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Case No. 2020-0096-PAF

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

MELVIN GROSS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 2020-0096-PAF
	)	
BIOGEN, INC.,	)	**PUBLIC VERSION FILED:**
	)	**May 6, 2022**
Defendant.	)	

SPECIAL MASTER'S FINAL REPORT AND RECOMMENDATION ON PLAINTIFF'S MOTION TO COMPEL DOCUMENTS WITHHELD AS PRIVILEGED

INTRODUCTION

Before the Court is the Motion to Compel Documents Withheld As Privileged (the "Motion")[1] filed by Plaintiff Melvin Gross ("Plaintiff") seeking the production of documents withheld by Defendant Biogen Inc. ("Biogen" or the "Company"). The Court entered its order appointing the undersigned as Special Master on January 21, 2022.[2] The undersigned heard oral argument on March 4, 2022. This is my final report and recommendation (the "Final Report").

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1 Trans. ID 67167919 (hereinafter cited "Mot.").

2 Trans. ID 67254994.

BACKGROUND[3]

I. Events Leading to Trial

Biogen, a Delaware corporation headquartered in Cambridge, Massachusetts, is a global pharmaceutical company that develops drug therapies to treat neurological and neurodegenerative diseases.[4] Plaintiff first became a stockholder of Biogen in February 2011.[5]

The pharmaceutical industry is heavily regulated, and Biogen's governance documents recognize that risk oversight is crucial in conducting its business.[6] Biogen's board of directors (the "Board") oversees Biogen's compliance program, which is led by a Corporate Compliance Committee of senior officers.[7] The compliance program enumerates policies and practices that "prohibit illegal remuneration in violation of federal and state anti-kickback statutes" and that provide for "appropriate . . . making of grants and charitable contributions so that such funds are not conditioned, express or implied, on any agreement to prescribe,

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3 The following facts were largely either stipulated or found by the Court to have been proven by a preponderance of the evidence at trial, as stated in the Court's April 14, 2021 memorandum opinion (the "Opinion"). Trans. ID 66512037 at 2 (hereinafter cited "Op.").

4 Op. at 2.

5 *Id.* at 11.

6 *Id.* at 3.

7 *Id.*

purchase, recommend, influence or provide favorable formulary status for any Biogen product."[8]

Biogen's sales rely partly on certain charities that provide financial assistance to Medicare patients.[9] These charities "operate[] funds that receive payments from pharmaceutical manufacturers and others, and that then use those payments, less administrative fees that [the charity] charges, to cover the drug co-pay obligations of patients, including Medicare patients."[10] However, these practices are all subject to various state and federal laws pertaining to health care fraud and abuse, including the federal Anti-Kickback Statute,[11] which prohibits prescription drug manufacturers from receiving or paying remuneration to generate business, including the purchase or prescription of a drug.[12] A violation of this statute is a fraudulent claim under the federal False Claims Act.[13]

Biogen disclosed on April 21, 2016 that its "sales and promotional practices" were under investigation by federal and state authorities, which had sent Biogen subpoenas.[14] In the same disclosure, Biogen revealed that it had also received a document subpoena on March 4, 2016 as part of a federal investigation (the

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8 *Id.* at 3-4.
9 *Id.* at 4.
10 *Id.* at 4.
11 42 U.S.C. § 1320a-7b(b)(2).
12 Op. at 4.
13 *Id.* at 5.
14 *Id.*

"Investigation") into Biogen's "relationship with non-profit organizations that provide assistance to patients taking drugs sold by Biogen."[15] Additionally, Biogen was featured in a Bloomberg article on May 27, 2016 (the "Bloomberg Article"), which reported that Biogen was among three pharmaceutical companies under investigation related to their relationships with charities.[16] Following its initial disclosure about the subpoenas in 2016, Biogen regularly reported in filings with the U.S. Securities and Exchange Commission that it had received those subpoenas.[17]

On November 20, 2019, the U.S. Attorney for the District of Massachusetts announced a $4 million settlement with The Assistance Fund ("TAF"), a charity that provided financial assistance to Medicare patients.[18] The settlement resolved government claims that TAF violated the False Claims Act by enabling certain pharmaceutical companies, including Biogen, to pay kickbacks to Medicare patients taking the companies' drugs (the "TAF Settlement").[19] In the corresponding Settlement Agreement, the federal government accused TAF and Biogen of, *inter alia*, engaging in a coordinated effort to use Biogen's money to cover Medicare co-pays for Tysabri patients.[20]

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15 *Id.*
16 *Id.*
17 *Id.* at 6.
18 *Id.* at 7.
19 *Id.*
20 *Id.*

Biogen executed a settlement agreement with the federal government on December 17, 2020, "to resolve the DOJ's investigation."[21] The DOJ Settlement agreement arose from a federal *qui tam* action filed in the United States District Court for the District of Massachusetts.[22] The DOJ investigation alleged that Biogen's payment of co-pays through two charitable assistance programs were kickbacks, and "as a result, Biogen caused the submission of false or fraudulent claims to Medicare for [two of its drugs] associated with these payments."[23] Under the DOJ Settlement, Biogen was required to pay $22 million in exchange for releases from certain civil and administrative claims. The DOJ Settlement did not release claims for, *inter alia*, criminal liability or claims arising under the Internal Revenue Code.[24] As of the time of trial in the above-captioned action, the Company was still cooperating with the other state and federal investigations into Biogen's "sales and promotional practices."[25]

Plaintiff is a current Biogen stockholder. He was a stockholder when he made the operative demand, and he was a stockholder at the time of trial.[26] On December 3, 2019, Plaintiff served on Biogen what became the operative demand (the

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21 *Id.* at 8.
22 *Id.*
23 *Id.*
24 *Id.* at 9.
25 *Id.*
26 *Id.* at 11.

"Demand").[27] The stated purposes of the Demand were ostensibly to (1) "investigate possible corporate wrongdoing and/or breaches of fiduciary duty owed to the Company and its shareholders by its officers and directors" and (2) "determine the independence of the Board members."[28] The Demand specifically identified the subpoenas referenced in the Bloomberg Article, as well as the March 4, 2016 subpoena disclosed in the Company's April 21, 2016 Form 10-Q.[29] The Demand specifically referred to the federal investigation "of Biogen and other companies address[ing] concerns that the companies may be violating the kick-back rules by making charitable contributions," which the Demand defined as the "Investigation."[30] The Demand also cited the TAF Settlement and a verdict reached in an employment matter in further support of Plaintiff's purposes.[31] The Demand listed eight specific categories of documents that Plaintiff sought to inspect.[32]

Biogen rejected Plaintiff's Demand, arguing that it (1) failed to comply with Section 220's form and manner requirements by not attaching documentary evidence of contemporaneous and continuous ownership of Biogen stock; (2) failed to state a

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27 *Id.* at 12. Plaintiff had served several demands previously, all of which were rejected by Biogen. *Id.* at 11.

28 *Id.* at 12.

29 *Id.*

30 *Id.*

31 *Id.*

32 *Id.*

proper purpose; and (3) requested inspection of documents that were not necessary and essential to Plaintiff's stated purpose.[33]

Plaintiff filed his Verified Complaint on February 14, 2020 seeking to compel Biogen to produce the books and records set forth in the Demand, and the Court conducted a half-day video trial on August 12, 2020.[34] The parties submitted post-trial briefing, including supplemental submissions addressing the Delaware Supreme Court's intervening decision in *AmerisourceBergen Corp. v. Lebanon County Employees' Retirement Fund*, 243 A.3d 417 (Del. 2020) ("*AmerisourceBergen II*"), *aff'g* 2020 WL 132752 (Del. Ch. Jan. 13, 2020), as requested by the Court.[35] Biogen continued to argue that Plaintiff lacked a proper purpose,[36] but contended that, if the Court found that Plaintiff established a proper purpose, then Plaintiff must be limited to formal, board-level materials.[37]

The Court held that Plaintiff had stated a proper purpose because the government investigation combined with the TAF Settlement demonstrated a

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33 *Id.* at 13.

34 *Id.*

35 *Id.* at 13-14.

36 *See e.g.* Trans. ID 65831776 (Biogen's Pre-Trial Br.) at 52; Trans. ID 65924872 (Biogen's Post-Trial Opening Br.) at 7-8; Trans. ID. 65971931 (Biogen's Answering Post-Trial Br.) at 18.

37 Trans. ID 66243239 (Biogen's Post-Trial Supplemental Br. (hereinafter cited "Post-Trial Supp.")) at 11-12 (stating "Even if Plaintiff Has A Proper Purpose, He Is Limited To Formal Board Materials" and incorporating arguments from pre- and post-trial briefing).

credible basis to suspect possible mismanagement by the Biogen Board.[38] The Court also held that the additional revelations detailed in the December 2020 DOJ Settlement agreement were powerful evidence supporting the right to inspection, though the evidence was not necessary to establish a proper purpose.[39]

The Court also found that Plaintiff demonstrated a credible basis to infer that the Board engaged in possible mismanagement, by identifying "the importance of government reimbursements to Biogen's revenue, the existence of an officer-level committee to ensure compliance with the laws governing receipt of those reimbursements, and the alleged involvement of a vice president in an alleged violation of those laws are sufficient to establish a credible basis to suspect that Biogen's directors or officers knew or should have known about the possible wrongdoing."[40]

Moreover, even though potential litigation was "a likely use of the demanded books and records," the Court found that Plaintiff had "not limited the purpose of his Demand solely to litigation."[41] The Court recognized that Plaintiff may use the results of his investigation for other purposes, such as to compel action by the

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38 Op. at 27-28.

39 *Id.* at 28.

40 *Id.* at 29-30. The Court noted that Biogen had followed the recent trend in adopting what has been referred to as an "overly aggressive defense strategy" in opposing Plaintiff's inspection wholesale. *Id.* at 14.

41 *Id.* at 33.

Company.[42] The Court also found that this books-and-records action is "not the proper proceeding to consider Biogen's defenses that any underlying wrongdoing would be exculpated or time-barred, or that Plaintiff needed to demonstrate at the time of the Demand that he owned stock that would afford him standing to bring a derivative suit," because those "issues do not bear on Plaintiff's right to inspect the Company's books and records."[43] The Court held that Plaintiff also established a proper purpose to investigate the independence and disinterestedness of the Board.[44]

The Court limited the scope of Plaintiff's inspection of Biogen's books and records to board-level materials, which the Court determined would "enable Plaintiff to assess the extent to which Board members were made aware of the alleged wrongdoing and to evaluate how the Board members responded to the Investigation."[45] The Court held that such "documents [and communications] are necessary and essential to reveal the degree of [the company's] compliance with positive law and government regulations."[46] The Court limited Plaintiff to an inspection of "the formal board materials relating to the Investigation or to any implicated policies and procedures," where "[f]ormal board materials" refers to

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42 *Id.* at 33-34.
43 *Id.* at 34-35
44 *Id.* at 36.
45 *Id.* at 41.
46 *Id.* at 41-42 (quoting *Pettry v. Gilead Sciences, Inc.*, 2020 WL 6870461, at *27 (Del. Ch. Nov. 24, 2020)).

minutes, agendas, reports, and presentations provided to, created by, or reviewed by the Board or by any committee thereof," and "[t]he "Investigation," as defined in the Demand, refers to the investigation by the U.S. Attorney's offices relating to Biogen's alleged violations of the federal Anti-Kickback Statute."[47]

In accordance with the Court's findings, Biogen was ordered to make available for inspection the Company's compliance policies that pertain to the Anti-Kickback Statute and the making of grants and contributions to nonprofit organizations that assist patients taking drugs sold by Biogen, "including updates, that are or were in existence during the relevant time period specified in the Demand," and "documents sufficient to identify the Board committees or subcommittees responsible for oversight and monitoring of the Investigation as defined in the Demand."[48] The Court also ordered Biogen to "permit inspection of director questionnaires maintained internally for the entire relevant time period,"[49] because "the Demand investigates alleged violations of positive law and government regulations, [and] understanding the directors' motives and potential conflicts is paramount."[50]

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47 Op. at 44-45.
48 *Id.* at 46-47.
49 *Id.* at 50.
50 *Id.* at 49 (quotation omitted).

On May 18, 2021, the Court entered its final post-trial order.[51] The Order required Biogen to produce, no later than ten business days after the entry of the Order,[52] the non-privileged portions of Formal Board Materials,[53] Compliance Policies,[54] Documents sufficient to identify the Board committee(s) or subcommittee(s) responsible for the oversight and monitoring of the Investigation,[55] and Director Questionnaires.[56] Biogen was required to produce a privilege log reflecting any documents withheld or redacted.[57] Biogen was not required to log documents redacted for containing information falling outside of the scope of

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51 Trans. ID 66611086 (May 18, 2021 Order (hereinafter cited "Order")).

52 Order at 3.

53 *Id.* at 3. "Formal Board Materials" are defined as "the minutes, agendas, reports, and presentations that were provided to, created by, or reviewed by the Board, or any committee thereof relating to the Invesitgation [sic]; and any minutes, agendas, reports, and presentations provided to, created by, or reviewed by the Board, or any committee thereof concerning Biogen's policies and procedures relating to the Investigation." *Id.* at 2-3.

54 *Id.* at 3. The "Compliance Policies" are defined therein as "policies, including updates, that were in existence during the Relevant Time Period, that pertain to the Anti-Kickback Statute and the making of grants and contribution to nonprofit organizations that assist patients taking drugs sold by Biogen." *Id.* at 2.

55 *Id.* at 3.

56 *Id.* The "Director Questionnaires" are defined as "the directors' questionnaires for each member of Biogen's Board of Directors maintained internally for the entire Relevant Time Period." Order at 2. "Relevant Time Period" is defined as "January 1, 2016 through December 2, 2019." *Id.*

57 *Id.* at 4.

production.[58] The Parties expressly reserved the right to make further application to the Court to enforce or clarify the Order.[59]

II. Post-Trial Production

After entry of the Order, on July 2, 2021, Biogen produced documents to and served its privilege log on Plaintiff.[60] Biogen's production comprised 682 pages, 419 of which were Director Questionnaires, 85 pages of which were redacted Board updates and functional updates, 18 pages of which were redacted Risk Committee minutes and agenda, 10 pages of which were redacted discussion outlines for Risk Committee meetings, and 14 pages of which were selected PowerPoint slides titled "Litigation Discussion – Government Investigations."[61] Biogen's privilege log contains 25 entries, and each entry reflects that each of the subject documents were either withheld or redacted on the basis of both the attorney-client privilege and the work-product doctrine.[62]

The Parties thereinafter corresponded regarding alleged deficiencies in Biogen's privilege log, and Plaintiff made known his position that documents withheld as privileged should be produced pursuant to the fiduciary exception to the

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58 *Id.*

59 *Id.* at 5.

60 Trans. ID 67167919 (Motion to Compel (hereinafter cited "Mot.")) at 6; Trans. ID 67278485 (Def.'s Opp'n to Pl.'s Mot. to Compel (hereinafter cited "Opp'n")) at 3.

61 Mot. at 6-8. Biogen did not dispute these figures. *See generally,* Opp'n,

62 Mot. Ex. A.

attorney-client privileged pursuant to *Garner v. Wolfinbarger*[63] and its progeny.[64] Biogen rejected Plaintiff's assertion that documents withheld as privileged should be produced under the circumstances.[65] When the Parties failed to reach an agreement, Plaintiff filed his motion to compel production of documents withheld as privileged on December 15, 2021.

PARTIES' CONTENTIONS

Plaintiff asks the Court to find that he is entitled to documents withheld by the Company as responsive to his Demand, but over which the Company has asserted the protections of the attorney-client privilege and the work product doctrine.

As to the attorney-client privilege, Plaintiff argues, first, that the fiduciary exception properly applies here pursuant to the *Garner* factors employed by Delaware courts: (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 availability of it from other sources. According to Plaintiff, the standard to determine *Garner* colorability is the same as the standard for the underlying claim, meaning that a plaintiff must show a "credible basis" to infer possible mismanagement in the context of an action for inspection of books and

63 430 F.2d 1093 (5th Cir. 1970).
64 Mot. at 8; Opp'n at 3.
65 Mot. at 8; Opp'n at 3-4.

records.[66] Here, according to Plaintiff, because the Court has already determined that he has a "credible basis" to investigate "possible mismanagement related to the Investigation,"[67] he also has satisfied the first prong of the *Garner* test.

Second, Plaintiff argues that he has satisfied the second *Garner* factor—that he seeks only a narrow, specified set of documents rather than engaging in a fishing expedition—insofar as he seeks twenty-five documents set forth on Biogen's privilege log together with presently-redacted documents that do not appear on the log.[68]

Third, Plaintiff asserts that his investigation turns entirely upon the information and advice the Board received and the actions they took in response thereto; hence, because nearly all such information was withheld as privileged, and because the information is not available from any other source, Plaintiff should have access to such documents in order to complete his investigation.[69]

Regarding the work-product doctrine, Plaintiff argues that he has shown substantial need for the documents requested within the meaning of Court of Chancery Rule 26(b)(3). According to Plaintiff, the fact that he has already shown that the documents and information are necessary and essential to his investigation

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66 Mot. at 11.

67 *Id*. at 15; Trans. ID 67306982 (Reply in Support of Mot. to Compel (hereinafter cited "Reply")) at 5.

68 Mot. at 12-13.

69 *Id*.

and that there is no other source of the materials is sufficient to invoke Rule 26(b)(3)'s exception to the work-product doctrine.[70]

Biogen disagrees. According to the Company, Plaintiff has failed to satisfy *Garner* factors for at least two reasons. First, Biogen argues that colorability under *Garner* requires a stockholder-plaintiff to establish a colorable *underlying* derivative claim, rather than a credible basis to infer potential mismanagement by directors sufficient to succeed on a Section 220 claim.[71] Biogen argues that accepting Plaintiff's argument would render it easier for a stockholder to invade the corporate privilege in a Section 220 than it would in a follow-on derivative action, which Biogen claims would be illogical and contrary to sound policy.[72] Because Plaintiff never attempted to show a colorable underlying derivative claim, Biogen argues, Plaintiff cannot satisfy *Garner*'s colorability factor. Second, Biogen argues that Plaintiff has not shown that he requires the privileged information he seeks in order to conduct his investigation, or that the information is unavailable from other sources, which thereby weighs against requiring production of Biogen's privileged materials.[73]

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70 *Id*. at 14.
71 Opp'n at 10.
72 *Id*. at 11.
73 *Id*. at 13.

Regarding the work-product doctrine, Biogen argues that all of the documents sought by Plaintiff are also protected work product;[74] that Plaintiff has failed to show either "substantial need" for the materials or that he cannot obtain equivalent information without undue hardship;[75] and that Plaintiff has failed to explain the nature his "substantial need."[76]

In reply, Plaintiff reiterates his contention that the standard to determine *Garner* colorability is the same as that of the underlying claim—here, in the context of a Section 220 action, a "credible basis."[77] Plaintiff argues that, because the Court has already held that Plaintiff has a credible basis for his investigation, he has satisfied the *Garner* colorability factor.[78] Plaintiff denies that he has disclaimed any desire to investigate Biogen's handling of the Investigation, pointing to a number of communications between himself and Biogen, as well as to the Court's Order, as evidencing his desire to so investigate.[79] Plaintiff further emphasizes that the materials he seeks—i.e., materials regarding how the Board handled the Investigation—are only apparently available from one source: the materials Biogen withheld as privileged.[80] Finally, Plaintiff argues that he has shown both substantial

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74 *Id.* at 14.
75 *Id.* at 15.
76 *Id.*
77 Reply at 3.
78 *Id.* at 5.
79 *Id.* at 5-7.
80 *Id.* at 7-8.

need for the documents and their unavailability for purposes of satisfying Rule 26(b)(3)'s exception to the work-product doctrine.[81]

ANALYSIS

Plaintiff seeks to compel production of documents withheld by Biogen as protected by both the attorney-client privilege and the work-product doctrine. Hence, the Court must analyze independently whether *either* the attorney-client privilege or the work-product doctrine protects such documents from production, or whether exceptions to both protections apply.[82]

I. Attorney-Client Privilege

The attorney-client privilege is "the oldest privilege recognized by Anglo-American jurisprudence," tracing back to Roman times.[83] In *Garner v. Wolfinbarger*,[84] the Fifth Circuit Court of Appeals recognized an exception to the traditional attorney-client privilege, often referred to as a "fiduciary exception."[85] Where "good cause" is shown, the fiduciary exception allows "stockholders of a

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81 *Id.* at 9-10.

82 *See e.g.*, *Wal-Mart Stores, Inc. v. Ind. Elec. Workers Pension Tr. Fund IBEW*, 95 A.3d 1264, 1278-81 (Del. 2014) (Holland, J.).

83 *Wal-Mart*, 95 A.3d at 1278.

84 430 F.2d 1093 (5th Cir. 1970).

85 *Wal-Mart*, 95 A.3d at 1276 ("[W]here the corporation is in suit against its stockholders on charges of acting inimically to stockholder interests, protection of those interests as well as those of the corporation and of the public require that the availability of the privilege be subject to the right of the stockholders to show cause why it should not be invoked in the particular instance.") (quoting *Garner*, 430 F.2d at 1103-04).

corporation to invade the corporation's attorney-client privilege in order to prove fiduciary breaches by those in control of the corporation."[86] That said, the attorney-client privilege is "critical" to permitting full and frank communication between attorneys and their clients, including corporate clients, and the *Garner* exception is, therefore, "narrow, exacting, and intended to be difficult to satisfy."[87] The fiduciary exception to the attorney-client privilege can apply both in plenary actions and in stockholder actions to compel production of corporate books and records.[88]

While the *Garner* court identified a number of "good cause" factors,[89] the Court of Chancery typically focuses on three: "(i) whether the [plaintiff's] claim is colorable, (ii) the necessity or desirability of information and its availability from

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86 *Id.* at 1276.

87 *Id*. at 1278.

88 *Id.* at 1278; *see also Salberg v. Genworth Financial, Inc.*, 2017 WL 3499807, at *5 (Del. Ch. July 27, 2017).

89 *Wal-Mart*, 95 A.3d at 1276 n.32 ("There are many indicia that may contribute to a decision of presence or absence of good cause, among them the number of shareholders and the percentage of stock they represent; the bona fides of the shareholders; the nature of the shareholders' claim and whether it is obviously colorable; the apparent necessity or desirability of the shareholders having the information and the availability of it from other sources; 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; whether the communication is of advice concerning the litigation itself; the extent to which the communication is identified versus the extent to which the shareholders are blindly fishing; the risk of revelation of trade secrets or other information in whose confidentiality the corporation has an interest for independent reasons.") (quoting *Garner*, 430 F.2d at 1104).

other sources and (iii) the extent to which the information sought is identified as opposed to a blind fishing expedition."[90]

A. Plaintiff Has Satisfied *Garner* Necessity/Unavailability

In the context of a books-and-records action, like the instant case, the second *Garner* "good cause" factor—i.e., whether documents sought are "necessary to prosecute the action and unavailable from other sources"—has been called "the most important of the *Garner* factors," and "dispositive," without discarding the other factors.[91] Further, the Court of Chancery has "consider[ed] the necessary and essential prong for Section 220 to be similar, if not identical, to this aspect of the *Garner* analysis."[92] To determine whether the necessity/unavailability factor is satisfied, as noted, "the question is whether Plaintiffs 'have exhausted every available method of obtaining the information they seek.'"[93]

Here, the Court has already determined that formal, Board-level materials were necessary and essential to Plaintiff's proper purpose, and the Court limited the Company's required production accordingly.[94] In so doing, the Court specifically found that such documents would "enable Plaintiff to assess the extent to which

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90 *Emps.' Ret. Sys. of Rhode Island v. Facebook, Inc.*, 2021 WL 529439, at *9 (Del. Ch. Feb. 10, 2021) (cleaned up).

91 *Id.* (citations and quotations omitted).

92 *Id.* (quoting *In re Lululemon Athletica Inc.220 Litig.*, 2015 WL 1957196, at *12 (Del. Ch. Apr. 30, 2015)).

93 *Facebook*, 2021 WL 529439, at *9 (citations omitted).

94 Op. at 41; Order at 3.

Board members were made aware of the alleged wrongdoing and to evaluate how the Board members responded to the Investigation."[95] Further, the Court's decision noted that such documents are "necessary and essential to reveal the degree of [the company's] compliance with positive law and government regulations."[96]

Biogen's arguments that Plaintiff failed to demonstrate necessity or unavailability are unpersuasive. Biogen asserts that Plaintiff does not need the privileged information sought because Plaintiff is "concededly ***not*** investigating Biogen's handling of the Investigation, but rather the alleged underlying wrongdoing that was the subject of the Investigation," and that Plaintiff seeks only "privileged communications from a period of time at least ***four years after*** the alleged conduct that sparked the Investigation and that necessarily would contain information concerning the Investigation itself."[97] I disagree. The Court's Opinion makes clear that, at least in its view, Plaintiff would be investigating "the extent to which Board members were made aware of the alleged wrongdoing and to evaluate how the Board members responded to the Investigation," i.e., the Board's handling of the Investigation.[98] And arguments about the Relevant Time Period are also unpersuasive here: Biogen did not dispute the relevant time period previously in the

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95 Op. at 41.
96 *Id.* at 41-42.
97 Opp'n at 13 (emphasis original).
98 Op. at 41.

context of the Court's Section 220 analysis,[99] and it was established in the Order that relevant documents within that time period would be produced as necessary and essential to Plaintiff's proper purpose.[100] In short, especially in light of the documents produced here,[101] it seems clear that the information withheld as privileged is "necessary" within the meaning of *Garner*.

As to Biogen's contentions that Plaintiff failed to show that "the information is unavailable from non-privileged sources[,]" and that "Plaintiff has not 'exhausted' other available avenues, as required to obtain documents under *Garner*,"[102] it is not apparent what other sources of non-privileged information could exist. Plaintiff has argued persuasively that here, where Plaintiff has shown a proper purpose in investigating the Board's handling of the Investigation, the information and advice the Board received is critical to his investigation. Because such information and advice has been withheld as privileged, and because insufficient sources of non-privileged information have been produced, it follows logically that the information

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99 *Id.* at 47 n.130 ("Biogen has not contested the relevant time period.").

100 *See* Order at 3 ("Relevant Time Period" means January 1, 2016 through December 2, 2019.").

101 Biogen's production comprised 682 pages, 419 of which were director questionnaires, 85 pages of which were redacted Board updates and functional updates, 18 pages of which were redacted Risk Committee minutes and agenda, 10 pages of which were redacted discussion outlines for Risk Committee meetings, and 14 pages of which were selected PowerPoint slides titled "Litigation Discussion – Government Investigations." Mot. at 6-8. Biogen did not dispute these figures.

102 Opp'n at 13.

is not available from any other source.[103] In other words, the information Plaintiff seeks is necessarily only in Biogen's possession if it is privileged, as Biogen has maintains. Also critically, the Company has repeatedly argued in this action that Plaintiff should be limited to formal, Board-level materials, while Plaintiff demanded a far-broader scope of production."[104] Therefore, it would be inequitable, and contrary to the Order, for Plaintiff to be effectively limited to documents that are either (a) unhelpful to or insufficient to allow his investigation or (b) are now withheld or heavily redacted on the basis of attorney-client privilege, especially where the Court has determined that Plaintiff is entitled to documents "necessary and essential" to carrying out his proper purpose in investigating possible wrongdoing.

Biogen's passing reference to *Drachman*[105] is unhelpful to its arguments. While it is true that a plaintiff must "exhaust" other avenues of procuring information before invading the company's privilege,[106] the facts of *Drachman* bear no resemblance to the facts here. In *Drachman*, the Court found that a stockholder-plaintiff failed to satisfy the necessity/unavailabilty factor where it appeared to the

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103 Mot. at 13.

104 *E.g.*, Post-Trial Supp. at 11-12 (stating "Even if Plaintiff Has A Proper Purpose, He Is Limited To Formal Board Materials" and incorporating arguments from pre- and post-trial briefing).

105 Opp'n at 13 (citing *Drachman v. BioDelivery Scis. Int'l*, Inc., 2021 WL 3779539, at *6 (Del. Ch. Aug. 25, 2021)).

106 *Facebook*, 2021 WL 529439, at *9 (citations omitted).

Court that the plaintiffs were "attempting to employ *Garner* to short-circuit the discovery process."[107] There, the Court noted that plaintiffs had "still not taken a deposition" and that "[g]iven the important considerations that weigh in favor of preserving privilege, it would be inequitable to invade that privilege at the outset of discovery before the plaintiffs have exhausted other avenues."[108] In *Drachman*, the Court additionally questioned whether the information plaintiffs sought to be produced pursuant to *Garner* was "necessary" to their claims insofar as the plaintiffs had not "presented a common thread between the [sought] email," and the complained-of act.[109]

Here, by contrast, there is no discovery to be taken—trial has concluded—and no apparent sources of additional documents to be pursued. Indeed, Plaintiff sought documents regarding the Investigation, including all documents produced by the Company to the relevant investigating agencies,[110] but were limited to formal, board-level materials in accordance with the Company's arguments. The Court has already found that formal, board-level materials related to the Investigation are necessary and essential to Plaintiff's proper purpose; therefore, the "common thread" problem of *Drachman* simply is not present here.

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107 *Drachman v. BioDelivery Scis. Int'l*, Inc., 2021 WL 3779539, at *6 (Del. Ch. Aug. 25, 2021).

108 *Id*.

109 *Id*. at 7.

110 Op. at 38.

In sum, Plaintiff has satisfied *Garner*'s necessity/unavailability factor. The documents sought by Plaintiff are necessary and essential to his proper purpose, and there are no apparent alternative means of procuring non-privileged documents that would be sufficient to enable him to carry out his investigation. Accordingly, Plaintiff has exhausted other available avenues of procuring non-privileged information.

B. Plaintiff Has Established a Colorable Claim.

i. Applicable standard.

As mentioned previously herein, the Parties dispute the applicable standard to determine whether Plaintiff has shown a colorable claim for the purposes of the *Garner* analysis. Plaintiff contends that the Court must look to the standard of the instant action: a "credible basis" to infer that wrongdoing may have occurred in the underlying action pursuant to Section 220.[111] Biogen disagrees and argues that the Court must examine whether there is colorable underlying derivative claim based on the alleged possible wrongdoing.[112] I find Plaintiff's argument persuasive based on clear precedent.

The Court of Chancery rejected the argument Biogen advances in *Salberg v. Genworth Fin., Inc.*[113] In *Salberg*, the company-defendant argued that plaintiff-

111 Mot. at 11.
112 Opp'n at 10.
113 2017 WL 3499807, at *5 (Del. Ch. Jul. 27, 2017).

stockholder failed to state a colorable claim because such claims would be procedurally barred by a "fully informed and uncoerced vote of stockholders[.]"[114] Plaintiff, on the other hand, argued that the Court need look only to the applicable standard of review in a Section 220 action—the "credible basis" standard.[115] The Court found that "[i]n the context of this Section 220 action, I agree with Plaintiffs that the colorability of their claim must be assessed under the standard that applies here—'credible basis'—a standard that has notoriously been described as 'the lowest possible burden of proof.'"[116]

At oral argument, Biogen contended that *Salberg* was wrongly decided, and that it should be disregarded here.[117] I disagree. For one thing, "[i]t is axiomatic ... that once a trial judge decides an issue, other trial judges on that court are entitled to rely on that decision as stare decisis."[118] *Salberg* found unequivocally that the "credible basis" standard should be applied when determining *Garner* colorability in a Section 220 case.[119] Hence, this Court is entitled to follow *Salberg* here.

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114 *Id.*

115 *Id*.

116 *Id.* (citations omitted).

117 *Gross v. Biogen, Inc.*, C.A. No. 2020-0096-PAF, at 34:12-35:23 (Del. Ch. March 4, 2022) (Transcript).

118 *Fannin v. UMTH Land Dev., L.P.*, 2020 WL 4384230, at *18 (Del. Ch. July 31, 2020) (citations omitted).

119 *Salberg*, 2017 WL 3499807, at *5.

Further, precedent Biogen cited for a contrary result does not clearly support Biogen's argument. Biogen points to *In re Lululemon Athletica, Inc. 220 Litig.*,[120] and *Wal-Mart*,[121] as Section 220 actions in which Delaware courts analyzed *Garner* colorability based on the viability of underlying substantive claims, rather than Section 220's"credible basis" standard. But in *Lululemon*, the Court of Chancery did *not* appear to focus solely on the colorability of underlying claims, but stated that "Plaintiffs' mismanagement claim similarly was obviously colorable in the sense that **they had reasonable suspicion about the trades, and were justified in seeking books and records relating to what, if anything, the lululemon directors did** to ensure that those trades were lawful and in accordance with Company policy."[122] As such, *Lululemon* does not support Biogen's argument; rather, in relying on the propriety of plaintiff's books-and-records demand, it supports *Salberg*'s holding that the "credible basis" standard applies.

In *Wal-Mart*, the Supreme Court merely noted that "the Court of Chancery concluded that a colorable claim existed based on 'Wal–Mart's own public statements about this [which] suggest that there were some real concerns about what was going on in Mexico and whether it was legal.'"[123] That statement does not, in

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120 2015 WL 1957196, at *11 (Del. Ch. Apr. 30, 2015).
121 95 A.3d at 1279-80.
122 *Lululemon*, 2015 WL 1957196, at *11 (emphasis added).
123 *Wal-Mart*, 95 A.3d at 1279.

my view, indicate a focus on the colorability or viability of an underlying derivative claim, and it does not, therefore, support Biogen's argument. Accordingly, even if *Salberg* were not on point, Biogen has failed to advance contrary authority supporting its contention.[124]

Therefore, in accordance with *Salberg*, "colorability" here must be determined by looking to the "credible basis" standard applicable in Section 220 actions.

ii. Plaintiff has shown a colorable claim.

Having decided that the credible basis standard applies here for the purposes of determining the *Garner* colorability factor, Plaintiff has clearly satisfied that factor here. The Court previously found that Plaintiff has shown a credible basis to suspect potential wrongdoing sufficient to warrant his investigation.[125] Specifically, the Court found that Plaintiff had stated a proper purpose because the government investigation plus the TAF Settlement demonstrate a credible basis to suspect possible mismanagement by the Board.[126] The Court found further that "the

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[124] Biogen's policy-based argument—that *Salberg*'s holding untenably and undesirably renders it "easier for a stockholder to invade the attorney-client privilege in a Section 220 case than in a follow-on derivative action[,]"—is also unpersuasive. *See* Opp'n at 11. Among other things, it is likely only a small minority of Section 220 actions, like that here, where a critical mass of the documents and information determined by the Court to be "necessary and essential" to stockholder-petitioner's proper purpose are withheld as privileged.

[125] Op. at 29-30.

[126] *Id.* at 27-28.

additional revelations detailed in the December 2020 DOJ Settlement agreement, though not necessary to establish Plaintiff's burden, are powerful evidence supporting the right to inspection."[127] The Court found that Plaintiff demonstrated a credible basis to infer possible mismanagement based on "the importance of government reimbursements to Biogen's revenue, the existence of an officer-level committee to ensure compliance with the laws governing receipt of those reimbursements, and the alleged involvement of a vice president in an alleged violation of those laws are sufficient to establish a credible basis to suspect that Biogen's directors or officers knew or should have known about the possible wrongdoing."[128] For these reasons, Plaintiff has established an obviously colorable claim because there was a credible basis from which the Court could infer possible mismanagement or wrongdoing by Biogen's Board.[129]

C. Plaintiff Has Sufficiently Identified the Information Sought

The Court must also examine "the extent to which the information sought is identified as opposed to a blind fishing expedition."[130] Biogen has not argued that Plaintiff failed to satisfy this factor.[131] Plaintiff seeks only (a) unredacted versions

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127 *Id.* at 28.

128 *Id*. at 29-30.

129 *Cf. Salberg*, 2017 WL 3499807, at *5.

130 *Facebook*, 2021 WL 529439, at *9 (cleaned up).

131 *See generally* Opp'n. Biogen has waived any argument that Plaintiff is engaging in a "fishing expedition." *Emerald P'rs v. Berlin*, 726 A.2d 1215, 1224 (Del. 1999) ("Issues not briefed are deemed waived.").

of documents already produced, and (b) documents withheld and logged by Plaintiff. Hence, Plaintiff has sufficiently identified the categories of documents sought to satisfy this *Garner* factor.

In sum, Plaintiff has (a) shown that the documents he seeks are necessary to his proper purpose and unavailable from any non-privileged sources insofar as he has exhausted other avenues; (b) demonstrated an obviously colorable claim in the context of this Section 220 action; and (c) sufficiently identified the universe of documents he seeks. As a result, Plaintiff has satisfied the requirements of the fiduciary exception to the attorney-client privilege pursuant to *Garner* and its progeny.

II. Work Product Doctrine

The work product doctrine protects "materials an attorney assembled and brought into being in anticipation of litigation."[132] Pursuant to Court of Chancery Rule 26(b)(3), a party may obtain information protected by this doctrine if it can show that it has a "substantial need for the materials and is unable, without undue hardship, to obtain the substantial equivalent of the materials by other means."[133] Thus, the question here is whether Plaintiff has adequately demonstrated a

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[132] *Grimes v. DSC Communications Corp.*, 724 A.2d 561, 569-70 (Del. Ch. 1998) (quoting *Lee v. Engle*, 1995 WL 761222, at *4 (Del. Ch. Dec. 15, 1995) (cleaned up)).

[133] *Grimes*, 724 A.2d at 570; Ct. Ch. R. 26(b)(3).

"substantial need" for the information that Biogen asserts is otherwise protected by the work product doctrine. Notably, while the "*Garner* doctrine applies to information protected by the attorney-client privilege," it does not apply to work product.[134]

Again, the Delaware Supreme Court's opinion in *Wal-Mart* is instructive. There, the Delaware Supreme Court noted the overlap between *Garner's* "apparent necessity or desirability of the shareholders having the information and the availability of it from other sources," and the work product analysis pursuant to Rule 26(b)(3).[135] Ultimately, the Court found that "the Court of Chancery's work product ruling was properly and solely based upon Rule 26(b)(3) and only referred to the privilege rationale of *Garner* as overlapping with its own separate work product analysis."[136]

In *Grimes*, the Court of Chancery also observed the overlap between the *Garner* necessity/unavailability factor and the required showing pursuant to Rule 26(b)(3): "For the same reasons that the plaintiff has shown 'good cause' to overcome the claim of attorney-client privilege, I conclude he has also shown a

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134 *Wal-Mart*, 95 A.3d at 1280.

135 *Id.* at 1280-81 (citing *Garner*, 430 F.2d at 1104); *see also Facebook*, 2021 WL 529439, at *9 (citations and quotations omitted) (noting that "whether the privileged information sought 'is both necessary to prosecute the action and unavailable from other sources' has been described as 'the most important' of the *Garner* factors.").

136 *Wal-Mart*, 95 A.3d at 1281.

substantial need for the information for purposes of the work-product doctrine."[137] The *Grimes* Court determined that, in order for the plaintiff to properly evaluate whether the board engaged in wrongdoing, plaintiff needed to access documents that revealed the "deliberative processes which the committee and the board underwent."[138] The Court held that the plaintiff-stockholder successfully demonstrated that he could only obtain the information needed to prosecute his claims from the documents that the company-defendant withheld as protected by the work-product doctrine.[139]

Here, the Court has already determined that formal, Board-level materials are necessary and essential to Plaintiff's proper purpose.[140] Moreover, Plaintiff has persuasively shown that the only source from which the information sought may be obtained is in the documents Biogen has withheld. Again, it is not apparent what other sources of non-privileged information could exist, especially where (a) Plaintiff sought broader categories of non-privileged documents and was denied; and (b) the Court has already found that the categories of documents to be produced were "necessary and essential" to Plaintiff's proper purpose. Given the heightened need for the documents here in relation to Plaintiff's proper purpose, Plaintiff has

137 *Grimes*, 724 A.2d at 570.
138 *Id.*
139 *Id.*
140 Op. at 41.

made the required showing to satisfy Rule 26(b)(3)'s exception to the work-product doctrine.

CONCLUSION AND RECOMMENDATION

Consistent with this Court's prior rulings, and for the foregoing reasons, I recommend that the Court find that Plaintiff has properly invoked the fiduciary exception to the attorney-client privilege pursuant to *Garner* and its progeny. For the foregoing reasons, Plaintiff has (1) satisfied *Garner*'s necessity/unavailability factor because, among other things, he sought and was denied a broader scope of non-privileged documents, and it is not apparent what untapped, non-privileged sources of documents exist; (2) established a colorable claim because the Court has already determined that he has shown a credible basis from which the Court could infer possible mismanagement in this Section 220 action; and (3) sufficiently identified the information sought, because he seeks a narrowly-defined scope of documents either produced in redacted form or withheld by Biogen.

Moreover, I recommend that the Court find that Plaintiff has shown a substantial need for the materials he seeks and that he is unable, without undue hardship, to obtain the substantial equivalent of the materials by other means, thereby satisfying the Rule 23(b)(3)'s exception to the work-product doctrine. For similar reasons to those supporting *Garner*'s necessity/unavailability factor, Plaintiff has shown for the purposes of Rule 26(b)(3) that are no viable alternative means of

procuring the information he seeks and the information is necessary to effectuate his proper purpose in investigating potential mismanagement by the Biogen Board.

Thus, I recommend that the Court grant Plaintiff's Motion to Compel documents withheld or redacted on the basis of the attorney-client privilege or the work-product doctrine and order Biogen to produce, within 10 business days of entry of a final order, all documents so withheld or redacted. I further recommend that the Parties be ordered to confer and submit a form of implementing order effectuating the terms of this Final Report by May 13, 2022.

Finally, the Order permits Biogen to redact information or materials excluded from the materials required to be produced by Paragraph 2 of the Order ("Non-relevant Material").[141] I recommend that Biogen be permitted to produce documents pursuant to this Final Report in redacted form; however, Biogen must strictly adhere to the Order and redact only Non-relevant Material.

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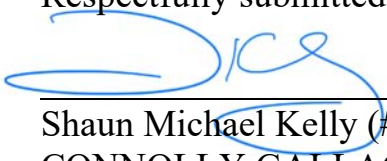
[141] Order at 4.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Shaun Michael Kelly, certify that on this 6th day of May 2022, I caused copy of the forgoing to be filed and served upon the following via File&Serve*Xpress*:

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