Hedge Fund Litigation Update

Delaware Chancery Court Denies Icahn's "Novel" Bid For Books And Records

I. Background

On November 14, 2019, Vice Chancellor Slights of the Delaware Chancery Court denied a stockholder demand—led by Carl Icahn—to inspect the books and records of Occidental Petroleum Corporation under Section 220 of Delaware General Corporation Law ("Section 220"). The demand stemmed from what Icahn referred to as Occidental's "fundamentally misguided and hugely overpriced acquisition of Anadarko Petroleum Corporation."[1] After a half-day trial, the court found that the "primary purpose" of the demand was to aid Plaintiffs in their proxy contest, and declined to expand the scope of Section 220 for this "novel" application.[2] The court, however, expressly left open the possibility that in the future, "this court might endorse a rule that would allow a stockholder to receive books and records relating to questionable, but not actionable, board-level decisions so that he can communicate with other stockholders in aid of a potential proxy contest."[3]

This decision, and similar decisions in 2019, shed light on the threshold for "suspected wrongdoing" that needs to be stated for Section 220 demands to be successful *and* the types of documents that may be obtained (including personal emails and text messages) as a result.

II. Opinion

In *High River Ltd. et al. v. Occidental Petroleum Corporation,* the Icahn parties proffered two purposes to support their Section 220 demand.[4] The first and primary purpose was to mount a proxy contest following Occidental's acquisition of Anadarko. The court recognized that facilitation of a proxy contest, without more, would be "a new, or at least expanded" application of Section 220 and declined to make such a ruling.[5]

The second purpose, argued in the alternative, was that the terms of the Anadarko acquisition presented a "credible basis to *infer* corporate mismanagement or wrongdoing."[6] Prior to Occidental's bid, Chevron had reached an agreement to acquire Anadarko for approximately $65 per share.[7]

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1 *High River Ltd. et al. v. Occidental Petroleum Corporation*, Case No. 2019-0403-JRS (Del. Ch. 2019), Verified Complaint, at ¶ 1.

2 *High River Ltd. et al. v. Occidental Petroleum Corporation*, Case No. 2019-0403-JRS (Del. Ch. 2019), Memorandum Opinion, at 2-3.

3 *Id.* at 2.

4 *Id.* at 12.

5 *Id.* at 2.

6 *Id.* at 12-13 (emphasis added).

7 *Id.* at 5.

Occidental made a competing proposal of $76 per share, later revising its bid to $59 per share cash plus 0.2939 shares of Occidental stock per share of Anadarko.[8] Chevron did not exercise its matching rights and Anadarko paid a $1 billion termination fee under that agreement.[9] Occidental ultimately paid $38 billion in cash to acquire Anadarko, which it financed in part through a $10 billion preferred offering and through a pre-sale of $8.8 billion of Anadarko's assets.[10] The court noted that under Section 220, a plaintiff must "provide *some* evidence of wrongdoing" and "[m]ere disagreement with a business decision is not enough."[11] Ultimately, the court found that the Icahn parties had not alleged, much less proven, that the Occidental board was conflicted, disloyal, or that it acted in bad faith with respect to the Anadarko acquisition or its financing.[12] Accordingly, the court denied the Icahn parties' bid for books and records under Section 220.

Notably, the court expressly warned, "[i]t may well be that, in the right case, this court might endorse a rule" that would permit a Section 220 demand solely to aid a proxy contest, but that this was not the "right case."[13]

Section 220 cases are generally "summary proceedings that are to be promptly tried."[14] The expedited nature of the proceedings are highlighted in *High River Ltd. et al. v. Occidental Petroleum Corporation* where the Icahn parties filed their complaint in May, tried the case in September, and received a decision from Delaware Chancery Court in November. While pre-trial motion practice is possible, it may only be "entertained in a [Section 220] action where the underlying facts are largely undisputed."[15]

III. Significance

The Delaware Chancery Court's decision in *High River Ltd. et al. v. Occidental Petroleum Corporation*, reaffirms the boundaries of well-established Delaware law—that to permit inspection under Section 220, plaintiffs must present "some evidence to suggest a credible basis from which a court can infer that mismanagement, waste or wrongdoing may have occurred."[16]

However, companies should be aware that once a "credible basis" has been established, Delaware courts have found that books and records subject to a Section 220 demand are not strictly limited to formal board minutes and resolutions and where necessary may include "informal electronic communications" such as emails and text messages. For example, in *KT4 Partners LLC v. Palantir*

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8 *Id.* at 6.

9 *Id.*

10 *Id.* at 6-7.

11 *Id.* at 13.

12 *Id.*

13 *Id.* at 2.

14 *Graulich v. Dell Inc.*, 2011 WL 1843813, at *4 (Del. Ch. May 16, 2011).

15 *Id.*

16 *High River Ltd. et al. v. Occidental Petroleum Corporation*, Case No. 2019-0403-JRS (Del. Ch. 2019), Memorandum Opinion, at 11.

Technologies, Inc., the Delaware Supreme Court found that where a company does not observe "traditional formalities" such as board minutes and resolutions, "emails were necessary to investigate potential wrongdoing."[17] Generally, where a company maintains regular board minutes, resolutions, and formal orders, it should not expect a Section 220 inspection to extend to informal electronic communications because the inspection is limited to those books and records that are "essential and sufficient to the stockholder's purpose."[18] Notably, in *Schnatter v. Papa John's International, Inc.*, the Delaware Chancery Court ordered inspection of emails and text messages from the personal accounts of directors, the CEO, and General Counsel under Section 220. The Chancery Court noted, "[t]he reality of today's world is that people communicate in many more ways than ever before" and "[a]lthough some methods of communications (e.g., text messages) present greater challenges for collection and review than others…the utility of Section 220 as a means of investigating mismanagement would be undermined if the court categorically were to rule out the need to produce communications in these formats."[19] The Chancery Court clarified that this ruling did not suggest a "bright line rule" for personal email and text messages, rather courts must "balance the need for information sought against the burdens of production and availability of the information from other sources."[20]

As Section 220 demands are increasingly brought in advance of shareholder derivative or post-merger damages suits, the threshold for an actionable demand and its potential consequences, are important for companies and their investors to consider.

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If you have any questions about the issues addressed in this memorandum, or if you would like a copy of any of the materials mentioned in it, please do not hesitate to reach out to:

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17 *KT4 Partners LLC v. Palantir Technologies, Inc.*, 203 A. 3d 738, 742 (Del. 2019).

18 *Id.* at 751-52.

19 *Schnatter v. Papa John's International, Inc.*, 2019 WL 194634, at *16 (Del. Ch. 2019).

20 *Id.*