

The Importance of Documenting Corporate Actions: Delaware Supreme Court Requires Production of Emails in Books-and-Records Request

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The Delaware Supreme Court held yesterday that a corporation can be required to produce emails and other electronic documents where necessary to satisfy a shareholder's legitimate request to inspect corporate books and records under § 220 of the Delaware General Corporation Law. The Supreme Court also held that, under the circumstances of the case, a court could not impose jurisdictional limitations on the shareholder's use of documents obtained through the § 220 inspection process.

The Court's decision in [*KT4 Partners LLC v. Palantir Technologies, Inc.*](#) should cause corporations to focus on how they maintain key corporate records. The Court held that, "if a company observes traditional formalities, such as documenting its actions through board minutes, resolutions, and official letters, it will likely be able to satisfy a § 220 petitioner's needs solely by producing those books and records. But if a company instead decides to conduct formal corporate business largely through informal electronic communications, it cannot use its own choice of medium to keep shareholders in the dark about the substantive information to which § 220 entitles them."

Thus, the more formal and traditional the corporation's recordkeeping, the better a defense the corporation might have to a § 220 request for emails and other electronic communications, which can be quite burdensome to produce. And as for jurisdictional restrictions on use of produced documents: they might be acceptable if a corporation has a forum-selection clause in its charter or bylaws, but they might face more skepticism in other circumstances.

Section 220 of the Delaware General Corporation Law

Section 220 gives shareholders a qualified right to demand inspection of corporate books and records. The inspection right does not depend on the existence of pending litigation, and it is intended to be narrower than discovery rights available in litigation.

To inspect books and records under § 220, a shareholder must present a proper purpose and must show that each requested category of books and records is “essential” to the accomplishment of that purpose. If litigation over the inspection request ensues, a court must limit any inspection order to only those books and records that are “essential and sufficient” to the shareholder’s stated purpose. “In other words, the court must give the petitioner everything that is essential, but stop at what is sufficient.”

The *KT4* Decision

The *KT4* case arose from a § 220 inspection demand that KT4 Partners had sent to Palantir Technologies. The parties were engaged in a dispute and other litigation relating to Palantir’s alleged violations of certain stockholder agreements and its alleged mistreatment of KT4. The inspection demand sought access to corporate books and records, “including hardcopy and electronic documents and information,” about a variety of topics.

The Court of Chancery concluded that KT4 had stated several proper purposes for its inspection demands, but it ruled that “inspection of electronic mail is not essential to fulfilling KT4’s stated investigative purpose.” The court also held that KT4 could use the produced documents only in the Court of Chancery or, if jurisdiction could not be obtained there, in another state or federal court in Delaware. The Supreme Court reversed the Court of Chancery on both points.

The Supreme Court recognized that courts generally “should not order emails to be produced when other materials (e.g., traditional board-level materials, such as minutes) would accomplish the petitioner’s proper purpose.” But § 220 “must be interpreted in light of companies’ actual and evolving record-keeping and communication practices.” If a company “conducts formal corporate business without documenting its actions in minutes and board resolutions or other formal means, but maintains its records of the key communications only in emails, the [corporation] has no one to blame but itself for making the production of those emails necessary.”

In this case, Palantir had not shown that sufficient “traditional board-level materials” existed and obviated the need to produce electronic documents. In fact, Palantir had conceded that *no* board-level documents existed. The petitioner was therefore entitled to the necessary electronic records.

The Court also held that nothing in § 220 or Delaware case law “has ever suggested that the only possible place a stockholder can sue” using books and records obtained under § 220 is in the Court of Chancery. A prior Supreme Court decision had upheld jurisdictional restrictions on use, but in a context where the corporation had a Delaware forum-selection provision and had already been involved in related derivative litigation in the Court of Chancery.

Here, in contrast, Palantir did not have a forum-selection provision; it was a private company unlikely to face multi-forum litigation; no prior related litigation was pending in the Court of Chancery; and the underlying contracts in the dispute had California choice-of-law clauses. In these circumstances, the jurisdictional limitation on use was not permissible.

Implications

The *KT4* decision illustrates the importance of adhering to “traditional” corporate formalities, such as memorializing formal corporate decisions in minutes, resolutions, business letters, and other formal documents. The more informal a company’s recordkeeping processes, the greater the chance that the company might need to review and produce a broad range of informal, electronic documents in response to a § 220 demand. On the other hand, though, the decision provides ammunition for excluding emails and other such communications from § 220 responses where a company does follow traditional forms of recordkeeping and documentation.

The decision also illustrates the importance of including forum-selection provisions in corporate charters or bylaws. A company that has such provisions stands a better chance of imposing jurisdictional limits on the use of documents produced in response to a § 220 demand than does a company without those provisions.

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