

## ***KT4 Partners LLC v. Palantir Techs. Inc.: Navigating the Choppy Waters of Stockholder Inspection Demands***

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Client Alert

On January 29, 2019, the Delaware Supreme Court (Strine, C.J.) addressed when stockholders may be able to access company emails as part of a books and records inspection demand. [1] It also weighed in on when the Court of Chancery may limit stockholder lawsuits based on company books and records to a single forum.

While the Supreme Court's opinion did not change Delaware law on these topics, the outcome of the appeal underscores: (1) the importance of keeping formal corporate records of board activities to prevent stockholders from accessing information from other, more burdensome, document sources such as email; and (2) the importance of having a forum selection provision in a company's governing documents, if the company wishes to limit the location of lawsuits filed as a result of books and records inspections.

### ***Background and Court of Chancery Proceedings***

Plaintiff KT4 Partners LLC, a stockholder of Palantir Technologies Inc., made a demand to inspect the company's books and records under Delaware General Corporation Law § 220. A demand under § 220 is a written request to a company by a stockholder of that company, made before litigation is filed, seeking to inspect certain categories of company books and records for specified purposes described in the written demand. Frequently § 220 demands are used to bolster a later complaint filed by the stockholder. When KT4 and Palantir could not agree on the scope of a document production, KT4 filed an action against Palantir in the Delaware Court of Chancery. In its post-trial ruling, the Court of Chancery held that KT4 was entitled to inspect documents related to particular contested subject matters. [2] The parties could not agree on certain aspects of a final order implementing the Court of Chancery's post-trial ruling, two of which are relevant to the appeal.

1. KT4 sought to include emails within the scope of the final production order. Palantir refused. The Court of Chancery ruled in favor of Palantir, holding that inspection of electronic mail was "not essential" to fulfilling KT4's stated investigative purpose.
2. Palantir sought a provision requiring KT4 to bring any action arising out of the inspection documents in the Court of Chancery, unless that court lacked jurisdiction, in which case KT4 was required to file suit in another Delaware state or federal court. KT4 sought two limited exceptions allowing it to: (a) file in Delaware Superior Court in the first instance; and (b) file in another jurisdiction if an individual defendant refused to consent to personal jurisdiction in Delaware. The Court of Chancery ruled in Palantir's favor and entered the more restrictive jurisdictional provision.

### ***The Delaware Supreme Court's Opinion***

*Palantir Required to Produce Emails*

The Supreme Court held that the lower court had abused its discretion in concluding that emails were not necessary for KT4's purpose of investigating potential wrongdoing. The Supreme Court reiterated existing law that the scope of a permissible inspection under § 220 is much less extensive than normal discovery in a civil lawsuit. Books and records produced in response to a § 220 action must be "essential" to the accomplishment of the stockholder's stated purpose, which means the information sought in the documents must be "unavailable from another source." The court recognized "the principle that the Court of Chancery 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." This inquiry, however, must be undertaken "in light of companies' actual and evolving record-keeping and communication practices."

In this case, the court relied extensively on the fact that no non-email documents responsive to plaintiff's investigative purpose existed. For example, KT4 sought documents related to amendments made to an Investors' Rights Agreement. The only responsive documents other than emails were the Investors' Rights Agreement amendments themselves, which would be insufficient to address KT4's purpose of investigating the circumstances surrounding the amendments. The court also noted that Palantir "conducted other corporate business informally, including over email."

Providing some assurance to companies facing future § 220 demand, the court emphasized: "If a corporation has traditional, non-electronic documents sufficient to satisfy the petitioner's needs, the corporation should not have to produce electronic documents."

#### *Strict Jurisdiction Provision Was Unreasonable Under the Circumstances*

The court noted that nothing in the text of § 220 limits an inspecting stockholder to filing a suit arising from the books and records in any particular court. The court also favorably discussed its 2014 opinion in *United Technologies Corp. v. Treppel*, [3] which held that the Court of Chancery has the authority to impose jurisdictional restrictions on where a stockholder can file a lawsuit arising out of documents obtained from a § 220 action. However, the Court of Chancery's decision to impose such terms should be based on the facts and circumstances of the case. The Supreme Court rejected the suggestion that imposition of jurisdictional restrictions is "the norm" for § 220 orders.

In reversing the Court of Chancery's strict provision that included none of the limited exceptions requested by KT4, the Supreme Court emphasized that, in *Treppel*, the subject corporation had a forum selection clause in favor of the Court of Chancery in its governing documents. Palantir had no comparable charter or bylaw provision. The Supreme Court also noted that, as a private company with a discrete set of investors, Palantir does not face the same risk of multi-forum class or derivative litigation that a public company faces. Palantir and KT4 were also already engaged in litigation in two different courts, neither of which was the court specified by the challenged jurisdiction limitation. Therefore, the Supreme Court reasoned that the strict jurisdictional provision in this action would increase the number of litigation forums between the parties and decrease judicial efficiency. Finally, a number of the agreements at issue in KT4's § 220 demand included choice of law clauses specifying California law, which the court found to be a rational basis to allow suits to be filed in forums other than the Court of Chancery.

In reversing, the Supreme Court held that the few limited exceptions to the strict jurisdiction provision requested by KT4 were reasonable safeguards under the circumstances.

#### **Key Takeaways**

While the Delaware Supreme Court increased the scope of production and decreased the protections of the jurisdictional clause in this particular case, companies should not view this opinion as signaling a major change in law.

Rather, negotiated or court-ordered clauses limiting where a plaintiff can file a lawsuit based on § 220 inspection materials will still be permitted in many cases. However, the court will need to consider any challenged clause in the context of the facts and circumstances of the case. Maintaining a forum selection clause in favor of the Court of Chancery will significantly increase a company's ability to insist on this type of jurisdictional limitation in the context of § 220 books and records demands.

Likewise, this case should not be seen as a change in existing law regarding a stockholder's ability to access emails. Should a company be unable to produce traditional board-level documents sufficient for a stockholder to investigate its proper purpose, the company may be ordered to produce emails. However, if non-email documents are available and sufficient for the stockholder to investigate its purpose, email production will not be required. This case is a reminder of the importance of maintaining formal corporate records for board-level actions and the potential risk under § 220 associated with conducting official board business over email.

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[1] *KT4 Partners LLC v. Palantir Techs. Inc.*, No. 281, 2018 (Del. Jan. 29, 2019), available [here](#).

[2] *KT4 Partners LLC v. Palantir Techs. Inc.*, C.A. No. 2017-0177-JRS, 2018 WL 1023155 (Del. Ch. Feb. 22, 2018).

[3] 109 A.3d 553 (Del. 2014).