

Locke Lord QuickStudy: Delaware Court of Chancery Finds That Crossing the “Fine Line Between Glaringly Egregious Conduct and an Aggressive Litigation Position” Costs Gilead \$1.76 Million in Attorneys’ Fees

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As discussed last January, Delaware courts have lowered the threshold for stockholders to gain access to books and records. Stockholders are permitted to obtain books and records so long as they can show a credible basis to suspect wrongdoing, which is the “lowest possible burden of proof under Delaware law.” Under this standard, stockholders need not identify any particular course of action they intend to take with the books and records obtained or explain whether any suspected wrongdoing is actionable.

Last November, the Delaware Court of Chancery in *Pettry v. Gilead Sciences, Inc.*, 2020 WL 6870461 (Del. Ch. Nov. 24, 2020) granted the request of Gilead Sciences, Inc.’s stockholders to inspect Gilead’s books and records under Delaware General Corporation Law Section 220. The Court found that, while the unverified allegations may not have been “substantiated or even probable,” they met the stockholder plaintiffs’ low burden of demonstrating a “credible” basis for their investigation.

In its ruling, the Court unexpectedly invited the stockholders to file a motion for attorneys’ fees. The Court criticized Gilead for its “overly aggressive defense strategy,” and opined that there is a “trend of overly aggressive litigation strategies by blocking legitimate discovery, misrepresenting the record, and taking positions for no apparent purpose other than obstructing the exercise of Plaintiffs’ statutory rights.” The Court also expressed its belief that Gilead’s “real goal in this litigation is not to protect its interests but, rather, to make the process of investigating wrongdoing as difficult as possible for its stockholders.” Following the Court’s ruling, the stockholders filed a motion for an award of attorneys’ fees and expenses.

On July 22, 2021, in a barely six page opinion, the Court of Chancery granted the stockholders’ motion for an award of attorneys’ fees and expenses, and ordered Gilead to pay the stockholders’ \$1.76 million legal bill. The Court primarily took issue with Gilead’s declining to produce a single document to any stockholder plaintiff, thereby forcing the stockholders to commence litigation. With this backdrop, the Court found that Gilead took positions during the litigation that “when viewed collectively, were glaringly egregious.” The Court specifically referenced:

- Gilead’s argument that the stockholders had not met “the lowest possible burden of proof,” even though the stockholders had “ample support”;
- Gilead’s argument that the books and records demand should be denied because any follow-on claims after

the inspection would be dismissed, which ignored that the standard does not require stockholders to demonstrate actionable wrongdoing;

- Gilead's assertion of a defense based on *Wilkinson v. A. Schuman, Inc.*, 2017 WL 5289553, at *3–4 (Del. Ch. Nov. 13, 2017),¹ despite all stockholder plaintiffs' deposition testimony revealing that the plaintiffs "were knowledgeable about the basis for their Demands"; and
- Gilead's aggressive positions in discovery, despite the "purpose and nature of Section 220 proceedings" being better served when "managed expeditiously."

In opposition to the stockholders' motion, Gilead had contended that it vigorously defended the lawsuit on the "good-faith belief that the case law and factual record developed through discovery supported its arguments." The Court disregarded Gilead's subjective belief, and found that "[a]lthough Delaware courts have described the bad faith standard as 'subjective,' this court has shifted fees based on litigation conduct without launching a fact-intensive investigation into the offending party's state of mind." The Court found that "where this court shifts fees to curb and correct for overly vexatious litigation behavior, a showing of glaringly egregious litigation conduct is enough."

Conclusion

As Delaware courts continue to grow weary of challenges to books and records demands, companies are well-advised to mitigate exposure to added liability arising out of such demands and avoid taking overly aggressive litigation positions, such as refusing to provide stockholders with any documents. Locke Lord reiterates its suggestion that corporations consider taking the following steps in response to a books and records demand:

- Responding to Section 220 demands in a timely manner and with records that reasonably fall within the proper purpose specified in the demand can foreclose access to other information and help avoid a potential fee award in favor of the stockholders.
- Because courts may allow discovery beyond formal meeting minutes in order to determine "what records exist," including potentially a corporate representative deposition, it can be advantageous to maintain detailed and accurate formal board materials, including but not limited to minutes, consents, letters, and resolutions.
- Company board members can protect personal information by using company email platforms for board-related communications and other messaging platforms for personal emails and other communications.

¹ A *Wilkinson* defense involves demonstrating that the stated "proper purpose" of the books and records demand is not, in fact, the actual purpose for the demand. Such a showing is "fact intensive and difficult to establish." In *Wilkinson*, the Delaware Court of Chancery denied inspection where the defendant proved that the plaintiff was a passive conduit in a purely lawyer-driven inspection effort. The *Gilead* Court noted that Delaware courts have clarified that *Wilkinson* involved "extreme facts." Thus, the *Gilead* Court found that "Gilead's argument that five separate plaintiffs represented by four separate sets of counsel committed the same blunders found in *Wilkinson* borders on absurd."

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