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**IN THE SUPREME COURT OF THE STATE OF DELAWARE**

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| KT4 PARTNERS LLC,<br><br>Plaintiff Below,<br>Appellant,<br><br>v.<br><br>PALANTIR TECHNOLOGIES, INC.,<br><br>Defendant Below,<br>Appellee. | No. 281, 2018<br><br>On Appeal from the Court of Chancery of the State of Delaware in C.A. No. 2017-0177-JRS<br><br>**PUBLIC VERSION**<br>**FILED SEPTEMBER 14, 2018** |

# APPELLANT'S REPLY BRIEF

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## INTRODUCTION

Palantir's opposition brief tries to distract from the issues raised in this appeal. Its main strategy is to attack KT4's managing member, Marc Abramowitz, claiming that his testimony supposedly "contradicted key allegations" made in KT4's complaint. Palantir Br. 1-2. Palantir made these same "contradiction" arguments before the Court of Chancery—and that Court properly rejected them.

After "carefully reviewing the evidence presented at trial and the arguments of counsel"—which included Palantir's oft-repeated "contradiction" arguments—the Court of Chancery found that KT4 was seeking information for a "proper purpose" and that its stated purposes were not "pretext purposes." Op. 3, 31. The Court did not even feel compelled to directly address Palantir's "contradiction" arguments.[1]

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[1] And it is easy to see why. Consider Palantir's primary example of "contradiction": that Abramowitz's testimony somehow conflicted with the complaint's allegation that the parties to the Brooklands/CDH transaction had "agreed upon the purchase price and all material terms and conditions of the sale." A1714 (¶ 32). Palantir has repeatedly pointed to testimony in which Abramowitz states that he did not have personal knowledge of the negotiations as evidence of a "contradiction." A3638 (Tr. 169:4-6). But the complaint's allegation about the parties having reached an agreement was not based on his personal knowledge. It was based on two facts: (1) that Abramowitz's broker, who was handling the negotiations, told Abramowitz that he had reached an agreement and (2) that every other seller in the deal signed a contemporaneous letter to Palantir stating that they too were intent on proceeding with the transaction. A3526-27, A3536-37 (Tr. 57:17-58:1, 67:8-68:7). Each of Palantir's claims of "contradiction" is similarly defective: the Court below correctly deemed them unworthy of a response.

Palantir's brief tries to distract in other ways, as well—for example, it implies that KT4 is not entitled to inspection because it supposedly earned paper returns of "3000%", or because of Palantir's baseless allegations of "theft" of "trade secrets" (more on that below). None of that is relevant to the issues raised in this appeal. Once all this noise is eliminated from Palantir's brief, the Court is left with four straightforward legal issues.

*First*, KT4's Demand was specific enough to allow Palantir to determine that KT4 had a valuation purpose. Indeed, Palantir concedes that it knew even before KT4 filed its complaint that KT4 had a valuation purpose. And there is no dispute that KT4 explicitly raised a valuation purpose at every step in this litigation, up to and including at trial. There is no reason to ignore this record when assessing whether KT4 stated a valuation purpose. The Court of Chancery erred by holding otherwise.

*Second*, the Jurisdictional Limitation, which requires KT4 to file any subsequent suit arising out of its Section 220 investigation in the Court of Chancery, impedes KT4's ability to remedy the very wrongdoing that KT4 is investigating. It also imperils KT4's constitutional right to a jury trial. In these circumstances, the Court of Chancery abused its discretion by imposing the Jurisdictional Limitation.

*Third*, the Court of Chancery found that KT4 was entitled to investigate Palantir's failure to honor KT4's right of first offer under an Investors' Rights Agreement ("IRA"). But the Court did not order Palantir to produce any documents related to that wrongdoing. That was an abuse of discretion under this Court's precedent.

*Fourth*, KT4 needs emails to adequately conduct its investigation into Palantir's retroactive evisceration of stockholder rights under the IRA: Palantir concedes that it has no responsive documents to produce other than emails. Emails are therefore essential to KT4's investigation.

KT4 respectfully requests that the Court of Chancery's Final Order and Judgment be reversed in part.

## STATEMENT OF FACTS

Palantir's recitation of the facts contains several misleading statements that require a brief statement of correction.

### A. The California case and Palantir's undisclosed German case.

As it did before the Court of Chancery, Palantir's opposition brief repeatedly treats its allegations of trade secret theft against KT4 and Abramowitz as if they were established facts. *See* Palantir Br. 1, 10. But Palantir has never attempted to justify those allegations with any evidence. And when KT4 asked for discovery on these allegations, Palantir immediately dropped any defense based on them. Moreover, if Palantir's allegations had any merit, one would expect Palantir to be able to provide a simple description of the "trade secrets" that were supposedly "stolen," as required by California law. KT4 Br. 13. But despite having three years to get its story straight (over one year before filing suit, and nearly two years since), Palantir has been unable to produce this simple description; for that reason, the California court stayed discovery. *Id.* (citing A3834).

Unhappy with that ruling, Palantir has now resorted to drastic measures: On August 6, 2018, it filed suit against Abramowitz in Germany based on the same years-old allegations underlying the California case, a move that Abramowitz only discovered by happenstance (as Palantir had not served him or even notified his counsel). The Court can take judicial notice of Palantir's suit and the related

pleadings. AR001-98. The purpose of this new German lawsuit—which Palantir continued to keep secret even when describing the "litigation landscape"[2] for this Court in its opposition brief—is clear: Palantir aims to circumvent California law and the California court's stay of discovery, all while running up Abramowitz's costs with duplicative, international litigation.

Immediately after secretly filing the German suit, Palantir sought an *ex parte* order from a U.S. district court that would allow it to obtain discovery from Abramowitz, ostensibly for use in the German proceeding. *See* AR001, AR075-98. Proceeding *ex parte* and without Abramowitz's knowledge is critical to Palantir's strategy: because it believed that Abramowitz would not have an opportunity to appear before the U.S. district court (and thus would be unable to correct the record), Palantir did not disclose the California court's stay of discovery to the federal court. AR003-22. Instead, Palantir's entire description of the California case to the federal court was that the "action . . . is pending." AR013-14. Palantir did not disclose that the California court had repeatedly denied its attempts to obtain the same discovery it is now seeking.

But even setting aside Palantir's lack of candor, it is also telling that Palantir, even by its own account, waited over a year to bring any of its suits. *See* Palantir Br. 1. As this Court is no doubt aware, when plaintiffs with legitimate trade

[2] *See* Palantir Br. 1. Palantir filed its brief with this Court on August 15, 2018, more than a week after it initiated the German proceeding.

secrets claims learn that their valuable information might be lost, they usually take immediate action. For example, when one of Palantir's competitors allegedly discovered that Palantir employees had been fraudulently posing as customers to obtain the competitor's trade secrets, it filed suit one month after discovering the alleged conduct. *i2 Inc. v. Palantir Technologies Inc. et. al*, 10CV885-LO/JFA, Dkt. 8, at 1-2 (E.D. Va.) (motion for TRO stating that plaintiff discovered the alleged conduct on July 1, 2010 and filed suit on August 9, 2010). Palantir, by contrast, sat on its hands for more than a year and only took action after KT4 asked for information related to the misconduct of Palantir and its officers and directors. Only then did Palantir (1) file the California action, (2) execute the retroactive amendments to the IRA; and (3) begin its press campaign to discredit Abramowitz (a campaign that Palantir began before any defendant was even served with the complaint). A1641-44.

"Logic," which this Court can consider when assessing Palantir's conduct, shows that Palantir's allegations of "theft" have little to do with any supposed "trade secrets" and everything to do with thwarting KT4's investigation and running up KT4's costs through litigation. *Sec. First Corp. v. U.S. Die Casting & Dev. Co.*, 687 A.2d 563, 568 (Del. 1997). Indeed, the Court of Chancery already found that some of Palantir's conduct in this regard provided a credible basis to infer wrongdoing. Op. 33-35.

### B. The proceedings below.

Palantir also claims that this case has led "two lives" because "its centerpiece was an allegation that Palantir tortiously interfered" with KT4's sale of stock to Brooklands/CDH. Palantir Br. 2. But Palantir's interference with this deal was never the "centerpiece" of this case: as the complaint makes clear, KT4 has always been focused on Palantir's non-compliance with the IRA and the First Refusal and Co-sale Agreement ("FRCSA"), as well as Palantir's failure to hold annual meetings[3] and its wrongdoing in connection with the retroactive amendments. A1691-94, A1698-1709, A1721-23, A1728-30 (¶¶ 3-4, 14-23, 50-54, 62-66). These issues also made up a significant portion of KT4's pre- and post-trial memoranda. A3172-77; *see also* A3877-78; A3888-90. KT4 never pivoted to these issues: they were always a key part of its case.

To be sure, after the Court of Chancery's ruling on hearsay issues (which KT4 respectfully disagrees with but from which it does not appeal), it became clear that the Court did not believe that an investigation into a tortious interference claim was permissible under Section 220. KT4 also wanted to file suit before there were

[3] Palantir tries to imply that its failure to hold annual meetings is permissible because it acts "by written consent." Palantir Br. 3. But Palantir has never solicited KT4's consent for any annual meeting, and it has not sent KT4 any notices of actions by written consent, as required by Delaware law. 8 *Del. C.* § 228(e). Moreover, the Order below requires Palantir to produce documents related to annual meetings, which would include documents relating to written consents in lieu of an annual meeting. Order ¶ 1(e). Palantir has not produced a single document showing that it has acted by written consent.

even any arguable concerns with the statute of limitations. KT4 therefore decided, as the Court invited it to do, to file its tortious interference claim in Superior Court. A3750 (Tr. 58:5-6) ("If you have [a tortious interference] claim, bring it and get discovery."). The Superior Court recently denied the motions to dismiss of Palantir and its co-defendant, Disruptive Technology Advisers LLC, and the case is now proceeding. *KT4 Partners LLC v. Palantir Technologies, Inc.*, 2018 WL 4033767 (Del. Super. Ct. Aug. 22, 2018).

### C. KT4's new Section 220 demand.

As Palantir points out, KT4 sent a new Section 220 demand a week after the Court of Chancery entered its Order, which denied KT4's requests for valuation information. The new demand unequivocally stated a valuation purpose. Given that the Court rejected all of Palantir's "pretext purpose" arguments when addressing KT4's investigative purpose, KT4 hoped that Palantir would agree to provide the requested documents, which were all proper under Delaware law. Op. 29-31. But Palantir denied the new demand outright, refusing to even provide KT4 with the documents that govern its rights as a stockholder.

After two months of negotiations, Palantir agreed to provide nothing in response. KT4 then filed suit on the new demand in a complaint that this Court can judicially notice. AR099. KT4 did so to satisfy its urgent need to learn the true value of KT4's more than five million shares of Palantir stock. The

relationship between KT4 and Palantir's current management is severely fractured, and KT4 needs valuation information as quickly as possible so that it can make meaningful decisions about what course of action to take.

**D. KT4's motion to compel.**

As indicated in its opening brief, KT4 has recently filed a motion to compel with the Court of Chancery. KT4 Br. 21. The basis for the motion is that Palantir deliberately altered the books and records it produced in a manner that prevented KT4 from, among other things, using a document-review database to organize the documents and to run searches over them, so that, among other things, it can meaningfully share and discuss them with other stockholders. The motion also addresses Palantir's refusal to produce all the documents related to the secret sales of over 100 million shares of stock by Palantir's Founders, which was required by the Court of Chancery's Order. *See KT4 Partners LLC v. Palantir Techs., Inc.*, C.A. 2017-0177-JRS, Trans. I.D. No. 62279331 (Del. Ch. July 26, 2018).

## ARGUMENT

### I. The Court of Chancery erred in holding that the Demand does not state a valuation purpose.

#### A. The Demand states a valuation purpose.

KT4's opening brief showed that, under this Court's precedent, the Demand adequately stated a valuation purpose. KT4 Br. 22-28. The standard from *Northwest Industries* controls: the issue is whether a demand's purposes are stated with enough specificity "to enable [the corporation], and the courts if necessary, to determine whether there was a reasonable relationship between its purpose . . . and [the stockholder's] interest as a stockholder." *N.W. Indus. v. B.F. Goodrich Co.*, 260 A.2d 428, 429 (Del. 1969); *see also Thomas & Betts Corp. v. Leviton Mfg. Co.*, 685 A.2d 702, 708 n.3 (Del. Ch. 1995) (recognizing standard).

Here, the Demand sought valuation-related information and stated that KT4 wanted this information because Palantir had "improperly prevented disfavored investors from realizing the value of their investments by . . . improperly depriving such investors of information necessary to assess the value of their investments." A1648 (part C.4). That language was specific enough to allow Palantir to determine that KT4 had a valuation purpose. And Palantir did in fact determine that KT4 had a valuation purpose: that is why, as Palantir readily admits, it made a

pre-suit offer of information that it deemed "sufficient for KT4 to value its shares."[4] Palantir Br. 15.

### B. The "surrounding circumstances" confirm that the Demand states a valuation purpose.

But even setting that (dispositive) issue aside, the Court of Chancery should also have considered the "surrounding circumstances" when interpreting the Demand. KT4 Br. 23 (quoting *Weisman v. W. Pac. Indus.*, 344 A.2d 267, 269 (Del. Ch. 1975)). Palantir's response here is devoted to trying to distinguish the facts of specific cases. Palantir Br. 25. But Palantir does not dispute the broad principle from these cases: the "surrounding circumstances" matter. *Id.* In this case, the surrounding circumstances confirm that the Demand sought information so that KT4 could value its shares.

*First*, the Demand must be interpreted in light of KT4's request for information under the IRA, which was sent only a few weeks before the Demand. KT4 Br. 24. Palantir responds by claiming that the IRA request only contained "one request" related to valuation. Palantir Br. 26. Not so: the IRA request

[4] Palantir argues that this Court should apply an abuse of discretion standard when reviewing a trial court's interpretation of a Section 220 demand. But its sole support is a case involving "the denial of a motion for a preliminary injunction [that] was based entirely on a paper record." *Ivanhoe Partners v. Newmont Min. Corp.*, 535 A.2d 1334, 1340 (Del. 1987). The argument seems to be that, because a Section 220 demand is written on a piece of paper, the same standard should apply. But this overlooks *Northwest Industries*, which appeared to review a trial court's interpretation of a demand *de novo*. 260 A.2d at 429.

sought financial reports, budgets, business plans, as well as interviews with Palantir's management regarding "the value of Palantir's equity"—far more than "one request." A1582-84. Palantir's other response is to note the obvious: that the IRA request was "pursuant to a contract," while the Demand was made "under Section 220." Palantir Br. 26. But KT4 is not claiming that the IRA request is formally a part of the Demand—rather, it is a surrounding circumstance that shows that KT4 wanted information so that it could value its shares. *Weisman*, 344 A.2d at 269.

*Second*, the Demand's requests sought information that advanced a valuation purpose. KT4 Br. 24. In response, Palantir claims that KT4 did not have a valuation purpose because it refused to accept Palantir's offers for valuation information. Palantir Br. 26. But Palantir mischaracterizes the nature of its offers. As the Court of Chancery found, the offers were all-or-nothing and were intended to "resolve this litigation." Op. 18. That is, if KT4 accepted Palantir's offer of 16-month old financial statements, a list of officers and directors, a stockholder list, and a few contracts, it would have had to drop every other request, including its requests for Palantir's stock ledger (which a stockholder is presumptively entitled to) and for information about Palantir's routine breaches of the FRCSA and IRA. *Id.*

*Third*, Palantir's retroactive evisceration of KT4's rights under the IRA explains why the Demand's valuation purpose was phrased in terms of Palantir's wrongdoing. KT4 Br. 24. Palantir tries to claim that this argument is akin to "point[ing] to a corporation's actions as a substitute for satisfying" Section 220's form and manner requirements. Palantir Br. 27. But Palantir's wrongful denial of basic information is merely context for the Demand's language—not a "substitute" for the provisions of Section 220.

### C. Even if there was any ambiguity in the Demand, it was cured.

As KT4 showed in its opening brief, this Court should allow stockholders to cure ambiguous wording in a Section 220 demand at trial. KT4 Br. 25. Palantir does not dispute that cure is permissible in some cases—instead, the only dispute is over whether cure is permissible in this case. Palantir Br. 28. But even assuming that the Demand's purposes were vague, that sort of ambiguity should be curable.

A contrary rule would overlook the fact that the parties have already gone through a full trial. Requiring a stockholder to start over, after a case has progressed through the pleadings stage, written discovery, depositions, and a trial with live witnesses, would serve no purpose. Indeed, it would only give a corporation another opportunity to continue raising a stockholders' costs, which appears to be Palantir's strategy with KT4. After two months of fruitless negotiations over KT4's new Section 220 demand for valuation materials, Palantir

refused to provide any information, which has forced KT4 to start from scratch with a new Section 220 case. This shows its true goal: to keep material information from KT4 for as long as possible, all while raising KT4's costs by forcing it to litigate for every single document.

## II. The Court of Chancery abused its discretion by adopting the Jurisdictional Limitation.

As KT4 showed in its opening brief, the Jurisdictional Limitation could prevent KT4 from remedying the very wrongdoing that the Order permitted it to investigate: by requiring KT4 to sue in Delaware, the Jurisdictional Limitation may prevent KT4 from obtaining personal jurisdiction over all necessary defendants. KT4 Br. 29-32. This problem is especially acute for the Founders, who were all directors at one point and who would all almost certainly be necessary parties in any claim brought under the FRCSA. KT4 Br. 30-31. The Jurisdictional Limitation also makes KT4's constitutional right to a jury trial a matter of the Court of Chancery's discretion. KT4 Br. 31. For these reasons, the Court below abused its discretion by imposing it.

Palantir's arguments in response all fail. Palantir first claims that KT4 has no jury rights to protect—arguing that the Order bars KT4 from bringing a legal claim, such as a breach-of-contract or fraud claim. Palantir Br. 34. But in a holding from which Palantir does not appeal, the Court of Chancery held the opposite. The Court's Order provides that KT4 can investigate wrongdoing with respect to KT4's "contractual rights under the FRCSA and IRA." Order ¶ 8. That language plainly authorizes KT4's breach-of-contract investigation (as well as its fraud investigation). The Court's opinion is just as explicit, recognizing that KT4 can bring a "breach claim" after its investigation. Op. 39. Palantir's argument to

the contrary is an attempt to "enlarg[e]" its own rights under the Order and to "lessen[]" those of KT4. *Haley v. Town of Dewey Beach*, 672 A.2d 55, 58 (Del. 1996). Palantir cannot make such an argument without filing a cross appeal.[5] *Id.*; *see also Berger v. Intelident Sols., Inc.*, 906 A.2d 134, 138 (Del. 2006). In the event KT4 brings the "breach claim" contemplated by the Court below, it will have a right to a jury trial, and that constitutional right cannot be a matter of a court's discretion.[6]

As for the possible need to sue necessary parties outside of Delaware, Palantir claims that the Jurisdictional Limitation does not harm KT4 because it believes that KT4 cannot sue the Founders except in their capacities "as fiduciaries," not as "individuals" selling stock in violation of the FRCSA. Palantir Br. 33. While that litigating position no doubt benefits Palantir's Founders, it has no basis in the Order or Delaware law.

*First*, the Order does not support Palantir's distinction between the Founders acting as "individuals" or as "fiduciaries." Indeed, the Order authorizes KT4 to

[5] The Court of Chancery was on firm ground with that holding, as explained *infra* Argument, Section III.

[6] Palantir also claims that KT4 could seek relief under Chancery Rule 60(b) to vindicate its constitutional right to a jury trial. While that would certainly suit Palantir's overarching strategy (another opportunity for it to force KT4 to litigate), it would be completely contrary to judicial economy. Based on the facts that exist now, KT4 has a right to a jury trial, and the Order currently makes that right a matter of the Chancery Court's discretion. There is no reason to wait to correct this ruling later, with a Rule 60(b) motion.

use Palantir's books and records in any suit that arises out of, or relates to, one of KT4's investigations. Order ¶¶ 8, 12-13. That obviously would include a suit against Palantir and the Founders for their routine violations of the FRCSA. *See* Op. 36 & n.135.

*Second*, the distinction between the Founders acting "as individuals" and the Founders acting "as fiduciaries" is artificial. Palantir Br. 33. If the Founders sold their stock in violation of the FRCSA, it is only because they were able to use their positions as fiduciaries to allow the secret sales and to cause Palantir to breach its FRCSA obligations. It is thus impossible to disentangle the Founders as "individuals" (or, more accurately, as selling stockholders) from the Founders as "fiduciaries" when they were acting under the FRCSA—they used their fiduciary status to further their individual interests. In so doing, the Founders, and Palantir, harmed all stockholders party to the FRCSA. KT4 must be able to remedy that harm.

These issues—KT4's need to obtain jurisdiction over necessary parties and its need to preserve its constitutional right to a jury trial—far outweigh any interest Palantir has. Citing to this Court's decision in *United Technologies*, Palantir claims that it needs to litigate in the Court of Chancery because it has an interest in obtaining "consistent rulings" on issues of "Delaware law." Palantir Br. 32. But if that were truly Palantir's concern, it would have adopted a Delaware forum-

selection clause in its bylaws. Moreover, KT4's next suit is likely to enforce its rights under the FRCSA or the IRA, which are governed by California, not Delaware, law. A0046 (§ 9); A0126 (§ 3.2). Finally, Palantir misunderstands what *United Technologies* meant by "consistent rulings." In that case, "the same corporate conduct" that was at issue had already been litigated in a derivative case in the Court of Chancery. *United Techs. Corp. v. Treppel*, 109 A.3d 553, 560 (Del. 2014). Here, there has been no such prior, substantive litigation.

## III. The Court of Chancery abused its discretion by not granting KT4 inspection of books and records relating to Palantir's apparent misconduct with respect to KT4's right of first offer under the IRA.

The Court of Chancery correctly found potential wrongdoing under the IRA: Palantir appears to have conducted new rounds of financing without honoring KT4's right of first offer under the IRA. Op. 38-39. But the Court failed to grant KT4 inspection of any books and records on that issue, without explanation. KT4 Br. 33-36. That was an abuse of discretion under this Court's precedent, which requires a stockholder to "be given enough information to effectively address the problem" it is investigating. *Saito v. McKesson HBOC, Inc.*, 806 A.2d 113, 115 (Del. 2002).

Palantir's arguments in response all fail.

*First*, Palantir claims that "non-compliance with a contract" is not a proper purpose under Section 220. Palantir Br. 37. But as shown above, the Court of Chancery expressly held otherwise, and Palantir did not appeal from that holding. *See supra* Argument Section II; Op. 35. In any event, the Court of Chancery's holding was firmly rooted in precedent. Both this Court, and the Court of Chancery, have held that similar investigations are proper purposes under Section 220. For example, in *Compaq Computer Corp. v. Horton*, this Court held that a stockholder could properly use Section 220 to further fraud claims brought by a subset of stockholders. 631 A.2d 1, 4 (Del. 1993). In line with *Compaq*, the Court

of Chancery, in *Deephaven Risk Arb Trading Ltd. v. UnitedGlobalCom, Inc.*, held that a stockholder could properly use Section 220 to investigate a corporation's breach of contract. 2004 WL 1945546, at *6-7 (Del. Ch. Aug. 30, 2004). The same is true for KT4's investigations into Palantir's breaches of the IRA and FRCSA. Op. 35.

*Second*, Palantir claims that "KT4 did not provide any evidence" to infer wrongdoing in connection with its right of first offer under the IRA. Palantir Br. 38. Again, the Court of Chancery held precisely to the contrary in a holding from which Palantir does not appeal. It found that "KT4 has established a credible basis to investigate Palantir's compliance with the IRA in regard to providing stockholders with notice and the opportunity to exercise the [right of first offer.]" Op. 39. That holding was well founded: Palantir's own documents showed that it conducted several rounds of financing without providing KT4 its right of first offer. *Id.*

*Third*, Palantir argues that KT4 should not be entitled to any further inspection because Palantir has produced "copies of waivers by which Palantir and its investors [secretly] waived both the notice and first offer rights" of KT4. Palantir Br. 39. But whether or not KT4's rights were properly "waived" is an affirmative defense under California law that Palantir must prove in any subsequent breach-of-contract suit—KT4 would have no obligation to prove the

invalidity of the "waivers." *Walton v. City of Red Bluff*, 2 Cal. App. 4th 117, 131 (1991). If KT4 would not have that burden in a merits case, *a fortiori* it cannot have such a burden in a Section 220 proceeding, in which the stockholder must only meet "the lowest possible burden of proof." Op. 27 (citation omitted). For that reason, the Court of Chancery correctly determined that Palantir's "waiver" argument was a merits defense inappropriate in a Section 220 proceeding. Op. 37. Palantir must produce all documents essential to KT4's investigation—not just the documents relevant to its planned affirmative defense.

In any event, the "waivers" that Palantir cites were not in the record before the Court of Chancery and are not properly before the Court. They cannot be a basis for limiting inspection. But even if the "waivers" were in the record, the Court would quickly see that they are dubious. Some of the "waivers" appear to [redacted]—are also likely unenforceable under California contract law. They likely violate the implied covenant of good faith and

fair dealing, which is "one very significant restriction on what might otherwise be a party's unfettered power to amend or terminate [an] agreement." *See Cobb v. Ironwood Country Club*, 233 Cal. App. 4th 960, 965-66 (2015). While this is not the forum to fully argue these issues, the Court should be aware of the doubtful validity of the "waivers," even at this early stage.

## IV. The Court of Chancery erred by not granting KT4 inspection of emails.

KT4's opening brief showed that the Court of Chancery erred by concluding that the Demand did not request emails and that the Court abused its discretion by concluding that emails were not essential to KT4's investigation. KT4 Br. 37-41.

Palantir's argument to the contrary depends on the notion that a Section 220 demand requesting "all books and records" somehow requests something less than "all books and records." Palantir Br. 41-42. That cannot be right—and no other court has adopted similar reasoning. The Demand's specific mention of emails in a catchall, belt-and-suspenders request does not change the fact that "all books and records" means "all books and records," including emails. A1647. This conclusion is bolstered by the Demand's definition of "books and records," which included "electronic documents and information." A1645. Although the Court of Chancery found that this definition is "most reasonably construed as an attempt to reach the company's books and records stored in that format,"[7] that is exactly the point. Emails are books and records stored in electronic format. *Wal-Mart Stores, Inc. v. Indiana Elec. Workers Pension Tr. Fund IBEW*, 95 A.3d 1264, 1273 (Del. 2014).

Palantir's arguments on whether emails are essential to KT4's investigations also fail.

[7] *See* KT4 Br., Ex. C ¶ 4.

*First*, Palantir claims that inspection of emails is "the exception rather than the rule" in Section 220 case. Palantir Br 43. But a stockholder is entitled to "enough information to effectively address the problem" it is investigating no matter what form that information is in. *Saito*, 806 A.2d at 115. If non-email documents "do not allow [the stockholder] to address [its] stated purposes," inspection of emails is necessary, as the Court of Chancery recently recognized. *Mudrick Capital v. Globalstar, Inc*, 2018 WL 3625680, at *9 (Del. Ch. July 30, 2018). Here, Palantir concedes that "there are no [non-email] documents related to the board's consideration of the September 2016 IRA Amendments." Palantir Br. 43. Palantir must therefore produce documents that allow KT4 to "effectively address" Palantir's potential wrongdoing. *Saito*, 806 A.2d at 115. That means emails.

*Second*, Palantir tries to minimize its misconduct in retroactively amending the IRA by claiming that "KT4 has not identified any reason to suspect wrongdoing related to the September 2016 IRA Amendments." Palantir Br. 44. The Court of Chancery disagreed, holding that KT4 had established "a credible basis . . . to suspect wrongdoing with respect to the September 2016 IRA Amendments." Op. 34. Again, if Palantir wanted to challenge that holding, it was obligated to file a cross appeal. *Haley*, 672 A.2d at 58; *Berger*, 906 A.2d at 138. But Palantir did not file one—nor did it engage with the Court of Chancery's well-

supported legal analysis or factual findings. *See* Op. 34. Palantir's bald statement of disagreement cannot be enough.

*Third*, the record already reveals that some of Palantir's misconduct occurred over email: Palantir's in-house counsel sent an email to KT4's counsel designed to mislead KT4. KT4 Br. 41. Palantir tries to whitewash that email, claiming that it merely shows a "corporation communicat[ing] with a stockholder by email." Palantir Br. 45. The Court of Chancery held to the contrary: it described the email as Palantir leading "KT4 to believe that it was considering KT4's information request" before Palantir "pulled the rug" out from under KT4. Op. 34; A1586. Because Palantir was willing to use email to further its wrongdoing, it is likely that other emails exist that address the "crux of [KT4's] stated purposes." *Mudrick Capital*, 2018 WL 3625680, at *9. They must be produced. *Id.*

Given these circumstances, the Court of Chancery abused its discretion by not granting inspection of emails.

## CONCLUSION

For the foregoing reasons, and the reasons in KT4's opening brief, the Court of Chancery's Final Order and Judgment should be reversed in part.


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