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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,	)	
	)	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
	)	OF DELAWARE IN C.A. NO.
Plaintiff Below, Appellee.	)	7779-CS
	)	

APPELLANT/CROSS-APPELLEE WAL-MART STORES, INC.'S REPLY BRIEF ON APPEAL AND ANSWERING BRIEF ON CROSS-APPEAL

OF COUNSEL:

Theodore J. Boutrous, Jr.
GIBSON DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90071-3197
(213) 229-7000

Jonathan C. Dickey
Brian M. Lutz
GIBSON DUNN & CRUTCHER LLP
200 Park Avenue
New York, NY 10166-0193
(212) 351-4000

Mark A. Perry
GIBSON DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, DC 20036-5306
(202) 955-8500

POTTER ANDERSON & CORROON LLP
Donald J. Wolfe, Jr. (I.D. #285)
Stephen C. Norman (I.D. #2686)
Tyler J. Leavengood (I.D. #5506)
Hercules Plaza, 6th Floor
1313 North Market Street
P. O. Box 951
Wilmington, Delaware 19899-0951
(302) 984-6000

Attorneys for Appellant/Defendant-Below Wal-Mart Stores, Inc.

Dated: February 24, 2014

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SUMMARY OF ARGUMENT

Wal-Mart addresses this Summary of Argument to the subject of IBEW's cross-appeal.

3. Denied. The Chancery Court did not abuse its discretion in refusing to expand even further the number of custodians whose files should be searched. The refusal to expand the number of custodians was fully consistent with limited nature of a Section 220 proceeding. The Chancery Court likewise did not abuse its discretion by refusing to order follow-up interviews. Such relief is not warranted in a 220 proceeding.

4. Denied. The Chancery Court's ruling that privileged documents stolen from the Company and provided to plaintiffs' counsel anonymously should be returned has ample support in the record. Wal-Mart did not authorize the dissemination of these documents, which are indisputably privileged, and therefore IBEW has no legal or equitable right to keep or use them.

ARGUMENT

I. The Final Order Should Be Reversed

This Court has repeatedly emphasized that the limited right to inspect books and records afforded by Section 220 is not to be "confused" with merits discovery. *Beam ex rel. Martha Stewart Living Omnimedia, Inc. v. Stewart*, 845 A.2d 1040, 1056 n.51 (Del. 2004); *see also Saito v. McKesson HBOC, Inc.*, 806 A.2d 113, 114 (Del. 2002); *Sec. First Corp. v. U.S. Die Casting & Dev. Co.*, 687 A.2d 563, 570 (Del. 1997). The Court of Chancery failed to heed that admonition in this case, and IBEW's principal brief simply repeats this fundamental error with respect to the two aspects of the Final Order—the scope of production and the invasion of privilege—challenged by Wal-Mart on appeal. Those rulings are legally erroneous and should be reversed.

IBEW did not make a pre-suit demand on Wal-Mart's Board of Directors. Accordingly, unless and until IBEW can prove that demand would have been futile, and thereby secure judicial approval to step into the shoes of the corporation, the merits of this dispute—the alleged misconduct at Wal-Mart's Mexican subsidiary—are not properly before the Chancery Court. *Rales v. Blasband*, 634 A.2d 927, 933–34 (Del. 1993).

The only "proper purpose" of IBEW's Section 220 demand is, in IBEW's own words, "to determine whether a presuit demand is necessary. . . ." A77.

Chancellor Strine recognized as much: "I take it that everybody understands that's the primary purpose of [IBEW's] demand, is really to get past the demand excusal stage of a derivative action." A225. In the court below, IBEW itself construed this ruling to mean that it "is entitled to books and records sufficient to plead demand futility. . . ." A273.

As recounted in Wal-Mart's opening brief, Wal-Mart has already made a full and complete production of documents related to IBEW's proper purpose of establishing demand futility—and (with the exception of two throwaway cross-appeal points, addressed below) IBEW does not contend otherwise. IBEW's submission to this Court also ignores the extraordinary search that Wal-Mart has already conducted for potentially responsive documents. These efforts included, among others, the review of 160,000 documents; the search and review of the data of eleven custodians; and interviews of a number of current and former employees, officers, and directors to ensure potentially responsive documents were collected and reviewed. A307–09.

The Final Order, however, went much further by ordering Wal-Mart to produce officer-level documents as well as privileged documents, neither category of which is necessary and essential to IBEW's proper purpose. Both of these aspects of the Final Order are, literally, unprecedented. They are fundamentally indefensible under this Court's precedents (which IBEW essentially ignores) holding that a

Section 220 order must be crafted with "rifled precision." *Espinoza v. Hewlett-Packard Co.*, 32 A.3d 365, 372 (Del. 2011) (emphasis & citation omitted); *Brehm v. Eisner*, 746 A.2d 244, 266 (Del. 2000). Contrary to IBEW's insinuations (IBEW Br. 3, 18, 27), Wal-Mart is not attempting to "hide" or "conceal" documents; it is merely asking (as it must) that this Court's precedents concerning the proper scope of a Section 220 action be followed.

On the scope of production, IBEW does not even attempt to argue that the officer-level documents are necessary and essential to establish demand futility. Instead, IBEW argues that these materials will permit it "to investigate the underlying bribery and how the ensuing investigation was handled." IBEW Br. 22. That, however, *is* the merits of the underlying derivative litigation that IBEW has yet to commence; and IBEW has no warrant to conduct such an investigation unless and until it can establish demand futility. Merits discovery cannot be a "proper purpose" for a Section 220 demand, yet that is the gist of IBEW's appellate argument.

On the invasion of Wal-Mart's privilege, IBEW argues that merely establishing a proper purpose under Section 220 is itself sufficient to allow any stockholder to access corporate documents otherwise protected by the attorney-client privilege and work product doctrines. That argument, if accepted by this Court, would sound the death knell for these established and important protections.

IBEW's defense of the Final Order, like the Final Order itself, erases the important distinctions between a Section 220 proceeding and the merits stage of a derivative lawsuit. IBEW has not received judicial authorization to represent Wal-Mart in this litigation, and its ultimate capacity to do so is entirely suspect. Its inspection rights are accordingly limited to those documents necessary and essential to establish whether a pre-suit demand on the Board of Directors would have been futile. The Final Order here, in contrast, grants a sweeping and unauthorized fishing expedition into Wal-Mart's records.

A. The Chancery Court Committed Legal Error By Permitting IBEW To Conduct Merits Discovery

The Final Order requires the Company to produce documents that have nothing to do with IBEW's proper purpose of ascertaining whether pre-suit demand in this matter is futile. *See* WM Br. 8–19. Under Delaware law, demand futility turns on what the directors knew and when they knew it.[1] The documents at issue were created or maintained by officers of the Company, and/or the "Office of the General Counsel," rather than the Board of Directors, and thus have no bearing on director knowledge.

[1] *See In re Citigroup Inc. S'holder Derivative Litig.*, 964 A.2d 106, 123 (Del. Ch. 2009) ("[T]o establish oversight liability a plaintiff must show that the directors knew they were not discharging their fiduciary obligations or that the directors demonstrated a conscious disregard for their responsibilities such as by failing to act in the face of a known duty to act."); *Guttman v. Huang*, 823 A.2d 492, 506 (Del. Ch. 2003) ("[T]he decision premises liability on a showing that the directors were conscious of the fact that they were not doing their jobs.").

IBEW devotes just two paragraphs to the proposition that officer-level documents are necessary and essential to the demand futility inquiry in this case. *See* IBEW Br. 24–25. IBEW reiterates the challenged ruling that it is entitled to "[o]fficer-level documents from which director awareness of the WalMex Investigation may be inferred. . . ." *Id.* at 24. IBEW, however, offers no basis for drawing such an "inference," and cites no authority for doing so in the Section 220 context. IBEW, which bears the burden of proof, does not provide any facts suggesting that even a single document was in fact shared with the Board of Directors, that even one of the officers at issue discussed the contents of these documents with Board members, or that any director was privy in any way to the content of these documents. Rather, IBEW proposes that the entire Board of Directors should, collectively, be "inferred" to have awareness of the contents of any and all officer-level documents. IBEW's self-serving conjecture does not satisfy its burden.

It was legal error for the Chancery Court to presume that officer-level information can be imputed, indiscriminately and with no additional showing, to the Board of Directors. WM Br. 13–15. Although the Chancery Court's ruling was unambiguous in this respect, A594, 610–11, IBEW insists that "[t]he Chancellor adopted no such presumption." IBEW Br. 25. Yet, IBEW is forced to concede the point when it tries to explain the Chancery Court's ruling: IBEW maintains that if officers who had a "reporting relationship" to the Board "received key infor-

mation" regarding WalMex, IBEW maintains that the "reasonable inference" would be "that they passed that information on to the directors." *Id.* In plain English, this is no different than saying that the Final Order permits officer-level knowledge to be imputed to the Board.

Here, there is no justification for supposing that documents held by officer- (and lower-) level employees were delivered to the Board, let alone presuming they were. Indeed, as established in Wal-Mart's opening brief, such a presumption is contrary to Delaware law. *See Desimone v. Barrows*, 924 A.2d 908, 943 (Del. Ch. 2007) ("Delaware law does not permit the wholesale imputation of one director's knowledge to every other for demand excusal purposes."); *Rattner v. Bidzos*, 2003 WL 22284323, at *11 (Del. Ch.) (declining to impute knowledge based on defendants' positions). IBEW also offers no hint as to how this presumption (or inference) could ever be rebutted in the Section 220 context.

The thrust of IBEW's argument is not that the officer-level documents are necessary and essential to the demand futility inquiry (since they obviously are not), but rather that "the purpose of [IBEW's] inspection demand is <u>also</u> to investigate the underlying bribery and how the ensuing investigation was handled." IBEW Br. 22 (emphasis in original). The Chancery Court never found such an "investigat[ion]" to be a proper purpose under Section 220, nor could it have. IBEW confuses this Section 220 proceeding, which should carry with it a laser-like

focus on director knowledge (and consequent demand futility), with the merits of the lawsuit that it proposes to pursue on Wal-Mart's behalf. IBEW is not entitled to "investigate" anything other than director knowledge unless and until a court authorizes such an investigation by making a demand-futility determination.[2]

Nonetheless, IBEW wants to bypass the critical threshold inquiry into demand futility and—without standing to do so—conduct document discovery on the merits of its proposed derivative litigation by "investigat[ing] … breaches of fiduciary duties by Wal-Mart *officers*, making officer-level documents directly relevant . . . ." *Id.* at 23. But IBEW has no warrant or authority to conduct such an investigation on Wal-Mart's behalf. Delaware law unequivocally mandates that Section 220 remain a carefully circumscribed procedure that "does not open the door to the wide ranging discovery that would be available in support of litigation." *Saito*, 806 A.2d at 114. This Court has held time and again that a Section 220 demand and order must be made with "rifled precision" to ensure that the stockholder

[2] IBEW contends that Wal-Mart has "conceded" that such an investigation is a proper purpose. IBEW Br. 23. It bases this contention on part of the following statement in Wal-Mart's opening brief: "*The Chancery Court misconstrued Garner's 'necessity' factor to be satisfied simply because* the plaintiff's Section 220 purpose was to investigate allegations in the *New York Times* concerning corrupt payments supposedly made by WalMex employees in Mexico, and how Wal-Mart investigated those allegations." WM Br. 28 (emphasis added). As the emphasized passage, which IBEW omits from its selective quotation, makes clear, Wal-Mart was summarizing one of plaintiffs' arguments en route to demonstrating that the Chancery Court's ruling on the privileged documents was in error; Wal-Mart has never agreed that investigating the WalMex situation is itself a proper purpose. *See id.* at 10 ("IBEW's inspection purpose was limited to determining whether demand on the current Board would have been futile— and consequently whether it should be excused.").

gets those books and records to which it is entitled without kicking off merits discovery that might never be necessary. *E.g.*, *Brehm*, 746 A.2d at 266–67; *Sec. First Corp.*, 687 A.2d at 570.

The Chancery Court recently applied these principles to a books and records action that similarly demanded the production of all books and records relating to alleged wrongdoing, this time in connection with an acquisition. *Cook v. Hewlett-Packard Co.*, 2014 WL 311111, at *4 (Del. Ch.). There, the stockholder sought the company's books and records, including strictly officer-level documents, for three stated purposes: "(1) the investigation of wrongdoing at [the company], (2) communication with [the company's] board about possible wrongdoing, and (3) the determination of whether the members of [the company's] board who were involved in the . . . acquisition were disinterested and acted in accordance with their fiduciary duties." *Id.* at *4. The court rejected the stockholder's overreaching demands, holding that the only documents to which the stockholder was entitled under Section 220 were the non-privileged documents provided to the company's board of directors—not officer-level documents:

> [T]he documents necessary and essential to the Plaintiff's stated purpose of investigating wrongdoing on the part of [the company's] officers and directors are the documents that the Plaintiff has already received: board and committee minutes for meetings at which the board discussed the . . . acquisition, and documents reflecting presentations given at those meetings. To the extent the Plaintiff seeks additional documents—including the 750,000 pages of documents [the compa-

> ny] has provided to governmental investigators—his requests amount to a fishing expedition.

Id. at *5; *see also id.* at *4 ("Those [non-privileged board-level] documents are sufficient for the Plaintiff to investigate wrongdoing on the part of [the company's] officers and directors.").

Here, likewise, the only documents necessary and essential to IBEW's limited purpose of investigating demand futility are the documents that already have been produced: the non-privileged documents provided to Wal-Mart's Board of Directors.

Undaunted by the well-settled case law in Delaware, IBEW misconstrues this Court's decision in *Saito* to mean that it is entitled to access "'all of the documents in the corporation's possession, custody or control . . . .'" IBEW Br. at 20. But *Saito* does not permit the sort of broad-ranging merits discovery IBEW wishes to conduct here. Simply put, a stockholder-plaintiff must carry the burden of demonstrating a proper purpose and essentiality before gaining access to books and records, not *vice versa*. *Saito*, 806 A.2d at 114–15. Indeed, *Saito* affirmed the Chancery Court's refusal to require disclosure of third-party documents never presented to the corporation (or, therefore, its board of directors), in no small part because those documents would have no bearing on "what [the] company's directors knew and why they failed to recognize [the] accounting irregularities" at the core of plaintiff's claim of corporate mismanagement. *Id.* at 118–19.

IBEW also attempts to explain away the Final Order's *sua sponte* requirement that Wal-Mart produce documents maintained by "the Office of General Counsel"—which does not exist—by interpreting that phrase "to mean the folks at Wal-Mart who were responding to the Demand." IBEW Br. 29. Aside from the fact that the parties never briefed this issue (and IBEW does not claim that it did), this Court has never authorized a Section 220 production from unspecified "folks," and for good reason: the statute requires far more precision than this. Nor does IBEW dispute that this is the first time in Delaware history that a corporation has been ordered to search disaster recovery tapes as part of a Section 220 production. Instead, lacking any factual support, IBEW conclusorily asserts that collecting this data would "hardly" impose a burden on Wal-Mart. IBEW likewise fails to explain how documents post-dating the relevant time period by up to six years are "necessary and essential" to investigating whether demand on the Board of Directors would be futile with respect to the WalMex Allegations.

By requiring Wal-Mart to produce officer-level documents with no connection to the Board of Directors, the Chancery Court effectively obliterated the crucial distinction between books and records and merits discovery. Neither the Final Order itself nor IBEW's defense of that Order can be reconciled with this Court's precedent. Affirmance would work a radical change in Section 220 practice and

subject Wal-Mart—and, by extension, every other Delaware corporation—to unprecedented pre-litigation discovery obligations.

B. The Chancery Court Erred As A Matter Of Law By Invading The Attorney-Client Privilege And Work Product Doctrine

IBEW does not dispute that this Court has never applied *Garner v. Wolfinbarger*, 430 F.2d 1093 (5th Cir. 1970), in any kind of case, much less in the narrow context of a Section 220 inspection demand. That is a matter of historical and jurisprudential fact that Wal-Mart did not (and could not have) "waived." *See* IBEW Br. 30–31. The Final Order applied the *Garner* exception in the context of a Section 220 proceeding. If this Court were to hold (as it should) that *Garner* is unworkable in this context—because the stockholder-plaintiff has not yet received judicial authorization to maintain the lawsuit, *see* WM Br. 22—then it need not address the details of its application here.

Assuming, *arguendo*, that this Court were to conclude that *Garner* is available in *some* Section 220 proceedings, a stockholder still must establish that otherwise privileged documents are *necessary* to the continued prosecution of "obviously colorable claims." *Deutsch v. Cogan*, 580 A.2d 100, 108 (Del. Ch. 1990). The Court of Chancery in this case conflated this stringent inquiry with Section 220's "proper purpose" requirement—the lowest standard under Delaware law—effectively ruling that any stockholder who arguably establishes a proper purpose under Section 220 may also gain access to privileged documents. WM Br. 27–28.

IBEW does not dispute that the Chancery Court equated "proper purpose" under Section 220 with the *Garner* prerequisites. Instead, IBEW insists that this is the correct analysis, even while recognizing that the Chancery Court itself is divided on this question. *See* IBEW Br. 34 & n.31. Yet IBEW makes no effort to explain *why* any stockholder who can clear the relatively low hurdle established by Section 220 should automatically gain access to a corporation's privileged documents. IBEW thus fails to engage on Wal-Mart's main point, which is that the Chancery Court improperly allowed the "low bar" for stating a "colorable claim" for Section 220 purposes to supersede the far more stringent standard of necessity to prosecution of "obviously colorable claims" under the *Garner* doctrine. *Deutsch*, 580 A.2d at 108.

IBEW's principal argument is that it would be "illogical" to require a claimant to demonstrate a colorable claim on the merits before ordering production of privileged documents under the *Garner* exception. IBEW Br. 35. But if a stockholder in a Delaware corporation cannot show that it is likely to succeed on the merits, the courts should not be giving that stockholder access to the corporation's privileged materials. It may well be that such a showing cannot be made at the Section 220 stage; but that is merely a reflection of the reality that Section 220 is only a preliminary proceeding and the scope of available documents is limited. Materials otherwise protected from disclosure should be ordered divulged only in

the clearest of cases; the summary procedure under Section 220 is not suited to that inquiry. If (and only if) a stockholder can establish demand futility, then it will have an opportunity during the merits proceeding to evaluate its need for privileged materials and make application to the court at an appropriate time in the litigation after having exhausted the other discovery tools available.

Indeed, under *Garner*, an existing discovery record is required before privileged documents can even be requested, not to mention ordered produced: even if a claimant can demonstrate an obviously colorable claim on the merits, it must also establish that the privileged documents sought are necessary to the prosecution of that claim, including that the information is unavailable from any non-privileged sources. *Deutsch*, 580 A.2d at 108; *Grimes v. DSC Commc'ns Corp.*, 724 A.2d 561, 568 (Del. Ch. 1998). IBEW did not, and could not, prove in the Chancery Court that the privileged information encompassed by the Final Order is unavailable from other sources. Without such a showing, the *Garner* exception is simply inapplicable.

IBEW does suggest that because (according to its theory) there allegedly was wrongdoing in Wal-Mart's initial investigation of possible corrupt payments by WalMex employees in Mexico, all the privileged documents plaintiff seeks contain information that is unavailable from other sources. IBEW Br. 37. But IBEW made no such showing in its trial briefs or otherwise. If privileged internal investi-

gation documents were automatically subject to production under *Garner* in every case, as they would be under plaintiff's theory, internal corporate investigations would be chilled to the point of nonexistence.[3]

Moreover, the Chancery Court's rulings under *Garner* extend beyond the documents identified in the Company's privilege log. Final Order (Ex. A ¶¶ 1(c), (g)-(h), 2(c).) This potentially sweeping, *sua sponte* ruling demands reversal because the standards under Section 220 and *Garner* must be satisfied for *each* specific communication sought. *Espinoza*, 32 A.3d at 371–72. IBEW says nothing in defense of this ruling, thus conceding that it is erroneous. Instead, IBEW tries to create the impression that the Chancery Court's *Garner* and work product rulings were confined to the 19 privileged documents listed on Wal-Mart's privilege log. *See* IBEW Br. 40 n.38. In fact, the Final Order makes clear that the Chancery Court's ruling encompasses *all* privileged documents falling within the scope of responsiveness (as expanded by the Chancery Court), including those documents yet to be collected or placed on a privilege log. Invading the privilege for docu-

[3] In a footnote, IBEW argues that the crime-fraud exception to the attorney-client privilege provides an independent basis to conclude that the Company's privilege should be vitiated. IBEW Br. 34 n.30. However, the Chancery Court expressly declined to address IBEW's argument on this point, emphasizing that the exception should not be "lightly invoked," and that the standard for finding an exception under this doctrine is "pretty tough." A587. Plaintiff offered no facts or allegations that would establish this as one of the rare cases in which a company loses its privilege through the crime-fraud exception, and indeed plaintiff cannot demonstrate that a lawyer's advice was sought to facilitate the commission of a fraud or a crime. To the contrary, the very fact that the Company undertook an internal investigation following the initial allegations by Sergio Cicero belies plaintiff's contention that legal advice was used to further the alleged bribery and corruption.

ments that have never even been reviewed constitutes reversible error, particularly in a Section 220 case.

With respect to the Final Order's requirement that Wal-Mart produce attorney work product, IBEW argues that the Chancery Court correctly applied the heightened standard applicable to attorney work product. IBEW Br. 40. However, the Chancery Court's ruling affords no support for that argument. That ruling did not mention the requirements of Rule 26(b)(3); instead, it rendered its work product ruling "[f]or the same reason I mentioned with respect to *Garner* . . . ." A590. By requiring production of Wal-Mart's attorney work product documents based on Section 220's "low[]" bar, the Chancery Court both misapplied *Garner* and failed to engage in the necessary analysis of whether IBEW had established a "substantial need" for the materials, which could not otherwise be obtained "without undue hardship" as required by Rule 26(b)(3). Ch. Ct. R. 26(b)(3). As the Chancery Court has correctly recognized elsewhere, merely stating (as IBEW has done) that "[t]here is no other way for Plaintiff to obtain the information contained in those [documents]" does not demonstrate "undue hardship." *Saito v. McKesson HBOC, Inc.*, 2002 WL 31657622, at *12 (Del. Ch.) (citation omitted), *aff'd*, 870 A.2d 1192 (Del. 2005) (TABLE).

Finally, IBEW has no response to Wal-Mart's argument that if stockholders are routinely given access to privileged materials during the Section 220 process,

this summary proceeding will become bogged down with objections and appeals—as this case demonstrates. Any stockholder with a proper purpose may initiate a Section 220 demand, and under the reasoning of the Final Order may request all privileged documents that are within the scope of that demand; responding corporations and their directors will have to appeal to avoid the argument that they failed to use every means available to protect the privilege. This paradigm will drastically and unnecessarily complicate every books and records action, thereby defeating the value of Section 220's summary nature.

II. IBEW's Cross-Appeal Should Be Denied

IBEW presents two separate arguments in its cross-appeal. *First*, it seeks to compound the Final Order's erroneous ruling on the scope of production Wal-Mart must make, by expanding it to include a number of additional custodians, without any showing that the documents they might have would be in any way relevant to the question of demand futility—the *only* proper purpose for this Section 220 action. *Second*, IBEW challenges the Chancery Court's order requiring IBEW to return to Wal-Mart certain documents, all privileged, that were stolen from Wal-Mart and delivered to IBEW's counsel by an anonymous source. Both of IBEW's cross-appeal arguments should be rejected.

A. The Chancery Court's Decision Not To Expand The Number Of Custodians To Be Searched For Responsive Documents Or To Require Follow-Up Interviews Should Be Affirmed

1. Question Presented

Whether the Chancery Court properly held that Wal-Mart should not be required to collect data from additional custodians or conduct follow-up interviews of custodians.

2. Standard Of Review

IBEW's first argument on cross-appeal is that the Chancery Court "should have required Wal-Mart to collect documents from" additional custodians. IBEW Br. 42. Unlike the two points raised by Wal-Mart, which turn on legal questions reviewed *de novo*, this argument directly attacks a discretionary decision by Chancellor Strine regarding the scope of collection and production. It is reviewable only for abuse of discretion, and there is none here. *See Espinoza*, 32 A.3d at 372; *Sec. First Corp.*, 687 A.2d at 569.

3. Merits Of The Argument

First, the Chancery Court properly found that IBEW waived this argument by not raising it in its opening brief below (which IBEW concedes). A614; IBEW Br. 43. This is fatal to its cross-appeal. *See, e.g.*, *Emerald Partners v. Berlin*, 2003 WL 21003437, at *43 (Del. Ch.), *aff'd*, 840 A.2d 641 (Del. 2003) (citations omitted) (finding an argument waived when it was not included in the party's opening post-trial brief).

Second, even if IBEW had properly raised the argument concerning purportedly "key" officers, IBEW's request would nevertheless fail on the merits. IBEW fails to make any substantive argument as to *why* the trial court abused its discretion in declining to order Wal-Mart to search the files of additional custodians, including Wal-Mart's then-International Division General Counsel, internal auditors, and other executives, including officers at Wal-Mart's foreign subsidiary. IBEW describes these as "obvious" sources of documents, IBEW Br. 42, but in a Section 220 proceeding—the entire purpose of which is to determine whether pre-suit demand on Wal-Mart's Board of Directors would have been futile—this is not obvious at all. Even a stockholder with a proper purpose under Section 220 must show that the specific books and records it seeks are "essential to [the] accomplishment of the stockholder's articulated purpose . . . ." *Espinoza*, 32 A.3d at 371–72 (citation omitted).

IBEW utterly fails to establish that documents in the possession of the additional custodians are in any way "essential" to showing demand futility (and did not do so in its trial briefs, either). The custodians identified by IBEW are employees who generally did not communicate with the Board, A397, and so their custodial files are irrelevant to determining whether Wal-Mart's Board of Directors is disinterested and independent. Instead, IBEW is trawling for documents that

have no relevance to the purpose of its inspection: what the *Board* knew about the WalMex Allegations.

Third, IBEW's attempt to expand the number of custodians is inconsistent with its representation to the Chancery Court on October 12, 2012. With respect to Wal-Mart's motion for a protective order, the Chancellor ruled at a hearing on that date that Wal-Mart would be required to search the files of (at most) five custodians. In full agreement with that ruling, IBEW conceded that "there is a more narrow subset of officers, something on the order of five fingers . . . we could identify." A229. After the hearing, Wal-Mart identified five individuals, and, contrary to its belated assertion that there were other "obvious sources," IBEW Br. 42, IBEW did not object to the custodians selected or suggest any others. IBEW cannot now be heard to challenge the Chancery Court's discretion on this basis.

At the June 4, 2013 hearing, the Chancery Court warned IBEW that there would be "no more new custodians . . . ." A638; *see also* A635 ("And the oh-by-the-way stuff about an additional custodian, no, I'm not hep to that"); A529 ("THE COURT: When we had the hearing and there was the discussion about custodians, why was [Munich] not then insisted upon? MR. GRANT: The answer is I don't know."). IBEW's extraordinarily untimely and overreaching attempt to transform this books and records inspection into plenary discovery should be rejected.

Fourth, IBEW cannot support its belated request for documents from Wal-Mart's subsidiary, WalMex. Before a stockholder is given access to books and records of a subsidiary, Delaware law requires that the stockholder show that the entity is a "subsidiary" within the meaning of Section 220, and that the corporation has "actual possession and control" of the subsidiary's documents or the actual ability to cause the subsidiary to make its books and records available for inspection. 8 Del. C. § 220(b)(2); *Weinstein Enters., Inc. v. Orloff*, 870 A.2d 499, 506 (Del. 2005) ("Establishing that an entity is a 'subsidiary' of the corporation that is before the Court of Chancery is a condition precedent to invoking the 2003 amendment to section 220."). IBEW has never argued or offered any evidence that these prerequisites have been satisfied. Accordingly, its argument must fail.

Finally, IBEW argues that Wal-Mart should be ordered to interview the twelve custodians identified in the Final Order. IBEW Br. 44–45. Yet, IBEW can cite no case law, nor make any compelling argument, for requiring interviews of these individuals—and, as IBEW demands, searching their electronic and hardcopy files for responsive documents—to determine whether demand on the current Board would be futile. IBEW Br. 45. Again, IBEW is transparently demanding the type of merits discovery that would only be available in a derivative action following a judicial determination of demand futility—not in a Section 220 proceeding.

B. The Chancery Court Did Not Commit Legal Error By Requiring That Documents Stolen From The Company Be Returned To It

1. Question Presented

Whether the Chancery Court committed legal error by requiring IBEW to return to Wal-Mart documents stolen from the Company.

2. Standard Of Review

The Chancery Court's factual findings are reviewed "with a high level of deference" and will not be set aside "unless they are clearly wrong and the doing of justice requires their overturn." *Amirsaleh v. Bd. of Trade of City of N.Y., Inc.*, 27 A.3d 522, 529 (Del. 2011) (quotations omitted). "If there is sufficient evidence to support the findings of the trial judge, this Court, in the exercise of judicial restraint, must affirm." *Levitt v. Bouvier*, 287 A.2d 671, 673 (Del. 1972) (citation omitted).

3. Merits Of The Argument

IBEW received from an anonymous source a package of clearly privileged materials. B213–17; B340–55, 357–59. These materials were stolen from Wal-Mart by a former employee and have been disseminated without Wal-Mart's consent. B214–16; B298–99. Although IBEW's counsel were under an ethical obligation to return those materials to Wal-Mart, they refused to do so. Wal-Mart therefore sought the Chancery Court's assistance in securing the return of its stolen property.

The Court of Chancery ruled that the privilege had been lost as to certain documents that have been posted on websites maintained by *The New York Times* and Members of Congress. A477; A729. The Court of Chancery also ruled that the remaining stolen documents—that is, those that have not been published by the media or elected representatives—remain privileged and therefore must be returned to Wal-Mart. A729. It is from that aspect of the ruling that IBEW cross-appeals. Its argument, in short, is that it should be permitted to keep (and, presumably, use) stolen documents that are protected by privilege, for no other reason than they were delivered to the doorstep of IBEW's counsel by an anonymous source.[4] Merely to state the proposition is to refute it.

IBEW does not dispute that the documents in issue belong to Wal-Mart; that they are privileged; and that they were delivered to IBEW anonymously. Yet, IBEW contends that the record does not contain sufficient "evidence" to support the order requiring IBEW to return the documents to Wal-Mart. IBEW Br. 47. In these circumstances, however, *res ipsa loquitur*: IBEW has no entitlement to Wal-Mart's privileged documents in the absence of Wal-Mart's consent, or clear evidence of Wal-Mart's waiver of privilege. Neither of those circumstances exists

[4] IBEW also suggests that Wal-Mart "republished references" to the stolen documents in related litigation. IBEW Br. 15–16. The Company did no such thing. In that case, it was the plaintiffs who included excerpts of Wal-Mart privileged materials in their complaint; the Company in no way "republished" those privileged materials in attaching the complaint as an exhibit to its Stay Motion. IBEW can cite no authority to support its position that such actions constitute a waiver of privilege. And in any event, any publication of the stolen documents at issue on appeal can only be attributed to plaintiffs' counsel.

here. In any event, Wal-Mart submitted more than enough evidence on the subject to support Chancellor Strine's findings. Wal-Mart has shown since its initial Motion to Strike that IBEW violated Wal-Mart's property rights by disclosing the contents of, and refusing to return, the stolen documents. B224–26.

IBEW has also argued that Wal-Mart was required to show that it maintained its property interest in the privileged documents in order to support the Chancery Court's order that certain of the stolen documents must be returned. IBEW is confusing involuntary disclosure with inadvertent production. A privilege-holder's burden to establish document security protocols arises from cases involving the *inadvertent* production of privileged documents. *See In re Kent Cnty. Adequate Pub. Facilities Ordinances Litig.*, 2008 WL 1851790, at *5 (Del. Ch.) (among other factors, the court evaluates "the reasonableness of the precautions taken to prevent inadvertent disclosure" in deciding whether privilege is waived) (citing *Monsanto Co. v. Aetna Cas. & Sur. Co.*, 1994 WL 315238, at *6 (Del. Super. Ct.)).

Here, there was nothing inadvertent about the transmittal of stolen documents to IBEW's counsel by an anonymous source. These documents were sent without Wal-Mart's knowledge or consent, and IBEW does not argue otherwise. Nor has IBEW argued that Wal-Mart was negligent in maintaining these documents in the first place, or has been anything but diligent in attempting to get them

back. In fact, Wal-Mart has pursued the suspected thief across several states, obtaining contempt orders, a restraining order, and a permanent injunction in order to secure the return of these stolen documents. B214–16. Based on this undisputed record, the Chancery Court did not abuse its discretion in ordering the return of these stolen documents.

CONCLUSION

For the reasons stated, the challenged aspects of the Final Order should be reversed. IBEW's cross-appeal points should be rejected.

OF COUNSEL:

Theodore J. Boutrous, Jr.
GIBSON DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90071-3197
(213) 229-7000

Jonathan C. Dickey
Brian M. Lutz
GIBSON DUNN & CRUTCHER LLP
200 Park Avenue
New York, NY 10166-0193
(212) 351-4000

Mark A. Perry
GIBSON DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, DC 20036-5306
(202) 955-8500

POTTER ANDERSON & CORROON LLP

By */s/ Stephen C. Norman*
Donald J. Wolfe, Jr. (I.D. #285)
Stephen C. Norman (I.D. #2686)
Tyler J. Leavengood (I.D. #5506)
Hercules Plaza, 6th Floor
1313 North Market Street
P. O. Box 951
Wilmington, Delaware 19899-0951
(302) 984-6000

Attorneys for Appellant/Defendant-Below Wal-Mart Stores, Inc.

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