



IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

ERNESTO ESPINOZA,)
)
 Plaintiff,)
)
 v.) Civil Action No. 6000-VCP
)
 HEWLETT-PACKARD COMPANY,)
)
 Defendant.)
_____)

PLAINTIFF'S OPENING BRIEF ON THE MERITS

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
NATURE AND STAGE OF PROCEEDINGS	1
STATEMENT OF FACTS	4
A. The Board Learns of Hurd's Improper Actions and Acknowledged Violation of HP's Standards of Business Conduct.....	4
B. The Board Conducts an Investigation and Allows Hurd to Resign with a Lavish Golden Parachute Instead of Terminating Him for Cause.....	6
C. HP Denies Plaintiff's Demand to Access the Covington Report	7
ARGUMENT	8
A. Plaintiff Has Complied with the Requirements of Section 220.....	8
1. Plaintiff Has Complied With the Form And Manner Requirements of Section 220	8
2. Plaintiff Has a Proper Purpose.....	9
B. Plaintiff Has Demonstrated "Good Cause" for the Attorney-Client Privilege Not to Attach	11
1. Plaintiff Asserts a Colorable Claim	13
2. The Information Is Necessary and Not Available from Any Other Source	14
3. Plaintiff's Request Is Narrowly Tailored	19
C. The Work-Product Doctrine Does Not Apply to the Covington Report.....	21
D. HP Waived Its Ability to Claim the Covington Report Is Protected by Attorney-Client or Work-Product Privilege.....	23
CONCLUSION.....	25

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Alldread v. City of Grenada</i> , 988 F.2d 1425 (5th Cir. 1993)	23
<i>Carapico v. Phila. Stock Exch., Inc.</i> , 791 A.2d 787 (Del Ch. 2000).....	9, 13
<i>Deutsch v. Cogan</i> , 580 A.2d 100 (Del. Ch. 1990).....	11, 20
<i>Garner v. Wolfenbarger</i> , 430 F.2d 1093 (5th Cir. 1970)	passim
<i>Grimes v. DSC Commun'cns Corp.</i> , 724 A.2d 561 (Del Ch. 1998).....	passim
<i>In re Citigroup Inc. S'holder Derivative Litig.</i> , 964 A.2d 106 (Del. Ch. 2009).....	11
<i>In re Freeport-McMoran Sulphur, Inc.</i> , 2005 WL 225040 (Del. Ch.)	19
<i>In re Fuqua Inds., Inc.</i> , 2002 WL 991666 (Del. Ch.)	12, 20
<i>In re HP Derivative Litigation</i> , No. 10-CV-3608 JW (Jan. 14, 2011)	2
<i>In re Walt Disney Co. Derivative Litig.</i> , 825 A.2d 275 (Del. Ch. 2003).....	11
<i>Ramada Inns, Inc. v. Drinkhall</i> , 490 A.2d 593 (Del. Super. 1985).....	22
<i>Saito v. McKesson HBOC, Inc.</i> , 2001 WL 818173 (Del. Ch.)	17
<i>Saito v. McKesson HBOC, Inc.</i> , 2002 WL 31657622 (Del. Ch.)	passim

Sealy Mattress Co. of N.J., v. Sealy, Inc.,
1987 WL 12500 (Del. Ch.) 13

Seinfeld v. Verizon Commc'ns, Inc.,
909 A.2d 117 (Del. Supr. 2006)..... 10

Sutherland v. Dardanelle Timber Co.,
2006 WL 1451531 (Del. Ch.) 9, 13

Sutherland v. Sutherland,
2007 WL 195444 (Del. Ch.) 18-19

Thomas & Betts Corp. v. Leviton Mfg. Co.,
681 A.2d 1026 (Del. Supr. 1996)..... 9

UniSuper Ltd. v. News Corp.,
2006 WL 668547 (Del. Ch.) 13

United States v. Ary,
518 F.3d 775 (10th Cir. 2008) 25

STATUTES

Corporate and Commercial Practice in the Delaware Court of Chancery

§8-6(e)(1) (1998) 9

§26(b)(3) 21

NATURE AND STAGE OF PROCEEDINGS

The key facts of this books and record action are uncontested. After conducting an investigation, the Board of Directors (the "Board") of Hewlett-Packard Company ("HP" or the "Company") determined that the Company's then Chief Executive Officer ("CEO"), Mark Hurd ("Hurd"), had violated HP's Standards of Business Conduct and Conflicts of Interest Policy. Compl., ¶2; Answer, ¶2.¹ The investigation found "numerous instances where inaccurate expense reports were submitted by [Hurd]" and that Hurd failed to tell the Board about a close personal relationship with a contractor. Compl., ¶20; Answer, ¶20 (quoting HP General Counsel Michael Holston ("Holston")). Hurd even admitted that "there were instances in which [he] did not live up to the standards and principles of trust, respect, and integrity that [he] espoused at HP." Compl., 22; Answer, ¶22 (quoting Press Release, HP, HP CEO Mark Hurd Resigns (Aug. 6, 2010)). In short, Hurd breached his fiduciary duties to the Company and wasted HP's assets.

If plaintiff were only investigating whether Hurd engaged in wrongdoing, HP may well be correct in stating in its past correspondence with plaintiff that it provided him "with documents which are more than sufficient ... to conduct an investigation into any purported misconduct." Letter from Steven M. Schatz ("Schatz") to Felipe J. Arroyo ("Arroyo") (Nov. 3, 2010), attached as Ex. A to Affidavit in Support of Gregory E. Del Gaizo in Support of Plaintiff's Opening Brief on the Merits ("Del Gaizo Aff.") However, plaintiff is not merely

¹ The term "Compl." refers to the Complaint for Relief Pursuant to 8 *Del. C.* §220 filed in this Court on November 18, 2010. The term "Answer" refers to the Answer of Defendant Hewlett-Packard Company filed in this action on December 17, 2010, in this Court.

investigating whether Hurd engaged in some form of wrongdoing. Instead, plaintiff is concerned with, and investigating, why the Board, well aware of all the above, resolved to provide Hurd with a severance package valued between \$35-40 million, rather than terminate him for "cause." Compl., ¶7. "Cause" is defined in HP's Severance Plan as "[c]onduct (including action or failure to act) that is not in the best interest of, or is injurious to, HP." Compl., ¶2; Answer, ¶2. It appears even from the public record that the Board had every right to terminate Hurd for "cause," which would have eliminated any right or obligation to pay him a multi-million dollar severance. Indeed, there can be no doubt about the validity and import of plaintiff's investigative concern and purpose any longer: the Company, itself, finally and at long last, has initiated what it purports to be an investigation tracking plaintiff's concerns. Joint Case Management Statement at 3, *In re HP Derivative Litigation*, No. 10-CV-3608 JW (Jan. 14, 2011) attached as Ex. B. to Del Gaizo Aff.

To further plaintiff's investigative purpose, plaintiff sent an inspection demand to HP on August 17, 2010. He followed all the procedural prerequisites of a Title 8, Section 220 of the Delaware Code ("Section 220") demand, including providing HP with his proper purpose: to investigate the circumstances that led the Board to enter a separation and severance agreement with Hurd, rather than terminate him for cause. Further, Plaintiff tailored his records requests narrowly to further his cause: he sought only books and records concerning the Board's internal investigation, the Board's consideration of whether to terminate Hurd, including whether to terminate him for "cause," the Board's negotiation of and approval of the terms of Hurd's separation agreement, the Company's guidelines and policies regarding reimbursement and conflicts of interest, and Hurd's expense reports. In

response, HP provided certain board minutes, some publicly filed documents, such as HP's Standards of Business Conduct, some of Hurd's expense reports, and the letter from Gloria Allred ("Allred") to Hurd and HP dated June 24, 2010 (the "Allred Letter") attached as Ex. 4 to Compl.² All told, HP provided plaintiff with less than 100 pages of documents.

A critical piece of the puzzle is missing from HP's production: a report by the law firm Covington & Burling LLP ("Covington"), concerning its investigation into the sexual harassment allegations against Hurd and the steps the Board should have taken in response (the "Covington Report"). The Board apparently reviewed and relied upon the Covington Report in its dealings with Hurd.³ The exclusive way for plaintiff to learn about the key information embodied in the Covington Report is to review it. Despite the many manifest issues and potential claims that spring from the Board's decision to pay Hurd tens of millions of dollars rather than fire him outright, HP nonetheless has refused to provide plaintiff with the Covington Report, claiming that it is protected by attorney-client privilege and the work product doctrine. But, as demonstrated below, HP's claims of privilege and work product cannot survive scrutiny under Delaware law. More, even if these principles somehow once

² The parties previously appeared before the Court on January 21, 2011, to argue whether the Allred Letter should be kept confidential and all references in court filings redacted. Dkt. #124 (court taking matter under submission.).

³ From the public record, including detailed articles about the investigation in *The Wall Street Journal* and *FORTUNE* (undercutting any suggestion of privilege), plaintiff learned that the Covington Report contains the results of the investigation that included a review of Hurd's phone calls, travel, expenses, and PC usage, as well as interviews with a number of HP's employees, including Hurd. After reviewing the Covington Report, the Board decided that Hurd could no longer serve as CEO of the Company, but – for reasons undisclosed -- chose not to terminate him for "cause."

protected the Covington Report, any such protections have been waived. The parties have agreed to submit that no trial is necessary and to submit this dispute to the Court on a paper record. As explained below, the Court should compel HP to provide plaintiff with the Covington Report.

STATEMENT OF FACTS

A. The Board Learns of Hurd's Improper Actions and Acknowledged Violation of HP's Standards of Business Conduct

HP is a Delaware corporation, headquartered in Palo Alto, California. Compl., ¶13; Answer, ¶13. The Company specializes in developing and manufacturing computing, data storage, and networking hardware, in addition to designing software and delivering services. *Id.* The Company has 2.2 billion shares of common stock outstanding and its market capitalization is approximately \$100 million. *Id.*

Hurd became HP's CEO in 2005. Compl., ¶2; Answer, ¶2. As an officer and director of HP, Hurd was subject to the Company's Standards of Business Conduct which forbids "sexual harassment, including unwelcome sexual advances, requests for sexual favors, or other unwelcome verbal or physical contact of a sexual nature." Compl., ¶2; Answer, ¶2. In addition, Hurd was subject to the Conflicts of Interest Policy, which requires employees to disclose "close personal relationship[s] that could cause the perception of any conflict between ... [the employee's] HP responsibilities and ... [the employee's] involvement in the relationship." Answer, ¶2 (quoting HP, Conflicts of Interest Policy); Compl., ¶2. [REDACTED]

The Board learned [REDACTED]
[REDACTED] on June 24, 2010. On that day Hurd and HP received the

[REDACTED] Compl., ¶3; Answer, ¶3.

B. The Board Conducts an Investigation and Allows Hurd to Resign with a Lavish Golden Parachute Instead of Terminating Him for Cause

After receiving the Allred Letter, HP retained Covington as outside counsel to investigate the allegations contained in the Allred Letter. Compl., ¶5; Answer, ¶5; Robert A. Guth, Ben Worthen, and Justin Scheck, Accuser Said Hurd Leaked on HP Deal, Wal. St. J., at 2 (Nov. 6, 2010) attached as Ex. E to the Del Gaizo Aff. During the course of the Board's investigation, Covington interviewed Hurd, Caprice Fimbres ("Fimbres") (Hurd's "unofficial chief of staff" [REDACTED]), and Dennis Lynch (Hurd's security guard [REDACTED])

[REDACTED]. Del Gaizo Aff., Ex. E at 2; Compl., ¶5; Answer, ¶5. On July 28, 2010, Covington presented the Covington Report to the Board, revealing the results of its investigation and the steps the Board could take with respect to Hurd's status with the Company. Compl., ¶¶5, 9; Answer, ¶9.

After reviewing the Covington Report, the Board concluded that Hurd could no longer serve as CEO of the Company. Compl., ¶6; Answer, ¶6. However, the Board did not choose to terminate him for "cause." In fact, despite Hurd's admitted transgressions, the Board allowed Hurd to resign as CEO of HP and authorized the Company to enter into a Separation Agreement. Compl., ¶6; Answer, ¶6. Pursuant to the Separation Agreement, the Board awarded Hurd, among other things: (i) a severance payment of \$12.2 million; (ii) nearly 350,000 shares of HP stock worth an additional \$16 million based on HP's closing price on August 6, 2010; (iii) an extension on the expiration date to purchase up to 775,000 shares of HP common stock; and (iv) continuing health benefits including medical and dental

coverage for eighteen months. Compl., ¶7; Answer, ¶7. The estimated worth of Hurd's Separation Agreement was valued between \$35-\$40 million by the *Financial Times*. Compl., ¶7. In contrast, had the Company terminated Hurd for "cause," it would not have been required to pay *any* severance. Compl., ¶7.

On August 6, 2010, the Company announced that the investigation revealed Hurd had violated the HP's Standards of Business Conduct, and that "it would be impossible for him to be an effective leader moving forward and that he had to step down." Compl., ¶6; Answer, ¶6.

C. HP Denies Plaintiff's Demand to Access the Covington Report

On August 17, 2010, plaintiff made his inspection demand upon HP "to investigate corporate mismanagement, wrongdoing, and waste by the Board" in connection with Hurd's resignation (the "Inspection Demand"). Compl., ¶8, Ex. 1. Plaintiff's Inspection Demand sought "all books and records concerning the internal investigation into [Fisher's] sexual harassment allegation(s) against ... Hurd" including "all minutes of any meeting of the Board" and "any materials provided or presented to the Board or committee thereof concerning the investigation." Compl., Ex. 1 at 3. Plaintiff and HP, through their respective counsels, engaged in lengthy discussions regarding the production of documents and records sought under plaintiff's Inspection Demand. Compl., ¶8. Despite plaintiff's effort to facilitate the process by entering into a confidentiality agreement with HP, so far, HP has only provided plaintiff with: (i) the Allred Letter; (ii) certain Board meeting minutes; (iii) the Separation Agreement; (iv) the Company's Standards of Business Conduct and Conflicts of Interest Policy; and (v) Hurd's and his assistant's expense reports. Compl., ¶8; Answer, ¶8.

HP has repeatedly refused to provide plaintiff with the Covington Report. Compl., ¶9; Answer, ¶9. Most recently, on November 3, 2010, HP, through counsel, sent plaintiff a letter refusing to produce the Covington Report for plaintiff's inspection invoking the attorney-client privilege and the work-product doctrine. Letter from Schatz to Arroyo (Nov. 3, 2010) attached as Ex. C to Del Gaizo Aff. Unable to reach an agreement with HP, plaintiff was forced to file this action.

ARGUMENT

A. Plaintiff Has Complied with the Requirements of Section 220

Plaintiff has made the requisite showings pursuant to Section 220 to inspect the Covington Report. Under Section 220, a stockholder is entitled to inspect the books and records of a company if the stockholder demonstrates that he is a stockholder; that the stockholder has complied with the form and manner requirements, and that the stockholder has a proper purpose for seeking the inspection. Plaintiff has satisfied all three criteria as set forth herein.

1. Plaintiff Has Complied With the Form And Manner Requirements of Section 220

Plaintiff has met the requisite form and manner requirements prescribed under Section 220. Plaintiff made his demand under oath, which was duly notarized. Compl., Ex. 1. Plaintiff's oath states that he is "a stockholder of Hewlett-Packard Company" and he attached a current brokerage statement demonstrating his ownership of HP stock. *Id.* Additionally, plaintiff also executed a notarized power of attorney authorizing his counsel, Robbins Umeda LLP, to act on his behalf with respect to his inspection demand. *Id.* Finally, plaintiff sent the inspection demand letter to HP's headquarters in Palo Alto, California via certified mail. *Id.* Accordingly, plaintiff has fulfilled his procedural obligations under Section 220.

2. Plaintiff Has a Proper Purpose

Plaintiff's stated purpose for inspecting HP's books and records, including the Covington Report, is "to investigate corporate mismanagement, wrongdoing, and waste by the Board" in connection with the resignation of the Company's CEO, Hurd. *Id.* at 1. In particular, plaintiff is investigating the Board's decision to allow Hurd to resign and provide him with a lucrative severance package, instead of terminating him for "cause." *Id.*

For the purposes of this action, plaintiff's proposed purpose is uncontested. And for good reason. A proper purpose is any purpose "reasonably related to such persons' interest as a stockholder." Del. Code Ann. tit. 8 §220(b). Delaware courts unanimously agree that investigating breaches of fiduciary duty, mismanagement, and waste is a proper purpose for inspection of corporate books and records. *Thomas & Betts Corp. v. Leviton Mfg. Co.*, 681 A.2d 1026, 1031 (Del. Supr. 1996) ("It is well established that investigation of waste and mismanagement is a proper purpose for a Section 220 books and records inspection.").⁴

To pursue his stated purpose, a shareholder need only show by a preponderance of the evidence that there is some credible basis to believe that wrongdoing occurred. *Seinfeld v. Verizon Commc'ns, Inc.*, 909 A.2d 117, 123 (Del. Supr. 2006). As the Delaware Supreme Court explained in *Seinfeld*, to have a proper purpose, a shareholder is not required to prove

⁴ *Sutherland v. Dardanelle Timber Co.*, CIV. A. 671-N, 2006 WL 1451531, at *8 (Del. Ch. May 16, 2006) ("The investigation of possible breaches of fiduciary duty is such a proper purpose."); *Carapico v. Phila. Stock Exch., Inc.*, 791 A.2d 787, 792 (Del. Ch., 2000) ("[T]he investigation of possible waste, mismanagement, or breach of fiduciary duty has been recognized as a purpose proper to warrant the inspection of corporate books and records.") (citing Donald J. Wolfe, Jr. & Michael A. Pittenger, *Corporate and Commercial Practice in the Delaware Court of Chancery* §8-6(e)(1) (1998)).

that wrongdoing is "actually occurring," but rather he "need only show, by a preponderance of the evidence, a credible basis from which the [court] ... can infer there is possible mismanagement that would warrant further investigation – a showing that 'may ultimately fall well short of demonstrating that anything wrong occurred.'" *Id.* (citations omitted). In fact, the Delaware Supreme Court called this credible basis standard "the lowest possible burden of proof." *Id.*

The Board's decision here is highly in doubt in light of the findings made during its internal investigation and the option that the Board had to fire Hurd without paying him severance. The Company, for example, has admitted in its press releases and accompanying conference calls that Hurd violated its Standard of Business Conduct and Conflicts of Interest Policy. Compl., ¶20. In fact, its internal investigation revealed, among other things: (i) that Hurd had a "close personal relationship with [Fisher]"; (ii) that on numerous occasions, Fisher received "compensation and/or expense reimbursement where there was not a legitimate purpose"; and (iii) that Hurd engaged in a "systematic pattern of [submitting] improper expenses and inaccurate reports" with the intent to or that had the effect of concealing his personal relationship with Fisher. See *Del Gaizo Aff., Ex. C.* Nevertheless, although the Board apparently had more than sufficient "cause" to terminate Hurd pursuant to HP's Severance Plan, it inexplicably refused to do so. In exchange for this lucrative severance package, the Company claims Hurd provided HP with "valuable" consideration consisting of amendments to Hurd's confidentiality agreement, his agreement to cooperate with HP post-employment, and his agreement not to disparage HP. The true value, or lack thereof, of this consideration was evident a month later when Hurd joined HP's biggest rival,

Oracle. Meanwhile, the Company's market capitalization fell over \$8.6 billion after Hurd's resignation. Compl., ¶24. Accordingly, plaintiff has established a credible basis to believe that the Board committed wrongs here.⁵

B. Plaintiff Has Demonstrated "Good Cause" for the Attorney-Client Privilege Not to Attach

HP invokes the attorney-client privilege to shield the Covington Report from plaintiff. Del Gaizo Aff. Ex. A. However the protections the attorney-client privilege affords are not absolute. As courts in Delaware have repeatedly recognized, "to allow the lawyer-client privilege to block access to information and basis of ... [the Board's] decisions as to the persons whom the obligations are owed might allow the perpetration of frauds." *Deutsch v. Cogan*, 580 A.2d 100, 108 (Del. Ch. 1990) ; *In re Fuqua Inds., Inc.*, No. CIV. A. 11974 2002 WL 991666, at *2 (Del. Ch. May 2, 2002). The *Duetsch* court continued, stating a:

fiduciary owes an obligation to his beneficiaries to go about his duties

⁵ Indeed, in similar situations where a company has afforded its outgoing senior officer a non-fault termination laden with a lucrative severance package amidst a cloud of misconduct, Delaware courts have denied motions to dismiss under even the heightened pleading standards of a Rule 23.1 inquiry. See *In re Citigroup Inc. S'holder Derivative Litig.*, 964 A.2d 106, 138 (Del. Ch. 2009) (denying motion to dismiss plaintiff's claim for corporate waste due to the board's approval of a multi-million dollar severance package to departing CEO); *In re Walt Disney Co. Derivative Litig.*, 825 A.2d 275, 291 (Del. Ch. 2003) (denying the defendants' motion to dismiss due to board's authorization of the non-fault termination and \$41 million in cash and stock severance package to outgoing CEO). *Citigroup* is particularly instructive. In *Citigroup*, the plaintiff challenged the board's decision to grant an outgoing CEO, who allegedly damaged the company, a severance package worth tens of millions of dollars. 964 A.2d at 138. The court found that the plaintiff adequately stated a claim for waste and that demand was excused in light of the size of the severance compared to the company's paltry consideration of "a non-compete agreement, a non-disparagement agreement, a non-solicitation agreement, and a release of claims against the [c]ompany." *Citigroup*, 964 A.2d at 138.

without obscuring reasons from the legitimate inquiries of the beneficiaries.... Moreover, '[t]he more general and important right of those who look to fiduciaries to safeguard their interests, to be able to determine the proper functioning of the fiduciary, outweighs the need for the privilege and its base of attorney-client confidence.'

Id. (citation omitted). In order to balance the need for corporate fiduciaries to conduct full and frank communication with counsel, and the need for shareholders to investigate whether those same fiduciaries breached their duties, Delaware has adopted a doctrine which precludes the application of the attorney-client privilege upon a plaintiff's showing of "good cause" for disclosure. *Fuqua*, 2002 WL 991666, at *3.

To determine whether "good cause" exists for disclosure of what would otherwise be privileged communications, Delaware has adopted the factors set forth in *Garner v. Wolfenbarger*, 430 F.2d 1093 (5th Cir. 1970). *Grimes v. DSC Commun'cns Corp.*, 724 A.2d 561, 568 (Del. Ch.1998) . The *Garner* factors are: "(i) the number of shares owned by the shareholder and the percentage of stock they represent; (ii) the assertion of a colorable claim; (iii) the necessity of the information and its unavailability from other sources; (iv) whether the stockholder has identified the information sought and is not merely fishing for information; and (v) whether the communication is advice concerning the litigation itself."

Id. The three primary factors that courts focus on are: (i) whether the claims are colorable; (ii) necessity or desirability of information and its availability from other sources; and (iii) extent to which information sought is identified as opposed to the plaintiff engaging in a blind fishing expedition. *Sealy Mattress Co. of N.J. v. Sealy, Inc.*, No. CIV. A. 8853, 1987 WL 12500, at *41 (Del. Ch. June 19, 1987); *UniSuper Ltd. v. News Corp.*, No. Civ. A. 1699-N 2006 WL 668547, at *1 (Mar. 7, 2006) (enumerating these three primary factors). As

explained in more detail below, each of these three factors weighs heavily in plaintiff's favor. Accordingly, good cause for disclosure exists.

1. Plaintiff Asserts a Colorable Claim

In the context of a Section 220 action, whether plaintiff asserts a colorable claim overlaps with whether he asserts a proper purpose for the inspection. *See Grimes*, 724 A.2d at 569 (plaintiff presented a colorable claim when he had a proper purpose to investigate whether his demand was wrongfully refused); *Saito v. McKesson HBOC, Inc.*, No. CIV. A. 18553, 2002 WL 31657622, at *13-*14 (Del. Ch. Nov. 13, 2002) (plaintiff presented a colorable claim when he had a proper purpose to investigate a board's possible breaches of fiduciary duty in connection with a merger). As explained above in Section A(2), plaintiff's uncontested proper purpose is to investigate the Board's possible breach of fiduciary duty and waste. *Thomas*, 681 A.2d at 1031 ("It is well established that investigation of waste and mismanagement is a proper purpose for a Section 220 books and records inspection.").⁶

As also explained above, plaintiff has established a credible basis for his proper purpose, and accordingly has presented a colorable claim. Section A(2). Hurd breached his fiduciary duties, violated the Company's Standards of Business Conduct policy and its

⁶ *See also Sutherland*, 2006 WL 1451531, at *8 ("The statute defines 'proper purpose' as any purpose 'reasonably related to such person's interest as a stockholder.' The investigation of possible breaches of fiduciary duty is such a proper purpose.") (quoting tit.8 §220(b)); *Carapico*, 791 A.2d at 792 ("It is well established that investigation of mismanagement is a proper purpose for a Section 220 books and records inspection.' Moreover, 'the investigation of possible waste, mismanagement, or breach of fiduciary duty has been recognized as a purpose proper to warrant the inspection of corporate books and records.'") (citations omitted).

Conflicts of Interests Policy. Further, he attempted to mislead the Board regarding his relationship with Fisher. Del Gaizo Aff., Ex C. "Cause" for termination exists when an officer acts in a way "that is not in the best interest of, or is injurious to HP." Answer, ¶2. Despite that these acts that were not in HP's best interest and injurious to it, the Board did not terminate Hurd for cause. Instead, it provided Hurd with a lavish separation package worth between \$35-40 million. Lavishing the Company's assets on an unfaithful fiduciary, for little, if any, consideration presents a colorable claim against the Board. *See Citigroup*, 964 A.2d at 138. Accordingly, this factor weighs in favor of disclosure of the Covington Report.

2. The Information Is Necessary and Not Available from Any Other Source

The Covington Report contains vital information central to plaintiff's purpose that is unavailable from any other source. Covington presented its report to the Board on July 28, 2010. The Covington Report contained the results of an investigation that included interviews with Hurd, Ms. Fimbres, and Mr. Lynch. Del Gaizo Aff., Ex. C. In addition, the investigation reviewed Hurd's phone calls, travel, and computer usage. *Id.* One fact that the Covington Report revealed was that Hurd lied to the Board about when he met Fisher and what he knew about her past. *Id.* In contrast to his claims that he was unaware of her past adult film career, the Covington Report revealed that Hurd searched out these movies and watched them on a pornographic website, erotic4u. *Id.* The Covington Report is the only place to find the results of the investigation, with its complete access to HP's documents, files, and employees. After presentation of the Covington Report, six directors voted in favor of disclosing Fisher's allegations against Hurd, and several directors felt that he could no longer serve as the Company's CEO. Del Gaizo Aff., Ex. C. The Covington Report is a

necessary and vital piece of information that will help explain why the Board did not go a step further and fire Hurd for "cause," despite their apparent ability to do so in light of findings of its investigation.

HP claims that the production of the Covington Report is unnecessary because it has already provided plaintiff with some Board minutes, expense reports, and certain other miscellaneous documents. Del Gaizo Aff., Ex. A at 1-2. HP is incorrect. Although the already-produced documents strongly suggest that Hurd breached his fiduciary duties and the Board had the ability to fire him for "cause," the Covington Report exclusively provides crucial information concerning what the Board *actually reviewed and relied upon* in determining that Hurd's misconduct warranted a resignation *without "cause"* but with a substantial severance package⁷

Delaware courts have dealt with a similar situation within the context of a Section 220 demand in *Grimes* and *Saito*. *Grimes*, 724 A.2d at 568; *Saito*, 2002 WL 31657622, at*1. The issue in *Grimes* was whether attorney-client privilege attached to a report prepared by a special committee formed to consider the plaintiff's demand upon the board that it avoid or abrogate the compensation package and long-term incentive plan that it awarded its CEO. 724 A.2d at 564. After an investigation, a special committee recommended that the board

⁷ The Covington Report also apparently contains information undisclosed to plaintiff, including: (i) notes on interviews with Hurd, Hurd's unofficial chief of staff, Fimbres, and other HP employees; and (ii) certain of Hurd's business records, including phone calls and computer usage. Del Gaizo Aff., Ex C. Additionally, Covington also apparently interviewed Denis Lynch, Hurd's security guard, during its investigation. *Id.* The interview with Mr. Lynch is significant because he could verify Hurd's false representations on expense reports where Hurd stated he was dining with Lynch when, in fact, he was with Fisher. *Id.*

reject the plaintiff's demand, which the board adopted. *Id.* The plaintiff in *Grimes* then made a written request to inspect certain documents concerning the special committee's formation and investigation, including the special committee's report on its investigation. *Id.* at 565. The defendant, however, refused to provide the report for inspection, arguing, among other things, that it was protected by the attorney-client privilege and the work-product doctrine. *Id.* The plaintiff, in turn, argued that he had established sufficient "good cause" for the disclosure of the report. *Id.* at 569.

In support of his argument for good cause, the plaintiff in *Grimes* stated that the report was unavailable from other sources and necessary for his proper purpose to inquire into whether the board wrongfully refused his demand. 724 A.2d at 576, 569. The defendant argued that the plaintiff had all the necessary information because it produced over 2,800 pages of documents that provided the basis for the special committee's conclusions. *Id.* at 569. The court rejected the defendant's argument explaining that "[o]f particular import" is that the report was unavailable from any other source and that it was integral to the plaintiff's proper purpose. *Id.* The Court explained that 2,800 pages of documents that went to the underlying merits of the issues addressed by the special committee are of "secondary or indirect relevance." *Id.* at 567. Rather, the important consideration was the independence, good faith, and due care of the special committee, which the report directly addressed. *Id.*

In *Saito*, the plaintiff sought to inspect pre-merger and post-merger legal advice provided to the board of the acquiring company in order to investigate whether there was wrongdoing involved with the merger. 2002 WL 3165722, at *13. The plaintiff's

investigation stemmed from the acquiring company's announcement that it would have to restate its financial statements after it learned post-merger that the target company's financial records contained accounting irregularities. *Saito v. McKesson HBOC, Inc.*, No. CIV. A. 18553, 2001 WL 818173, at *1 (Del. Ch., July 10, 2001) *aff'd in part, rev'd in part by Saito*, 806 A.2d 113 (Del. 2002). The court dealt with the pre and post-merger legal advice separately. *Saito*, 2002 WL 31657622, at *13-*14. Regarding the pre-merger legal advice, the defendants argued that the plaintiff needed only the financial information underlying the legal advice, not the actual legal advice given to the board, similar to the defendants' argument in *Grimes*. *Saito*, 2002 WL 31657622, at *13. The court disagreed, stating that the legal advice the board received "is relevant and necessary in determining what information the board relied upon." *Id.* In other words, the court in *Saito* explained that the plaintiff was entitled to know what the Board actually considered in making its decision, not only the information it could have considered. *Id.* The court also noted that this information cannot be obtained from any other source and thus, concluded that the *Garner* factors compelled disclosure of the pre-merger documents. *Id.*⁸

⁸ HP cited *Saito* in correspondence to Plaintiff, presumably because *Saito* did not find "good cause" for plaintiffs to inspect the post-merger documents. *Id.*, at *14. But, unlike the pre-merger documents, the board could not have relied on the post-merger documents in approving the merger, the main focus of plaintiff's inspection demand. *Id.*, at *13. Rather, the documents that the plaintiff sought concerned legal advice prepared for the ensuing shareholder litigation related to the post-merger discovery of the accounting irregularities. *Id.*, at *2, *14. The court also explained that the plaintiff through discovery had already obtained all the necessary underlying information he sought. *Id.* In contrast, the legal advice in the Covington Report does not relate to this litigation.

This case is closely analogous to both *Grimes* and the pre-merger documents at issue in *Saito*. The Board conducted an investigation into the allegations in the Allred Letter, which produced the Covington Report. The Covington Report contained an analysis of the potential claims against Hurd and, presumably, what actions the Board could take with respect to Hurd. HP : Privilege Log attached as Ex. A to Del Gaizo Aff., . After reviewing the Covington Report, the Board chose not to terminate Hurd for "cause," but instead allowed him to resign with a lavish severance package. As the defendants in *Grimes* and *Saito* unsuccessfully argued, HP claims that the Covington Report is unnecessary because it has provided plaintiff "with documents which are more than sufficient for [plaintiff] to conduct an investigation into any purported misconduct." Del Gaizo Aff., Ex. C at 1. As the court in both those cases explained, however, plaintiff has the right to inspect whether the Board's decision was the result of an adequately informed independent judgment. For plaintiff to ascertain what information the Board relied upon, and assess whether it exercised good faith and due care in its decision regarding Hurd, plaintiff must review the very document that the Board relied on in making its ultimate decision - the Covington Report. In particular, it is necessary that plaintiff review the information that the Board relied upon (as in *Saito*) in order to determine whether the purported business decision was made loyally and with due care (as in *Grimes*). In addition, as was the case in *Grimes* and for the pre-merger documents in *Saito*, the information the Board relied on in deciding not to fire Hurd for "cause" is unascertainable from any other source, further weighing in favor of good cause.⁹

⁹ In its correspondence, in addition to *Saito*, HP also cited *Sutherland v. Sutherland*, No. Civ.

Thus, because the Covington Report is necessary and unavailable, this factor weighs in favor of finding "good cause."

3. Plaintiff's Request Is Narrowly Tailored

Plaintiff's request for the Covington Report is narrowly tailored. It seeks a single, identified report that the Board undoubtedly reviewed during its investigation and is directly related to whether the Board exercised good faith and due care in deciding to allow Hurd to resign with a lucrative golden parachute. The court's decision in *In re Freeport-McMoran Sulphur, Inc.* is instructive. No. Civ. A. 16729, 2005 WL 225040 (Del. Ch. Jan. 26, 2005). The underlying action in *Freeport* was a shareholder suit against a company's directors for approving a merger. *Id.*, at *1. The plaintiff in *Freeport* sought fourteen documents that the defendants claimed were privileged. The privileged documents concerned previous litigation that accused some of the same directors of breaching their fiduciary duties. *Id.* The court held that the plaintiff was not "blindly fishing" for evidence because it identified the specific documents it was seeking and how those documents were relevant to the current case. *Id.*, at *4.

A. 2399-VCL 2007 WL 1954444 (Del. Ch. July 2, 2007), in support of withholding the Report. Neither the facts nor the requested documents in *Sutherland* bear any resemblance to this case. The plaintiff in *Sutherland* sought memorandum and drafts of reports sent between a special litigation committee and its counsel. *Id.*, at *4. Plaintiff, however, is not seeking drafts of a report being edited by counsel. Rather, he requests the report that was shown to the entire Board which it used in coming to a major business decision, allowing Hurd to resign with a lucrative severance package, instead of firing him for "cause." The Covington Report is more akin to a final report of a special litigation committee which courts have repeatedly held should be produced in response to a shareholder inspection demand, than the drafts at issue in *Sutherland*. See e.g. *Grimes* 724 A.2d at 567 (holding that plaintiff is entitled to receive copies of the special committee's report).

Similarly, in *Deutsch*, the plaintiffs sought documents detailing communications between the defendants and their counsel regarding the disputed merger transaction at issue in the parties' litigation. 580 A.2d at 101, 108. The defendants claimed the documents were subject to the attorney-client privilege. *Id.* at 107. In determining that the plaintiffs established "good cause" under the *Garner* factors, the court found the "fact that the documents sought are clearly identified" demonstrated that the plaintiffs were not "blindly 'fishing'" for evidence. *Id.* at 108.

Finally, *Fuqua* is also in agreement with *Deutsch* and *Freeport*. 2002 WL 991666. The plaintiffs in *Fuqua* alleged that the board made decisions for an entrenchment purpose which prevented the company's shareholders from receiving a change of control premium. *Id.*, at *5. The plaintiffs in *Fuqua* specifically identified the documents they sought from the defendants' privilege log and showed that they were relevant to plaintiffs' allegations. *Id.* The Court held that this level of specificity showed that the plaintiffs were "not blindly fishing for information." *Id.*

Like the plaintiffs in *Freeport*, *Deutsch*, and *Fuqua*, plaintiff here has identified the single specific document that he is seeking. He also explained in detail how this document is relevant to his inspection of the Board's decision not to fire Hurd for cause. See Section B(2). Therefore, this factor weighs in favor of granting plaintiff access to the Covington Report.¹⁰

¹⁰ As stated earlier, courts focus on the three above factors when considering whether there is good cause. Section 111(B). An additional *Garner* factor, whether the communication is advice concerning this litigation, also weighs in favor of finding good cause. Since this

C. The Work-Product Doctrine Does Not Apply to the Covington Report

In addition to attorney-client privilege, HP argues that the Covington Report is not subject to inspection because of the work-product doctrine. *Del Gaizo Aff., Ex. C*. The work-product doctrine is codified in Chancery Court Rule 26(b)(3), which bars discovery of materials created in anticipation of litigation or for trial preparations. This doctrine, like the attorney-client privilege, is not absolute. The work-product doctrine does not bar the discovery of an item if a party can establish substantial need for the materials and is unable to obtain its substantial equivalent without undue hardship. Because plaintiff has established a substantial need for the Covington Report and demonstrated he is unable to obtain its substantial equivalent without undue hardship, the work-product doctrine does not apply.¹¹

litigation was not in existence when the Board allowed Hurd to resign, the Covington Report could not concern this litigation. *See Saito*, 2002 WL 31657622, at *14 ("The advice is also not addressed to the litigation itself, because the litigation had not commenced."). In addition, the Covington Report contained legal advice concerning potential actions by the Company or Fisher against Hurd, not shareholder actions, such as a derivative action, against the Board. *Compare id.* (plaintiffs not allowed to access *post-wrongdoing* documents containing legal advice prepared for the "*litigation at hand*." (emphasis added)). The last factor, plaintiff's stock ownership, is only relevant if no other factor supports good cause. *Saito*, 2002 WL 31657622, at *13. Since the other factors all weigh in favor of privilege not attaching to the Covington Report, the Court should impart little, if any, weight on plaintiff's holdings during its *Garner* analysis.

¹¹ There is additional doubt that the Covington Report is subject to the work-product doctrine in this litigation because if it was created in anticipation of litigation, that anticipated litigation was with a different third-party and concerned a different subject matter. The Covington Report was the result of an investigation completed in anticipation of sexual harassment and other employment-type claims that could be potentially asserted by Fisher against Hurd and possibly HP. *See Del Gaizo Aff., Ex. A* (describing the Covington Report as prepared "for purpose [sic] of providing legal advice concerning allegations made against an HP executive.") In contrast, plaintiff here brings an action against HP, so that he may investigate potential wrongdoing by the Board. Courts have refused to apply the work-

The work-product doctrine is inapplicable to the Covington Report because plaintiff has demonstrated a substantial need for the information contained therein, and is unable to obtain its substantial equivalent. Though there is no *Garner* exception to the work-product doctrine, plaintiff's explanation of the necessity factor in the *Garner* test applies equally here to show his substantial need. See *Grimes*, 724 A.2d at 570 ("For the same reasons that the plaintiff has shown 'good cause' to overcome the claims of attorney-client privilege, I conclude he has also shown a substantial need for the information for purposes of the work-product doctrine."). As already explained, the Covington Report was used to assist the Board in its decision not to terminate Hurd for "cause," the very decision that plaintiff is investigating. Without the Covington Report, plaintiff cannot ascertain exactly what facts, data, advice, and recommendations were presented to the Board, and in what context and form they were delivered. This situation is analogous to *Grimes*. There plaintiff showed a substantial need for the report because, as the court explained, the report was one of the only ways that the plaintiff could evaluate the deliberative process of the board. *Id.* Plaintiff requires the Covington Report for the same purpose here, to shed light into the deliberative process of the Board in deciding not to fire Hurd for "cause," and instead allow him to resign with a lucrative severance package. Accordingly, the work-product doctrine does not apply

product doctrine in such circumstances. See *Ramada Inns, Inc. v. Drinkhall*, 490 A.2d 593, 596 (Del. Super. 1985) (refusing to apply the work-product doctrine in a libelous action to a report that was prepared in anticipation of litigation over a purchase of assets, because the work-product privilege only applies if the two matters are closely related in parties and subject matter).

here.¹²

D. HP Waived Its Ability to Claim the Covington Report Is Protected by Attorney-Client or Work-Product Privilege

Even if the attorney-client or work-product privileges were to apply to the Covington Report, HP has waived its right to assert such privileges. Courts recognize an implicit waiver of privilege when the privilege holder fails to properly treat the purportedly privileged communications as confidential leading to its wide-spread disclosure, regardless of whether the disclosure is voluntary or inadvertent. *See Alldread v. City of Grenada*, 988 F.2d 1425, 1434 (5th Cir. 1993) (determining a court "will not relieve those claiming the [attorney-client] privilege of the *consequences of their carelessness* if the circumstances surrounding the disclosure do not clearly demonstrate that continued protection is warranted")(emphasis added); *see also Tri-County Paving, Inc. v. Ashe Cnty.*, No. 5:99CV105-V 2000 WL 1811606, at *4 (W.D.N.C. Oct. 5, 2000) (finding waiver of privilege because contents of privileged communications "have already been widely disclosed at a public hearing and *in media coverage* of the hearing") (emphasis added). HP has waived its privilege as to the Covington Report because it publicly disclosed the contents of the Covington Report.

HP contends that the Covington Report is a sensitive and confidential document, yet the Company's indifferent treatment of its contents belies any notion of confidentiality.

¹² Plaintiff has also demonstrated the hardship component. As explained *supra*, the only known entity that has the Covington Report is HP. Thus, plaintiff cannot get the information in the Covington Report from any other source without the substantial hardship of recreating Covington's investigation.

Inexplicably, the Covington Report has managed to exchange hands from HP's possession to that of the media. Both *The Wall Street Journal* ("*WSJ*") and *FORTUNE* have penned separate articles detailing the findings presented to the Board in the Covington Report and the investigations that led to it. In particular, the *WSJ* reported in its article, after quoting the Allred letter and mentioning that it claimed Hurd leaked information about a potential acquisition by the Company, that the Board met at HP's Palo Alto offices on July 28, 2010, at which time Covington lawyer Tom Williamson explained that the Covington Report "described the result of a review of Mr. Hurd's phone calls, travel, expenses and PC usage, and interviews with Hurd [and other HP employees]." Del Gaizo Aff., Ex. C. The *WSJ* article explains that Covington found that Fisher met Hurd in Atlanta, St. Louis, San Diego, Madrid, Los Angeles, Laguna Beach, Calif., Chicago, Beverly Hills and Tokyo, among other cities. *Id.* It also revealed that Covington found that on February 11, 2008, HP sent Fisher to dine with Hurd in San Diego, but there was no HP event scheduled that day near their hotel. *Id.* The *WSJ* article knew the last time Hurd and Fisher met, October 5, 2009, in Boise, and what they did according to Hurd, watched a football game. *Id.* The *WSJ* article contained direct quotes from Hurd to Covington concerning his relationship with Fisher, including that he had developed a "very close personal relationship" and he considered her "a positive uplifting person who left me feeling good at the end of the day." *Id.* The *WSJ* article also revealed the results of Covington's review of Hurd's computer files. It knew exactly the phrase Hurd googled ("Jodie Fisher video"), the website he visited ("erotic4u.com"), the number of pages he viewed (more than 30), and what those pages showed (scenes from Fisher's adult film "Passion and Romance: Ocean of Dreams"). *Id.* Finally, the *WSJ* article

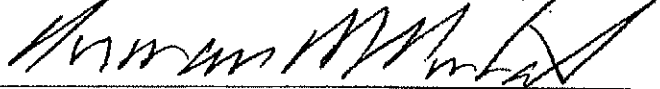
detailed that Covington found inconsistencies on Hurd's expense reports. *Id.* In particular, Hurd claimed that he dined with his security guard, Mr. Lynch, when he was actually with Fisher. *Id.* The *FORTUNE* article revealed similar findings from the Covington Report, including "evidence of a close relationship" between Hurd and Fisher, and "worrisome inconsistencies in Hurd's expense reports ... primarily regarding dinner that Hurd had with Fisher." What Really Happened between HP ex-CEO Mark Hurd and Jodie Fisher, *FORTUNE* (Nov. 4, 2010) attached as Ex. D to Del Gaizo Aff. As such, HP has failed to treat the Covington Report and its contents as confidential and sensitive information. Accordingly, the Company's disregard for the confidential nature of the Covington Report constitutes a waiver of its contents. *United States v. Ary*, 518 F.3d 775, 784 (10th Cir. 2008) ("The key is that the party seeking protection [by asserting privilege] must treat the document or communication as confidential.").

CONCLUSION

Based on the undisputed facts, plaintiff is entitled to the Covington Report. He has complied with the procedural requirements of Section 220, has demonstrated a proper purpose, as HP concedes, and has established "good cause" pursuant to the *Garner* factors, such that attorney-client privilege does not attach. The work-product doctrine is similarly inapplicable because the Covington Report was not prepared in anticipation of the present litigation, and plaintiff has demonstrated the requisite substantial need and hardship for the information contained therein. However, even if these privileges did attach to the Covington Report, HP has waived its right to assert these privileges. Accordingly, the Court should enter an order requiring the Company to permit plaintiff and/or his attorneys to

inspect and copy the Covington Report.

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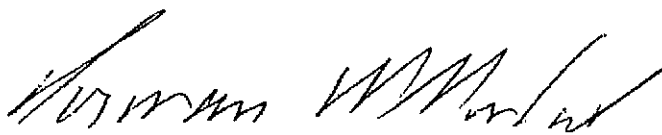
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