75 Bus. Law. 2123

Business Lawyer
Summer, 2020

Article

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THE PARADOX OF DELAWARE'S "TOOLS AT HAND" DOCTRINE: AN EMPIRICAL INVESTIGATION

Much has been written on the subject of abusive shareholder litigation. The last decade has witnessed at first an increase and then a dramatic spike in such suits, primarily suits filed in connection with mergers and acquisitions. Delaware courts are known for not just their deep experience in corporate lawsuits but as being doctrinal innovators. One such innovation occurred in Rales v. Blasband, 634 A.2d 927 (Del. 1993), *establishing the "tools at hand" doctrine, whereby, before considering whether to grant a motion to dismiss, the court admonishes the shareholder to resort to inspection rights accorded by the Delaware General Corporation Law so as to gather facts necessary for the complaint to survive the pretrial motion. On its face, the doctrine reflects a balanced approach to the competing claims that shareholder litigation is necessary to address and discourage managerial misconduct and the belief the suits are vexatious, being brought to garner an extortionate settlement. In this article, we empirically examine how* Rales *has dramatically changed the composition of suits in which shareholders seek to exercise their inspection rights. We compare the composition, outcomes, and related questions surrounding such suits maintained 1981-1994 with the post-*Rales *period 2004-2018. We not only find that post-*Rales *suits entail substantially more suits involving "books and records" requests but, in tracing the results of those requests, we find that many suits maintained after using the tools at hand yield outcomes favorable to plaintiffs. Our data also support the belief that such books and records litigation is something of a surrogate for a trial on the underlying claims of wrongdoing. Thus, our data support the positive social benefits of Delaware's innovative tools at hand doctrine. Nonetheless, in the concluding section, we bring bad news. The increasing usage of private ordering to limit inspection rights of owners--stockholders, partners, and members--raises concerns that the potential benefits of the tools at hand doctrine will not be fully realized. We also reason that the Delaware Supreme Court's decision in* California State Teachers' Retirement System v. Alvarez, 179 A.3d 824 (Del. 2018), *likely* ***2124** *eviscerates the tools at hand.* Alvarez *holds that the Delaware litigant's suit is precluded by an earlier decision by another jurisdiction that a derivative suit initiated by a different shareholder than was prosecuting the Delaware action lacked standing to sue. We reason that* Alvarez *is a powerful disincentive for Delaware litigants to pursue the tools at hand as the time expended in pursuing that right may enable competing slothful lawyers to take their chances with a less developed complaint in a sister jurisdiction's courts on the same claim.*

I. INTRODUCTION

Since at least 1999, most class action litigation in Delaware has involved M&A deals where the charge was either that the directors, in selling the company, failed to fulfill their *Revlon* duties to pursue other bids or the transaction involved control shareholder self-dealing so that *Weinberger*'s heightened standard of review applied. [1] Under these plaintiff-friendly standards of judicial review, deal litigation became so ubiquitous that, by 2013, over 96 percent of large mergers and acquisitions ("M&A") transactions were challenged by class action shareholder lawsuits. [2] This shift was coupled with a change in the focus of M&A litigation away from reviewing the merits of the target company directors' actions toward examining the adequacy of a company's

disclosures about the transaction.[3] Post-closing litigation became common and disclosure-only settlements abounded.[4] This led the Delaware courts to adopt a series of measures designed to combat frivolous litigation.[5]

Concurrently, the Delaware courts developed an alternative method to balance the conflicting needs of the plaintiffs and defendants in shareholder derivative litigation through the "tools at hand" doctrine. The cornerstone of the doctrine is the shareholders' mandatory right to seek information from the corporation as qualified by Section 220 of the Delaware General Corporation Law ("DGCL").[6] The tools at hand doctrine encourages plaintiffs to use Section 220 to gather facts believed necessary to survive a motion to dismiss in shareholder litigation. The doctrine can be seen as providing a balanced response to the problems faced by plaintiffs in shareholder suits: To survive a motion to dismiss a derivative suit, ***2125** the plaintiff must allege specific facts to establish that a pre-suit demand on the board of directors is excused; however, until that is determined, the plaintiff is denied discovery to obtain the facts necessary to so plead. Similarly, discovery is not available in non-derivative shareholder suits until the complaint survives a motion to dismiss. Absent access to company records and documents, the plaintiff is limited to information that is public, which is frequently less robust than the materials in the company's possession, so that the resulting derivative complaint is less developed and likely not to survive a motion to dismiss. In data that we hand collected for this article, we show that the tools at hand doctrine has been the source of information for a large number of shareholder suits, and that such access is associated with many successful outcomes for the plaintiffs. Equally significant, the data show that, since the tools at hand doctrine came into existence, there has been both a dramatic increase in the amount of books and records litigation but the litigation that now occurs in this area is much more intense, essentially supplementing, if not displacing in some instances, suits focused on the underlying claims. Books and records suits are the new battleground in shareholder litigation.

The tools at hand historically had not been widely used in merger litigation.[7] While *Revlon* and *Weinberger* litigation was escalating to unprecedented levels, plaintiffs rarely used the tools at hand doctrine in those cases. Instead, the norm was to quickly file these cases without pre-filing discovery. Much of such litigation was unrelated to the substantive merits of the legal claim of unfairness but played on wresting peppercorn settlements with fee awards to the plaintiffs' counsel based on modest disclosure or governance enhancements by the defendants. Supporting this critical view are the rapid increase in the amount of deal litigation, the short interval after a deal is announced that challenging suits are filed, and the evidence that settlements rarely yield observable gains to their shareholders. For our purposes though, what is key is that, when these factors are combined with the dramatic rise in deal litigation *after* the development of the tools at hand doctrine, there can be serious cause to wonder whether that doctrine has failed in its mission in the deal litigation arena: facilitating stronger complaints for suits filed and discouraging pursuit of suits lacking merit. Yet, for a number of years, the Delaware courts did little to address this problem.[8]

Eventually in 2014-2015, the Delaware courts decided to take action to curtail the deal litigation explosion by making critical changes to the underlying ***2126** substantive legal standards in these types of M&A lawsuits. In two important decisions, *Corwin v. KKR Financial Holdings LLC* ("*Corwin*")[9] and *Kahn v. M&F Worldwide Corp.* ("*MFW*"),[10] the Delaware Supreme Court blessed the use of shareholder ratification as a means to dismissing shareholder M&A class actions. *Corwin* fundamentally qualified the legal standards in *Revlon* cases so that today a fully informed, uncoerced shareholder vote approving a merger will result in the application of the highly deferential business judgment standard for judicial review of the directors' conduct of the sale. *MFW* attached the same effect to fully informed shareholder ratification by a majority of the minority vote in control shareholder mergers when coupled with the approval of a special committee of independent target firm directors. Crucially, the Delaware courts went further and allowed defendants to win dismissal in such cases based on a motion to dismiss, and did so without permitting the plaintiffs merits-based discovery.[11] And, the Delaware court's frustration with the bar most directly was manifested in *In re Trulia, Inc. Stockholder Litigation*,[12] announcing that disclosure only settlements (and importantly, the fee awards in such settlements) will be approved only where the disclosures are "plainly material." *In re Trulia* thus strongly discouraged filing claims in Delaware courts of the type that previously yielded non-substantive relief, suggesting they were filed with an eye toward garnering fees through a quick settlement that provides minimal additional disclosures. The net effect of all of these changes was to greatly reduce the level of merger litigation in the Delaware courts but to increase its level in the federal courts.[13]

While Delaware might have reached this point by deploying stronger procedural devices by tweaking the standards to apply in such cases, as was Congress' response in the Private Securities Litigation Reform Act of 1995 ("PSLRA") to alleged abuses surrounding securities class actions,[14] Delaware instead chose ***2127** to redefine its substantive law to focus intensely on shareholder ratification. Effectively, this means that plaintiffs need to plead that the shareholder vote was not fully informed to

avoid the preclusive effect of *Corwin* and *MFW*. But, as observed earlier, this is a task that, absent the tools at hand, can only be accomplished by using only publicly disclosed information.

Suddenly the tools at hand became vital to plaintiffs in merger litigation as a backdoor method of obtaining pre-filing discovery. As with derivative litigation, the Delaware courts attempted to encourage greater responsibility on the plaintiffs' bar in filing class actions than the record to date shows it has generally demonstrated. We might therefore see *Corwin* and *MFW* as a substantive response to plaintiffs' failures in such suits to more frequently use the tools at hand in merger litigation.

Corwin, *MFW,* and *Trulia* have overshadowed the value of the tools at hand doctrine. Despite the troubling record of deal litigation, we show not only how the doctrine is complimentary to the substantive and procedural tools the Delaware courts have established to address the tsunami of deal litigation, but more importantly, our foremost contribution is to show empirically how resort to the tools at hand has increased exponentially and that use of the doctrine is associated with socially positive outcomes, as the data below are consistent with books and records litigation serving a winnowing process-- leading to dismissal or non-pursuit of suits as well as strengthening the claims in other suits. Just as facts gathered through a Section 220 records request may provide the basis for excusing a demand requirement in the case of a derivative suit, such as the access to facts to plead with particularity so as to raise a reasonable doubt that a majority of the directors is independent, so might the request unearth facts suggesting a breach of fiduciary duty or facts that should have been disclosed in a matter submitted to the shareholders for approval.

We closely examine below the great utility of the tools at hand doctrine in facilitating the advancement of meritorious shareholder litigation. Since the doctrine was firmly embraced by the Delaware courts, there has been a dramatic, nearly thirteen times increase, in Section 220 inspection requests directed toward investigating possible management misconduct. Moreover, the evidence we gather supports the belief the proceedings are often not summary but hard fought surrogate litigation probing the extent of management misconduct. Our results are consistent with the view the broad use of the tools at hand doctrine provides a valuable mechanism for sorting strong cases from others, and likely facilitates settlements as well. Despite these virtues, the tools at hand doctrine is vulnerable on two fronts.

First, private ordering is very much in the winds in Delaware, with the breeze stimulated by the Delaware Chancery Court's full embrace in *Boilermakers Local 154 Retirement Fund v. Chevron Corp.*, [15] upholding a forum selection bylaw adopted unilaterally by the board of directors on the basis the corporation's charter empowered the board to adopt bylaws and the substance of the bylaw was ***2128** appropriate for inclusion in a bylaw. In a post-*Boilermaker* world, there is cause to wonder whether a duly adopted bylaw may so qualify a shareholder's access to the books and records to determine if officers or directors have misbehaved as to weaken the operation of the tools at hand doctrine. Any discussion today of procedures that apply to shareholder litigation must occur with a healthy regard for the fact that certain corporate behavior spawns suits in multiple forums by different plaintiffs, each prosecuted by different law firms vying for their share of the total fees to be produced by the questioned (in)activity. We therefore see that a very high percentage of merger announcements are quickly followed by multiple suits in multiple forums alleging misconduct in connection with the merger transaction. [16] Similarly, the filing of a class action alleging the public company's announcement was materially misleading now prompts derivative suits against the company's directors, alleging either their complicity or their failure to properly monitor the behavior of those who committed the disclosure violation. [17] Such multiple suits pose challenging coordination problems among the forums as the suits are not just procedurally diverse, involving sometimes direct, class and derivative actions, but can be filed in numerous state or federal courts. Hence, the elephant in the room in our examination of experiences under Delaware's tools at hand doctrine is how that doctrine survives in an era of such multi-forum litigation. Thus, we assess here the potential impact of *Alvarez* on the vitality of the tools at hand doctrine.

We later review a few modern developments that elevate this fear. However, we are more deeply concerned that the positive effects--as reflected by our data-- the tools at hands doctrine has had in the non-corporate setting, most notably litigation within limited partnerships ("LPs") and limited liability companies ("LLCs"), will be short lived. A central attraction of non-corporate business forms is that they enjoy the statutory imprimatur for private ordering. [18] As reviewed below, the inspection rights of their partners and members are not enshrined with the same strong public policy on which Section 220 inspections by shareholders are based. At the same time, there is no reason to believe that owner concerns for management misbehavior is less likely in a non-corporate form of business.

Second, the incentives that plaintiffs have to use Section 220 have been severely undercut by the Delaware Supreme Court's 2018 decision in *California State Teachers' Retirement System v. Alvarez*.[19] There the *New York Times* published a story that provided extensive details concerning a Wal-Mart subsidiary in Mexico engaging in bribery as well as a cover-up by Wal-Mart executives. One ***2129** group of Wal-Mart shareholders filed a lawsuit in Delaware that was stayed by the Chancellor who admonished them to file a Section 220 inspection case, which they then did. A second group of investors filed a derivative suit in Arkansas federal court without using the books and records statute. Initially, the Arkansas court stayed its action to allow the Delaware 220 action to proceed, but, after numerous delays in Delaware, ultimately decided to dismiss the Arkansas case for failure to make demand on the directors. The Delaware Supreme Court subsequently held that the decision of the Arkansas court barred the Delaware plaintiffs from pursuing their merits case.

While the Delaware decision may have correctly applied earlier precedents, according preclusive effect to the dismissal of another court's derivative suit, the net effect of the *Alvarez* decision is to penalize diligent plaintiffs that investigate potential wrongdoing using the books and records statute before filing their merits-based action to the benefit of less careful law firms that hastily file and litigate shareholder suits in search of quick settlements.[20] We thus may view *Alvarez* as not just an unintended consequence of the tools at hand doctrine but also severely restricting its use. It, of course, is not possible to even speculate whether the Delaware plaintiff, following access to the books and records sought under Section 220, would have been successful in alleging facts sufficient to excuse a demand on Wal-Mart's board. It is such uncertainty that causes us to believe the better policy is to enable books and records requests in light of the beneficial effects that accompany the tools at hand doctrine, as reflected in the data below.

This article proceeds as follows. In Part II, we review the operation of Section 220 with a sharp eye toward its use in shareholder litigation as a discovery mechanism because of the Delaware courts' development and application of the tools at hand doctrine. Part III closely examines the role the doctrine plays in *Revlon*and *Weinberger*-inspired suits, especially after their recent modification by the *Corwin* and *MFW* decisions. We develop how the Delaware courts have forced plaintiffs to use Section 220 as a pre-filing discovery tool in M&A litigation and how recent opinions in this context underscore the great benefits plaintiffs have reaped in M&A litigation by deploying Section 220 to obtain the information needed in drafting their complaint's allegations.

In Part IV, we present our empirical analysis of the evolution of Section 220 and the tools at hand doctrine. Using our prior empirical study of Section 220, in Subpart A, we show that, during that earlier time period (1981-1994), Section 220 was primarily used by plaintiffs that were seeking to obtain the company's stocklist and much less frequently sought to obtain books and records. The median successful stocklist litigation took about one month to be resolved; unsuccessful stocklist litigation took two months. Books and records cases took longer to resolve: The median successful litigation lasted three months, while an unsuccessful ***2130** litigant waited nine months. In both types of cases, the parties expended substantial resources to resolve the petitioner's rights under Section 220.

In recent years, there has been an explosion in Section 220 litigation. Using a new hand-collected sample of all 699 corporate cases and 154 LLC/LP cases from 2004-2018, we find that books and records demands far exceed stocklist requests, although a significant number of cases request both types of documents. We also find differences in the frequency, length, intensity, and outcome in these actions from those brought in the earlier time period. Overall, these data show a thirteen-fold expansion of the use of Section 220 in recent years.

However, there are some indications that this trend has created pressure to rein in shareholder inspection rights. In Part V, we show that, although the Delaware legislature and courts have generally been supportive of reasonable restrictions on the rights of shareholders, Delaware LLCs and LPs may be acting through their formative documents to weaken investors' inspection rights contractually. We begin Part V by discussing the restrictions that the Delaware courts have approved, and then look at how LLCs and LPs have used private contracting to shape their investors' inspection rights. Finally, we present data on plaintiffs' inspection demands in LLC/LPs. The overall results are similar to those for corporations.

Part VI considers *Alvarez*'s multiple impacts on the tools at hand doctrine going forward. We believe *Alvarez* can encourage a defendant involved in multi-forum litigation to press forward toward dismissal or settlement in forums where the plaintiff has not pursued a parallel books and records request so that the defendant's counsel has cause to believe the complaint is less developed and thus more vulnerable. In particular, we are concerned about the bad incentives it gives to defendants to conduct reverse auctions, namely wresting a very weak settlement as a result of the pressure a weak complaint places on the plaintiff. In

these situations, defendants settle cases with the weaker members of the plaintiffs' bar at the expense of the better plaintiffs' law firms that file Section 220 cases to uncover solid evidence of corporate wrongdoing before bringing their merits-based cases.

We conclude by observing that Delaware should resolve the paradox its courts have created. The Delaware Supreme Court has admonished plaintiffs to use Section 220 before they file shareholder litigation. The plaintiffs' bar heeded the courts and has brought increasing numbers of books and records suits. Now, in *Alvarez*, the Delaware Supreme Court has increased the peril of heeding the court's earlier advice to use the tools at hand. We argue that the Delaware courts and legislature should be more protective of inspection rights, as they are one of the few areas where shareholders' rights are mandatory in nature, and that they need to be strong if they are to give investors the information that they need to monitor management effectively,[21] especially after *Corwin* and *MFW*. We believe this same policy should apply to LLCs and LPs so that inspection rights are protected from qualification to the same extent as in the corporate entity.

*2131 II. GENESIS OF THE TOOLS AT HAND

Section 220(b) of the DGCL embraces and protects one of the central ownership rights stockholders have, that is, the right to inspect the books and records of a Delaware corporation.[22] Courts hold that this right "cannot be eliminated or limited by a provision in a corporation's certificate of incorporation."[23] That right is not absolute but conditional,[24] because access is contingent upon the stockholder "demonstrat[ing] a proper purpose for making such a demand."[25] The statute defines a "proper purpose" as "a purpose reasonably related to such person's interest as a stockholder."[26] Examples of established proper purposes include, but are not limited to,[27] investigating corporate mismanagement,[28] ascertaining the value of stock,[29] soliciting other stockholders' support of derivative action,[30] investigating the independence of a special litigation committee for its demand-refusal decision,[31] and communicating with other stockholders in order to effectuate management policy changes.[32] A stockholder seeking books and records bears the burden on demonstrating a proper purpose for her request.[33] The Court of Chancery has discretion to refuse an inspection ***2132** for an improper purpose.[34] For example, any request based on a purpose that is "adverse to the corporation's best interest" will be denied.[35]

The breadth of the shareholder's inspection right is underscored by it not being necessary that the plaintiff establish the proper purpose by a preponderance of the evidence.[36] Instead, to survive a motion to dismiss in a Section 220 case for pre-suit discovery, the stockholder must demonstrate a proper purpose based on "evidence that established a *credible basis* from which the Court of Chancery could infer there were legitimate issues of possible waste, mismanagement or wrongdoing that warranted further investigation."[37] In other words:

> [T]o satisfy the burden of proof necessary to succeed at trial [in a Section 220 action], a plaintiff seeking inspection for the purpose of investigating possible waste, mismanagement, or breach of fiduciary duty is obligated to demonstrate some credible evidence of possible mismanagement or breach of duty sufficient to warrant further investigation to determine whether such activity is, in fact, afoot .... [T]he Court of Chancery has observed that the so-called "credible basis" standard sets "the lowest possible burden of proof" ... [on] the plaintiff stockholder.[38]

As such, the evidentiary standard to gain access is much lower than the test applied by courts in deciding if the allegations of a complaint are sufficient to survive a motion to dismiss.[39] The lower standard enables plaintiffs in Section 220 actions to make requests that will lead to additional discovery of potential management wrongdoing even though they lack sufficient evidence to bring such a claim directly. However, the credible basis standard provides some protection to corporations as well. In particular, the Delaware courts have stated that the credible basis standard threshold is an important safeguard against "fishing ***2133** expeditions."[40] In addition, even a successful plaintiff is limited to obtaining those documents that are "necessary and essential" to achieving the plaintiff's stated purpose.[41]

Under Section 220(c) of the DGCL, the Court of Chancery enjoys broad discretion to "prescribe any limitations or conditions with reference to" a books and records inspection.[42] Courts may, and customarily do, condition inspections on the entry of a

reasonable confidentiality order. The Delaware Supreme Court, in *Tiger v. Boast Apparel, Inc.*, recently took a balanced approach to the question of confidentiality, holding that, even though inspections are not subject to a presumption of confidentiality, courts are to weigh the stockholder's legitimate interests in free communication against the corporation's legitimate interests in confidentiality in considering the corporation's request for protecting the discovered information. [43]

A stockholder is permitted to obtain copies of books and records that "address the crux of the shareholder's purpose and if that information is unavailable from another source." [44] Additionally, the Delaware courts have required that a stockholder sign a confidentiality agreement when nonpublic information is sought, [45] such as when the inspection involves documents that reflect sales strategies and valuations. [46] Documents obtained under a Section 220 action that are subject to a confidentiality agreement "will remain confidential unless the stockholder concludes that grounds exist to initiate litigation and the court in which that proceeding is brought determines to include those documents in the public record." [47]

***2134** In other settings, the Delaware courts have held that plaintiffs must show "a proper purpose and make specific and discrete identification, *with rifled precision*, of the documents sought." [48] Furthermore, a stockholder's inspection right is "not open-ended; it is restricted to inspection of the books and records needed to perform the task," [49] and stockholders are not afforded the right to engage in "wide ranging discovery that would be available in support of litigation." [50] As seen, access linked to possible shareholder litigation is conditioned on allegations setting forth a credible basis of misconduct.

Books and records requests may uncover information leading to the shareholder litigation alleging breaches of fiduciary duties. State law breach of fiduciary duty claims can be either class action claims (direct injuries to the shareholder) or derivative claims (injury to the corporation resulting in indirect harm to the shareholders). In derivative litigation, the board of directors normally decides whether the corporation should file a suit and, absent some disqualifying event, the plaintiff must first request that the board bring the action. In Delaware, a plaintiff bringing a derivative suit that makes demand on the board of directors concedes that the board has the power to choose whether to pursue the action. [51] As a result, plaintiffs seek to avoid asking the board's permission to bring the case by claiming that the directors are disqualified from doing so because they have breached their fiduciary duties.

The difficulty with this path is that the plaintiff must allege with particularity facts that create a reasonable doubt that making demand on the defendant directors is futile. [52] However, "[t]he law in Delaware is settled that plaintiffs in a derivative suit are not entitled to discovery to assist their compliance with the particularized pleading requirement of Rule 23.1 in a case of demand refusal." [53] In light of this barrier to discovery, in the seminal Delaware case of *Rales v. Blasband*, [54] the Delaware Supreme Court urged derivative plaintiffs to use Section 220, the so-called tools at hand, [55] to meet the particularization requirement to excuse a demand. [56] That is, *Rales* provides the basis for shareholders to employ Section 220 as a form of pre-suit discovery. As of the time of that case, 1993, the *Rales* court observed that "little use has been made of Section 220 as an information-gathering tool in the derivative ***2135** context." [57] A few years later, the Delaware Supreme Court decided *Grimes v. Donald*, [58] where the court, in dismissing the case on the grounds that the plaintiff had failed to establish demand futility, underscored the important function Section 220 provides: "If the stockholder cannot plead such assertions consistent with Chancery Rule 11, after using the 'tools at hand' to obtain the necessary information before filing a derivative action, then the stockholder must make a pre-suit demand on the board." [59]

However, as our empirical data discussed below show, plaintiffs were slow to appreciate the importance of the "tools at hand" doctrine. In particular, they appear to have only pursued this route more frequently after the Delaware Supreme Court's 2000 decision in *Brehm v. Eisner*. [60] In that case, the plaintiff shareholders attacked the Disney board's decision to offer a lucrative employment contract to Michael Ovitz, which paid him $140 million in severance after just fourteen months of service at Disney. The complaint was replete with allegations based on publicly available information, but in part because of the discovery stay under Delaware law, it largely failed to survive a motion to dismiss. [61] The plaintiffs complained that the Delaware discovery stay was unfair and made their job of pleading demand futility impossible. [62] The Delaware Supreme Court rejected this contention, stating that:

> Plaintiffs may well have the "tools at hand" to develop the necessary facts for pleading purposes. For example, plaintiffs may seek relevant books and records of the corporation under Section 220 of the Delaware General

> Corporation Law, if they can ultimately bear the burden of showing a proper purpose and make specific and discrete identification, with rifled precision, of the documents sought. Further, they must establish that each category of books and records is essential to the accomplishment of their articulated purpose for the inspection. [63]

Since *Brehm*, this standard has been invoked many times by the Delaware courts. [64] In fact, the Court of Chancery has stated that, "[a]fter the repeated ***2136** admonitions of the Supreme Court to use the 'tools at hand,' ... lawyerswho fail to use those tools to craft their pleadings do so at some peril." [65] Our data examined below support the view that many plaintiffs avoid the perils of not accessing the company's books and records when considering pursuing claims of misconduct.

III. THE INTERFACE OF *CORWIN, MFW*, AND THE TOOLS AT HAND DOCTRINE

In recent years, the vast majority of M&A transactions involving Delaware corporations has attracted class action shareholder litigation. [66] These cases frequently challenge the actions of the target firm's board of directors in the conduct of a sale of the company, or, in the context of mergers involving a controlling shareholder, they raise a claim the transaction's terms are unfair to the minority holders. In both instances, prior to 2014, the shareholder litigant benefited from plaintiff-friendly litigation standards. In particular, prior to 2014, Delaware did not have a reliable method to deter frivolous M&A lawsuits: The well-accepted practice was for the plaintiffs to file their cases quickly after the announcement of the proposed deal and seemingly without evidence of wrongdoing. One study found that the vast majority of acquisition-oriented class actions was filed within three days of the public disclosure of the deal. [67] By contrast, only a small minority of derivative suits was quickly filed, perhaps reflecting the tighter constraints on these suits arising out of the demand requirement and discovery stay. [68] Not surprisingly, our data discussed below show that class action deal litigation did not widely use the tools at hand doctrine, apparently because of the long delays involved in litigating Section 220 actions. [69]

Alternative paths were proposed but not followed. For instance, Delaware only sparingly borrowed from the federal arsenal that addresses baseless securities claims and that was established by the PSLRA; Delaware limited its action to judicial selection of a lead plaintiff, the claimant with the largest ownership interest, but only in the very narrow limited instance where competing counsel were unable to resolve this choice. [70] Perhaps because of this inertia, over the ***2137** course of the 2000s, there was a sharp increase in the number of deal lawsuits, until by 2013 it was widely recognized that a crisis was on hand. [71] The M&A lawsuit explosion put pressure on the Delaware courts and legislature to take action, which ultimately led them to weaken the substantive law in the area and substitute shareholder ratification voting for close judicial scrutiny. [72] In the remainder of this part, we discuss the two key cases *Corwin* and *MFW*, and associated substantive changes that they made to Delaware law.

A. *REVLON* AND *CORWIN*

Revlon is a landmark corporate law case that stands for the proposition that the directors of Delaware corporations (and the corporations of about half of the other states that have ruled on the issue), when faced with a sale of the company, are subject to enhanced scrutiny to establish they acted independently and in good faith to pursue the best offer reasonably available. [73] In other words, in sales of control, the board often enjoys none of the favorable presumptions commonly associated with the business judgment rule.

In *Revlon* and similar cases, the Delaware courts have applied heightened judicial scrutiny for directorial actions in a sale of control. Often these were cases where the directors appeared to prefer one bidder over another bidder. For example, the Delaware Supreme Court in *Revlon* determined that, based on perceived conflicts of interest of the directors and apparent favoritism, the board had discriminated unfairly between the competing bidders. However, directorial laxity can also be found, and with some consistency, when there was but a single bidder. [74]

Revlon's impact was recently constrained in *Corwin*. [75] In an acquisition not involving self-dealing, the Delaware Supreme Court greatly limited disclosure violation claims by holding that, in an arm's-length M&A transaction where the directors

suffered no explicit conflict of interest, a fully informed non-coerced vote of approval by the disinterested stockholders invokes the business judgment rule. [76] *Corwin* waxed exuberant about the protective effects of such a vote:

> When the real parties in interest--the disinterested equity owners--can easily protect themselves at the ballot box by simply voting no, the utility of a litigation-intrusive standard of review promises more costs to the stockholders in the form ***2138** of litigation rents and inhibitions on risk-taking than it promises in terms of benefits to them. [77]

As two of us have explained more fully elsewhere, *Corwin* is significant for two reasons. [78] First, when its conditions are satisfied, it promotes stockholder approval as a mechanism for supplanting *Revlon*. Second, and more importantly, it sanctions the use of statutory shareholder approval, that is, the shareholder vote compelled by statute for the transaction to be duly undertaken, as a replacement for a separate ratification vote of any *Revlon* violations. However, as we discuss more fully below, in this article, we focus on *Corwin*'s impact on the plaintiff's need for pre-filing discovery to survive a defendant's motion to dismiss. [79]

B. *WEINBERGER* AND *MFW*

Under longstanding Delaware law, a controlling shareholder's self-dealing conduct triggers a close judicial review of its actions under the entire fairness doctrine. [80] This standard was famously applied by the Delaware Supreme Court in *Weinberger v. UOP, Inc.* [81] *Weinberger*'s entire fairness test has teeth. However, the fact that the standard is stringent gives all shareholder plaintiffs' claims, even frivolous ones, value in the litigation settlement process. In other words, the defendants have great difficulty winning a motion to dismiss in pre-trial motion practice, which incentivizes plaintiffs to bring even weak cases. [82]

The Delaware Supreme Court addressed this problem in *MFW*. [83] There, the controlling shareholder engaged in a typical self-dealing squeeze-out of the minority shareholders but added several conditions, especially the approval of an independent special committee and shareholder approval by a fully informed uncoerced majority of the minority shareholder vote. The court reviewed these conditions, then applied the business judgment standard of review, stating a new rule:

> [I]n controller buyouts, the business judgment standard of review will be applied *if and only if*: (i) the controller [*ab initio*] conditions the procession of the transaction on the approval of both a Special Committee and a majority vote of the minority shareholders; (ii) the Special Committee is independent; (iii) the Special Committee is empowered to freely select its own advisors and to say no definitively; (iv) the Special Committee meets its duty of care in negotiating a fair price; (v) the vote of the minority is informed; and (vi) there is no coercion of the minority. [84]

***2139** *MFW* appears to have brought about the desired decrease in the number of these shareholder suits. In reviewing the recent cases, it appears that well-counseled controllers are following the steps set forth in *MFW*, earning the desired dismissals of suits challenging self-dealing acquisitions. Predictably, the Chancery Court has blazed the path for early stage dismissals, including cutting off discovery for plaintiffs faced with motions to dismiss. [85] Nonetheless, litigation and the tools at hand remain viable for self-dealing acquisitions even after *MFW*. The Delaware Supreme Court's recent decision in *Flood v. Synutra International, Inc.* illustrates the role of Section 220 discovery when defendants invoke *MFW*. The acquisition was structured pursuant to *MFW*, but the company failed to disclose details regarding compliance with *MFW*'s elements, including when the elements were met. Although the *MFW* court required that the controller "ab initio" condition the transaction on approvals by a committee of independent directors and by disinterested shareholders, the court did not explicitly specify that "ab initio" meant the time of the initial contact between the controlling shareholder and the committee. However, in *Flood*, the court decided that a controlling shareholder needs to agree to the protective conditions required by *MFW* "before there has been any economic horse trading." [86] As the dissenting justice pointed out, the decision makes it more difficult for the plaintiff to plead that these protective conditions had not been satisfied, thereby increasing the importance of pre-filing discovery as a means of uncovering when the key events occurred. [87] *Flood*'s link to the tools at hand is that information regarding when "negotiations" commenced is the type of information that can only be acquired prior to surviving a motion to dismiss through use of the tools at hand. [88]

From the plaintiffs' perspective, these cases create barriers, even for highly meritorious cases, when the defendants' public disclosures do not exhibit obvious deficiencies. Hence, the tools at hand doctrine has even greater importance to shareholders considering a challenge to self-dealing acquisitions effected pursuant to the *MFW* formulation.

C. *THE IMPACT OF CORWIN AND MFW ON DISCOVERY AND THE USAGE OF SECTION 220 TO REVIVE CLAIMS UNDER REVLON AND WEINBERGER*

Corwin and *MFW*'s focus on shareholder ratification and their effect in imposing the business judgment standard of review mean that directors' decisions in M&A transactions will go virtually without review unless their conditions are not satisfied. As a practical matter, shareholder approval is virtually always ***2140** assured: Empirical data show that, in M&A transactions, the shareholders almost inevitably approve the deal. [89] However, if it is established that the shareholder vote is not fully informed, heightened judicial review standards will apply so that the plaintiffs have a chance to make their case on the merits. Within this context, skeptical shareholders minimally need an effective method for determining if the merging companies are making complete disclosure of all their material actions in the sale of a company. Resort only to information already in the public domain to support a complaint's allegations that the proxy materials were materially misleading is generally insufficient for this purpose in most cases. However, the company's books and records can reveal discrepancies between the facts surrounding the transaction and the public disclosures regarding the transaction, or omissions therefrom. [90] In this article, we focus primarily on Section 220 of the DGCL, which has become an important mechanism for pre-filing discovery for any shareholder. [91]

Today, defendants commonly move to dismiss *Revlon* and *Weinberger* cases when deal litigation is filed. [92] In such a setting, to survive a motion to dismiss ***2141** under Chancery Court Rule 12(b)(6), the complaint must plead facts that are sufficient to show that plaintiffs would be able to recover under a reasonably conceivable set of circumstances susceptible of proof without the benefit of discovery. [93] The Delaware courts have held that "[c]ompliance with the *M&F Worldwide* [and *Corwin*] structure[s] can be tested on a motion to dismiss." [94] In this situation, the burden is on the plaintiff to "identify a deficiency in the operative disclosure document, at which point the burden would fall on the defendants to establish that the alleged deficiency fails as a matter of law in order to secure the cleansing effect of the vote." [95] It is exceedingly difficult for a plaintiff to carry the burden of identifying material deficiencies in the defendant's disclosures unless the plaintiff has a viable avenue to obtain discovery. [96] Given the degree of protection *Corwin* and *MFW* attach to transactions accompanied by a shareholder vote, and the difficulties that plaintiffs face in pleading material disclosure violations based solely on public information, Section 220 is an essential discovery mechanism for highly motivated plaintiffs. [97]

The role of the tools at hand doctrine as a pre-filing discovery tool in M&A litigation involving *Corwin* claims was recently illustrated in the Delaware Supreme Court's decision in *Appel v. Berkman*. [98] There, Appel challenged the directors' disclosures relating to the cash sale of Diamond Resorts International to private equity firm Apollo Global Management LLC in a friendly "two-step merger transaction involving a front-end tender offer followed by a back-end merger under Section 251(h)." [99] While the transaction was pending, Appel filed a Section 220 action seeking books and records from the company. [100] After the transaction closed, the company provided documents in the ***2142** Section 220 case. The documents obtained were pivotal as they supported the complaint's charge that the defendants' Schedule 14D-9 had failed to disclose that:

> [T]he company's founder, largest shareholder, and still Chairman, Stephen J. Cloobeck, had abstained from supporting the procession of the merger discussions, and from ultimately approving the deal because: "he was disappointed with the price and the Company's management for not having run the business in a manner that would command a higher price, and that in his view, it was not the right time to sell the Company." [101]

The Delaware Supreme Court accordingly held that the defendants had failed to disclose material facts necessary to make the disclosures made not misleading. [102]

The Delaware Supreme Court's decision in *Morrison v. Berry* [103] also underscores the pivotal role a books and records request can play in a *Revlon* case in overcoming the *Corwin* defense of shareholder ratification. The case involved the sale of Fresh Market to the private equity firm Apollo Global Management LLC and Fresh Market's founder Ray Berry in a friendly tender offer. While the tender offer was pending, Morrison filed a Section 220 action seeking books and records from the company. [104] The company refused and the tender offer closed with a majority of the stock being validly tendered. Subsequently, as a result of successful Section 220 litigation, the plaintiff obtained documents, enabling her to file a breach of fiduciary duty case against the company's directors. The plaintiff's complaint alleged that Berry had "teamed up with Apollo to buy ... Fresh Market at a discount by deceiving the Board" and misleading them "into believing that Ray Berry would open-mindedly consider partnering with any private equity firm willing to outbid Apollo" when Berry had "already entered into an undisclosed agreement with Apollo." [105]

The key document uncovered as a result of the inspection was a November 28, 2015, email between Fresh Market's lawyers and the lawyers for Ray Berry that revealed Berry had entered into an agreement with Apollo months earlier--in contradiction to what Berry had previously told the Fresh Market directors. [106] That email supported the plaintiff's complaint because it corroborated the fact that Berry misled the board about his willingness to work with alternative bidders. There was also an undisclosed "threat" contained in the email--Berry would sell his shares if the board did not sell the company, implying that he would be unwilling to partner with other bidders if those bidders offered a higher price. Furthermore, the November 28th email stated that Berry would roll over his shares of Fresh Market for shares in the acquisition entity (that is, exchange his existing Fresh Market shares for shares in Apollo's ***2143** acquisition subsidiary, unlike other shareholders who would receive cash), if Apollo was the winning bidder, thereby facilitating their acquisition. None of these things were disclosed to the shareholders.

Despite these damning revelations, the Chancery Court dismissed the suit, agreeing with the defendants that, under *Corwin*, they were entitled to the protections of the business judgment rule because of the ratification effects of the successful tender offer. [107] However, the Delaware Supreme Court reversed, stating that the emails gathered through the books and records request supported the complaint's allegations that the defendants had failed to show that the vote was fully informed, because the defendants failed to disclose "troubling facts regarding director behavior ... that would have been material to a voting shareholder." [108] But for the emails obtained in the books and records request, the defendants most assuredly would have ultimately prevailed.

Revlon-based duties are not, of course, the sole area in which the tools at hand doctrine works. Plaintiffs repeatedly exercise inspection rights in controlling shareholder squeeze-out transactions as well. For example, the plaintiffs in *Olenik v. Lodzinski* employed a Section 220 action to obtain the information that they needed in a controlling shareholder squeeze-out case to avoid the effects of shareholder ratification under *MFW*. [109] The plaintiffs successfully obtained books and records, enabling them to survive a motion to dismiss, as the documents supported an inference that the controlling stockholder had engaged in substantive negotiations before initiating the procedures required by *MFW*. [110]

The above recent decisions illustrate the critical importance of Section 220 today in shareholder litigation in Delaware. Not surprisingly, plaintiffs in numerous other contemporary actions are deploying Section 220 in their quests to support prospective shareholder suit complaints with much needed non-public information so that they might survive motions to dismiss in suits under *Corwin* and *MFW*. [111] Section 220 has of necessity become the principal means for plaintiffs seeking pre-suit discovery to challenge M&A transactions. [112]

***2144 IV. OBSERVING THE TOOLS AT HAND: AN EMPIRICAL ANALYSIS OF HOW USE OF SECTION 220 HAS EVOLVED**

How have litigants responded to the Delaware Supreme Court's urging that they use Section 220 as a pre-suit discovery tool? In this part, we compare the results of two separate empirical studies on this question. The first study covers a fourteen-year period (1981-1994) that largely predates the Delaware Supreme Court's 1993 decision in *Rales v. Blasband* that first embraced the tools at hand doctrine. The second study examines data from 2004 through 2018, which postdates the Delaware Supreme Court's 2000 decision in *Brehm v. Eisner*. We compare the results of these two studies to document the shifts in Section 220 litigation. As we will establish, there has been a dramatic transformation in the frequency with which shareholders employ their inspection rights.

A. THE (LARGELY) PRE-*RALES V. BLASBAND* STUDY: 1981-1994 [113]

In the first study, published in 1997, two of the authors examined Section 220 cases including both stocklist cases and books and records litigation. At that time, all court records were kept in paper form; we therefore hand collected data from the Section 220 case files from the Delaware Chancery Court for New Castle County, Delaware, that were filed and resolved from 1981 through ***2145** 1994. [114] We compiled complete information on each of the stocklist and books and records actions. [115] We did not code LLC/LP cases separately in that study, but, to the best of the authors' recollections, there were none in the sample. In the remainder of this section, we summarize the basic empirical findings from the earlier study. [116]

The first important finding in the earlier study was that stocklist cases (ninety-one) were significantly more common than books and records filings (fifty-three). Recall that, as discussed earlier, the tools at hand doctrine was first developed by the Delaware Supreme Court in its *Rales* decision in 1993, so we did not expect to find any effect of the tools at hand doctrine on the cases included in the first study, except possibly for the period 1993-1994. For that one-year window, 1993-1994, we found only a small change in Section 220 litigation.

A second finding of the earlier study was that the Chancery Court denied relief in a sizeable minority of stocklist cases (14 percent) and books and records cases (18 percent) that were litigated to a judicial conclusion. This suggests that plaintiffs were not always successful in their quest to "get the list" or access to any of the company's books and records. Turning to the plaintiffs' stated proper purposes, we found a wide variety of stated purposes, including contacting shareholders, valuing stock, investigating corporate wrongdoing or mismanagement, among others. [117] The type of purpose stated did not seem to affect the likelihood of the plaintiffs succeeding in their litigation.

We also examined how long it took to resolve these cases. Stocklist cases proceeded more rapidly, [118] whereas books and records filings took longer to resolve. [119] Finally, in an effort to gauge the cost of these cases, we collected data on the number of pages of documents filed by the plaintiffs and the defendants in our cases. We found that, on average, the parties invested significant amounts ***2146** of effort in litigating these cases. [120] While these filings reflect effort and accompanying costs by both parties, they were still in the cost range below $50,000 for books and records cases and below $25,000 for stocklist cases. [121]

Our first study ended before the Delaware Supreme Court's opinion in *Brehm v. Eisner* was published in 2000. As discussed earlier, *Brehm* was a pivotal development in the history of the tools at hand doctrine. This fact is evident in our data for the second study, as plaintiffs' use of Section 220's books and records demand picked up sharply after that decision.

B. POST-*BREHM V. EISNER* ANALYSIS: 2004-2018

To obtain our data for the second study, we first asked the Registrar in Chancery's office of the Delaware Court of Chancery to provide us with a list of all Section 220 actions filed from 2004 to 2018. We then used this list and the Bloomberg Law database to find the docket sheets and court filings for each case in the sample. We designed a coding manual and used it to classify data on a wide variety of variables including the names of the parties, the date that the suit was filed and the date it was resolved, the case number, the outcome (when available), whether there was a subsequent suit filed by the plaintiff with identical parties and, if so, its outcome, whether the plaintiff was seeking a stocklist, books and records, or both, the plaintiff's stated purpose for obtaining the documents, and the total number of pages of filings by the plaintiff, the defendant, and the court itself. Using the coded data, we constructed Tables 1-5 to display the data on Section 220 cases.

Table 1 provides a description of the Section 220 cases filed during 2004-2018. The data show that only a handful of cases (eight) involved plaintiffs who sought solely the corporate stocklist. The bulk of the cases in the sample involved requests solely for corporate books and records (510), while a substantial additional number of cases contained requests for both books and records and the stocklist (181). The distribution of cases filed over the sample period ranged from a low of twenty-nine in 2009 to a high of sixty-seven in 2014, with substantial variation on a year-to-year basis.

TABLE 1

Section 220 Filings in Delaware Chancery Court to Obtain Stockholder List and/or Books and Records Corporations Only

Year Filed	Number of Cases	Stocklist Only	Books and Records Only	Both Stocklist & Books and Records
2004	49	2	30	17
2005	57	0	37	20
2006	40	3	27	10
2007	34	0	21	13
2008	33	1	20	12
2009	29	1	23	5
2010	35	1	20	14
2011	38	0	27	11
2012	38	0	31	7
2013	56	0	47	9
2014	67	0	51	16
2015	48	0	39	9
2016	52	0	36	16
2017	61	0	48	13
2018	62	0	53	9
Total	699	8	510	181

***2147** Comparing these numbers to those compiled in the earlier study, it is apparent that there has been a large increase in the number of Section 220 filings in recent years. Looking at the composition of the filings, there is an increase in stocklist filings from ninety-one cases in the earlier period to 189 (the sum of stocklist only plus stocklist and books and records cases) in the more recent time period. However, there is a thirteenfold jump in the number of books and records cases filed: rising from fifty-three requests in the earlier study to 691 corporate actions in this study. [122]

Table 2 lists the stated purposes given by the plaintiffs seeking documents. Plaintiffs frequently state more than one purpose in their demand letters so the totals exceed the number of cases filed. The most common purposes given in our sample cases were to investigate alleged wrongdoing by management or to value the shareholder's stock. A substantial number of cases end successfully with the plaintiff obtaining books and records either by court decision or through a negotiated settlement. On the other hand, the largest number of observations for each of the categories in Table 2 is that of "Dismissal Without ***2148** Further Information." [123] For the stated purpose of "Investigate Management Wrongdoing," we find that, for books and records requests, while plaintiffs were successful in eighty-two instances, this represented less than a quarter of all instances in which this purpose was stated. Significantly fewer cases involve court decisions in favor of the defendant or a dismissal which clearly

states that the plaintiff did not obtain books and records. The final column shows that a large number of cases involve a dismissal where the court filings are silent about whether or not the plaintiff obtained books and records. [124]

TABLE 2

Frequency Distribution of Stated Purposes for Use of Books and Records (B&R) with Outcomes Corporations Only

Purpose Stated	Decision in Favor of Plaintiff	Settle, Defendant Provides B&R	Decision Against Plaintiff	Dismissal Without B&R	Dismissal Without Further Information
Value Stock	39	25	7	8	168
Communicate re: Soliciting Proxies	2	4	1	0	15
Communicate re: Tender Offer	0	0	0	0	2
Investigate Management Wrongdoing	57	25	24	14	320
Communicate re: Management Proposals	0	1	0	1	5
Fulfill Fiduciary Duties as a Director	5	2	0	0	29
Use B&R in a Later Lawsuit	7	1	1	0	6
Any Other Purpose	63	32	21	17	356

***2149** As noted earlier, the values in Table 2 will not sum to the number of corporate cases as many cases involve multiple purposes. To provide precise outcome information, in untabulated results we find that there are eighty-two books and records cases with a court decision in favor of the plaintiff and an additional forty-three cases where the parties settle and expressly state that the plaintiff is receiving books and records. We find another thirty-six cases where the court dismissed the case without providing any books and records, and twenty-one cases where the plaintiff withdrew its case and explicitly stated that it was not receiving books and records. If we focus solely on these cases where we have publicly available information about outcomes, it appears that plaintiffs are successful in 125 cases (eighty-two court decisions plus forty-three settlements where parties stated documents were produced), versus fifty-seven failures (thirty-six court dismissals plus twenty-one settlements where parties stated documents were not produced). Finally, also in untabulated data, we find that there are 465 cases where the case is dismissed by the plaintiff without stating whether it received books and records. As we discuss above, we cannot classify this last group of cases as wins or losses based on publicly available information. [125] We asked some experienced Delaware lawyers about these situations and they responded that, in their experience, these are generally settlements in which the plaintiff receives some documents even though there is no mention of that in the court filings. [126]

Table 3 sets forth the number of days between the date of the initial court filing and the date of the final outcome in the case (DELAY), as well as the number of pages filed in the matter by the plaintiff, the defendant, and the court itself. Delay can favor the defendants because "[o]ne major concern about protracted books and records cases is that while they drag on, other

shareholder plaintiffs could file a lawsuit over the same matter in another jurisdiction," so that, when the books and records case is concluded, a "subsequent derivative lawsuit could end up being dismissed on the grounds that other plaintiffs already have litigated the issue." [127] The DELAY variable measures the duration of the records request cases; this is an important data point given that Section 220 cases are precursors to breach of fiduciary duty cases so that the DELAY variable frequently reflects additional time and effort involved in prosecuting the underlying claim. For our overall sample of books and records cases, we find that the mean delay is ***2150** around ten months (312 days), while the median delay is roughly six months (193 days). These values are similar to those obtained in the earlier study. [128]

TABLE 3

Descriptive Statistics of Variables Associated with Request for Books and Records Corporations Only

Variable	Mean	Standard Deviation	Minimum	Median	Maximum
DELAY	312	367.01	0	193	2,666
PLTPAGES	182	288.9	7	77	2,597
DEFPAGES	152	315.8	0	32	3192
COURTPAGES	46	78.1	0	18	579
TOTPAGES	380	593.2	9	144	5,781
PLT%TOTAL	58.1%	21.1%	7.7%	59.0%	100.0%

Variable definitions are as follows:	
DELAY	Number of days between complaint filing and outcome dates.
PLTPAGES	Number of pages filed by plaintiff.
DEFPAGES	Number of pages filed by defendant.
COURTPAGES	Number of pages filed by the court.
TOTPAGES	Total number of pages filed by the plaintiff + defendant + court.
PLT%TOTAL	Percentage of total litigation pages filed by plaintiff.

The page length filings data are very interesting. Plaintiffs filed on average more than twice as many pages as we observed in the first study, while defendants filed an average of almost three times as many pages as reported in the first study. [129] Median filings show similar patterns. The Chancery Court itself also tends to produce a substantial number of pages with an average of forty-six pages (and a median of eighteen pages), reflecting the fact that court involvement in these cases can be significant.

The combination of the long time for case resolution and of the increased amount of page filings by both plaintiffs and defendants gives weight to complaints by plaintiffs' lawyers that books and records cases are no longer summary proceedings. In their eyes, defendants have turned books and records litigation into a surrogate proceeding to litigate the possible merits of the suit where they place obstacles in the plaintiffs' way to obstruct them from employing it as a quick and easy pre-filing discovery

tool. [130] If this is true, it violates the very ***2151** standards the courts have developed for handling Section 220 requests; as stated earlier, the plaintiff in those proceedings should not be required to marshal facts and arguments that persuade the court by a preponderance of the evidence. A separate concern is that these proceedings now require the Delaware courts to spend a substantial amount of time in hearing and resolving these cases. Section 220 has always been a summary proceeding and should remain that way. As one leading treatise put it: "[T]he Court of Chancery has rebuked 'a continuing tendency' to use section 220 suits for 'broad defensive as well as offensive purpose[s] ....'" [131] Delaware should give serious consideration to awarding plaintiffs their attorneys' fees in cases where the defendants make untoward efforts to delay the resolution of these summary cases.

In Table 4, we present some data on how frequently books and records cases lead the plaintiff to file a subsequent action involving the same corporation. Our methodology in measuring such frequency begins by identifying a Section 220 action and is followed by a search for all cases involving the same plaintiffs and defendants, or cases involving the same defendants but with different named plaintiffs where the complaint in the merits-based action mentioned the earlier filed inspection action. We also classified the cases we found according to whether they raised derivative claims, class action claims, individual claims, or other types of claims.

TABLE 4

Frequency Distribution by Year of Section 220 Cases Where a Subsequent Case Is Filed by Plaintiff Corporations Only

	All Subsequent Related Suits	Derivative Suits	Class Actions	Individual Actions	Receiver Appointment Actions	Appraisal Suits
2004	16	13	6	3	0	0
2005	20	12	11	3	0	1
2006	2	0	0	1	1	0
2007	3	2	1	1	0	0
2008	7	4	1	3	0	0
2009	4	3	1	1	0	0
2010	3	1	0	1	1	0
2011	11	5	1	5	1	0
2012	7	4	3	1	0	0
2013	12	8	2	3	0	0
2014	16	13	5	2	0	1
2015	12	9	3	2	1	0
2016	7	3	1	2	0	1
2017	10	5	4	2	0	0
2018	3	1	1	1	0	0

Totals	**133**	**83**	**40**	**31**	**4**	**3**

We see that a substantial number of subsequent related actions (133) are filed over our sample period. This represents 30 percent of observed cases in which the objective of the record request was classified as "Investigate Management Wrongdoing." If we compare the number of subsequent suits (133) to the full sample containing all Section 220 cases (699), we see about 19 percent of the total cases result in the filing of a subsequent merits-based lawsuit. [132] This suggests that, in at least a significant percentage of Section 220 actions involving corporate defendants, the plaintiffs find sufficient evidence to warrant filing a merits-based complaint. Some suits raise multiple merits-based claims and are reflected in multiple columns in Table 4. For example, twenty-seven cases are classified as both derivative and class actions because they contain both types of allegations in the complaint. As a result, the total number of cases is less than the sum of the total of each category of suit. Bearing in mind this overlap, when we break these filings out into the five categories, we find that about 62 percent of the subsequent actions contain derivative suit allegations, roughly ***2152** 30 percent include class action claims, another approximately 23 percent are individual actions, with a small number of cases falling outside these categories.

An earlier study of 1999 and 2000 case filings in the Delaware Chancery Court found that, during that two-year time period, there were 213 public company class actions of which 194 were M&A litigation. [133] That same study found that there were only eighty-three public company derivative suits, of which seventy-four were *not* M&A litigation. [134] If these values can be treated as general approximations of the filing patterns for derivative and class action M&A litigation during the 2000s, then they show that a much higher percentage of all derivative lawsuits had Section 220 suits associated with them than did M&A class actions. In sum, the tools at hand doctrine appears to have the greatest impact during our sample period on derivative suit litigation. This is not surprising given the practice of filing M&A suits so quickly after the public announcement of the deal, and the much longer pre-filing delay for derivative suits. This is ***2153** suggestive of Delaware's general weakness in developing methods for controlling frivolous deal litigation pre-*Corwin*.

Are the tools at hand useful? One answer to that question is surely that plaintiffs would not invest substantial amounts of unreimbursed money in filing and prosecuting these actions if they did not believe those actions were a component of a valuable litigation strategy. Plaintiffs' attorneys, being regularly employed on a contingent fee basis, are compensated only when they achieve success in prosecuting merits-based lawsuits, such as breach of fiduciary duty cases where their fees are paid as part of a settlement or judgment against the defendants. They do not normally earn any fees from Section 220 cases, but are forced to absorb the suits' costs, unless their subsequent merits-based suits end successfully with a judgment or settlement. [135] These considerations should guide plaintiffs' actions, even with respect to pursuing a books and records request.

Second, we can assess the likelihood of a Section 220 case leading to a successful merits-based lawsuit by examining the outcomes in the subsequently filed litigation cases. To do this, we tracked the outcomes of all of the subsequently filed cases and sorted them into different categories: plaintiff victories (settlement, default judgment, summary judgment for plaintiff, trial with judgment for plaintiff), defendant victories (defendant's motion to dismiss granted, summary judgment for defendant, trial with judgment for defendant, dismissal for failure to prosecute), cases where the plaintiff voluntarily dismissed without explicit settlement terms, and cases still pending. Table 5 presents statistics on the 110 subsequent cases that were filed after the resolution of a Section 220 action where we know both the outcome of the Section 220 case and the outcome of the subsequent action. [136]

TABLE 5

Outcomes of Subsequent Litigation Filed after Section 220 Action Corporations Only

Outcome in Inspection Action	Number of Subsequent Actions with Known Outcome	Plaintiff Voluntarily Dismisses Subsequent Merits-Based Action	Plaintiff Wins Subsequent Merits-Based Action	Defendant Wins Subsequent Merits-Based Action
Plaintiff Voluntarily Dismisses Inspection Action	20	5	10	5
Plaintiff Wins 220 Action	82	16	43	23
Defendant Wins 220 Action	8	0	2	6

While we lack statistics on a comparison group of cases filed without the plaintiffs using Section 220, we observe that plaintiffs that win inspection cases (eighty-two) are frequently very successful in subsequent merits-based litigation (forty-three of eighty-two cases), and unsuccessful in a substantially smaller number of cases (twenty-three of eighty-two). It is difficult to interpret the outcome of cases where the plaintiffs voluntarily dismiss their merits-based suits--perhaps those cases were bad, perhaps those cases were settled privately. Defendants win comparatively few Section 220 cases (eight) but we find a small number of these cases when plaintiffs are successful in ensuing merits-based suits (two), although most of those suits fail (six). Voluntarily dismissed Section 220 actions (twenty) may be withdrawn because the defendants chose to provide documents, and these could form the basis for a successful subsequent merits-based suit (ten) or not (five).

To summarize our findings in this part, when we compare the results of the earlier study and the current study, we find a large increase in the amount of Section 220 corporate litigation, a shift within that litigation away from cases seeking a ***2154** 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 shareholders' 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, 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.

V. LIMITATIONS ON INSPECTION RIGHTS IN DELAWARE

Despite its creation and sustained embrace by the Delaware Supreme Court as well as its entrenchment in current litigation practice in Delaware, the tools at hand doctrine now confronts limitations that have been imposed by the legislature and the courts. Moreover, in litigation arising within LPs and LLCs, the doctrine can be, and is, qualified by contractual provisions that limit investors' inspection rights. As developed below, we find that the legislature and courts have been sensitive to the concern that overly zealous plaintiffs will abuse their rights, while being generally reasonable about the limitations that they have imposed to constrain opportunistic behavior. However, as we consider developments across LPs and LLCs, we worry that contract language can be more heavily impacted by protectionist concerns, which may result in overly burdensome limitations. [137] Part A of this section examines judicially crafted or endorsed ***2155** limitations on Section 220 and Part B reviews important contractual restrictions that have been adopted by LPs and LLCs.

A. JUDICIAL RESTRICTIONS

In recent years, the common law and statutory qualification that the inspection must be for a proper purpose has been supplemented by newer and more invasive specific restrictions that have been grafted onto the statute. "Companies are placing 'creative' conditions on books and records requests .... There has been a 'significant evolution' in this emerging area over the last year or two." [138] Professor Hamermesh commented on this trend stating that:

> The Delaware courts have basically ruled that reasonable conditions are fine .... If there is a guiding principle on this issue, it is that conditions that are in the interests of the corporation and its shareholders generally are allowed .... However, where the condition infringes on the rights of shareholders, such as limiting the right to sue, then it seems less defensible. [139]

For example, if production would circumvent a stay of discovery in an existing derivative action, the Court of Chancery conditions "production in such a way as to prevent [the stockholder] or his counsel from sharing information discovered with anyone involved in the pending derivative litigation." [140] Further, when a Section 220 action is commenced to ascertain the possibility of filing a derivative complaint, or for a direct action that could be the basis for a class action, the scope of the inspection will be limited to books and records "that are required to prepare a well-pleaded complaint." [141]

Another limitation arose in *United Technologies Corp. v. Treppel*, where the stockholder brought a Section 220 action for the purpose of "inquiring into the board's decision to deny his litigation demand." [142] The defendant corporation agreed to allow the stockholder "to inspect most of his requested documents, but insisted that he first sign a confidentiality agreement ... contain [ing a forum selection] provision requiring that 'any claim, dispute, controversy or causes of action ... arising out of, relating to, involving or in connection with' the inspection be brought in a Delaware court." [143] The stockholder refused to ***2156** sign the confidentiality agreement. [144] The Court of Chancery held that it did not have statutory authority under Section 220(c) of the DGCL to impose the forum selection condition. [145] The Delaware Supreme Court reversed, reasoning:

> [T]he Court of Chancery has wide discretion to shape the breadth and use of inspections under [Section] 220 to protect the legitimate interests of Delaware corporations. Because nothing in the text of [Section] 220 itself or Delaware case law in interpreting it limits the Court of Chancery's authority to restrict the use of material from an inspection when those interests are threatened, the Court of Chancery erred in concluding it lacked the statutory authority to impose its own preclusive limitation here. [146]

A fourth restriction arose in *Amalgamated Bank v. Yahoo! Inc.*, where the Court of Chancery imposed an "incorporation condition" whereby the entire books and records production must be "incorporat[ed] by reference into any derivative action complaint." [147] This condition "protects the legitimate interests of both [the defendant] and the judiciary by ensuring that any complaint that [the plaintiff] files will not be based on cherry-picked documents." [148] "The incorporation-by-reference doctrine permits a court to review the actual document to ensure that the plaintiff has not misrepresented its contents and that any inference the plaintiff seeks to have drawn is a reasonable one." [149] In other words, this condition will "ensure that the plaintiff cannot seize on a document, take it out of context, and insist on an unreasonable inference that the court could not draw if it considered related documents." [150] However, plaintiffs' lawyers view this limitation differently: It allows the defendants to "litter the record with their own side of the story--[so that] books and records actions can evolve from to the 'tools at hand' to a 'Trojan Horse.'" [151]

As a final example, some private companies are insisting that their employees waive their inspection rights as a condition of receiving stock options. [152] The companies claim that the waiver is necessary in order to keep their financial data private as they only supply large investors with selected financial information and give smaller investors "little if any information." [153] As one attorney stated, "It's unclear whether this kind of waiver would be supported in court." [154]

Overall, with the exception of the stock option waiver just discussed, the scope of legislative and judicial limitations on shareholders' Section 220 inspection rights in Delaware seem mostly reasonable to us as they are designed to curb ***2157** abuses and permit stockholder demands. However, in the next section, we examine contractual limitations in the governing documents of LPs and LLCs that present greater concerns.

B. CONTRACTUAL LIMITATIONS ON INSPECTION RIGHTS: LPS AND LLCS

Inspection rights are also available for investors in non-corporate forms of business organizations. As one of the leading treatises on Delaware business law notes:

> With a frequency indicative of their growing popularity, alternative entities--general and limited partnerships, limited liability companies, and business trusts--have been the target of litigation by investors seeking enforcement

> of inspection rights. Each of these alternative entities is governed by its own enabling statute, and each such statute contains a separate provision addressing the nature and scope of the inspection rights of investors, including rights respecting a list of interest holders and with respect to proprietary information regarding the status and financial condition of the business. [155]

In this section, we focus on LPs and LLCs, which are creatures of both statute and contract. An important distinctive feature of each of these alternatives to the corporate form is that the governing agreement of an LP or LLC gives the parties great contractual freedom, authorizing private ordering arrangements that might not be permitted for corporations.

General partners in an LP are granted unqualified inspection rights. [156] But, under Section 17-305 of the Delaware Revised Limited Partnership Act ("DRLPA"), each limited partner is granted inspection rights, "subject to such reasonable standards ... as may be set forth in the partnership agreement or otherwise established by the general partners," to seek access to the books and records of the partnership in a summary proceeding. [157] Similar to a shareholder in a Section 220 case, a limited partner seeking access must make a written demand and must state the purpose of the demand. [158] The purpose shall "reasonably relate[] to the limited partner's interest as a limited partner." [159] The Court of ***2158** Chancery interprets the aforementioned provisions as a "proper purpose" requirement, [160] so that "the limited partner must demonstrate a proper purpose in requesting such information." [161] However, the limited partner's right may be further restricted in a partnership agreement. [162] Notably, Section 17-305(b) grants a general partner the right to withhold some confidential information from limited partners for a reasonable time period. [163]

For LLCs, Section 18-305(a) of the Delaware Limited Liability Company Act ("DLLCA") provides LLC members with an inspection right upon establishing a proper purpose; [164] however, this is a right that can be restricted by the operating agreement. [165] The statute's reference to qualifying the owners' rights through the operating agreement is underscored by Section 18-1101(b): "It is the policy of this chapter to give the maximum effect to the principle of freedom of contract and to the enforceability of limited liability company agreements." [166] That statutory provision is "virtually identical" to the statutory provisions addressing LPs. [167]

In the case of an LP, the parties' agreement can contractually create additional inspection rights or, in other cases, restrict a partner's statutory inspection rights per Section 17-305(f). [168] The Court of Chancery will apply the same rules to contractual inspection rights of members of an LLC because of the similarity of the two statutes. [169] Provisions in an LP agreement are presumed to create contractual rights separate and independent of statutory rights, unless the partnership agreement "explicitly state[s] that the provision is merely clarifying ***2159** or placing additional conditions on the other statutory or contractual right." [170] However, under Section 17-305(f), a partnership agreement may restrict limited partners' statutory inspection rights. [171] The intention to restrict statutory rights must be expressed explicitly in the partnership agreement. [172] Even if an operating agreement explicitly states such limitations, only "reasonable" restrictions will be upheld by the court. [173] Generally speaking, operating agreements may place restrictions on who may inspect, how they inspect, and what they inspect. [174] For example, one way to restrict inspection rights is to adopt narrowed terms, such as "books of accounts," instead of "all books and records." [175]

In one disturbing case, an LLC rejected a member's demand for books and records, claiming, among other things, that her demand was barred because the company's operating agreement provided that the "Managing Member has the right to unilaterally limit complete access of all books and records to any Member holding less than 5% interest in the Company as shown in the Operating Agreement." [176] The propriety of this limitation may be guided by analogy to corporate law. While some states may limit inspection rights to holders of 5 percent of the corporation's stock, those states provide an alternative avenue for inspection, such as holding shares for more than six months. [177] Moreover, Delaware corporate statutory law does not impose any restrictions on the size of a plaintiff's ownership stake in determining whether they are entitled to inspection rights, so the Chancery Court would have to determine if the 5 percent contractual limitation was reasonable in order to enforce

it. [178] At the same time, the DLLCA ***2160** fully embraces according "the maximum effect to the principles of freedom of contract and the enforceability of limited liability company agreements." [179]

A second potentially overbroad limitation arose in an inspection case in *Hertzberg v. Millbrae Natural Gas Development & Exploration Fund 2002, L.P.*, where limited partners in several related but different limited partnerships requested books and records under Section 17-305 of the DRLPA, as well as under the terms of the partnership agreements. [180] The defendants refused to provide the requested information. The plaintiffs were informed they were being required to withdraw from their limited partnerships because the managing partners had decided that, in light of their threat to take legal action, it was not in the best interests of the partnerships for them to remain as investors. [181] When the investors subsequently filed their inspection action, one of the defendants argued that they lacked standing because they were no longer limited partners, [182] and because all of the documents requested were confidential and immune from disclosure. [183] The court denied the parties' cross motions for summary judgment, stating that the managing partner's approach toward confidentiality "sound[ed] ... awful[ly] overbroad," despite the language of the limited partnership agreement. [184] While the court did not issue a final ruling before the case settled, it is clear from the transcript of the hearing that the Vice Chancellor thought that the managing partner's interpretation of the limited partnership agreement was improper. We nonetheless are left to ponder the validity of provisions in an agreement that explicitly authorize a manager to determine the confidentiality of documents or to terminate one's status as a limited partner due to a threat of litigation.

A far more significant impact of private ordering that distinguishes LPs and LLCs from corporations is the possible double immunity shield that Delaware ***2161** appears to authorize. For example, each of the DRLPA and the DCCLA authorizes the governing agreement to qualify or even eliminate fiduciary obligations among investors, partners, and managers, sparing only bad faith violations of the implied contractual covenant of good faith and fair dealing. [185] Any such provision--if coupled with a severe limitation of investors' inspection rights under the DRLPA or the DLLCA, [186] and if interpreted consistent with the broad statutory command to give "maximum effect to the principle of freedom of contract" [187] --could effectively remove a legal challenge to conduct alleged to be a bad faith violation of the investors' foundational expectations that typically would be protected by the implied covenant of good faith and fair dealing. Such suits typically proceed by setting forth the initial understandings among investors with discovered facts supporting the claim that the partner or manager acted inconsistent with those expectations. [188] This litigation strategy fails however to the extent access to books and records is restricted with the effect of preventing access to facts necessary to establish the breach. So understood, private ordering authorized in Delaware can doubly insulate misconduct by first removing the conduct from the realm of traditional fiduciary protection and second hobbling the pursuit of a claim under the implied covenant by restricting access to facts necessary to establish conduct inconsistent with the covenant. To date this fear has not materialized; the data below reflect the impact of the tools at hand doctrine in litigation occurring in LPs and LLCs, where the data evidence the positive role the doctrine has recently enjoyed in shareholder suits. Nonetheless, unlike the corporate setting, the emerging trends in private ordering within these non-corporate entities could foreshorten the doctrine's role in the future.

C. LLC/LP EMPIRICAL DATA: 2004-2018

We collected data for all LLC/LP inspection cases for 2004-2018 to complement our study of Section 220. Table 6 displays the overall frequency of these cases over the sample period. In total, we find 154 cases of which 149 involve solely or partly books and records demands. Requests for lists of investors by themselves are few, although a significant number of cases seek both that list and books and records.

TABLE 6

Inspection Filings in Delaware Chancery Court to Obtain Investor List and/or Books and LLC/LPs Records only

Year of Filing	Number of Cases Per Year	Seeking Investor List Only	Seeking Books & Records Only	Seeking Both Investor List and Books & Records
2004	4	0	3	1
2005	4	0	3	1
2006	5	0	3	2
2007	9	1	4	4
2008	8	1	3	4
2009	13	0	8	5
2010	11	1	5	5
2011	11	1	6	4
2012	9	0	4	5
2013	4	0	2	2
2014	7	0	7	0
2015	14	0	10	4
2016	19	1	11	7
2017	13	0	5	8
2018	23	0	13	10
Total	154	5	87	62

In untabulated results, we examined the plaintiffs' stated purposes for seeking documents. As with the corporate cases, the most common purposes were ***2162** seeking to value their interest in the firm and investigating whether management is breaching its fiduciary duties. Table 7 provides descriptive statistics for the length of time these cases take to be resolved and for the intensity of litigation. The mean number of days for a case to resolution is 305.9, or approximately ten months. Litigation intensity, as measured by pages filed, shows that both parties are often filing a substantial amount of material with the court, and the court itself is producing an average of about forty-two pages of filings per case. Overall, the data are similar to those displayed in Table 3 for corporate cases.

TABLE 7

Descriptive Statistics of Variables Associated with Request for Book and LLC/LPs Records only

Variable	Mean	Standard Deviation	Minimum	Median	Maximum
DELAY	305.9	343.9	1	194	2,432
PLTPAGES	177.4	260.5	11	91	1,506
DEFPAGES	126.3	271.1	0	23	1,721
COURTPAGES	41.9	72.8	0	20	601
TOTPAGES	343.5	531.6	12	140	2,577
PLT%TOTAL	62.5%	19.8%	14.6%	63.8%	100.0%

Variable definitions are as follows:	
DELAY	Number of days between complaint filing and outcome dates.
PLTPAGES	Number of pages filed by plaintiff.
DEFPAGES	Number of pages filed by defendant.
COURTPAGES	Number of pages filed by the court.
TOTPAGES	Total number of pages filed by the plaintiff + defendant + court.
PLT%TOTAL	Percentage of total litigation pages filed by plaintiff.

Table 8 in the Appendix provides an overview of the number of inspection cases that are followed by a merits-based action against the same defendants. As with the corporate cases, our methodology entails assessing, in each inspection case, whether a new action was filed either with the same parties or with the same defendant with a complaint that references the earlier inspection action. We classify the cases in Table 8 according to the content of the second merits-based complaint.

***2163** We find that there is a subsequent merits-based lawsuit filed in twenty-eight of the 154 inspection cases involving LLC/LPs, which is approximately 18 percent. About half of these actions are primarily derivative cases, while almost all of the rest are individual actions.

Table 9 in the Appendix shows that as with the Section 220 data examined earlier, plaintiffs that win inspection actions are generally successful if they bring subsequent merits-based lawsuits (ten of fourteen), although two cases were voluntarily dismissed by the plaintiff and defendants won the other two subsequent merits-related actions. Of the four cases with subsequent merits-based litigation following a voluntary dismissal of the inspection action, plaintiffs were successful in one case and voluntarily dismissed the other three cases.

In conclusion, we note that one of the key differences between LLC/LPs and corporations is that corporate law provides little room for private ordering by the parties with respect to inspection rights. Bearing that in mind, there is a greater risk that contractual limitations imposed in the governing agreements for LLC/LPs will limit investor inspection rights. Given the high

number of LLC/LP inspection cases that we find in the Delaware Chancery Court, it raises the question whether private ordering with respect to this basic right of ownership should enjoy the same deference as accorded other areas of members' and partners' rights.

*2164 VI. TOOLS AT HAND: THE PATH TO NON-OPTIMAL INCENTIVES

Corporate announcements, and particularly investigative reports in the news, regarding possible management misconduct frequently prompt litigation in multiple forums. For example, following a *New York Times* story detailing extensive bribery of Mexican officials and suggesting a cover-up by senior executives of a Wal-Mart subsidiary, derivative suits were filed against Wal-Mart executives in the Delaware Chancery Court, as well as in the federal district court in Arkansas, Wal-Mart's headquarters. Different named plaintiffs and law firms were involved in both the suits, but the complaints in both cases relied on facts set forth in the *Times* story. The Delaware proceeding was stayed after the Chancellor admonished its lawyers to use the tools at hand to sustain the bald allegations in the complaint, as otherwise the suit would not likely survive a motion to dismiss. Due to the fierce resistance of Wal-Mart to the inspection request, nearly three years passed as the parties litigated in Delaware. During this period, the parallel suit initiated in Arkansas by a different plaintiff and law firm was also stayed. [189]

However, the U.S. Court of Appeals for the Eighth Circuit ultimately vacated the stay, [190] which led to the Arkansas district court severely modifying the stay, [191] and ultimately holding that a pre-suit demand on the board of directors was necessary and dismissing the suit with prejudice because no demand had been made. [192] Thereafter, Wal-Mart moved for dismissal of the Delaware proceeding, arguing the Arkansas holding collaterally estopped the Delaware plaintiff from relitigating demand futility. The Delaware Supreme Court, in *California State Teachers' Retirement System v. Alvarez*, [193] held that, because the corporation is the real plaintiff in the derivative suit, privity existed between the litigants in the two forums; the court further reasoned that the Due Process Clause was satisfied by the Arkansas court using reasonable process in reaching its decision, such that there was adequate representation of the claim in the Arkansas proceeding. [194] Hence, the Delaware plaintiff could not relitigate before the Delaware court the issue of demand futility. The action in Delaware was therefore dismissed.

***2165** *Alvarez* should not be a surprise. Just a few years earlier, the Delaware courts addressed the impact of a dismissal by another jurisdiction when the same nucleus of facts gave rise to multi-forum litigation. In *Louisiana Municipal Police Employees' Retirement System v. Pyott*, [195] the Delaware Supreme Court held the lower court could not ignore another court's dismissal of a non-Delaware action, even if the lower court believed that dismissal had been based on a misapplication of Delaware law. [196] Both *Alvarez* and *Pyott* are consistent with non-Delaware decisions regarding the preclusion of relitigating issues resolved in another court involving the same matter. [197]

Our focus in this article is not the correctness of the courts according preclusion to another court's dismissal of a derivative suit; [198] the importance here is understanding how these decisions shape the contemporary legal environment in which the tools at hand doctrine operates, namely that multi-forum litigation is common and its existence frequently leads to competition among plaintiffs and even the courts themselves, and likely adversely impacts the attractiveness of the tools at hand doctrine to responsible litigants. To this backdrop, we introduce another Delaware-spawned development, *Matsushita Electric Industrial Co. v. Epstein*, [199] involving two competing class actions, one in the federal court alleging violations of the Williams Act and the other in the Delaware Chancery Court alleging various breaches of fiduciary duty. Defendant Matsushita prevailed in the federal court, and, while that action was on appeal to the Ninth Circuit, it entered into a settlement of the state court action on terms that provided it with a release from all Williams Act claims for investors that did not opt out of the state proceeding. The Supreme Court held, similar to the Delaware rulings in *Alvarez* and *Pyott*, that full faith and credit must be accorded to the state court's approval of the settlement, notwithstanding that it released Williams Act claims that are within the exclusive jurisdiction of the federal courts. Such preclusion in ***2166** each case can only be challenged by establishing that there was not adequate representation in the first-resolved matter. [200]

To be added to the contemporary legal context in which the tools at hand doctrine operates are forum selection clauses. When crafted as a bylaw amendment, a board of directors can unilaterally adopt a forum selection provision, [201] and companies have widely and enthusiastically adopted these provisions in response to multi-forum litigation. The typical provision allows the corporation to select in which forum to proceed from among those forums in which suits are pending. [202] This discretion can be

and likely is used strategically, as it permits the corporation to assess, among competing plaintiffs, who has the least developed complaint, as well as who might be most compliant in settling the action. And, reason supports the view that a less developed complaint signals greater susceptibility to a lower settlement. Against this tapestry, we raise an important concern regarding the tools at hand doctrine in an era of widely adopted forum selection clauses--their combination promotes the evils of a reverse auction whereby a meritorious suit is either dismissed or settled by defendants for too little, through the cooperation of the plaintiffs' attorney, who eschewed the tools at hand so that the suit was thereby more vulnerable to dismissal or an inadequate settlement.

As set forth earlier, the tools at hand doctrine is an important development because it provides a balanced approach to shareholder litigation. The doctrine reflects the good sense that--rather than expend judicial resources (as well as those of the litigants) resolving an incomplete complaint against the plaintiffs--the plaintiffs' attorney is directed to exercise the rights of shareholders to access the company records upon a showing the records are linked to a credible basis that the named corporate officials have engaged in misconduct. On such a showing, the shareholder inspection suit avoids outright dismissal; whether the suit ultimately leads to merit-based litigation rests on what the accessed records reveal. The data presented herein support the social value of the tools at hand doctrine. We have shown that the doctrine contributes positively to separating the "wheat from the chaff." The data reflect that a good many successful books and records requests lead to filing of shareholder suits--the chaff; but ***2167** the data also reflect high success rates from shareholder suits that were preceded by a books and records request--the wheat.

As discussed earlier, the right provided by Section 220 is a qualified one; the plaintiff's suit must establish a credible basis for believing misconduct occurred for which the sought-after access is connected, and the courts have allowed the defendant to further condition use in subsequent litigation of the obtained information. These are not trivial limitations and thus provide defendants with a means to shed baseless requests. To be sure, the tools at hand does shift litigation into a different framework, namely whether a credible basis has been established and the connection the sought-after records have with the suit's claims. And, as our data reflect, the doctrine has stimulated books and records litigation. But we believe this stimulated litigation has been a healthy development, as it is litigation designed to determine whether a viable shareholder suit exists. Merits-based suits that are continued after successful Section 220 actions frequently produce an outright victory or settlement for plaintiffs. Moreover, in theory, the focus of litigation seeking access for the purpose of investigating possible misconduct is itself more sharply focused than in suits raising issues that determine fault so that such cases should be less of a burden on the court. This means that the burdens of the tools at hand doctrine from a policy perspective can be seen as the institutional costs inherent in a process that seeks to facilitate a fulsome development of the facts to determine whether further pursuit of the matter is appropriate.

Yet, *Alvarez* shows that this elevated view of the tools at hand doctrine is misplaced when there is multi-forum litigation.[203] The litigant who pursues a shareholder suit in the Delaware courts necessarily does so with a full awareness of the tools at hand doctrine and its likely application to the case. This is not a consideration in suits filed outside Delaware as the doctrine is unique to Delaware. The investigation of the facts garnered by the Delaware plaintiff who was successful in gaining access to company records necessarily means that, compared to suits outside of Delaware, the Delaware-filed complaint can be expected to have a richer factual development. That is, as among pending multi-forum suits, the Delaware action can be expected to have the more textured foundation for its claims. The data reviewed earlier bearing on outcomes of litigation in the post-books and records ***2168** litigation period are consistent with this supposition. If this is correct, which of the suits pending in multiple forums would objectively be the weakest ones? This question cannot be answered, except that the suit that has invoked the tools at hand invitation would seem *least* likely to be the weakest of the suits, and there is reason to expect its more richly developed investigation would make it relatively strong compared to the others.[204] If this surmise is correct, the defendant who wishes to rid itself of the litigation would more likely find it easier and cheaper to do so by aggressively pursuing dismissal of the less developed complaint by the litigant who did not invoke the tools at hand. This strategy coexists with the defense seeking a global settlement with the plaintiff in that action.

The tools at hand doctrine, therefore, appears to offer perverse incentives for shareholder litigation. A non-Delaware-filing plaintiff can avoid the burdens of pursuing their own books and records request, thereby facing either dismissal of the less developed complaint, or harvest the fruits of such slothful practice by offering settlement terms far more favorable to the defendant than the Delaware plaintiff whose review of the records has provided better insight into the suit's relative merits. Defendants are aware of this unevenness in the suits' qualities and thus can move for dismissal while seeking a settlement, thereby ending the litigation, with a low-cost plaintiff. When this happens, the result is a reverse auction of the claim's value. And its occurrence violates the premise supporting the tools at hand doctrine-- institutional support of shareholder suits with a view that the tools at hand can better enable meritorious suits to be optimally prosecuted. How might the courts address this

problem? The problem of multi-forum shareholder suits is, of course, surmountable when each of the forums are within the same judicial system. For example, Delaware Chancellor Bouchard recently stayed three pending derivative suits against the Boeing Company for ninety days so that two labor pension funds that were each pursuing Section 220 actions could intervene in the derivative cases.[205] The Chancellor found that intervention was appropriate because there were common issues of law in all of the actions, as well as a real risk that the Section 220 plaintiffs would be precluded from filing suit after having obtained corporate books and records. Importantly, all of these cases were pending in Delaware.

This result is less certain to occur when proceedings are not all before the Delaware courts, as was the case in *Alvarez*, because the Delaware court lacks power to permit a record-seeking shareholder to intervene in another jurisdiction's proceeding. ***2169** Moreover, a duly authorized forum selection clause is unlikely to allay concern that such multi-forum suits can eviscerate the benefits provided through resort to the tools at hand. Consistent with Delaware's statutory authorization,[206] the prevalent forum selection clause provides that the Delaware Court of Chancery is the exclusive jurisdiction for shareholder suits unless the corporation otherwise grants written consent.[207] Because such consent does not displace the statutory jurisdiction of the Chancery Court to entertain books and records requests,[208] the proceeding by shareholders to exercise that right can, as it was in *Alvarez*, proceed simultaneously with the motion to dismiss before the non-Delaware court.

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.[209] As *Alvarez* illustrates, this approach is fertile ground for reverse auctions. More generally, it leads to concern that meritorious cases are dismissed because their attorneys chose to file the complaint quickly and without resort to the tools at hand. We believe non-Delaware courts remember that, in cases filed in Delaware, the plaintiffs' attorneys know that they must use Section 220 as a pre-filing discovery device and therefore are likely to file a well-supported complaint. The courts should therefore give due consideration to staying, as did the Arkansas federal district court in *Wal-Mart Stores*, while any pending books and records request is pursued in Delaware.[210] Most importantly, we believe, in considering whether there was adequate representation, the deciding court should give close attention to the efforts competing plaintiffs took to flesh out their complaints. Even though this was considered by the courts in both Delaware and Arkansas,[211] it was not a penetrating inquiry of what such a request might produce in light of the gravamen of the complaint before the court. Certainly, we believe ***2170** the data and case histories examined herein support more than the casual discard of the lack of invoking the tools at hand that occurred before the courts.

In pursuing this approach, Delaware courts should clearly distinguish *Alvarez* like proceedings from *Matsushita*-like proceedings. Because the latter involved the settlement of a class action, prevailing procedures provide absent shareholders with protections not found in motion to dismiss procedures, such as occurred in the Arkansas district court.[212] For example, in *Matsushita*, the Delaware court's approval of the settlement included notice to class members of the settlement, an opportunity for objectors to challenge the settlement, a finding bearing on the settlement's fairness, and a finding of adequacy of representation.[213] None of these procedural protections exist in a presiding court's ruling on whether the derivative suit plaintiff should have made a demand on the board or in granting a motion to dismiss in a class action. Moreover, there is a good deal of intuition to reject a claim of adequacy of representation when, as was the case in the Arkansas proceeding, the complaint was quickly filed soon after news reports of misconduct by Wal-Mart executives and there was no books and records request by the suit's Arkansas counsel. But because these factors were considered, but not deemed sufficiently persuasive, by the Arkansas district court, and there were no other errors present in the Arkansas proceeding, the *Alvarez* court lacked a basis to conclude there was not adequate representation of the corporation's claim in Arkansas. We are hopeful that courts now armed with data presented here will have an even higher regard for the benefits of plaintiff's counsel invoking the tools at hand. This might lead courts to probe more deeply into the adequacy of counsel by considering whether information that would support the complaint could have been revealed by an inspection of the books and records. This inquiry was not made by the Arkansas court. Indeed, following the Eighth Circuit's instruction that the federal district court reconsider its stay, Wal-Mart modified its stay request. It asked that the stay remain in place until the books and records action in Delaware was completed.[214] The request was unsuccessful but can be seen as suggesting the Arkansas plaintiffs doubted the completeness of their own complaints. That is, where there are competing suits in multiple jurisdictions and at least one suit is pursuing the ***2171** tools at hand, due process requires any forum where the plaintiff has not pursued the tools at hand to closely consider the likelihood that the complaint's deficiencies might have been overcome through a diligent books and records request. If so, the court should either order a further stay of the proceeding or dismiss the case without finding the suit was adequately prosecuted.

VII. CONCLUSIONS AND POLICY RECOMMENDATIONS

Ownership and access to company information have long been the connective tissue of the law of business organizations. The menu of varying types of business organizations has expanded in recent years and that expansion has reflected the trend toward less regulation and more choice within business organization statutes. This freedom is the hallmark of LPs and LLCs. Nonetheless, resort to court to resolve disputes among owners and between owners and managers is the ultimate guardrail for owners. Decisions whether to sue and to sustain allegations in pretrial motions require detailed information regarding the disputed matter, with such information being within the firm's books and records. The data presented here document not only the importance of books and records requests in facilitating efficiency in litigation but the great success the Delaware courts have achieved in this area through the tools at hand doctrine. To preserve this successful record, we believe private ordering must not bar any inspection request where owners have otherwise successfully alleged "credible evidence" of mismanagement or a breach of fiduciary obligation. Such a bar would preserve the rich record Delaware courts have achieved since announcing the tools at hand doctrine.

Section 220 has become a more important part of the Delaware corporate governance landscape. While it was initially largely used by derivative-suit plaintiffs, Delaware eventually realized that it had great utility as a pre-filing discovery technique in deal litigation as well. The empirical evidence in this article shows that the number of inspection cases has exploded in recent years. Section 220's use as a pre-filing discovery device seems to be what is driving this change. As its importance has increased, however, so has it become more crucial for Delaware to be sure that the conditions imposed on its use, and the strategic reasons for encouraging its use, are carefully considered.

Shareholders' inspection rights are one of their few mandatory rights under corporate law and should be protected. Our analysis shows that the Delaware courts and legislature have imposed significant, but largely reasonable, restrictions on shareholder inspection rights. These limitations balance investors' need to obtain information about corporate management's actions, especially now in M&A litigation given *Corwin* and *MFW*, with concerns about abuses of the inspection process. Given its recent vintage, it is early to assess the impact of *Alvarez*. Nonetheless, we are concerned that *Alvarez* creates a strategic nightmare for shareholders by encouraging defendants to engage in reverse auctions of potentially valuable claims. Delaware should address these issues to ensure that shareholder inspection rights are not diluted and that Section 220's use as a pre-filing discovery technique is not undermined.

*2172 APPENDIX

Table 8

Frequency Distribution by Year of Cases Where a Subsequent Case Is Filed by LLC/LPs Plaintiff only

	ALL SUBSEQUENT RELATED SUITS	DERIVATIVE SUITS	CLASS ACTIONS	INDIVIDUAL ACTIONS	RECEIVER APPOINTMENT ACTIONS	APPRAISAL SUITS
2004	0	0	0	0	0	0
2005	2	2	0	0	0	0
2006	2	1	0	1	0	0
2007	0	0	0	0	0	0
2008	2	1	0	2	0	0
2009	2	1	0	1	0	0
2010	2	0	0	2	0	0

2011	2	0	0	2	0	0
2012	1	0	0	1	0	0
2013	1	0	0	1	0	0
2014	2	2	0	0	0	0
2015	3	2	0	1	0	0
2016	5	2	1	2	0	0
2017	1	1	0	0	0	0
2018	3	2	0	1	0	0
Totals	**28**	**14**	**1**	**14**	**0**	**0**

Table 9

Outcomes of Subsequent Litigation Filed After Inspection Action LLC/LPs Only

OUTCOME IN INSPECTION ACTION	NUMBER OF SUBSEQUENT ACTIONS WITH KNOWN OUTCOME	PLAINTIFF VOLUNTARILY DISMISSES SUBSEQUENT MERITS-BASED ACTION	PLAINTIFF WINS SUBSEQUENT MERITS-BASED ACTION	DEFENDANT WINS SUBSEQUENT MERITS-BASED ACTION
Plaintiff Voluntarily Dismisses Inspection Action	4	3	1	0
Plaintiff Wins Inspection Action	14	2	10	2
Defendant Wins Inspection Action	0	0	0	0

Footnotes

a1 Professor James D. Cox is the Brainerd Currie Professor of Law, Duke University School of Law; Professor Kenneth J. Martin is a Regents Professor of Finance in the College of Business at New Mexico State University; Professor Randall S. Thomas is the John S. Beasley II Professor of Law at Vanderbilt Law School and a Professor of Management at the Owen Graduate School of Management at Vanderbilt University. The authors wish to thank Vice Chancellor Joseph Slights of the Delaware Chancery Court, Professor Ann Lipton, the participants of the University of California, Berkeley Academic Conference held October 10, 2018, the participants of the William & Mary Law School's faculty workshop, and an anonymous referee for *The Business Lawyer*. We also wish to acknowledge the excellent research assistance of Joseph Caputo, Tiffany Han, John Kim, and Xu Ping.

1 Robert B. Thompson & Randall S. Thomas, *The New Look of Shareholder Litigation: Acquisition- Oriented Class Actions*, 57 VAND. L. REV. 133, 195 (2004) (discussing claims associated with *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986), and *Weinberger v. UOP, Inc.*, 457 A.2d 701 (Del. 1983) (en banc)).

2 Matthew D. Cain, Jill Fisch, Steven Davidoff Solomon & Randall S. Thomas, *The Shifting Tides of Merger Litigation*, 71 VAND. L. REV. 603, 604 (2018).

3 James D. Cox & Randall S. Thomas, *Delaware's Retreat: Exploring Developing Fissures and Tectonic Shifts in Delaware Corporate Law*, 42 DEL. J. CORP. L. 323, 325-26 (2018). This trend toward litigation focused on disclosure picked up a good deal of speed following *Corwin v. KKR Financial Holdings LLC*, 125 A.3d 304 (Del. 2015) (en banc), as the Delaware Supreme Court held that, at least when self-dealing is not alleged, a fully informed non-coerced vote of the shareholders insulates the transaction from review for misconduct, such as claims the board of directors did not fulfill its duties under *Revlon*.

4 Cain, Fisch, Davidoff Solomon & Thomas, *supra* note 2, at 623 & tbl.2.

5 *Id.* at 613-18.

6 DEL. CODE ANN. tit. 8, § 220 (2019).

7 But it should be noted that, in M&A litigation, demands under Section 220 of the DGCL are now being used quite frequently.

8 They also ignored many of the innovations in the federal securities class action area introduced by the Private Securities Litigation Reform Act of 1995 (PSLRA). Pub. L. No. 104-67, 109 Stat. 737 (codified in scattered sections of 15 U.S.C.). For a discussion of these innovations, see James D. Cox & Randall S. Thomas, *Does the Plaintiff Matter? An Empirical Analysis of Lead Plaintiffs in Securities Class Actions*, 106 COLUM. L. REV. 1587, 1588 (2006).

9 125 A.3d 304 (Del. 2015) (en banc).

10 88 A.3d 635 (Del. 2014) (en banc).

11 Singh v. Attenborough, 137 A.3d 151 (Del. 2016) (en banc) (dismissing complaint without discovery under *Corwin*); *In re* Books-A-Million, Inc. S'holders Litig., No. 11343-VCL, 2016 WL 5874974 (Del. Ch. Oct. 10, 2016) (dismissing complaint without discovery under *MFW*). The plaintiffs have the burden of pleading "disclosure deficiencies in the first place to test whether the vote really was fully-informed." *In re* Solera Holdings, Inc. S'holder Litig., No. 11524-CB, 2017 WL 57839, at *7-8 (Del. Ch. Jan. 5, 2017).

12 129 A.3d 884, 898 (Del. Ch. 2016); *see also In re* Walgreen Co. S'holder Litig., 832 F.3d 718, 722, 726 (7th Cir. 2016) (rejecting settlement that only obtained disclosures the court deemed "worthless"). *But see* Gordon v. Verizon Commc'ns, Inc., 46 N.Y.S.3d 557, 569-70 (App. Div. 2017) (approving settlement even though court believed disclosure in settlement agreement provided minimal benefit other than the avoidance of additional litigation costs).

13 The existing empirical evidence strongly supports this claim that much of that litigation has migrated to the federal courts. Cain, Fisch, Davidoff Solomon & Thomas, *supra* note 2, at 621 & tbl.1.

14 The PSLRA, among other innovations, introduced the "strong inference" requirement when alleging violations involving scienter, 15 U.S.C. § 78u-4(b)(2) (2018), introduced procedure for selecting the lead plaintiff in class actions with a presumption the most adequate plaintiff is the petitioner with the greatest loss, *id.* § 78u-4(a)(3), and, contrary to modern federal discovery practices, stays discovery until the complaint survives all motions to dismiss. *Id.* § 78u-4(b)(3)(B).

15 73 A.3d 934 (Del. Ch. 2013).

16 *See*, *e.g.*, Cain, Fisch, Davidoff Solomon & Thomas, *supra* note 2, at 621 & tbl.1.

17 *See* Stephen Choi, Jessica Erickson & A.C. Pritchard, *Piling On? An Empirical Study of Parallel Derivative Suits*, 14 J. EMPIRICAL LEGAL STUD. 653 (2017).

18 *See* DEL. CODE ANN. tit. 6, § 17-1101(c) (2019) ("It is the policy of this chapter to give maximum effect to the principle of freedom of contract and to the enforceability of partnership agreements."); *id.* § 18-1101(b) ("It is the policy of this chapter to give the maximum effect to the principle of freedom of contract and to the enforceability of limited liability company agreements.").

19 179 A.3d 824 (Del. 2018) (en banc).

20 It also creates strong incentives for defendants to delay and prolong books and records cases, despite the fact that Section 220 is intended to be a summary proceeding. DEL. CODE ANN. tit. 8, § 220 (2019).

21 Randall S. Thomas, *Improving Shareholder Monitoring of Corporate Management by Expanding Statutory Access to Information*, 38 ARIZ. L. REV. 331, 335 (1996).

22 DEL. CODE ANN. tit. 8, § 220(b) (2019). Examples of documents that are available include "corporate accounting records; minutes of all meetings of the shareholders, board of directors, and board committees; ... stocklist materials; the corporation's certificate of incorporation; corporate bylaws; written communications to shareholders; and copies of resolutions creating one or more classes of stock. 'Books and records' may also include documents relating to allegedly wrongful transactions." Randall S. Thomas & Kenneth J. Martin, *Using State Inspection Statutes for Discovery in Federal Securities Fraud Actions*, 77 B.U. L. REV. 69, 84 (1997). Section 220 requires that a stockholder own shares at the time they file suit. Weingarten v. Monster Worldwide, Inc., No. 12931-VCG, 2017 WL 752179, at *4-5 (Del. Ch. Feb. 27, 2017). Hence, the stockholder has no inspection right if she waits until after the effectiveness of a merger in which her shares are converted into cash or other securities. *Id.*

23 Cedarview Opportunities Master Fund, L.P. v. Spanish Broad. Sys., Inc., No. 2017-0785-AGB, 2018 WL 4057012, at *21 (Del. Ch. Aug. 27, 2018) (quoting 2 EDWARD P. WELCH ET AL., FOLK ON THE DELAWARE GENERAL CORPORATION LAW § 220.01, at 7-203 (6th ed. Supp. 2004)).

24 State *ex rel.* Miller v. Loft, Inc., 156 A. 170, 172 (Del. Super. Ct. 1931).

25 King v. VeriFone Holdings, Inc., 12 A.3d 1140, 1145 (Del. 2011) (en banc).

26 DEL. CODE ANN. tit. 8, § 220(b) (2019).

27 For a more detailed discussion of established proper purposes, see 2 EDWARD P. WELCH ET AL., FOLK ON THE DELAWARE GENERAL CORPORATION LAW § 220.05, at 7-226 to -236 (6th ed. Supp. 2020); DONALD J. WOLFE, JR. & MICHAEL A. PITTENGER, CORPORATE AND COMMERCIAL PRACTICE IN THE DELAWARE COURT OF CHANCERY § 9.07(e)(1) (2d ed. 2019).

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

29 *See* CM & M Grp., Inc. v. Carroll, 453 A.2d 788, 792 (Del. 1982) (citing State *ex rel.* Brumley v. Jessup & Moore Paper Co., 77 A. 16, 20 (Del. 1910), and State *ex rel.* Rogers v. Sherman Oil Co., 117 A. 122, 125 (Del. Super. Ct. 1922)).

30 *See* State *ex rel.* Bloch v. Sentry Safety Control Corp., 24 A.2d 587, 590 (Del. Super. Ct. 1942); State *ex rel.* Foster v. Standard Oil Co. of Kan., 18 A.2d 235, 238 (Del. Super. Ct. 1941); *see also* Compaq Computer Corp. v. Horton, 631 A.2d 1, 2 (Del. 1993) (addressing inspection rights in furtherance of non-derivative litigation against the defendant corporation).

31 *See* La. Mun. Police Emps. Ret. Sys. v. Morgan Stanley & Co., No. 5682-VCL, 2011 WL 773316, at *1 (Del. Ch. Mar. 4, 2011); Grimes v. DSC Commc'ns Corp., 724 A.2d 561, 566 (Del. Ch. 1998).

32 *See* Marathon Partners L. P. v. M&F Worldwide Corp., No. 018-N, 2004 WL 1728604, at *8 (Del. Ch. July 30, 2004).

33 Thomas & Martin, *supra* note 22, at 85.

34 *See* State *ex rel.* Healy v. Superior Oil Corp., 13 A.2d 453, 456 (Del. Super. Ct. 1940).

35 Norfolk Cnty. Ret. Sys. v. Jos. A. Bank Clothiers, Inc., No. 3443-VCP, 2009 WL 353746, at *5 (Del. Ch. Feb. 12, 2009) (citing *Grimes*, 724 A.2d at 565).

36 WOLFE & PITTENGER, *supra* note 27, § 9.07(e)(2).

37 Seinfeld v. Verizon Commc'ns, Inc., 909 A.2d 117, 118 (Del. 2006) (en banc) (emphasis added). A stockholder is "not required to prove by a preponderance of the evidence that waste and [mis]management are actually occurring." *Id.* at 123 (quoting Thomas & Betts Corp. v. Leviton Mfg. Co., 681 A.2d 1026, 1031 (Del. 1996)). "Stockholders need only show, by a preponderance of the evidence, a credible basis from which the Court of Chancery can infer there is possible mismanagement that would warrant further investigation--a showing that 'may ultimately fall well short of demonstrating that anything wrong occurred.'" *Id.* at 123 (quoting Khanna v. Covad Commc'ns Grp., Inc., No. 20481-NC, 2004 WL 187274, at *6 n.25 (Del. Ch. Jan. 23, 2004) (footnote omitted)). The credible basis requirement thus qualifies by rendering more specific the showing that the shareholder meets the "proper purpose" requirement set forth in Section 220(b). Some states have followed Delaware in similarly conditioning record requests on alleging a "credible basis" of misconduct when records are sought as a possible prelude for a shareholder suit. *See*, *e.g.*, Arctic Fin. Corp. v. OTR Express, Inc., 38 P.3d 701, 704 (Kan. 2002) (quoting "credible basis" standard of Sec. First Corp. v. U.S. Die Casting & Dev. Co., 687 A.2d 563, 567 (Del. 1997) (en banc)); Cain v. Merck & Co., 1 A.3d 834, 841 (N.J. Super. Ct. App. Div. 2010) (same). Other courts adhere to the more general "proper purpose" standard but closely scrutinize the request for information supporting the presence of wrongdoing. *See*, *e.g.*, Chitwood v. Vertex Pharm., Inc., 71 N.E.3d 492, 501 (Mass. 2017) (holding that request should be granted if there is "reasonable inference ... that would tend to indicate the existence of corporate wrongdoing or mismanagement").

38 WOLFE & PITTENGER, *supra* note 27, § 9.07(e)(2) (quoting Amalgamated Bank v. Yahoo! Inc., 132 A.2d 752, 778 (Del. Ch. 2016)).

39 *See id.*

40 *Seinfeld*, 909 A.2d at 122 (quoting *Sec. First Corp.*, 687 A.2d at 571).

41 Saito v. McKesson HBOC, Inc., 806 A.2d 113, 116 (Del. 2002) (en banc); *see also* Helmsman Mgmt. Servs., Inc. v. A & S Consultants, Inc., 525 A.2d 160, 167 (Del. Ch. 1987). In addition to stating a proper purpose, a stockholder seeking a Section 220 inspection must satisfy certain form and manner requirements outlined in the statute. *See* DEL. CODE ANN. tit. 8, § 220 (2019); W. Coast Mgmt. & Capital, LLC v. Carrier Access Corp., 914 A.2d 636, 641 (Del. Ch. 2006). For example, a stockholder is required to serve a "written demand under oath stating the purpose thereof ... directed to the corporation at its registered office in [Delaware] or at its principal place of business." DEL. CODE ANN. tit. 8, § 220(b) (2019). If the corporation refuses to permit the demanded inspection or fails to respond "to the demand within 5 business days after the demand has been made, the stockholder may apply to the Court of Chancery for an order to compel such inspection." *Id.* § 220(c). When filing a Section 220 complaint, the plaintiff stockholder is required to attach proof of being a stockholder of record. *Id.* § 220(b).

42 DEL. CODE ANN. tit. 8, § 220(c) (2019). The Court of Chancery's imposition of a condition or limitation is determined on a "case-by-case and 'fact specific'" basis. United Techs. Corp. v. Treppel, 109 A.3d 553, 558 (Del. 2014) (en banc) (quoting Espinoza v. Hewlett-Packard Co., 32 A.3d 365, 372 (Del. 2011) (en banc)).

43 214 A.3d 933, 935 (Del. 2019).

44 Wal-Mart Stores, Inc. v. Ind. Elec. Workers Pension Trust Fund IBEW, 95 A.3d 1264, 1271 (Del. 2014) (en banc) (quoting *Espinoza*, 32 A.3d at 371-72).

45 *See* Disney v. Walt Disney Co., 857 A.2d 444, 447 (Del. Ch. 2004).

46 *See* 1 R. FRANKLIN BALOTTI & JESSE A. FINKELSTEIN, THE DELAWARE LAW OF CORPORATIONS & BUSINESS ORGANIZATIONS § 7.48 (3d ed. Supp. 2020).

47 Stone v. Ritter, No. 1570-N, 2005 WL 2416365, at *2 (Del. Ch. Sept. 26, 2005) ("[T]here is a reasonable expectation that confidential information produced in the books and records context will be treated as confidential unless and until disclosed in the course of litigation or pursuant to some other legal requirement."); *see also Disney*, 857 A.2d at 450 ("In ... limited circumstances, and upon a clear showing, this court will entertain extraordinary applications to remove 'confidential' designations from documents produced as the result of a Section 220 proceeding.").

48 Brehm v. Eisner, 746 A.2d 244, 266-67 (Del. 2000) (en banc) (emphasis added).

49 BBC Acquisition Corp. v. Durr-Fillauer Med., Inc., 623 A.2d 85, 88 (Del. Ch. 1992).

50 Saito v. McKesson HBOC, Inc., 806 A.2d 113, 114 (Del. 2002) (en banc).

51 Grimes v. Donald, 673 A.2d 1207, 1216, 1218-19 (Del. 1996) (en banc).

52 This requires a plaintiff to show enough to "create a reasonable doubt either that: (1) a majority of the board is independent for purposes of responding to the demand or refusing the demand; or (2) the challenged action is protected by the business judgment rule." Thomas & Martin, *supra* note 22, at 82 (footnotes omitted).

53 Scattered Corp. v. Chi. Stock Exch., Inc., 701 A.2d 70, 77 (Del. 1997); *see* DEL. CH. CT. R. 23.1 ("In a derivative action ..., the complaint shall allege ... with particularity the efforts, if any, made by the plaintiff to obtain the action the plaintiff desires from the directors ... and the reasons for the plaintiff's failure to obtain the action or for not making the effort.").

54 634 A.2d 927 (Del. 1993).

55 *Id.* at 934-35 & n.10.

56 Aronson v. Lewis, 473 A.2d 805, 814-15 (Del. 1984).

57 *Rales*, 634 A.2d at 934 n.10.

58 673 A.2d 1207 (Del. 1996) (en banc).

59 *Id.* at 1216 (footnotes omitted); *see* DEL. CH. CT. R. 11(b)-(c) (imposing, akin to FED. R. CIV. P. 11, "information and belief" requirements on pleadings, and, if those requirements are violated, allowing for sanctions).

60 746 A.2d 244 (Del. 2000) (en banc).

61 *Id.* at 267.

62 *Id.* at 266.

63 *Id.* at 266-67 (footnotes omitted).

64 *See*, *e.g.*, King v. VeriFone Holdings, Inc., 12 A.3d 1140, 1145 (Del. 2011) (en banc); Seinfeld v. Verizon Commc'ns, Inc., 909 A.2d 117, 120 (Del. 2006) (en banc). In *Verizon*, the Delaware Supreme Court said:
More than a decade ago, we noted that "[s]urprisingly, little use has been made of Section 220 as an information-gathering tool in the derivative [suit] context." Today, however, stockholders who have concerns about corporate governance are increasingly making a broad array of Section 220 demands. The rise in books and records litigation is directly attributable to this Court's encouragement of stockholders, who can show a proper purpose, to use the "tools at hand" to obtain the necessary information before filing a derivative action. Section 220 is now recognized as "an important part of the corporate governance landscape."
Id. (quoting, in the first instance, Rales v. Blasband, 634 A.2d 927, 934 n.10 (Del. 1993), and, in the last instance, Sec. First Corp. v. U.S. Die Casting & Dev. Co., 687 A.2d 563, 571 (Del. 1997) (en banc)). Some commentators have argued that "[s]ection 220 demands are especially relevant when shareholders in a company assert what are now commonly referred to as '*Caremark* claims.'" Frank R. Schirripa & Daniel B. Rehns, *Is the Delaware Section 220 Tango Worth the Wait?*, AM. B. ASS'N (Oct. 3, 2017), https://www.americanbar.org/groups/litigation/committees/class-actions/articles/2017/fall2017-delaware-section-220-tango.html [https://perma.cc/4ZXK-F4D2].

65 Mizel v. Connelly, No. 16638, 1999 WL 550369, at *5 n.5 (Del. Ch. Aug. 2, 1999).

66 *See* Cain, Fisch, Davidoff Solomon & Thomas, *supra* note 2, at 604.

67 Thompson & Thomas, *supra* note 1, at 182, 183 tbl.9 (showing that almost 70 percent of class action acquisition-oriented complaints were filed within three days of the announcement of the proposed transaction).

68 *Id.* (reporting only 11 percent of derivative suit complaints are filed within three days of the announcement of the transaction challenged).

69 *See infra* Part IV.

70 Randall S. Thomas & Robert B. Thompson, *A Theory of Representative Shareholder Suits and Its Application to Multijurisdictional Litigation*, 106 NW. U. L. REV. 1753, 1806-07 (2012). However, the Delaware courts apply this common law rule only in situations where the plaintiffs' law firms fail to reach agreement on which firm should be the lead counsel for the case. *Id.* at 1806 n.282.

71 Cain, Fisch, Davidoff Solomon & Thomas, *supra* note 2, at 621 tbl.1 (charting statistics on upswing of deal litigation since 2003).

72 Cox & Thomas, *supra* note 3, at 327.

73 Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173 (Del. 1986); *see* Michal Barzuza, *The State of State Antitakeover Law*, 95 VA. L. REV. 1973, 2018-42 (2009) (gathering non-Delaware cases that address takeover related issues that are consistent with, and diverge from, Delaware law).

74 Cox & Thomas, *supra* note 3, at 329-31.

75 Corwin v. KKR Fin. Holdings LLC, 125 A.3d 304 (Del. 2015) (en banc).

76 *Id.* at 308-09.

77 *Id.* at 313.

78 Cox & Thomas, *supra* note 3, at 338-40.

79 James D. Cox, Tomas J. Mondino & Randall S. Thomas, *Understanding the (Ir)Relevance of Shareholder Votes on M&A Deals*, 69 DUKE L.J. 503, 544-50 (2019) (arguing that statutorily required shareholder approval of a transaction should not also be treated as ratification of misconduct by fiduciaries committed in connection with that transaction).

80 Sinclair Oil Corp. v. Levien, 280 A.2d 717 (Del. 1971).

81 457 A.2d 701 (Del. 1983) (en banc).

82 *In re* Cox Commc'ns, Inc. S'holders Litig., 879 A.2d 604, 605-06 (Del. Ch. 2005).

83 Kahn v. M&F Worldwide Corp., 88 A.3d 635 (Del. 2014) (en banc).

84 *Id.* at 645.

85 *In re* Books-a-Million, Inc. S'holders Litig., No. 11343-VCL, 2016 WL 5874974 (Del. Ch. Oct. 10, 2016); *see also* Singh v. Attenborough, 137 A.3d 151 (Del. 2016) (en banc) (dismissing complaint without discovery under *Corwin*).

86 Flood v. Synutra Int'l, Inc., 195 A.3d 754, 756 (Del. 2018) (en banc).

87 *See id.* at 768-70 (Valihura, J., dissenting).

88 The plaintiffs did not employ the tools at hand in this case.

89 As we observed in our earlier work, Cox, Modino & Thomas, *supra* note 79, we illustrate this point using data from Professor Morgan Rick's M&A database. His data covers all M&A deals involving U.S. public company targets signed after January 1, 1996, and concluded by March 31, 2017. The minimum size of deals included in the database is $1 billion and there are a total of 1,620 deals in it. In all, only five deals were rejected by shareholders and an additional seventeen deals were withdrawn before completion, some of which may have been withdrawn because of an anticipated negative shareholder vote. If all twenty-two transactions are counted as rejected deals (which is probably an overestimate), then only 1.3 percent of mergers fail from lack of shareholder approval.

90 Shortly after *Corwin* was decided, enterprising defense counsel sought, albeit unsuccessfully, to extend *Corwin* to also insulate the corporation from the inspection request a shareholder had launched to challenge the merger. In *Lavin v. West Corp.*, No. 2017-0547-JRS, 2017 WL 6728702 (Del. Ch. Dec. 29, 2017), the defendants interjected a novel

extension of *Corwin*, arguing that, under *Corwin*, not only does shareholder ratification protect the transaction but it also collaterally bars a Section 220 request that alleges misconduct in connection with the underlying transaction. *Id.* at *1. Vice Chancellor Slights ruled in Lavin's favor, although he limited the documents provided to Lavin. *Id.* at *7. In reaching this conclusion, the Vice Chancellor provided valuable guidance about the scope of Section 220 in a *Revlon* case involving a *Corwin* defense. After noting that plaintiffs in *Revlon* cases should anticipate a *Corwin* defense, he praised Lavin for utilizing Section 220 as a pre-suit discovery device. *See id.* at *9 ("Although our courts primarily direct that encouragement (or admonition) to stockholders who intend to file derivative complaints where they will allege demand futility, the direction is equally applicable to stockholders who intend to file class action suits challenging transactions approved by a shareholder vote." (citing Compaq Computer Corp. v. Horton, 631 A.2d 1, 4 (Del. 1993)). The Vice Chancellor stated it would be "naïve" for a shareholder to think that he would not face a motion to dismiss based on *Corwin* if he based his complaint only on public documents. *Id.* at *9 & n.71 (acknowledging Joel Edan Friedlander, *Vindicating the Duty of Loyalty: Using Data Points of Successful Stockholder Litigation as a Tool for Reform*, 72 BUS. LAW. 623, 648 (2017) (arguing that Section 220 discovery is a "pale substitute" for expedited discovery in deal litigation)). More significantly, the Vice Chancellor rejected the defendants' argument that the court needed to adjudicate their *Corwin* defense in the context of a Section 220 action: "*Corwin* does not fit within the limited scope and purpose of a books and records action in this court .... [S]tockholders seeking books and records under Section 220 for the purpose of investigating mismanagement need not prove that wrongdoing or mismanagement actually occurred." *Id.* at *9.

91 Some states impose restrictions on shareholders' entitlement to a stocklist and/or books and records. *See*, *e.g.*, ARIZ. REV. STAT. ANN. § 10-1602 (2019) (requiring that a shareholder owns stock in the company for at least six months or holds more than 5 percent of the company's stock to qualify for an inspection).

92 Cain, Fisch, Davidoff Solomon & Thomas, *supra* note 2, at 623 tbl.2.

93 *In re* Books-a-Million, Inc. S'holders Litig., No. 11343-VCL, 2016 WL 5874974, at *6-7 (Del. Ch. Oct. 10, 2016); *see* DEL. CH. CT. R. 12(b)(6) (allowing for dismissal akin to FED. R. CIV. P. 12(b)(6)).

94 *In re Books-a-Million, Inc. S'holders Litig.*, 2016 WL 5874974, at *8; *see id.* at *8 n.2 (explaining that one purpose of the *MFW* structure was to remedy a doctrinal situation in which there was "no feasible way for defendants to get [cases] dismissed on the pleadings" (quoting *In re* MFW S'holders Litig., 67 A.3d 496, 504 (Del. Ch. 2013)). Similar logic has been applied in motions to dismiss in the *Corwin* setting. Singh v. Attenborough, 137 A.3d 151 (Del. 2016) (en banc) (dismissing complaint without discovery under *Corwin*).

95 *In re* Solera Holdings, Inc. S'holder Litig., No. 11524-CB, 2017 WL 57839, at *8 (Del. Ch. Jan. 5, 2017).

96 As mentioned earlier, *see supra* Part III.B, the need for pre-filing discovery has been heightened by the Delaware Supreme Court's recent decision in *Flood v. Synutra International, Inc.*, 195 A.3d 754 (Del. 2018) (en banc).

97 Some plaintiffs' attorneys have been skeptical about the value of Section 220 proceedings as a substitute for discovery in an M&A case. Friedlander, *supra* note 90, at 648 ("At present, there is no clear path for pleading a case that a sale process has been disloyally manipulated by an insider or a financial advisor. There are no longer disclosure settlements to object to. Bringing a preliminary injunction motion is self-defeating in light of *Corwin*. Seeking expedited discovery in the absence of an injunction application is an uncertain proposition. Section 220 inspections are a pale substitute for expedited discovery.").

98 180 A.3d 1055, 1057 n.2 (Del. 2018) (citing *Corwin*).

99 *Id.* at 1057 (referencing DEL. CODE ANN. tit. 8, § 251(h) (2019)).

100 *Id.* at 1059.

101 *Id.* at 1057 (quoting minutes of the board meeting held on June 25, 2016); *see* 17 C.F.R. §§ 240.14d-9, 240.14d-101 (2019).

102 *Appel*, 180 A.3d at 1064. The Chancery Court found that, under *Corwin*, the defendants were entitled to the protections of the business judgment rule because they had made full disclosure of all material facts and the transaction had been approved by a majority of the shareholders. *See id.* at 1057.

103 191 A.3d 268 (Del. 2018).

104 *Id.* at 273.

105 *Id.* at 273-74 (quoting, in the last instance, the complaint).

106 *Id.* at 276-77.

107 *See id.* at 275. The Delaware courts have extended *Corwin* to situations in which there is an "acceptance of a first-step tender offer by fully informed, disinterested, uncoerced stockholders representing a majority of a corporation's outstanding shares in a two-step merger." *In re* Volcano Corp. S'holder Litig., 143 A.3d 727, 747 (Del. Ch. 2016).

108 *Morrison*, 191 A.3d at 275 (quoting Corwin v. KKR Fin. Holdings LLC, 125 A.3d 304, 312 (Del. 2015) (en banc)).

109 Olenik v. Lodzinski, 208 A.3d 704 (Del. 2019).

110 *Id.* at 718.

111 *See*, *e.g.*, Verified Complaint, Klein v. BioCryst Pharm., Inc., No. 2018-0499-JRS (Del. Ch. July 10, 2018) (*Corwin* defense likely here); Verified Complaint, Evankovich v. Rite Aid Corp., No. 2018-0471-AGB (Del. Ch. June 29, 2018) (*Corwin* defense likely here); Verified Complaint, Gorban v. Cadus Corp., No. 2018-0463-MTZ (Del. Ch. June 27, 2018) (*MFW* defense likely here); Verified Complaint, Fang Grp. Inv., Ltd. v. Lytro, Inc., No. 2018-0401-JTL (Del. Ch. June 1, 2018) (*Corwin* defense likely here); Arca Invs., A.S. v. Amtrust Fin. Servs., No. 2018-0381-AGB (Del. Ch. May 30, 2018) (*MFW* defense likely here).

112 There is also the potential for discovery as part of an appraisal action in the wake of *Cede & Co. v. Technicolor, Inc.*, 542 A.2d 1182 (Del. 1988), where the plaintiff Cinerama started out with an appraisal action and then filed a class action alleging breach of fiduciary duty once discovery was finished. *See id.* at 1183. It is at least theoretically possible that plaintiffs may be using appraisal actions as an alternative discovery device for filing class actions. While only time will tell if this is true, it strikes us as unlikely that stockholders would want to invest in a large block of target company stock, and leave their investment illiquid until the appraisal action is resolved through a settlement or a judgment, simply to get discovery for the purpose of determining whether to file a breach of fiduciary duty class action. *See* DEL. CODE ANN. tit. 8, § 262(g) (2019) (providing for dismissal of appraisal rights for publicly traded shares unless those shares exceed 1 percent of the outstanding shares or the merger consideration for such shares exceeds $1 million). Practitioners tell us that the investment strategies of the hedge funds that are driving appraisal litigation in Delaware are focused on the potential upside between the deal price and the underlying value of the target firms. In this situation, getting discovery from the appraisal case that might lead to filing a fiduciary duty case is, at best, a collateral benefit.

113 Before we discuss our empirical results, however, we briefly note that many shareholder demands for documents do not lead to litigation. Knowledgeable Delaware attorneys say that, once a shareholder makes a request for books and records, it is far more common for companies to produce some documents than to reject the investors' demand and force them to file a lawsuit. Kevin Shannon, Partner, Potter Anderson Corroon LLP, Trending Developments: Dealing with Books and Records Inspection Demands, Address at the Third Annual Symposium on Corporate Law at U.C. Berkeley (Oct. 12, 2018). There are several reasons for this willingness of defendants to cooperate. First, it helps avoid the expense of litigation. Second, if the defendants litigate, there is a substantial risk that they will lose and have to produce the documents anyway. Third, the documents produced may help the defendants if they show that the disclosures were accurate. Fourth, if there is litigation, then the shareholder will get to present evidence to the court about the defendants' alleged misconduct as part of establishing their right to the information, but the defendants will not be permitted to reply by presenting their own evidence. Finally, it is frequently the case that, even once they get the documents, the plaintiffs do not bring a suit on the merits against the defendants. *Id.* From our perspective, we are unable to determine how many such instances occur because we have no written record on which to assess them. In other words, we can only study what we can measure. It does mean, however, that our empirical analysis does not capture the full impact of the tools at hand doctrine on practitioners and companies.

114 Our procedure is laid out more fully in our earlier paper. Thomas & Martin, *supra* note 22, at 90.

115 While we coded all of the outcomes in the cases, we were faced with a data problem for cases that were dismissed voluntarily by the parties or the plaintiff alone. In this situation, it is often the case that the dismissal filings do not specify

whether the plaintiff has received the stocklist and/or books and records. Given the small number of cases, we attempted to contact the attorneys of record to determine whether the documents were ultimately provided to the plaintiff. When we were able to determine with certainty that the plaintiff had obtained some information in the case, we coded it as a dismissal with the stocklist/books and records. When we were unable to determine the outcome from the court filings and conversations with attorneys, we coded it as a dismissal without further information. *Id.* at 91. This had the effect of overstating the likelihood of failure for the plaintiffs. As we discuss below, in our more recent study, we used a different coding protocol for these cases.

116 For tables summarizing the data of the earlier study, see *id.* at 102-07 tbls.1-6.

117 *Id.* at 103 tbl.3, 106 tbl.5. The most common "proper purpose" for plaintiffs "is the desire to investigate potential corporate mismanagement, wrongdoing, or waste." Melzer v. CNET Networks, Inc., 934 A.2d 912, 917 (Del. Ch. 2007).

118 Thomas & Martin, *supra* note 22, at 93 (reporting that successful plaintiffs obtained information in a median time of approximately one month and a mean time of approximately three months, whereas unsuccessful plaintiffs waited a median of approximately two months and a mean of approximately six months).

119 *Id.* at 96 (reporting that successful shareholders experienced median and mean delays of roughly three months and seven months, whereas the unsuccessful plaintiffs had mean and median delays of approximately nine months and eleven months).

120 For stocklist actions, successful plaintiffs filed a mean of eighty-one pages and a median of thirty-nine pages, whereas defendants in those same actions filed a mean of fifty-seven pages and a median of eighteen pages of documents. *Id.* at 104 tbl.3. Unsuccessful stocklist plaintiffs filed quite a few more pages on average (with a mean of 128 pages) although the median was roughly the same as the successful plaintiffs. *Id.* All plaintiffs in books and records cases were somewhat comparable in terms of the number of pages filed (successful plaintiffs filed a mean of ninety-three pages and a median of thirty-five pages; unsuccessful plaintiffs filed a mean of eighty-seven pages and a median of twenty-five pages), while defendants filed consistently less than plaintiffs (unsuccessful defendants filed a mean of fifty-six pages and a median of thirteen pages; successful defendants filed a mean of fifty-nine pages and a median of nineteen pages). *Id.* at 107 tbl.6.

121 *See id.* at 96. In our earlier study, we highlighted three important caveats to our results: (1) some shareholders may have obtained information from companies without filing a Section 220 action because companies respond to the threat of such an action; (2) we may have overestimated the failure rate for Section 220 cases because we classified voluntary dismissals without further information as dismissals where we had no further information about what the plaintiff received; and (3) in books and records cases, we could not tell what information was provided to the plaintiff even in successful actions unless there was a court order specifying the documents to be produced. *Id.* at 97.

122 *See infra* Part V.C (reporting an additional 154 cases for requests from LLCs and LPs).

123 We include both dismissals without further information and settlements without further information in this column.

124 Unlike the earlier study, we did not engage in an outreach to attorneys for the parties to see if they would provide us information about whether dismissals without further information should be coded as successes or failures. We made this decision for two reasons. First, the outreach in the earlier study had been very time consuming and relatively unsuccessful. During our earlier study, we contacted the attorneys of record for all of the cases in this category and received very few responses. Often the responses that we did receive stated that the attorneys could not, for confidentiality reasons, disclose any information about whether books and records were provided by the company. Second, the number of cases in this sample was much larger than in the earlier study and would have required even more time and effort to contact all of the attorneys. Furthermore, expending that additional time and effort was unlikely to yield valuable data, as we anticipated most attorneys would refuse to provide the requested information because of confidentiality issues, as occurred during our earlier study.

125 *See supra* note 124.

126 Some of these settlements are in response to judicial pressure to resolve cases without unnecessary litigation, while others may arise because the filing of the Section 220 cases acts as "a shot across the bow," leading the defendant to seek to resolve the underlying dispute.

127 Michael Greene, *Books and Records Disputes Getting Longer, More Complex*, BLOOMBERG (May 2, 2016) (citing Megan D. McIntyre, Director, Grant & Eisenhofer P.A.).

128 *See supra* note 119. We did not separately calculate the differences in delay for stocklist and books and records cases in the second study. *See supra* notes 118-19.

129 *See supra* note 120.

130 At a recent practitioner conference, a leading Delaware lawyer made the further point that defense attorneys are paid by the hour in books and records cases, whereas plaintiffs' attorneys frequently have to bear their own costs in bringing these cases and are only compensated for their work if they successfully bring a subsequent merits-based lawsuit. Kevin Shannon, Partner, Potter Anderson Corroon LLP, Trending Developments: Dealing with Books and Records Inspection Demands, Address at the Third Annual Symposium on Corporate Law at U.C. Berkeley (Oct. 12, 2018).

131 EDWARD P. WELCH& ANDREW J. TUREZYN, FOLK ON THE DELAWARE GENERAL CORPORATION LAW: FUNDAMENTALS § 220.1, at 422 (2000) (quoting Mite Corp. v. Heli-Coli Corp., 256 A.2d 855, 857-58 (Del. Ch. 1969)).

132 Alternatively, we could calculate this fraction by dividing the number of subsequent suits (126) by the number of cases alleging mismanagement (437). Doing so results in 29 percent of cases where the plaintiff is investigating wrongdoing which results in subsequent litigation.

133 Thompson & Thomas, *supra* note 1, at 169 tbl.2.

134 *Id.*

135 Interview by Randall S. Thomas with Jay W. Eisenhofer, Director, Grant & Eisenhofer P.A.

136 When we completed work on this article, there were eleven subsequent cases that remained unresolved, as well as two subsequent cases where the decisions were under seal.

137 While sophisticated LLC investors may negotiate contractual protections that produce beneficial agreements, less knowledgeable investors may find themselves being taken advantage of and without the benefit of fiduciary protections. Peter Molk, *Protecting LLC Owners While Preserving LLC Flexibility*, 51 U.C. DAVIS L. REV. 2129, 2133 (2018).

138 Michael Greene, *Companies Placing More Conditions on Records Inspections*, BLOOMBERG (Aug. 25, 2016) (quoting Lawrence Hamermesh, Professor, Delaware Law School, Widener University).

139 *Id.* (quoting Lawrence Hamermesh, Professor, Delaware Law School, Widener University).

140 Freund v. Lucent Techs., Inc., No. 18893, 2003 WL 139766, at *5 (Del. Ch. Jan. 9, 2003).

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

142 109 A.3d 553, 557 (Del. 2014) (en banc).

143 *Id.* at 555 (quoting the proposed agreement). After the Section 220 action was filed, the United Technologies board of directors adopted a forum selection bylaw "evincing its concern to organize corporate governance litigation in the courts of Delaware." William Savitt, *Delaware Court Curtails Books & Records, Validates Board-Adopted Forum Selection Bylaws*, HARV. L. SCH. F. ON CORP. GOV. (Jan. 12, 2015), https://corpgov.law.harvard.edu/2015/01/12/delaware-court-curtails-books-records-validates-board-adopted-forum-selection-bylaws/.

144 *Treppel*, 109 A.3d at 555.

145 *Id.* at 554.

146 *Id.* at 559.

147 132 A.3d 752, 796 (Del. Ch. 2016).

148 *Id.* at 797.

149 *Id.*

150 *Id.* at 798.

151 Greene, *supra* note 127 (quoting Mark Lebovitch, Partner, Bernstein Litowitz Berger & Grossmann LLP).

152 Rolfe Winkler, *Obscure Law Opens Startups' Books*, WALL ST. J., May 25, 2016, at B1.

153 *Id.*

154 *Id.* (quoting Richard Grimm, an attorney specializing in executive compensation).

155 WOLFE & PITTENGER, *supra* note 27, § 9.07(a)(2)(ii).

156 DEL. CODE ANN. tit. 6, § 17-403 (2019) (cross-referencing, for general partners of LPs, the inspection rights of general partners in general partnerships at DEL. CODE ANN. tit. 6, § 15-403 (2019) (providing "access to the books and records of the partnership and other information concerning the partnership's business and affairs")); *see* Schwartzberg v. Critef Assocs. Ltd. P'ship, 685 A.2d 365, 375 (Del. Ch. 1996) (holding that, because the statute contains no express limit regarding purpose, "one must begin with the recognition that a partner has no obligation to prove that it has a 'proper purpose' in order to enforce" her inspection rights). However, the defendant can negate these rights by proving that the purposes of the plaintiff's inspection are improper. *Id.* at 374; *see also* Bond Purchase, L.L.C. v. Patriot Tax Credit Props., L.P., 746 A.2d 842, 857 (Del. Ch. 1999) (discussing the two steps of the "improper purpose defense"); *cf. In re* Paine Webber Ltd. P'ship, No. 15043, 1996 WL 535403, at *7 (Del. Ch. Sept. 17, 1996) (summarizing the second prong of the two-step test as "the ... purpose ... would actually harm the value of the joint investment").

157 DEL. CODE ANN. tit. 6, § 17-305(a) (2019); *see* Gotham Partners, L.P. v. Hallwood Realty Partners, L.P., 714 A.2d 96, 97 (Del. Ch. 1998).

158 DEL. CODE ANN. tit. 6, § 17-305(d) (2019).

159 *Id.* § 17-305(a).

160 *See Schwartzberg*, 685 A.2d at 375; *see also* Madison Ave. Inv. Partners, LLC v. Am. First Real Estate Inv. Partners, L.P., 806 A.2d 165, 170 (Del. Ch. 2002) (Lamb, V.C.) (interpreting a statutory condition to inspection as a "basis for the proper purpose analysis").

161 *Schwartzberg*, 685 A.2d at 375 n.14; *see also* Madison Real Estate Immobilien-Anlagegesellschaft Beschrankt Haftende KG v. KanAm USA XIX Ltd. P'ship, No. 2863-VCP, 2008 WL 1913237, at *5 (Del. Ch. May 1, 2008) ("In determining whether a purpose is reasonably related to the limited partner's interest under § 17-305, the Court of Chancery will consider whether that purpose is 'proper' within the meaning of 8 *Del. C.* § 220.").

162 DEL. CODE ANN. tit. 6, § 17-305(f) (2019). Any such restriction must appear in the original partnership agreement or "any subsequent amendment approved or adopted by all of the partners or in compliance with any applicable requirements of the partnership agreement." *Id.*

163 *Id.* § 17-305(b).

164 *Id.* § 18-305(a); *see also* Arbor Place, LP v. Encore Opportunity Fund, L.L.C., No. 18928, 2002 WL 205681, at *5 (Del. Ch. Jan. 29, 2002) ("To establish a right to inspect records under § 18-305 of the LLC Act, a plaintiff must demonstrate a proper purpose for the inspection.").

165 DEL. CODE ANN. tit. 6, § 18-305(g) (2019) ("[T]he rights of a member or manager to obtain information as provided in this section may be restricted in an original limited liability company agreement or in any subsequent amendment approved or adopted by all of the members or in compliance with any applicable requirements of the limited liability company agreement.").

166 *Id.* § 18-1101(b); *cf. id.* § 17-1101(c) (same for LPs).

167 WOLFE & PITTENGER, *supra* note 27, § 9.07(a)(2)(ii).

168 DEL. CODE ANN. tit. 6, § 17-305(f) (2019).

169 *See* Grand Acquisition, LLC v. Passco Indian Srings DST, 145 A.3d 990, 995 (Del. Ch. 2016) ("[T]his Court's decisions involving LLCs and LPs often cite one another on the basis that '[t]he Delaware [LLC] Act has been modeled on the popular Delaware LP Act.'" (quoting Elf Atochem N. Am., Inc. v. Jaffarin, 727 A.2d 286, 290 (Del. 1999)); *Arbor Place*, 2002 WL 205681, at *4 n.9 ("Reliance on a limited partnership case [in deciding a limited liability company case] is appropriate because Delaware's LLC Act was 'modeled on the popular Delaware LP Act. In fact, its architecture and much of its wording is almost identical to that of the Delaware LP Act.'" (quoting *Elf Atochem N. Am., Inc.*, 727 A.2d at 290 (footnote omitted)).

170 Bond Purchase, L.L.C. v. Patriot Tax Credit Props., L.P., 746 A.2d. 842, 855 (Del. Ch. 1999); *see also Grand Acquisition*, 145 A.3d at 994 ("This Court consistently has treated a contractual books and records right provided in a limited liability company's ... or a limited partnership's ... governing instrument as independent from the relevant default statutory right.").

171 DEL. CODE ANN. tit. 6, § 17-305(f) (2019).

172 *Bond Purchase, L.L.C.*, 746 A.2d at 855.

173 DEL. CODE ANN. tit. 6, § 17-305(a) (2019) (providing inspection rights "subject to reasonable standards"); ROBERT L. SYMONDS, JR. & MATTHEW J. O'TOOLE, SYMONDS & O'TOOLE ON DELAWARE LIMITED LIABILITY COMPANIES § 12.07(G)(1) (2d. ed. 2019).

174 SYMONDS & O'TOOLE, *supra* note 173, § 12.07(G)(1).

175 Mickman v. Am. Int'l Processing, L.L.C., No. 3869-VCP, 2009 WL 2244608, at *2 (Del. Ch. July 28, 2009) (interpreting "all books and records" more expansively than "books of accounts"); *see also* Tafaro v. Innovative Discovery LLC, No. 11311-VCMR, 2016 Del. Ch. LEXIS 190, at *3-4 (Del. Ch. Oct. 31, 2016) (holding that, even if the agreement granted an economic interest holder the right to inspect "books of account," the economic interest holders had no statutory right to inspect "books and records"); RED Capital Inv. L.P. v. RED Parent LLC, No. 11575-VCN, 2016 WL 612772, at *5 (Del. Ch. Feb. 11, 2016) ("Specifically, Section 10.2(c) limits a Company member's right to inspect Company records to 'books of account' of the Company."); Arbor Place, L.P. v. Encore Opportunity Fund L.L.C., No. 18928, 2002 WL 205681, at *3 (Del. Ch. Jan. 29, 2002) ("The list of 'records' found in the LLC Act contains much more than just books of account ....").

176 Answer and Defenses to Verified Complaint at 23, Dayan v. ASAP Sales LLC, No. 12693-VCS (Del. Ch. Sept. 23, 2016), 2016 WL 5548107.

177 *See*, *e.g.*, ARIZ. REV. STAT. ANN. § 10-1602 (2019) (granting inspection rights to any shareholder that owns stock in the company for at least six months or that holds more than 5 percent of the company's stock).

178 SYMONDS & O'TOOLE, *supra* note 173, § 12.07(G)(1). In the *Dayan* case, it appears that the 5 percent restriction was added to the company's operating agreement after the plaintiff filed her Section 220 action, apparently impermissibly, as the defendants were sanctioned by the Chancery Court for this action. *See* Opening Brief in Support of Plaintiff's Motion for Sanctions, Dayan v. ASAP Sales LLC, No. 12693-VCS (Mar. 17, 2017), 2017 WL 1092711. Unfortunately, the court's ruling on the motion for sanctions is under seal, so we are unable to determine what happened, although the defendants withdrew their affirmative defenses in the action. Defendants' Notice of Withdrawal of Affirmative Defenses Asserted in Their Amended Answer & Defenses to Verified Complaint, Dayan v. ASAP Sales LLC, No. 12693-VCS (Del. Ch. Mar. 21, 2017). At the time this article was written, the case was still pending. *But see* Loews Theatres, Inc. v. Commercial Credit Co., 243 A.2d 78, 81 (Del. Ch. 1968) (holding as void a provision in articles of incorporation limiting inspection to holders having at least 25 percent voting interest).

179 DEL. CODE ANN. tit. 6, § 18-1101(b) (2019).

180 Verified Complaint for Access to Ltd. P'ship Books & Records at 5, Hertzberg v. Millbrae Nat'l Gas Dev. & Expl. Fund 2002, L.P., No. 3224-VCS (Del. Ch. Sept. 12, 2007).

181 Opening Brief in Support of the Millbrae Partnerships' & Managing Partners' Motion to Dismiss the Complaint or, in the Alternative, for Summary Judgment at 6, 12-13, Hertzberg v. Millbrae Nat'l Gas Dev. & Expl. Fund 2002, L.P., No. 3224-VCS (Del. Ch. Oct. 23, 2007), 2007 WL 5208189 ("The Managing Partner may for any reason it determines ... on 15 days' prior notice, require any Investor Partner to withdraw from the Partnership ... on such ... date as determined by the Managing Partner, in its sole discretion." (quoting pertinent agreements)).

182 *Id.* at 15-17.

183 *Id.* at 17-21; *see id.* at 7 ("[T]he Managing Partner may refuse an Investor Partner's access to confidential information ...." (quoting pertinent agreements)).

184 Rulings of the Court from Oral Argument on Cross Motions for Summary Judgment & Defendants' Motion to Compel at 4, Hertzberg v. Millbrae Nat'l Gas Dev. & Expl. Fund 2002, L.P., No. 3224-VCS (Del. Ch. Apr. 2, 2008).

185 DEL. CODE ANN. tit. 6, § 17-1101(d)-(f) (2019) (addressing LPs); *id.* § 18-1101(c)-(e) (addressing LLCs).

186 *Id.* § 17-305(f) (authorizing restriction of inspection rights in the partnership agreement); *id.* § 18-305(g) (authorizing restriction of inspection rights in the operating agreement).

187 *Id.* §§ 17-1101(c), 18-1101(b).

188 *See*, *e.g.*, Gerber v. Enter. Prods. Holding, LLC, 67 A.3d 400 (Del. 2013) (en banc) (holding that implied covenant was violated as the operating agreement provision setting forth procedure for a fairness opinion as a means of addressing any self-dealing transaction was not fulfilled as the clear intent of the provision was that the opinion should value the rights relinquished by the transaction and the discovered facts reflected the investment banker did not inquire into this area when rendering the opinion).

189 *In re* Wal-Mart Stores, Inc. S'holder Derivative Litig., No. 4:12-cv-4041, 2012 WL 5935340 (W.D. Ark. Nov. 27, 2012) (amending the order of November 20, 2012, and granting defendants' motion for a stay so that Delaware could address whether demand could be excused), *vacated*, Cottrell v. Duke, 737 F.3d 1238 (8th Cir. 2013).

190 Cottrell v. Duke, 737 F.3d 1238 (8th Cir. 2013) (holding that a stay was inappropriate because the suit in the federal Arkansas court included federal issues that were not justiciable in the Delaware state court).

191 *In re* Wal-Mart Stores, Inc. S'holder Derivative Litig., No. 4:12-cv-4041, 2014 WL 12700619 (W.D. Ark. June 4, 2014) (rejecting the defendants' request for a stay that would last until Delaware had resolved whether a demand was excused and instead ordering a much shorter stay).

192 *In re* Wal-Mart Stores, Inc. S'holder Derivative Litig., No. 4:12-cv-4041, 2015 WL 13375767 (W.D. Ark. Apr. 3, 2015) (amending order of March 31, 2015, and granting defendants' motion to dismiss), *aff 'd*, Cottrell v. Duke, 829 F.3d 983 (8th Cir. 2016).

193 179 A.3d 824 (Del. 2018) (en banc).

194 *Id.* at 849-54; *cf.* Epstein v. MCA, Inc., 179 F.3d 641 (9th Cir. 1999) (holding that Delaware court's earlier approval of a global settlement could not be collaterally attacked nor could there be broad collateral review of the adequacy of representation).

195 46 A.3d 313 (Del. Ch. 2012), *rev'd*, 74 A.3d 612 (Del. 2013) (en banc).

196 The Ninth Circuit did, however, ultimately right the situation by reversing and remanding to the district court on the ground that the trial court misapplied Delaware's "reasonable doubt" standard for determining whether a demand must be made as a precondition to maintaining a derivative suit. Rosenbloom v. Pyott, 765 F.3d 1137 (9th Cir. 2014).

197 *See*, *e.g.*, Arduini v. Hart, 774 F.3d 622 (9th Cir. 2014) (applying Nevada law on issue preclusion); Pisnoy v. Ahmed (*In re* Sonus Networks, Inc.), 499 F.3d 47 (1st Cir. 2007) (applying Massachusetts law on issue preclusion).

198 This area of law is greatly influenced by the *Restatement of Judgments*. RESTATEMENT (SECOND) OF JUDGMENTS §§ 41-42 (AM. LAW INST. 1982). For example, section 42(1) provides there is no preclusion if the representative in

the earlier suit "failed to prosecute or defend the action with due diligence and reasonable prudence, and the opposing party was on notice of facts making that failure apparent." *Id.* § 42(1)(e). Even though sounding in negligence, the supporting comment refers to counsel acting "grossly deficient." *Id.* cmt. f. For close examination of the preclusion issue, see DEBORAH A. DEMOTT, SHAREHOLDER DERIVATIVE ACTIONS LAW AND PRACTICE § 4.19 (2020); Lawrence A. Hamermesh & Jacob J. Fedechko, *Forum Shopping in the Bargain Aisle:* Wal-Mart *and the Role of Adequacy of Representation in Shareholder Litigation*, *in* RESEARCH HANDBOOK ON REPRESENTATIVE SHAREHOLDER LITIGATION 156 (Sean Griffith, Jessica Erickson, David H. Webber & Verity Winship eds., 2018); George S. Geis, *Shareholder Derivative Litigation and the Preclusion Problem*, 100 VA. L. REV. 261 (2014).

199 516 U.S. 367 (1996).

200 *See* Epstein v. MCA, Inc., 179 F.3d 641, 649 (9th Cir. 1999) (holding that "*Matsushita* itself indicates that broad collateral review of the adequacy of representation ... is not available"). The concurring opinion, in the two-to-one decision, emphasized that the adequacy of representation was very much before the Delaware court as it approved the settlement, even though two objectors to the settlement pointedly argued that the suit's counsel was guided by self-interest. *Id.* at 651 (Wiggins, J., concurring).

201 *See* DEL. CODE ANN. tit. 8, §§ 109, 115 (2019); Boilermakers Local 154 Ret. Fund v. Chevron Corp., 73 A.3d 934 (Del. Ch. 2013).

202 The Delaware legislature enacted Section 115, which authorized forum selection provisions, after the Delaware Court of Chancery decided *Boilermakers*. The statute gives great clout to the board in drafting and exercising its forum selection clause, as the Delaware statute permits "all internal corporate claims [to] be brought solely and exclusively" in a Delaware court. DEL. CODE ANN. tit. 8, § 115 (2019). Thus, the common forum selection provision allows the board to choose among competing forums with the ability to exercise the authorized authority to require the suit to be maintained in Delaware. Hence, *Boilermakers* empowers the forum selection clause and the Delaware legislature provided the clout behind that power.

203 Some have argued that *Alvarez* is limited to situations where there is a long delay in completing a Section 220 action, that Section 220 is a summary proceeding that frequently ends in two to three months, and that the Delaware plaintiffs are able to intervene in the other pending action to protect their action from being settled. If so, *Alvarez* may be an outlier and unlikely to arise in the future. In response, we note that the data in Table 3 show that the median delay in a Section 220 case is about six months while the mean delay is around ten months. Moreover, some cases last multiple years. *See supra* Table 3 (noting that "Maximum" delay was 2,666 days). The length of these delays may deter careful plaintiffs from initiating inspection lawsuits. Intervention in other jurisdictions is problematic when the Delaware plaintiff cannot tell the judge in the other jurisdiction how long it will be before their Delaware inspection suit is concluded and what information they will obtain even it concludes soon. In the *Wal-Mart* case, the Eighth Circuit lifted the stay on notions of federalism. *See* Cottrell v. Duke, 737 F.3d 1238 (8th Cir. 2013). As to both federal securities law claims, for which the federal courts have exclusive jurisdiction, and state claims were joined in the Arkansas federal court, the Eighth Circuit held it was inappropriate for a state proceeding to justify a stay in federal question litigation. *See id.* at 1240.

204 In affirming the federal district court's dismissal for failure to make a demand on the Wal-Mart board of directors, the Eighth Circuit focused on the lack of particularity in allegations that the Wal-Mart directors had sufficient knowledge--where the plaintiffs assumed that the board received reports from the audit committee and corporate officials--to suggest they were culpable in failing to act. *See* Cottrell v. Duke, 829 F.3d 983, 990-96 (8th Cir. 2016). An inspection may have produced documents that reached the board of directors and might have enabled the plaintiffs to meet the pleading requirement to excuse a demand.

205 *See* Rose Kerbs, *Chancery Pauses Boeing 737 Suit Amid Records Blitz*, LAW 360 (Jan. 21, 2020, 10:26 PM) (reporting on developments in Isman v. Bradway, No. 2019-0794 (Del. Ch.), Kirby Family P'ship LP v. Muilenburg, No. 2019-0907 (Del. Ch.), and Slotoroff v. Bradway, No. 2019-0941 (Del. Ch.)).

206 DEL. CODE ANN. tit. 8, § 115 (2019).

207 *See*, *e.g.*, Richards, Layton & Finger, P.A., *Forum Selection Bylaw*, *in* JAMES D. COX & MELVIN A. EISENBERG, CORPORATIONS AND OTHER BUSINESS ORGANIZATIONS: STATUTES, RULES, MATERIALS, AND FORMS 1111 (2019).

208 *See* DEL. CODE ANN. tit. 8, § 220(c) (2019).

209 *See* Hamermesh & Fedechko, *supra* note 198, at 156-75 (calling for consideration of the "totality of the circumstances," where a variety of factors--such as quality of pleadings, discovery efforts, choice of forum considerations, failure to pursue appeal, and investment in the suit--would be evaluated to determine adequacy of the representation).

210 Section 220(c) vests the Delaware Court of Chancery with exclusive jurisdiction for suits enforcing the provision. DEL. CODE ANN. tit. 8, § 220(c) (2019).

211 *Alvarez* observed that "the Arkansas plaintiffs' decision to forgo a Section 220 demand *in this instance* does not rise to the level of constitutional inadequacy." Cal. State Teachers' Ret. Sys. v. Alvarez, 179 A.3d 824, 854 (Del. 2018) (en banc). This conclusion is difficult to understand as the gravamen of the complaint is the Wal-Mart's board oversight of the foreign subsidiary, a claim inherently calling for a review of internal documents of the type not in the public domain. Instead, the Delaware Supreme Court cast its critical eye to the Delaware plaintiffs, observing "the Delaware Plaintiffs should have coordinated, intervened, or participated in some fashion in the Arkansas proceedings." Cal. State Teachers' Ret. Sys. v. Alvarez, No. 295-2016, 2017 WL 6421389, at *4 (Del. Jan. 18, 2017).

212 The record in *Alvarez* reflects the Delaware litigants were fully aware the Arkansas district court was considering the motion to dismiss that ultimately was granted, leading to the dismissal of the Delaware complaint. *See Alvarez*, 179 A.3d at 851-52.

213 These factors were emphasized in the Ninth Circuit's rejection that full faith and credit should not be accorded to the Delaware court's approval of the settlement in *Matsushita* on the grounds of inadequate representation of the federal securities law claims in the Delaware proceeding. *See* Epstein v. MCA, Inc., 179 F.3d 641, 649 (9th Cir. 1999); *see also* Marcel Kahan & Linda Silberman, *The Inadequate Search for "Adequacy" in Class Actions: A Critique of* Epstein v. MCA, Inc., 73 N.Y.U. L. REV. 765 (1998) (criticizing the earlier *Eptstein* decision by the Ninth Circuit, Epstein v. MCA, Inc., 126 F.3d 1235 (9th Cir. 1997), *withdrawn*, 179 F.3d 641 (9th Cir. 1999), which allowed the second forum to consider the adequacy of representation in deciding whether to accord full faith and credit to another forum's approval of a settlement, and proposing incentives so that all parties participate in the settlement action, coupled with a narrower, process-based standard for collateral attack).

214 *Alvarez*, 179 A.3d at 831-32.

75 BUSLAW 2123

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