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VICE CHANCELLOR

COURT OF CHANCERY
OF THE
STATE OF DELAWARE

COURT OF CHANCERY COURTHOUSE
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Re: Cook v. Hewlett-Packard Co.,
Civil Action No. 8667-VCG

Dear Counsel,

This case once again calls upon this Court to state the obvious: that the right of stockholders to documents under Section 220 is both essential to good corporate governance, and capable of being exercised in a manner that is inimical to such governance; and that we therefore must be vigilant in enforcing both rights under that Section and the limits to those rights. The Defendant Company here acquired an asset the value of which it shortly had to write down substantially, due to accounting irregularities at the acquired company *before* the acquisition. Those irregularities are being investigated by, at least, the United States Department of Justice, the Securities and Exchange Commission, and the Serious Fraud Office of

the United Kingdom. The Plaintiff here seeks to investigate wrongdoing by the Company and its board in connection with this acquisition; he seeks not only documents necessary to that inquiry (which the Company has already produced to him), but also all documents produced by, or sought from, the Company by all governmental authorities investigating wrongdoing *by the acquired entity*, together with any communications by the Company concerning those investigations. Because this material is beyond what is necessary to the Plaintiff's purpose—it is, in fact, profoundly overbroad—the Plaintiff's request must be denied.

I. Background

Hewlett-Packard Co. ("HP," or the "Company"), a Delaware corporation headquartered in Palo Alto, California, is one of the largest global technology, software and technological services providers in the country. On August 18, 2011, HP announced its plan to acquire Autonomy Corporation plc ("Autonomy") for $10.2 billion, explaining:

> Autonomy presents an opportunity to accelerate our strategic vision to decisively and profitably lead a large and growing space . . . Autonomy brings to HP higher value business solutions that will help customers manage the explosion of information. Together with Autonomy, we plan to reinvent how both unstructured and structured data is processed, analyzed, optimized, automated and protected. Autonomy has an attractive business model . . . which is aligned with HP's efforts to improve our portfolio mix.[1]

[11] Compl. ¶ 9.

Shortly after announcing the acquisition, HP's CEO, Leo Apotheker, was replaced by Margaret Whitman. On December 14, 2011, HP owned a 99% equity interest in Autonomy and "expect[ed] to acquire a 100% equity interest before the end of the first quarter of fiscal 2012."[2] At that time, HP filed a Form 10-K disclosing that:

> The acquisition date fair value consideration of $11 billion consisted of cash paid for outstanding common stock, convertible bonds, vested in-the-money stock awards and the estimated fair value of earned unvested stock awards assumed by HP. In connection with the acquisition, HP recorded approximately $6.6 billion of goodwill and amortizable purchased intangible assets of $4.6 billion. HP is amortizing the purchased intangible assets on a straight-line basis over an estimated weighted-average life of 8.8 years.[3]

Initially, Michael Lynch, Autonomy's pre-acquisition CEO, stayed on with HP, but after two unsuccessful quarters, Lynch left the Company in May 2012. On November 20, 2012, HP disclosed that it had taken an $8.8 billion goodwill impairment charge within its software segment due to accounting improprieties at Autonomy that had occurred prior to its acquisition;[4] HP had discovered the improprieties after Lynch's exit, when an Autonomy executive came forward and notified HP's general counsel of Lynch's pre-acquisition conduct, and accounting firm PricewaterhouseCoopers confirmed that Autonomy had engaged in accounting fraud. At that time, HP issued a press release, explaining:

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[2] *Id.* at ¶ 11.
[3] *Id.*
[4] That impairment charge proceeded an $8 billion impairment charge within HP's services segment, which charge the Company claimed was due to "recent trading values of HP's stock, coupled with market conditions and business trends within the Services segment." Compl. ¶ 14.

> HP is extremely disappointed to find that some former members of Autonomy's management team used accounting improprieties, misrepresentations and disclosure failures to inflate the underlying financial metrics of the company, prior to Autonomy's acquisition by HP. These efforts appear to have been a willful effort to mislead investors and potential buyers, and severely impacted HP management's ability to fairly value Autonomy at the time of the deal. . . . HP launched its internal investigation into these issues after a senior member of Autonomy's leadership team came forward, following the departure of Autonomy founder Mike Lynch, alleging that there had been a series of questionable accounting and business practices at Autonomy prior to the acquisition by HP. This individual provided numerous details about which HP previously had no knowledge or visibility.[5]

HP's stock price dropped $1.59 per share as a result.

Following the discovery of accounting fraud at Autonomy, the news media sized up Autonomy's previous accounting practices, explaining that "Autonomy had the hallmarks of a company that recognized revenue too aggressively."[6] Notably, these newspaper articles, which the Plaintiff incorporates into his Complaint, do not suggest that HP itself was involved in Autonomy's illicit accounting practices, but suggest that "questions are mounting about how H-P failed to uncover the alleged irregularities ahead of buying Autonomy;" that "to juggle two transformative initiatives at once, the board divided itself into two

[5] *Id.* at ¶ 20.
[6] *Id.* at ¶ 22.

separate teams and skirted some standard company procedure;" and that some proxy advisory firms "blamed the [HP] directors for inadequate due diligence."[7]

Upon HP's disclosure of the accounting improprieties at Autonomy, government authorities, including the Department of Justice, Securities and Exchange Commission, and UK Serious Fraud Office (the "SFO"), began investigating Autonomy's pre-acquisition accounting procedures. These investigations are ongoing, and HP is cooperating with each of these departments' investigations.

In addition, three securities fraud class action suits, three ERISA-based class action suits, and eight stockholder derivative suits were filed in the U.S. District Court for the Northern District of California, and several other stockholders made demand on HP's board to initiate derivative suits. In response to those requests, the HP board formed a Demand Review Committee, the purpose of which was to investigate whether any HP officers or directors had committed wrongdoing with respect to the Autonomy acquisition. That investigation is ongoing, and securities and derivative actions filed in California have been stayed pending the results of the Committee's investigation.[8]

The Plaintiff here, Rod Cook, made a written books and records demand on the Company on December 17, 2012, requesting documents in eighteen categories,

[7] *Id.* at ¶¶ 22, 23, 24.
[8] Def.'s Opp'n Br. at 3.

for the purported purposes of "1. Investigating possible wrongdoing, mismanagement, or violations of law by the Board and the company's senior officers; 2. further communication with the Board regarding the issues set forth above; and 3. determining whether the Board and the Company's senior officers are independent and/or disinterested and whether they have acted in good faith."[9] The categories of documents the Plaintiff has requested include (1) documents related to Autonomy's accounting practices, (2) documents reviewed by HP's board detailing HP's desire to unwind the Autonomy acquisition, (3) documents reviewed by HP's board detailing the impairment charge, (4) documents related to HP's service division's operating margin, (5) findings of HP's internal investigations regarding Autonomy's historical results, (6) findings of HP's internal investigations regarding the write down, (7) all documents produced by HP to the SEC, (8) all documents that the SEC has ordered HP to produce, (9) all documents produced by HP to the SFO, (10) all documents that the SFO has ordered HP to produce, (11) all documents produced by HP to the FBI, (12) all documents that the FBI has ordered HP to produce, (13) all documents that HP has produced to any other governmental agency, (14) all records of communication between HP and the SEC, (15) all records of communication between HP and the SFO, (16) all records of communication between HP and the FBI, (17) documents

[9] Leavengood Aff. Ex. 4 at 13.

sufficient to identify business and financial relationships between HP directors and the Company, and (18) all communications regarding any other matters identified in the request.

Without conceding that the Plaintiff is entitled to these documents, HP responded to the Plaintiff's demand by producing 2,668 pages of non-privileged documents over the course of four separate productions, which HP contends were sufficient to meet categories (1) through (6) as well as category (17).[10] Specifically, according to HP, the Company has produced "[a]ll board minutes at which Autonomy was discussed;" "[a]ll committee minutes at which Autonomy was discussed;" "[a]ll presentations concerning Autonomy that were made to the board, including those by HP's third-party financial advisors Barclays Capital and Perella Weinberg;" "[a]ll presentations concerning Autonomy that were made to the committees of the board;" "[d]irector questionnaires from 2008 to 2013;" and "[a] privilege log."[11] HP has refused to produce documents relating to the ongoing investigations by the SEC, the FBI, and the SFO.

The Plaintiff filed his Verified Complaint in this Court on June 20, 2013, requesting the same categories of documents identified in his earlier demand on the

[10] *See* Def.'s Opp'n Br. at 11 ("HP produced every single non-privileged page of every single board-level document that was responsive to requests 1 through 6 that HP could identify upon conducting a diligent search."); Pl.'s Op. Br. at 16 n.20 (acknowledging that the Company has produced "documents responsive to Request 17").
[11] Def.'s Opp'n Br. at 11.

board. The parties conducted a one-day trial on December 9, which was followed by post-trial briefing. This is my post-trial Letter Opinion.

II. Analysis

In this action, the Plaintiff requests eighteen categories of documents. The Company contends that the Plaintiff is not entitled to those documents because he lacks a proper purpose for pursuing the request; the requested documents are not necessary and essential to his stated purpose; and producing the requested documents would injure HP. Because I find that, even assuming the Plaintiff has stated a proper purpose, the Plaintiff has already received from HP all documents necessary and essential to his stated purposes, I deny the Plaintiff's request for additional books and records as overbroad.

The Plaintiff makes his document request pursuant to 8 *Del. C.* § 220, which provides that "[a]ny stockholder, in person or by attorney or other agent, shall, upon written demand under oath stating the purpose thereof, have the right during the usual hours for business to inspect for any proper purpose" a corporation's books and records.[12] In seeking records other than the stock ledger or list, "a stockholder has the burden of proof to demonstrate a proper purpose by a preponderance of the evidence. It is well established that a stockholder's desire to

[12] 8 *Del. C.* § 220(b).

investigate wrongdoing or mismanagement is a 'proper purpose.'"[13] In order for a purpose to be "proper," it must be both the plaintiff's actual purpose,[14] and, where the plaintiff has cited investigation of wrongdoing as the basis for his books and records request, the plaintiff must demonstrate a "credible basis" to infer possible wrongdoing.[15]

Even where a plaintiff has stated a proper purpose, this Court has recognized the "limited nature of the books and records remedy in contrast to the broader scope of discovery under Rule 34," noting that the Section's "very importance requires that the court act vigilantly to prevent it from being used as a tool of oppression . . . ."[16] Accordingly, "[i]t is not enough for a Section 220 claim . . . merely to satisfy the proper purpose and credible suspicion prongs of the test. Rather, the scope of such relief will typically be limited only to the inspection of those books and records that are necessary and essential to the satisfaction of the stated purpose, a burden of proof with which the plaintiff is charged."[17]

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[13] *Seinfeld v. Verizon Commc'ns, Inc*., 909 A.2d 117, 121 (Del. 2006).
[14] *See Sutherland v. Dardanelle Timber Co.*, 2006 WL 1451531, at *8 (Del. Ch. May 16, 2006) ("A defendant facing a Section 220 action may resist that demand by showing that the plaintiff's purpose, although a valid one, is not the actual purpose.").
[15] *Seinfeld*, 909 A.2d at 125; *see also Helmsman Mgmt. Servs., Inc. v. A & S Consultants, Inc*., 525 A.2d 160, 165-66 (Del. Ch. 1987) ("A mere statement of a purpose to investigate possible general mismanagement, without more, will not entitle a shareholder to broad § 220 inspection relief. There must be some evidence of possible mismanagement as would warrant further investigation of the matter.").
[16] *Highland Select Equity Fund, L.P. v. Motient Corp*., 906 A.2d 156, 157 (Del. Ch. 2006).
[17] *Id.* at 164.

As a preliminary matter, I reject the Defendant's argument that Mr. Cook lacks a proper purpose because he is "merely serving as a passive conduit for his counsel's pursuit of the company's books and records."[18] The Defendant contends that Mr. Cook initiated this suit after responding to a press release issued on November 29, 2012 by the law firm Ryan & Maniskas, LLP, which press release encouraged stockholders to contact the firm about participating in litigation against HP;[19] that Ryan & Maniskas, LLP then referred Mr. Cook to The Weiser Law Firm, P.C., which "affix[ed] Cook's name to their already-drafted [books and records] demand;" and that these facts indicate that the investigation of wrongdoing is not Mr. Cook's actual purpose in pursuing this litigation. Defense counsel sought at trial to discredit Mr. Cook's request by demonstrating that he has filed similar lawsuits in this Court, and that in those suits he was an "inactive participant . . . and had not reviewed the verified complaint before it was filed."[20] Despite that exercise, it is clear from Mr. Cook's testimony that he is well informed about management at HP and is interested in protecting his investment.[21] As the Company has failed to point to any other purpose Mr. Cook might have for

[18] Def.'s Opp'n Br. at 14.
[19] *Id.* at 8.
[20] *Id.* at 14.
[21] *See, e.g.*, Trial Tr. 7:10-11 (Cook) (explaining that since 2001, the Plaintiff had contacted management at HP roughly fifty times); *id.* 27:3-20 (Cook) (evidencing the Plaintiff's knowledge about management at HP).

pursuing the record request,[22] I must reject its argument that the investigation of wrongdoing is not Mr. Cook's actual purpose.

However, without deciding whether the Plaintiff has demonstrated a credible basis for requesting the documents he seeks,[23] I find that the Plaintiff has already received all documents necessary and essential to the satisfaction of his stated purposes. As noted above, the Plaintiff has stated as his purposes for requesting documents (1) the investigation of wrongdoing at HP, (2) communication with HP's board about possible wrongdoing, and (3) the determination of whether the members of HP's board who were involved in the Autonomy acquisition were disinterested and acted in accordance with their fiduciary duties. With respect to the Plaintiff's purpose of determining whether any HP directors were interested in the Autonomy transaction, HP has already delivered to the Plaintiff and other stockholders director questionnaires from 2008 through 2013 sufficient to identify board members' relationships,[24] and no other documents have been identified by the Plaintiff as necessary to satisfy that purpose.

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[22] *But see Pershing Square, L.P. v. Ceridian Corp.*, 923 A.2d 810, 819 (Del. Ch. 2007) (denying a books and records request based on the finding that the plaintiff's actual purpose in pursuing the 220 action was to broadcast improperly obtained confidential information); *Thomas & Betts Corp. v. Leviton Mfg. Co., Inc.*, 685 A.2d 702, 715 (Del. Ch. 1995), *aff'd*, 681 A.2d 1026 (Del. 1996) (limiting a discovery request in a 220 action where there was a showing that the plaintiff was using the record request to create leverage in pursuing its acquisition of the company).

[23] The Plaintiff argues, in effect, that the very size of the loss sustained by HP is itself sufficient to provide a "credible basis" to infer breach of duty on the part of the HP board of directors.

[24] *See, e.g.*, Pl.'s Op. Br. at 16 n.20 (acknowledging that the Company has produced "documents responsive to Request 17").

The Plaintiff has already received all documents necessary or essential for investigating wrongdoing on the part of HP's officers and directors as well. Importantly, HP produced, prior to the Plaintiff's filing this action, "every single non-privileged page of every single board-level document that was responsive to" the Plaintiff's request for documents relating to Autonomy's accounting practices, documents reviewed by HP's board detailing HP's desire to unwind the Autonomy acquisition, documents reviewed by HP's board detailing the impairment charge, documents related to HP's service division's operating margin, reports of findings of HP's internal investigations regarding Autonomy's historical results, and reports of findings of HP's internal investigations regarding the write down. Those documents included minutes from all board meetings and committee meetings at which the Autonomy acquisition was discussed, as well as all presentations that were made to the board and its committees dealing with the acquisition, including presentations made by the Company's financial advisors. Those documents are sufficient for the Plaintiff to investigate wrongdoing on the part of HP's officers and directors.[25]

The Plaintiff argues that the documents produced by HP prior to this litigation are insufficient because HP has refused to deliver documents included in

[25] To the extent that the Plaintiff argues that "[t]he documents produced by HP to Cook were irrelevant filler material and/or are so heavily redacted and sanitized as to be useless," Pl.'s Op. Br. at 16 n.19, he has made no showing that that is the case, despite ample opportunity to do so at trial and throughout briefing.

productions made to, and the findings made by, the governmental organizations investigating the pre-acquisition conduct, not of HP, but of *Autonomy*. Specifically, the Plaintiff points to the Court's finding in *Freund v. Lucent Technologies, Inc.* that "[d]ocuments relating to the SEC formal order of investigation [were] reasonably required to satisfy [the plaintiff's] stated purpose of investigating [the company's] alleged fraudulent accounting practices."[26] In that case, however, investigations by the SEC and the plaintiff had a common purpose: to uncover fraudulent accounting committed *by the suspect company*.[27] Here, the credible testimony given at trial demonstrated that the ongoing SEC, FBI, and SFO investigations focus on accounting practices that occurred at Autonomy before the acquisition, *not* at HP.[28] The newspaper articles upon which the Plaintiff relies articulate a suspicion that, had the HP board acted more carefully, the Company might not have incurred such a large loss. Because documents produced in the context of ongoing investigations could not uncover evidence of the HP board's

[26] *Freund v. Lucent Technologies, Inc.*, 2003 WL 139766, at *5 (Del. Ch. Jan. 9, 2003).
[27] *See id.* at *1 ("In response to Lucent's financial restatement, the Securities and Exchange Commission initiated a formal investigation into possible fraudulent accounting practices *at Lucent*.") (emphasis added).
[28] Trial Tr. 72:2-6 (Drew) (testifying that he had no reason to believe HP was the focus of any ongoing governmental investigations); *id.* 72:8-13 ("The focus is on the accounting fraud issues that we presented when we made the criminal referral to those—to the SFO and presented the accounting fraud evidence to the SEC. So specifically on the fraudulent conduct that occurred at Autonomy prior to the acquisition."); *id.* 72:18-23 ("My understanding, that under the relevant rules in the U.K., if the Serious Fraud Office commenced an investigation that was focused on HP, the Serious Fraud Office would be obligated to notify HP that it had started that investigation. And we have received no such notice.").

lack of oversight throughout the acquisition process at a time when Autonomy—the focus of the investigation—was still a separate entity, documents relating to those investigations cannot be necessary and essential to investigating the wrongdoing the Plaintiff suspects may have been committed by HP's officers and directors.[29]

To summarize, the documents necessary and essential to the Plaintiff's stated purpose of investigating wrongdoing on the part of HP's officers and directors are the documents that the Plaintiff has already received: board and committee minutes for meetings at which the board discussed the Autonomy acquisition, and documents reflecting presentations given at those meetings. To the extent the Plaintiff seeks additional documents—including the 750,000 pages of documents HP has provided to governmental investigators—his requests amount to a fishing expedition. Mr. Cook admitted as much on the stand when, in describing what documents he was seeking, he stated that he would "actually like to have everything."[30]

III. Conclusion

[29] In addition, I note that it is unclear to me—and the Plaintiff has not explained—how any of the documents requested would enable him to "communicate" with the board about possible wrongdoing. I therefore cannot find that documents relating to the SEC, FBI, and SFO investigations are necessary and essential to that stated purpose.

[30] Trial Tr. 9:6-7.

For the reasons explained above, the Plaintiff's request for books and record pursuant to 8 *Del. C.* § 220 is denied. The parties should submit an appropriate order.

Sincerely,

/s/ Sam Glasscock III

Sam Glasscock III