Protecting the Keys to the Magic Kingdom: Shareholders’ Rights of Inspection and Disclosure in Light of Disney

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I. INTRODUCTION

“[I]nformation is like any other valuable resource, [m]ore information is beneficial, but information is costly to produce. At some point, the costs of generating more information fall short of the benefits of having more information.”¹ The costs associated with information come not only from how the information is produced or obtained, but how it is ultimately put to use. Shareholders in Delaware corporations have long had the right to inspect the corporate books and records of the corporations in which they hold stock.² This right of inspection has been one of the only ways for shareholders to effectively monitor their financial investment.³ However, some shareholders now seek to go one step further and publicly disclose the information that they obtain pursuant to their statutory right of inspection. This desire to disclose presents an issue of first impression for the Delaware courts: how to give meaning to the shareholder’s ability to monitor his or her investment through inspection while protecting the information obtained from disclosure to the public.⁴ This Note examines that issue in light of Disney v. Walt Disney Co.⁵ and the policies that underlie a shareholder’s statutory right of inspection.

To provide an adequate backdrop for analysis of the problems associated with disclosure, Part II.A begins with a discussion of the facts and circumstances surrounding the Disney litigation. An understanding of these facts is necessary to appreciate the unique opportunities and dangers that are posed by disclosure in the corporate context. Part II.B examines the policy choices made by the Delaware legislature in codifying the right of inspection by examining the statutory language of section 220 of the Delaware General Corporation Law. These policy choices are placed in context by comparing the Delaware statutory scheme to the California inspection statute and the Revised Model Business Corporation Act. Finally, Part II.C discusses the judicial interpretation of section 220 and how the Delaware courts have given meaning to the statutory language by applying a balancing test to the right of inspection that weighs the interests of the

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² See generally Randall Thomas, Improving Shareholder Monitoring of Corporate Management by Expanding Statutory Access to Information, 38 ARIZ. L. REV. 331, 335 (1996) (discussing the historical foundations of the shareholder’s right of inspection).
³ McChesney, supra note 1, at 1207.
⁵ Disney v. Walt Disney Co., 857 A.2d 444 (Del. Ch. 2004).
In light of the backdrop established by the discussion of the statutory language and the judicial interpretation of that language, Part III.A.1 analyzes the interests that are involved in the corporate entity and how those interests may diverge even in the ideal corporate setting. Part III.A.2 discusses those same interests in light of the realities of corporate society by discussing the problems of trust and opportunism that are present in the corporate context. Part III.B contains an analysis of the types of situations in which disclosure of non-public information obtained pursuant to a section 220 petition would be warranted and how disclosure in each of those contexts would affect the balance demanded by section 220. Part III.C discusses how the current mechanisms that are in place to protect that balance are inadequate to deal with situations where disclosure is either warranted or necessary. In conclusion, Part IV discusses the potential solutions to the problems that are associated with disclosure and how the Delaware courts must establish a new framework for analyzing the interests at stake when disclosure is necessary and how to adequately protect the interests of both the shareholder and corporation in that context.

II. BACKGROUND

A. Who’s the Leader of this Club?

The Disney litigation began in 2003 when Roy Disney, nephew of founder Walt Disney, and his good friend and investment manager, Stanley Gold, resigned their respective seats on the Disney Company’s (Disney) Board of Directors (Board). Prior to his resignation, Roy Disney was the long-serving Vice Chairman of the Disney Board of Directors and the Chairman of the Disney Feature Animation Division. In their respective letters of resignation, Mr. Disney and Mr. Gold expressed their dismay with the lack of leadership from Disney CEO Michael Eisner and blamed Mr. Eisner and the Disney Board for the plummeting value of Disney stock. They further asserted that Mr. Eisner had muzzled their voices on the Board and made their presence ineffective.

Following their resignations, Mr. Disney and Mr. Gold submitted a request to Disney seeking access to Disney’s corporate books and records.
inspection in their role as shareholders under section 220 of the Delaware General Corporation Law. Mr. Disney and Mr. Gold alleged that they needed the records in order to: “(1) communicate with other stockholders regarding the issues relating to the Annual Meeting, and (2) to request stockholders to cast their vote at the Annual Meeting for certain of management’s nominees for the Company’s board of directors.”

Disney acknowledged that Mr. Disney and Mr. Gold had a statutory right of inspection but refused to release the information until both men agreed to the provisions of a strict confidentiality agreement. Under the terms of that proposed agreement, Disney had the authority to designate broad categories of non-public information as “confidential,” thereby preventing disclosure of the contents of those documents to others. Mr. Disney objected to the broad scope of the confidentiality agreement and subsequently filed a section 220 petition with the Delaware Chancery Court in order to compel inspection.

The filing of the petition led Disney to propose a modified version of the confidentiality agreement. In this modified version, Disney retained the prerogative to designate information as confidential, but Mr. Disney was given the explicit authority to challenge those confidential designations in court. Following the execution of this agreement, Disney produced over 600 pages of documentation, thirty percent of which was labeled confidential. Disney alleged that the only documents that were labeled confidential were those documents relating to “performance evaluations, documents reflecting the board’s deliberative process and non-public financial targets established for a tax-qualified compensation plan.” Unhappy with the designations, Mr. Disney sought to have the confidentiality restrictions lifted in court. After prompting from the Delaware Chancery Court, Mr. Disney narrowed the scope of his challenge to ten documents totaling 34 pages in length.

On August 6, 2004, following a hearing, the Delaware Chancery Court issued its decision regarding the confidential designations. The Chancery Court first acknowledged the well established competing policy interests underlying a shareholder’s pursuit to section 220 of the Delaware General Corporation Law. See infra Part II.B for further discussion of this issue.

12. Letter from Roy E. Disney and Stanley P. Gold, beneficial shareholders of the Disney corporation, to David K. Thompson, Corporate Secretary of the Walt Disney Corporation (Jan. 2004) (on file with author). See also Disney v. Walt Disney Co., 857 A.2d 444, 444 (Del. Ch. 2004) (stating that the purpose for the inspection was “to investigate possible mismanagement, waste of corporate assets, improper influence or conduct, improper conflicts of interest between directors and officers and the Compensation Committee and lack of due care regarding senior executive bonus or other performance-based compensation”).
13. Disney, 857 A.2d at 446.
14. Id.
15. Id.
16. Id.
17. Id.
18. Disney, 857 A.2d at 446.
19. Id.
20. Id.
21. Id.
22. Id.
23. Disney, 857 A.2d at 447.
right of inspection under section 220. Citing CM & M Group, Inc. v. Carroll,\textsuperscript{24} the court noted the need to protect the rights of the individual shareholder and the duty to protect the legitimate rights and interests of the corporation.\textsuperscript{25} The court rejected Mr. Disney’s “expansive” interpretation of section 220\textsuperscript{26} and upheld the imposition of the confidentiality agreement.\textsuperscript{27} Seemingly focused solely on the interests of the corporation, the court posited that “any decision that permitted the public disclosure of [non-public information obtained through a 220 petition by a stockholder] would lead the corporation to disclose even more otherwise non-public information in order to put the stockholder’s disclosures in what the corporation believes to be the proper context.”\textsuperscript{28} The court went on to note that such a process would not be in the best interests of either the corporation or its shareholders-at-large.\textsuperscript{29}

Despite the rejection of Mr. Disney’s arguments in favor of lifting any restrictions on disclosure, the court recognized that some shareholders may have a cognizable interest in disclosing information obtained pursuant to a section 220 petition.\textsuperscript{30} Specifically, the court identified participation in an active proxy contest as an example of a case where a shareholder may have such a cognizable interest.\textsuperscript{31} In the face of such interests, the court indicated that “upon a clear showing, this court will entertain extraordinary applications to remove ‘confidential’ designations from documents produced as a result of a section 220 proceeding.”\textsuperscript{32} In making this observation, the Chancery Court identified an issue of first impression in Delaware: under what circumstances could information obtained pursuant to a section 220 petition be disclosed publicly? This Note evaluates the current Delaware inspection scheme to determine how the Delaware courts should deal with the issues relating to disclosure while still maintaining the balance between the interests of the individual shareholder and the corporation that is demanded by section 220.

\textsuperscript{24} 453 A.2d 788 (Del. 1982).
\textsuperscript{25} Id. at 793-94.
\textsuperscript{26} Mr. Disney contends:

By allowing shareholders to use the “tools at hand” under Section 220 to gather information regarding executive compensation decisions in connection with an exercise of the shareholder franchise (and not just in the context of costly and burdensome litigation), and to disclose that information when it is inconsistent with Company and Board statements on the subject, the Court will allow shareholders to more effectively use the “electoral check” upon which the legitimacy of the corporate form rests.

\textsuperscript{27} Id. at 449 (quoting plaintiff’s brief at 15).
\textsuperscript{28} Id. at 450.
\textsuperscript{29} Id. The court’s concern is premised on the fact that a shareholder who receives such information is not subject to fiduciary duties and therefore has the potential to do great harm to the corporate interests. Id. Mr. Disney subsequently appealed the Chancery Court’s refusal to lift the confidential designations to the Delaware Supreme Court, which remanded the case back to the Chancery Court with specific instructions to balance the harms associated with the release of the documents. The Chancery Court once again upheld the confidential designations noting that the documents related directly to “the preliminary deliberations” of the Board of Directors which were entitled to a reasonable expectation of privacy. Disney v. Walt Disney Co., C.A. No. 234-N, 2005 Del. Ch. LEXIS 94, at *10 (Del. Ch. June 20, 2005).
\textsuperscript{30} Id.
\textsuperscript{31} Disney, 857 A.2d at 450.
\textsuperscript{32} Id.
B. The Screenplay: The Delaware Inspection Scheme

In establishing the shareholder’s statutory right of inspection, the Delaware legislature made policy judgments. These policy judgments are meant to balance the interests of the multiple parties who have a stake in the corporate entity.\(^{33}\) In order to discern those policies and understand those competing interests, one must first examine the statutory language and the judicial interpretation of that language.

The right of inspection that shareholders had at common law was codified in section 220 of the Delaware General Corporation Law.\(^{34}\) Since 1967, the statute’s only amendment was one that clarified a sitting director’s right to inspect corporate books and records.\(^{35}\) The statute sets forth the criteria a shareholder must satisfy in order to exercise his or her right of inspection. First, the person seeking access must be a record holder of stock\(^{36}\) or authorized agent thereof.\(^{37}\) Second, the shareholder must make a written demand under oath stating the purpose for the inspection and the records being sought.\(^{38}\) That purpose must be a “proper purpose” in order for the court to grant the right of inspection.\(^{39}\) It is often the nature of the purpose that is the most contentious issue in litigation surrounding the statutory right of inspection.\(^{40}\)

If the shareholder satisfies these requirements, he or she is entitled to view essentially the entire universe of corporate books and records. The statute entitles the shareholder to inspect: (1) the stock ledger;\(^{41}\) (2) other corporate books and records;\(^{42}\) and (3) the books and records of a subsidiary of the corporation.\(^{43}\) If the corporation refuses to comply with the shareholder’s demand for inspection, the shareholder can compel inspection by filing a section 220 petition with the Delaware Chancery Court.\(^{44}\) The Chancery Court evaluates the petition to determine “whether or not the person seeking inspection is entitled to the inspection sought”\(^{45}\) based upon: (1) the compliance with procedural requirements;\(^{46}\) (2) whether the purpose for which the records are sought is a proper one;\(^{47}\) and (3) whether the purpose is one that reasonably relates to the person’s status as a shareholder.\(^{48}\) The statute also explicitly charges the Chancery Court

\(^{33}\) See infra Part III.A (discussing these parties and the interests they have in the corporate enterprise).

\(^{34}\) For a general discussion of the common law right of inspection see Thomas, supra note 2, at 336-37.


\(^{36}\) DEL. CODE ANN. tit. 8, § 220(a)(2) (2004).

\(^{37}\) Id. § 220(b).

\(^{38}\) Id. There is an additional requirement that the inspection be sought during the normal business hours of the corporation. Id.

\(^{39}\) Id.

\(^{40}\) See generally Thomas, supra note 2, at 349-54 (discussing an empirical case study of section 220 cases and the litigation surrounding the determination of proper purpose).

\(^{41}\) DEL. CODE ANN. tit. 8, § 220(b)(1) (2004).

\(^{42}\) Id.

\(^{43}\) Id. § 220(b)(2). In order to access the books and records of a subsidiary, the parent corporation must have actual possession or control of the records or be able to obtain such records without violating any agreements between the parent and the subsidiary. Id. §§ 220(b)(2)(a)-(b).

\(^{44}\) Id. § 220(c).

\(^{45}\) DEL. CODE ANN. tit. 8, § 220(c) (2004).

\(^{46}\) Id. § 220(c)(2).

\(^{47}\) Id. § 220(c)(3).

\(^{48}\) Id. § 220(b)(2). See also Mite Corp. v. Heli-Coil Corp., 256 A.2d 855, 858 (Del. Ch. 1969) (interpreting section 220 and the requirement that the purpose must be reasonably related to the shareholder’s
with the authority to impose limitations on both the scope and conditions of the inspection.\footnote{49} As a court sitting in equity, the Chancery Court can impose limitations even in the absence of a statutory grant. However, the explicit recognition of this authority demonstrates the legislature’s acknowledgment of the competing interests that are at stake in inspection\footnote{50} and allows the court to maintain tight control over balancing those interests.

1. The Statutory Language

As noted above, under Delaware law the shareholder essentially has access to the entire universe of corporate books and records. However, the standards for accessing different types of information vary depending on the perceived importance of that information. The following Parts discuss the different types of information that a shareholder can access and the requirements that must be met in each case. To place the Delaware scheme in context, this Note compares it with the California inspection statute\footnote{51} and the inspection statute contained in the Revised Model Business Corporation Act.\footnote{52} This comparison highlights the policy choices that are at stake in the context of disclosure and provides a comparative analysis of the policy choices made by the Delaware legislature.

a. Access to the Stock Ledger

In section 220, the Delaware legislature has drawn a bright line between shareholder access to the stock ledger versus access to other corporate books and records.\footnote{53} When a shareholder seeks access to the stock ledger, the purpose is presumed to be proper and the burden falls on the corporation to demonstrate that the shareholder’s purpose is an improper one.\footnote{54} The fact that the legislature placed the burden of proves an improper purpose on the corporation demonstrates a policy judgment. The legislature has systematically decided that there are very few situations where a corporation would be justified in denying a shareholder access to the stock ledger.\footnote{55} This is presumably because a stock ledger in the hands of a shareholder is not a great danger to the corporation in the abstract or to other shareholders.\footnote{56}

The Delaware legislature is not alone in making a policy judgment about the innocuous nature of the stock ledger. The California legislature has gone one step further

\footnote{50} See infra Part III.A (discussing these interests further).
\footnote{51} Cal. Corp. Code § 1600(a) (West 2004).
\footnote{54} Id. § 220(b)(1).
\footnote{55} But see Sec. First Corp. v. U.S. Die Casting & Dev. Co., 687 A.2d 563, 570 (Del. 1997) (denying access to a shareholder who admitted under oath that he did not know what he would do with the stock ledger if given access to it).
\footnote{56} That is not to say that there are not dangers associated with inspection of the stock ledger. The stock ledger would certainly be useful in the hands of those who wish to telemarket or simply harass other shareholders. However, any reasons for which a corporation may refuse to allow a shareholder to inspect the stock ledger are presumably inappropriate.
by providing that shareholders have an absolute right, without a showing of proper purpose, to inspect the stock ledger.\(^57\) However, the California scheme limits the universe of shareholders who have this absolute right to those shareholders who "hol[d] at least [five] percent in the aggregate of outstanding voting shares of the corporation" or "[one] percent of those voting shares and have filed a Schedule 14A."\(^58\) By limiting the universe of shareholders who have access to the stock ledger, the California legislature has eliminated the "pesky" shareholder who may seek to communicate with other individual shareholders about a cause completely unrelated to the corporation. This construction also eliminates the need for the courts to be involved in shareholder access to the stock ledger because if the requisite number of shares are held, the access is absolute. If the requisite number of shares are not held, there is no right of inspection.

The drafters of the Revised Model Business Corporation Act (RMBCA) have gone the other way.\(^59\) Under the provisions of the RMBCA, the stock ledger is placed on a list of corporate documents to which a shareholder only has access after a good faith showing of a proper purpose.\(^60\) Therefore, in RMBCA jurisdictions, the burden of proof for demonstrating a proper purpose to access the stock ledger lies at the feet of the shareholder.\(^61\) The drafters of the RMBCA have made it much more difficult for shareholders to access the stock ledger and have retained intense judicial involvement in controlling and monitoring that access.

\(b.\) Access to Other Corporate Books and Records

In addition to the stock ledger, shareholders have a statutory right of access to other corporate books and records, but the requirements for accessing those remaining records are much more stringent. In Delaware, it is the shareholder who bears the burden of proving proper purpose when he or she seeks access to other corporate books and records.\(^62\) This pro-corporation standard tends to limit shareholder access.\(^63\) The more stringent requirements that the Delaware legislature has implemented for the shareholder seeking access to corporate books and records demonstrates a policy judgment that the information contained in those records is more sensitive and has the potential to be much more injurious to the corporate interests. The importance of this type of corporate information is also evinced by the specific legislative charge given to the Delaware Chancery Court to prescribe limitations on corporate books and records inspections.\(^64\)

In terms of access to corporate books and records, the California scheme is quite

\(57\) Cal. Corp. Code § 1600(a) (West 2004).
\(58\) Id.
\(60\) Id. § 16.02(b). The provisions of the RMBCA do not treat the stock ledger as a special type of corporate document. Id. It is categorized with other types of corporate documents and is not given a presumption of accessibility as it is in Delaware. Id.
\(61\) Id. § 16.02(c)(1).
\(63\) See Thomas, supra note 2, at 360 (discussing the success rate of shareholders who seek access to corporate books and records and the transaction costs associated with such a request).
\(64\) Del. Code Ann. tit. 8, § 220(c) (2004). Even in the absence of this statutory grant, the Chancery Court could exercise its equitable powers to place any limitations deemed necessary and proper on the shareholder’s right of inspection.
similar to the Delaware statute. The difference lies not in the criteria necessary to exercise the right, but rather in the enforcement of the right in the face of corporate refusal. The California Code contains a specific provision that allows the courts not only to compel inspection but also to “appoint one or more competent inspectors or accountants to audit the books and records” of the corporation. The California judiciary has only exercised its power under this statute in one reported case. Given the limited interpretation and application of this remedy, the effect that such a heavy-handed enforcement mechanism has on the balance between the interests of the corporation and the interests of the shareholder is yet to be seen but is probably minimal. However, it is apparent that this enforcement mechanism falls more in favor of the shareholder, seemingly discouraging bad faith refusals of the right of inspection by the corporation.

The RMBCA is strikingly different from the Delaware statute in that a shareholder’s access to corporate information is limited to items contained on a specific list. The universe of records to which the shareholder has access is limited by statute. Furthermore, a shareholder seeking access to these types of records must show a good faith proper purpose and request records directly related to that purpose. The RMBCA also requires that the shareholder describe with reasonable particularity the records that he or she desires to inspect. These more stringent requirements of the RMBCA demonstrate a policy judgment on behalf of its drafters that the corporate interest, and not the shareholder’s interest, is the one that is paramount in the right of inspection.

2. Judicial Gloss on the Right of Inspection

The Delaware statutory scheme clearly places disparate levels of importance on the various types of corporate documents. The question is why? The answer to that question is less evident from the actual language of the statute than it is from the judicial interpretation of the statute. The Delaware Supreme Court has interpreted section 220 to require a balance between the interests of the shareholder and the interests of the corporation.

65. CAL. CORP. CODE § 1603(a) (West 2004).
66. Id.
67. See Koshaba v. Koshaba, 132 P.2d 854 (Cal. 1942) (holding that where an independent accountant was appointed by consent of the parties pursuant to the predecessor to section 1603(a) of the California Corporations Code, the court properly exercised its statutory authority to order the corporation to bear the cost of the audit).
69. REV. MODEL BUS. CORP. ACT § 16.02(b) (2004). The universe of information to which a shareholder has access is limited to: (1) minutes of any meeting of the board of directors or committee thereof; (2) minutes of any meeting of the shareholders; (3) records of any action taken by the shareholders; (4) accounting records of the corporation; and (5) the record of shareholders. Id. It should be noted that the Delaware judiciary has interpreted section 220 to require a showing that the information sought by a shareholder is directly relevant to their demonstrated proper purpose. See Sec. First Corp. v. U.S. Die Casting & Dev. Corp., 687 A.2d 563, 567-69 (Del. 1997).
70. REV. MODEL BUS. CORP. ACT § 16.02(c) (2004).
71. Id. § 16.02(c)(2).
72. See, e.g., CM & M Group, Inc. v. Carroll, 453 A.2d 788, 793-94 (Del. 1982) (recognizing that the
law that surrounds a shareholder’s right of inspection demonstrates that that perception is not always reality. Given the reality of the corporate entity, the Delaware courts have sought to define the limits of the interests of the shareholder and the protections afforded to the corporate entity.

a. Defining the Interests of the Individual Shareholder

A shareholder, acting as a shareholder, theoretically only has a single interest in exercising the right of inspection: protection of an economic investment. The Delaware courts have consistently acknowledged the necessity of the right of inspection in monitoring this economic investment. First, and most notably, is the court’s apparent unwillingness to deny access to the stock ledger. The stock ledger is the main way, and perhaps the only way, for an individual shareholder to communicate with other shareholders regarding the management of the corporate investment. As such, the court has only been willing to deny access to the stock ledger when the shareholder seeking it has admitted that there is no reason for obtaining it. By upholding what amounts to an unfettered right of access to the stock ledger, the court has recognized that such access is necessary to protect both the shareholders’ equity interest and their interest in the shareholder franchise.

In addition to protecting the right to communicate with other shareholders, Delaware courts have consistently acknowledged that shareholders have an interest in protecting their investment from corporate waste and mismanagement and have allowed inspection for that purpose. For example, when access is sought to investigate ineffective management, the individual shareholder may seek access to communicate with other shareholders in order to effectuate change in management and therefore vindicate the rights of the abstract corporate entity. Investigation for these purposes introduces a third interested party into the inspection scheme, corporate management. Especially in derivative litigation and active proxy contests, the interests of management conflict with the court is empowered to protect the corporation’s interests.

73. See Shaw v. Agri-Mark, Inc., 663 A.2d 464, 467 (Del. 1995) (stating that “[a]s an equitable owner of the corporation’s assets, a stockholder possessed a right to reasonable information concerning the conduct of corporate management”).

74. See, e.g., Thomas & Betts Corp. v. Leviton Mfg. Co., 685 A.2d 702, 708 (Del. Ch. 1995) (articulating a presumption that a shareholder seeking access to the stock ledger is seeking it for a proper purpose). See also Compaq Computer Corp. v. Horton, 631 A.2d 1, 5 (Del. 1993) (describing circumstances in which a corporation can rebut the presumption that the stock ledger is sought for a proper purpose).

75. See Beth-ann Roth, Proactive Corporate-Shareholder Relations: Filling the Communications Void, 48 Cath. U. L. Rev. 101, 102 (1998) (acknowledging that an essential part of corporate governance is communication between shareholders).

76. See Sec. First Corp. v. U.S. Die Casting and Dev. Co., 687 A.2d 563, 570 (Del. 1997) (denying a shareholder the right to inspect the stock ledger when the shareholder admitted under oath that he did not know what he would do with it).

77. See, e.g., MM Cos., v. Liquid Audio, Inc., 813 A.2d 1118, 1126 (Del. 2003) (stating that the stockholder franchise is the “ideological underpinning” of the legitimacy of the separation between ownership and control in the corporation (citing Blasius Indus., Inc. v. Atlas Corp., 564 A.2d 651, 659 (Del. Ch. 1988))).

78. See, e.g., Thomas & Betts Corp., 685 A.2d at 710 (holding that “[i]nvestigating possible waste and mismanagement is a proper purpose under [section 220]”); Skouras v. Admiralty Enters., Inc., 386 A.2d 674, 678 (Del. Ch. 1978) (holding that it is “clearly proper for a stockholder to ask leave to examine corporate books and records to follow up his suspicions of corporate mismanagement”).
the interests of the corporation in the abstract, as defended by the individual shareholder. As such, the court has promoted section 220 as a mechanism by which a shareholder can get the information necessary to bypass the board in a shareholder derivative action.

The scales of the balance begin to tip in favor of the interests of the corporation when the shareholder seeks access to corporate books and records in order to value his or her stock. In the early part of the century, Delaware courts consistently held that valuation of stock was a proper purpose for seeking inspection of corporate books and records. However, courts have progressively shied away from that position, especially with respect to public companies, by recognizing that an adequate valuation of stock can be made on the basis of information publicly available to the shareholder. This trend reflects a suspicion that valuation of publicly traded shares is less likely to be the actual motive prompting inspection.

This situation differs from those described above in that the shareholder is protecting only his or her individual economic investment. The shareholder is not seeking to protect his or her investment by vindicating the interests of the corporation through exposure of mismanagement or by communicating with other shareholders about potential problems. The unwillingness of the Delaware courts to recognize this as a proper purpose for inspection indicates that this type of situation tips the scales too far in favor of the shareholder, which is a result that is not contemplated by section 220.

b. Defining the Parameters of Protection for the Corporate Interest

The Delaware courts have also outlined the parameters of protection afforded to the corporate interest. The corporation in the abstract exists to turn a profit in order to continue financing operations and provide a return on shareholder investments. The ability of corporate management to realize this interest can be severely hindered by shareholders who exercise their right of inspection in a disrupting or harassing way. In light of this problem, the Delaware courts have exercised close scrutiny over shareholder access to corporate information and have denied access to those shareholders who seek to exercise their right of inspection simply to satisfy individual curiosity or interfere.

79. See generally Ahmed Bulbulia & Arthur Pinto, Statutory Responses to Interested Directors’ Transactions: A Watering Down of Fiduciary Standards?, 53 NOTRE DAME L. REV. 201 (1977) (discussing a director’s duty of loyalty and how conflicts of interest may prevent the director from exercising his or her role in a fiduciary capacity).

80. See, e.g., Rales v. Blasband, 634 A.2d 927, 935 (Del. 1993) (suggesting that shareholders should use section 220 to conduct a “deliberate and thorough investigation” prior to filing a complaint alleging director misconduct).

81. See, e.g., State ex rel. Rogers v. Sherman Oil Co., 117 A. 122 (Del. Super. Ct. 1922) (holding that a shareholder who seeks access to corporate books and records for the purpose of valuing his stock has stated a proper purpose for inspection).

82. See BBC Acquisition Corp. v. Durr-Fillauer Med., Inc., 623 A.2d 85, 91 (Del. Ch. 1992) (recognizing that a shareholder in a privately held corporation may seek inspection to value stock but such inspection is questionable for a publicly held corporation).

83. See, e.g., ERNEST L. FOLK III ET AL., FOLK ON THE DELAWARE GENERAL CORPORATION LAW § 220.5 (2d ed. 1990) (discussing the primary and secondary motives that may prompt a shareholder to seek inspection of corporate books and records).

84. See Compaq Computer Corp. v. Horton, 631 A.2d 1, 5 (Del. 1993); State ex rel. Miller v. Loft, Inc.
unnecessarily with the business of the corporation.\textsuperscript{85}

Courts recognize that in these types of situations, the shareholder is not seeking access to corporate records to protect his or her investment, and is therefore not acting in his or her capacity as a shareholder. By preventing individual shareholders from harassing or unduly burdening the resources of the corporation, courts have afforded additional protection to the larger group of shareholders who have a collective interest in both their anonymity and the effective operation of the corporation.\textsuperscript{86} The shareholder’s right of inspection does not grant a voice in everyday corporate management decisions, and the courts have not allowed shareholders to use it as a backdoor to effectuate individual shareholder purposes that are unrelated to a proper purpose or to usurp the corporate governance structure.\textsuperscript{87}

The judicial interpretation of section 220 demonstrates that there are interests that lie on both sides of the right of inspection: the interests of the individual shareholder and the interests of the corporation at large.\textsuperscript{88} When determining which side should receive the benefit of the doubt, any questions surrounding the right of inspection must be resolved in favor of the shareholders’ rights.\textsuperscript{89} Disclosure of the information obtained through a section 220 petition, however, adds an entirely new question to the balance that the Delaware courts have yet to deal with: How should these interests be balanced when a shareholder seeks to disclose corporate information?\textsuperscript{90}

III. ANALYSIS

A. The Cast of Characters

As noted above, the judicial interpretation of section 220 has led the Delaware courts to a balancing test when addressing inspection issues. The Delaware courts have identified the two interests that must be balanced as the interests of the corporation\textsuperscript{91} and

\textsuperscript{85} See State ex rel. Cochran v. Penn-Beaver Oil Co., 143 A. 257, 260 (Del. 1926) (holding that every shareholder would not be entitled to inspection where inspection would result in a “consumption of time and interference with [the] business that would be injurious to the company”).

\textsuperscript{86} See Thomas, supra note 2, at 369 (discussing the interest that the corporation has in protecting the anonymity of its shareholders).

\textsuperscript{87} See Cochran, 143 A. at 257 (recognizing that the right of inspection could be troublesome where unreasonable shareholders are allowed too much access to corporate books and records). Section 220 itself is not directly aimed at combating the second potential danger. However, its goal of preventing the usurpation of the corporate governance structure is of the utmost importance when a judicial determination must be made about what shareholders are allowed to do with the information once they have obtained it. Id. at 260-61.

\textsuperscript{88} Id. (holding that it is the duty of the court to protect both the rights of the shareholders and the rights of the corporation).

\textsuperscript{89} See State ex rel. Foster v. Standard Oil Co., 18 A.2d 235, 238 (Del. 1941).

\textsuperscript{90} See Amalgamated Bank v. UICI, No. CIV.A.884-N, 2005 WL 1377432, at *4 (Del. Ch. June 2, 2005) (noting the need for any disclosure of corporate information to require an accommodation of “the legitimate concerns of both the corporation and the shareholder submitting the demand”).

\textsuperscript{91} See Skouras v. Admiralty Enters., Inc. 386 A.2d 674, 678 (Del. Ch. 1978) (citing Skoglund v. Ormand Indus., Inc., 372 A.2d 204 (Del. Ch. 1976) (holding that the purpose for which inspection is sought must not be contrary to “the best interests of the corporation”).
the interests of the shareholder. There are two problems with this identification. First, the court has provided no definition of what is meant by the broad strokes in which it has chosen to refer to these interests. Second, it fails to acknowledge that those two broad interests have subcomponents that cannot be ignored: the interests of the shareholders-at-large and the interests of the board of directors. One cannot adequately analyze the issues that surround disclosure of information obtained pursuant to a section 220 petition without recognizing all of these interests and defining their scope. Consequently, this Note considers four separate interests in the context of disclosure: (1) the interests of the corporation in the abstract; (2) the interests of the shareholders-at-large; (3) the interests of the individual shareholder; and (4) the interests of the board of directors. In analyzing the issues surrounding the disclosure of corporate information, one must consider not only the paradigm corporate entity, but also the reality of the corporate governance structure that results from the human element. Therefore, Part III.A.1 discusses these interests as they would exist in the ideal corporate world while Part III.A.2 identifies the problems of trust and opportunism that arise when real human beings inhabit that structure.

1. The Fairy Tale: Interests in the Ideal Corporate World

a. The Corporation in the Abstract

The corporation is an artificial legal entity. It is a group of individuals that come together to pool their resources to get a return on their monetary investment. Absent the operation of law, the corporation has no real existence. However, the law has stepped in to give the corporate entity a real existence with the ability to own assets and participate in legal transactions. By the operation of law, the modern corporation has an identity that is separate from the large group of shareholders that own the residual interest.

Because the corporation has a separate legal existence, the interests of the corporation, in the abstract, can diverge from those of the large group of shareholders that
hold the residual interest. One example of such a divergence is corporate philanthropy. \(^{98}\) The donation of money to charitable organizations benefits the corporation by providing a higher public profile and good public relations. \(^{99}\) This long-term value, while benefiting the shareholders at some point in the future, is antithetical to the goal of most shareholders to receive a short-term gain on their investment. \(^{100}\) Another prime example of the divergence of corporate and shareholder interests are corporate management decisions that maximize the corporation’s economic value, but ultimately prove to be tax inefficient for the shareholders.

Not only can the actual interests of the shareholders and the corporate entity in the abstract diverge, but those groups may also differ about the best way to achieve shared corporate goals. For example, in the Disney litigation, one of the pieces of information that Roy Disney seeks to disclose is the minutes of the compensation committee. \(^{101}\) He claims he needs these documents to prove his allegations of corporate waste. \(^{102}\) It is in both the interests of the corporation and the interests of the shareholders to eliminate waste and mismanagement of corporate funds. However, in this case, Mr. Disney seeks to do that by exposing the alleged mismanagement to the public while corporate management would likely prefer to combat the problem behind closed doors. While this information may prove necessary to such a claim, release of the information could have harmful long-term effects on the corporation. \(^{103}\) This difference points directly to the conundrum posed by section 220 in the context of disclosure. Mr. Disney’s stated purpose, investigating corporate waste and mismanagement, is a proper purpose, but in order to achieve that purpose he needs to be able to release information to the public and that release may ultimately harm the corporation.

\textit{b. The Shareholders}

As noted above, there are two interests that arise on the shareholder side of the corporate equation, the individual shareholder and the shareholders-at-large. In the modern corporation, the shareholders hold a residual interest in the corporation, which is a purely economic investment. \(^{104}\) While they do have some rights to approve major corporate actions, like electing directors \(^{105}\) or approving mergers, \(^{106}\) the shareholders are effectively precluded from participating in the day-to-day operations of the corporation.


\(^{99} \) See, \textit{e.g.}, Dodge v. Ford Motor Co., 170 N.W. 668, 684 (Mich. 1919) (holding that charitable donations are outside the powers of directors because the business corporation is organized and carried out for the profit of the stockholders).

\(^{100} \) Id. (stating that philanthropic donations result in a “reduction of profits [and] the nondistribution of profits among stockholders”).

\(^{101} \) See Disney v. Walt Disney Co., 857 A.2d 444, 446 (Del. Ch. 2004).

\(^{102} \) Id. at 448.

\(^{103} \) Id. (noting that disclosure of information by the shareholder will force the corporation to release more information that may prove adverse to the corporate interests).


\(^{105} \) DEL. CODE ANN. tit. 8, § 211 (2004) (discussing the voting rights of shareholders with regards to the election of directors at the annual shareholders meeting).

\(^{106} \) Id. § 251 (discussing the voting rights of shareholders with regard to mergers).
Therefore the shareholders ultimately have two interests in the corporate entity: (1) an economic interest in getting a return on their investment;\textsuperscript{107} and (2) an interest in the franchise that allows them to approve major corporate action.\textsuperscript{108}

In addition to the interests that the individual shareholder has in protecting his or her economic investment and vote, he or she also has individual interests. Each individual shareholder has his or her own reasons for purchasing a given stock. He may shop at Wal-Mart and therefore purchase Wal-Mart stock. More dubiously, she may purchase stock in an effort to gain control of the company in an attempt to loot corporate assets or purchase stock in order to gain information that would allow her to more effectively compete with her corporate rival. Regardless of the particular reason, each individual shareholder has some personal reasons\textsuperscript{109} for being involved, and those personal reasons are not shared by the shareholders-at-large. Therefore the potential for divergent interests arises again.

In the Disney case, one need not look too far to find Mr. Disney’s reasons for being invested, both financially and personally, in Disney. Both his family and his career are tied to the success or failure of Disney stock. Therefore emotional issues and business issues lead to his current situation with the Disney management team.\textsuperscript{110} Most of Disney’s shareholders do not share this connection. Mr. Disney’s actions in seeking to disclose the information may be motivated by reasons other than pure profit; he may be simply seeking to vindicate his family legacy that is forever tied to the success of Disney and exact revenge on the individuals that, at least from his perspective, forced him out of the company. Given this personal interest, his reasons for seeking to disclose information may not necessarily be in the best interests of the shareholders-at-large. The court is responsible for maintaining the proper balance between the two potentially competing interests.

c. The Board of Directors

The members of the board of directors of a corporation occupy the unique position of being corporate fiduciaries.\textsuperscript{111} The directors are responsible for controlling the course of the corporate entity and overseeing day-to-day operations,\textsuperscript{112} but they must perform

\begin{footnotesize}
\begin{enumerate}
\item See Arthur Pinto, \textit{Corporate Governance: Monitoring the Board of Directors in American Corporations}, 46 Am. J. Comp. L. Supp. 317, 324 (1998) (stating that the shareholders are the residual claimants in the corporate entity whereby the return on their investment increases as the value of the corporation increases).
\item See Hill, \textit{supra} note 104, at 51 (discussing the shareholder’s participation in the corporation as a voter in a quasi-political entity).
\item These reasons need not be reasons that caused the shareholder to purchase the stock. A shareholder may own stock in a corporation as an investment, but may also want to use those shares to further a personal interest, such as environmentalism.
\item See Pinto, \textit{supra} note 107, at 318 (noting the separation of ownership and control in the modern corporate context and the responsibility of the board to manage the operations of the corporation); Stephen F. Funk, \textit{Recent Developments in Delaware Corporate Law}, \textit{In re Caremark International Inc. Derivative Litigation: Director Behavior, Shareholder Protection, and Corporate Legal Compliance}, 22 Del. J. Corp. L.
\end{enumerate}
\end{footnotesize}
those duties in a fiduciary capacity. Because of their status as fiduciaries, each member of the board of directors is required to put the interests of the corporation before his or her own personal interest.113

The very nature of each director’s status as a fiduciary causes a divergence in interests. The director is a fiduciary of the corporation,114 but the directors, and the board as a whole, owe no special duty to ensure that the shareholders get the best return on their investment.115 The directors answer to the shareholders only through periodic elections. So, at a practical level, the consequences of perceived ineffectiveness on the part of a director are temporally removed from the actions that that director takes. Thus, the very fact that a shareholder believes that disclosure of corporate information is necessary in the best interests of the corporation does not mean that the board of directors must agree or comply with this belief.116 This creates the potential for the board to act against the interest of the individual stockholder.

In addition to this structural divergence, one cannot ignore the fact that each individual member of the board of directors also has individual interests in keeping his or her job and avoiding public shame and criticism.117 Therefore, there is always the possibility that the actions taken by the board of directors on behalf of the corporation are done with ulterior motives. This may be the case in the context of disclosure. The directors, acting on behalf of the corporation, may refuse to grant a shareholder access to corporate books and records in an effort to protect their individual interests.118

2. Enter the Villain: Recognizing the Problems of Trust and Opportunism

In the ideal corporate world described above, all the parties involved in the corporate enterprise would seek to act in the best interests of the corporation as a whole. However, the involvement of the “human factor” makes the situation more complicated than it would be in the ideal world. Each director on the board has an interest in keeping his or her job in addition to a shared interest in promoting the corporate welfare.119 The individual shareholder has interests both as a shareholder and an individual person.120

311, 311 (1997) (stating that the board of directors is responsible for managing all aspects of a corporation).
113. See Pinto, supra note 107, at 330.
114. Id. (recognizing that directors must act with due care and loyalty to protect the corporate interests over their own).
115. See Coates, supra note 95, at 844-45 (stating that the mere fact that shareholders have contributed capital to the corporate enterprise does not entitle them to profit at any cost to other corporate constituencies).
116. See Pinto, supra note 107, at 326-27 (stating that the board of directors is entitled to engage in action that is in the best interests of the corporation even if the majority of the shareholders disagree).
117. See WILLIAM KLEIN & JOHN COFFEE, JR., BUSINESS ORGANIZATION AND FINANCE 172-73 (7th ed. 1996) (discussing the empire building phenomenon that takes place at the managerial level of some corporate enterprises and how this phenomenon focuses on the personal interests of the individual directors).
118. See Thomas, supra note 2, at 365 (posing that directors may have ulterior reasons for denying a shareholder the right of inspection, including postponing the solicitation of proxies or making derivative litigation more difficult).
119. See Pinto, supra note 107, at 321 (arguing that directors have a personal interest in their positions as directors and recognizing the limitations on the shareholder-director relationship from the agency perspective).
120. A striking example is an individual shareholder who seeks information to further a personal cause. For example, an environmental activist may purchase one share of stock as the “price of admission” to the corporate books and records in order to expose the corporation’s environmental abuses and thereby subject the corporation to liability. McChesney, supra note 1, at 1200 (arguing that “the law governing individual
These dual roles can create problems in the context of disclosure because one must question whether there is a difference between the stated motive for inspection, or refusal of inspection, and the ulterior motives that may underlie that action. The statutory schemes described in Part II.B and the courts have not turned a blind eye to the potential for abuse of the right of inspection. In each formulation of the right of inspection, there are restrictions that attempt to eliminate opportunism on the part of the individual shareholder seeking the information and on the part of the board of directors in responding to that request.

The issue of opportunism becomes even more important when the individual shareholder seeks to disclose the information, because that individual shareholder operates in the absence of any fiduciary duty and therefore has a greater potential to act adversely to the interests of the corporation in the abstract. The problem is that the individual shareholder must be able to monitor his or her investment and, when necessary, effectuate change in management. There are times when this type of monitoring requires not only inspection but also disclosure, such as in the case of disclosure to sellers after valuation, disclosure to fellow shareholders to induce action, or disclosure in open court to pursue an action on the corporation’s behalf. To this point, the courts have chosen to see the glass as half-full, resolving all doubts surrounding a shareholder’s right of inspection in favor of the shareholder. But this presumption may prove impractical in the context of disclosure.

There is also potential for abuse on the part of the board of directors. While the board of directors must be able to protect the corporation from those shareholders who are simply trying to harass the corporation, occupy idle time, or misuse the information obtained through a section 220 petition, opportunism on their part must

shareholder access to information about the firm itself . . . reflects judicial suspicion as to the purpose for requesting the information”).

121. See, e.g., BBC Acquisition Corp. v. Durr-Fillauer Med., Inc., 623 A.2d 85, 88 (Del. Ch. 1992) (citing Petition of B & F Towing and Salvage Co., 551 A.2d 45, 51 (Del. 1988)) (holding that the inspection rights of a shareholder are “limited to those documents that are necessary, essential, and sufficient for the shareholders’ purpose”).

122. See, e.g., Henshaw v. Am. Cement Corp., 252 A.2d 125, 129 (Del. Ch. 1969) (holding that management could not refuse to allow a shareholder access to corporate books and records just because that shareholder may be hostile to management).

123. See Disney v. Walt Disney Co., 857 A.2d 444, 450 (Del. Ch. 2004). The ability of the chancery court to impose fiduciary duties as a condition of disclosure is discussed further in Part IV.B.

124. One of the two principle rights of a shareholder in the corporate context is the right to the appreciation in the value of shares that corporate performance produces. See McClesney, supra note 1, at 1206-07.

125. See, e.g., Guthrie v. Harkness, 199 U.S. 148, 155 (1905) (recognizing that there are some types of corporate activities, such as fraud, which may only be discoverable through examination by the shareholders of corporate books and records).


127. See infra Part IV.A (discussing this presumption further).

128. See, e.g., Linihan v. United Brokerage Co., 101 A. 433, 437 (Del. Super. Ct. 1917) (holding that instituting annoying or harassing litigation against a corporation is an improper purpose for inspection).

129. See, e.g., State ex rel. Miller v. LoI, Inc. 156 A. 170 (Del. 1931) (holding that where the motive or purpose of the examination is mere curiosity, the shareholder does not state a proper purpose within the meaning of section 220); Insuranshares Corp. of Del. v. Kirchner, 5 A.2d 519, 521 (Del. 1939) (holding that conducting a “fishing expedition” or satisfying idle curiosity are not proper purposes for seeking inspection).

also be constrained. There is a danger that the board of directors could deny a shareholder’s request for disclosure out of self interest.\textsuperscript{131} The board enjoys the protection of the business judgment rule and the presumption that its actions are in the best interests of the corporation.\textsuperscript{132} Therefore, it would be difficult for a shareholder to prove that the refusal to allow disclosure was in fact proper. In maintaining the balance demanded by section 220 in the context of disclosure, the Delaware courts must adopt a solution that constrains this type of opportunism while at the same time allowing the board of directors to legitimately protect the corporate interest.

\textbf{B. Situations Warranting Disclosure of Information Obtained through a Section 220 Petition}

With the backdrop of the statutory language of section 220 set forth, supplemented by judicial interpretation, and the cast of characters in place, one must now examine what types of situations the chancery court was referring to when it referred to “exigent circumstances.”\textsuperscript{133} As noted in Part II.A., the Delaware Chancery Court noted in \textit{Disney} that “there can be exigent circumstances in which time constraints will not allow a stockholder to draft and file a complaint and then deal with issues of confidentiality in the ordinary course.”\textsuperscript{134} The court further noted that “[i]n those limited circumstances . . . this court will entertain extraordinary applications to remove ‘confidential’ designations from documents produced as the result of a section 220 proceeding.”\textsuperscript{135} One must now determine in what types of situations such disclosure would now be warranted. This Note examines two such situations: derivative litigation and an active proxy contest.\textsuperscript{136} These two situations highlight the spectrum of issues associated with disclosure and represent the situations in which disclosure is most likely to lead to a drastic imbalance in the relevant interests.

\textbf{1. Pleading with Particularity in Derivative Litigation}

In the face of ineffective corporate management, one of the very limited ways that a shareholder can protect his or her investment is by filing a derivative action on behalf of the corporation. As such, the Delaware courts have long recognized that a shareholder

\textsuperscript{18}, 1985) (holding that obtaining the stock ledger for the purpose of bringing pressure on a third corporation is an improper purpose); Gen. Time Corp. v. Talley Indus., Inc., 240 A.2d 755, 756 (Del. 1968) (holding that obtaining the stock ledger for the purpose of selling the stockholder’s names to a third party is an improper purpose).

\textsuperscript{131} See supra note 118 and accompanying text.

\textsuperscript{132} See Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984) (establishing the presumption that actions taken by the board are taken in the best interests of the corporation and are protected as proper business judgments absent a showing of gross negligence, bad faith, or conflict of interest on the part of the board).

\textsuperscript{133} Disney v. Walt Disney Co., 857 A.2d 444, 450 (Del. Ch. 2004).

\textsuperscript{134} \textit{Id}.

\textsuperscript{135} \textit{Id}.

\textsuperscript{136} Two additional potential situations where disclosure may be warranted, communication with management and the sale of individual stock, are not discussed in this Note. In the case of communication with management, the question of disclosure is moot given that each director has a fiduciary duty that prevents disclosure in a way that would be inconsistent with the corporate interest. In the case of individual sale of stock, as was noted in Part II.C., the Delaware courts tend to lean towards the denial of section 220 petitions for the valuation of stock and therefore the importance of discussing a situation is rendered irrelevant.
seeking inspection for the purpose of investigating waste and/or mismanagement states a proper purpose within the meaning of section 220. The main obstacle facing shareholders who seek to institute such an action is Federal Rule of Civil Procedure 23.1. The rule requires that a shareholder must be able to “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.” In other words, in order to bypass the board the shareholder must plead particularized facts that prove demand futility. In Delaware, a shareholder is not generally entitled to discovery prior to responding to a motion to dismiss for failure to plead particularized facts. Therefore, Delaware courts have encouraged and even demanded that shareholders seek information through a section 220 petition prior to initiating derivative litigation.

Prior to formally filing the complaint, there are no problems associated with disclosure since only the shareholder and his or her attorneys need access to the information. As an agent of the shareholder, the attorney already has a statutory right of access to the information and is subject to the same limitations of confidentiality placed on the shareholder. However, if a shareholder succeeds in bypassing the board and the matter proceeds to litigation, even the initial complaint may contain information obtained through the section 220 petition which would then become part of the public record unless it is sealed pursuant to judicial authority.

So how does disclosure in the derivative litigation context affect the balance between the corporate interests and the shareholders’ interests? The first thing to note is that the positions of the players in the corporate world are disturbed. The shareholder who filed the derivative suit now sits in the position of the board, whose judgment has

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139. Id.
141. See Levine v. Smith, 591 A.2d 194, 208 (Del. 1991) (citing the common law rule that “a shareholder plaintiff, alleging that a pre-litigation demand has been wrongfully refused, is not entitled to discovery prior to responding to a Rule 23.1 motion to dismiss”). But see Zapata Corp. v. Maldonado, 430 A.2d 779, 788-89 (Del. 1981) (holding that a court has a right to allow limited discovery when a board has delegated its power to dismiss to a special litigation committee).
142. See, e.g., In re Walt Disney Co. Derivative Litig., 825 A.2d 275 (Del. Ch. 2003) (recognizing that the Supreme Court of Delaware and the Chancery Court have repeatedly urged plaintiffs to seek access to books and records under section 220 prior to filing a demand futility complaint).
143. DEL. CODE ANN. tit. 8, § 220(h) (2004).
144. See generally Henshaw v. Am. Cement Corp., 252 A.2d 125 (Del. Ch. 1969) (holding that a director is entitled to the assistance of agents of his or her choosing so long as those agents are qualified to perform their duties and have no interests adverse to that of the corporation).
145. See, e.g., Stone v. Ritter, No. Civ.A. 1570-N, 2005 WL 2416365, at *2 (Del. Ch. Sept. 16, 2005) (refusing to allow complaint in a derivative action to be filed under seal because the “reasonable expectations of confidentiality with respect to documents produced in a § 220 action do not continue unabated in the context of litigation” and establishing that the test for disclosure once a complaint has been filed is a balancing test that requires “balancing the interests of companies in protecting proprietary commercial, trade secret or other confidential information against the legitimate interests of the public in litigation filed in the courts, as well as stockholder interests in monitoring how directors of Delaware corporations perform their managerial duties”).
been deemed untrustworthy by the court.\textsuperscript{146} The shareholder is now responsible for exercising business judgments with respect to the litigation and disclosure, a position the shareholder would not normally occupy. This unfamiliar territory is often complicated by the fact that the litigation is in the hands of the shareholder’s attorneys who, often as an uninterested third party, have no economic stake in the corporation and therefore no reason to vigorously protect the corporate interest or information.

The two interests that the court is charged with protecting now both appear on one side of the playing field. This seems to imply that disclosure would not be a problem since the interests of the corporation and the shareholder are congruent, but that is not necessarily the case. The interest that the shareholder has in releasing the information in order to prove waste and mismanagement may ultimately prove devastating to the corporate interest.\textsuperscript{147} The shareholder may perceive that he or she is acting in the best interests of the corporation, but that shareholder only has a short-term view of what the corporate interests might be. One can also not ignore the fact that the shareholders-at-large will all be affected by the outcome of the derivative litigation because it is their residual investment that may ultimately be affected. Therefore the court must develop a strategy for allowing disclosure in this context that supports the goal of the derivative litigation (the enforcement of corporate rights against faithless fiduciaries), while also protecting the corporation and the shareholders-at-large from the potential long-term impacts of such disclosure.

2. The Proxy Contest

Absent derivative litigation, the proxy contest is one of the main ways in which a shareholder can exercise control over a corporation and one of the primary ways for a shareholder to effectuate change in management.\textsuperscript{148} In recognition of this, the solicitation of proxies has been deemed a proper purpose for seeking inspection under section 220.\textsuperscript{149} Management of information in the proxy context is invaluable.\textsuperscript{150} However, a shareholder who has access to the information but is unable to use it is not in any better position than the shareholder who does not have the information to begin with. Effective management of information in a proxy contest may require disclosure.\textsuperscript{151} The question is

\begin{itemize}
  \item \textsuperscript{146} See, e.g., Aronson v. Lewis, 473 A.2d 805 (Del. 1984) (holding that a shareholder can prove demand futility by demonstrating that the members of the board of directors are not disinterested or sufficiently independent).
  \item \textsuperscript{147} See generally Thomas, supra note 2, at 370 (arguing that trade secrets and confidential business information should never be provided to the shareholder because of the potential for harm to the corporation).
  \item \textsuperscript{148} See MM Cos. v. Liquid Audio, Inc., 813 A.2d 1118, 1126 (Del. 2003) (recognizing that “[t]he most fundamental principles of corporate governance are a function of the allocation of power within a corporation” and also recognizing the “stockholder franchise” as the “ideological underpinning” upon which the legitimacy of the directors managerial power rests” (citing Blasius Indus., Inc. v. Atlas Corp., 564 A.2d 651, 659 (Del. Ch. 1988))).
  \item \textsuperscript{149} See Gen. Time Corp. v. Talley Indus., Inc., 240 A.2d 755, 756 (Del. 1968).
  \item \textsuperscript{150} For a general discussion about the types of information needed to mount a proxy action see Lucian Bebchuk & Marcel Kahan, A Framework for Analyzing Legal Policy Towards Proxy Contests, 78 CAL. L. REV. 1073 (1990).
  \item \textsuperscript{151} See Gregg A. Jarrell, The Wealth Effects of Litigation by Targets: Do Interests Diverge in a Merge?, 28 J.L. & ECON. 151 (1984) (arguing that forcing the shareholder who is initiating a proxy contest into court is one way for management to defeat such an action).
\end{itemize}
how far the courts can go in allowing disclosure in support of the corporate interest without also allowing disclosure of information that subverts the corporate interest and whether the shareholder is the one who should make that determination.

The motives that a shareholder may have for launching a proxy contest can be mixed. A shareholder could launch the contest in order to oust ineffective management and presumably protect the interests of the shareholders-at-large. However, the shareholder could also be acting solely to take control of the corporation. The major problem is not the shareholder who is acting opportunistically, since the court is equipped to evaluate an individual’s motivation. Rather, the major problem is when the court should allow disclosure when neither the board nor the shareholder is acting opportunistically. The only difference between the parties to the proxy contest is their differing views of how the interests of the corporation are best protected, especially in the context of disclosure.

Again, one must examine what the disclosure of information in this context would do to the balancing of interests demanded by section 220. In this case, the shareholder’s interest is affected by the imposition of confidentiality restrictions that prevent disclosure. The board of directors, acting on behalf of the corporation, has the right to impose such restrictions, at which point the shareholder must fight the provisions of the confidentiality agreement in Chancery Court. Such a delay in resolving the issue of disclosure may ultimately prove fatal to the shareholder’s proxy action.

The interests of the corporation are also in danger because, in contrast to the board of directors, the shareholder will be able to operate in the absence of fiduciary duties. Since the shareholder would be free to release information in the absence of fiduciary duties, there is the potential for partial disclosure of that information only after the information has been adequately “spun” to further the proxy contest. Therefore, the interests of the corporation are left in the hands of an individual who owes no special duty to protect those interests. Such disclosure may ultimately prove harmful to the corporate interest. The question is how the court should use its authority under section 220 to both promote the interests of the shareholder in soliciting proxies while at the same time protecting the interests of the corporation in the event of disclosure.

C. Limits of the Current Scheme: The Bounds of Confidentiality

The current statutory scheme in Delaware allows the Chancery Court, in its

152. For instance, Roy Disney has launched a marketing campaign to inform other shareholders about the mismanagement that he perceives to be present at Disney.


154. “[D]irectors in Delaware corporations are under a fiduciary duty to disclose fully and fairly all material information within the board’s control when it seeks shareholder action.” Stroud v. Grace, 606 A.2d 75, 86 (Del. 1992). The board of directors will always have the option of offensively releasing information. However, at that point the issue of disclosure would become moot since it is hard to envision a situation where the court would enforce a confidentiality agreement exclusively against the shareholder.

155. See Disney v. Walt Disney Co., 857 A.2d. 444, 450 (Del. Ch. 2004) (noting that a “stockholder seeking to disclose non-public information . . . would not be under the same fiduciary obligation as the corporation to make complete or candid disclosures”).

discretion, to place limitations on the use of information obtained through a section 220 petition.\textsuperscript{157} As noted above, such limitations usually consist of strict limitations on the items to be inspected\textsuperscript{158} and a confidentiality agreement that precludes the shareholder from disseminating the information to others. However, as the court acknowledged in Disney, there are certain circumstances in which disclosure may be necessary\textsuperscript{159} and the limits of traditional confidentiality agreements prevent them from being effective in those situations.

On an individual basis, the confidentiality agreement is effective at curbing the potential for disclosure of confidential information to people who were not parties to the original petition. The effectiveness comes from the small group of people bound by the agreement as well as the potential for legal redress if the agreement is violated.\textsuperscript{160} In the event of violation, only a limited number of people could be held responsible. Therefore, the threat of legal recourse is substantial. The problem with the confidentiality agreement is the practical restraints on its effectiveness when large numbers of shareholders seek the same information. If multiple shareholders obtain the same information subject to a confidentiality agreement and that information becomes public, the corporation may often be left without a remedy. In all practicality there is no way for the corporation to find out who leaked the information. In essence, the confidentiality agreement becomes nonenforceable on a large scale.

Not only is the confidentiality agreement an impractical way of protecting the interests of the corporation in the abstract, but the imposition of such restraints may deter shareholders from seeking the information they are entitled to or from using it for the very purposes the statute envisions. The rational apathy of the shareholders in large, public corporations is well documented.\textsuperscript{161} Most shareholders will not even go through the trouble of obtaining the information in the first place. But the additional restrictions placed on disclosure may lead the less savvy or motivated shareholder to question the necessity of getting the information at all. Therefore, the imposition of a blanket confidentiality agreement, and thereby an absolute ban on disclosure, may actually deter shareholders from exercising a statutory right of access. An argument can be made that the court must develop a new solution that encourages shareholders to actively monitor their investment in the corporation while at the same time protecting the corporation from the danger that could come from unfettered disclosure.

**IV. RECOMMENDATIONS**

The two situations described in Part III.B find their common ground in the fact that the shareholder cannot fulfill his or her stated purpose for inspection without disclosing the information that was obtained. In other words, these situations present potentially

\textsuperscript{157} Del. Code Ann. tit. 8, § 220(c) (2004).

\textsuperscript{158} See Folk, supra note 83, § 220.5 (stating that inspection will be limited to those documents that are “essential or sufficient” to satisfy the stated purpose).

\textsuperscript{159} See Disney, 857 A.2d. at 450.

\textsuperscript{160} See Thomas, supra note 2, at 368-69 (discussing the limits on the effectiveness of confidentiality agreements in the context of inspection).

\textsuperscript{161} See Pinto, supra note 107, at 317 (arguing that the lack of concentration of ownership in large public corporations results in shareholder passivity).
exigent circumstances that might justify allowing disclosure. The Delaware Chancery Court has suggested its willingness to lift confidentiality restrictions and allow disclosure in the face of such circumstances.\textsuperscript{162} However, the court cannot simply allow unfettered disclosure without upsetting the balance demanded by section 220. Therefore, the court needs to find a mechanism for disclosure that permits the shareholder to fulfill his or her stated purpose, and presumably protect his or her economic investment, while at the same time protecting the interests of the corporation in the abstract. A one-size-fits-all approach is unlikely to work. The solution to the problem must be tailored to the circumstances of the specific situation.

\textit{A. A Change in the Presumption: Determining if Disclosure is Warranted}

As noted above, the Delaware courts have established a presumption that all doubts regarding the rights of inspection should be resolved in favor of the rights of the shareholder.\textsuperscript{163} While this presumption works well for inspection, it must be reversed when the shareholder seeks to disclose information obtained through a section 220 petition. The presumption in cases of disclosure must be that any doubts regarding the need for disclosure should be resolved against disclosure in order to protect the interests of the corporation. By reversing the presumption, the court places the burden of proving a compelling need for disclosure squarely on the shoulders of the shareholder, who should rightly bear the burden in light of the corporate governance structure that attempts to prevent the individual shareholder from being in a position to harm the corporation as a whole.

Beyond reversing the presumption, the court needs to enact a more stringent standard of proof. While a proper purpose standard may suffice for simple inspection, the standard is too “stockholder-favorable” in the context of disclosure. In order to maintain balance between the interested parties in the corporate context, the shareholder should be required to demonstrate a \textit{compelling purpose} for disclosure. In the absence of such a compelling purpose, the court should deny any requests to remove limitations on disclosure. In order to demonstrate a compelling purpose, the shareholder must be required to demonstrate to the court why the actions that he or she wishes to take cannot be accomplished in the absence of disclosure. The requirement of such a showing will effectively eliminate the majority of the shareholder’s opportunism. If the shareholder is able to make such a showing of a compelling purpose for disclosure, the burden would then shift to the corporation to prove how disclosure would harm the interests of the corporation in the abstract.

This type of burden shifting is much like the type employed in the analysis surrounding the business judgment rule. The board of directors enjoys the protection of the business judgment rule because their actions are presumed to be in the best interests of the corporation.\textsuperscript{164} However, if the shareholder is able to rebut the presumption of the business judgment rule by demonstrating a conflict of interest, gross negligence, or bad faith, the burden shifts back to the corporation to prove the entire fairness of the

\textsuperscript{162} See \textit{Disney}, 857 A.2d. at 450.
\textsuperscript{163} See \textit{State ex rel. Foster v. Standard Oil Co.}, 18 A.2d 235, 239 (Del. 1941).
\textsuperscript{164} See \textit{Aronson v. Lewis}, 473 A.2d 805, 812 (Del. 1984).
transaction in question.\textsuperscript{165} This type of analysis provides an already cognizable framework for the analysis of disclosure following inspection. Furthermore, it will allow the court to better examine any potential bad faith that either the shareholder or the board of directors has in seeking or denying inspection and disclosure.

\section*{B. Maintaining the Balance in the Context of Disclosure: Sacrificing the Sheep to Save the Flock}

As a last resort, when the shareholder seeks to disclose information that is clearly injurious to the corporation in the abstract, the court should uphold the interests of the corporation over those of the individual shareholder. The shareholder may not be able to fulfill his or her stated purpose for inspection. The shareholder may feel that his or her investment is in danger without disclosure, but the shareholder generally has the option to sell the stock, an option that is not available to the corporation.

There are two primary ways that a shareholder can protect his or her investment, by having a voice or by selling. There is nothing compelling a shareholder to keep his or her stock if he or she is concerned about the path the corporation is on. Take Mr. Disney, for instance. While he certainly has a personal connection to Disney, he is not bound to remain involved. His continued concern about the path of Disney may be warranted, and there is no doubt that the price at which he may be forced to sell his stock is less than he would like, but at least he has the option to get out. If the court is forced to choose between his individual investment in the corporation and the preservation of the corporate interest in the abstract, the court must choose the corporate interest. Sometimes one must sacrifice the sheep to save the flock, or perhaps more appropriately, sacrifice the mouse to save the magic kingdom.

\section*{V. CONCLUSION}

It cannot be doubted that shareholders have the right to monitor their investment in corporations in which they hold stock, and that the right of inspection is the vehicle through which they can accomplish that monitoring. But disclosure of information obtained pursuant to the right of inspection creates a risk to the corporate interest and, consequently, the remaining shareholders. Therefore, when the court encounters situations with exigent circumstances where disclosure may be warranted, it must first place the burden of proving the necessity of disclosure on the shareholder. If disclosure is warranted, the court must take all necessary precautions to ensure that any disclosure is not injurious to the interests of the other shareholders. This can be accomplished by holding shareholders who seek to disclose information in a fiduciary relationship to the company.

When push comes to shove, the interests of an individual shareholder must not be exalted over the interests of the corporation. In situations where disclosure is necessary to effectuate the purpose, but the court finds that disclosure creates too large of a risk of harm to the corporation, the shareholder must exercise his or her right to sell. When possible, the court should seek to give maximum meaning to the right of inspection by allowing disclosure that is not injurious to the interests of the corporation. However,
when such a balance is not possible, the balance must fall in favor of the corporation and shareholders at large, even if the interests of the individual shareholder suffer as a result.