikellis LLP
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4 BRIAN E. ETZEL, ESQ.
of the Michigan Bar
5 The Miller Law Firm, P.C.
-and-
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9 WILLIAM E. HOESE, ESQ.
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10 Kohn Swift & Graf, PC
For Plaintiff Wayne County Employees'
11 Retirement System and the Police and
Fire Retirement System of the
12 City of Detroit

13 A. GILCHRIST SPARKS, ESQ.
JOHN P. DITOMO, ESQ.
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-and-
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16 Cadwalader Wickersham & Taft
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1 APPEARANCES (Cont'd):

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4 -and-
PAUL K. ROWE, ESQ.
5 MARC WOLINSKY, ESQ.
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Associate General Counsel for
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For Defendant JPMorgan Chase & Co.
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SRINIVAS M. RAJU, ESQ.
11 Richards Layton & Finger, P.A.
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12 GANDOLFO V. DiBLASI, ESQ.
of the New York Bar
13 Sullivan & Cromwell LLP
For The Outside Directors of Bear Stearns
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1 THE COURT: All right. Good
2 afternoon. So defendants? Do you want to do the
3 introductions first?
4 MS. TIKELLIS: I would like to. It's
5 rare that I have many to make, Your Honor, so I'm
6 pleased to introduce my colleagues today.
7 Denis Sheils, from the firm of Kohn
8 Swift. And next to him is my partner, Bob Kriner.
9 And Mr. William Hoese, from, also, the Kohn Swift
10 firm. And I have Gregory Nespole and Stacey Kelly,
11 from the firm of Wolf Haldenstein. And last but not
12 least, Brian Etzel, from the Miller law firm.
13 Thank you, Your Honor.
14 MR. McBRIDE: Good afternoon, Your
15 Honor.
16 THE COURT: Good afternoon.
17 MR. McBRIDE: I would like to make
18 introductions on behalf of counsel for JPMorgan Chase.
19 At front table, Marc Wolinsky, from Wachtell, Lipton,
20 who will make the argument today. Second table, Paul
21 Rowe, from Wachtell, Lipton; Garrett Moritz, from
22 Wachtell, Lipton; my partner, Bruce Silverstein; and
23 Patricia Kelly, who is senior vice president and
24 associate general counsel of JPMorgan Chase.

1 THE COURT: Mr. Raju.
2 MR. RAJU: Your Honor, just for
3 introductions, Srini Raju, on behalf of the outside
4 directors. Also with me is Vince DiBlasi, of Sullivan
5 & Cromwell in New York.
6 THE COURT: Welcome.
7 MR. SPARKS: Your Honor, to complete
8 the introductions, with me at counsel table is Greg
9 Markel, of Cadwalader, Wickersham & Taft. We are for
10 Bear Stearns.
11 With Your Honor's permission, I will
12 open. I think it's our motion to stay. Mr. Wolinsky
13 would like to say some words on behalf of JPMorgan,
14 and then we will turn it over.
15 THE COURT: All right. And I
16 apologize in advance to everyone. I have got a cold.
17 I had an argument this morning where intermittently I
18 start coughing. I hope that doesn't happen too badly
19 here. We will just fight through it as best we can.
20 All right.
21 MR. SPARKS: Thank you, Your Honor.
22 Your Honor, defendants' motion to stay and plaintiffs'
23 application, implicit in their answering papers, to
24 schedule a preliminary injunction hearing both arise

1 in an extraordinary factual and procedural setting.
2 In the midst of what we all know to be
3 the U.S. financial markets' experience, in terms of
4 significant liquidity restraints, Bear Stearns faced a
5 run on the bank that in the national interest has been
6 alleviated only by coordinated action by its board and
7 management, by JPMorgan Chase and various federal
8 regulators, including the Federal Reserve Bank of New
9 York. That rescue effort, which to date has preserved
10 a substantial value for stockholders and averted
11 broader economic dislocations, was and is focused
12 factually almost entirely in New York. Moreover, the
13 success of that effort continues to be a market focus
14 and to require the close attention of the players
15 involved, making the wasteful burdens of duplicative
16 litigation particularly inappropriate in this
17 instance.
18 Against that backdrop, defendants find
19 themselves faced with the unfair specter of
20 simultaneous and identical litigation on behalf of the
21 same shareholder class, looking toward a preliminary
22 injunction hearing in two cases, not only with the
23 risk of inconsistent adjudications, but also the risk
24 that the market could understand action by this

1 country's two most significant state business courts
2 to permit expedited litigation to proceed in two
3 forums as being some sort of commentary on the merits
4 of the rescue plan, thereby potentially undermining
5 the confidence of Bear Stearns' customers,
6 counterparties and the market in general in that plan.
7 In other words, to anyone outside of
8 our court system -- and frankly, inside it -- the
9 concept of having two preliminary injunctions going
10 forward on roughly the same schedule, on the same set
11 of facts, would appear to be bizarre. And I think
12 that is the problem that really underlies all of this.
13 What do we do about that?
14 Now, contrary to plaintiffs'
15 assertions, defendants did not bring this on
16 themselves. This is not a case where there was a
17 declaratory judgment here by defendants to seize a
18 forum. In fact, faced with filings in New York of
19 complaints, and Justice Cahn's authoritative rulings
20 on New York forum selection law in Topps, which I hope
21 Your Honor has had a chance to look at --
22 THE COURT: I have read it.
23 MR. SPARKS: There can be little
24 question, given the even greater New York factual

1 nexus in this case, that Justice Cahn would not defer.
2 Given that reality and the fact that
3 New York is in fact a more convenient forum, when
4 faced with plaintiffs' application for a preliminary
5 injunction, defendants negotiated for a sensible
6 preliminary injunction schedule. That's all that has
7 happened here.
8 There is no opinion cited by the
9 plaintiffs, and for that matter, no Delaware case of
10 which we are aware, that has ever tolerated subjecting
11 Delaware corporations, much less the broader public
12 interest uniquely implicated here, to the risks,
13 burdens and uncertainties of two parallel expedited
14 proceedings, on behalf of an identical class,
15 culminating in two preliminary injunction hearings.
16 So what is the solution under our law?
17 Well, the preferred solution, I submit, is to stay
18 this case under balancing principles akin to forum non
19 conveniens. I stole that phrase from Vice Chancellor
20 Strine in the Biondi/Scrushy case. As the Supreme
21 Court's 2006 decision in Berger versus Intelident
22 makes clear, the overwhelming-hardship standard
23 invoked by plaintiff -- or plaintiffs -- properly
24 applies only if the Delaware case is first filed; and

1 even then, only, arguably, if the motion is one to
2 dismiss, rather than one principally to stay, as Vice
3 Chancellor Lamb observed in the Brandin case. Bottom
4 line, Your Honor has a balancing test here, and with
5 the broad discretion that that entails.
6 Now, in that balancing analysis, as we
7 detail in our briefs, there is no question that New
8 York is a convenient forum and that the New York
9 action is assigned to a specialized division of the
10 New York Supreme Court capable of rendering complete
11 and fair justice. Indeed, as Your Honor can see in
12 the Topps opinion by Justice Cahn, he explained that
13 that court has been handling complex corporate
14 litigation, including class actions concerning
15 Delaware corporations, and applying Delaware law since
16 it was formed in 1993.
17 Second, now that Justice Cahn has
18 spoken in Topps, this Court must take into account the
19 realities of New York forum selection law, including
20 the greater emphasis it places on the first-filed
21 concept.
22 Third, there can also be no question
23 that dual preliminary injunction proceedings not only
24 constitute a very real hardship, to be given weight in

1 any balance, but also, if permitted to proceed, would
2 raise questions as to the rationality of our overall
3 state-law judicial system for adjudicating matters of
4 this nature.
5 Now, laid against all of that, on one
6 side of the scale is this state's interest, as
7 articulated in Topps, in the formulation of Delaware
8 corporate law principles to address emerging trends in
9 corporate governance.
10 First, I submit in this case whatever
11 weight might be given to that factor -- whatever
12 weight -- is insufficient to overcome the convenience
13 of the New York forum, but most significantly, the
14 hardship and irrationality of proceeding toward two
15 dueling preliminary injunction proceedings, something
16 that was not faced in Topps, given the assumptions
17 that Vice Chancellor Strine made in that case, and
18 something which we have not found -- no precedent for
19 this Court to permit, in all of our case law.
20 Moreover, for a number of reasons, the
21 Delaware-law factor itself should not be as
22 significant as in the handful of cases, including
23 Topps, where it has been invoked as a significant
24 factor to deny a stay.

1 The proposed merger activity which is
2 the subject of these lawsuits is not in an emerging
3 area of the law, as in Topps or the backdating cases.
4 To the contrary, this is a one-off factual situation
5 in the M & A area, which is one of the most developed
6 areas of our jurisprudence.
7 Second, a preliminary ruling -- a
8 preliminary ruling by a foreign court on Delaware law
9 questions won't reshape our law. That is done by this
10 Court and by our Supreme Court.
11 Third, there is in this pattern a
12 reasonable likelihood that a preliminary injunction
13 will be decided on purely equitable grounds, based on
14 unique facts, including balance of hardships, which
15 would including the extraordinary public interest
16 involved in this matter, irreparable injury grounds,
17 and indeed, even the bonding requirement, which will
18 take a high level role if there is no other bidder.
19 Beyond that, rest assured that in a
20 matter of this magnitude, sophisticated Delaware and
21 New York counsel, familiar with our law, will be
22 available to assist the parties in the New York court
23 in understanding the well-established Delaware
24 corporate law principles that the Court would have to

1 apply. In short, and without yielding our court's
2 sovereignty over corporate law developments in
3 general, a proper forum non conveniens balancing here
4 should result in a stay, to avoid not only the risks
5 inherent in, and the bizarre public appearance of,
6 double jeopardy injunctive proceedings, but also to
7 avoid the universally condemned waste from judicial --
8 from duplicative litigation, which is particularly
9 pernicious here -- and I can't overemphasize this --
10 given the ongoing pressure cooker in which those
11 witnesses in any expedited proceedings are presently
12 functioning.
13 Now, in the alternative, as we suggest
14 in our brief, and at a bear minimum, Your Honor also
15 should exercise your broad discretion, established in
16 the Snapple line of cases, not to schedule a
17 preliminary injunction, even if Your Honor chose not
18 to decide to stay the case. Under that law, if the
19 circumstances are such that at the scheduling stage it
20 appears a preliminary injunction is not necessary in
21 order to protect plaintiffs from irreparable harm,
22 then a preliminary injunction hearing is not
23 scheduled. Here, a preliminary injunction hearing is
24 already scheduled in a jurisdiction which all parties

1 concede is sophisticated and capable of rendering
2 complete justice. Under these circumstances, concepts
3 of comity dictate a presumption that, if warranted,
4 the New York court would grant a preliminary
5 injunction, thereby eliminating any irreparable harm.
6 That is the presumption that you have to make at this
7 stage, were it warranted.
8 I would submit, Your Honor, that our
9 case law shows that our courts are not imbued with
10 such hubris as to say that only they can get it right,
11 and have repeatedly in our jurisprudence acknowledged,
12 in appropriate circumstances, the ability of other
13 courts to apply our rich case law to the particular
14 facts before them.
15 Now, while this alternative solution
16 would not eliminate all the inefficiencies of
17 duplicative litigation, and, therefore, certainly
18 would not be optimal in defendants' view, it would
19 leave this Court in a position to shape our law at a
20 later and more definitive stage of this controversy,
21 were it necessary, while avoiding the irrational and
22 harmful result of subjecting defendants to two
23 preliminary injunction hearings.
24 THE COURT: Okay.

1 MR. SPARKS: Did Your Honor have any
2 questions of me at this time?
3 THE COURT: No.
4 MR. SPARKS: Okay.
5 MR. WOLINSKY: Good afternoon, Your
6 Honor. As I said, Marc Wolinsky. When I prepared my
7 pro hac papers for this case, I noticed that before
8 this case, I had been -- in the past 12 months, I have
9 been in this courthouse, this courtroom, or the one
10 next-door, three times, in three major cases,
11 including one case for JPMorgan, in the Sallie Mae
12 case. I'm very happy to say that all those cases
13 turned out very well, including just last Friday.
14 So the notion that JPMorgan is trying
15 to avoid this forum in order to influence the outcome
16 is just far afield. This is not a case about forum
17 shopping. It's just not true. JPMorgan and my firm,
18 as Your Honor I'm sure appreciates, have only the
19 greatest respect for this Court and its judges. We
20 hope and expect to prevail here. We hope and expect
21 to prevail in New York. But the practical problem is
22 whether we should be faced with two preliminary
23 injunction hearings.
24 As Mr. Sparks said, as Your Honor

1 knows, there is a PI scheduled for May 8th, and that
2 hearing will address the same issues that are being
3 addressed here, the legality of the Bear Stearns
4 board's actions, board actions that were taken to save
5 the company and avoid a certain bankruptcy filing and
6 liquidation. That was the context.
7 And most especially, as Mr. Sparks
8 mentioned, the hearing will address whether in that
9 special context, when the company's very existence is
10 at stake -- where the balance of equities lies. The
11 question will be whether its interests of the company
12 shareholders, bondholders, customers, counterparties
13 and employees, and in the interests -- in the
14 balancing of the equities, my client's interests,
15 which has posted -- which has provided a guarantee of
16 tens of billions of dollars of trading obligations,
17 and tens of billions of dollars of borrowings from the
18 Federal Reserve in order to rescue this company --
19 whether an injunction is warranted in that
20 circumstance, when literally, two weeks ago the world
21 financial system was in jeopardy.
22 So the question then, Your Honor, is,
23 given that context and given that -- is New York an
24 appropriate forum, and is there any reason why this

1 Court should usurp or try and leap frog ahead of what
2 Justice Cahn has done?
3 There can be no question that the New
4 York courts can ably address the issues that are
5 presented here. Justice Cahn is one of the most
6 highly respected judges in the commercial division of
7 our court. And as Mr. Sparks said, it's a court that
8 routinely hears claims involving breaches of fiduciary
9 duty.
10 There is no question that the
11 plaintiffs' counsel in New York will be able to
12 vigorously pursue the claims, such as they are, and
13 represent the Bear Stearns shareholders' interests.
14 Any suggestion by plaintiffs' counsel here that the
15 New York lawyers are not capable of prosecuting the
16 claim is just sparring between plaintiffs' lawyers.
17 There is no record and no basis for this Court to
18 conclude that the case will not be ably presented --
19 will not be ably presented in New York, and the New
20 York plaintiffs have filed an amended complaint that
21 specifically attacks the actions that are attacked by
22 these plaintiffs.
23 So you have a scheduled PI hearing
24 before one of New York's most respected trial court

1 judges, addressing the same issues that are being
2 raised in this Court, pursued by able plaintiffs'
3 counsel. And there is no question that Judge Cahn, in
4 his mind, thinks that he -- his forum is the
5 appropriate forum, and the Topps case tells you that.
6 So the practical question: Is there
7 any reason for this Court to schedule a second
8 preliminary injunction hearing? And I haven't seen a
9 good one. According to plaintiffs, the case law is
10 settled. The prospect of Justice Cahn rendering a
11 decision that will have some deleterious or lasting
12 impact on Delaware jurisprudence is just not real, not
13 only because the case will have limited precedential
14 value -- a New York court deciding an issue in a
15 preliminary context -- but because Justice Cahn is one
16 of our very best judges, and this Court should not
17 presume that he is going to get it wrong, which really
18 brings me to the point that I think needs to be
19 emphasized.
20 The doctrine that should control the
21 outcome of this motion is the doctrine of comity, the
22 idea that courts of one state should not act in a way
23 that demeans the jurisdiction, laws or judicial
24 decisions of another state. If this Court schedules a

1 preliminary injunction hearing in the face of the fact
2 that one is already scheduled by the New York court,
3 it will be acting in a way that demeans the
4 jurisdiction of the New York courts. The implicit
5 message of the ruling will be that the case should go
6 forward in Delaware because New York may not get it
7 right.
8 Now, certainly, there may be
9 circumstances in which that will be an appropriate
10 outcome, but I don't believe this is one. The New
11 York court has jurisdiction over all the parties. It
12 is able to provide the parties with complete relief.
13 The New York court is acting on a timely basis. New
14 York is more convenient to my clients and to Bear
15 Stearns, and its equally, if not more, convenient to
16 the plaintiffs. The New York court has better access
17 to third-party witnesses. And just to be specific,
18 the Federal Reserve Bank of New York was intimately
19 involved in every step of this rescue, and the
20 witnesses from the Federal Reserve Bank of New York
21 are not subject to compulsory process here. They are
22 subject to compulsory process in New York.
23 In short, Your Honor, this is a
24 classic case for the invocation of the doctrine of

1 comity. There is no need for this Court to set itself
2 on a collision course with its sister courts in New
3 York. That is what the doctrine of comity is meant to
4 prevent. There is no need for two PI hearings,
5 because there is no threat of irreparable harm that
6 the New York court cannot address.
7 Your Honor, if you have any other
8 questions, or any questions, I would be happy to
9 answer them.
10 THE COURT: No. That's fine.
11 MR. WOLINSKY: Thank you.
12 MS. TIKELLIS: May it please the
13 Court: Pamela Tikellis, on behalf of the plaintiffs.
14 Why shouldn't this Court deal with the
15 issues presented in this case? Defendants' opening
16 brief did not provide an answer, defendants' reply
17 brief did not provide an answer, and I submit counsel
18 today have not provided an answer.
19 Your Honor urged the defendants the
20 other day, when we all got together by phone, to move
21 beyond the time-worn arguments that first-filed
22 actions were the ruler, and to address the paramount
23 issues. And the issues that come to my mind are, one,
24 Delaware's interests in deciding new, novel,

1 substantial, subtle issues of law; two, the authority
2 of the state of Delaware to regulate the internal
3 affairs of corporations; three, this Court's unique
4 position as the regular arbiter of corporate law
5 disputes, and this Court's interaction with our
6 Delaware Supreme Court; and finally, the importance of
7 directors' responsibilities being articulated in a
8 consistent and predictable way.
9 But notwithstanding Your Honor's
10 urging, defendants persist even today with the first-
11 filed action arguments, so I'm going to address it
12 just briefly, so that I can make a record. The
13 reality is, Your Honor, that many mergers involving
14 Delaware public companies draw litigations by
15 shareholders within days or weeks. But important
16 decisions about where a case should reside, and what
17 court should hear that case, is not driven by a
18 three-day difference in filing.
19 As Your Honor noted the other day, the
20 revised merger agreement of March 24th was a major
21 development, and a major development the Delaware
22 plaintiffs addressed promptly. A great deal of effort
23 went into the preparation of that complaint and the
24 TRO application. Your Honor only needs to compare the

1 written effort of New York and Delaware, including the
2 belatedly-filed consolidated complaint, to appreciate
3 the difference in effort.
4 Not one of defendants' cited cases
5 decided under McWane analysis support a stay here, and
6 I'm not going to go through that. We distinguished
7 each case in our answering brief. Those factual
8 settings where a stay was entered are generally under
9 McWane, as to the second filed, where there has been a
10 filing, a second-filed case, months and months after
11 the first filed, or where the first-filed jurisdiction
12 has had substantial activity. Neither of those
13 circumstances exist here.
14 So the bottom line is no reactive
15 flurry -- and I know defendants don't like it when I
16 say that -- or activity by defendants and the New York
17 plaintiffs will change the fact that the New York case
18 was filed three days prior to the first Delaware case,
19 and will not change the fact that no activity took
20 place in New York until the Delaware plaintiffs
21 advised the defendants that they were filing a TRO.
22 And no reactive flurry will change the fact that the
23 Delaware litigation first addressed the amended
24 agreement, and the Delaware plaintiffs moved promptly,

1 as required, to protect the class.
2 So any claimed inconvenience the
3 defendants have -- and they are saying they will have
4 to litigate in two forums. I'm going to get to some
5 suggestions on that later in my presentation -- really
6 comes with ill grace. Unlike in Topps, where the
7 defendants initially moved here in Delaware to stay,
8 they did that. They had a New York choice of law and
9 venue provision. When Vice Chancellor Strine refused
10 to stay the case on all the reasons we are talking
11 about today, they went back to Judge Cahn and, in
12 refusing to grant that stay, Judge Cahn heavily relied
13 on the New York choice of law and forum clause found
14 in the Topps merger agreement.
15 THE COURT: I don't know about that.
16 He did mention that, but he mentioned quite a number
17 of other things. I'm not saying whether he was right
18 or wrong. I guess the main point of information for
19 me is it looks like that is what Justice Cahn
20 believes, and that is his interpretation of New York
21 law. Is it your view that the fact that it's Delaware
22 law -- it's a Delaware choice of law and a Delaware
23 forum here would cause him to come to a different
24 conclusion in this situation?

1 MS. TIKELLIS: I believe it's likely,
2 Your Honor. And I went through this, and I kept going
3 through it as I prepared for today. And I said,
4 "There is three times that Judge Cahn talks about..."
5 -- they are on pages -- I think I'm using Lexis. I
6 don't know. Whatever is attached to our compendium,
7 pages three, four and, ultimately, on page six, where
8 he references not only the choice of law and forum
9 clause, but he also takes note -- apparently there was
10 another case that was filed by an entity called Upper
11 Deck. He also took note that the issues, and the key
12 issues, raised by Upper Deck were likely to be
13 determined under Delaware -- under New York contract
14 law.
15 So I do submit that defendants'
16 prediction -- I don't have a crystal ball, either,
17 Your Honor. But I think defendants' prediction that
18 Judge Cahn will necessarily refuse to stay the New
19 York action under the Topps decision doesn't really
20 resonate with me, and I don't think it should with the
21 Court. I don't think this is a cookie-cutter New York
22 Topps case.
23 Here, the potential for two forums is
24 their own making. When they were made aware of the

1 TRO, they reached out to the plaintiffs in New York.
2 There was no record of any TRO being requested by
3 those plaintiffs. There is no application that can be
4 found. There is no scheduling order that can be
5 found. The only thing in the record is an affidavit
6 from an associate at Morris, Nichols, who says on
7 information and belief, he thinks those things
8 happened, or he was told so, but it doesn't appear
9 that he was even at the conference.
10 So to end this segment, the fact that
11 these defendants have borrowed trouble, if you will,
12 should not garner them sympathy, and certainly should
13 not garner them relief through granting of a stay.
14 Forum non conveniens, just a word
15 about that. They don't get any relief under that
16 doctrine, either. And we know that this is the
17 preferred analysis, not McWane. And Mr. Sparks says
18 today that the Berger opinion basically says the
19 overwhelming-hardship standard only applies when
20 Delaware is the first filed. Well, I think in Berger
21 there was only one case that was filed, and it was
22 filed in Delaware, and the defendants argued it was
23 more convenient to be in Florida. The Supreme Court
24 let them go to Florida. And I think Chancellor

1 Chandler, rightfully relying on Berger in deciding the
2 Ryan case on the Supreme Court precedent -- I think
3 there is no question that overwhelming hardship
4 exists. That is the standard in this case.
5 THE COURT: But is it the standard
6 when we have got multiple lawsuits in different
7 jurisdictions? Do we have -- if I'm understanding
8 what you are saying, the Berger case, there might have
9 only been one lawsuit, and then it was a traditional
10 forum non conveniens --
11 MS. TIKELLIS: Exactly.
12 THE COURT: -- type analysis. So put
13 that a little bit to the side. Is there some other
14 case that used the overwhelming-hardship standard when
15 we have had another action pending in another
16 jurisdiction?
17 MS. TIKELLIS: Yes. That is the Ryan
18 opinion that was decided by the Chancellor. And
19 defendants in that case sought to stay the Delaware
20 action under the forum non conveniens doctrine in
21 favor of a first-filed federal derivative action in
22 California. And he refused enter the stay. He
23 recites the same overwhelming-hardship standard from
24 the Supreme Court decision.

1 THE COURT: All right.
2 MS. TIKELLIS: So defendants' argument
3 that New York is more convenient is curious, at best.
4 And I raise, again, if that is the case, why did they
5 agree in their own merger agreement that Delaware law
6 will apply to their disputes, contract disputes? But
7 more importantly, why did they agree that Delaware was
8 the venue for all litigation?
9 Once you parse through defendants'
10 points on where the documents are, where the witnesses
11 are, who we can compel, who we have to go through the
12 commission process, all those facts -- factors are
13 really inconsequential in light of technology.
14 Defendants really assert three points
15 in support of their claim that New York is more
16 convenient. They say there is a powerful nexus
17 because the factual issues in this case are focused
18 upon the activities of the financial institution and
19 regulators in New York. But Your Honor, if the mere
20 presence of New-York-based financial institutions in
21 an action becomes a basis of a stay for the Delaware
22 proceeding, what corporate matter of any real
23 significance would ever be heard here?
24 Then defendants say the factual issues

1 are so unique that this case will never be repeated,
2 and so Your Honor doesn't need to reach out and
3 protect the integrity of the Delaware corporate law as
4 it may apply to a future case, because there will be
5 no future case; this is just a case unto itself. They
6 further say -- and I heard it again today from
7 Mr. Sparks -- that "It's likely Judge Cahn will never
8 even have to reach the merits of the claims, that he
9 will deny it on grounds of lack of irreparable harm,
10 or some other equitable notion. So again, Your Honor,
11 you don't need to worry about maybe what Judge Cahn
12 says or doesn't say; and Ms. Tikellis, you don't have
13 to worry whether or not you get an injunction against
14 this 40 percent block we talked about the other day in
15 connection with the TRO."
16 I don't think any of us can make the
17 predictions made by defendants here today, especially
18 the point that this case will never be repeated. All
19 one needs to do is review the financial reports and
20 the markets each day, look at the subprime mortgage
21 debacle and the state of the markets. The Bear
22 Stearns situation is not the first and the last in the
23 class of these situations. And Delaware should be the
24 first to address this genre of case.

1 I started my points today with Your
2 Honor's question of the other day. Why shouldn't this
3 Court deal with the issues here? Having not heard a
4 good reason from defendants, I think the question
5 becomes: What are the reasons this Court should deal
6 with the issues here? I think there are several. I
7 think they are important.
8 First, the proposed merger of Bear
9 Stearns and JPMorgan does present numerous new and
10 substantial issues of Delaware law. Defendants try
11 and place this case in a cookie-cutter mold. They say
12 the facts may be unusual, but the Court will,
13 nonetheless, apply the same principles of corporate
14 law that the Court applies to every merger. That is
15 an easy but superficial analysis, Your Honor, because
16 all new and substantial issues are contextual by
17 definition.
18 For instance, in Topps, Vice
19 Chancellor Strine didn't make new law, but what he was
20 asked to do was to apply Delaware principles of law to
21 whether the merger involving Topps should be enjoined.
22 And he was asked to do that in the context of a
23 going-private transaction. He noted that that genre
24 of case raised new and subtle issues of director

1 responsibility that have only begun to be considered
2 by Delaware.
3 Here, too, Your Honor will be asked to
4 consider the contextual requirements of directors'
5 fiduciary duties as they apply to unprecedented
6 actions and inactions in merger and takeover history.
7 Notably, in an action unprecedented,
8 at least to my knowledge, JPMorgan bought up nearly
9 40 percent of Bear Stearns, to ensure that it would
10 have close to a majority of the votes to approve the
11 merger. That agreement and action disregards the New
12 York Stock Exchange rule preventing a purchase of
13 20 percent or more of Bear Stearns stock without a
14 vote. That agreement, taken together with some of the
15 other provisions in the merger agreement, such as the
16 asset option, presents the most extreme combination of
17 deal protections ever approved by a board.
18 Your Honor will also be asked to
19 decide these novel issues in yet another context. And
20 I think these are pretty important, and I think they
21 are novel. To what degree are these directors
22 shielded, or not, from liability for entering into
23 unfair lockups and interfering and blocking the
24 stockholders franchise because of a liquidity crisis,

1 or an alleged threat of insolvency, or because the
2 federal government may have insisted on those terms
3 before it would support a bidder?
4 Your Honor will also likely need to
5 address the interplay of the New York Stock Exchange
6 rules and the directors' duties under Delaware law.
7 So to say that this case does not present novel and
8 substantial issues is just not credible.
9 This Court is an efficient and
10 convenient forum, prepared to issue a timely ruling.
11 And public policy -- and I agree with Mr. Wolinsky --
12 comity dictate that a Delaware court should answer the
13 question whether the JPMorgan/Bear Stearns merger
14 should be enjoined. The new and subtle issues of
15 director responsibility also dictate that Your Honor
16 -- the state of Delaware has an overriding interest in
17 addressing them and providing guidance. The Court
18 will apply Delaware law to the question of whether
19 this action should be stayed, and Your Honor is not
20 constrained or controlled by the New York Supreme
21 Court's opinion.
22 And the situation here is one of
23 defendants' making, but having said that, I think we
24 can all make efforts here regarding duplication. I

1 have given it some thought. One, and I have already
2 expressed to Your Honor, I don't believe that Judge
3 Cahn is necessarily just going to say, "Well, this is
4 Topps, and I'm going to stick by my decision." I know
5 Justice Cahn, and he is a smart man. I think he is
6 going to look at the facts as they are presented to
7 him. I think defendants here can go back to the New
8 York court and ask for a stay. I think the factors
9 dictate that they should do that.
10 Two, we are, as Delaware plaintiffs --
11 we are not fighting with anybody in New York. We are
12 coordinating discovery with our colleagues in New
13 York. And in fact, Your Honor, we have reached out to
14 our colleagues in New York. We invited them to join
15 us in this litigation. They have not yet accepted our
16 invitation, but I can assure Your Honor that we are
17 going to work on that. And we have a case that we
18 need to prosecute and get relief, and I believe this
19 is the jurisdiction to do it in.
20 And finally, after Your Honor rules
21 today on this motion -- and hopefully you will rule in
22 our favor -- we have prepared a motion to expedite
23 proceedings, and we would be asking for a hearing date
24 a little before May 8th, and not to undermine or

1 undercut Judge Cahn. I think Judge Cahn will probably
2 -- well, I'm not making predictions, but anyway, I
3 think a little before May 8th would be a better time.
4 May 8th falls on Thursday. We have got a closing on
5 May 14th, which means Your Honor will be writing an
6 opinion over the weekend, to get us an opinion so
7 whoever needs to go to the Delaware Supreme Court is
8 in a position to do that before the 14th. So we would
9 respectfully ask for a hearing time that is a bit
10 before the May 8th date that is currently scheduled in
11 New York. But we have thought about --
12 I think there are ways that we can
13 deal with the situation, which -- I think the law
14 dictates that this case really should be here. I'm
15 hearing my colleagues over here complaining that they
16 are victims of dual proceedings. And I may have my
17 views on how we got there, but I'm certainly willing
18 to work with them, to see if we, as a court and
19 colleagues at the bar, can resolve that.
20 THE COURT: All right. Thank you.
21 MR. SPARKS: I only have a few points
22 in rebuttal.
23 First, I don't think you can fairly
24 read Justice Cahn's decision and come to a conclusion

1 that the fact that as between the parties they agreed
2 to New York law in that case was determinative. Even
3 in that case, the question here isn't what law the
4 parties agreed to to interpret a contract as between
5 themselves. Neither in this transaction nor in that
6 one does that extend to complaints of a fiduciary
7 nature brought by shareholders. Nobody is dictating
8 the governing law in this type of case. I don't
9 understand Ms. Tikellis to be making that argument.
10 Let me talk next about overwhelming
11 hardship, two levels. First, if both jurisdictions
12 applied an overwhelming-hardship test in the
13 circumstance that Your Honor faces right now, there
14 would always be stalemate. That can't be the test,
15 and that isn't comity, as explained -- referred to by
16 Mr. Wolinsky. Your Honor, we are -- we are always
17 faced, in terms of our Balkanized state corporate law
18 system, with threats when the system appears
19 irrational and doesn't work. Today, this morning, the
20 federal government is proposing some omnibus new set
21 of regulations over businesses.
22 It is not in Delaware's interests, it
23 is not in New York's interests, at this point to have
24 the next headline be, in the Wall Street Journal, that

1 Delaware and New York, integral parts of the state
2 system of corporate governance, can't even agree on
3 who is going to hear a preliminary injunction, so we
4 are going to hear it twice. That is not in anybody's
5 interests.
6 What is the test here? It's in the
7 very first case in Ms. Tikellis' compendium, a Vice
8 Chancellor Steele case, back when he was Vice
9 Chancellor Steele, in the Adirondack matter. After
10 going through all the considerations about what you
11 think about on a motion to stay, he says, "Ultimately,
12 the exercise of the Court's discretion will depend
13 upon review of the relevant practical considerations,
14 keeping in mind the broader policies of comity between
15 the states and their courts in the orderly and
16 efficient administration of justice."
17 That's what -- that's what we are
18 asking Your Honor to think about, and that's what we
19 are asking Your Honor to do here by staying this case.
20 Now, on the overwhelming hardship, I
21 have gone back. I spent much of the morning, as I'm
22 sure perhaps some of Your Honor's law clerks did,
23 looking at this massive body of forum non conveniens
24 case law, some of which come up in a declaratory

1 judgment context -- some are first filed. Some are
2 second filed. Some have no other filings -- to try to
3 understand exactly what this -- where this
4 overwhelming-hardship case, and one other case, came
5 from. And actually, you can see where it came from if
6 you track it through.
7 In the Ryan case, which is a second-
8 filed case, the Court says a party seeking to -- the
9 Chancellor says, "A party seeking to stay or dismiss
10 on the grounds of forum non conveniens must
11 demonstrate that litigating in Delaware would subject
12 it to overwhelming hardship." And there is one
13 citation to that. And that is the decision in 2006 in
14 Berger versus Intelident, at footnote 19. That is 906
15 A.2d 134. So I went, this morning, to look at what
16 actually the Court said in Berger versus Intelident.
17 If Your Honor goes to that, you will
18 see that the Court says, "Defendants moving to dismiss
19 a first-filed suit on the ground of forum non
20 conveniens must establish with particularity that they
21 will be subjected to overwhelming hardship and
22 inconvenience if required to litigate in Delaware."
23 Where, as here, you have a suit that
24 either -- we are -- either the Delaware suits are

1 second filed or you could conclude that they are
2 concurrent, that isn't the rule that applies. It's a
3 balancing test. It is only a balancing test that
4 works in this context, both for judges in courts
5 foreign to Delaware and for this Court, if we are
6 going to have comity, which is the underlying concept
7 here when faced with this type of conflict in a
8 nonunified system, unlike the federal system, where we
9 have, in effect, a whole series of independent states,
10 all with interests. Nobody is denying that we have an
11 interest. Nobody is denying that New York has an
12 interest. It just calls upon -- calls for a
13 balancing. In this particular case, just because of
14 the way it happened, it calls upon this Court to do
15 that balancing.
16 We happen to believe that New York is
17 the more convenient forum in this pressure cooker
18 situation. So -- I also believe, for the reasons I
19 stated, that it's a futile act to go and antagonize
20 Judge Cahn, when he has spoken so recently and his
21 views are so clear. Ms. Tikellis' solution isn't a
22 solution, at least from our point of view, at all.
23 I would just remark on one or two
24 other things. One of the things she said, my ears

1 perked up. She said, "We are going to have things
2 like a consideration of the interplay of the New York
3 Stock Exchange rules with our corporate law." Well, I
4 can't think of a better place to do that than in New
5 York.
6 Thank you, Your Honor.
7 THE COURT: Thank you.
8 MR. WOLINSKY: Your Honor, I actually
9 was under a misimpression. There is a transcript of
10 the proceeding before Justice Cahn, which took place
11 the morning before the plaintiffs filed the temporary
12 restraining order application here. So we were there
13 at 10:00 o'clock that morning, before the TRO was
14 filed here.
15 Speaking for myself, the night before
16 the 25th, I did get a call from plaintiffs' counsel in
17 Delaware, but all they spoke to me about was expedited
18 discovery, not a TRO. I can't speak to what they said
19 to anyone else.
20 Your Honor, I'm happy to hand up this
21 transcript, so you will have it.
22 THE COURT: All right. That's fine.
23 That's fine.
24 All right. I appreciate, very much,

1 the arguments of counsel, and also the efforts of
2 counsel in the relatively expedited briefing that we
3 have gone through. I am very well aware of the
4 importance for expedition in this matter, but I'm also
5 well aware of the importance of the issues raised by
6 this case, the case itself on the merits, whether it
7 gets heard here or in New York, or however that goes,
8 but also in terms of the relative roles of this Court
9 and the Court in New York.
10 So I am going to endeavor to put
11 something out in writing, and to do it shortly, but in
12 the meantime, it's my understanding that the parties
13 will be proceeding with a -- still with the
14 coordinated discovery in both this action and in the
15 New York action, and I won't be setting any kind of
16 schedule or really even thinking about that until I
17 have gone through, made the decision on this motion to
18 dismiss or stay, and then gotten that to you. And I
19 will endeavor to do it as promptly as I can. I'm sure
20 it will be a few days before it comes out, at least.
21 All right. Thank you, very much.
22 (Recess at 2:48 p.m.)
23 - - -
24

1 CERTIFICATE

2 I, WILLIAM J. DAWSON, Official Court Reporter
3 of the Chancery Court, State of Delaware, do hereby
4 certify that the foregoing pages numbered 3 through 39
5 contain a true and correct transcription of the
6 proceedings as stenographically reported by me at the
7 hearing in the above cause before the Vice Chancellor
8 of the State of Delaware, on the date therein
9 indicated.
10 IN WITNESS WHEREOF I have hereunto set my hand
11 at Wilmington, this 1st day of April, 2008.
12
13
14 /s/William J. Dawson
Official Court Reporter
15 of the Chancery Court
State of Delaware
16
17
Certification Number: 187-PS
18 Expiration: Permanent
19
20
21
22
23
24