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Delaware Courts Address Production of Emails and Other Electronically Stored Information In Response to Section 220 Demands

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[Section 220](#) of the Delaware General Corporation Law, 8 Del. C. § 220, provides that any stockholder of a Delaware corporation “shall, upon written demand under oath stating the purpose thereof, have the right during the usual hours for business to inspect for any proper purpose, and to make copies and extracts from . . . the corporation’s stock ledger, a list of its stockholders, and its other books and records.” Whether emails and other electronically stored information (“ESI”) created and maintained by the corporation constitute “other books and records” within the meaning of Section 220 has been a matter of some uncertainty. Recent decisions from the Delaware Courts provide useful guidance to practitioners on this question.

In [Inter-Local Pension Fund GCC/IBT v. Calgon Carbon Corp.](#), C.A. No. 2017-0910-MTZ, 2018 WL 6719718 (Del. Ch. Jan. 25, 2018) (Zurn, V.C.), petitioner sought electronic communications, including personal emails, to investigate the discussions between Calgon Carbon Corp.’s management and third parties to determine if management prioritized its own retention and compensation over the interests of Calgon’s stockholders. The Chancery Court granted the petition in part. The Chancery Court noted that the nature of those communications meant that the fund was unlikely to uncover any meaningful answers in the more traditional, formal books and records, like minutes or letters between the companies. The court found that the electronic communications sought were necessary and essential to the investigative purpose, including the personal emails of management to the limited extent that they are not duplicative of sources from company emails and devices. As the Chancery Court noted, in today’s age, corporate records are not always confined to a company’s premises, domain name, and servers. Thus, the court held that “[w]hen considering requests for information from personal accounts and devices in Section 220 proceedings, a court should apply its discretion on a case-by-case basis to balance the need for the information sought against the burdens of production and the availability of the information from other sources, as the statute contemplates” (citing [Schnatter v. Papa John’s Int’l, Inc.](#), C.A. No. 2018-0542-AGB, 2019 WL 194634 (Del. Ch. Jan. 15, 2019) (Bouchard, C.)).

The Chancery Court emphasized that the core inquiry is whether the record is necessary and essential to the stockholder’s investigation. Prior decisions have echoed this sentiment. In [Thomas & Betts Corp. v. Leviton Mfg. Co.](#), 681 A.2d 1026, 1035 (Del. 1996), the court noted that an inspecting stockholder with a proper purpose “bears the burden of proving that each category of books and records is essential to accomplishment of the stockholder’s articulated purpose for the inspection.” In [Amalgamated Bank v. Yahoo! Inc.](#), 132 A.3d 752, 775 (Del. Ch. 2016), the Chancery Court indicated that there is some limit on what need be produced: “The order should permit access to books and records that are ‘essential’ for the plaintiff to achieve its purpose, but should stop at the quantum of information that the court deems ‘sufficient.’” Note, too, 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 Section 220 petitioner’s needs solely by producing those books and records.” [KT4 Partners, LLC v. Palantir Technologies, Inc.](#), C.A. No. 2017-0177-JRS, 2018 WL 6719718 (Del. Jan. 29, 2018) (Strine, C.J.).

The decisions discussed above confirm the term “other books and records” in Section 220 can, in an appropriate case, include emails and other ESI. These decisions also recognize, however, that production of emails and other ESI can be onerous and unnecessary depending upon the stated purpose of the demand, especially where the

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corporation maintains traditional types of books and records. Boards and management should consider whether their recordkeeping comports with traditional practices to minimize the likelihood that burdensome email and ESI production will be required in response to a stockholder's Section 220 demand.

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