

Alert | Corporate



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Lack of Traditional Corporate Recordkeeping and Communications Practices May Allow Stockholders Access to Company Email and Other Electronic Communications

The Delaware Supreme Court recently held that a company may be required to produce emails and other electronic communications where necessary to satisfy a stockholder's request to inspect corporate books and records under Section 220 of the Delaware General Corporation Law (DGCL). This should cause companies to focus on how they maintain key corporate records and communicate internally.

In *KT4 Partners LLC v. Palantir Technologies, Inc.*, the Court stated that, “[u]ltimately, 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 Section 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 Section 220 entitles them.” Fittingly, to the extent a company uses more formal and traditional recordkeeping and communications practices, the more persuasive the company's arguments seeking to limit the scope of a Section 220 request in order to deny access to emails and other electronic documents and communications.

Stockholder Inspection of Corporate Books and Records

A demand under Section 220 of the DGCL is a written request to a company by a stockholder of that company seeking to inspect certain categories of company books and records for specified purposes described in the written demand. This statutory inspection right, however, is not unlimited. As the Court noted, “[b]ooks and records actions are not supposed to be sprawling, oxymoronic lawsuits with extensive discovery. . . . [T]he 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. . . . In other words, the court must give the petitioner everything that is ‘essential,’ but stop at what is ‘sufficient.’”

The Court’s Decision

The stockholder, KT4 Partners LLC, appealed from the Delaware Court of Chancery’s post-trial order granting in part and denying in part KT4’s request to inspect various books and records of Palantir Technologies Inc., a privately held technology company, to investigate potential wrongdoing. KT4’s request related to (1) disputes surrounding Palantir’s amendments to its Investors’ Rights Agreement in a way that stripped KT4’s contractual information rights; and (2) Palantir’s alleged violation of two stockholder agreements by failing to give stockholders notice and the opportunity to exercise their rights of first refusal, co-sale rights, and rights of first offer as to certain stock transactions.

KT4 initially sent Palantir an information request under the Investors’ Rights Agreement. Palantir wrote back five days later “stating that it was reviewing the request and would respond soon.” Rather than respond, Palantir instead executed a new set of amendments to the Investors’ Rights Agreement that stripped KT4’s information rights under the Investors’ Rights Agreement. These amendments purported to retroactively alter KT4’s rights under the Investors’ Rights Agreement, effectively mooted its earlier information request. KT4 then sent Palantir a written demand requesting to inspect its books and records under Section 220 of the DGCL. The inspection demand requested general “access to the books and records of the Corporation (including hardcopy and electronic documents and information),” as well as more specific requests. The Court of Chancery concluded, as relevant here, that KT4 had stated a proper investigative purpose for its inspection demands, but it ruled that “inspection of electronic mail is not essential to fulfilling KT4’s stated investigative purpose.”

As an initial matter, the Court on appeal held that KT4’s request was drafted expansively to cover seemingly anything in the general category of “books and records,” which has long been understood to cover both official corporate records and less formal written communications,” by including not only “hardcopy” documents, but also “electronic documents and information.” “‘Emails,’ of course, are a type of ‘electronic document.’”

The Court next addressed the issue of whether, under the circumstances presented, emails were “necessary” to accomplish the stockholder’s purpose and should be provided to KT4. The Court recognized the principle that the Delaware courts “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 if non-email books and records are insufficient, then the court should order emails to be produced.” As part of this inquiry, the Court noted that Section 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, it was acknowledged that Palantir often did not follow corporate formalities such as holding its annual stockholders' meeting, preparing board resolutions and keeping minutes of board meetings, but rather often communicated by email and acted by email – including on matters that were the subject of the investigative purpose of KT4's Section 220 demand. Indeed, Palantir conceded that no board-level documents existed; KT4 was therefore entitled to the necessary emails and electronic communications.

Key Considerations

In this day and age of hurried and informal electronic communications via email, text, or business messaging app, the need for quick responses and decisions, the ease of forwarding emails or responding to group texts, and the reality that we are rarely away from our mobile devices, the KT4 decision demonstrates the importance of observing traditional corporate formalities, such as memorializing formal corporate decisions in minutes, resolutions, business letters, and other non-electronic documents. The more informal a company's recordkeeping and communications practices, the more likely the company will need to review and produce a broad range of informal, electronic communications in response to a Section 220 demand, including messages sent via LinkedIn, personal email, cellphone text, or business messaging app.

The Court also addressed an unrelated issue: the importance of including forum-selection provisions limiting internal affairs claims in corporate charters or bylaws. Having such forum-selection provisions in place may help support a company's imposition of jurisdictional limits on the use of documents produced in response to a Section 220 demand.

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