

Delaware Chancery Declines Post-Filing Use of Section 220 Books and Records Inspection Request

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A recent decision by the Delaware Chancery Court suggests that a litigant might forego the ability to file a books and records request if it waits to do so until after the lawsuit is filed. Last month the Delaware Chancery Court [dismissed just such an action](#), characterizing the request for a books and records inspection after the filing of a lawsuit as “inherently contradictory” and an improper attempt to “sue first, ask questions later.”

[Section 220 of the Delaware General](#) Corporation Law allows stockholders to inspect books and records of a Delaware corporation for any proper purpose and to compel inspection if such inspection is refused. Section 220 is typically used prior to the filing of a lawsuit as a means to develop information to support a plaintiff’s claims before it has access to discovery rules. The corollaries to a Section 220 demand in the limited partnership and limited liability company contexts are known as a Section 17-305 demand and a Section 18-305 demand, respectively.

CHC Investment LLC brought suit against Strategic Growth Bancorp Inc. in August 2018 alleging fraud and fiduciary duty claims. In requesting a Section 220 books and records inspection, CHC sought to reconcile the differences in “diametrically opposed representations” made by Strategic Growth between 2014 and 2015. Strategic Growth challenged the books and records request, stating that it was an inappropriate pre-motion request for discovery.

Vice Chancellor Kathleen S. McCormick rejected the attempt to “sue first, ask questions later” as an arguably improper use of a books and records request. In dismissing the case, Vice Chancellor McCormick held that the use of a books and records request to investigate pending claims “undermines well-established discovery law” because once the lawsuit is filed, “discovery rules dictate what information relevant to its claims the stockholder may receive and when the stockholder may receive that information.”

According to the Vice Chancellor, in admitting that the document categories it sought were to advance its investigation of claims in the lawsuit, CHC contradicted itself – the act of filing the lawsuit presumed CHC already had the requisite information necessary to support its claims.

While there are situations where a books and records request may be used after the filing of a lawsuit, they are rare. For example, Delaware courts have allowed the use of a books and records request post-filing when there are time pressure implications or if a court has found a need to amend the complaint. There were no such special circumstances present in CHC's case, leading to the Vice Chancellor's dismissal.

The Chancery Court's decision here provides practical guidance to litigants. Delaware courts will expect a plaintiff to have performed a sufficient investigation and accumulated the information necessary to satisfy its pleading obligations before bringing a lawsuit. Litigants therefore should not expect to succeed in bringing a books and records inspection request while the lawsuit is pending in order to acquire additional information – once a lawsuit is filed that process is governed (and limited) by the typical discovery rules and procedures.

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