

Delaware Supreme Court Clarifies Scope of Relief A Shareholder Is Entitled For Inspection Of Corporate Books And Records Pursuant To A Section 220 Demand

*December 9, 2011 by **John Stigi and Taraneh Fard***

In *Espinoza v. Hewlett-Packard Co.*, No. 208, 2011 WL 5838882 (Del. Nov. 21, 2011), the Delaware Supreme Court held that shareholders seeking inspection of corporate books and records under Section 220 of the Delaware General Corporation Law, 8 Del. C. § 220 (“Section 220”), must demonstrate that the records sought are “essential” to the “articulated purpose for the inspection.” In so holding, the Delaware Supreme Court affirmed the Delaware Court of Chancery’s holding that a report prepared in connection with an internal investigation into sexual harassment allegations made against Hewlett-Packard’s (“HP”) former Chief Executive Officer was not “essential” to plaintiff’s “articulated purpose for the inspection.” The decision provides insight into the limits of corporate documents a shareholder may obtain pursuant to a Section 220 demand and the proper legal analysis for determining whether a shareholder is within his or her right to inspect such documents.

The action centered around the resignation of HP’s former chief executive officer, Mark Hurd (“Hurd”). On or about June 29, 2010, HP received a letter claiming that Hurd had sexually harassed a female contractor over the two-year period. The letter threatened legal action against both Hurd and HP. Thereafter, the HP Board began an internal investigation of the allegations. The Board was presented with a report by independent counsel retained to investigate the matter (the “Covington Report”), which contained interim factual findings and analysis arising out of the investigation. One week later, on August 5, 2010, Hurd reached a confidential settlement with the former contractor. The following day, HP announced Hurd’s departure from HP. In that announcement, the Board explained that although its internal investigation did not show that Hurd had committed sexual harassment, the investigation did reveal that Hurd had breached HP’s

Standards of Business Conduct. The Board did not terminate Hurd “for cause.” Instead, the Board approved a separation agreement under which Hurd received, among other benefits, severance payments estimated as worth over \$30 million.

HP’s announcement of Hurd’s departure led to a flurry of shareholder derivative actions. On August 17, 2010, plaintiff wrote a letter to HP demanding to inspect certain HP books and records relating to Hurd’s resignation under Section 220. Section 220 permits a shareholder to seek inspection of certain corporate books and records subject to various conditions and limitations. [See, e.g., [here](#), [here](#) and [here](#) for blog articles on the subject.] HP provided extensive documentation relating to Hurd’s departure, but declined to produce the Covington Report, claiming that it was protected from disclosure under the attorney-client privilege and/or attorney work product doctrine. After HP refused to produce the Covington Report, plaintiff filed a Section 220 action in the Court of Chancery seeking a inspection of that document. The Court of Chancery denied plaintiff’s claim, holding that he had not met his burden of demonstrating the requisite need to override the attorney-client privilege. Espinoza appealed.

The Delaware Supreme Court held that a shareholder seeking inspection of documents pursuant to a Section 220 demand must show that the documents are “essential” to the “articulated purpose for the inspection.” The Court continued that a document is “essential” for Section 220 purposes if, at a minimum, it addresses the crux of the shareholder’s purpose, and if the essential information the document contains is not available from another source.

In application, the Court held that while plaintiff’s specific purpose was to “investigate why the Board paid tens of millions of dollars rather than dismiss [Hurd] for ‘cause,’” Espinoza did not meet his burden of showing the “essentiality” of the Covington Report, for three reasons. First, the Covington Report itself did not discuss the “for cause” issue. Second, plaintiff failed to show that the Covington Report was “central” to the Board’s decision. Finally, HP already had disclosed the information contained in the Covington Report that was essential to plaintiff’s Section 220 stated purpose. Having so concluded, the Court did not address the separate question of whether inspection of the Covington Report was precluded by the attorney-client privilege and/or attorney work product doctrine.

This decision clarifies the scope of relief to which a plaintiff is entitled pursuant to a Section 220 demand. The decision further clarifies that while a privilege/work product analysis applies to any document for which privilege/work product is claimed, in a Section 220 case, the predicate issue is whether the books and records sought to be inspected are “essential” to the plaintiff’s stated purpose.

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