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Case No. 2018-0816-JTL

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE DELL TECHNOLOGIES INC : Consol. C.A. No.
CLASS V STOCKHOLDERS LITIGATION : 2018-0816-JTL

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Chancery Court Chambers
Leonard L. Williams Justice Center
500 North King Street
Wilmington, Delaware
Friday, September 17, 2021
3:19 p.m.

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BEFORE: HON. J. TRAVIS LASTER, Vice Chancellor

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ORAL ARGUMENT ON PLAINTIFFS' MOTION TO COMPEL AND RULINGS OF THE COURT - HELD VIA ZOOM

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CHANCERY COURT REPORTERS
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24 Appearances Cont'd ...

1 APPEARANCES (Cont'd):

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1 THE COURT: Welcome, everyone. I know
2 we have a lot of people on the line, so I'm hoping to
3 focus on the folks who are going to present the motion
4 to compel involving Mr. Green.
5 If I could start with Mr. Green's
6 counsel and get introductions from them, we can then
7 pivot over to the plaintiffs and the plaintiffs can
8 get underway.
9 MR. BARLOW: Your Honor, good
10 afternoon. It's Mike Barlow from Abrams & Bayliss
11 here today on behalf of defendant Bill Green. I am
12 joined today by April Kirby of my office, as well as a
13 team from Latham & Watkins, Michele Johnson, Kristin
14 Murphy, and Ryan Walsh.
15 With the Court's permission,
16 Ms. Murphy will present the argument today. She's
17 been admitted *pro hac*.
18 THE COURT: Thank you very much, and
19 welcome to you.
20 And if I didn't say it before, welcome
21 to everyone who has joined. The fact that I'm not
22 going to take everyone's introduction doesn't mean I'm
23 not very grateful to you-all for being here.
24 For the plaintiffs?

1 MR. WEINBERGER: Good afternoon, Your
2 Honor. Ned Weinberger on behalf of the plaintiff. I
3 have colleagues on the line from my firm, as well as
4 co-counsel from Quinn Emanuel, Andrews & Springer and
5 Friedman, Oster & Tejtel and, finally, Robbins,
6 Geller, Rudman & Dowd.
7 THE COURT: Great. Well, welcome to
8 all of you as well.
9 Feel free to get underway.
10 MR. WEINBERGER: Okay. Ned Weinberger
11 again, for plaintiff, for the record.
12 We are here today on plaintiff's
13 motion to compel defendant William Green, who is one
14 of the two members of the special committee, to
15 produce emails that he is withholding on the basis of
16 attorney-client privilege. All of the emails that are
17 at issue are ones that Mr. Green either sent or
18 received in his capacity as a director of Dell
19 Technologies, but that he's sent or received using an
20 email account provided by and controlled by his former
21 employer, Accenture PLC.
22 The legal issue before the Court is
23 reasonable expectation of confidentiality. Mr. Green
24 contends that he had a reasonable expectation that

1 Accenture would never monitor, review, or access any
2 of his emails unless he were engaged in some type of
3 wrongdoing. But as we explained in our papers, to the
4 extent Mr. Green genuinely harbored that subjective
5 expectation, it was objectively unfounded, given the
6 policies that Accenture adopted and that Mr. Green was
7 on notice of.
8 And these are policies adopted when
9 Mr. Green was CEO of Accenture, when he was chairman
10 of the board of Accenture, and they're policies that
11 have remained in force following Mr. Green's
12 retirement from the company. And despite my friends'
13 suggestion in their papers, the policies have really
14 never changed in any material respect. It's always
15 been clear that users' privacy is limited. Accenture
16 has always possessed the right to review, monitor, and
17 access email, and that right has not been narrowed in
18 any way, as my friends suggest.
19 And unless Your Honor has another
20 preference, what I would like to do is perhaps walk
21 you through a few of the policies, because I know
22 there's a lot of sort of hop-scotching in my friends'
23 papers, but I think if we sort of look at them
24 chronologically, just a few of them, from the time

1 when Mr. Green was CEO, when he was chairman, and the
2 policy from the present day, I think you'll see that
3 the policies have remained very consistent over time.
4 Your Honor, am I able to use screen
5 share, perhaps?
6 THE COURT: If you're not currently,
7 then my intrepid clerk will facilitate that.
8 MR. WEINBERGER: It looks like I am.
9 Thank you.
10 Okay. I'll sort of group these into
11 sets of policies. Your Honor received a number of
12 policies from Mr. Green's last year as CEO of
13 Accenture in 2010. In chronological order, it's
14 Exhibit C to Ms. Kirby's declaration, Exhibit D to
15 Ms. Kirby's declaration, and then Exhibits 9, 8, and 7
16 to my declaration. And I'm only going to show you two
17 of the policies from 2010, which, again, is
18 Mr. Green's last year as CEO of Accenture.
19 Now, what you should be seeing on my
20 screen is Kirby Exhibit C. This is the policy that
21 was adopted February 17, 2010. You can see the date
22 there. And I'm just going to, really, show you two
23 things in this policy. This is at page 4 of 13 of the
24 policy, "Expectation of Privacy."

1 And sort of skipping ahead to the
2 second sentence of this Section 5.1, it states, "users
3 should not have an expectation of absolute privacy in
4 the materials that are created, sent, or received by
5 them on Company systems." And it further states, "To
6 the extent permitted by local laws and regulation,
7 Company authorized personnel (such as Information
8 Security team members, Computer Incident Response Team
9 [] personnel, and technology support []) may examine
10 all material stored on [the] Company['s] systems
11 without prior notice."
12 And then the only other section I
13 would point Your Honor to is Section 7.1. At the
14 bottom of the same page, "Acceptable Use of Company
15 E-mail." And I point this out because it states,
16 consistent with all the other policies, personal use
17 is no doubt permitted, but what Accenture's policies
18 say is only limited personal use is acceptable.
19 The next policy I would point the
20 Court to is Exhibit D to Ms. Kirby's declaration.
21 That should be showing on your screen. This was
22 adopted May 14, 2010. If we scroll down to page 2 of
23 7, you'll see here again, there's a reference to
24 personal use. "The Company allows limited personal

1 use of Company-provided Technology or Devices."
2 The last sentence, "Employees are
3 encouraged to use a personal email account for
4 personal communications." So, again, not a
5 prohibition, but advised that if you want to keep your
6 emails private, you use a personal email.
7 And then, scrolling down to page 4 of
8 7, the language has been removed about no absolute
9 expectation of privacy. But in its place, in bold,
10 paragraph 7, "As allowed under applicable laws and
11 regulations, the Company may access, monitor, inspect,
12 and/or remove any and all information contained on any
13 and all Devices."
14 And that remains consistent. This is
15 effectively the policy. There's a few more iterations
16 of it. As I mentioned before, Exhibit 9 to my
17 declaration, Exhibit 8, Exhibit 7, that remained in
18 force throughout Mr. Green's tenure as CEO, which
19 ended late in 2010.
20 The next policy I will show Your
21 Honor -- and by the way, these policies from his
22 tenure as CEO, they continued following his retirement
23 as CEO. This is sort of the next change, albeit
24 immaterial. And this is in Mr. Green's last 12 months

1 as chairman of the board of Accenture, before his full
2 retirement from the company.
3 So what we're looking at here is the
4 policy adopted March 1, 2012. You go down to page 2
5 of 10. Same as the last policy from 2010 we had
6 looked at. Again, the reference to personal use,
7 encouraging the users to use personal email account
8 for personal communications.
9 And then, if we scroll down more,
10 page 5 of 10, Accenture has added back in somewhat of
11 another admonition. This is A.1, 7A.1, at the top of
12 this page. "The Company needs to verify how Devices
13 and Technology are used for a number of reasons ...."
14 The last sentence, "Users should
15 therefore be aware that privacy will be limited as
16 further explained below when using or connecting to
17 Company Devices or Technology."
18 Further down, 7A.4, "Company[] Devices
19 and Technology may be monitored for a number of
20 reasons, including (but not limited to)[.]" So this
21 is a nonexhaustive list. And the list includes things
22 beyond simply, you know, wrongdoing.
23 For example, item 4 on the
24 nonexhaustive list, "to ensure that the Company's

1 systems are operating effectively and to perform
2 disaster recovery ... locate [] retrieve data."
3 "6. [] comply with law or ... court
4 order ...."
5 "7. [] safeguard the environment
6 ...."
7 "8. [] quality control or training
8 purposes."
9 And then, if we -- scrolling down to
10 page 6 of 10, this is concerning the limited personal
11 use that, again, at all times has been permitted, but
12 the admonition is that the personal use be limited.
13 This explains acceptable personal use of devices or
14 technology, and then there are some instructions.
15 If users are using Accenture
16 technology for personal reasons, states at C.2, "Users
17 who legitimately wish to protect the privacy of their
18 communications or files when using the Company's
19 Technology or Devices should mark such items clearly
20 as 'private' or 'personal'. For example, by including
21 'private' in the subject line of an email or in the
22 name of a file."
23 Beneath that there's an admonition,
24 notwithstanding about what we've told you about how to

1 properly safeguard your personal emails, the company
2 still has the right, subject to applicable laws,
3 regulations, "to open [those] items that are marked as
4 'private' or 'personal' in some circumstances [again]
5 including (but not limited to) ...."
6 So this is a nonexhaustive list of
7 situations where items are marked personal or private.
8 And, again, Mr. Green did not mark any emails
9 "personal" or "private" or "privileged," give emails
10 any specific notation. What the policy says is,
11 nonetheless, if your emails -- even if you intend to
12 keep them private, we still reserve the right to look
13 at them.
14 The final policy that I would show
15 Your Honor is from 2018. And I think, candidly, if
16 I'm considering kind of what is the most relevant
17 policy, in terms of Mr. Green's expectation, I would
18 look to the policies from when he was CEO, from when
19 he was chairman. According to his interrogatory
20 responses, that is when he says he became aware of the
21 policies that applied to his email. But nonetheless,
22 I do want to point out to Your Honor just that the
23 policies remained consistent continuing through the
24 dates of Mr. Green's service on the special committee.

1 This last document is Exhibit 11 to my
2 declaration, policies adopted March 9, 2018. Your
3 Honor has two sets of 2018 policies in my declaration.
4 Exhibit 11 and then -- Exhibit 10 to my declaration,
5 also Exhibit B to Ms. Kirby's declaration, is also the
6 second 2018 policy.
7 And here again, things are just
8 reordered a little bit, but in substance still the
9 same. Now personal use is addressed earlier. It's
10 not in Section 7 anymore. It's been moved to Section
11 3. Again, limited personal use.
12 You move down to paragraph 2, there
13 are instructions for how to keep your emails genuinely
14 private. Mark them private, mark them personal.
15 Paragraph 4 says notwithstanding those efforts, the
16 company still reserves the right to access a user's
17 email.
18 And then we scroll down a bit further.
19 This is Section 6.1. Again, an admonition. Privacy
20 will be limited. And then, similar to the prior
21 policies, the company's devices and technology may be
22 monitored for a number of reasons, including but not
23 limited to -- again, nonexhaustive list, and includes
24 things, and even the list provided includes things

1 beyond just suspicion of wrongdoing by a user of the
2 Accenture emails.
3 So turning to the *Asia Global* factors
4 themselves, Your Honor, the first factor, which
5 focuses entirely on the policy, and as Your Honor
6 notes in *Information Management Services*, courts have
7 held the first factor weighs in favor of production
8 where "employer advises employees that the employer
9 monitors or reserves the right to monitor work email
10 communications." Here, again, all of the policies are
11 consistent, from the time when Mr. Green was CEO to
12 when he was simply chairman following his retirement:
13 users' privacy is limited. Accenture has the right to
14 review, monitor, and access.
15 And that's confirmed at least
16 implicitly by the affidavit from Paula Wlos, the IT
17 executive at Accenture whose declaration was submitted
18 by Mr. Green. She never disputes plaintiff's reading
19 of the policies, which is the plain reading of the
20 policies. Doesn't dispute that Accenture has at all
21 times possessed the unfettered right to monitor,
22 review, or access Mr. Green's emails.
23 As for the second *Asia Global* factor,
24 the Court considers the degree to which Accenture has

1 acted in accordance with its policies. So essentially
2 two questions: Does Accenture enforce its policies,
3 and to the extent it doesn't, is Mr. Green aware of
4 it?
5 The answer to the first question, does
6 Accenture enforce its policies, the answer is yes.
7 And I go back again to the affidavit from the IT
8 executive from Accenture, which is very different from
9 the affidavit that the two defendants submitted in
10 *Information Management Services*.
11 There, the two defendants had
12 submitted affidavits stating Information Management
13 Services never at any time has actually monitored an
14 employee's email. Here, Ms. Wlos never represents
15 that. All she says is based on her personal
16 knowledge -- and, again -- and notably, personal
17 knowledge. She's not testifying on behalf of
18 Accenture. She states that she is not aware of
19 Accenture monitoring or accessing Mr. Green's emails
20 since he left the company in 2013.
21 Third factor, ease of third-party
22 access. This factor looks at what steps Mr. Green
23 took to protect the privacy of his emails. The answer
24 is, effectively, none. Didn't mark purportedly

1 privileged emails "privileged" or "private." Nor did
2 he take the more-meaningful steps to prevent access to
3 his email.
4 And I will note, there's -- you know,
5 we point out in our papers that Mr. Green did have
6 access to other emails. He had an AOL account. He's
7 also CEO of another entity, GTY Technologies. He had
8 other options at his disposal.
9 My friends say that even had he used a
10 different email address, we would have challenged
11 confidential -- we likely would have challenged
12 confidentiality of that. I would point out, Your
13 Honor, there were five outside directors on Dell's
14 board during the relevant time period, including Ellen
15 Kullman, former CEO of DuPont, director of many
16 companies. She uses a Gmail address. So it is not --
17 and just from experience and what we see case to case
18 to case, this is very common, for outside directors
19 not to be using their corporate third-party email
20 address, but rather, a Gmail, something along those
21 lines.
22 The fourth *Asia Global* factor, Your
23 Honor, looks at whether Mr. Green was aware of
24 Accenture's policy. If the employee had actual or

1 constructive knowledge of the policy, the factor
2 favors production. Mr. Green was aware of Accenture's
3 policy. He admits it. He suggests he had a somewhat
4 different understanding of the policy. I don't think
5 that that actually complies, given that he was the
6 senior-most executive of the company, as CEO and then,
7 ultimately, chairman of the board. So he should be
8 charged, at a minimum, with constructive knowledge of
9 what Accenture's policies are and were.
10 And so, Your Honor, I will stop there
11 and ask if the Court has any questions. And if Your
12 Honor does not, I will cede the floor to Ms. Murphy.
13 THE COURT: Help me think through
14 this. What is the distinction between Gmail, Google's
15 ability to access Gmail, or AOL's ability -- if
16 they're even a company anymore. They're probably a
17 URL that's owned by somebody else -- to access an AOL
18 account and Accenture's ability to access Green's
19 account?
20 MR. WEINBERGER: So my understanding
21 is Gmail and AOL, as a professional service provide,
22 they do not possess the unfettered right to simply
23 access and review customer or client emails. If we
24 serve a subpoena on Gmail asking for, for example,

1 Ms. Coleman's Gmail, they would not have the ability
2 to simply hand over her emails without client consent.
3 And just to give you an analogy, Your
4 Honor, in this case, we subpoenaed phone records of
5 certain -- certain defendants. Subpoenaed phone
6 records from professional service providers, I believe
7 AT&T. AT&T would not simply produce those emails to
8 us -- or not emails to us, but those phone records,
9 text records, et cetera, without customer or client
10 consent.
11 Here, I think if -- as a matter of
12 fact, if we go back to the specific Accenture
13 policies, Accenture, in fact, warns users of the email
14 that -- to comply with the court order or law or
15 subpoena, your emails may be accessed by the company.
16 So I view, again, the corporate policy
17 or third-party corporate email with a clear policy
18 stating that the employer can review the policies very
19 different from the understanding and expectations that
20 one has when using the email of a professional service
21 provider.
22 THE COURT: All right. And say more
23 about why this is a good policy to apply, in terms of
24 causing the use of an employer-sponsored email account

1 under policies like this one to effectuate a waiver.
2 Help me think, from the big picture, why that is
3 beneficial.
4 MR. WEINBERGER: I certainly
5 understand the sort of initial policy premise of
6 privilege, and that we do absolutely want to encourage
7 clients to freely consult with counsel. But there are
8 limitations on that. And this is not a circumstance
9 that applies to every single director of every single
10 corporate board.
11 As I mentioned to Your Honor, Dell, in
12 2018, had five outside directors, individuals who work
13 for Silver Lake. Mr. Dorman used an email account
14 from a small family office that he and his son ran.
15 So to the extent -- the policy question is no doubt a
16 little bit difficult, but I guess what I would say is
17 this is not, you know, a scenario where I would say
18 we're opening the floodgates, in any respect, to broad
19 waivers of privilege for outside directors.
20 I think the ultimate effect is it ends
21 up remaining consistent with the policy of
22 attorney-client privilege that, in most cases, there
23 will be no waiver and that, yes, certainly, if
24 directors are using Gmail or other accounts, or even

1 employer emails that are not subject to policies that
2 state that the employer can, you know, for any reason
3 review the email, that it will not in that instance
4 result in a waiver.
5 THE COURT: And what would the policy
6 have to say, in your view, to be sufficient?
7 MR. WEINBERGER: I'm sorry, Your
8 Honor, I'm not -- when you say -- what would the
9 policy have to be --
10 THE COURT: Yeah. Imagine that I am
11 advising some issuer, and we think, for whatever
12 reason, that it's good to have our officers serve on
13 boards of other companies, but we also don't want
14 routine waivers of privilege when they're serving on
15 boards of other companies. So we want to adopt a
16 policy that somehow finesses this issue. I mean, the
17 harder question is how would one reserve the right to
18 monitor for some stuff and yet protect against waiver.
19 But let's just start with the idea of
20 what would I have to have in that policy so that there
21 wouldn't be the waiver risk? Would my policy have to
22 say, effectively, the company will not monitor or
23 access employee email accounts that use company
24 technology without employee consent, or is there

1 something short of that that I could implement?
2 MR. WEINBERGER: You could absolutely
3 implement something short of that. I think the
4 scenario Your Honor posits is probably one end of the
5 spectrum. Similar to the Accenture policies, we could
6 have instructions for how a user would mark or
7 designate a particular email, and the policy could
8 state that the employer/issuer, as Your Honor said,
9 would not access an email that is marked "privileged"
10 or that is marked "outside board use."
11 We could also have a policy where
12 separate email accounts are issued in the instance
13 where an executive does serve as an outside director
14 of another company. So there are things, just as a
15 practical matter, like that -- issuing a different
16 email account or having a modified policy -- that
17 would absolute prevent the waiver scenario that we
18 submit has occurred here.
19 And when you have this monitoring idea
20 out there, what happens in just a normal derivative
21 action -- let's assume, you know, an outside holder of
22 some relatively small percentage -- you know, let's be
23 generous and say a 2 percent holder -- brings a
24 derivative action. All the directors of the company

1 have been issued company email accounts. Would you
2 think that, in that setting, if the company had a "we
3 will monitor" or "we reserve the right to monitor"
4 policy, that you could effectively get the
5 attorney-client privileged communications that were
6 sent over the company email?
7 MR. WEINBERGER: So in your scenario,
8 the company issues emails for the outside directors?
9 THE COURT: Yeah. So imagine I'm
10 Dell, just to use a randomly selected entity.
11 MR. WEINBERGER: Sure.
12 THE COURT: And I decide that I don't
13 want to deal with future issues involving people using
14 their own email accounts, like an Accenture account or
15 some other account. So I'm now going to give all my
16 directors Dell accounts. But I have a monitor policy
17 in place.
18 What happens in a derivative action?
19 So in a derivative action, you're nominally suing on
20 behalf of the company. Traditionally, you'd have to
21 go through *Garner* to get that. I'm wondering, would
22 those directors have a reasonable expectation of
23 privacy in that setting? And -- go ahead.
24 MR. WEINBERGER: Well, again, I think

1 it's probably a scenario that would be addressed
2 through the policy governing those emails. And so I
3 could certainly see, as an outside director, having
4 some discomfort if the policy said, okay, this is
5 being issued to you as a director, but we still
6 reserve the unfettered access -- unfettered ability
7 and right to review, access, and monitor that email.
8 I could see that giving you perhaps a little bit of
9 heartburn, as an outside director. So I think it's
10 something that, in practice, could be addressed, would
11 be addressed by an issuer.
12 In the scenario that you've raised of
13 the derivative action, I certainly -- I think I'd have
14 to think through that scenario a little bit more,
15 including wondering at what point does the company
16 truly become adverse to that director. I believe the
17 law suggests that the company is not necessarily
18 adverse to insiders simply because a stockholder -- or
19 at all times simply because a stockholder has
20 initiated a case nominally in the name of the company.
21 THE COURT: All right. Anything else
22 you want to tell me?
23 MR. WEINBERGER: Nothing else, Your
24 Honor, for right now, at least.

1 THE COURT: Okay.
2 Ms. Murphy.
3 MS. MURPHY: Thank you, Your Honor.
4 So I want to address a few things that
5 my friend Mr. Weinberger said, and I'll get there in a
6 minute.
7 But, I don't know, I think important
8 context here, right, is, as he said, Mr. Green retired
9 from Accenture in 2013. He was given use of his email
10 from then on, in addition to office space and an
11 administrative assistant, really, as a courtesy to him
12 so that he could continue using their resources in
13 recognition of the 35 years of service he put in with
14 that company.
15 He has used that Accenture.com email
16 address to correspond about Dell business, to
17 correspond about EMC business before that, when he was
18 a director on the EMC board and then came to join the
19 Dell board. He uses it on numerous other -- he's on
20 six other boards. He's been on many others in the
21 last decade or so. This is the email address he uses
22 for that.
23 And he had no doubts about the
24 confidentiality of his emails that were sent using

1 this email account. You know, as Your Honor knows,
2 there are nearly a thousand emails that are the
3 subject of this motion, because he sent virtually
4 every email about the Class B transaction with this
5 email address.
6 As we submitted, you know, Dell -- a
7 representative of Dell testified that they have no
8 concerns. They never expressed concerns to him. They
9 do not have concerns that this email was not safe and
10 secure. Notwithstanding that, apparently, other board
11 members did use Gmail accounts. So there's really no
12 question here that Mr. Green subjectively intended for
13 his attorney communications about the Class B
14 transaction to be private and that he subjectively
15 believed that they were private.
16 And so the question for you, the
17 really narrow question, based on all the facts here,
18 is, you know, was Mr. Green, as the former CEO and
19 chairman of Accenture -- which, by the way,
20 specializes in IT services -- objectively unreasonable
21 in his belief that these emails would remain
22 confidential.
23 You know, Your Honor wrote, in the
24 *Information Management* decision, that in light of the

1 variety of work environments, whether an employee has
2 a reasonable expectation of privacy has to be decided
3 on a case-by-case basis. And in this case, based on
4 the nature of Mr. Green's relationship with Accenture
5 during this period, based on the Accenture email
6 policies and their actual practices, and based on the
7 fact that Mr. Green is an outside director of Dell, he
8 never had a Dell email address, the law strongly
9 favors maintaining privilege over these 900 emails.
10 And a little bit more on *Information*
11 *Management*, Your Honor. I want to talk a little bit
12 about the facts there, because I think, you know,
13 understanding the facts and the guidance that Your
14 Honor gave in that case really underscores a lot of
15 the reasons why production would not be appropriate
16 here. *Information Management* was, of course, a
17 derivative case. You just brought up the derivative
18 hypothetical with Mr. Weinberger, and I think that
19 really illustrates the point, right?
20 So there are executives who are
21 adverse to the company, and while this litigation is
22 going on, they are using company email addresses to
23 correspond with their personal attorneys about their
24 defense in this litigation against the company. And

1 Your Honor cautioned that the corporation and its
2 employees should be on different and stronger ground
3 when those outside the corporation seek to compel
4 production of otherwise privileged documents that
5 employees have sent using work email.
6 A stockholder of Dell is seeking
7 documents from a former employee of Accenture.
8 Mr. Green is not adverse to Accenture. Dell is not
9 adverse to Accenture. And, you know, while you
10 pointed out in that opinion, and plaintiffs pointed
11 out in their briefs, certainly there are other cases
12 where courts have found no expectation of privacy for
13 other reasons in suits by outsiders, I think this is a
14 really important framing and important factor that
15 should go into the overall analysis of whether he was
16 reasonable in believing that he had an expectation of
17 privacy here.
18 So I will walk through the *Asia Global*
19 factors. Factor one focuses on the text of the policy
20 itself. I'm not sure I need to say a lot here,
21 because Mr. Weinberger graciously walked us through,
22 you know, each of those policies. I'm not sure it
23 makes a material difference here, but I think one
24 important thing is it is not surprising to me that the

1 plaintiffs think that the 2010 policies, while
2 Mr. Green was the CEO of Accenture, are the most
3 important policies, because they obviously had that
4 language that an employee should have no expectation
5 of privacy. They did not really provide for personal
6 use.
7 We obviously, you know, would say that
8 the relevant policy, or the most relevant policy here,
9 is the one that was in place in 2018, during which the
10 vast majority of these emails in question were sent,
11 right? The Class B transaction was largely
12 negotiated -- entirely negotiated in 2018. So that's
13 really the time period we're talking about.
14 And that 2018 policy looks a lot like
15 it did -- you know, really, dating back to about 2012,
16 when Mr. Green had transitioned into the chairman role
17 of the board and no longer was the CEO of the company.
18 And since that time, every iteration of the policy has
19 expressly allowed for personal use and has set forth
20 limited specific circumstances under which Accenture
21 reserves the right to monitor personal emails.
22 And, you know, as a reminder here, all
23 of Mr. Green's emails from 2013 on were personal. He
24 no longer worked for Accenture. And I think that's a

1 really important point to keep coming back to, because
2 this -- the company had no legitimate interest in
3 monitoring his emails.
4 And, obviously, you know, even setting
5 aside the policy, they have said, whether under the
6 policy or not, they did not monitor his emails.
7 THE COURT: I guess I would push back
8 on you on that a little bit, because assume that you
9 had some Bizarro World where Green went rogue and was
10 engaging in some type of illicit activity, or
11 something like that, and the company had reason to
12 believe that.
13 I personally don't think for a second
14 that Accenture would have hesitated, under those
15 circumstances, to monitor his emails or to go in and
16 look at them or to access them. And it would have
17 relied on this policy to do so, notwithstanding that
18 he wasn't an employee. Because he would have been out
19 there -- again, in my extreme hypothetical -- sending
20 emails with an Accenture URL on them in damaging ways,
21 or ways that could create exposure for the company.
22 And that's part of the reason why I'm
23 not sure how much the former employee issue gets you.
24 I like the idea that it shifts. It shows that all of

1 his business, or most of his business, all of his
2 business, was going to be personal. And so there was
3 some implicit acknowledgment from Accenture that that
4 was the case.
5 But I just can't believe that they
6 were going to be hands-off if they got some reason --
7 and we can all credit that it's my hypothetical -- but
8 if you had someone in this situation who was engaging
9 in illicit behavior, that they wouldn't have gone in.
10 Now, are you willing to concede that
11 or --
12 MS. MURPHY: Of course. Yes.
13 THE COURT: Okay.
14 MS. MURPHY: Of course. And the
15 policy specifically sets that out. So he -- you know,
16 the policy says if it's related to -- so talking about
17 personal emails. If it's related to Accenture
18 business, if the company suspects that you're breaking
19 a law or otherwise violating company policy, if it's
20 related to company litigation or an internal
21 investigation, or if the company inadvertently
22 accesses your emails, you know, these are all
23 possibilities.
24 And so the question is, going back to

1 your hypothetical, was it reasonable for him to think
2 that he had privacy here. And the answer is yes,
3 because he was not doing that sort of -- engaging in
4 that sort of activity, right?
5 So, yes, that was a possibility. But
6 he did not reasonably expect that that was going to be
7 the basis for monitoring here, because he wasn't
8 engaged in that kind of conduct.
9 Your Honor, I think you're muted.
10 THE COURT: Sorry about that. Thank
11 you so much. I appreciate it.
12 I have been looking at Exhibit E,
13 which is the March 2012 policy. Just for those
14 purposes, if you go to page 6 on that, which talks
15 about the types of things that you've been saying when
16 the company will still look, is a gating item for that
17 type of hands-off behavior that the employer has to
18 have marked clearly the email as private or personal?
19 MS. MURPHY: That's not our -- sorry.
20 THE COURT: Go ahead. No. I was just
21 trying to reiterate my question more clearly, but you
22 probably understand what I'm asking.
23 MS. MURPHY: I think I understand the
24 question, and I think the answer is if it is -- if the

1 emails are understood to be personal, then this is the
2 bucket that they fall under. I don't think it is --
3 you know, the company encourages that marking. We
4 think that encouragement is sort of futile when it
5 comes to Mr. Green, who is actually no longer doing
6 Accenture business.
7 And, you know, I understand your point
8 about the former employee, but that's where I think it
9 matters, is the assumption that all of his emails are
10 personal to start with.
11 THE COURT: So the fact that he didn't
12 mark his emails personal, you don't view that as a
13 problem because there was this understanding that,
14 generally, what he was doing was personal? He was
15 retired?
16 MS. MURPHY: That's right. There were
17 no Accenture business-related emails going on at that
18 time. So the assumption is that all of them were
19 personal.
20 And by the way, you know, it wasn't
21 just Dell boards. It's other boards too. So it would
22 have been a lot of emails. And I'm not sure I
23 understood Your Honor -- or Mr. Weinberger suggested
24 that he's also the CEO of GTY, and so he had that

1 email to use. I'm not really sure why that would have
2 been different or better, particularly when he was the
3 actual CEO there.
4 THE COURT: I guess the idea is just
5 because everyone, effectively, always has the option
6 of getting a Gmail account, is it, therefore, more
7 fair to look at someone who doesn't do that and say,
8 "Hey, look, you chose to use the monitored account.
9 Don't come crying to me now."
10 So I suspect Mr. Weinberger was
11 thinking something along that line; like, who knows
12 what the policy was at GTY, but it might have been
13 better. Or who knows what it was at AOL. It
14 certainly wasn't better. So why shouldn't we
15 basically say to him, "You made a choice. You're
16 stuck."
17 MS. MURPHY: Yeah. And to that I
18 would say I think he reasonably believed that his
19 Accenture.com email, at that point, was maybe superior
20 to Gmail in a lot of ways. This is a technology
21 company. He gets access to an administrative
22 assistant who can help him, you know, stay organized.
23 And so -- and he gets to keep contacts from -- that is
24 what he used for 35 years. Or maybe there wasn't

1 email for that whole time, but that's what he used for
2 that entire period. And so it just made sense, now
3 that he's going to go onto all these public company
4 boards and be in contact with many of the same people,
5 that he would use that, rather than starting this
6 completely new Gmail account; which, you know, I have
7 not seen any evidence from the plaintiffs about why
8 that is, in fact, more secure. He raised the
9 hypothetical and talked about the AT&T subpoena. But
10 I don't think any of that really goes to the heart of
11 this, which is was the Accenture email reasonably
12 private.
13 So factor two, of course, is actual
14 monitoring. I think we've talked about that. I think
15 Mr. Weinberger sort of unfairly characterized the
16 Accenture declaration and suggested that she agreed
17 that their access was unfettered. I don't think
18 that's an accurate characterization of the policy, and
19 it's certainly not what she said in her declaration.
20 I think the most important takeaway from her
21 declaration is they followed the policy and they did
22 not monitor his emails during the time period, other
23 than to access them to help us respond to discovery in
24 this litigation.

1 Factor three, I think, you know, as
2 Your Honor noted in *Information Management*, this is a
3 really similar analysis to the first two, in that of
4 course we can't dispute that Accenture had the
5 technical ability to access Mr. Green's account during
6 this period, but for the reasons that we all -- that
7 we just discussed, the requirement or the
8 encouragement to label these emails private or
9 confidential in order to avoid access by Accenture
10 just doesn't make any sense for him in this situation,
11 when he was not actually doing Accenture business
12 during this period.
13 And then factor four, was Mr. Green
14 aware of Accenture's email policies. Yes, he was
15 generally aware of the policies. And his belief, as
16 Mr. Weinberger explained, was that because he was not
17 engaged in wrongdoing or company litigation or any
18 other, you know, of those identified circumstances,
19 that Accenture was not -- had no reason to, and was
20 not going to, monitor his emails.
21 He had every reason to expect that
22 these were going to stay confidential. And as I said,
23 Dell had the same expectation. They had no concerns
24 with him having used this email address for five or

1 six years now on their board.
2 So I think it just makes sense to come
3 back to the ultimate question, Your Honor, which is
4 based on all these facts, based on his situation,
5 based on the text of these policies -- which clearly
6 allow for some personal use and, really, delineates
7 specific circumstances where access is appropriate --
8 you know, was Mr. Green really unreasonable in his
9 belief that these emails were going to stay
10 confidential. And we think the answer to that is,
11 obviously, no.
12 So if you have questions, I'm happy to
13 answer them.
14 THE COURT: I appreciate it.
15 I think the biggest question I would
16 have is what do you think are the main distinguishing
17 factors between this case and the Neumann request for
18 emails in *WeWork*?
19 MS. MURPHY: Sure. A lot of
20 differences, so I'm glad you asked. First of all, the
21 two employees claiming privilege in that case
22 obviously were both actively employed by both Sprint
23 and Softbank. They both had Sprint and Softbank email
24 addresses, but they chose to use the Sprint email

1 address to talk about the confidential Softbank
2 business.
3 So I think that's point number one,
4 right? Mr. Green is not actively employed by either
5 of these companies. He is an outside director at
6 Dell. He has no Dell email address. So I think
7 that's point one.
8 And by the way, a related point on
9 that is, going back to the what email address should
10 he use. You know, even if Dell had issued an email
11 address in this case, Bill Green was a special
12 committee member. He was adverse to Dell for a great
13 portion of this. So, you know, what email address,
14 really, would he have used then?
15 Turning to --
16 THE COURT: The glib answer is outside
17 directors get email addresses. And so you'd have
18 BillGreen_outsidedirector@Gmail, and you'd have one of
19 those for each of your companies.
20 So I guess why isn't that just the
21 easy and simple policy solution and, in fact, better
22 board hygiene, and a rationale where a monitoring
23 policy effectively leads to a lack of a reasonable
24 expectation of privacy, in fact, has this beneficial

1 policy consequence of creating an incentive to engage
2 in a better hygiene practice by separating out your
3 emails?
4 MS. MURPHY: I think that's a lot to
5 ask of public company board members, who often serve
6 on five or more boards, to have a different email
7 address for every single company they sit on.
8 I also think we're making kind of a
9 big assumption, and we don't have any evidence, that
10 Gmail is, in fact, a more appropriate, more secure --
11 at least more than Accenture, right? I mean, I'm here
12 to talk about Mr. Green, but I think that would have
13 really dangerous policy consequences if we were to
14 suggest that an individual Gmail address for every
15 single board is better than what Mr. Green did here.
16 THE COURT: All right. Well, I
17 interrupted you. You were explaining to me that one
18 of the key distinctions, as you view it, with *WeWork*
19 is the degree to which people involved in the email
20 were adverse. I interrupted you, so why don't you
21 carry on.
22 MS. MURPHY: Sure. So I guess the
23 next part I was going to cover was the Sprint policy,
24 which I think had a lot more teeth, was a lot more

1 aggressive than Accenture's. They explicitly said --
2 and I say "explicitly" because I'm talking about the
3 relevant policy at the time -- said that employees
4 should have no expectation of privacy and that they
5 reserved the right to review workplace communications
6 at any time.
7 And Chancellor Bouchard criticized the
8 parties for not submitting evidence about actual
9 monitoring, which I think we've done here, and we've
10 showed you that the policy is not that broad, that
11 that "no expectation of privacy" language was removed
12 in 2010 and never put back into the policy.
13 And then, finally, I think another
14 really important factor there was that the
15 witnesses -- you know, there was actually information
16 in the record before Chancellor Bouchard that the
17 witnesses had expressed concern about the
18 confidentiality of their Softbank information on the
19 Sprint emails and suggested moving on to another
20 channel.
21 So that, again, is very different.
22 Mr. Green never had those concerns, still never had
23 those concerns. So I think we're in a different world
24 than *WeWork*.

1 THE COURT: All right. Thank you.
2 Mr. Weinberger.
3 MR. WEINBERGER: Thank you, Your
4 Honor. Just very briefly.
5 Ms. Murphy started her presentation
6 sort of highlighting that, you know, Mr. Green has
7 retired from Accenture, that we need to bear that in
8 mind. And I think we do need to bear that in mind.
9 It seems pretty clear that he made, effectively, a
10 tradeoff when he retired, as Ms. Murphy mentioned, by
11 getting continued use of his email and system and
12 office. He got to keep his contacts. He got to
13 basically keep status quo.
14 And what he exchanged for that was
15 privacy and control. His assistant is an employee of
16 Accenture. His email account is controlled by
17 Accenture. His personal office is controlled by
18 Accenture.
19 In terms of -- and, second, the notion
20 that Accenture understood at all times that his email
21 was going to be used for other corporate boards, I'm
22 not sure that that's really been established in the
23 record at all. When we were investigating the claims
24 of privilege, we served Mr. Green with

1 interrogatories. It's Exhibit 12 to my declaration.
2 And we asked, why did you continue using your
3 Accenture email address when you left the company?
4 And his response was "Seamless transition of
5 leadership," which, to me, is very different than "I
6 was going to be a professional board member and I
7 wanted to use my Accenture email address for those
8 boards."
9 So I know he says that in the
10 affidavit that he's submitted in connection with the
11 opposition, but that was not his response, his sworn
12 response to the interrogatories we served months
13 earlier, when I think he didn't understand what was
14 actually happening in terms of potential challenge.
15 In terms of, I guess, most relevant
16 policy, I'd just underscore, again, it doesn't matter
17 which policy the Court looks at. Ms. Murphy said
18 2018's most relevant. Well, 2018 has the admonition
19 that I showed Your Honor, bottom of page 11 of 15.
20 "Be aware that privacy will be limited." That was the
21 warning.
22 In terms of, you know, whether it was
23 unreasonable to ask him to mark certain emails, I
24 don't think there's anything unreasonable about a

1 director marking an attorney-client privileged email
2 or a purportedly attorney-client privileged email
3 "privileged," "attorney-client privilege," "private."
4 And I think something else to bear in
5 mind, too, just in terms of monitoring and review.
6 I'm not sure that it's always just limited or focused
7 user by user. Companies have all sorts of reasons to,
8 across the board, review users' emails -- for
9 compliance with the law, downloading of software that
10 compromises a system's integrity. And so, you know,
11 when the IT personnel, or whomever, is looking at
12 these emails, they're not saying, "Oh, that's William
13 Green. We understand that he serves on outside
14 boards." So I'm not sure it's so clear-cut.
15 The last point, or perhaps
16 second-to-last point I would make, Your Honor had
17 asked about the policy of issuing separate email
18 accounts to outside directors, and Ms. Murphy said
19 that that's a lot to ask of corporate directors, to
20 use, if they serve on three separate boards, three
21 separate emails.
22 I don't think it is a lot to ask of a
23 director. Even leaving aside good corporate hygiene,
24 it's not a lot to ask of a corporate director who

1 meets, what, ten or fewer times a year and is paid six
2 or seven figures serving on a corporate board, to have
3 one isolated email account for their work on that
4 board. I don't think that is too much to ask at all.
5 And that's not what we're asking for,
6 as a matter of fact. Again, Mr. Green had other
7 alternatives, just as the other outside directors of
8 the company had various alternatives.
9 And then, just finally, Your Honor had
10 asked distinctions in *WeWork*. I don't think there's a
11 whole lot of distinction there. You know, I think
12 Mr. Neumann is, arguably, more of an outsider than
13 Steamfitters is, who was owed a duty by Mr. Green.
14 The certified class here was owed a duty by Mr. Green.
15 So I don't know that I really -- you know, I
16 understand sort of the outside employer versus
17 employee contact, but I would not really consider the
18 plaintiff here to be an outsider. Certainly, again, I
19 would submit less of an outsider than Mr. Neumann was
20 in *WeWork*.
21 And, sure, in *WeWork*, there were two
22 emails. Here, Mr. Green had at least -- at least two
23 emails at his disposal, if not three.
24 So with that, again, I'll stop. If

1 Your Honor has any questions, happy to answer them.
2 THE COURT: No. I appreciate it.
3 It's all very helpful.
4 It's 4:15 now. Let's take ten
5 minutes, and then we'll come back on at 4:25.
6 (Recess taken, 4:15 to 4:25 p.m.)
7 THE COURT: All right. Welcome back,
8 everyone. Thank you for your presentations and for
9 returning to the Zoom promptly. I appreciate it.
10 I'm going to go ahead and give you my
11 ruling now. As I usually do, I'll give you the bottom
12 line up front. I'm going to deny the motion, based on
13 the particulars of the Accenture policy as it applies
14 to Mr. Green's use, which I think was understood to be
15 personal, given his relationship with the company at
16 the time. Given the parameters of Accenture's policy
17 when viewed against those facts, Mr. Green's
18 expectation of confidentiality in his email account
19 was objectively reasonable.
20 I'm now going to spell that out a
21 little bit more. William Green is a director of Dell
22 Technologies and the former CEO of Accenture LLP.
23 While employed with Accenture, Green had a corporate
24 email account from Accenture associated with the URL

1 Accenture.com. Upon retiring from Accenture, Green
2 was provided with office space, a personal assistant,
3 and other support services, including continued access
4 to an Accenture.com email account.
5 Since his retirement, Green has, in
6 fact, continued to use his Accenture.com email
7 account. Because Green was retired and no longer
8 working for Accenture, it was understood that Green
9 necessarily was using that account for matters
10 unrelated to the business of Accenture.
11 While serving as a director of Dell on
12 a special committee of the board of directors of Dell,
13 Green used his Accenture corporate email account to
14 communicate with counsel for the special committee.
15 The plaintiffs have moved to compel production of
16 those emails, approximately 925 in number. They argue
17 that Green did not have a reasonable expectation of
18 privacy when using his Accenture.com email account and
19 hence cannot assert privilege for those emails.
20 Delaware Rule of Evidence 502(b)
21 permits a client to assert privilege to protect
22 "confidential communications made for the purpose of
23 facilitating the rendition of professional legal
24 services ...." So one requisite is the existence of

1 "confidential communications."
2 The burden of proving that the
3 requirements of the privilege are met, including the
4 element of confidentiality, is on the party asserting
5 the privilege. That's from the *Moyer v. Moyer* case by
6 the Delaware Supreme Court in 1992. Mr. Green, here,
7 bears the burden of establishing the requirements of
8 privilege.
9 Rule 502(a)(2) states -- and, again,
10 I'm quoting -- "A communication is 'confidential' if
11 not intended to be disclosed to third persons other
12 than those to whom disclosure is made in furtherance
13 of the rendition of professional legal services ...."
14 Importantly, though, the parties'
15 subjective expectation of confidentiality must be
16 objectively reasonable. One cannot simply believe
17 subjectively that the communication is confidential if
18 the circumstances would not support a reasonable
19 belief to that effect.
20 Here, the record establishes that
21 Green subjectively believed that his emails were
22 confidential. Dell, likewise, subjectively believed
23 that its communications with Green using his Accenture
24 account were confidential. But that's not

1 dispositive. People seem to think that their
2 activities on the internet are confidential in many
3 respects when they usually are not.
4 The real question here is whether
5 Green has carried its burden of proving that he had an
6 objectively reasonable expectation of confidentiality
7 when using the Accenture email account.
8 The general rule is that although
9 using email carries a risk of unauthorized disclosure,
10 just like any other form of communication, lawyers and
11 clients may communicate confidentially through
12 unencrypted email with a reasonable expectation of
13 confidentiality.
14 In the ordinary course of business,
15 individuals who use a company-provided email system
16 for company-related business have a reasonable
17 expectation of privacy in the use of that system, and
18 they can reasonably expect that outsiders to that
19 privileged relationship will not be able to access the
20 system or the communications. Under those
21 circumstances, the fact that the company may monitor
22 or access communications isn't problematic, because
23 the company is aligned with the employee and there is
24 no outsider to the relationship who is breaking the

1 confidentiality. Consequently, assuming a
2 communication is otherwise privileged, use of a
3 company-sponsored email system does not, without more,
4 result in loss of the privilege; again, even if the
5 company engages in monitoring.
6 Questions arise when an individual
7 uses the company-sponsored email account on matters
8 unrelated to the company's business, where the company
9 can effectively be viewed as an outsider to the
10 relationship. Under those circumstances, the user of
11 the company-sponsored email account doesn't
12 necessarily have an objectively reasonable expectation
13 of privacy. Whether a reasonable expectation of
14 privacy exists is something that a court has to decide
15 on a case-by-case basis. It's not a situation where
16 we can establish bright-line rules, although certainly
17 one can rely on precedent and on developing practices
18 and things of that sort.
19 In terms of precedent in Delaware, we
20 now have a few cases that address this issue. There's
21 the *DLO Enterprises* case from 2020 by Vice Chancellor
22 Zurn. There's the *Lynch v. Gonzalez* case from 2019,
23 also by Vice Chancellor Zurn. There's the *WeWork*
24 litigation case from 2020 by then-Chancellor Bouchard.

1 And then, somewhat more ancient, is the *Information*
2 *Management Services* case that I wrote back in 2013.
3 All of these cases analyze the reasonable expectation
4 of privacy using a four-factor test drawn from the
5 *Asia Global* case, which is a bankruptcy case out of
6 the Southern District of New York in 2005.
7 The first factor in the *Asia Global*
8 test focuses on the nature and specificity of the
9 policies that the company providing the email account
10 has regarding email use and monitoring. This factor
11 will favor production when the company has a policy
12 banning personal use or where the company informs
13 users that they have no right to privacy in
14 communications that use that email account.
15 When you have these types of outright
16 bans or broad statements, the inquiry into whether
17 there's an objectively reasonable expectation of
18 privacy essentially ends at the start. But absent a
19 complete ban like that, the inquiry is more nuanced.
20 One can have a policy that would not lead to a
21 reasonable expectation of privacy under some
22 circumstances and would allow for a reasonable
23 expectation of privacy in other circumstances,
24 depending on the nature of the use.

1 I'm going to turn now to Accenture's
2 policies. The parties have provided me with several
3 of them. I think what matters is the policy that's in
4 place when the communications are made. That's the
5 one that the company is actually applying to the
6 communications in question. Whether the employee or
7 the user is on notice of that policy or thought there
8 was a different policy in place or remembered a policy
9 from earlier days can come in under other factors in
10 the *Asia Global* test, most notably the fourth one, but
11 I think what matters is the policy that's in place
12 when the person is using the system.
13 Here, there are two policies that I
14 think are substantively identical, or at least
15 substantively consistent. One is the policy from 2012
16 that appears at Exhibit E to the Kirby transmittal
17 affidavit. The other one, that I'm actually going to
18 work from, is a policy from 2018 which, therefore, was
19 the policy in place for most of the time. That is
20 Exhibit 10 to the Weinberger declaration.
21 What these policies show is that
22 Accenture acknowledged that personal use was
23 permissible, that Accenture indicated that it would
24 respect personal use except in specific circumstances,

1 and also that Accenture would need to engage, and
2 would engage, in systemwide monitoring to protect the
3 entity and the system. The question is how you
4 reconcile those three things for purposes of the *Asia*
5 *Global* factors.
6 Now, I'll give you examples from the
7 policy. And, again, I'm going to work off the 2018
8 one, just so I don't go through two of them.
9 The discussion of personal use starts
10 in Section 3.1.2. It specifically authorizes personal
11 use subject to the restrictions in the policy. And it
12 says, "Personnel are permitted to use Devices and
13 Technology, (including e-mail, internet and
14 telephones) for limited personal use, provided such
15 use is in compliance with all Company policies,
16 applicable laws and regulations, and does not" -- and
17 now there are three bullets: "Interfere with on-going
18 work; Adversely affect the problem handling or
19 security of Information; or Create a significant
20 overload on Company Technology."
21 This is an acknowledgment that
22 personal use is going to happen. The company, though,
23 doesn't encourage personal use. It encourages people
24 to use individual email accounts. And it also says

1 that "[p]ersonnel who wish to protect the privacy of
2 their personal communications or files ... should mark
3 such items clearly as 'private' or 'personal'." It
4 also encourages people to put their private
5 information in a separate folder.
6 As I indicated at the outset,
7 notwithstanding that acknowledgment, the company
8 reserves the right to monitor. Item 4 in this section
9 says just that: "Notwithstanding the above, the
10 Company maintains the right, subject to all applicable
11 laws, regulations, agreements, and local policies" --
12 and I'm going to skip over some language here -- "to
13 open items that are marked 'private' or 'personal' in
14 some circumstances including but not limited to," and
15 then there are four bullet points.
16 The first is if there is a reasonable
17 suspicion that the communication is really not
18 personal but is, in fact, business related. The
19 second is if there's a reasonable suspicion that
20 there's been a criminal offense or a similar breach of
21 law. The third is that if access is needed in
22 connection with a company-related litigation or an
23 internal or external investigation. And then the last
24 one simply acknowledges the possibility of inadvertent

1 access during the company's general monitoring
2 activities that it engages in to protect its system.
3 I think the flagging of these items
4 creates a sense in the reader of this policy that they
5 have some expectation of privacy in using this system.
6 This certainly isn't an exclusive list, but it
7 suggests that some personal use is permitted and that
8 the company won't freely access all personal
9 information. This is particularly pertinent to Green,
10 who, because of his retirement from the company, was
11 essentially only engaged in non-company-related
12 business. One could say it was all personal for him
13 at that point.
14 In reaching this conclusion regarding
15 the policy -- namely, that it allows some expectation
16 of privacy -- I acknowledge that the policy in
17 paragraphs 6.1 and 6.2 discloses that the company will
18 engage in widespread activities to verify compliance
19 with the policy. Essentially, there is an awful lot
20 of systemic monitoring going on by the company to
21 protect its interests.
22 These activities include -- and
23 there's a list of six of them, but the first one is
24 the most noteworthy, I think. "Monitoring [] some or

1 all incoming and outgoing e-mails including, if
2 necessary, monitoring e-mails marked 'personal',
3 'private' or 'sensitive' as well as personal webmail
4 accounts accessed via work provided systems)."
5 So it seems to me that it would be
6 going too far to say that the company has created a
7 hands-off situation. It is saying that it is going to
8 continue to engage in monitoring.
9 But nevertheless, I think the
10 combination of these statements, particularly in
11 Mr. Green's situation, is sufficient to create a
12 reasonable expectation of privacy in his email
13 account, to the extent that what he was doing complied
14 with the policy. Namely, he wasn't interfering with
15 anybody's ongoing work at the company. He wasn't
16 affecting the company adversely. He wasn't creating a
17 systemic overload. He wasn't engaging in anything
18 that looked like illicit behavior or problematic
19 behavior or anything of this sort. And there's zero
20 suggestion in the record to indicate that Green would
21 have had any reason to think that any of those
22 situations were applicable or that there were
23 circumstances that would cause the company to look at
24 his emails more closely.

1 The case that is distinguishable from
2 the current situation, I believe, is *WeWork*. I
3 believe there, there was a stricter policy in play.
4 There were also differences in terms of the
5 involvement in the litigation of the sponsor of the
6 email system.
7 Here, I do think Accenture, because of
8 its relationship to Mr. Green, is more akin to a
9 third-party provider. It isn't all the way analogous
10 to a Google or an AOL or a Hotmail, but because
11 Mr. Green had retired and left Accenture's active
12 employ, Accenture was providing him with services
13 analogous to that.
14 With Accenture's less-intrusive
15 policy, the purely personal use, and the relationship
16 that's more akin to a service provider, I think that
17 *WeWork* is distinguishable. As a result of that, I
18 think the first factor counsels against production.
19 And that really is the dominant factor in the
20 four-factor analysis.
21 The second factor involves whether the
22 employer actually engages in the monitoring or
23 accessing of work email. Accenture says that it has
24 never monitored Green, but I don't think that's the

1 inquiry. I don't think one looks at the individual in
2 question. I think one looks at the practices of the
3 organization.
4 Here, I think it's reasonable to infer
5 that Accenture does, indeed, monitor, consistent with
6 its policies, and that it does indeed access employee
7 email when it believes that it has the need to do so,
8 consistent with its policies. The fact that Accenture
9 is a very large organization that has to do things to
10 keep its systems safe makes it largely
11 incomprehensible to me that it's not doing that.
12 I don't believe that the fact that
13 there's no specific instance where someone can say
14 that they've monitored Green is what is relevant in
15 this factor. To the extent that I consider this
16 factor, I do think it would favor production if the
17 policy favored production.
18 The third factor asks about the extent
19 to which some party outside the client-attorney
20 relationship has access to the system. When you're
21 dealing with a company-sponsored system, this factor
22 is largely superfluous. It may still have salience
23 when someone takes the additional step of, for
24 example, using company resources to access a web-based

1 system.
2 We know from the Accenture policies
3 that Accenture understands that someone may use their
4 corporate terminal, their company terminal, to access
5 a remote email account that they've created. If
6 someone has taken the step to create that remote email
7 account, that is a factor that counsels against
8 production. It is an additional step to try to
9 establish an expectation of privacy.
10 We don't have that here. What we have
11 here is the use of Accenture's email account. If the
12 policy were different, this factor would favor
13 production. And viewed in isolation, this factor does
14 favor production.
15 Relatedly, even the lesser things that
16 Green could have done weren't done in this case. He
17 didn't specifically mark things private. He didn't
18 specifically put anything in the re: line to say it
19 was confidential. He didn't put emails in a separate
20 folder. He didn't use encryption. This factor,
21 viewed separately, would favor production.
22 And then the final factor is whether
23 the user is fairly on notice of the policy. The
24 factor asks whether the user knew about the policy,

1 but I don't think you can just put your head in the
2 sand. The question is, is the user fairly on notice
3 of the policy that the company is following.
4 Here, Green acknowledges that he was
5 generally aware of the policies. Iterations of them
6 were put in place while he was the CEO. To the extent
7 this factor applies and is considered, it would favor
8 production.
9 I circle back to where I started,
10 which is what are the specific policies in this case
11 and do they create a reasonable expectation of privacy
12 for someone like Green, who has established a
13 relationship with the company where, essentially, all
14 he is doing is using his Accenture email account for
15 personal use.
16 And I think, under those
17 circumstances, an objectively reasonable view of this
18 relationship is that Green had good reason to think
19 that his emails would not be accessed and would remain
20 confidential, vis-a-vis the world and people like the
21 plaintiff, unless he was engaging in some behavior
22 that would raise suspicions at Accenture and cause
23 them to have to do some type of investigation.
24 There's no indication that that was

1 the case. This is simply a situation where Green was
2 using his Accenture email account. And so I think he
3 did have a reasonable expectation of privacy under
4 these circumstances.
5 All of this is not to say that using
6 the type of corporate email account that Green used is
7 not without risk. I think a strong argument can be
8 made that the better course is for outside directors
9 to have an email account that they can be confident is
10 not subject to potential monitoring. One can debate
11 whether that's one for each board or one for all of
12 their boards, or whether it's a Gmail account or some
13 other type of more-secure provider. Regardless, that
14 type of corporate hygiene goes a long way to avoiding
15 these types of motions.
16 Green obviously didn't do that, but I
17 don't think that that fact, in this case, warrants
18 ordering production of all of the emails that he
19 exchanged using his Accenture account. I'm going to
20 deny the motion to compel on that basis.
21 I'm grateful for everyone's time.
22 Thank you for listening to my ruling. I hope everyone
23 has a good rest of the afternoon and a good weekend.
24 (Proceedings concluded at 4:50 p.m.)

CERTIFICATE

I, JULIANNE LABADIA, Official Court Reporter for the Court of Chancery of the State of Delaware, Registered Diplomate Reporter, Certified Realtime Reporter, and Delaware Notary Public, do hereby certify that the foregoing pages numbered 3 through 59 contain a true and correct transcription of the proceedings as stenographically reported by me at the hearing in the above cause before the Vice Chancellor of the State of Delaware, on the date therein indicated, except for the rulings, which were revised by the Vice Chancellor.

IN WITNESS WHEREOF I have hereunto set my hand at Wilmington, this 28th day of September, 2021.

/s/ Julianne LaBadia
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Julianne LaBadia
Official Court Reporter
Registered Diplomate Reporter
Certified Realtime Reporter
Delaware Notary Public