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HURD V. ESPINOZA: "THIRD-PARTY CONFIDENTIAL INFORMATION" IN DELAWARE CORPORATE LITIGATION

Hurd v. Espinoza, 34 A.3d 1084 (Del. 2011)

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On June 24, 2010, celebrity attorney Gloria Allred sent a letter (the Allred Letter)[1] to Mark Hurd, then the Chief Executive Officer of Hewlett-Packard Company (HP), claiming that Hurd sexually harassed her client Jodie Fisher, a former HP contractor.[2] In addition to being marked "CONFIDENTIAL TO BE OPENED BY ADDRESSEE ONLY," the letter included a ledger at the top that read, "PERSONAL & CONFIDENTIAL."[3] Hurd gave the letter to Michael Holston, HP's Executive Vice President and General Counsel.[4] Although Hurd and Fisher privately settled the claim without Fisher filing suit, HP publicly announced on August 6, 2010, that Hurd had resigned from HP.[5]

∗ J.D. 2012, University of Florida Levin College of Law; B.A. 2009, Florida International University. I would like to thank Professor Tom C.W. Lin for inspiring me to write this Comment and for his guidance throughout this process. I would also like to thank my family for their unwavering support, including my mother and grandmother. Me han enseñado lo mas importante en la vida: nunca pierdas la fe. Finally, thank you to Paul Pakidis and Lauren Millcarek for their helpful comments and to the wonderful colleagues I have had the pleasure of working with on the *Florida Law Review*.

1. Quentin Hardy, *Letter that Led to Downfall of Hewlett Chief Surfaces*, N.Y. TIMES (Dec. 29, 2011), http://www.nytimes.com/2011/12/30/business/note-that-led-to-downfall-of-hewlett-chief-surfaces.html.

2. *See* Espinoza v. Hewlett-Packard Co., No. 6000-VCP, 2011 WL 941464, at *1–2 (Del. Ch. Mar. 17, 2011). The letter contained extremely personal and sensitive information about Hurd and Fisher:

> As you were walking back to the Ritz, you invited Ms. Fisher to come up to your room. . . . She did not want to go. Ms. Fisher first went to her room and called her sponsor in AA, Diane Rogers. Ms. Fisher reported to her what the situation was and asked for her advice. She agreed that Ms. Fisher "had" to go but that Ms. Fisher should remember who she was and that she did not ever have to do anything that compromised her integrity. . . . Ms. Fisher went to your suite. . . . She sat down on one of two love seats in the sitting room. She was worried when you came over and sat directly next to her and put your arm on the back of the love seat. As you did so, your hand brushed across her breast. . . . It happened a second time . . . .

Letter from Gloria Allred, Partner, Allred, Maroko & Goldberg, to Mark Hurd, Chief Exec. Officer, Hewlett-Packard Co. 3 (June 24, 2010) [hereinafter Allred Letter], *available at* http://graphics8.nytimes.com/packages/pdf/business/hurd_letter.pdf.

3. *Espinoza*, 2011 WL 941464, at *1–2; Allred Letter, *supra* note 2, at 1.

4. *Espinoza*, 2011 WL 941464, at *2.

5. *Id.*; *see also* Colin Barr, *HP Chief Hurd Quits After Sexual Harassment Claim*, CNN MONEY (Aug. 6, 2011), http://money.cnn.com/2010/08/06/news/companies/hurd.resignation.fortune/ ("Hewlett-Packard chief executive officer Mark Hurd, one of the highest-profile CEOs in America,

Eleven days later, Ernesto Espinoza, an HP shareholder, sent a demand letter to HP requesting to inspect HP's documents in order to investigate "corporate mismanagement, wrongdoing, and waste."[6] Among the requested documents was the Allred Letter.[7] Despite many requests from both Hurd and Fisher that HP keep the Allred Letter confidential,[8] HP decided to disclose the letter to Espinoza.[9] Hurd and Fisher failed to settle the dispute with Espinoza out of court or convince Espinoza and HP to keep the Allred Letter confidential.[10]

On November 17, 2010, the Delaware Court of Chancery issued a sealing order instructing the parties to file the pleadings under seal so that Hurd could motion the court if he wanted the pleadings to remain sealed.[11] The next day, Espinoza filed suit to inspect certain HP books and records for the purpose of "investigati[ng] . . . whether Board members breached their duty to HP."[12] Attached to the complaint was the Allred Letter, which was filed under seal.[13] HP then filed its answer under seal.[14] Hurd moved to have certain pieces of the complaint and answer remain sealed.[15] He formally intervened in the action on December 28, 2010.[16] On January 21, 2011, the court held a hearing on Hurd's motions.[17] The court asked HP to file an amended answer but reserved judgment on the motion to have the complaint remain sealed.[18] On March 17, 2011, the court issued an order stating that the Allred Letter must be unsealed.[19]

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resigned Friday following a sexual harassment claim against him and the company.").

6. *Espinoza*, 2011 WL 941464, at *2 (quoting Affidavit of Keith Paul Bishop) (internal quotation marks omitted).

7. *Id.*

8. *Id.* at *2–3 ("The following day, Hurd's counsel sent a letter to HP requesting that it oppose the 'inspection, disclosure and/or copying' of the Allred Letter or related documents in response to Plaintiff's Demand Letter."). Further, Allred wrote another letter to HP requesting to keep the Allred Letter private. *Id.* at *2 ("Allred sent a letter to Holston, as Executive Vice President and General Counsel of HP, and Amy Wintersheimer Findley, an attorney for Hurd . . . [in which Ms. Allred] emphasized the confidential nature of the Allred Letter . . . .").

9. *Id.* at *3. HP described the letter as "nonconfidential." *Id.*

10. *Id.*

11. *Id.* at *4.

12. *Id.* at *4; Complaint for Relief Pursuant to 8 Del. C. § 220, ¶ 1, Espinoza v. Hewlett-Packard Co., 2011 WL 941464 (Del. Ch. Mar. 17, 2011) (No. 6000-VCP).

13. *Espinoza*, 2011 WL 941464, at *3–4.

14. *Id.* at *4.

15. *Id.* at *4; *see also* Del. Ch. Ct. R. 5(g)(3) ("[T]he Court may, in its discretion, by appropriate order, authorize the parties or other persons to designate documents to be filed under seal pending a judicial determination of the specific documents or categories of documents to which such restriction on public access shall continue to apply.").

16. *Espinoza*, 2011 WL 941464, at *4.

17. *Id.*

18. *Id.*

19. *Id.* at *1. The Delaware Court of Chancery came to this conclusion not only through the analysis of Delaware Court Rules but also by analyzing California law. *See* Hurd v. Espinoza, 34

On appeal to the Supreme Court of Delaware, Hurd argued that unsealing the Allred Letter, which was attached to the complaint, would violate California privacy rights.[20] The Supreme Court of Delaware explained that the issue—whether the court should unseal a document filed in the Court of Chancery—does not implicate California privacy rights, but it is instead governed by Delaware Court of Chancery Rule 5(g),[21] which concerns the sealing of court records.[22] The court held that under Rule 5(g), as interpreted by Delaware courts, Hurd's argument did not constitute "good cause" to keep the Allred Letter sealed.[23] Later that same day, the New York Times disseminated the letter to the world.[24]

This Comment argues that the Supreme Court of Delaware decided *Hurd* incorrectly. First, this Comment reviews information essential to understanding the *Hurd* ruling, specifically Rule 5(g) and cases interpreting that rule. Second, this Comment explains how the decision in *Hurd* fits into the law. Third, this Comment explains why the Supreme Court of Delaware, by failing to find good cause to keep the Allred Letter sealed, decided *Hurd* incorrectly and uses a hypothetical involving Steve Jobs to illustrate the ramifications of the court's decision.

The court's analysis turns on its understanding of Rule 5(g), Delaware's rule on the sealing of court records. First, it is necessary to review the Rule and how it has been interpreted. Rule 5(g)(1) states that "all pleadings and other papers, including deposition transcripts and exhibits, answers to interrogatories and requests for admissions, and affidavits or certificates and exhibits thereto ('documents') filed with the Register in Chancery shall become a part of the public record of the proceedings before [the Court of Chancery]."[25] Rule 5(g)(2) expands on this (while permitting a good cause exception to keep documents private) by stating, "Documents shall not be filed under seal unless and except to the extent that the person seeking such filing under seal shall have first obtained, for *good cause* shown, an order of this Court specifying those documents or categories of documents which should be filed under seal . . . ."[26] Just because a sealing order is granted, though, does not mean that the documents it protects will remain private forever. Rule 5(g) goes on to state that unless the duration of the sealing order is extended (again

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A.3d 1084, 1086 (Del. 2011) ("The trial court analyzed Hurd's California law claims at length and concluded that he failed to demonstrate that disclosure of the Allred letter would invade any California privacy rights codified in the state Constitution, its statutes, or common law.").

20. *Hurd*, 34 A.3d at 1086.

21. *Id.* at 1085–86. Essentially, the Supreme Court of Delaware believes that other states' privacy rights are irrelevant when deciding whether pleadings in Delaware courts should be sealed.

22. Del. Ch. Ct. R. 5(g).

23. *Hurd*, 34 A.3d at 1086.

24. *See* Hardy, *supra* note 1.

25. Del. Ch. Ct. R. 5(g)(1).

26. *Id.* 5(g)(2) (emphasis added).

requiring a showing of good cause), sealing orders expire "three years after the final disposition of the action."[27] At that time, any documents previously protected by the seal become part of the public record.[28] Thus, whether a document may be filed under seal and remain sealed hinges on the presence of good cause. Unfortunately, Rule 5(g) fails to set out a clear standard for what constitutes good cause; however, case law exists that has interpreted the good cause standard.

The Delaware Court of Chancery has found good cause for sealing a document in instances where the petitioner demonstrated that the document contained trade secrets, nonpublic financial information, or third-party confidential information.[29] In general, Delaware courts balance "the general principle that items filed in . . . [c]ourt become a part of the public record with the need to protect the sensitive information of parties' to litigation."[30] Essentially, the court weighs public access to information with the parties' (or third parties') privacy.

Delaware courts have elaborated on the burden of showing that good cause exists because certain documents contain confidential information.[31] For instance, in *Stone v. Ritter*,[32] the defendants petitioned the Court of Chancery to maintain certain parts of the complaint under seal.[33] The defendants argued that the court should seal the portions of the complaint that included information regarding a due diligence assessment and board meeting minutes because those portions included confidential information.[34] The court held that nothing in the complaint was confidential in nature and that the complaint should be unsealed.[35] Regarding the due diligence assessment, the court found that it was not

27. *Id.* 5(g)(8). Rule 5(g)(8) states that "any order permitting or requiring a document, brief or letter to be filed or remain filed under seal . . . shall expire three years after the final disposition of the action . . . ." *Id.*

28. *Id.* Rule 5(g)(8) states that "any document, brief or letter filed under seal pursuant to the Sealing Order shall become a part of the public record. Notwithstanding anything to the contrary in this Rule 5(g)(8), the time within which the Sealing Order shall expire may be extended by the Court for *good cause* shown." *Id.* (emphasis added).

29. Romero v. Dowdell, No. Civ.A. 1398-N, 2006 WL 1229090, at *2 (Del. Ch. Apr. 28, 2006) ("This Court repeatedly has held that good cause exists pursuant to Rule 5(g) to seal documents containing (1) trade secrets, (2) third-party confidential material or (3) nonpublic financial information." (citing One Sky, Inc. v. Katz, No. Civ.A. 1030-N, 2005 WL 1300767, at *1 (Del. Ch. May 12, 2005) (quoting Fitzgerald v. Cantor, No. 16297-NC, 2001 WL 422633, at *2 (Del. Ch. Apr. 17, 2001)); *In re* Walt Disney Co. Derivative Litig., No. 15452-NC, 2004 WL 368938, at *1 (Del. Ch. Feb. 24, 2004))).

30. *Fitzgerald*, 2001 WL 422633, at *2.

31. *Romero*, 2006 WL 1229090, at *1; Stone v. Ritter, No. Civ.A. 1570-N, 2005 WL 2416365, at *1 (Del. Ch. Sept. 26, 2005).

32. *Stone*, 2005 WL 2416365, at *1.

33. *Id.* at *1.

34. *Id.*

35. *Id.* at *2–3.

confidential because it was "historical in nature."[36] The court then reasoned that the board meeting minutes were not confidential because disclosing the minutes would not "chill the board or committee's deliberative processes."[37] The court did not give examples of what would be considered "confidential" to justify a showing of good cause. However, the court stated that Rule 5(g) requires "balancing the interests of companies in protecting proprietary commercial, trade secret or other confidential information against the legitimate interests of the public in litigation filed in the courts, as well as stockholder interests in monitoring how directors of Delaware corporations perform their managerial duties."[38]

In *Romero v. Dowdell*,[39] defendant Career Education Corporation (CEC) provided the plaintiff with several "confidential" and "highly confidential" documents pursuant to section 220 of the Delaware General Corporation Law.[40] The plaintiff, through a derivative action, filed a complaint and included information from the confidential documents that CEC had provided, specifically the CEC Audit Committee meeting minutes.[41] CEC requested that the Court of Chancery seal portions of the complaint, arguing that good cause existed because the complaint contained "third-party confidential information."[42] CEC explained that the minutes discussed in the complaint contained information about an employee that the employee could reasonably have expected to be kept confidential.[43] The court held that CEC failed to meet its burden to show that good cause existed to keep the documents under seal.[44] The court reasoned that "[t]he employee is not named in the minutes and no further information is provided about the employee's concerns."[45] Further, the court stated that there was "no showing that the minutes provide information that could lead one to identify the employee."[46] Like in *Stone*, the court did not explain what would be considered sufficiently confidential to constitute a showing of good cause. The court merely refuted the defendant's arguments.

In sum, both Rule 5(g) and case law explain that to seal a document filed with the court, a party must show good cause. Case law exists to explain what constitutes a trade secret or nonpublic financial information. However, neither Rule 5(g) nor case law explains what is sufficiently

36. *Id.* at *2.
37. *Id.* at *2–3.
38. *Id.* at *2.
39. No. Civ.A. 1398-N, 2006 WL 1229090, at *1 (Del. Ch. Apr. 28, 2006).
40. *Id.*
41. *Id.*
42. *Id.* at *4.
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.*

confidential to constitute a showing of good cause. In the cases described above, the defendants made several arguments that the information in the pleadings was confidential; in both cases, the defendants were unsuccessful.

Second, it is important to understand how *Hurd* fits into the Rule 5(g) framework. In the instant case, the court reviewed the lower court's decision using the abuse of discretion standard.[47] Hurd did not argue that the Allred Letter contained trade secrets or nonpublic financial information; rather, he argued that the information contained confidential information. Hurd contended that the Allred Letter should remain sealed because unsealing the letter would violate his privacy rights under California law.[48] The court declined to decide the issue on the basis of California law,[49] explaining instead that the issue was governed by Rule 5(g).[50] After stating that the Allred Letter did not contain information regarding trade secrets or nonpublic financial information, the court explained why the Allred Letter also did not contain third-party confidential information.[51]

The court gave several reasons why the Allred Letter did not contain third-party confidential information. First, the court stated that despite Hurd's argument that the letter was marked "personal and confidential" when sent to Hurd in his official capacity as CEO of HP, the substance of the letter—rather than its labeling—was crucial in deciding whether the letter contained third-party confidential information.[52] Next, the court pointed out that the letter stated that Fisher's potential claims were against not only Hurd, but also HP.[53] Third, the court stated that "virtually every media" outlet had reported the content of the Allred Letter.[54] And finally, the court noted that the letter "[did] not describe any intimate conversations or conduct."[55] The court therefore held that Hurd failed to establish good cause to keep the Allred Letter sealed.[56] Without any obvious benefit to the either Espinoza or HP with regard to their litigation before the court, the private matters of Hurd and Fisher were made part of the public record and disclosed to the world.

Third, the Supreme Court of Delaware decided *Hurd* incorrectly for three reasons: first, the court's reasoning had little basis in existing law; second, the court offered unpersuasive and illogical grounds in an attempt

47. Hurd v. Espinoza, 34 A.3d 1084, 1086 (Del. 2011).
48. *Id.* at 1085.
49. *Id.* at 1086.
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.*

to justify its decision that the letter was nonconfidential; and third, the court's decision creates dangerous policy implications that permit shareholders and plaintiffs' attorneys to maliciously manipulate CEOs of large corporations to settle otherwise potentially frivolous lawsuits by threatening to include private information in shareholder's complaints filed with the Court of Chancery.

The reasoning invoked in *Hurd* has little basis in existing law. The court failed to cite even one case to support its decision that the Allred Letter did not contain confidential information. Although the case law does not offer great guidance as to what would constitute "confidential information," the court could have looked to other Delaware cases that interpreted Rule 5(g) for principles to apply to the instant case.

For example, in *Stone*, the court set out a balancing test to decide whether a document is sufficiently confidential to constitute good cause.[57] Some Delaware courts have explained that, under the First Amendment, court proceedings should be open to the public.[58] The U.S. Supreme Court has interpreted this principle to include judicial records and documents.[59] In the same fashion, the instant court should have weighed the public's interest in having access to court filings against the interest of individuals in protecting their private and confidential information. The instant case did not even attempt to balance these interests.

Analyzing *Romero* demonstrates another example of how the instant case failed to utilize precedent to support its decision. Although *Romero* did not set out the clearest standards for what would constitute confidential information, the court did supply some explanation that the instant case could have applied. The *Romero* court explained that the information that was requested sealed was not confidential because the information included no identifying names or other identifying information.[60] Had the instant case applied this reasoning, the court likely would have found that the information was confidential. The Allred Letter was replete with identifying information for both Hurd and Fisher. Thus, *Hurd* was incorrectly decided because the court failed to follow or reconcile binding,

57. Stone v. Ritter, No. 1570-N, 2005 WL 2416365, at *2 (Del. Ch. Sept. 26, 2005).

58. *In re* Nat'l City Corp. S'holders Litig., No. 4123-CC, 2009 WL 1653536, at *1 (Del. Ch. June 5, 2009) (citing Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 579 n.17 (1980)); *see also* Kronenberg v. Katz, 872 A.2d 568, 608 (Del. Ch. 2004) ("But, if trial courts permit the sealing of (all or part of the record of) a judicial proceeding simply because the parties wish to conceal their dispute or because the parties take an unreasonably broad view of what matters are truly confidential, they risk injuring the public's right of access and generating appellate decisions that constrain trial courts not only from sealing judicial records when there is no justification for doing that, but that thereby make it more difficult for trial courts to protect truly sensitive information from public disclosure, when that protection is genuinely warranted.").

59. Nixon v. Warner Commc'ns, Inc., 435 U.S. 589, 597 (1978).

60. Romero v. Dowdell, No. Civ.A. 1398-N, 2006 WL 1229090, at *4 (Del. Ch. Apr. 28, 2006).

relevant precedents to justify its ruling.[61]

In addition to lacking legal basis, *Hurd* was also incorrectly decided due to the unpersuasive, illogical grounds the court offered in attempting to justify the Allred Letter being classified as nonconfidential. The court initially justified the nonconfidentiality of the letter by stating that it was sent to Hurd in his official capacity as CEO of HP. Although the Allred Letter was addressed to Hurd and sent to his office at HP, the letter was clearly marked as personal, confidential, and "for Mr. Hurd's eyes only." Even if the Allred Letter was sent to Hurd in his official capacity, it does not change the fact that the letter is confidential. Surely, the court is not suggesting that *everything* addressed to a corporation's CEO is nonconfidential. What if the letter contained information about trade secrets or medical information? The mere fact that it was addressed to Hurd as CEO of HP does not automatically mean that the Allred Letter is nonconfidential.

The court also attempted to justify its holding by stating that the letter noted that the claims were against both HP and Hurd. This one sentence in the opinion does little, if anything, to explain why this fact is significant. Regardless of the litigants to the claims, the information in the letter still contained third-party confidential information. Hurd does not surrender his privacy rights by virtue of being the CEO of a publicly traded company.[62]

Next, the instant court tried to justify its holding by stating that most of the media knew about the substance of the letter, even though the letter was under seal. The fact that a document contains information that is already in the public sphere is a sufficient justification labeling the document nonconfidential;[63] however, the court did not give any support for this proposition. *Hurd* offers no evidence that the media actually knew the substance of the letter before it was unsealed. Imagine a scenario in

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61. *See* Oscar George, Inc. v. Potts, 115 A.2d 479, 481 (Del. 1955). The Supreme Court of Delaware has elaborated on the point that our justice system relies on precedent:

> The rule of stare decisis means that when a point has been once settled by decision it forms a precedent which is not afterwards to be departed from or lightly overruled or set aside even though it may seem in later years archaic. This rule is grounded upon public policy and should be followed except for urgent reasons and upon clear manifestation of error.

Id.

62. *But see* Tom C.W. Lin, *Undressing the CEO: Disclosing Private, Material Matters of Public Company Executives*, 11 U. PA. J. BUS. L. 383, 394–95 ("Such heightened status from the investing public should also come with heightened accountability to the investing public, and sensible additional disclosure from public company executives would be a responsible step in that direction.").

63. One Sky, Inc. v. Katz, No. Civ.A. 1030-N, 2005 WL 1300767, at *1 (Del. Ch. May 12, 2005) ("Any documents or information that do not fit the above criteria, cannot harm the parties or third parties, or previously have entered the public sphere should be deemed available for public disclosure.").

which the plaintiff was responsible for "leaking" the substance of the Allred Letter.[64] Would it be fair to grant the plaintiff's motion to unseal the letter for nonconfidentiality even though he was the one who disseminated it to the media? This logic leads to perverse incentives. If a plaintiff wanted to unseal portions of the pleadings, he need only send the information to the media and then argue to the court that the letter should be unsealed because it is already available to the public.

Additionally, the court in *Hurd* attempted to justify the nonconfidentiality of the Allred Letter by stating that it "does not describe any intimate conversations or conduct."[65] It is unclear how the court did not find that the Allred Letter contained "intimate" conversations or conduct. Even if the court applied a very narrow interpretation of the word "intimate," the letter included more than enough examples. For instance, one passage of the letter describes when Hurd's hand brushed across Fisher's breast twice.[66] The letter also discusses Hurd's romantic partners in different cities around the country.[67] In another example, the Allred letter discusses how Hurd tried to cajole Fisher into having sex with him.[68] These examples are clearly of an intimate nature, and that sensitive nature, among other reasons, should make the letter confidential.[69]

A final reason that the instant case was decided incorrectly is because the Supreme Court of Delaware's interpretation of Rule 5(g) creates dangerous policy implications that allow some shareholders and plaintiff attorneys to maliciously manipulate CEOs of large corporations into settling potentially frivolous lawsuits by threatening to include private information in shareholder's complaints.

The story of the late Steve Jobs, Apple's former CEO, provides an illustration of the potential ramifications of the *Hurd* decision. In 2004, Jobs disclosed that he underwent successful surgery to remove a tumor in

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64. No evidence exists to suggest that Espinoza leaked information to the media. This is purely a hypothetical. However, one could readily imagine a malicious plaintiff or plaintiff's attorney doing so.

65. Hurd v. Espinoza, 34 A.3d 1084, 1086 (Del. 2011).

66. Allred Letter, *supra* note 2, at 3.

67. *Id.* at 5.

68. *Id.* at 3.

69. Another reason supporting why the letter should have been kept confidential is that its facts turned out to be not fully accurate:

> Fisher sent a letter to Hurd related to certain aspects of the Allred Letter (the "August 5 Letter"). In it she states: "First, I do not believe that HP engaged in any inappropriate conduct towards me in any way. Second, there are many inaccuracies in the details of the [Allred Letter]. I do not believe that [Hurd's] behavior was detrimental to HP or in any way injured [HP] or its reputation."

Espinoza v. Hewlett-Packard Co., No. 6000-VCP, 2011 WL 941464, at *2 (Del. Ch. Mar. 17, 2011) (alterations in original). Further, it is likely that Hurd's reputation was irreparably damaged as a result of the allegations—even if they were false.

his pancreas.[70] In 2008, while presenting a new Apple product in San Francisco, California, Jobs looked very sick.[71] Investors were suspicious that his pancreatic cancer had returned, but Apple blamed the illness on a "common bug."[72] People quickly began discussing Apple's succession plan, without having proof that Jobs' cancer had returned.[73]

Imagine the following hypothetical (and assume for the purposes of this hypothetical that no laws, including the Health Insurance Portability and Accountability Act (HIPAA), were implicated or violated): Following the product demonstration, Apple (with Jobs' consent) obtains Jobs' medical records to adequately prepare a succession plan in the event that Jobs could no longer work. Members of Apple's board of directors and Jobs exchange several e-mails discussing Jobs' illness and options for the succession plan. A suspicious shareholder, pursuant to section 220, requests to inspect and to make copies of relevant Apple documents, including Jobs' medical records and the e-mail exchanges. That shareholder then brings suit against Apple for failing to create a succession plan earlier and includes Jobs' medical records and the e-mails in the complaint. Under the rule set forth in *Hurd*, the court arguably would not hold Jobs' medical information—in the medical records or the e-mails—"confidential" for the purposes of Rule 5(g) because it failed to satisfy the "good cause" requirement to keep documents under seal.[74] Jobs' medical information likely would be subject to public disclosure due to sinister maneuvers by plaintiff's counsel. Under *Hurd*, that information likely would have been disclosed because (1) it would be relevant to a suit against both Apple and Jobs, (2) the public could see that Jobs was sick, thus, the information was in the public domain, and (3) no "intimate" conversations or conduct is described in the medical information.

Of course, Steve Jobs likely would not have wanted to disclose his personal medical information included in the records and e-mails—even disregarding the harm it may have caused Apple—because fighting a disease such as pancreatic cancer is a private and personal ordeal. It is probable that another CEO in this position would try to settle the case with the plaintiff, even if the claims were false, to avoid disclosing the CEO's

70. *Apple CEO Jobs's Health Reports Since Cancer Diagnosis in 2003: Timeline*, BLOOMBERG (Aug. 25, 2011, 12:01 AM), http://www.bloomberg.com/news/2011-08-25/apple-ceo-jobs-s-health-reports-since-cancer-diagnosis-in-2003-timeline.html.

71. *See Jobs's Job*, ECONOMIST, Aug. 2, 2008, at 68.

72. *See id.*

73. *See id.*

74. *See* Tom C.W. Lin, *Executive Trade Secrets*, 87 NOTRE DAME L. REV. 911 (2012) (arguing that certain private information should be protected from disclosure as an "Executive Trade Secret"); *see also* Joan MacLeod Heminway, *Personal Facts About Executive Officers: A Proposal for Tailored Disclosures to Encourage Reasonable Investor Behavior*, 42 WAKE FOREST L. REV. 749, 771–74 (2007) (arguing that the current federal securities disclosure regime "[c]reates [u]nresolved [t]ensions with [i]ndividual [r]ights").

private information to the public. When removed from the context of a sexual harassment suit and placed in the context of an iconic CEO diagnosed with cancer, it is easier to see why the Supreme Court of Delaware decided *Hurd* incorrectly.

Additionally, it is important to note that CEOs are particularly susceptible to attack under the *Hurd* ruling because, in terms of reputational harm, CEOs have much more to lose than the average person. Today, investors view a CEO as an extension of the corporation that he manages.[75] Many investors look to a corporation's CEO when deciding whether to invest in the corporation.[76] The future of a corporation can depend on what the public knows about its CEO. A famous CEO will be more vulnerable to frivolous lawsuits where devious plaintiff's attorneys include private information in the court filings. These policy repercussions are especially frightening coming from Delaware because of how influential the state is on issues of corporate litigation across the United States.[77] Thus, *Hurd* was incorrect as it creates dangerous policy implications that will allow shareholders and plaintiff's attorneys to maliciously manipulate CEOs of large corporations into lucrative settlements of potentially frivolous lawsuits by threatening to include private information in shareholder's complaints.

Although a court would not be able to seal personal information in every case,[78] the court in *Hurd* should have kept the Allred Letter under seal. *Hurd* was decided incorrectly because it has little basis in existing law, the court offered no persuasive, logical reasons for unsealing the Allred Letter, and the court's interpretation of Rule 5(g) has perverse and potentially far-reaching policy implications. The perilous ramifications of this case extend far beyond the Delaware courts, and the *Hurd* decision therefore should be immediately overturned.[79]

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75. Lin, *supra* note 74, at 924–25 ("These individual investors often viewed executives as doppelgangers of their firms. The executive became a primary factor, if not *the* primary factor, in an investor's investment calculus." (footnote omitted)).

76. GIDEON HAIGH, FAT CATS: THE STRANGE CULT OF THE CEO 98 (Thunder's Mouth Press 2005).

77. *See* Stephen A. Radin, *The New Stage of Corporate Governance Litigation: Section 220 Demands—Reprise*, 28 CARDOZO L. REV. 1287, 1287–88 (2006) ("The Delaware court system, indeed, has been called 'the Mother Court of corporate law.'" (quoting Kamen v. Kemper Fin. Servs., Inc., 908 F.2d 1338, 1343 (7th Cir. 1990), *rev'd on other grounds*, 500 U.S. 90 (1991))).

78. A Delaware court would not be able to seal personal information in every case because of the First Amendment issues and because it would compromise judicial efficiency. *See In re* Walt Disney Co. Derivative Litig., No. 15452-NC, 2004 WL 368938, at *1 (Del. Ch. Feb. 24, 2004) (order denying request for the court to defer unsealing the record of the case) ("If I were to authorize the sealing of records in a case because they contained information that was potentially embarrassing or unflattering, I expect the Court would be inundated with applications by parties to seal portions of the records in virtually every case that is filed in this Court.").

79. Other scholars have commented on Delaware courts' blunders in the corporate context. *See, e.g.*, Ann M. Scarlett, *Confusion and Unpredictability in Shareholder Derivative Litigation:*

The Delaware Courts' Response to Recent Corporate Scandals, 60 FLA. L. REV. 589, 593 (2008) (arguing that, during recent corporate scandals, Delaware courts have "created doctrinal confusion and introduced unpredictability into derivative litigation").