

November 15, 2019

Delaware Court Denies Activist's 220 Demand to Inspect
M&A Books and Records

Yesterday, Vice Chancellor Slight of the Delaware Court of Chancery [denied](#) Carl Icahn's lawsuit to compel inspection of the internal books and records of Occidental Petroleum as part of his pending proxy contest against the company. Icahn's proxy contest was initiated in response to the decision by the Occidental board to approve the company's \$55 billion acquisition of Anadarko Petroleum in a transaction structured to avoid the requirement of Occidental shareholder approval of the deal.

Under Section 220 of the Delaware General Corporation Law, stockholders acting in good faith may inspect corporate books and records, usually on a confidential basis, if they prove that the information is not available from another source and access to the specified non-public materials is "necessary, essential and sufficient" to accomplish the articulated purpose. The Delaware courts are often willing to grant access to books and records to investigate cases of [wrongdoing](#), misconduct and breaches of fiduciary duty. But the courts have decried "fishing expeditions," [limited access](#) when warranted and recognized that there is potential for abuse when Section 220 demands are made in the context of a threatened or ongoing [proxy contest](#).

Key takeaways from the ruling:

1. "Mere disagreement" with a business decision, including "disagreeing with a board's business judgment" or a board's "deal making prowess," does not establish a credible basis to infer corporate mismanagement or wrongdoing sufficient to support a books-and-records demand.
2. The court refused to "recognize a new rule entitling stockholders to inspect documents under Section 220 if they can show a credible basis that the information sought would be material in the prosecution of a proxy contest," and concluded that "pleading an imminent proxy contest is not enough to earn access to broad sets of books and records relating to the details of questionable transactions...."
3. The court refused to grant Icahn access to materials addressing whether the Occidental board considered selling the company itself. "If Plaintiffs think the Board should have considered in the past, or should consider in the future, a sale of the Company, they do not need records from the Company to make that case" as they can make that argument directly to the stockholders without access to private deliberations.

Yesterday's ruling provides an important reminder that activist hedge funds cannot expect unfettered access to a company's non-public books and records, including sensitive board materials, to help them prosecute proxy contests in the M&A context, and that the courts stand ready to enforce restraint against activists who over-reach.

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