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IN THE SUPREME COURT OF THE STATE OF DELAWARE

KT4 PARTNERS LLC, Plaintiff-Below, Appellant, v. PALANTIR TECHNOLOGIES INC., Defendant-Below, Appellee.	)	No. 42, 2021 On Appeal from the Court of Chancery of the State of Delaware, C.A. No. 2017-0177-JRS

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NATURE OF PROCEEDINGS

This appeal is the latest manifestation of what the Court of Chancery appropriately described as "a fundamentally broken shareholder company relationship." (Opening Br., Ex. A at 20:9-12.)[1] Since at least 2015, there has been an openly adverse relationship between Marc Abramowitz, Plaintiff-Appellant KT4 Partners LLC's ("KT4") managing member, and Palantir Technologies Inc. ("Palantir" or the "Company").[2] To date, Mr. Abramowitz and Palantir have squared off in no fewer than six lawsuits filed in Delaware, California and Germany.[3] This adversity first manifested itself when Palantir confronted Mr. Abramowitz with allegations of trade secret theft and misappropriation in 2015, grew with Mr. Abramowitz's claims of tortious interference in late 2015 and early 2016 and, most relevant for this appeal, took on a litigation posture when Mr. Abramowitz had a well-known, aggressive litigator

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[1] Citations to "Opening Br. __" refer to Appellant's Opening Brief.

[2] Palantir was a privately held company from its inception until it made its shares publicly traded through a direct listing on the New York Stock Exchange on September 30, 2020.

[3] Besides this case, three lawsuits remain pending in Delaware and California. *See, e.g.*, *KT4 Partners LLC v. Palantir Techs., Inc.*, C.A. No. N17C-12-212 EMD CCLD (Del. Super.); *Palantir Techs. Inc. v. Abramowitz, et al.*, No. 5:19-cv-06879-BLF (N.D. Cal.); *KT4 Partners LLC v. Palantir Techs., Inc.*, C.A. No. 21-cv-376344 (Cal. Super. Ct.). Palantir also filed suit against Marc Abramowitz in the Regional Court of Munich, Germany, arising out of Abramowitz's misappropriation of Palantir's trade secrets.

send an information request to Palantir in August 2016 seeking extensive information about a variety of topics pursuant to the Company's Investor Rights Agreement ("IRA").

After receiving KT4's IRA demand letter, Palantir amended the IRA to increase the number of shares required to qualify as a Major Investor from 5 million to 10 million and to permit the Company to deny a request for the Company's financial information or inspection if the request was made in bad faith or for an improper purpose (the "IRA Amendments").[4] As multiple Palantir witnesses have already testified, this amendment was undertaken to protect the Company from Abramowitz by preventing him from obtaining the Company's confidential and sensitive information. Palantir's counsel—both in-house and outside—was involved in the IRA Amendments, and it is their communications related to this amendment that KT4 seeks here.

KT4 does not dispute that the communications at issue are privileged. KT4 also does not dispute—because it cannot reasonably do so—that the parties were in an openly adverse posture when those privileged communications occurred. And KT4 does not dispute that witnesses have already testified to the "origin, purpose

[4] The IRA permitted the amendment of its provisions through the consent of a majority of the holders of the Registrable Securities held by Major Investors, which Palantir obtained before amending the IRA. (B018-19 (§ 3.7).)

and need" for the IRA Amendments—the specific topics that the Court of Chancery has held should be subject to inspection in this Section 220 action. KT4 nonetheless requests that it be allowed to pierce Palantir's attorney-client privilege in this Section 220 action through the narrowly construed fiduciary exception to the attorney-client privilege set forth in *Garner v. Wolfinbarger*, 430 F.2d 1093 (5th Cir. 1970). The Court of Chancery rejected this request, and that decision should be affirmed.

First, the Court of Chancery correctly held that KT4's *Garner* motion suffered from a foundational flaw—KT4 lacked a mutuality of interests with Palantir at the time of the privileged communications. (Opening Br., Ex. A at 20:22-23.) This decision comported with Delaware precedent, which uniformly establishes that there must be a mutuality of interests between the stockholder and the company at the time of the privileged communications for the stockholder to later carry the heavy burden of invoking the *Garner* exception.

KT4 urges the Court to dispense with this mutuality of interests requirement, even though it can be traced back to *Garner* itself. According to KT4, as long as the party seeking to pierce the privilege was a stockholder at the time of the privileged communications, it does not matter whether that stockholder and the company—or that stockholder and the company's other stockholders—had directly antagonistic interests at the time of the privileged communications. KT4's

proposed reconstruction of Delaware law would fundamentally harm the interests of the stockholders of Delaware corporations. As this Court has seen time and time again, the interests of a particular stockholder may at times diverge from the interests of the company and its other stockholders. In those circumstances, the company's management must be allowed—indeed, encouraged—to seek legal advice about how to deal with the antagonistic stockholder to protect the interests of the company and its other stockholders. The mutuality of interests requirement exists precisely to address these circumstances, and it would be counter to Delaware policy to eviscerate that protection as KT4 urges the Court to do here.

In applying the correct legal standard, the Court of Chancery carefully reviewed the factual record and concluded that "[t]he divergence of interests as between KT4 and Palantir specifically cannot be understated" (*id.* at 20:1-2), and that "the parties were certainly adverse when the privileged communications regarding the investor solicitation process were made." (*Id.* at 18:6-8.) The court further found that "litigation was likely anticipated over the precise subject of changing Mr. Abramowitz's rights under the IRA." (*Id.* at 18:9-11.) For these reasons alone, the ruling below can and should be affirmed.

Second, the Court of Chancery properly found that, even if there had been a mutuality of interests, KT4's motion suffered from another fatal shortcoming: KT4 failed to carry its heavy and onerous burden of showing good cause to invoke

the *Garner* fiduciary exception. Delaware courts have held that *Garner*'s good cause factors cannot be satisfied where the information sought can be obtained without piercing the sanctity of attorney-client privilege, such as through depositions. In the context of Section 220 actions, where a stockholder may only obtain documents that are necessary and essential to its stated purpose, this requirement that the information sought be unavailable from any other source is particularly important. Based on the testimony of Palantir's witnesses, the Court of Chancery determined that "KT4 has acquired sufficient information regarding the amendment's origin, purpose, and need, and there is, therefore, no need to compel Palantir to provide documents about this issue that are protected by the attorney-client privilege." (Opening Br., Ex. A at 13:9-14.) There is simply no dispute that the origin, purpose and need for the IRA Amendments was to protect the Company's confidential and sensitive information from Marc Abramowitz. KT4 cannot justifiably claim to have good cause to pierce Palantir's privilege to obtain more information on this topic.

SUMMARY OF ARGUMENT

1. **Denied.** The Court of Chancery correctly denied the motion to compel privileged information under the narrow *Garner* fiduciary exception based on a lack of "mutuality of interests" between KT4 and Palantir at the time of the IRA Amendments. A mutuality of interests between the stockholder and company is an essential prerequisite for the *Garner* fiduciary exception under Delaware law. KT4 and Palantir's subjective interests diverged long before the IRA Amendments, and litigation was reasonably anticipated immediately upon the receipt of the August 16, 2016 IRA Demand (defined below). Furthermore, because the privileged communications regarding the IRA Amendments were specifically made for the purpose of protecting the Company from Abramowitz, KT4 was not a stockholder for whose ultimate benefit that advice was sought.

2. **Denied.** The Court of Chancery correctly concluded that KT4 lacked "good cause" for disclosure under the *Garner* exception to privilege because KT4 has already acquired sufficient information regarding the origin, purpose and need for the IRA Amendments through the depositions of multiple Palantir witnesses. The testimony makes clear that the origin, purpose and need for the IRA Amendments was to protect Palantir's confidential information from Marc Abramowitz.

STATEMENT OF FACTS

I. ABRAMOWITZ AND PALANTIR'S RELATIONSHIP

A. Abramowitz's Initial Investment and Early Relationship with Palantir.

Marc Abramowitz, the managing member of KT4 Partners LLC, first invested in Palantir in 2003. *See KT4 Partners LLC v. Palantir Techs., Inc.*, 2018 WL 1023155, at *2 (Del. Ch. Feb. 22, 2018), *aff'd in part*, *rev'd in part and remanded*, 203 A.3d 738 (Del. 2019). Over the next nine years, Abramowitz added more than $2 million to his initial investment. *Id.* During that time, he maintained a close relationship with Palantir and its CEO, Dr. Alexander Karp. *Id.* at *1-2. Abramowitz "was afforded unique access to Palantir's executives" and "visited Palantir at least a dozen times." *Id.* Unbeknownst to Palantir and Dr. Karp at the time, Palantir now alleges that Abramowitz abused this insider access to misappropriate the Company's trade secrets and confidential information.

As a holder of Palantir preferred shares, KT4 was a party to Palantir's IRA. *Id.* at *3. The IRA, together with the Right of First Refusal and Co-Sale Agreement, set forth the rights and obligations of Palantir's stockholders, as well as the circumstances in which those rights can be amended, altered or waived. *Id.* The IRA provided that stockholders that held more than five million shares qualified as Major Investors with a right to inspect certain Palantir books and records. *Id.* *3-4 & n.29.

The rights set forth in the IRA are not unlimited. The IRA clearly states that any provision may be amended or waived "either generally or in a particular instance and either retroactively or prospectively . . . with the written consent of [Palantir] and the holders of a majority of the Registrable Securities." (B018-19 (§ 3.7).)

B. Abramowitz and Palantir's Relationship Is Irreparably Fractured.

In the spring of 2015, the previously warm relationship between Abramowitz and Palantir was irreparably fractured when Palantir learned that Abramowitz had apparently taken advantage of his insider access to misappropriate Palantir's trade secrets. *See KT4 Partners LLC*, 2018 WL 1023155, at *1,*5. Dr. Karp confronted Abramowitz about his alleged misappropriation of Palantir's confidential information and told Abramowitz that his access to Palantir had ended. *Id.* Abramowitz and Palantir's openly adverse relationship would only continue to deteriorate over the next five years.

Following his falling out with Dr. Karp and the Company, and recognizing that his relationship with the Company had been permanently damaged, Abramowitz decided he wanted to exit his investment. *Id.* Abramowitz joined with several other Palantir investors (together with Abramowitz, the "Selling Group") and attempted to sell his stake in Palantir in late-2015 to a Chinese fund called CDH Investments, which was represented by Brooklands Capital Strategies

("Brooklands"). *Id.* at *1, 5. When Brooklands ultimately declined to purchase the Selling Group's shares, Abramowitz blamed Palantir and a third party, Disruptive Technology Advisers LLC ("DTA"). *See KT4 Partners LLC*, 2018 WL 1023155, at *5.

By early 2016, Abramowitz "began assessing filing a lawsuit against Palantir." (A482-483 (Tr. 70:22-71:2).) To that end, in the summer of 2016, Abramowitz retained the law firm of Williams & Connolly in anticipation of litigation against Palantir. *See KT4 Partners LLC*, 2018 WL 1023155, at *5.

On August 16, 2016, Abramowitz's litigation counsel sent Palantir a sweeping and aggressive letter demanding access to 16 categories of highly sensitive documents and information (the "IRA Demand"). (A377-80.) Through the IRA Demand, KT4 sought to investigate alleged misconduct by the Company, including Palantir's alleged interference with KT4's failed attempt to sell its Palantir stock to CDH, which would later form the basis for KT4's tortious interference action in the Delaware Superior Court. (*Id.*) Abramowitz's IRA Demand sought confidential financial materials—including business plans and internal budgets—as well as notices of Palantir's intention to offer stock provided to Major Investors since 2008. (A377-78.) KT4 also sought discussions with Palantir's officers related to 12 additional topics, including every actual or potential offering or sale of Palantir stock, by anyone, over the prior five years.

(A377.) The IRA Demand was the first affirmative step of Abramowitz's long litigation campaign against the Company, and a clear signal to Palantir that litigation was forthcoming.

C. Palantir Takes Steps To Protect the Company from Abramowitz.

Immediately following the receipt of the IRA Demand on August 16, 2020, Palantir began taking steps to protect Palantir's confidential information and the interests of its stockholders as a whole. On September 1, 2016, Palantir amended its IRA in several respects.

First, Palantir amended the IRA to increase the number of shares required to qualify as a Major Investor from 5 million to 10 million. *See KT4 Partners*, 2018 WL 1023155, at *3. *Second*, Palantir amended the IRA to permit the Company to deny a request for the Company's financial information or inspection if the request was made in bad faith or for an improper purpose. *Id.* at *4. *Third*, Palantir amended the IRA to permit the Company to decline to provide Major Investors access to any information that it "reasonably considers to be a trade secret or similar confidential information." *Id.*

As confirmed by multiple Palantir witnesses, the origin, purpose and need for the IRA Amendments was to protect the Company's confidential information from Marc Abramowitz. When current CFO David Glazer was asked why Palantir desired to increase the threshold to trigger information rights under the IRA, he

testified that Palantir "wanted to prevent [Marc Abramowitz] from misappropriating our information." (A527 (Tr. 271:8-15).) He further testified that Palantir's "purpose was in amending so someone that was stealing our trade secrets and misappropriating information wouldn't have access to our most confidential information, our financial data." (*Id.* at 271:20-24.) Similarly, Dr. Karp's Chief of Staff, Gavin Hood, testified that "the purpose of the amendments was to protect Palantir's confidential information from individuals who may have access to that information and who may use it with, you know, bad faith intentions." (A552 (Tr. 157:14-19).) Gavin Hood further explained that the purpose of the IRA Amendments was "prompted by [Palantir's] experience with Mr. Abramowitz" and "the recommendation was to amend the IRA to impose more stringent conditions on relevant shareholders." (*Id.* at 158:19-159:13; *see also* A595-597 (Tr. 250:5-252:7); A536-543 (Tr. 286:13-287:20).)

D. Abramowitz's Litigation Campaign Against Palantir.

Since Dr. Karp first confronted Abramowitz about his misappropriation of Palantir's trade secrets in 2015, Abramowitz has pursued his vendetta against Palantir and fought the Company at every turn. Marc Abramowitz and Palantir are currently engaged in five different lawsuits across Delaware, California and Germany.

At the same time that Palantir amended the IRA, on September 1, 2016, Palantir sued Abramowitz, KT4 and an Abramowitz-affiliated trust in California Superior Court for the theft of Palantir's trade secrets (the "Trade Secret Action"). *See Palantir Techs. Inc. v. Abramowitz, et al.*, No. 5:19-cv-06879-BLF (N.D. Cal.).[5] After KT4 learned of the IRA Amendments, it withdrew the IRA Demand and on September 20, 2016, sent a books and records demand under 8 *Del. C.* § 220 (the "Section 220 Demand") seeking 22 categories of documents for the stated purpose of investigating alleged fraud and mismanagement in connection with a slew of purported misconduct. *See KT4 Partners LLC*, 2018 WL 1023155, at *6.

On September 28, 2016, Palantir rejected the Section 220 Demand on the grounds that KT4 failed to state a proper purpose, among other reasons, but nonetheless attempted to resolve the Section 220 Demand by offering to provide KT4 with Palantir's audited financial statements and a summary capitalization table subject to Palantir's standard non-disclosure agreement. *Id.* at *7. Despite Palantir's attempts to resolve the Section 220 Demand without litigation, KT4 refused Palantir's offers, and on March 8, 2017, KT4 filed this action in the Delaware Court of Chancery (the "Section 220 Action"). *Id.*

[5] Palantir also filed a separate lawsuit against Abramowitz in Germany arising out of his misappropriation of Palantir's trade secrets.

On December 14, 2017, KT4 filed a lawsuit against Palantir and DTA in the Delaware Superior Court arising from many of the same allegations at the center of the Section 220 Action—Palantir's alleged interference in KT4's attempted sale of Palantir stock to CDH in 2015 (the "Tortious Interference Action"). *See KT4 Partners LLC v. Palantir Techs., Inc.*, C.A. No. N17C-12-212 EMD CCLD (Del. Super.). Even after over four years of highly contentious litigation, Abramowitz's campaign against the Company is not over. On February 22, 2021, KT4 filed yet another long-threatened action against Palantir, arising from the alleged breach of KT4's rights under Palantir's First Refusal and Co-Sale Agreements in California Superior Court (the "FRSCA Amendment Action"). *See KT4 Partners LLC v. Palantir Techs., Inc.*, C.A. No. 21-cv-376344 (Cal. Super. Ct.).

All of these lawsuits between Palantir and KT4 remain pending.[6] Simply put, this is no ordinary stockholder-company relationship, and "[t]he divergence of interests as between KT4 and Palantir specifically cannot be understated." (Opening Br., Ex. A at 20:1-2.)

[6] KT4 also filed another Section 220 action against Palantir in August 2018 seeking books and records for the purported purpose of valuing KT4's shares in Palantir stock; the action was concluded in July 2019. *See KT4 Partners LLC v. Palantir Techs., Inc.*, C.A. No. 2018-0596-JRS (Del. Ch.).

II. THE SECTION 220 PROCEEDINGS

A. The Trial and Appeal.

After a one-day trial in the Section 220 Action, on February 22, 2018, the Court of Chancery denied the majority of KT4's inspection requests, but ordered Palantir to produce the identities of Palantir's officers and directors and their dates of service from 2011 through the present, the books and records related to Palantir's annual stockholder meetings and Palantir's audited year-end financial statements since 2011. *KT4 Partners LLC*, 2018 WL 1023155, at *6, 18. The Court of Chancery also ordered Palantir to provide copies of books and records related to the IRA Amendments, but denied KT4's requests to inspect emails relating to the same. *Id.* at 18.

On January 29, 2019, this Court affirmed the Court of Chancery's decision in part, reversed in part and remanded for further proceedings. Specifically, this Court ordered Palantir to produce emails relating to the "origins, purposes, and need" for the IRA Amendments. *KT4 Partners LLC v. Palantir Techs. Inc.*, 203 A.3d 738, 757-58 (Del. 2019).

On July 1, 2019, pursuant to this Court and the Court of Chancery's order, Palantir produced 552 non-privileged documents relating to the origins, purposes and need for the IRA Amendments, as well as the documents used to secure

internal approval for the IRA Amendments.[7] Palantir withheld 159 documents on the grounds that the documents were protected by attorney-client privilege, and produced 71 documents with partial redactions of the privileged materials. (A427-446.)

B. The Court of Chancery's Denial of the *Garner* Motion To Compel.

On February 17, 2020, KT4 moved to compel the production of all non-work product documents on Palantir's privilege log in unredacted form, without limitation.[8]

At the July 23, 2020 hearing on KT4's motion to compel, the Court of Chancery acknowledged that KT4 had not exhausted all available non-privileged avenues of obtaining the information it sought because there were depositions scheduled in the Tortious Interference Action where KT4 would have an opportunity to ask Palantir executives questions about the origins, purposes and

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[7] Palantir was also ordered to produce "[all emails] used to secure internal and investor approvals for the [IRA Amendments], including investors' responses to those solicitations." (A316-317 (¶ 2) (internal quotation marks omitted).)

[8] This is not KT4's first attempt to pierce the Company's attorney-client privilege. KT4 notes in its Opening Brief that it is not seeking privileged material relating to KT4's efforts to sell stock to CDH, (Opening Br. at 30 n.8) but neglects to mention that KT4 previously sought exactly that in the Tortious Interference Action, even going so far as to invoke the crime-fraud exception. The Superior Court found that there was no evidence to support invocation of the crime-fraud exception, and denied KT4's efforts to pierce the Company's privilege. (*See* A491, A493-94 (Tr. 54:1-3, 56:6-57:9).)

need for the IRA Amendments. (*See* A369-372 (Tr. 50:19-51:1).)[9] The Court of Chancery agreed to defer its decision on the motion to compel until after those depositions occurred. (A372 (Tr. 53:16-20).) In the Tortious Interference Action, KT4 proceeded to depose five Palantir executives on the origin, purpose and need for the IRA Amendments, including Colin Anderson, David Glazer, Alexander Karp, Gavin Hood and Kevin Kawasaki. (A510-22; A524-32; A535-44; A546-90; A592-A600.)

With the benefit of the excerpts of the relevant deposition testimony, on December 9, 2020, the Court of Chancery denied KT4's motion to compel in its entirety, reasoning that KT4 failed to meet its burden to satisfy the requirements for invoking the *Garner* fiduciary exception to the attorney-client privilege. (Opening Br., Ex. A at 4:12-14, 13:8-14, 17:7-10.)

First, the Court of Chancery found that KT4 lacked good cause to invoke the *Garner* fiduciary exception because "the depositions sufficiently provide information regarding the origin, need, and purpose of the amendments." (*Id.* at 12:9-12.) There is no dispute that the IRA was amended to protect Palantir's

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[9] Palantir stipulated on the record at the hearing that the Superior Court depositions in the Delaware Tortious Interference Action covering topics related to the origin, purpose and need of the IRA Amendments could be used in the Section 220 Action. (*See* Opening Br., Ex. A at 11:17-24; A345 (Tr. 26:11-17).) The parties submitted the relevant depositions excerpts to the Court of Chancery in advance of its decision. (*See* A381-382; A510-532; B053-54; A533-A600.)

confidential and sensitive information from Marc Abramowitz. (*See* A527 (Tr. 271:10-271:24); A536-543 (Tr. 279:25-287:20); A552-554 (Tr. 157:14-159:13); A595-597 (Tr. 250:5-252:7).) Based on the testimony of Palantir's witnesses, the Court of Chancery determined that "KT4 has acquired sufficient information regarding the amendment's origin, purpose, and need, and there is, therefore, no need to compel Palantir to provide documents about this issue that are protected by the attorney-client privilege." (Opening Br., Ex. A at 13:8-14.)[10]

Second, the Court of Chancery held that "[a]s a prerequisite to Garner's application, there exists a further requirement that the parties maintain a mutuality of interest" (*id.* at 10:5-9), and concluded that KT4 and Palantir did not "maintain[] a mutuality of interest with respect to the [IRA] amendment process." (*Id.* at 20:21-23.) The Court of Chancery explained that "[t]he divergence of interests as between KT4 and Palantir specifically cannot be understated" (*id.* at 20:1-2), and "[t]o put a finer point on it, there existed a fundamentally broken shareholder

[10] The Court of Chancery concluded that the depositions did not provide sufficient information regarding the process and procedure Palantir used to solicit investor approval of the IRA Amendments. (*See* Opening Br., Ex. A at 13:15-14:9.) However, because the Court of Chancery held that KT4 and Palantir lacked a mutuality of interests at the time of the privileged communications, it nonetheless found that KT4 was not entitled to invoke the *Garner* fiduciary exception with respect to those documents. (*See id.* at 20:1-13.)

company relationship between KT4 and Palantir at the time the privileged communications occurred." (*Id.* at 20:9-12.)

Critically, the Court of Chancery explained that "the timing of the development of adversity is the key focus" (*id.* at 17:23-24), and found that "after reviewing this record, the parties were certainly adverse when the privileged communications regarding the investor solicitation process were made, mainly because litigation was likely anticipated over the precise subject of changing Mr. Abramowitz's rights under the IRA." (*Id.* at 18:6-11.)

Following the Court of Chancery's initial ruling, the court conducted an *in camera* review of several documents on Palantir's privilege log and concluded that those documents were properly withheld on the basis of attorney-client privilege. (Opening Br., Ex. B.) The Court of Chancery issued its final order denying the motion to compel on January 1, 2021. (*Id.*)

ARGUMENT

I. THE COURT OF CHANCERY CORRECTLY HELD THAT THE *GARNER* FIDUCIARY EXCEPTION DOES NOT APPLY BECAUSE KT4 AND PALANTIR DID NOT HAVE THE REQUISITE MUTUALITY OF INTERESTS WHEN THE PRIVILEGED COMMUNICATIONS TOOK PLACE

A. Question Presented.

Did the Court of Chancery correctly deny the motion to compel privileged information under the narrow *Garner* fiduciary exception because KT4 and Palantir lacked a mutuality of interests at the time of the IRA Amendments? (A468-73.)

B. Standard of Review.

The Supreme Court "reviews a trial court's application of the attorney-client privilege and work product immunity doctrine *de novo*, insofar as they involve questions of law." *Espinoza v. Hewlett-Packard Co.*, 32 A.3d 365, 371 (Del. 2011) (footnote omitted). However, the Supreme Court reviews fact-intensive, judgment-based determinations of the Court of Chancery for abuse of discretion. *See Alaska Elec. Pension Fund v. Brown*, 988 A.2d 412, 419-20 (Del. 2010) (applying abuse of discretion standard to a "fact-specific inquiry for the application" of attorney-client privilege). A court commits an abuse of discretion only if it has "exceeded the bounds of reason in view of the circumstances, or so ignored recognized rules of law or practice so as to produce injustice." *MCA, Inc.*

v. Matsushita Elec. Indus. Co., 785 A.2d 625, 633-34 (Del. 2001) (internal quotation marks, alterations and citations omitted).

C. Merits of Argument.

This Court has recognized that the *Garner* exception to privilege is "narrow, exacting, and intended to be very difficult to satisfy." *Wal-Mart Stores, Inc. v. Ind. Elec. Workers Pension Tr. Fund IBEW*, 95 A.3d 1264, 1278 (Del. 2014). The attorney-client privilege is "'critical' to 'encourag[ing] full and frank communication between attorneys and their clients and thereby promot[ing] broader public interests in the observance of law and administration of justice,' including where the client is a corporation." *Id.* (alterations in original) (quoting *In re Lyle*, 74 A.3d 654 (Del. 2013) (TABLE)). Attorney-client privilege is essential to the functioning of a corporation, as "management has a legitimate concern that its confidential communications should be allowed to remain confidential." *Metro. Bank & Tr. Co. v. Dovenmuehle Mortg., Inc.*, 2001 WL 1671445, at *2 (Del. Ch. Dec. 20, 2001).

The narrow "fiduciary" exception recognized in *Garner v. Wolfinbarger* does not permit a stockholder to invade the province of attorney-client privilege in all circumstances "merely because those demanding information enjoy the status of stockholders." 430 F.2d 1093, 1103 (5th Cir. 1970). Rather, as the Court of Chancery correctly concluded, "[a]s a prerequisite to *Garner*'s application, there

exists a further requirement that the parties maintain a mutuality of interest." (Opening Br., Ex. A at 10:5-7.) The Court of Chancery also correctly found that KT4 and Palantir did not "maintain[] a mutuality of interest with respect to the [IRA] amendment process." (*Id.* at 20:21-23.)

KT4 presents three erroneous arguments in an attempt to overturn the Court of Chancery's ruling. *First*, KT4 seeks to write the mutuality of interests requirement out of Delaware law, arguing that *Garner* applies as long as there is a fiduciary relationship between the stockholder and company at the time of the privileged communications even if the relationship between the stockholder and the company reflects divergent interests. (Opening Br. at 27-28.) *Second*, KT4 argues that even if there is a mutuality of interest requirement in most cases, that requirement evaporates when *Garner* is applied in the context of Section 220 cases. (Opening Br. at 25-28.) *Third*, KT4 argues that, even if the mutuality of interests requirement applies in Section 220 cases, a stockholder must take an affirmative act challenging a specific corporate action to sever the mutuality of interests between the stockholder and the company. (Opening Br. at 29-31.) KT4's arguments are without merit and, for the reasons set forth below, the Court of Chancery's decision should be affirmed.

1. *A Mutuality of Interests Between the Stockholder and the Company at the Time of the Privileged Communications Is—And Should Be—Required To Invoke the Garner Fiduciary Doctrine.*

The Court of Chancery's ruling that the existence of a mutuality of interests is an essential prerequisite to the *Garner* doctrine was in accord with a long line of Delaware cases. (Opening Br., Ex. A at 10:5-8); *see Cont'l Ins. Co. v. Rutledge & Co.*, 1999 WL 66528, at *2 (Del. Ch. Jan. 26, 1999) ("[M]utuality of interest is a prerequisite to the [*Garner*] exception to the attorney-client privilege doctrine"); *Metro. Bank*, 2001 WL 1671445, at *3 ("The fiduciary duty exception, thus, is based upon a commonality of interest or a 'mutuality of interest' between" the parties); *In re Fuqua Indus., Inc. S'holder Litig.*, 2002 WL 991666, at *3 (Del. Ch. May 2, 2002) ("Before the Court considers whether a showing of good cause compels production of purportedly privileged documents, however, the 'litigant [must] first establish that a mutuality of interest existed between the parties' at the time the disputed communication was made.") (alteration in original) (citation omitted); *In re Freeport-McMoRan Sulphur, Inc. S'holder Litig.*, 2005 WL 225040, at *2 (Del. Ch. Jan. 26, 2005) ("In order to succeed in their motion to compel [under *Garner*], the plaintiffs bear the burden of demonstrating the mutuality of interest.").

Indeed, the threshold requirement that a stockholder and corporation share a mutuality of interests at the time of the privileged communication before the

Garner exception applies can be traced back to *Garner* itself. As the court explained in that initial case, the fiduciary exception should apply where "[t]he representative and the represented have a mutuality of interest in the representative's freely seeking advice when needed and putting it to use when received." 430 F.2d at 1101. By contrast, at the point in time when the interests of the fiduciary and the beneficiary diverge, there is no longer a mutuality of interests and a *Garner* analysis is not appropriate. *Fuqua*, 2002 WL 991666, at *3; *Metro. Bank*, 2001 WL 1671445, at *3 (concluding that even where there had been a common purpose and interest between an individual and a corporation in the past, "once those purposes and interests diverge, the exception no longer applies"); *see also Cont'l Ins.*, 1999 WL 66528, at *2-3.

Critically, this is true even when the corporation continues to owe fiduciary duties to the plaintiff. *See Cont'l Ins.*, 1999 WL 66528, at *2-3; *Fuqua*, 2002 WL 991666, at *3. Once the parties' subjective interests have diverged, *Garner* cannot be invoked even though the fiduciaries continue at that time to owe duties to the stockholders as a whole. *See Cont'l Ins.*, 1999 WL 66528, at *2-3; *Fuqua*, 2002 WL 991666, at *3. As the Court of Chancery aptly explained, "[t]his perspective makes sense as a matter of public policy because when litigation is anticipated with a shareholder, the mutuality of interest with respect to the corporation gives way as to the subject matter of the litigation so that the fiduciary can confer with company

counsel 'about the matters likely to be litigated without fear that the fiduciary duty exception might be invoked to deny continuing confidentiality to those communications.'" (Opening Br., Ex. A at 16:13-21 (quoting *Metro. Bank*, 2001 WL 1671445, at *3).) The Court of Chancery has further emphasized that the mutuality of interests between a stockholder and the company may be severed long before the company reasonably anticipates litigation and has grounds to assert work product privilege. (*See* Opening Br., Ex. A at 17:13-18 (quoting *Cont'l Ins.*, 1999 WL 66528, at *4)); *see also Fuqua*, 2002 WL 991666, at *3 n.19 ("The requirement of a mutuality of interest explains why there is no *Garner*-exception to the work product privilege.").

Through this appeal, KT4 seeks to overturn this mutuality of interests requirement. Given how well established the mutuality of interest requirement is, it is no surprise that KT4 fails to cite a single authority to support its contention that the mutuality of interest requirement does not actually exist. Instead, KT4 misleadingly cites to *Morris v. Spectra Energy Partners (DE) GP, LP* for the proposition that *Garner*'s "only prerequisite . . . is the existence of a fiduciary relationship between the parties in dispute." 2018 WL 2095241, at *6 (Del. Ch. May 7, 2018) (citing Donald J. Wolfe, Jr. & Michael A. Pittenger, *Corporate and Commercial Practice in the Delaware Court of Chancery* § 7.02[c][3] (2016)); (Opening Br. at 22). However, the *Morris* court itself explicitly recognized that

"[w]here there is no mutuality of interest between the parties . . . *Garner* does not apply," and ultimately found that because "the mutuality of interest that underpins the *Garner* exception [did] not exist" in that case, *Garner* was inapplicable. 2018 WL 2095241, at *6.[11]

KT4's citation to *Ward v. Succession of Freeman* similarly undermines its position here. KT4 claims that case held that stockholders may establish good cause under *Garner* even "where some pecuniary interests are necessarily adverse." 854 F.2d 780, 785 (5th Cir. 1988). In fact, that court made clear that the mutuality of interests between shareholders and management is necessarily destroyed at the point in time when a party anticipates litigation, *id.* at 785 at n.2, and explained that where, as here, the stockholder lacks a mutuality of interests with the company and is acting purely to further its own self-interest, "the motivations behind the suit are more suspect, and thus more subject to careful scrutiny, in determining if good cause for suspending the privilege exists," *id.* at 786.

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[11] The Wolfe & Pittenger treatise that the *Morris* court cites, and KT4 purports to rely upon, also explains that "[a]t the point in time when the interests of the fiduciary and beneficiary have diverged to such an extent that there no longer exists such a mutuality of interests, the *Garner* exception will no longer be available." Wolfe & Pittenger, § 7.02[d][4].

Writing the mutuality of interest requirement out of Delaware law would fundamentally harm stockholder interests. Directors and officers of Delaware corporations owe fiduciary duties to all stockholders, not just to any particular stockholder. *See, e.g.*, *In re Nine Sys. Corp. S'holders Litig.*, 2014 WL 4383127, at *36 (Del. Ch. Sept. 4, 2014), *aff'd sub nom. Fuchs v. Wren Hldgs., LLC*, 129 A.3d 882 (Del. 2015) (TABLE). The mutuality of interests requirement recognizes that there may come a time when the interests of a particular stockholder diverge from those of the company, such that the company's management must take steps adverse to *that* stockholder to protect the company to the benefit of *all other* stockholders. In those circumstances, a company "should be able to communicate with [its] counsel about the matters likely to be litigated without fear that the fiduciary duty exception might be invoked to deny continuing confidentiality to those communications." *Metro. Bank*, 2001 WL 1671445, at *3.

Under KT4's proposed standard, a company would be unable to consult with its counsel to take actions to protect itself from a stockholder posing a serious threat to the company's interests without the risk of having to disclose those privileged communications to the very stockholder that the company is seeking to protect itself from down the road. This would have a chilling effect on the full and frank communications between attorneys and their clients, to the detriment of both companies and their stockholders as a whole, and runs contrary to Delaware

courts' recognition "that the management function [of Delaware corporations] includes communications with counsel and that management has a legitimate concern that its confidential communications should be allowed to remain confidential." *Id.* at *2. This outcome is inconsistent with this Court's admonition that the *Garner* fiduciary exception be "narrow, exacting, and . . . very difficult to satisfy." *Wal-Mart*, 95 A.3d at 1278.

2. *Garner's Mutuality of Interests Requirement Applies in Section 220 Cases.*

KT4's assertion that the "mutuality of interests" requirement should not apply in Section 220 cases is equally meritless. (Opening Br. at 25-28.) KT4 concedes that "this Court adopted the *Garner* exception as the law in Delaware in Section 220 cases and plenary proceedings." (Opening Br. at 27 (citing *Wal-Mart*, 95 A.3d at 1278).) And Delaware courts have found that the mutuality of interests requirement applies in Section 220 actions. *See, e.g.*, *Saito v. McKesson HBOC, Inc.*, 2002 WL 31657622, at *13 n.74 (Del. Ch. Nov. 13, 2002) (stating that a stockholder was only entitled to access to privileged documents under *Garner* because it shared a "mutual interest" with the company in a Section 220 action).

KT4 relies solely on *Grimes v. DSC Communications Corp.*, 724 A.2d 561, 563-68 (Del. Ch. 1998)—a case that exclusively analyzed the "good cause" requirement of the *Garner* exception—for the proposition that there is no mutuality of interests requirement in Section 220 cases. But at no point did the *Grimes* court

discuss the mutuality of interests requirement, let alone conclude that it does not apply in Section 220 cases. There was no evidence in that decision that the particular stockholder who was seeking to pierce the privilege had interests that were antagonistic to the company or its other stockholders. Instead, the stockholder was seeking information concerning executive compensation that appeared to be in the interests of all stockholders to explore. *Id.* at 563-64. That the *Wal-Mart* and *Espinoza* courts cited favorably to the analysis of the "good cause" factors in *Grimes* has no bearing on whether the mutuality of interests requirement applies in Section 220 cases. *Wal-Mart*, 95 A.3d at 1277; *Espinoza*, 32 A.3d at 373.

Where Delaware courts *have* addressed the mutuality of interests requirement, they have uniformly held that it is an essential prerequisite to the application of the *Garner* fiduciary exception to attorney-client privilege. *See Cont'l Ins.*, 1999 WL 66528, at *2; *Metro. Bank*, 2001 WL 1671445, at *3; *Fuqua*, 2002 WL 991666, at *3; *In re Freeport*, 2005 WL 225040, at *2; *Morris*, 2018 WL 2095241, at *6. KT4 has not provided any compelling reason why this Court should disregard the mutuality of interests requirement in Section 220 cases. While KT4 argues that "especially in Section 220 cases, all that should be required is a fiduciary relationship at the time of the communications at issue" because the stockholder is purportedly seeking to investigate conduct that impacted all

stockholders (Opening Br. at 27), the Court of Chancery rejected the idea that KT4's demand for documents related to the origins, purpose and need for the IRA Amendments was in the interest of all Palantir stockholders. Specifically, the Court of Chancery explained that "the amendment process was, as acknowledged by Palantir, rightly or wrongly, targeted at Abramowitz" and that many other investors that would have been impacted by the amendment were carved out of the impact through a series of side letters. (Opening Br., Ex. A at 19:20-24.)

Moreover, KT4's assertion that the mutuality of interests requirement should not apply where a stockholder is seeking to benefit all stockholders fundamentally misunderstands the history and function of the *Garner* fiduciary exception to attorney-client privilege. *Garner* and its progeny were derivative lawsuits brought on behalf of the corporation for the benefit of *all* stockholders. *See Garner*, 430 F.2d at 1095, 1101. The relevant inquiry conducted by the courts in those cases was not whether there was a divergence between the interests of *all* stockholders and the company; rather, the courts analyzed whether there was a divergence of interests between the *specific stockholder* seeking to invoke the fiduciary exception and the company. *See Fuqua*, 2002 WL 991666, at *3; *In re Freeport*, 2005 WL 225040, at *2. The same inquiry applies here, and KT4 has not identified any discernible reason to justify abandoning the mutuality of interests requirement in the Section 220 context.

3. *The Court of Chancery Properly Denied KT4's Motion After Finding that the Mutuality of Interests Between Abramowitz and Palantir Was Severed at the Time of the Privileged Communications.*

Finally, KT4 argues that even if the Court below correctly found that the mutuality of interests requirement exists and applies to Section 220 actions, KT4 nonetheless should prevail on this issue. In doing so, KT4 tries to write a new requirement into Delaware law, arguing that a stockholder must take an affirmative act that challenges a specific corporate action to sever the mutuality of interests between the stockholder and the company. (Opening Br. at 29-31.)

That is not the law. A mutuality of interests can be severed in the absence of any affirmative act challenging a specific corporate action. *See BV Gateway Phase II, LLC v. AV Startt, LLC*, C.A. No. 9676-CB, at 47, 64 (Del. Ch. Mar. 21, 2016) (TRANSCRIPT) (finding no mutuality of interests where "there was [an] ongoing dispute [between the parties] for a decade" and "[t]he record here show[ed] a great amount of general antagonism between [the parties]"). All that is required is a "clear-cut dispute" between management and a stockholder based on the parties' subjective interests. *Cont'l Ins.*, 1999 WL 66528, at *2; *Metro. Bank*, 2001 WL 1671445, at *3.[12]

[12] To support its proposed "affirmative act" standard, KT4 conjures up a hypothetical that is completely untethered from the facts of this case. (Opening Br. at 31.) Unlike the relationship between Abramowitz and Palantir at

In re Freeport-McMoRan Sulphur, which KT4 claims made it "explicit" that a stockholder must take an affirmative act challenging a specific corporate action to sever the mutuality of interests between the stockholder and the company, is inapposite.[13] There, the dispute between the stockholder and the company first arose when the plaintiff received a proxy statement announcing the disputed merger. *In re Freeport*, 2005 WL 225040, at *1. "[B]efore the proxy statement, 'there was no identified dispute between the parties, and insufficient indication of a deal that would necessitate litigation.'" *Id.* at *2 (citation omitted). Unlike the stockholder-company relationship in *In re Freeport-McMoRan Sulphur*, here, Abramowitz and Palantir's interests diverged long before the privileged communications at issue were created. (Opening Br., Ex. A at 18:5-11); *see KT4 Partners LLC*, 2018 WL 1023155, at *5.[14]

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the time of the privileged communications, there is no evidence of any existing antagonism between the stockholder and the company in KT4's hypothetical. Nor does KT4's hypothetical contemplate that the officer sought advice from counsel because of this antagonistic relationship for the specific purpose of protecting the company and its other stockholders from that specific stockholder, as is the case here.

[13] Contrary to KT4's assertions, the *Continental Insurance* and *Metropolitan Bank* courts do not even implicitly suggest that an affirmative act challenging a specific action is a necessary prerequisite for a finding that the parties lacked a mutuality of interests. Rather, those courts explicitly stated that all that is required is that the subjective interests of the stockholder and company diverge. *See Cont'l Ins.*, 1999 WL 66528, at *2-3; *Metro. Bank*, 2001 WL 1671445, at *3.

[14] There is also no requirement that an adverse party take an affirmative act challenging a specific action before a party has grounds to claim work product

In any event, the Court of Chancery did not merely find that the relationship between KT4 and Palantir was "generally adverse"; it found that it was adverse "in connection with the specific information requested," such that any actions taken by the Company in response to the August 16, 2016 IRA Demand would be reasonably expected to lead to litigation. (Opening Br., Ex. A at 17:7-10; 20:1-8.) Indeed, the mutuality of interests in the stockholder-company relationship was lacking here because the very nature and purpose of the privileged communications at issue were adverse to Marc Abramowitz and KT4.[15] The August 16, 2016 IRA Demand listing numerous categories of alleged wrongdoing that Abramowitz

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privilege; rather, it is a subjective determination based on when one of the parties reasonably anticipates litigation. *See Carlton Invs. v. TLC Beatrice Int'l Hldgs., Inc.*, 1996 WL 535407, at *2 (Del. Ch. Sept. 17, 1996). KT4 concedes in its Opening Brief that *Garner* does not reach documents protected by work product privilege because such documents were necessarily made at a time when the parties anticipated litigation. (Opening Br. at 28); *see Wal-Mart*, 95 A.3d at 1280-81. Despite this concession, KT4 now asks this Court to adopt a reading of the mutuality of interests requirement that is significantly narrower than the standard for the application of work product protection, in direct conflict with the *In re Freeport-McMoRan Sulphur* court's holding that "the parties' mutuality of interest may diverge earlier than any potential work product protection begins." 2005 WL 225040 at *3. This Court should not do so.

[15] Although KT4 states that it is not seeking documents protected by the work product privilege (Opening Br. at 28), Palantir's invocation of work product protection at the time of the privileged communications is further evidence that Palantir reasonably anticipated litigation with Abramowitz and that the mutuality of interests between Abramowitz and Palantir was lacking. (A427-46.)

sought to investigate pursuant to the IRA was an affirmative act by KT4 sufficient to sever the parties' interests even under KT4's proposed standard.

The Court of Chancery did not abuse its discretion in holding that the mutuality of interests between KT4 and Palantir was severed at the time of the privileged communications.[16] Applying the correct standard, the Court of Chancery appropriately recognized that "there existed a fundamentally broken shareholder company relationship between KT4 and Palantir at the time the privileged communications occurred" (*id.* at 20:9-12) and that there was not a mutuality of interests because "[b]oth Abramowitz and Palantir were abundantly aware–or at least should have been aware at this point–that litigation was on the horizon with respect to Abramowitz's alleged prior theft and Palantir's actions allegedly in response to that action, including its amendment of the IRA" (*id.* at 19:6-12). Because the privileged communications were made for the specific purpose of protecting the Company from KT4 and Abramowitz, after their mutuality of interests had been severed, it cannot possibly be said that KT4 was a stockholder "for whose ultimate benefit that advice was sought."[17] *Fuqua*, 2002 WL 991666, at *3.

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[16] The decision of the Court of Chancery should be upheld regardless of whether this Court applies an abuse of discretion standard or *de novo* review.

[17] KT4 contends that the Court of Chancery based its finding that the mutuality of interest was severed solely on Palantir's subjective view of the likelihood of

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Because KT4 failed to meet its burden of showing a mutuality of interests with Palantir at the time of the privileged communications, the Court of Chancery properly denied KT4's motion to compel.

litigation (Opening Br. at 30), but that is wrong. The Court of Chancery considered the subjective interests of both KT4 and Palantir and determined that "[t]he divergence of interests as between KT4 and Palantir specifically cannot be understated." (Opening Br., Ex. A at 20:1-3.) The Court of Chancery concluded that "[e]ach party knew or should have known litigation between them was on the horizon and Palantir's actions to effectively cut Abramowitz out were at least in part a response to the litigation it knew was coming with Abramowitz." (*Id.* at 20:3-7.)

II. THE COURT OF CHANCERY CORRECTLY HELD THAT KT4 LACKED GOOD CAUSE TO PIERCE THE PRIVILEGE

A. Question Presented.

Did the Court of Chancery correctly conclude that KT4 lacked "good cause" for disclosure under the *Garner* exception to privilege because multiple Palantir witnesses offered deposition testimony that sufficiently provided information about the origin, purpose and need for the IRA Amendments?[18] (A473-76.)

B. Standard of Review.

Although the Supreme Court reviews questions of law, such as the application of attorney-client and work product privilege, *de novo*, *Espinoza*, 32 A.3d at 371, fact-specific determinations of the Court of Chancery, including the application of facts to exceptions to attorney-client privilege, are reviewed for abuse of discretion. *See, e.g.*, *Brown*, 988 A.2d at 419.

C. Merits of Argument.

Even if KT4 could establish the requisite mutuality of interests—which, for the reasons stated above, it cannot—KT4 has failed to show that the Court of Chancery abused its discretion in concluding that KT4 lacked "good cause" to invoke the *Garner* exception because the depositions of Palantir witnesses

[18] If this Court affirms the Court of Chancery's decision as to mutuality of interests, it need not address the question of whether the Court of Chancery correctly held that KT4 lacked good cause to invoke the *Garner* exception.

provided sufficient information regarding the origin, purpose and need for the IRA Amendments.[19]

Given the generally inviolable nature of the attorney-client privilege, piercing that privilege by way of the *Garner* doctrine is exceedingly difficult and subject to a heightened and rigorous standard. *See In re Facebook, Inc. Section 220 Litig.*, 2019 WL 2320842, at *18 n.184 (Del. Ch. May 31, 2019) (holding that parties invoking *Garner*'s "narrow" exception must meet a "heavy burden"); *Wal-Mart*, 95 A.3d at 1278. Once mutuality of interests has been established, the party must then demonstrate "good cause" for the invasion of the privilege by satisfying several factors delineated by *Garner* and its progeny. *See Salberg v. Genworth Fin., Inc.*, 2017 WL 3499807, at *5 (Del. Ch. July 27, 2017). When assessing good cause under *Garner*, the Delaware courts have identified three factors of "particular significance": "(1) the colorability of the claim; (2) the extent to which the communication is identified versus the extent to which the shareholders are blindly fishing; and (3) the apparent necessity or desirability of shareholders

[19] KT4 similarly lacks good cause to obtain privileged communications soliciting stockholder consent for the IRA Amendments because Palantir has already produced numerous documents showing the process and procedures used to solicit investor consent for the amendments, and because Palantir witnesses testified that Palantir's legal team coordinated outreach to investors to walk through the proposed amendments and to explain that the objective of the amendments was to protect Palantir's confidential information. (A582-583 (Tr. 187:17-20; 188:10-20); A595-599 (Tr. 250:11-17; 251:2-10; 252:3-7).)

having the information and availability of it from other sources." *Buttonwood Tree Value P'rs, L.P. v. R.L. Polk & Co.*, 2018 WL 346036, at *3 (Del. Ch. Jan. 10, 2018) (citation omitted).

Whether the privileged information sought is unavailable from other sources has been described as "the most important" of the *Garner* factors. *Id.* at *5 n.24 (citation omitted); *Bray v. Okla. Publ'g Co.*, 1990 WL 108313, at *2 (Del. Ch. July 26, 1990) (noting that, while the plaintiffs had asserted a colorable claim and were not engaged in a fishing expedition, "these factors [are not] sufficient to establish good cause. One of the more significant factors in the balancing test, as I see it, is the necessity of the information and its availability from other sources. Based upon my in camera review of the documents, I am satisfied that the Intervenor can obtain the information in the privileged documents from other sources.").

For that reason, when the information sought can be obtained through depositions without piercing the sanctity of attorney-client privilege, Delaware courts have concluded that *Garner*'s good cause factors are not satisfied as a matter of law. *See Buttonwood Tree*, 2018 WL 346036, at *5 ("[I]nformation found in privileged communications is available from other sources when depositions may allow a stockholder-plaintiff to obtain the information without

intruding on the attorney-client privilege."); *In re Fuqua Indus., Inc.*, 1999 WL 959182, at *3 (Del. Ch. Sept. 17, 1999).

In connection with a separate lawsuit, KT4 has deposed five Palantir executives on the issue of the origin, purpose and need for the IRA Amendments. KT4 suggests that Palantir's witnesses' testimony on the origin, purpose and need for the IRA Amendments was "vague" and evasive. (Opening Br. at 34.) But the testimony is in fact quite clear that the origin, need and purpose of the IRA Amendments was to protect the Company and its confidential information from Marc Abramowitz and KT4. (Opening Br., Ex. A at 13:8-14.) For example, when asked why Palantir desired to increase the threshold to trigger information rights under the IRA, current CFO David Glazer stated: "My understanding was that we wanted to prevent [Marc Abramowitz] from misappropriating our information." (A527 (Tr. 271:10-15).) Mr. Glazer further testified that Palantir's "purpose was in amending so someone that was stealing our trade secrets and misappropriating information wouldn't have access to our most confidential information, our financial data." (*Id.* at 271:16-24.) Furthermore, Dr. Karp's Chief of Staff, Gavin Hood, testified that "the purpose of the amendments was to protect Palantir's confidential information from individuals who may have access to that information and who may use it with, you know, bad faith intentions." (A552 (Tr. 157:14-19).) Gavin Hood further explained that the purpose of the IRA Amendments was

"prompted by [Palantir's] experience with Mr. Abramowitz" and "the recommendation was to amend the IRA to impose more stringent conditions on relevant shareholders." (*Id.* at 158:19-159:13.)[20]

Accordingly, the Court of Chancery concluded that "through relevant deposition testimony . . . KT4 has acquired sufficient information regarding the amendment's origin, purpose, and need, and there is, therefore, no need to compel Palantir to provide documents about this issue that are protected by the attorney-client privilege." (Opening Br., Ex. A at 13:8-14.) KT4 thus does not need to invade Palantir's attorney-client privilege to obtain information that it has already received.[21] This is particularly true in the Section 220 context, where a stockholder

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[20] KT4 claims that only two Palantir witnesses testified about the origin, purpose and need of the IRA Amendments. That is incorrect. All five Palantir witnesses offered testimony as to the origin, purpose and need of the IRA Amendments. (*See* A595-597 (Tr. 250:5-252:7) (testifying that "[t]he primary reason for the amendment was to increase the company's ability to protect ourself from people who may use our information against us"); A536-544 (Tr. 279:25-287:20) (explaining that Dr. Karp "asked [Palantir's] very capable legal counsel to take all steps to protect [the company by amending the IRA] from what [they] suspected, and unfortunately correctly came to be, an enormous breach of trust" by Marc Abramowitz); *see also* A527 (Tr. 271:10-271:24); A517 (Tr. 272:16-22); A552-554 (Tr. 157:14-159:13).)

[21] To be clear, although the Court of Chancery correctly found that this factor was dispositive of the analysis, the remaining *Garner* factors tip against a finding that KT4 has good cause to invade attorney-client privilege, including, among others, that KT4 is engaging in a blind fishing expedition by seeking the production of every single document that Palantir withheld on the basis of attorney-client privilege on Palantir's privilege log. *See Fuqua*, 1999 WL 959182, at *4 (finding plaintiffs had failed to satisfy this factor because they did not

seeking to inspect books and records may only obtain documents that are "necessary and essential" to its stated purpose, and only if that information "is unavailable from another source." *Wal-Mart*, 95 A.3d at 1271 (quoting *Espinoza*, 32 A.3d at 371-72.)

Despite having received direct testimony regarding the origin, purpose and need for the IRA Amendments, KT4 remains unsatisfied, complaining about a supposed lack of detail in the testimony of Palantir's witnesses and suggesting that the deposition testimony does not provide the "best evidence" of the facts. (Opening Br. at 33-35.) Neither complaint is sufficient to establish an abuse of discretion that warrants the reversal of the Court of Chancery's holding.

First, KT4 contends that the deposition testimony was insufficient because witnesses lacked specific recollection of certain events occurring nearly five years ago. The only case cited in support of this proposition, *In re Fuqua*, is inapposite. There, the plaintiffs filed an initial unsuccessful motion to compel the production of privileged documents, which was denied because the court noted that "further depositions may provide the answers [plaintiffs] seek without infringing upon the attorney-client privilege." 2002 WL 991666, at *4 (citation omitted). After the depositions occurred, the court found that the plaintiffs were unable to obtain any

identify specific documents); *Oliver v. Boston Univ.*, 2004 WL 944319, at *3 (Del. Ch. Apr. 26, 2004) (same).

information about the subject of the privileged communications. *Id.* Here, by contrast, the Court of Chancery reviewed the relevant deposition excerpts and determined that Palantir witnesses testified directly to the origins, purpose and need for the IRA Amendments.

Second, KT4 argues that the deposition testimony reviewed by the Court of Chancery does not provide the "best evidence" of the facts. Accepting KT4's argument that it is entitled to discover privileged documents created contemporaneously with the events at issue merely because those documents might constitute better evidence than deposition testimony taken at a later date would open the door to this argument in every case where deposition testimony is taken in lieu of producing privileged documents, which directly contradicts Delaware courts' repeated holdings that deposition testimony is a well-accepted means of "allow[ing] a stockholder-plaintiff to obtain the information without intruding on the attorney-client privilege." *See Buttonwood Tree*, 2018 WL 346036, at *5; *Fuqua*, 1999 WL 959182, at *3. Moreover, KT4 is not entitled to the "best evidence" in this summary Section 220 proceeding. KT4 is only entitled to the documents that are necessary and essential to its stated purpose. *KT4 Partners LLC*, 2018 WL 1023155, at *6.

KT4's only cited authority, *Lee v. Engle*, cuts directly against its argument. (Opening Br. at 34.) While the *Lee* court concluded that privileged "documents

may be the best evidence of the facts" where those facts would be unavailable from any other source, the court also acknowledged that depositions of the company's directors could serve as a "possible alternative to th[e] information" contained in the documents, noting only that such depositions would be "avoidable, unnecessarily cumbersome and expensive." 1995 WL 761222, at *3 (Del. Ch. Dec. 15, 1995). Here, the depositions have already occurred, and the Court of Chancery properly found that they provided sufficient information about the origin, purpose and need for the IRA Amendments.

* * *

Because KT4 has already acquired sufficient information regarding the origin, purpose and need for the IRA Amendments through the depositions of multiple Palantir witnesses, the Court of Chancery correctly held that KT4 lacked good cause to invoke the *Garner* fiduciary exception to attorney-client privilege.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Chancery should be affirmed.

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Dated: May 3, 2021

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 3, 2021, a copy of the foregoing was served by File & Serve*Xpress* on the following attorneys of record:

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