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Case Number 614,2013

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

PLAINTIFF BELOW-APPELLEE/CROSS-APPELLANT'S REPLY BRIEF ON CROSS-APPEAL

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I. THE CHANCERY COURT ABUSED ITS DISCRETION IN FAILING TO ORDER WAL-MART TO CORRECT OBVIOUS DEFICIENCIES IN THE COMPANY'S SEARCH FOR RESPONSIVE DOCUMENTS

On cross-appeal, Plaintiff respectfully requests that this Court reverse as an abuse of discretion the Chancery Court's decision not to order Wal-Mart (i) to search certain obvious sources of responsive documents and (ii) to conduct appropriate interviews of the twelve custodians identified in the Final Order.

A. PLAINTIFF DID NOT WAIVE THIS BASIS FOR CROSS-APPEAL

Wal-Mart first asserts that, because Plaintiff did not raise in its opening trial brief Plaintiff's request that the Company search the files of custodians in addition to the twelve identified in the Final Order, "[t]his is fatal to [Plaintiff's] cross-appeal."[1] Wal-Mart's argument simply ignores the fact, pointed out in Plaintiff's opening brief on cross-appeal, that the Company had the opportunity to – and *did* – address Plaintiff's request in its sur-reply trial brief.[2] Moreover, the Court below had a full opportunity to consider the issue and rule upon it, albeit incorrectly.

The single case Wal-Mart cites in support, *Emerald Partners v. Berlin*, 2003 WL 21003437 (Del. Ch. Apr. 28, 2003), *aff'd*, 840 A.2d 641 (Del. 2003), is inapplicable. In *Emerald Partners*, the trial court denied the plaintiff's motion to

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1 Appellant/Cross-Appellee Wal-Mart Stores, Inc.'s Reply Br. on Appeal & Answering Br. on Cross-Appeal ("CAAB") at 18.

2 *See* Plaintiff Below-Appellee/Cross-Appellant's Answering Br. on Appeal & Opening Br. on Cross-Appeal ("CAOB") at 43; A397-98.

submit briefing after post-trial argument on an issue the plaintiff had previously failed to raise in fifteen years of litigation, over the course of a lengthy trial and numerous appeals. *See id*. at *43. Wal-Mart fails to respond to Plaintiff's argument that, where there is no prejudice given the Company's filing of a sur-reply brief below, Plaintiff's cross-appeal should be decided on the merits, rather than deemed waived on technical grounds. CAOB at 43 (citations omitted).

B. THE CHANCERY COURT ABUSED ITS DISCRETION IN FAILING TO DIRECT WAL-MART TO SEARCH THE FILES OF OBVIOUS SOURCES OF RESPONSIVE DOCUMENTS

1. Wal-Mart's Argument Hinges On The Faulty Premise That Establishing Demand Futility Was The Only Proper Purpose Of Plaintiff's Demand

This Court should reverse the Chancery Court's decision not to direct Wal-Mart to search the files of (i) Maritza Munich, the former General Counsel of Wal-Mart International, (ii) the Wal-Mart internal investigation team that handled the WalMex Investigation, and (iii) certain key WalMex officers. *See* CAOB at 42-44. These individuals and departments were directly involved in the WalMex Investigation or implicated in the bribery scheme. *See* CAOB at 6-8, 10, 42, 44. As such, they are obvious sources of documents responsive to the Demand, and the Chancery Court's refusal to include them in the Final Order constituted an abuse of discretion.

The Company's primary argument in response is that Plaintiff must demonstrate that the responsive documents in the possession of the additional

custodians are "'essential' to showing demand futility…." CAAB at 19. The underpinning of Wal-Mart's argument is the faulty premise that "the entire purpose of [this Section 220 proceeding] is to determine whether pre-suit demand on Wal-Mart's Board of Directors would have been futile…." CAAB at 19. Wal-Mart repeats this fallacy throughout its brief – indeed, fifteen times in all.[3]

The Company fails to identify – both in response to Plaintiff's cross-appeal and in its own appellate arguments – any support in statute or case law for its proposition. Investigating mismanagement is a proper purpose for a Section 220 demand, whether or not in support of efforts to overcome demand futility.[4] And, of course, Section 220 says nothing about the inspection rights of stockholders being limited to demonstrating demand futility. *See* 8 *Del. C.* §220.

The other obvious problem with this argument is that Plaintiff does not know what responsive documents are in the possession of each custodian and so showing each document is essential becomes a tautology. Plaintiff agrees with Messrs. Wolfe and Pittenger that this cannot be the law:

> The requirement that stockholders make demands "with specific and discrete identification" and "rifled precision["] … should not be understood to require a litigant to state his demand with "pinpoint specificity." Rather, the Court has required only that, "at least where

[3] *See* CAAB at 2-8, 10, 11, 17, 19, 21.

[4] *See, e.g.*, *Doerler v. Am. Cash Exch., Inc.*, 2013 WL 616232, at **6-7 (Del. Ch. Feb. 19, 2013) (recognizing right of stockholders to inspect books and records in order to value their shares and investigate potential mismanagement); *Skoglund v. Ormand Indus., Inc.*, 372 A.2d 204, 207 (Del. Ch. 1976) (recognizing right of stockholders to inspect books and records to investigate potential mismanagement and to aid in stockholders' takeover attempt).

> the purpose is to investigate particularized claims of mismanagement, the categories of documents be identified more narrowly and precisely than is typical in ordinary civil discovery." Indeed, if the requirement were applied more strictly, a stockholder's right to demand documents would be nearly defeated as he frequently would not be in a position, prior to inspection, to identify the documents he seeks to inspect in his demand or complaint with pinpoint accuracy.[5]

2. Plaintiff's Proper Purpose Includes More Than Overcoming Demand Futility

Wal-Mart suggests that the only "'proper purpose' of [Plaintiff's] Section 220 demand is, in [Plaintiff's] own words, 'to determine whether a presuit demand is necessary…." CAAB at 2 (citing A77). In making that assertion, the Company *selectively* quotes from the Demand. In fact, demand futility is the *third* of the three stated purposes:

> to investigate: (a) … mismanagement by the directors and/or officers of Wal-Mart or WalMex in connection with [the WalMex Investigation]; (b) the possibility of breaches of fiduciary duty by the directors and/or officers of Wal-Mart or WalMex in connection with the [WalMex Investigation]; (c) to determine whether a presuit demand is necessary or would be excused prior to commencing any derivative action on behalf of the Company.

A76-77.

Wal-Mart did not challenge the purposes of the Demand before the trial court. Instead, Wal-Mart *conceded* that Plaintiff stated a proper purpose. *See* A132; A297; B409-10 ("This is an action in which the propriety of stated purpose has been conceded….). The propriety of Plaintiff's stated purpose *was therefore*

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[5] *See* Donald J. Wolfe, Jr. & Michael A. Pittenger, CORPORATE AND COMMERCIAL PRACTICE IN THE DELAWARE COURT OF CHANCERY (hereinafter, "Wolfe & Pittenger") § 8.06[e][3] (2013) (citations omitted).

not at issue before the trial court, with Wal-Mart conceding that "[t]he only issue in dispute in this case is the extent of the corporate books and records to which Plaintiff is entitled and whether it extends beyond those documents the Company has already provided." A297; A623 (trial court stating that "Wal-Mart conceded the propriety of the petitioner's purpose and, thus, the paper trial was solely about the scope of books and records to be granted and what was proportionate to that purpose").[6] Wal-Mart's about-face on appeal must be rejected.[7]

3. Plaintiff Demonstrated The Necessity Of The Requested Documents

Having relied on the incorrect premise that the "entire purpose" of Plaintiff's Demand "is to determine whether pre-suit demand on [the Board] would have been

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[6] Wal-Mart also asserts that the Chancellor found – and that Plaintiff somehow conceded – that Plaintiff's sole proper purpose was to overcome demand futility. *See* CAAB at 3 (quoting A225). This is incorrect. The statement quoted by Wal-Mart was made during a teleconference on Wal-Mart's motion for a protective order, not at trial, and as such was not part of any actual ruling. *See* A221; A225. Also, Plaintiff's "proper purpose" was not at issue at trial given Wal-Mart's concession that Plaintiff stated a proper purpose and Wal-Mart's representation to the Court that the only issue for resolution at trial was the scope of production, and not the propriety of Plaintiff's purpose. *See* A132; A297; A623; B409-10. Wal-Mart now claims that it "never agreed" that investigating the WalMex bribery is a proper purpose (*see* CAAB at 8 n.2), but this is irrelevant given the Company's waiver of trial on the issue of Plaintiff's purpose. That Wal-Mart regrets its decision now is no basis to relitigate it before this Court.

[7] Wal-Mart recognizes this point in its opening brief on appeal: "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*." CAAB at 8 n.2 (emphasis added). Wal-Mart now backpedals, claiming that it was merely "summarizing one of plaintiff['s] arguments en route to demonstrating that the Chancery Court's ruling on the privileged documents was in error…." *See id*. But Wal-Mart's opening brief goes on to argue that Plaintiff "made no showing that *the facts concerning Wal-Mart's investigation* could only be discovered from Wal-Mart's privileged documents…." *See* Wal-Mart's Opening Br. on Appeal at 28. In other words, Wal-Mart conceded that investigating the underlying WalMex bribery scheme, and not just demand futility, was part of Plaintiff's purpose – it merely debated whether the privileged documents at issue were "necessary" to that purpose.

futile" (CAAB at 19), Wal-Mart's rebuttal concerning the "necessity" of the documents Plaintiff seeks on cross-appeal must fail.

On cross-appeal, Plaintiff seeks an order directing Wal-Mart to search the files of certain key individuals involved, or implicated, in the WalMex Investigation in addition to the twelve custodians identified in the Final Order. This request is entirely consistent – and, indeed, compelled by – the Chancellor's conclusion that Plaintiff demonstrated the necessity of documents regarding the WalMex Investigation, including the underlying bribery and cover-up. *See* A582 (explaining that "core information regarding the WalMex bribery, construction-permitting situation and how it was handled within Wal-Mart by high-level officers and directors" is "essentially central to the [P]laintiff's request"). Having ruled that Plaintiff demonstrated the necessity of such documents, the Chancery Court abused its discretion in not directing Wal-Mart to search the files of individuals who were obvious sources of documents regarding the WalMex Investigation.

Documents of custodians below the director-level *are* necessary both in demonstrating demand futility and in assisting to draft a complaint against those who have committed wrongs against the Company. *See* CAOB at 23-24. Wal-Mart nevertheless asserts that "[t]he custodians identified by [Plaintiff] are employees who generally did not communicate with the Board" and therefore their files are "irrelevant…." CAAB at 19. Yet, based on the limited documents Plaintiff has received to date, at least Wal-Mart's Internal Audit Services and

Maritza Munich communicated about the WalMex Investigation with members of Wal-Mart management who also served as directors.[8]

In addition, the defendants in any derivative litigation will presumably move to dismiss under both Rule 23.1 *and* Rule 12(b)(6). Unless Plaintiff can be assured that the defendants will not move to dismiss on those grounds, Plaintiff's investigation in order to obtain documents to overcome any such motion is a request for necessary documents. *See Saito v. McKesson HBOC, Inc. ("Saito I")*, 806 A.2d 113, 115 (Del. 2002).

4. Wal-Mart Misleadingly Claims That Plaintiff Agreed To Seek No More Than Five Officer Custodians

Wal-Mart argues that Plaintiff's "attempt to expand the number of custodians is inconsistent with its representation to the Chancery Court on October 12, 2012." CAAB at 20. The Company appears to assert that "the Chancellor ruled" – and Plaintiff conceded – that Wal-Mart would only be required to search the files of "(at most) five custodians" for purposes of responding to Plaintiff's Demand. *Id.* This is a mischaracterization of the transcript.

[8] *See, e.g.*, B206-9 (email dated November 1, 2005, from Munich to Duke and others, subject line "WALMEX Real Estate Transactions"); B22 (excerpt of Internal Audit Services report, dated December 1, 2005 and titled "Mexico FCPA Investigation," providing that "Wal-Mart Store's Internal Audit charter requires that the results of Internal Audit reviews be reported to management"); *see also* B80 at entry 24 (entry from Wal-Mart's privilege log reflecting memorandum, dated November 4, 2008, from Karen Roberts, SVP and Chief Compliance Officer, to Wal-Mart directors Duke, Scott, Roland Hernandez and Rob Walton regarding "ongoing initiates relating to compliance with the FCPA globally").

The passage from the October 12, 2012 teleconference on which the Company relies concerns the scope of testimony of the Company's Rule 30(b)(6) witness. *See* A221-24. The Company had moved for a protective order to block Plaintiff from taking limited depositions regarding deficiencies in Wal-Mart's document search process and the existence of responsive documents. *See* A221. During the conference on Wal-Mart's motion, the Chancery Court held that Plaintiff could proceed with its Rule 30(b)(6) deposition, but that the Company's designee would not be required to testify about the documents of all Wal-Mart officers because there are hundreds if not thousands of them. *See* A224-27. Instead, the witness should be prepared to testify about the documents of a limited subset of officers: "It may be that there is some discrete small number of officers who were [the Wal-Mart Board's] key communication folks whose documents ought to be testified about by the 30(b)(6) witness …. [T]he focus of the deposition is what records exist from a discrete number of custodians." A227-28. Given the Court's admonition to limit the number of officers about which Plaintiff would seek 30(b)(6) deposition testimony – *see* A226 ("I've got my hand up – a number smaller than the number of fingers on my hand.") – Plaintiff's counsel simply agreed that "there is a more narrow subset of officers, something on the order of five fingers ... we could identify." A229. Plaintiff's counsel never conceded that Wal-Mart's obligation to conduct a complete search for documents responsive to Plaintiff's Demand was somehow excused or limited to these five officers.

Indeed, Wal-Mart's suggestion that the Company need search no more than five custodians is entirely at odds with the rest of the proceedings, particularly in light of the Final Order directing the Company to search the files of twelve custodians. This same tactic led the Chancellor to admonish Wal-Mart for its attempt to seize on decontextualized references to the October 12, 2012 teleconference in order to withhold otherwise responsive documents. *See* A614-15 ("I think there was perhaps a seizing on my words in a way that … frankly, wasn't consistent with … why I was focused on them.").

5. Wal-Mart Waived Its Arguments Concerning The Key WalMex Executives Who Are Obvious Sources Of Documents Responsive To The Demand

Wal-Mart contends that it does not have to produce books and records of its subsidiary WalMex because Plaintiff "never argued or offered any evidence that" WalMex is a "subsidiary" of Wal-Mart for purposes of Section 220 or that Wal-Mart has actual possession, custody and control of WalMex's books and records. *See* CAAB at 21. Yet, it is Wal-Mart that never argued – prior to its answering brief on cross-appeal – that Plaintiff was required, or had failed, to make any such showing. Plaintiff's Demand expressly requested the production of responsive documents in the possession, custody or control of "the Company *and its subsidiaries*" (A75) (emphasis added), to which Wal-Mart did not object (*see* B35-36). Because it did not timely raise this objection, Wal-Mart has waived it. *See* Sup. Ct. R. 8. In addition, the Company acknowledged in its opening trial brief

that WalMex is its "majority-owned" subsidiary. A295. And Wal-Mart does not deny that WalMex's documents are in its possession, custody or control. The Company's investigators had full access to WalMex's files during the WalMex Investigation. *See* A96-116.

C. THE CHANCERY COURT ABUSED ITS DISCRETION IN FAILING TO DIRECT WAL-MART TO CONDUCT BASIC INTERVIEWS AS PART OF ITS SEARCH PROCESS

The Chancery Court abused its discretion in failing to order Wal-Mart to interview each of the twelve custodians identified in the Final Order. Wal-Mart argues that Plaintiff "can cite no case law, nor make any compelling argument" that such interviews are necessary. *See* CAAB at 21. But Wal-Mart does not deny that it has an obligation to give Plaintiff "access to all of the documents in the corporation's possession, custody or control, that are necessary to satisfy [Plaintiff's] proper purpose." *Saito I,* 806 A.2d at 115. Wal-Mart does not dispute the numerous critical deficiencies that Plaintiff identified regarding the Company's prior interviews of the custodians. *See* CAOB at 45. How then can Wal-Mart have met its obligation if the interviews of the custodians which formed the basis of Wal-Mart's search were deficient in numerous respects? The answer is that it could not.

The Chancery Court acknowledged these material deficiencies in Wal-Mart's custodian interview process,[9] but nevertheless entered a Final Order requiring Wal-Mart to interview only three of the twelve custodians. The Chancery Court therefore essentially condoned Wal-Mart's failure to comply with its obligation to make a complete search for, and production of, responsive documents under Section 220.

D. PLAINTIFF DOES NOT SEEK PLENARY DISCOVERY AS WAL-MART SUGGESTS

Wal-Mart argues that Plaintiff is inappropriately seeking "plenary discovery" in this Section 220 proceeding. CAAB at 20. That is incorrect. Consistent with this Court's prior rulings, Plaintiff merely seeks "enough information to effectively address the problem" – *i.e.*, to investigate (a) mismanagement in connection with the WalMex Investigation, (b) possible breaches of fiduciary duty by directors and/or officers of Wal-Mart and WalMex, and (c) whether a presuit demand on the Board would be excused. *Saito I*, 806 A.2d at 115; A76-77.

Wal-Mart notes this objection in only summary fashion in its argument on cross-appeal. In support of its argument on appeal, however, the Company claims that a Section 220 demand and order "must be made with 'rifled precision'…." CAAB at 8-9 (citing *Brehm*, 746 A.2d at 266-67; *Sec. First Corp.*, 687 A.2d at

[9] *See, e.g.*, A597-98 (Chancery Court describing how Wal-Mart's interviews reflected "a very persnickety kind of narrow approach and … a memory test").

570) and that Section 220 "'does not open the door to the wide ranging discovery that would be available in support of litigation'" (CAAB at 8 (quoting *Saito I*, 806 A.2d at 114)).

Although Wal-Mart quotes this Court's admonition in *Saito I* against "wide ranging discovery," the Company ignores the scope of the implementing order ultimately entered by the Chancery Court and affirmed by this Court in that litigation. *See McKesson Corp. v. Saito ("Saito II")*, 818 A.2d 970 (Del. 2003) (TABLE).[10] That order, which followed this Court's instruction that "the stockholder should be given enough information to effectively address the problem" (*Saito I*, 806 A.2d at 115), provides for a *substantially broader scope* of inspection than the Final Order in this proceeding. *See* CAOB at 25-26.[11] In *Saito II*, this Court affirmed the implementing order as "an appropriate implementation of the [stockholder's] entitlement to discovery established under this Court's decision in *Saito [I]*…." 818 A.2d at 970.[12]

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[10] The Company references this Court's affirmance in *Saito I* of the Chancery Court's rejection of the stockholder's request for certain documents of the company's post-merger subsidiary that were not shared with the company. *See* CAAB at 10 (citing *Saito I*, 806 A.2d at 118-19). That holding is irrelevant to this proceeding.

[11] This Court's decision in *Saito I* recognized that the stockholder would need access to all of these underlying documents "in order to understand what his company's directors knew and why they failed to recognize HBOC's accounting irregularities." *Saito I*, 806 A.2d at 119.

[12] Wal-Mart relies on a recent Chancery Court decision in *Cook v. Hewlett-Packard Co.*, 2014 WL 311111, at *4 (Del. Ch. Jan. 30, 2014), for the proposition that "officer-level documents" are not "necessary and essential" to Plaintiff's "limited purpose of investigating demand futility…." *See* CAAB at 9-10. Plaintiff's proper purpose, however, is not limited to investigating demand futility. Also, Wal-Mart provides no analysis as to why *Cook* controls here. There, the plaintiff made a Section 220 demand to investigate breaches of fiduciary duty in

It is settled law that, "where a [Section] 220 claim is based on alleged corporate wrongdoing, and assuming the allegation is meritorious, the stockholder should be given *enough information to effectively address the problem*…." *Saito I*, 806 A.2d at 115 (emphasis added). Stockholders who meet the requirements of Section 220 "should be given access to all of the documents in the corporation's possession, custody or control, that are necessary to satisfy [the stockholder's] proper purpose." *Id*. The scope of documents that is "necessary" to a stockholder's inspection "is fact specific and will necessarily depend on the context in which the shareholder's inspection demand arises." *Espinoza v. Hewlett-Packard Co.*, 32 A.3d 365, 371-72 (Del. 2011).

This is not the typical Section 220 action. Wal-Mart intentionally withheld and failed to log responsive documents (*see* A560-65; B105-106), undertook materially deficient document search efforts (*see*, *e.g.*, B101), was unable to describe in any detail and with any confidence how the electronic database of documents it relied on for its search was compiled (*see* A597; A623-24), and performed cursory and "persnickety" custodian interviews (*see* A597-98). In light

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connection with an acquisition that the defendant corporation was required to substantially write down due to undetected accounting fraud at the target *prior* to the acquisition. *Cook*, 2014 WL 311111, at *2. Critically, there was no allegation that the defendant corporation's officers and directors were *involved* in the fraud – only that they "failed to uncover the alleged irregularities[.]" *Id.* Unlike here, the plaintiff in *Cook* had nothing similar to the Times Article, Whistleblower Documents and Congressional Documents detailing an illegal cover-up by *officers of the company* and a concerted effort to minimize the paper trail at the board level. *See* CAOB at 23-24. These facts, unique to this case, led the Chancery Court to conclude that officer-level documents were "necessary" to Plaintiff's investigation. *See* A582-83.

of Wal-Mart's unwillingness to comply with its obligations under Section 220 and make a complete production of responsive documents, Plaintiff was forced to institute this action, take two depositions concerning Wal-Mart's document search process, and submit extensive pre- and post-trial briefing to the Court.

At the heart of this case is a cover-up by senior Wal-Mart executives. Consistent with the nature of a cover-up, the evidence shows that Wal-Mart actively sought to minimize the evidentiary paper trail.[13] Without access to the documents directed to be produced by the Final Order *and* the documents sought by Plaintiff on cross-appeal, Plaintiff will not have the information necessary to carry out its investigation given the cover-up, the involvement of Wal-Mart's in-house counsel in that cover-up, and the Company's resulting attempts to shield key documents as privileged. Wal-Mart's whine of purported "plenary discovery" without addressing the unique circumstances presented in this action, are crocodile tears.

[13] *See, e.g.*, A112-16; A516-19; B5-11 (minutes of the March 2, 2006 Wal-Mart Board meeting, held just days after the "modified protocol" was implemented and responsibility for the WalMex Investigation was transferred to WalMex, which note that a presentation on "compliance organization" was to be conducted "verbally"); *see also* B3-4 (February 27, 2006, Fung memo referring to undisclosed prior "updates to the Chairman of the Audit Committee").

II. WAL-MART CONCEDES THAT IT OFFERED NO EVIDENCE TO SUPPORT ITS CONVERSION CLAIM, AND THE CHANCERY COURT'S RULING IS THEREFORE NOT SUPPORTED BY THE RECORD AND MUST BE OVERTURNED

With respect to its conversion claim, Wal-Mart's brief is notable for what it does not say. Although Wal-Mart bore the burden of establishing each element of its conversion claim, *see* CAOB at 47,[14] it does not defend, or even address, the fact that it *failed to identify or otherwise enter into the record the forty-seven Whistleblower Documents that are the subject of Plaintiff's cross-appeal*. Wal-Mart points to no evidence in the record supporting its contention that the Whistleblower Documents were privileged and confidential, had been reasonably safeguarded and maintained, or were stolen from it without authorization by a former IT employee and disseminated to Plaintiff's counsel without authorization. Wal-Mart offers no support for its assertion that the Whistleblower Documents are subject to injunctions entered in Arkansas addressing unspecified Wal-Mart "trade secrets," particularly in light of the fact that the Whistleblower Documents all relate to the WalMex Investigation and appear to bear no relation to any trade secrets. In short, Wal-Mart implicitly concedes that it offered no evidence to support its claim of conversion. This Court need go no further to conclude that the

[14] *See Rockwell Automation, Inc. v. Kall*, 2004 WL 2965427, at *4 (Del. Ch. Dec. 15, 2004) (the elements of a conversion claim are: (i) a property interest; (ii) a right to the possession of that property; and (iii) damages); *Triton Constr. Co. v. E. Shore Elec. Servs., Inc*., 2009 WL 1387115, at *24 (Del. Ch. May 18, 2009) (explaining that the party claiming conversion bears the burden of proving each element of the claim by a preponderance of the evidence).

Chancery Court's decision granting Wal-Mart's conversion claim must be reversed. *See Stegemeier v. Magness*, 728 A.2d 557, 561 (Del. 1999) (holding that trial court's factual findings will be accepted only "[i]f they are sufficiently supported by the record and are the product of an orderly and logical deductive process") (citation omitted).

Wal-Mart now asks this Court to assume that the documents were "stolen" and "protected by privilege…." CAAB at 23. Wal-Mart's "evidence" that the documents were stolen and protected by privilege is nothing more than "*res ipsa loquitor*." CAAB at 23. This is an exceedingly strange way of attempting to satisfy one's evidentiary burden, given that the Company chose not even to submit into the record before the trial court, or this Court, the documents that purportedly "speak for themselves."

The Company asserts that, "[i]n any event," it has "submitted more than enough evidence" to support the Chancery Court's findings and that it "has shown since its initial Motion to Strike that [Plaintiff] violated Wal-Mart's property rights" – without citing any evidentiary support other than *its own Motion to Strike*. CAAB at 24 (citing B224-26). Lacking evidence on which to base its ruling, the Chancery Court abused its discretion in accepting Wal-Mart's bootstrapping. *See* CAOB at 48-49; A449-450.[15]

[15] In a footnote, Wal-Mart acknowledges that, in related federal litigation, it publicly filed complaints submitted by plaintiffs other than Plaintiff IBEW which contained unredacted

Wal-Mart makes a number of erroneous and unsupported assertions on cross-appeal. Wal-Mart argues that the Whistleblower Documents are "clearly privileged" (CAAB at 22) and that Plaintiff "does not dispute that the documents in issue belong to Wal-Mart [and] that they are privileged" (*id*. at 23). This is just not true. Plaintiff has consistently disputed Wal-Mart's claim of privilege since *June 2012* (*see* B33-34), and devoted *twelve pages* of its brief in opposition to Wal-Mart's Motion to Strike to disputing whether the Company had met its burden of showing that the Whistleblower Documents were privileged (*see* B302-13).[16]

Wal-Mart also asserts that Plaintiff's counsel had an "ethical obligation" to return the Whistleblower Documents upon receipt, without identifying the source of this purported ethical obligation. *See* CAAB at 22. That is because Plaintiff's counsel was under no such obligation. Upon receiving the Whistleblower Documents, Plaintiff's counsel satisfied all of its ethical obligations by promptly

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references to certain purportedly confidential Whistleblower Documents. *See* CAAB at 23 n.4. The Company nonetheless asserts that Plaintiff is wrong to "suggest" Wal-Mart thereby "republished references" to the documents and that Plaintiff can identify no authority in support. *See id*. Yet, this is *precisely* what the Chancery Court found in rejecting Wal-Mart's motion to strike references to that information in this litigation. *See* A411-12 ("THE COURT: Could you name a case where a company has … successfully sought to strike from a evidentiary record documents … *where the company has itself republished that information in public filings? Got a case for that?*") (emphasis added).

[16] The Chancery Court never made a determination of privilege with respect to the Whistleblower Documents at issue on cross-appeal. Nor could it have, since Wal-Mart failed to put the documents into the record or even to identify the documents on a privilege log. *See* A524; B78-80; *In re NYMEX S'holder Litig.*, 2008 WL 3349067 (Del. Ch. July 29, 2008) ("In short, absent extraordinary circumstances ... one cost of asserting privilege is the preparation of a privilege log. Otherwise … there is no check on the decision (or the incentive) to assert privilege.").

notifying Wal-Mart's counsel. *See* B30; *see also* Del. Prof. Cond. R. 4.4(b) ("A lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender."). Plaintiff's counsel offered to – and did – refrain from publicly using or otherwise disseminating the information contained in the Whistleblower Documents for a reasonable period of time to permit Wal-Mart to determine how it would proceed. *See* B33-34. Plaintiff's counsel also invited the Company to commence an *in rem* proceeding in Delaware to resolve the status of the documents, which Wal-Mart declined to do. *See* B299-301. Plaintiff's counsel took the additional step of confirming with the Delaware Office of Disciplinary Counsel that Plaintiff's counsel was required only to notify Wal-Mart that Plaintiff's counsel had received the Whistleblower Documents and to provide Wal-Mart an opportunity to take whatever protective measures it deemed necessary. *See* B326. Wal-Mart's irresponsible allegations of unethical behavior should be rejected.

Finally, Wal-Mart effectively concedes that it offered no evidence regarding the manner in which the Whistleblower Documents were maintained, and instead argues that it was not required to do so because the "burden to establish document security protocols" is only implicated in the case of an inadvertent disclosure. *See* CAAB at 24. But, Wal-Mart bore the burden of establishing a property interest as

an element of its conversion claim, and as Wal-Mart's own cases on conversion make clear, Wal-Mart could claim a property interest only in *confidential* business information. *See* B224-26. Wal-Mart offered no evidence that the Whistleblower Documents at issue were ever confidential, that this confidentiality was maintained, or that these Whistleblower Documents were stolen and disseminated to Plaintiff's counsel without authorization, all of which go to whether the Company has a property interest that is properly subject to conversion. As such, Wal-Mart failed to meet its burden of establishing this first element of a conversion claim.[17]

[17] The Whistleblower Documents, even if returned, would have to be produced to Plaintiff in response to the Chancery Court's ruling on responsive documents. *See* A480 (trial court stating at pre-trial hearing on Wal-Mart's Motion to Strike: "Now, it might be a momentary return in the sense that that is certainly without prejudice to any argument … on the merits that there are responsive documents that the company didn't produce.").

CONCLUSION

For the reasons stated, Plaintiff respectfully submits that the Final Order should be reversed on the grounds set forth in Plaintiff's cross-appeal, as discussed herein, and otherwise affirmed in all respects.

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Dated: March 6, 2014

CERTIFICATE OF SERVICE

I hereby certify that on March 6, 2014, a copy of the foregoing **Plaintiff Below-Appellee/Cross-Appellant's Reply Brief on Cross-Appeal** was served vial File and ServeXpress on the following counsel:

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