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PERSPECTIVE

Ruling doesn't alter a director's access to books and records

By Marc Boiron

In *Bizzari v. Suburban Waste Services, Inc.*, the Delaware Court of Chancery denied, in part, the demand to inspect the books and records of a corporation by a person in his capacity as a stockholder and director of the corporation, due to the desire of the stockholder and director to harm and compete with the corporation using the information obtained from the corporation.

In 2013, after suffering operating losses for several years, Suburban Waste Services raised capital from David DiLenno in exchange for 20 percent of the outstanding capital stock of Suburban Waste. He later increased his interest in Suburban Waste to 33.33 percent of its outstanding capital stock. Bizzari and his spouse at the time owned the other 66.66 percent of the outstanding capital stock of Suburban Waste.

Upon DiLenno's acquisition of his interest in Suburban Waste, he was elected Suburban Waste's chief executive officer and Bizzari was elected its chief operating officer. DiLenno made significant changes to the manner in which Suburban Waste operated, and Bizzari began making negative comments about Suburban Waste that could negatively affect its reputation.

In April 2014, Bizzari took a leave of absence for medical reasons. When he sought to return to work at Suburban Waste in August 2014, he felt unwelcome. He began working at his father's waste management company, B&L Hauling, a competitor of Suburban Waste. Bizzari contacted several long time employees of Suburban Waste to solicit their employment

Any corporation seeking to thwart a director's right to inspect the books and records of the corporation should understand that *Bizzari* does not alter a director's essentially unfettered access to the books and records of the corporation. The corporation will continue to face an uphill battle when fighting a books and records demand because it has the burden of showing that the director's demand is improper.

with B&L. In addition, he appeared to have informed Suburban Waste's banks and credit agencies that Suburban Waste was having financial difficulties.

During this time, Bizzari's spouse had a romantic relationship with DiLenno, which resulted in Bizzari's divorce and custody battle over a minor child.

On Jan. 13, 2015, Bizzari sent a demand for inspection of Suburban Waste's books and records pursuant to Section 220 of the General Corporation Law of the State of Delaware as both a director and a stockholder. The demand sought, among other things, information regarding the ownership and governance of the corporation; organizational documents; financial information, including financial statements, employee compensation, production sales and bank statements; and documents relating to the actual or possible sale of corporate assets.

The stated purpose of Bizzari's inspection demand was, among other things, to (i) monitor the performance of the corporation, (ii) determine the value of his ownership interest therein, and (iii) investigate claims relating to wrongdoing, improper transactions, waste and mismanagement by the

other stockholders of Suburban Waste.

Suburban Waste refused to comply with Bizzari's inspection demand, and Bizzari commenced this action.

After a trial, the court concluded that Bizzari, in his capacity as a stockholder and a director, was entitled only to inspect high-level financial information for the purpose of valuing his shares, subject to a confidentiality order.

With respect to Bizzari's demand to inspect books and records in his capacity as a stockholder of Suburban Waste, Bizzari argued that investigating possible mismanagement or wrongdoing and valuing his interest in Suburban Waste constitute a proper purpose to inspect the books and records. The stockholder's primary purpose for seeking to inspect books and records must be proper, and any secondary purpose is irrelevant. No purpose may be adverse to the corporation or be intended to harass the corporation.

The court found that Bizzari failed to meet his burden of establishing a credible basis to investigate possible mismanagement or wrongdoing. After the trial in this action, Bizzari filed a claim against the other two directors for

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breach of fiduciary duty as a result of their attempts to remove him as a director and to sell certain Suburban Waste assets without his consent, which are some of the same allegations supporting Bizzari's books and records demand. Bizzari also alleged that an increase in accounts payable as compared to the previous year demonstrated mismanagement. The court concluded that filing the breach of fiduciary duty claim conceded that inspection of books and records was not essential to investigate mismanagement or wrongdoing and that an increase in accounts payable, alone, was insufficient to support an inference of mismanagement or wrongdoing.

Suburban Waste conceded that the valuation of Bizzari's shares of the corporation's stock was a proper purpose to inspect books and records that would enable him to value his shares but limited the scope of the documents to be inspected. The court concluded that high-level documents, such as financial statements, income statements, balance sheets, communications from accountants, tax returns and schedules thereto, agreements encumbering Suburban Waste's assets and documents concerning the actual or possible acquisition of any stockholder's interest in Suburban Waste must be provided to Bizzari. However, the court refused to permit Bizzari to inspect records related to compensation paid to employees, sales and expenses, bank statements and other detailed operating information, especially where the information is more likely to be used to further Bizzari's vendetta against the two other stockholders than to value his shares of stock.

With respect to Bizzari's demand

to inspect books and records in his capacity as a director of Suburban Waste, Suburban Waste successfully carried its burden to show that Bizzari's essentially unfettered right under Delaware law to inspect books and records in his capacity as a director should be denied because Bizzari's motives were inconsistent with his fiduciary obligations and with the interests of Suburban Waste and its stockholders. Given Bizzari's willingness to compete directly with Suburban Waste and to damage Suburban Waste's reputation and operations, the court determined that Bizzari's inspection of books and records, other than high-level financial information, would enable him to breach, rather than uphold, his fiduciary duties.

This decision reinforces principles that often arise in the context of demands for books and records and supports a corporation's attempt to deny certain books and records demands. Any corporation

seeking to thwart a director's right to inspect the books and records of the corporation should understand that *Bizzari* does not alter a director's essentially unfettered access to the books and records of the corporation. The corporation will continue to face an uphill battle when fighting a books and records demand because it has the burden of showing that the director's demand is improper. However, *Bizzari*, which is a rare case denying a director's right to inspection, supports a corporation's argument against giving a director access to books and records where the intended use of the books and records is potentially contrary to the director's fiduciary duties.

A corporation refusing to give access to books and records that a director demands on the basis of the director's potential adverse use of the documents should seek to obtain the director's agreement to sign a confidentiality agreement or offer his or her interest in the

corporation (if he or she is also a stockholder) as collateral for a guarantee not to misuse the books and records if the corporation agrees to provide access to the requested books and records. The court in *Bizzari* suggested that a party seeking to inspect books and records with proper motives should show a willingness to sign a confidentiality agreement or to offer stock in the corporation as collateral for a guarantee not to misuse the books and records. Therefore, a director's unwillingness to take the requested actions may support a corporation's attempt to deny a books and records demand.

Moreover, in the context of family-owned businesses, the purpose of a demand for inspection of books and records may be unclear. The stockholder making the demand often has a real business purpose and a non-business, potentially vengeful purpose. If the primary purpose of the demand is proper, then any

secondary purpose is irrelevant. However, the primary purpose of the demand may be difficult to determine. It is important to understand all of the facts surrounding the demand and the timing of the demand to determine the primary purpose of the demand. If the primary purpose is adverse to the corporation, unrelated to a legitimate interest of the stockholder, or intended to harass the corporation, then the demand likely will be denied.

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