

Delaware's Court of Chancery Rules that Former Directors Lack Standing to Pursue Statutory Information Demands

BY [KEVIN C. LOGUE](#) & [KEVIN P. BROUGHEL](#)

Section 220(d) of Delaware's General Corporation Law memorializes a corporate director's broad and fundamental rights to inspect corporate books and records, providing that any director shall have the right to examine the corporation's stock ledger, stockholder list and other books and records "for a purpose reasonably related to the director's position as a director". In determining whether to enforce such rights, the Court generally considers a two-part inquiry. First, the individual seeking inspection must make out a prima facie case, by showing that he or she is a director of the target corporation and demanded inspection that was refused. Second, the director must seek inspection for a proper purpose, although it is the corporation that bears the burden of showing that the director's purpose is improper.

In *King v. DAG SPE Managing Member, Inc.*, 2013 Del. Ch. LEXIS 308 (Del. Ch. Dec. 23, 2013) ("*King v. DAG*"), the Court of Chancery was confronted with a demand by a former director – who was not also a stockholder – seeking corporate books and records for the purported purpose of investigating generally whether mismanagement or breaches of fiduciary duties occurred during the period of his directorship. In considering the demand, Vice Chancellor Parsons acknowledged that some states, including New York, have conferred limited books and records rights on former directors, generally focused on inspection of records covering the period of the requesting party's directorship and upon a proper showing that inspection is necessary to protect a personal responsibility interest. However, the Court found nothing to suggest that Delaware has adopted such a broad reading of Section 220(d), and concluded that once a director of a Delaware corporation is removed from, or leaves, office, that individual's right to inspect books and records of the corporation under Section 220(d) ends. Accordingly, because the requesting party had ceased to be a director, he lacked standing to assert any inspection rights under the statute.

The Court also noted that even if Delaware recognized some form of former director's right of inspection similar to New York, the requesting former director had not alleged that he had been or reasonably could be accused of malfeasance or nonfeasance during his directorship. It is not entirely clear whether the Court would have overlooked the "standing" defect, had the former director done so.

The requesting director argued, unsuccessfully, that he also possessed common law inspection rights independent of Section 220(d). Vice Chancellor Parsons held that Section 220(d) at least arguably

preempts a director's common law right to inspect corporate books and records, but went on to note that even if it did not preempt such rights, the director had not demonstrated a common law inspection right. No other litigation claims were pending or asserted against or by the former director that would have warranted the right to pursue discovery of documents relevant to that dispute, the requesting party had not challenged his removal as a director, and the request for inspection rights had not been initiated while the individual was a director.

Finally, it is important to stress again that the former director at issue was not a stockholder of the corporation. Had he been such, he might have had access to some of the books and records at issue upon proper application and showing under the stockholder information rights portions of Section 220.

The *King v. DAG* decision should provide helpful guidance to corporations confronted with information demands from former directors.

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If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings lawyers:

New York

Kevin C. Logue
1.212.318.6039
kevinlogue@paulhastings.com

Kevin P. Broughel
1.212.318.6483
kevinbroughel@paulhastings.com
