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Case No. 2018-0542-AGB

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

JOHN SCHNATTER	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 2018-0542-AGB
	)	
PAPA JOHN'S INTERNATIONAL, INC.,	)	
	)	
Defendant.	)	

PLAINTIFF'S ANSWERING POST-TRIAL BRIEF

BAYARD, P.A.

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PRELIMINARY STATEMENT

John Schnatter is a director of Papa John's International, Inc. ("Papa John's" or the "Company"). He made a demand under 8 *Del. C.* § 220(d) to inspect the Company's books and records. The Company refused that demand, putting the burden on the Company to prove that his stated purposes in his demand, at deposition and at trial, were untrue. The Company presented no affirmative evidence at trial. It did not carry its burden. Mr. Schnatter suspicions about what happened at the Company may be proven wrong after production of documents, but he did not have to prove he is right, at this stage, to merit inspection.

In lieu of presenting evidence, the Company has used the litigation as another opportunity to try to embarrass Mr. Schnatter. The Company uses its Opening Post-Trial Brief to directly call Mr. Schnatter "confused," "misguided" and "coy," and to not so subtly imply that he is a liar. Of course, when you have the burden at trial and strategically choose not to present evidence, your only defense is to denigrate your opponent.

The Company's pejoratives, loose citation to the record and questionable, at best, application of legal precedent reveal the infirmity in its legal position. Even a cursory inspection of the factual and legal sources relied on by the Company shows that the Company had to stretch every fact and legal precedent to fit its pre-

conceived story. The Company clearly had a story and it was sticking to it, regardless of the evidence.

The problem is that Mr. Schnatter's unrebutted testimony amply satisfies his only burden to show that the documents he seeks are reasonably related to his position as a director. And the Company's arguments that he did not have a proper purpose or that his true purpose was personal have no basis in the record. Mr. Schnatter articulated clearly the reasons why the Company's decision not to protect him after the NFL incident and the Forbes article caused him concern. Mr. Schnatter was the face of the Company's marketing efforts for over thirty years. The Company's failure to protect that image, unceremonious severing of ties with Mr. Schnatter and termination of longstanding agreements by a special committee that had been formed only hours before should have been of concern to any director. The Company cites to no precedent for the proposition that Mr. Schnatter cannot exercise his rights as a director because the subject matter he seeks to investigate involves him.

The Company's law school exam approach, arguing every single issue, no matter how marginal or hypothetical, should not distract from the core of what this case is about. Mr. Schnatter is a director. His demand was refused. The Company put on no evidence. Mr. Schnatter's testimony is unrebutted. The Company's arguments fall far short of the heavy burden it has to resist a director's demand

under 6 *Del. C.* § 220(d). The Court should find in favor of Mr. Schnatter and against the Company.

STATEMENT OF FACTS[1]

A. Mr. Schnatter Creates Papa John's And Grows The Company Into A Global Brand

Nearly 35 years ago, John Schnatter converted a broom closet in his father's tavern in Jeffersonville, Indiana, installed a pizza oven, and began delivering pizzas out of the back of the bar. (Tr. at 5:20-6:18; Dep. at 12:22-13:4.) Mr. Schnatter's brainchild later expanded into several brick and mortar stores, eventually becoming what is now known as Papa John's International, Inc. (Dep. at 14:2-22.) From these humble beginnings, Papa John's went public in 1993 (Tr. at 6:23-24; Dep. at 15:6-11), and quickly grew to become the third largest take-out and pizza delivery restaurant chain in the United States, with more than 5,000 locations in 45 countries and territories. (JX-106 at https://savepapajohns.com/about-john-schnatter/)

Since founding the Company in 1984, Mr. Schnatter has served, at varying times, as its Chief Executive Officer, co-Chief Executive Officer, and Interim Chief Executive Officer. (Tr. at 6:19-7:8; Dep. at 14:23-15:19; http://ir.papajohns.com/ corporate-governance/board-of-directors.) And while Mr.

[1] Unless otherwise indicated, all citations to the factual record are included in the parties' Joint Exhibit List and will be styled "JX-__ at _." Citations to the deposition transcript of John Schnatter will be styled as "Dep. at __." Citations to the trial transcript will be styled as "Tr. at __." Citations to the Company's Opening Post-Trial Brief will be styled as "DOB at __." Citations to the Pre-Trial Order will be styled as "PTO ¶ __."

Schnatter voluntarily resigned as Chairman of the Board in mid-2018 (JX-23 at JS-DE-0001844), a role he served in since the Company's inception, he continues to serve as a director and is the Company's largest shareholder, owning approximately 30% of the outstanding shares. (Tr. at 123:4-22; Dep. at 253:8-9.)

B. The Company Blames Mr. Schnatter For Its Economic Struggles

There is no denying that, under Mr. Schnatter's leadership, the Company performs materially better than when others are at the helm. (*See* JX-8 ("Despite recently slowing sales, the business has grown massively under Schnatter's watch."); JX-7.) Indeed, the Company's financial performance began deteriorating in mid-2016 – *i.e.*, long before Mr. Schnatter *and* Mr. Ritchie said anything about the NFL. Sales continued to steadily decline when Mr. Ritchie was officially promoted to CEO in January 1, 2018 (*see* JX-80), and allowed his cohorts, whom he promoted to leadership positions, to create a toxic, "frat-like" culture at Papa John's. (JX-46; *see also* JX-78 (noting that "Ritchie helms an insular band of executives who are prone to inappropriate behavior and who have received special treatment and fast-tracked careers"); Dep. at 45:13-18.) Rather than address the real reason for lagging sales and replace its leadership team, the Company's leadership has sought to preserve their own jobs, and repeatedly generate, or, at least, allow to perpetuate, false stories of racism to divert attention away from their own inability to correct the Company's financial downturn.

An early example arose out of comments Mr. Schnatter made during a November 2017 earnings call (the "November 2017 Call"). Prior to the November 2017 Call, Mr. Schnatter reviewed a script of his prepared remarks with Mr. Ritchie. Mr. Ritchie was adamant that Mr. Schnatter not make any comments about the NFL during the call. (Tr. at 10:16-22.) Mr. Ritchie, however, did not have authority to instruct Mr. Schnatter not to make those comments.[2]

During the November 2017 Call, Mr. Schnatter *and* Mr. Ritchie made statements regarding the need for the NFL to resolve disputes to the players' and the owners' satisfaction. (JX-6.) Those comments were neither racist nor particularly controversial. As Papa John's was the official sponsor of the NFL at this time, the NFL's viewership affected Papa John's. Mr. Schnatter explained:

> Now to the NFL. The NFL has hurt us. And more importantly, by not resolving the current debacle to the player and owners' satisfaction, NFL leadership has hurt Papa John's shareholders. Let me explain. The NFL has been a long and valued partner over the years, but we are certainly disappointed that NFL and its leadership did not resolve the ongoing situation to the satisfaction of all parties long ago. This should have been nipped in the bud 1.5 years ago. Like many sponsors, we are in contact with NFL. And once the issues is [sic] resolved between the players and the owners, we are optimistic that NFL's best years are ahead, but good or bad,

[2] Although the Company stated in its Pre-Trial Brief and the Opening Brief that "*the Company requested* that [Mr. Schnatter] not make public statements" regarding the NFL, there is no evidence in the record to support this contention. (See Defendant's Pre-Trial Brief ("DPTB") at 4; DOB at 4 (emphasis added).)

> leadership starts at the top. And this is an example of poor leadership.

(JX-6.) Later during the November 2017 Call, in response to a question about why the decline in viewership of the NFL was a bigger issue than it had been the previous year, Mr. Schnatter stated:

> And Chris, this is John. But you need to look at exactly how the ratings are going backwards. Last year, the ratings for the NFL went backwards because of the elections. This year, the ratings are going backwards because of the controversy. And so the controversy is polarizing the customer -- polarizing the country, and that's the big difference here.

(JX-6.) In the very next comment, Mr. Ritchie enthusiastically supported Mr. Schnatter's position:

> I think it's a great point, John. That's a great point because I do think that the negative consumer sentiment is having a big impact on our business. Because last year, with declining ratings, we were able to reallocate some of our investments as we continued to put more money into digital, but less viewership and negative consumer sentiment is the double-down effect that's having the biggest negative impact. It's a great point by John.

(JX-6.)

Notwithstanding the existence of a written transcript from the November 2017 Call – which reflected Mr. Ritchie's similar and supportive statements – the Company permitted Mr. Schnatter's NFL-related comments to be misreported by the media. Within hours of the November 2017 Call, the press started reporting

that Mr. Schnatter objected to NFL players "kneeling" (even though that word appears nowhere in his statement). (Tr. at 15:21-24.) The Company, however, did nothing to correct these reports. (Tr. at 17:16-18, 18:15-17.) A few *hours* later, the press was reporting that Mr. Schnatter was a racist. (Tr. at 15:24-16:1; JX-11.) And rather than quell the media's misreporting of Mr. Schnatter's comments and defend its founder from accusations that he was racist, the Company, its public relations department and in particular Mr. Ritchie, adopted a struthonian approach and advised Mr. Schnatter not to talk and let the dispute pass. (Tr. at 19:14-23.)

Two things about the November 2017 Call struck Mr. Schnatter as odd. One was how quickly the media seemed ready to misreport Mr. Schnatter's comments as being against the players and shortly thereafter, racist. (Tr. at 16:11-18.) The second was Mr. Ritchie's change in attitude about the NFL comments. (Tr. at 18:23-24.) Whereas the day before the November 2017 Call, Mr. Ritchie had been adamant that Mr. Schnatter not mention the NFL, now, after the call, Mr. Ritchie acted as if he was more concerned with the NFL brand than attacks on his own Papa John's brand, and did not care about the ramifications of the comments. (Tr. at 19:2-7.) Indeed, he had even joined in them. (JX-6.)

On top of these "odd" incidents, the Company then opportunistically blamed its poor sales on Mr. Schnatter's comments which, according to the Company, "alienated [its] customer base." (Tr. at 19:24-20:7; JX-110.) Intent on blaming the

Company's lackluster performance on Mr. Schnatter's NFL-related comments – comments which post-dated the decline in the Company's performance by over a year – the Board asked Mr. Schnatter to officially resign as CEO. Mr. Schnatter acceded to the Board's request and Mr. Ritchie obtained the CEO title on January 1, 2018 (a position he unofficially held since 2016).[3] (JX-9; Dep. at 37:18-20.)

C. The Directors Focus On Ousting Mr. Schnatter

The Company's failure to back its founder did not end there. The Company retained The Laundry Service ("Laundry Service"), an advertising and marketing agency, to provide "creative" advice. Meanwhile, Laundry Service was trying to convince the Company to use Laundry Service for its "media buys." (Tr. at 22:4-13.)

On May 14, 2018, Mr. Schnatter met with Laundry Service in person at its offices in New York. (Tr. at 23:23-24:2.) During this meeting, Laundry Service suggested that the Company put Kanye West alongside Mr. Schnatter in its commercials. (Tr. at 25:2-3.) At the time, Mr. Schnatter did not know who Kanye

[3] The Company asks this Court to strike Mr. Schnatter's demonstrative exhibit, JX-202, which provides a summary of the Company's declining financial performance under the guidance of Mr. Ritchie. (DOB at 11, fn. 8.) The underlying data supporting JX-202 was provided to the Company's counsel at trial (*See* Exhibit A) and is taken from the Company's publicly reported quarterly financial results. Accordingly, JX-202 should not be stricken as it complies with DRE 1006.

West was, but noticed that certain of his Papa John's team members at the meeting were uncomfortable with using Kanye West. (Tr. at 25:5-10.)

After the initial meeting, Mr. Schnatter researched Kanye West. Mr. Schnatter learned that Kanye West was famous but also discovered that he used the "N-word" a lot in his lyrics. (Tr. at 25:17-26:1.) Because of those lyrics, Mr. Schnatter did not believe that Kanye West would be appropriate for the Company's brand, culture, or advertising and he let Laundry Service know it. (Tr. at 25:17-26:5.)

On May 22, 2018, Mr. Schnatter participated in a telephonic meeting with Laundry Service, along with Mr. Ritchie and two other Company employees. (Tr. at 165:15-3.) Mr. Schnatter thought the meeting was a follow up on the creative ideas discussed at the prior meeting in New York. (Tr. at 26:13-16.) Instead, when he received a handout from Laundry Service, he learned for the first time that the meeting was intended to be a diversity media training exercise (the "Training Exercise"). (Tr. at 27:6-21; JX-23.) The purpose of this Training Exercise was purportedly to prepare Mr. Schnatter for questions he may be asked during an upcoming appearance. (JX-23; *see also* Dep. at 33:12-16.) At the outset of the Training Exercise, Mr. Schnatter was asked if he was a racist. (JX-23.) Mr. Schnatter stated that he was not racist. (JX-23; Dep. at 33:21-34:3.) Mr. Schnatter recounted a number of reasons for his strong feelings against racism, including a

vivid recollection of a disgusting racist act that he had read about years ago. (*Id.*) In other words, throughout that discussion, Mr. Schnatter was speaking out *against racism*.

The marketing firm persisted with these types of questions, including asking why Mr. Schnatter had made bad comments about the NFL. (Tr. at 29:10-16.) The questioning persisted for 40 minutes after which time, to make his point, Mr. Schnatter said that Colonel Sanders used the "N" word (and regrettably said the word to make that point) and he emphasized that he did not want that word associated with Papa John's advertising. (Tr. at 29:15-21.) And – although ostensibly a "training exercise" – *no one* from Laundry Service made a comment or stopped the call to do any "training" after this incident. (Tr. at 30:13-19.)

The next day, Mr. Ritchie informed Laundry Service that the Company would not use Laundry Service for its media buys. (Tr. at 31:2-8.) Mr. Schnatter expressed to Mr. Ritchie his concern that Laundry Service would blame Mr. Schnatter for the termination because of what occurred the day before. (Tr. at 31:14-20.) Mr. Schnatter's concern later proved prophetic.

After Laundry Service learned it would not receive the media buy business, its executives were upset. For the next few weeks, the Company and Laundry service negotiated over the fees that the Company owed to Laundry Service. Near the end of those discussions, Casey Wasserman, owner of Laundry Service, called

Steve Ritchie. In this call, Mr. Wasserman threatened that if the Company did not pay millions of dollars over what Laundry Service was owed, Laundry Service would "bury your founder." (Tr. at 33:11-13.)

Mr. Schnatter next heard about the Training Exercise on July 10, 2018, when the Company contacted Mr. Schnatter to inform him that Forbes magazine ("Forbes") had contacted Papa John's human resources department about the Training Exercise. Mr. Schnatter asked the Company whether he would be permitted to review the article before he commented on it, but the Company said he would not.

On July 11, 2018, Forbes published an article falsely claiming that Mr. Schnatter used a racial slur during the Training Exercise (the "July 11 Forbes Article"). (JX-12.) This is false, as there is a world of difference between using the word as a racial slur – demeaning someone by calling them that word – and quoting that word to make a point that the Company's advertising should not be associated with it. Although Mr. Schnatter renounced the claims in the July 11 Forbes Article (*see* JX-23; JX-26), news that Mr. Schnatter allegedly used a racial slur spread like wildfire in the media. (*See, e.g.*, JX-15; JX-18; JX-21.) And the Company, yet again, did nothing to douse the flames by spreading the truth. (Dep. at 43:4-44:12.) Among other things, the Company did not use the time between

the call from Forbes and publication of the article the next morning to create and implement a media strategy to protect Mr. Schnatter. (Tr. at 37:1-4.)

Indeed, once again the Company attempted to capitalize on the misreporting. On July 11 – the very same day the Forbes article was published – the Board asked Mr. Schnatter to step down as Chairman of the Board. (JX-23; JX-26; Dep. at 44:6-8.) Although Mr. Schnatter vehemently denied the media reports claiming he used a racial slur, he agreed to step down as Chairman that same day, as it was clear that if he did not, the Board would simply vote him out. (JX-23.) Despite the Board's insistence, however, Mr. Schnatter declined to resign as a director. (PTO ¶ 27; JX-36 at JS-DE-0000447.)

Then, two days after Mr. Schnatter's resignation as Chairman and before conducting any sort of investigation, the Company abandoned the "ostrich defense" and began actively promoting the narrative that Mr. Schnatter used a racial slur during the Training Exercise. In its July 13 press release, the Company condemned Mr. Schnatter's statements during the Training Exercise, stating "[r]acism and any insensitive language, no matter what the context simply cannot – and will not – be tolerated at any level of our company." (*See* https://ir.papajohns.com/news-releases/news-release-details/message-papa-johns ceo-steve-ritchie). Even today, the Company continues to fan the flames, claiming

that Mr. Schnatter's "behavior has turned our most loyal customers away from our pizza." (JX-110.)[4]

Not surprisingly, the Company's failure to correct the misreporting and defend its founder proved disastrous to Papa John's and to Mr. Schnatter. Various companies suspended or cancelled partnerships with Papa John's based on the erroneous belief that its founder used a racial slur. (*See, e.g.*, JX-15; JX-16; JX-18-JX-22.) And Mr. Schnatter was vilified in the media as a racist who made "divisive" and "reprehensible" comments. (JX-16.) All the while, and despite knowing the truth, the Company promoted this false narrative as well.

D. The Special Committee Is Formed To Conduct An Independent Investigation

On Sunday, July 15, 2018 at approximately 8:15 p.m., the Board held a special telephonic meeting (the "July 15 Board Meeting"). (JX-25.)[5] At approximately 8:30 p.m. and at the request of Mr. Schnatter (*see* JX-26; Dep. at 222:20-225:1), the Board voted on and passed a resolution establishing a Special Committee consisting of all directors, except for Mr. Schnatter. (JX-25.) The

[4] Of course, in making such statements, the Company is forced to turn a blind-eye to the internal tumult that has plagued Papa John's since Mr. Ritchie took over as CEO. (*See, e.g.*, JX-78 (detailing the toxic culture at Papa John's under Mr. Ritchie's leadership).)

[5] In advance of the July 15 Board Meeting, board materials were circulated to the directors, which included a draft resolution appointing a Special Committee.

Special Committee was given one (and only one) charge, the "exclusive power and authority" to review all the relationships between the Company, Mr. Schnatter, and his affiliates. (JX-25.)

Less than 3 hours after the Special Committee was formed and before conducting any investigation, the Company's counsel emailed Mr. Schnatter two notices of termination (the "Termination Notices"). (JX-27.) The first notice, from Mr. Ritchie, purported to terminate the "Agreement for Services as Founder," which governs Mr. Schnatter's appearances on behalf of the Company (the "Founder's Agreement"). (JX-29.) And the second notice, also from Mr. Ritchie, purported to terminate a "Sublease Agreement" governing Mr. Schnatter's use of office space at the Company's headquarters (the "Sublease Agreement"). (JX-28.)

The following day, counsel to the Special Committee advised Mr. Schnatter that they would "oversee an external audit and investigation of the Company's existing processes, policies and systems related to diversity and inclusion, supplier and vendor engagement and the Company's culture." (JX-30.) Actual legal authority to conduct such an investigation is found nowhere in the initial resolution that established the Special Committee, and on that basis alone the Special Committee's statement was inexplicable. Nonetheless, and despite Mr. Schnatter's obvious relevance to any such investigation, the Special Committee advised him

that he would only be contacted "if appropriate" as part of the Special Committee's diversity review.[6] (JX-30.)

E. Mr. Schnatter Is Forced To Make A Demand On The Board For Information He Is Entitled To Receive As A Director

1. Mr. Schnatter's Demand Seeks Documents Necessary to Inform Himself as a Director and to Investigate Potential Mismanagement.

None of this conduct made sense to Mr. Schnatter. The behavior of the Company's leadership in connection with the NFL and the Laundry Service events was difficult to defend standing alone. But in light of the Special Committee's apparent willingness to act beyond its legal authority, and its swift action in purporting to terminate the Founder's Agreement and the Sublease Agreement less than three (3) hours after its formation, Mr. Schnatter became concerned that the Special Committee was either acting without adequate information in breach of its duty of care, or had planned this coup in advance for its own self-interest and with the assistance of the Company's advisors unbeknownst to Mr. Schnatter in breach of their duty of loyalty. As such, on July 18, 2018, Mr. Schnatter served on Papa

[6] Notably, in its response to Mr. Schnatter's July 18, 2018 demand to inspect the Company's books and records, Papa John's acknowledged that the Special Committee "was formed with the express purpose of addressing issues involving Mr. Schnatter." (JX-53.) It is unclear, therefore, under what circumstances it would not be appropriate for the Special Committee to interview Mr. Schnatter during the course of its investigation.

John's a demand, pursuant to 8 *Del. C.* § 220(d), to inspect the Company's books and records (the "Demand"). (JX-35.)

In the Demand, Mr. Schnatter demanded categories of documents related to advice or other information given to the Board prior to the formation of the Special Committee as well as non-privileged documents provided to the Special Committee. (JX-35.) Specifically, Mr. Schnatter sought the following documents and records:

1. Communications with and between Counsel to the Company and any officer or director of the Company from October 31, 2017 through the formation of the Special Committee at the July 15, 2018 meeting of the Board of Directors (the "July 15 Meeting") referring or relating to me. For purposes of this Demand, Counsel shall mean any outside counsel to the Company, including without limitation, Hogan Lovells US LLP, Gibson Dunn & Crutcher, LLP, in-house counsel to the Company, and any counsel representing any director in connection with such director's service on the Board of Directors (the "Board").

2. Communications between or among directors, and/or any director and Counsel from October 31, 2017 through the July 15 Meeting relating to the article on Forbes.com's website published on or about 5:00 a.m. on July 11, 2018 referring to me (the "Forbes Article").

3. Communications between or among directors, and/or any director and Counsel from October 31, 2017 through the July 15 Meeting referring or relating to me.

4. Communications between or among directors and Counsel from October 31, 2017 through the July 15 Meeting referring or relating to Schnatter Group Arrangements as that term is defined in the resolutions adopted at the July 15 Meeting appointing the Special Committee (the "July 15 Resolutions").

5. Documents reflecting notice to me that the Independent Directors had retained separate legal representation in connection with their service

on the Board. For purposes of this Demand, the term Independent Directors means Olivia F. Kirtley, Christopher L. Coleman, Laurette T. Koellner, Sonya E. Medina, and Mark S. Shapiro.

6. Communications between or among directors or officers, Counsel and/or Akin Gump LLP prior to the July 15 Meeting, including without limitations all drafts of the July 15 Resolutions and the Special Committee Charter.

7. Any engagement letter between the Independent Directors and Akin Gump LLP prior to formation of the Special Committee.

8. The engagement letter between the Special Committee and Akin Gump.

9. The minutes of all meetings of the Board and any committees thereof from October 31, 2017 through and including the July 15 Meeting.

10. All materials provided to the Independent Directors in connection with the July 15 Meeting.

11. The minutes of any meeting of the Special Committee.

12. All materials provided to the Special Committee in connection with the meeting of the Special Committee held on or about July 15, 2018.

13. Communications between or among directors and Counsel referring to relating to my membership on the Board from October 31, 2017 to the present.

14. All documents referring or relating to any allegations of sexual harassment or other sexual misconduct and innuendo by any member of the Board or any Section 16 officers including without limitation all communications received or sent by the Company or any officer or director of the Company referring or relating to such allegations.

15. All documents referring or relating to the Company's relationship with Laundry Service, including without limitation all communications between the Company, Laundry Service, Casey Wasserman, and/or any companies (including their employees) affiliated with Casey Wasserman and any engagement letter between the Company and Laundry Service.

16. Any contracts, agreements or understandings between me and any of my affiliates and the Company.

17. Any settlement agreements or non-disclosure agreements involving me or my affiliates in the possession, custody or control of the Company.

(JX-35.) As set forth in the Demand, Mr. Schnatter sought the inspection for purposes of informing himself as a director as well as investigating potential mismanagement by other members of the Board. (JX-35.)

2. The Company Refuses Mr. Schnatter's Demand, Forcing the Filing of this Lawsuit.

On July 25, 2018, the Company responded to the Demand (the "Response"), advancing a cornucopia of flimsy and legally flawed arguments as to why Mr. Schnatter was not entitled to any of the documents and records he sought. (JX-53.) The Company first claimed, incorrectly, that Mr. Schnatter's stated purpose of investigating potential mismanagement by the Board was not proper under Delaware law. (JX-53.) The Company did not deny, however, that Mr. Schnatter would be entitled to any communications with in-house or outside counsel representing any director in connection with such director's service on the Board – core communications which could likely reveal if any of those individuals had breached their fiduciary duties, alone or in concert with others.

As for Special Committee-related requests, the Company argued that much of the information sought in the Demand would be privileged vis-à-vis Mr. Schnatter since the Special Committee was formed for the express purpose of

addressing issues involving Mr. Schnatter, a contention Mr. Schnatter does not dispute as is evident from the phrasing of his Demand. (JX-53.) Finally, the Company feigned concern that Mr. Schnatter must have misplaced confidential Company documents since a number of the documents requested in his Demand should already be in his possession. (JX-53.) This claim ignores the reality of the situation: Mr. Schnatter does not know what was provided to other members of the Board so he must request these documents so he can ensure that he is being provided with the same information as other members. (JX-53.)

Notwithstanding its litany of excuses as to why Mr. Schnatter was not entitled to any documents, the Company agreed to produce basic materials, such as board minutes and various agreements, subject to Mr. Schnatter's execution of a confidentiality agreement. (JX-53.) The Company eventually produced these documents on September 24, 2018. *See infra* at 22.

Without explanation, however, the Company refused to produce the vast majority of indisputably non-privileged documents essential to Mr. Schnatter's stated purpose. For instance, the Company refused to produce any pre-July 15 communications between or among directors and the Company's counsel referring or relating to Mr. Schnatter, the July 11 Forbes Article, or the Company's relationship with Laundry Service. Without these documents, Mr. Schnatter cannot meaningfully investigate whether the Board and the Special Committee

properly informed themselves before engaging in a series of knee-jerk reactions, and potentially legally unauthorized conduct, that ultimately caused significant and ongoing financial harm to the Company.

As a result of the Company's refusal to produce these documents, despite Mr. Schnatter's virtually unfettered access to the Company's books and records as a director, he initiated this litigation pursuant to 8 *Del. C.* § 220(d) (the "220 Action"). (JX-56.) The Company's sole defense to the 220 Action is that Mr. Schnatter does not have a proper purpose to inspect the Company's books and records.

F. Mr. Schnatter Sues To Enjoin The Special Committee From Fiduciary Breaches

On August 30, 2018, Mr. Schnatter filed a Verified Complaint for Violations of the Duties of Loyalty and Care Causing Irreparable Harm against the Company, the Company's directors, and Mr. Ritchie, the Company's CEO, for various breaches of fiduciary duties occurring after the period for which Mr. Schnatter sought information in his Demand (the "Injunctive Relief Complaint"). *See Schnatter v. Shapiro*, C.A. No. 2018-0646-AGB (Del. Ch.) (the "Injunctive Relief Action"). In the Injunctive Relief Action, Mr. Schnatter sought to enjoin Mr. Ritchie from making public statements without authority, to enjoin the Special Committee from investigating claims of sexual harassment against its own members and retaliating against employees who provided information about those

claims, and to enjoin the effectiveness of the Termination Notices. Mr. Schnatter also sought to invalidate certain portions of the rights plan adopted by the Company on July 22, 2018 (the "Rights Plan").

On September 21, 2018, before any defendant responded to the complaint, Mr. Schnatter amended his Injunctive Relief Complaint (the "Amended Injunctive Relief Complaint"). The Amended Injunctive Relief Complaint eliminated the claim against Mr. Ritchie and removed him as a defendant, as Mr. Ritchie had ceased making the offending statements.

G. The Company Produces Some Documents On The Eve Of Trial

On September 24, 2018, just seven days before trial, the Company finally produced certain documents identified in the Response, subject to Mr. Schnatter's agreement to treat them as confidential under the Confidentiality Policy adopted by the Board after Mr. Schnatter made his Demand. (JX-103.) As a result, the Company produced the following documents:

- Documents made available to all Board members on the Board portal by Company counsel from October 31, 2017 to July 31, 2018, regarding the July 11 Forbes Article and/or regarding Schnatter Group Arrangements;
- The meeting notice for the July 15 Meeting;
- The draft and final resolutions provided to the Board regarding the Special Committee;
- Final minutes of Board and committee meetings, excluding the Special Committee's minutes, from October 31, 2017 through and including July 15, 2018;

- Materials provided to all Board members on the Board portal in connection with the July 15 Meeting;
- Executed agreements between the Company and Laundry Service (and/or its affiliates); and
- Executed agreements between the Company and Mr. Schnatter.

(JX-103.) To date, these are the only documents the Company has produced in the 220 Action.

In addition, in response to the Court's September 21, 2018 Order requiring the Company to produce communications among the directors regarding the Demand that were available on the "Board Portal," the Company stated that the Board Portal contained no such documents.

ARGUMENT

I. AT TRIAL MR. SCHNATTER ESTABLISHED HIS RIGHT TO INSPECT THE COMPANY'S BOOKS AND RECORDS PURSUANT TO 8 *Del. C.* § 220(d)

A. Mr. Schnatter Established A *Prima Facie* Right To The Requested Books and Records

There is no dispute that Mr. Schnatter has established a *prima facie* right to the inspection of the requested books and records. A "director seeking inspection of books and records makes out a *prima facie* case when he shows that he is a director, he demanded inspection and his demand has been refused." *Bizzari v. Suburban Waste Servs., Inc.*, 2016 WL 4540292, at *8 (Del. Ch. Aug. 30, 2016) (internal quotations and citation omitted). Mr. Schnatter is a director of Papa John's. On July 18, 2018, he issued his Demand for inspection of the Company's books and records on Papa John's. On July 25, 2018, the Company refused Mr. Schnatter's Demand. *See* PTO ¶¶ 13, 36, 37, and 45.

B. The Company Cannot Meet Its Burden In Demonstrating That Mr. Schnatter's Purposes Are Improper

Having established his statutory right to the Company's books and records, the burden shifts to the Company to demonstrate that Mr. Schnatter is not entitled to the information sought in his Demand. "The burden of proof shall be upon the corporation to establish that the inspection such director seeks is for an improper purpose." 8 *Del. C.* § 220(d). If a director establishes his or her *prima facie* right to books and records, the company must satisfy its "rather substantial burden" in

proving that the director is improperly motivated. *Bizzari*, 2016 WL 4540292, at *1. Challenges to a director's purpose in seeking company documents are rare. *See Norman v. US MobilComm, Inc.*, 2006 WL 1229115, at *4 (Del. Ch. Apr. 28, 2006) ("Unlike a director, a stockholder, such as Norman, frequently encounters challenges to his purpose for a Section 220 demand.")

Mr. Schnatter identified two inseparable and proper purposes in his Demand. *First*, Mr. Schnatter requested Company information "to inform myself so that I may fulfill my fiduciary duties." (JX-35.) *Second*, Mr. Schnatter sought books and records to "ensure that the other members of the Board are fulfilling their fiduciary duties as well." (*Id*.) Both of Mr. Schnatter's stated purposes are proper under Delaware law. A director "is a fiduciary and in order to meet his obligation as such he must have access to books and records; indeed he often has a duty to consult them." *Henshaw v. Am. Cement Corp.*, 252 A.2d 125, 128 (Del. Ch. 1969). "It is well established that investigation of mismanagement is a proper purpose for a [] books and records inspection." *Sec. First Corp. v. U.S. Die Casting & Dev. Co.*, 687 A.2d 563, 567 (Del. 1997). Further, "[i]f [a director's] inspection of [a corporation's] records is to effectuate its purpose of enabling him to determine whether management wrongdoing has occurred, his access to [the corporation's] books and records must necessarily be broad and unrestricted."

Holdgreiwe v. Nostalgia Network, Inc., 1993 WL 144604, at *7 (Del. Ch. Apr. 29, 1993).

A director of a Delaware corporation is a fiduciary and, as such, owes a duty to the entity and its stockholders to protect and preserve the corporation. *See Henshaw*, 262 A.2d at 128. A director's right to the corporation's books and records is so vital to that director's fulfillment of his or her fiduciary duties, it has been codified. 8 *Del. C.* § 220(d).

Section 220(d) of Delaware's General Corporation Law states that "[a]ny director shall have the right to examine the corporation's stock ledger, a list of its stockholders and its other books and records for a purpose reasonably related to the director's position as a director." 8 *Del. C.* § 220(d). "The rights of directors to access the corporate books and records are recognized by Delaware law as of fundamental importance and a necessary concomitant to the imposition upon directors of fiduciary duties." *Holdgreiwe*, 1993 WL 144604, at *3.

The Company does not dispute that Mr. Schnatter's stated purposes are proper. Nor did the Company produce any witnesses at trial to refute the propriety of Mr. Schnatter's stated purposes. Instead, the Company attacks Mr. Schnatter's veracity, his competency, and his counsel's integrity in an effort to deny Mr. Schnatter his virtually unfettered right to the Company's books and records.

1. Mr. Schnatter's purposes are reasonably related to his role as a director and are not personal in nature.

The Company argues that, because Mr. Schnatter seeks information relating to him and his agreements with the Company, his purpose must be personal and unrelated to his status as a director. This is incorrect.

The Company has chosen to break ties with its founder, largest stockholder and face of its marketing for the last two decades. The Company did not implement this change gradually to allow for the market to become accustomed to a new vision for the Company. Instead, it broke its ties immediately, without investigation, without interviewing Mr. Schnatter, without research into the consequences and without, apparently, any care for how such actions would impact the Company, its employees, its franchisees or its stockholders. And it did so based on the purported "harm" caused by Mr. Schnatter's comments that, on their face, were not racist and media reports accusing Mr. Schnatter of racism that the Company allowed to fester (or indeed promoted) until the only narrative in the public was the incorrect and worst one.

That the director making the demand is the founder, largest stockholder and face of its marketing does not disqualify him from investigating the Company's decision-making. If any other director had questioned the reasoning behind the Company's abrupt shift away from its founder, largest stockholder and public face in a manner that suggested a pre-conceived plan, there would be no question that

such director would be entitled to inspect documents to investigate whether such plan existed and whether her fellow directors had complied with their fiduciary duties. The fact that the director in this case is also the founder does not render his purpose "personal."

The Company's actions, and inactions, relating to Mr. Schnatter have caused Papa John's significant harm. Mr. Schnatter's Demand seeks information necessary to inform himself as to whether the other directors on the Board acted with appropriate care and loyalty in managing the Company since the November 2017 Call. That is a proper purpose.

The Company cites no relevant case or authority supporting its contention that a director's interest in investigating mismanagement is improper if the director is the target of such mismanagement. This Court's decision in *Bizzari* denying a director the right to inspect the company's books and records is premised on the Court's finding that Mr. Bizzari was seeking the company's information in order to aid his *competing* venture. 2016 WL 4540292, at *8-9. Here, the Company has not argued that Mr. Schnatter even has a competing venture, let alone that he would use the information obtained from the Demand in violation of his fiduciary duties.

Similarly, this Court's ruling in *Gunther v. 5i Scis., Inc.*, C.A. No. 5800-CC (Del. Ch. Nov. 23, 2010) (TRANSCRIPT) also does not support the Company's

argument. In *Gunther*, Chancellor Chandler held that a director's demand for information was not for a proper purpose as it was made on behalf of and for the benefit of a stockholder of which the director was a principal. *Gunther*, C.A. No. 5800-CC, at 5. No such conflict of interest exists here. Mr. Schnatter is not seeking information as a straw man for the benefit of his affiliate and against the Company's interests. To the contrary, Mr. Schnatter's Demand seeks information that could save the Company. Since the Company suggests that Mr. Schnatter's actions have caused it economic injury over the past year, any director would be well-advised to make sure that he or she is informed regarding the Company's actions regarding Mr. Schnatter and investigate whether the other directors' actions or inactions have caused or exacerbated that harm. In this regard, the relevant question is not why Mr. Schnatter seeks these documents; rather the relevant question is why no other director is doing so. That silence speaks volumes.

2. Mr. Schnatter's testimony supports, and certainly does not undermine, his stated purposes.

The Company makes much of Mr. Schnatter's stated purposes of seeking the requested books and records to inform himself so that he can fulfill his fiduciary duties and investigate whether the other directors have fulfilled their fiduciary duties. In its opening papers, the Company argues that Mr. Schnatter lacks a proper purpose due to "varying sworn testimony." (DOB at 22.) However, the "variance" targeted by the Company is hyper-technical, inconsequential, and of

necessity *ignores* the overwhelming substance of Mr. Schnatter's sworn statements.

To be clear, Mr. Schnatter's Demand seeks information regarding past events. The information sought in the Demand does not relate to upcoming or ongoing Company deliberations. Rather, the requested books and records relate to past events and communications from which Mr. Schnatter was potentially wrongfully excluded. That information will inform him so that he can ensure that the other members of the Board fulfilled their fiduciary duties. (JX-35.) Accordingly, Mr. Schnatter's stated purposes in informing himself so that he can fulfill his fiduciary duties and ensure that the other members of the Board fulfilled their fiduciary duties are inseparable. Mr. Schnatter will not be able to ascertain whether the other directors comported with their fiduciary duties without being fully informed, himself.

The Company's counsel asked Mr. Schnatter about his stated purposes and the purported differences between what is stated in the Demand and what Mr. Schnatter stated in his interrogatory responses during trial and his deposition. (Tr. at 66:5-67:13 ("You know, there's potential that they violated their duties. I just want to be informed whether they did or they didn't."); Dep. at 230:18-231:16 ("I think [informing himself and investigating mismanagement are] one and the

same.") His trial testimony is consistent with his understanding of the inseparable nature of his stated purposes:

> Q. If we could turn to Exhibit 79. Page 13, I believe you were asked by counsel for the company a question about this response.
>
> Mr. Schnatter, do you recall being asked by counsel for the company whether this response you gave in the initial interrogatory responses represented a truthful answer, in your understanding?
>
> A. Yes.
>
> Q. And do you see the words there "to investigate"?
>
> A. Yes.
>
> Q. What do those words mean to you?
>
> A. To gain knowledge, to inform yourself, to have insight. I mean, investigate means to get to the bottom of something and know what's going on.

(Tr. at 181:22 – 182:12.) What is plainly evident from Mr. Schnatter's sworn statements and testimony is that he understood both stated purposes in his Demand, and believed them to be related.[7]

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[7] The Company's counsel spends significant time arguing that Mr. Schnatter's amended response to the Company's Interrogatory No. 6 should be stricken, and that Mr. Schnatter lacks personal knowledge regarding the amended responses. (DOB at 24.) Mr. Schnatter's counsel sought to avoid this sideshow by having Mr. Schnatter amend his original response to Interrogatory No. 6, which merely conformed his response to the Demand and his deposition testimony. (JX-79 ("Plaintiff states that his only purpose is set forth in the Demand: to investigate

Despite Mr. Schnatter's repeated, consistent testimony, the Company argues that his stated purposes for inspection belong to his counsel. (DOB at 19.) In support of this argument, the Company points to this Court's decision in *Wilkinson v. A. Schulman, Inc.*, a factually inapposite matter involving a stockholder plaintiff who admitted at trial that his "entrepreneurial plaintiffs' counsel" "came up with each of his" stated purposes. 2017 WL 5289553, at *2 (Del. Ch. Nov. 13, 2017). That is certainly not the record in this action. At trial, Mr. Schnatter discussed his belief that the Company's actions regarding the NFL and the Laundry Service caused him to seek information from the Company. (*See, e.g.*, Tr. at 5:1-5:10; 67:14-69:1.)

The Company argues that because Mr. Schnatter did not draft the specific document requests, his Demand should be denied. (DOB at 20.) Again, this proposition finds no support in Delaware law. The facts described in *Wilkinson* are unlike anything in this matter. For instance, Wilkinson was a "nominal plaintiff" who served as a plaintiff for the same law firm in seven separate lawsuits, typically

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whether members of the Board have breached their fiduciary duties to the Company and its stockholders."); JX-201 ("Plaintiff states that consistent with his Demand and his deposition testimony, his purposes are to inform himself so that he may fulfill his fiduciary duties and ensure that the other members of the Board are fulfilling their fiduciary duties as well.")). The Company did not even ask Mr. Schnatter at trial about his amended responses. Thus, it is difficult to understand how the Court could strike the amended responses for "lack of personal knowledge" when there is no testimony in the record about them.

challenging mergers. *Wilkinson*, 2017 WL 5289553, at *3. In fact, Vice Chancellor Laster made clear the unique nature of his ruling:

> A stockholder obviously can use counsel to seek books and records. Section 220 expressly contemplates that a stockholder can make a demand "in person or by attorney or other agent." Indeed, given the complexity of Delaware's sprawling Section 220 jurisprudence, a stockholder is well-advised to secure counsel's assistance. But a stockholder seeking an inspection and retaining counsel to carry out that stockholder's wishes is fundamentally different than having an entrepreneurial law firm initiate the process, draft a demand to investigate different issues than what motivated the stockholder to respond to the law firm's solicitation, and then pursue the inspection and litigate with only minor and non-substantive involvement from the ostensible stockholder principal.

Id. (citations omitted.) Mr. Schnatter clearly articulated in his deposition and at trial his purpose for seeking inspection and the reasons for seeking inspection. That Mr. Schnatter relied on his counsel to articulate the language of the requests to carry out his wishes is not the "fundamentally different" situation in *Wilkinson*. The Company's argument serves no purpose other than to attempt to embarrass Mr. Schnatter, a non-lawyer, for not knowing or understanding certain legalese typical of Section 220 litigation.[8]

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[8] Keeping with its pattern of arguing even the most insignificant of issues, the Company contends that Mr. Schnatter should have to produce "all communications with his counsel regarding the drafting of the Demand" or have his trial testimony elicited on redirect regarding the drafting of the Demand stricken. (DOB at 21, fn.12.) That counsel aided Mr. Schnatter in drafting his Demand is unremarkable.

The Company's accusations of gamesmanship against Mr. Schnatter's counsel are similarly unavailing. (*See, e.g.*, DOB at 24, fn.15.) The Company cannot argue seriously that it was prejudiced by Mr. Schnatter amending his response to Interrogatory No. 6. The amended response is consistent with the Demand. The Company had ample opportunity to depose Mr. Schnatter about any difference between the Demand and the initial response. Mr. Schnatter *testified clearly* at his deposition that he sought documents for both purposes, which he considered to be identical. Mr. Schnatter amended his response to Interrogatory No. 6 before trial to conform to the Demand and his deposition testimony. And the Company never asked Mr. Schnatter about his amended response at trial.

See Wilkinson, 2017 WL 5289553, at *3 ("Indeed, given the complexity of Delaware's sprawling Section 220 jurisprudence, a stockholder is well-advised to secure counsel's assistance."). The Company argues that Mr. Schnatter has placed his attorney-client privileged communications with counsel at-issue in this litigation and asks that the Court find that the privilege has been waived. (DOB at 21, fn. 12.) This Court has held that "[a]pplication of the at-issue exception is guided by considerations of 'fairness and discouraging use of the attorney-client privilege as a litigation weapon.'" *JPMorgan Chase & Co. v. Am. Century Cos.*, 2013 WL 1668393, at *3 (Del. Ch. Apr. 13, 2013) (quoting *Sokol Holdings. Inc. v. Dorsey & Whitney, LLP*, 2009 WL 2501542, at *6 (Del. Ch. Aug. 5, 2009)). Mr. Schnatter has not utilized the attorney-client privilege as a weapon. Mr. Schnatter gave substantial testimony both at his deposition and at trial regarding his purpose in seeking inspection of the Company's records. The Court must now determine whether Mr. Schnatter's requests are reasonably related to his role as a director. Further discovery of the drafting of the Demand serves no purpose other than the Company's desire to further punish Mr. Schnatter for exercising his statutory rights to equal information.

3. The Injunctive Relief Action does not impair Mr. Schnatter's purposes in pursuing the Company's books and records.

Next, the Company argues that even if Mr. Schnatter's stated purpose of investigating mismanagement is proper, he is not entitled to inspect the Company's records. (DOB at 25.) In support of this contention, the Company misstates the holding in *Holdgreiwe* and applies a standard to Mr. Schnatter's Demand that does not exist. (*Id*.) First, the Company incorrectly posits that *Holdgreiwe* held that a director "must show 'ample evidence that [he] has a bona fide need to inspect the corporate records in order to ensure that [management] has not engaged in any mismanagement of [the Company]." (*Id*.) Chancellor Allen did *not* state that the plaintiff in *Holdgreiwe* must show ample evidence that he has a bona fide need to inspect corporate records. Rather, Chancellor Allen stated that there was "ample evidence that Holdgreiwe has a bona fide need to inspect the corporate records" of the company. *Holdgreiwe*, 1993 WL 144604, at *4. There is nothing in Delaware's vast jurisprudence regarding director information demands that supports the Company's argument that a director must show a bona fide need to inspect records. Rather, the familiar standard codified in Section 220(d) is "[a]ny director shall have the right to examine the corporation's…books and records for a purpose reasonably related to the director's position as a director." 8 *Del. C.* § 220(d). And a director makes out a *prima facie* case for inspection simply by

showing he is a director who made a demand that was refused. *Bizzari*, 2016 WL 4540292, at *8. The Company's attempts to circumvent this liberal and well-established standard are untenable.

As set forth above, on September 21, 2018, Mr. Schnatter filed an Amended Injunctive Relief Complaint[9] against the Company and the Company's directors for various breaches of fiduciary duties occurring after the period for which Mr. Schnatter sought information in his Demand. The Company argues that the Injunctive Relief Action demonstrates Mr. Schnatter's improper purpose in pursuing the Demand. This contention is false.

The Injunctive Relief Action, in all but one instance, seeks relief for actions that occurred *after* the Demand. Count I of the Amended Injunctive Relief Complaint asserts a claim for breach of the duty of care against the members of the Special Committee. The claim does seek an order precluding the effectiveness of the Special Committee's termination of two Schnatter agreements. However, that does not vitiate Mr. Schnatter's need to inform himself regarding the Company's actions. At present, Mr. Schnatter does not even know if the Special Committee

[9] Mr. Schnatter's counsel notified the Company that in the near future he intends to move for leave to file a Second Amended Complaint, that would withdraw the derivative claims presently asserted as Counts I-III. However, insofar as Mr. Schnatter has not sought leave to file his Second Amended Complaint yet, he will address the Company's arguments pertaining to the existing claims in the Amended Complaint. Moreover, the Company's characterization of Mr. Schnatter's contemplated amendment (DOB at 28, fn.17) is incorrect and, much like a number of other arguments, unnecessarily pejorative.

actually even met or discussed anything before terminating the agreements. What is known is that the Special Committee purported to terminate those fundamental agreements hours after its formation.

Count II of the Amended Injunctive Relief Complaint asserts a claim for breach of the duty of loyalty against members of the Special Committee. This claim focuses on the Special Committee's decision to perform an investigation into claims that directly implicate members of the Special Committee. The actions detailed in the Amended Injunctive Relief Complaint and the focus of Count II took place after Mr. Schnatter issued the Demand.

Count III of the Amended Injunctive Relief Complaint asserts a claim for breach of fiduciary duty against the members of the Special Committee for retaliatory actions taken in response to the information provided by Mr. Schnatter to the Board and the Company's Human Resources Department. As noted above, the facts supporting this claim occurred after Mr. Schnatter issued his Demand.

Finally, Count IV of the Amended Injunctive Relief Complaint seeks to invalidate some or all of the Company's Poison Pill. The Company may argue that Mr. Schnatter's challenge to the Poison Pill overlaps with, among other things, Request No. 3 in his Demand, which asks for communications among the directors from October 31, 2017 through July 15, 2018 "relating to Mr. Schnatter." On its face, this request has nothing to do with the Poison Pill, nor could Mr. Schnatter

have intended such a request to include the Poison Pill – he did not get notice of the Board's intention to consider the Poison Pill until after the Demand. It is a stunning admission that the Poison Pill is related to Mr. Schnatter given that the directors *never mentioned* Mr. Schnatter being a threat at any Board meeting nor in the Company's press release.

It is important to note that this Court has held that "the mere prospect of harm to a corporate defendant" will not satisfy a company's substantial burden in demonstrating that a director does not have a proper purpose. *Obeid v. Gemini Real Estate Advisors, LLC*, 2018 WL 2714784, at *3 (Del. Ch. June 5, 2018) (citation omitted). Rather, a "defendant must produce 'concrete evidence' that the [director] 'will use privileged information to harm the Company in violation of his fiduciary duties.'" *Id.* (citing *Kalisman v. Friedman*, 2013 WL 1668205, at *5 (Del. Ch. Apr. 17, 2013)). This Court is reluctant to deny a director's inspection right, and recently refused to do so despite evidence indicating that a manager interfered with business operations of a company. *Obeid*, 2018 WL 2714784, at *3. This Court held that notwithstanding those serious acts, the company did not carry its substantial burden in demonstrating that the director did not have a proper purpose. *Id.*

At bottom, the Company cannot satisfy its substantial burden in demonstrating that Mr. Schnatter does not have a proper purpose by filing the

Injunctive Relief Action. And having failed to demonstrate any other facts or authority supporting its argument that Mr. Schnatter does not have a proper purpose, judgment should be entered in favor of Mr. Schnatter.

II. THE DOCUMENTS AT ISSUE

As discussed above, on September 24 at 5:47 p.m., the Company produced a few documents responsive to Mr. Schnatter's Demand. *See supra* at 20. In fact, these documents are little more than the bare minimum that Mr. Schnatter would be entitled to receive. Moreover, this production does little to address the substantive categories of documents sought in the Demand. The production only broadly touches on two categories in full – the request for all board minutes from October 31, 2017 through and including July 15, 2018 and some of the contracts evidencing the "Schnatter Group Arrangements" – and addressed a few others only in part.

For example, in category 15, Mr. Schnatter sought documents relating to the Company's relationship with Laundry Service, including communications between the Company and Laundry Service, but the Company has agreed to provide only "executed agreements" between the Company and Laundry Service while withholding communications between the Company and Laundry Service – including, importantly, the recording of the Training Exercise. Further, the Company continues to refuse to produce the important and core communications

between the directors or counsel in response to categories 1-4, 6 and 13. In addition, despite the late production of documents, the Company will not produce any documents in response to categories 5, 7, 8, 10-12, 14 and 17. Thus, the Court still must determine whether Mr. Schnatter is entitled to review documents in response to categories 1-8, 10-14, 17, and the communications with Laundry Service requested in category 15 (the "Open Requests").

In general, the Open Requests can be broken into two groups and two stand-alone requests. Categories 1-4, 6 and 13 seek director communications, including emails from their personal accounts discussing Company business (the "Director Requests"). Categories 5, 7, 8, and 10-12 seek information relating to the Special Committee (the "Special Committee Requests"). Category 14 is a stand-alone request for information relating to reports of sexual harassment at the Company. Category 17 is a stand-alone request for any settlements or non-disclosure agreements involving Mr. Schnatter.

As set forth below, Mr. Schnatter is entitled to review all documents responsive to the Open Requests.

III. MR. SCHNATTER NEEDS THE BOOKS AND RECORDS SOUGHT IN HIS DEMAND TO INFORM HIMSELF AND INVESTIGATE POTENTIAL MISMANAGEMENT

Once a director establishes a proper purpose for inspection of a corporation's books and records, other motivations or improper secondary purposes are

irrelevant. *Carlson v. Hallinan*, 925 A.2d 506, 545 n.267 (Del. Ch. 2006); *CM & M Grp., Inc. v. Carroll*, 453 A.2d 788, 792 (Del. 1982). This Court has described a director's right to a corporation's books and records as "essentially unfettered in nature." *Schoon v. Troy Corp.*, 2006 WL 1851481, at *1 n.8 (Del. Ch. June 27, 2006) (quoting *Milstein v. DEC Ins. Brokerage Corp.*, C.A. Nos. 17586 & 17587, at 3, Lamb, V.C. (Del. Ch. Feb. 1, 2000) (TRANSCRIPT)); *Kalisman v. Friedman*, 2013 WL 1668205, at *3 (Del. Ch. Apr. 17, 2013). "Unlike a stockholder, a director is not limited to information that is necessary and essential to a proper purpose." *Obeid v. Gemini Real Estate Advisors, LLC*, 2018 WL 2714784, at *3 (Del. Ch. June 5, 2018). "The court will not second-guess [a director's] business judgment about the information that he needs." *Id*. "A director is the individual who has to make the decisions. The director gets to judge what information he needs. People may disagree. People may think that the director really doesn't need that information; but in my view, it's the director's call, it's the director's decision as to what information he needs. And I don't think it is permissible to give half-truth answers to a director . . . ." *Kalisman*, C.A. No. 8447-VCL, at 30-31 (Del. Ch. May 14, 2013) (TRANSCRIPT).

In *Saito v. McKesson HBOC, Inc.*, the Supreme Court established that even though inspection pursuant to Section 220 is not as wide-ranging as in discovery, a stockholder who has a proper purpose "should be given access to all of the

documents in the corporation's possess, custody or control[] that are necessary to satisfy that purpose." 806 A.2d 113, 115 (Del. 2002). This is a standard that should apply even more fully to a director. Thus, the two key issues are whether a document is in the possession, custody or control of the corporation and, if so, whether it is reasonably related to the director's status as a director.

A. The Directors' Personal Emails Discussing Company Business Are Books And Records Of The Company

The Company argues that it need not produce communications about Company business between or among directors on their personal email, text, chat or communication applications because they are not in the possession, custody or control of the Company. The Company's position is incorrect.

Corporations have been resisting the production of documents based on the argument that they do not have possession, custody or control for over 100 years. *E.g.*, *Martin v. D.B. Martin Co.*, 88 A. 612, 615 (Del. Ch. 1913) ("It would follow that the books, etc., of the agent are under the control of the principal to such an extent as that the latter can be compelled to produce them for the purpose of furnishing discovery in a suit by a stockholder of the dominant company alleging a fraudulent misappropriation of the property and business of the allied, or subsidiary, companies by officers of the dominant company for their individual benefit, to the detriment of the interests of the stockholders of the dominant company."). The majority of these decisions addressed whether a parent

corporation could be compelled to produce records held by a subsidiary. Although the courts generally did not permit inspection of documents held by a subsidiary absent fraud,[10] courts did consistently hold that "the rights of shareholders secured by § 220 cannot be defeated simply by having another entity hold the records relating to [the corporation] which [the corporation] ordinarily would have." *Dobler v. Montgomery Cellular Holding Co.*, 2001 WL 1334182, at *10 (Del. Ch. Oct. 19, 2001). Eventually, in 2003, the General Assembly passed an amendment to Section 220 clarifying the circumstances under which a corporation could be compelled to produce for inspection the books and records of its subsidiaries. *See Weinstein Enter., Inc. v. Orloff*, 870 A.2d 499, 505-06 (Del. 2005) (describing amendment to § 220 to provide for inspection of documents of a subsidiary).

The proliferation of electronically stored information, and in particular email, presented a new challenge for the notion of documents within a corporation's possession, custody or control. Directors of Delaware corporations may, from time to time, use their personal computers or mobile devices to access information provided by the company or use their personal email or other methods of communication to communicate with other directors or the company about company business. Courts struggled with whether to require information related to

[10] *See, e.g.*, *Carapico v. Philadelphia Stock Exch., Inc.*, 791 A.2d 787, 793 (Del. Ch. 2000); *Skouras v. Admiralty Enters.*, 386 A.2d 674, 681 (Del. Ch. 1978).

the Company's business residing on these devices or accounts to be produced in response to a Section 220 demand. Then-Chancellor Strine addressed the issue[11] in *Indiana Electrical Workers Pension Trust Fund IBEW v. Wal-Mart Stores, Inc.*, C.A. No. 7779-CS (Del. Ch. May 20, 2013) (TRANSCRIPT) ("*Wal-Mart I*"). In *Wal-Mart I*, the Court required the custodians identified by the Company to have their home computers and devices searched for information responsive to the demand. *Wal-Mart I*, at 97-98. The Court reasoned that it would be "stunning" if Wal-Mart thought that company information on the home computers and devices of the custodians did not, in fact, belong to Wal-Mart. *Id.* at 98. The Court did, however, allow Wal-Mart to "file an affidavit indicating that all their directors, officers, employees who use their information at home, that that becomes their personal unrestricted information outside the control of the company and free to be distributed to anyone on earth … then I won't require that as to those people you actually gather that information." *Id.* at 97.

The Court next considered the issue in *In re Lululemon Athletica 220 Litigation*, 2015 WL 1957196 (Del. Ch. Apr. 30, 2015). There, the Court distinguished *Wal-Mart I* on the grounds that then-Chancellor Strine's offer to Wal-Mart to file an affidavit about use of company information at home "left open

[11] In 2004, the Court declined to require production of emails as "excessive." *Khanna v. Covad Commc'ns Grp., Inc.*, 2004 WL 187274, at *9 (Del. Ch. Jan 23, 2004).

the possibility that, depending on Wal-Mart's policy for use of company information and documents on non-company devices, information residing in the director's personal computers may or may not have to be produced." *Id.* at *5 n.35. Based on this reading of *Wal-Mart I*, whether the Court could require production of non-employee director emails would have to be "based on a careful review of the circumstances of the case." *Id.* The Court held that factual record did not permit such careful review. *Id.* Moreover, the Court held that the plaintiffs had not properly raised the issue of production of non-employee director emails in their pre-trial briefing, trial or related arguments. *Id.* at *6. The Court held that even if plaintiffs had raised the issue properly, they had not shown that the emails were "essential" to their purpose because the documents already produced by the company satisfied their purpose of determining whether any "investigation" of insider trading occurred. *Id.* at *7. The Court reasoned that emails between directors would not constitute an "investigation" of insider trading, and if they had, such emails would have made their way to the company's servers. *Id.*

The Court reached a similar result in *Chammas v. Navlink, Inc.*, 2016 WL 767714 (Del. Ch. Feb. 1, 2016). In *Chammas*, a director sought to inspect, among other things, *all* communications between management and the board chairman, and the other directors and the board chairman. The Court denied the director's request on the grounds that the plaintiff had not shown that this broad range of

communications were communications affecting the corporation's rights and obligations nor sufficiently tailored to the director's purpose. *Id*. at *8. The Court, citing *Wal-Mart I*, noted that its holding was "not to be interpreted as a blanket prohibition against inspection of private communications." *Id.*

More recently, however, this Court has held that directors' personal emails discussing company business should be produced in response to a proper demand under Section 220. In *Amalgamated Bank v. Yahoo! Inc.*, 132 A.3d 752 (Del. Ch. Feb. 2, 2016), decided just one day after *Chammas*, the Court held that if the Chief Executive Officer "chose to use a personal email account to conduct Yahoo business, she must produce responsive documents." Relying on this Court's holding in *Dobler* and *Wal-Mart I*, the Court held that

> A corporate record retains its character regardless of the medium used to create it. By analogy, if two officers used their home computers to produce a confidential corporate document that they shared with one another over their private email addresses, no one would think that the report was a personal document that the officers could sell for their own profit. As with other categories of documents subject to production under Section 220, what matters is whether the record is essential and sufficient to satisfy the stockholder's proper purpose, not its source.

Id. at 793 (internal citations omitted).

Since its decision in *Yahoo!*, this Court has ordered production of personal emails in two written decisions. In *Lavin v. West Corp.*, 2017 WL 6728702, at *14 n.103 (Del. Ch. Dec. 29, 2017), the Court cited *Yahoo!* when requiring production

of emails because they would "show what [key players] knew and when." In *Mudrick Capital Management, L.P. v. Globalstar, Inc.*, 2018 WL 3625680, at *9 (Del. Ch. July 30, 2018), the Court ordered the Company to produce emails within a 17-month period between or among the company's CEO and controlling stockholder, the general counsel, and two members of the special committee,.

The Court should follow the recent case law and hold that director emails, even on their personal email accounts, and any other preserved communications, are the books and records of the Company and should be produced. The analysis in *Yahoo!*, even though in the context of a stockholder demand, is consistent with this Court's long-held belief that the rights of a director or stockholder under Section 220 cannot be defeated simply by having another entity hold the documents. *Dobler*, 2001 WL 1334182, at *10. Here, the directors hold the emails and other communications but they clearly must be discussing Company business. For example, the directors arranged for the retention of Akin Gump and for the drafting of resolutions forming and empowering the Special Committee. Even if the Court holds Mr. Schnatter is not entitled to inspect those specific documents, the Court still can infer from the facts of Akin Gump's retention and the presentation of the resolutions that the directors were communicating with each other outside the presence of Mr. Schnatter.

This approach also reflects practical realities: with increasing frequency, individuals avoid using their corporate email accounts and resort to personal accounts – including social media applications – for the express purpose of hiding information from discovery and concealing conduct for which they hope to avoid responsibility. If other Board members or senior management were overtly discussing putting their own interests ahead of the best interests of the Company, such communications most likely did not occur using Company email accounts, but rather occurred in text messages and other personal communication methods. But as in the case law discussed above, those discussions are Company discussions, and they must be produced.

Even if the Court were inclined to follow *Chammas* and *Lululemon*, those decisions are inapposite. In *Chammas*, the plaintiff sought a broad range of communications among directors without reference to any topics. Here, the Director Requests are narrow in that they require the communication to be about Mr. Schnatter, and not all communications.[12] And, unlike the demand in *Lululemon*, there are no documents produced already which satisfy Mr. Schnatter's

[12] It was precisely because the Court in *Chammas* found that unbounded request unreasonable that Mr. Schnatter asked for emails relating to him. The Company attempts to turn that reasonable limitation on the scope into evidence of the personal nature of Mr. Schnatter's purpose. But, if Mr. Schnatter could not so limit his request to comply with the law without also turning his request into a "personal" one, it would effectively eviscerate his virtually unfettered right to inspect documents.

purpose or would render such communications superfluous. Indeed, the Company's representation on September 24, 2018 that the Board portal contains no record of directors communicating about the Demand or its purpose supports requiring the Company to produce emails from the directors' personal accounts because Mr. Schnatter cannot get this information elsewhere. *Cf. Wal-Mart Stores, Inc. v. Indiana Elec. Workers Pension Trust Fund IBEW*, 95 A.3d 1264, 1271 (Del. 2014) (holding that to satisfy more stringent "necessary and essential" requirement for stockholder inspection, the information must be "unavailable from another source) (quoting *Espinoza v. Hewlett-Packard Co.*, 32 A.3d 365, 372 (Del. 2011)).

B. The Demand Seeks Information Reasonably Related To Mr. Schnatter's Proper Purposes And His Position As A Director Of The Company

1. The Director Requests.

Mr. Schnatter needs these documents to determine the extent that the Company's other directors, officers and counsel have excluded Mr. Schnatter from important Board decisions. For example, after the November 2017 Call, the Company told Mr. Schnatter not to respond, then issued a lukewarm response that was not even attributed directly to Mr. Schnatter. Standing alone, the failure to protect Mr. Schnatter might not have been indicative of anything, but the Company doubled down on this approach after the July 11 Forbes Article. Indeed, the speed with which the Company and the Board acted to ask Mr. Schnatter to resign as

Chairman, to refuse to defend Mr. Schnatter, to retain counsel to represent a Special Committee, and to terminate two key agreements with Mr. Schnatter indicates that certain of these actions had been planned for some time. Of course, the other members of the Board and management did not include Mr. Schnatter on any such communications, but it is reasonable to infer that they occurred.

Mr. Schnatter will treat any information produced in response to the Director Requests consistent with his fiduciary duties as a director of the Company and consistent with the terms of the Company's Confidentiality Policy.

2. The Special Committee Requests.

The Special Committee Requests are essential to Mr. Schnatter's investigation into potential mismanagement by his fellow directors. The purpose of these requests is not an attempt to invade the attorney-client privilege between the Special Committee and its counsel, but rather to investigate the process the Special Committee engaged in prior to terminating two key agreements – the Founder's Agreement and the Sublease Agreement – with Mr. Schnatter. All that is known, to date, is that at the July 15 Board Meeting, a Special Committee was formed of all the directors except Mr. Schnatter, and approximately three hours after its inception, the Special Committee acted to terminate the aforementioned agreements. It is impossible for Mr. Schnatter to investigate whether his fellow directors complied with their fiduciary duties without knowing what information

the other directors on the Board had prior to formation of the Special Committee, what information the Special Committee had before and during the meeting, the minutes of the Special Committee's meeting, and the terms and circumstances regarding the engagement of Akin Gump by the Special Committee.

Mr. Schnatter will treat any information produced in response to the Special Committee Requests consistent with his fiduciary duties as a director of the Company and consistent with the terms of the Company's Confidentiality Policy.

3. The Sexual Harassment Request.

Following the July 11 Forbes Article, Mr. Schnatter received various media inquiries to discuss the allegations in the article. However, some of the media inquiries also wanted Mr. Schnatter to comment on alleged claims of sexual harassment at the Company. Mr. Schnatter was not aware of any sexual harassment claims at the Company, but nonetheless was disturbed by the allegations. Ultimately prophetic, Mr. Schnatter issued his Demand one day prior to Forbes publishing an article concerning the Company's purported "toxic culture." (JX-46.) The documents concerning allegations of sexual harassment are necessary to Mr. Schnatter's proper purpose of informing himself of the Company's affairs while also essential to Mr. Schnatter's investigation into potential mismanagement.

Mr. Schnatter will treat any information produced in response to the Sexual Harassment Request consistent with his fiduciary duties as a director of the Company and consistent with the terms of the Company's Confidentiality Policy.

4. The Laundry Service Communications Request.

On September 24, 2018, the Company produced executed agreements between the Company and Laundry Service. Absent from the Company's production were communications between the Company and Laundry Service. Communications between the Company and Laundry Service, Casey Wasserman or his affiliates are vital to Mr. Schnatter's proper purpose of investigating potential mismanagement relating to settlement discussions with Laundry Service. Despite engaging in settlement discussions, the Company has not provided necessary information to Mr. Schnatter regarding the status of those negotiations, nor the consideration the Company has proposed to offer Laundry Service to settle any disputes.

Mr. Schnatter will treat any information produced in response to the Laundry Service Communications Request consistent with his fiduciary duties as a director of the Company and consistent with the terms of the Company's Confidentiality Policy.

5. The Settlement Agreements Request.

In light of the media inquiries concerning claims of sexual harassment at the Company, Mr. Schnatter requested all settlement agreements or non-disclosure agreements involving him in the possession, custody, or control of the Company. These documents, to the extent they exist, are necessary for Mr. Schnatter to review and possess so he can be fully informed in the face of increased media scrutiny on the Company.

Mr. Schnatter will treat any information produced in response to the Settlement Agreements Request consistent with his fiduciary duties as a director of the Company and consistent with the terms of the Company's Confidentiality Policy.

IV. THE COMPANY'S REQUEST FOR THE IMPOSITION OF CONDITIONS UPON MR. SCHNATTER'S RECEIPT OF BOOKS AND RECORDS IS MERITLESS

Mr. Schnatter is a director of the Company and owes fiduciary duties to protect the Company and its stockholders. Mr. Schnatter has previously acknowledged that he will abide by the Board's Confidentiality Policy. (T: 147:17-148:1.) The Company does not need a separate order *further* compelling Mr. Schnatter to comport with his fiduciary duties and the terms of the Board's Confidentiality Policy. If any director improperly makes confidential information

available to persons hostile to the Company, the Company has a remedy available in the courts. *See Chammas*, 2016 WL 767714, at *7.

The Company also argues that Mr. Schnatter should be precluded from using any documents he obtains in response to his Demand in a stockholder fiduciary action. (DOB at 48-49.) This argument presumes, perhaps tellingly, that the Company has information that demonstrates fiduciary breaches by the other directors on the Board. In the event that the Company does produce information suggesting that the other directors or officers breached their fiduciary duties, there is no prohibition against Mr. Schnatter using litigation to right those wrongs. *See, e.g.*, *Carlson v. Hallinan*, 925 A.2d 506 (Del. Ch. 2006) (Director of CR Services Corp., who also controlled a stockholder of CR Services Corp., received books and records of the company and subsequently prosecuted direct and derivative claims against the company and its other directors).

Finally, the Company argues that Mr. Schnatter's counsel should be forbidden from receiving any further information from the Company. (DOB at 49-51.) In support of this novel proposition, the Company cites two factually inapposite cases (*Henshaw* and *Holdgreiwe*) and argues that "50 years of Delaware law" prevents Bayard and Glaser Weil from seeing further Company materials resulting from this litigation. (DOB at 51.) *Henshaw* and *Holdgreiwe* stand for the unremarkable proposition that where a director's counsel is representing *other*

persons with interests adverse to the corporation who do not have the same inspection rights, counsel should at least create an ethical wall to prevent that information from being shared with those other clients. Unlike in *Henshaw* and *Holdgreiwe*, Mr. Schnatter's counsel is not prosecuting claims adverse to the Company on behalf of anyone other than Mr. Schnatter.[13] Moreover, there is no question that seeking to have Mr. Schnatter's counsel effectively excluded from this matter at the eleventh hour is so prejudicial it cannot be seriously countenanced. For instance, if Mr. Schnatter's counsel is precluded from reviewing the Company's documents produced in response to the Demand, Mr. Schnatter will be forced to retain additional counsel with no background in the litigation to determine if the production of documents was compliant with this Court's ruling. There is no support for such a restriction in *Henshaw* or *Holdgreiwe* or Delaware law for 50 or even 100 years.

For the reasons stated above, Mr. Schnatter's entitlement to inspection of the Company's books and records should not be further conditioned or restricted.

[13] Glaser Weil's representation of two witnesses to allegations of sexual harassment in connection with their interviews by the Special Committee is not the same as representing people with affirmative claims against the Company.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court enter an order requiring the Company to produce the information sought in the Demand for inspection and copying immediately.

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Dated: October 30, 2018

Words: 12,907

CERTIFICATE OF SERVICE

I hereby certify that on October 30, 2018, a true and correct copy of the foregoing has been served upon the following counsel *via FileandServeXpress*:

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