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Lessons From the First State: Delaware's Books and Records Jurisprudence – Corporate America's Evolving Battleground

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In this edition of Equity Chambers, Ryan Mcleod**,** a partner in Wachtell, Lipton, Rosen & Katz's litigation department, provides an insider's insights on Delaware's books and records rapid changing doctrinal landscape. In addition, Ryan examines possible solutions to the heightened pressure of late from inspecting stockholders—remedial actions that would keep in balance the corporate litigation ecosystem.

Representing leading multinational corporations and their senior executives and directors in high-stakes corporate governance and merger-and-acquisitions litigation in the Delaware Court of Chancery and other courts around the country**,** Ryan has secured victories for clients in forefront corporate governance actions. Among recent examples, he has defended Facebook in response to a stockholders' attack on its stock reclassification proposal in *United Food & Commercial Workers Union v. Zuckerberg***,** litigated the landmark defense victory in *Corwin v. KKR Financial*, successfully defended Sothebys' stockholder rights plan against an activist investor attack in *Third Point LLC v. Ruprecht*, as well as defending corporate bylaw and charter provisions in courts around the country, including the validation of exclusive forum bylaws in *Boilermakers Local 154 Ret. Fund v. Chevron* and *United Technologies Corp*. v. *Treppel.*

Corporate litigation largely operates through stockholders' books and records inspection these days. Given the continuing judicial relaxation of the interpretation and expansion of Section 220, companies might look for ways to mitigate stockholders increasing inspection powers. What can companies do to limit the omnipresent threat of costly pre-filing investigations?

It is important to remember the genesis of stockholders' inspection rights before addressing the developing trends in this context. Perhaps the appropriate starting point for discussion is at first principles. Section 220 of the Delaware General Corporation Law ("DGCL") is an attempt to codify a common law right.[2]

At the beginning of the seventeenth century, modern corporations began to take shape, which meant that their stockholders became more numerous and dispersed. As stockholders became less involved in the corporation's management, they lost their access to inside information about the company's business.

Stockholders' need for reliable information concerning corporate affairs--which expanded with the increasingly complicated problems of corporate finance and production--in addition to the rapidly expanding number of stockholders,[3] led the English common law to recognize stockholders' right to inspect books of the corporation in order to protect the residual equity holders' property interests.[4]

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[2] DEL. CODE ANN. tit. 8, § 220.

[3] *See* Randall S. Thomas, *Improving Shareholder Monitoring of Corporate Management by Expanding Statutory Access to Information*, 38 ARIZ. L. REV. 331, 338 (1996).

[4] In the early seventeenth century, the English courts—namely the King's Bench and Court of Chancery--granted stockholders access to corporate books and records. *See Gery v. Hopkins*, 87 Eng. Rep. 1142 (1702) ("there is great reason for…recognizing stockholders' right to inspect books and records of the corporation…for they are books of a public company, and kept for public transactions, in which the public are concerned, and the books are the title

Stockholders' intra-corporate inspection rights have developed from two overlapping sources: stockholders' property right in the corporation,[5] and the fiduciary relationship that exists between stockholders and the corporation's management.[6]

Originally, there were three principal purposes of the stockholders' right of inspection corporate books and records. The first was to get a list of who the other stockholders were in order to facilitate communication among

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of the buyers of stocks, by Act of Parliament"). This note refers to stockholders' right to inspect the corporation's books and records as "stockholders' inspection rights", "intra-corporate inspection rights", or "pre-filing investigation powers" interchangeably.

[5] From the property right perspective, stockholders are entitled to inspect corporate books and records to obtain information to protect their economic interest in the corporation. Inspection rights are based on the notion that stockholders are the "residual claimants, the ultimate beneficiaries of the firm's value."[I wouldn't say, I don't think, that stockholders have any ownership interests in a corporation's assets or property—just an ultimate residual claim to the liquidated value of those assets. So maybe better to rephrase to something more like "claim to" rather than "owenerhip interest"?] *In re Trados Inc. S'holder Litig*., 73 A.3d 17, 35-36 (Del. Ch. 2013); *See* Samuel M. Koenigsberg, *Provisions in Corporate Charters and By-Laws Governing the Inspection of Books by Stockholders*, 30 GEO. L.J. 227, 227-28 (1942); Brian C. Griffin, *Note, Shareholder's Inspection Rights*, 30 OKLA. L. REV. 616, 616 (1977). Graciano C. Regala, *Nature of the Rights of Stockholders to Examine the Books of the Corporation*, 21 PHIL. L.J. 74, 75 (1941). The stockholder is recognized as an equitable owner of the corporate assets through his title to the stock. Russell B. Stevenson, JR., *Corporations And Information: Secrecy, Access, And Disclosure* 152 (1980); Susan B. Hoffnagle & Jolyan A. Butler, *Shareholders' Right to Inspection of Corporate Stock Ledger*, 4 CONN. L. REV. 707, 709 (1972). The stockholder's right to inspection is acknowledged as one of the rights incident to ownership in order to protect her proprietary interest and to insure the honest and diligent performance of those to whom she has entrusted to manage her investment. Stockholders have a fundamental right to be intelligently informed about corporate matters.

[6] Stockholders have a right to inform themselves about how their fiduciaries are performing their duties. Without such investigatory tools, the corporation's fiduciaries may potentially engage in gross incompetence or dishonesty for years. Therefore, the English courts have recognized stockholders' right to examine the books and records of the corporation in order to monitor those who control it.

themselves.[7] Since corporations are legal forms of dispersed ownership, there is a necessarily a collective action problem among stockholders.

Stockholders' inspection rights thus originally played a key role in the effective exercise of stockholders' franchise on significant intra-corporate matters, and primarily the election of management. In other words, this common law right was largely aimed at figuring out who else a stockholder had to talk to or communicate with in order to coordinate on a vote or to campaign.

The second core essential purpose of the common law right of stockholders to inspect corporate books and records was valuing one's own stockholdings.[8] The early corporations at common law were privately-held entities that were not obligated to provide extensive disclosures—as became mandated years later under the federal securities laws—to its stockholders about its business, and of which there was no available market value of their stock.

Given that stockholders of a privately-held corporation did not receive mandated, periodic, detailed disclosures associated with a publicly-held corporation, they were at an informational disadvantage and faced attendant risks. Courts at common law therefore recognized that stockholders may have a legitimate need to inspect the corporation's books and records to value their investment, in order to decide whether to hold or dispose their shares, or take some other action to protect their investment.[9]

The third, and one of the most traditional purposes for stockholders to exercise their corporate books and records inspection common law right, was investigation of possible wrongdoing by management.[10] As the residual

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[7] *State v. Cities Service Co.*, 115 A. 773 (Del. 1922); *E.L. Bruce Co. v. State ex rel. Gilbert*, 144 A.2d 533 (Del. 1958) ("Inspection of the stock ledger to solicit proxies at the stockholders' meeting is obviously proper.").

[8] *State ex rel. Rogers v. Sherman Oil Co.*, 117 A. 122 (Del. 1922).

[9] *Id*.

[10] In *Martin* v. *D. B. Martin, Co.*, 88 Ad. 612 (Ch. 1913) (holding that minority stockholders plaintiffs, who brought suit in equity against defendant corporation and certain corporate officers for alleged mismanagement and misappropriation of property of the corporation and

equity holders, stockholders are primarily interested in seeing that the corporation is efficiently and profitably managed.[11]

> *"Stockholders' need for reliable information concerning corporate affairs, in addition to the rapidly expanding number of stockholders, led the English common law to recognize stockholders' right to inspect books of the corporation in order to protect the residual equity holders' property interests"*

It has been against this backdrop that the English courts recognized that stockholders had a qualified right to inspect records that were necessary to inform them about corporate matters in which the stockholders had legitimate interest.[12]

That common law right encompassed stockholders' right to seek information about corporate wrongdoing, mismanagement, or waste, at least

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certain of its subsidiaries, are entitled to inspect the sought books and records); *State ex rel. Miller v. Loft*, Inc., 156 Ad. 170, 172 (Super. Del. 1931); *State ex rel. Waldman v. Miller-Wohl Co., Inc.*, 28 A.2d 148, 153 (Del.Super.1942) *Nodana Petroleum Corp. v. State*, 123 A.2d 243, 246 (Del. Super. 1956) ("It is well established that investigation of waste and mismanagement is a proper purpose for a Section 220 books and records inspection.")

[11] In other words, this purpose was originally designed at common law to protect small and minority stockholders against the power of the majority, and against the mismanagement and faithlessness of agents and officers.

[12] *Rex v. Fraternity of Hostman*, 93 Eng. Rep. 1144 (1745) ("every member of the corporation had, as such, a right to look into the books for any matter that concerned himself, though it was in a dispute with others….[S]uch books....[a]re the common property of aggregate bodies acknowledged as such by our law, in which every member has an interest as being the evidence of some property or franchise being vested in him, or of his having conducted himself in the exercise of that franchise correctly. Such are corporation books with respect to corporators."); *Richards v. Pattinson*, 94 Eng. Rep. 893 (1737) (granting stockholder of a corporation the right to inspect the "part of the corporation-books where the names of the freemen are inrolled, and make copies at his own expense."); *Rex v. Babb*, 100 Eng. Rep. 743, 744 (1790) ("in certain cases the members of a corporation may be permitted to inspect all papers relating to the corporation."). *See also Rex v. Merchant Tailors' Co.*, 109 Eng. Rep. 1086, 1089 (1831); *Young v. Lynch*, 96 Eng. Rep. 14 (1747).

where there were circumstances justifying some suspicion of mismanagement wrongdoing. Stockholders' right to inspect a corporation's books and records was therefore recognized at common law as a matter of self-protection—that is, stockholders were entitled to know how their fiduciaries were conducting the affairs of the corporation of which they were a part owner. Stated differently, stockholders' corporate books and records inspection rights rested upon the proposition that stockholders—the residual owners of the corporate assets—needed a mechanism by which to protect their economic interests from corporate officers, who were viewed as agents or trustees.[13]

All of this is to say, stockholders' inspection rights existed even before states even codified corporate law into statutes.[14] It was a longstanding proposition at common law that stockholders were entitled to inspect 'necessary' corporate books and records, if made for a proper purpose and at a proper time.[15]

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[13] The United States Supreme Court endorsed this position in *Guthrie v. Harkness*, 199 U.S. 148, 154-55 (1905) ("The right of inspection rests upon the proposition that those in charge of the corporation are merely the agents of the stockholders who are the real owners of the property.").

[14] This common law right was recognized over two hundred and fifty years ago by the English courts. See *The Fraternity of Hostmen in Newcastle-Upon-Tyne*, 2 Str. 1223, 93 E.R. 1144 (KB 1744) (suggesting that stockholders may have a right to apply a mandamus for a general inspection and copying of the books of a corporation, by analogy to the old quasi-feudal right of the tenants of a manor to inspect the court rolls). *Vide Rex v. G. Babb*, 3 Term Rep. 579. But tenants of a manor have this right as to the court rolls, &c. *Rex v. Shelly*, 3 term Rep. 141.); See also *Richards v. Pattinson* (1737) Barnes, Notes, 235, 94 Eng. Reprint, 893; *Young v. Lynch* (1748) 1 W. Bl. 27, 96 Eng. Reprint, 14; *Rex v. Wilts & B. Canal Navigation* (1835) 3 Ad. & El. 477, 111 Eng. Reprint, 495, 5 Nev. & M. 344.
Stockholders inspection rights in Delaware date from the turn of the twentieth century, when the courts recognized them under the common law. See, e.g., *State ex rel. De Julvecourt v. Pan-Am. Co.*, 63 A. 1118 (Del. 1906).

[15] *State ex rel. Miller v. Loft, Inc.*, 156, 170 (Del. Super.1931); *Mercantile Trading Co. v. Rosenbaum Grain Corp.*, 325, 154. 457 (Del. Ch. 1931); *State ex rel. Brumley v. Jessup & Moore Paper Co.*, 77 Ad. 16 (1910). As a matter of common law, a stockholder of a Delaware corporation possessed a qualified right to inspect or examine the stock ledger, as well as the books and records of the corporation. *Rainbow Nav., Inc. v. Pan Ocean Nav.*, 535 A.2d 1357, 1359 (Del. 1987); *State ex rel. Healy v. Superior Oil Corp.*, 13 A.2d 453, 454 (Del. Super. 1940); *State ex rel. Cochran v. Penn-Beaver Oil Co.*, 143 A. 257 (Del. 1926). At common

This common law right of stockholders to inspect corporate books and records has been adopted by the Delaware at the end of the nineteenth century.[16] It is now codified at Section 220 of the DGCL,[17] and has been recognized by the Delaware courts as 'an important part of the corporate governance landscape'.[18]

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law, when a demand was refused, the right of inspection was enforceable only through the issuance of a writ of mandamus-a remedy at law--compelling the corporation to permit inspection by the stockholder. *State ex rel. Richardson v. Swift*, 30 A. 781, 781-82 (Del.Super.1885) ("*Swift I*"), *aff'd, Swift v. State ex rel Richardson*, 6 A. 856 (Del.Ct.Err. & App.1886) ("*Swift II*"). The writ of mandamus was an extraordinary remedy, not issuable as a matter of right. *State ex rel. Thiele v. Cities Service Co.*, 115 A. 773, 774 (Del. 1922). Its issuance was within the sound discretion of the court, depending upon the particular circumstances of each case. *Id.; State ex rel Brumley v. Jessup & Moore Paper Co.*, 77 A. 16, 22-23 (Del. 1910); *State ex rel Miller v. Loft, Inc.*, 156 A. 170, 171-72 (Del.Super.1931). For a writ of mandamus to issue, "[t]he right which it is sought to protect must[] be clearly established." *Swift II*, 6 A. at 861. The stockholder was therefore required to make specific factual averments in the petition to show clearly that he or she was entitled to the relief (inspection) sought. *Swift I*, 30 A. at 785. In other words, the stockholder was required to demonstrate to the court "those special circumstances which would justify it in interposing its mandatory process in his behalf." *Thiele*, 115 A. at 775.

[16] 21 Del. Laws ch. 273, § 17 (1899). In March 1899, the Delaware legislature enacted Section 17 of the Delaware General Corporation Law, the predecessor of the modem version of the DGCL. The statute codified stockholders' right to inspect the corporate stock ledger, or stocklist: "The original or duplicate stock ledger containing the names and addresses of the stockholders, and the number of shares held by them…". The Delaware courts interpreted this statute to authorize stockholders to inspect the corporation's books and records. Shaw v. Agri-Mark, Inc., 663 A.2d 464, 467 (Del. 1995), although this was not expressly provided for in the statutory language until the 1967 revision of the current version of the DGCL. Until 1967, stockholders had both common law and statutory rights to enforce inspection of books and records from a Delaware corporation by making an application to the Delaware Superior Court (and not the Court of Chancery) through a mandamus petition. *See Agri-Mark, Inc.*, 663 A.2d at 468 (enactment of § 220 replaced the "formalized and burdensome mandamus procedure in the Superior Court.").

[17] *See* DEL. CODE ANN. tit. 8, § 220. *Bay State Gas Co. v. State ex rel. Content*, 56 A. 1114 (Del. Super. 1904).

[18] *Seinfeld v. Verizon Commc'ns, Inc.*, 909 A.2d 117, 120 (Del. 2006) (quoting *Sec. First Corp. v. U.S. Die Casting & Dev. Co.*, 687 A.2d 563, 571 (Del. 1997)).

Section 220(b) of the DGCL grants stockholders of a Delaware corporation the right to demand the inspection of its books and records.[19] That right is not absolute but conditional—access is contingent upon the stockholder demonstrating a proper purpose for making such a demand.[20]

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[19] 8 Del. C. § 220(b).

[20] Myriad proper purposes have been accepted under Delaware law including: the determination of the value of one's equity holdings, evaluating an offer to purchase shares, inquiring into the independence of directors, investigation of a director's suitability for office, testing the propriety of the company's public disclosures, investigation of corporate waste, and investigation of possible mismanagement or self-dealing.
Donald J. Wolfe, Jr. & Michael A Pittenger, *Corporate and Commercial Practice in the Delaware Court of Chancery* § 9.07[e][1], at 9-143 to -144 (2d ed. 2019); see also Edward P. Welch et al., *Folk on the Delaware General Corporation Law, Fundamentals* § 220.05, at 771 772 (2020 ed.) ("A stockholder may state a 'proper purpose' when he seeks to investigate allegedly improper transactions or mismanagement; to clarify an unexplained discrepancy in the corporation's financial statements regarding assets; to investigate the possibility of an improper transfer of assets out of the corporation; to ascertain the value of his stock; to inspect the stock ledger in order to contact other stockholders regarding litigation he has instituted and invite their association with him in the case; [t]o inform fellow stockholders of one's view concerning the wisdom or fairness, from the point of view of the stockholders, of a proposed recapitalization and to encourage fellow stockholders to seek appraisal; to discuss corporate finances and management's inadequacies and then, depending on the responses, determine stockholder sentiment for either a change in management or a sale pursuant to a tender offer; to inquire into the independence, good faith, and due care of a special committee formed to consider a demand to institute derivative litigation; to investigate director independence; to communicate with other stockholders regarding a tender offer; to communicate with other stockholders in order to effectuate changes in management policies; to investigate the stockholder's possible entitlement to oversubscription privileges in connection with a rights offering; to determine an individual's suitability to serve as a director; to obtain names and addresses of stockholders for a contemplated proxy solicitation; to inspect documents relating to a 'market check' on the terms of financing that may have been influenced by an interested party; or to obtain particularized facts needed to adequately allege demand futility after the corporation had admitted engaging in backdating stock options; or to investigate a private corporation's serial failure to convene annual stockholder meetings").
Importantly, the Delaware Supreme Court has recently held in the *AmerisourceBergen* case that stockholders who are seeking to investigate possible corporate wrongdoing do not need to specify an end-use at the outset of their demand or commit in advance to what they will do with the books and records before seeing the results of the investigation. The court further explained that the availability of affirmative defenses to withstand possible future fiduciary

The statute defines a "proper purpose" as "a purpose reasonably related to such person's interest as a stockholder.[21] Examples of established proper purposes include investigating corporate mismanagement,[22] ascertaining the value of stock,[23] soliciting other stockholders' support of derivative action,[24] investigating the independence of a special litigation committee for its demand-refusal decision,[25] and communicating with other stockholders in order to effectuate management policy changes.[26]

If a corporation refuses to permit the demanded inspection or fails to respond to the demand within five business days after the demand has been made, the stockholder may apply to the Court of Chancery for an order to compel such inspection.[27]

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duty claims cannot solely act to bar a plaintiff under Section 220. The court went on to explain that only in a rare case in which a stockholder's sole reason for investigating mismanagement or wrongdoing is to pursue litigation and a purely procedural obstacle--such as standing or the statute of limitations--stands in the stockholder's way such that the court can determine, without adjudicating merits-based defenses, that the anticipated litigation will be dead on arrival, the court may be justified in denying inspection. But in all other cases, the court should defer the consideration of defenses that do not directly bear on the stockholder's inspection rights, but only on the likelihood that the stockholder might prevail in another action. *AmerisourceBergen Corp. v Lebanon County Employees' Ret. Fund*, 2020 WL 7266362 (Del. 2020).

21 8 Del. C. § 220(b).

22 See Sec. First Corp. v. U.S. Die Casting & Dev. Co., 687 A.2d 563, 567 (Del. 1997) ("It is well established that investigation of [corporate] mismanagement is a proper purpose for a § 220 books and records inspection.").

23 *See CM & M Group, Inc. v. Carroll*, 453 A.2d 788, 792 (Del. 1982) (citing *State ex rel. Brumley v. Jessup & Moore Paper Co.*, 77 A. 16, 20 (Del. 1910)).

24 *See State ex rel. Bloch v. Sentry Safety Control Corp.*, 24 A.2d 587, 590 (Del. Super. 1942); *State ex rel. Foster v. Standard Oil Co. of Kansas*, 18 A.2d 235, 238 (Del. Super. 1941); *Compaq Comput. Corp. v. Horton*, 631 A.2d 1 (Del. 1993) (non-derivative litigation against the defendant corporation).

25 *See Grimes v. DSC Commc'ns Corp.*, 724 A.2d 561, 566 (Del. Ch. 1998); *La. Mun. Police Emples. Ret. Sys. v. Morgan Stanley & Co.*, 2011 WL 773316, at 42 (Del. Ch. 2011).

26 *See Marathon Partners L.P. v. M&F Worldwide Corp*. 2004 WL 1728604 (Del. Ch. 2004).

27 8 Del. C. § 220(c).

Section 220(c) of the DGCL provides that a stockholder who seeks to judicially enforce her inspection rights must establish that (1) such stockholder is a stockholder; (2) such stockholder has complied with Section 220 respecting the form and manner of making demand for inspection of such documents; and (3) the inspection such stockholder seeks is for a proper purpose.[28] Once a stockholder has established a proper purpose, the stockholder will be entitled only to the "books and records that are necessary and essential to accomplish the stated, proper purpose."[29]

To protect corporations from indiscriminate fishing expeditions and mere curiosity, the Delaware courts have tempered stockholders' books and records inspection right on the corporation with the showing of a 'credible basis' from which the court could infer there is "possible mismanagement as would warrant further investigation."[30] That is, a stockholder need not show that corporate wrongdoing or mismanagement has occurred in fact—and courts do not evaluate the viability of the demand based on the likelihood that the stockholder will succeed in a plenary action[31]--but rather the "threshold may be satisfied by a credible showing, through documents, logic, testimony or otherwise, that there are legitimate issues of wrongdoing."[32] Although not an insubstantial threshold, the credible basis standard is the is the lowest burden of proof under Delaware law.[33]

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[28] Section 220 "contemplates summary proceedings and the accelerated scheduling of cases under it emphasizes prompt processing and dispositions. *Mite Corp. v. Heli-Coil Corp.*, 256 A.2d 855, 857 (Del. Ch. 1969) (Books and records action is a summary procedure, with expedited discovery on limited issues and a quick trial.

[29] *Saito v. McKesson HBOC, Inc.*, 806 A.2d 113, 116 (Del. 2002).

[30] *Sec. First Corp. v. U.S. Die Casting & Dev. Co.*, 687 A.2d 563, 568 (Del. 1997).

[31] *AmerisourceBergen*, 2020 WL 7266362 (Del. 2020) (affirming that a stockholder seeking to obtain books and records, only need to show a credible basis from which the Court of Chancery can infer there is possible mismanagement or wrongdoing warranting further investigation, and need not demonstrate that the alleged mismanagement or wrongdoing is actionable to be entitled to inspect corporate books and records).

[32] *Seinfeld v. Verizon Commc'ns, Inc.*, 909 A.2d 117, 120 (Del. 2006).

[33] *Seinfeld*, 909 A.2d at 123. A stockholder plaintiff may rely on circumstantial evidence. *Wal-Mart Stores, Inc. v. Ind. Elec. Workers Pension Tr. Fund IBEW*, 95 A.3d 1264, 1273 (Del. 2014). A stockholder plaintiff also may rely on hearsay, as long as it is sufficiently

In the last few years, the more contentious issue has become what types of documents can stockholders inspect in order to achieve their purported purpose of intra-corporate investigations. In other words, assuming a stockholder proved a proper purpose for her inspection demand, the breadth of the 'necessary and essential' books and records ("permissible scope") was the focus of the battle.

Back in the day, there were not many books and records. The corporate books and records that did exist were limited to a few paper documents.[34] Those records included the stockholdings list, as well as some conception of other books and records,[35] but certainly not an email, text message, or other digital forms of communication.

For many years, the prevailing wisdom in Delaware and elsewhere, including states that adopted variations of the Model Business Corporation Act, was that books and records subject to inspection were the stock ledger,[36] a list of the corporation stockholders,[37] and formal board materials, such as its minutes, resolutions, and presentations made to it—documents that formally evidence the directors' deliberations and decisions, and materials received and considered by the board of directors.

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reliable. *Marmon v. Arbinet-Thexchange, Inc.*, 2004 WL 936512, at 4 (Del. Ch. 2004); *Skoglund v. Ormand Indus., Inc.*, 372 A.2d 204, 208–13 (Del. Ch. 1976).

[34] As incidents of the common law inspection right, stockholders were entitled to make copies of those books and records as were "essential and sufficient" to furnish the needed information. *State ex rel. Rogers v. Sherman Oil Co.*, 117 A. 122 (Del. 1922).

[35] *Swift v. State ex rel. Richardson*, 6 A. 856, 864 (Del. 1886) (permitting stockholder to inspect pertinent contracts, conveyances of franchises and tangible property, and all records showing net earnings of the company during pertinent years); *State ex rel. Brumley v. Jessup & Moore Paper Co.*, 77 A.2d 16, 20 (Del. Ch. 1910) (permitting examination of the minute books of the director's meetings for the last seven years, the books of account of the corporation that showed the amounts received from the sale of preferred stock during the last seven years and the disposition of these funds, the stock book of the preferred stockholders, the stock book of the common stockholders, the books showing the amount of business done during the last four years, and the statements submitted to the directors which showed the business done by the company, its profit and loss, and assets and liabilities during each six-month period for the last five years.)

[36] 8 Del. C. § 220(b)

[37] *Id*.

Other than those formal board materials, there was not much clarity on what additional corporate documents, if at all, stockholders were entitled to inspect, as the DGCL does not specifically state what constitutes books and records.

There was certainly law in transcripts and a few written decisions that suggested that courts may compel inspection of corporate board-level emails, but only upon the stockholder plaintiffs making specific and discrete identification, with "rifled precision",[38] of the emails sought. The "rifled precision" requirement stood for the proposition that Section 220 proceeding does not open the door to wide ranging discovery.[39]

Such "rifled precision" may be a stockholder demanding for inspection emails in which the board of directors supposedly provided their unanimous consent for a corporate action—that is, one bullet hitting one place. The statute anticipates directors can provide written consent in such a manner, and such a specific, tailored demand would be looking for effectively validation of that. A corporation could not properly resist such a demand for inspection.

> *"In the last few years, courts have adopted increasingly liberal interpretations of Section 220 requirements and broadening the scope of inside corporate information that is subject to stockholders' inspection"*

That is, however, a far field from courts affording stockholders wide-ranging discovery, which is where the landscape has shifted over the last few

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[38] *Sec. First Corp.*, 687 A.2d 563, 579; *Disney v. Walt Disney Co.*, 2005 WL 1538336 Del. Ch. 2005).

[39] *See Brehm v. Eisner*, 746 A.2d 244, 266-67 (Del.2000) (Plaintiffs "bear the burden of showing a proper purpose and [must] make specific and discrete identification, with rifled precision...[to] establish that each category of books and records is essential to the accomplishment of their articulated purpose..."); *Sec. First Corp.*, 687 A.2d 563, 568, 570 ("mere curiosity or desire for a fishing expedition" is insufficient.).

years. In recent years, the Delaware courts have loosened the scrutiny, adopting increasingly liberal interpretations of Section 220 requirements and broadening the scope of inside corporate information that is subject to stockholders' inspection.[40]

One of the central matters that signaled a clear step toward shifting the long, established equilibrium of modern stockholders' investigatory rights was the *Wal-Mart* case.

In a nutshell, *Wal-Mart* involved a request by one of its institutional investors to inspect a broad category of documents of Wal-Mart pursuant to Section 220. The request was in response to established media outlets' reports that a Wal-Mart's Mexico-based subsidiary engaged in a scheme of illegal bribery payments to Mexican officials at the direction of the Mexico-based subsidiary's CEO in exchange for benefits, from zoning changes to rapid and favorable processing of permits and licenses for new stores.[41]

The institutional investor served a demand on Walmart, requesting the documents was "to investigate: (1) mismanagement in connection with Wal-Mart's Mexico-based subsidiary allegations; (2) the possibility of breaches of fiduciary duty by Wal–Mart or Wal-Mart's Mexico-based subsidiary executives in connection with the bribery allegations; and (3) whether a pre-suit demand on the board would be futile as part of a derivative suit."[42]

Although Wal-Mart responded by providing the stockholder with thousands of documents—albeit many heavily redacted—the institutional investor believed that the document production was deficient and too narrow

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[40] *Woods v. Sahara* Enterprises, Inc., 2020 WL 4200131 at 4-5 (Del. Ch. 2020) (*Sahara* (directing defendant corporation to produce to produce documents of third-party entities despite lack of holding); *Alexandria Venture Investments, LLC v. Verseau Therapeutics, Inc.*, 2020 WL 7422068 (Del. Ch. Dec. 18, 2020) (granting stockholders' demand to inspect defendant corporations' internal deal-related documents in order to investigate whether its directors violated their fiduciary duties when they rejected a financing proposal made by the plaintiff stockholders).

[41] *Wal-Mart Stores, Inc. v. Ind. Elec. Workers Pension Tr. Fund IBEW*, 95 A.3d 1264, 1268 (Del. 2014).

[42] *Id*.

in scope.[43] Wal-Mart also declined to produce documents that were protected by the attorney-client privilege and attorney work-product doctrine.[44]

As a result, the institutional investor brought an action in the Court of Chancery pursuant to Section 220 to investigate potential mishandling on the part of Wal-Mart's directors: how much they knew in real time and whether they could have done more to stop it.

Affirming the scope of the production ordered by the Court of Chancery, the Delaware Supreme Court granted the institutional investor's right to inspect (1) officer (and lower)-level documents, regardless of whether they were ever provided to Wal–Mart's board of directors or any of its committees; (2) documents spanning a seven-year period and extending well after the timeframe at issue; (3) documents from disaster recovery tapes; and (4) additional responsive documents 'known to exist' by the undefined 'office of the general counsel.'[45]

Additionally, the Delaware Supreme Court officially adopted an exception to the attorney-client privilege in derivative suits brought on behalf of the company against fiduciaries (a "Garner" exception), ordering Wal-Mart to produce documents protected by the attorney-client and work-product privileges.[46]

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43 *Id*. at 1269.

44 *Id*.

45 *Id*. at 1270.

46 *Id*. at 1278; *Garner v. Wolfinbarger*, 430 F.2d 1093 (5th Cir. 1970). It is worth noting that the Delaware Supreme Court adopted and applied the Garner exception not in regular, plenary proceedings (as other courts had done), but rather in pre-filing proceedings. In so ruling, the Delaware Supreme Court relied on the following factors in determining that the institutional investor had satisfied the "good cause" standard required by Garner: (1) the institutional investor had a colorable claim; (2) the information sought was unavailable from non-privileged sources; (3) the information sought was particularized and not just "a broad fishing expedition"; (4) disclosure of the material would not risk the revelation of trade secrets; (5) the allegations at issue implicated criminal conduct under the Foreign Corrupt Practices Act; and (6) the institutional investor was a legitimate stockholder as a pension fund. *Id*. at 1279-1280. It should also be noted that the Delaware Supreme Court affirmed the Court of Chancery's ruling that IBEW was entitled to certain work-product documents. *Id.* at 1281.

The Delaware Supreme Court's decision in *Wal-Mart* is often cited when parties seek, or subsequent courts have permitted, expansive inspection rights pursuant to Section 220.

It is important, however, to look at the context that influenced the Delaware courts to expand the scope of information subject to the stockholder inspection in that case. The result in *Wal-Mart* was a product of strong establishment of a credible basis of wrongdoing. Also, there was an extensive reporting by prominent and respected media outlets about fraud and ill behavior. When the plaintiff stockholder demanded to inspect the relevant corporate documents, it identified pretty broad categories that included emails, and persuaded the court that those broad categories were in fact necessary to fully investigate the suspected wrongdoing.

Since then, we keep seeing an expansion of the permissible scope—the type of documents courts allow stockholders to get access to. We started to witness a clear trend of liberalization--broadening the scope of corporate books and records subject to inspection by stockholders.

> *"While the court's reasoning that a corporate officer who conducts business through a private electronic platform or medium, constitutes corporate 'books and records' has some merit, the law is getting farther and farther away from what the original concept of the common law right was"*

If the first wave of broadening the scope of inspection revolved primarily around a shift from providing formal, hard copy corporate books and records, such as stock listing materials, to providing access to internal corporate communications, the second wave signaled the courts' recognition of stockholders' rights to electronic forms of internal communications, such as private emails exchanged among the company's managers, and between them and their third-party advisors.[47] As long as the sought information implicated

[47] *KT4 P'rs v. Palantir Techs. Inc.*, 203 A.3d 738 (Del. 2019). In *Palantir*, a Plaintiff stockholder of the defendant corporation, brought suit seeking inspection of corporate books

a corporate-related issue, stockholders have been entitled to inspect them, regardless of the medium, as illustrated in the *Yahoo!* case.[48]

In *Yahoo!*, a stockholder sought to inspect corporate books and records, specifically emails of the company's CEO, for the purpose of investigating possible wrongdoing and breaches of fiduciary duty in connection with *Yahoo!*'s retention of an extremely highly-compensated chief operating officer, and his termination without cause fourteen months later, triggering almost $60 million in severance payments.

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and records under Section 220 for the stated purposes of valuing its stock and inspecting possible wrongdoing, including interfering with plaintiff's planned sale of its stock to a third party. The Delaware Supreme Court concluded that the plaintiff stockholder was entitled to inspect emails from personal accounts and text messages stored on personal devices due to lack of other materials sufficient for its purpose. The high court recognized that in the modern age, business is done by email, text messages and other electronic communications. In ordering the company defendant to produce electronic communications in response to the Section 220 demand, the Delaware Supreme Court held that the trial court's production order that was limited to formal board documents was insufficient because the plaintiff presented evidence that the company "conduct[ed] its corporate business informally over email and other electronic media," instead of through "more traditional means," such as board meeting materials and minutes. The high court further explained that production of electronic communications was appropriate because the corporation failed to proffer "any evidence that other materials would be sufficient" to accomplish the plaintiff's purpose. In so ruling, the court noted, however, that a corporation should not be required to produce electronic communications if other materials, such as board meeting minutes, exist and would accomplish the petitioner's proper purpose. *Palantir* and its progeny have signaled the recognition that as the overwhelming volume of business correspondence shifts to e-mail and text platforms and away from hard copy, the ability to investigate potential wrongdoing may be marginalized unless emails and other purely electronic communications are "fair game" as part of stockholders' right to investigate corporate books and records. See *Mudrick* Capital Mgmt., L.P. *v*. *Globalstar*, Inc., 2018 WL 3625680 (Del. Ch. 2018) (ordering production of internal emails to investigate flaws in the deal process).

[48] *Amalgamated Bank v. Yahoo! Inc.*, 132 A.3d 752 (Del. Ch. 2016). It is interesting to see whether the judiciary would be receptive to allow plaintiffs to test possible allegations of directors in a 220 Section action that the directors have only used formal corporate accounts to share information and communicate with each other. *In re WeWork Litig.*, 2020 WL 7624636, (Del. Ch. 2020) (holding that use of third-party email account by outside directors or others could waive privilege).

Holding that the plaintiff stated a proper purpose for its request, the Court of Chancery ordered the production of officer level documents and emails from the personal account of the company's CEO,[49] who was directly involved in the retention and termination of the COO, and was alleged to have altered the terms of COO's compensation without authority.

In ordering the company's then-CEO to produce communication from her personal email—not just the email account that was hosted on the company's servers--*Yahoo!* signaled a further extension of the growing trend of expanding the "scope" of documents courts enabled stockholders to inspect, thus strengthening their pre-filing intra-corporate inspection rights.

One may ask whether personal private communication constitutes corporate 'books and records.' The court reasoned that a corporate officer who conducts business through a private electronic platform or medium essentially transforms the private communications into corporate 'books and records.' Regardless of the merit of that reasoning, it does seem clear that the law is getting farther and farther away from what the original concept of the common law right was.[50]

Then, in the last of couple of years, the Delaware courts, have routinely and repeatedly, significantly expanded the universe (boundaries and scope) of documents that may be subject to inspection by stockholders.[51] Those

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[49] *Id.* 132 A. 3d, 792.

[50] *Mudrick Capital Mgmt.*, 2018 WL 3625680 at 9 (ordering production of internal emails to investigate flaws in the deal process); *Schnatter v. Papa John's Int'l, Inc.*, 2019 WL 194634 (Del. Ch. Jan. 15, 2019) (ordering two private equity directors to produce private LinkedIn messages in which they exchanged views on the process of ousting the company's founder); *In re Facebook, Inc. Section 220 Litig.*, 2019 WL 2320842 at 18 (Del. Ch. May 30, 2019) (ordering internal communications of company's top managers relating to data privacy issues).

[51] *AmerisourceBergen*, 2020 WL 132752, at 51-52 (Del. Ch. 2020) (explaining that the starting point, and often the ending point, for an adequate inspection will be board-level documents. Formal board materials need not be an end point however, particularly where the wrongdoing appears vast. "If the plaintiff makes a proper showing, an inspection may extend to informal materials," and "wide-ranging mismanagement or waste" might require a "more wide-ranging inspection."). It would be curious to see where a board portal would end up in the *AmerisourceBergen*'s Dante's circle diagram: whether it would be considered email or formal board minutes?

materials included not only formal board materials,[52] but also informal board materials[53] and officer level materials[54]--when access to board formal materials alone do not satisfy the plaintiff stockholders' proper purpose--whether they come in the form of hardcopy, electronic or some other medium.[55]

Coupled with recent admonishing of corporate defendants for overly aggressive defenses in books and records actions,[56] the consequences of the

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[52] See, e.g., 3 William B. Solomon & Michael A. Nemeroff, *Practice Checklist, Successful Partnering Between Inside & Outside Counsel* § 46A:31 (2015) ("In connection with the corporate secretary's role as the company's record keeper, the corporate secretary often maintains the official minutes of the meetings of the board in a central location. . . . The corporate secretary generally prepares board packages or gathers them from the applicable members of management, reviews what is gathered to ensure it is narrowly tailored to the board's purposes and disseminates the materials necessary for the board members to review in advance of each meeting of the board."); Soc'y of Corp. Sec'ys. & Gov'ce Prof'ls, Corporation Minutes: A Publication for the Corporate Secretary 23–24 (Feb. 2014) ("Corporate secretaries may also maintain separate meeting files for each board and committee meeting which includes the material related to the meeting and materials referenced in the minutes….Companies have also started storing these materials electronically. . . .").

[53] *AmerisourceBergen*, 2020 WL 132752, at 53 (Del. Ch. 2020) ("Informal Board Materials generally will include communications between directors and the corporation's officers and senior employees, such as information distributed to the directors outside of formal channels, in between formal meetings, or in connection with other types of board gatherings. Informal Board Materials also may include emails and other types of communication sent among the directors themselves, even if the directors used noncorporate accounts").

[54] *Id*. ("In an appropriate case, an inspection may extend further to encompass communications and materials that were only shared among or reviewed by officers and employees").

[55] *See Palantir*, 203 A.3d at 755

[56] *Pettry v. Gilead Sciences*, 2020 WL 6870461 (Del. Ch. 2020) (criticizing corporate defendant for an "overly aggressive defense strategy" which the court found "epitomizes a trend" to "obstruct [demanding stockholders] from employing [Section 220] as a quick and easy pre-filing discovery tool."); *Police & Fire Retirement System of the City of Detroit v. WalMart, Inc.*, C.A. No. 2020-0478-JTLt (Del. Ch. Oct. 5, 2020; filed Oct. 19, 2020) (Transcript) (expressing dissatisfaction at corporate defendants' outright refusal to honor stockholders' statutory right to inspect books and records). Recently, leading corporate law scholars have been observing that plaintiffs may use appraisals actions to craft meaningfully

continued liberalization and broadening of stockholders' inspection rights are profound, especially when considering what was the original purpose of stockholders' inspection rights.

> "Delaware ought to consider whether the constant expansion of this front-loaded pre-filing investigation tool reflects a good policy and effectively protects stockholders' interests."

Additionally, expanding stockholders' pre-filing information rights also comes with its set of costs that subject companies to "excessive and disruptive" demands for inspection and protracted books and records actions to enforce them. These costs do not only shift managements' resources and focus from their business objectives, but ultimately are imposed on the corporations—and the at the end of the day, its stockholders—in most cases.[57]

The constant expansion of this front-loaded pre-filing investigation tool by the Delaware courts and its growing utility by stockholders, has transformed the landscape of modern corporate litigation. It is important to recall, however, the rationales that these pre-filing investigations tools were originally based on and that prompted the Delaware courts to endorse their use. The Delaware judiciary ought to consider where the pendulum currently stands, and whether it reflects a good policy.

Starting in the mid-1990s, stockholder plaintiffs challenging corporate wrongdoing gradually faced heightened pleading standards in bringing derivative litigation without access to discovery before they filed, as well as

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stronger plenary complaints by first seeking appraisal of a small subset of target shares. *See* (*Harris v. Harris FRC Corp.*, C.A. No. 2019-0736-JTL (Del. Ch. 2021) (holding that discovery that was obtained in an appraisal proceeding could be used in a separate breach of fiduciary duty action that has yet to be filed).

[57] The expansion in stockholders' pre-filing inspection rights has also significant benefits such as narrowing the information asymmetries between managers and the corporate residual equity holders (stockholders), increasing market (reputational) deterrence, and promoting stockholders' monitoring of corporate management' behavior across wide range of situations (which reduces the need for judicial supervision).

admonished for not using the "tools at hand"—particularly, using their Section 220 rights to inspect the company's books and records--to generate information pre-suit.[58] Heightening the pleading requirements and staying discovery for actions rested on the rationale that only substantiated claims, as opposed to frivolous lawsuits, should be subject to judicial review.

As many breach of fiduciary claims are derivative claims—that is, reflect an injury to the corporation rather than direct harm to the stockholders—they are considered the corporation's litigation assets. The board of directors is vested with the authority to determine what action the corporation will take with its litigation assets.[59] In derivative actions, the board of directors decides whether the corporation should file a suit and, absent some disqualifying event, the stockholder plaintiff must first request that the board bring the action.

In Delaware, a plaintiff bringing a derivative suit that makes demand on the board of directors concedes that the board has the power and is capable of properly exercising the power to choose whether to pursue the action. As a result, when bringing a derivative suit, a stockholder seeks to displace the board's authority over a litigation asset and assert the corporation's claim.[60]

As directors are empowered to manage, or direct the management of, the business and affairs of the corporation,[61] plaintiffs seek to avoid asking the board's permission to bring the case by claiming that the directors are disqualified from doing so because they have breached their fiduciary duties. To do that, plaintiffs have to plead with particularity facts suggesting that

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58 *Grimes v. Donald*, 673 A.2d 1207, 1216 (Del. 1996).
59 8 Del. C. § 141(a); *See also Zapata Corp. v. Maldonado*, 430 A.2d 779, 782 (Del. 1981).
60 *Aronson v. Lewis*, 473 A.2d 805, 811 (Del. 1984).
61 *See* 8 Del. C. § 141(a).

directors are either too interested[62] or lacking in independence[63] or that the challenged transaction is too far off from a reasonable business judgment[64] for the court to trust their judgment on whether to pursue the lawsuit.[65] Importantly, plaintiffs need to clear the demand-excusal pleading hurdle without having the benefit of discovery.

In light of this barrier—satisfying a gradually raising, high pleading burden for the demand-requirement stage without the access to pre-filing discovery—the Delaware courts directed stockholders to employ their intra-corporate inspection rights under Section 220 to meet the particularization requirement to excuse a demand in the derivative lawsuits context.[66] In other words, as the Delaware courts ratcheted up the pleading burden for to state a derivative claim under the Rule 23.1, they repeatedly encouraged stockholder plaintiffs to use their inspection rights under Section 220 to obtain the necessary information before filing a derivative action in order to establish the demand futility requirement.

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[62] *In re Cornerstone Therapeutics Inc. Stockholder Litigation*, 115 A.3d 1173, 1183 (Del. 2015) (holding that to survive a motion to dismiss brought by disinterested, independent directors who are protected by an exculpatory charter provision, a plaintiff seeking only monetary damages is required to plead facts supporting a rational inference that each such director breached her duty of loyalty, acting in bad faith).

[63] *Beam v. Stewart*, 845 A.2d 1040, 1055 (Del. 2004) (holding that even in a situation where the controller held 94% and was friends with the directors, directors were presumed independent until proven otherwise).

[64] Such common claim, for example, involves failure of managerial oversight. To survive a pleading stage motion to dismiss, stockholders plaintiffs have to plead particularized facts showing that the corporate board had actual or constructive knowledge of the oversight failure in question—an undoubtedly tall order with access only to public information. *In re Citigroup Inc. S'holder Deriv. Litig.*, 964 A.2d 106, 125 (Del. Ch. 2009) ("The presumption of the business judgment rule, the protection of an exculpatory § 102(b)(7) provision, and the difficulty of proving a *Caremark* claim together function to place an extremely high burden on a plaintiff to state a claim for personal director liability").

[65] Del. Ct. Ch. R. 23.1.

[66] *Rales v. Blasband*, 634 A.2d 927, 934-935 n.10 (Del. 1993); *Aronson v. Lewis*, 473 A.2d 805 (Del. 1984). *See also Grimes v. Donald*, 673 A.2d 1207, 1216 (Del. 1996) (emphasizing that "If the stockholder cannot plead such assertions consistent with Chancery Rule 11, after using the 'tools at hand' to obtain the necessary information before filing a derivative action, then the stockholder must make a pre-suit demand on the board".).

To overcome the heightened pleading standards of derivative claims, beginning in the mid-90's the Delaware Supreme Court has repeatedly urged stockholders' plaintiffs to exercise their inspection rights under Section 220 and pursue access to corporations' books and records, to conduct thorough pre-filing investigations.[67] Following the Court's encouragement of stockholders to use their pre-filing investigatory tools, the Delaware courts supplied just that by adopting increasingly liberal interpretations of Section 220 requirements that allowed plaintiffs to clear the demand futility pleading hurdles.

Thus, in the derivative litigation context, there is a sort of elegant tie between the kinds of wrongdoing being investigated and granting inspection rights since the corporate entity—in the name of which the stockholder plaintiff prosecutes the claims—has control over and access to its own documents. To reiterate, if a stockholder plaintiff pleads a claim in the name of a corporation, at a minimum, she should have the ability to look at some of the entity's own documents in order to state the corporation's own grievances.

For a short while, there was a pretty clear equal ratcheting: the courts ratcheted up the pleading burden under Rule 23.1 on the one hand, while providing stockholder plaintiffs effectively pre-filing investigation discovery tools.

And then *Corwin* came along.[68] In *Corwin*, the Delaware Supreme Court held that the business judgment deference applied where the challenged decision was approved by a majority of disinterested, fully informed and

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[67] *Rales*, 634 A.2d at 934 n.10. *See also Brehm v. Eisner*, 746 A.2d 244, 266-267 (Del. 2000) (""Plaintiffs may well have the "tools at hand" to develop the necessary facts for pleading purposes. For example, plaintiffs may seek relevant books and records of the corporation under Section 220 of the Delaware General Corporation Law, if they can ultimately bear the burden of showing a proper purpose and make specific and discrete identification, with rifled precision, of the documents sought. Further, they must establish that each category of books and records is essential to the accomplishment of their articulated purpose for the inspection.").

[68] *Corwin v. KKR Financial Holdings LLC*, 125 A.3d 304, 306 (Del. 2015) (holding that the business judgment standard of review applies where a transaction "is approved by a fully informed, uncoerced majority of the disinterested stockholders."). It is particularly worth noting that *Corwin* did not arise in a derivative lawsuit context

uncoerced stockholders, so long as there was no conflicted controlling stockholder present.[69]

The rationale behind the policy to adopt the stockholder ratification[70]--which is to be distinguished from a ratification in the pure, classic sense of this term[71]--mechanism that subjects challenged director action to business judgment review is tied to the rise of institutional stockholders.

In the last forty years, institutional investors—that are presumed to be managed by financially sophisticated managers--are the predominate owners of the American equity markets. When disinterested approval of a corporate action—outside the controlling stockholder context--is given by a majority of stockholders who have had the free and informed chance to decide whether or not to approve the action assigned to them, there is a long-standing tradition of giving deference to the stockholders' decision, subjecting the challenged action to the business judgment standard of review.

The significance of *Corwin* and its impact on stockholder litigation cannot be underestimated: in holding that it was appropriate to ratchet down a more searching standard of review to the deferential business judgment review[72] by

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[69] *Id.* at 313. Elaborating on the basis for adopting the doctrine of stockholder ratification in the M&A transactional context, the High Court explained:" "When the real parties in interest—the disinterested equity owners—can easily protect themselves at the ballot box by simply voting no, the utility of a litigation-intrusive standard of review promises more costs to the stockholders in the form of litigation rents and inhibitions on risk-taking than it promises in terms of benefits to them".

[70] The notion that stockholders can ratify less-than-perfect decisions made by corporate fiduciaries is well-embedded in Delaware fiduciary jurisprudence. The idea that stockholder ratification can and should ratchet down the level of judicial scrutiny paid to fiduciary decision-making, is also not new. *See MacFarlane v. North American Cement Corporation*, 157 A. 396 (Del. Ch. 1928).

[71] *See In re Wheelabrator Techs., Inc. S'holders Litig.*, 663 A.2d 1194 (Del. Ch. 1995).

[72] In fiduciary litigation, the business judgment rule is the golden egg. It is fair to say that the business judgment rule is the "most prominent and important standard" in all of corporate law because when it applies, the court is obliged to presume that director fiduciaries were fully informed and were acting in good faith in their decision-making. As a practical matter, and as the Delaware Supreme Court made clear "[w]hen the business-judgment-rule standard of review is invoked because of a [stockholder] vote, dismissal is typically the result. That is because the vestigial waste exception has long had little real-world relevance because it has

virtue of the stockholder vote, the Delaware Supreme Court embraced stockholder vote as the stockholder protection mechanism of choice.[73] This shift by the High Court, in turn, incentivized stockholder plaintiffs to investigate the veracity of the information provided to stockholders so as to show that the vote was not fully informed.

On the heels of the *Corwin* decision, Chancellor Bouchard issued his opinion in *Solera,* which clarified that a plaintiff alleging that a stockholder vote was not fully informed—in order to avoid invoking the *Corwin* "cleansing"--has an initial burden of pleading specific deficiencies in the operative disclosure.[74] Stated differently, *Corwin* imposes a heightened pleading burden[75] on plaintiffs in the sense that they must affirmatively plead around what is generally regarded otherwise as an affirmative defense.

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been understood that stockholders would be unlikely to approve a transaction that is wasteful". *Singh v. Attenborough*, 137 A.3d 151, 152 (Del. 2016). Post-vote application of the business judgment rule at the pleading stage almost always means that breach-of-fiduciary-duty claims will be dismissed before they even get out of the gate.

[73] The Delaware Supreme Court's decision in *Corwin* signaled a significant development: a shift from substantive judicial review to a ratifying stockholder vote.

[74] *In re Solera Holding, Inc. S'holder Litig.*, Consol. C.A. No. 11524-CB, slip op. at 19 (Del. Ch. 2017) (holding that ""a plaintiff challenging the decision to approve a transaction must first identify a deficiency in the operative disclosure documents, at which point the burden would fall to defendants to establish that the alleged deficiency fails as a matter of law in order to secure the cleansing effect of the vote.").

[75] That burden is made all the more onerous by other Delaware decisions that limit the stockholder plaintiffs' ability to obtain expedited pre-closing discovery. Take, for instance, the Delaware Supreme Court's decision in *C&J Energy Servs., Inc. v. City of Miami Gen. Emps.' & Sanitation Emps.' Ret. Tr.*, 107 A.3d 1049 (Del. 2014). There, the court made clear that the Court of Chancery should not preliminarily enjoin the completion of a pending merger based on alleged flaws in the deal process "where no rival bidder has emerged to complain that it was not given a fair opportunity to bid, and where there is no reason to believe that stockholders are not adequately informed or will be coerced into accepting the transaction if they do not find it favorable." In practice, *C&J* eliminates "a basis for seeking expedited pre-closing discovery. *See* Joel Edan Friedlander, Vindicating the Duty of Loyalty, 72 Bus. Law. 623, 643 (2017). Also significant in the post-*Corwin* litigation landscape is the Court of Chancery's decision in *In re Trulia Inc. Stockholder Litigation*, 129 A.3d 884 (Del. Ch. 2016), which marked the end of expedited discovery that was routinely taken in aid of disclosure-only settlements.

From that point on, stockholder plaintiffs started using their inspection rights under Section 220 for the purpose of gaining access to board materials related to the applicable disclosure, possibly identify a deficiency that would help them to defeat a *Corwin* motion to dismiss.[76]

The Delaware Courts' call for stockholders to use their pre-filing investigations rights was heard loud and clear, as illustrated in the immediate aftermath of *Corwin*, *Solera*, and the progeny of the books and records jurisprudence, such as the *West* decision.[77]

In *West*, Vice Chancellor Slights held that even a ratifying stockholder vote under the *Corwin* doctrine does not absolve a corporation from having to produce documents in Section 220 books and records actions.[78] In allowing plaintiffs to use Section 220 to extract internal corporate communications in anticipation of a *Corwin* defense upon filing post-closing damages case, the Court of Chancery held that *Corwin* does not, as a matter of law, prevent a stockholder who can otherwise articulate a credible basis to investigate corporate wrongdoing from obtaining books and records to support a post-closing breach of fiduciary duty claims.[79]

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[76] *See Sciabacucchi v. Liberty Broadband Corp.*, WL 2352152 at 15 (Del. Ch. May 31, 2017) (explaining that one kind of coercion--structural coercion—occurs when the board structures the vote in a manner that requires stockholders to base their decisions on reasons extraneous to the economic merits of the transaction at issue); *In re Massey Energy Co. Deriv. & Class Action Litig.*, 160 A.3d 484, 508 (Del. Ch. 2017) (explaining that when a board tries to pack too much into a vote, that dynamic can create a structurally coercive vote); *In re Saba Software, Inc. Stockholder Litig.*, C.A. No. 10697–VCS, 2017 WL 1201108, at 15 (Del. Ch. 2017), as revised (Apr. 11, 2017) (finding situational coercion when the target company's stockholders were given a choice between keeping their recently deregistered illiquid stock, which was a circumstance created by the board's own failures, or accepting substantially deflated merger consideration since the board had "[f]oisted a Hobson's choice upon the stockholders" by insisting on selling the company "in the midst of [its] regulatory chaos.").

[77] *Lavin v. West Corp.*, 2017 WL 6728702 (Del. Ch. 2017).

[78] *Id*., at 18.

[79] *Id*., at 28.

Expectedly, the stockholder plaintiffs' bar followed accordingly through the door that had been opened in Vice Chancellor Slights' decision in *West*, which led to a sharp increase in books and records use in fiduciary litigation.[80]

Importantly, however, unlike what happened in the early 2000s when the Delaware Supreme Court essentially put up an open invitation for plaintiffs to use internal corporate books and records to overcome the once increasing pleading hurdles—namely, the demand-excusal requirement--in derivative actions, there was no corresponding change in the pleading requirements that justified the expansion of stockholders' pre-filing discovery powers.

To be sure, *Corwin* did not raise the pleading bar for plaintiffs stockholders. The Delaware Supreme Court has steadfastly stuck to a "minimal", plaintiff-friendly notice pleading standard in all direct brought actions under which "even vague allegations are 'well-pleaded' if they give the opposing party notice of the claim."[81]

"Therefore, if Delaware has made a policy choice to broaden and liberalize stockholders' inspection rights, it is at least worth contemplating whether the pleading standards should be ratcheted up accordingly. In other

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[80] Commentators have observed that the expansion of stockholders' inspection rights mitigated much of the presumed problematic effects of Delaware's dilution of the substantive standards of review. See Roy Shapira, *Corporate Law, Retooled: How Books and Records Revamped Judicial Oversight*, __ Cardozo L. Rev. __ (forthcoming 2021) ("the expansion of Section 220 is not just good policy but also good law. By emphasizing full disclosure, it is consistent with basic principles of fiduciary law. Fiduciary duties in corporate law have always been geared to deal with extreme information asymmetries – those stemming from unobservable and unverifiable information. The way to tackle these information problems has been to impose "a strict, full-disclosure-based accountability regime." To the extent that the *Corwin*/*MFW* shift toward disclosing everything to the beneficiaries (stockholders) and letting them decide is more consistent with fiduciary law than the previous regime of ex post judicial review of the fairness of deals,191 so too is the expansion of Section 220, which assures that the pre-vote disclosure is indeed full and comprehensible.").

[81] *Savor, Inc. v. FMR Corp.*, 812 A.2d 894, 896–97 (Del. 2002); *accord Central Mortg. Co. v. Morgan Stanley Mortg. Cap. Hldgs. LLC*, 27 A.3d 531, 536 (Del. 2011).

words, a policy to broaden pre-filing investigation powers of stockholders should correspond with a more rigorous standard"

Given that this 'reasonable 'conceivability' pleading standard is already extremely low as it is (and less rigorous than the federal ""plausibility" standard), one might question the need for the expanding stockholders' inspection rights of corporate information. It has not been logically connected as it has been in the early 2000s when the Delaware judiciary had been increasing the pleading burden on derivative actions. This expansion of stockholders' pre-filing investigatory powers only made it easier for plaintiffs easier to bring litigation.

The pleading standards and the amount that needs to be pled to state a claim is a quintessential gating function in every legal system. The touchstone to survive a motion to dismiss in Delaware, as mentioned above, is "reasonable conceivability" which only requires that a well-pleaded complaint provide a defendant with notice of the claims. As a practical matter, that means that many more cases—which are now supported by expedited, pre-closing and expansive Section 220 inspection discovery—get beyond a Rule 12(b)(6) motion. In an event of a case going beyond the pleading stage, the plaintiffs then are entitled to exceedingly comprehensive, full-blown discovery and obtain to all information that might be relevant to their plenary litigation. Coupled with the trend of late in the Court of Chancery to not allow defendants to file summary judgments motions, the result is that when a motion to dismiss is denied, every case immediately has pretty significant settlement value.

"There ought to be a little bit more of a smell test at the front end of these fiduciary duty litigation cases given the significant, constant broadening boundaries and scope of documents that may be subject to inspection by stockholders"

Therefore, if Delaware has made a policy choice to broaden and liberalize stockholders' inspection rights, it is at least worth contemplating whether the pleading standards should be ratcheted up accordingly. In other words, a policy to broaden pre-filing investigation powers of stockholders should correspond with a more rigorous standard.

There ought to be a little bit more of a smell test at the front end of these fiduciary duty litigation cases given the mentioned-above developments in stockholder litigation, in which plaintiffs are only subject to pleading stage deference and that is truly a major sea change since the Delaware Supreme Court's decision in *C&J Energy Services*.[82] There, the Court made clear that the Court of Chancery should not preliminarily enjoin the completion of a pending merger based on alleged flaws in the deal process "where no rival bidder has emerged to complain that it was not given a fair opportunity to bid, and where there is no reason to believe that stockholders are not adequately informed or will be coerced into accepting the transaction if they do not find it favorable."[83] In practice, *C&J* eliminated a basis for seeking expedited pre-closing discovery.

In the wake of *C&J* decision, the Delaware courts stopped scheduling preliminary injunctions and temporary restraining orders hearings, which necessitated the courts to apply a more onerous standards to evaluate those cases at the front end. In those preliminary relief hearings, the courts evaluated whether the corporate action challenged posed serious risks to the stockholders. In the current corporate litigation landscape, however, the Delaware courts rarely ever get to exercise their equity powers and test the true strength of stockholder plaintiffs' claims.

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[82] *C&J Energy Servs., Inc. v. City of Miami Gen. Emps.' & Sanitation Emps.' Ret. Tr.*, 107 A.3d 1049 (Del. 2014).

[83] *Id*. at 1072–73.

Can corporations and their boards of directors restrict stockholders' inspection rights altogether, thus limiting the considerable cost and burden of production associated with such books and records investigation?

Historically, the Delaware courts have rejected efforts by corporations to limit or eliminate inspection rights.[84] There are, however, strong countervailing considerations, including Delaware's broad recognition of parties' ability to waive other important rights, whether constitutional or statutory.[85] Although restrictions on inspection rights in a corporation's

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[84] *See State v. Penn-Beaver Oil Co.*, 143 A. 257, 260 (Del. 1926) ("[T]he provision in defendant's charter which permits the directors to deny any examination of the company's records by a stockholder is unauthorized and ineffective."); *Marmon v. Arbinet-Thexchange, Inc.*, 2004 WL 936512, at 5 (Del. Ch. 2004) ("Nor could they rely upon a certificate provision prohibiting disclosure to avoid a stockholder's inspection right conferred by statute."); *BBC Acq. Corp. v. Durr-Fillauer Med., Inc.*, 623 A.2d 85, 90 (Del. Ch. 1992) (holding that a contract with a third party could not be used to limit inspection rights, which "cannot be abridged or abrogated by an act of the corporation"); Loew's Theaters, Inc. v. Commercial Credit Co., 243 A.2d 78, 81 (Del. Ch. 1968) (holding that charter provision which limited inspection rights to holder of 25% of shares was void as conflicting with statute*); State ex rel. Healy v. Superior Oil Corp.*, 13 A.2d 453, 454 (Del. Super. 1940) ("In Delaware it has been considered that the right of a stockholder to examine the books of the company is a common law right and can only be taken away by statutory enactment."); *State v. Loft, Inc.*, 156 A. 170, 173 (Del. Ch. 1931) (following Penn-Beaver).

[85] *See Baio v. Commercial Union Ins. Co.*, 410 A.2d 502, 508 (Del. 1979) ("Clearly, our legal system permits one to waive even a constitutional right . . . and, a fortiori, one may waive a statutory right.") (citations omitted); *see, e.g., Graham v. State Farm Mut. Auto. Ins. Co.*, 565 A.2d 908, 913 (Del. 1989) (holding that an arbitration clause in a contract effectuated a valid waiver of the constitutional right to a jury trial); *Manti Hldg., LLC v. Authentix Acq. Co.*, 2019 WL 3814453, at 4 (Del. Ch. 2019) (concluding "that waiver of appraisal rights is permitted under Delaware law, as long as the relevant contractual provisions are clear and unambiguous"); *Tang Capital P'rs, LP v. Norton*, 2012 WL 3072347 at 7 (Del. Ch. 2012) (holding that the plaintiff contractually waived its rights to seek a receivership under Section 291 of the DGCL); *Libeau v. Fox*, 880 A.2d 1049, 1056 (Del. Ch. 2005) (holding that the plaintiff waived her right to statutory partition by contract, noting that "[b]ecause it is a statutory default provision, it is unsurprising that the absolute right to partition might be relinquished by contract, just as the right to invoke § 273 to end a joint venture or to seek liquidation may be waived in the corporate context"); *Red Clay Educ. Ass'n v. Bd. of Educ.*

constitutive documents are probably barred, there are arguments for distinguishing between unilaterally modifying stockholders fundamental rights in an entity's constitutive documents—based on an implied consent regime--and waivers in private agreements that receive stockholder consent and thus may be valid, as Vice Chancellor Laster has observed recently in *Juul Labs*.[86]

It is inconceivable, however, that publicly-held corporations would be able to enter into a bilateral agreement with each and every stockholder to waive the statutory inspection rights. Therefore, private agreements may only serve as a partial solution, primarily for closely-held private corporations.

Therefore, the solution is going to arise from one of two places. First, the courts could effectively change the standard that governs stockholders' demands for books and records pursuant to Section 220—or at least enforce "rifled precision" requirement, which is still the law. The second may come from the Delaware legislature that has the power to amend Section 220 and clarify what constitutes "books and records" or codify the "rifled precision" in this context.

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of Red Clay Consol. Sch. Dist., 1992 WL 14965, at 6 (Del. Ch. 1992) (holding that a provision in a collective bargaining agreement constituted an effective waiver of negotiation right under unfair labor practices statute). The *Kortum* decision, cited above, held that a bilateral agreement had not waived statutory inspection rights where the waiver was not "clearly and affirmatively" expressed. *See Kortum*, 769 A.2d at 125; *accord Schoon v. Troy Corp.*, 2006 WL 1851481, at 2 (Del. Ch. 2006). Perhaps even a clear and express waiver would be contrary to public policy under *PennBeaver* and its progeny, but the standard set forth in *Kortum*, at minimum, implies that a stockholders' agreement could waive statutory inspection rights if the waiver was sufficiently clear.

[86] *Juul Labs, Inc. v. Grove*, 2020 WL 4691916 (Del. Ch. 2020). Along similar lines, the Model Business Corporation Act bars waivers in the constitutive documents of the corporation, but is silent on the viability of waivers in other agreements. *See* Model Bus. Corp. Act § 16.02(f) (2016) ("The right of inspection granted by this section may not be abolished or limited by a corporation's articles of incorporation or bylaws.").