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IN THE SUPREME COURT OF THE STATE OF DELAWARE

WAL-MART STORES, INC., Defendant Below, Appellant, v. INDIANA ELECTRICAL WORKERS PENSION TRUST FUND IBEW, Plaintiff Below, Appellee.	)	No. 614, 2013 APPEAL FROM THE FINAL ORDER AND JUDGMENT DATED OCTOBER 15, 2013 OF THE COURT OF CHANCERY OF THE STATE OF DELAWARE IN C.A. NO. 7779-CS

APPELLANT'S OPENING BRIEF

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Dated: December 23, 2013

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NATURE OF PROCEEDINGS

Plaintiff-appellee Indiana Electrical Workers Pension Trust Fund IBEW ("IBEW") is a stockholder of defendant-appellant Wal-Mart Stores, Inc. ("Wal-Mart" or the "Company"). On June 6, 2012, IBEW made a demand to inspect books and records relating to allegations of bribery at Wal-Mart's Mexican affiliate. *See* 8 *Del. C.* § 220. Although the Company produced a significant volume of documents in response to the demand, IBEW filed this Section 220 action on August 13, 2012. Trial was conducted on a paper record on May 20, 2013, and Chancellor Strine entered a Final Order and Judgment on October 15, 2013. On November 5, 2013, Wal-Mart filed its notice of appeal. IBEW has cross-appealed.

The Chancery Court's order requires the Company to produce a host of materials that far exceed the limited scope of a Section 220 proceeding. The Chancery Court erroneously ordered Wal-Mart to produce materials that were never provided or presented to the Company's Board of Directors, or that post-date the events at issue by many years, and thus lack the requisite connection to the purpose for IBEW's inspection request—a determination of whether pre-suit demand on Wal-Mart's Board of Directors would be futile. The Chancery Court further erred by directing Wal-Mart to produce documents protected by the attorney-client privilege and attorney work product doctrine without conducting the stringent inquiry required to abrogate those protections. The judgment should therefore be reversed.

SUMMARY OF ARGUMENT

1. ***Expansive Scope of Production.*** The Court of Chancery committed legal error and abused its discretion in ordering the Company to produce an expansive array of documents created over an extensive period of time that is not tethered to the conceded purpose of the Section 220 demand. IBEW's ultimate goal is to prosecute a pending consolidated derivative action that asserts liability on the part of the Wal-Mart Board of Directors for allegedly failing, in 2005 and 2006, to stem certain alleged acts of foreign bribery; but because pre-suit demand was not made on the Board, IBEW sought to inspect the Company's books and records to marshal facts it may use to support an assertion of demand futility.

Wal-Mart produced responsive Board-level documents in response to IBEW's demand. However, the Chancery Court ordered the Company to produce additional documents, mostly created at the officer or lower levels of the Company, through June 6, 2012. Because these documents were not shared with the Directors and did not refer to communications with them, or because they post-date the events in question (or both), they are not focused with the requisite "rifled precision" on the predicate question of demand futility, which turns on what the Directors knew about the situation in Mexico and when they knew it. The Chancery Court determined *sua sponte* that these documents could be used to impute officers' knowledge to the Directors. This approach is contrary to Delaware law. If

uncorrected, it would permit any stockholder to use Section 220 to demand inspection of documents that were never considered by a company's board of directors, effectively allowing plenary discovery before the filing of a derivative complaint.

2. ***Abrogation of Privilege.*** The Court of Chancery also committed legal error and abused its discretion in requiring the production of documents that indisputably fall within the protections of the attorney-client privilege and the attorney work product doctrine. The Chancery Court invoked a limited exception to the attorney-client privilege, known as the *Garner* doctrine—which this Court has never applied in any context and certainly has never approved for use in a Section 220 proceeding that precedes a derivative complaint.

Even assuming, *arguendo*, the availability of *Garner*, the Chancery Court still erred by misapplying it. The Court incorrectly concluded that a stockholder making a Section 220 demand may gain access to documents otherwise protected by the attorney-client privilege and attorney work product doctrine so long as it meets the "low bar" for establishing a "proper purpose" for inspection, and asserts, like every other stockholder in a Section 220 proceeding, that the documents are necessary to complete its investigation. The Chancery Court's order would chill corporations' established right to seek legal advice and engage in otherwise privileged communications without fear that such advice and communications would be revealed to *any* stockholder who files a Section 220 demand action.

STATEMENT OF FACTS

On June 6, 2012, the Company received a letter from IBEW (the "Demand") that demanded inspection of broad categories of documents relating to allegations described in an April 2012 *New York Times* article regarding supposed bribery at the Company's subsidiary in Mexico ("WalMex Allegations"). The Demand set forth a laundry list of more than 40 requests. (A54.) The purpose for IBEW's Demand was to determine whether a litigation demand on the Board of Directors would be futile in connection with derivative litigation. (*E.g.*, A272–73; A225.)

On June 13, 2012, the Company responded to the Demand, agreeing, subject to certain conditions, to make available to IBEW Board materials such as minutes, agendas, and presentations, relating to the WalMex Allegations, as well as existing Company policies relating to Wal-Mart's Foreign Corrupt Practices Act ("FCPA") compliance. (A55.) The Company declined, however, to provide documents that were not necessary and essential to the stated purpose, or that were protected by the attorney-client privilege and work product doctrine. (A55.)

On August 1, 2012, the Company produced documents to IBEW, consisting of: policies relating to FCPA compliance, all Board and Audit Committee minutes and materials referencing the WalMex Allegations dating back to when those allegations arose in 2005, as well as Board and Audit Committee minutes and materials relating to Wal-Mart's FCPA policy and compliance program. (A57.)

On August 13, 2012, IBEW filed its Complaint pursuant to Section 220, alleging various deficiencies relating to the Company's confidentiality designations and redactions in its production, and asserting that certain documents falling within the scope of the Demand had not been produced. (A57.) On August 28, 2012, in an effort to address IBEW's concerns, the Company provided IBEW with a supplemental production. (A118.)[1]

On September 10, 2012, IBEW noticed depositions of a current senior officer, a former senior officer, and a Rule 30(b)(6) witness. (A32.) In response, the Company moved for a protective order, because—among other reasons—the deposition notices encompassed virtually every document that might relate in any way to the WalMex Allegations. (A32, 137.)

At an October 12, 2012 hearing, the Chancery Court granted the motion for a protective order in part. The Court held that IBEW's inspection purpose was whether demand on the Board would be excused. (A225.) But instead of focusing on requests tailored to get at the knowledge of the relevant Board members, the Court allowed IBEW to depose the Rule 30(b)(6) witness regarding—to use the Court's words—"what a discrete group of officers have, the ones who were involved in reporting to the relevant committees of the board or the board itself about

[1] On September 3, 2012, stockholders who had filed derivative complaints in the Delaware Court of Chancery entered into a proposed case management order that provided for, among other things, the sharing of the books and records provided to IBEW with the other co-lead plaintiffs and the filing of a consolidated amended complaint after the conclusion of IBEW's books and records action. On September 5, the Chancery Court approved the order.

[the WalMex] matter." (A232.)

To comply with the Court's October 12 ruling, the Company reviewed more than 160,000 documents. (A309.) To locate any additional responsive documents, the Company also interviewed a number of current and former employees, officers, and Directors, and it searched the data of eleven custodians. (A307–09.) The Company then provided IBEW with a further supplemental production and an updated privilege log. (A309.) On December 6, 2012, IBEW conducted a Rule 30(b)(6) deposition. (A309.) Thereafter, the parties agreed to conduct the trial on the basis of a paper record. (A296.) The sole issue presented for judicial determination was whether the Company had produced all responsive documents. (A297.)

On May 20, 2013, the Court heard oral argument and ordered the Company to produce all documents in the custody of the eleven custodians whose data the Company had previously searched relating to (1) the WalMex Allegations, (2) policies and procedures regarding FCPA compliance, and (3) policies and procedures relating to internal investigations. (A502.) The Court's ruling also required Wal-Mart to produce documents in the files of a twelfth custodian, Roland A. Hernandez, a former Director and former Chairman of Wal-Mart's Audit Committee. (A605–07.) It also ordered the Company to search the files of any person who served as an assistant to any of the twelve custodians. (Ex. A ¶ 1(a), (c).) The Court further held that IBEW was entitled to documents protected by the attorney-

client privilege, invoking the exception articulated in *Garner v. Wolfinbarger*, 430 F.2d 1093 (5th Cir. 1970) (the "*Garner* doctrine"). (*Id.* ¶ 2(c).) The Court also applied that ruling to documents protected by the attorney work product doctrine.

At a June 4, 2013 hearing on the parties' competing forms of order, the Court also addressed IBEW's request for production of documents from the Company's disaster recovery (or "backup") tapes, which was made for the first time at the June 4 hearing. (A638.)

On October 15, the Court entered the Final Order and Judgment, which granted even broader relief than IBEW had requested. (Ex. A.) The Final Order requires the Company to produce (1) officer (and lower)-level documents regardless of whether they were ever provided to the Company's Board of Directors or any committee thereof, (2) documents spanning a seven-year period and extending well after the timeframe at issue, (3) documents from disaster recovery backup tapes, and (4) any additional responsive documents "known to exist" by the undefined "Office of the General Counsel." (*Id.* ¶¶ 1(b), 1(f), 1(g), 1(h), 2(a)(ii), 2(b).) The Final Order also requires the production of, among other things, "contents of Responsive Documents that are protected by the attorney-client privilege . . . , and the contents that are protected by the attorney work-product doctrine under Court of Chancery Rule 26(b)(3)." (*Id.* ¶ 2(c).)

ARGUMENT

I. THE COURT OF CHANCERY ERRED IN ORDERING WAL-MART TO PRODUCE DOCUMENTS THAT FAR EXCEED THE PROPER SCOPE OF SECTION 220

A. Question Presented

Does the Final Order violate established principles of Delaware law because its scope is overbroad as to the source, content, and timeframe of the documents to be presented for inspection? This issue was preserved for appeal. (A313–22; A396–400; *see also* A576–90.)

B. Standard Of Review

Errors of law—including the application of the pertinent Section 220 legal standards—are reviewed *de novo*. *City of Westland Police & Fire Ret. Sys. v. Axcelis Techs., Inc.*, 1 A.3d 281, 282, 287 (Del. 2010); *see also In re Heller*, 669 A.2d 25, 29 (Del. 1995). The Chancery Court's decision will be reversed where it fails to "tailor the inspection to the stockholder's stated purpose" and to "harmonize[]" "the interests of the corporation . . . with those of the inspecting stockholder," *Sec. First Corp. v. U.S. Die Casting & Dev. Co.*, 687 A.2d 563, 569 (Del. 1997), or where it creates a new rule of law that fails to "comport with existing Delaware law or sound policy," *King v. Verifone Holdings, Inc.*, 12 A.3d 1140, 1145 (Del. 2011). It is only in the "[a]bsen[ce] [of] any apparent error of law, [that] this Court reviews for abuse of discretion the decision of the trial court regarding the scope of a stockholder's inspection of books and records." *Sec. First*

Corp., 687 A.2d at 569; *see also Espinoza v. Hewlett-Packard Co.*, 32 A.3d 365, 371–72 (Del. 2011). Undergirding this Court's review is the tenet that "the burden of proof is always on the party seeking inspection to establish that *each* category of the books and records requested is essential and sufficient to the stockholder's stated purpose." *Thomas & Betts Corp. v. Leviton Mfg. Co.*, 681 A.2d 1026, 1035 (Del. 1996) (emphasis added).

C. Merits Of The Argument

The scope of production ordered by the Chancery Court is unprecedented and contrary to bedrock Delaware law that Section 220 inspection demands must be made with "rifled precision." The Chancery Court afforded IBEW the type of discovery that is *only* available in a plenary action. Moreover, the Final Order is premised on the Court's erroneous and unfounded ruling that the knowledge of officers and other lower-level employees is conclusively imputed to directors for the purposes of a Section 220 analysis, so long as the officer or employee is shown to have been aware of a document and to have interacted with the directors—a proposition advanced by neither party. (A553–54 [reasoning that Section 220 plaintiffs are "entitled to the inference" that officers who "regularly interacted with the audit committee during the time period in question . . . do what they're supposed to do and provide material information in their possession to the audit committee," and that whether such information was *in fact* provided was "a matter for the plenary

case"]; *see also* A593–94; A610; A611.)[2]

It is black-letter Delaware law that even a stockholder with a proper purpose under Section 220 is not thereby entitled to inspect every document within the corporation that may touch on the subject matter that motivated its inspection request. Rather, the stockholder must show that the *specific* books and records it seeks to inspect are "essential to [the] accomplishment of the stockholder's articulated purpose." *Espinoza*, 32 A.3d at 371–72. Here, IBEW's inspection purpose was limited to determining whether demand on the current Board would have been futile—and consequently whether it should be excused. (A225; *accord* A272–73.) Thus, IBEW was only entitled to documents truly "essential" to showing demand futility.

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 unavailable from another source." *Espinoza*, 32 A.3d at 371–72 (citations omitted); *see also Seinfeld v. Verizon Commc'ns, Inc.*, 909 A.2d 117, 121–25 (Del. 2006); *Thomas & Betts Corp.*, 681 A.2d at 1035. "[W]hether or not a particular document is essential to a given inspection purpose is fact specific and will necessarily depend on the context in which the shareholder's inspection demand arises." *Espinoza*, 32 A.3d at 372.

[2] This and other problematic aspects of the Order were made *sua sponte* by Chancellor Strine. *See Winshall v. Viacom Int'l, Inc.*, 76 A.3d 808, 813 n.12 (Del. 2013) (reminding lower court that it should not pass upon an issue that no party had contested); *Gatz Props., LLC v. Auriga Capital Corp.*, 59 A.3d 1206, 1219 (Del. 2012) (similar).

As this Court has held, a books and records demand "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 La. Mun. Police Emps. Ret. Sys. v. Hershey Co.*, 2013 Del. Ch. LEXIS 273, *38–39 (Del. Ch. Nov. 8, 2013) ("A Section 220 action is not a forum in which to seek the wide-ranging categories of documents that may be appropriate for discovery under Court of Chancery Rule 34."). Although Section 220 proceedings are one of several "tools at hand" that derivative plaintiffs may use to meet their burden under Rule 23.1, Section 220 itself does not permit and should not "be confused" with "discovery." *Beam v. Stewart*, 845 A.2d 1040, 1056 n.51 (Del. 2004); *Rales v. Blasband*, 634 A.2d 927, 934 n.10 (1993); *Sec. First Corp.*, 687 A.2d at 570.

Section 220 orders must be "circumscribed with rifled precision" to (1) serve *only* the proper purposes articulated and (2) protect the company's rights and interests, which include its privileges. *Sec. First Corp.*, 687 A.2d at 570; *Brehm v. Eisner*, 746 A.2d 244, 266 (Del. 2000); *Thomas & Betts Corp.*, 681 A.2d at 1035; *Hershey Co.*, 2013 Del. Ch. LEXIS 273, at *38–39. Where the Chancery Court's decision fails to "tailor the inspection to the stockholder's stated purpose," error is patent and reversal is required. *Sec. First Corp.*, 687 A.2d at 569.

The Final Order fails this standard in at least four ways. First, it requires Wal-Mart to produce documents that were prepared by officers and employees;

that do not refer to communications with and were not even intended for the Board, much less seen by the Directors; and that, therefore, are presumptively irrelevant to an evaluation of the disinterestedness and independence of the Company's Directors under Rule 23.1. Second, the Final Order requires the Company to produce documents spanning a nearly seven-year period—far beyond the period of the alleged wrongdoing here. Third, the Final Order improperly requires the Company to search disaster recovery tapes—a task that is unduly burdensome and oppressive, and that was requested only after trial. Finally, the Chancery Court erred by *sua sponte* requiring the Company to produce documents "known to exist" by "the Office of the General Counsel of [Wal-Mart]." This effectively creates a thirteenth "custodian," the extent of which is unknown, since the phrase is entirely ambiguous: it could either refer to the then-chief legal officer of the Company, or to some group of persons known only to the Chancery Court—perhaps to the entire worldwide in-house legal department of Wal-Mart. Whatever the interpretation, this relief was neither requested by IBEW, nor warranted under the circumstances.

1. The Court of Chancery Committed Legal Error In Ordering The Company To Produce Officer-Level Documents

The Chancery Court committed legal error in ordering the Company to produce documents that were never presented to or created by members of the Company's Board of Directors. (Ex. A ¶ 1(g).)

It is undisputed that the purpose of IBEW's inspection here is limited to de-

termining whether demand on the current Board with respect to the WalMex Allegations would be futile. (A225; A272–73.) Under applicable law, a demand futility analysis in the context of a *Caremark* claim, such as that at issue here, turns on what *directors* knew about the alleged wrongdoing and when they obtained that information. *See Wood v. Baum*, 953 A.2d 136, 141 (Del. 2008) (to prove demand was futile because individual directors were not independent or disinterested, plaintiffs must allege particularized facts "demonstrat[ing] that the directors acted with scienter, *i.e.*, that they had 'actual or constructive knowledge' that their conduct was legally improper"); *accord Stone v. Ritter*, 911 A.2d 362, 370 (Del. 2006). IBEW's inspection thus must be limited with "rifled precision" to only those documents that reflect what, if anything, the current *Directors* of the Company knew in 2005 and 2006 when allegations of bribery in Mexico were allegedly brought to the attention of certain Company officers—not what the officers or other employees might have known. *See Espinoza*, 32 A.3d at 372 & n.16 (distinguishing Section 220's requirement that each category of books and records sought be "*essential* to the accomplishment of the stockholder's articulated purpose" from Delaware Court of Chancery Rule 26(b)(1)'s far more lenient relevance standard).[3]

Despite the Company's comprehensive search for documents from custodi-

[3] To this end, Wal-Mart has produced to IBEW meeting agendas, minutes, and presentations demonstrating what, if anything, the Directors knew about the WalMex Allegations, as well as documents reflecting any substantive presentations to, or communications with, current Directors concerning the WalMex Allegations from the files of the eleven key custodians searched by the Company.

ans who might have been expected to have reported to the Board with respect to such activities, the Final Order requires the Company to pursue another, even more extensive and burdensome search for additional books and records that might have been created by numerous officers and employees that have no logical relevance to the question posed in the demand futility inquiry at issue here—what current Directors knew about the WalMex Allegations in 2005 and 2006. These documents, which were never provided to Directors, cannot bear directly—let alone with "rifled precision"—on the Directors' knowledge about allegations of bribery in Mexico. Without that required link, such documents cannot, as a matter of law, be necessary and essential to IBEW's purpose as the Chancery Court defined it. To the contrary, the broad production ordered by the Chancery Court is tantamount to the very kind of plenary discovery that is *prohibited* under Section 220, and substitutes scattershot for the "rifled precision" standard. *See Sec. First Corp.*, 687 A.2d at 570 (reversing Section 220 order that failed to scrutinize whether the requested documents were reasonably related to plaintiff's stated purpose); *Highland Select Equity Fund, L.P. v. Motient Corp.*, 906 A.2d 156, 165 (Del. Ch. 2006) (holding that Section 220 is "not a way to circumvent discovery proceedings, and is certainly not meant to be a forum for the kinds of wide-ranging document requests permissible under Rule 34"). Indeed, if this Court were to hold that officer (and lower)-level documents beyond those referring to communications with the Board are

necessary to consideration of demand futility, then there would be no limit to the "indiscriminate fishing expedition[s]" that would be allowed under Section 220 in virtually every future stockholder action. *Id.* at 565.

The Chancery Court ordered the production of officer-level documents because it inappropriately and *sua sponte* invented a presumption—not grounded in any authority—that officer-level knowledge should be imputed wholesale to the Board. (A610; A611 ["[I]f you can say Strine received a five-point memo . . . [and] two days later he spoke to the audit committee chair, I think at a plaintiff level—you know, 23.1, the plaintiffs are entitled to the inference if they said that the chairman of the audit committee was informed of what Strine knew."].) The Chancery Court's presumption contravened clear Delaware law proscribing this sort of imputation of knowledge as a substitute for "facts specific to each director." *E.g.*, *Desimone v. Barrows*, 924 A.2d 908, 943 (Del. Ch. 2007) ("Delaware law does not permit the wholesale imputation of one director's knowledge to every other for demand excusal purposes."); *Rattner v. Bidzos*, 2003 WL 22284323, *11 (Del. Ch. Sept. 30, 2003) (declining to impute knowledge based on defendants' positions).

As a matter of law, officer (or lower)-level documents are not necessary or essential to IBEW's purpose of determining demand futility absent *actual evidence* that they referred to communications with members of the Board upon which de-

mand ordinarily should have been made (but was not). The Chancery Court's presumption of imputation is contrary to this Court's precedents requiring narrow tailoring, and it fails to "comport with existing Delaware law or sound policy." *Sec. First Corp.*, 687 A.2d at 570 (reversing inspection order where no facts indicated that the information related to the plaintiff's purpose); *King*, 12 A.3d at 1145.

2. The Court of Chancery Committed Legal Error In Ordering The Company To Search For Documents Created Or Reviewed During A Seven-Year Period

The Chancery Court erred in requiring the Company to search for and produce responsive data beyond the 2005–2006 time period. (Ex. A ¶ 1(f).) IBEW's Section 220 demand was grounded in the theory that, in the 2005–2006 timeframe, allegations of bribery were brought to the attention of at least one former Director, but the Company did not adequately investigate the issues. (*See* A253–55.) IBEW itself acknowledged that the relevant time period is 2005–2006. (*See* A273.) But the Chancery Court expanded the time period for which the Company would be required to search the data of twelve individuals, as well as their assistants, generated over nearly seven years, from 2005–2012. Again, this order violates the bedrock principle that inspections must be limited with "rifled precision," and it warrants reversal. *Sec. First Corp.*, 687 A.2d at 570.

3. The Court of Chancery Committed Legal Error In Ordering The Company To Search Disaster Recovery Tapes For Data From Two Custodians

The Chancery Court committed legal error in requiring the Company to collect and search the data from disaster recovery tapes for two custodians, or to explain why such a collection would not be feasible. (Ex. A ¶ 2(a)(ii).) With this requirement, the Final Order transforms a Section 220 inspection into a burdensome, time-consuming endeavor, rather than the summary proceeding it is intended to be, on the naked assumption that disaster recovery tapes might contain something helpful. *See* 8 *Del. C.* § 220(c). To our knowledge no Delaware court has ever ordered a company to search backup tapes for production in a Section 220 action. Indeed, even if such a demand had been made under the far more inclusive standard of Rule 34, IBEW would not be entitled to discovery of backup tapes. *See Genger v. TR Investors, LLC*, 26 A.3d 180, 193–94 (Del. 2011).

In fact, the requirement to search disaster backup tapes constitutes a surprising reversal of position. At the June 4 hearing, the Chancery Court stated:

> [N]o more new custodians, backup tapes. I mean, unless what you're thinking of is you would like to . . . set a land speed record for the fastest reversal that ever came from Dover. . . . [L]et's just focus on the fact that this is a 220 action.

(A638.) The Company respectfully submits that the Chancery Court was correct the first time.

4. The Court of Chancery Committed Legal Error In Ordering Production Of Documents "Known To Exist" By The "Office Of The General Counsel Of Wal-Mart"

Lastly, the Chancery Court committed legal error by *sua sponte* ordering the production of documents "known to exist by . . . the Office of the General Counsel of Wal-Mart." (Ex. A ¶ 1(g).) This obligation constitutes a post-trial addition by the Chancery Court, which was never a subject of the trial of this action. Nor is it a document category as to which the Company had any opportunity to brief and argue, and if left standing would impose impossible obligations on Wal-Mart with which it cannot comply.

The phrase "Office of the General Counsel" appears to be a term coined by the Chancery Court; it does not appear in the parties' briefs, and no such organizational unit even exists within the Company. Had Wal-Mart been permitted to brief this issue, the Chancery Court could have been informed of this fact, and that aspect of the Order could have been modified. But since Wal-Mart was not afforded that opportunity, the requirement that the Company produce documents "known to exist by" that undefined and unidentified "Office" is vague and ambiguous. If the phrase is understood to extend to the Company's entire in-house legal infrastructure, Wal-Mart would be forced to search for and review a vast swath of materials from a group that currently numbers more than 325 employees in the United States alone. The documents in the files of most of those employees are likely to have no

perceptible bearing whatsoever on the plaintiff's attempt to demonstrate demand futility—and a great many of them are *privileged*. Beyond that, the Company would somehow have to determine what other documents, somewhere outside the files of the legal department, are "known to exist" by the "Office." This type of sweeping, indiscriminate production order flies in the face of Section 220's mandate that the Chancery Court narrowly circumscribe Section 220 relief to serve only the plaintiff's stated purpose. *Sec. First Corp.*, 687 A.2d at 570; *Espinoza*, 32 A.3d at 371–72.

If the meaning of "Office of the General Counsel" were known to embrace all in-house counsel (both past and present), or even just some significant subset of that group, compliance with the provision would present countless problems and impose undue burden. It is not clear, for example, how the Company could certify it has gathered all of the responsive documents within the knowledge of the "Office." Moreover, requiring the Company to ascertain the knowledge of individuals within this "Office" inevitably would raise a host of issues related to privilege—which could require additional briefing of the *Garner* and Rule 26 issues, discussed next.

The Chancery Court's Order lacks the requisite "precision" in all these respects. *Sec. First Corp.*, 687 A.2d at 570; *Espinoza*, 32 A.3d at 371–72.

II. THE COURT OF CHANCERY ERRED IN ORDERING WAL-MART TO PRODUCE DOCUMENTS PROTECTED BY THE ATTORNEY-CLIENT PRIVILEGE AND WORK PRODUCT DOCTRINE

A. Question Presented

Did the Court of Chancery err in ordering Wal-Mart to produce to IBEW in this Section 220 proceeding documents that indisputably are protected by both the attorney-client privilege and the attorney work product doctrine? This issue was preserved for appeal. (A322–42; A396–400; *see also* A541; A552; A616–17; A635–39; A648; A662–63.)

B. Standard Of Review

This Court "reviews a trial court's application of the attorney-client privilege and work product immunity doctrine *de novo*, insofar as they involve questions of law." *Espinoza*, 32 A.3d at 371. Factual findings are reviewed for clear error. *Amirsaleh v. Bd. of Trade of N.Y.*, 27 A.3d 522, 529 (Del. 2011).

C. Merits Of The Argument

The Chancery Court erred as a matter of law in requiring Wal-Mart to produce documents that indisputably are protected by the attorney-client privilege and the work product doctrine. These crucial protections are designed to allow open communication between clients and their counsel. *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981); *Moyer v. Moyer*, 602 A.2d 68, 72 (Del. 1992); *Tackett v. State Farm Fire & Casualty Ins. Co.*, 653 A.2d 254, 260 (Del. 1995). Where the client is a corporation, the privilege belongs to the corporate entity, not its stock-

holders, and cannot be abrogated simply because a stockholder—particularly one who has not yet established demand futility—seeks books and records under Section 220. The Chancery Court's ruling to the contrary was based on a legally erroneous implementation of the "fiduciary exception" to the privilege that has become known as the *Garner* doctrine.

Although the *Garner* doctrine has been summarily invoked by the Chancery Court in a few cases, this Court has never actually approved its use in any kind of litigation—and it certainly has never held that *Garner* can abrogate the attorney-client and work product privileges in the limited context of an inspection demand under Section 220. In fact, this Court has only mentioned *Garner* twice: In *Zirn v. VLI Corp.*, 621 A.2d 773, 781–82 (Del. 1993), a class action where the Court mentioned *Garner* only in dicta; and in *Espinoza*, a Section 220 action in which the Court did not reach the privilege question because the Court held that the stockholder had not satisfied the "predicate" standard under Section 220—that the document sought was "essential" to the plaintiff's inspection purpose. 32 A.3d at 365. In holding that the Section 220 "essentiality" inquiry must "logically precede any privilege or work product inquiry," *Espinoza* made clear that Section 220 does not simply subsume these protections. *Id.* The Chancery Court's ruling directly contravenes *Espinoza*, as explained below.

The Final Order and Judgment requires this Court to address, for the first

time, the fundamental tension inherent in applying the *Garner* exception in derivative litigation before the question of demand futility has been resolved. Invariably, a Section 220 inspection demand is made by a stockholder who has not yet been authorized to step into the shoes of the corporation. Allowing routine access to attorney-client privileged or attorney work product materials at the pre-litigation stage would ensure that such requests are made in every Section 220 proceeding, resulting in protracted litigation and appeals such as this one—and clearly subverting the summary nature of the Section 220 proceeding.

Section 220 gives a stockholder more rights to inspect corporate books and records than a stranger would have. But the stockholder pursuing a Section 220 proceeding does not (and may never) represent the interests of the corporation and is often represented by lawyers who have their own financial incentives in the litigation that are contrary to the interests of the corporation. Accordingly, a stockholder in a Section 220 action should neither expect nor be given routine access to the company's protected documents. The adverse consequences of doing so could be avoided by prohibiting, or at a minimum sharply circumscribing, the use of the *Garner* exception in the Section 220 context.

Assuming, *arguendo*, that *Garner* may be invoked at all in connection with a Section 220 inspection demand, the Chancery Court nonetheless erred as a matter of law in requiring production of protected materials here. The Chancery Court

collapsed *Garner*'s stringent threshold for invading the privilege into Section 220's far more lenient "proper purpose" inquiry, effectively rendering privileged documents available any time a stockholder can plead a viable Section 220 claim. If affirmed, that ruling would largely eviscerate the attorney-client privilege and work product doctrine in Delaware, since stockholders (and their lawyers) will make a *Garner* argument in every Section 220 case. Reversal is required because *Garner* and its progeny rightly require a much higher showing than IBEW made here before production of protected materials may be compelled by a court.

1. The Court of Chancery Committed Legal Error By Improperly and Incorrectly Applying The *Garner* Doctrine To Privileged Communications

In *Garner*, a plenary case that involved derivative and direct claims, the court held that when a company is "in suit" against its stockholders, the "obligations . . . that run from corporation to shareholder" "must be given recognition in determining the applicability" of the attorney-client privilege. 430 F.2d at 1102. The court emphasized that "[d]ue regard must be paid to the interests of nonparty stockholders, which may be affected by impinging on the privilege," and that the corporation "is vulnerable to suit by shareholders whose interests or intention may be inconsistent with those of shareholders." *Id.* at 1101 n.17.

Garner itself makes clear that the "fiduciary exception" should only be applied "where the corporation is *in suit* against its stockholders on charges of acting

inimically to stockholder [or its own] interests." 430 F.2d at 1103–04 (emphasis added). It is only then that "protection of those interests as well as those of the corporation and of the public require that the availability of the privilege be subject to the right of stockholders to show cause why it should not be invoked in the particular instance." *Id.*

Accordingly, the *Garner* court held that a stockholder could access a company's privileged communications in the context of plenary litigation, and only then upon a showing of "good cause." *Id.* at 1104. And the "good cause" test is a rigorous one. It would be "a gross mistake to believe that shareholder interests would uniformly, or even perhaps regularly, be advanced by a rule of discovery that automatically required disclosure of confidential business information or plans to shareholders who assume for themselves the role to speak for others in bringing . . . derivative litigation." *Gioia v. Texas Air Corp.*, 1988 Del. Ch. LEXIS 30, *7–8 (Del. Ch. Mar. 4, 1988). Even when stockholders have satisfied Rule 23.1's hurdles to stand in the shoes of the corporation, "discovery of lawyer-client confidential communications is not automatic." *In re Fuqua Indus., Inc. S'holders Litig.*, 1999 WL 959182, at *3 (Del. Ch. Sept. 19, 1999). Rather, "a court should be reluctant to erode" a company's attorney-client privilege. *Deutsch v. Cogan*, 580 A.2d 100, 106 (Del. Ch. 1990) (citing *Upjohn*, 449 U.S. at 396).

Companies and stockholders alike benefit from the availability of confiden-

tial legal advice, and Delaware courts have embraced the U.S. Supreme Court's view of the attorney-client privilege as "critical" to "'encourag[ing] full and frank communication between attorneys and their clients and thereby promot[ing] broader public interests in the observance of law and administration of justice," including where the client is a corporation. *Zirn*, 621 A.2d at 781 (quoting *Upjohn*, 449 U.S. at 389); *In re Lyle*, 74 A.3d 654 (Table) (Del. 2013); *Moyer*, 602 A.2d at 72; *Deutsch*, 580 A.2d at 104, 106. If the *Garner* doctrine were applied too leniently, so that stockholder-plaintiffs could routinely access protected materials in connection with a Section 220 demand, it would encourage "strike suits" and other "harassment suits by minority stockholders" with "suspect motives," causing "deterioration of candid attorney-client communication and effective corporate management," and incentivizing companies to settle dubious claims when faced with demands for privileged communications. *Cox v. Admin. U.S. Steel & Carnegie*, 17 F.3d 1386, 1414 (11th Cir. 1994); *Fausek v. White*, 965 F.2d 126, 131 (6th Cir. 1992); *Ward v. Succession of Freeman*, 854 F.2d 780, 786 (5th Cir. 1988); *Cole v. Wilmington Materials, Inc.*, 1993 Del. Ch. LEXIS 106, *7 (Del. Ch. Jul. 1, 1993).

For precisely these reasons, only a plaintiff who "satisfies the applicable tests . . . may claim to represent the economic interests of the corporate client," and it is only such a plaintiff who may rightfully claim "good cause" to access privileged materials in aid of their derivative actions. *Cole*, 1993 Del. Ch. LEXIS 106,

at *4; *Grimes v. Donald*, 673 A.2d 1207, 1216 (Del. 1996); *In re Bairnco Corp. Sec. Litig.*, 148 F.R.D. 91, 98 n.3 (S.D.N.Y. 1993). To demonstrate "good cause," *Garner* requires stockholder plaintiffs to articulate on the strength of an *existing* discovery record an "obviously colorable claim." *Deutsch*, 580 A.2d at 108. If that test is met, plaintiffs must establish the *necessity* of the privileged documents to the prosecution of that claim, including that the information is unavailable from any non-privileged sources. *Grimes v. DSC Commc'ns Corp.*, 724 A.2d 561, 568 (Del. Ch. 1998); *see also, e.g.*, *Espinoza*, 32 A.3d at 370 n.9; *Saito v. McKesson HBOC, Inc.*, 2002 WL 31657622, *13 (Del. Ch. Nov. 13, 2002).

It is no surprise that IBEW did not make these showings here. *Garner* contemplates that plaintiffs will *already* have taken enough discovery and gathered enough facts to articulate an "obviously colorable claim," *Deutsch*, 580 A.2d at 108, and will then—*only* then—have evaluated the *necessity* of the privileged documents, including whether the information is unavailable from other, non-privileged sources. *Grimes v. DSC Commc'ns Corp.*, 724 A.2d at 568; *see also, e.g.*, *Espinoza*, 32 A.3d at 370 n.9; *Saito*, 2002 WL 31657622, at *14 (*Garner* inapplicable where plaintiff had already "obtained the necessary underlying information . . . during discovery"); *In re Fuqua Indus., Inc. S'holders Litig.*, 2002 WL 991666, *5 (Del. Ch. May 2, 2002) (granting third motion to compel under *Garner* only after plaintiffs established through discovery that information in privileged

documents was otherwise unavailable).

The standard under Section 220 for the right to inspect a corporation's books and records imposes a much lower bar for the stockholder, who needs only to demonstrate a "proper purpose." In fact, this Court has explained that "the 'credible basis' standard" under Section 220 "sets the lowest possible burden of proof." *Seinfeld*, 909 A.2d at 123; *see also Thomas & Betts Corp.*, 681 A.2d at 1031. This "low[]" burden cannot, as a matter of law, be the same as the rigorous test under *Garner*. *Seinfeld*, 909 A.2d at 123; *Espinoza v. Hewlett-Packard Co.*, Del. Ch., C.A. No. 6000-VCP, Parsons, V.C. (Mar. 25, 2011), Tr. at 22:19–23 (Transcript of Oral Argument) ("I reject the plaintiff's contention . . . that to state a proper purpose under Section 220 related to corporate wrongdoing automatically means that a plaintiff has stated an obviously colorable claim . . . .").

Here, Chancellor Strine committed legal error by expressly conflating the two standards: "I think that [IBEW has] met the 220 claim. I think, honestly, Wal-Mart's own public statements about this suggest that there were some real concerns about what was going on in Mexico and whether it was legal. So I think the colorable claim [under *Garner*] is articulated." (A586; A587.) In collapsing together the standards, the Chancery Court erroneously disregarded this Court's holding that the Section 220 inquiry poses a "predicate question"—whether the shareholder has stated a proper purpose—that must be addressed *before* considering challenges

to the Company's privilege, *Espinoza*, 32 A.3d at 374, and disregarded the further, and strong, showings the stockholder must then make under *Garner*.

The Chancery Court misconstrued *Garner*'s "necessity" factor to be satisfied simply because the plaintiff's Section 220 purpose was to investigate allegations in the *New York Times* concerning corrupt payments supposedly made by WalMex employees in Mexico, and how Wal-Mart investigated those allegations. The Court stated: "[W]here there's a colorable basis that part of the wrongdoing was in the way the investigation itself was conducted, I think it's very difficult to find those documents by other means." (A587; A589.) But IBEW made no showing that the facts concerning Wal-Mart's investigation could only be discovered from Wal-Mart's *privileged* documents; the Chancery Court merely found that IBEW's task would be made "more difficult" without the production of such privileged documents. Nothing in *Garner* suggests that the "fiduciary exception" applies whenever discovery is made more difficult because a corporation refuses to waive its privileges. *See, e.g.*, *Fuqua*, 1999 WL 959182, at *3 (refusing to set aside attorney-client privilege where plaintiffs did not "exhaust[] every available method of obtaining the information they seek").

The Chancery Court pointed up the error in its own approach by stating that "anytime a [large] corporation chooses not to engage expensive outside advisors to do an investigation" privileged materials are the only way to investigate alleged

wrongdoing by the Board. (A576.) Privilege determinations, however, should not turn on whether an investigation is performed by outside or in-house counsel. The attorney-client privilege and work product doctrine apply equally in both cases. Such a result inevitably will chill—if not stop cold—exactly the sort of internal compliance investigations that are consistent with a board or directors' duty of oversight. *Stone*, 911 A.2d at 372.

Equally troubling, the Chancery Court's rulings under *Garner* arguably go beyond the documents identified in the Company's privilege log and instead extend to materials identified in the subsequent searches "contemplated by" the Court's Final Order (Ex. A ¶¶ 1(c), (g)-(h), 2(c)), ignoring in the process the requirement that the standards under Section 220 and *Garner* be satisfied for each *specific* communication sought. *Espinoza*, 32 A.3d at 371–72. For example, although any documents in the possession of the "Office of the General Counsel" (whatever that term is interpreted to mean) are highly likely to be privileged or attorney work product, Wal-Mart could be required to produce these documents without any opportunity to assert these protections.

The Chancery Court's ruling is incompatible with one of the principal goals of *Garner*: providing a meaningful check on stockholders' demanding production of privileged materials as a matter of routine. *Id.* at 374; *Deutsch*, 580 A.2d at 106; *Gioia*, 1988 WL 18224, at *2; *see also Garner*, 430 F.2d at 1101 n.17. Indeed, the

Chancery Court's ruling turns these principles on their head: attorney-client privileged communications automatically will become fair game in Section 220, unimpeded by any rational limitation based on the requirement of establishing "good cause." Wal-Mart respectfully submits that the Chancery Court's standard must be rejected, as it would inevitably lead to widespread misuse of inspection demands to force production of a corporation's most sensitive attorney-client communications.

If affirmed, the ruling below would threaten the ability of Delaware corporations to manage their businesses without fear that a stockholder—*any stockholder*—could access their privileged documents merely by serving an inspection demand. Such a result directly conflicts with the longstanding rule that the corporation's privilege may be pierced by stockholders only following a "discriminating, particularized inquiry" that protects the interests of the corporation and *all* of its stockholders. *Gioia*, 1988 Del. Ch. LEXIS 30, at *7–8; *see also Deutsch*, 580 A.2d at 106 (noting that *Garner*'s rigorous framework serves *Upjohn*'s goal of predictability). It would also ignore the fundamental tenet that the *corporation*—not its stockholders—holds the privilege, and thus controls the right to protect or waive it, except in rigorously restricted circumstances. *Deutsch*, 580 A.2d at 107.

Moreover, because satisfying *Garner*'s necessity prong requires a plaintiff to explore all other possible sources for obtaining the information contained in privileged documents, an effortless assertion of *Garner* in the context of Section 220—

historically, a summary and abbreviated procedure aimed at paring back, rather than expanding, the shareholder and derivative action dockets, *see, e.g.*, *Brehm*, 746 A.2d at 267; *Grimes v. Donald*, 673 A.2d at 1216 & n.11; *Rales*, 634 A.2d at 934–935 & n.10—would necessarily convert nearly all Section 220 proceedings into convoluted, drawn-out battles in which the parties argue about what discovery *might* eventually yield. This cannot serve the interests of the corporation, the public, or the Chancery Court itself, much less Section 220's goal of achieving "prompt processing and disposition." *Mite Corp. v. Heli-Coil Corp.*, 256 A.2d 855, 857–58 (Del. Ch. 1969) ("Administration of the statute will present special difficulties if the 'purpose' clause permits open-end litigation" eschewing the "narrow nature of the act" in favor of "broad defensive as well as offensive purpose[s] in battles over corporate control . . . .").

2. The Court of Chancery Committed Legal Error By Improperly Applying *Garner* To Attorney Work Product

The Chancery Court also vitiated the protections otherwise afforded to Wal-Mart's attorney work product documents. Delaware law recognizes that such documents must be afforded the highest level of protection due to their extremely sensitive nature—yet the Chancery Court failed to address the factors enumerated under Court of Chancery Rule 26(b)(3) that are to be used in deciding whether work product protection should be undone, and relied instead on its flawed analysis under *Garner*: "[f]or the same reason I mentioned with respect to *Garner*, I believe

the work product doctrine documents also have to give way." (A590.)

This too was reversible error. Courts are "required to apply a more stringent standard to the work product assertion to guard against disclosure of the mental impressions of counsel." *Tackett*, 653 A.2d at 260; *see also N.J. Carpenters Pension Fund v. infoGROUP, Inc.*, 2012 WL 3711378, at *5 (Del. Ch. Aug. 16, 2012) ("[i]n contrast [to *Garner*], Court of Chancery Rule 26(b)(3) sets a more stringent standard for access generally to [attorney work product]"). Rule 26(b)(3) reflects the judiciary's policy that it is essential for a company's attorneys to further the adversarial process without fear that their private thoughts and impressions will later be exposed. If they cannot do so, the company will necessarily suffer—as will the stockholders who purport to act in its interests. Rule 26(b)(3) thus provides that attorney work product is discoverable only when a party has "substantial need" for materials that cannot be otherwise obtained without "undue hardship." Opinion work product is subject to an even more stringent standard and should not be disclosed unless a party can show that the documents are directed to a pivotal issue and the need for the information is compelling. *Tackett*, 653 A.2d at 262.

As Wal-Mart emphasized in its trial briefs, the documents its attorneys prepared during the course of the investigation in 2005 and 2006 unquestionably contained the mental impressions and analysis of those attorneys, formed in anticipation of litigation related to the WalMex Allegations. (A324.) However, despite

the clear admonition under Rule 26 that work product protections can be overcome only in rare circumstances, the Chancery Court invoked *Garner* and summarily ordered that work product be turned over to plaintiff. (A590.)

By requiring production of Wal-Mart's attorney work product documents based on Section 220's "low[]" bar, the Chancery Court misapplied *Garner* and failed to engage in the necessary analysis of whether IBEW had established "good cause" for accessing Wal-Mart's attorney work product. *See Saito*, 2002 WL 31657622, at *11 (conclusory statements that work product was "necessary" or that "there is no other way for plaintiff to obtain the information contained in those documents" were insufficient to force disclosure).

Finally, the *Garner* analysis addresses only whether a stockholder can receive *privileged* materials, not work product. *Tackett*, 653 A.2d at 258; *Zirn*, 621 A.2d at 782. The "mutuality of interest" rationale of *Garner—i.e.*, the notion that in certain limited circumstances, stockholders should receive attorney-client privileged materials held by the company in order to protect it—does not apply to the work product protection, which is held by the company's attorneys. This Court should join "the wide majority of courts that have held that the fiduciary exception [outlined in *Garner*] does not apply to work product immunity" and reverse the Chancery Court's erroneous application of *Garner* to attorney work product here. *Jicarilla Apache Nation v. United States*, 88 Fed. Cl. 1, 13 (Fed. Cl. 2009); *see al-*

so Saito, 2002 WL 31657622, at *11 ("*there is no Garner* exception to the work product privilege" (emphasis added)); *Fuqua*, 2002 WL 991666, at *3 (similar); *In re Teleglobe Commc'ns Corp.*, 493 F.3d 345, 385 (3d Cir. 2007) (similar).

* * *

Section 220 is a valuable tool for stockholders of Delaware corporations, and this Court has encouraged its responsible use in derivative litigation. Indeed, Wal-Mart has already made substantial productions to IBEW in response to the Demand in this case. This Court has also emphasized, however, that Section 220 does not authorize plenary discovery, and therefore the focus of books-and-records actions must remain tightly controlled so as not to disrupt the preliminary and summary nature of this unique procedure. The Chancery Court breached these boundaries at multiple points—including requiring production of inappropriate documents from improper custodians, created throughout irrelevant and expansive time periods, containing protected communications. These proceedings have already been overly protracted, and have extended well beyond the bounds of this Court's Section 220 jurisprudence. Upholding the Chancery Court's unprecedented ruling would do violence to Section 220, virtually guaranteeing that the Chancery Court will be inundated with Section 220 litigation (and that this Court will receive many more Section 220 appeals). This Court should not allow Section 220 proceedings to be transformed into the "main event."

CONCLUSION

For the reasons stated, the Final Order should be reversed and the Chancery Court should be instructed to enter an order in favor of Wal-Mart.

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Dated: December 23, 2013

POTTER ANDERSON & CORROON LLP

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EXHIBIT A

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

INDIANA ELECTRICAL WORKERS PENSION TRUST FUND IBEW,	)	
Plaintiff,	)	
v.	)	C.A. No. 7779-CS
WAL-MART STORES, INC.,	)	
Defendant.	)	

FINAL ORDER AND JUDGMENT

WHEREAS, Plaintiff Indiana Electrical Workers Pension Trust Fund IBEW ("Plaintiff") filed the above-captioned action (the "Action") against defendant Wal-Mart Stores, Inc. ("Defendant" or the "Company," and with Plaintiff, the "Parties") under 8 *Del. C.* § 220 seeking production of certain books and records of Defendant relating to allegations of bribery involving Wal-Mart de Mexico and the Company's conduct in connection therewith, which were discussed in an April 21, 2012 *New York Times* article (the "WalMex Investigation");

WHEREAS, the Parties agreed to conduct a trial on the basis of a paper record and submitted the matter to the Court for decision at a trial conducted on May 20, 2013;

WHEREAS, on February 28, 2013, Defendant filed a Motion to Strike Privileged Material from Plaintiff's Opening Trial Brief (the "Motion to Strike");

WHEREAS, on May 16, 2013 the Court held a hearing on the Motion to Strike and issued an oral ruling granting the motion in part and denying it in part;

WHEREAS, on May 20, 2013, the Court issued an oral ruling on the issues litigated in the paper trial;

WHEREAS, following its oral ruling on May 20, 2013, the Court held a hearing on June 4, 2013 regarding competing forms of order submitted by the Parties, in which the Court directed Defendant to submit an affidavit describing the process by which potentially responsive documents had been collected by Defendant; and

WHEREAS, on June 18, 2013, Defendant submitted the Affidavit of Stephen C. Norman, Esquire, under seal, which described the steps Defendant has taken to collect potentially responsive documents and the steps it intends to take to complete the document collection process.

WHEREFORE, with the Court having considered the Parties' briefs and arguments presented during an in-person hearing on May 20, 2013, and for the reasons stated in the Court's oral ruling during the hearings on May 16, 2013, May 20, 2013 and June 4, 2013,

IT IS HEREBY ORDERED, the ____ day of _____, 2013, as follows:

1. The following defined terms shall have the meanings identified below:

a. "Custodians" means the following twelve individuals: F. Scott Draper, Michael Fung, Roland Hernandez, Thomas Hyde, Thomas Mars, Alberto Mora, Lee Stucky, JP Suarez, Sam Guess, Michael T. Duke, H. Lee Scott, Jr., and Jose Villarreal;

b. The "Demand" means the demand for inspection pursuant to 8 *Del. C.* § 220 made by Plaintiff;

c. "Identified Sources" means 1) the data sources of the Custodians and their relevant administrative assistants that a) have been collected and identified in Paragraph 37 of the Affidavit of Stephen C. Norman, Esquire, dated June 18, 2013, and b) may be collected pursuant to the efforts contemplated by this Order; and 2) the hard-copy and electronic documents previously searched by Defendant or Litigation Counsel with respect to this Action;

d. "Litigation Counsel" means the attorneys of Gibson, Dunn & Crutcher LLP and Potter Anderson & Corroon LLP involved with this Action;

e. "Order" means this Final Order and Judgment;

f. "Relevant Period" means the period from September 1, 2005 through June 6, 2012;

g. "Responsive Documents" means any hard-copy or electronic documents from the Relevant Period relating to any of the Responsive Topics, located within the Identified Sources or known to exist by any of the Custodians or the Office of the General Counsel of Defendant; and

h. "Responsive Topics" means 1) any aspect of the WalMex Investigation; 2) Defendant's FCPA general compliance policies and procedures; and 3) Defendant's internal investigation policies, procedures, and/or protocols.

2. Within ninety (90) days of the entry of this final Order, the following actions shall be completed to the extent they have not already been completed:

a. Defendant shall:

i. Complete the actions identified in Paragraph 44 of the Affidavit of Stephen C. Norman, Esquire, dated June 18, 2013 and file a detailed affidavit of counsel certifying that these actions have been taken. In certifying compliance, counsel for Defendant shall certify that counsel collected all potentially responsive documents from the required custodians and personal assistants and made the responsiveness and privilege determinations themselves.

ii. Collect and review data from the specified sources of data for the following custodians: F. Scott Draper (disaster recovery tape data, archive data), Michael Fung (hard copies), Sam Guess (hard copies, BES data), Alberto Mora (hard copies, hard drives, Exchange Server data, BES data), H. Lee Scott, Jr. (hard drives, Exchange Server data, BES data, Enterprise Vault data), Lee Stucky (hard copies, hard drives, archive data), and Jose Villarreal (disaster recovery tape data, Exchange Server data, BES data, Enterprise Vault data). If it is not feasible to collect data from these sources for these Custodians, Defendant shall provide a detailed explanation for the inability to collect data. If, for any of the Custodians, BES data, Exchange Server data, or Enterprise Vault data is unavailable, Defendant shall image company-issued Blackberry (or any other relevant) devices for that Custodian.

iii. Collect and review data from the personal computers and devices of all Custodians.

b. Defendant shall produce all Responsive Documents. The production shall include 1) the March 27, 2006 handwritten notes of F. Scott Draper; and 2) the

emails from or to Michael T. Duke or H. Lee Scott, Jr. concerning the WalMex Investigation in 2005 and/or 2006. In order to identify documents that may relate to the Responsive Topics, Defendant shall use the search terms attached as Exhibit A to the Affidavit of Tyler J. Leavengood, Esquire, in Support of Defendant Wal-Mart Stores, Inc.'s Answering Trial Brief and the search terms attached hereto as Exhibit A.

c. Plaintiff is entitled to receive the contents of Responsive Documents that are protected by the attorney-client privilege under the *Garner* doctrine, and the contents that are protected by the attorney work-product doctrine under Court of Chancery Rule 26(b)(3); provided, however, that nothing herein is intended to extend this Court's ruling on the application of the *Garner* doctrine or exceptions to attorney work-product protection to any other documents of Defendant, or to result in a waiver of any of Defendant's applicable privileges. Accordingly, Defendant is ordered to produce to Plaintiff under the *Garner* exception and/or Rule 26(b)(3), the privileged documents referred to in Entry Nos. 14, 16, 19-25, and 27-35 of Defendant's December 4, 2012 Privilege Log (attached as Exhibit 32 to Plaintiff's Opening Brief). Plaintiff's request for documents protected by the attorney-client privilege and/or the attorney work-product doctrine that were created, modified, reviewed or distributed on or after January 1, 2011 is denied. Plaintiff shall take appropriate steps to protect the confidentiality of Defendant's privileged documents, including filing and maintaining any such document as confidential.

d. Defendant shall provide an updated privilege log to Plaintiff. Defendant's privilege log shall identify all Responsive Documents over which Defendant

asserts privilege and/or work-product protection. To the extent that any document(s) on Defendant's privilege log were and remain subject to attorney-client privilege and/or work-product protection, Plaintiff's counsel, and their other Co-Lead Counsel in *In re Wal-Mart Stores, Inc. Delaware Derivative Litigation* (C.A. No. 7455-CS) and the plaintiff in the action captioned *Plumbers & Steamfitters Local Union No. 248 Pension Fund v. Wal-Mart Stores, Inc.* (C.A. No. 7726-CS), shall maintain the privilege and/or work-product protection of any such documents)s) produced to Plaintiff by Defendant, and such production shall not prejudice Defendant's ability to assert privilege and/or work-product protection vis-à-vis any third-party.

3. Within thirty (30) days after Defendant's completion of its production of documents required by this Order, Plaintiff may identify for Defendant a reasonable number of documents for Defendant to identify the custodian(s) in whose files the documents reside. Defendant shall provide such identification within twenty (20) days after receipt of Plaintiff's list.

4. Except as otherwise provided herein, all relief requested in Plaintiff's Reply Trial Brief is hereby denied.

5. Defendant's Motion to Strike is granted in part and denied in part. Defendant's Motion to Strike is granted in that Plaintiff shall immediately return to Defendant any of the "Whistleblower Documents" that were not posted on the *New York Times* website or the Congressional website as of the Court's May 16, 2013 ruling on Defendant's Motion to Strike. Plaintiff shall certify that it has destroyed any copies, summaries, notes, memoranda, or other work product that Plaintiff, its counsel, or any

respective representatives have created based on the "Whistleblower Documents" that are subject to return to Defendant pursuant to this Paragraph.

Chancellor Leo E. Strine, Jr.

EXHIBIT A

Exhibit A

"Foreign Corrupt Practices Act" /10 (policy OR policies OR protocol! OR procedure! OR practice! OR report! OR compli! OR comply! OR investigat! OR analy!)

"FCPA" /10 (policy OR policies OR protocol! OR procedure! OR practice! OR report! OR compli! OR comply! OR investigat! OR analy!)

investigat! w/10 (policy OR policies OR protocol! OR procedure! OR practice! OR report!)

This document constitutes a ruling of the court and should be treated as such.

Court:	DE Court of Chancery Civil Action
Judge:	Leo E Strine
File & Serve Transaction ID:	54384892
Current Date:	Oct 15, 2013
Case Number:	7779-CS
Case Name:	CONS W/ CA#7726-CS CONF ORD ON DISC - Indiana Electrical Workers Pension Trust Fund IBEW vs Wal Mart Stores Inc
Court Authorizer:	Strine, Leo E

/s/ Judge Strine, Leo E

CERTIFICATE OF SERVICE

I hereby certify that on December 23, 2013, a copy of the foregoing document was electronically served via *File & ServeXpress* on the following counsel of record:

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