IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

THE PAVERS AND ROAD BUILDERS BENEFIT FUNDS,	:	
Plaintiff,	:	
v	:	C. A. No. 2024-0136-PAF
ILLUMINA, INC.,	:	
Defendant.	:	

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Chancery Court Chambers
Leonard L. Williams Justice Center
500 North King Street
Wilmington, Delaware
Tuesday, July 16, 2024
11:00 a.m.

- - -

BEFORE: HON. PAUL A. FIORAVANTI JR., VICE CHANCELLOR

- - -

TELEPHONIC RULINGS OF THE COURT

APPEARANCES:

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THE COURT: Good morning. Vice Chancellor joining. Thank you everyone for getting on the line. I'm not going to ask for a roll call, but just make sure that the court reporter has accurate information as to who is on the line for the parties for this call.

This is my post-trial decision in this books and records action. If you would kindly put your phones on mute, I will deliver my ruling in this action. I'm not going to leave you all in suspense until the very end. I am going to permit the plaintiff some narrow additional inspection relating to the board's decision to close the GRAIL merger.

I will start with background and then give you the analysis and my reasoning.

In the summer of 2020, defendant Illumina, Inc., which I refer to as "Illumina" or the "Company," sought to reacquire its former subsidiary, GRAIL, Inc., which I refer to as "GRAIL."

Over several months, Illumina's board of directors received advice on a wide range of merger-related topics, including "Anti-Trust: Key Takeaways," "Regulatory Strategy," and Due Diligence Findings: Legal." That's Exhibits 41, 54, and again

54. On September 20, 2020, Illumina announced that it would reacquire GRAIL for $8 billion.

That merger faced scrutiny from both U.S. and European regulators. On March 30, 2021, the U.S. Federal Trade Commission filed an administrative complaint to block the acquisition on antitrust grounds and initiated a federal action to enjoin the deal pending adjudication of the administrative complaint. The European Union's European Commission, or "EC," initiated its own investigation into the merger on April 20, 2021, also on antitrust grounds, which triggered a "Standstill Obligation" under EU Merger Regulation. On April 28, 2021, the company initiated an action challenging the EC's jurisdiction to review the merger.

On May 20, 2021, the FTC moved to dismiss its request for injunctive relief because, in its view, Illumina could not implement the merger under the standstill obligation, rendering the TRO and PI it had initially sought unnecessary. Notwithstanding the standstill and pending antitrust investigations in the U.S. and EU, Illumina's board decided to go forward with the merger, closing the deal on August 18, 2021.

In the months and days leading up to the closing, the board met several times, including on May 5, August 13, and August 15, during and outside of which directors sought and received legal advice related to the merger. This advice included "EU merger control strategy with respect to Illumina/GRAIL transaction," "antitrust reviews in the U.S. and Europe with respect to Illumina/GRAIL transaction," and "proposed hold separate commitments to be given to the European Commission on closing." Those are from the privilege log, JX 232.

The minutes of the board's meeting on August 17, during which the board resolved to close the GRAIL merger, stated that, at least in part, the board's decision to close was based on "the advice of legal counsel on the merits of the Company's position with the European Commission, the EU court and the FTC and US courts with respect to competition and antitrust matters." That's JX 113 at two.

During this interim period between the launch of the EC's investigation and the board's closing of the deal, the board also considered Illumina's D&O insurance policy, and the possibility of "obtaining additional Side A coverage ... dedicated

solely to GRAIL acquisition related claims." That's JX 103.

On August 4, two weeks before the board voted to close the merger, the board unanimously approved the purchase of up to $300 million in unspecified D&O insurance coverage at a cost of up to $100 million. In the same resolution authorizing the closing, the board also resolved to purchase an unspecified amount of insurance.

In response to Illumina's closing the merger, the EC ordered the companies to be held separate until it had completed its review. During this period, the board continued to receive legal advice, including at least five presentations and a presentation by Illumina's general counsel "reflecting legal advice regarding proposed remedies submission with the European Commission related to its regulatory review of the GRAIL acquisition." That's from the privilege log, which is JX 232.

On September 6, 2022, the EC officially blocked the merger and ordered Illumina to divest GRAIL, on the grounds that the merger "would have stifled innovation, and reduced choice in the emerging market for blood-based early cancer detection

tests."

On September 9, 2022, Chief Administrative Law Judge Chappell issued an initial post-trial decision in favor of Illumina.

On March 31, 2023, the FTC reversed that decision, blocked the merger, and ordered divestment. The commissioners voted 4-0 in favor of the FTC's order, with Commissioner Christine S. Wilson issuing a concurring opinion advocating for the application of a different legal standard, under which she reached the same conclusion.

On July 12, 2023, the EC fined Illumina €432 million for "knowingly and intentionally breach[ing] the standstill obligation," deeming it "an unprecedented and very serious infringement undermining the effective functioning of the EU merger control system." That's JX 225.

On December 15, 2023, the Fifth Circuit determined that "substantial evidence supported the Commission's conclusions" but held that the legal framework Commissioner Wilson advocated for in her concurring opinion was correct, and, therefore, vacated the FTC's order and remanded for further proceedings under that standard. Two days later,

Illumina announced it would divest GRAIL.

Earlier this year, Illumina reported in its Form 10-K that the company had recorded impairments of $3.914 billion in 2022 and $821 million in 2023 related to GRAIL.

On May 19, 2023, plaintiff, an Illumina stockholder, delivered a Section 220 demand to Illumina for inspection of books and records about the GRAIL merger, among other matters. The plaintiff stated six purposes for its demand.

"(a) investigating corporate waste, mismanagement or wrongdoing, and breaches of fiduciary duties of loyalty, good faith and due care on the part of Illumina's directors and officers with respect to the above-described matters;

(b) investigating whether the policies and processes employed by the Board in overseeing compliance with laws and regulations are sufficient;

(c) investigating the disinterestedness and ability of the Board to consider a demand to initiate and maintain litigation related to any breaches of fiduciary duty as detailed in (a)- (b), and determining whether it is necessary to institute class and/or derivative litigation to remedy

such breaches of fiduciary duty;

(d) discussing with the Board and/or management proposed reforms of Illumina's internal controls to prevent any future wrongdoing or mismanagement related to the issues described above;

(e) investigating the value of Pavers' shares of Illumina common stock; and

(f) determining whether the current directors are fit to continue serving on the Board." That's from JX 221.

On May 30, 2023, notwithstanding its objections to the purpose and scope of the plaintiff's demand, the company agreed to produce certain non-privileged documents, conditioned upon the plaintiff's entering into a confidentiality agreement. The parties entered into a confidentiality agreement on July 28, 2023, and Illumina produced approximately 1,140 pages of documents on August 4, 2023, and an additional 4,240 pages on November 22.

On January 24 of this year, the plaintiff sent the company a letter challenging redactions within produced pages and the nonproduction of other documents. I refer to this as the "Challenge Letter." That is JX 231.

On February 2nd, the company produced an additional 32 pages. On February 5, the company responded to the plaintiff's challenge letter, refusing plaintiff's requests and explaining that the company believed that the plaintiff was not entitled to inspect privileged material and that the company's other redactions related to material that was unrelated to the subject matter of the demand. That is JX 233.

On February 14, 2024, the plaintiff filed this action to compel inspection of the company's books and records pursuant to Section 220 and sought expedited proceedings. The parties stipulated to an accelerated schedule and a trial on a paper record. As the parties briefed the issues, the company produced additional documents and made certain representations to the plaintiff which, together, mooted or addressed plaintiff's challenges that did not relate to privilege or work product issues. The Court heard argument on the remaining issues on June 7.

Now turning to the analysis. The plaintiff seeks production of specific materials that the defendant has redacted or withheld on the grounds

of attorney/client privilege or the work product doctrine. To establish its entitlement to the information it seeks, the plaintiff must first satisfy the requirements of Section 220. Then, the plaintiff must demonstrate good cause under *Garner* to receive privileged material under the fiduciary exception. And to the extent any of the material constitutes work product, the plaintiff must also satisfy the standard for production of non-opinion work product or, where applicable, the meaningfully higher standard for opinion work product.

"To obtain books and records under Section 220(b), the plaintiff must establish by a preponderance of the evidence (i) its status as a stockholder, (ii) compliance with the statutory requirements for making a demand, and (iii) a proper purpose for conducting the inspection." That's from *Lebanon County v. AmerisourceBergen*, 2020 WL 132752, at *6, from this court on January 13, 2020.

The plaintiff must also establish "that each category of books and records is essential to accomplishment of the stockholder's articulated purpose for the inspection." That's from *Thomas & Betts v. Leviton Manufacturing*, 681 A.2d 1026 at page

1035 from the Delaware Supreme Court in 1996.

The plaintiff's status as a stockholder and compliance with the statutory requirements are uncontested. The defendant does contest the plaintiff's stated purposes for inspection.

Among the plaintiff's stated purposes is to investigate the board's alleged merger-related misconduct. "It is well established that investigation of mismanagement is a proper purpose for a Section 220 books and records inspection." That's from *Security First v. U.S. Die Casting*, 687 A.2d 563 at page 567 from the Delaware Supreme Court in 1997. But "a bare allegation of possible waste, mismanagement, or breach of fiduciary duty, without more, will not entitle a stockholder to a Section 220 inspection." That's from *AmerisourceBergen* from our Supreme Court at 243 A.3d 417 at page 426 in 2020. "Mere curiosity or a desire for a fishing expedition will not suffice. But the threshold may be satisfied by a credible showing, through documents, logic, testimony or otherwise, that there are legitimate issues of wrongdoing." That's from *Security First* at page 568.

As our Supreme Court reaffirmed in *Seinfeld v. Verizon*, to obtain inspection, a Section 220 plaintiff must "present 'some evidence' to suggest a 'credible basis' from which a court can infer that mismanagement, waste or wrongdoing may have occurred." That's 909 A.2d 117 at page 118 from our Supreme Court in 2006. "The 'credible basis' standard of proof is the lowest recognized under Delaware law. But it is not inconsequential." That's from *Oklahoma Firefighters v. Amazon.com*, 2020 WL 1760618 at *6 from this court on June 1, 2022.

The plaintiff argues that it has proffered "some evidence" of board misconduct in connection with Illumina's entering into the merger, litigating against the FTC and the EC, and closing the merger. I find that the plaintiff has not presented sufficient evidence to suggest credible basis to infer misconduct in connection with Illumina's entering into the merger agreement. Plaintiff has not presented any allegations regarding any board member's interest in GRAIL or the merger, or their lack of independence from anyone interested. The plaintiff only highlights connections certain members of GRAIL's board had with Illumina, and connections between Illumina's CTO and

GRAIL, but does not connect either to Illumina's board. The absence of any evidence regarding any board member's interest in or lack of independence with respect to the merger leaves the only remaining concerns as those which may give rise to an inference of bad faith.

The plaintiff points to two pieces of evidence concerning the pre-announcement process: That deSouza communicated an offer prior to receiving board authorization to do so and the results of the board's self-evaluation noting that "[a] concern was raised that during [the] Grail acquisition, there were multiple streams of unauthorized communications between an Illumina Board Member and Grail Board Members and the bankers." These issues do not, alone, provide a credible basis to infer wrongdoing in connection with entering into the merger.

The company's decision to litigate against the FTC and EC also does not provide a credible basis for inspection. While the company's positions have not, to date, been vindicated in either proceeding, its arguments were not frivolous. Rather, there is evidence that the arguments were colorable. For example, the company won at the administrative

trial level in the U.S., and EU Court of Justice's Advocate General, Nicholas Emiliou, recommended adopting Illumina's position in the EU. Each indicates the board had a good faith basis for pursuing those cases, notwithstanding the company's actual losses in each proceeding thus far, and the plaintiff has not introduced any evidence providing a credible basis to infer that the decision to contest either proceeding was undertaken in bad faith.

With respect to the board's decision to close the merger, however, the court concludes that the plaintiff has provided "some evidence" that establishes a credible basis to infer wrongdoing and, therefore, has stated a proper purpose.

The company asserts that the decision to consummate the merger was a product of the board's business judgment. There is, however, "some evidence" that the board knew about and, nevertheless, caused the company to close the merger in a knowing violation of the standstill obligation. The defendant conceded in its briefing that "the Board was aware of the challenge to the jurisdiction of the EC, deliberated based on the advice of counsel as to whether to close the Merger and made the decision to close the Merger

...." That's at the answering brief at page 40.

As the defendant explained at oral argument, "I don't think there's any doubt [about] what the standstill said. It is indisputable. It's a function of the way this statutory scheme in Europe operates. Nor do I think there's any doubt whether the company acted notwithstanding the standstill. And it was not an accidental closing. It was a knowing closing. It was a thoughtful closing. It was a closing based upon the view that the European Commission lacked jurisdiction; that the standstill itself was illegal, was without jurisdiction." That's at oral argument page 39.

Despite the board's disagreement with the standstill, it was a positive law that the board knowingly appears to have violated. As this court outlined in *Massey Energy*, directors and officers are free to disagree with policies and regulations, and "[i]f the fiduciaries of a Delaware corporation do not like the applicable law, they can lobby to get it changed." That's at 2011 WL 2176479, at *21. But the *Massey* court was clear that "until [the applicable law] is changed, [the fiduciaries of a Delaware corporation] must act in good faith to ensure that the

corporation tries to comply with its legal duties." That's also at *21. Distinguishing from what the court referred to as "the straw man arguments of certain academics," including that "a fiduciary can act 'loyally' toward a Delaware corporation while consciously causing the corporation to act illegally," the Court stated, in no uncertain terms, that "Delaware law does not charter law breakers." "Delaware law allows corporations to pursue diverse means to make a profit, subject to a critical statutory floor, which is the requirement that Delaware corporations only pursue 'lawful business' by 'lawful acts.' As a result, a fiduciary of a Delaware corporation cannot be loyal to a Delaware corporation by knowingly causing it to seek profit by violating the law."

Therefore, under our case law, the board's closing the merger may be misconduct, even if the EU ultimately determines that it lacked jurisdiction. An analogous example is the case of *Eagle Force Holdings, LLC v. Campbell*, 187 A.3d 1209 from the Delaware Supreme Court in 2018. In that case, this court had entered an order of contempt against the defendant for having violated a *status quo*

order. This court entered that order while the defendant was litigating whether he was subject to jurisdiction in this court. The Delaware Supreme Court held that the contempt order was lawful. The Court stated: "Several courts have noted that courts may hold proceedings to determine whether it has jurisdiction over a given action and, while doing so, impose orders to preserve the *status quo* pending the outcome of the proceedings ... We hold that, when a Delaware court issues a *status quo* order pending its adjudication of questions concerning its own jurisdiction, it may punish violations of those orders with contempt and for sanctions, no matter whether it ultimately finds that it lacked jurisdiction." That's at pages 1241 to 42 of the Supreme Court's decision.

I note, however, as this Court observed in the *Facebook Section 220 Litigation* from 2019, "[t]his is not the time for a merits assessment of Plaintiff['s] potential claims against [the Company's] fiduciaries. The 'credible basis' standard applicable in this Section 220 action imposes the lowest burden of proof known in our law and asks a fundamentally different question than would be asked at a trial on the merits ...."

I am not prejudging the issue, and I do not know whether the EU court would apply the logic and reasoning of *Eagle Force* if it ultimately determines it never had jurisdiction. The parties here have not briefed it. The litigation in the EU is ongoing and subject to European law, which this Court has no expertise, speaking for myself, and on which the Court expresses no opinion. But based on the record before it, and the defendant not having argued that the issue isn't ripe, there is some evidence providing a credible basis to infer potential wrongdoing from the board's decision to close the merger in contravention of the standstill obligation.

The plaintiff has also presented "some evidence" establishing a credible basis to infer that the board had an understanding not only that their conduct violated the standstill obligation, but that it could harm the company and they might be held liable for it. The plaintiff highlights the board's increasing of its D&O insurance coverage in connection with the closing. The company stresses that it was well within its statutory authority to purchase insurance for its directors and officers and emphasizes the importance of minimizing the downside

risks of serving as an officer or a director through insurance. The ability of the company to purchase D&O insurance, and the general desirability thereof, however, are not subject to dispute. Rather, plaintiff highlights both the timing and the apparent size of the new policy as evidence of the board's knowledge of the impropriety of closing.

There is a credible basis to infer the board engaged in conduct constituting a knowing violation of positive law. Its purchasing of hundreds of millions of dollars of side-A only D&O insurance that covered only derivative liability in connection with the GRAIL transaction further supports an inference that the board made this decision knowingly. It provides a basis not only to infer that the board knew about the unlawful nature of its conduct, but also specifically that the closing could result in hundreds of millions of dollars of liability for the company and that the members of the board might personally be held liable for those damages via a derivative action. Therefore, the plaintiff has presented some evidence providing a credible basis to infer the board engaged in wrongdoing in connection with the closing of the merger and, therefore, a

proper purpose for inspection has been established.

Next I turn to scope. Here, board-level materials, including board minutes and presentation materials, are necessary and essential for the plaintiff's proper purpose of investigating alleged wrongdoing in connection with the board's decision to close the merger. That the core documents themselves are necessary and essential to the plaintiff's proper inspection purpose is not subject to reasonable dispute, and the defendant has, in fact, already produced almost all of the board-level materials pertinent to the demand. The dispute before the Court centers on the redaction or the withholding of information on grounds of privilege or work product.

The plaintiff does not contest the defendant's designation of any of the challenged material as privileged. Therefore, it must satisfy *Garner* to obtain production.

The *Garner* test for production of privileged information under the "fiduciary exception" derives from the Fifth Circuit's 1970 decision in *Garner v. Wolfinbarger*, 430 F.2d 1093. This court has consistently applied *Garner* for more than four

decades, and the Delaware Supreme Court expressly adopted *Garner* in *Wal-Mart Stores v. Indiana Electrical Workers Pension Trust Fund*, 95 A.3d 1264 in 2014, and it did so specifically in a books and records action.

Garner only applies if there is a mutuality of interest between the parties. The defendant does not contest the plaintiff's mutuality of interest with respect to privileged information here, so the plaintiff's access to this information depends on whether it has established "good cause" for production.

Courts traditionally consider eight factors:

> [(i)] the number of shareholders and the percentage of stock they represent;
>
> [(ii)] the *bona fides* of the shareholders;
>
> [(iii)] the nature of the shareholders' claim and whether it is obviously colorable;
>
> [(iv)] the apparent necessity or desirability of the shareholders having the information and the availability of it from other

sources;

[(v)] whether, if the shareholders' claim is of wrongful action by the corporation, it is of action criminal, or illegal but not criminal, or of doubtful legality;

[(vi)] whether the communication is of advice concerning the litigation itself;

[(vii)] the extent to which the communication is identified versus the extent to which the shareholders are blindly fishing;

[(viii)] the risk of revelation of trade secrets or other information in whose confidentiality the corporation has an interest for independent reasons.

That's from the *Wal-Mart* decision of our Supreme Court at page 1276, note 32, quoting the *Garner* opinion at page 1104.

Those eight are not exclusive factors that a court may consider, but of those eight, this court tends to place particular emphasis on three: "(1) the colorability of the claim; (2) the extent to which the communication is identified versus the extent to which the shareholders are blindly fishing; and (3) the apparent necessity or desirability of

shareholders having the information and the availability of it from other sources." That's from *In re Fuqua* 2002 WL 991666 at *4 from this court on May 2, 2002. The plaintiff has the burden of establishing "good cause." And as the Supreme Court noted in *Wal-Mart*, the fiduciary exception "is narrow, exacting, and intended to be very difficult to satisfy." That's from page 1278.

With respect to the secondary factors, the defendant does not contest the plaintiff's *bona fides* or argue the privileged information sought concerns this litigation or that there is an independent risk of revealing confidential information. The defendant highlights that the plaintiff held a low percentage of the company's stock. This is true, but it was, nevertheless, a holding of over $1.5 million at the time of the demand. For a company the size of Illumina, with a current market cap of about $18.5 billion, and that's B, it is not a significant percentage, but I don't believe that this is the touchstone of the factor. It is, in my view, designed to assist the court in assessing the *bona fides* of the plaintiff and the plaintiff's claim. For that, there is support in Vice

Chancellor Laster's decision in the *United Food and Commercial Workers Local 1776* case against *Allergan* from the transcript on April 27, 2011.

At best for the defendant, this is a neutral factor. The defendant contends that the conduct the plaintiff seeks to investigate is not criminal, illegal, or of doubtful legality. The decision to close certainly was not alleged to be criminal but, as noted earlier, there is a credible basis to infer a knowing violation of the standstill obligation. Therefore, this factor too favors the plaintiff.

And, as noted, the plaintiff has stated a colorable claim, and I view it to be obviously colorable. There is little daylight, in my view, between a colorable claim and an obviously colorable claim, but, nevertheless, I conclude, for the reasons stated, that the plaintiff has stated an obviously colorable claim.

Next, "the extent to which the communication is identified versus the extent to which the shareholders are blindly fishing" also counsels in the plaintiff's favor. That's from *Garner* at page 1104. The plaintiff highlights that it has

specifically identified redactions in 17 documents and argues that its requests are targeted. Defendant contends that the plaintiff's requests are "unmoored from any facts whatsoever," and that it is pure speculation that this material would evince the board closing the merger against the advice of its counsel.

The plaintiff's purpose is not, however, to find only that information; rather, the plaintiff's purpose is to investigate an obviously colorable claim of potential wrongdoing. Here, the court places more emphasis on the degree to which the plaintiff's requests appear targeted for its proffered purposes. The plaintiff appears to have done so. The plaintiff has not challenged every privilege redaction, instead seeking only information that, based on unredacted information, appears directly related to plaintiff's purpose for inspection. The plaintiff may not know precisely what it will find, but that's not what this factor asks. Rather, plaintiff's requests are, in my view, reasonably targeted, and the plaintiff is not "blindly fishing." This factor supports inspection.

I next turn to the "necessity and unavailability" factor.

In *Lululemon*, this court observed that Section 220's "necessary and essential" prong was "similar, if not identical, to" *Garner*'s necessity and unavailability prong. That's from *In re Lululemon Athletica Inc. 220 Litigation*, 2015 WL 1957196, at *12 from this court on April 30, 2015.

As discussed, the production of board-level materials regarding the merger and the decision to close is warranted under Section 220. But that does not mean that the necessity and unavailability factor of *Garner* is also satisfied. A party may be entitled to board-level materials but not specific information contained therein which is privileged.

It is helpful to frame what the plaintiff is investigating and what it is looking for here. The plaintiff has, as the Court has already discussed, presented an obviously colorable claim regarding the board's decision to close the merger. There are several aspects of that decision with respect to which the plaintiff seeks additional information. The plaintiff seeks information from before the announcement regarding the board's original decision to enter into the merger agreement.

Specifically, the plaintiff wants to know more about what the board knew about the risk of anti-trust scrutiny prior to the announcement, and its considerations and deliberative process before deciding to pursue the merger.

The plaintiff seeks the advice the board received about the regulatory scrutiny that did occur, the information the board received which led it to conclude to litigate against the FTC and EC initially, and then why the board caused the company to continue to press its positions after closing. Of course, the plaintiff also seeks the advice the board received and considered in deciding to close the transaction, the attendant risks of doing so, and in deciding to beef up its Side A coverage.

With respect to the materials the board considered in deciding to enter into the merger in the first place, the Court can see how this might be helpful, but it does not strike the Court as necessary for the plaintiff's purpose. This information might give context to the later decision to close, but is not necessary to discern the board's deliberative process at the critical time.

Next, legal advice delivered in

connection with the board's decision to challenge the EC's assertion of jurisdiction and to litigate with the FTC is not necessary to investigate the decision to close. I do want to be clear, I'm deciding a books and records action, not a plenary action where some of these issues could resurface in a different context with a more fully developed record. My denial of inspection as to privileged information pertaining to the decision to enter into the merger and the decision to challenge the EC's jurisdiction and litigate against the FTC is not intended to and should not be construed as foreclosing a later challenge in a different case.

That leaves me with the demand to inspect legal advice that specifically addresses or directly informed the board's decision to close. The mere knowledge that the board made the decision to close after having considered legal advice and other facts is not, as the company argues, all of the necessary and essential information to satisfy the plaintiff's proper purpose. Knowing what the legal advice was is necessary for the plaintiff's investigative purpose, and that information is not otherwise available. Specifically, the advice that

the board received about the company's ability to close in the face of the standstill obligation, and any advice the board received about the potential consequences thereof, including liability therefrom, are necessary, and neither can be gleaned from publicly available information or elsewhere in the record.

Compare, for example, the *Facebook* decision with *Grimes v. DSC* from our court in 1998, at 724 A.2d 561. In the 2021 decision in *Facebook*, this court found information about the Facebook board's deliberative process necessary and essential and compelled production of non-privileged communications demonstrating that deliberation. It denied production of privileged communications, however, because the non-privileged communications might yet provide the same information as might be found in the privileged communications. It was critical to note that the information itself — the board's discussions of negotiations — is not, by its nature, privileged, and the court's ruling rested on the likely availability of this information from other sources.

Here, there is no other apparent source for this information. In that respect, this

case is like the *Grimes* decision, where there was no non-privileged substitute for information about the formation and report of a special committee responding to a litigation demand.

Similarly, here, there is no true non-privileged substitute for whatever advice the board received about the company's ability to close and the liability it faced for doing so. Further bolstering the plaintiff's claim, in *Saito v. McKesson,* the court found that financial information alone was insufficient to investigate the board's knowledge of financial reporting information and required production of privileged, pre-merger material as well. That's 2002 WL 31657622 from this court on November 13 in 2002. The court grounded its ruling in the necessity of information to determine scienter.

So too here, the plaintiff seeks information regarding how the board was advised about the company's and the directors' potential liability in connection with the merger. That the *Saito* court denied production of other information which concerned the litigation and was reflected in information the plaintiff already had is beside the point. Here, the plaintiff does not seek information regarding this

litigation, and it does not possess information regarding advice the board received regarding the company's ability to close or the risks of liability that might result therefrom. *Lululemon* further counsels in favor of production. There, the stockholder sought to inquire into the board's investigation of alleged insider trading. The communications at issue reflected the board's investigation. Although the information they discussed was otherwise available, the board's investigation itself was the crux of the plaintiff's inspection. Specifically, the plaintiff sought information about the board's knowledge, not just the alleged underlying misconduct. Here, the plaintiff seeks to investigate the board's decision to violate the standstill obligation. Some of the inputs into the advice the board received are available to the plaintiff.

For example, the board's understanding of its litigation positions and the merits thereof is well known to the plaintiff. But understanding the board's basis to believe that its litigation position was correct is not the same as understanding its decision to effect an alleged violation of positive

law by exercising self-help prior to the resolution of its litigation. The nature of the standstill obligation and that closing would violate it are clear. But the fact that the violation was clear, as the company understandably conceded at the oral argument, counsels further towards the need for information as to why the board decided to violate it.

Additionally, the company concedes that the calculation under the statute to reach the fine ultimately levied against the company is simple. The plaintiff has provided an obviously colorable theory from which to infer that the purchase of D&O insurance was connected to anticipated liability. But it is not clear how the company reached the specific value of the insurance that it obtained, how its assessment of that risk factored into the board's decision to close, and how the company's purchasing of hundreds of millions of dollars in personal insurance affected its assessment of the transaction's risks and the board's willingness to cause the company to close.

My conclusion in this regard is heavily grounded in the specific facts of this case. Information reflecting the full scope of advice and deliberations demonstrating why the board chose to

follow a particular course will not always be necessary, and the substance thereof may often be available elsewhere. This is best, perhaps, reflected by the scope of information that does not satisfy this factor.

Despite the plaintiffs presenting an obviously colorable claim, privileged information that goes only to the board's decisions to enter into the merger, to litigate with the FTC and EC, or about the adoption of its litigation positions is not necessary or otherwise available. Though each would likely provide helpful color, none are necessary for the plaintiff's proper purpose: investigation of the decision to close.

Therefore, the Court concludes that this factor favors production of privileged information about the advice the board received about the company's ability to close in the face of the standstill obligation, and any advice the board received about the potential consequences thereof, including liability therefrom, but does not favor production of other information.

Based on the Court's consideration of all the *Garner* factors, the Court concludes that the

plaintiff has satisfied its burden with respect to that information which the Court identified as being necessary and otherwise unavailable. This is in line with the Court's observation that the necessity and unavailability factor "has been described as 'the most important' of the *Garner* factors," and observation that "Delaware courts have been especially reluctant to apply *Garner* where the stockholder failed to satisfy the necessity/unavailability factor," and a description of its "dispositive nature" of Section 220 actions. That is from *Facebook*, 2021 WL 529439, at *9 n.84.

Garner, however, is not the end of the inquiry. The company also asserts work product protection against the majority of the documents that the plaintiff seeks.

First, with respect to non-opinion work product, Rule 26(b)(3) permits a party to "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 party is unable without undue hardship to obtain the substantial equivalent of the materials by other means." That's from *Wal-Mart* 95

A.3d at page 1280, quoting Court of Chancery Rule 26(b)(3).

As the Delaware Supreme Court has observed, and the parties agree, a "careful reading of the *Garner* factors demonstrates that they overlap with the required showing under Rule 26(b)(3) work-product doctrine." That's *Wal-Mart* at page 1280 to 1281.

For the reasons already discussed with respect to *Garner*, inspection of the same material is appropriate under Rule 26(b)(3). Specifically, the plaintiff has shown a substantial need for that information, given that it has demonstrated that it is necessary for its proper investigative purpose, and the plaintiff has demonstrated that it is unable to obtain this information by any other means.

The standard to obtain opinion work product, however, is higher than that under *Garner*. To obtain opinion work product, a party must demonstrate that the documents are "directed to the pivotal issue in the current litigation and the need for the information is compelling." That's from *Saito* at *12.

In my view, the plaintiff has not met this higher standard. *Williams Union Boiler v.*

Travelers Indemnity is instructive. That's a Superior Court case at 2003 WL22853534. There, the plaintiffs sought discovery into a coverage letter prepared by their insurer's counsel, upon which the defendant relied in refusing coverage, and a deposition of the insurer's counsel.

The court concluded that the "Plaintiffs fail to state a substantial need, other than the fact that they allege bad faith." The *Williams* court contrasted that case with the *Tackett* case from the Supreme Court in 1995. In *Tackett*, 653 A.2d 254, the insurer relied on a routine processing argument, injecting the issue into the litigation. Furthermore, *Tackett's* plaintiff had not just pleaded a bad faith claim but demonstrated that the insurer had rejected its counsel's advice. And the Court concluded that "the rejection of the advice provided significant evidence tending to show a lack of reasonable justification to deny the claim." That's at pages 262 to 63 of the opinion.

Unlike in *Tackett*, the plaintiff in *Williams* had merely pleaded a bad faith claim and had not demonstrated that the defendant rejected the advice of its counsel. Furthermore, the defendant's

representative testified that the decision to reject the plaintiff's coverage was not based on that legal opinion, but rather that "she merely relied upon that coverage opinion to support the coverage decision that she had already made." That's at *2 of the *Williams* decision.

Here, the plaintiff does not argue that it has demonstrated that the board rejected the advice of counsel on the record currently before the Court. The plaintiff candidly admits that this is information that it hopes to discover. But having articulated such a concern in its inspection purpose, just like having pleaded such a claim, does not alone entitle the plaintiff to inspect opinion work product.

The plaintiff also argues that the directors might assert as a defense in a future plenary action that they relied on the advice of counsel. Under our law, it is well established that a party cannot use the attorney/client privilege as a sword and a shield. If the plaintiff's expectation comes to pass in a future plenary action, there will be ample opportunity for the plaintiff to seek discovery into that opinion work product at that time. But that is for another day. The plaintiff has not

demonstrated that opinion work product is directed to a pivotal issue in the current litigation, or that its need for the information is compelling, and the plaintiff is not entitled to inspection of opinion work product at this time.

In conclusion, the plaintiff has stated a proper purpose of inspecting the board's decision to close the merger, and has demonstrated that inspection of board-level materials is necessary and essential to that purpose.

The plaintiff has also proven that it is entitled to inspection of privileged materials and non-opinion work product regarding the advice the board received about the company's ability to close in the face of the standstill obligation and about the liability that the company and the board might face. Plaintiff, however, has not established entitlement to inspect opinion work product at this stage.

Counsel, that is my ruling. I will allow the parties five days after the transcript becomes available to move for reargument.

I would like the parties to confer and submit a proposed form of implementing order, which you can submit within seven days after the transcript

becomes available.

Counsel, thank you for your patience. That is my ruling. Again, I'm not asking for reargument, but if there are any questions, I'm happy to entertain them now.

Let me first turn to counsel for the plaintiff.

ATTORNEY SBORZ: Your Honor, this is David Sborz from Andrews & Springer. No questions at this time. Thank you.

THE COURT: For the defendant?

ATTORNEY MARRIOTT: Your Honor, this is David Marriott. No questions at present. Thank you.

THE COURT: Thank you, counsel. With that, the Court stands in recess. Have a good afternoon.

CERTIFICATE

I, LORENA J. HARTNETT, Official Court Reporter for the Court of Chancery of the State of Delaware, Registered Professional Reporter, Certified Realtime Reporter, and Delaware Notary Public, do hereby certify the foregoing pages numbered 3 through 40, contain a true and correct transcription of the proceedings as stenographically reported by me at the hearing before the Vice Chancellor of the State of Delaware, on the date therein indicated.

IN WITNESS WHEREOF, I have hereunto set my hand at Wilmington this 17th day of July, 2024.

/s/ Lorena J. Hartnett

Lorena J. Hartnett
Official Court Reporter
Registered Professional Reporter
Certified Realtime Reporter
Delaware Notary Public