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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 ANSWERING BRIEF ON APPEAL AND OPENING BRIEF ON CROSS-APPEAL

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NATURE OF PROCEEDINGS

Defendant Below/Appellant-Cross Appellee Wal-Mart Store, Inc. ("Wal-Mart" or the "Company") appeals a final judgment of the Chancery Court identifying specific steps the Company must take in searching for documents, and specific categories of documents the Company must produce, in response to the demand (the "Demand") pursuant to 8 *Del. C.* §220 ("Section 220") of Plaintiff Below/Appellee-Cross Appellant Indiana Electrical Workers Pension Trust Fund IBEW ("Plaintiff").

Unlike most Section 220 litigation, the parties agreed that the sole issue for resolution by the trial court was the scope of production. Plaintiff developed an extensive record supporting entry of the Final Order. The record included detailed media reports of the bribery scandal and cover-up giving rise to the Demand; two depositions of Wal-Mart representatives concerning the document search process; pre- and post-trial briefing, hearings, and fact affidavits from Wal-Mart representatives; and trial. The record shows Wal-Mart's withholding of responsive documents, failure to take basic steps in searching for responsive documents, and persistent adoption of a "know-nothing" response when pressed on what steps it did take. With the exception of the two limited issues raised on cross-appeal, the Chancery Court entered a final judgment that was specifically tailored to the facts and a proper exercise of the trial court's discretion.

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SUMMARY OF ARGUMENT

1. Denied. The Final Order identifies specific steps that the Company must take in searching for documents, and specific categories of documents the Company must produce, in response to the Demand. These determinations of the Chancery Court are fully supported by the record and do not constitute an abuse of discretion. Although Wal-Mart argues for *de novo* review, the issues it identifies are, in reality, mere quibbles with the trial court's Section 220(c) discretion in determining the scope of production and are therefore subject to review for abuse of discretion.

Given the uncontested proper purpose of Plaintiff's Demand, the Chancery Court correctly concluded that the "core information regarding the WalMex bribery, construction-permitting situation and how it was handled within Wal-Mart by high-level officers and directors" was "essentially central to the [P]laintiff's request." A582. Having found that director- and officer-level information was necessary to achieving Plaintiff's purpose, the Chancery Court did not abuse its discretion in ruling that Wal-Mart must search for and produce documents from nine key officer-level custodians who were involved in the bribery response and cover-up or would otherwise be likely sources of responsive documents. The Chancery Court's decision was further supported by evidence suggesting that, although officers reported on the bribery response to one or more directors, the Company attempted to minimize the paper trail of such reports.

In addition, the Chancery Court did not abuse its discretion in directing the Company to produce documents from the time of the 2005 investigation and cover-up through the date of the Demand. Wal-Mart's attack on that date range is particularly confusing, given that the Company's first response to Plaintiff's Demand acknowledged that the production of books and records relating to Wal-Mart "for the period of 2005 to the present" would "satisfy the necessary and essential requirement imposed by Section 220…." B35-36. Similarly, Wal-Mart's attack on the Final Order's instruction that the Company search "disaster recovery tapes" of two custodians is surprising, given that, following trial Wal-Mart revealed that it had voluntarily collected disaster recovery tapes for nine other custodians.

Finally, the Chancery Court did not abuse its discretion in ordering Wal-Mart to produce documents responsive to the Demand that its counsel already knows to exist. The identification of custodians and application of search protocols is intended to establish a reasonable process for a party to locate responsive documents without imposing an undue burden. It is not, and cannot be, the law of Delaware that a party may hide responsive documents its counsel already knows to exist simply because the search protocols do not independently locate the responsive documents. Nor was the issue "ginned up" by the Chancellor. It was raised by Plaintiff and briefed by the parties. The Chancellor's

use of the term "Office of The General Counsel" in the Order was not vague, but rather a short-hand for his resolution of this issue.

2. Denied. The Chancery Court did not abuse its discretion in holding that Plaintiff may have access to 18 privileged documents (9 of which were also work-product documents) identified on Wal-Mart's privilege log. The Chancellor ruled that because Plaintiff stated a colorable Section 220 claim, Plaintiff satisfied the colorable claim factor under *Garner*. Wal-Mart argues that the colorable claim factor requires a stockholder to state a colorable derivative claim. Wal-Mart's position has no support in the law and would be inconsistent with this Court's repeated encouragement that stockholders employ Section 220 to obtain the information necessary to determine whether to pursue derivative litigation.

The Chancellor also expressly considered the necessity of the information sought by Plaintiff under *Garner*, notwithstanding the Company's assertion that the Chancellor merely concluded Plaintiff's task would be "more difficult" absent production. Wal-Mart's argument relies on a single sentence of the transcript. Reading the complete bench ruling, however, demonstrates that the Chancellor correctly articulated and applied this *Garner* factor. With respect to Wal-Mart's policy-based argument that *Garner* should neither be the law of Delaware nor available in a Section 220 proceeding, Wal-Mart failed to present that argument to the trial court and therefore failed to preserve it for appeal.

3. On cross-appeal, the Chancery Court abused its discretion by failing to order the Company to search obvious locations of responsive documents, including the files of the internal investigative team that reported in late 2005 "[t]here is reasonable suspicion to believe that Mexican and USA laws have been violated." A109. In addition, the Chancery Court abused its discretion by failing to order Wal-Mart to conduct reasonable follow-up interviews of the custodians. For example, Wal-Mart failed to interview Michael Duke ("Duke"), despite Duke's direct involvement in the 2005-2006 internal investigation and status as a director and chief executive officer ("CEO") of Wal-Mart.

4. Also on cross-appeal, the Chancery Court concluded without any support in the record that documents that Plaintiff's counsel received from an anonymous whistleblower were subject to conversion. Wal-Mart failed to submit any evidentiary support for its motion and failed even to identify most of the documents for which it was claiming conversion. The Chancellor based his ruling entirely on his supposition that, because the documents were sent anonymously, the sender must not have had authority to send them. The Chancery Court's conversion ruling was therefore simply not supported by the record and should be overturned.

COUNTER-STATEMENT OF FACTS

A. A HIGH-LEVEL COVER-UP OF BRIBERY AT WAL-MART AND ITS MEXICAN SUBSIDIARY IS EXPOSED

On April 21, 2012, *The New York Times* reported that Wal-Mart's Mexican subsidiary, Wal-Mart de Mexico, S.A. de C.V. ("WalMex"), engaged in the systematic payment of illegal bribes to government officials throughout Mexico from at least 2002 through 2005 (the "Times Article"). A96. In exchange for the bribes, WalMex received benefits ranging from zoning changes to rapid and favorable processing of permits and licenses for new stores. A96; A98; A100. The Company was aware of this illegal conduct by no later than September 21, 2005, when an executive of WalMex, Sergio Cicero Zapata ("Cicero"), informed the general counsel of Wal-Mart International, Maritza I. Munich ("Munich"), of "'irregularities' authorized 'by the highest levels' at [WalMex]." A99.

Munich initiated the investigation (the "WalMex Investigation"), first hiring a Mexican attorney to interview Cicero and evaluate his allegations, and then working with Willkie Farr & Gallagher LLP ("Willkie Farr") to develop an independent investigation plan. A101-04. Wal-Mart's senior leadership in the U.S., however, rejected Willkie Farr's November 2005 proposal for a "thorough investigation", and instead chose a "far more limited" internal two-week "Preliminary Inquiry" involving Wal-Mart's Corporate Investigations Department and International Internal Audit Services ("IAS") departments. A103. The

"Preliminary Inquiry" work-plan provided that, among other things, a progress report would be given to Wal-Mart's management and the Chairman of the Audit Committee, Roland Hernandez ("Hernandez"), on November 16, 2005.[1] A103; B20.

Munich kept senior Wal-Mart officials in Arkansas apprised of the preliminary inquiry in a series of emails and detailed memoranda.[2] In December 2005, an internal Wal-Mart report on the preliminary inquiry's findings was sent to Wal-Mart executives describing evidence "corroborat[ing] the hundreds of gestor payments [*i.e.*, payments to 'fixers'], the mystery codes, the rewritten audits, the evasive responses from [WalMex] executives, the donations for permits, the evidence gestores [*i.e.*, 'fixers'] were still being used." A109.[3] The report's conclusion was grave: "There is reasonable suspicion to believe that ***Mexican and USA laws have been violated***." A111 (emphasis added).

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[1] Hernandez was kept informed throughout this process, as explained in a February 27, 2006, internal Wal-Mart email attaching a memorandum from Michael Fung to Hernandez titled "Investigation Results", and directing that the memorandum be placed on "the Board Website" such that "only Roland can access [it]." B1-2; *see also id.* (referring to prior updates on investigation to Hernandez).

[2] These included: Duke, Vice-Chairman of Wal-Mart International from 2005 to February 2009, Wal-Mart's current CEO, and a Wal-Mart director since 2008; H. Lee Scott, Jr. ("Scott"), a director of Wal-Mart since 1999, Wal-Mart's CEO from 2000 to 2009, and an executive officer of Wal-Mart until January 31, 2011; Thomas A. Mars, Wal-Mart's general counsel; Thomas D. Hyde, Wal-Mart's executive vice president and corporate secretary, Michael Fung ("Fung"), Wal-Mart's top internal auditor; Craig Herkert, the chief executive for Wal-Mart's Latin American operations; and Lee Stucky, chief administrative officer of Wal-Mart International. A102.

[3] The Times Article explains that "gestores" are "fixers" and that, while some are legitimate, "often gestores play starring roles in Mexico's endless loop of public corruption scandals. They operate in the shadows, dangling payoffs to officials of every rank. It was this type of gestor that [WalMex] deployed, Mr. Cicero said." A101.

Rather than expand the investigation, Wal-Mart executives chastised the investigators for being "overly aggressive…." A97. On February 3, 2006, Scott ordered the prompt development of a "modified protocol" for internal investigations. A112. As a result, control over the WalMex Investigation was transferred "to one of its earliest targets", José Luis Rodríguezmacedo, WalMex's general counsel ("Rodríguezmacedo"). A112-13. Munich complained to senior Wal-Mart executives, noting that "[t]he wisdom of assigning any investigative role to management of the business unit being investigated escapes me", and resigned from the Company shortly thereafter. A99, A111-12. Rodríguezmacedo quickly cleared himself and his fellow WalMex executive of any wrongdoing, "wrapp[ing] up the case in a few weeks, with little additional investigation[,]" and concluding that "[t]here is no evidence or clear indication of bribes paid to Mexican government authorities with the purpose of wrongfully securing any licenses or permits." A114.

Wal-Mart is now the subject of multiple governmental investigations regarding these matters. *See* B28-29; B192-193. In addition, Wal-Mart has revealed that it is now looking into potential bribery by foreign subsidiaries in addition to WalMex. B51. On August 15, 2013, Wal-Mart disclosed that it had spent more than $300 million on Foreign Corrupt Practices Act ("FCPA") (15 U.S.C. §§ 78dd-1, *et seq.*) compliance investigations, and expected to spend

"between $75 and $80 million for both the third and fourth quarters" of 2013. B396.

B. PLAINTIFF DELIVERS ITS SECTION 220 DEMAND TO WAL-MART

On June 6, 2012, Plaintiff sent its Demand to Wal-Mart. A74-87. The Demand provides that its purpose is to investigate (a) mismanagement in connection with the WalMex Investigation; (b) possible breaches of fiduciary duty by directors and/or officers of Wal-Mart or WalMex; and (c) whether a presuit demand on the Board would be excused. A76-77. Wal-Mart conceded the propriety of the Demand's stated purpose. A132.

C. WAL-MART MAKES DEFICIENT PRODUCTIONS OF DOCUMENTS

On August 1, 2012, Wal-Mart produced 3,451 pages of documents, nearly half of which were entirely redacted, in paper format and out of chronological order (the "August 1 Production"). The August 1 Production omitted numerous highly relevant documents sought by the Demand. On August 28, 2012, Wal-Mart made a replacement production (the "August 28 Production") purportedly containing fewer redactions and this time identifying the basis for redactions, and including documents that had been "inadvertently omitted" from the August 1 Production. B43-44. Again, Plaintiff identified several critical deficiencies in the August 28 Production, including omitted meeting minutes, agendas, exhibits, and

compliance reports. B45-47. On November 21, 2012, Wal-Mart made another deficient production of limited documents. B68-70.[4]

D. WAL-MART FAILS TO SEARCH OR INTERVIEW OBVIOUS SOURCES OF RESPONSIVE DOCUMENTS

Given the serious deficiencies in Wal-Mart's productions, Plaintiff took the deposition of a Rule 30(b)(6) designee, Geoff Edwards ("Edwards"), Wal-Mart's Senior Associate General Counsel, regarding its search and collection efforts. *See* B90-191. Plaintiff also took the deposition of Wal-Mart's trial counsel, Tyler Leavengood ("Leavengood"), after the Company attempted to rehabilitate Edwards' testimony by introducing an affidavit from Mr. Leavengood as an exhibit to Defendant's Answering Trial Brief. *See* B230-283. These depositions confirmed that Wal-Mart and its counsel had failed to search the following obvious locations of potentially responsive books and records: (i) Munich, the General Counsel of Wal-Mart International; (ii) the Wal-Mart internal investigation team that handled the WalMex Investigation; and (iii) key WalMex officers implicated in the bribery allegations—Eduardo Castro-Wright (WalMex's CEO in 2005), Jose Luis Rodríguezmacedo (WalMex's then-General Counsel), and Eduardo Solorzano Morales (WalMex's CEO in 2006). *See* A96-116; B237-240; B263. In addition, Plaintiff learned that Wal-Mart had relied on a database of electronic documents

[4] Less than two days before the December 6 deposition of Wal-Mart's Rule 30(b)(6) designee, Wal-Mart produced three emails and an updated privilege log reflecting email communications with Duke and others relating to the WalMex Investigation. This last-minute production was the first time Wal-Mart turned over any emails in response to the Demand.

purportedly created by Wal-Mart counsel in a separate internal investigation, but was unable to explain in any detail what universe of documents were contained in that database or how it was compiled. A549;[5] *see* B112; B242-243.

Of the custodians that were interviewed, the interviews were perfunctory. Edwards could recall only *one* custodian who was shown documents in advance in order to refresh his recollection of events that had taken place six to seven years earlier. *See* B106.[6] Nor were custodians asked to search their electronic and hardcopy files for responsive documents – they were simply asked whether they could recall responsive documents years after the fact. A597-598. And, incredibly, Wal-Mart's definition of "responsive" was impermissibly narrowed to include only "presentations" to Wal-Mart directors. *See* B101; B248.[7]

E. WAL-MART IMPROPERLY WITHHELD RESPONSIVE DOCUMENTS

Plaintiff's counsel also learned through depositions that Wal-Mart had intentionally failed to produce or log responsive documents. Wal-Mart failed to produce emails to Duke and/or Scott (the "Duke/Scott Emails") reflecting their awareness of the WalMex Investigation in 2005 and/or 2006 because the emails

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[5] *See id*. (trial court stating that "one of the things we were communicating about was exactly this issue of what … was on the database that was the subject of the search. And, honestly, we couldn't figure out exactly, from Mr. Edwards or … from [Potter Anderson] what was there."); A613.

[6] *See also* A598 (trial court describing how Wal-Mart's interview protocol reflected "a very persnickety kind of narrow approach and … a memory test ….").

[7] *See also* A553 (trial court stating that "I think there was a narrowing -- I don't believe I ever said, for example, if someone who regularly interacted with the audit committee, had a document about the core investigation, that so long as he said to [Mr. Norman] or Mr. Leavengood or Mr. Lutz, 'I never gave that to the board,' that that meant it wasn't responsive.").

were "non-substantive" and were not used in a "presentation" to any director. A560-65; B105-106. Edwards further revealed that Wal-Mart had collected, but failed to produce or log, handwritten notes (the "Draper Notes") prepared on or about March 27, 2006, by Scott Draper ("Draper"), Wal-Mart's Vice President of Internal Audit Services, reflecting a meeting with Roland Hernandez, Chairman of the Audit Committee, regarding the WalMex Investigation. A558-60; B101. Incredibly, the Draper notes were not produced because Draper could not, more than six years later, recall whether he had actually had the meeting referenced in the notes. A558-60; B101.

F. THE CHANCERY COURT'S MAY 20 RULING AND FINAL ORDER

On May 20, 2013, the Chancery Court held a trial on the papers. Chancellor Strine identified multiple deficiencies with respect to Wal-Mart's conduct in responding to the Demand and concluded that the Company had adopted an inappropriately narrow view of responsiveness focused on "presentations" to the Board (A584-85),[8] and held that Wal-Mart would need "to undo the responsiveness things, [and] get those [documents] produced." A611.[9] The Court also determined that Wal-Mart had conducted "persnickety" interviews of custodians that amounted

[8] *See id*. ("We talked about – and that's when we had the hearing in October – about custodians who, by virtue of their positions and responsibilities in Wal-Mart, were communicating with directors or others about it. What seems to have broken down here is an understanding of what those limitations meant and what they didn't."); *id*. at A557 ("by making the judgment … that there has to be an actual To-From memo. You've kept out most of the most interesting stuff.").

[9] Relatedly, the Court held that the Company had failed to produce the Draper Notes and Duke/Scott Emails. A594-96.

to a "memory test" (A597-98) and that Wal-Mart was unable to describe with any certainty how its collection occurred (A597).[10] The Court directed Wal-Mart to collect documents from its former Audit Committee Chairman, which it had not previously done, and to interview certain additional administrative assistants to the relevant custodians. A607-08. The Court also ordered Wal-Mart to search the custodians' personal computers and devices. A598. The Court held that Plaintiff would be permitted access to certain documents subject to privilege and work-product protection. A586-89, A615-16.

Thereafter, the parties submitted competing proposed orders, and the Court held a hearing on June 4, 2013, to address those proposed orders. A621-58. The Court directed Wal-Mart to submit an affidavit detailing its process for collecting, producing and logging documents in response to the Demand and its proposal for making a supplemental production of documents. A632. On June 18, 2013, the Company submitted an affidavit in response to the Court's request (the "Norman Affidavit"). B366-393. The Norman Affidavit not only failed to address numerous deficiencies in Wal-Mart's search, but also raised several new questions.[11]

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[10] *See also* A597 ("We're at trial. The 30(b)(6) witness could not say that. Even Mr. Norman could not say for sure what was done.").

[11] *See* A687-97. For example, comparing the charts at paragraphs 18 and 37 of the affidavit demonstrate that Wal-Mart appears to have had access to, but chose not to collect and search, electronic data from key custodians including Scott, and that Wal-Mart failed to collect data from home computers. The Norman Affidavit did not address with specificity how Wal-Mart

On October 15, 2013, the Chancellor entered the Final Order. It required Wal-Mart to conduct interviews of three custodians identified at paragraph 44 of the Norman Affidavit, rather than re-interview each of the twelve custodians. A736-37. The Chancery Court held that Wal-Mart's production must extend through June 6, 2012 – the date of Plaintiff's Demand. A739-40. The Chancellor further held the Company could not withhold responsive documents that its counsel knew to exist simply because they were not found among the twelve custodians identified in the Final Order. A736.

G. THE WHISTLEBLOWER DOCUMENTS

In May 2012, Plaintiff's counsel received a package of documents which contained no cover letter. Included were internal Wal-Mart documents quoted in the Times Article, excerpts of which had been posted on its website (*See* B18-27, the "Times Documents"), as well as other documents relating to the WalMex Investigation (collectively, the "Whistleblower Documents"). Plaintiff's counsel promptly informed Wal-Mart's counsel of its receipt of the documents. B30.

In a series of letters in June and July of 2012, counsel for the parties discussed Wal-Mart's claim that it had not authorized disclosure of these documents and its requested return of all documents. B31. Wal-Mart's counsel represented to Plaintiff's counsel that the documents had been stolen by a former

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would remedy its deficient interviews, nor did it explain the criteria employed by Wal-Mart's counsel in its responsiveness determinations.

information technology ("IT") employee and that the Company had obtained injunctions from an Arkansas court requiring the return of the documents and barring further disclosure. B37-38.

Plaintiff's counsel fully satisfied all of its ethical obligations with respect to its receipt of the documents.[12] Plaintiff's counsel promptly objected to Wal-Mart's assertion that counsel was restricted from using the documents, and noted that Wal-Mart had not identified or described the documents covered under the injunctions or identified the former employee.[13] Plaintiff's counsel sent complete copies of the Whistleblower Documents to Wal-Mart's counsel and invited Wal-Mart to commence an *in rem* proceeding to protect whatever rights it believed it had, during which time Plaintiff's counsel agreed to (and did) refrain from disseminating or disclosing the documents or their contents. B33-34; B42. Wal-Mart declined to take any such action. *See* B39.

H. WAL-MART RE-PUBLISHES NUMEROUS WHISTLEBLOWER DOCUMENTS, AND MANY OF THE WHISTLEBLOWER DOCUMENTS ARE MADE PUBLICLY AVAILABLE BY CONGRESS AND THE MEDIA

In July 2012, Wal-Mart had itself republished references to the Times Documents publicly in filings in litigation relating to the WalMex Investigation.

[12] Plaintiff's counsel also confirmed with the Delaware Office of Disciplinary Counsel that its sole obligation with respect to the Whistleblower Documents was to notify Wal-Mart that Plaintiff's counsel had received them, and to provide Wal-Mart with an opportunity to take whatever protective measures it deemed necessary. *See* B326.

[13] Plaintiff's counsel further pointed out that the Whistleblower Documents did not appear to constitute "trade secret information" and therefore were not covered by the injunctions, and that without any evidence to support its assertions, Wal-Mart's attempt to enforce an unrelated injunction issued by an Arkansas state court against Plaintiff's counsel failed. *See* B40-42.

See B295-97. In motions to stay related litigation in Arkansas, Wal-Mart attached numerous complaints relating to the WalMex bribery matter that had been filed in other jurisdictions and that extensively referenced many of the Whistleblower Documents. Wal-Mart filed these documents publicly, and they remain available for public access on the federal dockets.[14] In addition, the House Energy and Commerce Committee's Oversight and Government Reform Committee published certain Whistleblower Documents on the Internet (the "Congressional Documents"). B197-211; B295, n.5.[15]

I. THE MAY 16 RULING ON WAL-MART'S MOTION TO STRIKE

Despite having taken no action to limit Plaintiff's use of the Whistleblower Documents and having publicly filed complaints containing unredacted references to those documents in other litigations, Wal-Mart moved to strike references to the Whistleblower Documents, Times Documents and Congressional Documents from Plaintiff's Opening Trial Brief. *See* B212-229. Included in that motion was a claim for conversion of the Whistleblower Documents through which Wal-Mart sought their return. *See* B213; B224. The Company specifically identified by reference to Plaintiff's Opening Trial Brief only seventeen of the sixty-four

[14] On July 2, 2012, Wal-Mart filed a Motion to Stay the Entire Action, for a Protective Order, and for Extension of Time to Respond to Complaint in *Emory v. Duke*, No. 12-cv-00404-SWW (E.D. Ark. 2012). Thereafter, on July 6, 2012, Wal-Mart filed a Motion to Stay the Entire Action and for Extension of Time to Respond to Complaint in *In re Wal-Mart Stores, Inc. Shareholder Deriv. Litigation*, No. 12-cv-4041-SOH (W.D. Ark. 2012).

[15] The Whistleblower Documents included, but were not limited to, the Times Documents and the Congressional Documents. *See* B298.

Whistleblower Documents. *See* B218, n.14.[16] Wal-Mart entered no evidence into the record as to even the identity of the other forty-seven Whistleblower Documents. Wal-Mart provided no support for its claim that these documents were kept confidential, were stolen or were subject to an injunction. *See* B214-215.

At the hearing on the Motion to Strike, the Chancery Court denied-in-part Wal-Mart's motion and held that it could not strike from the record of a public proceeding references to documents that are publicly available on *The New York Times* or Congressional websites or had been referenced in public filings by Wal-Mart. A468-77. The Chancery Court granted Wal-Mart's motion as to the Whistleblower Documents which were not publicly available and which were never made part of the record, as reflected in the Final Order (*see* A739-40), on the speculation that the whistleblower likely lacked authorization to disclose the documents given that he chose to remain anonymous. A477-80.

[16] *See also* A244-285. The seventeen Whistleblower Documents identified by Wal-Mart consisted of thirteen documents cited in Plaintiff's Opening Trial Brief and attached as exhibits thereto, which had also previously been published on the *New York Times* or Congressional Websites, along with four additional Whistleblower Documents cited in Plaintiff's Opening Trial Brief but not included as exhibits thereto.

ARGUMENT

I. THE CHANCERY COURT DID NOT ABUSE ITS DISCRETION IN ORDERING WAL-MART TO SEARCH FOR AND PRODUCE THE DOCUMENTS IDENTIFIED IN THE FINAL ORDER

A. QUESTION PRESENTED

Did the Chancery Court abuse its discretion in directing Wal-Mart to take specific additional steps to search for and produce responsive documents based on a factual record that detailed Wal-Mart's deliberate efforts to conceal evidence and its prior deficient search and production efforts? No.

B. STANDARD OF REVIEW

"To the extent that the Court of Chancery exercised its discretion in defining the scope of discovery in an on-going Section 220 proceeding in that court, [this Court] review[s] that ruling under an abuse of discretion standard." *McKesson Corp. v. Saito*, 818 A.2d 970 (Del. 2003) (TABLE); *Sec. First Corp. v. U.S. Die Casting & Dev. Co.*, 687 A.2d 563, 569 (Del. 1997). Having failed to present adequate support for its positions in front of the Chancellor, Wal-Mart now seeks to evade the Chancellor's findings by manufacturing purported errors of law. A close reading of the Company's Opening Brief, however, reveals that nearly all of the issues raised by Wal-Mart on appeal are quibbles with the Chancellor's Section 220(c) discretion regarding the appropriate scope of Wal-Mart's production, which is subject to review solely for abuse of discretion.

C. MERITS OF ARGUMENT

In this appeal, Wal-Mart neither disputes that the Chancellor correctly articulated the standard to be applied to Section 220 actions nor disputes that Plaintiff stated a proper purpose. *See* A132.[17] Instead, Wal-Mart takes issue with the scope of the Chancellor's Final Order directing the Company to take specific steps to search for and to produce documents responsive to the Demand.

Wal-Mart has been unable to defend or even to explain adequately its document production efforts to date, despite repeated opportunities to do so offered by the Chancery Court.[18] *See* A597, A623-24, A632, A687-97. Wal-Mart now attempts to deflect from its inability to defend its document production by arguing that Plaintiff failed to meet its burden of showing that the scope of production ordered by the Chancery Court was "necessary and essential" to Plaintiff's proper purpose and that the Final Order provides Plaintiff the type of discovery reserved for plenary proceedings. *See* Appellant's Opening Brief, filed on December 23, 2013 ("OB") at 9-10. Wal-Mart is wrong.

Documents are "essential" for Section 220 purposes if they address "the crux of the shareholder's purpose" and if the essential information "is unavailable from

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[17] *See, e.g.*, A297 ("The 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.").

[18] For example, Wal-Mart intentionally withheld, and failed to log, notes taken by a Wal-Mart officer reflecting a conversation with a Wal-Mart director regarding the WalMex Investigation, and emails regarding the investigation sent to the then-vice chairman of Wal-Mart International and then-CEO (and a director) of Wal-Mart, on the grounds that the notes and emails were "non-substantive". *See* A356-58, A593.

another source." *Espinoza v. Hewlett-Packard Co.*, 32 A.3d 365, 371, 372 (Del. 2011). Whether documents are essential "is fact specific and will necessarily depend on the context in which the shareholder's inspection demand arises." *Id*. at 372. The Chancery Court correctly concluded that the documents ordered to be produced satisfied that standard. *See* A573-74, A582, 617-19.

Given Wal-Mart's high-level cover-up of the WalMex scandal, the Chancery Court's ruling is consistent with *Saito v. McKesson HBOC, Inc.*, 806 A.2d 113 (Del. 2002), in which this Court held that, upon meeting the requirements of Section 220, the stockholder "should be given access to all of the documents in the corporation's possession, custody or control, that are necessary to satisfy that proper purpose." *Id*. at 115. "[W]here 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* …." *Id*. (emphasis added).

Here, Wal-Mart compliance personnel, after an initial investigation, determined that there was a "reasonable suspicion to believe that Mexican and USA laws have been violated." A171. Despite this, senior Wal-Mart officials determined to transfer control over the investigation to the general counsel of the unit being investigated, who himself was a target of the investigation. This drew objections from Munich, the general counsel of Wal-Mart International, and Joe Lewis, director of Wal-Mart's Corporate Investigations department, among others.

See A537, A576-77. Munich resigned from the Company shortly thereafter. A99, A111-12. The investigation was then quickly scuttled with no finding of wrongdoing. *Id*.[19]

The "crux" of Plaintiff's purpose is to investigate: (i) the WalMex bribery scandal and cover-up; (ii) possible breaches of fiduciary duty by Wal-Mart's officers and directors in connection with the bribery and cover-up; and (iii) whether a presuit demand on the Wal-Mart Board would be excused under Rule 23.1. *See* A77. The Chancery Court did not abuse its discretion in finding that Plaintiff had met its burden of showing that three specific categories of responsive documents, which are unavailable from another source, are essential to addressing Plaintiff's Demand: (i) the "core information regarding the WalMex bribery, construction-permitting situation and how it was handled within Wal-Mart by high-level officers and directors"; (ii) documents reflecting awareness of the WalMex Investigation by current or former Wal-Mart directors and officers; and (iii) documents concerning Wal-Mart's FCPA compliance and internal investigation policies during the WalMex Investigation and changes thereto. *See* A582, A573-74, A617-19.

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[19] There is also evidence that Wal-Mart sought to minimize the paper trail of its investigation. *See* 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").

1. The Chancery Court Did Not Abuse Its Discretion in Ordering Wal-Mart to Produce Responsive Officer-Level Documents

Wal-Mart argues that the Chancery Court committed legal error by requiring the Company "to produce documents that were never presented to or created by members of" Wal-Mart's Board and by creating a "presumption" that "officer-level knowledge should be imputed wholesale to the Board." OB at 12-15. These arguments mischaracterize Plaintiff's Demand and misread the Court's ruling.

Wal-Mart is wrong that it is "undisputed that the purpose of [Plaintiff's] inspection here is limited to determining whether demand on the current Board with respect to the WalMex Allegations would be futile" (OB at 13-14) and that accordingly officer-level documents are not "necessary and essential to [Plaintiff's] purpose". OB at 14. As made clear in Plaintiff's Demand, the purpose of Plaintiff's inspection demand is also to investigate the underlying bribery and how the ensuing investigation was handled.[20] *See* A76-77. The Chancery Court agreed, explaining:

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[20] Wal-Mart's reliance on *Security First Corp. v. U.S. Die Casting and Development Co.*, 687 A.2d 563 (Del. 1997), and *Highland Select Equity Fund, L.P. v. Motient Corp.*, 906 A.2d 156 (Del. Ch. 2006), are misplaced. In *Security First*, this Court reversed the Court of Chancery's ruling on the scope of a Section 220 demand because it failed to analyze whether the plaintiff had met its burden of showing that each category of documents sought was necessary to its stated purpose, as required under Delaware law, and instead only found that the plaintiff's demand was "self-tailored". 687 A.2d at 570. In *Highland*, while the Chancery Court criticized the stockholder's demand as overbroad, it denied the demand in its entirety because evidence at trial showed that the stockholder's real purpose was to use the Section 220 action as a "rhetorical platform" in its long-running dispute with the defendant (which included related litigation in Texas state and federal courts, as well a proxy contest), and that therefore the stockholder had not satisfied the "proper purpose" requirement of Section 220. 906 A.2d at 167-68.

> I believe … that core information regarding the WalMex bribery, construction-permitting situation and how it was handled within Wal-Mart by high-level officers and directors, that information about that is essentially central to the plaintiff's request. That is the wrongdoing they're dealing with, is did Wal-Mart deal appropriately with that? Did Wal-Mart have effective internal controls to address situations like that and did it take appropriate remedial action when it was faced with that?

A582-583. Indeed, Wal-Mart concedes later in its Opening Brief that "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." OB at 28. Wal-Mart's argument that officer-level documents are not "necessary and essential to [Plaintiff's] purpose" therefore misses the mark.

Wal-Mart similarly attempts to limit Plaintiff's inspection rights by arguing that Plaintiff's purpose is only to investigate demand futility with respect to potential *Caremark* duty of oversight claims. *See* OB at 13. Wal-Mart is wrong. Plaintiff's investigation includes breaches of fiduciary duties by Wal-Mart *officers*, making officer-level documents directly relevant and necessary to Plaintiff's purpose. *See* A511.[21]

Wal-Mart does not dispute that key officers were involved in the WalMex Investigation, and cannot deny that senior Wal-Mart officers tried to minimize the

[21] Wal-Mart has conceded the responsiveness of officer-level books and records by producing some officer-level emails to Plaintiff. *See* A252.

paper trail relating to the investigation.[22] Given the nature of the cover-up, officer-level documents are critical to determining whether and to what extent mismanagement occurred and what information was transmitted to Wal-Mart's directors and officers. *See Saito*, 806 A.2d at 118 (affirming ruling permitting inspection of officer-level documents, noting that "generally, the source of the documents in a corporation's possession should not control a stockholder's right to inspection under § 220"); *see also Dobler v. Montgomery Cellular Holding Co., Inc.*, 2001 WL 1334182, at *5 (Del. Ch. Oct. 19, 2001) (recognizing the need to inspect "supporting documents" to determine whether mismanagement occurred).

Wal-Mart is also incorrect in its assertion that officer-level documents have "no logical relevance" to the "demand futility inquiry…." OB at 14. As Wal-Mart acknowledges, officer-level documents that "refer[ ] to communications with members of the Board" regarding the WalMex Investigation are necessary and essential to the demand futility inquiry. *See* OB at 14-15. However, documents need not only refer to *communications* with directors. Officer-level documents from which director awareness of the WalMex Investigation may be inferred are also necessary and essential to Plaintiff's inspection and must be produced. *See* A555-56, A610.

Wal-Mart further argues that the Chancery Court erred by adopting a presumption that "officer-level knowledge should be imputed wholesale to the

[22] *See, e.g.*, A112-16, A516-19; *see also* B1; B5-11.

Board." OB at 15. The Chancellor adopted no such presumption. The very quote Wal-Mart relies on belies its argument.[23] The Chancellor simply recognized that at the pleading stage, Plaintiff would be entitled to all *reasonable inferences* drawn in its favor based on the *particularized facts* of a complaint. *See id*. The Chancellor held that "officer-level" documents are necessary to Plaintiff's inspection because Plaintiff may establish director knowledge of the WalMex Investigation by establishing that certain Wal-Mart officers were in a "reporting relationship" to Wal-Mart directors, that those officers did in fact report to specific directors, and that those officers received key information regarding the WalMex Investigation, the reasonable inference being that they passed that information on to the directors. *See* A259, A555, A610-11. This is a far cry from "imputing" officer knowledge to directors generally.

Wal-Mart argues that "[t]he scope of production ordered by the Chancery Court is unprecedented…." OB at 9. That is not true. Following remand in *Saito*, Chancellor Chandler entered an implementing order substantially broader in scope

[23] *See* A610 ("[Y]ou are entitled to have inferences drawn in your favor if they're based on particularized facts. And it does make it more likely that if Strine spoke to Norman and Grant about a subject on August 17th, it makes it more likely that Strine shared particular information about that subject if on August 15th he received a report about that. That does make it more likely. And at a pleading stage, those kind of inferences, if you can say Strine received a five-point memo saying that there was good reason to believe that the legal counsel's office at WalMex was implicated in the bribery indications, received that 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. I think that is a inference that you would have to draw in favor of the plaintiff at that point.").

than the Final Order entered by Chancellor Strine in this case. *Compare Saito v. McKesson HBOC, Inc.* C.A. No. 18553 (Del. Ch. Sep. 20, 2002) (ORDER) ("*Saito* Order"), *with* A734-42 (Final Order). The defendant-corporation then appealed the implementing order, and this Court affirmed, holding that the order "was an appropriate implementation of the [stockholder's] entitlement to discovery established under this Court's decision in *Saito v. McKesson, HBOC*, 806 A.2d 113 (Del. 2002)," and involved "no abuse of discretion." *McKesson Corp.*, 818 A.2d at 970. Comparing the order entered in *Saito* and specifically approved by this Court with the significantly more limited scope of the Final Order entered here, the Final Order was well within the bounds of Delaware law and constituted an appropriate exercise of the Chancellor's discretion consistent with this Court's guidance in *Saito v. McKesson, HBOC*, 806 A.2d 113 (Del. 2002).

2. The Chancery Court Did Not Abuse Its Discretion in Determining the Relevant Dates for Production

Wal-Mart seeks to manufacture an error of law with respect to the date range of production required by the Final Order. *See* OB at 16. The Demand identified the relevant time period as "September 1, 2005 to the present." A75. Wal-Mart did not object to this time period in responding to the Demand and, in fact, agreed that it was appropriate.[24] Consistent with this representation, Wal-Mart then

[24] "The Company believes that board minutes and agendas and Company policies regarding compliance with the Foreign Corrupt Practices Act, *for the period of 2005 to the present, satisfy the necessary and essential requirement imposed by Section 220* and is therefore willing to produce them to your client." B35-36 (emphasis added).

produced documents dated into 2012 to Plaintiff.[25] At trial and in its September 2013 proposed final order, Wal-Mart changed course and sought to cap the relevant time period at December 31, 2010. A615-16; A671.

Now, Wal-Mart seeks to limit the relevant time period to "2005-2006".[26] That is simply an effort to hide relevant documents. For example, a key category of responsive documents essential to Plaintiff's proper purpose are documents concerning the Company's ongoing compliance activities and changes to its operative compliance procedures, such as changes to the Audit Committee's charter. *See* B78. These documents, including documents reflecting changes in the wake of the WalMex Investigation, will bear on director and officer knowledge of the investigation, and thus liability. *See* A616-19. Indeed, Wal-Mart's privilege log confirms that responsive documents exist from September 2005 through at least May 2012 (*see* B78-80), and additional documents may be found after Wal-Mart remedies its deficient search.

3. The Chancery Court Did Not Abuse Its Discretion in Ordering Wal-Mart to Review Disaster Recovery Tapes for Two Custodians

Wal-Mart argues that the Chancery Court "committed legal error in requiring the Company to collect and search the data from disaster recovery tapes

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[25] *See, e.g.*, B12-17 (minutes of April 2012 Audit Committee meeting).

[26] It is questionable whether Wal-Mart even preserved this this issue for appeal. In its final brief with respect to the form of Final Order, Wal-Mart argued to the Chancery Court that a date range of September 1, 2005 through December 31, 2010 would be both "appropriate and consistent with the [Chancery] Court's ruling." A662.

for two custodians, or to explain why such collection would not be feasible." *See* OB at 17; *see also* A727, ¶2(a)(ii). The events relating to the WalMex Investigation occurred in some instances over seven years ago. A640. Paragraph 37 of the Norman Affidavit states that Wal-Mart voluntarily collected disaster tape recovery data for nine custodians but not Draper and Jose Villarreal. B379-389. Wal-Mart therefore implicitly concedes by collecting backup data that it may be a source of responsive documents. The Final Order merely requires the Company to search this data for two additional custodians or, "[i]f it is not feasible, . . . provide a detailed explanation for this inability to collect [the] data" (A737) – hardly a burden to the Company.

4. The Chancellor Did Not Abuse His Discretion by Directing That Wal-Mart Produce Responsive Documents Its Counsel Knows to Exist

Notwithstanding Wal-Mart's argument (OB at 18-19), the Chancery Court did not abuse its discretion by ordering the production of responsive documents "known to exist by … the Office of the General Counsel…." A736, ¶1(g). This order is consistent with Wal-Mart's default production obligations under Delaware law.[27] The instruction was necessary because Wal-Mart failed to produce or log clearly responsive documents or to justify their absence.[28] Wal-Mart incorrectly

[27] *See Beck v. Atlantic Coast PLC*, 868 A.2d 840, 854 (Del. Ch. 2005) (withholding known documents "clearly called for by [the] request" was "behavior of an entirely calculated, tactical, and inexcusable kind").

[28] For example, Wal-Mart failed to produce or log most of the Whistleblower Documents as well as a November 2005 email sent to Fung, one of the custodians Wal-Mart purportedly

suggests that the Chancellor conjured up this requirement out of thin air. OB at 18-19. Not true. Plaintiff proposed a similar provision, and the parties had an opportunity to address it in their briefing. *See* A717, ¶2(c)(2); A662-63; A700-02.

The Chancellor's use of the term "the Office of the General Counsel" is not vague but rather was understood by all parties to mean the folks at Wal-Mart who were responding to the Demand. Those folks are aware of critical documents that were not located in custodians' files. Preventing Wal-Mart from hiding those documents from Plaintiff is not an abuse of discretion. *See e.g.*, *Saito* Order (using terms like "representatives," "management," "employees," "advisors").

searched, updating Fung about the WalMex Investigation and detailing "the outside law firms" who had facilitated bribe payments. B210-11.

II. THE CHANCERY COURT DID NOT ABUSE ITS DISCRETION IN ORDERING WAL-MART TO PRODUCE CERTAIN DOCUMENTS SUBJECT TO PRIVILEGE AND/OR THE WORK-PRODUCT DOCTRINE

A. QUESTION PRESENTED

Did the Chancery Court abuse its discretion in ordering Wal-Mart to produce certain documents that are subject to the attorney-client privilege and/or work-product doctrine? No.

B. STANDARD OF REVIEW

This Court reviews "the Court of Chancery's conclusions of law *de novo*…." *SV Inc. Partners, LLC v. ThoughtWorks, Inc.*, 37 A.3d 205, 209-10 (Del. 2011). "To the extent that the Court of Chancery exercised its discretion in defining the scope of discovery in an on-going Section 220 proceeding in that court, [this Court] review[s] that ruling under an abuse of discretion standard." *McKesson Corp.*, 818 A.2d at 970; *Sec. First Corp.*, 687 A.2d at 569.

C. MERITS OF ARGUMENT

1. Wal-Mart Failed to Preserve for Appeal Its Argument That *Garner* Was Unavailable

In its Opening Brief, Wal-Mart raises two arguments regarding the *Garner* doctrine that the Company did not present to the Chancery Court. First, Wal-Mart asserts that the *Garner* doctrine has never been approved by this Court and therefore the availability of the *Garner* doctrine to litigants in Delaware is an open question. *See* OB at 21-22. Second, Wal-Mart asserts that, regardless of whether

the *Garner* doctrine is generally available to litigants, the doctrine should not be available to stockholders in the context of Section 220 litigation. *See* OB at 21-23. Instead of presenting either of these new arguments to the trial court, Wal-Mart argued below only that Plaintiff had not shown "good cause" satisfying the *Garner* doctrine. *See* A332-40, A572. Accordingly, Wal-Mart failed to preserve either argument for appeal. Sup. Ct. R. 8 ("Only questions fairly presented to the trial court may be presented for review; provided, however, that when the interests of justice so require, the Court may consider and determine any question not so presented.").

The interests of justice neither require nor commend that this Court consider either of these policy arguments. Two decades ago, in *Zirn v. VLI Corp.*, 621 A.2d 773 (Del. 1993), this Court acknowledged that the attorney-client privilege "is not absolute and, if the legal advice relates to a matter which becomes the subject of a suit by a shareholder against the corporation, the invocation of the privilege may be restricted or denied entirely." *Id.* at 781 (citing *Valente v. Pepsico, Inc.*, 68 F.R.D. 361 (D. Del. 1975)). The decision in *Zirn* then specifically cited the Vice-Chancellor's application of the *Garner* doctrine requiring "good cause" for the disclosure of privileged communications and explained that the Court "[did] not share the Vice-Chancellor's conclusion that there was no showing of good cause based on direct conflict of interest…." *Zirn*, 621 A.2d at 781. Concededly, in *Zirn* the Court did not ultimately rely on the *Garner* doctrine in concluding that the

privilege was waived through partial disclosure. *See id*. Nevertheless, Wal-Mart has failed to show why the interests of justice require that this Court now re-visit *Zirn*'s implicit approval of the doctrine and stray from "the well settled rule which precludes a party from attacking a judgment on a theory he failed to advance before the trial judge." *Scion Breckenridge Managing Member, LLC v. ASB Allegiance Real Estate Fund*, 68 A.3d 665, 678 (Del. 2013).

Likewise, Wal-Mart has failed to show why the interests of justice require that this Court consider the applicability of the *Garner* doctrine to Section 220 litigation, when that issue was not first fully and fairly presented to the trial court below. Wal-Mart's Opening Brief attempts to identify a "parade of horribles" that would result from the availability of the *Garner* doctrine in Section 220 litigation. *See* OB at 22. Yet, litigants have understood the *Garner* doctrine to be available to stockholders in Section 220 litigation for well over a decade, without the adverse consequences Wal-Mart predicts. *See Grimes v. DSC Commc'ns Corp.*, 724 A.2d 561, 586-89 (Del. Ch. 1998) (granting stockholder seeking books and records in support of anticipated derivative action access to privileged documents under the *Garner* doctrine); *see also Espinoza*, 32 A.3d at 370-71 ("[Plaintiff] does not dispute the applicability of the *Garner*-based analysis to his Section 220 demand…."); *Khanna v. Covad Commc'ns Group, Inc.*, 2004 WL 187274, at *7 (Del. Ch. Jan. 23, 2004) ("[T]he attorney-client privilege may be avoided by a Section 220 plaintiff who can demonstrate 'good cause' [under the *Garner*

doctrine] why the privilege should not attach."). Application of the *Garner* doctrine does not mean that the information is open to public review. Stockholders still have an obligation of confidentiality and to maintain the privilege.[29]

2. The Chancery Court Correctly Articulated the "Colorable Claim" Factor under the *Garner* Doctrine

Wal-Mart contends that the Chancellor erred in finding that Plaintiff had stated a colorable claim for *Garner* purposes. OB at 27. But rather than show why it believes that Plaintiffs did not meet this standard by pointing to evidence missing in the record, Wal-Mart focuses on the fact that Plaintiff had taken very little formal discovery. So what? There is such significant evidence in the Times Documents, Congressional Documents and Whistleblower Documents to show a massive bribery scandal and cover-up at WalMex that no additional discovery had to be taken to show an obvious colorable claim. *See Grimes*, 724 A.2d at 568-69; *Saito*, 2002 WL 31657622, at *13 (in analyzing Garner factors, concluding that the plaintiff "clearly asserts a colorable claim" to inspect books and records). Wal-Mart has conceded that Plaintiff has stated a proper purpose. A132. Here, Wal-Mart does not deny that it has a massive bribery scandal on its hands (B28-29; B192-93; B396), on which it has spent over $300 million of stockholder money and expects to spend hundreds of millions more. B396. The Chancellor noted

[29] *See* A436 (Chancellor Strine explaining that, even if a plaintiff obtains access to a privileged document under *Garner*, "it would still be freighted with the confidentiality thing and an agreement if you use it in litigation, you have to take reasonable steps to maintain confidentiality"); *accord* A738-39 (provision of Final Order requiring Plaintiff to protect the Company's privilege in the documents ordered to be disclosed pursuant to the *Garner* doctrine).

those facts in concluding that Plaintiff satisfied the colorable claim factor. A586-87. The Chancellor's articulation of the standard was correct as was his application of that standard to the facts of this case.[30] *See* A586-89.

Wal-Mart seems to be claiming that rather than focusing on the Section 220 action at hand, Plaintiff was required to establish that any potential derivative claim it will bring as a result of its inspection is colorable. Wal-Mart's theory is not the law. *See U.F.C.W. Local 1776 & Participating Employers Pension Fund v. Allergan, Inc.*, C.A. No. 6223-VCL (Del. Ch. Apr. 27, 2011) (TRANSCRIPT) ("*U.F.C.W.* Tr.") at 35 (holding, in Section 220 action, that to satisfy colorable claim factor under Garner "the same analysis here applies as to the credible basis question" and rejecting argument that stockholder must show that it would overcome motion to dismiss in derivative litigation).[31] Moreover such a rule is

[30] Moreover, the "crime-fraud" exception to the attorney-client and attorney work-product doctrine (*see* D.R.E. 502(d)(1)) provides an independent basis to affirm the Chancery Court's ruling on the privilege issue, given the overwhelming evidence in the record from the Times Documents, Congressional Documents and Whistleblower Documents that Wal-Mart attorneys were heavily involved in the WalMex Investigation and cover-up. *See* B206-209 (email made public by Congress referring to a meeting, which included Wal-Mart attorneys, to discuss the investigation work plan); A276-83 (Plaintiff's Opening Trial Brief discussing crime-fraud exception).

[31] Wal-Mart cites to *Espinoza v. Hewlett-Packard Co.*, C.A. No. 6000-VCP (Del. Ch. March 25, 2011) (Parsons, V.C.) (TRANSCRIPT) ("*Espinoza* Tr."), for the proposition that a colorable Section 220 claim does not satisfy *Garner*'s colorable claim factor. The analysis in that bench ruling, however, represents the minority view on the Chancery Court. *Compare id*., *with Grimes*, 724 A.2d at 568-69; *Saito*, 2002 WL 31657622, at *13 (in analyzing *Garner* factors, concluding that the plaintiff "clearly asserts a colorable claim" to inspect books and records); *U.F.C.W.* Tr. at 35. Moreover, that analysis was *dicta*, *see Espinoza* Tr. at 23, and inapplicable here given that the Chancellor did not simply rely on the fact that Plaintiff stated a proper purpose and hold that Plaintiff therefore "automatically" stated a colorable claim under *Garner*. Instead, the Chancellor also found substantial other evidence supporting his analysis,

simply illogical, as it would require a stockholder-plaintiff to establish a "colorable" derivative claim *before* it has had a chance to fully investigate those claims and *before* it has even determined whether to bring such claims. *See Grimes*, 724 A.2d at 569 (concluding *Garner* analysis by explaining that the "Supreme Court contemplated that these documents would be available to a shareholder in the context of a Section 220 demand"); *U.F.C.W.* Tr. at 35 ("The whole question is do you get the information to decide whether you want to make a claim?"); *see also Saito*, 806 A.2d at 115.

3. The Chancery Court Correctly Articulated the "Necessity" Factor in Considering Application of the *Garner* Doctrine

Wal-Mart argues that the Chancery Court "misconstrued *Garner's* 'necessity' factor…." OB at 28. Wal-Mart claims that the Chancery Court "merely found that [Plaintiff's] task would be made 'more difficult' without the production of such privileged documents." OB at 28. Wal-Mart is wrong. Wal-Mart's only support for this assertion is one sentence, towards the end of Chancellor Strine's bench ruling on the *Garner* issue, which is taken out of context. There, the Chancellor observed that, "where there's a colorable basis that part of the wrongdoing was in the way the investigation itself was conducted, I

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including the millions of dollars spent by Wal-Mart on its recent FCPA investigations and the numerous details and supporting documents concerning the bribery scandal, alleged FCPA violations and a cover-up. *See* A537-39; A586-87; *see also U.F.C.W.* Tr. at 35-36 ("Another factor that has rarely come into play but is explicitly cited in *Garner* is whether the underlying wrong involved conduct that was allegedly illegal or criminal. And that's certainly the case here.") (italics added).

think it's very difficult to find those documents by other means." A589. Reading the entire ruling shows that the trial court found that Plaintiff demonstrated that the privileged information sought was "necessary and essential" to its proper purpose of investigating the WalMex bribery and subsequent cover-up, the very standard Wal-Mart claims should apply, not simply that Plaintiff's task would be made more difficult without those documents. *See* OB at 26-28.

> I'm going to start with what would ordinarily, I think, be … the more sensitive ruling, which is the documents which are actually on the privilege log. In my view, in terms of this 220 action … ***whether these are necessary to the plaintiff's purpose and not tangential – that's how I read "necessary and essential." Necessary and essential***, I think, just emphasizes because they're redundant. I mean, usually if something is necessary, I suppose it's usually essential. But my sense is it's saying is this the core stuff? Is this out there?

A582 (emphasis added).[32] Wal-Mart's argument that the Chancery Court somehow "misconstrued *Garner's* 'necessity' factor" therefore misses the mark.

4. The Chancellor Did Not Abuse His Discretion in Ordering Wal-Mart to Produce Certain Privileged Documents, Given That the Cover-Up Was Intended to Hide Knowledge of the Bribery Scandal and That the Cover-Up Was Aided by Wal-Mart's Lawyers

Wal-Mart contends that the Chancellor erred in holding that Plaintiff met its burden of showing the necessity of the privileged information sought. *See* OB at 28-29. Wal-Mart is incorrect. Plaintiff's proper purpose included the investigation of the handling of the WalMex Investigation, whether a cover-up took place, and

[32] *See also Grimes*, 724 A.2d at 569 ("Further, because the information sought in this Section 220 demand is necessary to the plaintiff's dispute with DSC, but is unavailable from other sources, [plaintiff] argues for production of the requested documents.").

what details were shared with the Wal-Mart Board. *See* A584-85. The documents Plaintiff sought under *Garner* "go to those issues." As the Chancery Court explained:

> There is evidence in this record of indications within Wal-Mart itself by internal audit and legal staff of Wal-Mart policies, to not entrust investigations to the business unit being investigated; indications of concern about entrusting the investigation to people within the legal department at WalMex, who are actually subjects of the investigation, or should have been subjects; indications when their reports came back from WalMex that this wasn't really a good-looking report, didn't seem up to snuff, and yet nothing being done to remedy it.

A586. Without access to the documents Plaintiff sought, there would simply be no other means of obtaining the information therein, which is particularly true given the substantial involvement of Wal-Mart's inside counsel in the apparent cover-up and given the evidence that the Company took steps to minimize any paper trail. *See, e.g.*, A112-16; A516-19; *see also* B1; B5-11.[33] As the Chancellor noted:

> This is the classic point of it isn't available from nonprivileged sources because the people who were involved in shaping the scope of the investigation … are ones that [Wal-Mart] say[s] if the communications went to and from them, it's intrinsically privileged.

[33] *See also* A573-74 ("[I]f people who are currently members of the Wal-Mart board were personally involved in decisions to … make something go away by … entrusting that investigation to someone who's actually a target of it, that … goes directly to demand excusal; and … this also applies for work product doctrine – ***you can't get it anywhere else***.") (emphasis added); A589 ("Mr. Norman said take a deposition. Well, if you ask the people who had these discussions [about how the WalMex Investigation should proceed] and at the deposition the attorney-client privilege is asserted because the subject matter is one over which the company has claimed privilege in its documents, aren't you at the same place and you're simply going to have to deal with the *Garner* situation…?").

A574.[34]

Nevertheless, Wal-Mart seriously misstates the Chancellor's ruling on the "necessity" of the privileged documents to Plaintiff's investigation by arguing:

> 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.

OB at 28-29 (quoting A576). Wal-Mart's quotation of the transcript is selectively made and, read in context, comes to the opposite conclusion. The Chancellor made the statement quoted by the Company while *agreeing with Wal-Mart's counsel* at trial that it is ***not*** the case that any time a company declines to hire an independent law firm to conduct an investigation, stockholder-plaintiffs would be entitled to inspect the company's privileged materials under the *Garner* doctrine. *See* A576-77. What the Court correctly found was that the record was much different in this case, not least because several Wal-Mart compliance personnel openly took issue with Wal-Mart's decision to have the general counsel of WalMex investigate himself, strongly suggesting a cover-up.[35]

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[34] *See also Grimes*, 724 A.2d at 589 (applying *Garner* doctrine and holding that stockholder was entitled to inspect privileged investigation report since the information was "unavailable from any other source while at the same time [its] production [was] integral to the plaintiff's ability to assess whether the board wrongfully refused his demand – the stated purpose of his Section 220 demand").

[35] *See* A575-77. The Chancellor's full comment, in context:

> MR. NORMAN: …. [E]ssentially you've made the … exception to the rule[,] right? Because every 220 plaintiff can come in and make the same allegation --

5. The Chancery Court Applied the Correct Standard in Concluding That Wal-Mart Must Produce Certain Documents Claimed as Work Product

Wal-Mart argues that the Chancery Court committed legal error by purportedly applying the *Garner* doctrine to documents over which Wal-Mart invoked the work-product doctrine. OB at 31-33. The Company's argument, however, is based on a selective reading of the Chancery Court's ruling that fails when viewed in context.[36]

The *Garner* doctrine applies to information protected by the attorney-client privilege, but not to work-product. *Saito*, 2002 WL 31657622, at *11. Instead, pursuant to Chancery Court Rule 26(b)(3), a party may obtain access to non-opinion work product "upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the

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> THE COURT: No. … I understand the attractiveness for litigators of a cartoonishly stark set of facts. You know, the person who's a judge or jury, we have to deal with the more complex reality.
>
> As I said, if all this was was Willkie Farr said, "Really, you should employ us to do a really expensive investigation," if that's the only thing that was in this record, I would agree, it would be closer to what you're saying, because then you would be saying anytime a corporation chooses not to engage expensive outside advisors to do an investigation, then under Garner you're giving away the thing at a very preliminary stage under 220 and that would be a bad incentive system.
>
> … That isn't the only fact, because Wal-Mart, given as big as it is, had lots of other choices other than have the general counsel of WalMex do the investigation[,] right?

[36] Wal-Mart selectively cites only the last sentence of the quotation on the next page hereof in support of its assertion that the Chancellor applied the *Garner* doctrine in deciding whether the Company must produce work-product. *See* OB at 31-32.

party is unable without undue hardship to obtain the substantial equivalent of the materials by other means."[37] The test is no doubt similar to *Garner*.[38]

The Chancellor correctly articulated this standard during his bench ruling granting Plaintiff access to the certain work product documents identified on Wal-Mart's privilege log:

> The work product doctrine documents fall out the same way [*i.e.*, must be produced to Plaintiff], because the core -- you know, you have to have this heightened need. Are they really important and urgent to what you're trying to get at and then the unavailability showing as core to that. For the same reason I mentioned with respect to *Garner*, I believe the work product doctrine documents also have to give way, because I don't understand how it is able to deal with this.

A590 (italics added).[39] Thus, the Chancellor both correctly identified the heightened standard for access to Wal-Mart's work product and stated his reasoning for why Plaintiff had met its burden.[40]

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[37] To obtain access to opinion work-product, the party must show that "(i) the material is directed to a pivotal issue; and (ii) the party's need for disclosure is compelling." *Espinoza*, 32 A.3d at 370 n.10 (citing *Tackett v. State Farm Fire & Cas. Insur. Co.*, 653 A.2d 254, 262 (Del.1995)). Wal-Mart, however, failed to identify in its privilege log, to the trial court below, or in its Opening Brief that any of the documents at issue are "opinion" work-product. Instead, the Company argues on appeal only that the Chancery Court improperly applied the *Garner* doctrine to its "attorney work product documents." *See* OB at 33.

[38] The Chancellor's ruling with respect to *Garner* and work product applies to the 19 documents on Wal-Mart's privilege log referenced herein. To the extent the Company identifies additional documents on its privilege log that fall within the reasoning of the Chancellor's privilege and work product rulings, one would expect Wal-Mart to produce those documents to Plaintiff, too.

[39] The Chancellor's analysis is consistent with *Grimes*:

> For the same reasons that the plaintiff has shown "good cause" to overcome the claim of attorney-client privilege, I conclude he has also shown a substantial need for the information for purposes of the work product doctrine. … [I]n order for the plaintiff to be able to determine whether the committee and the board

III. THE CHANCERY COURT DID ABUSE ITS DISCRETION BY NOT ORDERING WAL-MART TO CORRECT DEFICIENCIES IN ITS SEARCH FOR, AND COLLECTION OF, BOOKS AND RECORDS

A. QUESTION PRESENTED

After finding that Wal-Mart's search for, and production of, documents responsive to Plaintiff's Section 220 Demand was materially deficient in several respects, did the Chancery Court abuse its discretion by refusing to order Wal-Mart to make a complete search of obvious sources of potentially responsive documents and to conduct appropriate custodian interviews? Yes. This issue was preserved for appeal. *See* A271-75, A359-68, A529-30, A615.

B. STANDARD OF REVIEW

"To the extent that the Court of Chancery exercised its discretion in defining the scope of discovery in an on-going Section 220 proceeding in that court, [this Court] review[s] that ruling under an abuse of discretion standard." *McKesson Corp.*, 818 A.2d at 970; *Sec. First Corp.*, 687 A.2d at 569.

> wrongfully refused his demand he needs to have access to documents which reveal the deliberative processes which the committee and the board underwent.

Grimes, 724 A.2d at 570.

[40] In the final sentence of the quoted language above, the Chancellor makes his finding with respect to work product, which is distinct from his ruling on the *Garner* doctrine. If the Chancellor had simply applied the *Garner* doctrine to work-product, he would not have needed to say "[f]or the same reasons I mentioned with respect to *Garner*" when addressing work product. This language further confirms that the Chancellor understood that his *Garner* decision was separate from his decision with respect to work product.

C. MERITS OF ARGUMENT

1. The Chancery Court Abused Its Discretion in Failing to Order Wal-Mart to Make a Complete Search of Obvious Sources of Responsive Documents

Despite having recognized Wal-Mart's materially deficient search efforts, the Chancery Court failed to require Wal-Mart to remedy all of the errors identified by Plaintiff. The Final Order should have required Wal-Mart to collect documents from the following obvious sources: (i) Munich, the General Counsel of Wal-Mart International,[41] (ii) the Wal-Mart internal investigation team that handled the WalMex Investigation, and (iii) key WalMex officers implicated in the bribery allegations.[42] Each of these represents a key source of documents that will likely be responsive to Plaintiff's Demand and should have been an obvious starting point of any inspection relating to the WalMex Investigation. Yet, in responding to Plaintiff's Demand, Wal-Mart failed to search for responsive documents possessed by these custodians. *See* B240; B263. The trial court held that Plaintiff waived its arguments with respect to these search deficiencies because they were first identified in Plaintiff's Reply Trial Brief. *See* A614.

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41 *See* A102-03 ("Ms. Munich sent detailed memos describing Mr. Cicero's debriefings to Wal-Mart's senior management [including] Thomas A. Mars, Wal-Mart's general counsel …; Thomas D. Hyde, Wal-Mart's executive vice president and corporate secretary; Michael Fung, Wal-Mart's top internal auditor; Craig Herkert, the chief executive for Wal-Mart's operations in Latin America; and Lee Stucky, a confidant of [Wal-Mart CEO and director] Lee Scott's and chief administrative officer of Wal-Mart International.").

42 E.g., Eduardo Castro-Wright (WalMex's CEO in 2005), Jose Luis Rodríguezmacedo (WalMex's then-General Counsel), and Eduardo Solorzano Morales (WalMex's CEO in 2006). A96-117.

Wal-Mart has an obligation under Section 220 to make a complete production of responsive documents necessary for Plaintiff to carry out its proper purpose, which Wal-Mart has failed to do. *See Saito*, 806 A.2d at 115 ("A stockholder who demands inspection for a proper purpose should be given access to all of the documents in the corporation's possession, custody or control, that are necessary to satisfy that proper purpose."). Wal-Mart has this obligation regardless of whether it is raised by Plaintiff. Plaintiff acknowledges that the specific failings of Wal-Mart identified in this Part III were raised in Plaintiff's reply brief. Any prejudice to Wal-Mart, however, was eliminated when it was granted a surreply (*see* A393-402), giving it sufficient opportunity to argue to the trial court why it was not required to search these custodians and locations.[43] Wal-Mart therefore can identify no prejudice to it. Where there is no prejudice, this issue should be decided on the merits, rather than on technical grounds. *TVI Corp. v. Gallagher*, 2013 WL 5809271, at *22 (Del. Ch. Oct. 28, 2013) (granting plaintiff leave to amend complaint to correct an error after the parties had briefed a motion to dismiss, where there was no showing of bad faith or undue delay by plaintiff and defendant would not suffer undue prejudice); *see also Encompass Serv. Holding Corp. v. Prosero Inc.*, 2005 WL 332810, at *6 (Del. Ch. Feb. 3, 2005) ("[e]quity abhors a forfeiture"). Failing to order these searches was an abuse of discretion. *Saito*, 802 A2d at 115.

[43] *See* A393-402.

The Chancery Court also abused its discretion by refusing to order Wal-Mart to search the electronic and hardcopy documents of the Company's Internal Audit Services and corporate investigations departments, and collect documents from key internal investigators Ken Senser, Joseph Lewis, Bob Ainley or Ronald Halter. These were key departments and employees responsible for investigating the bribery allegations and were obvious sources of responsive documents.[44] Such a search may also have led to additional sources of potentially responsive documents.[45] The Chancery Court further abused its discretion in refusing to order Wal-Mart to search the documents of *the key WalMex executives implicated in the bribery scheme*. In order to make a complete and accurate production of the books and records to which Plaintiff is entitled under Section 220, Wal-Mart must be required to search these custodians and departments. *See Saito*, 806 A.2d at 115.

2. The Chancery Court Abused Its Discretion in Failing to Order Wal-Mart to Conduct Proper Custodian Interviews

Wal-Mart must be ordered to conduct proper interviews of the twelve

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[44] *See* A102-05, A582, A573-74, A617-19. For example, Senser, the head of the Global Security department within the Corporate Investigations department, received an update from his subordinate, Lewis, that the initial investigation was "not looking good" (A105), and helped implement the "modified protocol" at the heart of the cover-up of the WalMex bribery scheme (A112). Halter and Ainley authored a December 2005 memorandum to Wal-Mart executives concluding that there was a reasonable suspicion of wrongdoing. A109. The Internal Audit Services department was also tasked with providing updates on the investigation to the Board's Audit Committee, according to the Times Article.

[45] For example, the February 27, 2006, Fung memo to the Audit Committee Chairman referenced above (*see* n.1, above) was obtained from the electronic data of a relatively junior officer and was not located on the Board website to which it had originally been uploaded. *See* B1; B2; B258. Thus, it was reasonable to expect that other similarly responsive documents would have been located had Wal-Mart appropriately expanded its search.

custodians identified in the Final Order. *See* A725. Despite deficiencies in Wal-Mart's initial interviews, the Final Order only requires Wal-Mart to interview three of the custodians identified at paragraph 44 of the Norman Affidavit. *See* A726-27. Deficiencies in the initial interviews of the remaining nine custodians warrant new interviews.

First, Wal-Mart failed to interview Duke to determine whether he could identify responsive documents, despite the fact that he was actively involved in the WalMex Investigation and is currently Wal-Mart's CEO and a director. Second, Wal-Mart's Rule 30(b)(6) witness could recall only *one* custodian who was shown documents in advance of his interview to refresh his recollection of events that had taken place six to seven years earlier. *See* B106; A584-98. Nor were custodians asked to search their electronic and hardcopy files for responsive documents. *See* A584-98. The custodians were merely asked whether they could recall any potentially responsive documents, years after the fact. *See id*. Third, in conducting those interviews, Wal-Mart's questions improperly narrowed to focus only on "presentations" to Wal-Mart directors. *See* A359, A584-85, A598. These deficiencies unreasonably restricted the utility and scope of the interviews such they there were not reasonably designed to discover sources of potentially responsive documents.

IV. THE CHANCERY COURT'S RULING THAT THE WHISTLEBLOWER DOCUMENTS ARE SUBJECT TO CONVERSION IS NOT SUPPORTED BY THE RECORD

A. QUESTION PRESENTED

In granting in part Wal-Mart's Motion to Strike and ordering Plaintiff to return to Wal-Mart certain of the Whistleblower Documents, was the Chancery Court's ruling supported by the record given that Wal-Mart failed (i) to identify most of the documents subject to the Chancellor's ruling and (ii) to establish that those documents were maintained as privileged and confidential by the Company and that documents had been taken without proper authority? No. This issue was preserved for appeal. A710-13.

B. STANDARD OF REVIEW

The Chancery 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." *Stegemeier v. Magness*, 728 A.2d 557, 561 (Del. 1999) (quoting *Levitt v. Bouvier*, 287 A.2d 671, 673 (Del. 1972)). This Court will set aside or overturn the Chancery Court's factual findings if they are "clearly wrong and justice requires it …." *EMAK Worldwide, Inc. v. Kurz*, 50 A.3d 429, 432 (Del. 2012).

C. MERITS OF ARGUMENT

The Chancery Court granted in part Wal-Mart's Motion to Strike with respect to the Whistleblower Documents on the basis of conversion. *See* A477-78;

A729. That ruling, however, was simply not supported by the record and therefore must be reversed. *See Levitt v. Bouvier*, 287 A.2d 671, 673 (Del. 1972).[46]

The elements of a conversion claim are (i) a property interest; (ii) a right to the possession of that property; and (iii) damages. *See Rockwell Automation, Inc. v. Kall*, 2004 WL 2965427, at *4 (Del. Ch. Dec. 15, 2004). The party claiming conversion bears the burden of proving each element of the claim by a preponderance of the evidence. *Triton Constr. Co. v. E. Shore Elec. Servs., Inc*., 2009 WL 1387115, at *24 (Del. Ch. May 18, 2009). With very limited exceptions, a trial court may not consider purported facts that are not part of the record. *See Fawcett v. State*, 697 A.2d 385, 388 (Del. 1997) ("The doctrine of judicial notice … should be used with caution[.] If there is any doubt whatever, … evidence should be required ….[I]f there [is] any possibility of dispute the fact cannot be judicially noticed.") (citations and internal quotation marks omitted).

In making its Motion to Strike, Wal-Mart asserted that the Whistleblower Documents were privileged, internal documents that had been stolen from the Company and disseminated without the Company's authorization by a former employee in its IT department. *See* B214-215. Yet, Wal-Mart submitted no evidence on any of the elements of its claim. *See* A413, 447-49, A472. It did not

[46] The Whistleblower Documents are responsive to the Demand, and Wal-Mart's in-house counsel is in possession of those documents. Thus, to extent this Court affirms the instruction in the Final Order addressed in Part I(C)(4), above, Wal-Mart will be required to produce a complete copy of the Whistleblower Documents to Plaintiff's counsel and Plaintiff's cross-appeal of the Chancellor's conversion ruling will be rendered academic.

even identify which documents it claimed were converted. As a result, that portion of the Final Order, as well as the Chancery Court's finding that the documents were the subject of conversion, must be overturned. *See Candlewood Timber Group, LLC v. Pan Am. Energy, LLC*, 859 A.2d 989, 1001-1002 (Del. 2004) (rejecting Chancery Court's factual findings where "there is no identified record support for the Court of Chancery's finding").

Wal-Mart was required to show that its purported property interest in such information had been maintained and that the information was disclosed without authorization. *See Res. Ventures, Inc. v. Res. Mgmt. Int'l, Inc.*, 42 F. Supp. 2d 423, 439-40 (D. Del. 1999). Yet, Wal-Mart failed to provide evidence that the Whistleblower Documents were privileged and confidential, had been reasonably safeguarded and maintained as such, and were taken without authorization. *See* A413, 447-49, A472. At the hearing on Wal-Mart's Motion to Strike, the Company's counsel offered concessions that made it clear that the Chancery Court's conversion ruling was not based on facts in the record. Despite Wal-Mart's assertion that the Whistleblower Documents had been taken without authorization by a former IT employee, Wal-Mart's counsel conceded that the Company had submitted no evidence regarding the restrictions on IT employee access to Wal-Mart communications:

> THE COURT: How many IT people have … unlimited access within Wal-Mart to all email communications?

> MR. NORMAN: I don't know, Your Honor.
>
> THE COURT: What does Wal-Mart do to restrict the number of IT people who deal with them?
>
> MR. NORMAN: *We haven't put any evidence in the record on that.*

A413-414 (emphasis added); *see* A447-49; *see also* A479 ("THE COURT: [ ] I'm not saying a crime was committed. I don't know.").

Despite these concessions that Wal-Mart failed to satisfy its burden of proof, the Chancery Court based its holding on its own intuition that, because the whistleblower chose to remain anonymous, *ipso facto* the Whistleblower Documents must have been stolen from the Company and disseminated without its authorization. *See* A449-450 ("THE COURT: I'll tell you what's a really strong evidence in favor of that [disclosure] was unauthorized, is that – did the person who sent it to you identify him or herself? MR. GRANT: No …. is that evidence? THE COURT: Oh, yea, it is …. when people send anonymous packets, it's usually because they lack authority[.]"). This subjective determination does not find support in the record, much less "sufficient support" in the record. *See Unitrin, Inc. v. Am. Gen. Corp.*, 651 A.2d 1361, 1385 (Del. 1995) ("We have already noted that the Court of Chancery made a factual finding unsupported by the record …. That finding was based upon a hypothetical risk which originated from the Court of Chancery's attribution of subjective 'prestige and perquisite' voting motives to Unitrin's outside shareholder directors.") (citation omitted). Absent even the most

basic facts on which to base its decision, the ruling of the Chancery Court on the Whistleblower Documents must be reversed.

CONCLUSION

For the reasons stated, Plaintiff respectfully submits that the Final Order should be affirmed in all respects except reversed on the grounds set forth Parts III and IV hereof.

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Dated: January 24, 2014

CERTIFICATE OF SERVICE

I hereby certify that on January 24, 2014, a copy of the foregoing **Plaintiff Below-Appellee/Cross-Appellant's Answering Brief on Appeal and Opening Brief on Cross-Appeal** was served vial File and ServeXpress on the following counsel:

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