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COMPANIES, BEWARE: EMAILS ARE FOREVER

Corporations, take notice: If a company fails to observe corporate formalities, it can be required to produce electronic communications—including informal emails—upon a shareholder's demand for "books and records." The question is whether the company "observes traditional formalities, such as documenting its actions through board minutes, resolutions, and official letters," or whether the company "instead decides to conduct formal corporate business largely through informal electronic communications."

COMPANY REJECTS WRITTEN DEMAND FOR BOOKS AND RECORDS

In *KT4 Partners LLC v. Palantir Technologies Inc.*, a stockholder submitted a written demand to inspect various books and records of a privately held technology company to investigate potential wrongdoing, pursuant to section 220 of the Delaware General Corporation Law. Under the statute, a stockholder may make a written request to a company seeking to inspect certain categories of company books and records for specified purposes described in the written demand.

Here, the stockholder's demand related to the company's recent actions, which allegedly interfered with stockholders' rights to purchase and sell shares in the company, among other things. When the company rejected the demand, the parties tried to resolve the matter but failed to reach an agreement over the stockholder's inspection rights.

COMPANY SUED FOR ACCESS TO BOOKS AND RECORDS—INCLUDING EMAILS

About a half year after sending the original demand, the stockholder brought an action in the Delaware Court of Chancery under section 220, seeking to compel the company to provide access to the books and records requested in the demand. After another year of "[e]xtensive motion practice, a one-day trial, and additional post-trial motion practice," the court issued an opinion holding that the stockholder had shown a proper purpose of investigating "suspected wrongdoing" relating to its treatment of stockholders and that the stockholder would be "entitled to inspect books and records that are essential" to fulfill that purpose.

But after the parties submitted opposing proposed final orders on the scope of the term "books and records," the court held that "inspection of electronic mail is not essential to fulfilling [the stockholder's] stated investigative purpose."

EMAILS ORDERED PRODUCED ON APPEAL

On appeal, the Delaware Supreme Court considered whether the lower court "abused its discretion in ruling that emails were not necessary for [the stockholder's] purpose of investigating potential wrongdoing."

As the court observed, "[s]tockholders of Delaware corporations have a qualified common law and statutory right to inspect the corporation's books and records." But the statutory right has its limits. "Books and records actions are not supposed to be

sprawling, oxymoronic lawsuits with extensive discovery," the court observed. Rather, "the point of a summary Section 220 action is to give the stockholder access to a discrete set of books and records that are necessary for its purpose—a set that is much less extensive than would likely be produced in [litigation] discovery." Ultimately, "the court must give the petitioner everything that is 'essential,' but stop at what is 'sufficient.'" And it is the petitioner's burden to prove necessity by "presenting some evidence that [the requested] documents are indeed necessary."

The court held that the stockholder met this burden. Specifically, with respect to the documents that the stockholder would need, "those documents might come in the form of board minutes, PowerPoint presentations or memoranda addressed to the board, board resolutions, official hardcopy letters from the company to investors, and other non-email documents."

But in this case, the lower court found that the company had "a history of not complying with required corporate formalities, such as the requirement that it hold annual stockholders' meetings." And there was evidence that the company "conducted other corporate business informally, including over email." Under these circumstances, the appellate court concluded that emails were necessary for the stockholder's purpose of investigating potential wrongdoing, and the lower court abused its discretion in holding otherwise.

"Ultimately, 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."

DECISION IS "INTELLECTUALLY PROGRESSIVE"

"This is an interesting case because it is really recognizing that emails are now kind of intertwined in what is a corporate record," says Michael S. LeBoff, Newport Beach, CA, cochair of the ABA Section of Litigation's Commercial & Business Litigation Committee.

"I see it as being intellectually progressive in recognizing that the progression of corporate communications and the historical records of a corporation's books and records change from time to time as technology develops," agrees Zachary G. Newman, New York, NY, cochair of the Section of Litigation's Corporate Counsel Committee. "The court is recognizing that a company's choice as to how it communicates and records its books and records will be a factor in determining whether a party that has the right to demand an inspection of such books and records should have access to those types of communications."

COMPANIES, BEWARE: "EMAILS ARE FOREVER"

The lesson from the *KT4 Partners* decision seems clear. If a company wishes to avoid having to produce emails and other informal electronic communications in response to a shareholder's demand, it should strictly comply with traditional corporate formalities. "Dot your i's and cross your t's," advises Bradford S. Babbitt, Hartford, CT, cochair of the Section's Commercial & Business Litigation Committee. "Make sure you are carefully adhering to the corporate formalities and documenting very carefully what the board did, when, and why, and who was there when it happened."

There will always be a temptation to conduct business informally, Babbitt observes, "especially where it may be a privately held company, and maybe there's a relatively small board, and they all know each other, and so it's very easy to converse by email or text or WhatsApp. But the fact that it's easy," he adds, "doesn't mean it's wise."

"Corporate counsel should have a full understanding of how the company conducts this type of business, so that way counsel can be more proactive rather than reactive when such demands are received," Newman counsels. "I don't think the decision should necessarily guide a company as to how it should conduct its business, but rather be viewed as a material reminder that, to the extent technology is relied upon or less formal modes of communication are employed to conduct the business affairs of the company, demands for books and records could very well include a deeper dive than you would otherwise think," he continues.

"THE NUMBER ONE THING I ALWAYS TELL CLIENTS IS ANYTIME YOU WRITE AN EMAIL, EXPECT THAT EMAIL TO BE SEEN BY THE GENERAL PUBLIC."

Section leaders also agree that emails present potential pitfalls. "To the corporation that finds itself faced with a section 220 request," Babbitt warns that "emails are forever, and people can—even in the corporate setting—say things that they can later regret."

"The number one thing I always tell clients is anytime you write an email, expect that email to be seen by the general public. Expect that to go to a disgruntled shareholder or an attorney in litigation," says LeBoff.

Another possible piece of advice: play nice. "I think part of the problem was that the company tried to stonewall the shareholder on the inspection demand from the beginning," explains LeBoff, "as opposed to making a good-faith production up front and then working in good faith to negotiate and meet and confer with the other side on the appropriate scope."

RESOURCES

- *KT4 Partners LLC v. Palantir Techs. Inc.*, C.A. No. 2017-0177-JRS (Del. Ch. 2018).
- Caitlin Haney, "Court Compels Production of Privileged Documents to Shareholders," *Litigation News* (Dec. 1, 2014).
- Frank R. Schirripa & Daniel B. Rehns, "Is the Delaware Section 220 Tango Worth the Wait?" *Class Actions & Derivative Suits* (Oct. 3, 2017).
- Jason C. Jowers, "The Problem of Fast-Filing Plaintiffs in Derivative Actions Continues," *Delaware Insider* (May 31, 2013).
- Matthew D. Stachel, "Understanding and Mitigating the Risks Involved When Stockholder Books and Records Actions Are Asserted Outside of Delaware," *Bus. L. Today* (Sept. 19, 2018).
- Delaware General Corporation Law, Del. Code tit. 8, § 220 (Inspection of books and records).

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