Realigning Stockholder Inspection Rights

Geeyoung Min*

Alexander M. Krischik†‡

Abstract

Access to corporate information plays a pivotal role in stockholder litigation. One key to that access is stockholders' statutory right to inspect a corporation's books and records prior to filing litigation, enshrined in the Delaware General Corporation Law's Section 220. In the context of derivative actions brought by a stockholder on behalf of a company, Section 220 takes on an even greater importance. For years, Delaware courts have urged stockholder plaintiffs to use all the "tools at hand" to gather information before filing a derivative complaint to strengthen their allegations. One of those tools, Section 220's inspection rights, has become all but a requirement for most successful derivative actions. Yet two recent shifts in the case law present unique challenges for both corporate defendants and stockholder plaintiffs involving statutory inspection rights.

First, Delaware courts have liberalized the scope of books and records available under Section 220 to include emails, text messages, and other electronically stored information that otherwise would not have been accessible to prospective plaintiffs until the plenary discovery process. The blurred distinction between pre-suit Section 220 inspections and post-pleadings discovery can put corporate defendants in a tough spot to comply with wide-ranging demands under Section 220 without the well-developed rules and procedures that govern similar post-pleadings discovery. Second, since the Delaware Supreme Court's decision in *California State Teachers' Retirement System v. Alvarez*—which found a stockholder plaintiff who pursued a Section 220 inspection and subsequent derivative action in Delaware precluded by the dismissal of a hastier, first-filed action in another jurisdiction—Delaware plaintiffs have become vulnerable to a risk of preclusion due to the extra time (often a few months, but sometimes years) required to exercise

* Assistant Professor of Law, Michigan State University College of Law.

† Associate at Richards, Layton & Finger, P.A., in Wilmington, Delaware. The views expressed herein are those of the authors and are not necessarily the views of the firm or its clients.

‡ The authors are grateful for the feedback and comments from James M. Chen, Patrick Corrigan, Catherine G. Dearlove, Ann M. Lipton, Alexander I. Platt, Blake Rohrbacher, Michael Sant'Ambrogio, Roy Shapira, Cary Martin Shelby, David Blankfein-Tabachnick, and workshop participants at the 3rd Annual Chicagoland Junior Scholars Conference and the Michigan State University Spring into Summer Roundtable.

their inspection rights.

This Article offers a novel proposal to preserve and realign Delaware's Section 220 policies while minimizing those pain points: pleadings-stage discovery for derivative actions. By merging pre-suit Section 220 inspections into pleadings-stage discovery, parties could conduct those inspections under the auspices of court rules and oversight, with more certain boundaries and rules surrounding its scope and process. And stockholder plaintiffs in Delaware could bring their plenary suit from the start, with an amendment if needed after discovery, to limit the risk of preclusion posed by multi-forum litigation. The proposal does not add a new burden to the courts, on net. Instead, it only transforms the court's existing oversight of the *de facto* pre-suit discovery under Section 220 into a formal pleadings-stage discovery process.

Introduction

Information matters. Information is critical in any litigation, but stockholders[1] experience a unique information problem when they derivatively pursue claims on behalf of a company.[2] In Delaware, as in many jurisdictions,[3] the authority to manage a corporation is vested in its board of directors.[4] That authority includes the decision to institute litigation on behalf of a corporation.[5] "When the board is disabled from making the decision, however—whether because of interestedness or lacking independence from those who are interested—a stockholder can control the litigation decision."[6] Such a stockholder brings their claims derivatively, meaning on behalf of the corporation itself.[7] In order to maintain standing to pursue those claims,[8] the stockholder plaintiff either must have made a wrongfully refused demand of the relevant board that it institute litigation, or must proceed on a theory that making such a demand would have been futile to begin with.[9]

1. The terms "stockholders" and "shareholders" have been used interchangeably in corporate law scholarship. In this Article, we use "stockholders" to be consistent with the term in Delaware cases and Delaware General Corporation Law we discuss here.
2. *See, e.g.*, Jill E. Fisch, *Stealth Governance: Shareholder Agreements and Private Ordering*, 99 WASH. U. L. REV. 913, 953 (2021) [hereinafter Fisch, *Stealth Governance*]; Roy Shapira, *Corporate Law, Retooled: How Books and Records Revamped Judicial Oversight*, 42 CARDOZO L. REV. 1949, 1995 (2021) [hereinafter Shapira, *Corporate Law, Retooled*]; James D. Cox, Kenneth J. Martin & Randall S. Thomas, *The Paradox of Delaware's "Tools at Hand" Doctrine: An Empirical Investigation*, 75 BUS. LAW. 2123, 2125 (2020) [hereinafter Cox, Martin & Thomas, *Tools at Hand*]; George S. Geis, *Information Litigation in Corporate Law*, 71 ALA. L. REV. 407, 410 (2019) [hereinafter Geis, *Information Litigation*]; George S. Geis, *Shareholder Derivative Litigation and the Preclusion Problem*, 100 VA. L. REV. 261, 272-73 (2014) [hereinafter Geis, *Preclusion Problem*].
3. Jessica M. Erickson, *Corporate Governance in the Courtroom: An Empirical Analysis*, 51 WM. MARY. L. REV. 1749, 1781 (2010).
4. *See* DEL. CODE ANN. tit. 8, § 141(a) (West 2020) ("The business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors, except as may be otherwise provided in this chapter or in its certificate of incorporation.").
5. "Corporations, existing because of legislative grace, possess authority as granted by the legislature. Directors of Delaware corporations derive their managerial decision making power, which encompasses decisions whether to initiate, or refrain from entering, litigation, from 8 *Del. C.* § 141(a)." Zapata Corp. v. Maldonado, 430 A.2d 779, 782 (Del. 1981) (footnote omitted).
6. McElrath v. Kalanick, 224 A.3d 982, 987 (Del. 2020).
7. This is in contrast to direct claims, which plaintiff stockholders can bring individually, or class claims, which plaintiff stockholders can bring on behalf of other similarly situated stockholders. *See* Jessica M. Erickson, *The Lost Lessons of Shareholder Derivative Suits*, 77 WASH. & LEE L. REV. 1131, 1136-38 (2020).
8. In the case of Delaware, this standing is established under Court of Chancery Rule 23.1. *See* Del. R. Ch. Ct. 23.1. However, the Court of Chancery Rules, or "Rules" as used in this Article, largely mirror their Federal Rules of Civil Procedure counterparts for purposes of these discussions.
9. "A stockholder may not pursue a derivative suit to assert a claim of the corporation unless the stockholder: (a) has first demanded that the directors pursue the corporate claim and

Derivative claims can take a number of forms—including against corporate agents themselves. Where directors and officers are alleged to have mismanaged the corporation or acted wrongfully, and where the directors' decision of whether to sue themselves or their fellows is in question,[10] the law may permit stockholders to derivatively "bring suit on behalf of the corporation for harm done to the corporation."[11] Often, stockholder plaintiffs attempt to bypass making a litigation demand on directors under the theory that it would be futile to demand that the board bring those same claims, potentially against directors sitting on that same board.[12] But when faced with a motion to dismiss for lack of derivative standing, such as under Court of Chancery Rule 23.1, those stockholders face a heightened pleading burden to prove demand futility, i.e., the futility of asking the directors to bring the claims that belong to the company.[13] As

---

the directors have wrongfully refused to do so," commonly referred to as wrongful refusal or demand refusal, "or (b) establishes that pre-suit demand is excused because the directors are deemed incapable of making an impartial decision regarding the pursuit of the litigation," commonly referred to as demand futility or demand excusal. Wood v. Baum, 953 A.2d 136, 140 (Del. 2008).

10. *See, e.g.*, Robert B. Thompson & Randall S. Thomas, *The Public and Private Faces of Derivative Lawsuits*, 57 VAND. L. REV.1747,1782 (2004).

11. *See* Tooley v. Donaldson, Lufkin & Jenrette, Inc., 845 A.2d 1031, 1036 (Del. 2004) ("The derivative suit has been generally described as 'one of the most interesting and ingenious of accountability mechanisms for large formal organizations.'" (quoting Kramer v. Western Pac. Indus., Inc., 546 A.2d 348, 351 (Del. 1988))). Derivative and class claims, in no small part due to the magnitude of the potential damages that they can command, are two primary vehicles—if not *the* two primary vehicles—for stockholder litigation. As opposed to direct litigation and class litigation, the profit in derivative litigation may initially seem surprising to those not steeped in this particular brand of corporate litigation. After all, "the recovery [in a derivative claim], if any, must go to the corporation," *id.*, and so one might think that derivative litigation presents a rather unappealing avenue for profit-seeking plaintiff's attorneys to spend significant resources in litigation. However, because those attorneys can seek some percentage of their fees if victorious—typically through the common-fund or corporate benefit doctrines—the reality is that derivative litigation is fertile ground for plaintiff's firms. For a greater discussion of the dismissal and compromise of representative litigation, *see* DONALD J. WOLFE, JR. & MICHAEL A. PITTENGER, CORPORATE AND COMMERCIAL PRACTICE IN THE DELAWARE COURT OF CHANCERY § 13.03 (2021).

12. As noted above, Delaware plaintiffs face a choice when they seek to bring a derivative claim. *See supra* note 9. Delaware plaintiffs tend to pursue a demand futility theory for a variety of reasons, not least of which is the more onerous standard to show that a demand was wrongfully refused. *See* Raj & Sonal Abhyanker Fam. Tr. *ex rel.* UpCounsel, Inc. v. Blake, C.A. No. 2020-0521-KSJM, 2021 WL 2477025, at *5 (Del. Ch. June 17, 2021) ("Of the two potential routes presented by Rule 23.1—pleading demand excusal with particularity or making a pre-suit demand—the former is a steep road, but the latter is 'steeper yet.'" (quoting Zucker v. Hassell, C.A. No. 11625-VCG, 2016 WL 7011351, at *1 (Del. Ch. Nov. 30, 2016))); Ironworkers Dist. Council of Phila. & Vicinity Ret. & Pension Plan v. Andreotti, C.A. No. 9714-VCG, 2015 WL 2270673, at *24 (Del. Ch. May 8, 2015) ("[T]he decision to refuse demand is treated as any other disinterested and independent decision of the board—it is subject to the business judgment rule."), *aff'd*, 132 A.3d 748 (Del. 2016).

13. *See In re* Citigroup Inc. S'holder Derivative Litig., 964 A.2d 106, 139 (Del. Ch. 2009) ("The standard for pleading demand futility under Rule 23.1 is more stringent than the standard under Rule 12(b)(6), and 'a complaint that survives a motion to dismiss pursuant to

such, the role of information in stockholder derivative suits is not only about winning on the merits, but having a chance to litigate those merits at all.[14]

Information asymmetries present another problem for stockholder plaintiffs. While defendants to a derivative suit, particularly insiders like managers or directors, may have access to a variety of internal documents, stockholders often have access only to what companies have disclosed subject to mandatory federal securities regulations or otherwise.[15] This can leave plaintiffs seeking to pursue derivative claims in a difficult position. They face a rightfully heightened pleading standard under Rule 23.1,[16] but may lack the information to fortify their pleadings against that standard.

As a result, inspection rights under Section 220 of the Delaware General Corporation Law ("Section 220")—a statutory right that cannot be limited or eliminated even

Rule 23.1 will also survive a 12(b)(6) motion to dismiss, assuming that it otherwise contains sufficient facts to state a cognizable claim.'" (quoting McPadden v. Sidhu, 964 A.2d 1262, 1270 (Del. Ch. 2008))). Previously, the demand futility analysis was conducted under one of two different standards, depending on the underlying facts. However, The Delaware Supreme Court recently adopted a universal three-prong test to evaluate the circumstances under which a plaintiff can prove demand futility. *See* United Food & Com. Workers Union & Participating Food Indus. Emps. Tri-State Pension Fund v. Zuckerberg, 262 A.3d 1034, 1059 (Del. 2021) (requiring courts to assess on a director-by-director basis "(i) whether the director received a material personal benefit from the alleged misconduct that is the subject of the litigation demand; (ii) whether the director faces a substantial likelihood of liability on any of the claims that are the subject of the litigation demand; and (iii) whether the director lacks independence from someone who received a material personal benefit from the alleged misconduct that would be the subject of the litigation demand or who would face a substantial likelihood of liability on any of the claims that are the subject of the litigation demand").

14. *See* Roy Shapira, *A New Caremark Era: Causes and Consequences*, 98 WASH. U. L. REV. 1857, 1877 (2021).

15. *See* Geis, *Information Litigation*, *supra* note 2, at 409 ("The Securities Act of 1933 and the Securities Exchange Act of 1934 establish broad public disclosure frameworks. . . . Typically these requirements are immutable and cannot be limited by private agreement."). It is possible that some stockholders theoretically have greater, informal access to private information—such as institutional investors with lines of communication to corporate managers. But recent empirical studies suggest that mutual funds, despite deep-rooted private communication channels with corporate managers, rarely bring stockholder derivative actions. *See* Sean J. Griffith & Dorothy S. Lund, *A Mission Statement for Mutual Funds in Shareholder Litigation*, 87 U. CHI. L. REV. 1149, 1206 (2020) ("[The authors] could not find a single derivative suit filed by an index fund (or any of our mutual funds) over a ten-year period."). For further discussion on why mutual funds do not have incentives to bring a stockholder litigation, see *id*. at 1202-19.

16. That pleading standard is necessary because derivative claims inherently belong to the company, not its stockholders. Rule 23.1's heightened pleading bar helps block unproductive and wasteful litigation that might otherwise flood the courts.

by corporate charter[17]—play a critical role in Delaware's derivative suit playbook.[18] Decades of Delaware precedent urges stockholders to use the "tools at hand," including statutory inspection rights under Section 220, before filing derivative claims under a theory of demand futility.[19] This works, in part, because Section 220 requires swift, summary resolution of actions to enforce inspection rights. The idea is for stockholders to seek, and receive, a concise set of documents prior to filing their derivative claim, and for that information to provide the backbone to survive the heightened pleading standard of a motion to dismiss under Rule 23.1.[20] In that sense, Section 220 would have supported the tools at hand doctrine both to screen the wasteful practice of over-eager

17. Cedarview Opportunities Master Fund, L.P. v. Spanish Broad. Sys., Inc., C.A. No. 2017-0785-AGB, 2018 WL 4057012, at *21 (Del. Ch. Aug. 27, 2018) ("A stockholder's rights under [S]ection 220 cannot be eliminated or limited by a provision in a corporation's certificate of incorporation." (quoting 2 EDWARD P. WELCH, ROBERT S. SAUNDERS, ALLISON L. LAND, ANDREW J. TUREZYN & JENNIFER C. VOSS, FOLK ON THE DELAWARE GENERAL CORPORATION LAW § 220.01, at 7-203 (6th ed. Supp. 2018))); Marmon v. Arbinet-Thexchange, Inc., C.A. No. 20092, 2004 WL 936512, at *5 n.12 (Del. Ch. Apr. 28, 2004) ("A charter provision that conflicts with a statute is void."). Instead, the inspection right can be waived by statutory enactment or in an agreement where such waiver is "clearly and affirmatively expressed in the relevant document." Kortüm v. Webasto Sunroofs Inc., 769 A.2d 113, 125 (Del. Ch. 2000); *see also* Juul Labs, Inc. v. Grove, 238 A.3d 904, 909 (Del. Ch. 2020). For a detailed discussion on stockholder agreement provisions waiving inspection rights, see Fisch, *Stealth Governance*, *supra* note 2, at 951-53; Anat Alon-Beck, *Bargaining Inequality: Employee Golden Handcuffs and Asymmetric Information*, 81 MD. L. REV. 44-47 (forthcoming 2022), https://perma.cc/S45Q-3BDV.

18. All states—not only Delaware—have some manner of statutory inspection right, which can help alleviate information asymmetries between corporations and stockholders while preserving the legitimate interests of both. *See* Jesse M. Fried, *Firms Gone Dark*, 76 U. CHI. L. REV. 135, 140 n.23 (2009) ("All states, including Delaware, have shareholder inspection statutes that permit individual shareholders to seek to examine the books and records of a firm.").

19. *See generally* Rales v. Blasband, 634 A.2d 927, 934 n.10 (Del. 1993); White v. Panic, 783 A.2d 543, 556-57 (Del. 2001) ("Contrary to the plaintiff's argument, this case demonstrates the salutary effects of a rule encouraging plaintiffs to conduct a thorough investigation, using the 'tools at hand' including the use of actions under 8 *Del. C.* § 220 for books and records, before filing a complaint."); Frederick Hsu Living Tr. v. ODN Holding Corp., C.A. No. 12108-VCL, 2017 WL 1437308, at *2 (Del. Ch. Apr. 14, 2017) (corrected Apr. 24, 2017) ("Before filing suit, the plaintiff demanded books and records, thereby heeding the repeated admonition of the Delaware courts."). We describe the "tools at hand" doctrine further in Part I.D.

20. Because of Section 220's importance to the filing of strong derivative litigation, some scholars have gone so far as to describe it as a "mandatory right"—or a right with an accompanying obligation to exercise the right. *See* Cox, Martin & Thomas, *Tools at Hand*, *supra* note 2, at 2124 ("The cornerstone of the [tools at hand] doctrine is the shareholders' *mandatory right* to seek information from the corporation as qualified by Section 220 . . . ." (emphasis added)). For a definition of a mandatory right, see Howard Klepper, *Mandatory Rights and Compulsory Education*, 15 L. & PHIL. 149, 149 (1996) ("Where the term 'mandatory right' is used a person has both a legal claim that others not interfere with her performing an action, and at the same time a legal obligation to perform it.").

and under-qualified derivative lawsuits and, at the same time, to strengthen the meritorious ones to survive a motion to dismiss.[21]

Yet two recent trends in Delaware cases bring fresh questions to the tools at hand doctrine that challenge both stockholder plaintiffs and the corporate defendants on the other side of Section 220 inspections.

First, Delaware courts continue to liberalize stockholder inspection rights to keep pace with modern society's expanding use of electronically stored information ("ESI") and electronic communication in business. As email and other ESI have become more common and integral in business, the corporate "paper trail," once limited to formal board books and the like, has expanded. Under the right facts, stockholders are able to seek significant ESI books and records. That trend blurs the line between historically narrow inspection rights, on the one hand, and the expansive procedures of plenary discovery, on the other.[22] Doing so levies costs on corporate defendants. In addition to the clear spike in expense that comes with the collection and production of ESI, modern Section 220 can muddy a company's obligations to permit inspection. For instance, current Section 220 law suggests that a company, on the right facts, must collect, review, and produce the text messages of its officers for stockholder inspection. But the law is less clear on when and to what extent a company may need to collect the text messages of a former officer—who may possess the texts on a personal device—when those records are implicated in an inspection. These problems could be solved by future litigation. However, others will take their place so long as companies are asked to conduct increasingly broad ESI collections and productions without the rules and guiderails of plenary discovery.

Second, the Delaware Supreme Court's[23] 2018 decision in *California State Teachers' Retirement System v. Alvarez*[24]—which found the derivative action of a Delaware plaintiff who pursued books and records nonetheless precluded by the dismissal of a first-filed action in Arkansas—introduces complexities for stockholder plaintiffs, too. While time will tell how broadly Delaware courts will apply that holding, the recent direction of the tools at hand doctrine may leave stockholders with conflicting incentives. On

21. Cox, Martin & Thomas, *Tools at Hand*, *supra* note 2, at 2154. In their important empirical study of the use of Section 220 demands in pre- and post-*Rales* (which helped establish the tools at hand doctrine, see *infra* Part I.D) periods, Cox, Martin, and Thomas found that "many plaintiffs are using Section 220 as a pre-filing discovery technique in corporate cases and wind up ultimately filing a second action after they finish their inspection litigation, with a significant number of these subsequently filed cases resulting in success for the plaintiffs." *Id.*

22. As an example, albeit at the outer edge of the bell curve, the Court's decision in *In re Boeing Company Derivative Litigation* was proceeded by a Section 220 inspection in which "Plaintiffs received over 44,100 documents totaling over 630,000 pages"—more than is produced in many plenary cases. In re Boeing Co. Derivative Litig., C.A. No. 2019-0907-MTZ, 2021 WL 4059934, at *1 n.1 (Del. Ch. Sept. 7, 2021); Roy Shapira, *Max Oversight Duties: How Boeing Signifies a Shift in Corporate Law*, 48 J. CORP. LAW. 12 (forthcoming 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4035952.

23. This Article occasionally refers to the Court of Chancery as the "Court" and the Delaware Supreme Court as the "Supreme Court."

24. Cal. State Tchrs.' Ret. Sys. v. Alvarez, 179 A.3d 824 (Del. 2018).

the one hand, Delaware courts admonish stockholder plaintiffs to use Section 220 inspections as tools at hand to build their plenary complaint. But, after *Alvarez*, those same plaintiffs risk preclusion by hastier, first-filed actions in other jurisdictions.[25]

The first trend makes Section 220 more expensive and riskier to litigate for companies, with little perceived upside to the companies from the prior status quo. Whereas companies may have been willing to freely give certain formal books and records like minutes and board decks without fuss in the past, the current state of Section 220 makes it likely that stockholders will press for far more expensive and burdensome ESI records. This increases the incentive for companies to push back to try and narrow the scope, but that is made more difficult by the relative lack of guidelines and procedures when compared to plenary discovery disputes. The second trend exposes stockholder plaintiffs to a risk of preclusion merely for doing what they have been asked to do. And because each trend both harms and benefits one side of the "v"—i.e., stockholders likely enjoy and appreciate the increased scope of Section 220 demands, while companies likely enjoy the ability to preclude strong complaints in favor of weaker ones—a private ordering solution may be challenging to implement.

After examining these trends and the issues surrounding Section 220, we propose a novel way to preserve Delaware courts' Section 220 policies while minimizing those concerns: limited, pleadings-stage discovery for derivative actions, or "Tools at Hand Discovery." Modifying the tools at hand doctrine to permit pleadings-stage discovery for prospective derivative plaintiffs,[26] not unlike jurisdictional discovery procedurally, would smooth out several current complexities that spring from books and records jurisprudence. The standard for Tools at Hand Discovery could be fashioned to mirror the current, narrow statutory inspection standard, but parties would have greater certainty over the bounds and rules for its scope and process. And stockholders could bring their plenary suit from the start, with an amendment to follow after discovery, to minimize their risk of preclusion brought about due to the time required by a separate Section 220 action. We also address potential concerns with the proposal.

As a collaboration between an academic and a practitioner on modern Section 220 rights, this Article offers a unique contribution to bridge the current academic literature with actual practice on the ground, filling a gap in the prior literature on the issue. Delaware law has evolved to its current state for a reason, and the most significant benefit of Tools at Hand Discovery is that it preserves Delaware's current policies on Section 220 and the tools at hand doctrine while providing a mechanism to minimize the pain points of those policies. Our proposal, Tools at Hand Discovery, would demand a change or adaptation to certain procedural aspects of inspection rights, but would otherwise leave the substantive precedents of those rights unchanged. It could

25. As explained further in Part II.C, litigants have found relatively high degrees of success in circumventing preclusion by seeking to intervene in and stay first-filed actions pending the results of their Section 220 inspections. The solution is not a guaranteed one, however, and poses some issues for litigants, particularly outside of Delaware.

26. *Cf.* Robin Hui Huang & Randall S. Thomas, *The Law and Practice of Shareholder Inspection Rights: A Comparative Analysis of China and the United States*, 53 VAND. J. TRANSNAT'L L. 907, 941 (2020) ("Overall, [the recent empirical findings] are consistent with the claim that the tools-at-hand doctrine is having its greatest impact on derivative suit litigation.").

thus be adopted without requiring or awaiting a shift in the relevant substantive case law to Section 220 or the tools at hand doctrine. As such, this Article's proposal to realign the significant developments of stockholder inspection rights is beneficial to stockholders, companies, and the courts.

I. Evolution of Delaware's Stockholder Inspection Rights

In this section, we illustrate the evolution of key developments in Section 220. First, we explain some foundational aspects of Section 220. Second, we examine the expanding scope of Section 220 productions. Third, we address recent limitations to defenses against Section 220 demands. Fourth, we review the tools at hand doctrine and its origins. And finally, we address the preclusive effects of multi-forum litigation and how it interacts with the tools at hand doctrine.

A. Foundation of Section 220

Stockholders of a Delaware corporation enjoy a limited, statutory right to inspect the corporation's books and records, enshrined in Section 220. Originally a right at common law, "actions to compel the production of corporate books and records historically were pursued by seeking a writ of mandamus in the [Delaware] Superior Court."[27] But "[w]ith its enactment of Section 220 in 1967, the [Delaware] General Assembly sought to replace the formalized and burdensome mandamus procedure in the Superior Court with a summary procedure in the Court of Chancery by which a stockholder who has demonstrated a purpose reasonably related to his or her interest as such may gain swift access to the corporate books and records."[28] Delaware courts recognize that a stockholder may use the results of a successful Section 220 inspection for several purposes, including to "institute derivative litigation."[29]

As it is now codified, Section 220 permits stockholders to make a demand for books and records subject to specific, technical procedural requirements.[30] Through

27. *In re* IMO Daniel Kloiber Dynasty Tr., 98 A.3d 924, 939 (Del. Ch. 2014).

28. Shaw v. Agri-Mark, Inc., 663 A.2d 464, 468 (Del. 1995), *superseded on other grounds by statute*, 74 Del. Laws ch. 84, §§ 5–8 (2003).

29. Seinfeld v. Verizon Commc'ns, Inc., 909 A.2d 117, 119-20 (Del. 2006).

30. For instance, Section 220 details that an inspection demand must, under appropriate circumstances, be made "under oath stating the purpose thereof," "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," "be accompanied by a power of attorney or such other writing which authorizes the attorney or other agent to [] act on behalf of the stockholder," and "be directed to the corporation at its registered office in [Delaware] or at its principal place of business," among other requirements. *See generally* DEL. CODE ANN. tit. 8, § 220(a)-(b) (West 2010). Similarly, Section 220 requires that companies respond to a "demand within 5 business days after the demand has been made," or else the stockholder is authorized to immediately seek relief in the Court of Chancery. DEL. CODE ANN. tit. 8, § 220(c) (West 2010). "Delaware courts require strict adherence to [these] procedural requirements." Cent. Laborers Pension Fund v. News Corp., 45 A.3d 139, 145 (Del. 2012).

that demand, a stockholder may seek to inspect "[t]he corporation's stock ledger, a list of its stockholders, and its other books and records."[31]

That process takes place extra-judicially—that is, privately and outside of formal court proceedings. "If the corporation, or an officer or agent thereof, refuses to permit an inspection sought by a stockholder . . . the stockholder may apply to the Court of Chancery for an order to compel such inspection."[32] The Court of Chancery is "vested with exclusive jurisdiction to determine whether or not the person seeking inspection is entitled to the inspection sought."[33] At that point, "[t]he standard for evaluating a demand for books and records under Section 220 is well settled."[34] As summarized by Vice Chancellor Laster:

> [T]he plaintiff must establish by a preponderance of the evidence that the plaintiff (i) is a stockholder, (ii) complied with statutory requirements specifying the form and manner for making a demand, and (iii) possesses a proper purpose for conducting the inspection. After meeting these requirements, the plaintiff must demonstrate by a preponderance of the evidence that "each category of books and records is essential" to the plaintiff's purpose.
>
> Once the plaintiff has made the necessary showing, the court must determine the scope of the inspection. The order should permit access to books and records that are "essential" for the plaintiff to achieve its purpose, but should stop at the quantum of information that the court deems "sufficient."[35]

"To justify the purpose to investigate mismanagement or wrongdoing, the stockholder must demonstrate 'a credible basis from which a court can infer that mismanagement, waste or wrongdoing may have occurred.'"[36] In turn, "'[c]redible basis' is the lowest burden of proof known in [Delaware] law; a plaintiff need only present 'some evidence' of wrongdoing, 'through documents, logic, testimony or otherwise,' to satisfy the standard."[37] As a result, proving a credible basis to investigate mismanagement or wrongdoing sufficient to inspect books and records is, by design, an easier affair

31. DEL. CODE ANN. tit. 8, § 220(b)(1) (West 2010).
32. DEL. CODE ANN. tit. 8, § 220(c) (West 2010).
33. DEL. CODE ANN. tit. 8, § 220(c) (West 2010).
34. Bucks Cnty. Emps. Ret. Fund v. CBS Corp., C.A. No. 2019-0820-JRS, 2019 WL 6311106, at *5 (Del. Ch. Nov. 25, 2019).
35. Amalgamated Bank v. Yahoo! Inc., 132 A.3d 752, 775 (Del. Ch. 2016) (citations omitted) (quoting Sec. First Corp. v. U.S. Die Casting & Dev. Co., 687 A.2d 563, 569 (Del. 1997); Thomas & Betts Corp. v. Leviton Mfg. Co., 681 A.2d 1026, 1035 (Del. 1996)), *abrogated on other grounds by* Tiger v. Boast Apparel, Inc., 214 A.3d 933 (Del. 2019).
36. CBS Corp., 2019 WL 6311106, at *5 (quoting Seinfeld v. Verizon Commc'ns, Inc., 909 A.2d 117, 118 (Del. 2006) and Kosinski v. GGP, Inc., 214 A.3d 944, 953 (Del. Ch. 2019))).
37. *Id*. Additionally, the Delaware Supreme Court has ruled that the purpose need not necessarily be an actionable one. AmerisourceBergen Corp. v. Leb. Cty. Emps. Ret. Fund, 243 A.3d 417, 431 (Del. 2020); *see also id.* at 427 (holding as well that "a stockholder is not required to state the objectives of his investigation"). We address this further in Part I.C.

than stating a claim based on those same allegations in a plenary complaint under Court of Chancery Rule 12(b)(6).[38]

Once a stockholder with a technically proper demand establishes a credible basis to inspect and a proper purpose, the last core consideration is scope. The scope inquiry focuses on which documents—and what kinds of documents—satisfy a stockholder's proper purpose for seeking inspection. Because the proper purpose and credible basis inquiries are relatively low bars, the scope inquiry may often become the gating issue to inspection. A stockholder seeking inspection must request documents aimed "with rifled precision" towards inspecting a proper purpose,[39] and is only entitled to those documents that are necessary, essential, and sufficient to the inspection.[40]

In this Article we explore the complexities introduced by the two aspects of Section 220, each discussed further below. First is how the Delaware courts have interpreted the scope inquiry to modernize Section 220 for use in a world where business is done as often over emails, text messages, and servers as anything else. Second is the tools at hand doctrine, by which Delaware courts have "repeated[edly] admoni[shed]" stockholders seeking to file a derivative action to first explore and exhaust avenues to gather evidence for their pleadings—namely Section 220.[41]

B. The Expanding Scope of Section 220

Like most discovery rules, Section 220 was not drafted, at least originally, with ESI in mind. "Stockholder inspection rights in Delaware date from the turn of the twentieth century, when the courts recognized them under the common law. In that era and for a long time afterwards, courts logically focused on paper documents . . . ."[42] As recently as the early 2000s and 2010s, the Court of Chancery at times expressed some hesitance to grant access to ESI in the context of Section 220, sometimes likening

38. Rule 12(b)(6) permits a defendant to move to dismiss for "failure to state a claim upon which relief can be granted." Del. R. Ch. Ct. 12(b)(6).

39. Brehm v. Eisner, 746 A.2d 244, 266 (Del. 2000).

40. Delaware courts have recognized that these terms are used somewhat interchangeably, and often in pairs, for the scope analysis. *See Yahoo! Inc.*, 132 A.3d at 787-88. Recent authority from the Delaware Supreme Court has phrased the inquiry as: "the court must give the petitioner everything that is 'essential,' but stop at what is 'sufficient,'" but also analyzed whether certain records were "necessary" to accomplish a stockholder's purpose. KT4 Partners LLC v. Palantir Techs. Inc., 203 A.3d 738, 752 (Del. 2019) (quoting *Yahoo! Inc.*, 132 A.3d at 775).

41. Frederick Hsu Living Tr. v. ODN Holding Corp., C.A. No. 12108-VCL, 2017 WL 1437308, at *2 (Del. Ch. Apr. 14, 2017) (corrected Apr. 24, 2017).

42. *Yahoo! Inc.*, 132 A.3d at 792 (citation omitted).

demands for electronic communications to what the Court might expect to see in plenary discovery.[43] Even then, however, ESI was fair game in the right circumstances.[44]

The year 2014 marked a notable foray into two questions: the availability of ESI in Section 220, and whom and where it may come from. In *Indiana Electrical Workers Pension Trust Fund IBEW v. Wal-Mart Stores, Inc.*, then-Chancellor Strine granted Section 220 inspection demands for "the personal computers and devices" of various officer-level custodians, including electronic communications, and ordered that the defendant "image company-issued Blackberry (or any other relevant) devices" for custodians who were unable to otherwise provide the relevant information.[45] Although Section 220, by its terms, is limited to entity-level books and records, then-Chancellor Strine explained in his bench ruling that directors and officers "handl[ing] Wal-Mart information" on their "home devices" were likely handling documents that "still belong[ed] to Wal-Mart," making them fair game for Section 220.[46] The company appealed on several grounds, including concerns about the scope of the Court's granted inspection. But the Delaware Supreme Court affirmed, finding no abuse of discretion in either the Court of Chancery's inclusion of officer-level documents or the scope of those documents.[47]

Since then, Delaware courts have continued to liberalize the availability of ESI in Section 220 proceedings.[48] "In general, these decisions reflect the principle that the

43. *See* Paul v. China MediaExpress Holdings, Inc., C.A. No. 6570-VCP, 2012 WL 28818, at *8 (Del. Ch. Jan. 5, 2012) (rejecting inspection demand that "read[] much more like a sweeping discovery request than a narrowly focused § 220 demand"); Khanna v. Covad Commc'ns Grp., Inc., C.A. No. 20481-NC, 2004 WL 187274, at *9 (Del. Ch. Jan. 23, 2004) ("Moreover, to require the production of all communications, including e-mails, among directors and officers . . . under these circumstances, would be excessive. The appropriate documents, i.e., necessary for purposes reasonably related to his status as stockholder, consist of those documents which are not the documents of individuals but, instead, are those which are held by the corporation.").

44. *See, e.g.*, Deephaven Risk Arb Trading Ltd. v. UnitedGlobalCom, Inc., C.A. No. 379-N, 2005 WL 1713067, at *10 (Del. Ch. July 13, 2005) (granting limited inspection of "written or electronic communications" related to potential mismanagement or wrongdoing); Dobler v. Montgomery Cellular Holding Co., Inc., C.A. No. 18105 NC, 2001 WL 1334182, at *5-6 (Del. Ch. Oct. 19, 2001) (permitting inspection of "[i]nternal corporate memorandums, e-mails, letters, minutes and resolutions, or other documents" relating to potential corporate waste and mismanagement).

45. Final Order and Judgment, Ind. Elec. Workers Pension Tr. Fund IBEW v. Wal-Mart Stores, Inc., C.A. No. 7779-CS, 2013 WL 5636296, at *2 (Del. Ch. Oct. 15, 2013), *aff'd*, 95 A.3d 1264 (Del. 2014).

46. Trial Transcript and Rulings of the Court at 97-98, Ind. Elec. Workers Pension Tr. Fund IBEW v. Wal-Mart Stores, Inc., (Del. Ch. May 20, 2013) (C.A. No. 7779-CS).

47. Wal-Mart Stores, Inc. v. Ind. Elec. Workers Pension Tr. Fund IBEW, 95 A.3d 1264, 1273, 1282-83 (Del. 2014).

48. *See* KT4 Partners LLC v. Palantir Techs. Inc., 203 A.3d 738, 752-53 (Del. 2019); Inter-Local Pension Fund GCC/IBC v. Calgon Carbon Corp., C.A. No. 2017-0910-MTZ, 2019 WL 479082, at *17-18 (Del. Ch. Jan. 25, 2019) (collecting cases), *aff'd*, 237 A.3d 818 (Del. 2020); Schnatter v. Papa John's Int'l, Inc., C.A. No. 2018-0542-AGB, 2019 WL 194634, at *16 (Del. Ch. Jan. 15, 2019), *abrogated on other grounds by* Tiger v. Boast Apparel, Inc., 214 A.3d 933 (Del. 2019); Lavin v. W. Corp., C.A. No. 2017-0547-JRS, 2017 WL 6728702, at *14 (Del. Ch.

Court of Chancery should not order emails to be produced when other materials (e.g., traditional board-level materials, such as minutes) would accomplish the petitioner's proper purpose, but if non-email books and records are insufficient, then the court should order emails to be produced."[49] That liberalization tracks the evolution of ESI in modern society. "Limiting 'books and records' to physical documents 'could cause Section 220 to become obsolete or ineffective.'"[50] And although Delaware courts have recognized the additional burden and expense on companies to collect ESI as part of Section 220, they have found that burden largely justified to maintain the policy goals of Section 220.

> The reality of today's world is that people communicate in many more ways than ever before, aided by technological advances that are convenient and efficient to use. Although some methods of communication (e.g., text messages) present greater challenges for collection and review than others, and thus may impose more expense on the company to produce, the utility of Section 220 as a means of investigating mismanagement would be undermined if the court categorically were to rule out the need to produce communications in these formats.[51]

But although the Delaware courts have emphasized that ESI will not be available to every stockholder under Section 220, the standard to receive ESI at least appears to remain low. To obtain an order for ESI books and records, the Delaware Supreme Court has suggested that a stockholder need present only "some evidence that those documents are indeed necessary" to a proper purpose.[52] And in line with *Wal-Mart*, "[c]orporate records are not always confined to the company's premises, domain name, and servers," and "[w]here directors and officers conducted company business outside of company email addresses, [Delaware courts have] ordered production from their responsive personal accounts and devices."[53] Pulling together the last decade of

---

Dec. 29, 2017); Amalgamated Bank v. Yahoo! Inc., 132 A.3d 752, 791-93 (Del. Ch. 2016). Despite Delaware courts' recognition that "[t]he starting point—and often the ending point—for a sufficient inspection will be board level documents evidencing the directors' decisions and deliberations, as well as the materials that the directors received and considered," it is rare for Section 220 action that proceeds to the stage of a post-trial opinion to be so limited. *Yahoo! Inc.*, 132 A.3d at 790; *see also Palantir Techs.*, 203 A.3d at 756 ("If a corporation has traditional, non-electronic documents sufficient to satisfy the petitioner's needs, the corporation should not have to produce electronic documents."). This could be a form of survivorship bias from the disputes that make it to the post-trial stage—it is likely that far more Section 220 demands are resolved pre-trial, or even pre-filing.

49. *Palantir Techs.*, 203 A.3d at 753 ("Indeed, it cannot be otherwise if the statutory purpose of § 220 is to have meaning in a fast-moving society where the forms in which corporate records are kept continually evolve.").

50. *Yahoo! Inc.*, 132 A.3d at 792 (quoting Francis G.X. Pileggi, Kevin F. Brady & Jill Argo, *Inspecting Corporate 'Books and Records' in a Digital World: The Role of Electronically Stored Information*, 37 DEL. J. CORP. L. 163, 164 (2012)).

51. *Schnatter*, 2019 WL 194634, at *16.

52. *Palantir Techs.*, 203 A.3d at 755.

53. *Calgon Carbon*, 2019 WL 479082, at *17 (collecting cases); *see also* Transcript at 37, Firefighters' Pension Sys. of the City of Kansas City, Mo. Tr. v. Found. Bldg Materials, Inc., C.A.

evolution on Section 220, the Court of Chancery recently summarized the tiers of scope at play in a modern books and records action.

> The starting point (and often the ending point) for an adequate inspection will be board-level documents that formally evidence the directors' deliberations and decisions and comprise the materials that the directors formally received and considered (the "Formal Board Materials"). A corporation should be able to collect and provide its Formal Board Materials promptly and with minimal burden. In many organizations, the corporate secretary maintains a central file for each board meeting in either paper or electronic form that contains the minutes and other Formal Board Materials for that meeting.
>
> If the plaintiff makes a proper showing, an inspection may extend to informal materials that evidence the directors' deliberations, the information that they received, and the decisions they reached ("Informal Board Materials"). 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 non-corporate accounts. 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 ("Officer-Level Materials").[54]

We adopt the Court's descriptive use of Formal Board Materials, Informal Board Materials, and Officer-Level Materials for reference in this Article.

Whatever the source, "[t]he core inquiry remains the same: whether the record is necessary and essential to the stockholder's investigation."[55] Importantly, the Delaware Supreme Court has placed the burden to identify those sources on the company, which must "exercise good faith in agreeing to a final order that gives the petitioner the books and records she needs to accomplish the purposes that the Court of Chancery found

---

No. 2021-0001-JRS (Del. Ch. Jan. 7, 2022) (noting that documents collected from a director's non-company email account "aren't even books and records of the Defendant corporation or of a subsidiary of the corporation, which are the only documents a stockholder has a right to compel inspection of under Section 220 *absent a showing that directors were conducting board or company business on personal devices*" (emphasis added)).

54. Leb. Cnty. Emps.' Ret. Fund v. AmerisourceBergen Corp., C.A. No. 2019-0527-JTL, 2020 WL 132752, at *24-25 (Del. Ch. Jan. 13, 2020) (footnotes omitted) (citations omitted), *aff'd* 243 A.3d 417 (Del. 2020); Woods v. Sahara Enters., Inc., C.A. No. 2020-0153-JTL, 2020 WL 4200131, at *11-12 (Del. Ch. July 22, 2020).

55. *Calgon Carbon*, 2019 WL 479082, at *17; *see Yahoo! Inc.*, 132 A.3d at 793 (explaining that where a custodian "chose to use a personal email account to conduct Yahoo business, she must produce responsive documents").

proper."[56] As a result, companies are arguably required to do much of the legwork in identifying custodial records and sources of information that would be required in even plenary litigation.

Although Delaware courts have recognized limits on the availability of ESI as books and records, it is clear to practitioners that Section 220, in keeping pace with modern business realities, reaches far further than it once did and has created what amounts to pre-litigation discovery.

C. The Limitation of Defenses Against Section 220 Demands

Delaware courts have continued to emphasize Section 220's intended role as a summary, pre-litigation investigative tool for stockholders, even as its scope (and expense) grows for companies. Recently, that emphasis took two tangible forms: (i) the Delaware Supreme Court's rejection of merits-based defenses to Section 220 investigations (outside of rare circumstances), and (ii) Delaware courts' use of fee-shifting to discourage what the Court of Chancery has found to be overly aggressive defense strategies.

For some time, it was unclear under Delaware law to what extent defenses against the merits of an underlying investigation—i.e., whether an underlying investigation could be actionable or successful in plenary litigation—would bear on a stockholder's rights to receive books and records. One can see the argument both ways as balancing the summary, expedited nature of Section 220 demands against the unnecessary expense of demands that purported to seek litigation but had no viable claim. Delaware courts had addressed that balance several times. On the one hand, they had ruled that, for instance, plaintiffs failed to state a proper purpose when they sought to investigate (in furtherance of future litigation) breaches of fully exculpated fiduciary duties.[57] On the other, Delaware courts had rejected similar attempts to invoke merits-based defenses at the Section 220 stage.[58]

The Delaware Supreme Court resolved this tension in *AmerisourceBergen Corp. v. Lebanon County Employees' Retirement Fund*, where it ruled that defenses turning on the merits of an underlying Section 220 investigation should be rejected as beyond the nature of summary Section 220 proceedings.[59] In so doing, the Supreme Court remarked: "It has become evident that the interjection of merits-based defenses—defenses that turn on the quality of the wrongdoing to be investigated—interferes with" the process

56. *Palantir Techs.*, 203 A.3d at 757.

57. Se. Pa. Transp. Auth. v. Abbvie Inc., C.A. No. 10374-VCG, C.A. No. 10408-VCG, 2015 WL 1753033, at *13 (Del. Ch. Apr. 15, 2015), *aff'd,* 132 A.3d 1 (Del. 2016), *overruled in part by* AmerisourceBergen Corp. v. Leb. Cnty. Emps.' Ret. Fund, 243 A.3d 417 (Del. 2020).

58. *See, e.g.*, Lavin v. W. Corp., C.A. No. 2017-0547-JRS, 2017 WL 6728702, at *10 (Del. Ch. Dec. 29, 2017) ("Although our courts have not addressed whether a company may invoke *Corwin* as a bar to inspection in a Section 220 proceeding, this court has rejected similar attempts to invoke merits-based defenses that turn on doctrinal burden shifting as a basis to defend otherwise properly supported demands for inspection.").

59. *AmerisourceBergen*, 243 A.3d at 437.

of what is supposed to be a summary, expedited statutory proceeding.[60]

AmerisourceBergen's rulings took one category of defenses off the table in defending against Section 220 demands. But Delaware courts have also discouraged other, more general litigation strategies in Section 220 litigation through the risk of fee-shifting. In *Pettry v. Gilead Sciences, Inc.*, the Court of Chancery permitted the plaintiffs to move to shift fees in order to address what the Court found to be overly aggressive defense strategies from the company.[61] The tactics at issue in *Gilead* were described by the Court as: "blocking legitimate discovery, misrepresenting the record, and taking positions for no apparent purpose other than obstructing the exercise of Plaintiffs' statutory rights," in addition to a "failure to provide any Plaintiff with even a single [pre-litigation] document despite the ample evidence of a credible basis and the obvious responsiveness of certain categories of documents."[62] The Court explained the motivations behind its ruling, beginning with the Court's view that the "regrettable reaction by defendant corporations" to the rise in Section 220 enforcement actions "has been massive resistance,"[63] and stated:

> These obstacles increase the investment required from stockholder plaintiffs and their counsel when pursuing Section 220 inspections.
>
> It seems that defendants like Gilead think that there are no real downsides to overly aggressive defense campaigns at the Section 220 phase. Although aggressively defending a Section 220 action will result in higher defense costs during that phase, the approach can undermine follow-on derivative claims if successful, thereby lowering net costs for defendants. Even if the approach is unsuccessful in thwarting inspection, the work product created in building legal defenses to follow-on derivative claims can be repurposed in the context of the derivative suit. And the risk of reputational harm to defendants resulting from a decision detailing possible corporate wrongdoing

60. *Id.* ("The stockholder need not demonstrate that the alleged mismanagement or wrongdoing is actionable. To the extent that our summary affirmance in *AbbVie* suggests otherwise, we hereby overrule it."). Even so, the Supreme Court left open the possibility for merits-based defenses in specific circumstances.

> In the rare case in which the 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—as the Court of Chancery did here—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.

Id.

61. Pettry v. Gilead Scis., Inc., C.A. No. 2020-0132-KSJM, C.A. No. 2020-0138-KSJM, C.A. No. 2020-0155-KSJM, C.A. No. 2020-0173-KSJM, 2020 WL 6870461, at *30 (Del. Ch. Nov. 24, 2020).

62. *Id.*

63. *Id.* at *29.

> rendered under the plaintiff-friendly Section 220 standard appears to lack the deterrent effect one might expect it to have.
>
> Scholars have recommended fee shifting as one means of recalibrating the risks of Section 220 litigation. This proposition finds support in prior decisions of this court and the Model Business Corporation Act.[64]

The plaintiffs in *Gilead* were successful in their subsequent application to shift fees.[65] Other actions have reinforced *Gilead* more subtly by commenting favorably where the parties focus on issues that the Court found to "stand[] in marked contrast to the tactics that have prompted expressions of concern by this court regarding 'overly aggressive' Section 220 litigation."[66]

While the Court of Chancery's deployment of fee-shifting as a tool to discourage overly aggressive defenses to Section 220 seems likely to discourage those tactics, it seems equally likely to have a corresponding dampening effect on less objectionable litigation defenses to the extent litigants are unable to be certain about which strategies may fall on the wrong side of a determination about their level of aggression.[67]

D. Inspection Rights as Tools at Hand

Section 220's modern rise to prominence is no surprise—quite the opposite, it was by design. For the past several decades, and particularly within the last 15 years, Delaware courts have consistently encouraged derivative plaintiffs to develop their claims through Section 220 prior to filing plenary litigation.[68] This is particularly so in the context of the demand futility analysis.[69]

---

64. *Id.* at *29-30 (footnote omitted).

65. Pettry v. Gilead Scis., Inc., C.A. No. 2020-0132-KSJM, C.A. No. 2020-0138-KSJM, C.A. No. 2020-0155-KSJM, C.A. No. 2020-0173-KSJM, 2021 WL 3087027, at *3 (Del. Ch. July 22, 2021); *see also* Transcript, Police & Fire Ret. Sys. of Detroit v. Walmart, Inc., (Del. Ch. Oct. 5, 2020) (C.A. No. 2020-0478-JTL) (in finding a credible basis to support an inspection, noting that "really the only question for me was whether there ought to be some fee shifting for having put us all through this").

66. Emps.' Ret. Sys. of R.I. v. Facebook, Inc., C.A. No. 2020-0085-JRS, 2021 WL 529439, at *2 n.11 (Del. Ch. Feb. 10, 2021) (quoting *Pettry*, 2020 WL 6870461, at *30) (commending parties when they "agreed to focus trial on the scope of documents to be produced for inspection rather than litigate the propriety of Plaintiff's stated purposes at the outset").

67. That ambiguity, in turn, may be further compounded by Section 220's relative lack of guiderails and reliance on parties to narrow disputes before arriving at the courthouse steps.

68. *See, e.g.*, Shapira, *Corporate Law, Retooled*, *supra* note 2, at 1959 ("Section 220, the courts insisted, can increase the quality of pleading. Plaintiffs heeded the call and started filing section 220 requests more frequently and more broadly."); Cox, Martin & Thomas, *Tools at Hand, supra* note 2, at 2130; Geis, *Information Litigation*, *supra* note 2, at 435-36.

69. Because derivative plaintiffs purport to bring claims on behalf of, and belonging to, the company, they must either make a demand on the company's board or explain why making such a demand would have been futile. Courts grant a board wide leniency on whether to act on a demand. Thus, given the incentives involved for plaintiffs, many opt to demonstrate so-called "demand futility," sometimes called "demand excusal," instead. But doing so requires plaintiffs to meet "heightened pleading requirements," opening

In the 1993 landmark decision of *Rales v. Blasband*, the Delaware Supreme Court addressed the concern that derivative plaintiffs may find it difficult to prove demand futility without plenary discovery:

> [T]hey have many avenues available to obtain information bearing on the subject of their claims. For example, there is a variety of public sources from which the details of a corporate act may be discovered, including the media and governmental agencies such as the Securities and Exchange Commission. In addition, a stockholder who has met the procedural requirements and has shown a specific proper purpose may use the summary procedure embodied in 8 *Del. C.* § 220 to investigate the possibility of corporate wrongdoing. Surprisingly, little use has been made of section 220 as an information-gathering tool in the derivative context. Perhaps the problem arises in some cases out of an unseemly race to the court house, chiefly generated by the 'first to file' custom seemingly permitting the winner of the race to be named lead counsel. The result has been a plethora of superficial complaints that could not be sustained. Nothing requires the Court of Chancery, or any other court having appropriate jurisdiction, to countenance this process by penalizing diligent counsel who has employed these methods, including section 220, in a deliberate and thorough manner in preparing a complaint that meets the demand excused test of *Aronson*.[70]

A few years later, the Supreme Court repeated its direction to plaintiffs, noting that they "may well have the 'tools at hand' to develop the necessary facts for pleading purposes," including through Section 220.[71] Delaware courts continued to underscore and develop the tools at hand doctrine, as it came to be known.[72]

---

them to attack at the pleadings stage. *In re* BGC Partners, Inc., C.A. No. 2018-0722-AGB, 2019 WL 4745121, at *6 (Del. Ch. Sept. 30, 2019); *see also supra* note 9.

70. Rales v. Blasband, 634 A.2d 927, 935 n.10 (Del. 1993) (citation omitted).

71. *Brehm*, 746 A.2d at 266; *see also* Scattered Corp. v. Chi. Stock Exch., Inc., 701 A.2d 70, 79 (Del. 1997); Ash v. McCall, C.A. No. 17132, 2000 WL 1370341, at *15 n.56 (Del. Ch. Sept. 15, 2000) ("I leave it to plaintiffs to adduce such facts through various pre-discovery fact-gathering methods they have at their disposal. As the Delaware Supreme Court has repeatedly exhorted, shareholders plaintiffs should use the 'tools at hand,' most prominently § 220 books and records actions, to obtain information necessary to sue derivatively.").

72. *See, e.g.*, King v. VeriFone Holdings., Inc., 12 A.3d 1140, 1147 (Del. 2011) (citing to the tools at hand doctrine in referencing the dismissal of a complaint that failed to obtain facts pre-filing through Section 220); *White*, 783 A.2d at 556-57 ("Contrary to the plaintiff's argument, this case demonstrates the salutary effects of a rule encouraging plaintiffs to conduct a thorough investigation, using the 'tools at hand' including the use of actions under 8 *Del. C.* § 220 for books and records, before filing a complaint."); *ODN Holding*, 2017 WL 1437308, at *2 ("Before filing suit, the plaintiff demanded books and records, thereby heeding the repeated admonition of the Delaware courts.").

E. The Preclusive Effects of Multi-Forum Litigation and Section 220

The tools at hand doctrine has led to dispositive complexities for stockholders. For context, it is important to note that derivative litigation is often not a one-plaintiff show. Corporate governance scandals, public as they are, often draw scores of plaintiffs in different jurisdictions. In 2018, the *Alvarez* decision from the Delaware Supreme Court addressed the interaction between the tools at hand doctrine and the race to the courthouse that is common in derivative litigation.[73]

In Part I.B, this Article discussed the *Wal-Mart* Section 220 litigation. In a plenary, derivative action relating to that investigation, Delaware courts ran up against a curious, although perhaps not unexpected, issue: whether Delaware-based derivative plaintiffs who used the tools at hand before filing their complaint could still be precluded by a hastier action filed—and dismissed—outside Delaware.[74]

In *Alvarez*, dual tracks of litigation proceeded in both Arkansas and Delaware, each alleging claims relating to an alleged bribery scheme by Wal-Mart executives. Initially, the defendants successfully moved the United States District Court for the Western District of Arkansas (the "Arkansas Court") to stay its proceedings pending those in Delaware.[75] In Delaware, however, the plenary litigation would soon grind to a standstill. Based on comments from the Court of Chancery urging the plaintiffs to use their tools at hand and pursue their Section 220 rights, the Delaware plaintiffs benched their plenary case to focus on a Section 220 demand. But the ensuing litigation from that demand, "unusually contentious" as it was, dragged on for nearly three years.[76] In the interim, the Eighth Circuit Court of Appeals vacated the Arkansas Court's stay, and the Arkansas Court denied a more limited application for a stay. As a result, motion to dismiss proceedings marched forward in Arkansas, ending in the dismissal of the consolidated Arkansas actions.[77]

---

73. Cal. State Tchr.'s Ret. Sys. v. Alvarez, 179 A.3d 824, 855 (Del. 2018).

74. *Id.*

75. *Id.* at 830.

76. *Id.* at 831; *see also supra* Part I.B (discussing the *Wal-Mart* Section 220 litigation).

77. Notably, the Delaware plaintiffs were both concerned with, but not did not intervene to address, the potential preclusive effects at play. As the Delaware Supreme Court summarized:

> The Delaware Plaintiffs had expressed concern that, if the Arkansas court ruled first and found demand futility lacking, the Defendants were likely to argue in Delaware that the Arkansas court's ruling on demand futility should have preclusive effect through the doctrine of "collateral estoppel," also known as "issue preclusion" (used here interchangeably). The Delaware Plaintiffs also knew that the Arkansas court had warned in its June 4, 2014, order denying Defendants' stay that "[i]t is likely that the first decision on demand futility will be entitled to collateral estoppel effect." Yet the Delaware Plaintiffs refrained from intervening or otherwise expressing their concerns to the Arkansas court.

Alvarez, 179 A.3d at 832. As discussed in Part II.C, stockholders have since seen some success in seeking to intervene in, and stay, earlier filed actions while pursuing inspection rights.

When the Delaware plenary litigation picked back up following the Section 220 proceedings, the defendants moved to dismiss, including because of the preclusive effects of the Arkansas litigation. Originally, the Court of Chancery granted the motion to dismiss, finding that the rulings in the Arkansas court were preclusive under federal common law, which required an analysis under Arkansas law.[78] Key to the Court's decision was its finding that the Arkansas plaintiffs were not inadequate representatives and were in privity with the Delaware plaintiffs.[79] On appeal, however, the Delaware Supreme Court remanded and asked the Court of Chancery to supplement its opinion with an analysis of the following question: "In a situation where dismissal by the federal court in Arkansas of a stockholder plaintiff's derivative action for failure to plead demand futility is held by the Delaware Court of Chancery to preclude subsequent stockholders from pursuing derivative litigation, have the subsequent stockholders' Due Process rights been violated?"[80]

In its supplemental opinion, the Court of Chancery summarized the "troubling . . . competing policies":

> On the one hand, Delaware courts have long encouraged stockholders contemplating derivative actions to use the "tools at hand"—in particular to obtain corporate books and records under Section 220 of the Delaware General Corporation Law—*before* filing derivative litigation so that the issue of demand futility may be decided on a well-developed factual record.On the other hand, as a matter of comity and in the interest of preserving judicial resources, public policy discourages duplicative litigation. The tension between these policies in representative stockholder litigation involving multiple forums is heightened by the "fast-filer" phenomenon, where counsel handling cases on a contingent basis have a significant financial incentive to race to the courthouse in an effort to beat out their competition and seize control of a case, often at the expense of undertaking adequate due diligence.[81]

The Court undertook a careful analysis of the approaches followed in other juris-

78. *In re* Wal-Mart Stores, Inc. Del. Derivative Litig., C.A. No. 7455-CB, 2016 WL 2908344, at *1 (Del. Ch. May 13, 2016).

79. *Id.* at *19-23 ("It is certainly better practice for stockholder plaintiffs to use 'the tools at hand' to investigate their claims thoroughly before launching derivative suits, and I share the concerns Delaware courts have expressed regarding the risk of diligent derivative plaintiffs being collaterally estopped by fast filers. Indeed, it may turn out (depending on the outcome of the appeal to the Eighth Circuit) that the Arkansas plaintiffs' assessment of their ability to establish demand futility without pursuing books and records from Wal-Mart was ill-advised. But, in my opinion, that decision falls into the category of an imperfect legal strategy and does not rise to the level of litigation management that was so grossly deficient as to render them inadequate representatives.").

80. Cal. State Tchr.'s Ret. Sys. v. Alvarez, 175 A.3d 86 (Del. 2017) (citing Smith v. Bayer Corp., 564 U.S. 299 (2011)).

81. *In re* Wal-Mart Stores, Inc. Del. Derivative Litig., 167 A.3d 513, 515 (Del. Ch. 2017).

dictions and found that that D.C. Circuit, First Circuit, and Ninth Circuits each suggested or advocated rules that the "adequate representative" inquiry provides "the core constitutional check on when a nonparty may be bound by a judgment against someone with the same interests who was a party in a prior suit."[82]

Ultimately, the Court advocated a different rule. Relying on dicta in a prior decision of the Court that touched upon analogous issues, the Court recommended that "a judgment in a derivative action that is entered before the stockholder plaintiff acquires authority to litigate on behalf of the corporation from binding anyone other than the named stockholder plaintiff."[83] Put another way, the Court's rule would mean that representative plaintiffs purporting to bring derivative claims under a demand futility standard would lack the ability to bind similarly situated plaintiffs until they had survived a motion to dismiss under Rule 23.1 and thus proved up their derivative standing. This approach would "go a long way to addressing the 'fast-filer' problem and ensuring better protection of due process rights for [derivative] stockholder plaintiffs," who currently, in the Court's estimation, were in a "far less favorable" position than, for instance, counterpart plaintiffs in class litigation.[84]

However, the Delaware Supreme Court disagreed and held that the Delaware plaintiffs were precluded by the dismissal of the first-filed action in an Arkansas federal court, despite their pursuit of the tools at hand in Section 220.[85] First, the Supreme Court affirmed the Court of Chancery's original analysis on issue preclusion, including that the Arkansas plaintiffs were sufficiently adequate representatives, which cut off a line of argument for the Delaware plaintiffs that had the potential to reduce the preclusive impact of the Arkansas Court's dismissal.[86] And second, as for the Due Process analysis, the Supreme Court declined to adopt the Court of Chancery's recommended rule, opting instead to follow federal precedent and hold that "the Due Process rights of subsequent derivative plaintiffs are protected, and dismissal based on issue preclusion is appropriate, when their interests were aligned with and were adequately represented by the prior plaintiffs."[87]

> In conclusion, . . . our state's interest in governing the internal affairs of Delaware corporations must yield to the "stronger national interests that all state and federal courts have in respecting each other's judgments." This delicate balance would be impaired were we to

82. *Id.* at 521–23.

83. *In re* Wal-Mart Stores, 167 A.3d at 525 (quoting *In re* EZCORP Inc. Consulting Agreement Derivative Litig., 130 A.3d 934, 949 (Del. Ch. 2016)).

84. *Id.* at 528-30.

85. Cal. State Tchr.'s Ret. Sys. v. Alvarez, 179 A.3d 824, 855 (Del. 2018).

86. *Id.* at 853–54 ("Here, the Arkansas Plaintiffs considered making a Section 220 demand, but they decided against it because they considered the documents in the New York Times article sufficient. It turns out they were wrong. Although it might have been a tactical error, the Arkansas Plaintiffs' decision to forgo a Section 220 demand *in this instance* does not rise to the level of constitutional inadequacy. Reasonable litigants can differ on such tactical decisions.").

87. *Id.* at 840, 849-55.

> adopt the Chancellor's suggestion . . . for determining the preclusive effect of other courts' dismissals based on demand futility.[88]

The preclusive effects of multi-forum litigation on stockholder derivative litigation was a known issue even before *Alvarez*. As far back as 2013, the Delaware Supreme Court had occasion to grapple with a similar case—*Pyott v. Louisiana Municipal Police Employees' Retirement System*.[89] There, parallel derivative litigation was proceeding in both Delaware and California, each bringing claims related to a Department of Justice investigation into Allergan, Inc. Unlike in *Alvarez*, both sets of plaintiffs sought books and records to bolster their respective complaints, each of which was opposed by a motion to dismiss. The California motion was decided first, and the defendants in the Delaware action argued that it imposed a preclusive effect on the Delaware plaintiffs.

The Court of Chancery held that the California dismissal was not preclusive against the Delaware action.[90] But the Supreme Court reversed, holding:

> Once a court of competent jurisdiction has issued a final judgment, . . . a successive case is governed by the principles of collateral estoppel, under the full faith and credit doctrine, and not by demand futility law, under the internal affairs doctrine. . . . In the Court of Chancery, the motion to dismiss, based on collateral estoppel, was about federalism, comity, and finality. It should have been addressed exclusively on that basis. Under this Court's precedents, the undisputed interest that Delaware has in governing the internal affairs of its corporations must yield to the stronger national interests that all state and federal courts have in respecting each other's judgments. The United States Supreme Court has held that the full faith and credit obligation is "exacting" and that there is "no roving 'public policy exception' to the full faith and credit due judgments.[91]

The facts and precise legal issues in the *Alvarez* decision created a perfect storm;[92] lightning has not yet struck a second time in Delaware, and so *Alvarez* has not yet been further developed by either the Delaware Supreme Court or the Court of Chancery.

II. The Challenges: Rising Costs and Conflicting Incentives

The modernization Section 220's scope to encompass ESI and the developments of the tools at hand doctrine have introduced a number of issues affecting both stockholders and companies. We sketch out a few of those here. Then, we propose a novel

88. *Id.* at 855.

89. Pyott v. La. Mun. Police Emp.'s Ret. Sys., 74 A.3d 612 (Del. 2013).

90. La. Mun. Police Emp.'s Ret. Sys. v. Pyott, 46 A.3d 313, 359 (Del. Ch. 2012), *rev'd*, 74 A.3d 612 (Del. 2013).

91. *Pyott*, 74 A.3d at 616. *Alvarez* cited to *Pyott* favorably. *Alvarez*, 179 A.3d at 855.

92. *See, e.g.*, Lawrence Hamermesh, Jack B. Jacobs & Leo E. Strine, Jr., *Optimizing the World's Leading Corporate Law: A 20-Year Retrospective and Look Ahead*, 77 BUS. LAW. 321, 372 (2022) [hereinafter Hamermesh, Jacobs & Strine Jr., *Leading Corporate Law*]; Cox, Martin & Thomas, *Tools at Hand*, *supra* note 2, at 2164-71.

solution aimed at reducing these concerns and realigning incentives.

A. Defendants: Rising Costs of Section 220

The rising expense of Section 220 actions for companies comes from a confluence of two factors: the increasing similarity to already expensive plenary discovery (but with ambiguities and risks not inherent to plenary discovery), and the far lower standard stockholders must meet to get that discovery under Section 220. One could be forgiven for thinking that discovery costs would be relatively low in a Section 220 action. The scope, although expanding in practical terms, is still limited to "necessary and essential" documents, for instance. But the realities of document collection and review mean that companies face a costly discovery process to produce anything but Formal Board Materials.

The collection, review, and production of ESI—in particular electronic communications like emails and text messages—is expensive. The Court of Chancery has stated that a corporation "should be able to collect and provide its Formal Board Materials promptly and with minimal burden."[93] But Informal Board Materials and Officer-Level Materials, which play an increasingly common role in Section 220 demands, include a level of burden and expense previously associated only with plenary discovery.[94] In a Section 220 case meriting inspection of those latter categories, companies and their attorneys will likely have to (i) conduct custodial interviews, forensically examine the appropriate sources of data, and image mobile devices and email accounts (whether or not on corporate accounts or devices); (ii) negotiate search terms and protocols for review with the stockholder; and (iii) host and review the collected documents on an electronic review platform, including both a responsiveness review and corresponding privilege review.[95]

While these are standard costs of plenary discovery subject to Rules 26 and 34[96]—

93. Lebanon Cnty. Emp.'s Ret. Fund v. AmerisourceBergen Corp., C.A. No. 2019-0527-JTL, 2020 WL 132752, at *24 (Del. Ch. Jan. 13, 2020), aff'd, 243 A.3d 417 (Del. 2020). It is not clear that even this is the case. For instance, suppose that the meetings of a corporation's board of directors are characterized with detailed slide decks and minutes, each laden with privileged advice, confidential information not relevant to a stockholder's inspection demand, or both. The review and careful redaction of those materials may not be an insignificant burden.

94. *Id.* at *25 (noting that these materials "generally will include communications between directors and the corporation's officers and senior employees . . . . emails and other types of communication sent among the directors themselves, even if the directors used non-corporate accounts . . . . [and] communications and materials that were only shared among or reviewed by officers and employees.").

95. Some of these costs may arguably be borne during the litigation itself (i.e., before the Court of Chancery orders an inspection) in order to prepare for both the expedited review and production that may be required in the event of an inspection and, similarly, to "exercise good faith in agreeing to a final order that gives the petitioner the books and records she needs to accomplish the purposes that the Court of Chancery found proper," as discussed further in Part II.B. KT4 Partners LLC v. Palantir Tech.'s Inc., 203 A.3d 738, 756-57 (Del. 2019).

96. Rule 26 governs the general scope of discovery and provides that "[p]arties may obtain

conducted under the auspices of Court of Chancery rules and procedures and after a plaintiff files its plenary complaint—Section 220 imposes them whenever a stockholder can show a credible basis, the "lowest burden of proof known in [Delaware] law,"[97] for a proper purpose,[98] and that the books and records and necessary and sufficient for that purpose. And if the stockholder files a plenary action following Section 220 and survives any pleadings-stage assaults, the process begins anew.[99]

What is more, it bears emphasizing that, notwithstanding the dramatic increase in the scope in Section 220 actions, companies are still limited to the statutorily prescribed five business days to respond to a Section 220 demand—a fuse far shorter than anything analogous in plenary litigation.[100]

The Section 220 process also introduces increased risk and ambiguity for companies, at least relative to if that discovery were conducted in plenary litigation. Here, again, Delaware's well-crafted rules and robust precedent provide the parties with guiderails. Rule 37 delineates the potential scenarios under which discovery sanctions or fee-shifting may be appropriate.[101] In contrast, the risk of potential fee-shifting for what Delaware courts might find to be overly aggressive defense may dampen the

discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any documents, electronically stored information, or tangible things and the identity and location of persons having knowledge of any discoverable matter," subject to recognized exceptions. Del. R. Ch. Ct. 26(b)(1). Rule 34 specifically addresses requests for production (as opposed to interrogatories or requests for admission), and provides guidelines to parties for procedure on those requests and any responses and objections. *See* Del. R. Ch. Ct. 34.

97. *See* Bucks Cnty. Emp.'s Ret. Fund v. CBS Corp., C.A. No. 2019-0820-JRS, 2019 WL 6311106, at *5 (internal quotations omitted).

98. *See AmerisourceBergen*, 2020 WL 132752, at *7 (listing examples of proper purposes).

99. While a prior Section 220 action with significant inspections awarded can create a head start in plenary discovery, it is doubtful that the head start results in any efficiency gains, and likely that it instead causes efficiency losses. The collection and review required for the plenary action is almost guaranteed to cast a wider collection net, require the review of more documents, and demand higher volume of productions. Portions of collection done at the Section 220 stage may have to be repeated at the plenary discovery stage. And while collections could conceivably be done with prophylactic richness at the Section 220 stage in anticipation of plenary litigation, that merely hedges against the risk of double-collections without any upside in efficiency gains (just a shift in when the collection is done). Additionally, there will almost always be efficiency losses resulting in the leakage (and re-learning) of substantive factual knowledge and understanding at the attorney and client level due to the time between the Section 220 collection and review and any later, plenary discovery.

100. DEL. CODE ANN. tit. 8, § 220(c) (West 2010).

101. *See* Del. R. Ch. Ct. 37(a)(4) (setting forth rules relating to motions to compel); Del R. Ch. Ct. 37(b)(2) (setting forth rules relating to the failure to obey discovery orders); Del. R. Ch. 37(c) (setting forth rules relating to the failure to make certain admissions); Del. R. Ch. 37(d) (setting forth rules relating to the failure attend depositions or respond to discovery requests); Del. R. Ch. Ct. 37(e) (setting forth rules relating to the failure to preserve ESI).

willingness to pursue even potentially meritorious defenses against Section 220 demands, at least until that yardstick is better defined by further litigation.[102] The result may be a reduced level of defense to a correspondingly increased level of aggression and demands from stockholders.

B. Defendants: Further Issues in Application

The increasing overlap between Section 220 inspections and plenary discovery also raises a number of problems in application. Often these come from the conceptual question of how far the statutory device of Section 220 can go in emulating plenary discovery under a doctrinal regime that favors increased flexibility on Section 220's scope. Thus, although long-standing Delaware law holds that Section 220 inspections and plenary discovery "are not the same and should not be confused," the modern trends in Section 220 sometimes invite difficult questions into whether, and if so by how much, that line has blurred.[103]

An example may put a finer point on the issue. Recent Section 220 jurisprudence makes clear that officers' and directors' ESI, including on non-corporate email accounts and mobile devices, may be available under the right showing by a stockholder that corporate business was being conducted on those accounts.[104] The only defendant in a Section 220 action is the company itself, not officers or directors, and so Delaware courts have explained this aspect of the doctrine by reference to two rationales. First, and most predominantly, is that a corporate record belongs to the company regardless

102. The ripple effects created by *Gilead* can be seen in a sampling of recent Section 220 complaints, which suggest that it is at least not uncommon for plaintiffs to invoke *Gilead* at the outset (either in the complaint or in pre-litigation correspondence) to ratchet up the perceived risk of non-compliance. *See, e.g.*, Verified Compl. to Compel Inspection of Books and Records Under DEL. CODE ANN. tit. 8, § 220, Ex. 2 at 1, Cleveland Bakers and Teamsters Pension Fund v. Activision Blizzard, Inc., C.A. No. 2021-0991-KSJM (Del. Ch. Nov. 18, 2021); Verified Compl. for Relief Pursuant to 8 *Del. C.* § 220, at ¶ 6, Flannery v. Ubiquiti Inc., C.A. No. 2021-0913-PAF (Del. Ch. Oct. 21, 2021); Verified Compl. for Relief Pursuant to 8 *Del. C.* § 220, Ex. D at 1, Pacheco v. Celsion Corp., C.A. No. 2021-0705-SG (Del. Ch. Aug. 17, 2021); Verified Compl. Pursuant to 8 *Del. C.* § 220, Ex. A n.10, Altieri v. FireEye, Inc., C.A. No. 2021-0593-KSJM (Del. Ch. July 13, 2021); Verified Compl. for Inspection of Books and Records Pursuant to 8 *Del. C.* § 220, at ¶ 34, Solak v. eXp World Holdings, Inc., C.A. No. 2020-1066-PAF (Del. Ch. Dec. 16, 2020).

103. Sec. First Corp. v. U.S. Die Casting & Dev. Co., 687 A.2d 563, 570 (Del. 1997) ("The scope of the production which the Court of Chancery ordered in this case is more akin to a comprehensive discovery order under Court of Chancery Rule 34 than a Section 220 order. The two procedures are not the same and should not be confused. A Section 220 proceeding should result in an order circumscribed with rifled precision. Rule 34 production orders may often be broader in keeping with the scope of discovery under Court of Chancery Rule 26(b)."); Transcript of Trial and Rulings of the Court at 38, *In re* Citigroup Inc. Section 220 Litig., (Del. Ch. Nov. 5, 2015) (Consol. C.A. No. 11454-VCG) (declining "to order [the inspection of] communications between officers and directors" because "[t]hat begins to look to me like discovery").

104. *See supra* Part I.B. One could imagine a world where Delaware courts rule the other way—that anything not on the company's servers, accounts, and devices was off limits at the Section 220 stage out of concerns for encroaching on the personal devices of non-parties.

of who possesses it.[105] Second, and less commonly, the Court of Chancery has noted that its "authority to order a corporation to produce a particular officer, director, or managing agent for deposition in a particular location" suggests that "[a] third party subpoena is not necessary if the person to be examined is a party or an officer, director, or a managing agent of the party" because of the Court's "power to order production of corporate documents held by directors."[106]

But suppose a Section 220 inspection order requires communications from former directors and former officers. What are the obligations of the company if there is reason to believe those former directors and officers did business on their non-corporate email accounts and mobile devices, which are not in the company's possession? Unlike in plenary litigation, those former directors and officers cannot be parties to the Section 220 action themselves. Must the company request that its former officers and directors comply? If they refuse, must it subpoena them?[107] Or do these documents fall sufficiently outside the company's possession, custody, and control as to reach beyond the ambit of Section 220?[108]

Questions like these will likely find answers in future Section 220 litigation. But for now they create real problems that companies must assess and internalize in the context of a Section 220 production. And even if the Court resolves the questions above, more fringe questions will continue to spawn further litigation, as is the nature of common law.

A more concrete problem in practice comes from the inherent unknowability of a

105. *See* Amalgamated Bank v. Yahoo! Inc., 132 A.3d 752, 793 (Del. Ch. 2016), *abrogated on other grounds by* Tiger v. Boast Apparel, Inc., 214 A.3d 933 (Del. 2019) ("[I]f two officers used their home computers to produce a confidential corporate document that they shared with one another over their private email addresses, no one would think that the report was a personal document that the officers could sell for their own profit."); *see also* Transcript of Trial and Rulings of the Court at 97-98, Ind. Electrical Workers Pension Trust Fund IBEW v. Wal-Mart Stores, Inc., (Del. Ch. May 20, 2013) (C.A. No. 7779-CS). For a "corporate record" to exist outside the company's servers, it appears to be the case that a showing must be made of corporate work being done on that non-company account. *See* Transcript at 37, Firefighters' Pension Sys. of the City of Kansas City, Missouri Trust v. Foundation Building Materials, Inc., (Del. Ch. Jan. 7, 2022) (C.A. No. 2021-0001-JRS) (noting that non-company accounts of a director "aren't even books and records of the Defendant corporation or of a subsidiary of the corporation, which are the only documents a stockholder has a right to compel inspection of under Section 220 absent a showing that directors were conducting board or company business on personal devices").

106. *See Yahoo!*, 132 A.3d at 793, 793 n.43.

107. *See id.* ("Through its jurisdiction over a corporation, a court can compel production of documents in the possession of officers, directors, and managing agents of the firm.").

108. Chammas v. NavLink, Inc., C.A. No. 11265-VCN, 2016 WL 767714, at *7 n.92 (Del. Ch. Feb. 1, 2016) ("On which server a document or communications is stored is not necessarily determinative of whether it constitutes a book or record of the company. However, to be subject to compelled production pursuant to Section 220, a book or record must be 'in the possession or control of the corporation.'" (quoting Estate of Polin v. Diamond State Poultry Co., C.A. No. 6374, 1981 WL 7612, at *3 (Del. Ch. Apr. 14, 1981))); *see also In re* Lululemon Athletica Inc. 220 Litig., C.A. No. 9039-VCP, 2015 WL 1957196, at *5 (Del. Ch. Apr. 30, 2015) (expressing reservation regarding, but not deciding, whether outside director emails can be ordered to be produced under Section 220).

company's ESI to outsider stockholders demanding inspection. Unlike a request for Formal Board Materials, indicia of which may be partially disclosed by public filings and which may be more easily and centrally located,[109] Informal Board Materials and Officer-Level Materials are difficult to locate, pin down, and evaluate absent a full collection and review process. That collection and review is supposed to be the end result of an inspection, not the starting point. Yet Delaware courts have held that "once the Court of Chancery has determined the subject matter that the inspection must address, the respondent must exercise good faith in agreeing to a final order that gives the petitioner the books and records she needs to accomplish the purposes that the Court of Chancery found proper."[110]

This can introduce problematic complexities to companies. Although the company will likely have the best available information between itself, the stockholder, and the Court, it too is subject to the inherent unknowability of Informal Board Materials and Officer-Level Materials absent a full collection and review. Nor is the company responding to formal discovery requests with well-defined rules—such as the ability to lodge nuanced responses and objections—to guide the process.[111] This puts the company in a difficult position, particularly in light of the compressed timing expected for responding to and litigating Section 220 actions, as addressed in Part III.B below.

C. Plaintiffs: Risk of Issue Preclusion

The prior two challenges are largely confined to the companies receiving Section 220 demands. In 2018, however, the *Alvarez* decision presented a significant—and perhaps greater—complexity for stockholders.[112] The risks of preclusive multi-forum litigation on stockholder derivative litigation were on the radar of the corporate world prior to *Alvarez*. For instance, commentators honed in on the preclusive effects that *Pyott* implied for stockholder derivative litigation.[113] But unlike in *Pyott*, where the earlier decision of the non-Delaware court was simply a matter of timing, *Alvarez* resulted

109. This is not always the case. *See supra* note 93.

110. KT4 Partners LLC v. Palantir Tech.'s Inc., 203 A.3d 738, 756–57 (Del. 2019); *see also* Transcript at 26-28, Luxor Cap. Partners, L.P. v. Mindbody, Inc., (Del. Ch. Feb. 4, 2019) (C.A. No. 2019-0070-JTL) (noting that *Palantir* "seemed to contemplate more of a role for the company in figuring out in the first instance the documents that were necessary . . . in responding to the plaintiffs' request").

111. Additional issues may persist even with better guidance for the process. For instance, it has long been the case in early Section 220 negotiations that companies may opt to produce the low-hanging fruit of Formal Board Materials and other available documents at the outset to limit issues for any subsequent Section 220 litigation. But as the stakes and expense of Section 220 inspections continue to grow, it is less clear why companies would freely offer materials that could help stockholders build a more robust Section 220 complaint or argument at trial and demand yet more documents—other than the risk of shifted fees if the companies were found to be litigating over-aggressively.

112. Cal. State Tchr.'s Ret. Sys. v. Alvarez, 179 A.3d 824, 855 (Del. 2018).

113. Geis, *Preclusion Problem*, *supra* note 2, at 267. *Alvarez*'s fact pattern allowed the Supreme Court to fill in some of the theoretical questions left by *Pyott*.

from and focused on the more salient factual scenario of the tools at hand doctrine causing a delay that contributed, if not led, to the earlier resolution of the non-Delaware litigation.

Suffice to say that *Alvarez* presented plaintiffs with the warning that following Delaware's "repeated admonition"[114] to seek books and records under Section 220 prior to filing a derivative complaint would not necessarily protect them from the preclusive effects of a less developed, but earlier filed, action elsewhere.[115] That potential roadblock is all the more challenging to plaintiffs due to Delaware's "[p]ublic policy . . . to encourage stockholders to utilize Section 220 before filing a derivative action . . . in order to meet the heightened pleading requirements of Court of Chancery Rule 23.1 that are applicable to such actions."[116] While Section 220 is not mandatory, even under the tools at hand doctrine, *Alvarez* nonetheless presents plaintiffs with a conflicting incentive on the right facts: do their due diligence and risk preclusion, or file early and risk dismissal.

Commentators have addressed, and practitioners have developed, a few potential solutions to the risk presented by *Alvarez*. We sketch certain of those out here.

One natural thought is that the increasing use of exclusive forum bylaws may do some work in preventing the situation in *Alvarez* from occurring.[117] The thinking goes that because companies may limit litigation to Delaware, the risk of multi-forum litigation precluding Delaware plaintiffs under an *Alvarez* scenario could be reduced as a byproduct. But while this approach is likely to ameliorate at least some instances that would otherwise render multi-forum preclusion, it is unlikely to solve all or even most of them. First, it is not necessarily the case that every company will have exclusive forum bylaws.[118] Second, companies will generally have the ability to waive the application of their exclusive forum bylaws.[119] Preclusion of a robust derivative complaint in

114. *See* Pettry v. Gilead Sci.'s, Inc., C.A. No. 2020-0132-KSJM, C.A. No. 2020-0138-KSJM, C.A. No. 2020-0155-KSJM, C.A. No. 2020-0173-KSJM, 2020 WL 6870461, at *17 n.169 (Del. Ch. Nov. 24, 2020).

115. In particular, Cox, Martin, and Thomas write on how *Alvarez*'s impact in multi-forum litigation has the potential to distort the policy goals and incentives of the tools at hand doctrine. *See* Cox, Martin & Thomas, *Tools at Hand, supra* note 2, at 2169-70.

116. Freund v. Lucent Tech.'s, C.A. No. 18893, 2003 WL 139766, at *4 (Del. Ch. Jan. 9, 2003).

117. Geis, *Preclusion Problem*, *supra* note 2, at 303 ("But broader use of forum selection provisions would undoubtedly mitigate the preclusion problem in [stockholder derivative litigation] by channeling lawsuits into a single adjudicative body.").

118. Exclusive forum provisions can be implemented either in corporate charters or bylaws. Exclusive forum bylaws have grown in prevalence after the Court of Chancery upheld their validity. Albert H. Choi & Geeyoung Min, *Contractarian Theory and Unilateral Bylaw Amendments*, 104 IOWA L. REV. 1, 19-21 (2018); Roberta Romano & Sarath Sanga, *The Private Ordering Solution to Multiforum Shareholder Litigation*, 14 J. EMPIRICAL LEGAL STUD. 31, 38 (2017); Jill E. Fisch, *The New Governance and the Challenge of Litigation Bylaws*, 81 BROOK. L. REV. 1637, 1667 (2016).

119. *See* Boilermakers Local 154 Ret. Fund v. Chevron Corp., 73 A.3d 934, 954 (Del. Ch. 2013) ("Like a board that has adopted a poison pill in case of some future threat and can redeem it when a tender offer poses no threat, the boards of the companies in this case have re-

Delaware that follows from a Section 220 investigation is probably a plus, not a minus, to a company facing multi-forum litigation. Cox, Martin, and Thomas note that companies thus have an incentive to consent to multi-forum litigation from hasty complaints outside of Delaware in order to box prospective Delaware plaintiffs into an *Alvarez* situation.[120]

Another popular suggested reprieve is greater scrutiny on the adequacy of first-filing plaintiffs.[121] This would be a sensible approach. But we highlight a few difficulties in application. First, and most obvious, is that this approach hinges on the Delaware Supreme Court reversing course or adjusting recent case law and policy. While *Alvarez* was careful to leave room for more nuanced rulings on the adequacy of representatives,[122] it may nonetheless require a walking-back of, if not outright overruling of, the particular holdings of *Alvarez* for cases falling under similar facts. Second, one policy recommendation accompanying this approach would require non-Delaware courts to exercise their discretion to stay litigation to await the results of stronger, post-Section 220 Delaware complaints.[123]

This policy recommendation echoes the Delaware Supreme Court's own suggestion in *Alvarez*[124] and finds the most support on the ground. The primary method that

served the right in the bylaw itself—as is traditional for any party affected by a contractual forum provision—to waive the corporation's rights under the bylaw in a particular circumstance in order to meet their obligation to use their power only for proper corporate purposes."), *judgment entered sub nom.* Boilermakers Local 154 Ret. Fund & Key W. Police & Fire Pension Fund v. Chevron Corp., 2013 WL 3810127 (Del. Ch. 2013); *see also* Cox, Martin & Thomas, *Tools at Hand*, *supra* note 2, at 2166. ("The typical provision allows the corporation to select in which forum to proceed from among those forums in which suits are pending. This discretion can be and likely is used strategically…").

120. Cox, Martin & Thomas, *Tools at Hand, supra* note 2, at 2169-70.

121. *Id.* at 2169-71 ("We believe the viability of the tools at hand doctrine requires courts to go beyond the use of the current standard for adequate representation as a means of determining whether to impose a preclusive effect on a well-researched Delaware case from the dismissal of a hastily filed action in another jurisdiction"); *see also* Shapira, *Corporate Law, Retooled*, *supra* note 2, at 2002–03 ("Going forward, the courts should switch to emphasizing the willingness and ability of plaintiffs and their attorneys to conduct thorough pre-filing investigations as a factor to consider when determining who should be lead plaintiff, or whether the plaintiffs and their attorneys provide adequate representation.").

122. In *Alvarez*, the Delaware Supreme Court found that the plaintiffs in the Arkansas Court were sufficiently adequate for purposes of the preclusion analysis notwithstanding their tactical choice not to seek a prior books and records inspection. Cal. State Tchr.'s Ret. Sys. v. Alvarez, 179 A.3d 824, 853–54 (Del. 2018). In so doing, the Supreme Court noted that it "might see this as a closer call if the Arkansas Plaintiffs had not obtained *any* documents, particularly since the complaints were focused on the state-law *Caremark* claims," but that plaintiffs had made use of relevant documents in the public domain via media outlets, including internal memoranda. *Id.*; *see also id.* at 854 ("Although it might have been a tactical error, the Arkansas Plaintiffs' decision to forgo a Section 220 demand *in this instance* does not rise to the level of constitutional inadequacy.").

123. Cox, Martin & Thomas, *Tools at Hand, supra* note 2, at 2169–70.

124. *See* California State Teachers' Ret. Sys. v. Alvarez, 175 A.3d 86 (Del. 2017) ("The Delaware Plaintiffs were warned that the Arkansas court might rule first. If the Delaware Plaintiffs feared that the Arkansas Plaintiffs were not adequately protecting their interests, we think that there is much force in the suggestion that the Delaware Plaintiffs should have sought

stockholders have used to circumvent, or at least mitigate, a risk of *Alvarez* preclusion is to seek to intervene in earlier-filed derivative actions pending the results of their Section 220 investigation. When pursued in Delaware courts, which are broadly familiar with Delaware's tools at hand doctrine and related precedents, and may even be presiding over any related Section 220 proceedings, there are good reasons to believe that this will be successful.[125] And there are practical and efficient reasons why the intervenor strategy may succeed in other courts as well.[126] However, this may be unrealistic, or at least unreliable, as a policy outside of Delaware, particularly in the event of pushback from plaintiffs in the cases in which intervention is sought.[127] After all, the initial stay in Arkansas prior to the *Alvarez* decision was vacated on appeal, and then a narrower stay was rejected by the Arkansas Court.[128]

Relatedly, the process of seeking to intervene and stay in order to pursue Section 220 rights risks putting stockholders in the precarious position of putting the cart before the horse—under Federal Rule of Civil Procedure 24(c), a motion to intervene "must state the grounds for intervention and be accompanied by a pleading that sets

to intervene in the Arkansas court to protect their interests—notwithstanding the fact that they had not yet obtained the documents they were seeking—a fact that was already known to the Arkansas court. Such an attempt to intervene, even if unsuccessful, would ensure that the rendering court would take into account the litigation pending elsewhere and make a determination as to whether any dismissal should be with or without prejudice, and as to the named plaintiff only, and what provision, if any, should be made to protect the interests of the other shareholders litigating in other fora.").

125. *See, e.g.*, Granted (Proposed Order for Leo Lissog Goldstein's Mot. to Intervene and Stay), Campanella v. Rockwell, C.A. No. 2021-1013-LWW (Del. Ch. Mar. 29, 2022) (granting motion to intervene and stay by stockholder pursuing inspection rights); Transcript at 57-64, Spriglio v. Zuckerberg, (Del. Ch. Jan. 7, 2019) (C.A. No. 2018-0307-JRS) (granting motion to intervene and stay by stockholder pursuing inspection rights).

126. *See, e.g.*, In re Alphabet Inc. Stockholder Derivative Litig., No. 19-cv-06880, 2020 WL 6493988, at *4 (N.D. Cal. June 9, 2020) (granting motion to intervene and stay by stockholder pursuing inspecting rights where the plaintiffs joined in the motion and where "[a] limited stay while [the moving stockholder] pursues his Section 220 demand will prevent fruitless and costly motion practice and will help to ensure the derivative complaint brought on behalf of [the company] is as robust as possible and is litigated in a single forum").

127. For instance, in *CCAR Investments, Inc. v. Barra*, the United States District Court for the District of Delaware denied a motion to intervene and stay filed by a stockholder pursuing inspection rights. The motion was opposed by both the defendants and by the plaintiff—which had already pursued its own inspection rights. Oral Order, CCAR Investments, Inc. v. Barra, No. 1:20-cv-00957 (D. Del. Oct. 2, 2020). Notably, however, the parties and the proposed intervenor ultimately agreed on a collaborative path forward following the Delaware Supreme Court's ruling in the intervenor's Section 220 litigation. *See* Joint Status Report, CCAR Investments, Inc. v. Barra, No. 1:20-cv-00957 (D. Del. Feb. 22, 2022). Likewise, in *In re McKesson Corporation Derivative Litigation*, the United Stated District Court for the Northern District of California denied a motion to intervene and stay—also opposed by plaintiffs in that matter—although it did so "without prejudice to a future action brought by" the proposed intervenor in order to protect the intervenor's interests. *See* Order Denying Without Prejudice Charles Ojeda's Mot. to Intervene and Stay Proceedings and Continuing Case Management Conference, In re McKesson Corporation Derivative Litigation, No. 4:17-cv-01850 (N.D. Cal. Apr. 3, 2017).

128. *Alvarez*, 179 A.3d at 831.

out the claim or defense for which intervention is sought."[129] But because stockholders seeking to intervene in this particular scenario are doing so in order to *get* the books and records to form their complaint, that can pose a problem.[130] Delaware state courts have circumvented this problem by simply ruling that the Court of Chancery's Rule 24(c) (which includes an analogous requirement to Federal Rule of Civil Procedure 24(c)) does not require an attached pleading for certain stockholders pursuing inspection rights and intervening to pursue those inspection rights.[131] Other courts, however, appear to have denied motions to intervene from proposed stockholders on the basis of Federal Rule of Civil Procedure 24(c).[132] The intervene-and-stay approach, while the

129. Fed. R. Civ. P. 24(c).

130. This point came up in *Alvarez*. In response to the Delaware Supreme Court's suggestion in the initial *Alvarez* remand that the Delaware plaintiffs "should have sought to intervene in the Arkansas court to protect their interests," California State Teachers' Ret. Sys. v. Alvarez, 175 A.3d 86 (Del. 2017), those plaintiffs pointed out the concerning interaction with Federal Rule of Civil Procedure 24(c) and argued that they could not have intervened. The Supreme Court responded:

> Our Remand Order did not suggest that plaintiffs had an *obligation* to intervene in the Arkansas action. . . . The Delaware Plaintiffs insist that they could not have intervened in Arkansas given that they did not yet have all of the documents that they felt they needed to file a complaint. However, although formal intervention is not required, there were other potential avenues to ensure that they would not be precluded, or at least have a more compelling argument before this Court that the Arkansas Plaintiffs failed to adequately represent them. Such measures include filing a statement of interest . . . and participating as amici curiae to inform the Arkansas court of their concerns. Though such other measures are not required either, we simply note that Delaware Plaintiffs' awareness of the potential for collateral estoppel, combined with their failure to coordinate with the Arkansas Plaintiffs and failure to express their concerns to the Arkansas court, suggest that all the equities may not favor the Delaware Plaintiffs here.

Alvarez, 179 A.3d at 833 (internal citations omitted).

131. *In re* Freeport-McMoRan Copper & Gold Inc. Derivative Litig., C.A. No. 8145-VCN, 2013 WL 616296, at *2 (Del. Ch. Feb. 14, 2013) ("The Proposed Intervenors contend that they have not filed a derivative complaint because, without first inspecting Freeport's books and records, they are reluctant to draft a comprehensive pleading. The real dispute—at this stage of this action—is not framed by the derivative complaint. Instead, the pressing topics involve the Plaintiffs' organizational structure and, as argued by the Proposed Intervenors, whether it is yet prudent to pursue a derivative action without the benefit of reviewing Freeport's books and records. The application filed by the Proposed Intervenors regarding the establishment of Plaintiffs' structure meets—again, for this stage of the proceedings—the objectives of Rule 24(c)."); *see also* Transcript at 57-64, Spriglio v. Zuckerberg, (Del. Ch. Jan. 7, 2019) (C.A. No. 2018-0307-JRS) (citing *In re Freeport-McMoRan* to grant a motion to intervene and stay post-*Alvarez*).

132. *See* Minute Entry, Pemberton v. Carmichael, No. 1:20-cv-04115 (N.D. Ill. Sept. 10, 2020) (denying motion to intervene and stay by stockholder pursuing inspecting rights under governing law where motion to intervene did not satisfy Federal Rule of Civil Procedure 24(c)); *but see* Order, In re Mohawk Industries Derivative Litig., No. 4:20-cv-00110, at 11-13 (N.D. Ga. Sept. 28, 2021) (granting motion to intervene by stockholder pursuing inspecting rights despite non-compliance with Federal Rule of Civil Procedure 24(c)).

current best method of avoiding preclusion under *Alvarez*, may not always be successful or reliable outside of Delaware courts.

Other approaches from commentators include relating back the date of a post-Section 220 complaint to the date of the initial Section 220 demand or disallowing Section 220 demands after a plaintiff files their complaint.[133] Both approaches are sensible, but would require adjustments to the law and further development into the complexities and effects they may have on practice. For instance, the latter approach, designed to avoid a "shoot first, ask questions second" approach, may have the opposite intended effect by (i) preventing weak complaints from becoming stronger by amendment through an investigation process, and then (ii) allowing those weak complaints to potentially preclude later-filed, post-investigation complaints. It also bears noting that current Delaware law already discourages Section 220 demands to investigate mismanagement once the stockholder has filed litigation.[134]

Another suggestion notes that a "straightforward way to mitigate plaintiff attorneys' incentives to avoid pre-filing investigations" is to "streamlin[e] the section 220 process."[135] The logic here is to "drastically reduce the delay and costs associated with section 220" in order to encourage more plaintiffs to use it.[136] This is a sensible way to increase the use of Section 220 and related inspection rights, but it is not clear that this would solve the hasty first-filer problem. Section 220 already provides myriad benefits, and is all but required to secure a strong Delaware complaint and be in the running for lead plaintiff status in contested leadership proceedings. The plaintiffs who abandon Section 220 (or related inspection rights) to instead file first are likely not looking to have the strongest complaint—they are looking to have the first one. That incentive is unlikely to change if inspection rights are faster; it may even speed up the race to the courthouse.

That said, this Article agrees with the premise that streamlining Section 220 can reduce the first-filer problem in another way. Our proposal for streamlining Section 220, described below in Part III, aims to do just that.

D. Plaintiffs: The Ambiguous Role of the Company

An additional, more nuanced puzzle exists in current Section 220 jurisprudence. For stockholders seeking materials to pursue eventual derivative litigation (the focus of this Article), the materials being sought under Section 220 are intended to be used on behalf of the company in order to press claims against fiduciaries or others that the

133. Shapira, *Corporate Law, Retooled*, *supra* note 2, at 1950.

134. *See generally* CHC Inv.'s, LLC v. FirstSun Cap. Bancorp, C.A. No. 2018-0610-KSJM, 2019 WL 328414, at *5 (Del. Ch. Jan. 24, 2019) (dismissing Section 220 litigation and noting that "although there is no bright-line rule prohibiting stockholders from using Section 220 to investigate pending plenary claims, Delaware courts have enforced those inspection demands in special circumstances only").

135. Shapira, *Corporate Law, Retooled*, *supra* note 2, at 2004.

136. *Id.*

stockholder believes have committed wrongdoing. In derivative litigation, the customary wisdom is that the company—as a nominal defendant—should maintain a limited and more neutral role (often with separate counsel from the main defendants).[137]

But under the current doctrinal regime, the stockholder is forced into an adversarial position against the company—sometimes in litigation—in order to best secure a chance to represent the company derivatively, thus requiring the future nominal defendant to act as the true defendant for what has become an almost indispensable first act of successful derivative litigation. This duality has intensified with the scope and vigor of Section 220 litigation.

III. The Proposal: Pleadings-Stage Discovery in Derivative Actions

Commentators have discussed potential solutions to the cross-section of issues introduced by modern Section 220 jurisprudence and *Alvarez*.[138] In this Article, we propose one more: revamping Section 220, solely in the derivative litigation context, as pleadings-stage discovery. We call this "Tools at Hand Discovery."

At the outset, we wish to be clear that this is a proposal to solve some of the conflicting incentives inherent in the situation where a prospective derivative plaintiff seeks Section 220 materials in order to investigate—and, if appropriate, eventually build—a derivative complaint. In other words, our proposal is specifically related to Section 220's use as a tool for the pre-filing investigation of derivative litigation. We leave open the possibility that similar proposals could encompass other areas of litigation or types of claims, such as class claims that may be explored through Section 220 inspections.[139]

---

137. *See generally* Scott v. New Drug Serv.'s, Inc., C.A. No. 11336, 1990 WL 135932, at *4 (Del. Ch. Sept. 6, 1990).

138. *See supra* Part II.C; *see also* Shapira, *supra* note 2, at 1963-69; Cox, Martin & Thomas, *Tools at Hand, supra* note 2, at 2164-71; Geis, *Information Litigation*, *supra* note 2, at 435-36.

139. *See* Shapira, *supra* note 2, at 2002; Geis, *Preclusion Problem*, *supra* note 2, at 297-301. In particular, class and derivative claims can seek to adjust similar issues, and often may arise from the same set of facts. We focus on derivative claims here because of the crossroads presented between Section 220 rights and the unique multi-forum preclusion risks for derivative claimants. That said, it bears noting that any universal solution must address the prospective direct and class claimants that may also benefit from Section 220 inspections, as they likewise contribute to the increasing costs and complexities that defendants face in the current Section 220 landscape. The formulation of Tools at Hand Discovery in this Article could be implemented to address direct and class claimants with relatively few, if any, major changes.

Similarly, any universal solution must address how to treat Section 220 demands that seek inspection for multiple purposes—say, investigating mismanagement and valuation of stock—where the former may lend itself to something like Tools at Hand Discovery while the latter may not. Because any parsing of those issues would be bound up in the precise mechanics of implementing a proposal like Tools at Hand Discovery, we only touch on it here. But we do note in passing that one solution may be to carve off the purposes amenable to Tools at Hand Discovery (which tend to be the expensive and "key" purposes of an inspection) from others (which tend to be more easily resolved, for the most part), and permit the latter to proceed through the normal statutory process. Alter-

To focus on a discussion of the practical theory and impacts of Tools at Hand Discovery, we do not detail the mechanisms by which it could be implemented. That said, we see two main approaches. Tools at Hand Discovery could be implemented either by the Delaware legislature or the Delaware courts. Implementation by the legislature would require the General Assembly to modify Section 220 at a statutory level, either to replace current Section 220 procedure for prospective derivative plaintiffs with Tools at Hand Discovery or to add it as an additional route to the same destination. Similarly, Delaware courts could adopt a limited common law equivalent to Section 220 like that described in this Article to co-exist alongside the existing statutory Section 220 apparatus.[140]

We do not address which of the options would be better in this Article, save to suggest two things. First, because this formulation of Tools at Hand Discovery is intended only to address investigations to further a derivative complaint, modifying the statute itself would have to be a surgical task that leaves Section 220 available and untouched for the myriad other purposes beyond those associated with derivative complaints. Second, permitting Tools at Hand Discovery to co-exist with the existing Section 220 statutory scheme could offer plaintiffs an attractive strategic choice for derivative claims that may face a significant preclusion risk without requiring major disturbances to the current books and records inspection system.

We first address a potential roadmap for the procedure of Tools at Hand Discovery in the context of other, long-standing Delaware procedures for pleadings-stage discovery. Following that, we discuss the benefits of Tools at Hand Discovery.

A. Relevant Precedent: Jurisdictional Discovery

Pleadings-stage discovery is not unprecedented. Delaware has well-developed case law on its use in another, similar context: jurisdictional discovery. In Delaware, a plaintiff bears the burden of demonstrating a basis for the Court of Chancery to exercise personal jurisdiction over a nonresident defendant.[141] "Prior to discovery, the plaintiff need only make a prima facie showing of jurisdiction in order to survive a motion to dismiss."[142] At that stage, "plaintiffs' burden is a relatively light one," and "the record is construed in the light most favorable to the plaintiff."[143]

But "[t]he trial court is vested with a certain discretion in shaping the procedure by which a motion [to dismiss for lack of personal jurisdiction] is resolved," and, as a result, the Court "has discretion to delay decision until further discovery is completed"

---

natively, to qualify for the benefits of Tools at Hand Discovery, the implementing structure could require inspecting stockholders to seek inspection only for applicable purposes, or agree to delay any other purposes.

140. Putting to one side whether doing so would be a permissible exercise of judicial power.

141. *See* Cornerstone Tech.'s, LLC v. Conrad, C.A. No. 19712-NC, 2003 WL 1787959, at *3 (Del. Ch. Mar. 31, 2003).

142. Medi-Tec of Egypt Corp. v. Bausch & Lomb Surgical, C.A. No. 19760-NC, 2004 WL 415251, at *2 (Del. Ch. Mar. 4, 2004).

143. *Cornerstone Tech.'s*, 2003 WL 1787959, at *3 (quotations omitted).

on the topic of jurisdiction.[144] Moreover, the plaintiff "may not ordinarily be precluded from reasonable discovery in aid of mounting such proof,"[145] although "the decision to grant jurisdictional discovery is," ultimately, "discretionary."[146] Once a plaintiff tested their jurisdictional theory through discovery, their burden shifts to the more stringent "preponderance of the evidence."[147]

Thus, Delaware has long since used a sensible system for balancing pleadings-stage discovery, at least for jurisdictional purposes. Before discovery, the plaintiff is held to a light standard and need only make a prima facie case for the Court of Chancery's personal jurisdiction over a defendant. When faced with an adequate challenge to its jurisdiction, however, the Court may grant and shape limited jurisdictional discovery—with a thumb on the scale in favor of granting the plaintiff that discovery—after which the plaintiff's burden on that topic is ratcheted up accordingly.

B. Current Procedure of Section 220

Any discussion of what Tools at Hand Discovery could look like must first start with (and diverge from) a modern Section 220 proceeding aimed at gathering information for a derivative suit. That system can be inefficient and cumbersome for both the Court of Chancery and parties.

The stockholder must first send the company a demand that meets Section 220's strict technical requirements. The company, in return, faces a five-day deadline to respond. At that point, the stockholder and company typically engage in some negotiation over a period of weeks or months—the company may produce a small subset of materials, such as Formal Board Materials, in hopes to resolve the demand or narrow the issues in a subsequent action. Often this will be under the auspices of a privately negotiated confidentiality agreement.[148]

Should the stockholder want more books and records than the company is willing to provide, it must proceed to the next step of entering the courthouse doors for the

144. Hart Holding Co. Inc. v. Drexel Burnham Lambert Inc., 593 A.2d 535, 539 (Del. Ch. 1991).

145. *Id.*

146. Neurvana Med., LLC v. Balt USA, *LLC*, C.A. No. 2019-0034-KSJM, 2019 WL 5092894, at *2 (Del. Ch. Oct. 10, 2019); *see also* Reid v. Siniscalchi, L.L.C., C.A. No. 2874-VCN, 2011 WL 378795, at *4 (Del. Ch. Jan. 31, 2011) (noting that while a plaintiff is "entitled" to reasonable jurisdictional discovery, it "must relate to the factual allegations in the Complaint and to the question of personal jurisdiction").

147. *Hart Holding*, 593 A.2d at 539; *see also Medi-Tec of Egypt Corp*, WL 415251 at *2 ("Once jurisdictional discovery has been completed, however, the plaintiff must allege specific facts supporting its position.") (internal quotations omitted).

148. Parties often agree to confidentiality agreements for Section 220 productions, although "there is no presumption of confidentiality in Section 220 productions." Tiger v. Boast Apparel, Inc., 214 A.3d 933, 939 (Del. 2019). Commentators have discussed various policy goals, implications, and proposals that relate to the confidentiality of Section 220 provisions. *See* Hamermesh, Jacobs & Strine Jr., *Leading Corporate Law, supra* note 92, at 376; Shapira, *Corporate Law, Retooled, supra* note 2, at 1970. This paper glosses over that discussion to focus on the issues presented in Part II, and the proposal of Tools at Hand Discovery to solve them.

first time in this process to file a summary action in the Court of Chancery. Although most summary actions in the Court are slated for completion within 45 to 60 days, that timeline has become harder to meet for Section 220 actions as their prominence, scope, and stakes grow. It is no longer uncommon for Section 220 actions to span 90 days from complaint to resolution, or longer, depending on their complexity.[149] But in any case, the stockholder and company will either resolve the Section 220 dispute or proceed to trial.[150]

If the stockholder prevails on some number of its inspection demands at trial, the Court will enter an order for the collection and production of responsive materials, often after giving the parties an opportunity to coalesce on a mutually agreeable order or narrowed competing forms of order. In that order, it is not unusual for the Court to permit the corporation 30 to 60 days to substantially complete its production, with some period afterward for producing a privilege log, if necessary and depending on the size and complexity of the inspection. The stockholder then receives the production and can review. Sometimes, the stockholder and corporation may have an unexpected dispute in interpretation of the order or scope of the collection—a situation not unusual given the complexities of electronic discovery—at which point they will either negotiate a resolution or go back to the Court for a supplemental ruling.

Once the dust has cleared on any such disputes, the stockholder may file a plenary complaint for its true action. Because many modern Section 220 productions are conditioned on the ability for the company to incorporate the contents of that production into any motion to dismiss a resulting plenary action,[151] the defendants have an added tool should they elect to seek dismissal.[152] Finally, if the plenary action moves past the pleadings, the discovery process begins anew on the plaintiff's substantive claims.

As a summary at this stage, we underscore the potentially misaligned incentives and hidden costs accrued by this point, putting aside the considerable cost of the Section 220 litigation and trial itself. On the defense side, companies are expected to undergo what often amounts to limited, but expedited, discovery that is growing to resemble the burdensome (and expensive) process for plenary discovery, including custodial interviews and collections to acquire the necessary ESI where required; that discovery will likely be duplicative, at least in part, of discovery to come in the later

149. As one extreme example, the *Wal-Mart* Section 220 litigation, when all was said and done, took nearly three years including appeals and subsequent disputes between the parties regarding the inspections. *See Alvarez*, 179 A.3d at 831.

150. Dispositive motion practice is rare and disfavored in Delaware's statutory, summary actions. Under Section 220, dispositive motions are typically reserved for cases in which the inspection demand is technically improper or deficient.

151. These "incorporation by reference" provisions are standard, although they remain within the Court's discretion. *See* City of Cambridge Ret. Sys. v. Universal Health Serv.'s, Inc., C.A. No. 2017-0322-SG, 2017 WL 4548460, at *3 (Del. Ch. Oct. 12, 2017).

152. *But see In re* Clovis Oncology, Inc. Derivative Litig., C.A. No. 2017-0222-JRS, 2019 WL 4850188, at *14 n.216 (Del. Ch. Oct. 1, 2019) ("But incorporating documents that might not square with a complaint's otherwise well-pled allegations is a far cry from providing the court with an undisputed factual predicate upon which judgment as a matter of law may rest. In other words, Section 220 documents, hand selected by the company, cannot be offered to rewrite an otherwise well-pled complaint.").

plenary action; and companies must confront potentially ambiguous and novel issues without the guidance of Court discovery rules and procedures, while balancing against appearing to litigate in an overly aggressive manner that could draw fee-shifting. On the stockholder side, they face the risk of preclusion in a multi-forum *Alvarez* situation while they pursue the tools at hand instructions made clear by the Delaware Supreme Court. It is against this backdrop that we present the concept for Tools at Hand Discovery.

C. Procedure for Tools at Hand Discovery

Tools at Hand Discovery could be implemented to work in any number of ways: the core idea is simply to collapse the filings of two actions, a statutory inspection and plenary derivative action, into one. The exact procedure is a means to that end. Below, we provide one such proposal, which uses pleadings-stage discovery (not unlike jurisdictional discovery) to replace the Section 220 process for derivative plaintiffs.[153] Under this proposal, the plaintiff would not be required to seek materials under Section 220 prior to filing a derivative complaint, and the pleadings-stage discovery would be conducted under the Court of Chancery's well-defined discovery rules and guidelines.[154] The following dissection of a sample case illustrates the proposal.

We begin with the plaintiff filing their plenary derivative complaint—not making a Section 220 demand or filing an inspection action—and alleging, for the sake of example, that making a litigation demand on the relevant board of directors would have been futile. Should the defendants opt to answer rather than move to dismiss under Rule 23.1, then the analysis ends here. The action proceeds to discovery as normal, with the notable exception that the failure to pursue Section 220 in the first instance is not levied against the plaintiff under the tools at hand doctrine in any future proceedings.[155] But if the defendants move to dismiss under Rule 23.1, Tools at Hand Discovery permits the plaintiff to request pleadings-stage discovery.

The standard for resolving that request borrows from two well-developed aspects of Delaware law. First, as with jurisdictional discovery, there should be a thumb on the scale in favor of entertaining the plaintiff's request for that discovery.[156] After all, the point of the Tools at Hand Discovery proposal is to encourage plaintiffs to use it

153. As noted above, this proposal is focused specifically and narrowly on stockholders that would intend to use Section 220 as a means to pursue a later derivative action. However, a similar proposal could encompass direct and class claims as well, *see supra* note 139.

154. It bears noting that, under current law, "derivative plaintiffs may believe it is difficult to meet the particularization requirement of *Aronson* because they are not entitled to discovery to assist their compliance with Rule 23.1." *Rales v. Blasband*, 634 A.2d 927, 935 (Del. 1993). By collapsing the Section 220, tools at hand process into pleadings-stage discovery, this proposal would replace that paradigm.

155. That is, the tools at hand doctrine could still apply to other sources of information—including contractual records rights or publicly available materials.

156. *See Hart Holding*, 593 A.2d at 539 (the plaintiff "may not ordinarily be precluded from reasonable discovery in aid of mounting such proof").

instead of Section 220,[157] and making it harder for them to obtain the relevant discovery under challenge would defeat that point. Second, to harmonize with and mirror existing Section 220 precedent, the standard by which the plaintiff gets discovery—and into what subjects—is the credible basis standard.[158] Although the credible basis standard is traditionally tied to a proper purpose, that latter issue would be satisfied by the plaintiff having filed a complaint alleging wrongdoing or mismanagement.

As long as the plaintiff proves a credible basis for its allegations, the Court would award limited, pleadings-stage discovery.[159] The contours of those limits could again be lifted from existing Section 220 precedent: discovery would have to be necessary and sufficient to satisfy any credible bases.[160] Like jurisdictional discovery, Tools at Hand Discovery would thus be limited to the issues pled.[161]

Critically, the analysis is *more limited* than, and otherwise identical to, analogous Section 220 litigation, and thus should not result in a greater analytical burden on the courts. The credible bases and scope analyses are lifted directly from the Section 220 case law, with any alterations to fit within discovery rules that may be appropriate. Disputes regarding proper purpose and technical compliance with Section 220, however, are dropped entirely. This comports with the Court's recent policy of ushering Section 220 litigations towards issues of scope, for most cases, and away from disputes on proper purpose.[162]

It is important to emphasize that the credible basis standard would apply *only* to

157. Assuming that the Tools at Hand Discovery co-exists with Section 220 as it exists today, rather than replacing it by legislative action. In the latter case, too, however, the goal would not be to chill the equivalent pleadings-stage discovery replacing statutory inspection rights.

158. The credible basis standard, as Delaware's lowest burden, may be equivalent (at least conceptually, and perhaps practically) with the prima facie standard used to evaluate a plaintiff's personal jurisdiction allegations before jurisdictional discovery. *See* Part III.A.

159. One potential concern that may come to mind is whether defendants may strategically answer a strong complaint—rather than moving to dismiss—in order to preclude the pleadings-stage discovery for that complaint. We think that to be a relatively remote concern. First, doing so would come at a steep cost: conceding Rule 23.1 and 12(b)(6) issues. Second, the prospective plaintiff would still be entitled to plenary discovery as a result. And third, while the above scenario in the context of multiple competing plaintiffs would make it theoretically possible to try to "game" a stronger set of plaintiff's counsel into an ultimately weaker position for lead counsel (by virtue of a weaker set of another plaintiff's counsel getting pleadings-stage discovery instead), the former could argue that the lack of a motion to dismiss their complaint spoke to its strength, not weakness, in any leadership dispute among plaintiffs' counsel.

160. Other aspects of Section 220 practice would also be emulated—for instance, the greater leeway that defendants have to redact documents, as compared to plenary discovery.

161. *See* Reid v. Siniscalchi, L.L.C., C.A. No. 2874-VCN, 2011 WL 378795, at *4 (Del. Ch. Jan. 31, 2011) (jurisdictional discovery "must relate to the factual allegations in the Complaint and to the question of personal jurisdiction").

162. *See generally* Emp.'s Ret. Sys. of Rhode Island v. Facebook, Inc., C.A. No. 2020-0085-JRS, 2021 WL 529439, at *2 (Del. Ch. Feb. 10, 2021) (commending parties when they "agreed to focus trial on the scope of documents to be produced for inspection rather than litigate the propriety of Plaintiff's stated purposes at the outset").

the inquiry of pleadings-stage discovery (thus emulating the discovery under Section 220)—*not* to the merits of the underlying litigation. Following that discovery, conducted under the auspices of Court rules and supervision rather than partially outside courthouse doors, the plaintiff could either submit an opposition brief to the motion to dismiss or amend its pleadings.[163] In either case, the Court could evaluate any current or future Rule 23.1 or Rule 12 motion with the benefit of the Tools at Hand Discovery and under the typical pleading standards.[164]

The general structure of this discovery parallels both jurisdictional discovery and existing Section 220 precedent. Like jurisdictional discovery, Tools at Hand Discovery would grant the plaintiff discovery under a relatively lenient standard and counterbalance that with a relatively more onerous standard post-discovery. And like Section 220, Tools at Hand Discovery uses the familiar credible basis and necessary and sufficient standards to provide discovery in advance of the heightened standard of a plenary Rule 23.1, or demand futility, motion to dismiss.

Tools at Hand Discovery thus collapses the processes of negotiating a Section 220 demand, filing and trying a separate Section 220 action, and awaiting the results thereof before filing a plenary action. We do not pretend in this Article to offer the only solution to get at this idea, however. There are other permutations of the same system. One could imagine a system that continues to implement some narrowed version of the proper purpose requirement or applies to non-derivative direct or class claims.[165] Similarly, one could imagine a world where Section 220 remained available and untouched as an option, to the extent stockholders wished to seek more information, with Tools at Hand Discovery existing as a common law, strategic option to streamline litigation. We offer the above as a proposal for the more conceptual solution of combining derivative Section 220 inspections into plenary litigation.

163. *See* Del. R. Ch. 15(aaa) (permitting a plaintiff to amend its initial pleadings in response to a motion to dismiss). In Delaware, "Court of Chancery Rule 15(aaa) requires plaintiffs faced with a motion to dismiss [under Rule 12(b)(6) or Rule 23.1] to either amend their complaint instead of opposing the motion, or else stand firm and face a dismissal with prejudice if they lose." *Otto Candies, LLC v. KPMG, LLP*, C.A. No. 2018-0435-MTZ, 2019 WL 1856766, at *1 (Del. Ch. Apr. 25, 2019). This somewhat peculiar procedure is intended "to curtail the number of times that the Court of Chancery was required to adjudicate multiple motions to dismiss the same action." *Braddock v. Zimmerman*, 906 A.2d 776, 783 (Del. 2006). To the extent a procedure like Tools at Hand Discovery were implemented in Delaware, the implementers would have to decide whether the amendment contemplated above would burn the plaintiffs' amendment as a matter of right under Rule 15(aaa), or would act as an "extra" amendment under this procedure through Rule 15(aaa)'s "good cause" provision.

164. In re Citigroup Inc. S'holder Derivative Litig., 964 A.2d 106, 139 (Del. Ch. 2009) ("The standard for pleading demand futility under Rule 23.1 is more stringent than the standard under Rule 12(b)(6), and 'a complaint that survives a motion to dismiss pursuant to Rule 23.1 will also survive a 12(b)(6) motion to dismiss, assuming that it otherwise contains sufficient facts to state a cognizable claim.'") (quotations omitted).

165. *See supra* note 139.

D. Problems Addressed by Tools at Hand Discovery

The benefits of Tools at Hand Discovery are straightforward. It streamlines two processes by combining them into one, imposes much-needed Court guidance and guardrails on the discovery process, and further permits plaintiff stockholders to reduce the risk of an *Alvarez*-like preclusion by first-filers outside of Delaware.

1. Streamlined path to derivative actions

Although the Section 220 process as a summary, statutory action makes great sense for many of its intended purposes, including stockholders seeking stockholder lists, books and records to value their shares, and related issues, it does not offer much in the way of cognizable benefit relative to Tools at Hand Discovery when the ultimate goal is a derivative action. If anything, it requires the Court of Chancery and parties to sort through often ineffective challenges to technical aspects of a demand, proper purpose, and the extent of involvement of the stockholder's counsel.[166] Those are important obstacles peculiar to Section 220—not the merits of potential derivative claims—and can be sidestepped by Tools at Hand Discovery where the ultimate goal is a derivative action.

Relatedly, collapsing the Section 220 process into its eventual derivative litigation for appropriate stockholders also eliminates the uneasy conceptual flip of the company from an adversary in the former to an ideally neutral party in the latter. Under Tools at Hand Discovery, the company can be a nominal defendant from the start.

As a result, there is little on the "pro" side of keeping Section 220 separate from a subsequent derivative plenary action, other than, arguably, the sorting effects of Section 220 litigation itself. There is an argument that it is a feature, not a bug, of current Section 220 procedure that so much of it happens outside the courthouse doors. This has the laudable benefit of reducing the expenditure of judicial resources. However, it is not entirely clear how many judicial resources are being saved. Research by Cox, Martin, and Thomas, who documented and analyzed the rate and substance of Section 220 litigation in the Court of Chancery from 2004 to 2018, suggested the following conclusions:

> [W]e find a large increase in the amount of Section 220 corporate litigation, a shift within that litigation away from cases seeking a stocklist toward cases seeking books and records, and an increase in the intensity of the litigation effort on both sides. It is also apparent that courts expend meaningful effort in resolving stockholders' requests under Section 220. Our data are consistent with the belief that Section 220 litigation is a surrogate for litigating the merits of the claim. Finally,

166. *See* Wilkinson v. A. Schulman, Inc., C.A. No. 2017-0138-VCL, 2017 WL 5289553, at *3 (Del. Ch. Nov. 13, 2017) (finding stockholder lacked proper purpose for inspection where the demand was orchestrated and pursued almost exclusively by counsel); *see also* Inter-Local Pension Fund GCC/IBT v. Calgon Carbon Corp., C.A. No. 2017-0910-MTZ, 2019 WL 479082, at *9–10 (Del. Ch. Jan. 25, 2019) (addressing and rejecting challenge under *Schulman*).

> we see that many plaintiffs are using Section 220 as a pre-filing discovery technique in corporate cases and wind up ultimately filing a second action after they finish their inspection litigation, with a significant number of these subsequently filed cases resulting in success for the plaintiffs.[167]

So even if one grants that the Delaware courts spend fewer judicial resources on Section 220 cases than they would on corresponding Tools at Hand Discovery disputes, it is likely not a significant magnitude of difference.[168] As noted in Part III.C, the analytical burden should also be more focused under Tools at Hand Discovery, aligning with recent Court of Chancery decisions that encourage parties to focus on issues of scope. Moreover, the judicial resources are only one set of ledgers, the others being the companies and the stockholders. Under the current paradigm, companies face an outsized level of the expense compared to what they would under Tools at Hand Discovery, and prospective derivative plaintiffs face an unnecessary risk of preclusion if they are caught in the same sort of multi-forum crossroads that occurred in *Alvarez*.[169]

2. More guidance and less expense

As addressed in Parts II.A-B above, the mounting incorporation of ESI into Section 220 has brought with it complexities and ambiguities in how to apply plenary discovery practices and procedures to a statutory, summary inspection. Tools at Hand Discovery would help smooth those issues. Parties could make, respond and object to, and seek Court guidance on discovery under Rules 26, 34, and more—including the limited and appropriate use of interrogatories under Rule 33 and related discovery apparatuses familiar to practitioners and the Court. The Court, as is not uncommon in the context of jurisdictional discovery, could assign and appoint special discovery masters to assist the parties with resolving fast-moving and complex disputes. And any discovery ordered would be tied to real, sworn allegations, forcing the parties to tailor their requests and productions to actual issues in the litigation, rather than inspections that may result in nothing at all. That would ground the issues for Tools at Hand Discovery and should reduce the expense when compared to current Section 220 proceedings, which include floating requests tied to the broad anchor of proper purpose.

---

167. Cox, Martin & Thomas, *Tools at Hand, supra* note 2, at 2146–54.

168. While conventional wisdom is that Section 220 and the tools at hand process have the benefit of pre-filtering litigation that gets to the Court, the combination of those two doctrines—combined with the increased scope of Section 220 productions—makes the sharp increase in Section 220 litigation a natural consequence. Put another way, the pre-filtering mechanism of Section 220 and the tools at hand doctrine may have eroded as the scope (and necessity) of Section 220 productions increased.

169. Notably, because a plaintiff who takes advantage of the Tools at Hand Discovery process eschews the standard Section 220 process, there is also less risk that plaintiffs will fail to get off the starting line because of the strict application of the formalistic, technical requirements in Section 220, as alluded to in note 30 above.

Addressing the puzzle of the former officers and directors posed in Part II.B underscores the point. As there, say that the Court agrees to permit Tools at Hand Discovery that includes the personal devices of former officers and directors. First of all, it is likely that those former officers and directors—to the extent their personal devices were significant enough to merit discovery—would be parties to the litigation themselves. That alone solves the issue because, as parties, they are subject to discovery themselves rather than having to be reached through the company under Section 220. But even presuming they were not, the parties could agree to an amicable procedure or, barring that, the plaintiff could make appropriate use of motions to compel or subpoenas, as the facts demanded. The only puzzle here under Tools at Hand Discovery is a logistical one, not a conceptual one.

Finally, while it is unlikely that shifting this procedure to the plenary action would alleviate the majority of expense that naturally comes with ESI discovery, companies would at least benefit on the cost side from the reduced number of actions and efficiency drains that come from bifurcating the process into a separate Section 220 and plenary action.

3. Reduced likelihood of preclusion

The Supreme Court's *Alvarez* decision puts Delaware plaintiffs in a tough spot should they find themselves in the right storm of facts. Because they all but must use Section 220 in order to build an adequate complaint, and because that process can take months (and sometimes, albeit rarely, years), they are easily outpaced by even careful and thoughtful "first-filers" in other jurisdictions.[170] But fitting the tools at hand analysis into the pleadings stage of the ultimate plenary action permits Delaware plaintiffs to get to the courthouse in a reasonable time to compete for representation issues and negotiations with other national plaintiffs, and without needing to engage in the potentially unreliable intervene-and-stay approach that stockholders currently use. While this does not eliminate the possibility of preclusion under *Alvarez*, it at least further limits it, and does so while preserving *Alvarez*'s rulings on issue preclusion, comity, and due process.

For instance, in the Arkansas action that paralleled the Delaware proceedings in *Wal-Mart* and *Alvarez*,[171] the U.S. District Court for the Western District of Arkansas initially granted the defendants' motion for a stay pending demand futility rulings in Delaware. On appeal, the Eighth Circuit Court of Appeals reversed, but allowed the District Court to impose a "more finite and less comprehensive stay, if it concludes that such a stay properly balances the rights of the parties and serves the interests of judicial economy" on remand.[172] Yet the District Court denied the defendants' second motion for a stay—despite acknowledging a potential issue preclusion effect in the

170. *See* Huang & Thomas, *supra* note 26, at 938 ("For books and records cases, the mean delay [between the initial court filing and the final outcome in the case] in around ten months (312) days, while the median delay is approximately six months (193 days).").

171. The plenary action in *Alvarez* followed from the Section 220 proceedings in *Wal-Mart*.

172. Cottrell v. Duke, 737 F.3d 1238, 1249 (8th Cir. 2013).

future—because of the ambiguities in timing introduced by the Section 220 process:

> The stay that Defendants seek will not expire until after the following events have occurred: the section 220 appeal is decided by the Delaware Supreme Court; the section 220 proceeding is remanded back to the trial court for final disposition; the Delaware plaintiffs file a consolidated complaint; the Delaware defendants move to dismiss the consolidated complaint; and the Delaware state court rules on the motion to dismiss. *Neither the Court nor the parties are certain how long these processes will take, but they will likely continue into 2015*. The action in this Court has already been delayed at least two years. *Given the delays that have occurred in the Delaware action since the Court issued the stay order in this case, the Court is no longer convinced that a stay in this case promotes the interests of judicial economy*. Further, the Court is obliged to allow this case to proceed in an expeditious manner.[173]

That situation may have turned out differently if the Delaware plaintiffs were permitted to utilize the tools at hand in the context of their ultimate plenary action, rather than through Section 220.

Conclusion

Our proposal for Tools at Hand Discovery introduces a number of benefits. Companies, stockholders, and the public all benefit from a streamlined procedure taking place entirely within the courthouse doors, rather than partially through extra-judicial negotiations and demands. Defendant companies benefit from greater structure and guidance, and potentially reduced costs, in the expanding use, collection, and production of ESI as part of the Section 220 inspection (or analogous Tools at Hand Discovery). And stockholder plaintiffs benefit from reduced reliance on technical demand compliance and risk of preclusion by first-filers in other jurisdictions. These benefits merit a reexamination of Section 220's role in derivative litigation—and an examination of Tools at Hand Discovery as a replacement.

173. *In re* Wal-Mart Stores, Inc. S'holder Derivative Litig., C.A. No. 4:12-cv-4041, 2014 WL 12700619, at *2 (W.D. Ark. June 4, 2014) (emphasis added).