IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

HIGH RIVER LIMITED PARTNERSHIP, et al.,	)	
Plaintiffs,	)	
v.	)	C.A. No. 7663-ML
FOREST LABORATORIES, INC.,	)	
Defendant.	)	

MASTER'S REPORT

Date Submitted: November 1, 2012
Draft Report: January 16, 2013
Final Report: February 5, 2013

Stephen E. Jenkins, Esquire, Richard L. Renck, Esquire and F. Troupe Mickler IV, Esquire, of Ashby & Geddes, Wilmington, Delaware, Attorneys for Plaintiffs.

Gregory V. Varallo, Esquire, Richard P. Rollo, Esquire and Scott W. Perkins, Esquire, of Richards, Layton & Finger, P.A., Wilmington, Delaware, Attorneys for Defendant.

LEGROW, Master

This books and records case comes before me on the plaintiffs' motion under Court of Chancery Rule 60(b) for relief from a final order. The plaintiffs initially sought books and records related to, among other things, the defendant company's engagement of a corporate governance expert and the substance of that expert's review and recommendations to the defendant's board. The plaintiffs contended that the documents were necessary to aid in a proxy contest the plaintiffs were then waging in an effort to elect their nominees to defendant's board. The defendant contended that the plaintiffs did not have a proper purpose to inspect the documents, and that disclosure of the expert's recommendations would unfairly and improperly allow stockholders to delve into advice the board sought, which would have a potential chilling effect on board deliberations. After trial, I ordered the defendant to produce some, but not all, of the documents plaintiffs sought. I specifically held that the substance of the expert's recommendations was not essential to the plaintiffs' stated purpose, and therefore was not subject to inspection. A final order was entered memorializing that ruling, and the defendant produced the documents for inspection subject to a confidentiality agreement and order.

Days before the annual meeting, the parties waged what can best be described as "the battle of the press releases." The plaintiffs issued a rather inflammatory press release, and the defendant responded the next day with its own release that revealed some of the substance of the governance expert's report – information the defendant had successfully shielded from inspection. The plaintiffs now argue that the defendant's disclosure of information it previously contended was sensitive and confidential entitles the plaintiffs to relief under Rule 60(b) from the Court's final order.

This case illustrates the difficulties the Court and parties confront when a stockholder seeks to inspect books and records for use in a proxy contest, particularly where the documents at issue are subject to a confidentiality order. When a stockholder obtains books and records for the purpose of waging a proxy contest, and those books and records are confidential, the potential and temptation arises for just the type of "battle of the press releases" that ensued in this case. A stockholder who obtains such information is placed in a powerful position. If the stockholder issues a press release or makes some type of public statement that hints at the confidential information in a one-sided manner, the company is confronted with a Hobson's choice: it can respond with a press release that, in its view, corrects the stockholder's release or places it in context, or the company can say nothing. The first choice runs the risk of the problem the defendant now confronts: an argument from the stockholder that the company revealed "too much" and opened the door to the release of additional confidential information or even to further inspection. The second choice carries its own risk, including the possibility that the company's silence is viewed as a concession to the truth of the stockholder's release. This is the very death spiral the Court predicted in *Disney v. The Walt Disney Company*.[1]

For the reasons that follow, after careful review of the record, I conclude that the plaintiffs have not sustained their burden under Rule 60(b). I therefore recommend that the Court deny the plaintiffs' "Motion to Inspect Unredacted Documents." This is my final report in this matter. Exceptions should be taken in accordance with Court of Chancery Rule 144.

[1] *See* 857 A.2d 444, 450 (Del. 2004); 2005 WL 1538336, at * 4 (Del. Ch. June 20, 2005).

I. FACTUAL BACKGROUND

Plaintiffs High River Limited Partnership, Icahn Partners Master Fund LP, Icahn Partners Master Fund II, LP, Icahn Partners Master Fund III LP, and Icahn Partners LP (collectively "Plaintiffs") initiated this books and records action on June 28, 2012 against Forest Laboratories, Inc. ("Forest" or the "Defendant"). The filing of this action was preceded by a June 18, 2012 letter (the "Demand Letter") that Plaintiffs sent Forest, demanding to inspect certain books and records pursuant to 8 *Del. C.* § 220. Forest responded to the Demand Letter on June 26, 2012, denying that Plaintiffs had stated a proper purpose or otherwise complied with the requirements of Section 220.

On June 19, 2012, the Plaintiffs and other related entities filed a Schedule 13D with the Securities and Exchange Commission, notifying Forest that the Plaintiffs intended to nominate four individuals for election to Forest's board of directors at Forest's 2012 annual meeting, which was scheduled to take place on August 15, 2012. Plaintiffs previously had nominated four directors for election to Forest's board at the 2011 annual meeting, and initiated a books and records action in this Court to obtain documents to use in that proxy contest.[2] Although none of Plaintiffs' nominees were elected in 2011, the Company did respond to the proxy contest by, among other things, committing to "uphold[] the highest standards of corporate governance" by nominating three independent directors for election and (importantly for purposes of the present

[2] The parties in the 2011 books and records action ultimately settled their disputes before trial, although a hearing later was held when the plaintiffs sought to publicly disclose certain documents designated as confidential. The Court in that action issued a transcript ruling allowing the plaintiffs to make public the documents at issue. *See* Pls.' Op. Pre-Trial Br., Ex. C.

dispute) "recommend[ing] that [Forest's] board make a commitment, which would be a part of [Forest's] Corporate Governance Guidelines, to consult at least once per year with leading corporate governance experts to stay abreast of best practices and consider how they might apply to Forest."[3] Forest announced this new commitment on August 16, 2011, two days before the 2011 annual meeting.

In the Demand Letter, the Plaintiffs sought to inspect six categories of documents: (1) books and records concerning an accelerated share repurchase program Forest executed with Morgan Stanley & Company LLC; (2) books and records concerning the issuance of earnings guidance in April 2012 and June 2012; (3) books and records concerning Forest's succession planning; (4) books and records concerning the decision to execute certain licensing agreements to contain change in control provisions that Plaintiffs alleged were unfavorable to Forest; (5) books and records concerning Forest's commitment during the 2011 proxy contest to recommend that the Board revise its Corporate Governance Guidelines to require consultation with leading corporate governance experts at least annually (the "Corporate Governance Documents"); and (6) books and records concerning the Corporation's conduct under its "Corporate Integrity Agreement."

The Plaintiffs' stated purposes were lengthy (covering more than two single spaced pages). In their pre-trial brief, and for purposes of the trial in this matter, Plaintiffs argued that their purposes fell into three categories:

[3] Pls.' Op. Pre-Trial Br., Ex. D, p. 00913-14.

> (1) to investigate potential mismanagement and/or breaches of fiduciary duty; (2) to utilize (where appropriate) the information obtained in the inspection in the ongoing proxy contest in order to demonstrate that [Forest's] nominees for election are not the proper directors to lead [Forest] forward; and (3) to the extent the inspection shows that litigation is warranted, to prosecute litigation against the Forest Board and management.[4]

The parties conducted discovery, and a half-day trial and post-trial argument was held on July 27, 2012. At the conclusion of the argument, I issued a final report from the bench in which I held that Plaintiffs had stated a proper purpose relating to some of the categories of documents sought, and that within those categories Plaintiffs were entitled to some, but not all, of the books and records for which inspection was demanded. With respect to Plaintiffs' demand to inspect the Corporate Governance Documents, I held that Plaintiffs had not stated a credible basis to infer mismanagement entitling them to inspect those documents. I concluded, however, that Plaintiffs had shown that a subset of the Corporate Governance Documents was essential to conducting the proxy contest, because "[w]hether [Forest] followed through on its campaign promises" in the 2011 proxy contest "is something the [P]laintiffs [were] entitled to explore" as part of the 2012 proxy contest.[5] Specifically, I held that the documents essential to that purpose were documents showing "whether and when the [Corporate Governance Guidelines] were revised, whether and when a consultant was hired, whether and when the board or a committee of the board met with the consultant, and whether and when the consultant made

[4] *See* Pls.' Op. Pre-Trial Br., p. 13 (citing Demand Letter at p. 13-16).
[5] Transcript of July 27, 2012 proceedings (hereinafter "July 27 Transc.") at p. 33.

recommendations to the board or a committee of [the] board."[6] I further held that books and records concerning recommendations the corporate governance expert made to the board or one of its committees were not necessary and essential to Plaintiffs' purpose of advancing their proxy contest, and that allowing such an inspection would have an "obvious chilling effect" on the board's deliberations.[7]

Neither party took exception to my final report and the Chancellor entered an order on August 2, 2012 approving the final report and adopting the findings of fact made therein. The parties stipulated to an inspection order that was entered by the Court on August 6, 2012 (the "Inspection Order"). Paragraph 2 of the Inspection Order provided:

> Forest shall produce the following documents to Plaintiffs' counsel for inspection: … (d) Books and records sufficient to show (i) whether and when Forest's Corporate Governance Guidelines were revised, (ii) whether and when a corporate-governance consultant was hired, (iii) whether and when the board (or a committee of the board) met with a corporate-governance consultant, and (iv) whether and when the consultant made recommendations to the board (or a committee of the board). Forest shall have no obligation to produce books and records reflecting the substance or nature of any specific recommendation any expert may have made to Forest or its board.

The Inspection Order permitted Forest to redact documents for responsiveness to the extent necessary.[8] The parties also stipulated to a confidentiality agreement, which was entered as an order of this Court on August 1, 2012.

Forest produced for inspection two documents relating to its retention of a corporate governance expert: an engagement letter and a redacted version of an agenda

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[6] *Id*. at p. 34.
[7] *Id*.
[8] Order dated August 6, 2012, ¶ 1.

and minutes from a March 12, 2012 meeting of Forest's board. It appears from the agenda and minutes that Forest received a presentation from the expert. Although the substance of the expert's discussions with the board was redacted, Forest did not redact the following sentence: "Professor Clark indicated his general approval of Forest's corporate governance position and suggested recommendations to be considered."[9]

Meanwhile, the proxy contest continued virtually unabated in the Kabuki theater style to which the modern world (at least those familiar with proxy contests) has become accustomed. The sides traded barbs and exaggerations, and suggested that Forest's downfall would be imminent if shareholders elected the other side's slate of directors. The performance continued on August 9, 2012, when Plaintiffs issued a press release (the "August 9 Release") titled "BROKEN PROMISES MADE BY FOREST LABS: DOCUMENTS RECENTLY RELEASED BY FOREST LABS CONFIRM THAT CORPORATE GOVERNANCE AT FOREST GETS AN F."[10] The first paragraph of the press release stated:

> Last year we conducted a proxy contest that revealed serious corporate governance flaws at Forest Labs. In response to these revelations, as part of last year's proxy contest, Forest promised shareholders that it would task an independent committee of directors with selecting, engaging and consulting with a corporate governance expert and then making recommendations for corporate governance reform. Nearly two months ago, we requested documents from Forest Labs to determine whether those promises were kept. Forest refused this request but recently a court required Forest Labs to release these documents to us. What we found confirmed our suspicions regarding corporate governance at Forest.[11]

[9] Pls.' Mot. to Inspect Unredacted Docs., Ex. B, at FRX-220-00079.
[10] Def.'s Opp'n to Pls.' Mot. to Inspect Unredacted Docs., Ex. 3 (emphasis in original).
[11] *Id.*

The remainder of the release went on to contend that, rather than being retained and hired by a committee comprised of Forest's independent directors, the corporate governance expert was retained by Forest's management and reported to the entire board and senior management team. As Plaintiffs correctly point out, the August 9 Release did not directly refer to the substance of the expert's recommendations (because, of course, Plaintiffs had not been granted inspection of documents concerning those recommendations). The press release criticized a number of "corporate governance issues" that Plaintiffs contend Forest confronts, but did not directly attribute those criticisms to recommendations of Forest's expert.[12] For a shareholder, however, who was not familiar with the limitations imposed by this Court on Plaintiffs' inspection, the August 9 Release, particularly its title and first paragraph, suggested that the corporate governance expert retained by Forest had strongly criticized the company's corporate governance practices.

Forest responded the following day, by issuing its own press release (the "August 10 Release") in an effort to "set the record straight."[13] Forest contended that Plaintiffs' "recent statements about our corporate governance commitments [were] … a complete distortion of the facts."[14] Forest included in its August 10 Release a statement from the expert indicating that he was engaged by Forest's independent directors and was "very pleased with the Forest Board's constructive attitude, active participation and

[12] *Id*. at ¶¶ 4, 5.
[13] Pls.' Mot. to Inspect Unredacted Docs., Ex. C.
[14] *Id*.

responsiveness to the governance topics we discussed."[15] Forest also included a detailed timeline of the steps taken to engage and consult with the expert in question, and described in some detail the expert's March 2012 report to the Board, including the expert's recommendations and his "general approval of [Forest's] corporate governance position."[16]

Plaintiffs immediately sent a letter to the Court enclosing the August 10 Release and arguing that the statement attributed to the expert in the August 10 Release that "I was very pleased with the Forest Board's constructive attitude, active participation, and responsiveness to the governance topics we discussed" left shareholders with the (possibly inaccurate) impression that Forest's board responded constructively to the expert's recommendations.[17] Because the issue was raised in a letter, rather than in a formal motion, and because I concluded that the Plaintiffs had not carried their "heavy" burden to show "compelling circumstances" that would overcome Forest's interests in preventing the disclosure of confidential materials, as required by this Court's decision in *Disney*,[18] I denied Plaintiffs' request to publicly disclose any of the Corporate Governance Documents that were designated as confidential, but granted Plaintiffs leave to seek relief from the Inspection Order if they felt such relief was warranted.

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[15] *Id.* at p. 2.
[16] *Id.*
[17] *See* Letter to the Court from Richard Renck, p. 2. Notably, Plaintiffs' August 10 letter did not discuss the lengthy timeline and discussion of the expert's recommendations that also appeared in the August 10 Release.
[18] *See Disney*, 857 A.2d at 449.

Forest's 2012 Annual Meeting was held the following day, on August 15, 2012. Forest shareholders elected one of Plaintiffs' four candidates to the Forest board. Plaintiffs continue to contend that "fundamental governance issues remain" to be addressed at Forest.[19]

Plaintiffs filed their Motion to Inspect Unredacted Documents (the "Motion") on August 31, 2012. Through their Motion, Plaintiffs seek to compel Forest to produce for inspection unredacted copies of the engagement letter, agenda, and minutes previously produced, as well as "any other Board Materials and/or communications relating to, or arising from, Professor Clark's engagement and work for Forest."[20] The Motion was fully briefed and argument was held on November 1, 2012. This is my draft report on Plaintiffs' Motion.

II. LEGAL ANALYSIS

Plaintiffs' arguments have shifted during the course of briefing the Motion, and the legal bases for the requested relief were not fully set forth until Plaintiffs filed their reply brief in support of the Motion.[21] Plaintiffs now contend that they are entitled to relief from the Inspection Order, and are entitled to inspect the documents at issue, under Court of Chancery Rule 60(b)(5) or 60(b)(6). Forest contends that the Motion is not timely under Rule 60(b), that Plaintiffs' reliance on either Rule 60(b)(5) or (b)(6) is unfounded, and that even if relief was available to Plaintiffs under those rules, the most

[19] Pls.' Mot. to Inspect Unredacted Docs., p. 7, ¶ 8.
[20] *See* Proposed Order filed August 31, 2012.
[21] For that reason, the parties stipulated to Forest's application to file a sur-reply in further opposition to the Motion.

they would be entitled to is the opportunity to establish during another trial that they have a proper purpose to inspect the documents at issue.

Court of Chancery Rule 60(b) provides, in pertinent part, that:

> On motion and upon such terms as are just, the Court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: … (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

In applying Rule 60(b), I am guided by the two important values it implicates: the integrity of the judicial process and the finality of judgments.[22] "The rule exists to serve the first; its administration must acknowledge the second."[23] Motions filed under Rule 60(b) are not lightly taken or easily granted. The Court's decision must "strike a balance between the interest in bringing litigation to an end and the countervailing concern that justice is carried out."[24]

A. The Motion Is Timely Under Rule 60(b)

Unlike its federal counterpart, Court of Chancery Rule 60(b) does not contain a set time limit within which a party must file a motion for relief from a final judgment.[25] Despite the absence of a particular time limit in the rule, a party seeking relief under Court of Chancery Rule 60(b) "must exercise diligence and act without unreasonable

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[22] *See In re MCA S'holder Litig.*, 785 A.2d 625, 634-35 (Del. 2001).
[23] *Credit Lyonnais Bank Nederland, N.V. v. Pathe Communications Corp.*, 1996 WL 757274, at *1 (Del. Ch. Dec. 20, 1996).
[24] *In re MCA S'holder Litig.*, 785 A.2d at 635.
[25] *Compare* Fed. R. Civ. Proc. 60 (c) *with* Ct. Ch. R. 60.

delay."[26] Forest contends that, by waiting three weeks after the August 10 Release and two weeks after Forest's 2012 annual meeting before filing the Motion, Plaintiffs did not act with the requisite speed.

I agree with Forest that, in the context of a summary proceeding such as an action under Section 220, and particularly where, as here, a party contends that they may initiate proceedings under 8 *Del. C.* § 225 depending on the content of the documents they seek to inspect, the delay in bringing a motion under Rule 60(b) should be measured in weeks rather than months. Even accepting that argument, however, I cannot conclude that the passage of two or three weeks between the events Plaintiffs contend entitle them to relief under Rule 60 and the filing of the Motion constitutes unreasonable delay or a failure to exercise diligence, particularly when the Plaintiffs sought (and were denied) access to the documents before the 2012 annual meeting.[27]

B. Plaintiffs Fail To Carry Their Burden Under Rule 60(b)(5)

Having concluded that Plaintiffs' Motion was not untimely, I turn then to the portions of Rule 60(b) that form the basis for the Motion. Plaintiffs first contend that they are entitled to relief from the Inspection Order under Rule 60(b)(5) because "it is no longer equitable that the judgment should have prospective application" because the factual conditions that formed the basis of the Court's ruling have changed. Specifically,

[26] *Shipley v. New Castle Co.*, 975 A.2d 764, 770 (Del. 2009).

[27] This Court has granted relief under Rule 60(b) in cases arising several months or years after entry of the final order. *See, e.g. Meehan v. Meehan*, 515 A.2d 397 (Del. 1986) (TABLE), 1986 WL 17390 (an eight month delay in seeking relief under Rule 60 was not unreasonable); *Scureman v. Judge*, 1998 WL 409153, at *3 (Del. Ch. Jun. 26, 1998) (granting relief under Rule 60(b)(6) despite delay of five years in seeking relied).

Plaintiffs argue that the Court's decision denying inspection of the documents relating to the substance of the expert's review and recommendations was based "principally" on Forest's insistence that disclosure of the materials would have a chilling effect on board deliberations, and that Forest's subsequent disclosures in the August 10 Release constitute an "about-face" that is a significant change in circumstances unanticipated by Plaintiffs and the Court. Forest, for its part, contends that Plaintiffs are not entitled to relief under Rule 60(b)(5) because the Inspection Order did not have "prospective application," and that, even if the Inspection Order was prospective, its continued application would not be inequitable because Plaintiffs are free to make a new demand on Forest to inspect the same documents at issue in the Motion.

Relief from an order is available under subsection (b)(5) "only where 'the judgment, if permitted to stand, will cause a manifest injustice to the moving party.'"[28] The rule is premised on the "historic power of a court of equity to modify its decree in light of changed circumstances," if the changed conditions would make continued enforcement inequitable.[29] A significant change in factual conditions, not anticipated at the time of judgment, may entitle a party to relief under Rule 60(b)(5).[30]

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[28] *Cinerama, Inc. v. Technicolor, Inc.*, 1994 WL 1753202, at *1 (Del. Ch. Dec. 6, 1994) (quoting *TV58 Limited P'ship v. Weigel Broadcasting Co.*, 1994 WL 114809, at *1 (Del. Ch. Mar. 23, 1994)). *See also Nakahara v. NS 1991 American Trust*, 718 A.2d 518, 520 (Del. Ch. 1998).
[29] 11 WRIGHT, MILLER & KANE, FED. PRAC. & PROC. CIV. § 2863.
[30] *Wesley Jessen Corp. v. Bausch & Lomb Inc.*, 235 F.Supp.2d 370, 372-73 (D.Del. 2002) (citing *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 384 (1992)).

The portion of Rule 60(b)(5) upon which Plaintiffs rely applies to judgments only to the extent they are prospective in nature.[31] Although the rule principally applies to injunctions, its application is not confined to that form of relief.[32] Rather, the rule applies to any judgment that has prospective effect.[33] The resolution of motions brought under Rule 60(b)(5) often turns upon whether the judgment is in fact prospective.

Although Plaintiffs endeavor to argue that the Inspection Order has prospective application, the argument falls when considered against the cases explaining the meaning of "prospective application." The fact that an order has an effect on future events does not mean that the order has "prospective application" under Rule 60(b)(5). A judgment operates prospectively only when it requires a court to supervise changing conduct or conditions that are provisional or tentative.[34] As one court explained:

> Virtually every court order causes at least some reverberations into the future, and has, in that literal sense, some prospective effect … . That a court's action has continuing consequences, however, does not necessarily mean that it has 'prospective application' for the purposes of Rule 60(b)(5). … Thus, the standard we apply in determining whether an order or judgment has prospective application within the meaning of Rule 60(b)(5) is whether it is 'executory' or involves 'the supervision of changing conduct or conditions' … .[35]

Viewed in that light, the Inspection Order is not prospective under Rule 60(b)(5). Plaintiffs seek relief from paragraph 2(d) of the order, which required Forest to produce the corporate governance documents enumerated in that paragraph, and declared that Forest "shall have no obligation to produce books and records reflecting the substance or

[31] MOORE'S FEDERAL PRACTICE § 60.47[1][a] (3d ed. 2012).
[32] 11 WRIGHT, MILLER & KANE, FED. PRAC. & PROC. CIV. § 2863.
[33] *Id.*
[34] *See U.S. v. Swift & Co.*, 286 U.S. 106, 114 (1932).
[35] *Twelve John Does v. District of Columbia*, 841 F.2d 1133, 1138-39 (D.C. Cir. 1988).

nature of any specific recommendation any expert may have made to Forest or its board."[36] Once Forest produced the documents in question, which it indisputably did, there was no further conduct for this Court to supervise. Instead, paragraph 2(d) was essentially a declaration of the parties' rights and obligations under Section 220. That type of order is not prospective in nature.[37]

Plaintiffs cite paragraph 3 of the Inspection Order to support their argument that the order has prospective application. Paragraph 3 addresses the protocol for production of certain correspondence that the Court held Plaintiffs were entitled to inspect, and directed the parties to submit any disputes regarding that protocol for my consideration. Although Paragraph 3 arguably contemplated continued Court supervision of the production of correspondence, that paragraph is not the portion of the Inspection Order from which Plaintiffs seek relief. The fact that a portion of an order has prospective application does not entitle a movant to relief under Rule 60(b)(5) for any other portion of the order.[38]

Plaintiffs' reliance on paragraph 7 of the Inspection Order is equally unavailing. In paragraph 7, the Court retained jurisdiction to hear and resolve any disputes "over this matter." That simple retention of jurisdiction over the case, which would have entitled

[36] Inspection Order ¶ 2(d).
[37] MOORE'S FEDERAL PRACTICE § 60.47[1][c] ("declaratory relief judgments may, but usually do not[,] have prospective application").
[38] *See State of Pennylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. 421 (1856) (granting relief under Rule 60(b)(5) and distinguishing the portion of its order that was prospective from the other aspects of the order that were final and not directed at future events); *Twelve John Does*, 841 F.2d at 1138-40 (denying relief under Rule 60(b)(5) because, although portions of the order indisputably had prospective application, the section of the order from which the plaintiffs sought relief, *i.e.* the unconditional dismissal of a defendant, was not prospective).

Plaintiffs to seek relief if Forest failed to comply with the terms of the Inspection Order, does not mean that the order was a continuing decree, or required Court supervision of changing conditions. Once Forest produced the required documents within the time frame established by the Inspection Order, there was no conduct for the Court to supervise or enforce.

Finally, even if I were to conclude that Paragraph 2(d) had prospective application, the Plaintiffs have not shown a change in factual conditions that would render continued enforcement inequitable. Plaintiffs are correct that Forest disclosed substantive information regarding the findings and recommendations of its corporate governance expert after arguing to this Court that allowing Plaintiff to inspect those documents would have a chilling effect on board deliberations. I confess to being somewhat surprised by Forest's decision, which indisputably is inconsistent with its argument to this Court. That new fact, however, does not require relief from the Inspection Order for at least two reasons.

First, my ruling that Plaintiffs were not entitled to inspect the documents at issue was not, as Plaintiffs contend, based "principally" on the chilling effect the disclosure might have. Rather, I held that the Plaintiffs had not shown a credible basis to infer that mismanagement had occurred with respect to this category of documents, but that plaintiffs had stated a proper purpose of seeking the documents for purposes of the pending proxy contest.[39] I based that conclusion on the fact that Forest had promised, as part of the 2011 proxy contest, to consult with a corporate governance expert, and

[39] July 27 Transc. at 33.

Plaintiffs were entitled to explore whether Forest followed through on those campaign promises.[40] I further concluded, however, that the substance of the expert's report or recommendations to the board was not necessary or essential to that purpose.[41] I went on to state that requiring such disclosure would have a "relatively obvious chilling effect on the board's deliberations," but that chilling effect was not the "principal" basis of my ruling that the substance of the expert's report and recommendations was not necessary and essential to Plaintiffs' purpose of communicating with shareholders in the proxy contest.[42] Forest's decision to reveal some of the substance of the expert's report in response to the August 9 Release does not change that conclusion.

Second, as explained below, the continued application of Paragraph 2(d) would not result in "manifest injustice" because Plaintiffs are free to pursue these documents by making a new demand to Forest. Forest conceded during argument on the Motion that it would not argue that a new demand for these documents was barred by *res judicata* or collateral estoppel. Because the Inspection Order will not bar Plaintiffs from seeking these documents by other means, no relief under Rule 60(b)(5) is warranted.

C. Plaintiffs Are Not Entitled To Relief Under Rule 60(b)(6)

Plaintiffs also contend that they are entitled to relief under Rule 60(b)(6), which is a "catch-all" that applies when there is "any other reason justifying relief from the operation of the judgment." Despite the breadth implied by a literal reading of the rule, its application is relatively rare. A movant under Rule 60(b)(6) is required to make an

[40] *Id.*
[41] *Id*. at 34.
[42] *Id*. at 34-35.

even stronger showing than that required under the other five subsections of the rule.[43] In order to obtain relief under this portion of the rule, Plaintiffs must demonstrate the existence of "extraordinary circumstances that justify reopening the case."[44] The "extraordinary circumstances" test is a demanding standard that generally requires a showing that, in the absence of relief from the order, the movant will suffer "extreme hardship."[45]

Much like before, Plaintiffs contend that Forest's decision to reveal certain portions of the corporate governance expert's report and recommendations, after arguing to this Court that the disclosure would have a harmful chilling effect on board deliberations, rises to the level of "extraordinary circumstances" and requires relief under Rule 60(b)(6). Plaintiffs contend that, unless remedied, Forest would remain unchecked in its ability to make a selective, one-sided disclosure to shareholders.

This argument misses the mark. First, it ignores the factual realities under which Forest's disclosures arose. Forest did not disclose its expert's report and recommendations unprompted or voluntarily. Instead, the August 10 Release was a direct response to the August 9 Release, and something that Forest plainly felt compelled to do in order to correct, in Forest's view, the misimpression left by the August 9 Release. Plaintiffs argue that the August 10 Release went beyond the "scope" of the

[43] *South St. Corporate Recovery Fund I, L.P. v. Salovaara*, 2005 WL 5756720 (Del. Ch. Feb. 28, 2005).
[44] *T.R. Investors, LLC v. Genger*, 2012 WL 5471062, at *3 (Del. Ch. Nov. 9, 2012). *See also Dixon v. Delaware Olds, Inc.,* 405 A.2d 117, 119 (Del. 1979); *Jewell v. Div. of Social Services*, 401 A.2d 88, 90 (Del. 1979).
[45] *Salovaara*, 2005 WL 5756720; *Scureman*, 1998 WL 409153, at *5.

August 9 Release, which Plaintiffs contend only addressed the process by which the expert was retained and the persons to whom he reported. Plaintiffs' position glosses over the impression left by the August 9 Release's inflammatory headline and first paragraph. In any event, Plaintiffs' technical argument regarding the precise scope of the various releases underscores the point this Court foretold in *Disney*: that of dueling, spiraling press releases in which a stockholder's release of partial information obtained in a books and records action would lead to the company making its own public disclosures of otherwise non-public information, a process that has no promise of advancing the best interests of the corporation or its shareholders.[46] Plaintiffs, in fact, take the problem identified in *Disney* one step further by contending that Forest's release entitles Plaintiffs publicly to disclose confidential information *and* entitles Plaintiffs to inspect documents the Court previously has held Plaintiffs do not have a proper purpose to inspect.

Second, Plaintiffs' argument is further weakened by the fact that the proxy contest is over. Whether or not this Court allows Plaintiffs to inspect additional corporate governance documents cannot alter the results of the election at the 2012 annual meeting. Therefore, it is difficult to conclude that denying the Motion will work some form of extreme hardship or manifest injustice to the Plaintiffs.[47]

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[46] *Disney v. Walt Disney Co.*, 2005 WL 1538336, at *4.

[47] Plaintiffs contend that, depending on what the documents show, they may seek relief under 8 *Del. C.* § 225 by contesting the validity of the election on the basis that Forest's disclosures were false or misleading. As set forth below, however, that argument involves the statement of a new purpose not articulated in the demand at issue in this case. Accordingly, the only relief this Court could grant under Rule 60(b) is a new trial on Plaintiffs' newly stated purpose.

Third, even when a moving party demonstrates "extraordinary circumstances," Rule 60(b)(6) does not apply if there are other forms of relief available.[48] As set forth above, Plaintiffs have available to them an easier, and far more obvious, method to seek these documents from Forest. Plaintiffs remain free to make a new demand, complete with any new purposes, for Forest to consider, without facing any argument that the Inspection Order has preclusive effects on that demand.[49] Requiring Plaintiffs to pursue the documents in a new case serves several important interests, including efficiencies in the judicial process, the interests of the parties in bringing this case to a timely end, and allowing new inspection demands to be made in the manner directed by Section 220. In contrast, allowing relief under Rule 60(b)(6) in a Section 220 action, where new facts have generated a new purpose to seek inspection after entry of a final order, would threaten to extend this summary proceeding interminably.

D. Even If They Were Entitled To Relief From The Inspection Order, Plaintiffs Would Not Be Entitled To Further Inspection Without A New Trial

Finally, even if Plaintiffs were entitled to relief under Rule 60(b), they would not immediately be permitted to inspect the additional Corporate Governance Documents. The most this Court could do is reopen the case to allow Plaintiffs to present evidence in

[48] *See* DONALD J. WOLFE, JR. & MICHAEL A. PITENGER, CORPORATE AND COMMERCIAL PRACTICE IN THE DELAWARE COURT OF CHANCERY § 4.09[d][1] (2012).

[49] I acknowledge that, until Forest conceded this point at argument on the Motion, Plaintiffs faced an unenviable choice. Had they pursued a new inspection demand from the outset, Forest may well have raised the claim that the Inspection Order barred the new demand. Viewed in that light, Plaintiffs' decision to pursue the Motion is understandable.

support of their newly stated purpose, and allow Forest to present its defenses to the demand.[50]

This is the case because the purpose for which this Court granted inspection of some of the Corporate Governance Documents, *i.e.* the 2012 proxy contest, is now moot.[51] Plaintiffs indisputably cannot use any additional documents to influence the proxy contest or the election of directors at the 2012 annual meeting. Instead, Plaintiffs contend that inspection of the documents is "critical to Plaintiffs' understanding of whether the Press Release misled the Forest stockholders, and if it did, instituting appropriate proceedings against Forest related to that conduct – including the possibility of instituting an action pursuant to Section 225 of the DGCL, seeking a new election for directors."[52] This purpose, although related to the proxy contest, is distinct from the purposes stated in the Demand Letter or presented to the Court at trial. Forest therefore would be entitled to additional discovery and further proceedings to present any defenses to the Court.

[50] Even this relief may not be available, because Plaintiffs' Demand Letter did not articulate their present purpose for inspecting the additional Corporate Governance Documents. The Delaware Supreme Court recently reaffirmed the importance of "strict adherence" to the procedural requirements of Section 220. *Central Laborers Pension Fund v. News Corp.*, 45 A.3d 139, 145 (Del. 2012).

[51] *See Amalgamated Bank v. NetApp, Inc.*, 2012 WL 379908, at *7 (Del. Ch. Feb. 6, 2012) (purpose for which Court initially ordered inspection mooted by subsequent events, precluding any further inspection).

[52] Mot. to Inspect Unredacted Docs., ¶ 12.

III. CONCLUSION

For the foregoing reasons, I recommend that the Court deny Plaintiffs' Motion. This is my final report on the Motion, and exceptions should be taken in accordance with Rule 144.

Sincerely,

/s/ *Abigail M. LeGrow*
Master in Chancery