An Overview of the Stockholder's Statutory Right to Corporate Books and Records Under Delaware Law

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INTRODUCTION

Under the American system of corporate governance, the stockholders elect a board of directors to oversee the company's business and affairs, and the board retains officers to manage the day-to-day operations of the corporation. In the event of mismanagement by the company's officers or directors, the stockholder's recourse is generally to either replace the directors or to pursue legal remedies against the malfeasant officers and directors in the courts, most often through suits alleging breach of fiduciary duty. However, because the officers and directors control the dissemination of information to stockholders, there is often a gap between the information that is disclosed to stockholders and the information stockholders feel that they truly need in order to determine whether their officers and directors are acting appropriately, or for other purposes such as determining the value of their shares or the independence of the board. Indeed, when a corporation's directors or officers are engaged in self-dealing or other wrongdoing, it is reasonable to assume that they will not willingly disclose those activities to the stockholders. This creates a need for stockholders to have a means of obtaining information about the corporation beyond that which is voluntarily disclosed.

Fortunately for stockholders, they have a statutory right under state law to demand access to corporate books and records. This statutory right stems from the well-recognized right of inspection under common law, which exists because "[a]s a matter of self-protection, the stockholder [is] entitled to know how his agents [are] conducting the affairs of the corporation of which he or she [is] a part owner."

[2]When invoked properly, these rights can be invaluable tools for stockholders with legitimate needs to obtain information beyond that which has been publicly disclosed. Additionally, such statutes provide stockholders with the ability to communicate with their fellow stockholders regarding matters of common interest, such as class action lawsuits or upcoming stockholder votes.

The scope and prerequisites of the statutory right of inspection will vary depending on which state's law applies, but each state affords some right of inspection.[3] The focus of this article will be on Delaware' inspection statute, because Delaware law governs the majority of publicly traded companies in the United States and its statute is the most frequently used.[4] Delaware's statute is also one of the nation's broadest in terms of the rights afforded to investors. This article will discuss the scope of those rights, the procedures and requirements that must be followed to exercise them, and the reasons why stockholders who may wish to assert breach of fiduciary claims should seriously consider using a demand for inspection of books and records as a means to gather information before filing suit.

Stockholders' Rights Under Delaware's Inspection Statute

Delaware's inspection statute, 8 Del. C. § 220, provides that any stockholder of a Delaware stock corporation, or any member of a Delaware non-stock corporation, "shall, upon written demand under oath stating the purpose thereof, have the right during the usual hours for business to inspect for any proper purpose, and to make copies and extracts from … the corporation's stock ledger, a list of its stockholders, and its other books and records."[5] Additionally, this right of inspection extends to the books and records of a corporation's subsidiaries *if* (a) the corporation has actual possession and control of those records, or (b) the corporation could obtain them through the exercise of control over the subsidiary, the subsidiary has no legal right to deny the corporation access to the records, and permitting the inspection would not breach any agreement between the corporation or the subsidiary and a third party.[6] For purposes of Section 220, the term "subsidiary" encompasses not just wholly-owned subsidiaries, but any entity: (a) which is directly or indirectly owned, in whole or in part, by the corporation of which the stockholder is a stockholder, *and* (b) over the affairs of which the corporation directly or indirectly exercises control.[7]

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Under Section 220, the right of inspection may be exercised by any stockholder of the company, regardless of the number of shares owned or the duration of ownership.[12]

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If the corporation refuses to permit the inspection or fails to respond to the demand within five business days, the stockholder may file suit in the Delaware Court of Chancery for an order compelling the inspection.[8] A lawsuit brought pursuant to Section 220(c) is summary in nature,[9] and discovery will be limited to the narrow purposes of the proceeding.[10] In addition, the Delaware Supreme Court has stated that, from a timing perspective, Section 220 proceedings "should be managed expeditiously."[11] Thus, such cases can often be brought to trial and resolved by the Court within a few months after the initial demand is made.

Under Section 220, the right of inspection may be exercised by any stockholder of the company, regardless of the number of shares owned or the duration of ownership.[12] While the right of inspection was once limited to stockholders of record, Section 220 was amended in 2003 to extend the right to beneficial owners, provided that they provide proof of ownership (as discussed below).

Prerequisites to the Exercise of the Stockholder's Right of Inspection

In order to succeed in a request for inspection pursuant to Section 220, a stockholder must be careful to comply with all of the procedural requirements of the statute. Failure to do so may result in a corporation's rejection of the demand, and if timely raised as a defense to a legal action pursuant to Section 220, may result in the court's denial of the requested inspection

as well. Indeed, the courts have typically required strict adherence to the procedural requirements of the statute.[13]

Section 220 requires that a demand be made in writing and under oath, that it be directed to the corporation's registered office in Delaware or to its principal place of business, and that, if the demand is made by the stockholder's attorney or agent, the demand be accompanied by a power of attorney or other written authorization from the stockholder.[14] The demand must also state the stockholder's purpose for seeking the inspection with specificity, and should identify with as much precision as possible the documents that are being sought.[15] Additionally, when the demanding stockholder is not a record holder of the company's shares, the demand must "state the person's status as a stockholder, be accompanied by documentary evidence of beneficial ownership of the stock, and state that such documentary evidence is a true and correct copy of what it purports to be."[16]

Assuming that a stockholder has followed the statutory procedures for the form of its Section 220 demand, the next hurdle to be cleared is the statement of a "proper purpose" for the demand. If the demand is rejected by the corporation and a lawsuit follows, the burden of proof regarding the propriety of the stockholder's purpose will depend upon the nature of the documents sought. If the stockholder seeks only the company's stock ledger or stockholder list, the burden will be on the corporation to prove that the stockholder's purpose is improper.[17] If, on the other hand, the stockholder seeks other corporate books and records, it will be the stockholder's burden to prove that its purpose is proper.[18]

Section 220 defines "proper purpose" as "a purpose reasonably related to [the demanding stockholder's] interest as a stockholder."[19] The Delaware courts have also required that a stockholder's purpose not be adverse to the interests of the corporation,[20] and have refused to enforce Section 220 demands which are made in bad faith or primarily for purposes of harassment.[21] In cases where a stockholder has several purposes for its Section 220 demand, the courts will look at its primary purpose, and if that purpose is proper the inspection will be permitted notwithstanding any improper secondary purposes.[22] An evaluation of the propriety of a stockholder's purpose will necessarily depend upon the facts of each case.[23]

One of the most commonly cited purposes for making a Section 220 demand is the desire to investigate suspected mismanagement by corporate officials. Stockholders can use the fruits of this investigation for a variety of purposes, including preparation of a shareholder lawsuit (whether derivative or direct), seeking an audience with the board to discuss proposed corporate governance reforms, mounting a proxy contest, or preparing resolutions for consideration by the shareholders at the next annual meeting.[24] The Delaware courts have found the desire to investigate mismanagement to be a proper purpose under Section 220, as long as the stockholder demonstrates, by a preponderance of the evidence, that there is a credible basis from which to infer that mismanagement has occurred.[25] To do so, the stockholder does not have to prove that mismanagement actually occurred, but neither can it simply express disagreement with a business decision by the company's management; instead, it must make a "credible showing, through documents, logic, testimony or otherwise that there are legitimate issues of wrongdoing."[26]

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The Delaware courts have expressly encouraged stockholders to utilize Section 220 as a tool to investigate suspected wrongdoing or to evaluate demand futility before filing a suit alleging corporate mismanagement

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Other purposes which the Delaware courts have found to be proper purposes for demands under Section 220 include: evaluation of directors' independence in order to determine whether it would be futile to make a demand upon them to bring a derivative suit;[27] communication with other stockholders regarding a solicitation of proxies;[28] communication with other stockholders regarding a stockholder class action against the corporation;[29] communication with other stockholders for the purpose of influencing management to change its policies;[30] communication with other stockholders to encourage them to dissent from a merger and seek appraisal;[31] and valuation of one's stockholdings.[32]

Among the purposes which the courts have found to be improper under Section 220 are: obtaining evidence for use in other already-pending cases;[33] gaining information to facilitate a tender offer when the stockholder has already been enjoined from pursuing a tender offer;[34] valuing the company as a whole in order to determine whether to increase one's bid in a tender offer;[35] gathering information for use in a stockholder's individual employment-related claims against the corporation;[36] obtaining information to use to exert economic pressure upon a third party in connection with a labor union's strike;[37] obtaining information to facilitate the stockholder's accounting for its investment using a particular method;[38] or satisfying idle curiosity.[39]

Assuming that a proper purpose has been stated, the final inquiry in a Section 220 proceeding will focus on the appropriate scope of the inspection. Generally, a stockholder will be permitted to inspect those documents it proves are "essential and sufficient" to the accomplishment of its proper purpose(s).[40] In the case of demands for the purpose of investigating suspected mismanagement in anticipation of a potential lawsuit, the books and records that are subject to inspection are "those that are required to prepare a well-pleaded complaint."[41] However, Section 220(c) expressly permits the Court of Chancery to "prescribe any limitations or conditions with reference to the inspection … as the Court may deem just and proper,"[42] and the court in fact has a duty to tailor the inspection as necessary to protect the corporation's interests.[43]

Accordingly, there may be situations in which the inspection is circumscribed more narrowly than those documents that are "essential and sufficient." This may include, for example, instances where the demand encompasses documents that are subject to the attorney-client privilege or the work product doctrine. The Court of Chancery has held that a company need not produce documents for inspection which it claims to be protected by the attorney-client privilege, unless the stockholder demonstrates "good cause" why the privilege should not attach.[44] The factors to be considered when evaluating whether there is "good cause" include: whether the stockholder has asserted a colorable claim for an inspection; the need for the information and its availability from other sources; whether the stockholder is merely "fishing for information;" whether the documents reflect advice concerning litigation; and the number and percentage of shares owned by the stockholder.[45] Of these factors, the number of shares held is the least significant.[46]

In the case of a demand that encompasses opinion work product — *i.e.*, documents reflecting the mental impressions or the company's attorneys — the stockholder bears a more stringent burden, and must show that the information is directed to a "pivotal issue" and that there is a "compelling" need for disclosure.[47] For non-opinion work product — documents prepared in anticipation of litigation but that do not reflect attorneys' mental impressions or opinions — the stockholder must show that it has a substantial need for the information and cannot acquire it elsewhere without undue hardship.[48]

Where privilege issues are not present, the courts typically find that the stockholder's execution of a confidentiality agreement will suffice to protect the corporation's interests.[49] In fact, under Delaware law there is a "presumption that the production of nonpublic corporate books and records to a stockholder making a demand pursuant to Section 220 should be conditioned upon a reasonable confidentiality order,"[50] and "a stockholder making a books and records demand can expect that documents designated as confidential … will remain confidential unless the stockholder concludes that grounds exist to initiate litigation and the court … determines to include those documents in the public record."[51]

The Importance of Using Section 220 Before Asserting Breach of Fiduciary Duty Claims

Not only is Section 220 *available* as a tool to investigate suspected wrongdoing or to evaluate demand futility before filing a suit alleging corporate mismanagement, but the Delaware courts have *expressly encouraged* stockholders to utilize the statute for that purpose.[52] On numerous occasions, the Delaware courts have dismissed shareholder complaints containing vague allegations that could have been made more specific by resort to Section 220, and have chastised plaintiffs for failing to exercise their inspection rights as a precursor to filing suit.[53] For example, in dismissing a shareholder derivative suit against the officers and directors of Marta Steward Living Omnimedia, Inc., the Court of Chancery expressed frustration with the plaintiffs' failure to utilize Section 220 to gather information regarding the degree to which the directors may lack independence from the company's founder. The court explained:

> [P]laintiff offers various theories to suggest reasons that the outside directors might be inappropriately swayed by Stewart's wishes or interests, but fails to plead sufficient facts that could permit the Court reasonably to infer that one or more of the theories could be accurate. Evidence to support (or refute) any of the theories might have been uncovered by an examination of the corporate books and records, to which the plaintiff would have been entitled for this purpose … It appears, however, that plaintiff made no such investigation, instead relying largely, if not solely, on information from media reports to support the assertion that demand would be futile.
>
> It is troubling to this Court that, notwithstanding repeated suggestions, encouragement, and downright admonitions over the years both by [the Court of Chancery] and by the Delaware Supreme Court, litigants continue to bring derivative complaints pleading demand futility on the basis of precious little investigation beyond perusal of the morning newspapers.[54]

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The Delaware Supreme Court echoed the Court of Chancery's frustration in its affirmance of the dismissal, noting that the plaintiff's "failure to seek a books and records inspection that may have uncovered the facts necessary to support a reasonable doubt of independence has resulted in substantial cost to the parties and the judiciary."[55]

Similarly, in affirming the Court of Chancery's dismissal of a shareholder derivative complaint against the directors of The Walt Disney Company for breach of fiduciary duty, the Delaware Supreme Court rejected the plaintiffs' argument that the unavailability of pre-suit discovery had prevented them from pleading their claims with the requisite particularity.[56] The Court recognized that this was a "common complaint" among plaintiffs, but stated that the Section 220 inspection procedure "may well [provide plaintiffs with] the 'tools at hand' to develop the necessary facts for pleading purposes."[57] The Court then gave the plaintiffs the opportunity to replead, and the plaintiffs took advantage of that opportunity to make a books and records request to investigate potential wrongdoing. The

facts which were uncovered through that Section 220 request enabled the plaintiffs to adequately allege demand futility in their amended complaint.[58]

The use of Section 220 as an information-gathering tool may also cause the Court of Chancery to draw more favorable inferences to the plaintiff on a motion to dismiss. In several cases, the Court has expressed the view that it can decline to infer the existence of facts whose existence could have been proven or disproven through a Section 220 demand.[59] In another case, in denying a motion to dismiss the Court rejected the defendants' argument that exculpatory documents existed but had not been produced in response to the plaintiff's Section 220 demand. The Court stated: "Even if the [Section 220] request was in fact narrow, defendants had the opportunity to widen the scope of documents granted in order to exculpate themselves. While they were, of course, not *required* to do so, it is more reasonable to infer that exculpatory documents would be provided than to believe the opposite: that such documents existed and yet were inexplicably withheld."[60] The Court of Chancery has also rejected defendants' efforts to use documents produced pursuant to Section 220 to refute shareholder plaintiffs' factual allegations on a motion to dismiss.[61] As the Court explained:

> [Plaintiff] availed himself of the 'tools at hand' by filing the § 220 action. He should not now be penalized for taking this step that our courts have encouraged. Plaintiffs are urged to use these 'tools' to gather information and evaluate whether a legitimate claim exists.[62]

Therefore, pre-suit investigation is not only a proper purpose for a Section 220 demand, but it may well improve a stockholder's chances of surviving a motion to dismiss a suit alleging breach of fiduciary duty, whether by virtue of the evidence obtained or the favorable inferences to be drawn from the documents that are (or are not) produced. As the Court of Chancery has stated: "After the repeated admonitions of the Supreme Court to use the 'tools at hand' … lawyers who fail to use those tools to craft their pleadings do so at some peril."[63]

CONCLUSION

In an ideal world, all of a stockholder's questions regarding the companies in which it has invested will be answered in the ordinary course of a corporation's affairs, whether at stockholder meetings, through proxy statements, or in such documents as quarterly financial statements and annual reports. Unfortunately, however, such disclosures do not always suffice to address all of a stockholder's concerns, and in many cases serve only to create additional concerns. In such circumstances, Section 220 and similar statutes in other states provide stockholders with an invaluable means to find the answers they are looking for.

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2 *Saito v. McKesson HBOC, Inc.*, 806 A.2d 113, 116 (Del. 2002) (citing *Shaw v. Agri-Mark, Inc.*, 663 A.2d 464, 467 (Del. 1995)). See also Randall S. Thomas, "Improving Shareholder Monitoring of Corporate Management by Expanding Access to Information," 38 Ariz. L. Rev. 331, 335-36 (1996).

3 See Model Business Corporations Act Annotated, § 16.02 at pp. 16-20 (2000/01/02 Supp.) ("All jurisdictions have statutes dealing with the right of shareholders to inspect corporate records.")

4 For an overview of other states' inspection statutes, see Jay W. Eisenhofer & Michael J. Barry, Shareholder Activism Handbook, § 6.04 (2006).

5 8 Del. C. § 220(a)(b)(1). The courts have held that a request for a stockholder list implicitly includes a list of beneficial owners who hold their shares through nominees such as Cede & Co. *See Wynnefield Partners Small Cap Valu L.P. v. Niagara Corp.*, 2006 WL 1737862, at **7-8 (Del. Ch. June 19, 2006), aff'd, 907 A.2d 146 (Del. 2006); *Hatleigh Corp. v. Lane Bryant, Inc.*, 428 A.2d 350 (Del. Ch. 1981).

6 8 Del. C. § 220(a)(b)(2). This section of the statute was added in 2003. Prior to that, stockholders of a parent corporation could not inspect a subsidiary's books and records absent a showing of fraud or that the subsidiary was "the mere alter ego of the parent." *See Saito v. McKesson HBOC, Inc.*, 806 A.2d at 118-19.

7 8 Del. C. § 220(a)(3). The term "control" for purposes of the definition of "subsidiary" has a broader meaning than the term "control" as used in the statutory requirement that the corporation be able to obtain the subsidiary's records "through the exercise of control over the subsidiary." *Weinstein Enters., Inc. v. Orloff*, 870 A.2d 499, 508-10 (Del. 2005). Therefore, it is possible that an entity will qualify as a corporation's "subsidiary" under the statute, but that a stockholder cannot obtain that subsidiary's books and records

through a demand on the corporation. Id.

8 8 Del. C. § 220(c). The Delaware Court of Chancery has exclusive jurisdiction over actions pursuant to Section 220. Id.

9 *See Brehm v. Eisner*, 746 A.2d 244, 267 (Del. 2000); *Gotham Partners, L.P. v. Hallwood Realty Partners, L.P.*, 714 A.2d 96, 103-04 (Del. Ch. 1998); *Coit v. American Century Corp.*, 1987 WL 8458, at *1 (Del. Ch. Mar. 20, 1987).

10 *See Hoschett v. TSI Int'l*, 1996 WL 422344, at *1 (Del. Ch. July 17, 1996); *U.S. Die Casting & Dev. Co. v. Security First Corp.*, 1995 WL 301414, at *3 (Del. Ch. Apr. 28, 1995); *Patterson v. Tribune*, 1982 WL 8786, at **2-3 (Del. Ch. Mar. 11, 1982).

11 Brehm, 746 A.2d at 267.

12 8 Del. C. § 220(a).

13 *See, e.g., Seinfeld v. Verizon Commc'ns, Inc.*, 2005 WL 147765, at *2 (Del. Ch. Jan. 21, 2005) (denying right of inspection where stockholder did not comply with statutory requirements); *Mattes v. Checkers Drive-In Restaurants, Inc.*, 2000 WL 1800126, at **1-2 (Del. Ch. Nov. 15, 2000) (granting motion to dismiss where demand was not accompanied by power of attorney as required by Section 220(b)); *Norton v. Health-Pak, Inc.*, 1999 WL 252380, at *1 (Del. Ch. Apr. 12, 1999) (dismissing Section 220 complaint where plaintiff failed to affirm under oath that he was record stockholder); but see *Sahagen Satellite Tech. Group, LLC v. Ellipso, Inc.*, 791 A.2d 794, 795-96 (Del. Ch. 2000) (permitting inspection even though demand was not under oath, where plaintiff testified under oath at trial and defendant failed to raise defense in timely manner); *Kortum v. Webasto Sunroofs Inc.*, 769 A.2d 113, 122-23 (Del. Ch. 2000) (same).

14 8 Del. C. § 220(b). The requirement of a power of attorney or other written authorization only applies when the stockholder's attorney or agent is *making* the demand on the stockholder's behalf. The statute does not require such authorizations when the demand is made by the stockholder itself, but when it intends for its attorneys or agents to actually conduct the inspection. *Deephaven Risk Arb Trading Ltd. v. UnitedGlobalCom, Inc.*, 2004 WL 1945546, at *3 (Del. Ch. Aug. 30, 2004); *Henshaw v. American Cement Corp.*, 252 A.2d 125, 128 (Del. Ch. 1969).

15 See Brehm, 746 A.2d at 266.

16 8 Del. C. § 220(b).

17 8 Del. C. § 220(c).

18 8 Del. C. § 220(c).

19 8 Del. C. § 220(b).

20 *See, e.g. Compaq Computer Corp. v. Horton*, 631 A.2d 1, 3 (Del. 1993); *CM & M Group, Inc. v. Carroll*, 453 A.2d 788, 792 (Del. 1982). The courts have rejected the notion that a demand is contrary to a corporation's interests simply because the corporation may be "harmed" by a stockholder's use of the fruits of the demand to pursue claims of corporate mismanagement. Compaq, 631 A.2d at 4; Deephaven Risk Arb Trading Ltd., 2004 WL 1945546, at *7.

21 *See, e.g., Highland Select Equity Fund, L.P. v. Motient Corp.*, 906 A.2d 156, 167-68 (Del. Ch. 2006).

22 *See BBC Acquisition Corp. v. Durr-Fillauer Med., Inc.*, 623 A.2d 85, 88 (Del. Ch. 1992); CM & M Group, 453 A.2d at 792.

23 See CM & M Group, 453 A.2d at 792.

24 *See Seinfeld v. Verizon Commc'ns, Inc.*, 909 A.2d 117, 119-20 (Del. 2006); *Saito v. McKesson HBOC, Inc.*, 806 A.2d at 117; *Deephaven Risk Arb Trading Ltd. v. UnitedGlobalCom, Inc.*, 2005 WL 1713067, at **8-9 (Del. Ch. July 13, 2005); *Teachers' Ret. Sys. of La. v. Healthsough Corp.*, C.A. No. 20062, Trial Transcript Vol. II at 120-21 (Del. Ch. Mar. 19, 2003).

25 *See, e.g. Seinfeld v. Verizon Commc'ns, Inc.*, 909 A.2d at 121-23; *Security First Corp. v. U.S. Die Casting & Dev. Co.*, 687 A.2d 563, 567 (Del. 1997); *Thomas & Betts Corp. v. Leviton Mfg. Co.*, 681 A.2d 1026, 1031 (Del. 1996); *Marmon v. Arbinet-Thexchange, Inc.*, 2004 WL 936512, at **4-6 (Del. Ch. Apr. 28, 2004); *Carapico v. Philadelphia Stock Exch.*, 791 A.2d 787, 792-93 (Del. Ch. 2000); *Helmsman Mgmt. Servs. v. A & S Consultants, Inc.*, 525 A.2d 160, 165-166 (Del. Ch. 1987); *Skouras v. Admiralty Enters., Inc.*, 386 A.2d 674, 678 (Del. Ch. 1978). Although a stockholder only has standing to pursue derivative claims based on conduct occurring while it was a stockholder, the Delaware Supreme Court has held that a stockholder's right of inspection may extend to suspected mismanagement that occurred before the stockholder acquired its shares. *Saito v. McKesson HBOC, Inc.*, 806 A.2d at 117; *Amalgamated Bank v. UICI*, 2005 WL 1377432, at *2 (Del. Ch. June 2, 2005). Additionally, Section 220 can be used to investigate more than just potential derivative claims; it can also be used to evaluate potential class action or direct claims relating to the plaintiff's status as a stockholder. See Deephaven Risk Arb Trading Ltd., 2005 WL 1713067, at **8-9; *Teachers' Ret. Sys. of La. v. Healthsouth Corp.*, C.A. No. 20062, Trial Tr. Vol. II at 120-21 (Del. Ch. Mar. 19, 2003).

26 Security First Corp., 687 A.2d at 567-68. See also Seinfeld, 909 A.2d at 123; Thomas & Betts Corp., 681 A.2d at 1031; Deephaven Risk Arb Trading Ltd., 2005 WL 1713067, at *8; *Marathon Partners L.P. v. M&F Worldwide Corp.*, 2004 WL 1728604, at *4 (Del. Ch. July 30, 2004).

27 *See Haywood v. Ambase Corp.*, 2005 WL 2130614, at **5-6 (Del. Ch. Aug. 22, 2005).

28 *See, e.g. General Time Corp. v. Talley Indus., Inc.*, 240 A.2d 755, 756 (Del. 1968).

29 See, e.g. Compaq, 631 A.2d at 3-5.

30 S*ee, e.g. Conservative Caucus Research, Analysis & Educ. Found., Inc. v. Chevron Corp.*, 525 A.2d 569, 571-73 (Del. Ch. 1987); *Credit Bureau of St. Paul, Inc. v. Credit Bureau Reports, Inc.*, 290 A.2d 689, 690-91 (Del. Ch.), aff'd, 290 A.2d 691 (Del. 1972). This purpose has been found to be proper, even if the proposed policy change will not enhance shareholder value, as long as it is not adverse to the corporation's interest. *See Food & Allied Serv. Trades Dep't, AFL-CIO v. Wal-Mart Stores, Inc.*, 1992 WL 111285, at *4 (Del. Ch. May 20, 1992).

31 *Weiss v. Anderson, Clayton & Co.*, 1986 WL 5970, at *2 (Del. Ch. May 22, 1986).

32 See, e.g. CM & M Group, 453 A.2d at 792-793; *Schoon v. Troy Corp.*, 2006 WL 1851481, at *2 (Del. Ch. June 27, 2006); Kortum, 769 A.2d at 123; Helmsman, 525 A.2d at 165. While the valuation of one's holdings may be a proper purpose, the courts sometimes decline to enforce inspection rights absent a showing that publicly available information is insufficient to accomplish that purpose. *See, e.g., Polygon Global Opportunities Master Fund v. West Corp.*, 2006 WL 2947486, at **3-4 (Del. Ch. Oct. 12, 2006); Marathon Partners, 2004 WL 1728604, at *8.

33 *See, e.g., Parfi Holding, AB v. Mirror Image Internet, Inc.*, C.A. No. 18457, Tr. at 6 (Del. Ch. Mar. 23, 2001) (discussed in *Freund v. Lucent Techs., Inc.*, 2003 WL 139766, at **10-11 (Del. Ch. Jan. 9, 2003)). The Court of Chancery *has* permitted inspections by stockholders who are not connected (either directly or through counsel) to the plaintiffs in the pending litigation, and who agree not to share the material obtained pursuant to the demand with the plaintiffs in the other cases. *See, e.g., Cohen v. El Paso Corp.*, 2004 WL 2340046, at **2-3 (Del. Ch. Oct. 18, 2004); *Romero v. Career Educ. Corp.*, 2005 WL 1798042, at *3 (Del. Ch. July 19, 2005). However, in at least one such case the federal court that was presiding over the related securities class action then used its power under the Securities Litigation Uniform Standards Act (SLUSA) to stay the Section 220 proceeding. *See Wyatt v. El Paso Corp.*, No. H-02-2717, Order (S.D. Tex. Dec. 8, 2004). The Court of Chancery and at least

one federal court have held that Section 220 proceedings should not be stayed under SLUSA where the Section 220 plaintiff is not attempting to evade a stay of discovery in the federal courts. See Romero, 2005 WL 1798042, at *3; *City of Austin Police Ret. Sys. v. ITT Educ. Servs., Inc.*, 2005 WL 280345, at *9 (S.D. Ind. Feb. 2, 2005).

34 *American Carriers, Inc. v. Baytree Investors, Inc.*, 1988 U.S. Dist. LEXIS 5052, at **14-17 (D. Kan. May 18, 1988).

35 BBC Acquisition Corp., 623 A.2d at 90-91; *Golden Cycle, LLC v. Global Motorsport Group, Inc.*, 1998 WL 326680, at *2 (Del. Ch. Jun. 18, 1998).

36 *Lynn v. EnviroSource, Inc.*, 1991 WL 80242, at *2 (Del. Ch. May 13, 1991), aff'd, 608 A.2d 728 (1991).

37 *Carpenter v. Texas Air Corp.*, 1985 WL 11548, at **3-4 (Del. Ch. Apr. 18, 1985).

38 Thomas & Betts Corp., 681 A.2d at 1033.

39 See Security First Corp., 687 A.2d at 570; *Insuranshares Corp. of Del. v. Kirchner*, 5 A.2d 519, 521 (Del. 1939).

40 See Helmsman, 525 A.2d at 167; *Landgarten v. York Research Corp.*, 1988 WL 7392, at *4 (Del. Ch. Feb. 3, 1988); *Tactron, Inc. v. KDI Corp.*, 1985 WL 44694, at *1 (Del. Ch. Jan. 10, 1985).

41 *Kaufman v. CA, Inc.*, 905 A.2d 749, 753 (Del. Ch. 2006).

42 8 Del. C. § 220(c).

43 Thomas & Betts Corp., 681 A.2d at 1034; *Freund v. Lucent Techs., Inc.*, 2003 WL 139766, at *5.

44 *Saito v. McKesson HBOC, Inc.*, 2002 WL 31657622, at *13 (Del. Ch. Nov. 13, 2002).

45 Id.

46 Id.

47 Id. at *3.

48 Id. at *11.

49 See, e.g. CM&M Group, 453 A.2d at 793-794.

50 *Disney v. Walt Disney Co.*, 857 A.2d 444, 447 (Del. Ch. 2004). *See also Amalgamated Bank v. UICI*, 2005 WL 1377432, at *4.

51 Disney, 857 A.2d at 448.

52 See Brehm, 746 A.2d at 266-67; *Scattered Corp. v. Chicago Stock Exch., Inc.*, 701 A.2d 70, 78 (Del. 1997); *Grimes v. Donald*, 673 A.2d 1207, 1216 n.11, 1218 (Del. 1996); *Rales v. Blasband*, 634 A.2d 927, 934 n.10 (Del. 1993); *Litt v. Wycoff*, 2003 WL 1794724, at *7 & n.40 (Del. Ch. Mar. 28, 2003); *Grimes v. DSC Commc'ns Corp.*, 724 A.2d 561, 565-66 (Del. Ch. 1998).

53 See, e.g., Brehm, 746 A.2d at 266-67; Scattered Corp., 701 A.2d at 78-79; *White v. Panic*, 783 A.2d 543, 549-50 (Del. 2001); *In re J.P. Morgan Chase & Co. S'holder Litig.*, 906 A.2d 808, 819-20 (Del. Ch. 2005); *Guttman v. Huang*, 823 A.2d 492, 504 (Del. Ch. 2003).

54 *Beam v. Stewart*, 833 A.2d 961, 981-82 (Del. Ch. 2003) (internal footnotes omitted).

55 *Beam v. Stewart*, 845 A.2d 1040, 1056-57 (Del. 2004).

56 Brehm, 746 A.2d at 266-67.

57 Id.

58 *See In re Walt Disney Co. Deriv. Litig.*, 825 A.2d 275, 278-79 (Del. Ch. 2003).

59 *See White v. Panic*, 793 A.2d 356, 364 (Del. Ch. 2000); Beam, 833 A.2d at 982 n.66. On appeal from the Chancery Court's decision in White, the Delaware Supreme Court held that a "perceived deficiency in the plaintiff's pre-suit investigation would not permit the Court of Chancery … to limit its reading of the complaint or to deny the plaintiff the benefit of reasonable inferences from well-pleaded factual allegations." *White v. Panic*, 783 A.2d 543, 549-50 (Del. 2001). The Court of Chancery, in Beam, interpreted this language to mean that the Court could still decline to infer facts that could have been established through a Section 220 demand, because "if a complaint is devoid of facts that could have been proved (if they existed) by the use of [Section] 220, it is not 'well-pleaded,' and to infer the existence of those facts … is not 'reasonable.'" 833 A.2d at 982 n.66.

60 *In re Tyson Foods, Inc. Consol. S'holder Litig.*, 2007 WL 416132, at *7 (Del. Ch. Feb. 6, 2007).

61 *In re New Valley Corp. Deriv. Litig.*, 2001 WL 50212, at *6 n.17 (Del. Ch. Jan. 11, 2001).

62 Id.

63 *Mizel v. Connelly*, 1999 WL 550369, at *5 (Del. Ch. Aug. 2, 1999) (citations omitted). *See also Litt v. Wycoff*, 2003 WL 1794724, at *7 (plaintiffs who fail to use Section 220 before filing suit "act at their own hazard").

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