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Case No. 6000-VCP

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

ERNESTO ESPINOZA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 6000-VCP
	)	
HEWLETT-PACKARD COMPANY,	)	
	)	
Defendant.	)	
	)	

OPINION

Submitted: January 21, 2011
Decided: March 16, 2011

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In August 2010, Mark V. Hurd resigned as Chairman of the Board and CEO of Hewlett-Packard Company ("HP") amid allegations that he, among other things, engaged in an inappropriate relationship with former HP contractor, Jodie Fisher. A few months earlier, Fisher retained attorney Gloria Allred to draft a letter to Hurd (the "Allred Letter" or "Letter") to apprise him of Fisher's claims against him and HP arising from his alleged misconduct. The national media learned of the Letter and stories began to swirl about its connection to Hurd's resignation from HP.

In November 2010, an HP stockholder, Ernesto Espinoza, filed an action in this Court pursuant to 8 *Del. C.* § 220[1] seeking to obtain certain books and records from HP related to the handling of Hurd's resignation, including the Letter. Both Plaintiff and HP agree that the Letter is not confidential and the public's right of access to nonconfidential documents in proceedings before this Court justifies its public disclosure. Hurd and Fisher, however, contend the Letter contains their private personal information and, therefore, should be kept confidential.

On January 21, 2011, I granted Hurd's motion to intervene in this action to show good cause why the Letter should remain under seal. In this regard, Hurd asserts that California law applies and it provides six separate grounds for his claim of good cause. Having carefully considered each of these grounds and for the reasons stated in this Opinion, I hold that Hurd has not carried his burden to demonstrate good cause.

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[1] 8 *Del. C.* § 220.

Therefore, subject to a narrow exception discussed below, I order that the Allred Letter be unsealed.

I. BACKGROUND

A. The Parties

Plaintiff, Espinoza, is a beneficial owner of HP common stock.[2] Defendant, HP, is a Delaware corporation and global provider of products, technologies, software, solutions, and services to individual consumers, small and medium-sized businesses, and large enterprises, including customers in the government, health, and education sectors.[3] Third-Party Intervenor, Hurd, is the former CEO, President, and Chairman of the Board of Directors of HP.[4] After resigning his posts at HP, Hurd joined Oracle Corporation ("Oracle"), becoming one of its two presidents and a member of its board of directors.[5]

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2 Compl. for relief pursuant to 8 *Del. C.* § 220 ("Complaint") ¶ 12.

3 *Id*. ¶ 13.

4 Op. Br. in Supp. of the Mot. of Mark V. Hurd to Keep Confidential Information Under Seal ("HOB") 4. Similarly, I refer to Plaintiff's answering brief in opposition to that motion as "PAB," Defendant's response to the motion as "DRB," and Hurd's reply brief regarding it as "HRB."

5 *Id*. at 7. Although, HP sued Hurd in California to prevent him from working for Oracle, the parties to that suit reached a resolution and Hurd continues to serve as one of Oracle's presidents.

B. Facts

1. Background on Hurd and the Letter

Hurd became Chairman of the HP board on September 22, 2006. Less than four years later, on August 6, 2010, he resigned his positions with HP. According to reports in the national media, his departure occurred amid accusations that he engaged in inappropriate conduct related to Fisher, an independent contractor for HP.[6] Specifically, HP engaged Fisher's services in connection with various HP-sponsored events between 2007 and 2009.

On or about June 24, 2010, California attorney Gloria Allred drafted the Letter and sent it to Hurd on behalf of Fisher.[7] It describes Hurd's allegedly inappropriate conduct vis-à-vis Fisher and HP, was marked "CONFIDENTIAL TO BE OPENED BY ADDRESSEE ONLY," and was addressed to:

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6 *See, e.g.*, Adam Lashinsky, *The Letter That Took Down Mark Hurd Comes Closer to the Surface*, CNN MONEY.COM (Nov. 5, 2010), *available at* http://tech.fortune.cnn.com/2010/11/05/the-letter-that-took-down-mark-hurd-comes-closer-to-the-surface/?section=money_topstories; Connie Guglielmo, Ian King, and Aaron Ricadela, *HP Chief Executive Hurd Resigns After Sexual-Harassment Probe*, BLOOMBERG BUSINESSWEEK (Aug. 7, 2010), *available at* http://www.businessweek.com/news/2010-08-07/hp-chief-executive-hurd-resigns-after-sexual-harassment-probe.html.

7 *See* Compl. Ex. 4 (the "Allred Letter"). Hurd received the Letter on or around June 29. Docket Item ("D.I.") 69, Aff. of Amy Wintersheimer ("Wintersheimer Aff."), ¶ 2.

Mark Hurd. CEO
HEWLETT PACKARD COMPANY
3000 Hanover Street
Palo Alto, CA 94304.[8]

The legend "***PERSONAL & CONFIDENTIAL***" appears at the top of the Letter, and its subject line reads: "Jodie Fisher v. Hewlett Packard/Mark Hurd."[9] The first sentence makes clear that Fisher sought to assert certain claims against both HP and Hurd.[10] The second sentence asserts that Fisher retained Allred's firm to represent her in attempting to resolve her claims "confidentially" before proceeding to litigation.

Hurd promptly turned the Letter over to, and sought legal advice from, HP's Executive Vice President and General Counsel, Michael J. Holston. Thereafter, on August 5, 2010, Hurd reached a private and confidential settlement with Fisher.[11] That same day, and presumably as part of the settlement, 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

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8 Allred Letter 1. The Letter is addressed to HP's office and not Hurd's personal residence.

9 *Id*.

10 The Letter also states that it is "subject to California Evidence Code Sec. 1152 and therefore is not admissible for any reason." *Id*.

11 D.I. 19, Aff. of Dwight L. Armstrong ("Armstrong Aff."), ¶ 2.

reputation."[12] The next day, August 6, HP publicly announced that Hurd had resigned his posts at HP. In addition, HP indicated that after completing its investigation into the allegations made in the Allred Letter, it concluded that "there was no violation [by Hurd] of HP's sexual harassment policy" but that there were "violations of HP's Standards of Business Conduct."[13]

2. The § 220 suit

On or about August 17, 2010, counsel for Plaintiff in this action, the Robbins Umeda law firm, sent a demand letter to Holston pursuant to 8 *Del. C.* § 220, seeking to inspect books, records, and documents of HP for the stated purpose of "investigat[ing] corporate mismanagement, wrongdoing, and waste by [the HP Board and Hurd]" relating to Hurd's relationship with Fisher and the circumstances of his resignation (the "Demand Letter").[14] Because the Allred Letter was among the documents Plaintiff requested, HP provided a copy of the Demand Letter to Hurd's counsel on August 23, 2010.

A few days later, on August 26, Allred sent another letter to HP, which she addressed to Holston and HP's outside counsel, Amy Wintersheimer (the "August 26 Letter").[15] In it, Allred emphasized the confidential nature of the Allred Letter, asserting that it was marked "confidential," was not admissible under CALIFORNIA EVIDENCE

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12 *Id*. Ex. A.

13 *See* D.I. 19, Aff. of Kathaleen McCormick ("McCormick Aff."), Ex A.

14 *See* D.I. 19, Aff. of Keith Paul Bishop ("Bishop Aff."), Ex. A.

15 Armstrong Aff. Ex. B.

CODE § 1152, and had been prepared for the purpose of attempting to arrange a private mediation. She also stressed that she had never given permission to HP to disclose it to anyone. In particular, Allred requested that "both [HP] and [Hurd] take all appropriate steps to maintain the confidentiality of [the Letter] and to oppose its disclosure, including, without limitation, in the context of litigation or in response to a request to inspect corporate records."[16]

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.[17] Subsequently, on September 27, HP advised Hurd's counsel that HP would designate the Allred Letter as "confidential as an accommodation to [Hurd's] personal privacy concerns" but intended to produce it to Plaintiff ten business days later because HP believed it was responsive to the Demand Letter.[18] On October 11, when that time period expired, HP notified Hurd's counsel that it intended to produce the Allred Letter to Plaintiff the following day with a confidential designation pursuant to the Confidentiality and Non-Disclosure Agreement HP had

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16 *Id*.

17 McCormick Aff. Ex. B.

18 Bishop Aff. Ex. C. HP made clear to Hurd that it had agreed to designate the Allred Letter as confidential when it produced it to Plaintiff only to give Hurd the opportunity to resolve any confidentiality issue with Plaintiff's counsel. *Id*. Ex. E.

entered into with Plaintiff in connection with Plaintiff's Demand Letter (the "Confidentiality Agreement").[19]

On October 13, however, HP advised Hurd's counsel that the parties had entered into an Amended Confidentiality and Non-Disclosure Agreement (the "Amended Agreement") concerning Plaintiff's Demand Letter.[20] The Amended Agreement reflects HP's view, as previously expressed to Hurd, that the Allred Letter is not confidential. Moreover, HP reminded Hurd that it previously afforded him a ten-day notice period to give him an opportunity to work out an arrangement with Plaintiff or seek judicial redress concerning the confidentiality of the Letter and that notice period was "in no way [to] be viewed as a concession that the [L]etter is in fact confidential . . . ."[21] Thus, the Amended Agreement contains a new ¶ 3, which states:

> For the purposes of this Agreement, the letter dated June 24, 2010 from Gloria Allred (hereafter the "Allred letter") shall be designated Confidential Inspection Material, but only for a period of ten (10) business days following the date of its production to Robbins [Umeda]. HP does not consider the Allred letter to be confidential, but pursuant to the request of Mr. Hurd, HP has marked it as confidential for this 10 day period as a courtesy to Mr. Hurd. The Allred letter will be affixed with the label 'Confidential at the Request of Mark Hurd,' which confidentiality designation shall expire, of its

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19 *Id*. Ex. F.

20 *Id*. Ex. G.

21 *Id*.

> own accord and without further action by or notice to anyone, ten (10) business days after its production.[22]

Thereafter, Hurd and Plaintiff exchanged communications regarding Hurd's desire to keep the Allred Letter confidential. When they failed to reach a compromise, Plaintiff filed its § 220 Complaint on November 18, 2010, attaching the Allred Letter and quoting extensively from it.

Finally, the record indicates that Fisher also considers the Allred Letter confidential and does not wish it to be disclosed publicly. She avers that the Letter "contains highly personal and private information which [she has] never authorized to be disclosed publicly" and she does "not want the Allred Letter to be disclosed now, or at any time in the future."[23]

C. Procedural History

Pursuant to a sealing order dated November 17, 2010 (the "Sealing Order"), Plaintiff filed his § 220 Complaint under seal on November 18.[24] The Sealing Order permitted Hurd to "file a motion specifically identifying the information that [he] believes to be confidential, and request for good cause that the Court issue an order to keep the proposed designated confidential information under seal and restricted from

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22 Armstrong Aff. Ex. G ¶ 3. The Amended Agreement was executed by Robbins Umeda on October 12, 2010 and by HP's counsel on October 13.

23 *Id*. Ex. C, Aff. of Jodie Fisher ("Fisher Aff."), ¶ 3.

24 Originally, this case was before Chancellor Chandler, but it was transferred to me on December 13. D.I. 23.

public access."[25] Pursuant to that Order, Hurd has moved to keep certain information under seal,[26] and the parties have engaged in significant motion practice related to that application. In particular, on December 2, Hurd sought briefing on his motion to keep confidential certain portions of the Complaint (the "Complaint Motion"), which the Chancellor granted. I later granted HP's request to file its Answer under seal. On December 28, 2010, Hurd formally moved for permission to intervene in this action under Rule 24. Finally, Hurd filed a motion on January 4, 2011 to keep certain portions of the Answer under seal (the "Answer Motion"). Neither Espinoza nor HP opposed Hurd's motion to intervene, but the parties and Hurd have extensively briefed both his Complaint Motion and the Answer Motion.

On January 21, 2011, I heard argument on all three of Hurd's motions (the "Hearing"). I then granted Hurd leave to intervene under both Rules 24(a) and (b) to pursue his Complaint and Answer Motions.[27] At the Hearing, the parties also resolved their dispute as to the Answer Motion by agreeing that HP could publicly file an amended Answer (the "Amended Answer"), which it did on January 26, 2011.[28] I reserved judgment, however, on Hurd's Complaint Motion. This Opinion reflects my ruling on that motion.

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25 D.I. 1.

26 D.I. 6.

27 D.I. 68, Judicial Action form; Tr. of Jan. 21, 2010 Hearing ("Tr.") 5.

28 Because the parties consented to the public filing of the Amended Answer, Hurd's Answer Motion is moot. D.I. 70.

D. Parties' Contentions

Hurd contends that there is good cause to keep the Allred Letter under seal. He asserts that it has the characteristics of a confidential document and all parties with the most direct interest in it, including its author, subject, and recipient, desire it to remain nonpublic. Moreover, according to Hurd, disclosure of the contents of the Letter would violate a number of his privacy rights and privileges under California law. He also avers that the continued sealing of the Letter would cause little prejudice to Plaintiff or HP because both of them already have copies of the Letter and they initially agreed to treat it as confidential in the Confidentiality Agreement. In any event, he argues that the confidential status of the Letter is not germane to either Plaintiff's claim that HP's response to his § 220 demand is insufficient or HP's defense to that claim. Finally, Hurd contends that the balance of equities tips in his favor because public disclosure of the Letter would cause him irreparable harm.

HP technically "takes no position" on whether the Court should keep the Allred Letter sealed. Rather, it submitted a response to Hurd's opening brief for the singular purpose of "help[ing] the Court understand why, in designating certain documents as either confidential or not in connection with HP's Section 220 production, HP concluded that the Allred Letter was not properly deemed confidential."[29] But, HP unequivocally denies that the Letter is a private, personal communication as Hurd argues. Instead, HP

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[29] DRB 2. HP also explained that it filed its response to represent the public's right to know about the Letter, because that right "does not appear to have an advocate before the Court." *Id*. at 1; *accord* PAB 2 n.2.

describes it as a business communication from a former HP contractor to the Company and Hurd, in his professional capacity as CEO and Chairman of the HP board, about events arising out of that business relationship.[30]

Plaintiff agrees with HP that the Letter is not a personal, private communication entitled to confidential treatment in this action. He acknowledges that the § 220 action does not turn on publicizing the Letter and states that his investigative purpose would "neither [be] furthered nor undermined by the publication" of it. Nevertheless, Plaintiff "opposes any suggestion that his proper purpose in investigating the facts and circumstances of Hurd's departure from HP warrants the veil of secrecy that Hurd now seeks."[31] Plaintiff further asserts that Hurd has not shown good cause to deprive the general public of access to the Letter because its contents demonstrate it was, at all times, a business communication concerning how and why Hurd allegedly breached his fiduciary duties to HP stockholders. In particular, Plaintiff questions the applicability of Hurd's purported privacy rights and privileges and, regardless, contends that he has waived his right to invoke them. Lastly, he argues that the balance of the equities favors public disclosure of the Letter because of the inadequacy of Hurd's showing of good cause and this Court's policy of favoring open proceedings.

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30 DRB 2.

31 PAB 2-3.

II. ANALYSIS

A. The Governing Standard is "Good Cause"

Rule 5(g)(1) provides, in part, that "[e]xcept as otherwise provided in this Rule 5(g), all pleadings and other papers . . . filed with the Register in Chancery shall become part of the public record of the proceedings before this Court."[32] The default position of Rule 5(g) ensures public accessibility of filed documents unless, under Rule 5(g)(2), a party seeking to file or maintain a document under seal demonstrates "good cause" for doing so.[33] In determining "good cause," the Court "must balance the general principle that items filed in [the Court of Chancery] become a part of the public record with the need to protect the sensitive information of parties' to litigation."[34] This Court previously

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32 Ct. Ch. R. 5(g)(1).

33 *See, e.g.*, *id*. at R. 5(g)(2); *In re Yahoo! Inc. S'holders Litig.*, 2008 WL 2268354, at *1 (Del. Ch. June 2, 2008); *One Sky, Inc. v. Katz*, 2005 WL 1300767, at *1 (Del. Ch. May 12, 2005). Specifically, Rule 5(g)(2) states: "[d]ocuments 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." Ct. Ch. R. 5(g)(2).

34 *See, e.g.*, *Cantor Fitzgerald, Inc. v. Cantor*, 2001 WL 422633, at *2 (Del. Ch. Apr. 17, 2001); *One Sky, Inc.*, 2005 WL 1300767, at *1 ("[Rule 5(g)] also provides the court flexibility in balancing the need to protect sensitive material from public disclosure and the public's right of access."); *Romero v. Dowdell*, 2006 WL 1229090, at *3 (Del. Ch. Apr. 28, 2006) ("Accordingly, this Court must determine whether good cause exists to continue to seal the Amended Derivative Complaint and related documents, '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.'"); *Stone v. Ritter*, 2005 WL 2416365, at *2 (Del. Ch. Sept. 26, 2005) (same).

has held that good cause exists under Rule 5(g) to seal documents containing trade secrets, nonpublic financial information, and third-party confidential material.[35]

As Hurd does not allege that the Letter contains trade secrets or nonpublic financial information, I focus on whether it contains third-party confidential material. This Court does not take lightly a party's interest in avoiding public disclosure of confidential material, especially of the kind that could cause significant harm or hardship to that party if it came to light. At the same time, to preserve the public's right of access, courts must exercise caution to avoid sealing documents simply because a party makes unreasonably broad claims of confidentiality.[36] Therefore, "any documents or information that do not [in fact contain third-party confidential information,] cannot harm the parties or third parties, or previously have entered the public sphere should be deemed available for public disclosure."[37]

Documents sometimes are filed that contain information parties would prefer to keep confidential. But, whether or not to seal a document allegedly containing confidential information does not turn on whether its disclosure would cause embarrassment.[38] Rather, that decision depends on this Court's determination, after a

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35 *See, e.g.*, *In re Yahoo! Inc. S'holders Litig.*, 2008 WL 2268354, at *1; *Romero*, 2006 WL 1229090, at *1; *One Sky, Inc.*, 2005 WL 1300767, at *1.

36 *See One Sky, Inc.*, 2005 WL 1300767, at *1.

37 *Id*.

38 *See Khanna v. McMinn*, 2006 WL 1388744, at *40 (Del. Ch. May 9, 2006) ("Sealing any complaint that contains mildly embarrassing information would

careful balancing of the movant's privacy interests against the public's disclosure interests, of whether good cause exists to keep the document sealed.

B. Hurd's Claimed Privacy Interests

Hurd contends that public disclosure of the Allred Letter would violate his "protectable legal interests" based on six different theories arising variously under California constitutional, statutory, procedural, or common law.[39]

Preliminarily, I address briefly Hurd's choice of law contentions. He maintains that, under Delaware choice of law principles, this Court should look to California substantive law to determine the scope of any privacy interests at stake. In Delaware, choice of law questions are governed by the most significant relationship test articulated in the Restatement (Second) of Conflict of Laws (the "Restatement").[40] To determine which state has the most significant relationship to a tort dispute, including torts related to privacy interests, Courts look to the following factors: (1) the place where the injury occurred; (2) the place where the conduct causing the injury occurred; (3) the domicile,

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defeat the presumption, set forth in Rule 5(g), that a record is public unless good cause is shown as to why it should be sealed.").

[39] HOB 12.

[40] *See In re Am. Int'l Gp., Inc.*, 965 A.2d 763, 818 (Del. Ch. 2009) (citing *Travelers Indem. Co. v. Lake*, 594 A.2d 38, 46-47 (Del. 1991)), *aff'd sub nom. Teachers' Ret. Sys. of La. v. PricewaterhouseCoopers LLP*, 11 A.3d 228 (Del. 2011).

residence, nationality, place of incorporation, and place of business of the parties; and (4) the place where the relationship, if any, between the parties is centered.[41]

Most of the persons materially involved in the pending motion, including Hurd, Fisher, and Allred, are domiciled in California.[42] In addition, while HP is a Delaware corporation, its principal place of business is in California. Assuming Hurd would suffer a legally cognizable harm if the Letter is publicly disclosed, he credibly asserts that the locus of that harm would be in California where he resides. Moreover, no one disputed the applicability of California law in the extensive briefing on Hurd's motion or at the Hearing.[43]

Thus, I begin by looking to the California substantive law cited by Hurd as the source of the allegedly protectable privacy interests that, according to him, justify keeping the Letter under seal. Specifically, Hurd contends that public disclosure of the Letter would violate his legally cognizable privacy interests under: (1) California tort law

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41 *See Am. Int'l Gp., Inc.*, 965 A.2d at 819. As Hurd bases a number of his claims of good cause on California tort law, I look to Delaware choice of law principles pertaining to tort actions for those claims.

42 Hurd's domicile is especially important because he contends that disclosure of the Allred Letter would invade his privacy interests as a Californian. *See* Restatement § 153 cmt. b (1971) ("The rule of this Section calls for application of the local law of the state where the plaintiff was domiciled at the time when his privacy was invaded unless, with respect to the particular issue, some other state has a more significant relationship to the occurrence and the parties."); *see also In re Am. Int'l Gp., Inc.*, 965 A.2d at 818 (giving deference to the official commentary to the Restatement).

43 *See* Tr. 41.

and (2) a related constitutional right; (3) CALIFORNIA EVIDENCE CODE §§ 1152 and 1154, relating to the Letter as a confidential settlement offer; (4) CALIFORNIA EVIDENCE CODE §§ 1115 and 1119, relating to the Letter as subject to a mediation privilege; (5) CALIFORNIA CODE OF CIVIL PROCEDURE § 1985.6 and CALIFORNIA LABOR CODE § 1198.5, relating to the Letter as a confidential employment record; and (6) CALIFORNIA CIVIL CODE § 985, relating to an alleged copyright in the Letter as a confidential private communication. I address each of these grounds in turn.

1. The right to privacy embodied in California's tort of public disclosure of private facts

Hurd first argues that the California tort of public disclosure of private facts supports keeping the Allred Letter confidential. California common law recognizes the tort of public disclosure, one of four distinct torts that fall within the collective rubric of invasion of privacy.[44] This tort is distinct from a suit for libel or "false light" because the claimant need not challenge the accuracy of the information disclosed to the public, but rather, must show that the disclosure is so intimate and unwarranted as to outrage the community's notion of decency.[45] The tort of public disclosure seeks to protect an individual's interest in being free from the "wrongful publicizing of private affairs and

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[44] *See Diaz v. Oakland Tribune, Inc.*, 188 Cal. Rptr. 762, 767 (Cal. Ct. App. 1983) ("The development of the public disclosure tort in California is well documented. . . . In fact, California has recognized this right for over 50 years."). The three other privacy torts are: "(1) intrusion upon plaintiff's solitude or into his or her private affairs; (2) "false light" publicity; and (3) appropriation of plaintiff's name or likeness to the defendant's advantage." *See id*.

[45] *See id*.

activities which are outside the realm of legitimate public concern."[46] As such, a claimant for improper public disclosure must demonstrate the following four elements: (1) public disclosure (2) of a private fact (3) which would be offensive and objectionable to the reasonable person and (4) which is not of legitimate public concern.[47] A failure to prove any one of these elements is a complete bar to liability.[48] Thus, for example, the dissemination of truthful, newsworthy material is not actionable as a publication of private facts.[49]

I infer from the existence of this tort that Californians have a protectable interest in preventing the disclosure of certain kinds of private information without their authorization. Hence, private information relating to Hurd that would be offensive and objectionable to the reasonable person and not of legitimate public concern would be protected from unauthorized disclosure in California. I turn, therefore, to whether the Letter qualifies for such protection.

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46 *Kinsey v. Macur*, 165 Cal. Rptr. 608, 611 (Cal. Ct. App. 1980).

47 *See, e.g.*, *Taus v. Loftus*, 151 P.3d 1185, 1207 (Cal. 2007); *Shulman v. Gp. W Prods., Inc.*, 955 P.2d 469, 478 (Cal. 1998); *Moreno v. Hanford Sentinel, Inc.*, 91 Cal. Rptr. 3d 858, 862 (Cal. Ct. App. 2009); *Diaz*, 188 Cal. Rptr. at 767-68.

48 *See Moreno*, 91 Cal. Rptr. 3d at 862.

49 *See, e.g.*, *Taus*, 151 P.3d at 1207 (noting that the disclosure of newsworthy facts is a complete bar to common law liability); *Shulman*, 955 P.2d at 479.

a. Does the Letter constitute private information?

As to the first element, Hurd must demonstrate that the information he seeks to keep confidential is, in fact, private information.[50] Information that is already public is not private.[51] To be a private fact, however, information does not need to be absolutely secret.[52] Rather, the focus is on whether the claimant had an objectively reasonable expectation of privacy as to the information at issue.[53]

Hurd contends that the markings on and contents of the Letter, and the statements of Fisher and Allred, confirm that it is highly personal in nature and was intended to be kept confidential by all parties. In that regard, he notes that the persons most closely related to the Letter, Fisher and Allred, have made clear their desire to keep it confidential. Hurd also asserts that the markings on the Letter, including legends such as "Confidential" and "TO BE OPENED BY ADDRESSEE ONLY," indicate that it was intended for his eyes only. Additionally, he argues that HP's initial characterization of

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50 *Moreno*, 91 Cal. Rptr. 3d at 862.

51 *Id*.

52 *Id*. at 862-63 (noting that private is not equivalent to secret).

53 *See, e.g.*, *id*.; *Hill v. Nat'l Collegiate Athletic Ass'n*, 865 P.2d 633, 648 (Cal. 1994) (noting that a "plaintiff in an invasion of privacy case must have conducted himself or herself in a manner consistent with an actual expectation of privacy."); *Four Navy Seals v. Associated Press*, 413 F. Supp. 2d 1136, 1144 (S.D. Cal. 2005) ("In order to state a claim for invasion of privacy under California common law, a plaintiff must allege facts sufficient to establish that he had a 'personal and objectively reasonable expectation of privacy.'").

the Letter as "confidential" supports his position that the letter contains private, personal facts.

As Hurd notes, the Letter contained explicit notations regarding confidentiality, including a bold stamp stating "CONFIDENTIAL TO BE OPENED BY ADDRESSEE ONLY" and "***PERSONAL AND CONFIDENTIAL***."[54] Seizing upon such markings, Hurd cites Delaware case law[55] for the unremarkable proposition that the fact that a document is marked "confidential" is relevant in determining whether the document is, in fact, confidential. Just because a document is marked as confidential, however, does not mean it deserves confidential treatment as a matter of law.[56] Rather, the inquiry is whether these markings shed light on the parties' reasonable expectations in terms of confidentiality.[57]

Despite these markings, however, I find that there is insufficient evidence on the present record that the parties had a reasonable expectation of privacy with regard to the

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54 Allred Letter 1.

55 *Pershing Square, L.P. v. Ceridian Corp.*, 923 A.2d 810, 826 (Del. Ch. 2007); *Disney v. Walt Disney Co.*, 2005 WL 1538336, at *11 (Del. Ch. June 20, 2005).

56 *See Pershing Square*, 923 A.2d at 821, 823-24 ("I do not suggest that any document between an executive and a board member that the company marks as confidential is automatically excluded from inspection under § 220. There are circumstances where these confidential designations are overbroad, or where the benefit of disclosure outweighs the risks of harm. But, where a document indeed involves confidential business and personnel matters and where the potential benefit of disclosing the information does not outweigh the potential harm, this Court should exercise caution in requiring disclosure absent special circumstances." (internal citations omitted)).

57 *See, e.g.*, *id*. at 821; *Disney*, 2005 WL 1538336, at *3.

contents of the Allred Letter at the time it was sent. First, while the Letter is addressed only to Hurd, it is addressed to him in his official capacity as CEO and was delivered to his work address, HP's office in Palo Alto.[58] Moreover, the subject line says "Jodie Fisher v. Hewlett Packard/Mark Hurd" and explicitly states that Fisher seeks to bring claims "against Hewlett Packard ("HP") and [Hurd]."[59] While the Letter describes certain more intimate details of Hurd's interaction with Fisher, it makes clear that Fisher's claims against Hurd arise from her relationship with him as an HP-employed contractor. Similarly, her claims are directed at Hurd not merely in his personal capacity, but in his professional capacity as CEO.

Hurd stresses that Fisher's allegations are highly personal in nature. That may be true, but the allegations cannot be dissociated from his role as CEO of a Fortune 500 company. They involve, for example, allegations pertaining to Hurd's conduct toward HP's employees, his use of HP's funds, and his disclosure of nonpublic information about HP's business.

Despite the markings otherwise, the contents of the Letter demonstrate that it did not contain private, personal facts, but rather was a business communication sent to Hurd

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[58] Hurd argues that the letter being sent to HP's offices is of no moment because his home address was not published and it is not unusual for executives to receive personal correspondence at their corporation's headquarters. HRB 7. As discussed in the text, however, this correspondence was not solely personal in nature; it referred to HP as well, and was delivered to Hurd as CEO at his workplace.

[59] Allred Letter 1.

for the purpose of apprising him of legal claims against him and his employer arising from allegations pertaining to his role as company CEO. That Hurd immediately turned the Letter over to HP's general counsel, and not his own personal attorneys, further supports this conclusion. That disclosure indicates that even Hurd did not believe the Letter was a purely private matter; rather, he considered it sufficiently related to HP's business so as to deem it appropriate to turn it over to HP's counsel and, ultimately, to the board of directors. As Hurd asserts,[60] not all business communications by and among corporate executives are nonprivate communications. Nevertheless, having considered all of the relevant circumstances in this case, I find that Hurd has not shown that the Letter would be treated as private for purposes of the California tort of public disclosure of private facts.[61]

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60 HRB 8.

61 In reaching this conclusion, I found the other arguments Hurd made in this regard unpersuasive. Specifically, I afford limited weight to after-the-fact statements by Fisher and Allred concerning their supposed intentions with regard to confidentiality at the time they sent the Letter to Hurd. As discussed further below, these statements from Fisher and Allred emerged after Fisher reached a settlement with Hurd and obtained the relief she desired. Thus, her after-the-fact statements of prior intent are not very persuasive. I similarly afford little weight to Hurd's argument that HP also believed the Letter was a personal confidential communication. *See* HOB 8; Tr. 17-18. Hurd argues that HP initially designated the Letter as confidential in the Confidentiality Agreement but "abruptly changed its position" "for no legitimate purpose" by executing the Amended Agreement to exclude the Letter from confidential designation. *Id*. at 7-8. But, HP's communications to Hurd in the months leading up to this suit reflect that HP never believed the Letter was confidential. *See, e.g.*, Bishop Aff. Exs. C, E, & G. In fact, the only reason it initially deemed the Letter to be confidential in its responses to Plaintiff's § 220 production requests was that it sought to provide Hurd with a reasonable period of time in which to oppose Plaintiff's receipt or

b. Does the Letter constitute information that would be offensive and objectionable to the reasonable person

To show the Letter would be protected from unauthorized disclosure under California law, Hurd also must satisfy the second element by showing that disclosure of its contents would be objectionable to a reasonable person. My analysis of this issue is governed by the norm of the ordinary person, which means that, taking into consideration all of the circumstances, the "alleged objectionable publication must appear offensive in the light of 'ordinary sensibilities.'"[62]

The Allred Letter is detailed, but, as discussed further *infra*, not graphic. Nonetheless, it contains several allegations that a reasonable person would not want publicized. For example, the Letter contains accusations of sexual harassment and details of Hurd's alleged sexual advances toward Fisher and her rejection of those advances. In addition, there are personal statements attributed to Hurd with regard to details about his family life. None of this information rises to the level of egregiousness of the material found reasonably objectionable in *Kinsey v. Macur*,[63] upon which Hurd

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public disclosure of the Letter. *See id.* Ex. G; Tr. 50-51. Thus, HP's initial acquiescence to the Letter's confidential status in the Confidentiality Agreement is of little support to Hurd's contentions.

62 *See Gill v. Hearst Pub. Co.*, 253 P.2d 441, 443-44 (Cal. 1953) (noting that "[i]t is only where the intrusion has gone beyond the limits of decency that liability accrues."); *see also Catsouras v. Dep't of Cal. Highway Patrol*, 104 Cal. Rptr. 3d 352, 392 (Cal. Ct. App. 2010).

63 165 Cal. Rptr. 608 (Cal. Ct. App. 1980). In *Kinsey*, the plaintiff's former lover sent a series of letters to the plaintiff as well as to his wife, friends, and acquaintances, which contained accusations that he killed his first wife, spent six

relies. Still, a person of ordinary sensibilities likely would seek to avoid public disclosure of much of the information at issue here. Thus, as discussed further *infra*, at least some of the information in the Allred Letter probably could be considered reasonably objectionable.

c. Is the information in the Letter of legitimate public concern?

As to the final element, Hurd must demonstrate that the Allred Letter is not of legitimate public concern. This is the so-called "newsworthy" exception to a claimant's expectation of privacy; under it, even a publication of private facts that are reasonably objectionable to the claimant does not give rise to liability if the publication was a matter of legitimate public concern.[64] Whether information is newsworthy is measured in terms of a sliding scale of competing interests, including the claimant's right to keep private facts from the public's eye and the public's right to know.[65]

In light of these competing interests, California courts employ a three-part balancing test for determining whether matters are newsworthy.[66] They consider: (1) the

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months in jail for the crime, raped children, and engaged in other questionable behavior. *Id.* at 610. The Court of Appeal affirmed the trial court's finding for the plaintiff on his public disclosure action. *See id*. at 614.

64 *See Taus v. Loftus*, 151 P.3d 1185, 1208 (Cal. 2007).

65 *See, e.g., Morrow v. Los Angeles Unified Sch. Dist.*, 57 Cal. Rptr. 3d 885, 897 (Cal. Ct. App. 2007); *Diaz v. Oakland Tribune, Inc.*, 188 Cal. Rptr. 762, 771-72 (Cal. Ct. App. 1983).

66 *See Shulman v. Gp. W Prods., Inc.*, 955 P.2d 469, 487 (Cal. 1998) ("a certain amount of interest-balancing *does* occur in deciding whether material is of legitimate public concern, or in formulating rules for that decision.") (emphasis in original).

social value of the facts published (or, in this case, to be published); (2) the depth of the publication's intrusion into ostensibly private affairs; and (3) the extent to which the claimant voluntarily acceded to a position of public notoriety.[67] The social value factor requires, to some extent, making a normative judgment as to what news is valuable to the public. The mere fact that certain information might attract a large number of readers or viewers does not mean, as a matter of law, that the information is of legitimate public interest.[68] Nevertheless, newsworthiness is defined broadly to include matters of public concern, such as, for example, romantic involvements of famous people.[69]

As to the latter two factors, "intensely personal or intimate revelations might not, in a given case, be considered newsworthy, especially where they bear only slight relevance to a topic of legitimate public concern."[70] This is especially important in the context of a nonpublic figure involuntarily thrust into the public eye; in that situation, a claimant may show a lack of newsworthiness if he demonstrates the absence of a logical nexus between the events or activities that caused his notoriety and the particular facts to be disclosed.[71] There must be a reasonable proportion or logical connection between the

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67 *See, e.g.*, *Shulman*, 955 P.2d at 483-84; *M.G. v. Time Warner, Inc.*, 107 Cal. Rptr. 2d 504, 511 (Cal. Ct. App. 2001); *Diaz*, 188 Cal. Rptr. at 771-72.

68 *See Shulman*, 955 P.2d at 483-84.

69 *See Michaels v. Internet Entm't Gp., Inc.*, 5 F. Supp. 2d 823, 839 (C.D. Cal. 1998).

70 *Shulman*, 955 P.2d at 486; *see also Taus v. Loftus*, 151 P.3d 1185, 1208-09 (Cal. 2007).

71 *See, e.g.*, *Taus*, 151 P.3d at 1208; *Shulman*, 955 P.2d at 486 ("To observe that the newsworthiness of private facts about a person involuntarily thrust into the public

events or activity that makes an individual newsworthy and the private facts in question, if those facts are to be publicized.[72] Ultimately, courts have enforced privacy rights when "'publicity ceases to be the giving of information to which the public is entitled, and becomes a morbid and sensational prying into private lives for its own sake, with which a reasonable member of the public, with decent standards, would say that he has no concern.'"[73]

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eye depends, in the ordinary case, on the existence of a logical nexus between the newsworthy event or activity and the facts revealed is not to deny that the balance of free press and privacy interests may require a different conclusion when the intrusiveness of the revelation is greatly disproportionate to its relevance."); *Morrow*, 57 Cal. Rptr. 3d at 897 ("As long as the publication was of 'legitimate public concern,' there can be no tort liability under this theory where the facts disclosed 'bear a logical relationship to the newsworthy subject of the broadcast and are not intrusive in great disproportion to their relevance' - even if the subject of disclosure was 'a private person involuntarily caught up in events of public interest.'").

72 *See, e.g.*, *Shulman*, 955 P.2d at 484 ("Revelations that may properly be made concerning a murderer or the President of the United States would not be privileged if they were to be made concerning one who is merely injured in an automobile accident."); *Four Navy Seals v. Associated Press*, 413 F. Supp. 2d 1136, 1146 (S.D. Cal. 2005) ("Newsworthiness depends upon the logical relationship or nexus between the event that brought the plaintiff into the public eye and the particular facts disclosed, so long as the facts are not intrusive in great disproportion to their relevance.").

73 *See Catsouras v. Dep't of Cal. Highway Patrol*, 104 Cal. Rptr. 3d 352, 366 (Cal. Ct. App. 2010) ("Put another way, morbid and sensational eavesdropping or gossip 'serves no legitimate public interest and is not deserving of protection.'").

i. Social value

Turning first to social value, Hurd contends that the Letter contains allegations and inflammatory untrue conclusions "related to Mr. Hurd's private conduct."[74] In that regard, Hurd asserts that the public already has been apprised that he was accused by Fisher of sexual harassment and that, upon subsequent investigation, the HP Board found no violation of HP's sexual harassment policy. Hurd also argues that the Letter contains inaccuracies and details that are not relevant to the § 220 action and would serve only to embarrass him.[75]

Subject to a narrow exception, I find Hurd's argument unpersuasive. In recent years, there has been extensive debate about how much information concerning the private lives of CEOs and other highly compensated corporate executives the public is entitled to receive before the information is no longer valuable to the investing public.[76] The Allred Letter, however, generally falls within the scope of what properly is subject to

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74 HOB 16.

75 As discussed previously, in determining whether the Allred Letter should be unsealed, I have not accorded any material weight to Hurd's claims of inaccuracy based on Fisher's later statements in her August 5 Letter. I make no determination as to the truth of the matters asserted in the Letter, but note that the reliability of the August 5 Letter is subject to question because Fisher sent it the same day she reached a private settlement with Hurd regarding her sexual harassment claims.

76 *See generally* Patricia Sanchez Abril & Ann M. Olazbal, *The Celebrity CEO: Corporate Disclosure at the Intersection of Privacy and Securities Law*, 46 HOUS. L. REV. 1545 (2010). Indeed, the authors of a recent article related to the privacy of CEOs observed that "especially in the post-Enron era, strong arguments can be made that any information bearing on the honesty, integrity, or ability of the head of a publicly traded corporation is legitimately newsworthy." *Id*. at 1581.

disclosure. Disclosing it could not be characterized fairly as appealing to any morbid and sensational appetite to pry into a person's personal life for no legitimate purpose. Apart from a few largely irrelevant details about Hurd's family life, the Letter describes his alleged misuse of corporate funds to wine and dine Fisher, leaking of potentially material nonpublic information about HP to her, and other matters relating to Hurd's high corporate office and possible breaches of fiduciary duties to HP and its stockholders.[77]

In this regard, disclosure of the Letter would be valuable to a society concerned with corporate governance and integrity. The Letter provides insight about a corporate executive who left his post amid allegations of corporate impropriety and, despite such allegations, reportedly received what some might call a "golden bungee"[78] from the corporation.[79] These sorts of exit payments, especially those paid amid suggestions of

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[77] This case differs, therefore, from *Kinsey*, in which a jilted lover sent a number of letters filled with scandalous and salacious details about the plaintiff to his acquaintances for the admitted purpose of "tell[ing] the whole world what a bastard [the plaintiff] is." *See Kinsey v. Macur*, 165 Cal. Rptr. 608, 612 (Cal. Ct. App. 1980). In contrast to the *Kinsey* case, Allred sent the Letter to apprise Hurd of claims her client was making against him and HP for alleged misconduct in his official capacity as CEO.

[78] According to Investopedia, a "golden bungee" is a "juicy severance package that is given to a corporate executive who is leaving the company, either voluntarily or otherwise. A golden bungee can include cash, stock options and other perks to be paid to the departing executive." *See Golden Bungee*, INVESTOPEDIA, http://www.investopedia.com/terms/g/golden-bungee.asp (last visited Mar. 14. 2011). The term is a reference to a bungee cord, which protects thrill-seekers who jump from great heights. *Id.* They serve to "protect corporate executives who take figurative leaps by leaving a company." *Id.*

[79] *See* Mary Thompson, *HP CEO Hurd's Severance Pay Could Hit $40 Million: Experts*, CNBC.COM (Aug. 9, 2010),

corporate misconduct or scandal, are of particular interest to the public.[80] Moreover, as demonstrated by television shows like Undercover Boss[81] and American Greed,[82] the public has taken an interest in the inner workings of major public corporations, their executives, and the problems and scandals those executives face.[83]

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http://www.cnbc.com/id/38624369/HP_CEO_Hurd_s_Severance_Pay_Could_Hit_40_Million_Experts.

80 *See* Clair Suddath, *Biggest Golden Parachutes*, TIME.COM, http://www.time.com/time/specials/packages/completelist/0,29569,1848501,00.html (last visited Mar. 14, 2011) ("As outcry grows over executives who reap millions in severance bonuses in the face of their companies' downfalls and bail-outs, TIME takes a look at other golden parachutes — and the people who opened them.").

81 *See Under Cover Boss*, CBS, http://www.cbs.com/primetime/undercover_boss/about/ (last visited Mar. 14, 2011).

82 *See American Greed*, CNBC, http://classic.cnbc.com/id/18057119/ (last visited Mar. 14, 2011).

83 California courts have looked to see the level of interest the public has demonstrated in the subject matter of a document supposedly containing private facts. *See Four Navy Seals v. Associated Press*, 413 F. Supp. 2d 1136, 1146 (S.D. Cal. 2005) ("In this case, the social value of the published facts is readily apparent; the public has demonstrated an intense interest in, and concern about, Iraqi prisoner abuse scandals involving the American military."). In the wake of the Enron scandal at the birth of the 21st century, the public repeatedly has shown interest and presumably found value in following significant corporate governance scandals. Not surprisingly, therefore, this situation has been followed widely in the national media and the blogosphere. *See, e.g.*, Heidi Blake, *Actress Jodie Fisher cost Hewlett-Packard CEO Mark Hurd his Job*, THE TELEGRAPH, Feb. 15, 2011, http://www.telegraph.co.uk/technology/news/7934060/Actress-Jodie-Fisher-Cost-Hewlett-Packard-CEO-Mark-Hurd-his-job.html; Ben Worthen, *Hurd Wants Accuser's Letter Shielded*, WALL ST. J., Dec. 22, 2010, at B1, *available at* http://online.wsj.com/article/SB10001424052748704118504576034022336603348.html. In these circumstances, I cannot say that the public's interest in the alleged relationship between the CEO of a major corporation and a contractor for

Here, the public has heard through national media coverage and other public sources of Fisher's sexual harassment allegations, the HP Board's investigation into the matter, and its findings that Hurd did not violate HP's sexual harassment policy, but did violate its Standards of Business Conduct in connection with the circumstances described in the Letter.[84] Several of these reported facts relate to issues of interest to the investing public and those seeking to improve the integrity of corporate governance in areas such as executive compensation, use of corporate funds by executives for personal endeavors, and the avoidance of insider trading. So long as revelation of these allegations does not appeal simply to morbid or prurient curiosity, the public has a legitimate interest in having access to them. Thus, the first factor weighs in favor of finding the Letter to be newsworthy.

ii. Depth of the intrusion

Turning next to the depth of the alleged intrusion into Hurd's private affairs, Hurd argues that unsealing the Letter will be unduly intrusive because it contains inflammatory statements about his personal life, many of which are inaccurate. With the exception of certain allegations relating to Hurd's family that involve multiple levels of hearsay, I find

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that company and the CEO's relationship with his publicly traded corporation reflects only idle or morbid curiosity.

84 *See* McCormick Aff. Ex A. Hurd's argument that the public is already aware that the HP board found he did not violate HP's sexual harassment policy does not support keeping the Letter under seal. From the public's perspective, the Letter seems to have had a significant impact on the management of HP and led the company to conclude that Hurd had violated its Standards of Conduct. Therefore, the public has a legitimate interest in seeing the Letter.

that the intrusiveness of the Letter's details does not outweigh their relevance.[85] While some of the allegations in the Letter concerning Hurd's conduct vis-à-vis Fisher are candid, they are not graphic or lurid. In addition, the fact that Fisher accused Hurd of sexual harassment already has been publicized. Consequently, unsealing the Letter would not publicly reveal entirely new information about Hurd; instead, it simply would provide more details concerning a matter of established public knowledge. Hurd, understandably, wishes to keep these details away from the public's eye because, among other things, they are embarrassing. But, considering what the public already knows about Fisher's allegations and the general tenor of the Letter, I find that unsealing it would not result in an excessive intrusion into Hurd's private affairs.[86]

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[85] The only statements in the Letter I exclude from this conclusion involve what Fisher allegedly claimed Hurd said about his family and his relationship with them. These allegations relate to intimate details about Hurd's private life away from his role as CEO and are not important to the alleged misconduct described in the Letter. They do not have a logical relationship to the legitimate social interests discussed in the previous subsection and, as such, are tangential, at best, to the present action. Because disclosing the allegations relating to details of Hurd's family life would serve no social purpose, I find that he has a legitimate privacy interest sufficient to overcome the public's right of access to these portions of the Allred Letter.

[86] Hurd also disputes the applicability of a newsworthiness privilege here because for it to apply, the allegedly newsworthy information must be truthful. Because Fisher stated in her August 5 Letter that there were many inaccuracies in the Allred Letter, Hurd describes the Letter as being filled with salacious and untrue details and, therefore, of insufficient social value to outweigh the detriment caused by the personal intrusion into his affairs. HOB 17; Armstrong Aff. Ex. A. I reject this argument. To a significant extent, the social value of the Letter is not based on the truth of its contents, but rather the fact that the allegations were made in the first place. The public's legitimate interest stems from the fact that Fisher caused the Letter to be sent and that its receipt by Hurd caused HP to perform an

Therefore, subject to the narrow limitation outlined above, the second factor also favors finding the Letter to be newsworthy.

iii. Voluntary accession to fame

Finally, I find that the third factor for determining newsworthiness, voluntary accession to fame, also favors unsealing the Letter. Preliminarily, I note that the parties vigorously debate whether Hurd is a "public figure." Hurd contends that he is not comparable to a public official or movie star "who could potentially be considered someone whose 'fame' makes stories about the intimate details of his private conduct newsworthy."[87] He avers that, in fact, he has taken "great steps" to keep his personal life private. Hurd also asserts that he should not be deemed a public figure merely because he is a CEO or director of a public company and argues that, in any event, he still has First Amendment privacy rights.

This litigation, however, does not involve a claim for defamation such that Hurd's status as a private or public figure would dictate the elements he would need to prove to establish his cause of action.[88] Rather, in determining whether Hurd has a legitimate

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investigation that arguably resulted in Hurd's departure from the company. Thus, the Letter remains newsworthy even though vague doubts have been raised about the truth of unspecified assertions in it.

87 HOB 17.

88 *See McGarry v. Univ. of San Diego*, 64 Cal. Rptr. 3d 467, 480 (Cal. Ct. App. 2007) ("When the plaintiff is a public figure, he or she may not recover defamation damages merely by showing the defamatory statement was false. Instead, the plaintiff must also show the speaker made the objectionable statement with malice in its constitutional sense 'that is, with knowledge that it was false or

expectation of privacy as to the Allred Letter, his status is relevant only to the extent it sheds light on the degree to which he voluntarily acceded to fame.

In that regard, Plaintiff asserts that Hurd acceded to fame because he is a public figure who availed himself of the public light by becoming the CEO of HP, a $96.49 billion multinational corporation, and, during his tenure, made himself the public face of

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with reckless disregard of whether it was false or not.'"). California, like Delaware, recognizes two classes of public figures for purposes of defamation suits. "The first is the 'all purpose' public figure who has 'achiev[ed] such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts.' The second category is that of the 'limited purpose' or 'vortex' public figure, an individual who 'voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues.' Unlike the 'all purpose' public figure, the 'limited purpose' public figure loses certain protection for his [or her] reputation only to the extent that the allegedly defamatory communication relates to his [or her] role in a public controversy." *Id*. at 479-80 (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351 (1974)); *see also Q-Tone Broad. Co. v. Musicradio of Md., Inc.*, 1995 WL 875438, at *5-6 (Del. Super. Dec. 22, 1995). In determining whether a person is a limited purpose public figure for purposes of a defamation claim, California courts look to whether there is a public controversy, meaning an issue was debated publicly and had foreseeable and substantial ramifications for nonparticipants, whether the person undertook some voluntary act through which he sought to influence resolution of the public issue, and whether the alleged defamation is germane to the plaintiff's participation in the controversy. *See Gilbert v. Sykes*, 53 Cal. Rptr. 3d 752, 762 (Cal. Ct. App. 2007).

the company.[89] Plaintiff cites *Girod v. El Dia, Inc.*[90] and *Waldbaum v. Fairchild Pubs., Inc.*,[91] both cases from outside of California, to support this proposition.[92]

I am not persuaded, however, that these cases support Plaintiff's position. First, neither case applies California law or concerns the issue of whether someone acceded to fame in the context of a suit to enforce a claimed privacy interest, as opposed to whether a person is a public figure in the context of a defamation suit. Second, the plaintiff-libel

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89 PAB 7. In particular, Plaintiff notes that Hurd made frequent public appearances on behalf of HP and spoke at numerous public conferences. *Id*. at 7-8 (noting that in 2010, for example, Hurd spoke at Oracle Openworld, an annual open conference for customers and technologists hosted by Oracle, which featured performances from recording artists the Black Eyed Peas and Eagles founder, Don Henley.)

90 668 F. Supp. 82 (D.P.R. 1987). In *Girod*, the plaintiff, the former president of the Girod Trust Company, brought a libel suit against a newspaper publisher and reporter after they published a series of articles pertaining to investigations into and financial hardships of the company. *Id*. at 82-84. The court granted summary judgment for defendants, in part, because it found that the plaintiff was a limited public figure and, as such, he could not plead the requisite elements of actual malice on the part of the defendants. *Id*. at 85-86. In particular, the court noted that the plaintiff was a highly-visible entrepreneur who established what eventually became the third largest financial institution in Puerto Rico. *Id*. at 82.

91 627 F.2d 1287 (D.C. Cir. 1980). In *Waldbaum*, the plaintiff, the former president and CEO of Greenbelt Consumer Services, Inc., brought a libel suit against a newspaper publisher after it published an article about Greenbelt's board having ousted the plaintiff from his corporate positions and claimed that Greenbelt "has been losing money the last year and retrenching." *Id*. at 1291. As in *Girod*, the trial court granted summary judgment for the defendant, in part, because it found that the plaintiff was a limited public figure for the limited range of issues concerning Greenbelt's industry and the plaintiff's efforts to advance those issues and, as such, the plaintiff could not plead the requisite elements of actual malice on the part of the defendant. *Id*.

92 HOB 8.

claimants in each of the cited cases were found to be limited public figures based not just on their status as high corporate executives, but also on other aspects of the way they conducted themselves, which arguably are not present here. The court in *Girod* described the plaintiff as not just the head of a company, but also a political and social tycoon with an aura of grandeur in his community.[93] Similarly, the plaintiff in *Waldbaum* was not just the CEO of a consumer cooperative, but also took significant steps to inject himself as a leading advocate into matters of public concern regarding issues in the supermarket industry.[94]

Plaintiff alleges that Hurd acceded to fame because of his corporate station at HP and his efforts to publicly promote its interests. But, Plaintiff has not demonstrated that Hurd was particularly prominent in social or political spheres or that he became a leading advocate for a celebrated or controversial cause in the computer technology industry. Indeed, Plaintiff's descriptions of Hurd's supposed public activities vis-à-vis HP demonstrate that, unlike the executive in *Waldbaum*, Hurd sought to advance HP's

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93 *Girod*, 668 F. Supp. at 82-85 (explaining that the plaintiff's company became the center of attention in business circles and the plaintiff became "known as a tycoon in both business and political circles," and concluding that when an entrepreneur, like the plaintiff, "exhibits an active and public ostentation of his role within the business . . . community, as well as the social and political spheres, he becomes, under those circumstances, a public figure.").

94 *Waldbaum*, 627 F.2d at 1300 (finding that the plaintiff "became an activist, projecting his own image and that of the cooperative far beyond the dollars and cents aspects of marketing," that his advocacy activities extended beyond those of a profit maximizing manager of a single firm, and that the plaintiff was a limited public figure because he thrust himself into the public controversies concerning various supermarket industry issues).

interests in more typical fashion as a "profit maximizing manager of a single firm."[95] Because the cases relied upon by Plaintiff suggest that "being an executive within a prominent and influential company does not by itself make one a public figure,"[96] and the record does not show that Hurd engaged in additional activities similar to those described in *Girod* and *Waldbaum*, it is not clear that he would be considered even a limited public figure under California law.

The fact that Hurd might not be considered a public figure for purposes of a defamation claim, however, is not dispositive of the issues before me. Under the tort of public disclosure of private facts, information concerning a nonpublic or private person still may be newsworthy even if such person is involuntarily thrust into the public spotlight. Indeed, facts to be disclosed about a private person may be newsworthy if they bear a "logical relationship or nexus . . . [to] the events or activities that brought the person into the public eye . . . ."[97]

There is such a nexus in this case. The event that brought Hurd into the public eye, if he was not already in it, was his abrupt departure from his position as Chairman of

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95 *See id*. at 1300.

96 *See, e.g.*, *id*. at 1299 (noting that many executives who make corporate policy do not thereby take stands in public controversies); *Girod*, 668 F. Supp. at 85 ("Of course, we recognize that being an influential businessman and tycoon does not by itself make plaintiff a public figure."); *see also Rancho La Costa, Inc. v. Super. Ct.*, 165 Cal. Rptr. 347, 356 (Cal. Ct. App. 1980) ("a person in the business world advertising his wares does not necessarily become part of an existing public controversy.").

97 *See Taus v. Loftus*, 151 P.3d 1185, 1208 (Cal. 2007).

the Board and CEO of HP amid rumors of sexual harassment allegations against him by an HP contractor. The information to be disclosed is a letter that allegedly precipitated his departure and provided the impetus for the rumors. Specifically, the Letter details Hurd's allegedly inappropriate interactions with Fisher in both his professional and personal capacity. Based on Fisher's background,[98] it is not surprising that the media took such an interest in this relationship. In addition, the Letter reportedly described alleged corporate misdeeds, including Hurd's purported misuse of corporate funds and insider information, which allegedly contributed to the HP Board's finding that Hurd violated certain provisions of its code of conduct. Moreover, Hurd's abrupt and controversial departure from HP had a significant effect on HP and its stockholders. It received much (and mostly negative) national attention in the press and triggered a large benefits package for Hurd, including severance and stock options.[99] In addition, on the

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98 While I need not decide whether Fisher herself would constitute a public figure in the defamation context, her public notoriety also supports my finding of newsworthiness here. For example, Fisher reportedly has posed for *Playboy Magazine*. *See* Ashlee Vance, *Hurd is Now a President at Oracle, H.P.'s Rival*, N.Y. TIMES, Sept. 6, 2010, http://www.nytimes.com/2010/09/07/technology/07oracle.html. In addition, according to Plaintiff, Fisher's Internet Movie Database ("IMDb") profile indicates that she has been in a number of movies, including such titles as *Body of Influence 2* and *Sheer Passion*. Aff. of Alejandro E. Moreno ("Moreno Aff.") ¶ 9 & Ex. E. In a TV role, Fisher played herself as a contestant on NBC's *Age of Love*, a reality TV show in which a group of women of varying ages competed for the love of Australian tennis star Mark Phillippoussis. *Id.* ¶ 10-11 & Ex. F.

99 Compl. ¶ 21. In this regard, I also note that during his tenure with HP (2005-09), Hurd reportedly was one of the ten highest paid CEOs. *See* Thompson, *supra* note 79.

day his resignation was announced, HP's market capitalization fell $8.6 billion. The Letter and its contents, therefore, bear a sufficiently close nexus to Hurd's accession to the public spotlight, even if it was involuntary and he was not already in such light, that the third factor also weighs in favor of finding the Letter to be newsworthy.

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In summary, I find that the Allred Letter and its contents have social value, the Letter would not cause an intrusion into Hurd's private affairs disproportionate to its social value, and Hurd's accession to public notoriety by the time he left HP, if he was not already in the public's eye, bears a direct relationship with the Letter's contents and the events that reportedly gave rise to his departure. Based on these facts and a proper balancing of them, I conclude that the Letter is newsworthy and would not be protected from disclosure under the common law of California.[100]

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[100] Hurd also argues that Fisher herself, a nonparty, has a protectable right to privacy in the Letter. Under California law, however, "the right of privacy is purely personal. It cannot be asserted by anyone other than the person whose privacy has been invaded." *See, e.g.*, *Moreno v. Hanford Sentinel, Inc.*, 91 Cal. Rptr. 3d 858, 863 (Cal. Ct. App. 2009); *Hendrickson v. Cal. Newspapers, Inc.*, 121 Cal. Rptr. 429, 431 (Cal. Ct. App. 1975). In some cases, as Hurd contends, a court must take into consideration privacy interests of third parties when determining disputes between parties to litigation. Yet, the cases Hurd cited for this proposition, *Tien v. Super. Ct.*, 43 Cal. Rptr. 3d 121, 130 (Cal. Ct. App. 2006), *Perez v. Cty. of Santa Clara*, 3 Cal. Rptr. 3d 867, 874-75 (Cal. Ct. App. 2003), and *Hinshaw, Winkler, Draa, Marsh & Still*, 51 Cal. App. 4th 233, 239 (Cal. Ct. App. 1996), arose in the context of compelled discovery and are inapposite to this case. In those cases, the court took account of third party privacy interests in balancing the need for a party to discover certain confidential information in which those third parties claimed an interest. *See, e.g.*, *Tien*, 43 Cal. Rptr. 3d at 129 ("'In determining whether disclosure is required, the court must indulge in a 'careful balancing' of the right of a civil litigant to discover relevant facts, on the one hand, and the right of the

2. California's constitutional right to privacy

Hurd suggests that another ground for keeping the Letter confidential is that its disclosure would violate his right to privacy under Section 1 of Article 1 of the California Constitution.[101] That provision states that all citizens enjoy certain inalienable rights, including "pursuing and obtaining safety, happiness, and *privacy*."[102] California courts have characterized the inalienable right to privacy as a "'fundamental interest' of our society, essential to those rights guaranteed under the federal constitution."[103]

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third parties to maintain reasonable privacy regarding their sensitive personal affairs, on the other.' . . . In this case, we conclude that the privacy rights of the class members who contacted plaintiffs' counsel outweigh any interest Tenet may have in learning their identity."). Here, no one seeks to compel discovery; rather, Hurd seeks to prevent the unsealing of the Allred Letter. Fisher is not a party to this action and has not sought to intervene to preserve the alleged confidentiality of the Letter. Therefore, I need not address the scope of any privacy interest Fisher might have in the Letter.

101 HOB 12. Although Hurd referred to the California Constitution as a source for his claimed privacy interests in the Letter on more than one occasion, his briefs did not discuss the law relevant to this aspect of his claim independent of his discussion of the common law tort of public disclosure of private facts, discussed *supra*. Accordingly, I address Hurd's constitutional argument only briefly.

102 CAL. CONST. art. I, § 1 (emphasis added).

103 *See, e.g.*, *Hooser v. Super. Ct.*, 101 Cal. Rptr. 2d 341, 346 (Cal. Ct. App. 2000) ("The right of privacy is an 'inalienable right' . . . . It protects against the unwarranted, compelled disclosure of various private or sensitive information regarding one's personal life, including his or her financial affairs, political affiliations, medical history, sexual relationships, and confidential personnel information.") (internal citations omitted); *Garstang v. Super. Ct.*, 46 Cal. Rptr. 2d 84, 87 (Cal. Ct. App. 1995) (noting that "[t]he right to privacy is not absolute, but it may be abridged only when there is a compelling and opposing state interest.").

While related to the common law tort of public disclosure of private facts,[104] Article I of the California Constitution provides a separate and independent right of action for litigants.[105] To state a constitutional claim for a violation of privacy rights, a plaintiff must establish each of the following elements: "(1) a legally protected privacy interest; (2) a reasonable expectation of privacy in the circumstances; and (3) conduct by defendant constituting a serious invasion of privacy."[106] "If the plaintiff meets this preliminary test, the court then balances the justification for the conduct in question against the intrusion on privacy."[107] Ultimately, a plaintiff may not prevail on a state constitutional privacy action if he fails to demonstrate each of the three required elements

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104 *See Shulman v. Gp. W Prods., Inc.*, 955 P.2d 469, 487 (Cal. 1998) ("Thus, these two sources of protection for _ privacy - the common law and the state Constitution - are not unrelated.") (punctuation in original); *Hill v. Nat'l Collegiate Athletic Ass'n*, 7 Cal. 4th 1, 27 (Cal. 1994) (noting that the Constitutional right of action is not circumscribed by the common law tort).

105 *See Four Navy Seals v. Associated Press*, 413 F. Supp. 2d 1136, 1142-43 (S.D. Cal. 2005)

106 *See, e.g., Sheehan v. San Fran. 49ers, Ltd.*, 201 P.3d 472, 477 (Cal. 2009); *Hill*, 7 Cal. 4th at 39-40; *Four Navy Seals*, 413 F. Supp. 2d at 1143. In particular, California law generally recognizes two classes of privacy interests: "(1) interests in precluding the dissemination or misuse of sensitive and confidential information ('informational privacy'); and (2) interests in making intimate personal decisions or conducting personal activities without observation, intrusion, or interference ('autonomy privacy')." *Hill*, 7 Cal. 4th at 35. Moreover, "actionable invasions of privacy must be sufficiently serious in their nature, scope, and actual or potential impact to constitute an egregious breach of the social norms underlying the privacy right." *Id.* at 37 ("the extent and gravity of the invasion is an indispensable consideration in assessing an alleged invasion of privacy.").

107 *Four Navy Seals*, 413 F. Supp. 2d at 1143.

or if the defendant demonstrates, as an affirmative defense, that the invasion of privacy at issue is justified because it substantively furthers one or more countervailing interests.[108]

As with the common law, I infer from the California Constitution that Californians enjoy certain privacy rights with regard to select kinds of sensitive or confidential information in which they have a reasonable expectation of privacy. Nevertheless, to the extent Hurd fairly raised the Constitution as a basis for good cause, I find his argument to be without merit. Hurd arguably has demonstrated that he has a "legally protected privacy interest," of the informational privacy sort, relating to certain sensitive information in the Letter pertaining to his family and his relationship with them. In this narrow regard, I find that he has a reasonable expectation of privacy in keeping these hearsay statements out of the public eye, especially because they have no logical relationship to the allegations underpinning Plaintiff's § 220 action. In all other respects, for the reasons set forth *supra* Part II.B.1 and based on all the surrounding circumstances, I find that Hurd did not have a reasonable expectation of keeping the Letter confidential and disclosure of its contents would not seriously intrude upon his private affairs. Additionally, disclosure of the information is justified because it substantively furthers a countervailing interest and, as discussed *supra*, any expectation of privacy is outweighed

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[108] *Id*. at 38-40 ("Legitimate interests derive from the legally authorized and socially beneficial activities of government and private entities. Their relative importance is determined by their proximity to the central functions of a particular public or private enterprise. Conduct alleged to be an invasion of privacy is to be evaluated based on the extent to which it furthers legitimate and important competing interests.").

by the public's competing interest in having access to nonconfidential information filed in litigation before this Court.

Therefore, I come to the same conclusion as to Hurd's constitutional claim as I did regarding his claim under California common law. Specifically, I find that Section 1 of Article I of the California Constitution does not provide a sound basis for finding good cause to keep the Letter under seal, except for the limited statements regarding his familial relationships.

3. The mediation privilege

Hurd next argues that good cause exists to keep the Letter under seal because it is subject to California's mediation privilege. He contends that the purpose of the Letter was to bring about a settlement without litigation and Fisher contemplated mediation as one possible vehicle for achieving this objective. Plaintiff disagrees and asserts that the Letter is not subject to the mediation privilege because, at the time Allred sent the Letter, the parties were not engaged in mediation and the Letter does not contain any invitation to begin such a process. Moreover, Plaintiff contends that since the parties had neither agreed nor been ordered to mediate, the Letter could not have been prepared for the "purpose of, in the course of, or pursuant to mediation."[109]

California strongly favors mediation as an alternative to litigation.[110] Confidentiality is considered essential to effective mediation because it encourages the

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[109] PAB 17.

[110] *Doe 1 v. Super. Ct.*, 34 Cal. Rptr. 3d 248, 251 (Cal. Ct. App. 2005).

parties to engage in candid discussions without fear that adverse information presented will be used against them in later litigation if mediation fails.[111] To foster such candor in mediation, California law "unqualifiedly bars disclosure of specified communications, and writings associated with a mediation absent an express statutory expression."[112] In particular, CALIFORNIA EVIDENCE CODE § 1119(b) provides that:

> No writing, as defined in Section 250, that is prepared for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation, is admissible or subject to discovery, and disclosure of the writing shall not be compelled, in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given.[113]

This provision also protects the confidentiality of all communications by and between participants in the course of a mediation or a mediation consultation.[114]

Here, Allred and Fisher have made clear that, if the Letter is subject to the above-discussed mediation privilege, they do not agree to disclose it. Thus, if the Letter is subject to the privilege, Hurd may be able to demonstrate good cause to keep it under seal

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111 *Id*. at 251-52.

112 *Id.*; *Rojas v. Super. Ct.*, 93 P.3d 260, 265 (Cal. 2004).

113 CAL. EVID. CODE § 1119(b). CALIFORNIA EVIDENCE CODE § 250 defines "writing" in very broad terms. A "mediation" is defined as "a process in which a neutral person or persons facilitate communication between the disputants to assist them in reaching a mutually acceptable agreement." *Id.* § 1115(a). Finally, a "mediation consultation" is defined as a "communication between a person and a mediator for the purpose of initiating, considering, or reconvening a mediation or retaining the mediator." *Id*. § 1115(c).

114 *Id*. § 1119(c).

in this action. Therefore, I must determine whether Hurd has shown that the Letter was "prepared for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation."

Hurd argues that the Allred Letter was prepared in contemplation of mediation and that its purpose was to initiate such a proceeding.[115] He notes that the final paragraph invited him to contact Allred's firm if he was "interested in resolving" Fisher's claims through an "out-of-court settlement."[116] Hurd also emphasizes that Allred made clear in her August 26 Letter that the Allred Letter "was prepared for the purpose of attempting to arrange a private mediation."[117] He argues that the parties' action on July 7, 2010, only five business days after Hurd received the Letter, of scheduling a private mediation to occur on August 6, corroborates Allred's stated purpose.[118] The parties then submitted mediation briefs and the Letter itself to the mediator. The mediation, however, never took place because Hurd and Fisher reached a private settlement the day before it was to occur.

Having considered Hurd's arguments carefully, I find that he has failed to prove that the Allred Letter was "prepared for the purpose of, in the course of, or pursuant to a

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115 Tr. 19-22.

116 Allred Letter 8.

117 Armstrong Aff. Ex. B. Hurd touts the August 26 Letter as reliable evidence of the sender's intent because it was written "long before [Hurd's briefs were] written or this dispute had even come up." Tr. 25.

118 D.I. 69 at 2 & Ex. A; Tr. 19-20.

mediation or mediation consultation" within the meaning of § 1119(b). First, while the Letter invites Hurd to enter settlement negotiations with Fisher, it contains no reference to mediation, a mediator, or § 1119(b).[119] Second, I accord little, if any, weight to Allred's statement in her August 26 Letter that she intended the Letter to serve as an invitation to mediation. That evidence consists of post hoc statements made after her client obtained a private settlement and is insufficient to show that the Letter was intended as an invitation to mediation *at the time Allred sent it*. In that regard, I question the reliability of the self-serving August 26 Letter. It clearly was intended to shield the Allred Letter from disclosure by bringing it within the mediation privilege. By August 26, 2010, however, Fisher and Hurd had settled their dispute and probably both wished to minimize the possibility that the Letter would become public. Similarly, the brief time—five business days—between Hurd's receipt of the Allred Letter and the parties' act of scheduling the mediation proves nothing about whether the Letter itself was "prepared for the purpose of" mediation. As I observed at the Hearing,[120] it is always possible that a claim announced in an opening salvo like the Letter will end up in mediation. Whether it does so in a few days or months or years depends on a host of factors including, importantly, the reaction of the opposing party.

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[119] Significantly, the Letter does refer to §§ 1152 and 1154, discussed *infra*, upon which Hurd also relies in this action.

[120] Tr. 55-56.

Along these lines, I specifically asked counsel at the Hearing whether Hurd can rely on § 1119(b) to keep the Letter, which represents Fisher's initial communication regarding her claims against both Hurd and HP, under seal as a confidential document prepared for the purpose of a mediation when the opposing parties had not yet even discussed the possibility of mediation.[121] At the Hearing, Hurd cited *Cassel v. Superior Court*, a case decided after the close of briefing in this case,[122] for the proposition that the mediation privilege extends to "a wide variety of documents prepared in contemplation of the mediation [or] leading to the mediation[] . . . ."[123] Plaintiff countered that California case law dictates that § 1119(b)'s protections attach only after an agreement to mediate is reached or an order is issued regarding mediation. Neither party, however, identified a California case directly addressing this situation (*i.e.*, a party seeking to invoke the mediation privilege to protect its opening letter notifying the opposing party of claims against him, which makes no mention of a desire to mediate or § 1119(b) and precedes any discussions of mediation with the opposing party). I, therefore, invited the parties to submit supplemental briefing on this issue.[124]

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121 *See id*. at 21-22, 24. Hurd presented no probative evidence or argument suggesting that the Letter was "prepared for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation" within the meaning of § 1119(b).

122 *Cassel v. Super. Ct.*, 244 P.3d 1080 (Cal. 2011); *see also* D.I. 64.

123 Tr. 21 ("that's the law that applies to the negotiation then mediation between Mr. Hurd and Ms. Fisher . . . .").

124 *Id*. at 55, 21-26.

Hurd's supplemental brief stated that although his "research has not revealed a case with [a holding directly on point] . . . recent decisions by the California Supreme Court indicate that Section 1119 protects from disclosure . . . the Allred Letter."[125] The referenced decisions are the above-mentioned *Cassel* case and *Rojas v. Superior Court.*[126] But, neither decision supports Hurd's position.

The facts in *Rojas* are easily distinguished. There, an owner of an apartment building brought suit against contractors and subcontractors regarding certain alleged construction defects that resulted in toxic molds on the property.[127] The court, with the parties' consent, issued a comprehensive case management order ("CMO"), which provided that a broad category of evidence related to the parties' efforts to mediate the dispute would remain confidential. The dispute settled as a result of mediation, but soon thereafter tenants of the building complex sued the same defendants, alleging health problems caused by the toxic molds. The tenants sought discovery of a number of items related to the mediation, including certain photographs and witness statements. In response to the defendants' argument that they were protected by § 1119, the trial court ruled that whether a particular document prepared in the mediation was discoverable in the subsequent action depended in part on "whether it was prepared before or after the

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125 D.I. 69, Hurd's letter to the Court dated Jan. 25, 2011 ("Hurd Supp."), at 1. Similarly, I refer to D.I. 71 and 72, the letters of HP and Plaintiff responding to Hurd's supplemental letter, as "HP Supp." and "Pl. Supp.," respectively.

126 93 P.3d 260 (Cal. 2004); *see also* Hurd Supp. 1-2.

127 *See Rojas*, 93 P.3d at 262-63.

CMO was signed and the mediation process began."[128] The court then held the evidence protectable, but the Court of Appeal reversed, holding that § 1119 did not protect the *type* of evidence the tenants sought (*i.e.*, photographs and witness statements). The California Supreme Court reversed again, finding that the Court of Appeal "erred in holding that photographs, videotapes, witness statements, and 'raw test data' from physical samples collected at the complex-such as reports describing the existence or amount of mold spores in a sample-that were 'prepared for the purpose of, in the course of, or pursuant to, [the] mediation' in the underlying action are not protected under section 1119."[129] As this holding indicates, the California Supreme Court did not address or otherwise provide further guidance on the standard for determining whether a piece of evidence was prepared for the purpose of mediation. The Court focused instead on the kinds of evidence protected by § 1119 and the scope of the exceptions to that protection. Moreover, neither the Court of Appeal nor the Supreme Court disturbed the trial court's ruling that whether a piece of evidence was protected depended on whether it was created before or after the entry of the CMO. Here, there was no CMO, agreement between the parties, or even any negotiation between them, concerning a prospective mediation at the time Allred sent the Letter. Thus, *Rojas* is unhelpful in evaluating whether the Letter was prepared for the purpose of mediation within the meaning of § 1119.

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[128] *Id*. at 263-64 ("Documents prepared before that date were discoverable if they were 'subject to the discovery process prior to entry of the CMO' and 'were not prepared for mediation purposes.'").

[129] *Id*. at 270.

Hurd argues that the decision in *Rojas* "confirmed that under the plain language of the mediation confidentiality statements, all 'writings' 'prepared for the purpose of, in the course of, or pursuant to, a mediation,' are confidential and protected from discovery."[130] No one disputes this. Rather, the controversy here revolves around *when* something properly is deemed to have been prepared for the purpose of mediation. What is helpful in *Rojas*, but not cited by Hurd, is the California Supreme Court's analysis of § 1120(a), which provides that "[e]vidence otherwise admissible or subject to discovery outside of a mediation or a mediation consultation shall not be or become inadmissible or protected from disclosure solely by reason of its introduction or use in a mediation or a mediation consultation."[131] The court explained that

> [r]ead together, sections 1119 and 1120 establish that a writing . . . is not protected "solely by reason of its introduction or use in a mediation" (§ 1120, subd. (a)), but is protected only if it was "prepared for the purpose of, in the course of, or pursuant to, a mediation." (§ 1119, subd. (b).) In other words, under section 1120, a party cannot secure protection for a writing . . . that was not 'prepared for the purpose of, in the course of, or pursuant to, a mediation' (§ 1119, subd. (b)) simply by using or introducing it in a mediation or even including it as part of a writing . . . that was "prepared for the purpose of, in the course of, or pursuant to, a mediation."[132]

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130 Hurd Supp. 1-2 (citing *Rojas*, 93 P.3d at 265-66).

131 CAL. EVID. CODE § 1120(a).

132 *Rojas*, 93 P.3d at 266.

In other words, § 1120 limits the scope of § 1119 so as to prevent parties from using mediation as a pretext to shield materials from disclosure.[133] Thus, for example, the fact that the Letter was turned over to the mediator, as Hurd emphasizes, is immaterial.

The *Cassel* decision, which involved, among other things, the intersection of the mediation and attorney-client privileges, is equally unavailing for Hurd. In that case, a plaintiff, after settling through mediation business litigation to which he was a party, sued his attorneys for malpractice and other misconduct arising out of his claim that the attorneys in bad faith induced him to settle for less than the case was worth.[134] The defendant-attorneys moved under the mediation confidentiality provisions to exclude all evidence of private attorney-client discussions immediately preceding and during the mediation concerning mediation strategies and their efforts to persuade the plaintiff to settle. As in *Rojas*, the court examined whether certain communications were covered by § 1119 in the context of an actual, scheduled mediation, which each side previously had agreed to pursue.

Reversing the Court of Appeal, the California Supreme Court held that "attorney-client communications, like any other communications, were confidential, and therefore were neither discoverable nor admissible—even for purposes of proving a claim of legal malpractice—insofar as they were "for the purpose of, in the course of, or pursuant to, a

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133 *Id*. at 266, 270 n.8.

134 *Cassel v. Super. Ct.*, 244 P.3d 1080, 1083-84 (Cal. 2011).

mediation . . . ."[135] In doing so, the court discussed the broad scope of § 1119, finding that a principal purpose of that provision "is to assure *prospective participants* that their interests will not be damaged, first, by attempting this alternative means of resolution, and then, once mediation is chosen, by making and communicating the candid disclosures and assessments that are most likely to produce a fair and reasonable mediation settlement."[136] Hurd mistakenly seizes on the phrase "prospective participants" as supporting his assertion that § 1119 covers the Letter because Fisher and Allred were prospective mediation participants.[137]

A careful reading of *Cassel*, however, belies this assertion. The court sought to determine whether communications between a mediation participant and his lawyers in connection with a mutually-consented-to mediation between the parties to litigation were protected by § 1119 in the same way that communications between the mediation parties themselves would have been.[138] Thus, one reasonable interpretation of "prospective

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135 *Id*. at 1096.

136 *Id*. at 1094 (emphasis added).

137 Hurd Supp. 1.

138 In answering in the affirmative, the court explained that the purpose of § 1119 "is to ensure that the statutory protection extends beyond discussions carried out directly between the opposing parties to the dispute, or with the mediator, during the mediation proceedings. Instead, all oral or written communications are covered, if they are made 'for the purpose of' or 'pursuant to' a mediation. (§ 1119, subds.(a), (b).) It follows that, absent an express statutory exception, all discussions conducted in preparation for a mediation, as well as all mediation-related communications that take place during the mediation itself, are protected from disclosure. Plainly, such communications include those between a mediation

participants" is that it refers to parties who might be considering using mediation and who, therefore, would view the existence of the mediation privilege as a benefit. In that sense, the reference does not involve the scope of the mediation privilege at all. Another possible reading is that the statement pertains to protecting a prospective participant's communications to his own attorneys in preparation for a scheduled mediation. Neither of those interpretations, however, suggests that the mediation privilege would apply to a notice of claim that one party unilaterally sends to another before any discussions about mediation have even occurred. Most importantly, the court did not address when a communication between prospective parties may be deemed "prepared for the purpose of" mediation. Indeed, the court stated that "[it] need not decide in this case the precise parameters of the phrase 'for the purpose of, in the course of, or pursuant to, a mediation'" because "[t]here appears no basis to dispute that [the communications at issue] were [made] 'for the purpose of, in the course of, or pursuant to, a mediation . . .'"[139] Therefore, *Cassel* provides no support for Hurd's position regarding the Allred Letter.

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disputant and his or her own counsel, even if these do not occur in the presence of the mediator or other disputants." *See Cassel*, 244 P.3d at 1091.

139 *Id*. at 1097 (noting that "[t]he communications the trial court excluded from discovery and evidence concerned the settlement strategy to be pursued at an immediately pending mediation. They were closely related to the mediation in time, context, and subject matter, and a number of them occurred during, and in direct pursuit of, the mediation proceeding itself. Petitioner raises no factual dispute about the relationship between the excluded communications, or any of them, and the mediation in which he was involved.").

Having considered the record before me and California law, I am not convinced that the Letter was "prepared for the purpose of" mediation of Fisher's claims against Hurd. The evidence of record is insufficient to support that conclusion. Indeed, the Letter itself is devoid of any indication of such a purpose. Instead, it invites Hurd to engage in settlement negotiations and expressly notes that, as a result, it is inadmissible under CALIFORNIA EVIDENCE CODE §§ 1152 and 1154. Conspicuously, the Letter does not contain a similar reference to § 1119. In these circumstances, Allred's post hoc attempt in her August 26 Letter to recast the Letter as an invitation to mediate deserves little weight and, in any event, is insufficient to prove that it qualifies for the mediation privilege. Therefore, § 1119 does not provide Hurd with a basis for good cause to keep the Letter under seal in this action.

4. The settlement privilege

Hurd's next alleged ground for good cause is that the Letter constitutes a confidential settlement offer under CALIFORNIA EVIDENCE CODE §§ 1152 and 1154 and, as such, is not admissible or discoverable. Plaintiff responds that the settlement privilege is inapposite because it applies only to the admissibility of evidence at trial and whether information is discoverable in the course of a related litigation.

CALIFORNIA EVIDENCE CODE § 1152(a) provides that:

> Evidence that a person has, in compromise or from humanitarian motives, furnished or offered or promised to furnish money or any other thing, act, or service to another who has sustained or will sustain or claims that he or she has sustained or will sustain loss or damage, as well as any conduct or statements made in negotiation thereof, is

> inadmissible *to prove his or her liability for the loss or damage or any part of it*.[140]

In addition, § 1154 states that:

> Evidence that a person has accepted or offered or promised to accept a sum of money or any other thing, act, or service in satisfaction of a claim, as well as any conduct or statements made in negotiation thereof, is inadmissible to prove the invalidity of the claim or any part of it.[141]

Both provisions stem from the public policy of encouraging the settlement of disputes without litigation and are intended to promote candor in settlement negotiations.[142]

The second paragraph of the Letter explicitly states that it "is subject to California Evidence Code Sec. 1152 and therefore is not admissible for any reason."[143] But, the mere incantation of § 1152 does not end the inquiry. Sections 1152 and 1154 are rules of evidence designed to govern the admissibility of certain communications at trial. Evidence that a person has offered to compromise on a claim is inadmissible, but only to the extent it is offered to prove the offeror's liability as to that particular claim.[144] Similarly, evidence that a person accepted an offer to compromise a claim is

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140 CAL. EVID. CODE § 1152(a) (emphasis added).

141 *Id*. § 1154.

142 *See id*. at cmt. to § 1152; *Zhou v. Unisource Worldwide, Inc.*, 69 Cal. Rptr. 3d 273, 276 (Cal. Ct. App. 2007) ("The rule prevents parties from being deterred from making offers of settlement and facilitates the type of candid discussion that may lead to settlement.") (internal citations omitted).

143 Allred Letter 1.

144 *See Fieldson Assocs., Inc. v. Whitecliff Labs., Inc.*, 81 Cal. Rptr. 332, 334 (Cal. Ct. App. 1969).

inadmissible, but only to the extent it is offered to prove the invalidity of that claim or any part of it.[145]

In this case, the Letter described, among other things, the basis for Fisher's claims against Hurd and provided him with an opportunity to "attempt an out-of-court settlement before the protracted nature and emotions of litigation set."[146] Furthermore, it is undisputed that Hurd and Fisher, in fact, later reached a private settlement regarding those claims. This action, however, does not pertain to the merits of Fisher's claims against Hurd; rather, it relates to Plaintiff's attempt to inspect certain of HP's books and records pursuant to 8 *Del. C.* § 220. Thus, as Plaintiff asserts, the fact that the Letter might be inadmissible at a trial of Fisher's claims against Hurd has no bearing on whether the Letter might be admissible for some other purpose in this litigation or, more to the point, whether it must be kept confidential.

Nevertheless, Hurd contends that the public policy underlying §§ 1152 and 1154 can be undermined as much by discovery of documents concerning settlement negotiations as by their admissibility at trial. California courts have held that, while "admissibility is not a prerequisite to discoverability, a heightened standard of discovery may be justified when dealing with information which, though not privileged, is sensitive

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145 *See Zhou*, 69 Cal. Rptr. 3d at 278-79; *Fieldson Assocs., Inc.*, 81 Cal. Rptr. at 334; *Volkswagen of Am., Inc. v. Super. Ct.*, 43 Cal. Rptr. 3d 723, 728 (Cal. Ct. App. 2006) ("Evidence Code sections 1152 and 1154 are not absolute bars to admissibility, since a settlement document may be admissible for a purpose other than proving liability.").

146 Allred Letter 8.

or confidential."[147] A party seeking to compel production of evidence concerning a confidential settlement negotiation must "do more than show the possibility it may lead to relevant information. Instead they must show a compelling and opposing state interest."[148] In these situations, California courts balance the need for discovery against the need for privacy protection.[149] Moreover, many of the cases that have used a heightened standard concern primarily protecting "particularly sensitive matters, such as sexual or psychiatric histories, or the privacy interests of third parties."[150]

I do not agree, however, that §§ 1152 and 1154 provide Hurd with a protectable privacy interest in the Letter. First, the heightened standard discussed above applies in the context of discovery disputes. Here, the Letter already has been produced. The problem for Hurd is that he has not explained why §§ 1152 and 1154 provide good cause to require that it be kept under seal.[151]

In addition, Hurd's reliance on *Hinshaw, Winkler, Draa, Marsh & Still* is misplaced. There, the defendant law firm had represented the plaintiffs in a previous suit

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147 *See Volkswagen of Am., Inc.*, 43 Cal. Rptr. 3d at 729.

148 *Hinshaw, Winkler, Draa, Marsh & Still v. Super. Ct.*, 51 Cal. App. 4th 233, 239 (Cal. Ct. App. 1996).

149 *Id*. at 236.

150 *Volkswagen of Am., Inc.*, 43 Cal. Rptr. 3d at 729.

151 *Cf. id*. at 728-29 (There is no reason to provide heightened protection for information concerning Rusk's . . . medical condition which is directly at issue and undoubtedly substantially disclosed in materials that have already been produced during the course of discovery.").

against a third party until the plaintiffs dismissed their claims.[152] When the plaintiffs later were barred from joining a second law suit against the same third party based on the earlier dismissal of their claims, they sued the law firm. The plaintiffs then sought to compel discovery of certain information about the settlements achieved in each suit, including the amount of the settlement and how it was divided up among the plaintiffs. The court in *Hinshaw* held that the plaintiffs had not made a sufficient showing of compelling need to discover the settlement agreement in view of "the public policy favoring settlements, the parties' expressed desire for confidentiality, and the speculative nature of measuring plaintiffs' damages by these settlements."[153] But, no one seeks to discover or disclose information concerning the terms of Hurd's settlement with Fisher. In addition, Hurd has not articulated a cogent reason why §§ 1152 and 1154 should prevent public disclosure of the Letter, especially when Plaintiff does not seek to use it to prove Hurd's liability as to Fisher and, as discussed *supra* Part II.B.1.c, the public has a legitimate interest in its disclosure. Therefore, I find that neither § 1152 nor § 1154 provide a basis for maintaining the Allred Letter under seal.

5. Employment records

Next, Hurd asserts that the Letter qualifies for protection as a confidential employment record under CALIFORNIA CIVIL PROCEDURE CODE § 1985.6 and LABOR

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152 *Hinshaw, Winkler, Draa, Marsh & Still*, 51 Cal. App. 4th at 235-36.

153 *Id*. at 242.

CODE § 1198.5. Specifically, he argues that disclosure of the Letter would impair Fisher's expectation of confidentiality when she caused the Letter to be sent to him.

Section 1198.5's stated purpose is "to establish minimum standards for the inspection of personnel records by employees."[154] Section 1198.5(a) provides that "[e]very employee has the right to inspect the personnel records that the employer maintains relating to the employee's performance or to any grievance concerning the employee."[155] An employee's right to inspect his personnel records does not include the right to inspect certain specific classes of documents, including records relating to the investigation of a possible criminal offense and letters of reference.[156] Section 1985.6 outlines procedures related to the handling of subpoenas for employment records.[157]

Citing *Board of Trustees v. Superior Court*,[158] Hurd contends that under § 1198.5 a "zone of privacy" encompasses an employee's confidential personnel files, which supports a finding of good cause to keep the Letter under seal.[159]

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154 CAL. LAB. CODE § 1198.5(g).

155 *Id*. § 1198.5(a).

156 *See id*. § 1198.5(d)(1) & (2).

157 *See* CAL. CIV. PROC. CODE § 1985.6. Section 1985.6(a)(3) defines "employment records" as "the original or any copy of books, documents, other writings, or electronic data pertaining to the employment of any employee maintained by the current or former employer of the employee, or by any labor organization that has represented or currently represents the employee."

158 174 Cal. Rptr. 160 (Cal. Ct. App. 1981)

159 HOB 21.

In *Board of Trustees*, the plaintiff, a faculty member of Stanford's school of medicine, brought a suit for libel and other defamatory conduct against the Board of Trustees of the university and several other individuals, including Dr. Zoltan J. Lucas. The case arose out of a long-running dispute between the plaintiff and Lucas regarding competing accusations of research misconduct, including accusations by Lucas against the plaintiff for "serious violations of scientific ethics," reflected in letters from the two doctors submitted to the university.[160] In prosecuting his defamation suit, the plaintiff sought, among other things, copies of his "personnel, tenure, and promotion files." The university, however, refused to produce them based on its confidentiality policy pertaining to peer evaluations.

The trial court ordered production of those documents, except for "letters of reference" written while he was being considered for employment at the university. In setting aside that decision, the Court of Appeal noted that even when discovery of private information is directly relevant to issues of ongoing litigation, discovery of it may be precluded if a court finds that, on balance, the fundamental right of privacy outweighs a

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[160] *See Bd. of Trs.*, 174 Cal. Rptr. at 162-64. The plaintiff alleged that the other defendants "(1) had *republished* Dr. Lucas' countercomplaints to 'numerous academic and administrative personnel in the Stanford scientific community' and to the Department of Health, Education and Welfare, and (2) had 'willfully concealed from plaintiff [Dr. Dong] the true evaluations of at least one committee of academic peers appointed to evaluate charges of scientific misconduct against the defendant Lucas, and during the period of such concealment, misrepresented the true nature of said evaluations, plaintiff's role in said evaluations, and plaintiff's attitude concerning the preservation of the integrity of the Stanford academic community, to the courts, the public, and officials of the United States government . . . .'" *Id*. at 163.

compelling public need for the discovery.[161] The court explained that the action concerned "conflicting rights of privacy, i.e., [the plaintiff's] right of access to private information about himself, vis-á-vis that of those whose confidential communications are in [his] personnel, tenure, and promotion files."[162]

In deciding the issue, the Court of Appeal in *Board of Trustees* examined an older version of § 1198.5 which stated: "Every employer shall . . . upon the request of an employee, permit that employee to inspect such personnel files which are used or have been used to determine that employee's qualifications for employment, promotion, additional compensation, or termination or other disciplinary action . . . . This section . . . shall not apply to letters of reference."[163] The court interpreted the term "letters of reference" to mean "communications concerning the 'qualifications of a person seeking employment . . . given by someone familiar with them" as well as "answers in writing from persons 'to whom inquiries as to character or ability can be made,'" regardless of whether or not they were submitted to the university after the plaintiff began his employment.[164]

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161 *See id*. at 164, 167.

162 *Id*. at 166 (finding that the documents in the plaintiff's personnel file, whether pertaining to his initial employment or conduct after being hired, were communicated to the university in confidence and, thus, were covered by the communicators' right of privacy) (original emphasis omitted).

163 *Bd. of Trs.*, 174 Cal. Rptr. 160, 167 (Cal. Ct. App. 1981).

164 *Id*.

The court found that even if the items the plaintiff sought were letters of reference, there was no compelling state purpose in maintaining their confidentiality and the "privacy rights of our instant concern" would be respected by redacting the names and other identifying information of the confidential communications' authors.[165] As such, the plaintiff was entitled to discovery of his personnel file, subject to the redaction of the identifying information of those who furnished information to the university about him.[166]

The decision in *Board of Trustees* does not support Hurd's position. First, it presents a different factual scenario. Unlike the plaintiff in *Board of Trustees*, Hurd and the parties to this § 220 action already have a copy of the Letter. Rather than seeking to overcome competing third party privacy interests to obtain the Letter, he seeks to use § 1198.5 as a shield to prevent its public disclosure. In addition, the manifest purpose of § 1198.5 is at odds with Hurd's argument that it provides him, or Fisher, with a privacy right sufficient to prevent the unsealing of the Allred Letter. As previously noted, the section establishes minimum standards for the inspection of personnel records by

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165 *Id*. at 168 (noting that courts should impose partial limitations rather than outright denial of discovery when doing so would preserve otherwise affected constitutional rights).

166 *Id*. at 169. Although Hurd contends that "the court disallowed discovery of third party communications to the university concerning a faculty member," HOB 21, the plaintiff was entitled to discover these third party communications, subject to certain restrictions. *Bd. of Trs.*, 174 Cal. Rptr. at 169.

employees, such as Hurd. It does not create independent privacy interests in those records to enable an employee to keep them confidential in litigation.

Furthermore, the court in *Board of Trustees* found that the "manifest purpose" of the "letter of reference" exception to an employee's right to inspect his records was "to insure privacy of *all* furnishers of confidential information used to determine an employee's qualifications for employment, promotion, additional compensation, or termination, or other disciplinary action."[167] In this regard, Hurd contends that unsealing the Letter would impair the confidentiality that Fisher expected when she caused the Letter to be sent to HP.

This argument is without merit. The fact that the Letter was sent on Fisher's behalf and its pejorative nature have long been known independently of this action. At its core, § 1198.5 is a labor statute intended to govern an employee's access to his own employment file. This case does not involve that issue. Moreover, Hurd has not adduced any evidence or argument that supports the proposition that once an employee has access to disputed materials from his personnel file, he then can use the statute as a shield to avoid public disclosure of those materials. Therefore, §1198.5 has no bearing on whether Hurd now has good cause to prevent this Court from unsealing the Allred Letter.[168]

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[167] *Id*. at 166.

[168] Similarly, § 1985.6 is also inapposite.

6. CALIFORNIA CIVIL CODE § 985

Finally, Hurd argues that CALIFORNIA CIVIL CODE § 985 provides a basis for good cause to keep the Letter under seal. In particular, he asserts that, under the statute, he is the legal owner of the Letter and neither he nor anyone else may publish it against the wishes of the author, Allred. Because Hurd and Allred have made clear they wish to keep the Letter confidential and avoid its publication, Hurd contends that § 985 provides good cause for this Court to keep the Letter under seal. Plaintiff disagrees, claiming that § 985 is inapplicable to this case because it governs the rights and liabilities pertaining to any "common law copyright" in the Letter and does not concern confidentiality or the filing of documents under seal.

Section 985 states: "Letters and other private communications in writing belong to the person to whom they are addressed and delivered; but they cannot be published against the will of the writer, except by authority of law."[169] It is part of a group of statutory provisions that codify California's version of common law copyright law.[170] Common law copyright generally pertains to an author or creator's right to first publication of their work; once the work is published, the owner's common-law protection is gone and anyone may copy the work.[171]

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169 CAL. CIV. CODE § 985.

170 *See Smith v. Paul*, 345 P.2d 546, 554 (Cal. Ct. App. 1959); *Golding v. R.K.O. Pictures*, 221 P.2d 95, 97 (Cal. 1950) (citing CAL. CIV. CODE § 980).

171 *See Smith*, 345 P.2d at 554.

Having considered the parties' arguments, I hold that § 985 does not provide good cause to keep the Letter under seal. Hurd made his § 985 argument in less than a page in his opening brief and did not attempt seriously to advance it in either his reply brief or at the Hearing. He also cited only one case for the proposition that unsealing the Letter would constitute an unwarranted publication under § 985, without making any showing that § 985 would apply to this action in the first place. For these reasons, Hurd arguably waived this argument by not fairly presenting it to the Court.[172]

Even assuming Hurd did not waive his argument under § 985, however, I find that statute is inapplicable here. The lone case cited by Hurd, *Carpenter Foundation v. Oakes*, demonstrates that § 985 is an intellectual property statute aimed at protecting the right of an owner of an unpublished intellectual production to first publish or copy his work.[173] Beyond that, the *Carpenter* case provides no guidance as to whether a court

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[172] *See Simon v. Navellier Series Fund*, 2000 WL 1597890, at *9 n.38 (Del. Ch. Oct. 19, 2000) (noting that a party waived his argument because he did not fairly present it to the court in his briefs).

[173] 103 Cal. Rptr. 368, 375 (Cal. Ct. App. 1972). In *Carpenter*, the Court of Appeal affirmed the trial court's decision to enjoin the defendant from publishing or distributing copies of two of his literary works, which contained "large extracts from" materials he received from the plaintiff. The plaintiff was a Rhode Island nonprofit corporation that collected and preserved items by and about Mary Baker Eddy, the discoverer and founder of Christian Science, and made them accessible to "qualified students throughout the world." *Id*. at 370. The defendant was one such qualified student who obtained copies of several items related to Eddy, subject to a number of "conditions accompanying [their] delivery." *Id*. at 371. One condition was that the works "would be given only a limited, private and restricted circulation to those students of Christian Science defined as 'qualified.'" *Id*. Subsequently, without the knowledge or consent of the plaintiff, the defendant wrote two works containing significant extracts from the Eddy works that were

may unseal a letter properly on file with the court when such letter's author and recipient object. This is not a copyright suit and Hurd has not articulated any persuasive basis as to why a common law copyright statute that determines ownership and publication rights to a private communication would preclude a court from unsealing an exhibit to a pleading in litigation unrelated to those rights. Furthermore, Hurd has failed to demonstrate that the Letter is the kind of "private communication" that might qualify for protection under § 985. Thus, Hurd has not shown that § 985 provides good cause to keep the Letter under seal.

7. Waiver

Plaintiff contends that, even if Hurd has articulated an applicable privilege or right to privacy, he has waived it because he has not acted in a manner consistent with an intent to keep the Letter confidential. Having concluded that, subject to the narrow exception outlined *supra* Part II.B.1.c, Hurd has not articulated such a privilege or right, I do not reach Plaintiff's waiver argument.

C. Interests favoring public disclosure

As discussed *supra* Part II.A, a party seeking to maintain a document under seal pursuant to Rule 5(g)(2) must demonstrate good cause for doing so. Having considered

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published without regard to those restrictions. *Id*. at 371-72. The Court of Appeal ultimately did not address whether any infringement of a common law copyright occurred and grounded its holding, instead, in contract law, affirming the lower court's injunction because the defendant breached an implied contract with the plaintiff by violating the restrictions accompanying his receipt and use of the Eddy works. *Id*. at 377.

Hurd's arguments for keeping the Letter under seal, I now must balance them against the public's interest in having items filed in this Court become part of the public record.[174]

Hurd contends that the public's interest is slight and, in any case, his interests in keeping the Letter confidential, including those derived from privacy rights and privileges provided by California law as discussed *supra*, outweigh this interest. First, Hurd asserts that a balancing of the relevant interests favors keeping the Letter sealed. In particular, he argues that disclosure will cause him irreparable harm, though he never elaborates on this concept, whereas Plaintiff and the public will suffer no legally cognizable harm if it is kept under seal. Hurd emphasizes that Plaintiff already has a copy of the Letter and asserts that Plaintiff and HP's interests in its disclosure are limited because neither Plaintiff nor HP has taken the position that unsealing the Letter would have a bearing on this § 220 action.[175]

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[174] *See Cantor Fitzgerald, Inc. v. Cantor*, 2001 WL 422633, at *2 (Del. Ch. Apr. 17, 2001).

[175] HOB 4, 23; HRB 4-5 (citing PAB 2 ("Plaintiff's 8 Del. Code §220 action does not turn on publicizing the Allred Letter and ultimately Plaintiff's investigative purpose is neither furthered nor undermined by the publication of the Allred Letter. While Plaintiff opposes Hurd's attempt here to drape these proceedings with the same furtiveness that characterized his interactions with Ms. Fisher. Plaintiff has no vested interest in pressing the disclosure of the Allred Letter. Still, by his motion, Hurd seeks to bury the Allred Letter and information derived from it from the public and HP's public shareholders. For the reasons explained in detail below, Plaintiff opposes any suggestion that his proper purpose in investigating the facts and circumstances of Hurd's departure from HP warrants the veil of secrecy that Hurd now seeks."); DRB 1 ("HP takes no position on whether or not the Court should seal the records at issue in Hurd's motion.")).

Hurd, however, misapprehends the relevant countervailing interest. Unlike in a preliminary injunction context where the court balances each party's interests to see whether the equities favor granting injunctive relief, a court addressing a Rule 5(g) motion must balance the privacy interests of the party seeking to keep a document under seal against the public's right to an open court system, discussed further *infra*. The standard is whether Hurd can demonstrate "good cause" sufficient to overcome the public's right of access, not whether Hurd's interests in confidentiality outweigh his adversaries' interests in or need for disclosure. In any event, as discussed *supra*, Hurd has not demonstrated that California law provides him with "good cause" to keep the Letter sealed. Similarly, he has failed to articulate the harm he would suffer if it were unsealed, let alone that such harm would be irreparable or outweigh the public's right to know.[176]

In that regard, Hurd denies that any public interest supports unsealing the Letter. This argument ignores, however, "Delaware's commitment to the principles of open

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[176] This Court will not keep a document under seal pursuant to Rule 5(g) merely because it contains embarrassing details concerning its subject; rather, it will do so only upon a showing of good cause. *See Kronenberg v. Katz*, 872 A.2d 568, 609 (Del. Ch. 2004) ("The mere fact that a defendant in a business case is accused of wrongdoing and that he would prefer for the public not to know about those accusations does not justify the sealing of the complaint; otherwise, most of this court's docket would be under seal."); *see also id*., C.A. No. 19964, at 4 (Del. Ch. Oct. 24, 2003) (TRANSCRIPT) ("The idea that someone's future business partners might read about matters of public record in a previous lawsuit, if I were to tolerate that as excusing sealing of a public record, then I can't imagine what businessman with any type of diversive dealings wouldn't wish every one of his or her business disputes to be kept confidential. Of course, why would one want to taint one's future relations with . . . problems and past dealings.").

government reflected in the First Amendment to the United States Constitution, and in Delaware's common law."[177] Rule 5(g)'s default position reflects this tradition of open proceedings and places strict limits on a party's ability to maintain filings under seal.[178] The public's right of access exists "to enhance popular trust in the fairness of the justice system, to promote public participation in the workings of government, and to protect constitutional guarantees."[179] Indeed, if trial courts permit the sealing of disputed documents simply because one of the parties takes an unreasonably broad view of what is confidential, the court risks injuring the public's right of access.[180]

According to Hurd, the public's right of access is somewhat more circumscribed in the context of a § 220 action because documents produced in that type of proceeding generally are subject to a confidentiality agreement between the parties.[181] In that regard,

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177 *Kronenberg*, 872 A.2d at 607-08 (noting that this Court has a legal duty to honor the legitimate interest of the public and the press in access to judicial proceedings).

178 *See, e.g.*, *One Sky, Inc. v. Katz*, 2005 WL 1300767, at *1 (Del. Ch. May 12, 2005); *Kronenberg*, 872 A.2d at 607; *see also Cantor Fitzgerald, Inc. v. Cantor*, 2001 WL 422633, at *1 (Del. Ch. Apr. 17, 2001) ("United States' citizens have a fundamental 'right to be informed of the operations of government and to an open court system.' This right translates into a presumption that the press and public have a right of access to judicial documents and records. This concept is known as the Common Law Right of Access and is adopted or acknowledged in Court of Chancery Rule 5(g).").

179 *Kronenberg*, 872 A.2d at 610 n.80 (citing Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 427, 429 (1991)).

180 *See, e.g.*, *One Sky, Inc.*, 2005 WL 1300767, at *1; *Kronenberg*, 872 A.2d at 608.

181 *See* HRB 14-15; Tr. 12.

Hurd also reiterates that the Letter originally was subject to such a confidentiality agreement in this action. This is immaterial, however, because the producing party, HP, subsequently dedesignated the Letter in the Amended Agreement and does not seek to have it deemed confidential.

As then-Vice Chancellor Lamb explained in *Disney v. Walt Disney Co.*:

> [T]he provision of nonpublic corporate books and records to a stockholder making a demand pursuant to Section 220 will normally be conditioned upon a reasonable confidentiality order. Delaware courts have repeatedly 'placed reasonable restrictions on shareholders' inspection rights in the context of suit brought under 8 *Del. C.* § 220, and [have] made disclosure contingent upon the shareholder first consenting to a reasonable confidentiality agreement.'[182]

An oft-recurring situation in § 220 confidentiality battles is that after the parties agree to exchange information pursuant to a confidentiality agreement, the plaintiffs seek to disclose certain of the information the defendant corporation designated as confidential, arguing that it is not actually confidential or, if it is, the benefit of disclosing it to the defendant's stockholders outweighs any harm to the defendant.[183] In these situations, because of the narrow scope of a § 220 action and the importance of confidentiality

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182 *Disney v. Walt Disney Co.*, 2005 WL 1538336, at *1 (Del. Ch. June 20, 2005); *Romero v. Dowdell*, 2006 WL 1229090 (Del. Ch. Apr. 28, 2006) ("As Vice Chancellor Lamb recognized in the *Disney* decision, there is a reasonable expectation that confidential information produced in the books and records context will be treated as confidential unless and until disclosed in the course of litigation or pursuant to some other legal requirement.") (internal citations omitted).

183 *See Pershing Square, L.P. v. Ceridian Corp.*, 923 A.2d 810, 820-21 (Del. Ch. 2007) (internal citations omitted).

regarding sensitive corporate and business affairs, the reviewing court must "'make specific findings as to whether the documents are confidential.' If they are, [it] will address: (1) whether the company breached such confidentiality; and (2) 'the potential benefits and potential harms from disclosing the documents for [the] stated purposes.'"[184]

This is not the situation here, however. While HP initially deemed the Letter to be confidential under the Confidentiality Agreement, it credibly argues that it did so only as a temporary accommodation to Hurd to give him time to work out an agreement with Plaintiff or otherwise pursue any claim that the Letter should be kept confidential.[185] HP does not contend that the Letter contains any confidential information belonging to it. HP further explained that, under the circumstances, "to treat the [Letter] as some type of personal, non-business communication [of Hurd's], struck [it] as so baseless that HP could not in good faith assert confidentiality as to it."[186] Moreover, as discussed previously, Hurd has not articulated a basis, under California law or otherwise, for finding the Letter to be a protectable confidential communication. Therefore, the fact that this is a § 220 action does not negate my finding that the Letter is not confidential, except to the extent it contains statements regarding Hurd's family and his relationship with them, and, therefore, must be unsealed.

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184 *Id*. at 821 (internal citations omitted); *Disney*, 2005 WL 1538336, at *1.

185 *See* Bishop Aff. Exs. C & E.

186 DRB 3.

On Hurd's pending Complaint Motion, he had the burden under Rule 5(g) to demonstrate good cause to keep the Allred Letter under seal. He has not met that burden. Therefore, I hold that the Letter must be unsealed subject to the redactions specified in the accompanying Order.

III. CONCLUSION

For the foregoing reasons, I deny Hurd's motion to keep the Allred Letter confidential and under seal, subject to the limited exception specified in this Opinion. An Order implementing this ruling is being entered contemporaneously with this Opinion.