



## CORPORATE ALERT

### TO OUR CLIENTS AND FRIENDS

#### DELAWARE SUPREME COURT RULES THAT STOCKHOLDERS MAY INSPECT CORPORATE EMAILS UNDER STATUTORY RIGHT TO INSPECT BOOKS AND RECORDS IF FORMAL RECORDS ARE NOT AVAILABLE

The Delaware Supreme Court recently ruled, in *KT4 Partners LLC v Palantir Technologies Inc.*, that a Delaware corporate statute that gives stockholders the right to inspect corporate books and records includes the right to inspect emails if the books and records sought do not exist in another form. The ruling is instructive for corporations as they develop and implement procedures for taking and documenting corporate actions.

#### Factual Background

KT4 Partners LLC ("KT4") was a significant investor in Palantir Technologies Inc., a Delaware corporation ("Palantir"). In connection with KT4's investments, Palantir, KT4, and other stockholders entered into an Investors' Rights Agreement in 2006. This agreement gave KT4 and certain other investors a "right of first offer," i.e., the right to purchase additional shares in future stock offerings by Palantir. The agreement also gave KT4 the right to inspect Palantir's books and records, the right to inspect Palantir's properties, and the right to discuss Palantir's business with its officers.

In 2015, the previously amicable relationship between KT4 and Palantir deteriorated when Palantir's CEO accused KT4's principal of stealing Palantir's intellectual property. After the fallout, KT4 sent an information request to Palantir under the Investors' Rights Agreement in August 2016. According to the Delaware Supreme Court, in September 2016 Palantir did not produce the requested records but instead "executed a new set of amendments to the Investors' Rights Agreement" which, among other things, eliminated KT4's right of first offer and inspection rights.

Approximately three weeks later, KT4 sent a written demand to Palantir requesting to inspect its books and records not under the Investors' Rights Agreement but under Section 220 of the Delaware General Corporation Law. Section 220 is similar to the corporate laws of many other states in that it gives corporate stockholders the right to inspect the corporation's books and records for a "proper purpose" if the stockholder delivers a written demand for inspection to the corporation. Palantir rejected the Section 220 demand, and the parties attempted, unsuccessfully, to negotiate an agreement as to KT4's inspection rights.

KT4 then brought an action against Palantir to compel Palantir to provide the requested information under Section 220, and the Court of Chancery ruled, as a threshold matter, that KT4 had shown a proper purpose for the request. The Court of Chancery also ruled that KT4 was entitled to "all books and records relating to the" September 2016 amendments to the Investors' Rights Agreement. After further disagreement between the parties as to the scope of this ruling, the Court of Chancery ruled that KT4's request "for 'access to the books and records of [Palantir] (including hardcopy and electronic documents and information)' cannot reasonably be viewed as a targeted request for electronic mail" and that "inspection of email is not essential to fulfilling KT4's stated investigative purpose." KT4 appealed this ruling to the Delaware Supreme Court.

### Supreme Court Holding

The Delaware Supreme Court reversed the ruling of the Court of Chancery and held that KT4's request for Palantir's books and records "including hardcopy and electronic documents" did properly include emails. Importantly, the court noted that KT4 had argued that access to emails was necessary for it to accomplish its purpose because Palantir appeared to have chosen to conduct its business informally by means of email "and other electronic media instead of more traditional means." In fact, Palantir conceded that more traditional materials such as board resolutions or minutes did not exist. According to the Delaware Supreme Court, "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. 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."

### Takeaways from the Palantir Case

As an initial matter, the Palantir decision should not be interpreted as requiring Delaware corporate boards and stockholders to conduct corporate business only at in-person meetings. Corporate laws of most, if not all, states, including Delaware, permit corporate actions to be taken by informal means, such as telephonic meetings or without meetings at all. Corporate statutes do, however, require that corporations keep adequate records of board and stockholder proceedings and actions, regardless of the informality with which those proceedings were conducted. The Palantir decision is a reminder to corporations to maintain complete corporate books and records where they can be easily produced in order to reduce the risk that they may be ordered to open up their email records to dissident stockholders. One related takeaway, although not specifically a part of the Supreme Court's holding, is that corporations need to observe the statutory requirement to hold annual stockholder meetings (whether in-person, by telephone, or by other means authorized by the applicable corporate statutes). One of the factors underpinning the Court of Chancery's ruling that KT4 had shown a proper purpose for its Section 220 request (and, therefore, the ability of KT4 to even pursue its request) was "Palantir's serial failures to hold annual stockholder meetings."