

**To: New Jersey Law Revision Commission**  
**From: Mark Ygarza**  
**Re: Corporate Books and Records of Account**  
**Date: October 07, 2019**

## MEMORANDUM

### Executive Summary

In *Feuer v. Merck & Co., Inc.*,<sup>1</sup> the Appellate Division considered the definition of “books and records of account” in the context of whether a shareholder is entitled to all records pertaining to a transaction of a corporation or only the financial records.

The Court found that the statute in question, N.J.S. 14A:5-28, does not allow the shareholder to inspect all records from a corporate transaction, rather only those limited to *financial* records.<sup>2</sup> The decision of the Appellate Division was affirmed by the New Jersey Supreme Court substantially for the reasons expressed below.

### Relevant Statutes

The relevant portion of N.J.S. 14A:5-28(1) states the following:

Each corporation shall keep books and records of account and minutes of the proceedings of its shareholders, board and executive committee, if any. Unless otherwise provided in the bylaws, such books, records and minutes may be kept outside this State.

[...]

And N.J.S. 14A:5-28(4) states the following:

Nothing herein contained shall impair the power of any court, upon proof by a shareholder of proper purpose, irrespective of the period of time during which the shareholder shall have been a shareholder of record, and irrespective of the number of shares held by him, to compel the production for examination by such shareholder of the books and records of account, minutes, and record of shareholders of a corporation. The court may, in its discretion prescribe any limitations or conditions with reference to the inspection, or award any other or further relief as the court may deem just and proper. The court may order books, documents and records, pertinent extracts therefrom, or duly authenticated copies thereof, to be brought within this State and kept in this State upon whatever terms

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<sup>1</sup> *Feuer v. Merck & Co., Inc.*, 187 A.3d 873 (App. Div. 2018) aff'd, 238 N.J. 27 (2019).

<sup>2</sup> *Id.* at 73.

and conditions as the order may prescribe. In any action for inspection the court may proceed summarily.

### **Background**

In subsection one of N.J.S. 14A:5-28, the statute lays out the record keeping obligations of a corporation. The statute uses the terms “books and records of account” and “books” as if they are interchangeable terms. In subsection four, the statute uses “books and records of account” in the context of financial or accounting transactions.

The term “books and records of account” are not defined in this section statute. The term, however, is also used in another subsection of this statute.

A shareholder of a corporation may petition a court to compel the production of the “books and records of account” and other documents pursuant to N.J.S. 14A:5-28 subsection (4).<sup>3</sup> A court may impose limitations or conditions in allowing the examination of the requested documents, or may allow further relief that it may deem just and proper.<sup>4</sup> The statute does not define the phrase “books and records of account.” N.J.S. 14A:5-28 subsection (4) does not define the phrase “books and records of account.” The phrase is not referenced elsewhere in the statute and there is no legislative history addressing the definition of “books and records of account.” The absence of a statutory definition led to litigation centered around the meaning of these terms.

In *Feuer v. Merck & Co., Inc.*, the Plaintiff, who was the owner of 288 shares of Merck stock, sought the production of twelve broad categories of documents from Merck.<sup>5</sup> The Plaintiff intended to search for evidence that Merck acted wrongfully when it rejected his previous demand that Merck's Board of Directors (the “Board”) commence suit against itself and senior management responsible for Merck's acquisition of another pharmaceutical firm.<sup>6</sup>

In response to Plaintiff's demands, the Board appointed a “Working Group” to evaluate these demands, retain counsel, conduct an investigation, and recommend a response related to the acquisition of the pharmaceutical firm.<sup>7</sup> Four month's later, the Working Group informed the Plaintiff that the Board had rejected all of his demands, pursuant to its business judgment rule.<sup>8</sup>

In a subsequent letter to the Board, the Plaintiff demanded the documents that became the focus of this appeal.<sup>9</sup> He described twelve categories of “Merck's ‘Books and Records’” pertaining generally to the Working Group's activities, communications, and formation; documents provided

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<sup>3</sup> See N.J.S. 14A:5-28.

<sup>4</sup> See N.J.S. 14A:5-28(4).

<sup>5</sup> *Feuer v. Merck & Co., Inc.*, at 73.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 74.

<sup>9</sup> *Id.*

to the Board regarding Cubist and two of its drugs before Merck's tender offer; and the Board's consideration of Plaintiff's Demands and the Working Group's recommendations.<sup>10</sup>

The trial court held that Plaintiff had a "proper purpose" under N.J.S.A. 14A:5-28 in seeking the documents, but that the documents Plaintiff sought fell outside "books and records of account."<sup>11</sup> Plaintiff appealed the trial court's decision arguing that N.J.S. 14A:5-28(4) entitled him to the documents Merck withheld.<sup>12</sup>

### Analysis

In *Feuer*, the Appellate Division examined 14A:5-28 to determine whether the shareholder was entitled to the documents that Merck withheld. In order to ascertain the definition of the term "books and records of account" in subsection four of the statute in question, the Appellate Division reviewed secondary sources including a legal dictionary and the case law from other jurisdictions.

The Appellate Division also examined subsection one to ascertain whether the phrase "books and records of account" had a different meaning in that section. In subsection one, the Court determined that the phrase was used to obligate a corporation to maintain record-keeping for "books and records of account" which the Court defined as "consisting of accounting or financial documents."<sup>13</sup> The Court then found that subsection four gives the shareholder [the right of] "inspection of a significantly narrower universe of corporate records than Feuer demanded."<sup>14</sup>

The Appellate Division consulted *Black's Law Dictionary* to establish the regular definition of "books and records of account." *Black's Law Dictionary* defines the phrase "books of account" with "shop books," which are "[r]ecords of original entry maintained in the usual course of a business by a shopkeeper, trader or other business person."<sup>15</sup> The Court then turned its attention to how the term was used in the Commonwealth of Pennsylvania and in Missouri.

The Appellate Division observed that Pennsylvania also used the phrase "books and records of account."<sup>16</sup> In Pennsylvania, the Eastern District found that "'books and records of account' does not encompass any and all records, books, and documents of a corporation."<sup>17</sup> Additionally, the Court referred to a Missouri case in which the Court ruled that the phrase did not connote "inter-office communications."<sup>18</sup>

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<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 75.

<sup>12</sup> *Id.* at 76.

<sup>13</sup> *Id.* at 78.

<sup>14</sup> *Id.*

<sup>15</sup> *Black's Law Dictionary* at 362 (9th ed. 2009).

<sup>16</sup> *Feuer v. Merck & Co., Inc.*, at 78.

<sup>17</sup> See *Susquehanna Corp. v. Gen'l Refractories Co.*, 250 F.Supp. 797, 801 (E.D. Pa. 1966) (applying Pennsylvania law and stating "books or records of account" excludes "records of another corporation whose acquisition is contemplated" and "the proposed contract").

<sup>18</sup> See *State ex rel. Jones v. Ralston Purina Co.*, 358 S.W.2d 772, 778 (Mo. 1962) (holding that statutory right to inspect corporation's "books" did not include "analyses or tentative studies," which were "in the nature of confidential inter-office communications" and prepared solely for management's information).

The Appellate Division also considered the structure of the New Jersey statute. The Court noted that the phrase appears in both the first paragraph and the fourth of N.J.S. 14A:5-28. The Court noted that it “must presume the phrase means the same in both subsections absent a clear indication to the contrary.”<sup>19</sup>

The Court then determined that “[r]eading the statute sensibly, [...] does not impose such a vaguely defined record-keeping obligation on corporations, nor does it grant courts the power to grant an equally vague scope of inspection to shareholders.”<sup>20</sup> Since the Legislature used “books” and “records” in subsection four’s third sentence and does not include “of account” like in the first sentence, the Court held that this must be taken as a purposeful decision by the Legislature.<sup>21</sup>

Ultimately, the Court held that it would not expand the scope of the meaning of “books and records of account” and determined that the Legislature omitted “of account” purposefully. Although the Court ruled on the meaning, the statute does not clearly lay out the definition for the phrase.

### **Legislative History**

Staff examined the legislative history of N.J.S. 14A:5-28. The first amendment to the statute was in 1968. These amendments concerned Title 14A but did not address N.J.S. 14A:5-28. In 1972-73 the Corporation Commission inserted additional language regarding inspection of documents in the first subsection of the statute. These revisions eliminated the burdensome requirement that small publicly held corporations, headquartered or with transfer agents outside of New Jersey, keep duplicate shareholder records. The revisions did not define “shareholder records” and this term is used interchangeably with “records” in the subsection one.

In 1988, Section 14A:5-28 was revised to clarify that the “shareholder's right of access to the shareholders list is conditioned upon his having a proper purpose. The Commission was particularly concerned about a shareholder obtaining a mailing list to sell it or use it for a purpose otherwise unrelated to the business of the corporation.”<sup>22</sup>

Finally, in 2018, the statute was amended once more with the addition of subsection six. This new addition did not address the differences or clarification between “books and records” and “books and records of account.”

### **Pending Legislation**

Staff searched for any pending legislation related to “books and records of account” and found none.

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<sup>19</sup> *Feuer v. Merck & Co., Inc.*, at 79.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Feuer v. Merck & Co., Inc.*, (Editor’s Notes) (Commissioner’s Comments).

## **Conclusion**

Staff seeks authorization to conduct additional research and outreach regarding this issue to determine whether defining “books and records of account” for purposes of N.J.S. 14A:5-28 would be helpful in clarifying the statute.