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If You Have Someone Else's Stuff, You've Gotta Give It Back: Delaware Court of Chancery Reminds Us That Directors Generally May Not Share Confidential Information With Stockholders Who Nominated Them

Client Advisories

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January 29, 2024 - On January 16, 2024, Vice Chancellor Paul A. Fioravanti, Jr. of the Delaware Court of Chancery issued a decision in *Icahn Partners LP et al. v. Francis deSouza et al.*, reminding the public that, under Delaware law, only limited instances exist where a director nominated by a stockholder can share confidential company information with that stockholder.[1] As a result, the court determined that plaintiffs, stockholders of life sciences company Illumina who received confidential and privileged information concerning Illumina from the director they nominated, improperly included that information in a lawsuit against individual defendants related to the company and granted defendants' motion to strike the information from the lawsuit. Directors who have been appointed by stockholders should note the court's ruling because they may be precluded from sharing information with those stockholders, even where the stockholders nominate or employ that director.

Background

In February 2023, plaintiffs Icahn Partners LP, Icahn Partners Master Fund LP and Matsumura Fishworks LLC, each controlled by Carl Icahn, became stockholders of Illumina,[2] owning in total about 1.4% of Illumina's outstanding common stock. A few months later, plaintiffs proposed a three-candidate slate, including Andrew Teno, an employee of an Icahn affiliate.[3] Illumina's stockholders elected Teno to the company's board of directors.[4]

Teno agreed to abide by the company's code of conduct, which prohibited him from using or giving to others any trade secrets or confidential information of the company, except as necessary for the proper performance of his duties.[5] Nevertheless, Teno shared privileged and confidential company information with Icahn affiliates.[6] Plaintiffs used this

information to draft their complaint, bringing claims that individual company defendants had breached their fiduciary duties. [7]

As a general rule, "directors are entitled to privileged communications delivered to the corporation or the board." [8] Here, defendants did not dispute Teno's right to Illumina information covered by the attorney-client privilege. [9] Rather, the issue before the court was whether Teno was authorized to share that privileged material with the plaintiffs, who used the information in a complaint against the company's directors. [10] While directors possess certain rights to company information, the court noted that "this court has not developed a bright-line rule" about what a director can do with that information. [11]

Directors' Access to Corporate Information

The court began its analysis by restating the well-established rule that corporate directors possess broad rights to receive and review company information. Additionally, the court stated that directors may also be permitted to access "legal advice provided to the board before their tenure if they have a present need for that information to perform their fiduciary duties." [12] Thus, Teno possessed broad rights to information about Illumina, extending to privileged material. [13]

Shareholders' Access to Corporate Information and the Circle of Confidentiality

The court then turned to whether the plaintiffs were entitled to receive the privileged information about Illumina. Plaintiffs argued that they were entitled to receive the information because Teno was their board nominee and employed by a separate Icahn-controlled entity. [14] Additionally, plaintiffs argued that they were "joint clients" with regard to privileged information shared with Teno, and thus had an equal right to that information. [15] The court rejected these arguments, writing that "a director may share a corporation's privileged communications with the director's designating stockholder" only under specific limited circumstances. [16]

Pursuant to Delaware law, a director may disclose privileged or confidential company information to a stockholder only where: "(1) the director is designated to the board by the stockholder pursuant to contract or the stockholder's voting power, or (2) if the director also serves in a controlling or fiduciary capacity with the stockholder." [17] For the first exception, the court noted express contractual rights, such as those in a stockholders' agreement, present in prior designated-director cases. [18] For the second exception, the court highlighted a series of "one brain" cases [19] in which the director "controlled or served in a fiduciary capacity with the stockholder" pursuing the information. In such cases, the director was unable to divide her brain between her role as a director and her role "controlling or as a fiduciary" of the entity seeking information. [20]

Here, the court stated that the plaintiffs "[did] not have a contractual right to appoint a director" and did not control the Illumina vote during Teno's election, considering they owned less than two percent of Illumina's outstanding stock. [21] Further, Teno "[did] not serve in a fiduciary role for any of the [p]laintiffs." [22] Thus, there was no concern that Teno was a dual-fiduciary and would therefore fall into the same category as the "one brain" cases. [23]

Moreover, the court stated that it was not reasonable for Teno to have believed that he could share Illumina's privileged information with the plaintiffs, since he had agreed to follow the company's code of conduct. [24]

Conclusion

The court held that plaintiffs had not demonstrated that they fell within the "circle of confidentiality" that would allow Teno to share Illumina's privileged information with them, [25] noting the fact that the public cannot access that information does not permit its unauthorized dissemination and use. [26] Although the confidential information did not "neatly fit into the four categories that permit the court to strike information from a pleading" under Rule 12(f) [27], as a remedy for Teno's unauthorized distribution of Illumina's privileged information and plaintiffs' unauthorized use of it, the court granted defendants' motion to strike the information from the complaint. [28] In so doing, the court stated that

Delaware case law demonstrates that the court has "broad power to protect confidential information" and to create a suitable remedy if such information is "improperly interjected into litigation." [29] The court followed the directions of Delaware's former Chief Justice, then-Chancellor, Strine in the related circumstances of *Wal-Mart Stores, Inc. v. Indiana Elec. Workers Pension Tr. Fund IBEW*, concluding that "'if you have someone else's stuff and you shouldn't have that, then you [have] got to give it back' and may not use it for any purpose." [30]

Interestingly, the court did not address whether Teno should bear liability for improperly sharing Illumina's information in breach of both his fiduciary duty to the company and the company's code of conduct. However, directors who have been appointed by stockholders should keep the court's ruling in mind because they may be precluded from sharing information with those stockholders, even where the stockholders nominate or employ that director.

For more information about this case, please contact Dan Weiner, Chuck Samuelson or Gabrielle Gorelik.

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1. *Icahn Partners LP v. Francis deSouza*, C.A. No. 2023-1045-PAF, 2024 BL 14775 (Del. Ch. Jan. 16, 2024). ↩
2. *Id,* slip op. at 4. ↩
3. *Id.* ↩
4. *Id.* at 5. ↩
5. *Id.* at 6. ↩
6. *Id.* ↩
7. *Id.* ↩
8. *Id.* at 9. There are three exceptions to a director's broad access to privileged information: (1) the existence of an "ex ante agreement among the contracting parties", (2) "a board can act pursuant to 8 *Del. C.* § 141(c) and openly with the knowledge of the excluded director to appoint a special committee. A committee would be free to retain separate legal counsel, and its communications with that counsel would be properly protected, at least to the extent necessary for the committee's ongoing work, such as conducting a special committee investigation or negotiating an interested transaction . . .", or (3) if "sufficient adversity exists between the director and the corporation such that the director could no longer have a reasonable expectation that he was a client of the board's counsel." ↩
9. *Id.* at 10. ↩
10. *Id.* at 10. ↩
11. *Id.* at 11. *See also* Catherine G. Dearlove & Jennifer J. Veet Barrett, *What to Do About Informational Conflicts Involving Designated Directors*, 57 Prac. Law. 45, 48 (2011) ("[T]he boundaries of where a director's disclosure of confidential corporate information crosses from permissible disclosure to a breach of fiduciary duty are far from clear . . ."). ↩
12. *Icahn Partners,* slip op. at 8. ↩
13. *Id.* at 7. ↩
14. *Id.* at 11. ↩
15. *Id.* ↩
16. *Id.* at 12. ↩
17. *Id.* at 19. ↩
18. *Id.* at 22. For example, in *Moore Bus. Forms, Inc. v. Cordant Hldgs. Corp.*, 1996 WL 307444 (Del. Ch. Jun. 4, 1996), "the stockholder plaintiff ("Moore") acquired preferred stock of Cordant Holdings Corporation ("Holdings") and entered into a stockholders' agreement that enabled it to appoint a director to the Holdings board of its wholly owned subsidiary Cordant, Inc. ("Cordant") [. . .]. In resolving [a] dispute, Justice Jacobs, then a Vice Chancellor, held that Moore was entitled 'by virtue of the Stockholders' Agreement' to all of the information that its director designee could have received, and that 'no basis exists to assert the privilege against [the designee], or, by extension, against Moore." The court cited *Hyde Park Venture P'rs Fund III, L.P. v. FairXchange, LLC*, 292 A. 3d 178 (Del. Ch. 2023), explaining that "the outcome in Moore Business Forms [turned] on the fact that Moore could appoint a designee and was presumed to share information with its designee [. . .].That in turn meant that Holdings had no expectation of

confidentiality as to Moore and could not assert the attorney-client privilege."; s*ee also KLM*, 1997 WL 525861, where a stockholder was allowed to access privileged information because it had a contractual right to designate a director. ↩

19. *Id.* at 21. For example, in *Hyde Park*, 292 A.3d at 196, "having only one brain, Weiss [a director and manager of plaintiffs] could not avoid sharing information." ↩
20. *Id.* ↩
21. *Id.* at 20. ↩
22. *Id.* ↩
23. *Id.* ↩
24. *Id.* at 25. ↩
25. *Id.* at 26. ↩
26. *Id.* at 32. ↩
27. Rule 12(f) provides "Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these Rules, upon motion made by a party within 20 days after the service of the pleading upon the party or upon the Court's own initiative at any time, the Court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." ↩
28. *Id.* ↩
29. *Id.* at 30. ↩
30. *Id.,* quoting former Chancellor Leo E. Strine, Jr., Wal-Mart, C.A. No. 7779-CS, at 77:24–78:2. ↩

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