REDACTED PUBLIC VERSION –
Filed February 17, 2011

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

ERNESTO ESPINOZA,	:	
	:	
Plaintiff,	:	
	:	
v.	:	
	:	Case No.: 6000-VCP
HEWLETT-PACKARD COMPANY,	:	
	:	
Defendant.	:	

HEWLETT-PACKARD COMPANY'S OPENING BRIEF IN OPPOSITION TO PLAINTIFF'S DEMAND FOR THE INTERIM REPORT OF COUNSEL

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PRELIMINARY STATEMENT

Plaintiff seeks, pursuant to Section 220, the interim investigative report of outside counsel which unmistakably is protected from inspection by the work product doctrine and attorney-client privilege. Rarely has such a Section 220 plaintiff had less need for privileged materials. As detailed below, Hewlett-Packard Company ("HP") has already provided plaintiff copious material concerning the conduct in question and has been remarkably transparent in setting forth the bases for its actions. It has provided a detailed account of the bases for the Board's decision to terminate Mark Hurd (its former Chairman and CEO) and, of course, has fully described the terms of the Separation Agreement with Mr. Hurd. Under these circumstances, plaintiff falls woefully short of showing the compelling and exceptional need required to overcome the protections of the work product doctrine and attorney-client privilege. Indeed, plaintiff cannot even show that the interim investigative report is necessary and essential to his stated purpose. Accordingly, HP respectfully requests that the Court deny plaintiff's request.

NATURE AND STAGE OF PROCEEDINGS

This is a shareholder action pursuant to 8 *Del. C.* § 220 ("Section 220"). On August 17, 2010, plaintiff made a books and records demand pursuant to Section 220. HP responded on September 7, 2010 and thereafter produced numerous documents in response to the demand. Plaintiff subsequently requested that HP produce a report that had been prepared by outside counsel and withheld on grounds of attorney-client privilege and work product doctrine. On November 18, 2010, after HP refused to waive these privileges, plaintiff filed this action. The parties agreed to brief the issue of

whether plaintiff is entitled to inspect the report. This is HP's Opening Brief in Opposition to Plaintiff's Demand for the Interim Report of Counsel.

STATEMENT OF FACTS

A. The Parties

Defendant HP, a Delaware corporation with its principal executive office in Palo Alto, California, is one of the largest technology companies in the world. Plaintiff is a purported beneficial owner of HP stock. (Complaint ("Compl.") ¶ 12.)

B. Background to the Section 220 Demand

On June 29, 2010, HP received a June 24, 2010 letter from attorney Gloria Allred, sent on behalf of her client Jodie Fisher, accusing Mark Hurd, HP's former CEO, Chairman and President, as well as HP, of sexual harassment and other things (the "Allred Letter"). (Schultz Affidavit ("Schultz Aff.") ¶ 2.) Ms. Fisher had been employed by HP as an independent contractor. (*Id.*) As soon as HP's Board of Directors was made aware of Ms. Fisher's allegations, it directed that an investigation be conducted into her allegations (the "Hurd Investigation"). (Ex. 1 at 1;[1] Schultz Aff. ¶ 3.) The Hurd Investigation was conducted by outside counsel, Covington & Burling LLP ("Covington & Burling"), in conjunction with HP's General Counsel's office, and was overseen by the Company's Board of Directors (not including Mr. Hurd) (the "Board"). (*Id.*) As the Hurd Investigation proceeded, counsel kept the Board apprised

[1] "Ex." refers to exhibits attached to the affidavit of Katherine L. Henderson, filed herewith.

of its progress. (Schultz Aff. ¶ 4.) Communications between the Board and counsel concerning the Hurd Investigation were kept strictly confidential. (*Id.*)

At the conclusion of the Hurd Investigation, the Board asked for Mr. Hurd's resignation because it concluded that Mr. Hurd's conduct "demonstrated a profound lack of judgment," and "it would be impossible for him to be an effective leader moving forward." (Ex. 1 at 2.) As HP disclosed, the Board based its decision on the following conclusions:

- Mr. Hurd had a close personal relationship with an HP contractor who was hired by the office of the CEO and Mr. Hurd never disclosed that relationship to the Board of Directors;
- There were numerous instances where the contractor received compensation and/or expense reimbursement where there was not a legitimate business purpose;
- There were numerous instances where inaccurate expense reports were submitted by Mr. Hurd or on his behalf that were intended to conceal or had the effect of concealing Mr. Hurd's personal relationship with the contractor;
- There was a systematic pattern of improper expenses and inaccurate reports;
- Mr. Hurd's conduct undermined the standards expected of him as CEO;
- Mr. Hurd demonstrated a disregard for HP's values of trust, respect and integrity; and
- Mr. Hurd violated HP's Standards of Business Conduct.

(*Id.* at 1-2, 4; Ex. 2 at Exhibit 99.1.)

On August 6, 2010, HP announced that Mr. Hurd had resigned his positions as the Company's Chairman, CEO, and President, and that Mr. Hurd and HP had entered into a Separation Agreement and Release ("Separation Agreement"). (Ex. 2.) Under the terms of the Separation Agreement, Mr. Hurd was entitled to receive certain

severance benefits, including: 1) a severance payment of $12.2 million; 2) an extension until September 7, 2010 of the expiration date of vested options to purchase 775,000 shares of HP common stock; 3) pro-rata vesting of 330,177 performance-based restricted stock units; and 4) settlement on December 11, 2010 of 15,853 time-based restricted stock units at a modified price. (*Id.* at 1.[2]) In exchange, HP received a full release of claims from Mr. Hurd, as well as other valuable consideration, such as amendments to Hurd's confidentiality agreement, his agreement to cooperate with HP post-employment, and his agreement not to disparage HP, its affiliates, subsidiaries, officers or directors. (*Id.* at Exhibit 10.1 at 2-4.)

C. The Hurd Derivative Lawsuits

Four days after the announcement of Mr. Hurd's separation from HP, the first of eight derivative actions purportedly brought on behalf of HP was filed. (Henderson Affidavit ("Henderson Aff.") ¶ 2.) In total, three lawsuits were filed in the Superior Court of California ("California state actions"), four lawsuits were filed in the Northern District of California ("Federal actions"), and one lawsuit was filed in this Court ("Delaware action") (collectively, the "Hurd Derivative Lawsuits"). (*Id.*) The Hurd Derivative Lawsuits each alleged, *inter alia*, that HP's Board of Directors had committed

[2] In settlement of litigation subsequently filed by HP against Mr. Hurd, the parties later agreed to modify the terms of the Separation Agreement, with Mr. Hurd waiving his right to 330,177 performance-based restricted stock units and 15,853 time-based restricted stock units. (Ex. 4.)

waste and/or otherwise breached its duties to HP by approving the Separation Agreement.[3] (*See, e.g.*, Ex. 3.)

The California state actions were stayed in favor of the Federal actions, which were consolidated before the Honorable James Ware. (Henderson Aff. ¶ 4-5.) A consolidated complaint was filed in the Federal actions on December 3, 2010. (Ex. 5.)

The Delaware action -- *Zucker v. Andreessen, et al.*, C.A. No. 6014-VCP -- was filed on November 24, 2010 by shareholder Lawrence Zucker ("Zucker") after he had made a demand on HP pursuant to Section 220 and received essentially the same books and records produced to plaintiff in this action. (Henderson Aff. ¶ 3.)

D. The Current Independent Committee Investigation

On January 20, 2011, HP announced that it had appointed five new members to its Board, including Meg Whitman, Shumeet Banerji, Gary Reiner, Patricia Russo, and Dominique Senequier, and that four current Board members would not stand for reelection. (Ex. 6.) HP also disclosed that, in response to a shareholder demand, it had appointed a committee of independent directors to investigate, *inter alia*, the wrongdoing alleged in the Hurd Derivative Lawsuits (the "Independent Committee Investigation"). (Ex. 7 at 1.) The Independent Committee Investigation is currently underway. In light of the ongoing Independent Committee Investigation, plaintiffs in the Federal action consented to, and Judge Ware ordered, a 45-day stay of the consolidated Federal action.

[3] Some of the complaints also asserted claims against Mr. Hurd for unjust enrichment in relation to his receipt of the consideration provided for by the Separation Agreement.

(Henderson Aff. ¶ 6; Ex. 8.) Zucker has also agreed to a stay of the Delaware action. (Henderson Aff. ¶ 7.)

E. The Section 220 Demand

On August 17, 2010, plaintiff Ernesto Espinoza ("Espinoza") made a demand pursuant to Section 220 to inspect certain books and records of the Company related to Mr. Hurd's departure from HP (the "Section 220 Demand"). (Exhibit 1 to Compl.) Espinoza purported to bring the Section 220 Demand for the "proper purpose" of "investigat[ing] corporate mismanagement, wrongdoing, and waste by the Board of Directors . . . of HP and the Company's former Chief Executive Officer, Chairman, and President Mark Hurd." (*Id.* at 1.) Espinoza requested, *inter alia*, that HP provide "all books and records concerning the internal investigation into the independent contractor's sexual harassment allegation(s) against Mr. Hurd, including, without limitation, all minutes of any meeting of the Board or committee of the Board, any attachments to such minutes, any materials provided or presented to the Board or committee thereof concerning the investigation, and the letter sent on or about June 29, 2010 informing the Company of the allegations." (*Id.* at 3.)

F. The Response

On September 2, 2010,[4] HP responded to Espinoza's Section 220 Demand. (Exhibit 2 to Compl.) Although HP questioned whether Espinoza had stated a proper

[4] The parties reached an agreement on a response date.

purpose for the Section 220 Demand,[5] HP agreed to produce certain categories of documents responsive to the Section 220 Demand as follows:

1. Non-privileged final Board minutes and non-privileged materials provided to the Board, if any, related to the Hurd Investigation.

2. Non-privileged final Board minutes and non-privileged materials provided to the Board, if any, concerning consideration by the Board regarding whether to terminate Mr. Hurd.

3. Non-privileged final Board minutes and non-privileged materials provided to the Board, if any, concerning participation by the Board in the resolution of the allegations asserted by Ms. Fisher against Mr. Hurd.

4. Non-privileged corporate records, including final Board minutes, related to the Board's negotiation and approval of Mr. Hurd's Separation Agreement.

5. Expense reports submitted by or on behalf of Mr. Hurd for meals or meetings with Ms. Fisher.

6. Corporate records related to the compensation provided to Ms. Fisher for events, meals and meetings with Mr. Hurd.

7. Guidelines or policies concerning HP's definition of conflict of interest.

8. Guidelines or policies, if any, applicable to reimbursement of expenses incurred by Mr. Hurd.

9. The Allred Letter.[6]

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[5] HP has agreed, solely for the purposes of this action and plaintiff's request to inspect the Interim Report, that it will not contest that plaintiff has a proper purpose for the Section 220 Demand.

[6] HP agreed to produce the Allred Letter but noted that it had received objections to its production from Mr. Hurd's attorneys and from Ms. Fisher's attorney, citing various bases including privacy rights and settlement privilege. Accordingly, HP agreed to delay production to provide Mr. Hurd and Ms. Fisher a reasonable opportunity to petition the Court for an order denying the Section 220 Demand for the letter. They did not do so. On October 13, 2010, HP, plaintiff, and plaintiff's counsel entered into an amended confidentiality agreement, incorporating a specific provision to address production of the

(Exhibit 2 to Compl.) In its response, HP objected to the production of any documents subject to the attorney-client privilege and/or work product doctrine, specifically noting that certain communications and documents related to the Hurd Investigation were subject to the attorney-client privilege and/or work product doctrine and therefore were not subject to inspection. (*Id.* at 2.)

On October 4, 2010, the parties negotiated and entered into a confidentiality agreement governing the production of documents pursuant to the Section 220 Demand. (Ex. 9.) On October 4, 11, 13 and 29, and November 30, 2010,[7] HP produced a number of documents to plaintiff's counsel. (Henderson Aff. ¶ 8.) These documents included the Allred Letter, all final Board minutes concerning the Hurd Investigation, expense reports submitted by or on behalf of Mr. Hurd for meals with Ms. Fisher, deal memos concerning Ms. Fisher's employment by HP, HP's Standards of Business Conduct and Conflict of Interest Policy, HP's Severance Plan, and the Separation Agreement. (*Id.*)

After reviewing these materials, plaintiff's counsel requested that it be provided with the interim internal investigation report produced by outside counsel and presented to the Board during the course of the Hurd Investigation (the "Interim Report"). (*Id.* ¶ 9.) The Interim Report was referenced in the July 28, 2010 Board minutes, which

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Allred Letter. (Ex. 10.) HP produced the Allred Letter on October 13, 2010, with the designation "Confidential at the Request of Mark Hurd," which designation would expire ten business days after its production, to allow Mr. Hurd and plaintiffs to reach an agreement or seek judicial relief. Mr. Hurd later moved this Court to keep the Allred Letter under seal. That motion is currently *sub judice.*

[7] HP agreed to produce the requested Board minutes when they were finalized. HP completed its production of these Board minutes by producing the final two sets of minutes on November 30, 2010. This aspect of plaintiff's complaint thus has been rendered moot.

minutes were previously produced pursuant to the Section 220 Demand. (*Id.*) On November 3, 2010, HP responded to plaintiff's request, stating that the Interim Report was subject to both the attorney-client privilege and work product doctrine and thus was not subject to inspection pursuant to Section 220. (Ex. 11.) HP included a privilege log to support its assertions of privilege. (*Id.*)

On November 4, 2010, plaintiff's counsel contacted HP and requested, for the first time, the "final report on the Company's internal investigation concerning the conduct of Mark Hurd." (Ex. 12.) Although the Interim Report prepared by Covington & Burling was, by its terms, not "final,"[8] HP responded on November 9, 2010 that it would not produce any reports by outside counsel from the internal investigation as any such report would be privileged and subject to the work product doctrine. (*Id.*)

On November 18, 2010, HP learned that plaintiff had filed this action, having moved the previous day for permission to file under seal.

ARGUMENT

Plaintiff's request for inspection of the Interim Report should be denied for three reasons. First, the Interim Report is both an attorney-client communication and attorney work product and, as such, is protected from production. Second, given the extensive materials already provided, plaintiff has not and cannot show that he has a "compelling" need for the Interim Report and/or "good cause" for its production. Third, the Interim Report is neither "necessary" nor "essential" to plaintiff's purported purpose.

[8] As demonstrated in HP's privilege log (Ex. 11), the Interim Report drafted by outside counsel and presented by outside counsel to the Board on July 28, 2010 was the only report generated in connection with the Hurd Investigation.

I. The Interim Report is Protected By the Work Product Doctrine and Attorney-Client Privilege

A. Plaintiff's Need for the Interim Report of Counsel Must Be Assessed in Light of the Extensive Materials Already Provided

As set forth below, the Interim Report undeniably falls within the classic definitions of attorney-client privilege and work product. Because plaintiff's purported need for the Interim Report is relevant to assessing whether either of these bedrock privileges should be overridden,[9] it is important to understand the extent of the information that has already been provided to Mr. Espinoza in response to his Section 220 Demand:

- **Allred Letter.** HP produced the Allred Letter. This letter was the impetus for the Board's decision to authorize the internal investigation into Mr. Hurd's relationship with Ms. Fisher, which ultimately led the Board to ask for Mr. Hurd's resignation. The letter provides [redacted]

- **Expense Reports.** HP produced the expense reports submitted by or on behalf of Mr. Hurd for meals with Ms. Fisher. As HP disclosed, the Board concluded that some of these reports were inaccurate and were intended to or had the effect of concealing Mr. Hurd's relationship with Ms. Fisher.

[9] *Saito v. McKesson HBOC, Inc.*, 2002 WL 31657622, at *3 (Del. Ch.) (party can obtain work product only upon a showing of "substantial" or "compelling need" and shareholder can obtain production of information protected by attorney-client privilege only upon a showing of "good cause," which includes consideration of "the necessity of the information and its unavailability from other sources").

- **Compensation Records.** HP produced records showing the compensation received by Ms. Fisher for her work as an independent contractor. As HP disclosed, the Board concluded that there was not a proper business purpose for many of these payments.
- **Standards of Business Conduct and Conflict of Interest Policy.** HP produced the Standards of Business Conduct and Conflict of Interest Policy. These documents illustrate HP's policies and procedures with respect to, *inter alia*, "close personal relationships" between employees, the preparation of expense reports, and sexual harassment. As HP disclosed, the Board concluded that Mr. Hurd violated these policies by submitting inaccurate expense reports and by failing to disclose his close personal relationship with Ms. Fisher.
- **Separation Agreement and Severance Plan.** HP produced the Separation Agreement and HP Severance Plan for Executive Officers.
- **Board Minutes.** HP also produced all of its final Board minutes concerning the Hurd Investigation. These minutes reflect the Board's actions with respect to organizing and proceeding with the investigation of the allegations against Mr. Hurd and HP, and its eventual decision to ask for Mr. Hurd's resignation.

Moreover, on August 6, 2010, HP publicly disclosed the bases for the Board's decision to request Mr. Hurd's resignation and its conclusions regarding Mr. Hurd's improper conduct. HP disclosed that the Board determined there was no violation of HP's sexual harassment policy, but did find violations of HP's Standards of Business Conduct. (Ex. 2 at Exhibit 99.1.) HP disclosed that Mr. Hurd had a "close personal

relationship with an HP contractor who was hired by the office of the CEO and [he] never disclosed that relationship to the Board of Directors." (Ex. 1 at 1-2.) HP disclosed that there were "numerous instances where the contractor received compensation and/or expense reimbursement where there was not a legitimate business purpose." (*Id.* at 2.) And HP disclosed that there were "numerous instances where inaccurate expense reports were submitted by [Mr. Hurd] or on his behalf that intended to or had the effect of concealing [his] personal relationship with the contractor." (*Id.*) Finally, HP disclosed that the Board asked for Mr. Hurd's resignation because he violated HP's Standards of Business Conduct, "demonstrated a profound lack of judgment," and accordingly, the Board believed "it would be impossible for him to be an effective leader moving forward." (*Id.;* Ex. 2 at Exhibit 99.1.)

In light of these extensive disclosures, clearly no further information is needed in order for plaintiff to investigate the circumstances surrounding Mr. Hurd's departure from HP. Indeed, as explained below, to permit access to this non-essential information would invade the attorney-client privilege and work product doctrine.

B. The Interim Report is Subject to the Work Product Doctrine

1. The Interim Report is Clearly Work Product

The work product doctrine has been codified in Court of Chancery Rule 26(b)(3) and bars the discovery of materials created in anticipation of litigation. "It protects factual material gathered in preparation of a case and specifically shelters 'opinion' work product which includes attorneys' mental impressions, conclusions, opinion, and legal theories." *Lee v. Engle*, 1995 WL 761222, at *4 (Del. Ch.) (citing *Hickman v. Taylor*,

329 U.S. 495, 510-11 (1947)). "The policy behind this theory encourages lawyers to maintain their freedom to express and to record mental impressions and opinions for the benefit of their clients without fear of their impression and opinions being used against their clients." *Lee*, 1995 WL 761222, at *4.[10]

Pursuant to Rule 26(b)(3), a party may obtain factual information otherwise protected by the work product doctrine only upon a showing that it has "substantial need" for the materials and is unable, without undue hardship, to obtain a substantial equivalent by other means. *Saito*, 2002 WL 31657622, at *3. Opinion work product (which shows the mental impressions, conclusions, opinions, and legal theories of the party's attorneys) is subject to a more stringent standard and will not be ordered disclosed unless the requesting party can show that it is directed to the pivotal issue in the current litigation and the need for the information is compelling. *Id.*

There is no question that the Interim Report is work product. Covington & Burling prepared the Interim Report in its role as outside counsel to HP in connection with the Board's investigation into the allegations made in the Allred Letter, which accused Hurd and HP of sexual harassment and other things. (Schultz Aff. ¶¶ 2-3.) It contains information regarding the status of the Hurd Investigation, and the interim

[10] *See also Rembrandt Techs., L.P. v. Harris Corp.*, 2009 WL 402332, at *8 (Del. Super. Ct.) ("The work product doctrine safeguards the 'adversary system of litigation by assuring an attorney that his private file shall, except in unusual circumstances, remain free from the encroachments of opposing counsel.'") (citation omitted); *Clausen v. Nat'l Grange Mut. Ins. Co.*, 730 A.2d 133, 138-39 (Del. Super. Ct. 1997) ("Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. . . . The effect on the legal profession would be demoralizing. And the interest of the clients and the cause of justice would be poorly served.") (citing *Hickman*, 329 U.S. at 510-11).

analysis and legal advice of HP's counsel in relation to Ms. Fisher's allegations. (*Id.* ¶ 5.) As demonstrated on the privilege log attached to HP's November 3, 2010 letter, the Interim Report was meant to be confidential, was prepared in anticipation of litigation arising from the allegations in the Allred Letter, and contains counsel's mental impressions and analysis with respect to the allegations. (Ex. 11.) The Interim Report is thus subject to work product protection. *See, e.g.*, *Saito*, 2002 WL 31657622, at *3 (written report prepared by counsel in course of internal investigation of alleged wrongdoing, "summarizing relevant facts and legal principles involved," was subject to work product protection); *In re Grand Jury Subpoena*, 599 F.2d 504, 513 (2d Cir. 1979) (reports and summaries prepared by or under direction of counsel in course of audit committee investigation were work product and not subject to production); *In re Suprema Specialties, Inc.*, 2007 WL 1964852, at *4 (S.D.N.Y.) (audit committee report which "was prepared in anticipation of litigation that would foreseeably arise out of the alleged fraudulent activity of members of Suprema's management" was protected work product); *Sandra T.E. v. S. Berwyn Sch. Dist. 100*, 600 F.3d 612, 620 (7th Cir. 2009) (attorney notes and memoranda generated during course of factual investigation into allegations of sexual abuse were protected work product).

2. Plaintiff Cannot Show a Compelling Need for the Interim Report

Because the Interim Report contains both fact and opinion work product, Espinoza may only obtain production of the Interim Report if he demonstrates that the Interim Report concerns a pivotal issue in the litigation and he has a "compelling need"

for it. Espinoza has not come close to making the requisite showing. This Court's decision in *Saito* is instructive.

In *Saito*, a shareholder similarly sought documents prepared in the course of a company's internal investigation into allegations of wrongdoing, including the investigative reports by the audit committee. This Court refused to order production of the requested materials, finding that the plaintiff had not met the substantial need/undue hardship test or the higher burden required to receive opinion work product, *i.e.*, compelling need/pivotal issue. *Id.* at *11. This Court noted that conclusory statements that the documents are "necessary to his determination of Defendant's actions regarding the acquisition of HBOC and what fiduciary duties were breached in that transaction" or that "there is no other way for plaintiff to obtain the information contained in those documents" were not sufficient. *Id.*[11]

[11] *See also Khanna v. Covad Commc'ns Group, Inc.*, 2004 WL 187274 (Del. Ch.) (ordering production pursuant to Section 220 of all documents related to the findings and investigation of a special committee appointed to investigate allegations of self dealing by certain board members, but noting that any inspection was subject to the attorney-client privilege and work product doctrine); *Grand Jury Subpoena*, 599 F.2d at 512 (government was not entitled to work product prepared by or under direction of counsel in course of audit committee investigation because government had not shown sufficient necessity); *Suprema*, 2007 WL 1964852, at *4 (denying motion to compel production of audit committee report which "was prepared in order to uncover wrongdoing at Suprema and assess potential exposure to civil and criminal proceedings" under work product doctrine where plaintiff had not shown substantial need); *Sandra T.E.*, 600 F.3d at 620 (denying production of attorney notes and memoranda generated in the course of internal investigation where plaintiff had not shown substantial need); *In re Fuqua Indus., Inc.*, 2002 WL 991666, at *6 (Del. Ch.) (denying motion to compel production of work product where plaintiff had not shown compelling need); *Rembrandt*, 2009 WL 402332, at *8 (same); *Merisel, Inc. v. Turnberry Capital Mgmt., L.P.*, 1999 WL 252724 (Del. Ch.) (same).

Here, Espinoza has offered nothing more than the same conclusory allegations offered in *Saito*: that "Plaintiff has good cause and a substantial need for the Report" because it "uniquely detail[s] and evidence[s] the bases for the possible courses the Board evaluated and why it chose not to terminate Hurd for cause [and because t]his information is unavailable from any other source." (Compl. ¶ 11.) Contrary to plaintiff's unsubstantiated assertions, the document he seeks is not, in fact, a report by the Board detailing its conclusions or decision making process with respect to Mr. Hurd and his departure from HP.[12] Rather, it is an Interim Report to the Board by its outside counsel (created well before the Board made any decision with respect to Mr. Hurd), reflecting the then-current state of the Hurd Investigation and outside counsel's thoughts, impressions and advice to the Board as to the allegations lodged against HP by Ms. Fisher. Plaintiff simply has not demonstrated a compelling need for HP's counsel's thoughts and opinions with respect to the Allred Letter's allegations. Nor can he possibly do so in light of the documents already provided pursuant to the Section 220 Demand, and the publicly available information concerning the bases for the Board's conclusions. Plaintiff has all the information he needs to evaluate the Board's conduct with respect to Mr. Hurd's departure from HP.

In requesting the Interim Report, plaintiff cited to this Court's decision in *Grimes v. DSC Communications Corp.*, 724 A.2d 561 (Del. Ch. 1998). *Grimes* is distinguishable. In *Grimes*, the report at issue concerned a special committee

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[12] Nor could it be, given that the Interim Report was created by counsel over a week and a half before the Board even made its decision (based on nine subsequent Board meetings) to ask for Mr. Hurd's resignation.

investigation which was commenced in response to Grimes' own litigation demand. After the special committee completed its investigation, Grimes was told "without explanation, or 'peremptorily,' that the board of directors, on the recommendation of the special committee, had refused his demand." *Id.* at 566 (emphasis added). The Court held that, in those circumstances, Grimes was entitled to the special committee's report because it was the only source of information as to the process followed by and conclusions reached by the special committee in refusing his demand. In contrast, the investigation in this case was not undertaken in response to a litigation demand by Espinoza. Rather, the Interim Report was generated by counsel to advise the Board regarding the Allred Letter's allegations of misconduct. Moreover, unlike in *Grimes*, HP provided a detailed explanation of the bases for the Board's actions and plaintiff has received the underlying documents from which he can draw his own conclusions. Thus, in contrast to *Grimes*, it strains reality to suggest that the Interim Report is the only source of information concerning the conclusions of the Board.

As Espinoza has not come close to showing "compelling need" for the Interim Report and/or that the Interim Report concerns a pivotal issue with respect to his Section 220 Demand, the Court should deny production of the Interim Report on that basis alone.

C. The Interim Report is Subject to the Attorney-Client Privilege

The Court should also deny plaintiff's request because the Interim Report is protected from inspection by the attorney-client privilege. Under Delaware's Rules of Evidence:

> A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communication made for the purpose of facilitating the

> rendition of professional legal services to the client (1) between the client or the client's representative and the client's lawyer or the lawyer's representative...

D.R.E. 502(b). "The purpose of the attorney-client privilege is to encourage full and frank communication between clients and their attorneys." *Fuqua*, 2002 WL 991666, at *2; *Rembrandt*, 2009 WL 402332, at *5 (attorney-client privilege "recognizes the extraordinary importance of encouraging full and frank communication between attorneys and their clients").

The attorney-client privilege is applicable to corporations and protects communications made for the purpose of facilitating the rendition of professional legal services to the corporation. *Fuqua*, 2002 WL 991666, at *2; *Graham v. Allis Chalmers Mfg. Co*, 188 A.2d 125, 132-33 (Del. 1963). The privilege is specifically applicable where, as here, a corporation retains counsel to investigate potential violations of law by one of its employees. *Id.*

Discovery of privileged items is disallowed because it "would set dangerous precedent with the potential collateral effect of chilling communications" between a client and its counsel. *Sutherland v. Sutherland*, 2007 WL 1954444, at *4 (Del. Ch.); *see also 3Com Corp. v. Diamond II Holdings, Inc.*, 2010 WL 2280734, at *5 n.29 (Del. Ch.) (""The importance of the attorney-client privilege is central to the American model of adversarial litigation.'") (citation omitted); *Rembrandt*, 2009 WL 402332, at *5 (""[a]n uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all'") (alteration in original) (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981)).

1. The Interim Report is a Privileged Attorney-Client Communication

Just as the Interim Report is clearly work product, the Interim Report is also clearly an attorney-client communication. The report was created by Covington & Burling, in the course of its representation of HP, to communicate the status of its investigation of the allegations in the Allred Letter and to provide interim advice to the Board concerning Ms. Fisher's allegations. (Schultz Aff. ¶¶ 5-7.) The Interim Report was presented by outside counsel in a confidential executive session of the non-employee members of the Board and HP has not provided it to anyone other than the Board, counsel, counsel's consultants, and HP personnel supporting legal. (*Id.*) Indeed, plaintiff only learned of the existence of the Interim Report from the confidential minutes of that meeting which HP produced pursuant to the Section 220 Demand. The minutes do not disclose any of the contents of the Interim Report or any other advice of counsel. Accordingly, the Interim Report is protected from disclosure by the attorney-client privilege. *Sutherland*, 2007 WL 1954444, at *4 (preliminary drafts of special litigation committee's report and memoranda and opinions circulated between committee member and his counsel not subject to production); *Sandra T.E.*, 600 F.3d at 620 ("Following *Upjohn*, other circuits have concluded that when an attorney conducts a factual investigation in connection with the provision of legal services, any notes or memoranda documenting client interviews or other client communications in the course of the investigation are fully protected by the attorney-client privilege."); *Rembrandt*, 2009 WL 402332, at *5 (denying motion to compel because attorney-client privilege "recognizes the extraordinary importance of encouraging full and frank communication between

attorneys and their clients") (quotation marks and citations omitted); *N.K.S. Distribs., Inc. v. Tigani*, 2010 WL 2011603 (Del. Ch.) (same); *Ruger v. Commonwealth Land Title Ins. Co.*, 1996 WL 769793, at *3 (Del. Super. Ct.) ("The attorney-client privilege exists mainly to allow the client to freely seek advice and discuss legal matters without fear he will be compelled to divulge or that others will divulge the communications.").

2. Plaintiff Cannot Show "Good Cause" to Overcome the Attorney-Client Privilege

A shareholder of a corporation may obtain discovery of information subject to the attorney-client privilege only if the shareholder shows "good cause." *Fuqua*, 2002 WL 991666, at *3. In determining whether a shareholder has shown good cause, Delaware courts generally consider the factors outlined by the Fifth Circuit in *Garner v. Wolfinbarger*, 430 F.2d 1093 (5th Cir. 1970). *Fuqua*, 2002 WL 991666, at *3. In the books and records context, courts generally consider the following five factors:

1) "[T]he number of shares owned by the shareholder and the percentage of stock they represent;"
2) "[T]he assertion of a colorable claim;"
3) "[T]he necessity of the information and its unavailability from other sources;"
4) "[W]hether the stockholder has identified the information sought and is not merely fishing for information;" and
5) "[W]hether the communication is advice concerning the litigation itself."

Grimes, 724 A.2d at 568; *Saito*, 2002 WL 31657622, at *13.

Just as plaintiff has not met his burden in showing a compelling need for the Interim Report, he has not shown good cause under the *Garner* factors. The first factor weighs against disclosure as Espinoza owns 250 shares of HP stock out of more than two billion shares outstanding. (Compl., Exhibit 1.) The second factor weighs against

disclosure because Espinoza seeks outside counsel's Interim Report presumably in order to evaluate claims grounded in waste related to Mr. Hurd's Separation Agreement. Waste claims are among the most difficult to plead as the test for waste is "extreme" and "rarely satisfied." *Highland Legacy Ltd. v. Singer*, 2006 WL 741939, at *7 (Del. Ch.); *see also Brehm v. Eisner*, 746 A.2d 244, 263 (Del. 2000) (noting "the stringent requirements of the waste test").

The third factor weighs heavily against disclosure because, as discussed above, plaintiff has not shown why the information underlying the Interim Report – HP's counsel's advice with respect to Ms. Fisher's allegations – is needed given the extensive non-privileged materials he has received and the material facts HP has publicly disclosed concerning Mr. Hurd's departure, including the Board's reasons for asking for Mr. Hurd's resignation. *Oliver v. Boston Univ.*, 2004 WL 944319, at *3 (Del. Ch.) (denying motion to compel production of privileged communications because plaintiff had not met burden of showing that plaintiff could not otherwise gain access to the information that may be contained in the documents); *Bray v. Okla. Pub'g Co.*, 1990 WL 108313, at *2 (Del. Ch.) (denying motion to compel where "legal analyses that accompanied some of these drafts may be of interest to the Intervenor but do not appear to be necessary to a full exploration of the underlying issues").

The fifth factor also weighs against disclosure because the Interim Report contains advice which is relevant to the conduct plaintiff is investigating, *i.e.*, the Board's response to Ms. Fisher's allegations and its decision to ask for Mr. Hurd's resignation and approve the Separation Agreement. In sum, on balance, the *Garner* factors show that

plaintiff does not have good cause for inspecting the Interim Report.[13] *Saito*, 2002 WL 31657622, at *14 (plaintiff had not shown good cause for disclosure of privileged information where plaintiff failed to satisfy factors (iii) and (v)); *Tabas v. Bowden*, 1982 WL 17820, at *3 (Del. Ch.) (*Garner* factors weighed against disclosure of attorney opinion letters where plaintiff did not allege fraud, opinions related to prospective conduct and plaintiff was capable of developing her own interpretation of the legality of conduct). As the *Garner* factors weigh heavily against disclosure here, HP respectfully requests that the Court uphold the privilege and deny plaintiff's request.

D. Compelling Inspection of the Interim Report Would Be Against Public Policy

Allowing plaintiff to inspect Covington & Burling's Interim Report, which was prepared in the course of an investigation into allegations of misconduct and was never authorized to be disclosed outside of the boardroom and counsel, would serve to discourage corporations from investigating and seeking advice from counsel when confronted with allegations of misconduct by their employees. *Merrill Lynch & Co. v. Allegheny Energy, Inc.*, 229 F.R.D. 441, 449 (S.D.N.Y. 2004) ("[T]he court is 'persuaded' that it is likely that corporations will be less willing to engage in this sort of self-investigation if the results of such an investigation can be discovered in parallel civil litigation."). It almost certainly would impact the willingness of boards to have the kind of detailed analysis that leads to better corporate decisions. The strong policies weighing against disclosure are all the more vital here, where plaintiff seeks to inspect a report that

[13] While plaintiff only seeks one document in this action, and thus is not "fishing" in the traditional sense, this one factor does not support disclosure given the overall *Garner* analysis.

reflects only outside counsel's interim advice and does not reflect the Board's deliberative process or conclusions. Piercing attorney-client privilege and work product protection in these circumstances would certainly "discourage corporations from taking the responsible step of employing outside counsel to conduct an investigation when wrongdoing is suspected." *In re Woolworth Corp. Sec. Class Action Litig.*, 1996 WL 306576, at *2 (S.D.N.Y.) ("The failure to obtain the advice of outside counsel in the face of potential violations of law could only be detrimental to shareholders and potential shareholders, whose best interests are entrusted to the corporate directors and officers."); *see also Sutherland*, 2007 WL 1954444, at *4 (subjecting preliminary drafts of investigative report to inspection would "set dangerous precedent with the potential collateral effect of chilling communications" between outside counsel and boards); *Saito*, 2002 WL 31657622, at *10 (adopting selective waiver doctrine in part out of concern that a contrary rule could '"have the effect of thwarting the developing procedure of corporations to employ independent outside counsel to investigate and advise them in order to protect stockholders, potential stockholders and customers'") (footnotes and citation omitted).

Compelling disclosure would also hamper counsel and the manner in which they conduct such investigations. As the Supreme Court noted:

> [M]uch of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.

Upjohn, 449 U.S. at 398 (citing *Hickman*, 329 U.S. at 511). Thus, production under these circumstances would almost certainly impact the willingness of boards to request the kind of detailed written analysis that leads to better corporate decision-making. The attorney-client privilege and work product doctrine, which protect the Interim Report from inspection, should be upheld.

II. The Interim Report is Not Necessary and Essential to Plaintiff's Purported Purpose

A. Legal Standard

"[R]elief under Section 220 is limited only to the inspection of books and records that are necessary and essential to the satisfaction of the stated purpose," a showing for which plaintiff bears the burden of proof. *Kaufman v. CA, Inc.*, 905 A.2d 749, 753 (Del. Ch. 2006) (emphasis added); *Sec. First Corp. v. U.S. Die Casting & Dev. Co.*, 687 A.2d 563, 569 (Del. 1997). Thus, a demand for books and records under 8 *Del. C.* § 220 must be drafted "with rifled precision," *Brehm*, 746 A.2d at 266, and "does not open the door to the wide ranging discovery that would be available in support of litigation," *Saito v. McKesson HBOC, Inc.*, 806 A.2d 113, 114 (Del. 2002); *see also Sec. First*, 687 A.2d at 570 ("The two procedures are not the same and should not be confused. . . . [Court of Chancery] Rule 34 production orders may often be broader in keeping with the scope of discovery under Court of Chancery Rule 26(b)."); *Highland Select Equity Fund, L.P. v. Motient Corp.*, 906 A.2d 156, 165 (Del. Ch. 2006) (same); *Marathon Partners, L.P. v. M&F Worldwide Corp.*, 2004 WL 1728604, at *4 (Del. Ch.) ("The scope of inspection

should be circumscribed with precision and limited to those documents that are necessary, essential and sufficient to the stockholder's purpose.").

B. Plaintiff Cannot Show that the Interim Report is Necessary or Essential

Espinoza claims that he seeks to inspect the Interim Report by HP's outside counsel "to determine both the true extent of Hurd's wrongdoing" and "in furtherance of his investigation regarding whether Board members breached their duty to HP by causing it to enter into a separation agreement (the "Separation Agreement") with Hurd that is worth tens of millions of dollars instead of terminating him for cause." (Compl. ¶¶ 1, 8.) Plaintiff has not set forth, and cannot legitimately explain, why the Interim Report by outside counsel is necessary or essential to this purported purpose given all the materials he has already received. Indeed, the Section 220 complaint reads like a derivative complaint prepared by a shareholder who has already decided to file suit against the Board premised on allegations raised in the Allred Letter and the Board's response thereto. For example, the Complaint alleges:

- "Admitting that Hurd had violated Company policy and recognizing that he misused Company assets, conduct that was not in the best interest of and injurious to HP, the Board appeared to have more than sufficient bases to terminate Hurd for cause under the Severance Plan. The Board, however, did not terminate him for cause." (*Id.* ¶ 6.)
- "Because of his misconduct, the Board found that Hurd had violated the Company's Standards of Business Conduct policy." (*Id.* ¶ 21.)

- "Because the relationship between Hurd and Fisher (an HP contractor) was a 'close personal relationship,' it should have been disclosed under the Company's Conflicts of Interest Policy. . . . Hurd's close personal relationship with Fisher interfered with his responsibilities and duties to HP as demonstrated by his misuse of Company assets, improper documentation of his use of HP funds, and purported disclosure of non-public information about the Company's acquisition of EDS." (*Id.* ¶ 22.)
- "Because Hurd violated the Standards of Business Conduct and Conflicts of Interest Policy, he could have been terminated. The Board did consider terminating Hurd as detailed in the Company's August 4, and 5, 2010 Board meeting minutes." (*Id.* ¶ 23.)
- "Despite Hurd's violations of the Company's Standard of Business Conduct and Conflicts of Interest Policy, Hurd's misuse of Company assets, and attempts to cover it up, Hurd's alleged statements to Fisher regarding the EDS transaction, and his apparent effort to muzzle Fisher through an eleventh hour settlement, Hurd was not fired for cause. Instead, Hurd resigned and was provided with the financial benefits of the Separation Agreement." (*Id.*)

In light of the extensive information already provided as well as plaintiff's own allegations, it simply is not necessary or essential for plaintiff to have access to the legal advice provided by outside counsel to the Board in connection with the Board's investigation of Ms. Fisher's claims. As such, his request should be denied. *Kaufman*, 905 A.2d at 755 (denying books and records demand for investigation report where

defendant had provided numerous responsive documents and plaintiff "has not explained either in her papers or at oral argument, why the remaining documents are either necessary or essential to her proper investigative purpose under Section 220"). The necessary and essential analysis provides an independent basis for denying plaintiff's request such that the Court need not even reach the privilege issues.

CONCLUSION

For the foregoing reasons, HP respectfully requests that the Court deny plaintiff's request for inspection.

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CERTIFICATE OF SERVICE

I, James M. Yoch, Jr., Esquire, do hereby certify that on February 17, 2011, I caused a copy of the foregoing document to be served on the following counsel in the manner indicated below:

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