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Section 220 May Not Be Used to Remedy Pre-Suit Investigation

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In *King v. VeriFone Holdings, Inc.*, C.A. No. 5047-VCS (Del. Ch. May 12, 2010), the Court of Chancery dismissed with prejudice a stockholder's § 220 complaint, finding that conducting an adequate investigation into demand excusal after filing a derivative suit is not a proper purpose. In their haste to become lead plaintiff and lead counsel in a derivative suit in a federal court action, plaintiff and his counsel failed to conduct adequate pre-suit investigation. Rather than dismiss the plaintiff with prejudice, the federal court encouraged plaintiff to file a books and records action in Delaware in order to determine whether it had grounds for a claim and to plead demand excusal of any such claim.

Vice Chancellor Strine concluded that such a stockholder lacks proper purpose and "may not use § 220 of the Delaware General Corporation Law to rescue him from his own self-interested premature rush to file." *King v. VeriFone Holdings, Inc.*, 2010 WL 1904972, at *1 (Del. Ch.). The Vice Chancellor noted that plaintiff's purpose was improper for a variety of public policy reasons. First, it is an attempt to circumvent Federal Rule of Civil Procedure 23.1 which precludes a derivative plaintiff from obtaining discovery in order to plead demand excusal after a derivative suit is filed. *Id.* at *5. Also, filing a § 220 action to get discovery in a case pending in another court violates policies against subjecting defendants to simultaneous suits in separate forums. *Id.* at *6. Finally, allowing plaintiff's claim to stand encourages an inefficient race to the courthouse and "can only demoralize plaintiffs' counsel who desire to diligently investigate the facts before filing a complaint." *Id.*

