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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 in C.A. No. 2017-0177-JRS

APPELLANT'S OPENING BRIEF

OF COUNSEL:

Barry S. Simon
Jonathan B. Pitt
Stephen L. Wohlgemuth
WILLIAMS & CONNOLLY LLP
725 Twelfth Street NW
Washington, DC 20005
(202) 434-5000 (telephone)
(202) 434-5029 (facsimile)

DALTON & ASSOCIATES, P.A.

Bartholomew J. Dalton, Esq. (#808)
Michael C. Dalton, Esq. (#6272)
Cool Spring Meeting House
1106 West 10th Street
Wilmington, Delaware 19806
(302) 652-2050 (telephone)
(302) 652-0687 (facsimile)
bdalton@dalton.law
mdalton@dalton.law

Attorneys for Plaintiff Below, Appellant KT4 Partners LLC

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NATURE OF THE PROCEEDINGS

This appeal arises out of a books-and-records case that Plaintiff-Appellant KT4 Partners LLC filed under 8 *Del. C.* § 220 against Defendant-Appellee Palantir Technologies Inc. The only issues in this appeal pertain to the fiduciary exception to the attorney-client privilege articulated in *Garner v. Wolfinbarger*, 430 F.2d 1093 (5th Cir. 1970).

In August 2016, KT4 demanded information from Palantir under its Investors' Rights Agreement ("IRA"). KT4's demand sought basic financial information about the company and information about apparent misconduct at Palantir, including Palantir's interference with KT4's effort to sell its Palantir stock to a Chinese investment firm called CDH. Instead of providing the information, Palantir procured two amendments to the IRA that purported to retroactively strip KT4 of its rights under the Agreement ("IRA Amendments"). At the same time, Palantir filed a lawsuit for misappropriation of trade secrets against KT4 and Marc Abramowitz, KT4's managing member. Palantir's misappropriation suit came out of the blue as it was based on patent applications that Abramowitz told Palantir about years earlier and that had been in the public domain for months.

After learning of the purported amendments, KT4 withdrew the IRA Demand and served a Section 220 demand. After Palantir rejected the Section 220 demand, KT4 filed a books-and-records action. After a trial, the Court of Chancery found

that KT4 had established a credible basis to infer wrongdoing as to, among other issues, Palantir's conduct in procuring the IRA Amendments. The Court of Chancery also ordered Palantir to produce books and records relating to the Amendments, among other issues. As to KT4's other requests, the Court of Chancery granted inspection on some and denied others, including KT4's requests relating to its valuation purpose and to Palantir's interference with the potential sale to CDH. Palantir's interference with the potential sale to CDH is now the subject of a tortious interference case that is pending in the Delaware Superior Court.

As to the IRA Amendments, the Court of Chancery required Palantir to produce only board-level documents pertaining to the apparent wrongdoing, not emails. On appeal, however, this Court held that in light of the complete absence of any board-level documents relating to the Amendments (a topic as to which, this Court noted, Palantir had made inaccurate implicit representations to the Court of Chancery), it was error not to require Palantir to produce emails relating to: (1) the "origins, purposes, and need" for the Amendments, and (2) internal and external approvals for the Amendments. Palantir thereafter produced roughly 500 emails—none of which shed any light at all on either of those topics. The only documents on those subjects that were identified by Palantir were withheld as privileged under either the attorney-client privilege, or both the attorney-client privilege and work-product doctrine.

KT4 then moved to compel Palantir to produce some of those documents under the fiduciary exception to the attorney-client privilege articulated in *Garner*, and demonstrated that every *Garner* factor supported production. KT4's motion sought only documents that were withheld solely based on the attorney-client privilege and did not seek documents as to which work-product was also asserted. Palantir opposed, claiming that KT4 and Palantir lacked a "mutuality of interest" under *Garner* because their relationship was "deeply fractured and adverse" at the time of the Amendments as a result of the misappropriation allegations against Abramowitz.

But during the hearing on KT4's motion, Palantir came up with a new argument: according to Palantir, deposition testimony in KT4's tortious interference case against Palantir would directly answer KT4's questions about the IRA Amendments and, therefore, remove the need for disclosure of privileged documents under *Garner*. Those depositions went forward and, when asked about the IRA Amendments, Palantir's witnesses disclaimed any recollection of specifics. Two of them testified in general terms that the Amendments were related to a desire to keep Palantir's confidential information away from Abramowitz, but were unable to provide any specifics.

While it was undisputed that KT4 had a colorable claim of wrongdoing relating to the IRA Amendments and that Palantir's management owed fiduciary

duties to KT4 as a current stockholder, the Court of Chancery nevertheless denied the motion. The Court addressed the deposition issue first, finding that the testimony was sufficient to provide information regarding the origins, need, and purpose of the Amendments, but that the depositions were not sufficient as to the external (or investor) approval process. But the Court of Chancery still found that, even as to that issue, *Garner* did not apply because there was no mutuality of interest between the parties at the time Palantir procured the Amendments.

Although the Court of Chancery rejected Palantir's argument that it is "enough for KT4 and Palantir to be generally adverse [in order] to disable the *Garner* exception," that Court found that, at the time Palantir was procuring the Amendments, litigation over the Amendments was likely. The Court of Chancery found this to be the case because deposition testimony revealed that the Amendments were, "rightly or wrongly, targeted at Abramowitz." The Court of Chancery concluded that the purported motivation behind the Amendments, as well as the fact that KT4 sent the IRA Demand (which merely sought information to which KT4 was contractually entitled), was enough to render the parties' relationship "fundamentally broken" and to make litigation over the Amendments likely. The Court reached that conclusion even though Palantir's management owed KT4 a fiduciary duty at the time it procured the Amendments and even though the

Amendments, by their plain terms, affected stockholders other than KT4. The Court of Chancery therefore denied KT4's request for the documents.

This appeal followed.

SUMMARY OF THE ARGUMENT

1. The Court of Chancery erred by denying the motion to compel based on a lack of "mutuality of interest" under *Garner* between KT4 and Palantir as to the IRA Amendments. To the contrary, *Garner*'s only prerequisite is a fiduciary relationship between the company's management and the stockholder at the time of the privileged communications. That relationship indisputably existed here.

But even if something more than a fiduciary relationship is required to demonstrate a "mutuality of interest," the Court of Chancery still erred. Regardless of what is required in other contexts, in Section 220 cases, both this Court and the Court of Chancery have indicated that a fiduciary relationship at the time of the communications is *Garner*'s only threshold requirement. Moreover, the Court of Chancery's holding below is inconsistent with authority that recognizes that, before mutuality can be severed, a stockholder must affirmatively challenge, or at least consider litigation regarding, the corporate action at issue. Here, however, KT4 was not even *aware* of the surreptitiously procured IRA Amendments until after most of the communications at issue occurred, and it did not take any affirmative act to question them until at least September 20, 2016, when it served its Section 220 demand.

2. The Court of Chancery also erred by concluding that the depositions of certain Palantir witnesses sufficed to provide KT4 with information about the

"origins, need, and purposes" of the IRA Amendments. Instead, the testimony demonstrates good cause for disclosure under *Garner*. The depositions did not provide any specific information about the purpose or origins of the IRA Amendments. At most, the witnesses testified—without any specifics or foundation—that the Amendments were meant to deprive Abramowitz of the information to which he was contractually entitled.

But Palantir has never represented—and the Court of Chancery has never found—that those foggy recollections reflect an accurate and complete account of the purpose or origins of the Amendments. The witnesses—including percipient witnesses and Palantir's 30(b)(6) representative—provided no detail whatsoever beyond their naked assertion that the purpose of the Amendments was to deprive Abramowitz of information. They recalled none of the events surrounding the Amendments, nor any contemporaneous communications.

Palantir's witnesses, moreover, refused to answer the most critical questions, asserting the attorney-client privilege. In other words, even in the depositions that Palantir argued should obviate the need to produce privileged documents, Palantir's witnesses hid behind the same privilege to avoid answering questions regarding the IRA Amendments. There can therefore be no doubt that information about the Amendments is available only from the documents withheld as privileged. It was error for the Court of Chancery to fail to order their production.

STATEMENT OF FACTS

A. The Parties' Relationship

KT4's managing member, Marc Abramowitz, began investing in Palantir shortly after its founding. *KT4 Partners LLC v. Palantir Techs., Inc.*, No. CV 2017-0177-JRS, 2018 WL 1023155, at *2 (Del. Ch. Feb. 22, 2018), *judgment entered*, (Del. Ch. 2018), *modified*, (Del. Ch. 2020), and *aff'd in part, rev'd in part and remanded*, 203 A.3d 738 (Del. 2019). Over the next several years, Abramowitz maintained a good relationship with the company. *Id*. During this time, Abramowitz increased his investment in Palantir such that KT4 was a record holder of nearly 5.6 million shares of Palantir common and preferred stock.[1] *Id*. *2-*3. As an inducement for these investments, Palantir and its Founders granted KT4 and other stockholders certain contractual rights, including rights under the IRA. Under the IRA, all stockholders with more than 5 million shares qualified as "Major Investors" and had the right to inspect Palantir's books and records and to discuss Palantir's "affairs, finances and accounts" with management. *Id*. *3-*4, n.29. "Major Investors" were also granted a "right of first offer" over Palantir's future rounds of financing under certain circumstances. *Id.*

[1] KT4 sold most but not all of these shares before Palantir became a public company in 2020.

In the summer of 2015, CEO Alex Karp accused Abramowitz of stealing Palantir's confidential information, in a call where Karp "verbally abused" Abramowitz "in a manner that [Abramowitz] thought was irrational, somewhat unhinged, and completely contradictory to any relationship [he] had had with [Karp] in the past." *Id*. at *5. Abramowitz immediately decided to sell his position in Palantir. A088-A089. Months later, KT4 arranged to sell all of its shares to Brooklands Capital Strategies, a special purpose vehicle that was representing CDH, a Chinese investment group. A108-A123; *Palantir*, 2018 WL 1023155, at *5. In December 2015, however, the proposed sale to CDH fell apart because Palantir and its broker intentionally interfered with the transaction. A066.

At that point, Abramowitz no longer trusted Palantir's management and wanted information so that he could manage his significant holdings in the company. A073-A074. Because Palantir provided KT4 with "virtually nothing" about its governance or financial performance and had never held a single stockholder meeting during its entire existence, Abramowitz turned to the Investors' Rights Agreement. A074.

B. The IRA Demand and the IRA Amendments

In August 2016, KT4 sent Palantir a demand for information under the IRA, seeking information relating to Palantir's financial performance and potential misconduct. A377-A380. The request sought financial and governance information

such as financial reports, income statements, budgets, and business plans, as well as Palantir's interference with the potential sale to CDH and other potential wrongdoing; it also sought, as was KT4's right, an opportunity to interview Palantir executives about the company's "financial performance" and the value of Palantir's equity. *Palantir*, 2018 WL 1023155, at *5, n.50; A377-A380.

Palantir did not respond to KT4's request in good faith: Palantir's general counsel represented to KT4 that Palantir would respond to the request "soon," but, at that same time, Palantir was hastily preparing two Amendments to the IRA that purported to strip KT4 of its contractual right to information. A277. The first Amendment raised the Major Investor threshold to 10 million shares, which excluded not only KT4's 5.6 million shares, but affected other Palantir shareholders who held similar positions or who may have wanted to increase their position to become "Major Investors." *See Palantir*, 2018 WL 1023155, at *3-*4. By changing the definition of "Major Investor," the Amendment also circumscribed the rights of Palantir's shareholders to receive a right of first offer in any subsequent round of financing by Palantir. *Id*. at *4. The second Amendment enabled Palantir (together with a majority vote of Major Investors shareholders) to deny a Major Investor's request for information if Palantir considered the request to be made in "bad faith" or regarded the requested information to be a trade secret. *Id*.

Tellingly, the same day as the Amendments were effective, Palantir sued Abramowitz, KT4, and an Abramowitz charitable trust in California state court alleging that Abramowitz misappropriated Palantir's trade secrets by filing certain patent applications. *Id.* at *6. Notwithstanding that Palantir had known about Abramowitz's patent applications for years, and the applications had been in the public domain since April and May 2016, that complaint was the first time Abramowitz had heard about Palantir's allegations of "theft" since Karp's call, which had occurred over one year earlier.[2]

Palantir's California complaint also included a claim seeking a judgment declaring that KT4 did not have rights under the IRA. A288. This complaint was the first time KT4 learned that there was any amendment to the IRA that might adversely affect its rights under a fundamental corporate governance document. Although the complaint referred to the fact that the IRA had been amended, it did not attach a copy of any amendment. *Id.* Palantir refused to provide Abramowitz with a copy of the Amendments until after the Section 220 case was filed, in March

[2] After Palantir added a federal RICO claim to its misappropriation complaint, the case was removed to federal court. That complaint alleged that Palantir became aware that Abramowitz had or would file patent applications in the fall of 2014 but failed to protect its purported trade secrets because Abramowitz allegedly told the company that the applications were for Palantir's "benefit." In the context of ruling on a motion to dismiss, the federal district court described that allegation as "borderline preposterous." *Palantir Techs. Inc. v. Abramowitz*, No. 19-CV-06879-BLF, ECF 103 (N.D. Cal. Jul. 13, 2020).

2017. It was only at that time that KT4 learned that there were two Amendments not one, and what the actual terms of the Amendments were.

C. The Trial and the First Appeal

After learning of the Amendments, KT4 withdrew the IRA Demand, mooting Palantir's declaratory judgment claim—which Palantir subsequently voluntarily dismissed. A298-A299. On September 20, 2016, KT4 served a demand under Section 220, seeking books and records relating to, *inter alia*, the September 1, 2016 amendment to the IRA. *Palantir*, 2018 WL 1023155, at *6. After a one-day trial, the Court of Chancery granted KT4 the right to inspect all board-level documents—not emails—"relating to any amendment or purportedly retroactive amendment to the Investors' Rights Agreement made by Palantir or its stockholders on September 1, 2016." A303.

In reaching this conclusion, the Court first held that KT4 had a "proper purpose" under Section 220 because the IRA Amendments "undeniably" affected the rights of KT4 and other stockholders:

> [I]t appears from the evidence that Palantir has both prospectively and retroactively foreclosed certain stockholders' contractual rights to obtain information about Palantir. Palantir's September 2016 IRA Amendments eviscerated KT4's (and other similarly situated stockholders') contractual information rights after KT4 sought to exercise those rights. Investigating this potential wrongdoing is undeniably related to KT4's interest as a stockholder.

Palantir, 2018 WL 1023155, at *12.

The Court then held that KT4 had a credible basis to infer wrongdoing by Palantir relating to the Amendments. First, the Court noted that Palantir used contractual rights to information to improperly "pick and choose" which stockholders get access to material information about the company. *Id.* Second, the Court found further evidence of potential wrongdoing from the "circumstantial evidence" surrounding the Amendments and from *Palantir's explanation for the Amendments*, which the Court declined to credit:

> Palantir explains it executed the September 2016 IRA Amendments because Abramowitz requested broad swaths of confidential information after Palantir accused him of theft of trade secrets. Had Palantir been primarily concerned with Abramowitz obtaining confidential information, it could have denied certain requests and at least made an effort to provide information regarding the non-sensitive topics. Instead, Palantir led KT4 to believe that it was considering KT4's information request, and then pulled the rug out from under KT4 (and other similarly situated stockholders) eleven days later by eviscerating its contractual right to seek information.

Id. at *13.

The Court of Chancery also found that KT4 would consider filing a derivative claim arising out of its inspection, if warranted by the documents, although KT4 did not "commit[]" to "launch litigation against Palantir" irrespective of what the documents revealed. *Id.* at *11.

As to other issues raised in the demand: the Court of Chancery also found potential wrongdoing by Palantir with respect to the sale of Palantir stock by

Palantir's Founders[3] and Palantir's failure to hold annual meetings. *Id*. at *12, *15. The Court denied inspection as to other issues, including KT4's effort to satisfy a valuation purpose and to investigate interference with the CDH transaction. *Id*. at *16. KT4 filed suit against Palantir in the Delaware Superior Court, alleging that Palantir tortiously interfered with the CDH transaction. *KT4 Partners LLC v. Palantir Techs., Inc.*, C.A. No. N17C-12-212-EMD CCLD, (Del. Super. Ct. Dec. 14, 2017).

KT4 appealed, and this Court affirmed in part and reversed in part.[4] As is relevant here, this Court expanded the scope of inspection into the IRA Amendments. It held that Palantir had made an inaccurate "implicit representation" to the Court of Chancery about "the types of books and records in its possession"—Palantir had no "board-level" documents relating to the IRA Amendments. *KT4 Partners LLC v. Palantir Techs. Inc.,* 203 A.3d 738, 757-58 (Del. 2019). This Court

[3] KT4 recently filed suit against Palantir and certain of its Founders (including Karp and Peter Thiel, Palantir's chairman) in the California Superior Court. That suit arises out of the investigation authorized by the Court of Chancery.

[4] KT4 also appealed the Court of Chancery's holding that KT4's demand did not state a valuation purpose and the Court of Chancery's imposition of a jurisdictional requirement. KT4 filed a second Section 220 action solely relating to its valuation purpose. After extensive pre-litigation correspondence in which Palantir threatened sanctions against KT4 if it pursued the second Section 220 action, Palantir changed course in its pre-trial brief and agreed to certain inspection. The Court ordered inspection beyond what Palantir agreed to and entered judgment in KT4's favor. *KT4 Partners LLC v. Palantir Techs., Inc.*, C.A. No. 2018-0596-JRS (Del. Ch.).

also held that the Court of Chancery, which likely relied on that representation, erred by not permitting inspection of emails relating to the IRA Amendments. *Id*. This Court also reiterated that KT4 was entitled to inspect documents relating to "the origins, purposes, and need for the amendments, and [communications] used to secure internal and investor approvals for the amendments." *Id*. at 757.

D. Proceedings on Remand

On remand, the Court of Chancery entered an Order implementing this Court's holdings. A316-A317. In response, Palantir produced about 500 emails and attachments. These emails were largely ministerial in nature, relating, for example, to requests for a telephone call or the exchange of signature pages. The emails also showed that, by design, most of the substantive communications with investors about the amendments occurred over the phone. For example, when a Palantir executive attempted to obtain the consent of Founder's Fund, controlled by Palantir chairman of the board, Peter Thiel, he stated that Alex Karp had "tried [to] reach you [Thiel] and left a voicemail." A424. The executive also made clear that Thiel should call him or Karp if he needed "more information." *Id*.

The emails also showed that Palantir made side deals with several other stockholders in connection with the Amendments. The essential terms of the deals were straightforward: a handful of stockholders—but by no means all stockholders—were expressly carved out from Amendments so that they could

receive information even if they held fewer than 10 million shares. A413-A422. Some of the "chosen" shareholders would have been unaffected by the Amendments. KT4 and many others did not get the same treatment. They were required to have at least 10 million shares to be eligible to receive information.

The emails and privilege log show that Palantir acted quickly in order to execute the IRA Amendments. Within a week of receiving KT4's IRA demand, Palantir began seeking legal advice and, separately, generating attorney-work product related to "Abramowitz." A428. Days later, Palantir was in the process of obtaining approval for the Amendments. A424. By September 1, the Amendments were executed without any "board-level" approval.

None of the 500 emails produced by Palantir addressed "the origins, purposes, and need for the amendments, and [communications] used to secure internal and investor approvals for the amendments." A316. Palantir's privilege log, however, includes over 150 documents that were either entirely withheld or produced in redacted form. A425-A446. In its privilege log, Palantir claimed that certain documents were protected by the attorney-client privilege while claiming others (from the same time period) constituted attorney-work product as well as being attorney-client privileged. A425-A446. Every document listed on that log—whether designated as attorney-client privileged or attorney-work product—addressed either the origins, purposes, and need for the Amendments, or the internal

and external approval of the Amendments. A425-A446. Documents relating to any other subject would not have been included in response to the Court of Chancery's order.

When KT4 sought to confirm that none of the non-privileged emails revealed the "origins, purposes, and need" for the Amendments or the related side deals, Palantir identified two documents that supposedly addressed "these issues." A448-A456. But, as the Court of Chancery found, those documents did not provide any information on the "origins, purposes, and need" for the Amendments. All that those emails showed was that Palantir received KT4's IRA demand and that some Palantir employees had a "really fun" time with each other. A457-A461. The rest of those emails were redacted for privilege. *Id*.

E. The *Garner* Motion and the Court of Chancery's Ruling

Because all of the documents relating to the "origins, purposes, and need" for the Amendments and the investor solicitations were withheld based on claims of privilege, KT4 moved to compel under *Garner*'s fiduciary exception. KT4 argued that it had met *Garner*'s requirements: (1) it had a colorable basis to suspect wrongdoing in connection with the September 2016 IRA Amendments; (2) it had restricted its request to only documents on Palantir's privilege log that related to the IRA Amendments, exclusive of any documents where Palantir had asserted a claim

of work product; and (3) the information was not available from any other source. A399-A412.

Palantir opposed. It argued that *Garner* did not apply because KT4 and Palantir lacked a "mutuality of interest" at the time of the communications because Palantir's and KT4's interests were adverse. A468-A473. Palantir also contended that KT4 was "blindly fishing" for documents on Palantir's privilege log. A473-A476. During the hearing on the motion, Palantir argued for the first time that KT4 could get information about the IRA Amendments during depositions in the tortious interference case stemming from Palantir's interference in the CDH transaction, which is currently pending in Superior Court. A344-A346.

The Court of Chancery denied KT4's motion. As to the "origins, purposes, and need" for the Amendments, the Court concluded that the deposition testimony of certain Palantir witnesses from the tortious interference case adequately addressed KT4's request. Ex. A at 12-13. The Court cited to the depositions of Dave Glazer, Palantir's current CFO, and Gavin Hood, whom Palantir designated to be its Rule 30(b)(6) witness as to the Amendments. According to the Court, both witnesses confirmed that the purpose of the Amendments was to keep Palantir's information out of Abramowitz's hands. *Id*. The Court reached this conclusion even though Hood, who was testifying on behalf of Palantir, refused to disclose how he knew what the purpose of the Amendments was, relying on the attorney-client privilege.

A555. Hood, on behalf of Palantir, further confirmed that there were no non-privileged communications about the purpose of the Amendments, A555-A558, repeatedly stating that the IRA Amendments were handled exclusively by Palantir's legal department, but that he had not spoken with any of Palantir's in-house lawyers when preparing for his 30(b)(6) testimony. A548, A580.

The Court of Chancery understandably found that the depositions did not "shed light on the investor solicitations and consents." Ex. A at 13. The Court concluded, nevertheless, that KT4 was not entitled to the investor solicitation documents because there was no mutuality of interest between the parties at the time Palantir was procuring the IRA Amendments. Specifically, the Court of Chancery found that the parties were "certainly adverse" at the time of the privileged communications about the IRA Amendments because "litigation was likely anticipated over the precise subject of changing Mr. Abramowitz's rights under the IRA." *Id*. at 18. The Court held that litigation over the Amendments was anticipated at that time (even though Abramowitz was unaware of the Amendments), and that it did not matter whether Palantir's conduct was "improper" or "wrong[]." *Id.* at 18-19.

The Court appeared to rely on three factors when determining that litigation was likely: (1) that KT4 had requested information under the IRA (as was its contractual right); (2) that the goal of the Amendments was "to effectively cut

Abramowitz out" of his informational rights; and (3) that "[t]he allegations regarding misappropriation had been made." *Id.* at 18-20. The Court did not note, however, that at the time Palantir began procuring the Amendments, there was no litigation between the parties and no "allegation[s] had been made" in any court by either party about any subject. *Id.* In fact, from KT4's perspective, the only signal from Palantir about the status of the parties' relationship was that Palantir would substantively respond to the IRA Demand "soon" after receiving it, as it was contractually required to do. *Supra* 9.

After the Court entered its order,[5] KT4 timely appealed.

[5] The Court of Chancery reviewed certain of the emails relating to investor approvals to ensure that they were in fact attorney-client privileged. Ex. A at 21. The Court concluded that they were. Ex. C.

ARGUMENT

I. Palantir's Management and its Stockholders, Including KT4, Have a Mutuality of Interest Over the IRA Amendments.

A. Question Presented

Whether the Court of Chancery erred by denying KT4's motion to compel documents under *Garner*'s fiduciary exception due to a lack of "mutuality of interest" when it is undisputed that Palantir's management owed fiduciary duties to KT4. Ex. A, Ex. B.

B. Standard of Review

Questions of law, such as the applicability of the attorney-client privilege, are reviewed de novo. *Wal-Mart Stores, Inc. v. Indiana Elec. Workers Pension Tr. Fund IBEW*, 95 A.3d 1264, 1271 (Del. 2014).

C. Merits of the Argument

Under the fiduciary exception announced in *Garner*, a corporation may not assert the attorney-client privilege in litigation "against its stockholders on charges of acting inimically to stockholder interests," provided that the stockholders make a showing of good cause. *Wal-Mart*, 95 A.3d at 1276 (quoting *Garner*); *Zirn v. VLI Corp.*, 621 A.2d 773, 781 (Del. 1993) ("[The attorney-client privilege] is not absolute and, if the legal advice relates to a matter which becomes the subject of a suit by a shareholder against the corporation, the invocation of the privilege may be restricted or denied entirely."). In those circumstances, "protection of [stockholder]

interests as well as those of the corporation and of the public require" invasion of the privilege. *Id.* *Garner*'s "only prerequisite . . . is the existence of a fiduciary relationship between the parties in dispute." *Morris v. Spectra Energy Partners (DE) GP, LP*, 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), a "leading treatise"); *See also J.H. Chapman Group, Ltd. v. Chapman*, 1996 WL 238863, at *2 (N.D. Ill. May 2 (N.D. Ill. 1996) ("[T]he prerequisites of the fiduciary duty exception are a fiduciary relationship and good cause for overcoming the attorney-client privilege.").

Although the fiduciary relationship between Palantir's management and KT4 is undisputed, the Court of Chancery nonetheless found the parties lacked a mutuality of interest at the time Palantir was procuring the Amendments. The Court reached this conclusion largely because it viewed the parties' interests as being adverse, describing the relationship as "fundamentally broken." Ex. A at 20. But that reasoning, if accepted, risks undermining the *Garner* exception entirely; indeed, *Garner* itself recognized that "the corporate entity or its management, or both," may well "have interests adverse" to "some or all stockholders." 430 F.2d at 1101. Adverse interests do not change the fact that "when all is said and done management is not managing for itself"—it is managing for the company's stockholders. *Id*. That is why *Garner* anchored "mutuality of interest" to the fiduciary relationship:

> The representative and the represented have a mutuality of interest in the representatives freely seeking advice when needed and putting it to use when received. This is not to say that management does not have allowable judgment in putting advice to use. But management judgment must stand on its merits, not behind an ironclad veil of secrecy which under all circumstances preserves it from being questioned by those for whom it is, at least in part, exercised.

Id.

Courts interpreting *Garner* have reiterated this point: *Garner* "specifically elected" to allow shareholders showing good cause access to communications with counsel even "where some pecuniary interests are necessarily adverse." *Ward v. Succession of Freeman*, 854 F.2d 780, 784–85 (5th Cir. 1988).

Such is the case here. Palantir sought advice about the IRA Amendments and put it to use, amending a fundamental corporate document to change the company's contractual duties to its stockholders, not just the duties it owed to KT4.[6] In situations like this, Palantir's "judgment must stand on its merits, not behind an ironclad veil of secrecy which under all circumstances preserves it from being questioned by those for whom it is, at least in part, exercised." *Garner*, 430 F.2d at 1101. This Court should therefore reject a "mutuality of interest" standard that

[6] The Court of Chancery seemed to be under the impression that Palantir's side letters exempted all other stockholders from the effect of the Amendments. Ex. A at 19. That appears to be inaccurate; the side letters appear to only have affected a handful of stockholders and the record is silent as to Palantir's reasons for entering into such side letters because the information relating to that subject was withheld on attorney-client privilege grounds.

requires anything beyond the existence of a fiduciary duty at the time of the communications at issue.

The foregoing is not to say, however, that a stockholder whose interests are adverse to those of the corporation will necessarily be entitled to protected communications. For one thing, *Garner* does not apply to materials protected by the work-product doctrine. *Wal-Mart*, 95 A.3d at 1280. Thus, any corporate documents prepared by an attorney in anticipation of litigation would still be protected under Rule 26(b)(3). Moreover, *Garner*'s good-cause standard also protects a corporation's interests, as a court may consider, among other things, "the bona fides of the shareholders," "whether the communication related to past or to prospective actions," and "whether the communication is of advice concerning the litigation itself." *Garner*, 430 F.2d at 1101.

That said, undersigned counsel recognize that some Court of Chancery cases have taken a different approach to the mutuality-of-interest requirement. While "there is little direct law on this issue in Delaware," and this Court appears not to have addressed the issue, some Court of Chancery cases have held that a "clear-cut dispute" between management and a stockholder (or a general partner and a limited partner) over a particular action taken by management breaks mutuality of interest as to that particular action. *Cont'l Ins. Co. v. Rutledge & Co.,* 1999 WL 66528, at *1,*3 (Del. Ch. Jan. 26, 1999). But even this line of cases is clear that it takes "more

than a simple disagreement" to sever mutuality. *Metro. Bank & Tr. Co. v. Dovenmuehle Mortg., Inc*., 2001 WL 1671445, at *3 (Del. Ch. Dec. 20, 2001).

Even if the Court were inclined to adopt this sort of "clear-cut dispute" exception to the *Garner* exception (and it should not for the reasons set forth above), it should nevertheless hold that the Court of Chancery erred, for three reasons:

First, the Court of Chancery overlooked critical distinctions between this case and the only other cases in which the Court of Chancery has denied a *Garner* motion for lack of mutuality. Neither of those cases—*Metropolitan Bank* and *Continental Insurance*—was a Section 220 case. Rather, they were both partnership disputes involving limited partners who were asserting personal claims.[7] *Metro. Bank, Inc*., 2001 WL 1671445, at *1; *Cont'l Ins.,* 1999 WL 66528, at *1-*2. That distinction is critical, because the Court of Chancery has taken a different approach to mutuality of interest in the Section 220 context.

In *Grimes v. DSC Communications Corp.*, for example, the Court of Chancery dealt with a stockholder who served two demands on a corporation's board seeking to rescind an executive compensation package. 724 A.2d 561, 563-68 (Del. Ch. 1998). After the board rejected the stockholder's first demand, the stockholder filed, and lost, a derivative suit. *Id.* at 564. After receiving the second demand, the

[7] In *Metropolitan Bank*, the limited partners were asserting personal claims, as well as a derivative claim. *Metro. Bank, Inc*., 2001 WL 1671445, at *1.

corporation formed a Special Committee to investigate the demand. *Id.* at 562-64. The Special Committee ultimately recommended that the board reject the demand, which it did. *Id.* The stockholder then served a Section 220 demand seeking, among other things, the Special Committee's report, which was withheld as privileged because it contained "legal analysis, advice and recommendations regarding the appropriate response to [plaintiff's] demand" and "the necessity and propriety of litigation." *Id*. at 569.

The *Grimes* Court had no trouble concluding that *Garner* applied and therefore requiring the corporation to produce the Special Committee's report. The Section 220 context mattered to the *Grimes* Court. The corporation had argued that the stockholder was trying to obtain the Special Committee's report so that he could use it "in a later proceeding," which, according to the corporation, would be "adverse" to its interests; but the Court of Chancery rejected this argument because the stockholder's efforts were "directed at the institution of derivative litigation, brought on behalf of [the corporation], in which, at least in theory, his interests and those of [the corporation] are aligned." *Id.* at 566, n.9.

Importantly, *Grimes* did not invoke any "mutuality of interest" requirement, and it never suggested that the existence of anticipated litigation affected the *Garner* analysis in any way. *Id.* at 568-69. This was true, even though the circumstances indicated that litigation over the Special Committee's report was inevitable: the

affected stockholder had served two demands and filed one lawsuit about the same subject as the report.

The Court of Chancery's holding in the case at bar, which applied the holdings of *Metropolitan Bank* and *Continental Insurance* to a Section 220 case, directly contradicts the reasoning of *Grimes*. But this Court has cited *Grimes* favorably on two occasions. *Espinoza v. Hewlett-Packard Co.,* 32 A.3d 365, 373 (Del. 2011); *Wal-Mart*, 95 A.3d at 1277. The Court's opinion in *Wal-Mart* is particularly instructive. There, this Court adopted the *Garner* exception as the law in Delaware in Section 220 cases and plenary proceedings. *Id.* at 1278. The *Wal-Mart* Court never once applied any predicate to *Garner* beyond the existence of a "fiduciary" duty owed by "those in control of the corporation." *Id.* at 1276. Importantly, the *Wal-Mart* Court found *Grimes* to be of "particular relevance," *id.*, and quoted from it extensively. By contrast, *Wal-Mart* never even referenced the *Garner* analysis in *Metropolitan Bank* and *Continental Insurance*. Nor has any other decision of this Court.

Grimes and *Wal-Mart* adopted the right approach to mutuality of interest in any case. But especially in Section 220 cases, all that should be required is a fiduciary relationship at the time of the communications at issue. Here, as in *Grimes* and *Wal-Mart*, KT4 is seeking to investigate conduct that affected all stockholders. In the IRA Amendments, Palantir's management altered a fundamental corporate

document that defined several critical rights for Palantir's stockholders, including the right to information and the right to participate in subsequent rounds of financing. KT4 is seeking to investigate apparent wrongdoing relating to that significant change to Palantir's corporate governance, which the Court of Chancery held to be an action that "eviscerated" the rights of KT4 and other stockholders and to be an action that was "undeniably related to KT4's interests as a stockholder." *Palantir*, 2018 WL 1023155, at *12. KT4's investigation, like all Section 220 investigations into wrongdoing, "furthers the interest of all stockholders." *See Seinfeld v. Verizon Commc'ns, Inc.*, 909 A.2d 117, 121 (Del. 2006). *Garner* should therefore be applied in this context in a manner that promotes and encourages inspection, consistent with *Grimes* and *Wal-Mart*.

Second, it is important to emphasize that KT4 is not seeking documents relating to any dispute over the IRA Amendments. Rather, it is seeking documents that are solely protected by attorney-client privilege (not work-product) and that relate to the *origins, purpose and need* for the IRA Amendments, as well as the internal and external approvals for these Amendments. In other words, the only documents sought relate to how and why this significant corporate governance change occurred. To the extent any document sought related to any dispute with Abramowitz, Palantir has withheld it on work-product grounds and KT4 is not seeking its production.

Third, the Court of Chancery overlooked another critical distinction between this case and *Metropolitan Bank* and *Continental Insurance*. Both of those cases involved limited partners who took some overt act that put the general partners on notice that a dispute about a particular subject was likely. Shots were fired, in other words. In *Metropolitan Bank*, the limited partner "assert[ed] that [a] proposal [from the general partner] violated the partnership agreement," which severed mutuality as to that proposal. *Metro. Bank*, 2001 WL 1671445, at *3. Similarly, in *Continental Insurance*, the Court of Chancery found a "clear-cut" dispute when a limited partner tried to withdraw from the partnership, which severed mutuality as to the withdrawal. *Cont'l Ins.*, 1999 WL 66528, at *2 (Del. Ch. Jan. 26, 1999).

In the case at bar, the Court of Chancery ignored the factual context of *Metropolitan Bank* and *Continental Insurance*: in both cases, the stockholder had taken some affirmative act to create a dispute as to the specific issue over which mutuality was severed. In another case, *In re Freeport-McMoRan Sulphur, Inc. Shareholder Litigation*, 2005 WL 5756737 (Del. Ch. Jan. 26, 2005), the Court of Chancery adopted essentially the same rule, when it held that mutuality was severed only at the point in which the stockholder first learned of the corporate action at issue and "consider[ed] litigation" over that action. *Id.* at *3.

The Court of Chancery thus erred by deviating from the rule that was implicit in *Metropolitan Bank* and *Continental Insurance* and was explicit in *Freeport-*

McMoRan. At the time of the communications at issue, KT4 had taken *no* action to challenge the Amendments, nor could it have—KT4 indisputably lacked knowledge at that time that Palantir's management had procured them.[8] *See supra* 9. KT4 never even questioned the Amendments until it served its Section 220 demand on September 20, 2016. And even at that time, KT4 had not seen the Amendments themselves. *Id.*

The rule derived from *Metropolitan Bank*, *Continental Insurance*, and *Freeport-McMoRan* ensures that stockholders are not divested of their *Garner* rights (and management is not be immunized from *Garner* scrutiny) based solely on management's subjective view of the likelihood of litigation. Stockholders should not lose their *Garner* rights absent an affirmative act that challenges a specific corporate action. At that point, management may consult with counsel over the proper response to the stockholder's challenge.

It is worth considering the consequences of a contrary rule and of the Court of Chancery's reasoning in this case. In effect, the Court held that *Garner* was disabled because the Amendments affected KT4's rights and litigation was likely to ensue over the loss of those rights. Ex. A. The Court deemed irrelevant the fact that

[8] At the time of the IRA Demand, KT4 had affirmatively challenged Palantir's interference with KT4's efforts to sell stock to CDH, but KT4 is not seeking privileged material on that topic.

Palantir may have acted "wrongly" or "improper[ly]" without the stockholder's knowledge. Ex. A at 18-19. That cannot be the law; any time an officer or director "wrongly" or "improperly" strips stockholders of their rights, that officer or director is likely to anticipate litigation over his or her conduct. That is precisely when *Garner* would be most useful to stockholders; yet that is precisely when the Court's reasoning would disable the doctrine.

An example may help illustrate the point. Imagine an officer who works with counsel in secret to come up with a plan to avoid paying preferred stockholders a contractually required dividend. That officer does not have to be clairvoyant to know that the company may face litigation over that decision. And litigation is all the more likely if the officer made her decision in order to spite one specific stockholder. The entire point of *Garner* is to give the preferred stockholders in that hypothetical—including the spited one—the ability to assess the officer's "judgment . . . on its merits" about the dividends and not leave the materials she relied upon "behind an ironclad veil of secrecy." *Garner*, 430 F.2d at 1101. Yet that is what the Court of Chancery's reasoning would do. This Court should not adopt it.

* * *

For the foregoing reasons, the Court of Chancery erred by finding that Palantir and KT4 lacked mutuality of interest.

II. KT4 Has Shown Good Cause Under *Garner*'s Fiduciary Exception

A. Question Presented

Whether the Court of Chancery erred in finding that information regarding the "origin, need, and purpose" of the IRA Amendments was sufficiently provided in the depositions of certain Palantir witnesses who did not recall critical details relating to the IRA Amendments, review the at-issue documents before testifying, or speak to the persons with the relevant corporate knowledge before testifying.[9] Ex. A; Ex. B; A320-A376.

B. Standard of Review

The applicability of the attorney-client privilege is reviewed de novo. *Wal-Mart*, 95 A.3d at 127.

C. Merits of the Argument

While *Garner*'s fiduciary exception is "narrow," *Wal-Mart*, 95 A.3d at 1278, Delaware courts evaluate three "primary factors" when assessing good cause: "(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 having the information and availability of it

[9] If this Court reverses at to mutuality of interest, the Court of Chancery should, on remand, enter an order requiring production of all the at-issue documents relating to the approvals for the IRA Amendments, as lack of mutuality was the sole basis for the Court's denial of the motion to compel as to both internal and external approvals. Ex. A.

from other sources." *Salberg v. Genworth Fin., Inc.*, No. CV 2017-0018-JRS, 2017 WL 3499807, at *5 (Del. Ch. July 27, 2017).

This is a textbook example of where the fiduciary exception applies. There is a colorable claim; this Court and the Court of Chancery agreed that KT4 had a credible basis to infer wrongdoing by Palantir relating to the IRA Amendments. Ex. A at 10; A316-A319. KT4 has not gone fishing; it has limited its request to only those privileged documents that pertain to the origins and purpose of the Amendments, as well as the internal and external approval of those Amendments. Ex. A at 17; A409. And KT4 cannot obtain this information from other sources; Palantir has not produced a single document shedding light on the "origins, purpose, and need for" the IRA Amendments or what was communicated to stockholders to obtain their approval. A399-A412; A495-A506.

Below, the Court of Chancery concluded that the deposition testimony of Palantir employees Colin Anderson, Dave Glazer, Kevin Kawasaki, Gavin Hood, and CEO Alex Karp "sufficiently provide[d] information regarding the origin, need, and purpose of the amendments[.]" Ex. A at 12, and there was therefore "no need" to compel Palantir to provide the withheld documents as to only that issue. Ex. A at 13.

But the deposition testimony reviewed by the Court of Chancery did not provide "the best evidence of the facts [the withheld documents] contain"—instead,

the documents themselves are the only source of the information. *Lee v. Engle*, No. CIV. A. 13284, 1995 WL 761222, at *3 (Del. Ch. Dec. 15, 1995). The testimony provided little, if any, information about the IRA Amendments. Witness after witness testified that they had no specific recollection of the "events from over four and a half years ago." A540. Gavin Hood, Palantir's 30(b)(6) witness on the topic of the IRA Amendments, repeated some variation on "I don't recall" or "I don't know" nearly 25 times when asked about the Amendments. A546-A590. For Kevin Kawasaki, Palantir's head of business development, that number is seven times over eight pages of testimony. A594-A600. Dave Glazer, Palantir's current CFO, responded "I don't know" or "I don't recall" to nearly every question about the Amendments. A525-A532.

No witness could recall any specifics about the Amendments. For example, no one could remember what in KT4's demand letter supposedly triggered the Amendments, A565-A566, whether Palantir was concerned about KT4's request for information relating to the CDH transaction, A567, or whether Palantir was concerned about the Founders' misconduct when selling their stock. A581. KT4 does not know, and Palantir's representatives could not recall.

The only testimony about the "origin, need, and purpose" of the Amendments was a vague statement by two Palantir witnesses that the IRA Amendments were meant "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." A554-A555; A527. The deposition testimony provided no information as to why the two separate Amendments were needed, or why there were side deals for only certain stockholders with respect to one of those Amendments. Such a vague statement of purpose cannot stand in for the contemporaneous documents about the "origin, need, and purpose" of the IRA Amendments.

Deponents such as these, who "either did not recall information concerning the subject upon which they were being questioned or attempted to trivialize certain of the bases of the plaintiff's claim," tip *Garner*'s factors in favor of discovery. *In re Fuqua*, 2002 WL 991666, at *5. KT4 has "exhausted every available method of obtaining the information they seek," and the deposition testimony made clear that the information only exists behind Palantir's assertion of the attorney-client privilege. *See In re Fuqua*, 1999 WL 959182, at *3.

This fact is underscored by the testimony of Mr. Hood, who supposedly was prepared to testify as to the IRA Amendments as Palantir's 30(b)(6) witness. He did not "have any information . . . one way or the other" as to whether anyone at Palantir had any non-privileged conversations about the purpose of the Amendments. A557-A558. When asked how he knew what the purpose of the Amendments was, Hood refused to provide an answer on privilege grounds. A555. Hood claimed there was no conversation about the Amendments "where the lawyers weren't . . . present and

leading." A556. Yet Hood did not attempt to speak to anyone on Palantir's legal team about the IRA Amendments before testifying. A580. Other witnesses testified similarly. A540. The deposition testimony confirms that KT4 cannot obtain the information "without intruding on the attorney-client privilege," strengthening KT4's showing of good cause under *Garner*. *See Buttonwood Tree Value Partners, L.P. v. R.L. Polk & Co.*, No. CV 9250-VCG, 2018 WL 346036, at *5 (Del. Ch. Jan. 10, 2018); *In re Fuqua*, 2002 WL 991666, at *5.

Because the Court of Chancery erred by finding that information relating to the "origins, purposes, and need" of the IRA Amendments was available from another source, this Court should reverse the judgment and compel the disclosure of the withheld documents.

CONCLUSION

This Court should reverse the Court of Chancery's denial of KT4's Motion to Compel and order disclosure of the withheld documents under *Garner*'s fiduciary exception.

DALTON AND ASSOCIATES, P.A.

OF COUNSEL:

Barry S. Simon
Jonathan B. Pitt
Stephen L. Wohlgemuth
725 Twelfth Street NW
Washington, DC 20005
(202) 434-5000 (telephone)
(202) 434-5029 (facsimile)

/s/ Bartholomew J. Dalton
Bartholomew J. Dalton, Esq. (#808)
Michael C. Dalton, Esq. (#6272)
Cool Spring Meeting House
1106 West 10th Street
Wilmington, Delaware 19806
(302) 652-2050 (telephone)
(302) 652-0687 (facsimile)
bdalton@dalton.law
mdalton@dalton.law

Attorneys for Plaintiff Below, Appellant KT4 Partners LLC

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