



IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

ERNESTO ESPINOZA,

Plaintiff,

v.

HEWLETT-PACKARD COMPANY,

Defendant.

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)} **REDACTED VERSION**  
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)} **Dated: MARCH 3, 2011**  
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)} Civil Action No. 6000-VCP  
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**PLAINTIFF'S RESPONSE TO HEWLETT-PACKARD  
COMPANY'S OPENING BRIEF IN OPPOSITION TO  
PLAINTIFF'S DEMAND FOR THE INTERIM REPORT OF  
COUNSEL**

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**TABLE OF CONTENTS**

	<b>Page</b>
INTRODUCTION .....	1
ARGUMENT .....	3
A.    The Covington Report Is Not Subject to the Work-Product Doctrine.....	3
B.    Plaintiff Has Demonstrated a Compelling Need for the Covington Report.....	9
C.    The Covington Report Is Not Protected by the Attorney-Client Privilege Because Plaintiff Has Demonstrated "Good Cause" .....	15
1.    Defendant Concedes that Plaintiff Is Not Engaged in a Blind Fishing Expedition .....	17
2.    Plaintiff Asserts a Colorable Claim .....	17
3.    The Covington Report Is Necessary, and Its Information Is Unavailable from an Alternative Source.....	19
4.    The Covington Report Does Not Contain Attorney-Client Communications Concerning Plaintiff's Inspection Demand.....	23
D.    Allowing Plaintiff to Inspect the Covington Report Is Consistent with Public Policy .....	24
CONCLUSION.....	27

## TABLE OF AUTHORITIES

### CASES

<i>Bray v. Oklahoma Publishing Co.</i> , 1990 WL 108313 (Del. Ch.) .....	21
<i>Freund v. Lucent Techs., Inc.</i> , 2003 WL 139766 (Del. Ch.) .....	24
<i>Garner v. Wolfinbarger</i> , 430 F.2d 1093 (5th Cir. 1970) .....	<i>passim</i>
<i>Grimes v. DSC Commc'ns Corp.</i> , 724 A.2d 561 (Del. Ch. 1998).....	<i>passim</i>
<i>Hexion Specialty Chems., Inc. v. Huntsman Corp.</i> , 959 A.2d 47 (Del. Ch. 2008).....	4
<i>In re Citigroup Inc. S'holder Derivative Litig.</i> , 964 A.2d 106 (Del. Ch. 2009).....	18
<i>In re Fuqua Industries, Inc., Shareholder Litigation</i> , 2002 WL 991666 (Del. Ch.) .....	15, 16, 24
<i>In re Grand Jury Subpoena</i> , 599 F.2d 504 (2d Cir. 1979).....	8, 15
<i>In re Suprema Specialties, Inc.</i> , 2007 WL 1964852 (Bankr. S.D.N.Y.).....	8, 9, 15
<i>In re Walt Disney Co. Derivative Litig.</i> , 825 A.2d 275 (Del. Ch. 2003).....	18
<i>In re Woolworth Securities Class Action Litigation</i> , 1996 WL 306576 (S.D.N.Y.).....	26
<i>Khanna v. Covad Communications Group, Inc.</i> , 2004 WL 187274 (Del. Ch.) .....	14, 15
<i>King v. Verifone</i> , 994 A.2d 354 (Del. Ch. 2011), <i>rev'd on other grounds</i> , 2011 WL 284966 (Del.) .....	13

<i>La. Mun. Police Emps.' Ret. Sys. v. Countrywide Fin. Corp.</i> , 2007 WL 2896540 (Del. Ch.) .....	24
<i>Merisel, Inc. v. Turnberry Capital Management, L.P.</i> , 1999 WL 252724 (Del. Ch.) .....	15
<i>Merrill Lynch &amp; Co. v. Allegheny Energy, Inc.</i> , 229 F.R.D. 441 (S.D.N.Y. 2004) .....	25
<i>Oliver v. Boston University</i> , 2004 WL 944319 (Del. Ch.) .....	22
<i>Ramada Inns, Inc. v. Drinkhall</i> , 490 A.2d 593 (Del. Super. 1985) .....	<i>passim</i>
<i>Rembrandt Technologies, L.P. v. Harris Corp.</i> , 2009 WL 402332 (Del. Super.) .....	15
<i>Saito v. McKesson HBOC, Inc.</i> , 2002 WL 31657622 (Del. Ch.) .....	<i>passim</i>
<i>Sandra T.E. v. S. Berwyn Sch. Dist.</i> ; 600 F.3d 612 (7th Cir. 2010) .....	8, 9, 15
<i>Sealy Mattress Co. of N. J., Inc. v. Sealy, Inc.</i> , 1987 WL 12500 (Del. Ch.) .....	16
<i>Seinfeld v. Verizon Commc'ns, Inc.</i> , 909 A.2d 117 (Del. 2006) .....	18
<i>State v. Wright</i> , 1994 WL 807898 (Del. Super.) .....	6, 9
<i>Sutherland v. Sutherland</i> , 2007 WL 1954444 (Del. Ch.) .....	26
<b>STATUTES</b>	
Court of Chancery Rule 23.1 .....	18
Court of Chancery Rule 26(b)(3) .....	3
8 Del. C. § 220 .....	17, 18, 24

## **INTRODUCTION**

As plaintiff has consistently maintained, he is investigating the decision of Hewlett-Packard Company's ("HP" or the "Company") Board of Directors (the "Board") to provide its Chief Executive Officer ("CEO"), Mark V. Hurd ("Hurd") with a lucrative severance agreement instead of terminating him for "cause." HP has repeatedly acknowledged plaintiff's stated proper purpose (and has conceded that plaintiff has a proper purpose for the purpose of this action). But HP refuses to provide plaintiff with the key report that is most central to his purpose. In this action, HP touts the documents it has already provided to plaintiff, but the limited volume of its production so far does not excuse HP's failure to permit plaintiff the inspection he is due as to the Board's actions. Indeed, as to the Board's actions, HP has provided plaintiff only with terse and intentionally sanitized board minutes. The other categories of documents supplied go more directly to Hurd's misconduct, not the Board's actions.<sup>1</sup> Each of these sets of documents provides further support that Hurd breached his duties to the Company, and that HP should have terminated him for "cause." None of them, however, detail the Board's deliberations concerning Hurd's termination or illuminate the reasons for not terminating Hurd for "cause" and instead agreeing to the

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<sup>1</sup> HP has also provided plaintiff with (1) the letter from Gloria Allred to Hurd and the Company dated June 24, 2010 (the "Allred Letter"); (2) Hurd's expense reports; (3) HP's records showing the compensation received by Ms. Jodie Fisher ("Fisher"); (4) the Company's Standards of Business Conduct and Conflicts of Interest Policy; (5) certain Board meeting minutes (the "Board Minutes"); and (6) Hurd's separation agreement and its severance plan for executive officers.

lucrative separation package.<sup>2</sup>

The sanitized Board Minutes supplied to plaintiff reveal that Covington & Burling LLP ("Covington") provided the Board with a report on the findings of its investigation into the allegations in the Allred Letter, **REDACTED** (the "Covington Report"). Del Gaizo Aff., Exh. A at 4. Due to the complete and utter lack of detail in the Board Minutes, the Covington Report is the only window into the Board's investigation and reasoning for not terminating Hurd for "cause." Therefore, this report is a necessary and vital document to plaintiff's acknowledged proper purpose; namely, the investigation into whether the Board breached its duties or committed waste in agreeing to pay Hurd rather than terminate him for "cause."

Despite the significance of the Covington Report, the Board's express reliance upon it in seeking Hurd's resignation, HP's acknowledgment of the propriety of plaintiff's investigative purpose, and the uniqueness of the information it contains, the Company nonetheless has refused to allow plaintiff to inspect it. Instead, HP claims it is protected by the work-product doctrine. But the Covington Report does not qualify for protection under

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<sup>2</sup> The only set of documents HP provided that remotely comes close to providing any insight into the Board's reasoning and investigation is the Board Minutes. See Minutes of the Board of HP (dated July 9-Aug. 6, 2010), attached as Exh. A to the Affidavit of Gregory E. Del Gaizo in Support of Plaintiff's Response to Hewlett-Packard Company's Opening Brief in Opposition to Plaintiff's Demand for the Interim Report of Counsel ("Del Gaizo Aff."). However, even these documents, produced in their "final" form, are sanitized to such an extent that they provide only who was at the meeting and a brief description of the topic of discussion. *Id.* Importantly, they do not provide any hints into what information the Board considered significant, what facts weighed for or against firing Hurd for "cause," or whether the Board held any votes on whether to fire Hurd for "cause." In short, they provide no meaningful information about plaintiff's proper purpose.

the doctrine because if it was prepared in anticipation of any litigation at all, HP does not and cannot show that it was prepared in anticipation of this kind of investigative shareholder litigation or with the parties hereto in mind in this case. HP Brief at 12-14.<sup>3</sup> Further, HP claims that the Covington Report is protected by attorney-client privilege and is highly confidential despite numerous media outlets describing its apparent contents (and the investigation that apparently led to it) in minute detail. HP Brief at 17-18. Even if the privilege and work-product doctrines applied and had not been waived, plaintiff has demonstrated his compelling need for the Covington Report, and "good cause" for its production. Accordingly, neither the work-product doctrine nor the attorney-client privilege prevents the disclosure of the Covington Report. Therefore, the Court should enter an order directing HP to provide the Covington Report to plaintiff immediately.

#### **ARGUMENT**

##### **A. The Covington Report Is Not Subject to the Work-Product Doctrine**

The Covington Report is not subject to the work-product doctrine because it was not prepared in anticipation of sufficiently similar litigation. In order for a document to fall under the work-product doctrine, it must have been prepared in anticipation of litigation. Del. R. Civ. P. 26(b)(3). HP suggests that a report prepared in connection with any anticipated litigation by any parties will suffice to cloak it for all purposes under the doctrine. HP Brief at 13-14. But this is not how the doctrine works. To determine whether a document was prepared in anticipation of litigation, the Court must ask itself, "[u]nder the

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<sup>3</sup> "HP Brief" or "Opening Brief" refers to Hewlett-Packard Company's Opening Brief in Opposition to Plaintiff's Demand for the Interim Report of Counsel filed on February 11, 2011.

totality of the circumstance, why was the document prepared?" *Hexion Specialty Chems., Inc. v. Huntsman Corp.*, 959 A.2d 47, 52 (Del. Ch. 2008).<sup>4</sup> HP, in conclusory fashion, claims that the work-product doctrine applies here because Covington prepared the Covington Report "in connection with the Board's investigation into allegations made in the Allred Letter, which accused Hurd and HP of sexual harassment and other things." HP Brief at 13. The work-product doctrine, however, is more limited in its application. In order for a document to qualify as work product, it must have either been prepared in anticipation of the litigation at hand, or in anticipation of litigation "closely related in parties and subject matter." *Ramada Inns, Inc. v. Drinkhall*, 490 A.2d 593, 596 (Del. Super. 1985). Since the Covington Report was created in anticipation of a different litigation than the one at issue here, and the two matters are not, for the purposes of the work-product doctrine analyses, sufficiently related in the anticipated parties or subject matter, the work-product doctrine is inapplicable.

Defendant's own subsequent actions after Hurd's resignation and its statements in its Opening Brief confirm that the Covington Report was not prepared in anticipation of a potential shareholder investigation into the Board's decision to dismiss Hurd without "cause," or any other shareholder litigation for that matter. HP claims in broad and blanket fashion that the Covington Report is work product because Covington prepared it "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." HP Brief at 13. Thus, by HP's own characterization, Covington was retained to consider Fisher's potential sexual harassment and related claims against Hurd and HP, not potential shareholder investigations and actions

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<sup>4</sup> Here, as throughout, all emphasis are deemed added and citations and footnotes are deemed omitted, unless otherwise noted.



arising from potential waste or fiduciary duty claims.<sup>5</sup> More telling, however, are HP's and the Board's actions after plaintiff brought this case and other shareholders instituted other litigation and investigations. Despite its apparent and claimed familiarity with the subject matter, based on these matters publicly available dockets, neither HP nor the Board retained Covington to represent them in the shareholder derivative actions. *See* Dockets (Feb. 23, 2011), *In re Hewlett-Packard Co.*, No. 1-10-CV-179356 at 2-10 (Cal. Super. Ct. filed Aug. 10, 2010); *In re HP Derivative Litig.*, 5:10-cv-03608-JW at 11-26 (N.D. Cal. filed Aug. 16, 2010); and *Zucker v. Babbio*, No. CA 6014 at 27-30 (Del. Ch. filed Nov. 24, 2010), attached as Exh. B to Del Gaizo Aff. Nor did HP apparently retain Covington to represent it in this or any other shareholder investigation. Then, after receiving a shareholder litigation demand letter that questioned whether the Board acted properly when it refused to terminate Hurd for "cause," the Board did not retain Covington. Rather, it created a new committee of Board members and hired yet another outside counsel, Dechert LLP. Letter from Andrew J. Levander to Felipe J. Arroyo (Feb. 10, 2011), attached as Exh. C to Del Gaizo Aff. In light of the foregoing, it is apparent that the Covington Report was not prepared with plaintiff's investigative "litigation" in mind. Rather, Covington created its report in anticipation of possible litigation by Fisher against Hurd and HP for sexual harassment and other workplace torts.

Because the Covington Report was created in anticipation of different litigation than

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<sup>5</sup> *See also* HP Brief at 18 (Covington was retained "***to investigate potential violations of law by one of its employees.***"), 14 (The Covington Report contains, "information regarding the status of the Hurd Investigation, ***and the interim analysis and legal advice of HP's counsel in relation to Ms. Fisher's allegations.***"), 13 (Covington prepared its report "***in connection with the Board's investigation in to the allegations made in the Allred Letter.***"), 26 ("Covington was hired "***in connection with the Board's investigation of Ms. Fisher's claims.***").

present here, it is only protected by the work-product doctrine if that litigation is closely related in parties and subject matter to the litigation here. *Ramada*, 490 A.2d at 596. HP's suggestion that the facial factual overlap between the instant litigation and the facts analyzed in the Covington Report supports their work-product claim conflicts with Delaware law. The Court's review of the parties and subject matter of the two investigations should be granular and exacting. For example, in *Ramada*, the plaintiff brought a libel action against the defendant for allegedly publishing a defamatory article. *Id.* at 595-96. The material at issue was two reports, referenced in the article, that were prepared by an investigator in a previous action. *Id.* This prior action involved a dispute over an asset acquisition, and the reports were commissioned by the plaintiff to investigate potential mismanagement of a hotel which was the subject of the acquisition. *Id.* at 596. The defendant sought production of the reports, but the plaintiff, claimed, just as HP does here, that the reports were subject to the work-product doctrine, even though they were created in anticipation of a different litigation. *Id.* The court held that the reports were not protected by the work-product doctrine because there was insufficient identity of parties and litigation subject. *Id.* The subject of the *Ramada* action was the *Wall Street Journal's* allegedly libelous action, whereas the reports at issue were created for potential litigation regarding an acquisition. *Id.* In other words, the mere fact that the reports addressed overlapping facts in both litigations was not dispositive (as HP suggests here). Further, the court pointed to the captions of the different actions to show that there was not sufficient overlap of parties. *Id.*<sup>6</sup>

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<sup>6</sup> Similarly, in *State v. Wright*, 1994 WL 807898, at \*1 (Del. Super.), a claim of work product protection for documents prepared at the direction of counsel for a tax payer addressing the retention of certain fees he had earned was rejected where the documents were sought in litigation regarding a separate and distinct tax issue than the subject of the documents. *Id.*, at \*2.

Like *Ramada*, the parties and subject matter of the litigation anticipated in the Covington Report and the investigative "litigation" occurring here are substantially different. The Covington Report was created in anticipation of a potential sexual harassment lawsuit against Hurd and HP by Fisher. Here, plaintiff's investigation concerns potential mismanagement and waste by the Board. Thus, the subject matters of these two actions are just as divergent here as they were in *Ramada*. In addition, the only potentially overlapping party here (if plaintiff finds mismanagement that warrants a derivative action) is HP as a nominal defendant and possibly Hurd. Plaintiff would not be a party in Fisher's anticipated action for which the report was prepared, and Fisher is not a party here. Therefore, since the parties and subject matter do not substantially overlap, the work-product doctrine does not apply to the Covington Report.

HP relies on a number of cases that stand for the proposition that materials created *after* a wrongdoing, *in response* to the wrongdoing, are subject to work-product protection in litigation where *the very wrongdoing is at issue*. HP Brief at 14. However, HP's argument is inapplicable here, since plaintiff is not investigating a sexual harassment claim against Hurd and HP, as Covington did, but is instead looking at the Board's potential breaches of fiduciary duty and waste. To start, in *Saito v. McKesson HBOC, Inc.*, 2002 WL 31657622, at \*1-\*2, \*14 (Del. Ch.), 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. *Id.* Defendants claimed that all of these documents were protected by the work-product doctrine and attorney-client privilege. *Id.* The only documents that the court found classified as work product, however, were "post-merger legal advice," in particular, documents containing legal advice rendered during an internal investigation that commenced *after* the potential wrongdoing. *Id.* This again demonstrates defendant's confusion and conflation of plaintiff's proper purpose in

investigating the Board's actions, with the Board's investigation into Hurd. Plaintiff seeks the Covington Report which was prepared *before* the challenged transaction took place – the Board's decision to allow Hurd to resign. Therefore, the Covington Report is more akin to the pre-merger legal advice which the court in *Saito* did not preclude under the work-product doctrine. *Id.*, at \*14. Further, the court in *Saito* found the post-merger materials were work product because, unlike plaintiff's instant action, the audit committee hired the law firm Skadden, Arps, Slate, Meagher & Flom LLP ("Skadden Arps") for the specific purpose of investigating the Board's decision to enter into the challenged merger acquisition, *in response* to improprieties that came to light *after* the transaction took place. *Id.*, at \*1. Unlike defendant's relationship with Covington, in *Saito*, Skadden Arps worked on the report investigating the potential wrongdoing in the merger, and represented the company in the lawsuits challenging the board's actions in the merger. *Id.*, at \*2. Accordingly, *Saito* supports plaintiff's position that the Covington Report is not subject to the work-product doctrine.

Defendant relies on *Grand Jury*,<sup>7</sup> *Sandra T.E.*,<sup>8</sup> and *Suprema*,<sup>9</sup> which are all distinguishable because they all concern documents created by an investigation into potential wrongdoing after it occurred and where the second litigation concerned that same wrongdoing. The defendant in *Grand Jury* commenced an internal investigation into certain allegations that came to light regarding bribery of foreign officials. 599 F.2d 504. Thereafter, the U.S. Department of Justice convened a grand jury to investigate potential violations of federal laws arising from the bribery allegations and sought the

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<sup>7</sup> *In re Grand Jury Subpoena*, 599 F.2d 504 (2d Cir. 1979).

<sup>8</sup> *Sandra T.E. v. S. Berwyn Sch. Dist.*, 600 F.3d 612 (7th Cir. 2010).

<sup>9</sup> *In re Suprema Specialties, Inc.*, 2007 WL 1964852 (Bankr. S.D.N.Y.).

documents prepared during the company's internal investigation. *Id.* at 508. The court held that the work-product doctrine attached to these documents because the internal investigation was for the purpose of determining "the vulnerability generally of the corporation and its personnel to criminal and civil sanctions," which mirrored the purpose of the grand jury investigation. *Id.* at 511; *see also Sandra T.E.*, 600 F.3d at 622 (documents were protected by the work product doctrine from production in a lawsuit when they were prepared pursuant to an investigation "*in response to* the actual filing of [the] lawsuit [at hand]."); *Suprema*, 2007 WL 1964852, at \*2 (documents created during an investigation into suspected accounting irregularities and wrongdoing by the defendant protected by the work-product doctrine in litigation against the defendant based on the accounting fraud.). Accordingly, the decisions HP cites do not support defendant's contention that the Covington Report is subject to work-product protection. Rather, like *Ramada* and *Wright*, there are substantial and material differences in the subject matter of the investigation that led to the Covington Report and plaintiff's investigation, and the parties implicated in the two investigations are not closely related. Thus, the Covington Report is not protected by the work-product doctrine.

**B. Plaintiff Has Demonstrated a Compelling Need for the Covington Report**

Even if the Court finds the Covington Report is opinion work product, plaintiff has demonstrated a compelling need for its production. Defendant argues that the Covington Report is unnecessary in light of the less than 100 pages of documents it has provided and some public statements made by the Company and its officers regarding the reasons behind Hurd's resignation. HP Brief at 10-12. As explained in Plaintiff's Opening Brief (Pl. Brief at

1-2),<sup>10</sup> HP's error lies in its conflation of two different investigations: (i) Covington's investigation into Hurd's misconduct; and (ii) plaintiff's investigation into possible misconduct by the Board in choosing to enter into the separation agreement instead of terminating Hurd for "cause." The Covington Report is essential to plaintiff's investigation because it contains exactly what facts, data, advice, and recommendations Covington presented to the Board, and in what context and form they were delivered. Equally as important, the Board relied upon the information in the Covington Report when deciding that Hurd could no longer serve as HP's CEO, but refusing to terminate him for "cause." Del Gaizo Aff., Exh. A at 4-12.<sup>11</sup> Neither the documents HP has provided so far, nor any of the information HP has disclosed publicly, provides these facts. The Allred Letter, Expense Reports, Compensation Reports, Standards of Business Conduct, and Conflicts of Interest Policy, all of which HP touts as providing plaintiff sufficient information for his investigation, do not address the pertinent question as to why the Board did not fire Hurd for "cause." Nor do the materials and disclosures by HP reveal whether the Board considered

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<sup>10</sup> "Pl. Brief" or "Plaintiff's Opening Brief" refer to Plaintiff's Opening Brief on the Merits filed on February 11, 2011.

<sup>11</sup> Subsequent media reports concerning Covington's investigation and the presentation of the Covington Report further shows its significance to the Board's ultimate decision. For example, according to the *Wall Street Journal*, before the Board reviewed the Covington Report, it was compelled to believe Hurd's contention that there was no truth to the allegations made in the Allred Letter, and was leaning towards not disclosing any of its allegations. Robert A. Guth, Ben Worthen, and Justin Scheck, *Accuser Said Hurd Leaked on HP Deal*, *Wal. St. J.* at 1-2 (Nov. 6, 2010), attached as Exh. D to Del Gaizo Aff. It was only after the Board members reviewed the Covington Report that the Board realized that Hurd was lying to them and that he could no longer serve as CEO. *Id.* at 4-6.

these documents and what weight the directors placed on them. Ultimately, the only means available for plaintiff to learn this vital information is the Covington Report.

The Board Minutes in particular demonstrate the inadequacy of the documents provided to plaintiff for inspection. In fact, these Board Minutes are more notable for what they do not contain, than what they do contain. The information that can be gleaned from the Board Minutes is limited to who attended the meetings and the general topic of discussion. Del Gaizo Aff., Exh. A. Defendant claims in its Opening Brief that the "[Board] 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." HP Brief at 11. The Board Minutes, however, do not provide any detail on the actual discussions of the Board, any questions or comments made by the Board members, or any matters that the Board put to vote other than the final vote on August 6, 2010, or the results of any of such votes. Del Gaizo Aff., Exh. A.<sup>12</sup>

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<sup>12</sup> The paucity of the information in these Board Minutes is further displayed in their length. The most substantive of all the Board Minutes is the one from the Board's July 28, 2010 meeting ("July 28 Board Minutes"), during which Covington presented its report. *Id.*, Exh. A at 4. That Board meeting lasted from 5:00 p.m. to 1:00 a.m. the next day. *Id.* Despite an eight hour meeting, the July 28 Board Minutes are less than a page long, consisting of only six paragraphs, and five of those paragraphs are only one sentence. *Id.* For each meeting after the presentation of the Covington Report until the Company announced the resignation of Hurd on August 6, 2010, the Board Minutes are limited to the roll call and the same form statement. *Id.*, Exh. A. In particular, they state that **REDACTED**

*Id.* Thus, defendant's purported "extensive" production reveals little about the Board's actual deliberative process, and in particular, its decision not to terminate Hurd for "cause."

One of the few facts the Board Minutes reveal is the importance of the Covington Report. In fact, the Board Minutes explicitly show that the Board reviewed and relied on the Covington Report in the meetings leading up to the Board's decision to terminate Hurd without "cause." Del Gaizo Aff., Exh. A. For instance, the July 28 Board Minutes state that the Board reviewed the report, **REDACTED** *Id.*, Exh. A at 4. Similarly, in every meeting after, the Board considers the results of the Covington investigation as presented in the Covington Report. *Id.*, Exh. A at 5-15. However, after conceding the propriety of plaintiff's purpose here and essentially conceding the importance of the Covington Report, as evidenced in the Board Minutes, HP inexplicably fails to make it available for inspection. *Id.*

The Covington Report is also necessary to plaintiff's investigation because its contents, and therefore, the basis for the Board's decision, are not available in any other form. *Grimes v. DSC Commc'ns Corp.*, 724 A.2d 561, 567 (Del. Ch. 1998). As defendant admits in its Opening Brief, the Board Minutes do not disclose any of the contents of the Covington Report. HP Brief at 19 ("The minutes do not disclose any of the contents of the [Covington Report] ..."). Due to the complete lack of information in the Board Minutes, the Covington Report is the only way plaintiff can investigate what information the Board relied upon. Accordingly, plaintiff has demonstrated a compelling need for the Covington Report.<sup>13</sup>

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<sup>13</sup> Defendant also argues that plaintiff has not shown that the Covington Report is necessary or essential for his proper purpose. HP Brief at 25-27. Plaintiff's demonstration of his compelling need for the Covington Report to circumvent the work-product doctrine applies



The situation here is analogous to *Grimes*. In *Grimes*, the plaintiff sought to compel production of a committee report that the board relied on in rejecting his demand. 724 A.2d at 565. The court explained that the plaintiff was entitled to the report because it was one of the few ways the plaintiff could evaluate the deliberative process of the board. *Id.* at 567. In particular, the report was the only way to ascertain whether the board acted with "independence, good faith, and due care" when making its decision not to pursue the plaintiff's demand. *Id.* Similarly, in the instant case, plaintiff seeks to evaluate the deliberative process of the Board. The only means by which the plaintiff can investigate the deliberative process of the Board is to examine the very report that the Board reviewed and relied on in reaching its decision, the Covington Report.<sup>14</sup>

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equally to why it is necessary and essential for his proper purpose. Defendant attempts to muddle this issue by inexplicably stating that plaintiff's Complaint for Relief Pursuant to 8 *Del. C.* §220 ("Complaint") "reads like a derivative complaint prepared by a shareholder who has already decided to file suit against the Board[.]" HP Brief at 25. Plaintiff has made no such determination. In fact, rather than rush to file and win the "filing Olympics," plaintiff has heeded the Court of Chancery and Supreme Court's repeated recommendation to use the tools at hand to first investigate any wrongdoing. *King v. Verifone*, 994 A.2d 354, 355 (Del. Ch. 2011), *rev'd on other grounds*, 2011 WL 284966 (Del.). Accordingly, defendant's argument is without merit.

<sup>14</sup> Defendant's attempt to distinguish *Grimes* because the Board's investigation was "not undertaken in response to a litigation demand by [plaintiff]" and that it purportedly provided a "detailed explanation of the bases for the board's actions" must fail. HP Brief at 17. Nowhere in *Grimes* does the court narrow its holding to situations where a plaintiff makes a litigation demand. *Grimes*, 724 A.2d 561. Rather, *Grimes* stands for the proposition that a plaintiff is entitled to inspect books and records that reveal "the deliberative processes ... the board underwent," in reaching its disputed decision. *Id.* at 570. Further, in *Grimes*, the defendant unsuccessfully made the same argument that HP makes – that it had already provided the underlying documents and the basis for the Board's decision. *Id.* at 567 ("[The defendant] contends that by providing the underlying documents relating to the issues considered by the Special Committee it has already produced all of the documents sufficient

The cases on which defendant relies do not and cannot rebut the holding in *Grimes* that plaintiff is entitled to the Covington Report to investigate the Board's deliberative process. HP Brief at 15-16. First, as explained above, *Saito's* work-product reasoning does not apply to the Covington Report because the Covington Report is not analogous to the post-merger materials that the court in *Saito* found were protected under the work-product doctrine. *See supra* Section A. In addition to this key distinction, *Saito* is also distinguishable because the plaintiff there offered a mere "conclusory statement" that the documents were "necessary to [the plaintiff's] determination of the defendant's actions regarding the acquisition ... and what fiduciary duties were breached in that transaction." *Saito*, 2002 WL 31657622, at \*11. The court went on to state that the plaintiff, even in his reply brief, provided "no analysis of whether the challenged ... documents fit the profile of such discussions [that related to the core matter of the plaintiff's investigation], or even whether the documents in question were created before the challenged [acquisition] took place." *Id.*, at \*12. Here, however, plaintiff has offered substantial evidence of his compelling need for the Covington Report and how the report is essential to his concededly proper investigative purpose, as detailed above.

*Khanna v. Covad Communications Group, Inc.*, 2004 WL 187274 (Del. Ch.), another decision on which defendant relies, does not even consider whether the plaintiff could

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for the plaintiff to accomplish his purported purpose."); *compare with* HP Brief at 17 ("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.").

review attorney work-product documents. Instead, the court specifically noted that the plaintiff "has not sought to circumvent either the attorney-client privilege or the work-product doctrine." *Id.*, at \*7. Moreover, as defendant admits, the court in *Khanna* granted the plaintiff's request to inspect documents related to the findings and/or investigation by a special committee. *Id.*, at \*9; HP Brief at 15 n.11. Therefore, to the extent *Khanna* is relevant at all, it supports plaintiff's request to review the Covington Report.<sup>15</sup>

In sum, plaintiff has shown his compelling need for the Covington Report. The Covington Report is the only way that plaintiff can investigate what the Board considered and relied upon in deciding not to terminate Hurd for "cause." Therefore, it is the pivotal piece of evidence concerning whether the Board breached its fiduciary duty or committed waste when it chose not to terminate Hurd for "cause."

**C. The Covington Report Is Not Protected by the Attorney-Client Privilege Because Plaintiff Has Demonstrated "Good Cause"**

Plaintiff has demonstrated "good cause" to preclude the application of the attorney-client privilege to the Covington Report. Defendant acknowledges that attorney-client privilege should not attach to the Covington Report if plaintiff makes a sufficient showing of

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<sup>15</sup> Defendant also cites again to *Grand Jury, Suprema*, and *Sandra T.E.* in a footnote. HP Brief at 15 n.11. These cases, however, are inapposite for the same reasons stated above. *See supra* Section A. In this same footnote, defendant also cites to *In re Fuqua Industries, Inc., Shareholder Litigation*, 2002 WL 991666 (Del. Ch.), *Rembrandt Technologies, L.P. v. Harris Corp.*, 2009 WL 402332 (Del. Super.), and *Merisel, Inc. v. Turnberry Capital Management, L.P.*, 1999 WL 252724 (Del. Ch. ), for the unremarkable proposition that a court should deny a motion to compel "work product where plaintiff has not shown compelling need." HP Brief at 15 n.11. This statement is uncontroverted. However, as stated above, the Covington Report is not protected by the work-product doctrine, and even if it was, plaintiff has shown his compelling need for it

"good cause" for its production. HP Brief at 20. Nevertheless, defendant claims that the factors set forth in *Garner v. Wolfenbarger*, 430 F.2d 1093 (5th Cir. 1970) (the "*Garner* Factors"), do not weigh in favor of disclosure.<sup>16</sup> *Id.*

Delaware courts have identified the following five factors to consider in determining whether "good cause" exists to compel disclosure of otherwise privileged materials: "(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." *Grimes*, 724 A.2d at 568. However, what defendant fails to acknowledge is that of the five factors, courts primarily consider factors (ii), (iii), and (iv). *See Sealy Mattress Co. of N. J., Inc. v. Sealy, Inc.*, 1987 WL 12500, at \*1, \*4 (Del. Ch.); *see also Fuqua Indus.*, 2002 WL 991666, at \*4 (agreeing with *Sealy* court that factors (ii) – (iv) are of "particular significance").<sup>17</sup>

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<sup>16</sup> As detailed in Plaintiff's Opening Brief, plaintiff contends that defendant has waived its privilege over the Covington Report by failing to properly treat the purportedly privileged communications as confidential. Pl. Brief at 23-24. The substantial media leak of the contents of the Covington Report, and its subsequent publication, demonstrates defendant's indifference as to the purported confidential nature of the report and constitutes an implicit waiver over its protection.

<sup>17</sup> The Court should disregard defendant's attempt to place outsized importance on plaintiff's stock holdings. HP Brief at 20. Courts have largely disregarded the shareholder's stock holdings, finding that such information inconsequential or of little import to the court's *Garner* analysis. *See Sealy*, 1987 WL 12500, at \*4; *Saito*, 2002 WL 31657622, at \*13. This is especially true since title 8, section 220 of the Delaware Code ("Section 220") does not

**1. Defendant Concedes that Plaintiff Is Not Engaged in a Blind Fishing Expedition**

Defendant concedes, as it must, that plaintiff is not engaged in a blind fishing expedition and therefore, this primary *Garner* Factor weighs in favor of the production of the Covington Report. HP Brief at 22 n.13. Plaintiff's demand for inspection is narrowly tailored to a single, identified report that the Board reviewed and relied on in authorizing Hurd's resignation without "cause." Therefore, this factor weighs in favor of the attorney-client privilege not attaching to the Covington Report.

**2. Plaintiff Asserts a Colorable Claim**

Plaintiff asserts a colorable claim for the production of the Covington Report, and the defendant does not seriously argue otherwise. Defendant's argument is limited to two sentences stating that plaintiff has not presented a colorable claim because a waste claim is difficult to prove. HP Brief at 21. Defendant's argument is unsupported by applicable legal authority or logic. In fact, the potential difficulties in establishing breach of fiduciary duties or waste weigh in favor of the production of the Covington Report pursuant to Section 220. *See Grimes*, 724 A.2d at 565-66 (stating that Section 220 is one of the avenues available to shareholders to obtain information to assist in meeting the particularized pleading requirement in derivative actions).<sup>18</sup>

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discriminate in affording shareholders the right to inspect corporate books and records based on stockholding. As such, plaintiff's stockholdings bear little significance, if any, in the Court's determination as to whether "good cause" exists for production of the Covington Report.

<sup>18</sup> In addition, as stated in Plaintiff's Opening Brief (Pl. Brief at 11 n.5), in similar situations where a company has afforded its outgoing senior officer a non-fault termination laden with

In any event, defendant is mistaken as to the proper colorable claim standard. Courts have held that in the context of a Section 220 action, a plaintiff presents a colorable claim if he has a proper purpose for his demand, or in other words, if there is a credible basis that wrongdoing occurred. *Grimes*, 724 A.2d at 569 (determining colorable claim exists where the plaintiff demonstrates a proper purpose for his demand); *see also Saito*, 2002 WL 31657622, at \*13-\*14 (finding the plaintiff had asserted a colorable claim because the plaintiff established a proper purpose in investigating potential wrongdoing in connection with the defendant's challenged merger). This credible basis standard is "the lowest possible burden of proof." *Seinfeld v. Verizon Commc'ns, Inc.*, 909 A.2d 117, 123 (Del. 2006). To have a proper purpose, a shareholder is not required to prove that wrongdoing is "actually occurring," but rather he "need only show, by a preponderance of the evidence, a credible basis from which the [c]ourt ... 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.*

Plaintiff has established a credible basis for wrongdoing in the Board's decision to allow Hurd to resign with a lucrative separation package. Pursuant to its investigation, the

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a lucrative severance package amidst a cloud of misconduct, Delaware courts have denied motions to dismiss under even the heightened pleading standards of a Court of Chancery 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).

Board appears to have found more than sufficient evidence that Hurd acted in a way that "is not in the best interest of, or is injurious to, HP" and therefore could have been terminated for "cause." Compl., ¶2<sup>19</sup>; Answer of Defendant Hewlett-Packard Company, ¶2 filed on December 17, 2010 ("Answer"). In fact, Michael Holston ("Holston"), speaking in his official capacity as general counsel of HP, admitted that the Board's investigation uncovered, among other things, an improper "close personal relationship" with an HP employee, Fisher, and that Hurd had demonstrated a "systematic pattern of [submitting] improper expenses and inaccurate reports" with the intent to, or that had the effect of concealing his relationship with Fisher. Compl., ¶20; Answer, ¶20. Despite Hurd's systematic and continued malfeasance, and HP's potential exposure to liability arising from Hurd's misconduct, the Board determined that it could not, or would not terminate Hurd for "cause." The Board's refusal to fire Hurd for "cause" bound the Company to a massive severance payment for Hurd. The unexplained discrepancy between the Board's purported findings and its ultimate decision raises more than a credible basis of wrongdoing that establishes a colorable claim for plaintiff's inspection demand. Therefore, this factor also weighs in favor of attorney-client privilege not attaching to the Covington Report.

**3. The Covington Report Is Necessary, and Its Information Is Unavailable from an Alternative Source**

The Covington Report is necessary to plaintiff's investigation; its information is unavailable from any other source, and therefore, this factor weighs in favor of attorney-

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<sup>19</sup> ("¶ \_\_\_\_") or "Compl." are references to plaintiff's Complaint filed in this Court on November 18, 2010.

client privilege not attaching to the Covington Report, like all of the primary *Garner* Factors. Defendant contends that the Covington Report is unnecessary given HP's purported "extensive" production up to this point. HP Brief at 21. As already explained above (*see supra* Section B) HP is incorrect. At most, defendant offered isolated, fragmented pieces of information that support its position that Hurd violated the Company's standards of conduct, but provides no insight into the Board's decision to allow Hurd to resign with a lucrative severance package instead of firing him for "cause." For instance, the Allred Letter produced by HP merely details allegations that Fisher made against Hurd, however, it fails to reveal what the Board discovered during its investigation that either substantiated or refuted the allegations. *See* Allred Letter, attached as Exh. 4 to Compl. The expense reports and compensation reports that HP has disclosed, in of themselves, do not reveal which reports were inaccurate and why they were inaccurate. The Board Minutes are similarly devoid of any detail as to what convinced the Board that Hurd's conduct did not warrant his termination for "cause." Del Gaizo Aff., Exh. A. The majority of the Board Minutes simply state that the Board

**REDACTED**

*Id.* Moreover, the Board Minutes for the meeting in which Covington first presented its report to the Board states in conclusory fashion,

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*Id.*, Exh. A at 4. For purposes of plaintiff's investigation, it is not only



necessary to know that the Board reviewed the Covington Report as the Board Minutes indicate, but what information contained in the Covington Report compelled the Board to make its decision not to terminate Hurd for "cause." Finally, HP's vague public statements, including Holston's disclosures in the conference call, fail to cure the lack of information available to plaintiff to conduct his investigation. In its disclosures, HP admits that Hurd violated the Company's conduct standards, but sheds no light onto why the Board chose to stop short of firing him for "cause." In sum, the materials and disclosures provided by HP are wholly inadequate for plaintiff to determine whether the Board exercised good-faith judgment in dismissing Hurd without "cause."

The information contained in the Covington Report is unavailable from other sources. Defendant suggests that plaintiff should conduct his investigation into Hurd's misconduct using the materials it has already provided. HP Brief at 21. But, plaintiff's investigative purpose is to determine potential wrongdoing by the Board. The Covington Report is unique because it reveals the information the Board reviewed, and the materials the Board relied on, in making its decision.

For support, defendant cites to a number of cases where the plaintiff either had other means to access the pertinent information in a communication between an attorney and plaintiff, or where the information was not necessary for the underlying purpose. HP Brief at 21-22. None of these decisions concern a party investigating the deliberative process of the board, and in none of them did the plaintiff demonstrate that evidence into this deliberative process was only available through the allegedly privileged document. For example, in *Bray v. Oklahoma Publishing Co.*, 1990 WL 108313, at \*1 (Del. Ch.), the plaintiff alleged that the

defendants and its directors wrongfully amended the defendant's certification of incorporation to provide for a new class of favored voting stock. An intervenor brought a motion to compel production of documents related to the amendment, including transmittal letters describing and evaluating drafts of the amendments, which defendants alleged were protected under attorney-client privilege. *Id.*, at \*1-\*2. The court held that the documents were unnecessary because the drafts of the amendment had already been produced and could be used to "trace the evolution of the [a]mendment and the alternatives that were considered and rejected." *Id.*, at \*2. The court went on to say that although the "legal analyses that accompanied some of these drafts may be of interest to the Intervenor," they "do not appear to be necessary to a full exploration of the underlying issues." *Id.* In contrast, the materials HP provided do not provide a comparable roadmap for plaintiff to ascertain why the Board decided not to fire Hurd for "cause." At best, HP's production to date merely indicates why they dismissed Hurd, but woefully falls short of providing information as to why the Board decided not to fire him for "cause" and instead decided to provide him a severance worth up to \$40 million.<sup>20</sup> Accordingly, the decisions on which HP relies are inapposite. Rather, plaintiff's necessity for the Covington Report weighs in favor of disclosure.

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<sup>20</sup> Defendant also cites to *Oliver v. Boston University*, 2004 WL 944319, at \*1 (Del. Ch.), HP Brief at 21. Defendant here, however, has already conceded the dispositive issue in *Oliver*. The court in *Oliver* held that the plaintiffs did not establish "good cause" because they "[had] not identified what documents they believe would be helpful in remedying [the] knowledge shortfall." *Id.* In denying the plaintiffs' motion, the court explained that plaintiffs were simply on a "fishing expedition." *Id.* As defendant admits, HP Brief at 22 n.13., plaintiff here is not on a fishing expedition.

#### 4. The Covington Report Does Not Contain Attorney-Client Communications Concerning Plaintiff's Inspection Demand

Though it is not a factor that Delaware Courts usually consider in its *Garner* analysis, the fact that the Covington Report does not concern the litigation itself also weighs in favor of disclosure. Defendant mistakenly asserts that because the Covington Report purportedly contains attorney-client communication *relevant* to the Board's decision to allow Hurd to resign without "cause," this factor weighs against disclosure. HP Brief at 21. That, however, is not the test.<sup>21</sup> Rather, the question the Court must ask is whether the legal advice purportedly in the communication concerns *the litigation itself*. *Saito*, 2002 WL 31657622, at \*14. Here, plaintiff had not even contemplated his inspection demand when the Covington Report was prepared, hence, any legal advice contained therein could not directly concern plaintiff's inspection demand itself.<sup>22</sup> Thus, this factor weighs in favor of production.

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<sup>21</sup> Defendant's proposed interpretation of this factor would lead to a bizarre rule in which no party could ever satisfy the *Garner* test. Defendant claims that per factor 3, the document should be necessary to plaintiff's investigative purpose (HP Brief at 21), but if it is relevant to the investigation, then it fails this factor.

<sup>22</sup> The court's decision in *Saito* is particularly instructive. As explained above, in *Saito*, although the pre-merger materials were relevant to the plaintiff's investigation into the disputed merger, the court determined that the communications at issue were not addressed to the plaintiff's litigation itself because litigation of the matter had not commenced or was not imminent when the pre-merger materials were prepared. 2002 WL 31657622, at \*14. Instead, the court held that the purpose of the communications was "to aid the decision making of the board with respect to the merger," and therefore did not concern the plaintiff's litigation itself. *Id.* Similarly, the purpose of the Covington Report, as defendant repeatedly maintains in its Opening Brief, was to investigate Hurd's misconduct with respect to the allegations in the Allred Letter, not to address shareholder inspection demand questioning the Board's conduct. In short, defendant's argument that the Covington Report is relevant to this litigation is nothing more than a red herring.

In sum, because all the *Garner* Factors, aside from the plaintiff's stock holdings, favor production of the Covington Report, plaintiff has sufficiently established "good cause" to overcome defendant's claim of attorney-client privilege.

**D. Allowing Plaintiff to Inspect the Covington Report Is Consistent with Public Policy**

The public policy concerns weigh in favor of inspection of the Covington Report. Defendant contends, without any explanation, that compelling production of the Covington Report would discourage corporations from utilizing outside counsel in their internal investigations. HP Brief at 23. While the need for corporate fiduciaries to conduct full and frank communication with counsel protected by the attorney-client privilege and work-product doctrine is an important public policy, Delaware has consistently recognized that it must be tempered by the need for shareholders to investigate, through the tools at hand (i.e. Section 220), whether those same fiduciaries breached their duties. *Fuqua*, 2002 WL 991666, at \*3.<sup>23</sup> Such need for balance was the impetus behind Delaware adopting a doctrine which precludes the application of the attorney-client privilege upon a plaintiff's showing of "good cause" for disclosure. *Id.* Accordingly, public policy concerns are well accounted for, and compel production of documents where, as here, the plaintiff has

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<sup>23</sup> Indeed, Delaware courts have consistently advised shareholder to use the "tools at hand" to investigate corporate wrongdoing. See *Freund v. Lucent Techs., Inc.*, 2003 WL 139766, at \*1-\*4 (Del. Ch.) ("[T]he Delaware Supreme Court has made it clear that the public policy of this State is to encourage stockholders to utilize Section 220 before filing a derivative action ...."); *La. Mun. Police Emps.' Ret. Sys. v. Countrywide Fin. Corp.*, 2007 WL 2896540, at \*10 (Del. Ch.), (citing to *Freund*, for the proposition that courts have encouraged the use of Section 220 to investigate possible mismanagement, wrongdoings, and waste), *order clarified*, 2007 WL 4373116 (Del. Ch.).

demonstrated "good cause" and compelling need for the requested documents.

The cases defendant relies on in support of its policy argument are inapposite. In *Saito*, the plaintiff claimed the defendant waived any attorney-client privilege by disclosing some of the documents at issue to the SEC. 2002 WL 31657622, at \*1, 2. The court in *Saito* disagreed, however, because policy considerations weigh in favor of selective waivers in order to encourage corporations *to cooperate with government agency investigations*, such as the pending SEC investigation of the defendant. *Id.*, at \*10. Here, no such policy considerations are implicated in the disclosure of the Covington Report, because a selective waiver is not at issue.

Defendant also mistakenly cites to *Merrill Lynch & Co. v. Allegheny Energy, Inc.*, 229 F.R.D. 441 (S.D.N.Y. 2004), in support of its policy argument. *Id.* at 444; HP Brief at 22. In *Merrill Lynch*, the defendant sought to compel production of reports prepared by the plaintiff's outside counsel pursuant to its internal investigation into allegations of theft by one of its employees. 229 F.R.D. at 444. The plaintiff argued that the same reports were subject to work-product protection. *Id.* The defendant countered that the plaintiff had waived its privilege by disclosing the reports to its independent outside auditor. *Id.* at 445. In determining the plaintiff had not waived privilege, the court explained the need for auditors to receive complete disclosure from companies so that they may provide more "accurate information to the investing public," and to be apprised of pertinent information so that they may not later claim ignorance of malfeasance. *Id.* at 448-49. Like *Saito*, the specific policy consideration implicated in *Merrill Lynch* - the need for independent outside auditors to receive complete disclosures from the audited entity - is not present in plaintiff's action.

Likewise, the public policy interests in *In re Woolworth Securities Class Action Litigation*, 1996 WL 306576 (S.D.N.Y.), differ from the interests that are at issue in plaintiff's instant action. In *Woolworth*, the plaintiffs, shareholders of the defendant – corporation, brought a class action alleging violations of Sections 10(b) and 20(a) of the Securities and Exchange Act for accounting irregularities in the defendant's books. *Id.* at \*1. The defendant formed a special committee to investigate the allegations, and also retained outside counsel to assist the special committee. *Id.* The plaintiffs sought to compel the defendant to produce counsel's *internal* notes and memoranda claiming that the defendant waived any privilege to the documents by publishing a special committee report that contained some of the same information in the requested documents. *Id.*, at \*2. To start, in this action, plaintiff seeks the report presented to the Board, which it specifically relied upon, not Covington's internal communications. Notably, and unlike here, plaintiffs in *Woolworth* were given the special committee's report. *Id.* Finally, unlike plaintiff's instant action, the plaintiffs in *Woolworth* **did not** challenge the special committee's investigation itself. *Id.*, at \*1 n.1. Hence, the court never had to weigh the competing policy interests present when the board's actual decision after an investigation is at issue, and documents reviewed by the board, such as the Covington Report, are critical to revealing the deliberative process of the disputed action.<sup>24</sup>

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<sup>24</sup> Defendant's reliance on *Sutherland* (HP Brief at 23) is unavailing for the reasons detailed in Plaintiff's Opening Brief. Pl. Brief at 18-19 & n. 9; *Sutherland v. Sutherland*, 2007 WL 1954444, at\*1-\*2 (Del. Ch.). In *Sutherland*, the plaintiff sought certain books and records to investigate the independence and good faith of the special committee's decision to dismiss her complaint filed against the defendant's board. 2007 WL 1954444, at \*1-\*2. The court

## CONCLUSION

The work-product doctrine is inapplicable here because the Covington Report was not prepared in anticipation of the present litigation, and plaintiff has demonstrated the requisite compelling need and hardship for the information contained therein. In addition, plaintiff has demonstrated "good cause" under the *Garner* Factors for the attorney-client privilege not to attach to the Covington Report. Finally, even if these privileges did attach, as explained in Plaintiff's Opening Brief, HP has waived its right to assert these privileges. Accordingly, the Court should enter an order requiring the Company to permit plaintiff and his attorneys to inspect and copy the Covington Report.

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held only that the *special committee's preliminary drafts of its report* were undiscoverable. *Id.*, at \*3. In fact, the court allowed discovery over *documents reviewed* by the special committee and his counsel or advisors during their investigation into the plaintiff's complaint. *Id.* Similarly here, the policy interests in favor of disclosure are more pressing since plaintiff requests the critical document *reviewed by the Board*, the Covington Report, in reaching its decision to fire Hurd without "cause." HP disingenuously implies that the Covington Report was not a final report and therefore is closer akin to the drafts in *Sutherland*, even going so far to title it the "Interim Report." HP Brief at 22-23. The Covington Report, however, was the only report reviewed by the Board according to the Board's minutes. Del Gaizo Aff., Exh. A. Further, the Board continued to rely on the report's finding in subsequent meetings leading up to Hurd's resignation. *Id.* Therefore, the Covington Report was indeed final.

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February 28, 2011





**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 28th day of February, 2011, a copy of the **Plaintiff's Response To Hewlett-Packard Company's Opening Brief In Opposition To Plaintiff's Demand For The Interim Report Of Counsel (Filed Under Seal)** was served, by electronic filing through *LexisNexis File & Serve*, upon:

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