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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 REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF CITATIONS

Cases:

Statutes and Rules:

INTRODUCTION

Palantir's answering brief urges this Court to adopt a novel test that requires a stockholder seeking to invoke the *Garner* exception to prove that its "subjective interests" align with those of management. This new test has no grounding in *Garner* itself or this Court's own *Garner* cases. It also conflicts with persuasive authority from other jurisdictions and the Court of Chancery. And in urging this Court to adopt this novel test, Palantir never explains what sort of differing "interests" should be sufficient to destroy a stockholder's *Garner* rights. There is no basis for adopting this novel, unworkable standard. Instead, as KT4 showed in its opening brief, mutuality of interest exists for *Garner* purposes any time a fiduciary relationship exists. Here, KT4 is a stockholder and is owed a fiduciary duty. The Court of Chancery therefore erred by holding that KT4 did not have a mutuality of interest with Palantir as to the IRA Amendments.

Palantir's argument suffers from other deficiencies. Palantir attempts to re-write the factual record in this case, claiming that KT4 and Palantir had an "openly adverse" relationship since 2015. In reality, Palantir's CEO vaguely accused Marc Abramowitz of theft of trade secrets in 2015 while acting in a manner that Abramowitz described as irrational and unhinged. But Palantir *never mentioned* those allegations to Abramowitz again (or, apparently, anyone else) until after KT4 served its IRA Demand more than a year later. At that time, far from being "openly

adverse," Palantir sought to lull KT4 into believing that it was seriously considering the IRA Demand. It wasn't: Palantir quickly "pulled the rug" out from KT4 with the IRA Amendments.

Palantir's brief also ignores holdings in the Court of Chancery's post-trial opinion that undermine the argument it advances here. Palantir claims that it obtained the IRA Amendments to "protect" its confidential information from Abramowitz. Palantir uses this "fact" to bolster its argument under the "subjective interests" test and to argue that KT4 has no need to inspect actual documents pertaining to the IRA Amendments. But the Court of Chancery found this very explanation not credible after trial. In fact, the Court concluded that it *provided further evidence of wrongdoing* because if "Palantir [had] 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." Opening Br. 13. Palantir should not be heard to recycle that same rejected argument here.

Finally, Palantir claims that deposition testimony obviates the need for KT4 to inspect contemporaneous documents because the testimony is "quite clear" about the purpose of the Amendments. But this testimony does nothing more than parrot Palantir's years-old litigation position, which it continues to advance here and which the Court of Chancery rejected post-trial. And Palantir overlooks the fact that its

witnesses could not remember any details about the IRA Amendments, even though they effected a significant change to Palantir's corporate governance. Such a self-serving, detail-free explanation for a corporate action cannot substitute for inspection of actual documents. Palantir's witnesses also hid behind privilege when asked critical questions about the purpose of the Amendments, underscoring the fact that the information KT4 needs is privileged.

KT4 had a mutuality of interest with Palantir as to the IRA Amendments, which were the sole subject of KT4's *Garner* motion, and KT4 has no way to investigate the "origins, purposes, and need" for those Amendments outside of examining privileged documents. This is a paradigm case for application of the *Garner* exception, and the Court of Chancery's order should be reversed.

STATEMENT OF FACTS

KT4 relies on the statement of facts in its opening brief but writes here to address Palantir's recitation of the litigation history between the parties, which is inaccurate and pervades Palantir's arguments on the merits.

Palantir claims that Abramowitz has been pursuing a "vendetta against Palantir" since Palantir's CEO, Alex Karp, accused Abramowitz of "misappropriation of Palantir's trade secrets in 2015." Palantir Br. 11. According to Palantir, this "vendetta" robs KT4 of any "mutuality of interest" with Palantir as to the IRA Amendments. Palantir Br. 11.

This argument has no grounding in fact. The uncontroverted record shows that far from spurring some "vendetta," Karp's accusations of theft in the summer of 2015 were viewed by Abramowitz as unhinged and irrational, prompting Abramowitz to attempt to sell all of his Palantir stock to distance himself from Karp. A064. That is precisely what he tried to do by engaging a broker who arranged, in late-2015, to sell all of KT4's stock to a Chinese firm named CDH. A108-A123. But once Palantir got wind of the negotiations with CDH, Palantir and a co-conspirator scuttled that transaction by intentionally interfering with it. A066.

Even then, Abramowitz and KT4 did not file (or even threaten) suit. Instead, in August 2016 (months after Palantir's interference), KT4's counsel demanded information under Palantir's Investors' Rights Agreement in order to obtain financial

information about the company and to investigate the CDH transaction and other potential misconduct. A377-A380. At that time, Karp's baseless allegations were over a year old and had not been mentioned to Abramowitz again. Nor was there any pending or threatened litigation between the parties. Contrary to Palantir's current refrain that the parties were "openly adverse" at this time, the Court of Chancery found after trial that Palantir's general counsel "led KT4 to believe that it was considering KT4's information request."[1] *KT4 Partners LLC v. Palantir Techs., Inc.*, 2018 WL 1023155, at *13 (Del. Ch. Feb. 22, 2018). Thus, as the Court of Chancery found in an unchallenged ruling, at the time Palantir was procuring the IRA amendments, the only signal to KT4 was that Palantir was considering KT4's request in good faith.

Of course, Palantir was not acting in good faith—it was busily procuring the IRA Amendments in an effort to, in the Court of Chancery's words, "pull[] the rug out from under KT4." *Id.* It was only at that point, after Palantir procured the Amendments, that *Palantir* initiated litigation when it filed a misappropriation of trade secrets claim against Abramowitz. That lawsuit (filed on September 1, 2016) was the first time Abramowitz learned about the IRA amendments and the first time

[1] There is no evidence of any "open adversity." Nothing in the record suggests that Karp told anyone aside from a few employees about his allegations against Abramowitz.

he had heard about the theft allegations in the year-plus since Karp's phone call. That same day Palantir also filed a petition to institute a derivation proceeding before the United States Patent and Trademark Office based on the same allegations.

KT4 did not adopt Palantir's sue first, ask questions later approach. Instead, KT4 continued its quest for information before filing any damages claim; it withdrew the IRA Demand after learning of the Amendments and then served the first of two Section 220 demands.[2] Indeed, KT4 only filed the tortious interference suit in the Delaware Superior Court after it became clear that the Court of Chancery was not going to grant inspection on the CDH transaction for purely legal reasons.

Far from evidencing a "litigation campaign," KT4's approach has been marked by careful investigation and meritorious claims—and each of its claims was brought well *after* the events that are the subject of this appeal.

- The two Section 220 cases: The Court of Chancery entered judgment in KT4's favor in both Section 220 cases. Opening Br. 13-15. In the first case, the Court granted inspection into, among other things, sales of stock by Palantir insiders in apparent violation of Palantir's First Refusal and Co-Sale Agreements. *Palantir*, 2018 WL 1023155, at *18.

- The tortious interference case: This case is pending in the Delaware Superior Court and will be tried this fall. Discovery has uncovered clear evidence of Palantir's intentional interference with the CDH transaction: documents produced by Palantir and its co-conspirator show that Palantir wanted to "crush" and "shut down" Abramowitz's efforts to sell stock to CDH. *See*

[2] The second of these demands related solely to valuation materials and was only necessary because the first demand did not clearly state a valuation purpose.

BTIG, LLC v. Palantir Techs., Inc., 2020 WL 95660, at *6 (Del. Super. Ct. Jan. 3, 2020).

- The First Refusal and Co-Sale case: After examining the materials produced in response to the first Section 220 case, and after successfully appealing an unwarranted jurisdictional limitation in the Court of Chancery's final order, KT4 recently filed suit against Palantir and its Founders, alleging that defendants routinely violated Palantir's First Refusal and Co-Sale Agreements. KT4's complaint was supported by 18 exhibits, including 14 exhibits produced by Palantir in the Section 220 case. Palantir and its Founders have moved to keep almost every word of the complaint sealed.

By contrast, Palantir's petition to institute a derivation proceeding before the PTO was denied, and its trade-secret suit in California has been pending since September 2016 but has yet to get past the pleading stage. Opening Br. 11 n.2. Palantir's German patent lawsuit is still pending.

ARGUMENT

I. The Court of Chancery Erred by Holding That There Was No Mutuality of Interest Over the IRA Amendments.

A. The Mutuality-of-Interest Requirement Should Be Satisfied by the Existence of a Fiduciary Duty, Particularly in Section 220 Cases.

As KT4's opening brief showed, this Court should hold that a mutuality of interest exists so long as "a fiduciary relationship" exists at the time of the privileged communications.[3] Opening Br. 23. Palantir argues for a contrary rule—namely, that a mutuality of interest is destroyed if the stockholder and management have different "subjective interests." Palantir Br. 23. This "subjective interests" test is inconsistent with *Garner* itself, and conflicts with both controlling and persuasive authority on the *Garner* exception.

1. Palantir first tries to claim that *Garner* itself adopted the "subjective interests" test. Palantir Br. 3, 23. But *Garner* provides no support for any "subjective interests" analysis. In fact, it only used the term "mutuality of interest" once, when it recognized, as a rationale for its eponymous doctrine, that 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." *Garner v.*

[3] Most of Palantir's brief attacks a strawman, claiming that "KT4 seeks to overturn th[e] mutuality of interests requirement." Palantir Br. 24. Much of Palantir's brief is devoted to this argument that KT4 doesn't make. *See* Palantir Br. 3, 21, 27.

Wolfinbarger, 430 F.2d 1093, 1101 (5th Cir. 1970). In other words, under *Garner*, a mutuality of interest exists when a fiduciary is acting as a fiduciary.

Reading a threshold "subjective interests" test into *Garner* would put the Fifth Circuit's opinion at war with itself. *Garner* recognized that "the corporate entity or its management, or both," may "have interests adverse" to some or all stockholders. *Id.* at 1101. But *Garner* held that such adversity does not sever mutuality because "when all is said and done management is not managing for itself." *Id.* Palantir simply ignores this language in *Garner*, which immediately precedes *Garner*'s sole reference to "mutuality of interest" and is inconsistent with Palantir's proposed "subjective interests" test.

Garner also held that, if a stockholder were attempting to invoke the *Garner* exception to obtain a "communication [reflecting] advice concerning the litigation itself," that would merely be one of several good-cause factors to be balanced—not an automatic bar to obtaining the documents. *Garner*, 430 F.2d at 1104. But Palantir's "subjective interests" test would impose such a bar because a corporation and a stockholder who are already in litigation will always have different "subjective interests." If Palantir's test were adopted, such a stockholder would never be able to satisfy the *Garner* exception, irrespective of how heavily the good-cause factors weigh in the stockholder's favor.

2. This reading of *Garner* is consistent with persuasive authority interpreting *Garner*. For example, in *Ward v. Succession of Freeman*, 854 F.2d 780 (5th Cir. 1988), the Fifth Circuit dealt with a securities fraud suit arising out of a tender offer. *Ward* recognized that, in such a case, "managers of a tendering corporation must seek to conserve assets by not over-paying for redeemed stock," while stockholders want "the highest price they can get." *Id.* at 784. Even though stockholders and the corporation have "pecuniary interests [that] are necessarily adverse" in that situation, *Ward* held that "the mutuality of interest test" still "extend[ed]" to cover that "situation[]." *Id.* at 785. That holding is inconsistent with Palantir's "subjective interests" test, and Palantir never contends otherwise.[4] Other out-of-state authority is the same. *J.H. Chapman Grp., Ltd. v. Chapman*, 1996 WL 238863, at *2 (N.D. Ill. May 2, 1996) (holding that "the prerequisites of the fiduciary duty exception are a fiduciary relationship and good cause"); *Nama Holdings, LLC v. Greenberg Traurig LLP*, 18 N.Y.S.3d 1, 10 (2015) ("While some factors in the

[4] The best Palantir can do is to distort a footnote from *Ward*, claiming that *Ward* held that "the mutuality of interests between shareholders and management is necessarily destroyed at the point in time when a party anticipates litigation." Palantir Br. 25. In reality, the footnote in question only recognizes that *Garner* is an exception only to the attorney-client privilege, not work-product protection. *Ward*, 854 F.2d at 785 n.2 ("We have held that no 'mutuality of interest' exists between shareholders and management when management seeks counsel in matters that give rise to the work product privilege.").

Garner test are relevant to a determination of adversity, Garner did not create a categorical adversity limitation.").

3. Palantir's argument in favor of the "subjective interests" test hinges almost entirely on what it calls "a long line of Delaware cases." Palantir Br. 22. This "long line" is really just four Court of Chancery opinions: *Continental Insurance*, *Metropolitan Bank*, *Fuqua*, and *Freeport-McMoRan*. The opinions themselves are more diffident about their lineage than Palantir lets on in its brief,[5] and only two of them deny production because of a lack of mutuality. *See Cont'l Ins. Co. v. Rutledge & Co.,* 1999 WL 66528 (Del. Ch. Jan. 26, 1999); *Metro. Bank & Tr. Co. v. Dovenmuehle Mortg., Inc*., 2001 WL 1671445, at *3 (Del. Ch. Dec. 20, 2001). These two cases cannot be reconciled with other cases decided by both this Court and the Court of Chancery, particularly in the Section 220 context.

For example, the Court of Chancery has observed that *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). Of course, if "there is no fiduciary duty between the

[5] *See In re Freeport-McMoRan Sulphur, Inc.*, 2005 WL 225040, at *2 (Del. Ch. Jan. 26, 2005) (recognizing that "there is little Delaware case law on the subject").

parties," then "the mutuality of interest that underpins the *Garner* exception does not exist." *Id.* But if there is a fiduciary duty, then a mutuality of interest does exist.[6]

This reasoning is consistent with this Court's decision in *Wal-Mart*, which adopted *Garner* in Section 220 cases and found that it "allows stockholders of a corporation to invade the corporation's attorney-client privilege in order to prove fiduciary breaches by those in control of the corporation upon showing good cause." *Wal-Mart Stores, Inc. v. Indiana Elec. Workers Pension Tr. Fund IBEW*, 95 A.3d 1264, 1276 (Del. 2014). *Wal-Mart* never examined anyone's "subjective interests" and did not suggest that *Garner* required anything more than (1) status as a "stockholder[] of a corporation" and (2) "good cause." *Id.*

Grimes v. DSC Communications, 724 A.2d 561, (Del. Ch. 1998), another Section 220 case, is much the same. As KT4's opening brief showed, *Grimes* is inconsistent with the Court of Chancery's opinion below, as well as Palantir's "subjective interests" test. *See* Opening Br. 25-27. *Grimes* received extensive favorable treatment in *Wal-Mart*, even though privileged communications at issue related to a subject that had *already been litigated* by the stockholder and the corporation. *Id.*

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[6] Palantir claims that the discussion of *Morris* in KT4's opening brief was "misleading." Palantir Br. 24. But *Morris* states that if a fiduciary relationship exists, mutuality of interest is established; if a fiduciary relationship does not exist, mutuality of interest is not established. That is the exact rule endorsed by KT4.

Palantir has no answer to *Grimes*. It first claims that the case did not "discuss the mutuality of interests requirement" but rather focused its analysis on the good-cause factors. Palantir Br. 27-28. That's the point: there was no need for *Grimes* to discuss a mutuality of interest requirement—despite the parties' sharply divergent "subjective interests"—because mutuality was satisfied by the existence of a fiduciary relationship. Palantir next tries to distinguish *Grimes* on its facts, claiming that the stockholder in that case did not have "interests that were antagonistic to the company or its other stockholders." Palantir Br. 28. But neither does KT4, as has already been determined by the Court of Chancery after a trial.[7] *Palantir*, 2018 WL 1023155, at *10-13 (finding that KT4 has a "proper purpose" and rejecting Palantir's "pretext" purpose arguments).

As in *Grimes*, the Section 220 context underscores why KT4's inspection is not "antagonistic" to the corporation. KT4 is seeking to inspect documents relating to a significant corporate governance change, an issue as to which all stockholders would have an interest. The end result of that inspection, as the Court of Chancery already found, may include pursuing "breach of fiduciary duty litigation" if "evidence of wrongdoing [by management] is discovered." *Id.* at *11. As *Grimes*

[7] On appeal, this Court reaffirmed that holding as to the IRA Amendments, concluding that KT4 has "legitimate needs" to inspect documents relating to the Amendments. *KT4 Partners LLC v. Palantir Techs. Inc.*, 203 A.3d 738, 758 (Del. 2019).

recognized, using privileged documents to file such "derivative litigation" holding management accountable for any wrongdoing "align[s]" the interests of stockholder and corporation. *Grimes*, 724 A.2d at 566. By contrast, *Continental Insurance* and *Metropolitan Bank* both involved personal claims.[8] Opening Br. 25.

4. Palantir also advances a policy argument, claiming that, unless its "subjective interests" test were adopted, there would be a "chilling effect on the full and frank communications between attorneys and their clients, to the detriment of both companies and their stockholders."[9] Palantir Br. 26-27. Although corporations can certainly have a legitimate reason for invoking the attorney-client privilege against their own stockholders, that is not the only interest to be balanced. Stockholders also need to be "protect[ed]" when management is suspected of acting

[8] Palantir minimizes the Section 220 context by claiming that "Delaware courts have found that the mutuality of interests requirement applies in Section 220 actions." Palantir Br. 27. But the case it cites adopts KT4's rule, holding that the stockholder was "entitled to access to the pre-merger documents because his status as a stockholder derivative plaintiff provides a mutual interest with [the corporation]." *See Saito v. McKesson HBOC, Inc.*, 2002 WL 31657622, at *13 n.74 (Del. Ch. Nov. 13, 2002).

[9] In making this argument, Palantir invokes an image of a corporation trying to "protect itself from a stockholder posing a serious threat to the company's interests." Palantir Br. 26. That conception has no grounding in reality. After a trial, the Court of Chancery held, and this Court affirmed, that KT4 had "legitimate reasons" to inspect Palantir's books and records. *KT4 Partners*, 203 A.3d at 758. Palantir has never offered a shred of evidence showing that KT4 posed a legitimate "threat" to Palantir, even though KT4 invited Palantir to do so repeatedly before trial.

"inimically to [their] interests." *Id.* As this Court has held in *Wal-Mart*, *Garner*'s good-cause analysis is what "achieves a proper balance between [those] legitimate competing interests." *Wal-Mart*, 95 A.3d at 1278. Given that the good-cause test achieves this "proper balance," there is simply no reason to adopt a threshold "subjective interests" requirement—particularly one that finds no support in *Garner* itself or this Court's precedent. Any divergent "subjective interests" can be accounted for in the good-cause analysis. Opening Br. 24. And if the divergent "subjective interests" relate to a matter that is the subject of foreseeable litigation, a corporation may still claim work-product protection. *Id.*

B. Even Under *Continental Insurance* and *Metropolitan Bank*, the Mutuality-of-Interest Requirement Is Still Satisfied.

Even if this Court were to adopt *Continental Insurance* and *Metropolitan Bank*, KT4 and Palantir still had a mutuality of interest as to the IRA Amendments. Opening Br. 21-31. Those two cases found that mutuality was severed only after a limited partner took an affirmative act that created a specific dispute. Opening Br. 29-31. Knowing that, Palantir attempts to find new caselaw.

Specifically, Palantir cites a transcript ruling in *BV Gateway Phase v. AV Startt*, which Palantir claims establishes that a "mutuality of interests can be severed in the absence of any affirmative act challenging a specific corporate action." Palantir Br. 30. But the *BV Gateway* court declined to apply *Garner* only because it was "hotly disputed" whether the nature of the movant's interest was sufficient to

create "any fiduciary duty" between the parties. Ex. A at 63-64. Although the court did note that there was "a great amount of general antagonism" between the parties, it ultimately rejected the *Garner* motion for a "[m]ore specific[]" reason—namely, because the parties "dispute[d] the nature of AV Startt's interest in BV Gateway." *Id.* at 64. Here, there is no such dispute.

Palantir also attempts to distinguish *Freeport-McMoRan*, which held that mutuality of interest was only severed at the time that the stockholder "consider[ed] litigation" about the specific corporate action at issue. Opening Br. 29. Palantir claims that this case is different because "Abramowitz and Palantir's interests diverged long before" the IRA Amendments. Palantir Br. 31. Palantir seems to be resurrecting the argument it made to the Court of Chancery that "adversity" between management and a stockholder about *any subject* is sufficient to sever mutuality of interest as to *all subjects*. The Court of Chancery properly rejected this "general advers[ity]" argument. Opening Br. 4. This argument finds no support in *Metropolitan Bank* and *Continental Insurance*,[10] and we are unaware of any court anywhere accepting a similar argument.

[10] *See Metro. Bank,* 2001 WL 1671445, at *3-4 (mutuality of interest existed until one party "assert[ed] that the proposal [that was subject of litigation] violated the partnership agreement"); *Cont'l Ins.*, 1999 WL 66528, at *1 (mutuality of interest existed until limited partner announced withdrawal from partnership where litigation concerned propriety of withdrawal).

Palantir also claims that, by sending the IRA Demand, KT4 had taken an "affirmative act" that severed mutuality of interest. Palantir Br. 32. But under *Metropolitan Bank* and *Continental Insurance*, the limited partner's affirmative act created a specific dispute that was the subject of the *Garner* motion. *See, e.g.*, *Metro. Bank*, 2001 WL 1671445, at *3 (holding that both parties must "reasonably anticipate litigation about an identified dispute"). That is not the case here, as the corporate action in dispute (the IRA Amendments) did not occur until *after* KT4 took its supposed affirmative act (sending the IRA Demand). In fact, KT4 did not know about the IRA Amendments until after they were procured and could not have taken any act that could be construed as challenging the Amendments until after learning of their existence. Opening Br. 9-11. Because the communications at issue occurred *before* the Amendments, KT4 and Palantir had a mutuality of interest as to the Amendments, even under *Metropolitan Bank* and *Continental Insurance*. It is simply impossible for KT4 to have affirmatively challenged or anticipated litigation about a corporate action it knew nothing about, particularly when the corporation "led KT4 to believe that it was considering KT4's information request." *Palantir*, 2018 WL 1023155, at *13.

Finally, Palantir appears to suggest that mutuality of interest was severed because it claims to have effected the IRA Amendments for the "specific purpose of protecting the Company from KT4 and Abramowitz." Palantir Br. 33. This

argument fails for two reasons. First, Palantir's subjective intent, standing alone, is irrelevant under *Metropolitan Bank* and *Continental Insurance*. Those cases make clear that mutuality of interest was only severed "after *each party was made aware*" of the disputed conduct.[11] *Cont'l Ins.*, 1999 WL 66528, at *3 (emphasis added). As KT4 showed in its opening brief, a rule that only required the corporation (but not the stockholder) to anticipate litigation would allow management to hide behind the attorney-client privilege when taking an action, in secret, that management knew would be harmful to stockholders.[12] Opening Br. 30-31. Second, Palantir's claim that it effected the IRA Amendments to "protect[] the Company from KT4 and Abramowitz" conflicts with the Court of Chancery's factual findings after trial, which found that this very explanation *provided further reason to believe that wrongdoing occurred*:

> Moreover, the circumstantial evidence surrounding the September 2016 IRA Amendments provides a further credible basis to infer potential wrongdoing. 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

[11] *See also Metro. Bank*, 2001 WL 1671445, at *3 (mutuality lapses "by the time that *the general partner and the limited partner* can reasonably anticipate litigation about an identified dispute." (emphasis added)).

[12] Such a rule would undermine *Garner*'s purpose, which is to allow stockholders to invade the privilege if management is accused of acting contrary to stockholder interests. Opening Br. 21. *Garner* would mean little if it were disabled in cases where management anticipated litigation because it was taking an unannounced action that it *knew* was contrary to stockholder interests.

> 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.

Palantir, 2018 WL 1023155, at *13. Palantir cannot repeat that same argument now to avoid further inspection. Moreover, this argument puts the rabbit in the hat. As this Court held, the entire reason for KT4's inspection is to determine the "origins, purposes, and need for the amendments," as well as the internal and external approval process. *KT4 Partners*, 203 A.3d at 757. Palantir's bald claim in its appellate brief that the "purpose" of the IRA Amendments was to "protect" the company cannot obviate the inspection of actual books and records.

* * *

For these reasons, the Court of Chancery erred by finding a lack of mutuality of interest as to the IRA Amendments.

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

The sole dispute on *Garner*'s good-cause factors is whether depositions of Palantir's witnesses in the tortious interference case in Delaware Superior Court give KT4 adequate information about the "origins, purposes, and needs" of the IRA Amendments. There is no serious dispute that the depositions provide no information about the internal and external approval process for the Amendments. Nor is there any genuine dispute that every other *Garner* factor points toward inspection, as KT4 showed in its opening brief.[13] Opening Br. 33-34.

The Court of Chancery erred in concluding that the depositions shed any light on the "origins, purposes, and need" of the Amendments.[14]

Palantir's "good cause" arguments fail on the merits. To start, Palantir does not dispute that deposition testimony is no substitute for inspection of actual

[13] Palantir suggests that KT4 is on a "blind fishing expedition" because it has sought "production of every single document that Palantir has withheld on the basis of attorney-client privilege." Palantir Br. 39. That shopworn phrase is no substitute for actual argument, particularly where KT4's request is specifically targeted to only those documents relating to the "origins, purposes, and need" of the Amendments, as well as the external and internal approval process. Opening Br. 16-17. Even as to those documents, KT4 did not seek documents over which Palantir claimed both attorney-client privilege and work-product protection. *Id.*

[14] Palantir argues that an abuse of discretion standard should apply. This argument conflicts with *Wal-Mart*, where this Court reviewed the Court of Chancery's *Garner* rulings, including its good-cause analysis, de novo. *Wal-Mart*, 95 A.3d at 1272. So too here, where KT4 is not challenging the Court of Chancery's factual findings. The deposition transcripts say what they say. The only issue is whether those transcripts, as a matter of law, are enough to disable KT4's *Garner* rights.

documents if the deponents do "not recall information concerning the subject upon which they were being questioned or attempt[] to trivialize certain of the bases of the plaintiff's claim." Opening Br. 35-36 (citing *Fuqua*); *see also* Palantir Br. 40-41. Applying that legal standard, KT4 has shown good cause under *Garner*. Palantir ignores that the deponents could not recall *any* specifics about the Amendments or hid behind the attorney-client privilege. Opening Br. at 33-36. Five Palantir witnesses testified about amending a fundamental governance document and *none* could remember *even one* contemporaneous communication about the purpose of the Amendments.[15] Opening Br. 33-36. For that reason, Palantir, like its witnesses, can only rely on generalities, arguing (at 37-39) that the depositions were "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."[16]

[15] Indeed, Palantir's Rule 30(b)(6) witness testified that everything relating to the Amendments was handled by counsel but that he did not talk with counsel when preparing for his deposition. Opening Br. 35-36. Obviously, neither did any other Palantir witness.

[16] To bolster this argument, Palantir claims that the Amendments included a new provision that allowed it to decline to provide Major Investors access to any information that it "reasonably considers to be a trade secret or similar confidential information." Palantir Br. 16. That is demonstrably incorrect. The IRA has contained such a provision *dating back to at least 2008*. AR15. There is no world in which KT4's IRA Demand could have obligated Palantir to produce a "trade secret or similar confidential information." *Id.*

Every Palantir deponent merely parroted Palantir's long-held litigation position: the IRA Amendments were executed because Abramowitz requested confidential information after Karp accused him of theft of trade secrets. *Palantir*, 2018 WL 1023155, at *13. But Palantir tried this tack before the Court of Chancery, which did not find the explanation credible and ordered Palantir to produce books and records on that very topic. *Supra* pp. 19.

That same made-for-litigation explanation cannot be a substitute for the actual documents and communications relating to the Amendments here, particularly where Palantir's "explanation" leaves all the details unanswered. For example, Palantir's witnesses could not say if Palantir was motivated by hiding information that would have revealed management's (lack of) compliance with the First Refusal and Co-Sale Agreement. *See, e.g.*, A581 ("I don't recall whether [the Co-Sale Agreement] was or wasn't a specific concern."). If Palantir's self-serving, detail-free representation could prevent a stockholder from establishing good cause to examine actual documents, it is hard to imagine how a stockholder could ever establish good cause.

Moreover, Palantir's own caselaw recognizes that good cause is established if the depositions show that a stockholder cannot obtain the needed information "without intruding on the attorney-client privilege." *See Buttonwood Tree Value Partners, L.P. v. R.L. Polk & Co.*, 2018 WL 346036, at *5 (Del. Ch. Jan. 10, 2018).

But Palantir's CEO and its 30(b)(6) designee on this topic both refused to provide answers to questions related to the "origins, purposes, and need" for the Amendments on privilege grounds.[17] *See* Opening Br. at 35-26; A555-56, A540. Information relating to the "origins, purposes, and need" of the IRA Amendments is therefore not available from another, non-privileged source. Palantir has no real response to its witness's reliance on the attorney-client privilege, other than to repeat that the deposition testimony was adequate. Palantir Br. 37-39. But a one-sentence explanation that may as well been cribbed from Palantir's post-trial briefs cannot replace the contemporaneous documents and communications related to the IRA Amendments.

[17] When asked whether the IRA Amendments were designed to suppress information that "would have revealed misconduct" on the CDH transaction, Palantir's 30(b)(6) witness could only say: "Yeah, I -- I don't agree with the characterization that the company had committed any misconduct, but I can't answer that question further without attorney-client privileged information." A570.

CONCLUSION

For all the forgoing reasons, as well as those articulated in KT4's Opening Brief, this Court should reverse the Court of Chancery's Order.

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